SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 854 OF 1997

IN THE MATTER of the Commissions of Inquiry Ordinance Chapter 5 of the Revised Laws of St. Lucia 1957

and

IN THE MATTER of the Establishment of a Commission of Inquiry pursuant to the Commissions of Inquiry Ordinance, Chapter 5 of the Revised Laws of St. Lucia, 1957

and

IN THE MATTER of the appointment of Ms. Monica Joseph as the Commissioner of the said Commission of Inquiry

and

IN THE MATTER of the Rules of the Supreme Court 1970

BETWEEN:

DR. VAUGHN A. LEWIS

APPLICANT

AND

1. THE ATTORNEY GENERAL OF ST. LUCIA

1st RESPONDENT

2. MONICA JOSEPH

2nd RESPONDENT

Appearances:

Dr. Richard Cheltenham Q.C. and with him Mr. Kenneth Monplaisir Q.C. and Mrs. Cynthia Hinkson-Ouhla for the Applicant

Mr. Allan Alexander S.C. and with him Mr. Dexter Theodore for the First and Second Respondents

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1997: NOVEMBER 10, 11 and 25

JUDGEMENT

FARARA J

On 21st October, 1997 I granted leave to the Applicant, pursuant to Order 44 r. 1(1) of the Rules of the Supreme Court, to apply for an Order of Certiorari in terms of the Summons filed 20th October, 1997, for the purpose of -

(1) removing and bringing into the High Court of Justice and quashing and invalidating the appointment made by the Governor-General of Saint Lucia of Monica Joseph, the Second Respondent, as Commissioner of the Commission of Inquiry established pursuant to the provisions of the Commission of Inquiry Ordinance, Chapter 5 of the Revised Laws of Saint Lucia, 1957 and published in the Extra-Ordinary Gazette Volume 166 No. 65 dated 18th September, 1997 on the grounds of bias conscious or unconscious in the said Second Respondent;

(2) quashing a decision and/or determination made by the Second Respondent in her capacity as such Commissioner on 15th October, 1997 in ruling that neither the former Prime Minister Sir John Compton nor the Applicant herein is entitled as of right to be represented before the Commission of Inquiry since neither of them is the subject of the investigation or is in any way implicated or concerned in the matters under the said Inquiry;

(3) further quashing the decision of the Second Respondent as such Commissioner to continue sitting on the grounds that the said decision was wrong in law when once the grounds of bias were drawn to her attention and the challenge to the very foundation of the Commission indicated;

(4) a declaration that the Applicant is entitled to have the reasonable costs of his representation before the Commission paid by the Government of St. Lucia; and

(5) an Order prohibiting the Second Respondent as Commissioner from continuing to preside over the Commission of Inquiry until the application is head on its merits or until further other.

In support of his application for leave the Applicant on 20th October, 1997 filed an affidavit in support comprising some twenty-seven (27) numbered paragraphs with exhibits. He did not exhibit a copy of the gazetted appointment and terms of reference of the Commission of Inquiry.

As required by Order 44 r. 1(2) the Applicant also filed with his application for leave, a Statement setting out the reliefs sought, which included an order staying the proceedings of the Commission until the hearing and determination of this matter. The Statement give some five (5) grounds upon which relief was sought.

In granting leave, I made an Order, inter alia, that the substantive hearing be placed on the expedited hearing list for hearing on 10th November, 1997.

I had, in a previous but related application by Sir John G. M. Compton in Suit 846 of 1997, granted leave in identical terms but also made an Order staying all proceedings of the Commission of Inquiry until determination of Sir John's application for an order of certiorari. As a result, in the instant matter, there was no necessity to make a similar order for stay.

On 30th October, 1997 the Applicant filed an Originating Notice of Motion herein for an Order of Certiorari on the grounds set out in the Statement filed with his application for leave.

The grounds (as amended November 10, 1997) upon which the Applicant seeks rlief are that -

(1) there is a real danger of bias on the part of the Commissioner [Second Respondent] arising from the circumstances surrounding her retirement as High Court Judge and the role played by the Applicant;

(2) the decision of the Authority of the O.E.C.S. not to agree to the request of the Second Respondent to have her time of service extended beyond the retirement age directly and adversely affected her in a pecuniary manner;

(3) broadly viewed the Commission is an inquiry into aspects of the administration over which the Applicant presided and in particular,

the subject of Inquiry involving his wife Mrs. Shirley Lewis directly concerns him in so far as he was not only Head of Administration but also Head of Finance. Further, that the Second Respondent erred in law in ruling that the Applicant is not entitled as of right to legal representation within the meaning of Section 18 of the Commissions of Inquiry Ordinance, Chapter 5 of the Laws of St. Lucia;

(4) in making the decision in continuing to preside as Commissioner and to hear evidence at the Inquiry after the allegations of bias were made against her was wrong in law; and

(5) in the circumstances of the application of Section 18 of the Commissions of Inquiry Ordinance, Chapter 5, the Applicant is entitled to reasonable costs of legal representation incurred in defending himself before the Commission.

In his somewhat lengthy affidavit, the Applicant deposes that between 1982 to 1996 he was the Director-General of the O.E.C.S. headquartered in St. Lucia and between 2nd April, 1996 and 23rd May, 1997 he was Prime Minister of St. Lucia, with the usual responsibilities attendant thereto, including presiding over the Cabinet of Ministers.

His affidavit continues in paragraphs 4 to 27 as follows:-

4. As Director-General of the O.E.C.S. I had *inter alia* the responsibility of advising the Heads of Government who met in the Authority at least twice a year on all matters which fell to be determined by them. It was also part of my duties to communicate all decisions made by the body to the relevant persons and/or institutions.

5. In 1995 an application came before the Authority of the O.E.C.S. unanimously supported by the Judicial and Legal Services Commission seeking to extend beyond the determined age the period of service of Miss Monica Joseph, Respondent No. 2, who was then serving in St. Vincent and the Grenadines as High Court Judge. It was indicated that she particularly needed the extension so as to allow her to complete fifteen (15) years of service which would have entitled her to full pension.

6. The application did not meet with the full concurrence of all the members of the Authority and it was therefore denied.

7. On 18th December, 1995 I communicated the decision of the Authority to the Chairman of the Judicial and Legal Services

Commission (See Letter from the Director-General of the O.E.C.S. to the Chairman of the Judicial and Legal Services Commission dated 18th December, 1995 here displayed and marked **VL1**).

8. Subsequent to that decision Miss Joseph requested of the Judicial and Legal Services Commission she be transferred to Dominica where legislation provided for retirement of Judges at age 65. Dominica is the only country in the O.E.C.S. that provides for the retirement of Judges at age 65. (See letter of 1st January, 1996 from Miss Joseph to the Chairman of Judicial and Legal Services Commission here displayed and marked **VL2**).

9. This request of Miss Joseph of the Judicial and Legal Services Commission was refused on the ground that the Judicial and Legal Services Commission did not consider it right and prudent to grant the transfer in the face of the letter at 18th December, 1995 from the Director-General of the O.E.C.S. conveying the refusal to agree to the extension of time sought. (See letter of 4th January, 1996 from the Chairman of the Judicial and Legal Services Commission to Miss Joseph here displayed and marked **VL3**).

10. These decisions of the Authority and of the Judicial and Legal Services Commission affected Miss Joseph significantly in relation to her retirement benefits of gratuity and pension. Besides, it disappointed her in expectations and dislocated her domestic and personal planning. (See letter of 8th January, 1996 from Miss Joseph to Chief Justice of the Eastern Caribbean Court of Appeal here displayed and marked **VL4**).

11. The matter of the refusal of the Authority to agree to her extension of service became a political matter in St. Vincent and the Grenadines. Besides, the Bar Association of St. Vincent and the Grenadines and of Dominica met in emergency sessions and expressed dissatisfaction with the decision of the Authority and suggested that there was some form of discrimination, in so far as another Judge serving in the same circuit contemporaneously made an application for an extension of his service having reached the age of retirement and that extension was approved. (See Statements of the Bar Association of St. Vincent and the Grenadines and Dominica here displayed and marked **VL5** and **VL6** respectively).

12. Notwithstanding the decisions of the Judicial and Legal Services Commission and of the Authority Miss Joseph sought to have the provisions of the statute interpreted to mean that years could be added to her pensionable service so as to improve it. (See letter of 10th January, 1996 written to Chief Justice of the Eastern Caribbean Court of Appeal from Miss Joseph here displayed and marked **VL7**).

13. It is to my knowledge that Miss Joseph added to the public profile which this matter assumed by giving an interview to the B.B.C. Caribbean Service concerning the refusal of the Authority to extend her service beyond the age of retirement and expressed disappointment therewith.

14. One of the subjects of inquiry of the Commission relate to a financial transaction involving the Ministry of Finance and my wife, Mrs. Shirley Lewis. The sum of money involved is $10,365.11.

This transaction took place during the period when I was Prime Minister and Minister of Finance.

15. The Commissioner is mandated to consider whether in all the circumstances the payment was due and whether it was properly made or lawfully authorized by the responsible authority or authorities. Implicitly this matter touches and concerns me as Head of the Administration and as Minister of Finance, in which capacity I approved the Special Warrant-necessary pre-condition of payment as is directed by law. This Special Warrant authorize payment to persons other than my wife, to wit: Russel & Company (Solicitors of London), Monplaisir & Company and Mr. Parry Husbands.

16. Some of the subjects of Inquiry by the Commission relate to decisions and/or events which took place during my time as Prime Minister and Chairman of the Cabinet.

17. The Commission of Inquiry has a general power in accordance with its terms of reference to "enquire into any and all allegations of fraud, corruption, breach of trust, conflict of interest or any wrong doing or impropriety".

18. I have been advised and accept that this wide-ranging power of the Commission does touch directly and indirectly some aspects of Government and on decisions taken when I was Prime Minister and Head of Government.

19. I am unhappy over the fact that the Respondent, Monica Joseph in pursuit of her pecuniary interest, namely, improved pension and gratuity was twice frustrated by the decision taken by the Authority to which I was Adviser and had the responsibility of communicating that decision to Miss Joseph via the Chairman of the Judicial and Legal Services Commission. The said Respondent now sits as sole Commissioner investigating matters which directly and indirectly concern me as Prime Minister and Minister of Finance. In the circumstance I fear that there is a real danger of bias.

