

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2009/0444

BETWEEN:

LESTER BRYANT BIRD

Applicant/Claimant

And

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
THE HONOURABLE JAMES JACOB SPIGELMAN

Respondents/Defendants

CLAIM NO: ANUHCV 2009/0445

BETWEEN:

ASOT MICHAEL

Applicant/Claimant

And

THE HONOURABLE ATTORNEY GENERAL
THE HONOURABLE JAMES JACOB SPIGELMAN

Respondents/Defendants

Appearances: Mr. James Guthrie, QC. and Elliot Mottley, QC and with them Mr. John Fuller and Ms. Rika Bird for the Applicants/Claimants.
Mr. Reggie Armour, QC and with him Ms. Vanessa Gopaul for the First Respondent/Defendant.
Mrs. Karen Rait for the Second Respondent/Defendant.

.....
2009: December 16, 17 and 18

2010: April 14
.....

JUDGMENT

[1] **Thomas J (Ag):** In the two proceedings before the Court, the Claimants, Lester Bryant Bird and Asot Michael, are seeking leave to institute judicial review in order to challenge a Commission of Inquiry appointed under the Commission of Inquiry Act (“the Act”) by the Governor-General on the advice of the Cabinet of Antigua and Barbuda. The two applications are similar in content and as such, the first in time, will be used as the operative application with the destructions being pointed out.

[2] In both Applications the following interim Orders are sought:

1. An Order that the Applicant/Claimant be granted leave to apply for Judicial Review of the decision to appoint a Commission of Inquiry by the Governor General of which the Second Defendant/Respondent is the sole Commissioner.
2. An Order that such leave to apply for Judicial Review shall operate as a stay of proceedings and of the execution of the said Commission of Inquiry pending the determination of the matters herein.
3. A Declaration that the appointment of a Commission of Inquiry by the Governor General, acting on the advice of the Cabinet, of which the Second Defendant/Respondent is to be ‘the sole Commissioner, is in breach of the Application/Claimant’s right to the protection of the law guaranteed by section 3 of the Constitution of Antigua and Barbuda.
4. A Declaration or Declarations that the appointment of a Commission of Inquiry by the Governor General, acting on the advice of the Cabinet, is an abuse of the Court’s process and an interference with the administration of justice, and that it is further and otherwise unlawful, being irrational, procedurally unfair, a political name and shame exercise, and oppressive by the Executive.
5. An Order that the decision of the Governor General appointing the said Commission of Inquiry be quashed;
6. An Order that the Second Defendant/Respondent¹ be restrained from executing the said Commission of Inquiry;
7. An Order that the Claimant be awarded... costs of these proceedings.
8. Any further and other appropriate relief.

[3] Similarly, the grounds upon which the Applications of Lester Bryant Bird and Asot Michael are based are similar and the following contained in Mr. Bird’s Application is representative:

¹ At the start of proceedings, Mrs. Karen Rait indicated to the Court that the second named Respondent/Defendant wished her to inform the Court that he will not be taking part in the proceedings, but will abide with the decision.

1. On Saturday 25th July, 2009, reports appeared in Antigua newspapers headlined, in the Antigua Sun newspaper "PUBLIC INQUIRY ... Govt heads investigation into IHI loan repayment" and in the Daily Observer newspaper "Prime Minister Announces Commission of Inquiry". It was reported, and has since been confirmed by statements made by the First Respondent/Defendant on Monday 27th July, 2009, that the Government proposes that the Second Defendant/Respondent should be appointed as sole Commissioner of the Commission of Inquiry which will commence and open its investigation on 6th August, 2009.
2. On Thursday 30th July these matters were confirmed by Extraordinary Notice in the Antigua and Barbuda Official Gazette.
3. The Second Defendant/Respondent was appointed sole Commissioner under the Commissions of Inquiry Act, Cap. 91. The terms of reference of the said Commission appearing from the copy of the Gazette dated 30th July, 2009 and exhibited to the Affidavit in Support of Lester Bryant Bird marked "LBB 3"².
4. The said Commission of Inquiry contravenes the Claimant's constitutional right to the protection of the law guaranteed by section 3 of the Constitution of Antigua and Barbuda and is an abuse of the Court's process and an interference with the administration of justice. The decision to appoint the Commission of Inquiry is further irrational and/or unreasonable, and the investigation would involve procedural unfairness. The appointment and conduct of the Commission of Inquiry is further politically motivated and oppressive."

[4] In Asot Michael's Application paragraph 10 is worded in these terms:

"The said Commission of Inquiry contravenes the Claimant's constitutional right to the protection of the law guaranteed by section 3 of the Constitution of Antigua and Barbuda and is an abuse of the Court's process and an interference with the administration of justice; and is further and otherwise unlawful, being irrational, procedurally unfair, a political attempt to 'name and shame' the Claimant by the Executive, and oppressive."

Legal Grounds

[5] Therefore, based on the foregoing it can be said that part of the Applicants' focus is on the appointment of the Commission of Inquiry and this decision is sought to be impugned on the following grounds: abuse of the Court's process, and interference with the administration of justice, irrationally and/or unreasonableness, procedural unfairness.

[6] In terms of abuse of the Court's process, the Applicants contend that it is the mandate of the Commission to inquire into and report to the Government. In this regard it is contended that in view of the pleadings filed in the court actions there is a real likelihood of there being a substantial overlap of witnesses, information and subject matter involved in the Court actions and the Commission of Inquiry.

² The Terms of Reference of the Commission are fully set out at paragraph 95, *infra*.

- [7] Mention is also made of the fact that the Second Defendant is required to find whether anyone acted unlawfully and/or is guilty of misconduct (misbehaviour) in public office. According to the Applicants this means that the Second Defendant is thereby required to find persons guilty of criminal conduct on evidence which may include hearsay and is not required to satisfy the standard of proof necessary in criminal cases.
- [8] In further development of the ground of abuse of the court's process, the Applicants refer to a certain statement by the First Defendant on February 10, 2009 that the Government had sufficient information to found criminal proceedings in Court. Mention is also made of a press statement on the Government's official website concerning the Lindquist Report into the IHI matter and the handing over of the same to the Police for the purpose of the necessary steps being taken to file criminal charges against the individual named in the report.
- [9] The Applicants further dwell on the implications of the fact that the terms of the Commission require it to report into the very matters that are in issue in the court proceedings and the resulting reports and the information contained being supplied to the Government. Such information it is contended would not otherwise be available to the executive through the court process or to the public will become public.
- [10] Mention is also made by the Applicants of the fact that Mr. Martin Camacho who is appointed Secretary to the Commission also holds a substantive post of Crown Counsel in the Attorney General's Chambers and whose duties include advising the Government departments on legal matters. Added to this is the fact the Mr. Camacho deposed to affidavits in Claim No. ANUHCV 2006/0091 instituted by the First Defendant/Respondent, and also in the matter before the Florida Court, being Claim 06-03560 CA 25, which is an ongoing matter.
- [11] In effect, contends Mr. Bird, "the Commission will amount to a public pre-trial of matters which are plainly directly relevant to and the subject matter of the proceedings in the Court." And further: "There is a real likelihood that if the Commission of Inquiry is allowed to proceed, it will create undesirable public prejudice in relation to the proceedings in the Court and will be further prejudicial to the administration of justice in the pending court actions."

[12] Also in the equation, as far as abuse of process of the Court is concerned, are the Applicants' further contentions that no reasonable Government could appoint and proceed with such a Commission of Inquiry given the subsisting legal proceedings which it instigated; and the existence of multiple, and apparently in large part duplicate legal proceedings, is procedurally unfair.

The Evidence in Summary

Lester Bryant Bird

[13] The evidence in these proceedings, as far as Lester Bryant Bird is concerned, is contained in three affidavits with a number of exhibits.

[14] In the first affidavit, the affiant in reality elaborates on the grounds advanced for commencing the Application. As such, the Applicant deposes as to the various newspaper reports of the Government's proposal to set up a Commission of Inquiry into the IHI Loan Agreement and further as to the constitutional implications as to his right to protection of the law. Also, the various proceedings instituted by the Government and others. He also says that by way of Claim No. ANUHVC 2009/0185, he sued the present Prime Minister for the use of the words "foreign bank accounts" in relation to him on 20th November, 2008.

[15] In the remainder of the affidavit, the legal and constitutional propositions of breach of constitutional rights, unreasonableness and unfairness, abuse of the Court's process and abuse of process are elaborated upon in much the same way as in the grounds for the Application.

[16] The second affidavit sworn to by Mr. Lester Bryant Bird is in reality a response to the Affidavit in Reply by Mr. Justin Simon, QC, the First Respondent. And in this regard, the affiant deposes that having read the affidavits of Mr. Simon, and Martin Camacho he (the Applicant) stands by his Affidavit in Support. In this regard Mr. Bird takes issue with certain assertions by Mr. Simon regarding the Terms of Reference of the Commission and he (Bird) goes on to depose that he does not accept his assertions with regard to the welfare of the people of Antigua and Barbuda.

