

EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2011/014

BETWEEN:

SIR JAMES FITZ ALLEN MITCHELL

Appellant

and

EPHRAIM GEORGES
(SOLE COMMISSIONER OF THE OTTLEY HALL COMMISSION OF INQUIRY)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Don Mitchell
The Hon. Mde. Clare Henry

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Ramesh L. Maharaj, SC, Ms. S. Louise Mitchell-Joseph of LMJ Chambers with him, for the Appellant
Mr. Anthony W. Astaphan, SC, Mr. Joseph Delves with him, for the Respondent

2012: February 28;
June 25.

Judicial review – Commission of Inquiry – Whether the learned trial judge erred in dismissing claim for relief – Commissioner sending Interim Report to Governor-General and DPP – Appellant and his witnesses had not yet testified – Interim Report describing appellant’s behaviour on the evidence so far as inexcusable – Appellant alleged to have shut his mind to the obvious – Alleged he failed to act in accordance with the law and his duties as a Minister of Government – Whether the Interim Report contained concluded views – Whether the Interim Report should have been limited to facts, circumstances and evidence and not given opinions and argument – Whether showed a predisposition towards a particular view of the evidence – The fair minded and informed observer – Apparent bias – Procedural unfairness

This is an appeal arising out of a judge’s dismissal of a claim for judicial review of a sole Commissioner appointed to inquire into the failure of the Ottley Hall and Union Island Projects. The appellant was at the relevant time in the 1990s the Prime Minister and Minister of Finance of Saint Vincent and the Grenadines. The sole Commissioner was a

retired High Court Judge. His terms of reference authorised him *inter alia* to inquire into the *bona fides* and circumstances surrounding the Projects. He was to report immediately in writing to the Governor-General and the DPP any facts, circumstances or evidence that might give rise to, show, or establish that any criminal act may have been committed and in any event he was to issue an Interim Report within six months of the date of the establishment of the Commission. The Commissioner issued to the Governor-General and the DPP a "Report of Possible Criminal Acts or Offences by Certain Individuals". It contained a number of allegations adverse to the appellant. The appellant sought judicial review to quash the Interim Report and to restrain the sole Commissioner from continuing with the inquiry. The appellant complained that the Interim Report contained conclusionary statements and findings against him. They were arrived at without his having been given an opportunity to respond to any charges prior to the findings being made.

Held: dismissing the appeal and confirming the decision of the trial judge to dismiss the claim, and making no order as to costs, that:

1. It is generally accepted that a Commission of Inquiry must not exceed its common law powers and where it does, the Supreme Court in its supervisory jurisdiction will intervene. The question is whether a body exercising statutory powers of investigation and report has erred in law, exceeded its statutory jurisdiction, or failed to observe natural justice, if applicable, or committed some other abuse of power. Where such an error is established, the courts will usually be prepared to use their judicial review jurisdiction and they are unlikely to be deterred by arguments that a report is not a determination.
2. The principles that are laid down in the cases that dealt with the question of bias in courts or tribunals of a judicial or disciplinary nature have to be applied with great caution to the case of a Commission of Inquiry.

In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700; **Basdeo Panday v Wellington Virgil (Senior Superintendent of Police)** Republic of Trinidad & Tobago Mag. App. No. 75 of 2006 (unreported) distinguished; **Basdeo Panday v Senior Superintendent Wellington Virgil** [2008] UKPC 24 distinguished; **George Meerabux v The Attorney General of Belize** [2005] UKPC 12 distinguished; **Medical Board of Trinidad and Tobago v des Vignes** (2000) 60 WIR 375 distinguished; **Davidson (AP) v Scottish Ministers** [2005] UKHL 74 distinguished; **R v Kent Police Authority and Others Ex parte Godden** [1971] 2 QB 662 distinguished; **London Borough of Southwark v Jiminez** [2003] EWCA Civ 502 distinguished.