20. I am equally unhappy over the fact that the Second Respondent has made a decision as Commissioner on 15th October, 1997 to the effect that I am not entitled as of right to legal representation before the Commissioner in accordance with the provisions of Section 18 of the Commissions of Inquiry Ordinance Chapter 5 of the Laws of St. Lucia, 1957.

21. I am unable out of my own resources to pay the cost of legal representation incurred by appearing before the Commission of Inquiry in defence of my reputation and in defence, too, of the integrity and the propriety of the actions taken by the Government over which I presided.

22. I have been advised by Counsel and I accept that the application of Section 18 of the said Commissions of Inquiry Ordinance will dictate that the State pay reasonable legal costs incurred in my appearance before the Commission.

23. I am deeply concerned with the decision of the Commissioner and Second Respondent made on 15th October, 1997 whereby she continued to sit as Commissioner and took and received evidence in the face of allegations of bias actual or perceived, and resulting from the circumstances of her retirement as a High Court Judge, and the decision of the Authority to which I was its Adviser and Executive Arm. The reasoning of the Commissioner which informed her decision to continue to receive evidence was that she was a fair person and that all those who knew her knew that to be so.

24. The allegations of bias constitute a challenge to the very foundations of the Commission and question her competence to sit as Commissioner. In the circumstances, I have been advised and accept that she ought either to have excused herself or adjourn the hearing until the matter was determined by the High Court.

25. I have been further advised by my Counsel and accept and verily believe that in all the circumstances indicated herein my *locus standi* arises from my obvious interest and involvement in some of the matters under Inquiry and has been fully established.

26. I have been still further advised by my Counsel and I accept and verily believe that the nature of the Inquiry; its wide powers particularly described in paragraph 17 above, the large public interest generated in the matters under Inquiry and the devastating impact any adverse findings will have on my reputation make this a case of "... sufficient gravity...", establishes sufficient interest on my part and calls for the intervention of the law.

27. I make this Affidavit of my own knowledge except wherein otherwise indicated and for the purpose of seeking the leave of this Court to apply for Certiorari to quash the decisions of the Governor General and of the Commissioner Monica Joseph herein complained of.

The Applicant exhibited to his affidavit certain correspondence in May 1995 to January 1996 relating, broadly speaking, to the request by the Second Respondent, then a High Court Judge of the Eastern Caribbean Supreme Court, for an extension of her term of office as a judge beyond the statutory retirement age of 62 years. It appears that at least five (5) letters were omitted by the Applicant from the chronology of relevant correspondence relating to the said matters. Three (3) of those letters were supplied by Counsel for the Respondents and were, by consent, made exhibits in this matter. The other two (2), being a letter of 5th January, 1996 from the Chairman Judicial and Legal Services Commission to the President of the St. Vincent and the Grenadines Bar Association and a letter dated 9th January, 1996 from the then Chief Justice and Chairman Judicial and Legal Services Commission to Justice Joseph, where exhibited in the companion action Suit 846 of 1997 as Exhibits No. 9 and No. 11 respectively.

The correspondence, relating to the request of the Second Respondent for extension of her tenure as a High Court Judge of the Eastern Caribbean Supreme Court, in evidence in the instant matter are as follows:-

(a) Letter dated 3rd May 1995 by which Justice Joseph, then assigned to St. Vincent and the Grenadines, applied to the Judicial and Legal Services Commission pursuant to the proviso to Section 8 of the West Indies Associated States Supreme Court Order 1967 Statutory Instrument 1967 No. 223 for a two year extension beyond the designated retirement age for Court Judges, so as to enable her to secure a total of fifteen (15) years service, and to thereby qualify for full pension on retirement in accordance with Section 3(4) of the Eastern Caribbean Supreme Court (Rate of Pension of Judges) Act Chapter 198 of the Laws of St. Vincent and the Grenadines Exhibit "A".

(b) Letter dated 11th May, 1995 from the Chairman of the Judicial and Legal Services Commission to the Director-General of the O.E.C.S. [the Applicant] requesting the concurrence of the Authority of the O.E.C.S., ("the Authority") in accordance with Section 8(1) of the West Indies Associated States Supreme Court Order 1967, to the said application of Justice Joseph, which had met with the unanimous approval of the said Commission. (Not exhibited).

(c) Letter dated 16th December, 1996 (apparently a typographical error should be "1995") from Justice Joseph to the Chairman of the Judicial and Legal Services Commission, indicating that she had no objection to being transferred by the Chief Justice. Exhibit B.

(d) Letter dated 18th December, 1995 from the Applicant, as Director-General of the O.E.C.S., to the Chairman of the Judicial and Legal Services Commission, informing that the recommendation of the said Commission had not received "the unanimous concurrence of Authority". Exhibit VL1.

(e) Letter dated 19th December, 1995 from the then Chief Justice to Justice Joseph enclosing a copy of the letter of even date from the Director-General of the O.E.C.S. Exhibit C.

(f) Letter dated 22nd December, 1995 from the President of the St. Vincent and the Grenadines Bar Association to the Chairman of the Judicial and Legal Services Commission, noting that the Bar was aware that Justice Joseph's application for extension had been unsuccessful; that the Bar had met in emergency session calling into question the criteria used for making such decisions; making reference to another judge of the circuit who had been recently granted a similar extension; expressing their strong support for the extension of Justice Joseph's tenure of office, taking issue with what they perceived to be the shabby treatment meted out to her; and requesting a review of the Authority's decision "in the interest of the administration of justice". Exhibit VL5.

(g) Letter dated 1st January, 1996 from Justice Joseph to the Chairman of the Judicial and Legal Services Commission, applying for a transfer to Dominica from 10th January, 1996 where there is legislation providing for retirement of judges at age sixty-five (65), so as to enable her to obtain full retirement benefits in two (2) years time. Exhibit VL2.

(h) Statement by the Dominica Bar Association dated 4th January, 1996 concerning the failure of the Heads of Government to concur with the Judicial and Legal Services Commission to extend the tenure of Justice Joseph; also making reference to a similar but successful application of another judge; expressing their deep concern about what they termed "an arbitrary exercise of discretion"; expressing concern that the decision to continue the service of a judge "can be frustrated by the arbitrary decision of a single Prime Minister"; requesting a reconsideration or review of the legislation governing the tenure of service of judges; and urging a review by the Heads of Government of their decision not to extend the tenure of Justice Joseph. Exhibit VL6.

(i) Letter dated 4th January, 1996 from the Chairman of the Judicial and Legal Services Commission to Justice Joseph stating that the said commission did not consider it right and prudent to grant the requested transfer to Dominica, "in the face of the letter of 18th December, 1995 from the Director-General of the O.E.C.S." Exhibit VL3.

(j) Letter dated 8th January, 1996 from Justice Joseph to the Chairman of the Judicial and Legal Services Commission, requesting extra time for packing of her personal effects and continuation of certain of the usual entitlement during that period, and pointing out that she would have to live with her sister until the expiration of the tenancy of her house in Grenada. The penultimate paragraph of his letter reads -

"Finally I seek the permission of the Commission to communicate in writing, through the Registrar of the High Court, my thanks to the Bar Associations for their efforts on my behalf which they initiated without a request emanating from me. I think it is the polite thing to do but, in the peculiar circumstances of this case, I prefer to do it with the consent of the Commission". Exhibit VL4.

(k) Letter dated 10th January, 1996 from Justice Joseph to the Chief Justice making reference to an unspecified statute said to make provision for the adding of years to a judge's actual period of service for the purpose of computing pension, seeking clarification of that position, and referring to the legislation as a "fall back position to ensure that I obtain the best possible pension benefits". Exhibit VL7.

The correspondence seemingly ends there. No evidence of any response from the then Chief Justice has been produced to me and it must be presumed that none exists. Further, as there has been no evidence to the contrary, it is reasonable to infer, that the Second Respondent was unable to secure full pension entitlement by adding to her actual years of service for the purpose of computation, pursuant to some statutory provision.

Indeed, the allegation in the affidavit of the Applicant is that as a result of the decision of the Authority on the Second Respondent's application, she was adversely affected in both a pecuniary and personal way. There has been no denial of this and the matter proceeded on that basis. However, the extent of her loss of pension and/or gratuity has not been made known to the Court. Was it "significant" as the Applicant alleges in paragraph 10 of the his affidavit and if so, how significant was it, bearing in mind that the Second Respondent had already served some thirteen (13) years eleven (11) months of the fifteen (15) year period to qualify for full pension.

The Applicant, at paragraph 13 of his affidavit, refers to an interview given by the Second Respondent to the B.B.C. Caribbean Service, concerning the refusal of the Authority to extend her tenure of service, in which she expressed disappointment. No date, specific or approximate, has been given by the Applicant as to when the interview took place and what was said by the Second Respondent at that time.

Further, it is clear to me from the words used by the Applicant in paragraph 13, that he did not hear the B.B.C. interview himself but is relying on what others may have told him - heresay evidence - which is not permissible in non-interlocutory proceedings (**Supreme Court Practice 1995 para. 41/5/1**). However, there is no counter affidavit filed by or on behalf of the Respondents or any of them, and no challenge has been made by their Counsel to the accuracy of this paragraph of the Applicant's affidavit. Indeed, the Second Respondent in her capacity as Commissioner, at the proceedings of the Commission on 15th October, 1997 confirmed the fact of this interview when she offered that the interviewer stated at the end of the interview "Her extension was turned down by one O.E.C.S. Prime Minister".

For my part, I would have been rather surprised if the Second Respondent was not disappointed by the denial of her request for an extension of her tenure as a judge. Who would not be disappointed. However, that is a rather different matter from imputing bias to the Second Respondent. I will address that main issue later on.

Two (2) affidavits were filed on behalf of the Respondents although none of them were affidavits of either Respondent. These were -

1. An affidavit of Jean Morille sworn and filed 4th November, 1997 exhibiting a true copy of the transcripts of the proceedings of the Commission of Inquiry held 30th September and 15th October, 1997 - Exhibits JM1 and JM2 respectively; and

2. An affidavit of Margaret Rose Gustave, Principal Assistant Secretary in the Ministry of Legal Affairs, Home Affairs and Labour of the Government of St. Lucia, sworn and filed 6th November, 1997 exhibiting -
   (i) a copy of a memorandum from the then Attorney-General to the Director of Finance, Statistics and Negotiating dated

27th September, 1996 headed "Special Warrant - Request to Supplement 1601-32 Professional and Consultancy Services," Exhibit MRG1; and

(ii) Special Warrant No. 97/96/97 dated 15th October, 1996 to the Accountant-General of St. Lucia Exhibit MRG2.

