SAINT LUCIA

IN THE COURT OF APPEAL

CIV. APP. NO.12 OF 1997

BETWEEN:

DR. VAUGHN LEWIS

Appellant

and

THE ATTORNEY-GENERAL OF ST. LUCIA

First Respondent

MONICA JOSEPH

Second Respondent

Before:

The Hon. Mr. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances:

Dr. Richard Cheltenham, Q.C. and Mr. Kenneth Monplaisir, QC
for the Appellant
Mr. A. Alexander, S.C.; Mr. Dexter Theodore with him

1998: January 12;
February 9.

JUDGMENT

BYRON, C.J. [AG.]

I have had the opportunity of reading the Judgment of Redhead J.A. We have not come to the same conclusion. He has set out the facts and the other preliminary matters in detail. I can therefore deal with these matters briefly.

Background to the Appeal

There was a change of Government after General elections in May 1997. Shortly thereafter, the former Honourable High Court Judge, Justice Monica Joseph was appointed sole Commissioner to enquire into a number of issues related to the conduct of the administration of that had been recently been voted out of office. The terms of reference included two matters which former Prime Ministers Sir John Compton, and Dr. Vaughn Lewis [the appellant] claimed implicated them.

They applied to the Commissioner to disqualify herself on the ground of bias, and to order that they had the right to be represented at the Inquiry by Counsel paid for by the State. These applications were refused.

They then, separately, initialed proceedings in the High Court, by way of prerogative writ to cause these decisions to be brought into court and quashed.

The learned trial Judge, Farara J. [Ag.] in a lengthly and carefully reasoned judgment delivered on the 25th day of November 1997 refused to quash the decision of the Commissioner not to disqualify herself. He ordered that the applicant was entitled as of right to be legally represented at the Commission, but concluded that there was no provision requiring that the state pay legal costs incurred by the applicant. He made no order as to costs.

The Appeal

In this appeal against that decision, the appellant contends that the learned trial Judge erred in failing to conclude that there was a real danger of bias against him. The respondent cross-appealed to overturn the refusal to remove the Attorney-General as a party to the proceedings, and the order against costs. No appeal

was made against the conclusion that there was no requirement for the payment of the appellant's legal costs at the Inquiry.

The Cross-Appeal

It is convenient to dispose of the cross-appeal the issue was whether the Governor General was the proper party instead of the Attorney-General. I can briefly indicate that I agree with the learned trial Judge and with Redhead JA in approving the dictum of Wooding CJ in Sir Solomon Hochoy v N.U.G.E. (1964) 7 W.I.R. 174 suggesting that "the practice of having the Attorney-General as a defendant whenever the validity of an act of state done by the Governor – General is being called into question" be followed. It is well supported by authority and it allows for the affordance of civilities to the Governor-General in the performance of an official act on the advice of the Government.

With regard to question of costs, the learned trial Judge applied the general approach of the courts not to discourage citizens or public spirited persons, who have *locus standi* from approaching the court on matters of national and constitutional importance in the public interest. Consequently, although the appellant failed in his main challenge he decided to make no order as to costs. Again I agree with him and with Redhead JA.

I would therefore dismiss the cross appeal.

The Case For Bias

The appellant claimed that as the Director-General of the OECS at the relevant time, he was associated with decisions of the Heads of Government refusing the application of the Commissioner to continue to serve as a judge after the age of 62 years, despite the unanimous recommendation of the Judicial and Legal Services Commission. This caused her financial loss in reduction of income

and retiring benefits. He suggested that she would have considered the decision unjust and was disappointed by it.

Counsel emphasised, with the rhetoric of the courtroom, that she receives painful reminders of her reduced retirement benefits each month [and will for the remainder of her life] when she collects her pension. He contends that there is a real possibility that she will be influenced by these circumstances, perhaps unconsciously, against him.

Commissions of Inquiry Need to be Fair

The Need to be fair applies to Commissions of Inquiry. In his illuminating article "Procedures at Inquiries" (Law Quarterly Review October 1995) Lord Justice Scott explained that an important distinction between litigation in the Courts and Inquiries is that litigation is adversarial in character, but the nature of an Inquiry is investigative or inquisitorial. The result is that in an Inquiry there are no litigants, there are merely witnesses who have or may have knowledge of some of the matters under investigation. These witnesses have no case to promote although they have an interest in protecting their reputations. He concluded:

> "it is generally accepted that the procedures to be adopted at an Inquiry must take into account the need to be fair to witnesses".

The requirement of procedural fairness in Commissions of Inquiry is a well settled principle in keeping with all the leading authorities.

The Law Against Bias

Without attempting to offer a full definition of bias, I think I can refer to it as being a predisposition to favour or disfavour a party or

result, in a manner that is wrongful and which can lead to a denial of the judicial imperative of impartiality in the particular matter.

In general, bias may fall into three categories: cases of actual bias; cases where the decision maker has a direct pecuniary interest in the outcome of the proceedings and other cases where the circumstances give rise to a presumption of bias.