- [17] Mr. Bird also questions Mr. Simon's assertion that the Commission is not empowered to establish liability or guilt of any person. And to the contrary, Mr. Bird says that the Commissioner is required to decide whether the persons under the inquiry have committed civil wrongs or criminal offences. Mr. Bird goes on to say that it appears to him that Terms of Reference envisage the recommendation of sanctions of some sort against those persons found to be involved.
- [18] At paragraph 9 of his second affidavit, Mr. Lester Bryant Bird addresses the "repeated public statements", by among others, the Attorney General and the Prime Minister in relation to the IHI matter: And, according to him, this renders him one of the 'targets' or 'subjects' of the Commission of Inquiry.
- [19] The Attorney General's contention that the proceedings instituted by the Applicants being premature and itself an abuse of process is next addressed by Mr. Bird. He says that the Attorney General's contentions are wrong and goes on to say that his challenge is not merely to the evidence which may be called but also to the lawfulness of the purported decision of the Cabinet to appoint and the appointment of the Commission by the Governor-General acting on the advice of the Cabinet and also to the Terms of Reference themselves.
- [20] At paragraphs 12 to 14 of the said second affidavit, Mr. Bird draws attention to what he considers to be the political and oppressive basis of the Commission of Inquiry by way of a newspaper report on a statement by Mr. Simon and pending election proceedings. More than that, he refers to the holding of mock court at a public meeting at which he was 'put on trial' before jury comprised of UPP supporters. According to Mr. Bird, the matter "was aired live on Crusader Radio and ABS Television, the former which is owned by UPP members and the latter owned by the people of Antigua and Barbuda and controlled by the UPP Government. And further still, Mr. Bird deposes that: "There are several video clips of statements made by the Chairman of the United Progressive Party and the mock trial which are still being broadcast of youtube.com."
- [21] Concerning the ongoing criminal investigation aimed at him and others which are linked to the Lindquist Report, Mr. Bird deposes that:
- "... if I face criminal prosecution in the future, the Commission of Inquiry is likely to cause me great prejudice and deny me a fair trial. If any responsibility is attached to me it will, as matter of fact, be a finding of criminal

responsibility; it will brand me in the eyes of the public from whom any jury will be drawn; I have no right of appeal from the finding of the inquiry; I would have no means of clearing my name; and this is so even if there were no criminal trial. For all these reasons, the Commission, if it embarks on its Inquiry according to the Terms of Reference, will be an interference with the course of justice and fundamentally unfair to me."

[22] The affiant makes the further point that there are three other civil cases pending that concern this matter. He then goes on to assert that he does not agree that his commencement of proceedings in respect of the Commission of Inquiry can be described as 'speculative and premature'.

[23] With respect to Mr. Martin Camacho being Secretary to the Commission, the deponent, Mr. Bird, says that in view of his employment by the Government and his participation in proceedings against him, by way of affidavits, he continues to be concerned with the impartiality of the Commission.

[24] The essential purpose of Mr. Bird's third affidavit is to exhibit a public statement by Senator Colin Derrick, a former UPP Minister of Justice, which, according to the deponent "further demonstrates, among other things, the close correspondence between the threat of criminal proceedings against me and the proposed Commission of Inquiry."

Asot Michael

[25] Mr. Asot Michael's evidence is contained in four affidavits. His Affidavit in Support is along lines similar to that of Mr. Lester Bird in that events leading up to the Commission of Inquiry are detailed, including various statements and newspaper reports. He also addresses the Terms of Reference of the Commission and the implications as to his constitutional rights.

[26] At paragraphs 8 to 19 of the said affidavit, Mr. Michael details various investigations into his affairs and proceedings instituted against him, both in Antigua and Barbuda and in Florida. Mention is also made of proceedings he brought against the Government and the results in his favour coupled with the pending appeals in some other respects.

- [27] The central matter of the grounds of his Application is deposed to at paragraphs 30 to 41 together with the Orders that he seeks. The grounds mentioned are: breach of constitutional rights, unfairness, abuse of the court's process and abuse of process.
- [28] In his second affidavit Mr. Asot Michael deposes that it is in reply that sworn to by the First Defendant, being the Attorney General of Antigua and Barbuda.
- [29] Mr. Michael begins by taking issue with the use of the phrase 'considered advice of the Cabinet' by the Attorney General in the context of the appointment of the Commission. The reasons advanced are that the Cabinet consists of Leaders and Members of the United Progressive Party who accused him of corruption, made threats against him, and during the 2009 general election campaign advocated that he and other members of the Antigua Labour Party should be locked up. And during the said campaign also his practice was used in political advertisements together with documents allegedly related to the IHI matter.
- [30] Mr. Michael also takes issue with the Attorney General's contention that the Commission is not empowered to establish liability or guilt of any person. In this regard, the deponent points to paragraph 1(b) of the Terms of Reference which requires the Commissioner 'to establish whether any persons/corporations found to be involved ... acted unlawfully or improperly and/or whether such persons mis-conducted themselves in public office.' To this, Mr. Michael adds that even though inquiry will not include an actual verdict, it would hardly be possible then to have a fair criminal trial, and any civil proceedings would also be affected.
- [31] In the circumstances, having regard to statements by the Prime Minister and the Attorney General in relation to the IHI matter, Mr. Michael deposes that "in context and eyes of the public, it is manifestly obvious that I am one of the 'targets' or 'subjects' of this Commission of Inquiry."
- [32] At paragraph 36 of his affidavit Mr. Asot Michael disputes the Attorney General's statement at paragraph 16 of his affidavit to the effect that the Government has not carried out investigations into his affairs, but into those of Bellwood Services SA of which he was a director. In this connection, Mr. Michael deposes that by this statement and selective statements in paragraphs 16 to 17 of his affidavit the Attorney General "is misleading the Court."

- [33] Referring to paragraph 26 of the Attorney General's affidavit and Exhibit JLS 2, which according to Mr. Michael, are to the effect ("contrary to press reports") that he (the Attorney General) has not handed over the criminal investigation into his affairs to the police, he deposes that in light of criminal investigation into his affairs by the police, the Commission of Inquiry will cause him "great prejudice" with respect to any future criminal charge. He also dwells on the consequences of any finding of criminal responsibility. These, in his view, include the fact that he will be branded in the public eye from whom the jury will be drawn, the absence of any appeal against any finding by the Commission and the absence of any means of clearing his name with or without a trial. In the premises it is Mr. Asot's conclusion that if the Commission embarks on an inquiry according to its Terms of Reference this will constitute an interference with the course of justice and will be fundamentally unfair to him.
- [34] Finally, at paragraphs 47 and 49 of the said second affidavit, Mr. Michael rejects the notion that the legal challenge is premature and contends that, *inter alia*, the appointment of the Commission is an abuse of process.
- [35] In his third affidavit, Mr. Asot Michael deposes as to certain youtube videos showing the Justice Rally held on 18th February, 2009. According to the deponent, the videos themselves show that they were uploaded by UPP Antigua.
- [36] In his fourth affidavit, Mr. Michael says that his purpose is to bring certain matters to the attention of the Court. There are: 1. The youtube uploaded by the UPP of the so-called 'Justice Rally' remain posted. 2. A public statement by the former UPP Minister of Justice, Senator Colin Derrick. 3. The Government's intention to negotiate the termination of the proceedings in Miami regarding the IHI matter. 4. The granting of an injunction by the Court of Appeal in High Court Civil Appeal No. 20 of 2009 whereby the Attorney General is restrained from making use of any of the documents and other material seized from his property, including such as relate to the IHI matter and/or copies thereof, pending disposal of the said appeal.