In her affidavit Ms. Gustave deposes, with respect to paragraphs 14 and 15 of the Applicant's affidavit, that she forwarded the memorandum with the Special Warrant to the Director of Finance for the approval of $187,640.00 to Supplement Head 1601-32 in order to pay professional fees to four (4) persons, including a sum of $10,400.00 to the Applicant's wife, Shirley Lewis. Further, that the signature of the then acting Deputy Director of Budget in the Ministry of Finance Ms. Mavis St. Croix appears above the words "Minister of Finance" at the top left hand corner of the Special Warrant, and she is unable to recognize certain other signatures appearing on the document, except her own at the bottom right, having appended it as the officer submitting the application for the said warrant.

It will be recalled that the Applicant deposed, in paragraphs 14 and 15 of his affidavit, that the payment to his wife by the Ministry of Finance, one of the subjects of the Commission of Inquiry, took place whilst he was Prime Minister and Minister of Finance. He continues -

> *"Implicitly this matter touches and concerns me as Head of the Administration and as Minister of Finance in which capacity I approved the Special Warrant - necessary precondition of payment as is directed by law."*

The Applicant did not exhibit the Special Warrant with his affidavit which is not surprising, since there was a change of government after the 23rd May, 1997 general elections, he cannot now be expected to have access to such documents at the Ministry of Finance.

A careful examination of exhibits MRG 1 and MRG 2 reveals that the Applicant's signature is not on the Special Warrant, but appears on the covering memorandum, at the bottom left hand corner, after what appears to be the word "Approved" and followed by the date "15/10/96". This is compelling evidence that the Applicant did approve at least the making available or release of the funds for the purposes of effecting the payments to certain lawyers, including his wife. But is it proof that he authorized or approved the actual payment to his wife. Learned Counsel

for the Respondents contends to the contrary.

The other document exhibited in this matter is a copy of the letter dated 13th October, 1997 from the Applicant to Veronica Cenac, the Secretary to the Commission of Inquiry, (Exhibit D). In his letter the Applicant expressed his expectation to "be called as witness during the Commission's proceedings", as he was Prime Minister of St. Lucia during a portion of the period under inquiry by the Commission. He goes on to request an opportunity to make "a statement with the Commission in light of my overall responsibility for the political administration during the period alluded to above".

The letter ends with this statement -

> *"I would therefore wish you to convey to the Commissioner my desire and request to appear before the Commission when it resumes on Wednesday, October 15th, 1997 and to make a statement on the matter relative to advise which I have received from Counsel concerning my own situation. On that and any subsequent occasion on which I may be required to appear, I will of necessity be represented by Counsel and would expect that in the circumstances, the costs of my representation would be borne by the State of St. Lucia".*

The Applicant and his Counsel did appear before the Commission on 15th October, 1997. Also appearing was Sir John Compton, former Prime Minister of St. Lucia, and his Counsel.

Certain decisions of the Commission made at that time are the subject of this application and that of Sir John Compton in Suit 846 of 1997.

It was agreed by Counsel, in advance of the hearing of these two matters, that the submissions in both, though of different counsel, will be accepted or adopted in relation to both suits.

Establishment of Commission of Inquiry

The May 23rd, 1997 General Election in St. Lucia resulted in a change of government whereby the United Workers Party, of which the Applicant and Sir John Compton are leaders, lost in a landslide victory to the St. Lucia Labour Party headed by Dr. Kenny Anthony, who is St. Lucia's current Prime Minister.

By instrument dated 17th September, 1997, Her Excellency the Governor-

General, on the advise of the Cabinet, issued a Commission pursuant to the Commissions of Inquiry Ordinance,Chapter 5 of the Laws of St. Lucia, appointing the Second Respondent as sole Commissioner authorized to inquire into various matters specified in the terms of reference as gazetted 18th September, 1997.

The second preamble to the Commission reads -

> *AND WHEREAS the Governor-General on the advice of the Cabinet has deemed it advisable and for the public welfare that an inquiry be held into certain alleged corrupt practices within the administration of Government prior to the May, 1997 General Elections in Saint Lucia".*

Of particular importance to this application is paragraph 1(a) and the general or "umbrella" provision on page 3 of the Commission's terms of reference, which latter provision was incompletely quoted in paragraph 17 of the Applicant's affidavit, thereby misrepresenting its true meaning and effect. I set out hereunder those paragraphs of the terms of reference in full -

1. To inquire into:

(a) the payment by the Government of Saint Lucia to Mrs. Shirley M. Lewis of a sum of EC$10,365.15 for professional services rendered in the criminal case Police v. Claudius Francis by Virement Warrant 144 of 1996/97: Savings: 1601-05, in order to -

(i) establish whether in all the circumstances, payment was due from the Government of Saint Lucia to Mrs. Lewis for the matters claimed in her letter of claim, dated January 8th, 1996;

(ii) identify the person or persons who authorized endorsed or in any way facilitated the payment of the said sum, to Mrs. Lewis and establish whether the person or persons acted with the approval and/or knowledge of the Cabinet of Ministers or any Minister or Senior Public official of the Government of Saint Lucia;

(iii) determine whether the person or persons who authorized, endorsed or facilitated the said payment was subject to any duress and if so, by whom;

(iv) determine whether the Government of Saint Lucia has the right to recover all or any part of the money paid to Mrs. Lewis and if so, identify the steps to be taken to so recover the same".

And further to enquire into any and all allegations of fraud, corruption, breach of trust, conflict of interest or any wrongdoing, impropriety or irregularity whatsoever made by anyone against any person arising out of and in connection with any or all of the above.

It must be borne in mind that the Commission of Inquiry is charged to inquire with five (5) separate matters, one of which is the matter concerning the payment to the Applicant's wife.

Proceedings of the Commission

The proceedings of the Commission have been open to the public and are nationally televised. The first hearing on 30th September, 1997 was, in large measure, of a procedural nature where the terms of reference of the Commission was read, statements as to the conduct of the inquiry made by the Commissioner and Senior Counsel to the Commission, appearances by Counsel for certain persons whose conduct are the subject of the inquiry were recorded, and a statement made by Counsel for one such person.

The second, and only other meeting so far of the Commission of Inquiry held 15th October, 1997, was attended by the Applicant and his Counsel Dr. Richard Cheltenham Q.C. and also by Sir John Compton and his Counsel Mr. Karl Hudosn-Phillip Q.C. Neither the Applicant or Sir John had been summoned by the Commission to attend, and so they were there voluntarily at their own behest, having first despatched letters to the Secretary of the Commission requesting to make a statement at the said sitting.

At that sitting, Learned Counsel for the Applicant contended that the Applicant was a person implicated or concerned in the matters under inquiry, within the meaning of Section 18 of the Commissions of Inquiry Ordinance, "by virtue of the fact that many of the matters which are the subject of the inquiry fell under his watch as it were, took place during his administration". (See page 32 Exhibit JM2).
Dr. Cheltenham went on later to state (page 37 Exhibit JM2) -

> *"These matters called to be determined happened during their [Sir John and Dr. Lewis] administration and it would clearly reflect on them, not to mention that in Dr. Lewis' case the payment, which is the subject of the Inquiry, to his wife, was made by the Ministry of Finance when he was a Minister for Finance; I mean you cannot go closer that than";*

The Second Respondent qua Commissioner issued her ruling on the Applicant's claim to be entitled to be represented by Counsel during the inquiry, in these terms (page 38 Exhibit JM2) -

"Relative to Dr. Vaughn Lewis, he is also not a person implicated and he is not entitled to be represented. Under Section 18 of the Ordinance, if he considers it desirable to be represented he may, with the leave of the Commission, be so represented. The Commission grants him leave to make a statement, but the statement must be confined to the topics referred to in the Terms of Reference of the Commission".

I pause here to observe that the Second Respondent had not been informed, either by the Applicant or his Counsel, prior to giving her ruling, that the Applicant had endorsed, signed, or approved the Special Warrant or that he had in any way facilitated the payment to his wife.

Both the Applicant and Sir John Compton made lengthy statements before the Commission in which they, inter alia, charged that there was a danger that the judgement of the Commissioner, [Second Respondent] may be affected adversely or with disfavour to them, by the circumstances in which she retired from office as a judge of the Supreme Court. They main contended in the main that they are entitled to represented by Counsel during the proceedings of the Commission, with all their legal fees being paid by the State; and that the Second Respondent, against whom they had made allegations of bias in their statements, should not continue the proceedings of the Commission of Inquiry but ought to excuse herself from presiding over the Commission or adjourn the Commission to await a determination of the issue of bias by the Courts.

The Second Respondent in her response to these matters stated, *inter alia*, that she functions one way, straight and fair as is known by all those who know her (page 53 Exhibit JM2). She continued -

"Reference was made to a B.B.C. Caribbean Report, at the end of that, the sentence by the interviewer was and I quote Her extension was turned down by one O.E.C.S. Prime Minister. Objection was made to extension of my service of O.E.C.S. Judge by an O.E.C.S. Prime Minister, but that O.E.C.S. Prime Minister who made the objection was not Sir John Compton, former Prime Minister of St. Lucia. So there can be no bias so far as Sir John is concerned.

Dr. Vaughn Lewis was an officer of the O.E.C.S., and was acting not on the decision body making authority, but was executing the authority, and so far as I can see no bias can arise. I therefore do not disqualify myself from this and I expect the next step as has been indicated will be taken".

After a short adjournment the proceedings of the Commission of Inquiry resumed with the taking of testimony from certain witnesses. However, in light of the Court's order for stay of proceedings made in Suit 846 of 1997 (Sir John Compton) no further hearings have taken place pending

the outcome of that and this action.

I pause here to observe that the very first witness who gave testimony before the Commission, Mr. Anthony Severin, Secretary to the Cabinet of St. Lucia, testified, *inter alia*, that he did not find in his searches of the records, any authority or approval for payment out of the Consolidated Fund of any sum of money to Mrs. Shirely M. Lewis, for professional services rendered in the matter of Police v. Claudius Francis.

Legal Issues

The following are the main legal issues for determination of this application:-

(1) Is the First Respondent a proper party to the proceedings.

(2) Whether the Applicant is entitled as of right to be represented by Counsel at the whole of the Inquiry.