3. The court, in determining issues related to bias must have regard to the context in which such issues have arisen. It would not be appropriate to apply across-the-board general principles of bias without regard for the statutory framework, the terms of reference, and the nature of the inquiry in question. The court must take into account the special nature of a Commission of Inquiry. This is an investigative body and not an adjudicatory one. The Commissioner's report was a confidential, interim report which was not published to the public. The Commissioner acted in

compliance with his mandate which was to submit his Interim Report to the Governor-General and the DPP. Sir James had earlier been given every opportunity to participate in the hearings, but he had chosen not to come forward or to take advantage of the opportunity given to him. If his name was now mentioned in an interim report before he has had an opportunity to respond to a Salmon Letter, he cannot be heard to complain that he had been deprived of a right to be heard.

4. In view of the relevant authorities, Sir James was required to prove much more than the formulation or expression of a provisional or interim view or opinion to establish that the Commissioner had a closed or prejudiced mind. Sir James must prove that, in view of the nature of the inquiry, the terms of reference, and the opportunities given throughout the proceedings to him, the Commissioner has closed his mind. He must establish on the part of the Commissioner irreversible prejudgment and prejudice in the expression of his views in his Interim Report to the DPP, and that the Commissioner will not alter these views irrespective of the evidence and arguments which may be presented to him by Sir James and his counsel. He must demonstrate that in the conduct of the proceedings as a whole it has been shown that the Commissioner was biased or unfair. He has failed to do any of these.

Mario Hoffmann v Commissioner for the Turks & Caicos Islands Commission of Inquiry and the Turks & Caicos Islands Commission of Inquiry v Dr Cem Kinay et al Nos. CL-AP 11/09 and CL-AP 8/09 (unreported) applied; **Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)** [1997] 2 FC 527 applied.

5. On the question of procedural fairness, the Commissioner's terms of reference required him, "to report immediately ... any facts, circumstances, or evidence which in the opinion of the Commission may give rise to, show or establish ..." any of the matters set out in clause 13. The Commissioner was therefore required to submit his Interim Report once he formed an opinion on any fact or circumstance which may have given rise to any of the matters in question. There was no obligation imposed on him to first hear Sir James before reporting. The fact that the Interim Report was entitled "Report on Possible Criminal Acts ..." would indicate at the outset to a fair-minded and reasonable observer that the Commissioner had not yet found or concluded that Sir James had in fact committed and was guilty of the criminal acts alleged. Furthermore, after being served with a Salmon Letter and a Witness Summons, Sir James would have had the opportunity to answer the evidence and allegations made against him.
6. Clause 13 of the Terms of Reference did not require the Commissioner merely to list the facts, circumstances and evidence, without making any comment on them. The Commissioner was entitled to draw inferences and to make comments (which may have been of a conclusionary nature) on the evidence that he had heard to that date. It would seem clear to a fair-minded and reasonable observer giving it a

fair reading that the Interim Report was not intended as a final report consisting of concluded findings of criminal liability on the part of any person, including Sir James. Nothing in the Interim Report suggested that the Commissioner had come to a concluded view, showed a closed mind, or had a particular view of the evidence amounting to a prejudgment, nor was there anything to suggest that there was other than co-incidence in the timing of the Interim Report. Sir James had long retired from active politics. There was no reason to believe that the Commissioner had any animus to Sir James' political party, or wished to do it any harm.