Justin Simon

- [37] In his affidavit in reply, Mr. Justin Simon, QC deposes that he holds the office of Attorney General of Antigua and Barbuda and as such he is authorized to make the said affidavit on behalf of the Government "in response to the purported true affidavit of Lester Bryant Bird ("the Claimant's affidavit").
- [38] Mr. Simon begins by giving an overview of the appointment of the Commission of Inquiry with James Spigelman A.C., Esq., Chief Justice of New South Wales, Australia as the sole Commissioner. According to Mr. Simon, the Commission was duly issued and appointed by Her Excellency the Governor-General "on the considered advice of the Cabinet," in accordance with the law and having regard for and to serve the public welfare of the people of Antigua and Barbuda, including the need for accountability and transparency in the use of public funds and to address concerns for the exercise of integrity by persons holding public office.
- [39] In dealing with the Commission, the affiant says that it is not akin to a court of law and is not empowered to establish liability or guilt of any person.
- [40] In addressing the issue of the application for judicial review and related matters the Attorney General deposes thus: "The application is premature, and is itself an abuse of process; the appointment of the Commission does not contravene the constitutional right of the Claimant to protection of the law as guaranteed by section 3 of the Constitution; the appointment of the Commission is not an abuse of the Court's process; the decision to appoint the Commission is not irrational and/or unreasonable, and the complaint that such investigation as will be embarked on by the Commission within its remit is or will be procedurally unfair is wholly premature, speculative and baseless in the extreme."
- [41] With respect to the specific allegations of the Claimant; Mr. Simon deposes as follows: The appointment of the Commission is not politically motivated and oppressive; the Antigua and Barbuda filed claim is alive; the Miami - filed civil matter was initially filed as a Pure Bill of Discovery with the express goal of securing documents, but as later amended into a plenary claim; the claims are not in relation to the IHI Loan Agreement but specifically in respect of repayment of the loan following the execution in September 1997 of a Debt Settlement Agreement between the Government and IHI; the appointment of the Commission is not an attempt to side-step the civil

proceedings filed in Antigua and Barbuda; the Government Counsel in Miami has instructions to negotiate the termination of the Miami - filed proceedings; the rights of the Claimant to pursue his interlocutory applications have never been questioned nor in anyway frustrated; there is no rational basis for any suggestion that the Commission will take directions from the Honourable Prime Minister so as to amend the gazetted Terms of Reference; no criminal charges exist or have been laid against the Claimant in respect of any matter within the remit of the Commission; the fears of the Claimant in respect of the so called 'criminal charges' are speculative and premature; [no] public inquiry as may be conducted by the Commission will interfere with the fair trial of the civil court actions filed against the Claimant; the Commission is not a duplicate of the pending civil proceedings; the extent of Martin Camacho's involvement in the proceedings in Antigua and Barbuda and Miami is limited to an affidavit filed in each matter; the publication of the Extraordinary Notice of the appointment of the Commission of Inquiry was not unfair; the Commission is yet to summon witnesses or informed anyone that he or it is the subject of or implicated in its inquiry; and the Commission of Inquiry Act³ speaks definitively of the attendance of witnesses before the Commission and the use of their witness statements in civil or criminal proceedings.

Martin Camacho

[42] In his affidavit which, according to him, is directed at paragraphs 23 and 32 of the affidavit of Lester Bryant Bird, Martin Camacho says that he is attached to the Solicitor General's Department, Ministry of Legal Affairs and his duties are confined to non-contentious matters; but from time to time, at the request of the Attorney General or the Deputy Solicitor, he would depose to affidavits based on his knowledge gleaned from research. He then goes on to detail affidavits sworn by him in Claim No. 2006/0091 and in Florida Civil Action No. 06-03560 CA 25. Mr. Camacho also adds that he has not been involved in the prosecution of either of the civil actions.

Issue

³ Cap. 91 (Revised Laws of Antigua and Barbuda).

[43] The issue for determination is whether or not leave should be granted to the Applicants/Claimants to seek judicial review; and, if so, whether the Applicants have an arguable case with a reasonable prospect of success.

Submissions

[44] Learned counsel on all sides filed written submissions with respect to the Applications and these must now be brought into the equation.

[45] As far as abuse of the court's process is concerned, it is submitted on behalf of Mr. Bird that the Commission has been appointed as confirmed by the Attorney General. At the same time, it is further submitted that the scope of the Commission's Terms of Reference make clear that it is required "to establish whether any person/corporation found to be involved in the diversion of these funds acted unlawfully or improperly and/or whether persons misconducted themselves in a public office". And the Commission, it is submitted, is further required to make recommendations as it sees fit "concerning the persons/corporations or departments involved in any diversion or loss of public funds."

[46] And in so far as the Government is concerned, the submission is that it (the Government) considers that Mr. Bird is one such person and that the said Government has also brought civil proceedings in Antigua and Barbuda and in Florida in relation to the IHI matter and the diversion of funds. Further, based on certain statements by the Attorney General, the Government accepts that he is the subject of criminal investigation in relation to the said IHI matter. This, it is submitted, is followed by letters from the Secretary to the Commission to Mr. Bird relating to the work of the Commission.

[47] In the circumstances, the umbrella submission, is that "given the wealth of incontrovertible material...the Commission is plainly calculated to mirror the Governments current and threatened criminal proceedings against him"; and further that the government intends to make the Commission as part of its political campaign against the Claimant. The submission continues thus:

"The extent of the campaign and its specific reference to the IHI matter which is the subject of at least 2 sets of existing legal proceedings against the claimant and the threatened criminal proceedings goes beyond what might be apparent at first sight. The evidence is contained in LBB Affidavit 1 and 2. See in particular LBB Affidavit 2 at paragraphs 12-14....".

- [48] In relation to Asot Michael the submissions are similar up to a point in so far as the appointment of the Commission, paragraphs 1(b) and 1(d) of the Commission's Terms of Reference and the proceedings brought in Antigua and Barbuda and in Florida alleging the Applicant's involvement in the diversion of funds in relation to the IHI matter.
- [49] Other submissions on behalf of Asot Michael suggest that there is clear evidence that the Claimant/Applicant (with two other entities involved with him such as Bellwood SA) is a person that the present Government considers to have been involved. It is also submitted that the Government accepts that the Claimant is the subject of criminal investigations in relation to the IHI matter and that it cannot dispute that search warrants which were used against the Claimant's premises were issued and executed on the basis of the allegation that he was guilty of the criminal offence of misconduct in public office. And it is further submitted that: "There ought to be no dispute that the statements made by Members of the Government and UPP, and more recently at the Mock Trial, targeted the Claimant as being involved in and guilty of wrong doing in relation to IHI."
- [50] After a recital of a number of events⁴ in relation to the IHI matter, it is submitted that a case of abuse of process/interference with the course of justice; unreasonableness/irrationality, and political motivation/bad faith can be made out which taken together or separately render the appointment and execution of the Commission unlawful.
- [51] The following further submissions are made on behalf of Mr. Asot Michael:
- (i) The Commission of Inquiry will be held in public.
 - (ii) The proceedings of the Commission will not be subject to the ordinary rules of evidence and the other Procedural rules which apply in relation to Court proceedings.
 - (iii) The Commission of Inquiry will inevitably involve the same or a substantial overlap of witness, information and documentary evidences as the court proceedings.
 - (iv) The Claimant will have no right of appeal against any adverse finding by the Commission.
 - (v) The public nature of the Commission of Inquiry and the public disclosure of evidence will inevitably colour the existing court proceedings, and will be likely to be fundamentally prejudicial

⁴ These include a speech by the PM quoted in the Sun newspaper dated 25th July 2009, statements by and interviews involving the Attorney General including a report in a newspaper dated 17th July, 2009, searches of his residence after the 2004 elections, a statement by Miss Joanne Massiah after the 2009 general election and mock trial before the 2009 general election.

and unfair to the Claimant. This will be particularly the case if he is to face criminal proceedings at some time in the future.

(vi) This will be compounded by the wide dissemination of the proceedings of the Commission which will be bound to be received in the press and other media, given among other things, the tendency, well demonstrated in the evidence, for the Government to make use of media: paragraph 15 above and AM aff 1 at e.g. paragraphs 17, 24-27; AM aff 2 at e.g. paragraphs 16, 27, 29-33.

(vii) As a separate and specific matter, the proceedings brought by the Claimant against the Attorney General (among others) (No ANUHCV 2004/490) have not yet been resolved. They concern the IHI matter. The Government has been restrained by the Court of Appeal from carrying out investigations into the Claimant's affairs outside Antigua: AM aff 1 exhibit AMD, Order at item 4. If the Commission follows its terms of reference under paragraph 1 (a) it is required to inquire and report.... (whether the IHI repayment monies) 'were diverted into the possession of, or for the benefit of, other individuals and/or corporations and with a view to tracing the deposit or payment of these monies into the hands or bank accounts of these individuals and/or corporations whether in Antigua and Barbuda or elsewhere.' Since it is clear that the Claimant is one of the persons under investigation by the Commission, any investigation of his affairs abroad will necessarily be in breach of the injunction that he has obtained from the Court."

[52] In his address to the Court, Mr. James Gutherie, Q.C. noted that the Commission Terms of Reference are central to the case and noted that it is required to make recommendations as to whether persons conducted themselves properly which translates to means misfeasance which is a criminal offence.

[53] And referring to paragraph 8(iii) of the skeleton arguments submitted on behalf of Mr. Asot Michael noted that he (Mr. Michael) is a person involved in the IHI matter and the proceedings brought against him and others in Antigua and Barbuda and Florida. He however noted that the latter proceedings were withdrawn 'with prejudice' which means that they are not technically dead.

[54] In relation to the action of the Commission, learned Queen's Counsel noted that both Applicants received letters from Mr. Martin Camacho, the Secretary, which means that they are persons involved. He also submitted that this Commission is bound by paragraphs 1(b) and 1(d) of his Terms of Reference to enquire into the Applicants and noted that in *Re Nelles and Grange*⁵ the Ontario Court of Appeal ruled that the Order in Council specifically limited the Commissioner by forbidding him to express any conclusion regarding civil or criminal responsibility. He noted also that the limitation imposed in *Nelles and Grange* must be contrasted with the present position where

⁵ [1984] 46 O.R (2d) 210.

the Commission is told what it has to determine. He added that this is so without a doubt and even without the letters written.