In this case, no allegations of actual bias nor of pecuniary interest in the outcome of the proceedings have been made against the Commissioner.

This case concerns the third category. The modern law on this aspect of bias derives much of its impetus from the well known dictum of Lord Hewart C.J. R v Sussex Justices *ex parte* McCarthy (1923) All ER Rep 233. The applicant was charged with dangerous driving involving a collision between his vehicle and another vehicle. The solicitor acting as magistrates clerk on this occasion was also acting as solicitor for the other driver in civil proceedings against the applicant arising out of the collision. The evidence was that although he retired with the Magistrates in case his help should be needed on a point of law, the magistrates did not in fact consult him and he himself abstained from referring to the case. In quashing the conviction Lord Hewart said:

> "justice should not only be done, but should manifestly appear to be done. The question therefore is not whether in this case the deputy clerk made any observation of offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

This case became authority for invoking the rule against bias on a mere suspicion of bias, emphasising the need to maintain public confidence in the administration of justice. This came under review in R v Camborne Justices, *ex parte* Pearce (1954) 2 All E

R 850. In that case the applicant was convicted of an offence under the Food and Drugs Act 1938 on an information laid by a sampling officer of the County Council. The magistrates clerk who was invited into the magistrates private room to advise them was a member of the county council (though not on the relevant Committee). The court refused to quash the conviction on the ground of bias, holding that in the circumstances there was no real likelihood of bias on the part of the magistrates clerk, expressing an important variation in principle by refusing to apply the test of whether there was a "suspicion" of bias, and insisting instead on determining whether in the circumstances there was a "real likelihood of bias".

The law has now been settled in R v Gough [1993] 2 All ER 724. Lord Goff having examined the principles and relevant cases in detail changed the focus of the test of bias. He concluded that the test should be more severe than indicated in those cases which acted on a "mere suspicion" of bias, or "apparent bias". Yet it should not be severe as indicated in those cases which require satisfaction that it was probable that the Judicial Officer would be biased. He laid down a test which required assessment of the relevant circumstances to determine whether there was a "real danger" in the sense of a "real possibility" of bias. He stated it in these terms:

> "In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there is a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand."

As he was closing his opinion he emphasised the test in this succinct manner at page 737:

> "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 that

> 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 regarded) with favour, or with disfavour, the case of a party to the issue under consideration by him."

These principles were explained and applied in R v Inner West London Coroner exparte Dallaglio (1994) 4 All ER 139. Sir Thomas Bingham MR, stated:

> "The House of Lords was there called upon to choose between two tests for inclusion in this class, both of the rival tests finding support in authority. One test was whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible because of bias on the part of the decision-maker. The second was whether there was a real likelihood, or danger, of bias. The House of Lords unanimously upheld the second of these tests, expressed in terms of real danger, to make clear that it is possibilities, not probabilities, which matter. This decision shows, as it seems to me, that the description `apparent bias' traditionally given to this head of bias is not entirely apt, for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand. The famous aphorism of Lord Hewart CJ in R v Sussex Justices, ex p McCarthy [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234 that `justice……should manifestly and undoubtedly be seen to be done' is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias."

A number of cases were referred to us on the effect of various types of conduct or situations on the likelihood of bias. The issue of friendship was considered in Cottle v Cottle (1939) 2 All E R 535. The wife had initiated proceedings for desertion. The Chairman of the bench was a friend of the wife's mother, and it was proved that the wife had said that she see that her case was set before this

particular justice and "put him (the husband) through it". The proceedings were set aside on the ground of bias.

The effect of previous statements which were capable of demonstrating a predisposition to regard the litigant with disfavour was considered in Perkins v Irving, unreported, Jamaica Court of Appeal No. 80/97. The court found that a real danger of bias existed in the circumstances of that case, where the Judge had made pungent remarks about the litigant in an address to the court some 18 years previously (describing him as "viperous vermin"), this was coupled with an unreasonable refusal to grant an adjournment, and verbal demonstration that he thought the application to refuse himself offensive.

The court considered the effect of personal hostility in Rees v Crane (1994) 1 All ER 832. In that case it was contended that there was personal animosity on the part of the Chief Justice which predisposed him against the respondent.

Lord Slynn in delivering the judgment of the Privy Council said on this issue at 849:

> "it is not lightly to be assumed that he would allow personal hostility to colour his decision to suspend the respondent to recommend to the commission that the matter be referred to a tribunal. Having considered all the material before them, ….their Lordships are not satisfied "that a real danger" of bias has been established (R v Gough (1993) 2 All ER 724)."

This brings up the question of the judicial character, because one of the grounds of appeal is that the learned judge placed reliance on the fact that the Commissioner was a former High Court Judge to exclude the possibility of bias.

The authorities indicate that a judicial officer is expected to possess a degree of rationality and to free the mind of certain preconceptions.