(3) If the Applicant is so entitled, is he also entitled to have his reasonable legal costs of such representation paid by the State.

(4) Whether the Applicant has failed to make a full and frank disclosure in his application.

(5) Is there a real danger or possibility of bias on the part of the Second Respondent qua Commissioner whereby she will in the conduct of the Commission unfairly regard with disfavour the issues relating to Applicant and his wife.

(6) Can the appointment of the Commission, though valid under the Commissions of Inquiry Act, be quashed by the Court if apparent bias on the part of the Commissioner is found to exist.

(7) Does the Court have the power to make declarations on an application for certiorari under RSC Order 44.

(8) Was the decision of the Commissioner not to disqualify herself from sitting as Commissioner at the inquiry after the challenge was made by the Applicant and Sir John Compton on the basis of bias

conscious or unconscious, and to continue the inquiry, a proper or correct decision and if not can such decision be quashed by this Court on certiorari proceedings.

(9) Does the Application have *locus standi* to bring this application.

Attorney-General as Proper Party

On this issue, Learned Counsel for the Respondents submitted that certiorari proceedings are directed at removing and bringing into the High Court and quashing some decision, order or proceeding of an inferior tribunal. An order for certiorari goes to an error of law by an inferior tribunal in making a decision order or ruling. He further submitted, and it is beyond dispute, that the Applicant has not referred to any determination or decision made by the Attorney-General nor did he exercise any public law power and does not feature anywhere in the record of these proceedings. He, therefore, concluded that the First Respondent has been improperly joined as a party and ought to be dismissed from these proceedings with costs. In support of this proposition Counsel cited -

R V Northumberland Compensation Appeal Tribunal Ex Parte Shaw (1952) 1 AER 122.

Augustin Lionel v. the Attorney-General Civil Suit No. 357 of 1995 (St. Lucia) Per Matthew J (as he then was) at page 17 where the Learned Judge states -

> *"I am of the view that the application in its present form is therefore defective for it does not evince a proper party as the Respondent."*

In that case the applicant applied for an order of prohibition to prevent Sir Fred Albert Phillips from sitting as one of three (3) Commissioners appointed by the respondent (Attorney-General) on the ground that there is a real danger of Sir Fred being bias in favour of the then Prime Minister of St. Lucia, Sir John Compton, because of a statement at page 196 of Sir Fred's book, "Caribbean Life and Culture," in which he referred to Sir John Compton and the then Prime Ministers of St. Vincent and the Grenadines and Grenada, Son Mitchell and Herbert Blaize respectively, as "close long-time colleagues with whom it was always a pleasure to work".

On the issue of whether the Attorney-General was a proper party the Learned Judge reasoned that the Governor-General having appointed the

commissioners under Section 2 of the Commissions of Inquiry, Ordinance which is an "existing law" as per paragraph 2(5) of Schedule 2 of the Saint Lucia Constitution Order and, therefore, must be construed in light of Section 64(1) of the Constitution which provides that the Governor-General, in executing his functions, must act in accordance with the advise of the Cabinet or a Minister acting under the general authority of the Cabinet. The Applicant had pleaded erroneously that the Attorney-General had appointed the commissioners. Accordingly, the Learned Judge opined at pages 15 to 16 -

> *"So the application should either be directed at the Governor-General to prohibit him from continuing to allow the Commissioners to sit or perhaps at the Commissioners themselves to prevent them from sitting. !n the former case it is conceivable that the proceedings against the Governor-General could be instituted against the Attorney-General by virtue of the Crown Proceedings Ordinance but the document would or ought to indicate that was the position".*

Matthew J then went on to give examples where proceedings were brought against either the Governor-General or the Commissioner, including the Trinidad and Tobago case of *Sir Solomon Hochoy v. N.U.G.E.* (1964) 7WIR 174.

In **Bethel v. Douglas** (1996) 3 AER 801 PC where there was a challenge made to the validity of the appointment of a commission of inquiry by the Governor-General of the Bahamas, the originating summons was brought against the Attorney-General and the president and other members of the commission. The Privy Council in upholding the validity of the appointment either as a prerogative act or under the statute, held, *inter alia*, that the Governor-General was required under the relevant provision of the constitution to act on the advise of the government in making the appointment.

Dr. Cheltenham for the Applicant in his reply relied on the Hochoy case and, in particular, this passage from the judgement of Wooding CJ at page 181 C-G:-

> *" In both cases cited the defendant was the persona designata against whom it was alleged that he had exceeded the powers granted him by the statute which had empowered him to act. And it was held in each case that he was properly made a defendant although he had purported to act as on officer of state, because it was his act or conduct which was being challenged as ultra vires. Likewise, in the instant case, I hold that the appellant who, as the Governor-General, was the person designated by the Ordinance to exercise the statutory power to appoint a commission of inquiry is a proper defendant to answer the challenge that the appointment*

made by him was ultra vires and accordingly, null and void and of no effect.

For the foregoing reasons I would dismiss the appeals. Nevertheless, having discharged my duties as a judge, I would suggest that in future the practice be followed of having the Attorney-General as defendant whenever the validity of an act of state done by the Governor-General is being called into question.

It is not in dispute that the appointment by the appellant of the commission of inquiry which is said to be in excess of the Statutory power is one which by s.63 of the Constitution can only have been made in accordance with the advise of the Cabinet or a Minister acting under the general authority of the Cabinet. Accordingly, although the appointment of the commission was his act by reason that the Ordinance names him as the person to perform it, it is really an act of the Government or, as it may be called, an act of state. In my personal view the ordinary civilities dictate that the same course should be followed in this country as was followed in New Zealand when Cook and others challenged the validity of an appointment made there by the Governor in Council under its Commission of Inquiry Act, 1908: they sued the Attorney-General - see 28 N.Z.L.R. 405. I think that the same procedure might commendably be adopted here.I recommend accordingly".

Although the practice outlined in the above passage was said obiter and more by way of a recommended practice in matters of that kind, it is in my view nevertheless a statement of considerable weight, based on a common sense and realistic view taken by an eminent Caribbean judge and jurist which ought to be followed and applied. This approach also found some favour with Matthew J in the *Augustin Lionel v. Attorney-General* case.

Learned Counsel for the Applicant in his reply, whilst conceding that the First Respondent was not sued pursuant to the Crown Proceedings Act, Chapter 14 of St. Lucia, submitted that he was sued in accordance with "ordinary civilities" of life, and on the further basis that the appointment of the Second Respondent as Commissioner was an act of state or an act of the executive.

He relied on the first relief in the Applicant's Summons filed 20th October, 1997 seeking an order of certiorari quashing the appointment made by the Governor-General of the Second Respondent as Commissioner under the Commissions of Inquiry Ordinance, on the ground of bias conscious or unconscious and submitted that, therefore, the Attorney-General was a proper party.

Learned Counsel for the Respondents, with the leave of the Court, sought

to distinguish the Hochoy case as one in which declarations were sought under the provisions of the particular statute in Trinidad and Tobago, and submitted that the Crown Proceedings Act is not concerned with the prerogative Writs.

On this issue, Dr. Ramsahoye in the Sir John Compton matter, submitted that the Attorney-General would be a proper party where the applicant is alleging a contravention of the Commissions of Inquiry Ordinance, in challenging the validity of the appointment of a commission, but otherwise the Attorney-General is not a proper party since once the appointment was effected within Section 2 of the Ordinance, it is valid. In essence he submitted that where the appointment is validly made within the statute but the challenge to the Commission is one of bias and the court finds bias, that does not affect the validity of the appointment itself but merely disqualifies the person from sitting as Commissioner.

This latter proposition of Dr. Ramsahoye, with which I concur as a matter of law, is in my view a somewhat different issue to the question of whether the Attorney-General is a proper party, which has more to do with the nature of the relief sought by the Applicant and not whether that relief can be granted.

Wooding CJ in the Hochoy case in the passage quoted *in extensio* above, limited his recommendation to circumstances where the challenge is to the validity of the appointment of the Commission under the Commissions of Inquiry Act. However, Matthew J in the Augustin Lionel case, where the allegation was bias, seems to take the position that where the application is directed to the Governor-General the Attorney-General would be the proper party if sued pursuant to the Crown Proceedings Act, but the originating document ought to so indicate.

None of the documents filed in this matter by the Applicant indicates that the proceedings were brought against, or the Attorney-General is being sued pursuant to the Crown Proceedings Act and, indeed, Learned Counsel for the Applicant has so confirmed.

However, in my view, this would be a mere procedural irregularity which does not nullify the proceedings (RSC Order 2 r.1), and the normal civilities of life dictate that the Attorney-General should be named as a party instead of the Governor-General.

Furthermore, relief No. 1 in the Applicant's Summons is directed at quashing or invalidating the appointment of the Second Respondent made by the Governor-General and, *prima facie*, is a challenge to the effectiveness of the exercise of the statutory powers of the Governor-General in carrying out what is clearly an act or decision of state or of the executive. While it is not a challenge based on excess of statutory authority, its effect, if granted, would be to disqualify the Second Respondent from sitting as Commissioner, but not to invalidate or quash her appointment as Commissioner.

Halsbury Laws of England 4th Ed. Vol. 1 paragraphs 67 and 77.

Bethel v. Douglas (1996) 3 AER 810 P.C.

I am fortified in my view by the statement of Lord Goff of Chievely in his leading judgement in **R.V. Gough (1993) 2 AER 724 at page 730 e** -

> *"Of course if actual bias is proved, that is the end of the case: the person concerned must be disqualified: But it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question whether there is such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand".*

I therefore decline to strike out the First Respondent as a party to the proceedings.

Entitlement to Legal Representation

This issue turns essentially on construing certain paragraphs of the terms of reference of the Commission said to pertain to the Applicant, and the proper interpretation and meaning of Section 18 of the Commissions of Inquiry Ordinance and, in particular, the words "in any way implicated or concerned in".

Section 18, which provides for legal representation by persons before a commission, creates two (2) separate categories of persons who would have a right or entitlement to be represented by Counsel before the commission, and a third category of persons whose Counsel can only represent them with the leave of the commission.

The first category relates to persons whose conduct is the subject of the inquiry. In other words, someone whose conduct is being investigated or inquired into by the commission as one of its assigned subjects. Persons in this category are entitled as of right to appear with Counsel at the

inquiry.

