SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2005

BETWEEN:

HORACE FRASER

Appellant

and

[1] JUDICIAL AND LEGAL SERVICES COMMISSION
[2] CHAIRMAN OF THE JUDICIAL AND LEGAL SERVICES COMMISSION
[3] SIR DENNIS BYRON

Respondents

Before:

The Hon. Denys Barrow, SC — Justice of Appeal
The Hon. Hugh A. Rawlins — Justice of Appeal
The Hon. Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:

Mr. Leonard Ogilvy for the Appellant
Mr. Sydney Bennett, QC and Ms. Patricia Augustin for the Respondents

---

2006: February 7;
May 8.

JUDGMENT

[1] BARROW, J.A.: On the hearing of this application for leave to appeal counsel for the applicant conceded that the applicant was not entitled to leave as of right, as he had contended in his skeleton argument, and instead he asked this court, pursuant to section 108 (2) of the Constitution, to grant him leave to appeal to Her Majesty in Council as a matter of discretion.

[2] The decision of this court that the applicant wishes to appeal was given on 28th October 2005 and affirmed the decision of Shanks J striking out the applicant's claim for defamation. The reason for the judge's decision was that article 28 of the

Civil Code of St. Lucia contains a mandatory requirement that notice of intended action must be given to public officers and other persons fulfilling any public duty and that, no notice of intended action having been given, the claim was bound to fail.

[3] As counsel for the applicant argued it and as it appeared in the written submissions, but oddly not in the petition for leave, the factor of bias made the applicant's intended appeal one of great general or public importance to qualify it for leave under s 108(2) of the Constitution. First, the applicant submitted, one member of the panel that decided his appeal was so circumstanced in relation to the applicant that there was a real danger or an apprehension or a suspicion of bias on his part. Second, the applicant submitted, because the first respondent was responsible for the appointment of all judges and because the third (sic) respondent is "in a loose sense the boss of all judges and the de facto judicial head being sued" it could be said that there was a real danger or reasonable apprehension by a fair-minded member of the public that the judges may have been biased. Counsel stated that he was making no allegation of actual bias.[1] However, counsel submitted, it was of public and of constitutional importance that a person is entitled to a judicial determination by an impartial tribunal.

[4] In relation to the first contention, the apprehension of bias that was said to arise on the part of one member of the panel was that he was allegedly the director of a newspaper company against which the applicant had brought a defamation claim (and which the parties settled). From this bit of history counsel for the applicant invoked the proposition that where there are links between a member of the court and a party to the litigation such a link gives rise to the danger of bias. The case on which counsel relied for that proposition was the famous case of In Re Pinochet[2] in which the House of Lords set aside its previous decision when it was

[1] This position taken by counsel at the hearing makes it unnecessary to address the allegation in the written submissions that two members of the panel were "clearly hostile" to counsel for the applicant on the hearing of the appeal. The allegation of bias was never raised at the hearing of the application for leave.
[2] [2000] 1 AC 119

discovered that a member of the panel that had made the previous decision was a director of a company that was not a party to the litigation but was wholly owned by Amnesty International, who were parties to the suit and adversaries of the party who applied to set aside the previous decision.

[5] In the instant appeal the newspaper company is not a party to these proceedings. For the danger of bias to arise there has to be a link between the judge and a party to the litigation. I repeat: the newspaper company of which it is alleged the judge is a director is not a party to the instant litigation. It was never a party to the litigation. It is therefore beyond comprehension by what process of legal reasoning counsel considered he had the slightest basis for advancing bias against the individual judge.

[6] In relation to the second contention, it is of radical importance that the applicant did not raise the objection of bias at the hearing before this court that led to the decision that he now seeks to appeal. There can be no doubt that the failure to do so was deliberate because the applicant had raised the objection of bias on an application that was heard by Shanks J prior to the judge making the substantive decision striking out the applicant's case. In his fully reasoned decision[3] the learned judge identified the application, which he refused, thus:

> "… the Claimant applied for an order that the entire Eastern Caribbean Supreme Court recuse itself from sitting on the claim (including the strike out application) on the ground of bias and prejudice; he also asked that a list of outside judges should be provided from which he could choose one who would be specially appointed to deal with the case …".