R v Ruel Gordon (1969) 14 W.I.R. 21 in a case where two informations were heard by a magistrate after each other and both resulted in conviction, the Court of Appeal in Jamaica held that a resident magistrate being a trained lawyer, must be taken to have disabused his mind of any knowledge he may have gained from the previous case, and must be taken to have applied himself to the issues presented to him in the second information. Accordingly, there was no likelihood of bias.

The Court of Appeal in New Zealand had the same opinion in R v Cullen (1993) 1 LRC 610. Eichelbaum CJ said at 614:

> "It is inevitable that defendants will appear more than once before the same judge and there may be some happening on a prior occasion which is discreditable to the defendant. Judges are well able to put such things out of their minds, just as juries are expected to do from time to time under proper directions."

On the other hand Benjamin Cardozo illuminated the human condition of Judges in his work, The Nature of Judicial Process, 1921 at pp.12 – 13 and 167:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs….In this mental background every problem finds it setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes expect our own…….
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [he or she] be litigant or judge."

I agree that reliance on the fact that the Commissioner was a Judge of high standing and reputation, cannot be a substitute for careful examination of the circumstances.

In cases of “unconscious bias”, such as herein alleged, by very definition the judicial officer would not be aware of its existence. In such cases the dire warning of Lord Goff is relevant, that “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 instant case is set aside from the authorities quoted to us because no allegations are made of anything done or said by the Commissioner to show a predisposition to disfavour the appellant.

The allegation in this case is that the appellant has been associated with the taking of a decision which hurt or disappointed the Commissioner severely. The point being raised is about human nature, and I suppose it comes under the head of enmity, or a desire for revenge. Is this such a real and intrusive human quality that evidence of these circumstances raises the presumption that it may arise and present a real danger of bias? In my opinion, it is not highly probable that well intentioned people would be affected by malevolence in such circumstances. On the other hand it must be indisputable that there are some people who are driven by such motives. The legal test as I understand it does not permit an assessment of the Commissioner to determine how probable it is that she would be so driven. Lord Goff has stressed that the test is based on possibility not probability. Therefore, the question to be asked is whether a person could be driven by such motives. Not whether it is probable that this particular person would be. I find myself having to conclude that it is possible for a human being to be so driven.

However, I think that I am required to go further and examine the circumstances to determine whether there is a real danger. In my judgment the danger would only exist if the Commissioner could conclude that the appellant had unjustly caused her disappointment.

It would be unreasonable to conclude that she could view anyone who was not identified as an architect of unjust of unfair disappointment with disfavour.

I do not accept the comparison between the appellant and the magistrates clerk cases. In those cases the rule against bias was invoked only where it was proven that the clerk was, or might have been biased, and the court considered that he could have influenced the tribunal he advised. In this case, to carry on the analogy, there was no allegation that the clerk was biased. A litigant does not identify an unbiased clerk with the out come of a case. The evidence is clear. The appellant was not part of the decision making body. Taking his evidence at its highest value he was an unbiased [clerk] adviser. It would seem to require a degree of irrationality to regard him with the animosity necessary to deny him fairness.

In my view rationality must be accredited to the Commissioner. Even if she harbours disappointment to any degree, the focus of the disappointment would be directed at the decision makers. I find it impossible to conclude that the Commissioner could brand the appellant with the effects of a decision he did not make. I feel constrained to support the conclusion of the learned Judge that:

> "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 see this as different to Sir John Compton's case. He was part of the decision making body. There was no proof as to how he voted. The Commissioner made a statement at the Commission of Inquiry apparently disassociating him from the decision. There is force in the argument that it would be reasonable to regard all the decision makers as responsible for the decision and therefore it

would be improper for the court to conduct an exercise in assessing whether one Head of Government was more or less responsible. In any event, the evidence on this issue was inconclusive. I would therefore conclude that if the decision is capable of producing the result of disappointing her unfairly, there may be little rational basis for distinguishing between the decision makers, on the basis of inferences as to how they voted.

In the premises I would dismiss the appeal.

DENNIS BYRON
Chief Justice [Ag.]

REDHEAD, J.A.

The applicant/appellant Dr. Vaughn Lewis was Director of Organisation of the Eastern Caribbean States from 1982 to 1996.

He gave up that post in the year 1996 and became Prime Minister of St. Lucia succeeding Sir John Compton who was Prime Minister of St. Lucia for a number of years.

A general election was held in St. Lucia in May 1997 and Dr. Lewis' political party was defeated at the polls.

The new Government headed by the Honourable Kenny Anthony set up a one man Commission in the person of the second named respondent who was appointed by the Governor General as Commissioner to inquire into a number of alleged wrong doings by the past administration.

The terms of reference of the Commission and that which directly impact upon the appellant are inter alia to inquire into:

[1] 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 warrant 144 of 1996/97: Savings: $1,601.05 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.

ii. Identify the person or persons who authorised, 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 Officer of the Government of Saint Lucia;

iii. Determine whether the person or persons who authorised, 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:"…..