7. While the Commissioner's Interim Report was replete with strong and colourful language and while it was true that the Commissioner used the decisive language of a concluded finding, it would have been difficult for him to have fulfilled his mandate of reporting on the facts and evidence to the Governor-General without making an evaluation of the material before him. Even if his language was not as cautious and reserved as it should have been for an interim report prepared before all the evidence was in, the overall context would correct it. There was nothing that would give a fair minded and informed observer a reasonable apprehension that the Commissioner would at the end of the Inquiry reach a conclusion based other than on the evidence. There was simply no evidence that could displace the presumption that the Commissioner would act impartially.
8. Given the nature of the inquiry, the legislative framework, the terms of reference given to the Commissioner, the conduct of the Commissioner both before and after the delivery of his Interim Report, the duty of the Commissioner to make provisional findings and to form provisional views on the evidence and to give persons adversely affected an opportunity to be heard before making final findings and completing the Inquiry, the duty of the Commissioner to submit interim reports, the fact that the Commissioner had made it clear that his views or findings were provisional, the Commissioner's clear indication in his Interim Report that Sir James had not yet given evidence, the Commissioner's demonstration that his mind was not closed by his issuing a Salmon Letter and giving Sir James an opportunity to show cause why an adverse report should not be made against him, and the setting out in the Salmon Letter of the allegations made against Sir James as well as the substance of the evidence adduced in support of them, the Commissioner cannot be said to have prejudged the issues so that he was prevented by the law on bias from continuing with the Inquiry.

JUDGMENT

- [1] **MITCHELL JA [AG.]:** These proceedings have a long historical background going back to the early 1990s. For convenience I shall refer to the appellant as "Sir James" and to the respondent as "the Commissioner". "The Government" refers to the Government of Saint Vincent and the Grenadines, "the Cabinet" to the cabinet

of ministers of Saint Vincent and the Grenadines, and “the DPP” refers to the Director of Public Prosecutions. Sir James first sought in the High Court judicial review against the respondent for statements he made as sole Commissioner in an Interim Report to the Governor-General and the Director of Public Prosecutions in November 2005 and in a Salmon Letter subsequently sent to him in August 2007. A High Court Judge refused Sir James’ application for leave to apply for judicial review, and he appealed to the Court of Appeal. The Court of Appeal refused his application as regards the Salmon Letter but allowed it as regards the Interim Report, overturned the decision of the High Court and gave him leave to apply for judicial review.¹ His application in the High Court for judicial review of the Interim Report came before another judge. He was again refused the relief he sought in relation to the Interim Report. He has now appealed to the Court of Appeal against the decision of the second judge.

The Background

- [2] I take the background facts mainly from the helpful analysis of Thom J in her written judgment of 23rd June 2011, against which judgment this appeal lies. On 10th March 2003, the Governor-General of Saint Vincent and the Grenadines appointed the Commissioner, who is a retired High Court judge of the Eastern Caribbean Supreme Court, to be the sole Commissioner to inquire into two failed development projects. These were the Ottley Hall and the Union Island Resort projects (“the Projects”). The Projects began during the 1990s while Sir James was the Prime Minister and Minister of Finance of Saint Vincent and the Grenadines.
- [3] From the Interim Report we gather that Dr. Rolla was an Italian design engineer and owner of the Valdetarro Shipyard in Le Grazie, Italy. By the early 1990s his Italian shipyard was in serious financial straits and eventually went into bankruptcy. This was just about the time he conceived of the Ottley Hall Project in Saint Vincent as an opportunity to expand the capacity of his Italian shipyard and

¹ Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) and Another (2008) 72 WIR 161.

salvage it from financial ruin. He put a proposal to Cabinet to establish a marina, shipyard and other facilities at Ottley Hall. This was to be done through the formation of a local company, Caribbean Charter Yacht Yard Limited ("CCYY") of which 49% would be owned by the Government and 51% by the St. Vincent Yachting and Shipping Company ("SVYS"). SVYS was itself controlled by a UK registered company, Portland Shipping Ltd. CCYY was given a lease of some 45 acres of land at Ottley Hall in exchange for the 49% Government holding in the company.