The second category relates to persons who are "in any way implicated or concerned in the matter under inquiry". This Commission of Inquiry is concerned with not one but at least five (5) separate subject matters for inquiry, and so it is that a person may be implicated or concerned with one or more but not all of the subject matters under inquiry.

Counsel for the Applicant submitted that although the Applicant is not a person whose conduct is the subject of inquiry by the Commission, he is a person who, on a literal or any other reasonable and proper interpretation of paragraph 1(a) and the "umbrella" paragraph on the third page of the terms of reference, is a person who is implicated or concerned in a matter under inquiry. That matter he says involves payment of a certain sum of money to his wife by the Ministry of Finance as legal professional fees, at a time when the Applicant was Prime Minister, Head of Cabinet and Minister of Finance in the Government of St. Lucia, and, further, that the Applicant signed the Special Warrant authorizing such payment to his wife, as well as to other lawyers. (See Exhibit MRG 1 and MRG 2 and paragraphs 14 and 15 of the Applicant's affidavit).

Counsel relied, in support of his submission, on the meanings given in the Concise Oxford Dictionary to: "implicated" - entwined, entangled, involved: "concerned" - relate to, affect, interest oneself in or about.

Based upon those meanings he submitted that the Applicant clearly falls within the second limb of Section 18 of the Ordinance. Counsel went on to submit, particularly in relation to paragraph 1(a)(ii) of the terms of reference, that the Applicant, as the then Minister of Finance and Head of the Cabinet, is at the centre of that subject matter of the inquiry and accordingly he is entitled as of right to be legally represented at the whole of the inquiry. Accordingly, he urged the Court to determine that the decision of the Second Respondent on 15th October, 1997 in ruling that the Applicant was not a person implicated or concerned in a matter under inquiry and therefore not entitled as of right to appear before the Commission with Counsel, was bad, wrong in law and ought to be quashed.

Counsel for the Respondents in his submissions also relied on the literal

meaning of the words "implicated" and "concerned". He cited from the Oxford Dictionary which gave the following meanings:-

> "implicated" - involved in a charge or crime, brought into incriminating connection with, involved unfavourably.
>
> "concerned" - to be in a relation of practical connection with, to have a part in, to be implicated or involved in, to have to do with something especially something culpable.

Mr. Alexander submitted that "implicated or concerned in" when used in Section 18 means "culpably involved". When a person is culpably involved in a matter the subject of the inquiry, such a person is entitled as of right to appear with Counsel before the Commission so that his rights can be protected, and no connection with the subject matter short of culpable involvement can give rise to an entitlement to be represented by Counsel before the Commission, he continued.

In support of this proposition, Counsel for the Respondents relied on the decision of the Supreme Court of Western Australia Full Court in **Ashbury v. Reid (1961) WAR 49.**

In that case the defendant was charged and convicted of a forest offence under the Forestry Act 1918 -1954. He applied for review of his conviction. It was contended that he was a person indirectly concerned in the commission of a forestry offence and was, therefore, deemed to have committed such offence pursuant to Section 54(1) of the Forestry Act 1918 - 1954. The Full Court, after referring to the meanings of "concerned" in the Oxford dictionary (referred to above), concluded that those meanings are the sense in which that word was used in Section 54(1). (see page 51 lines 21 - 27) and that the question was whether the acts or omissions of the defendant "does in truth implicate or involve him in the offence, whether it does have a practical connection between him and the offence". The court concluded that the mere fact that he had been responsible for bringing on to his property the instrument [bulldozers] with which the offence was subsequently committed is not sufficient (see page 51 lines 31 -36). They opined that a mere omission to act is insufficient unless "from a common sense point of view" it can be said that the defendant's failure to act, whether intentionally or otherwise, really contributed to the commission of the offence (page 51 lines 36 -39). In allowing the appeal the full court concluded that the defendant's failure to exercise a continuous supervision over the activities of the bulldozers

or to do more than he did, does not bring him within s.54 as being "concerned" in the offence.

It is to be bourne in mind, as Counsel for the Applicant in my view rightly submitted, that *Ashbury V. Reid* dealt with construing a statute creating a criminal offence whereas, in the instant case, Section 18 is dealing with the right or entitlement to legal representation before a Commission of Inquiry appointed to inquire into matters which may or may not be concerned with criminal wrongdoing. He advocated strongly that the Court should apply the literal meaning of the words and give a more liberal or less restricted interpretation to Section 18 than was given to Section 54 of the statute under consideration in *Ashbury v. Reid.*

In my view Section 18 is not to be given too restricted an interpretation as a citizen ought not easily to be deprived of the right to be represented by Counsel before a commission of inquiry which, although it is not a Court and has no power to make any findings of criminal or civil liability, nevertheless can make findings of misconduct based on factual findings, with far reaching and long lasting adverse implications on a person's reputation and life.
Canadian Red Cross Society v. Horace Krever and Commissioner of the Inquiry on the Blood System in Canada (unreported) delivered 26th September, 1997 at page 2 (3rd para.).
Bethel v. Douglas (1995) 2 AER 801 at 802 f.

However, Section 18 on a literal interpretation clearly distinguishes between three levels or categories of involvement in or with a matter under inquiry, in addressing the entitlement to representation by Counsel before a commission of inquiry. In my opinion the distinctions are based on degree of culpable conduct, akin to the distinction in the criminal law between principal and accessory. I therefore construe the words "in any anyway implicated or concerned in" to mean in any way culpably involved in or connected with a matter under inquiry, though not necessarily in the sense of criminal wrongdoing. The question of some wrongdoing, or malfeasance or misconduct underpins the use and meaning of the said expressions in Section 18, as contrasted with the third category where a culpable act or omission or connection with the matter under inquiry is not alleged or likely to exist.

Counsel for the Respondents further submitted on this issue, that not

simply because the Applicant as Minister of Finance approved or signed the Special Warrant to enable the payment to be made which was approved in his Ministry (not that he made the payment) or the fact that the Applicant was carrying out his duty to see that money was provided for the payment, means that he made the payment and was culpably involved in the payment to his wife.

Regarding the Commission's ruling on the matter of legal representation of the Applicant, Counsel argued that her ruling was based on facts which were before her at the time including the contents of the Applicant's letter to the Commission dated 13th October, 1997 (Exhibit D) and the statements of his Counsel before the Commission on 15th October, 1997, neither of which, informed that the Applicant had approved or signed the Special Warrant. Her ruling was therefore a correct one, based on the facts before her, and the Court cannot substitute its decision for that of the Commission, but can only take account of the facts and matters which the Commissioner had before her in determining whether her decision was wrong or not.

And finally on this issue, Learned Counsel for the Respondents submitted that the matter of the Applicant's approval of the Special Warrant is irrelevant and immaterial and, even so, it is insufficient to show that the Applicant was culpably involved in the payment to his wife. The fact that the payment occurred during the Applicant's "watch" as Prime Minister and Minister of Finance is not enough, he must be shown to be culpably involved in a matter under inquiry to ground entitlement to be represented by Counsel before the Commission.

On this issue, Dr. Ramsahoye in the Sir John Compton matter, made the additional legal submissions which, if correct, would be equally applicable to my determination of this issue in this matter. In his view -

(a) Under Section 18 of the Ordinance a person implicated or concerned in a matter under inquiry would be entitled to be represented by Counsel for the whole of the inquiry.

In my view, the expression "the whole of the inquiry" can only mean the whole inquiry into the subject matter under investigation by the Commission, in which that person is implicated or concerned. It is not a right to be represented at all sittings of the

Inquiry where the Commission is inquiring into other subject matters in which that person is not implicated or concerned. If it were otherwise it would make nonsense of Section 18 and put unnecessary burdens of time and expense on both the citizen and the Commission.

(b) The Commissioner having ruled that she is not investigating the Applicant, and there has been nothing so far to show that his conduct is the subject matter of or he is in anyway implicated or concerned in a matter under inquiry, that ruling is decisive of the matter, and it is not open to the Applicant to say that the Commissioner ought to investigate him or his conduct.

This submission is an attractive one unless, in my view, the terms of reference of the Commission makes it clear that the Applicant is a person who is implicated or concerned in a matter under inquiry. Further, it is conceivable, having regard to the way in which inquiries of this nature progress, that a person who, on a proper reading and construction of the terms of reference as drafted is not implicated or concerned in a matter under inquiry, may at some later stage, based on new and revealing oral or documentary evidence before the commission, become clearly a person implicated or concerned in a subject matter of the inquiry. How then is such a person to be treated in light of Section 18, when the inquiry into that matter has already begun.

(c) Dr. Ramsahoye's view is that in such a case, since fundamentally a commission cannot properly make adverse findings of fact or misconduct against a person without having given him an opportunity to be heard in person or by Counsel, when it becomes clear that the person is implicated or concerned, the commissioner ought either to decline from making any adverse findings against him, in which case his conduct may be the subject of a separate inquiry; or that person could be given notice or summoned to appear before the commission to be heard on the allegations, before the commission issues its report.

(d) Affidavit evidence given post commencement of the inquiry, is not admissible or relevant in determining who is the subject of or implicated or concerned in the subject matter of the inquiry, as the

commissioner(s), in light of Section 18, must make that determination prior to commencement of the inquiry and, consequently, who would be entitled as of right to be represented by counsel at the whole of the inquiry.

I take a somewhat different view to Learned Counsel on these matters. I accept that for the proper execution of the commission, some prior determination has to be made by the commissioner as to the persons whose conduct are the subject of the inquiry or who are implicated or concerned in the matter or matters under inquiry, in order to summon such persons as witnesses and for them or their counsel to participate in the inquiry into the subject or subjects in which they are implicated. However, I do not agree that where, through error or otherwise, a person implicated or concerned in a matter under inquiry did not participate in the inquiry into that matter *ab initio*, the commissioner is precluded from summoning that person at that stage of the proceedings.

In my view, what is of fundamental importance is fairness and the observance of the principles of natural justice, in the conduct of the inquiry and in dealing with persons whose conduct is the subject of the inquiry or who are implicated or concerned in a matter under inquiry. **University of Celon v. Fernando** (1960) 1 AER 631 PC.

In re Prgamom Press Ltd. (1971) 1 Ch 388 at 389 (Held). Per Lord Denning MR at page 400 B - E and G:

> "This sort of thing should be left to the discretion of the inspectors. They must be masters of their own procedure. They should be subject to no rule save this: they must be fair. This being done, they should make their report with courage and frankness, keeping nothing back. The public interest demands it. They need have no fear because their report, so far as I can judge, is protected by an absolute privilege".