[55] Continuing his submission, learned Queen's Counsel said that the Commission has no discretion as it must follow its mandate in the Terms of Reference as set out at paragraph 6 of Mr. Michael's first affidavit. Counsel's conclusion was that this must lead to an interference with administration of justice. According to learned Queen's Counsel, the rule applies with equal force to the other paragraphs of the Terms of Reference by which the Commissioner is bound.

[56] With respect to the matter of the Applications being premature, Mr. Guthrie submitted that this cannot be the case as the damage will come on day one. As such, it cannot be in the interest of justice to say otherwise.

[57] Mr. Elliott Mottley, QC addressing the Court noted that the Attorney General admitted 'hounding' down his client at paragraph 37 of his affidavit in response. In this context he also made reference to paragraph 40 of Asot Michael's first affidavit giving examples of harassment. He also addressed the issue surrounding the establishment of the Commission including the statement by the Attorney General on 10th February, 2009. Mr. Mottley noted that the Attorney General did not say that steps will be taken to ascertain if the evidence was sufficient. According to Mr. Mottley, it was a foregone conclusion. He made the further point that this statement by the Attorney General in February 2009, must be contrasted with that of the Prime Minister on 4th July, 2009, when he said that the action taken was necessary because of the actions of the Claimants. Learned Queen's Counsel then asked what he termed the rhetorical question: Is there a proper purpose for appointing a Commission of Inquiry? In so doing, he referred to the case of *Re Nelles and Grange* and noted that this was not what was expected of justice in the Eastern Caribbean. According to Mr. Mottley: "Four years after being re-elected you do not go for proceedings to enforce findings where rules of evidence are non-existent." He continues thus: "Why would the Government go at this late stage as they have not been able to run rough shod over the Claimants – not as politicians but as citizens of Antigua and Barbuda. This is why the Commission was established."

- [58] Mr. Mottley next referred to Exhibit AMM to the Fourth Affidavit of Asot Michael and said that the paid advertisement⁶ by Mr. Colin Derrick show what the public wanted to know, and he noted further that the allegations in the said advertisement [statement] have not been challenged. He went on to add that the said statement informs what was said in July, 2009. In this regard, Mr. Mottley came to the conclusion that it would be an “abuse” to hold back charges and then appoint a Commission. Then he posed this question: “If you have the evidence how can you go to an inquiry and then oppose and application for leave to be granted?” He said further: “If you have sufficient evidence to justify criminal proceedings and money laundering is alleged, one would not expect proceedings to be instituted if there was no evidence.
- [59] Continuing Mr. Mottley questioned the need for a Commission. He then quoted this extract ‘when I finish with you, you will go crazy’. According to him: “People have rights which cannot be sacrificed on the altar of expediency being a method where notions of fair play do not exist. It is not in keeping with what is expected. Justice cannot be measured in dollars and cents.”
- [60] After noting the allegation of the mock trial, Mr. Mottley submits that since the Commission was appointed after all these events they must have coloured the Cabinet’s decision to so appoint the Commission.
- [61] Finally, Mr. Motley submits that when all the events are considered they are sufficient to warrant the grant of leave to seek judicial review. He adds that even if leave is not granted the said matters will be the subject of investigation by the Court under the constitutional aspects of the matter.
- [62] Two sets of skeleton arguments were filed on behalf of in respect of the two which, as the Respondents.
- [63] In both skeleton arguments the contention is that the Applications are premature and engage in speculation and therefore ought to be dismissed.

⁶ Dated 21st October, 2009

[64] With respect to the ground of contravention of sections 3 and 15 of the Constitution guaranteeing the right to protection of the law, in respect of both Applications the submissions⁷ are that there is a lack of particularity as to what is being contravened by the Commission of Inquiry. And the further submission is that the complaint is a general one to the effect that the Government seeks, by the Commission to side-step the current legal proceedings and to remove the protection of the law afforded by the provision.

[65] The further submission is that in the absence of criminal charges pending against both Applicants, it is only the civil proceedings that subsist; and the failure to particularize the contraventions in relation to him under section 15, is indicative of the purely speculative nature of the case. In a word: "A denial of protection of law cannot therefore be mounted credibly on such a speculative and unparticularized basis."

[66] With respect to the ground of abuse process and interference with the administration of justice, the submissions⁸ are that having regard to the fact that the Commission not having commenced, it is wholly speculative and premature to accept the Applicant's invitation to engage in an assessment and determination as to whether there is a real and substantial present danger that the Commission's proceedings will interfere with the administration of justice in the civil proceedings. By way of addendum the following are pointed out in this connection: 1. there is yet to be an indication as to the witnesses to be called by the Commission or the documents that will inform the Commission's proceedings; 2. the possibility of criminal proceedings are too remote having regard to the fact that advice is being sought on sufficiency of evidence uncovered by Mr. Lindquist; and 3. in the circumstances the discretion of the Director of Public Prosecutions is yet to be engaged; 4. the functions of Secretary to the Commission are purely administrative and the allegations of bias against him have not been substantiated, either in the Application or in the affidavits.

[67] As far as the ground of irrationality and procedural unfairness is concerned, the submission is that the prospects of success are slim, if not non-existent.

⁷Skeleton Arguments on behalf of the Hon. Attorney General, in Claim No. ANUHCV 2009/444, see paras 12-17; and Skeleton Arguments on behalf of the Hon. Attorney General in Claim No. ANUHCV 2009/445, see paras 12-17.

⁸ Skeleton Arguments on behalf of the Hon. Attorney General in Claim No. ANUHCV 2009/444, see paras 18-21; and Skeleton Arguments on behalf of the Hon. Attorney General in Claim No. ANUHCV 2009/445, see paras 18-21.

- [68] In his oral submission to the court, Mr. Armour SC, noted that the instrument of appointment and the Terms of Reference do not constitute a simple transaction and that it is equally important to consider the reliefs sought. He noted that it is the act of the Governor-General that is being attacked and he went on to consider what he termed core propositions of law and the threshold test. He says further that in the circumstances two propositions arise (1) Whether having regard to the notice of the appointment of the Commission and sections 2, 80 and 124 of the Constitution the redress sought against the decision of the Governor-General to appoint a Commissioner of Inquiry can be enquired into by the Court; (2) Whether having regard to the common law, and the nature of the Commission of Inquiry, the application is premature.
- [69] In addressing what learned Queen's Counsel referred to as the threshold level he referred to Clive Lewis, *Remedies in Public Law and De Smith* (6th ed.). He also noted that in *Mitchell v Georges* there are two iminent features: (1) Mitchell is mentioned in the Terms of Reference of that Commission; and (2) the Commission was directed to send its report to the Governor-General and the Director of Public Prosecutions. According to Mr. Armour, the Commission ran for some four years and towards the end the Commissioner produced a report and gave Mitchell a Salmond Letter. And learned counsel notes that in the final analysis both in the High Court and the Court of Appeal it was held that the application was premature.
- [70] In addressing the applications Mr. Armour characterized them as being based on speculation and apprehension without a scintilla of evidence except the letters from Camacho. He added that the higher the allegation the stronger must be the evidence. He noted also the allegations the Governor-General's actions are tainted by political statements; and the contention that things which the Commission is likely to do will interfere with the course of justice.
- [71] On the issue of abuse of process and interference with the course of justice, Mr. Armour submitted that there is no interference with the administration of justice because: (1) the Commission has not sat; and (2) in the existing proceedings a trial judge can deal with all issues when they arise. Learned counsel went on to say that all the objections can be raised prior to the sitting of the Commission as the Commission will operate according to law.

[72] It is the submission of Mr. Armour that the applicants have not made out a case. And with respect to the cases of *Re Nelles and Grange* and *Starr v Houlden* he contends that they are wholly inappropriate for application in this case – inappropriate to the jurisprudential context. He submitted further that the Blood System case is also not proper for general application. He went on to warn against the premature applications to stop the work of the Commission and drew reference to *Re Nelles and Grange* in which, according to him, the Court was confident that the Commission would get it right and did not stop the proceedings.

[73] Learned Queen’s Counsel ended his address by saying that there is a real and substantial danger to assume that the Commission will act contrary to law; and to anticipate that the Commission will act contrary to law.

Analysis

[74] It is common ground that a number of cases emanating from Canada are central to these proceedings. And given Mr. Armour’s contention that certain of these cases are “inappropriate” to the jurisprudential context, the Court considers it necessary to clarify the context. It will be conceded immediately that the cases come from a jurisdiction with a federal system of Government as opposed to a unitary system in Antigua and Barbuda. Despite this fundamental difference the Court considers that the cases are relevant as the point comes down to one of vires. For instance whether a provincial Government can empower a Commission to usurp the powers granted to courts of law under a federal statute. This vires point can be applied mutatis mutandis to the jurisdiction in issue.