[4] It would appear that the project was largely financed by a loan of US\$50 million from five European commercial banks led by West LB. Security was provided by a mortgage of the Ottley Hall lands owned by CCYY, a credit insurance guarantee of 85% of the loan by SACE (an Italian government export finance and credit agency), and a sovereign guarantee by the Government. What was not known at the time was that Dr. Rolla was, through this complex corporate structure, the majority owner and effective controller of CCYY, SYVS, Valdetarro and Portland Shipping Ltd. In this advantageous position Dr. Rolla fraudulently siphoned the loan monies from West LB into various accounts owned, managed, or controlled by him. In short order, the Ottley Hall funds ran out, the project was not completed and was a financial disaster, and the Government was saddled with a crippling and unsustainable debt of several million dollars. West LB has obtained a judgment in England against the Government as guarantor in respect of the unpaid capital and interest and costs. In due course a new government came to be elected in Saint Vincent and the Grenadines, and one of its first actions was the appointment of the Commissioner to inquire into the failed Projects.

[5] The Commissioner's Terms of Reference required him to inquire into and establish, among other things, the *bona fides* and circumstances surrounding the Projects, in particular, the discussions and communications between Dr. Rolla and Sir James and other Ministers of Government. He was to inquire into the identities and inter-relationships of the persons and corporate entities involved in the planning and construction of the projects; the purpose of the transfer of Crown or

public lands to the Projects or corporate entities involved in the Projects, and the procedures followed for the transfer to the said lands to the Projects; the decision relating to the mortgage placed on the said lands; the reason or reasons for the failure of the Projects, and the person or persons responsible; the due diligence, if any, that was requested or undertaken by the Government of Dr. Rolla and the corporate entities owned by him and the Government; to inquire whether or not any criminal act or offence was or may have been committed; whether there was any dereliction of duty, violation of any law, conflict of interest or breach of trust on the part of any Minister of Government or civil servant; and the steps, if any, that were taken to protect the Government after it became known that there was default in the loan payments.

[6] Clause 13 of the Commissioner's Terms of Reference directed him:

- "13. To report immediately in writing to His Excellency the Governor-General and the Director of Public Prosecutions any facts, circumstances or evidence which in the opinion of the Commission may give rise to show or establish that:
- (i) A criminal act, including any conspiracy to commit a criminal act or acts has been or may have been committed by any persons including any Minister of Government or public servant or corporate entity.
 - (ii) Any person obtained a personal and unlawful benefit by way of any large, unusual or non-commercial payments, transactions, transfers or receipts or money; or other benefits were made to any persons or corporate entity, whether related to the Project or not.
 - (iii) Any improper, corrupt or fraudulent relationship between Dr. Rolla and/or any of the corporate entities owned or controlled by him or his nominees and/or any Minister of Government or public servant or any other person.
14. To issue an interim report to His Excellency the Governor-General within six months of the date of the establishment

of the Commission and a final report within twelve months.”²

- [7] The Inquiry formally commenced on 28th April 2003. The public was invited to attend the hearings and to give statements. The Terms of Reference were published in the Gazette. The public proceedings before the Commission began on 14th November 2003. They were broadcast live on radio and on television and were widely reported in the news media. Counsel attended the proceedings and examined witnesses on behalf of the Commission. Some 30 persons gave evidence. Previous Ministers of Government and senior public servants attended and gave evidence. Sir James was notified that his conduct was a subject of the inquiry from the outset and he was invited to attend or to give a statement, but he declined to do either. Instead, he informed the Commission that he had no documents in his possession and that all documents should be at the office of the Prime Minister. He was neither present, nor represented by a lawyer, nor did he give any statement to the Commission. At his request, he was provided by the Commissioner with all the transcripts and other material that was in the Commission’s possession. Hearings were suspended in the period between May 2004 and January 2007 when legal challenges made to the appointment of the Commissioner by Mr. Richard Joachim (“the Joachim Proceedings”) were being heard by the High Court, the Court of Appeal, and the Privy Council. Those proceedings were eventually determined on 24th January 2007.
- [8] During this hiatus, the Commissioner prepared an Interim Report dated 18th November 2005 which he sent to the Governor-General and to the DPP pursuant to clause 13 of the Terms of Reference. This Interim Report contained several findings that were adverse to Sir James. It indicates that at the time it was written not all persons mentioned or involved in the Projects had been summoned or had yet given evidence. It was not published for general consumption. A copy of the Interim Report was, however, produced in evidence in the High Court proceedings