The Commission met on 30th September 1997. On 11th October 1997 challenge was made to the Commissioner by the applicant on the ground of bias.

On 30th October 1997 the appellant filed an originating motion in pursuance of leave which was granted by Gerard Farara J. for an Order of Certiorari to quash the appointment of the Commissioner.

The applicant/appellant deposed to and filed an affidavit, containing twenty-seven paragraphs in support of his application. In his affidavit he deposed inter alia that:

[2] “I was Director-General of the Organization of the Eastern Caribbean States [OECS] with Headquarters situated in St. Lucia from 1982 to 1996. The principal decision making body of the OECS is called the Authority.

[3] Between the period 22nd April 1996 to 23rd May 1997 I was Prime Minister of St. Lucia and among other things I appointed ministers, determined their areas of responsibility, presided over the Cabinet and assumed overall responsibility for actions of my Ministers and policy direction of the Government.

[4] As Director-General of the OECS 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 duty to communicate all decisions made by that body to the relevant persons and/or institutions.

[5] In 1995 an application came before the Authority of the OECS 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 who in turn communicated it to Miss Monica Joseph…."

[8] Subsequent to that decision, Miss Joseph requested the Judicial and Legal Services Commission that she be transferred to Dominica where legislation provided for retirement of Judges at age 65. Dominica is the only country in the OECS that provides for the retirement of Judges at age 65 years.

[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 think it right and prudent to grant the transfer in the face of the letter of 18th December 1995 from the Director-General of the OECS conveying the refusal to agree to the extension of time sought……"

[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 her expectations and dislocated her domestic and personal planning……."

The matter came on for hearing on the 1st of November 1997 before Farara J. and on 25th November he gave his decision which inter alia refused 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.

It is mainly from this decision that the appellant now appeals to this court.

The grounds of appeal filed on behalf of the appellant are as follows:

[1] The learned trial Judge erred in law in failing to resolve all of the factual issues in the Applicant/Appellant's favour from which he was bound to conclude that there was a real danger of bias on the part of the 2nd Respondent.

[2] The learned trial Judge erred in law in failing to pay any or any sufficient regard to the following facts and matters:

[a] The fact that the 2nd Respondent was prevented from completing fifteen [15] years of service as a Judge.

[b] The fact that the 2nd Respondent's pension and gratuity would, as a result, be based on thirteen [13] and not fifteen [15] years of service.

[c] The fact that the 2nd Respondent has been deprived of the status and income as a Judge for at least two [2] years and at most three [3] years.

[d] The 2nd Respondent publicly stated her disappointment in being rejected on two occasions for a further judicial appointment.

[3] The learned trial Judge erred in law in concluding as follows:

i. The Applicant/Appellant was not part of the decision making process which took the decision refusing to allow the Respondent to work beyond retirement.

ii. That the financial loss suffered by the 2nd Respondent was not significant or substantial.

iii. The fact that the 2nd Respondent was a former High Court Judge excluded the possibility of bias.

[4] The learned trial Judge erred in law and took irrelevant considerations into account in holding that

Applicant/Appellant should have quantified the loss of pension and gratuity suffered by the 2nd Respondent.

[5] The learned trial Judge erred in law in holding that there was no satisfactory evidence that the Applicant/Appellant was present at the meeting of the Authority that took the decision not to allow the 2nd Respondent to continue working beyond retirement.

[6] The learned trial Judge erred in law in relying on the statement and the implications flowing therefrom of the Commissioner/2nd Respondent to the effect that she told the B.B.C. Caribbean Report interviewer that her extension was turned down by one OECS Prime Minister but that the OECS Prime Minister who made the objection was not Sir John Compton, former Prime Minister of St. Lucia.

[7] The learned trial Judge erred in law in failing to conclude that, in all the circumstances of the case that there was a real danger of bias on the part of the 2nd Respondent in the sense that she might have unfairly regarded with disfavour the issues relating to the Applicant/Appellant and by extension his wife in her deliberations.

I first of all deal with ground 3 of this appeal.

At page 79 of the record the learned trial Judge said:

> "There is no evidence whatsoever that he [the Applicant] participated in or gave any advice on the matters of extension of the 2nd 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."

Learned Counsel for the Appellant criticised this finding of the learned trial Judge and argued that the learned trial Judge made errors of law in his approach to the appellant's case in that he impoverished the factual basis of the matter thereby coming to the

wrong conclusion. In support of this argument, Dr. Cheltenham pointed to the applicant's affidavit in particular paragraphs 2 and 4 thereof in which the appellant deposed that as Director-General of the OECS from 1982 to 1996, he had the responsibility of advising the Heads of Governments who met in the Authority at least twice a year on all matters which fell to be determined by them. Learned Counsel for the Respondents argued on the other hand that there was no evidence before the learned trial Judge that the appellant in anyway participated in or gave advice on the matter of the 2nd Respondent's extension of service and one could not infer this from the materials which were before the learned trial Judge. Mr. Alexander argued for one to draw the inference that the Director-General was present at that meeting and did advise one must necessarily first have to come to the conclusion that the Director-General never took holidays or never fell ill at any time.