[75] The Court considers that in view of the legal issue to be determined, it is appropriate to consider the two legal questions. First, whether, as the Respondent contends, the Applications are premature. Second, if the answer to the first question is in the negative, whether the Applicants have made out an arguable case with a reasonable prospect of success?

The First Question: Prematurity

[76] Essentially, the Respondent is contending that the Applications are premature and engage in speculations: But how is this proposition constituted?

[77] First, it is said that no criminal charges have been instituted against the Applicants, but conceded that there are on-going civil proceedings in both directions⁹. Second, that the actions of a Commission *ad inquirendum* may in a loose sense affect subjects detrimentally but have no effect upon their legal rights and duties. Third, the mere fact that proceedings are pending in a court of law does not and mean that any parallel or related administrative inquiry if conducted for proper administrative purposes, constitutes an interference with the due administration of justice in that court¹⁰. Fourth, a Commission is equipped with a plenitude of powers both statutory and inherent which will enable it to deal with challenges and objectives as they arise, plus there are constitutional safeguards. Fifth, a court will not restrain the proceedings of a Commission of Inquiry unless it appears that the Commission's proceedings will result in a real and substantial present danger of interference with the course of justice. Sixth, since the Commission has not started it is premature and speculative especially since the witnesses to be called are unknown and the possibility of criminal proceedings are too remote.

[78] In *De Smith's Judicial Review* the following propositions are stated in this connection:

"Judicial review may be premature for several reasons: the decision-maker may not yet have determined the facts; or completed assessment of relevant factors (though in cases involving deprivation of liberty the court will be cautious in rejecting a claim as precipitate); or the impugned decision is merely preliminary to a final destination. The court's general approach is to reject challenges made before the conclusion of a hearing in formal proceedings. Importance must be attached to the fact that judicial review is intended to be an expeditious process and that some decisions taken by public authorities need to be taken quickly."

[79] In the narrow orbit of premature applications for judicial review the cases cited to the Court are premised on an inquiry that has commenced, and in some cases has produced an interim report. For this reason it is important to cite the well established and canvassed fact that the impugned

⁹ ANUHCV 2006/0091; ANUHCV 2008/0097

¹⁰ *Johns and Waygood Ltd v Utah Australia Limited* [1963] VR 70 and *Hammond v Commonwealth of Australia* 42 ALR 327 are cited.

Commission of Inquiry, while it has been established and constituted;¹¹ it has not commenced its proceedings, but had given indication¹² as when that would be and what it proposed to do them.

[80] In the recent case of *Mitchell v Georges*¹³, Rawlins JA (as he then was) and with whom the other Justices of Appeal concurred, allowed an appeal, in part, in relation to a decision of the lower court that an application for judicial review seeking to impugn certain statements contained in the Commission's report. In this regard His Lordship had this to say¹⁴: "The question whether those statements are actually impeached on the grounds of apparent bias or procedural unfairness would be for the High Court to determine. I would accordingly remit the case to the High Court for that determination to be made"¹⁵.

[81] In the recent case of *Lynton Mac Intosh v Police Service Commission*¹⁶, the claimant made application for judicial review with respect to the decision of the defendant to exclude his name from the list of police officers to be promoted to the rank of inspector. That decision was communicated to the claimant on 12th July, 2005 and he sought to question the decision administratively, through his attorney, on 28th July, 2006 by way of communication with the Police Service Commission. This set the matter in train and on 3rd August, 2006 the Commission responded to the claimant indicating that the Director of Personnel Administration had been directed to take certain actions in the matter. By letter dated 16th October, 2006 the Chief State Solicitor responded to the claimant's attorney saying that the matter was in train and a response from the Commissioner of Police was awaited before a decision in the matter could be taken.

[82] On 30th October, 2006, the claimant, Mac Intosh filed judicial review proceedings seeking a number of reliefs.

[83] In ruling that the application for judicial review was premature, Madam Justice Charmaine Pemberton said this: "No decision had been made concerning the claimant's representations. Since there was no decision and there is no evidence of exceptional circumstances warranting my intervention I do not see how this application can be favourably considered."

¹¹ The sole Commission as the Second Respondent in these proceedings.

¹² See letters written to both Applicants by the Secretary to the Commission which are [LBB7] exhibited to the Second Affidavit of Lester Bryant Bird as LBB7; and to the Second Affidavit of Asot Michael as AML.

¹³ 72 WIR 161

¹⁴ *Ibid*, at page 95, page 193.

¹⁵ The other aspects of this important case is dealt with later in this judgment.

¹⁶ CV 2006—3410 (HC: T&T)

- [84] In other words, the Learned Judge treated the absence of a resolution of the matter in train as giving rise to the absence of a decision¹⁷. This accords with one of the grounds mentioned in *De Smith's Judicial Review* for treating an application for judicial review as being premature.
- [85] The case of *John and Waygood Ltd v Utah Australia Limited*¹⁸, though not strictly in pari materia, was cited by both sides. In this case, the Supreme Court of Victoria refused to grant an injunction prayed for to stop hearing by a Royal Commission appointed to inquire into the collapse of a bridge on which the Plaintiffs/Appellants had done additional work. The other part of the equation is that the Plaintiffs/Appellants had instituted civil proceedings in January 1962 seeking to recover payment. This was prior to the appointment of the Commission.
- [86] The Court accepted that the Executive Government, by virtue of its prerogative power, had no authority to appoint a Commission the effect of which will be to interfere with the course of justice in the ordinary courts with respect to civil or criminal action. It accepted further that in a proper case the court will restrain the Commission wholly or to the extent of the established or probable interference; but that it will not do so unless it appears that the impugned proceedings would result in the interference with the course of justice.
- [87] But although the injunction sought was not granted, the case cannot be treated as a 'premature' application strictly or otherwise. It is distinguishable on the facts. In the first place, the inquiry related to the collapse of the bridge as opposed to the payment sought to be recovered. Second, the matter before the Commission was purely civil, as opposed to both civil and criminal.
- [88] The reasoning relating to the refusal is of some importance and this is what Sholl, J said in part:

"There is certainly nothing as present as not the projected hearing which I consider to interfere by injunction to restrain. It is noteworthy that only one of the three parties to the action has moved for such a restraining order; the first defendant apparently does not care one way or the other whether the Commission proceeds, for it has not appeared to put any view in the present proceedings; and the secondly defendant has actively advocated the continuance of the Commission hearing. I am not unaware of the fact that it may suit the defendants to see if they can find a defence, or further defences to the action, in the course of the Commission hearing, but the fact remains that neither defendants thinks it is going to hurt the hearing, whether through prejudicing of the tribunal, or the publication of inadmissible evidence or inconvenience in preparation for trial, or loss of the element of surprise, or by intimidation of the party itself, or in any other way."

¹⁷ See also: Michael Fordham, QC, *Judicial Review Handbook*, (5th ed.) at para. 4.7 et seq.

¹⁸ [1963] VR 70.

- [89] By definition, therefore, reliance cannot be placed on this case to support the proposition that the court will not prevent a Commission of Inquiry from sitting as it turns on its own peculiar facts, circumstances and judgment by the court.
- [90] In the case at bar, it will be recalled that both Applicants are seeking reliefs in relation to the decision of Her Excellency the Governor-General to appoint the Commission so that although the Commission has not had any sittings the proceedings go to the decision to appoint. To this must be added the Commission's Terms of Reference which, in essence, require inquiries in relation to the IHI matter; the fact that there are subsisting civil proceedings in relation to the said matter and the existence of new or additional information as a result of an update Lindquist Report on the said IHI matter and the further fact, as deposed by the Attorney General, that legal advice being sought on criminal liability.
- [91] This is not a case of a sitting Commission. Rather, it is a case in which the facts and circumstances take it outside of the narrow jurisprudential mould that the courts are reluctant to injunct a Commission prior to the completion of its inquiry¹⁹. As such, given the decision that is being impugned, the court finds that the Applications are not premature. This is essentially what learned Queen's Counsel for the Applicants have argued and which the Court accepts. On the other hand, the contention that the Applications will give rise to speculation, as advanced by Mr. Armour, SC is not viable, as this can only apply to the projected criminal proceedings. Indeed, although there is no indictment by the proper functionary the facts surrounding facts place the likelihood of criminal charges being laid against the Applicants beyond mere speculation. In this regard, the following holding in the *Nelles and Grange*²⁰ case serves to clarify the issue in some form and the altitude of a Canadian Court: This is the reasoning on the issue of the Court of Appeal of Ontario:

"Although the commissioner's findings and conclusion would not be binding, they would be considered by the public as a determination and secondly prejudice any person named in subsequent proceedings. Even if no proceedings were taken, the person would have no recourse to clear his or her name. A finding that death was caused by the deliberate action of a named person would really amount to a finding that the person acted with intention to cause death and therefore would amount to a conclusion of law as to a civil or criminal responsibility."