² See The Instrument of Appointment of The Commissioner to and Terms of Reference for The Ottley Hall Commission of Inquiry.

by Sir James who had managed to acquire a copy. It describes itself as a "Report of Possible Criminal Acts or Offences by Certain Individuals". The public was made aware that the Interim Report was being prepared as, preceding the delivery of the Interim Report, counsel to the Commission made several public statements broadcast in the media referring to the preparation of the Interim Report.

[9] At the end of the Joachim Proceedings, the Inquiry recommenced. On 20th August 2007 the Commission issued a Salmon Letter and a Witness Summons to Sir James requiring him to appear before it. Sir James sought leave of the High Court to apply for judicial review in relation to the Interim Report and the Salmon Letter. As previously mentioned, the High Court refused leave, but the Court of Appeal granted leave for him to apply on the grounds of apparent bias and procedural unfairness in relation to the Interim Report. In due course, Sir James' claim for judicial review came before Thom J for determination. After hearing evidence and legal submissions, she dismissed it. It is from this decision that this appeal lies.

[10] Sir James complains against paragraphs 12, 17, 18, 21, 22, 26, 27, 29, 32, 33, 34, 35, 40, 41, 43, 44, 45 and 48 of the Interim Report. He urges that they contain conclusionary statements and findings against him. He claims that they were arrived at without his having been given an opportunity to respond to any charges prior to the findings being made. It is not necessary for the purposes of this judgment to set out all of the impugned paragraphs. For the purpose of illustration of Sir James' complaints, some of them read, where relevant, as follows:

"21. For the purpose of this report, a clear distinction is drawn between *"the Government of St. Vincent and the Grenadines"* and the Prime Minister of St. Vincent and the Grenadines. The evidence from former Members of the Cabinet and Parliament, which so far has not been contradicted, is that they were not provided with any or any proper information, data, plans, or the results of any due diligence carried out prior to any Cabinet or Parliamentary meeting. Senior public officers said substantially the same thing when they testified. The Director General of Finance, as well as the public servant responsible for Debt Analysis Mrs. Laura Anthony Browne were left out of the picture. ...

"22. The evidence is that no due diligence was ever requested or conducted. In the words of the Members of the Cabinet and Parliament who have already given evidence, the person behind the projects was Sir James Mitchell, Prime Minister and Minister of Finance of St. Vincent and the Grenadines. He was the moving light behind the Ottley Hall and Union Island projects and failure to properly inform and advise the members of Cabinet and Parliament is inexcusable. So too was the decision to exclude senior members of the Public Service. The decision not to so inform and to exclude them which was obviously made by Sir James Mitchell suggests that such action and deliberate failure to act in accordance with the law and his duties as a Minister of Government is tantamount to misbehaviour in public office and therefore was not, in all of the circumstances, 'the Government of St. Vincent and the Grenadines'.

...

"26. The point man of all the discussions and arrangements between Dr. Rolla and 'the Government of St. Vincent and the Grenadines' was Sir James Mitchell, Prime Minister of St. Vincent and the Grenadines. ...

"27. The Ottley Hall project had a most unfortunate beginning. The then Prime Minister and Attorney General visited Valdetarro Shipyard and publicly represented to the people of St. Vincent and the Grenadines that Rolla and Valdetarro were bona fides [sic]. That was a complete misrepresentation of the true facts. That misrepresentation was made without any due diligence having been carried out whatsoever

...

"33. The fraud is further aggravated by the fact that the then Prime Minister and Minister of Finance facilitated or permitted it by shutting his eyes to the obvious and acted recklessly in the extreme if not deliberately. The Prime Minister and Minister of Finance (and Attorney General) permitted or allowed a framework, which gave total control to Dr. Rolla and permitted him to freely execute his fraud. ...