Learned Senior Counsel drew attention to paragraph 7 of the appellant's affidavit which says in part…"*I communicated the decision of the Authority to the Chairman of the Judicial and Legal Services Commission*" and argued that where the applicant did something he said so positively and definitively. Learned Counsel submitted that is why paragraph 4 of the applicant's affidavit is couched in that manner because he could not say that he was present and advised because he was not present and did not advise.

Learned Counsel also referred to the Organisation of Eastern Caribbean States Act 1983 Article 10 paragraph 3 which provides as follows:

> "The Director-General shall be the Chief Executive Officer of the Organisation and shall have responsibility for the general decision and control of the Organisation. He shall be appointed by the Authority to serve in that capacity for a term of four [4] years and shall be eligible for reappointment."

Paragraph 4 provides:

> "In the performance of his functions, the Director-General shall be responsible to the Authority, the Foreign Affairs Committee, the Defence and Security Committee and the Economic Affairs Committee. He shall be responsible for the general efficiency of the Administrative Service, for co-ordination of the activities of the Organisation and for the operation of the Administration approaches in general. He shall similarly be responsible to any institution established by the Authority pursuant to paragraph 7 of Article 6 of the Treaty. In particular, his duties shall include the following:
>
> [a] to service meetings of invitations of the Organisation.
>
> [b] To take appropriate follow-up action on the decisions recommendations or directions taken at such meetings.
>
> [c] To keep the functioning of organisation under continuous review and to report its findings to the appropriate Chairman.
>
> [d] To make reports of activities and an annual report to the Authority on the work of the Organisation; and
>
> [e] To undertake such work and studies and perform such services relating to the functions of the organisation as may be assigned to him from time to time, and also make such proposals relating thereto as may assist in the efficient and harmonious functioning and development of the Organisation."

Mr. Alexander, learned Queen's Counsel, argued that when the learned trial Judge said:

> "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 cogent evidence, presume any such involvement or role played by the Applicant with regard to the decision on the 2nd Respondent's application.

That the learned trial Judge was entitled to look at the OECS Act and determine as he correctly did, the duties and responsibilities of the Director-General.

I agree with Mr. Alexander's arguments and also the Judge's findings that there is no direct evidence that the appellant took part in the decision or gave advice to the Prime Ministers concerning the 2nd Respondent's application for an extension of her tenure of office beyond the prescribed retirement age.

However, when one looks at paragraphs 4 and 5 of the appellant's affidavit, the irresistible inference and conclusion that one must draw from this evidence is that he was present and advised the Prime Ministers concerning the 2nd Respondent's application for an extension of tenure.

In paragraph 4 of his affidavit he swore on oath that his responsibility included advising the Heads of Governments who met in the Authority at least twice a year on the matters which fell to be determined by them.

In paragraph 5 he deposed that in 1995 an application came before the Authority of the OECS seeking to extend beyond the determined age the period of service of the 2nd Respondent. 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. [my underlining]

In my view paragraph 5 of the appellant's affidavit clearly indicates personal knowledge on the part of the appellant on the application which had gone before the Authority in 1985. Unless, in my opinion, one finds the affidavit inherently unreliable and I do not so find, the compelling conclusion that must be drawn is that he was present. I also agree with the learned Counsel's contention that under Article 10 paragraphs 3 and 4 with reference to the appellant's duties there is no mention of his role as an advisor to the

Prime Ministers. However, under paragraph 4 it is there stated inter alia:

"In particular, his duties shall inter alia include the following:"

It is obvious that what followed was not meant to be exhaustive. In other words it does not mean for instance, that other activities such as advising the Prime Ministers cannot be legitimately added to his duties.

There was no cross-examination of the appellant on his affidavit neither was there any affidavit from the Respondent. The uncontroverted evidence and the only evidence which was before the learned trial Judge was the affidavit of the appellant.

In my opinion, the conjoint effect of paragraphs 4 and 5 of the appellant's affidavit and the inference to be drawn therefrom is that the appellant was present.

I agree with learned Counsel for the appellant that the learned trial Judge erred in finding that the appellant did not participate in or gave any advice on the matter of extension of the 2nd Respondent's tenure of office beyond the prescribed retirement age.

This finding too, was critical and pivotal to the whole issue, so much so that the learned trial Judge was impelled to say of the Appellant:

> "What is clear is that the Applicant has sought to attribute to himself a role in the said application for the 2nd Respondent's request for an extension of her tenure as a Judge, which is not made out by the facts."

That to my mind affected and undermined the substrata of facts which inevitably affected the outcome, that is whether there was a real danger of bias or no bias.

I now turn to ground 6 of the appeal.