- [92] The only comment that needs to be made on the foregoing is that in the context and process of arriving at its conclusion, the Court resorted to an element of speculation.

¹⁹ See *Mitchell v Georges*, supra, *Canada (Ag) v Canada Kleevers Commission* [1997] R.S.C. 442

²⁰ [1984] 46 O.R. (2nd) 210, 211

The Second Question: Arguability of the Case

[93] The rule that in an application for leave the applicant must have an arguable case with a reasonable prospect of success. The entire law was analysed in *Mitchell v Georges* by Rawlins JA (as he then was) at paragraphs 46 to 49 in these terms:

"[46] An applicant for leave is required to show that there is an arguable case, one that is not frivolous. This is to prevent busy-bodies from wasting the court's time with misguided or trivial complaints. Thus in *Inland Revenue Comrs v National Federation of Self-Employed and Small Business Ltd* Lord Diplock stated as follows:

'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.'

[47] In *Sharma v Browne-Antoine*, the appellant, the then Chief Justice of Trinidad and Tobago, allegedly attempted to influence the course of a trial conducted by the Chief Magistrate. The Chief Justice denied the allegations and maintained that proceedings against him were influenced by political pressure. He applied for judicial review of the decision to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the applicant. The judge granted leave and stayed the proceedings. In affirming the decision by the Court of Appeal to set aside the judge's order, the Privy Council held that the challenge to the decision to prosecute was in principle susceptible to judicial review but in extremely rare cases. Their Lordships were satisfied that the judge had failed, *inter alia*, to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable. Their Lordships therefore held that the Court of Appeal was justified in making its own analysis of the facts and circumstances.

[48] In arriving at its decision in *Sharma's* case, Lords Bingham and Walker elucidated the test for the grant of leave in the following terms (2006) 69 WIR 379 at 387-388):

'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable *mutatis mutandis* to arguability:

'...the more serious the allegation of the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.' [Emphasis added.]

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen', *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733.'

[49] In my view this statement did not change the 'arguable case' standard for leave laid down in the Inland Revenue Comrs case. It merely qualifies arguable to require a greater degree of arguability. The quotation from **R (on the application of N) v Mental Health Review Tribunal (Northern Region)** seems merely to suggest that arguability cannot be supported on a speculative basis from evidence that may emerge during the course of the interlocutory process. It is also indicating that the nature and gravity of the issues must be taken into consideration in determining the sufficient and cogency of the evidence which will be taken into consideration to justify the grant of leave. Thus the court must bear in mind that 'a more serious allegation has to be proved to a higher degree of probability'. While the 'balance of probability' remains the test, the strength and quality of the evidence required to prove a serious allegation on the balance of probability will, 'in practice', be higher than that required to prove an allegation of trivial nature. This explains the statement 'thus the flexibility of the standard lies not in any adjustment to the degree of probability... but in the strength or quality of the evidence'. It is on this basis that I do not agree with Mr. Astaphan's contention, for which he cited **Mass Energy Ltd v Birmingham City Council, R (on the application of the Noble Organisation) v Thanet District Council** and **Tanfern Ltd v Cameron-MacDonald** as authority, that there are special circumstances in the present case, which require the standard of proof on this application for leave to be more than just an arguable case."

[94] In this context the question of arguability of the Applicants' case must be measured against a number of variables: the Commission's Terms of Reference the pleaded grounds of the Applications: abuse of the Court's process and interference with the administration of Justice and irrationality/unreasonableness and the affidavit evidence.

Terms of Reference

[95] The Terms Reference of the Commission of Inquiry as published in Extraordinary Notice in the Antigua and Barbuda Gazette on 13th July 2009 are as follows:

"1. The Terms of Reference of the Commission will be

- (a) to inquire into and report upon circumstances relating to the repayment by the Government of Antigua and Barbuda of the US \$29,750,000.00 loan (principal) and interest from Ishikawajima-Harima Heavy Industries Company Limited (IHI Japan) to Antigua Public Utilities Authority (APUA) with a view to determining whether and to what extent repayment monies were not in fact received by IHI Japan but were diverted into the possession of, or for the benefit of, other individuals and/or corporations and with a view to tracing the deposit or payment of these monies into the hands or bank accounts of these individuals and/or corporations whether in Antigua and Barbuda or elsewhere;
- (b) To further establish whether any persons/corporations found to be involved in the diversion of these funds acted unlawfully or improperly and/or whether persons mis-conducted themselves in public office or in the management of any department of the public service;
- (c) To inquire into any matters relating thereto as the Commissioner may think fit;
- (d) To make such recommendations as the Commissioner sees fit including:-
 - (i) Concerning the persons, corporation or departments involved in any diversion or loss of public funds;
 - (ii) Concerning the authorization by the Government of Antigua and Barbuda given to persons and/or corporations to negotiate settlement of public debts (specifically that of

IHI Japan) on its behalf and the subsequent approval by the Government of the settlement terms and conditions;

- (iii) Concerning reforms that might be made to prevent or deter corruption and financial mismanagement (if found to have occurred) in respect of public funds or public offices in Antigua and Barbuda;
- (iv) Concerning steps that might be taken by the international community to combat the laundering of funds derived from corrupt activities (if found to have occurred) through international banking arrangements; and
- (v) Concerning any matters relating thereto.

2. The Governor-General has directed the Commissioner to make a full, faithful, and impartial inquiry into the matters above-mentioned and to report on all facts relating to the same and any other matter connected therewith which may be brought to the notice of the Commissioner and to submit such conclusions, recommendations, and observations as he sees fit not later than the 31st day of December, 2009 (or as soon thereafter as is reasonably possible.)

3. The Inquiry will be held at the Exhibition and Cultural Centre at Perry Bay in the Parish of St. John in Antigua commencing on Thursday the 6th day of August 2009 at eleven o'clock in the morning and continuing thereafter at such place, date and time as the Commissioner may decide, and if the Commissioner considers it necessary, the Inquiry may take evidence outside the jurisdiction of Antigua and Barbuda.

4. The Inquiry shall be held in public unless the Commissioner deems it advisable for the due conduct of the Inquiry, the preservation of order or any other reason to exclude any particular person or persons from any sitting or part of a sitting.

5. Any interested person or others who wish to give evidence to the Commission are requested to communicate either orally or in writing under confidential cover with the Secretary to the Commission, Martin Camacho, Esq. of Ministry of Legal Affairs, Government Office Complex, Parliament Drive, St. John's from Friday July 31st, 2009. Written statements of views or evidence should be sent to the Secretary without delay.

6. The Commissioner will sit on Thursday 6th August 2009 to announce its procedure for conducting the Inquiry and to hear applications for legal representation under section 11 of the Commissions of Inquiry Act, Cap 91. Any person whose conduct is the subject of inquiry under the Act, or who is in any way implicated or concerned in the matter under inquiry is entitled to be represented by Counsel at the whole of the Inquiry; other persons or organizations who may consider it desirable that they should be represented by Counsel may, by leave of the Commissioner, be so represented.

Sir Eustace Francis"

[96] At this stage, the only observation the Court would wish to make is that the Terms of Reference are mandatory despite the inter-change of the words "will" and "shall". The critical point in this regard being that the Commissioner is required to report to Her Excellency the Governor General.

Abuse of the Court's process and interference with the administration of Justice.

[97] The notion of abuse of the court's process is part of the antiquity of the common law. This and more was alluded to in 1885 Lord Backburn when he uttered the following principles with respect to abuse of the process of the Court in the case of *Metropolitan Bank v Pooley*²¹:

"From early time (I rather think, though I have not looked enough to say from the earliest times) the Court had inherently in its power the right to see that its process was not abused by any proceeding without reasonable grounds so as to be vexations and harassing the Court had the right to protect itself against such abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstance as to be an abuse of the process of the Court; and in a proper case they did stay the action."

[98] Much later in *Connely v Director of Public Prosecutions*, Lord Morris gave a similar dictum:²²

"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."

[99] Also in *Bhola Nandlal v The State*²³ Sharma JA (as he then was) ruled in this manner:

"It has never been doubted that from earliest times a superior court of competent jurisdiction has always had, in the exercise of its inherent jurisdiction, the power to control its own proceedings and process and by this means to prevent its process from being abused."

[100] Finally, in *Mills v Cooper*²⁴, Parker CJ re-stated the proposition that "...every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court."

[101] With respect to the matter of interference with the course of justice, in *McGuinness v AG of Victoria*²⁵ the following statement of Griffith CJ in *Clough v Leahy*²⁶ was approved by the High Court of Australia by Latham CJ as follows:

"In *Clough v Leahy* it was said '...any interference with the course of justice is a contempt of court, and is unlawful. If therefore, any person, purporting to act under the authority of Royal Commission, were to do an act amounting to an interference with the course of justice, he could not claim any protection on the pleas that he was acting for the Crown.' If, for example, a prosecution for an offence were taking place, the establishment of a Royal Commission to enquire into the same matter would almost certainly be held to be an interference with the course of justice and consequently to constitute a contempt of court. There are other circumstances in which such an inquiry might prejudice proceedings in the civil or criminal courts. It is neither necessary nor desirable to attempt to enumerate in an exhaustive manner the circumstances which might raise a case of contempt of court. But it is important, I think, that there should be no doubt with respect

²¹ [1885] LR 10 App. Cas. 210, 220-221.