See also Sections 5 and 9 Commissions of Inquiry Act (St. Lucia).

Such a person should therefore be afforded by the commission the opportunity to appear before it, to give evidence and, either in person or by Counsel, question any and all witnesses who gave or are to give testimony, concerning the particular subject matter in which he is implicated, and also to call witnesses who can give favourable or exculpatory testimony before any adverse finding or determination is made by the commission in relation to him.

In short the entitlement to legal representation at the whole of the inquiry in Section 18 of the Commissions of Inquiry Ordinance, means that any person whose conduct is the subject of the inquiry or who is implicated or concerned in a matter under inquiry can, and must if he so request, as of right, be represented by Counsel for the whole of the inquiry into that particular subject matter in which he is implicated. If his involvement only becomes apparent after the inquiry into the subject matter has already begun, then the rules of fairness and natural justice dictate that he or his Counsel should be afforded every opportunity to participate fully in the inquiry, including recalling for cross-examination witnesses who had previously testified, and the making available to that person or his Counsel of all documents put into evidence at the inquiry, as well as any other documents in the possession of the commission, which may be exculpatory of or of assistance to that person, in relation to the allegations against him concerning the matter under inquiry. **Rees v. Crane (1994) 1 AER 832 at 835 a - d**.

There can be no question, that the ruling or decision of the Second Respondent, which she purported to make under Section 18 of the Commission of Inquiry Ordinance, that the Applicant is not entitled as of right to be represented by Counsel at the inquiry, can be the subject of certiorari proceedings on the ground of error of law or want of justification.
Re Royal Commission on Thomas Case (1980) 1 N.Z.L.R. 602.
R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw (1952) 1 AER 122.
Attorney-General v. Ryan (1980) A.C. 718 P.C. at 720 B-C.

In the *Thomas* case the Full Court of New Zealand held that the Court had jurisdiction to entertain the proceedings for judicial review

because -

(a) a commission of Inquiry, whether it was established by the executive under a statutory provision or created under the Royal prerogative, was subject to the Court's supervisory powers; (Cook v. Attorney General (1909) 28 N.Z.L.R. 405 applied); and

(b) regardless of the provisions of the Judicature Amendment Act 1972 the applicants would have been entitled to certiorari or prohibition.

The Full Court also found that the applicants had established an error of law relating to the Commission's interpretation of a pardon which were not irreversible, and went on to make certain declarations pursuant to the Judicature Amendment Act 1972.

In the judgement of the Court at page 615 lines 18 to 25 it was stated -

> *"In light of the authorities to which we have referred, we are satisfied that dicta in earlier cases to the effect that a Commission of Inquiry is immune from certiorari or prohibition because it is dong no more than inquiring and reporting are now out of date and are not in accord with the Court's responsibility to ensure that all tribunals carrying out functions (either investigative or decisive, or both) which are likely to affect individuals in relation to their personal civil rights or to expose them to prosecution under the criminal law, act fairly to those concerned".*

And in the British Virgin Islands Civil Appeal No. 7 of 1994 - **The Chief Immigration Officer v. Roger Burnett**, Sir Vincent Floissac CJ, at page 5 put it this way -

> *"There is no doubt that the High Court has an inherent jurisdiction (either by way of judicial review or otherwise) to supervise and judicially control certain decisions and actions of public authorities constituted by law to make those decisions or to take those actions. Subject to the formalities prescribed by Rules of Court, the jurisdiction is exercisable whenever a public authority (purporting to exercise a constitutional, statutory or prerogative power) has made or taken or intends to make or take a justiciable judicial, quasi-judicial or administrative decision or action which affects or will affect a complainant who has locus standi by way of a relevant or sufficient interest in the decision or action and who alleges and proves that the decision or action is or will be illegal, irrational or procedurally improper. In such a case, the High Court may make such appropriate prerogative or other order as may be necessary to protect the complainant from the illegality, irrationality or procedural impropriety of the decision or action."*

The main question, therefore, is whether upon a proper reading of the terms of reference of the Commission, in particular paragraph 1(a) and the "umbrella" paragraph, and applying the literal or purposive meaning or construction to the pertinent words of Section 18 of the Commissions of Inquiry Ordinance, it can be said that the Applicant is a person who is implicated or concerned in a matter under inquiry. If so, then the ruling/decision of the Second Respondent would be wrong in law and certiorari woud issue to quash it.

Before examining the wording of paragraph 1(a) and the umbrella paragraph, let me say that I do not accept as correct legal principle that an ex-head of government or ex-head of Cabinet is, simpliciter, entitled

to appear in person or by Counsel before a commission of inquiry to defend his administration or his stewardship before the Commission. The entitlement of such a leader, past or present, is no different in law to the entitlement of any citizen or person under Section 18 of the Ordinance, and the entitlement to be represented by Counsel before the Commission only arises where that individual's conduct is the subject of the inquiry or he is in anyway implicated or concerned in a matter which is under inquiry.

Likewise, I do not consider that such a right or entitlement would, as a matter of course, extend to a spouse of a person whose conduct is the subject matter of the inquiry, so that the spouse would likewise be entitled to appear before the Commission with Counsel, unless, from a common sense point of view, there is some act or omission or misconduct by the spouse which can reasonably be construed as contributing to the wrongdoing alleged against their partner.

The single issue is whether the Applicant, Dr. Vaughn Lewis, is implicated or concerned in a matter under inquiry, pursuant to any term of reference of the Commission of Inquiry being carried out by the Second Respondent.

Paragraph 1(a) and the umbrella paragraph of the terms of reference were set out verbatim earlier in this judgement.

In relation to the subject matter covered by paragraph 1(a) the Commission is to inquire into the payment by the Government of St. Lucia to the wife of the Applicant of the sum of EC$10,365.15 for professional services rendered in a criminal case.

The documentary evidence before me, Exhibit MRG1 the memorandum dated September 27, 1996 which has what appears to be the signature of the Applicant after it the word "approved", *prima facie* shows that the Applicant was at lease one person who authorized, endorsed or facilitated the payment. The approval of the request for payment and the Special Warrant attached, are essential steps to enable payment to be actually made to those who are said to be owed money.

Further, the indisputable fact is that the Applicant was Head of the Cabinet of Ministers and Minister of Finance at the relevant time, and

he, apparently, appended his signature approving the payment. The Commission has already been told by its first witness that no authority or approval can be found for this payment out of the Consolidated Fund. The Applicant as Minister of Finance at the time had direct responsibility under Sections 70, 80 and 81 of the Saint Lucia Constitution Order 1978 for payments made out of the Consolidated Fund.

It is also not difficult to surmise, that the suggestion in paragraph 1(a)(ii) of the terms of reference, is that persons other than the Applicant, such as officers of the Ministry of Finance who may have in some way facilitated the payment to Mrs. Lewis, may be said to have done so as a result of pressure exerted on them by someone in authority over them. The Applicant was certainly one such person.

Having regard to the dictionary meaning of the word "implicated", can it be said that the Applicant, by virtue of the terms of reference and his having approved the payment, has been brought into incriminating connection with or is involved unfavourably with the payment to Mrs. Lewis, a payment which he approved and for which some officer of his Ministry signed the Special Warrant on his behalf as Minister of Finance.

On the dictionary meaning of the word "concerned" can it be said that the Applicant may be in a relation of practical connection with the payment to his wife, or is implicated or involved in that payment or that he had something to do with it especially something culpable.

Having carefully pondered this aspect and having regard to the reason for the launching of this inquiry as stated in the second preamble to the instrument of appointment, and mindful of the documentary evidence before me, and taking the view that too narrow a construction ought not to be place on Section 18 of the Commissions of Inquiry Ordinance, and also bearing in mind the statement of the Commissioner that the Applicant is not a person implicated in the inquiry albeit a statement apparently made without knowing that the Applicant had under his signature approved the payment, and also mindful of what the Commission is required to investigate under paragraph 1(a) of its terms of reference and the Applicant's constitutional role or responsibility as Minister of Finance for payments made from the Consolidated Fund, I have determined that he is a person implicated or concerned in the matter under inquiry at

paragraph 1(a) of the Terms of Reference of the Commission within the meaning of Section 18 of the Commissions of Inquiry Ordinance.

I accordingly hold that the decision of the Second Respondent that the Applicant is not entitled to be represented by Counsel at the whole of the inquiry was wrong in law, to the extent that he is entitled to be represented at the whole of the inquiry into the matter the subject of inquiry under paragraph 1(a) of the terms of reference only.

The Applicant is not entitled to be represented by Counsel at the inquiry into any other of the specific matters being inquired into as he is in no way, on a proper construction of the terms of reference, implicated or concerned in any of those matters. Accordingly, I would order that certiorari be issued to remove that part of the Second Respondent's decision relative to paragraph 1(a) only into the High Court, and I hereby order the said decision quashed.

Entitlement to Payment of Legal Costs

Learned Counsel for the Applicant submitted on this issue, that once the Court finds the Applicant is entitled as of right to be represented by Counsel under Section 18 of the Commissions of Inquiry Ordinance, in order for that right not to become illusory, the State should pay for his legal representation.

In this regard he made reference to an excerpt from **Commissions of Inquiry by Pross Christie and Yogis 1990 at page 148** where it is stated -

> *"In contemporary society inquiries are sufficiently expensive and it is frequently argued that the state should fund participation by particular individuals or groups ... In particular circumstances, the right to participate and to be represented by Counsel will be on illusion in the absence of funding. This is particularly so in the case of persons whose conduct is under review and complex and lengthy inquiries. Considerations of public policy and the protection of the rights of individuals insist upon the need for ongoing government recognition of this requirement".*

I do not regard the subject matter of this Commission of Inquiry in which it can be said the Applicant is implicated or concerned, to be either complex or to require lengthy inquiry.

The authors of the same work cited by Counsel go on to state -

> *"I am not sure that the appropriate approach is to make some provision in the statutory regimes because it seems to me that no government would do that. That is really opening the door to a cost that would be absolutely horrendous. I am not sure whether there should not be some discretionary mechanism in the judge to order funding. How to do it. I do not know . . . I just cannot imagine any government saying "we'll provide in this statute that the Commission will be arbiter of whether or not there'll be funding . . ."*

This passage in my view sums up the legal position. There is no provision in the Commissions of Inquiry Act authorizing the payment or reimbursement of the legal cost of a person who is entitled to be represented by Counsel in a matter under inquiry; and no other statutory provision in St. Lucia to that effect, has been brought to my attention. Indeed, while the Constitution provides for the right to Counsel of your choice, it does not provide an entitlement to payment of your legal fees.