At page 55 of the judgment, the learned trial Judge said:

> "The 2nd Respondent in her response [to her challenge as Commissioner by the Appellant and Sir John Compton] stated inter alia, that she functions one way straight and fair by all those who know her. She continued:
> Reference was made to a B.B.C. Caribbean Report, at the end of that sentence by the interviewer and I quote:
> "Her extension was turned down by one OECS Prime Minister. Objection was made to extension of my service of OECS Judge by an OECS Prime Minister, but that OECS 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 OECS, 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."

This statement by the 2nd Respondent found its way before the learned trial Judge by way of an affidavit sworn to by Miss Morellie.

The reception of this evidence was attacked by learned Queen's Counsel, Dr. Cheltenham. He argued that the statement made by the 2nd Respondent was not on oath. The statement itself was hearsay. The statement that Sir John Compton was not the Prime Minister who made the objection to the extension of her tenure of service could not have come from her personal knowledge when these deliberations are secret therefore that was hearsay upon hearsay.

Finally the assertion in the statement that the appellant was not on the decision making body of the Authority, not made on oath and introduced as hearsay impacted upon the learned trial Judge's mind and influenced his findings. I agree entirely with the above arguments.

I turn now to grounds 3[ii] and 4.

At page 81 of the judgment the learned trial Judge said:

> "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".

The learned trial Judge seems to be frowning at the fact that the 2nd Respondent's loss was not quantified, and therefore he could not say whether or not it was substantive. Consequently, the learned trial Judge did not attach any credence to the statement that the 2nd Respondent suffered substantive financial loss resulting from a refusal to extend her tenure of office. Dr. Cheltenham argued that the learned trial Judge treated lightly the fact that the 2nd Respondent was denied 2 – 3 years loss of salary and gratuity and a full pension.

Judges' pensions rights are governed by Statute. The Eastern Caribbean Supreme Court [Rates of Pension] [Judges] Act No 12 of 1989 Section 3 [1][c] provides as follows:

> [1] The pension payable to a judge upon his retirement in pensionable circumstances shall be computed as follows:
> [c] In the case of a judge of the High Court if he has had continuous service as a Judge for a period of not less than fifteen years, or a rate equivalent to his full annual pensionable emoluments at the date of his retirement. In any other case, he shall receive a pension at a rate equivalent to three fourths of his full annual pensionable emoluments."

Dr Cheltenham argued that it is not a requirement of good sense or law that the loss should be quantified. He contended that what was before the learned trial Judge he ought to have found that the loss was substantial. I agree.

Learned Counsel submitted that that loss was coterminous with the rest of her life; everytime the 2nd Respondent draws her cheque it is a stark reminder that the appellant bears some

responsibility and therefore there is a real danger of bias, the possibility of bias.

I must therefore agree with Dr. Cheltenham that there are findings, in my view, which the learned trial Judge could have made and ought to have made in favour of the appellant.

In R v Gough [1993] AC 646 Lord Goff said at page 659.

> "But there is also the simple fact that bias is such an insidious thing that a person may in good faith believe that he was acting impartially his mind may unconsciously be affected by bias….In any event, there is always an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in [R v E Sussex Justices, Ex parte McCarthy 1924 1K B 256 or 259] that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

And at page 661:

> "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. Such a question may arise in a wide variety of circumstances. ……each falls to be considered on the facts".

At page 670 Lord Goff said:-

> "I think it unnecessary, in formulating the appropriate test, that the Court should look at the matter through the eyes of the reasonable man, because the Court in cases such as these personifies the reasonable man; and in any event the Court first has 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 regarded] with favour, or disfavour the case of a party, to the issue under consideration by him….."

As learned Counsel for the appellant puts it, is there an appearance of bias and or on examination of all the facts, a real possibility that the 2nd Respondent 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 toward the appellant, and by extension his wife in such a way as to influence her approach to the deliberation of matters concerning them.

In my judgment the critical issue is, this court having seized of all the facts, personifying the reasonable man must ask itself, is there a real danger or real possibility that there would be bias?

In answering this question, should the court take into consideration the strong objection by, and resentment to the 2nd Respondent of the sole Commissioner by the Appellant having regard to the part he swore on oath that he played in the determination of her application for an extension of tenure of office? Is it a reasonable objection, in the circumstances, for him to make?

The answer to the latter question must, in my view, be in the affirmative.

Having regard to the fact there is an overriding interest that there should be confidence in the integrity of the administration of justice, and also having regard to the fact that it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done; could the court possessed of all the facts as it has and the circumstances of the appellant [also he is of course a member of the public] and [the court] personifying the reasonable man say with confidence that there is no real danger of bias on the part of the Commissioner or Commission as presently constituted? I think not because bias is a

perception concept. It is what people think. And the Court personifying the reasonable man must come to that conclusion.