²² [1964] AC 1254, 1293.

²³ Cr. App. No. 99/1988 (T&T:CA).

²⁴ [1967] 2 QB 459, 467.

²⁵ [1940] 63 CLR 73.

²⁶ [1904] 2 CLR 137.

to two propositions –(1) the executive government cannot by the exercise of the prerogative create new courts; and (2) the executive government cannot by any exercise of the prerogative interfere with the due course of the administration of justice.”

[102] Further, in *Hammond v The Commonwealth*²⁷ Gibbs CJ stated the following:

“Once it is accepted that the Plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence....”

[103] The rules regarding abuse of the Court’s process and interference with the course of justice are potent based on the foregoing dicta. Contextually, to these must be juxtaposed dicta from number of cases decided in a number of Commonwealth Common Law jurisdictions have established a number of rules regarding Commissions of Inquiry which include the following: A Commission of Inquiry is not a court of law and as such cannot perform the functions of a court of law; a Commission need not follow the rules of evidence which must apply in a court of law,²⁸ a Commissioner cannot express any opinion as to criminal liability of any person or on the death of a person²⁹, a Commission of Inquiry cannot be used to circumvent the *Federal Criminal Law*³⁰; the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused³¹.

Arguability in Context

[104] As noted before, the test applicable for leave to seek judicial review is whether the applicant has an arguable case with a reasonable prospect of success. And with matter preliminary having been explored the central issue falls for consideration.

[105] In the *Oxford Concise Dictionary* ‘arguable’ is defined to mean, “capable of being supported or sustained by argument.” This must necessarily come from the affidavit evidence and by the authorities cited. With that said, it is also necessary to say that at this stage the Court is not

²⁷ [1982] 152 CLR 188 at paragraph 17.

²⁸ *Canada (A.G) v Canada (Kleever Commission)*, supra.

²⁹ *Re Nelles and Grange*, supra.

³⁰ *Starr v Houlden*, supra.

³¹ Per Lord Delvin in *Connelly v D.P.P.* [1964] AC 1252, 1298.

concerned with facts but rather with the nature of the evidence for the purpose of arguability and a reasonable prospect of success.

[106] As noted above also, the two Applicants deposed to a total of seven affidavits and the evidence contained therein covers the following broad areas: the circumstances surrounding the setting up and the constituting of, the Commission of Inquiry on 30th July, 2009; The Terms of Reference of the Commission; and in particular paragraph 1 (a) which directs or mandates the Commission to conduct an inquiry into the repayment by the Government of Antigua and Barbuda a US \$29,750,000.00 loan to IHI Japan, the on-going civil proceedings instituted by the Attorney General against the Applicants and other persons and corporations both in Antigua and Barbuda and in Florida³² in relation to the IHI matter, the current civil proceedings instituted by Lester Bryant Bird against the present Prime Minister for defamation relating to “foreign bank accounts” used in relation to the said Applicant, civil proceedings instituted by Asot Michael against the Attorney General and the Director of ONDCP relating to investigations into his affairs and search warrants executed at his home on 10th January, 2008, in relation to the IHI matter, various speeches made by the Prime Minister and the Attorney General concerning the IHI matter; a paid advertisement by the former Minister of Justice, Senator Colin Derrick concerning the IHI matter; recent developments concerning the Lindquist Report concerning the IHI matter; the Public Mock Trial of the Applicants and the availability on youtube; the impartiality of the Secretary to the Commission and a claim of political harassment by Asot Michael following the 2004 general election.

[107] From the foregoing, the Court, after due consideration of the totality of the evidence, must highlight the following details of the evidence:

1. The fact of the appointment of the Commission of Inquiry to inquire into the IHI matter.
2. The Terms of Reference of the Commission of Inquiry which are premised on the IHI matter and which at paragraph 1(a) thereof mandates the Commission to establish whether and to what extent monies were not in fact received by IHI Japan but were diverted into the possession of, or for the benefit of other individuals and/or corporations and with a view to tracing the deposit or payment of monies into the hands of or on bank

³² The Attorney General has indicated that instructions were given for the Florida proceedings to be discontinued ‘without prejudice.’

accounts of these individuals and/or corporations whether in Antigua and Barbuda or elsewhere.

3. Paragraph 1 (b) of the said Terms of Reference which states that "To establish whether any person/corporation found to be involved in the diversion of these funds acted unlawfully or improperly and/or whether persons mis-conducted themselves in public office or in the management of any department of the public service."

4. Paragraph 1 (d) of the said Terms of Reference which gives the Commission the discretion to make recommendations on a number of matters including "the persons, corporations or departments involved in any diversion or loss of public funds."

5. Mr. Lester Bryant Bird in his first affidavit in these proceedings in addressing the matter of the Commission's genesis and powers and sub-paragraphs 1(b) and 1(d) in particular deposes as follows at paragraphs 17, 19 and 20:

"17. In the Prime Minister's speech quoted in the Antigua Sun newspaper article dated 25th July 2009 (already exhibited herewith marked "LBB1"), he said 'It is widely known that the investigations into this matter [i.e. the IHI loan agreement] have been ongoing for a number of years; however the persons involved have sought to frustrate the investigation, utilizing every available legal maneuver and technicality. In light of that reality, we have decided that a Commission of Inquiry is the best course of action.

19. The Prime Minister's speech in the said Antigua Sun newspaper further contained the following passage: 'The Commission of Inquiry is expected to determine whether, and to what extent, repayment monies ostensibly intended for IHI were diverted into the possession of, or for the benefit of, other persons or corporations; to trace the whereabouts of these funds, whether in Antigua and Barbuda or elsewhere; and to determine whether the persons or corporations involved acted improperly or unlawfully and whether persons who were in public office are guilty of misconduct.

20. The above words are substantially repeated in paragraph 1(b) of the terms of appointment of the proposed Commission of Inquiry. The Government plainly

intends to use it to investigate and attribute responsibility for alleged criminal offences. I believe this fundamentally wrong and unfair. I also note that on February 10, 2009, the Government of Antigua and Barbuda released a press statement on its official website, exhibited herewith as "LBB5", stating that

'The Attorney General also announced that he will be handing over the Lindquist Report into the IHI Matter to the police for them to take necessary steps to file criminal charges against the individuals named in the report.'

6. The existence of current civil proceedings that touch and concern the IHI matter.
7. The various statements by the Prime Minister and the Attorney General concerning the IHI matter.
8. The paid advertisement by the former Minister of Justice, Senator Colin Derrick which also concerned the IHI matter.
9. The acceptance, expressly or impliedly, by the Government that the Applicants are involved in the IHI matter.
10. That letter dated 30th July, 2009, from the Secretary to the Commission to Mr. Lester B. Bird inviting him or a representative of his party to attend a "brief opening of the Commission and to participate at the stage to assist in fixing a timetable".
11. A letter dated 30th July from the Secretary to the Commission to "Hon. Asot A. Michael, MP" stating inter alia that "The Commissioner has instructed me to contact you as a person he has identified who may be concerned in the matter under inquiry."
12. Paragraph 9 of Lester Bryant Bird's second affidavit which states thus:

"There have been repeated public statements by among others, the Attorney General as the Prime Minister in relation to this IHI matter. I have been mentioned either expressly or impliedly by name as a person involved and accused of wrong doing in this IHI matter. Therefore, in the context and eyes of the public, it is

manifestly obvious that I am one of the 'targets' or 'subjects' of this Commission of Inquiry."

13. At paragraph 23 of his second affidavit Lester Bryant Bird deposes, in part, thus: "...I do verily believe that it is absurd for the Attorney General to say that the Commission, which is established to investigate the repayment of the very same IHI loan will not mirror on duplicate the outstanding legal proceedings."

14. At paragraphs 10 and 11 of his second affidavit Asot Michael deposes as follows:

"10. I would however point out (and respectfully ask the Court to note) that the Terms of Reference of the Commission at paragraph, 1 require the Commissioner (the Second Defendant) 'to establish whether any persons/corporations found to be involved ... acted unlawfully or improperly and/or whether persons mis-conducted themselves in public office...'. The Commissioner is therefore required to decide whether the persons under inquiry have committed civil wrong or criminal offences. I would respectfully remind the Court that it is for the alleged criminal offence of misconduct in public office, relating to the IHI matter, that I am under investigation and my home at Dry Hill and my business premises in St. John's were searched under a warrant. This appears from the judgment of the Honourable Justin Harris, which is exhibited to my first affidavit at 'AMF' at paragraphs 1 and 2.