The Court has no power to make provision for the payment of the Applicant's cost of representation before the Commission and, in any event, the Applicant cannot be said to have made out a sufficient case of need by merely stating, without more, at paragraph 21 of his affidavit, -

> *"I am unable to out of my own resources to pay the cost of legal representation incurred in appearing before the Commission of Inquiry in defence of my reputation and in defence, too, of the integrity and the propriety of the actions taken by the Government over which I preside".*

I therefore rule that there is no legal basis for or entitlement of the Applicant to payment by the Government of St. Lucia of any legal costs incurred by him in having Counsel represent him during the inquiry.

I also hold that ground No. 5 in the Applicant's Statement fails and this Court has no power to make the declaration sought at paragraph 4 of the Applicant's Summons filed 20th October, 1997; which is refused.

Re Royal Commission on Thomas Case (1980) 1 N.Z.L.R. 603 at page 615 line 24 - 31

<u>Challenge of Bias</u>

The sole challenge by the Applicant to the appointment of the Second Respondent as sole Commissioner is on the ground of bias conscious or unconscious. The relief sought is an order quashing and invalidating the

said appointment made by the Governor-General, and also quashing the decision taken by the Second Respondent, as Commissioner, to continue sitting once the grounds of bias were drawn to her attention and the challenge to the very foundations of the Commission indicated to her on 15th October, 1997.

The Applicant contends that there is a real danger of bias or a real possibility of bias on the part of the Second Respondent as Commissioner, arising from the circumstances surrounding her retirement as High Court Judge of the Eastern Caribbean Supreme Court and the role played by the Applicant therein. Further, that the decision of the Authority not to accede to the Second Respondent's request to have her tenure as a judge extended beyond the prescribed retirement age, directly and adversely affected her in a pecuniary and personal way.

The Law on Bias

The leading authority on the doctrine or test of bias is the decision of the House of Lord in **R V Gough (1993) 2 AER 724**.

The *ratio decidendi* of that case is stated at page 725 in these terms -

> *"Except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings when the court would assume bias and automatically disqualify him from adjudication, the test to be applied in all cases of apparent bias, whether concerned with justices, members of other inferior tribunals, jurors or arbitrators, was whether, having regard to the relevant circumstances, there is a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him".*

R V Gough was a case in which the allegation of bias was made after the defendant was convicted of a criminal offence upon a trial where a juror was a neighbour of and knew his brother whose name was mentioned frequently during the trial. Applying the test of whether there was a real danger of bias his appeal to quash the conviction was dismissed.

The test as formulated by Lord Goff in R V Gough was explained and applied in **R V Inner West London Coroner; ex parte Dallaglio (1994) 4 AER 150**. In that case a challenge of bias was made concerning a coroner, by members of bereaved families, whose relatives had died following a collusion between a dredger and a passenger launch in

August 1989. He refused to remove himself from or to resume the inquest into the deaths. Upon application for judicial review of those decisions, the Court of Appeal found that, on the facts, the degoratory expressions used by the coroner about one of the relatives of disaster victims, indicated a real possibility that he had unconsciously allowed himself to be influenced against the applicants and other members of the action group by a feeling of hostility towards them, and that he had under-valued their case that the inquest should be resumed.

In the instant matter the challenge to the appointment of the Second Respondent is not based on actual or assumed bias (as in *Dimes v. The Proprietors of Grand Junction Canal* (1852) 3 HL Cas. 759 where the Lord Chancellor who had a pecuniary interest as shareholder in a plaintiff company decided an appeal in that matter from the decision to the Vice Chancellor) but apparent bias, and this matter has to be determined in accordance with the principles relating to apparent bias as set out in both cases.

At pages 150 to 152 of the *Dallaglio* case, Simon Brown LJ sets out certain pertinent parts of Lord Goff's speech in R V Gough and extracts nine (9) propositions therefrom -

> "*R V Gough* has resolved this conflict in favour of the more stringent test, that of real danger of bias.
>
> The actual passages in Lord Goff's speech are these:
>
> *". . . bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias . . . the approach of the law has been . . . to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand . . . it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand . . . Since . . . the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man . . . If, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood,*
> *in the sense of a real possibility, of bias . . . justice requires that the decision should not be allowed to stand".*
>
> In conclusion Lord Goff said:
>
> *". . . I think it necessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first*

to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regard) with favour, or disfavour, the case of a party to the issue under consideration by him".

Lord Woolf said:

". . . I agree that the correct test to adopt in deciding whether a decision should be set aside on the grounds of alleged bias is that given by Lord Goff, namely whether there is a real danger of injustice having occurred as a result of the alleged bias . . . the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect . . . When considering whether there is a real danger of injustice, the court gives effect to the maxim [that justice must not only be done but be seen to be done], but does so by examining all the material available and giving its conclusion on the material. It the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed".

From *R V Gough* I derive the following propositions -

(1) Any court seised of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consid er all the evidence for itself so as to reach its own conclusion on the facts.

(2) It necessarily follows that the factual position may appear quite differently as between the time when the challenge is launched and the time when it comes to be decided by the court. What may appear at the leave stage to be a strong case of "justice [not] manifestly and undoubtedly be[ing] seen to be done", may, following the court's investigation, nevertheless fail. Or, of course, although perhaps less probably, the case may have become stronger.

(3) In reaching its conclusion the court "personifies the reasonable man".

(4) The question upon which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By "real" is meant not without substance. A real danger clearly involves more than a minimal risk, less then a probability. One could, I think, as well speak of a real risk or a real possibility.

(5) Injustice will have occurred as a result of bias if "the decision-maker unfairly regard with disfavour the case of a party to the issue under consideration by him". I take "unfairly regarded with disfavour" to mean "was pre-

disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue".

(6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased.

(7) It will be seen, therefore, that by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias.

(8) In the circumstances of the present case the court must therefore ask itself: is there a real danger that the coroner unfairly (though unconsciously) regarded with disfavour the case of those seeking a resumption of the inquest? Or: is there a real danger that the coroner was unconsciously prejudiced against this group? Or as Neil LJ put it in the Divisional Court:

> *". . . is there a real danger that in deciding . . . not to resume the inquests Dr. Knapam was influenced, consciously or unconsciously, to a material degree by his views . . . about the Marchioness action group?"*

(9) It is not necessary for the applicants to demonstrate a real possibility that the coroner's decision would have been different but for bias; what must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decide the merits, unfairly.

My first duty, therefore, is to ascertain the relevant circumstances of the instant matter in so far as they relate to the challenge based on apparent bias.

The Relevant Facts

The Second Respondent, a citizen of Grenada, was appointed a puisne judge of the High Court of Justice of the O.E.C.S. on 1st February, 1982 and served continuously until her retirement at the normal retirement age of sixty-two (62) years on 10th January, 1996. After serving some thirteen (13) plus years she applied for a two (2) year extension of her term of service as is permissible under the relevant statutory provision. Her request having been unanimously approved by the Judicial and Legal Services Commission, did not meet with the unanimous concurrence of the Authority of the O.E.C.S., comprising all the Prime Ministers and Chief

Ministers of the O.E.C.S., which at the relevant time, December 1995, including Sir John Compton the then Prime Minister of St. Lucia.

The Applicant, as then Director-General of the O.E.C.S., wrote to the Chairman of the Judicial and Legal Services Commission conveying the Authority's decision and the Chairman forwarded a copy thereof to the Second Respondent.

The Bar Associations of St. Vincent and the Grenadines and Dominica, upon learning of the adverse decision, met in emergency session and wrote in strong terms to the Chairman of the Judicial and Legal Services Commission taking issue with the decision and categorizing it as discriminatory since another judge of the same circuit had been granted an extension beyond retirement age.

The Second Respondent's efforts to be transferred to Dominica, to take advantage of a statutory provision there permitting a judge to retire at age sixty-five (65) so as to enable her to realize full retirement benefits, was not acceded to by the Judicial and Legal Services Commission in light of the prior non-approval by the Authority.

The Second Respondent was also unsuccessful in trying to realize full retirement benefits utilizing an unspecified statutory provision to enable her to add years to the time actually served.

As a result the Second Respondent retired as a judge of the O.E.C.S. at age sixty-two years at less than full pension. The timing of the decision also caused her some personal dislocation.

It is not known from the evidence before me, what was the extent of the difference in retirement benefits which the Second Respondent actual received and what she could have received, if her request for an extension of tenure had been approved by the Authority.

The Second Respondent was, at a date unknown to the Court, interviewed on the B.B.C. Caribbean Service and expressed disappointment regarding the non-approval of an extension of her tenure as a judge of the O.E.C.S.

The Applicant was not himself a member of the Authority and had no

voting rights in relation thereto.

There is no evidence whatsoever that he participated in or gave any advise on the matter of the extension of the Second Respondent's tenure of office beyond the prescribed retirement age, or that he even attended the meeting of the Authority at which the recommended extension did not receive full concurrence of members.

Furthermore, there is no evidence of any animosity or hostility displayed by the Second Respondent to the Applicant before or since the adverse decision was made on her application.

There is also no statutory requirement for the decision on a judge's application for extension of tenure beyond the prescribed retirement age, to be made by the Authority after consultation with or upon the advise of the Director-General, and so the Court cannot, short of direct and cogent evidence, presume any such involvement or role played by the Applicant with regard to the decision on the Second Respondent's application.

Indeed, one would expect that the Prime Ministers and Chief Ministers of member countries who make up the Authority, would be advised on such matter by members of their own cabinet and would come to such a meeting with some clear view one way or the other.

Mr. Alexander submitted that the Applicant has not, in his affidavit, acted with the utmost good faith and condour, *uberrime fide*, as is required of him in making this kind of application, and that he misrepresented certain facts, including the full text of the "umbrella" paragraph in the terms of reference of the Commission. (**see R. v. Kensington Commissioners (1917) 1 KB 486**). He therefore surmised that the Court ought to refuse relief without more.

I have already addressed in this judgement the Applicant's misstatement of the text of the "umbrella" paragraph in the terms of reference. However, the omission of certain pertinent words was one of which I was fully cognisant at the time of hearing the application for leave. Furthermore, the full text of the terms of reference were gazetted and the Court is entitled to take judicial notice thereof.