In R v Sussex Justices exParte Mc Carthy [1924] 1 K.B. 256, The appellant whose vehicle was involved in a collision with a motor cycle was convicted for the offence of driving in a manner which was dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of Solicitors who were acting for W in a claim for damages against the appellant for injuries received in the collision. At the conclusion of the evidence the justices retired to consider their decisions, the acting Clerk retiring with them in case they should desire to be advised on any point of Law. It was stated on affidavit that the justices came to their conclusion without consulting the acting clerk. The appellant's conviction was quashed on appeal as it was improper for the acting clerk having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

Dr. Cheltenham argued that the appellant's position was stronger than that of the clerk's in McCarthy. I understand Learned Counsel to be saying that McCarthy did not advise but because he retired with the justices the court found that the proceedings were tainted because justice was not seen to be done. Whereas, in the instant appeal the appellant swore that when the Prime Ministers met in the Authority it was part of his duties to advise them on all matters. So the appellant met with the Prime Ministers and advised them on the second respondent's application for an extension of her tenure of office. In that way, according to Dr. Cheltenham his position was stronger than that of the clerk in McCarthy.

In McCarthy, the proceedings were tainted because of the presence of the clerk whose firm had an interest in the proceedings and because his presence with the justices who convicted the appellant in those proceedings, the appellant being a potential

defendant in a claim brought by the clerk's firm on behalf of W, who was involved in the collision with the appellant. In McCarthy, the judgment could be explained on the ground that because of the clerk's firm's interest in the proceedings and his presence with the justices who rendered the decision, there was a real danger of bias. That bias was emanating from the tribunal.

Whereas in the present appeal, because of the presence of the appellant with the Prime Ministers who took advice from the appellant when the Prime Ministers rendered their decision not to extend the 2nd respondent's tenure of service, on an analogy with McCarthy the bias would be emanating from the Prime Ministers and the appellant. However what is contended here is that because the decision was taken against the 2nd Respondent and the appellant was involved in that decision the possibility of bias would be emanating from the 2nd Respondent. Although the analogy is not the same as McCarthy I yield to the reasoning.

Finally I turn to ground 3[iii]. At page 83 of the record the learned trial Judge said:

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

The court relied on the following authorities:

R v Ruel Gordon [1969] 14 WIR 21

R v Cullen [1993] ILRC 610

R v Hereford Magistrates Court, EL Parte Rowlands [1997] 2 WIR 854.

Rees v Crane [1994] 1 AER 832.

In the latter case at page 849 Lord Slynn said:

> "The allegation is in two parts. In the first place it is contended that there was personal animosity on the part of the Chief Justice which predisposed him against the respondent. There is certainly evidence of an acrimonious relationship between the two men and, if the respondents account [which was not challenged or answered] is accepted, the Chief Justice showed from time to time between 1986 and 1990 hostility towards the respondent. It is indeed unsatisfactory that the respondent was not told by the Chief Justice of his decision to suspend the respondent and to raise with the Commission the question of referring the matter to a tribunal. It is also curious to say the least that the respondent on his return had such difficulty in seeing the Chief Justice. On the other hand it is to be assumed that the Chief Justice either accepted that the complaints made to him were sufficiently established, or that at any rate, he considered that they were sufficiently serious to warrant reference to the Commission. If he so thought he was entitled to refer the matters to the commission. He had, even in a hostile way, given the respondent an opportunity to deal with earlier complaints. The Chief Justice must have realised the seriousness of these complaints for the respondent and even if he failed to deal with the respondent fairly, by giving him notice of them and a chance to deal with them, it is not lightly to be assumed that he would allow personal hostility to suspend the respondent or to recommend to the Commission that this matter be referred to a tribunal. Having considered all the matters before them ….their Lordships are not satisfied that "a real danger of bias has been established"

I make the observation that it is quite obvious to my mind that the learned trial Judge relied on the above. Dr. Cheltenham argued that the learned trail Judge was misled by the principle in Rees. He further argued that professional background and experience is not to be a factor to be taken into account. The test is either satisfied or not satisfied.

It is in my view that Rees must be looked at on its particular facts. Notwithstanding the very strong language used by Lord Slynn that "there was personal animosity on the part of the Chief Justice which predisposed him against the respondent.".

The Court held that the Chief Justice was entitled to refer the complaints against the respondent to the Commission. For a critical analysis of this judgment it is of vital importance to appreciate that Chief Justice was not a member of the Commission which investigated the appellant's conduct.

At paragraph 850 of the judgment Lord Slynn said:

> "The Commission ensured that the Chief Justice did not continue as chairman and there is no reason to assume that this was a charade. They also spent time in considering whether there should be a representation. Their professional backgrounds are such that an assumption of bias should not lightly be made, and the fact that they had agreed to the suspension does not mean that, on an investigation of further material they were not capable of looking at the question of representation afresh. Nor is it to be assumed that the Chief Justice unduly influenced them even though his view must have had considerable weight….."

There are other dicta which seem to support the view that judicial experience and professional background are factors to be taken into account in determining whether or not there is a real danger of bias.