11. It is therefore not true that the Commissioner is not empowered to establish liability or guilt of any person. That is exactly what he is being asked to do, even if it is technically the case that the inquiry will not include an actual verdict. I would add that any person against whom 'unlawful acts or misconduct in public office', i.e. criminal offences (or even if they were not criminal offences) would be unable to appeal against this. I would also add that it would hardly be possible then to have a fair criminal trial (and any civil proceedings would also be affected.)"

15. Both applicants deposing as to the 'Mock Trial' related to the IHI matter at which persons present were asked to convict and sentence the Applicants³³ and the availability of the proceedings on youtube³⁴.

16. At paragraph 34 of his first affidavit Asot Michael deposes as follows:

"34. The mandate of the Commission is to require and report to the executive, the Government of Antigua and Barbuda, into certain matters. Having regard to the pleadings filed in the court actions there is a real likelihood if there being a substantial overlay of witnesses, information and subject matter involved in the court actions and the Commission of Inquiry."

17. The Government of Antigua and Barbuda statement on the IHI matter appearing on the official website on August, 2009 (exhibited to the first affidavit of Asot Michael) and which states in part as follows:

"The Attorney General also announced that he will be handing over the Lindquist Report into the IHI Matter to the price for them to take the necessary steps to file criminal charges against the individuals named in the report."

18. The following dictum from the case of *Nelles and Grange* at pages 215-216 of the judgment of the Ontario, Court of Appeal:

"A public inquiry is not the means by which investigations are carried out in respect of the Commission of particular crimes or, using his [The Attorney General] words 'deaths which are thought to have been the result of deliberate criminal acts by a

³³ At paragraphs 13 & 14 Lester Bird's sworn affidavit and at paragraphs 30 – 32 of Asot Michael second affidavit.

³⁴ The youtube site given is: <http://www.youtube.com/watch?v=d41bZhPwtY&feature=Playlist&p=44534178B90A3466&index=7;>

The websites given where the video clips may be viewed are: <http://www.youtube.com/watch?v=TdMekoXJkyo>
<http://www.youtube.com/watch?v=9sjSXUJq0tc>

<http://www.youtube.com/watch?v=NAfqGOQxYbA&feature=Playlist&p=9AA8C3880E20FED&index=0&playnext=1>

http://www.youtube.com/watch?v=3C5T911rloU&feature=Playlist&p=9AA48C3880E20FED&playnext=1&playnext_from=PL&index=1

http://www.youtube.com/watch?v=9RVgl3Ed06Y&feature=Playlist&p=9AA48C3880E20FED&playnext=1&playnext_from=PL&index=2

<http://www.youtube.com/watch?v=DgN9xVmC1pc>

<http://www.youtube.com/watch?v=n3h2nMtVqXc>

person or persons unknown'. Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility."

Conclusion

- [108] The grounds upon which the Applicants rely in seeking leave for judicial review: abuse of the court's process/interference with the course of justice and unreasonableness/illegality are disjunctive on the pleadings. And on the evidence that has been highlighted, the question that remains is whether the Applicants have an arguable case with a reasonable prospect of success. With that said, it is to be noted that the ground relating to the violation of the right to protection of the law, in the view of the Court does not fall to be considered as it is within the strict Bill of Rights review for which no leave of the court is required.
- [109] Given the pleadings, both Mr. James Guthrie, QC and Mr. Elliot Motley, QC for the Applicants dwell on the events leading up to and after the appointment of the Commission of Inquiry and its Terms of Reference. In this regard, it is Mr. Guthrie's contention that the Terms of Reference are central to the entire proceedings. On the other hand, Mr. Armour's contention is that there is nothing known above the Commission, as for example the witnesses to be called. The implication being that there is nothing to review. Further, the Commission should sit and deal with objections as they arise, rather than the Applicants making premature applications and engaging in speculation.
- [110] If it is that the Court has interpreted Mr. Armour's submissions correctly, it means that his focus is entirely incorrect since the Applicants are seeking to impugn the decision of the Governor-General, acting on advice, to appoint the Commission on the face of their legal and constitutional circumstances, as identified in the pleadings.
- [111] The evidence highlighted, as pleaded, is intended to point towards the matter of abuse of the Court's process/interference with the course of justice. And although no criminal charges have been laid against any of the Applicants, various aspects of the evidence fall to be considered with respect to the matter of interference with the course of justice. These have been noted above.

[112] But this situation of pending or current criminal charges and a Commission being appointed to inquire into the same matter of the charge is not novel. In this regard, the case of *Hammond v The Commonwealth*³⁵ must be brought into the equation.

[113] In this case, the Appellant was charged in April 1982 with a criminal offence relating to the export of meat and a Commission of Inquiry was set up in June 1982 to inquire into malpractices in the handling of meat. The plaintiff was summoned to appear before the Commission. It is in this context that Gibbs CJ had this to say:

“Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of an offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private³⁶, and that the answers may not be used at a criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail; as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.”

[114] In the case of *John and Waygood Ltd v Utah Australia Limited*, Mr. Justice Sholl having made his ruling went to consider two prior instances to which he was referred. The instance which this Court considers most apposite involved two members of Parliament who filed actions for defamation in respect of bribery allegations. The remainder of the narrative given by his Lordship is in these terms:

“On 6 October 1952, when the actions were pending, the Royal Commission was appointed to inquire into (in substance) the precise question whether the alleged attempted bribery had taken place, as [*51] can be seen by comparing the alleged libel, set out in the endorsement on the writ in Snow's action, with the terms of reference of the Royal Commission set out in the Government Gazette, 6 October 1952, No. 822. Although it was stated that one action was not proceeding, and in the other no pleadings had been delivered, and justification was, therefore, not raised at the material time, the Commissioners, on 27 October 1952, appear to have come to the conclusion that they would be inquiring into the very same subject-matter as the issues in the current action if they proceeded with their inquiry, and they therefore adjourned the Royal Commission sine die. It never in fact went on, so far as I know; nor, so far as I am aware, did the libel action. The Commissioners affirmed the principle that a Royal Commission cannot do anything amounting to an interference with the course of justice, or constituting contempt of court.”

[115] The dicta and narrative quoted from the cases immediately above serve to further illustrate the operation and effect of the doctrine of interference with the course of justice, whether or not charges are laid in criminal proceedings and by extension subsisting civil proceedings.

[116] As far as the ground of irrationality (or illegality)/unreasonableness is concerned, the learning suggests that the questions are: whether the appointment of the Commission in the circumstances

³⁵ [1982] 152 C.L.R. 188.

³⁶ Paragraph 4 of the Terms of Reference says, inter alia, that: “The Inquiry shall be held in public....”.

is irrational or whether a reasonable Government would advise the Governor-General to appoint a Commission in these circumstances?

[117] The court has noted the pronouncement of Justice of Appeal Rawlins (as he then was) in *Mitchell v Georges* that the standard of proof which attaches to the test for leave to seek judicial review is the balance of probabilities and that it varies according to the circumstances. In this connection too, one of the propositions advanced by learned senior counsel for the Respondent is along the same lines except that he says that the more onerous the consequences the stronger must be the evidence before the court grants leave. With these propositions the court has no difficulty but the ruling of the Court of Appeal must be followed.

[118] Therefore, on the whole, upon an evaluation of the evidence the court is satisfied that the Applicants have an arguable case for the grant of leave to seek judicial review upon any of the pleaded grounds. The court is also satisfied that the Applicants have met the standard of proof having regard to the circumstances, the nature of the evidence as a whole and as highlighted. And further that the Applicants have a reasonable prospect of success.

Costs

[119] The success of the Applicants means that the First named Respondent in each case must pay each Applicant costs to be assessed under Part 65.11 of CPR 2000 if not agreed within 21 days of this Order. As noted above, at the start of the hearing Mrs. Karen Rait, appearing with Mr. Reginald Armour, SC, informed the court that the Second named Respondent will not be taking part in the proceedings but will abide with the decision of the court. In the circumstances there will be no order as to costs against the Second named Respondent.

ORDER

[120] IT IS HEREBY ORDERED AND DECLARED as follows:

1. In the circumstances of the Applicants, the Applications are not premature.
2. The Applicants have an arguable case, and have satisfied the standard of proof and have a reasonable prospect of success.

3. Leave is granted to the Applicants to seek judicial review.
4. The Applicants must file and serve a Fixed Date Claim within 14 days of the receipt of this Order.
5. The First Respondent/Defendant must pay costs to the Applicants to be assessed under Part 65.11 of CPR 2000, if not agreed within 21 days of this Order.
6. There shall be no public hearings by the Commission of Inquiry until the determination of the judicial proceedings or further order of the Court.
7. Penal notice to be attached to the final Order.

Appreciation

[121] The Court wishes to record its deep appreciation for their scholarship and for their assistance provided to the Court.

**Errol L. Thomas
Judge (Ag.)**