[7] In Locabail (UK) Ltd. v Bayfield Properties Ltd[4] the English Court of Appeal, constituted of a panel comprising the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor, in a single judgment of the court gave a comprehensive review of the law relating to bias arising out of five different applications for permission to appeal that were heard together. The judgment dealt with the matter

---

[3] St. Lucia HCV 2004/988 between the same parties; decision dated February 4, 2006.
[4] [1999] EWCA Civ 3004

of the waiver of objection on the ground of bias. The judgment spoke in the context of the party becoming aware of the facts that give rise to the objection as a result of disclosure made by the judge but it can make no difference how the party became aware of the facts upon which he relies. This is what the court stated:

> "We do not consider that waiver, in this context, raises special problems (Shrager v. Basil Dighton Ltd. [1924] 1 KB 274 at 293; R. v. Essex Justices, ex parte Perkins [1927] 2 KB 475 at 489; Pinochet (No. 2), at 285; Auckland Casino, above, at 150, 151; Vakauta v. Kelly, above, at 572, 577). If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

[8] In the instant case the applicant did not appeal the decision of Shanks J refusing to recuse himself and all other judges of the Eastern Caribbean Supreme Court - either immediately following the making of that decision or in the appeal against the subsequent decision of Shanks J striking out his claim. More importantly, the applicant did not raise any objection of bias in relation to any member of the panel of the Court of Appeal that heard his appeal. To attempt to do so now smacks of abuse of process. The ground that the judges of this court stand in a certain institutional relationship with the Chief Justice or with the Judicial and Legal Services Commission is no more or no less true today than it was when the applicant decided to proceed with his appeal before the judges to whom he now objects. It was an issue that Shanks J discussed in his recusal decision. The failure of the applicant to raise it before amounts to waiver of the objection and he cannot now complain - now that the appeal has gone against him. It would "undermine both the reality and the appearance of justice to allow him to do so."

[9] Actually, it is extraordinary that the applicant should now seek leave to appeal to the Privy Council against a non-decision of this court. As indicated above, the case of In Re Pinochet, on which counsel for the applicant so heavily relied, was an application to the House of Lords to set aside its own decision because the facts giving rise to the danger of bias became known to the applicant only after the court

had given its decision. That was the express basis of the decision. There is not even a remote parallel between the facts in that case and the facts in the instant case. It is, therefore, my opinion that there is no basis whatever for this court to exercise its discretion to allow the applicant to appeal to Her Majesty in Council on a matter that was perfectly open to him to raise on his appeal to the Court of Appeal and that he deliberately chose not to raise.

[10] Notwithstanding that in my view the applicant cannot be permitted to raise the matter of bias at this stage and should not be given leave to appeal, it is appropriate that I should take the time to remove any thought that there may be substance to the objection that there is a danger of bias on the part of all judges of the court because the second respondent, the Chief Justice, in the applicant's words, is in a sense all their bosses. The decision of the Privy Council in Meerabux v Attorney General of Belize[5] shows that the law in relation to such an allegation has progressed significantly beyond what has been called the highly technical decision[6] in the Pinochet case. The notion of automatic disqualification arising out some technical interest on the part of the judge in the proceedings has given way, as Lord Hope stated in delivering the advice of the Board, to the objective test of

> "whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. As Lord Steyn said in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14, public perception of the possibility of unconscious bias is the key. If the House of Lords had felt able to apply this test in the *Pinochet* case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule."[7]

[11] In the Meerabux case a sitting judge of the Supreme Court was removed from office through the constitutional procedure under which the question of his removal was referred to the Belize Advisory Council (the BAC), a body established by the Constitution. As provided by the Constitution the chairman of the BAC was a