R v Cullen [1893] ILRC

R v Ruel Gordon 14 W.I.R. 21

Dimes v Proprietors of Grand Junction Canal [1852] 3H.L.CAS 759,793

In the latter case Lord Campbell at page 793 said:

> "No one can suppose that Lord Cottenham[L.C.] could be in the remotest degree, influenced by the interest that he had in the concern, but my Lords it is of the last importance that the maxim that no man to be a judge in his own cause should be held sacred."

In Cottle v Cottle [1939] 2 A.E.R. 535 on a summons before justices alleging desertion by the husband, it appeared that the Chairman of the Bench was a friend of the wife's mother.

The husband took objection to the case being tried before a court presided over by the Chairman but the Chairman overruled his objection. Its was proved that the wife had said that she would obtain a summons to be set down for hearing when this particular justice was presiding and then he would "put him [the husband] through it". It was contended that the proceedings must be set aside on the ground of bias.

It was held that it was not necessary to show that the justice was in fact biased; there was sufficient evidence upon which the husband might reasonably have formed the impression that this justice could not give this case an unbiased hearing.

In my view whether or not professional qualification and judicial experience is a proper factor to be taken into account by the court in determining whether or not there is a real danger of bias depends upon the circumstances of this case.

The instant case is not based on actual bias. The case of the appellant is that there is a real danger of bias by commissioner against him i.e. unconscious bias. Dr. Cheltenham has put it thus there is no allegation that the Commissioner would be vindicative or display any vindicative action against him. But subconsciously having regard to the matters alleged, she would be incapable of that high standard of objectivity which strips any action of hers of any element of bias or calls into question any act on her part.

I compare the position of the Commissioner with a dictum of Lord Diplock in Mahon v Air New Zealand [1984] A.C. 808. Mahon was the Sole Commissioner appointed by the Governor-General of New Zealand to investigate an Air New Zealand crash. Lord Diplock said of Mahon J.:

> "He [the Governor-General] appointed as Sole Commissioner a distinguished judge of the High Court of New Zealand of some ten years standing Mahon J. ["the Judge"] who is the appellant in the appeal to this Board.'

At page 838 Lord Diplock said:

> "To say of a person who holds judicial office, that he has failed to observe a rule of natural justice, may sound to the lay ear as if it were a severe criticism of his conduct which carries with it moral virtues. But this is far from being the case. It is a criticism which may be, and in the instant case is certainly in making it to be easily disassociated from moral virtues."

Similarly in this instant appeal, the Second Respondent has had a distinguished career as a High Court Judge for thirteen years. No one would ever contemplate that she is or was a bias person. This judgment is not saying any such thing. What this judgment is saying is that having regard to the appellant's role which he played in her application for an extension of her tenure of office and the resulting refusal of that application if the Second Respondent sits as Commissioner to investigate any alleged wrongdoing of the appellant there may be actions on her part which may be called into question, in other words there is a real danger of bias.

Having regard to the foregoing, I hold that the appellant has made out a case that there is a real danger of bias against him if the Commissioner were to proceed to hear and determine matters involving him.

The respondents have cross-appealed arguing that the Judge erred in law in failing to strike out the Attorney-General as being a proper party to the action.

Learned Queen's Counsel, Mr. Alexander argued that the learned trial Judge erred in treating as a rule of practice a recommendation from Wooding C.J. Hochoy v N.U.G.E. and Others [1964] 7 W.I.R. 174 at 181. Wooding C.J. said:

"I would suggest that in future the practice be followed of naming the Attorney-General as defendant when ever the validity of an act of state done by the Governor-General's being called into question.

It is not in dispute that the appointment by the appellant of the Commission of Inquiry….can only have been made in accordance with the advice of Cabinet or a Minister acting under the general authority of the Cabinet. 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 his Commission of Inquiry Act 1908; they sued the Attorney-General."

Although learned Counsel Mr. Alexander argued that the case before Wooding C.J. was concerned with the validity of appointment of the Commission whereas in the instant case the validity of the appointment is not called into question but rather the suitability of the Second Respondent as Commissioner having regard to the surrounding circumstances. I agree.

I also agree that Wooding C.J. was making his pronouncement in the form of a suggestion, but it is my view that he was not limiting his suggestion to where the validity of an act done by the Governor-General is called in to question. In my opinion, he was concerned with protecting the dignity of the office of Governor-General and in that regard he was saying instead of suing the Governor-General you should sue the Attorney-General because the Governor-General never acts on his own in matters of this sort but rather on the advise of Cabinet or Minister.

Finally, the practice in matters of this nature in naming the Attorney-General as the party to the action is recognised throughout our jurisdiction.

For these reasons, I would dismiss the cross-appeal.

The appeal is allowed. And an order is hereby granted quashing the decision of the Commissioner not to disqualify herself in relation to those terms of reference that affect this appellant.

There will be no order as to costs.

ALBERT REDHEAD
Justice of Appeal

SINGH, J.A.

For the reasons given by Redhead J.A. to which I could usefully add nothing, I concur with his judgment and the orders proposed therein.

SATROHAN SINGH
Justice of Appeal