In short, I do not regard the omissions in the Applicant's affidavit

highlighted by Mr. Alexander to be, either singly or collectively so grave as to warrant summary refusal of the application on that basis only.

Returning to the relevant facts, this is not a case in which the Second Respondent is said to have an interest, pecuniary or otherwise, in the outcome of the Inquiry or in any of the subject matters of the Inquiry. Indeed, the Second Respondent is not a native of nor was she serving as a judge in St. Lucia. She is not said to have any political or other connection with the present Government of St. Lucia or with anyone in a position of leadership therein, so as to indicate partisanship. In other words, there is nothing to suggest or even hint that the Second Respondent would unfairly treat with favour the present government or unfairly treat with disfavour their immediate predecessors in office.

Furthermore, the Second Respondent is not charged to inquire into any matters of or concerning pension rights or retirement benefits, for example, of past elected members of the House of Assembly or past Ministers of Government, nor has she been accused of expressing opinion on the merits of any of the subject matters under inquiry or of a similar nature, so as to suggest prejudgment. **R.V. Secretary of States for the Environment ex parte Kirkstall Valley Campaign Ltd. (1996) 3 AER 304.**

What then is the genesis of the allegation of apparent bias made by the Applicant against the Second Respondent?

Applicant's Case for Bias

Learned Counsel for the Applicant, in his useful skeleton argument puts it this way -

> *"This is a case where resulting from the circumstances of the Second Respondent's retirement as a High Court Judge, and the role played by the Applicant, it is contended that, these events which constitute the backdrop to her appointment as Commissioner give rise to the appearance of bias and the possibility of bias conscious or unconscious arising in the facts".*

And he formulated the relevant questions for the court's determination in these terms -

(a) Is there a real danger that the Second Respondent will as Commissioner unfairly regard with disfavour the issues relating to the Applicant and by extension, his wife in her deliberations? Or, put differently -

(b) Is there an appearance of bias and or on examination of all the facts a real possibility that the Second Respondent qua Commissioner, may unconsciously be experiencing continuing disappointment resulting from her failure to realise increased gratuity and pension to the point that she may unconsciously feel resentment towards the Applicant, and by extension his wife, in such a way as to influence her approach to the deliberation of matters concerning them.

Learned Counsel further submitted that the Applicant was part of the decision making process of the Authority, and although he had no voting rights, he had a duty to participate in and contribute to all of the decisions of the Authority and is in the same position in law as a person with voting rights. I do not accept this as a correct statement either of law or of the facts as disclosed in this matter.

Counsel laid great emphasis and reliance on what he termed the adverse pecuniary effect on the Second Respondent which the non-approval of the extension of tenure as a judge must have, which he submitted is substantial and coterminous with her life.

As I have stated earlier, the extent of any financial "loss" has not been established to my satisfaction, and I regard the Applicant's classification of it as "significant" to be virtually meaningless from an evidential point of view. What is significant to one person may not be to another. It is a very subjective statement, and in the absence of actual figures, of which I would expect an ex-Director-General to have some knowledge, I do not attach much, if any, credence to that statement.

What is clear is that the Applicant has sought to attribute to himself a role in the said decision on the Second Respondent's request for an extension of her tenure as a judge, which is not made out by the facts.

I attach absolutely no weight or evidential value to the contention of Counsel for the Applicant that because the Second Respondent made no public statement disassociating herself from the allegation of discrimination against the Authority made by the two Bar Associations, it is to be assumed that she may unconsciously be harbouring bias. I agree with Mr. Alexander that the said proposition is, with all due respect to Learned Counsel, "scraping the bottom of the barrel".

I also do not accept as legally or factual correct, that the Second Respondent now sits in judgement of the Applicant who disappointed her on the matter of her extension of tenure. It is clear from the evidence that the Applicant was in no way involved in creating any such disappointment.

Respondents' Case Against Bias

I have already touched on several of the submissions of Learned Counsel for the Respondents on this issue.

In brief, Mr. Alexander in encapsulated the legal principles, submitted that the Court has to consider the nature of the "interest" of the person accused of bias, the effect of that interest and its relevance to the subject matter of the proceedings. Having alleged bias an applicant has to go further and show that injustice will be created. It is the duty of the Court first to consider the relevant materials before it in so far as they relate to the challenge of bias and then go on to consider whether it is satisfied that the commission is predisposed or prejudiced unfairly against the Applicant, for reasons unconnected with the matters into which she must inquire and, in the final analysis, the Court is dealing with whether there is actual bias albeit unconscious bias.

Counsel also submitted that the Court is entitled to look as the professional or legal qualifications of the Second Respondent, as an experienced lawyer and High Court judge, and it cannot lightly be assumed that she would treat the Applicant with disfavour. In support of this proposition he relied on -

R. v. Ruel Gordon (1969) 14 WIR 21.

R. v. Cullen (1993) 1 LRC 610 at 611 d-e.

R. v. Hereford Magistrates' Court, Ex parte Rowlands (1997) 2 WLR 854 at 874 and 875.

Rees v. Crane (1994) 1 AER 832 P.C. at 849 b-f and 850 d.

Having analised the evidence and commented on what he termed the Applicant's lack of candour in his affidavit, Learned Counsel submitted that the allegation of apparent bias had not been made out, and to find otherwise would be to find that the Second Respondent is a vindictive person.

Lord Slynn who delivered the opinion of the Board in **Rees v. Crane**

(ibid) attached some importance to the professional background of the persons who made up the Judicial and Legal Services Commission, in determining the issue of bias. He said at page 850 d -

> *"their professional backgrounds are such that an assumption of bias should not lightly be made . . ."*

In the instant matter, having regard to the Second Respondent's professional qualifications as a lawyer and judge of considerable experience, it is not lighly to be assumed that she would be affected by bias conscious or unconscious.

Conclusions on Bias

Having ascertained the relevant circumstances in the instant matter and applying the guiding principles set out in *R V Gough and R V Inner West London Governor ex parte Dallaglio* and, in particular, mindful that the court in reaching its conclusion on this issue personifies the reasonable man, is there a real danger, in the sense of one not without substance, something involving more than a minimal risk but less than a probability, in other words is there a real possibility that the Second Respondent, as sole Commissioner, will in the proceedings and deliberations of the Commission unfairly regard with disfavour the Applicant (or his wife) or that she is predisposed or prejudiced against them or either of them by virtue of the Applicant having written the letter conveying the decision of the Authority not to extend her tenure of office as a judge of the Eastern Caribbean Supreme Court beyond the prescribed retirement age, so as to lead to the conclusion that she harbours bias conscious or unconscious, notwithstanding any evidence whatsoever that the Applicant took any part or played any role, whether as adviser or otherwise in the deliberations and decision of the Authority or that he advised against or in any way influenced the outcome.

After a painstaking consideration of this matter, I conclude that there is no real danger or possibility of bias conscious or unconscious or put differently the Applicant has failed to make out a case of bias to my satisfaction so that I can exercise my discretion in his favour. Accordingly, Reliefs Nos. 1 and 3 in the Applicant's Summons filed 20th October, 1997, and as reiterated in his Statement of even date, and in the Originating Motion filed 30th October, 1997 fails and are dismissed.

I also hold that, in any event, even if a real danger of bias had been

established to my satisfaction, the Court could not quash the appointment of the Second Respondent as Commissioner for that reason, as the effect of such a finding of bias would have been merely to disqualify the Second Respondent from sitting as Commissioner, but not to invalidate her appointment as sole Commissioner, where no excess of authority or contravention of the provisions of the Commissions of Inquiry Ordinance, Chapter 5 were alleged in relation to the making of the appointment by the Governor-General. Accordingly, relief No. 1 sought by the Applicant in his Summons could not be granted and is also refused on that ground. *See R V Gough at 735j.*

Locus Standi

This threshold test has to be established by an applicant both at the leave stage and at the substantive hearing. However, the modern approach is to give a liberal interpretation to *locus standi*, so as not to prevent or discourage citizens from challenging perceived wrongs or excess of power by public bodies, authorities, and quasi judicial tribunals.

The modern test is "relevant or sufficient interest". This test was expressed by Sir Vincent Floissac *CJ in Chief Immigration Officer v. Burnett (ibid) at pages 5 - 6* in this way -

> *"A complainant will be held to have locus standi by way of a relevant or sufficient interest in an actual or intended decision or action of a public authority (1) if the decision or action infringed or threatens to infringe any constitutional, statutory or common law right whatsoever vested in the complainant or (2) if the decision or action infringed or threatens to infringe the complainant's specific constitutional, statutory or common law right to the observance of the formalities required by the "audi alteram partem" rule of natural justice or (3) if the decision or action disappointed or threatens to disappoint the complainant's legitimate expectation that certain benefits or privileges will be granted to him or that certain rules of natural justice or fairness would be observed in relation to him before the decision or action is made or taken".*

Applying that test to the instant matter, I entertain no doubt that the Applicant has a relevant or sufficient interest in the matter under inquiry, to satisfy the requirement of *locus standi*.

Orders

It is therefore ordered as follows:-

(1) the application for a writ of certiorari to quash and/or invalidate the appointment of the Second Respondent as Commissioner on the ground of bias conscious or unconscious is refused.

(2) It is ordered that the decision of the Second Respondent made 15th October, 1997 that the Applicant is not entitled as of right to be represented by Counsel before the Commission of Inquiry in so far as it relates to the matter the subject of the inquiry under paragraph 1(a) of the terms of reference of the Commission published in the Extra-Ordinary Gazette Vol. 166 No. 65 dated 18th September, 1997 be removed into the High Court of Justice and is quashed.

(3) The application for a writ of certiorari to remove into the High Court and quash the decision of the Second Respondent to continue to sit it as sole Commissioner of the Commission of Inquiry made 15th October, 1997 is refused.

(4) The application for a declaration that the Applicant is entitled to have the reasonable costs of his legal representation before the Commission paid by the Government of Saint Lucia, is refused.

As the general approach of the Court is not to discourage citizens or public spirited persons, who have *locus standi,* from approaching the court on matters of national or constitutional importance in the public interest, and although the Applicant has failed in his main challenge, I would make no order as to costs.

GERARD ST. C. FARARA, Q.C.
HIGH COURT JUDGE (ACTING)