---

[5] [2005] UKPC 12
[6] At paragraph 21
[7] At paragraph 22.

lawyer who was qualified to hold office as a judge of a superior court. It was mandatory under the Legal Profession Act that all lawyers in Belize should be members of the Bar Association. The complaint against the judge was made by the Bar association of Belize. In the challenge that the judge brought in the Supreme Court, to the determination of the BAC that he had misconducted himself in office and should be removed, the judge alleged that the chairman was automatically disqualified because of his membership of the Bar Association and, alternatively, that that membership gave rise to the appearance or the danger of bias. In an affidavit sworn by the chairman he deposed that he was purely a nominal member of the Bar association, that he took no part in the decisions which had led to the making of the complaints, and he had no power to influence the decision either way as to whether or not they should be brought.

[12] In expressing the opinion of the Board on this aspect Lord Hope stated:

> "In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Professor David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does: *English Public Law* (2004), para 15-76, citing *Leeson v Council of Medical Education and Registration* (1889) 43 Ch D 366 where mere membership of the Medical Defence Union was held not to be sufficient to disqualify and *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 where mere ex officio membership of the committee of the Medical Defence Union too was held to be insufficient. The same contrast between active involvement in the affairs of an association and mere membership is drawn by *Shetreet, Judges on Trial* (1976), p 310. Their Lordships are of the opinion that the principle of automatic disqualification does not apply in this case."

[13] In relation to the matter of apparent bias their Lordships emphasized that the observer by reference to whom the question of an appearance of bias was to be considered would be both fair minded and informed. That observer would have considered that the chairman's membership in the Bar Association was compulsory, that he took no part in the activities of the Association or the making of the complaint, that the Constitution required that the chairman of a tribunal that

was clearly charged with considering the removal of a judge should be a lawyer, the qualification that the lawyer needed to possess to be appointed chairman, and the composition of the tribunal.[8] Their Lordships agreed with the view of the court of appeal that an informed and fair-minded observer would not have concluded that the chairman was biased.[9]

[14] The objective test established by the Meerabux decision inters the applicant's wholly impermissible attempt to ascribe an apprehension of bias on the part of the judges of the court of appeal who determined his appeal. A fair minded and informed observer would know that the judges of the Court of Appeal are members of an independent and impartial judiciary who have security of tenure; that having been appointed by the Commission neither the Commission nor the Chief Justice can remove them[10]; that they took an oath upon their appointment to do justice to all litigants without fear or favour; that the fundamental premise of their appointment was that they were possessed of the character to be true to their oath; and that it is of the essence of the judicial function to adjudicate in disputes that may involve parties with whom a judge may have some social, organisational or professional relationship that is not of such a nature as to require the judge to recuse himself. The fair minded and informed observer will have no difficulty with the commonplace notion that in those circumstances it is the duty of the judge to put aside such a relationship and do his duty. It could not be otherwise.

[15] Counsel did not argue the point but because it appeared in the skeleton argument I mention the matter of the interpretation of Article 28 of the Civil Code, which was the provision that led the judge to strike out the applicant's case. In my view it is a provision so well known to the law and the application of comparable provisions has been so fully litigated[11] that there is no public interest or importance[12] in having this matter placed before the Privy Council.

---

[8] See paragraphs 24 and 25.
[9] At paragraph 25.
[10] Section 8 (3) Supreme Court Order 1967, CAP 2:01 Laws of Saint Lucia.
[11] See Castillo v Corozal Town Board and Acosta 1 Bz. L.R. 365

[16] I would dismiss the application for leave to appeal with costs in the sum of $1,500.00.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

---

[12] For the scope of the expression used in s 108 2 (a) of the Constitution, a question of great general or public importance, see the decision of Saunders JA in Saint Lucia Civil Appeal No. 37 of 2003, Martinus Francois v The Attorney General, judgment delivered 7 June 2004, at paragraph [13].