"34. Further, the Prime Minister of St. Vincent and the Grenadines ensured that there was no serious public service involvement and that the planning authorities were sidelined. However, he knew or ought to have known what was happening at Ottley Hall and Frigate Island. He publicly extolled the background and business acumen of Dr. Rolla and the benefits of the projects well knowing that there was absolutely no independent due diligence to support his wild assertions.

"35. The situation in relation to the Union Island Project is worse. At the time public statements were being made on the Union Island Project by the Prime Minister and Minister of Finance, Dr. Rolla, Valdetarro, and the Ottley Hall Project were in serious financial difficulty ...

...

"43. There is also the question of the manner in which the former Prime Minister sought to coerce or mislead the Members of the Frigate Island Trust into transferring the land held in trust by them to an empty shell of a company with no assets or finances. The former Prime Minister knew or must have known that the lands were valuable natural habitat and environmentally sensitive. The members of the Trust refused to cooperate. Faced with that refusal Sir James utilized his commanding vote [in] Parliament to transfer or lease the land to Union Island Resorts Limited. The former Attorney General later sought to justify the 'parliamentary transfer' by the unacceptable and palpably absurd suggestion that Government itself had an 'equitable interest'. Dr. Rolla enjoyed complete sway aided and abetted by Sir James and his cohorts who acted without any scruples or compunction.

"44. The former Prime Minister and Minister of Finance engineered the lease of the land to Union Island Resorts Limited notwithstanding the fact that there was and is no due diligence. ...

...

"48. Further, it is my firm belief and I so recommend that Counsel should be retained by the Attorney General and/or NCB to determine whether civil proceedings could be instituted against both Richard Joachim and Sir James

Mitchell to recover the moneys lost. It seems that Sir James is civilly liable both in respect of the tort of misfeasance in public office and breach of trust. ...”³

The High Court Proceedings

- [11] The learned trial judge analysed each of the impugned paragraphs of the Commissioner’s Interim Report, and observed at paragraph 48 of her judgment that the fair minded and informed observer having considered the circumstances and the statements in the context of the entire Interim Report would bear in mind that the Interim Report was a report on the evidence the Commissioner had received thus far and that the Commissioner had pointed out that it was evidence of persons who had not yet been cross examined and Sir James had not yet given evidence. The fair minded and informed observer would know that in reporting facts and evidence which in his opinion show that some offence may have been committed, as he was required to do under clause 13 of the Terms of Reference, it is inevitable that the Commissioner would have to state his opinion on the evidence in showing that it established that an offence may have been committed. The fair minded and informed observer having taken into account all the relevant circumstances would not conclude that the statements of which Sir James complains were conclusionary.
- [12] On the question whether the impugned paragraphs would cause the fair minded and informed observer to conclude that there was a real possibility that the Commissioner was biased in the sense that, having made these statements, he would be unable to bring an objective and undistorted judgment on the matters relating to Sir James, the learned trial judge found at paragraph 52 of her judgment that the fair minded and informed observer would make a distinction between the Commissioner expressing an opinion that the facts, evidence and circumstances show that an offence may have been committed, and an opinion that an offence has been committed, more so in view of the fact that the Commissioner specifically stated in the Interim Report that he had not yet heard

³ See Interim Report of The Ottley Hall Commission of Inquiry (Dated the 18th day of November 2005).

from Sir James and the evidence led so far had not been tested on cross-examination by Sir James. The observer would bear in mind that the Commission was a fact-finding and investigative body. She concluded that there was nothing to show that the Commissioner would not be able to change his opinion based on the facts and the evidence received thus far when other evidence is presented to him or when the witnesses are cross-examined.

[13] Sir James complained that the Interim Report was dated 18th November 2005 and sent to the Governor-General and the DPP on the same day. General elections were held on 7th December 2005. Sir James complained that the fact that it was sent both at a time when the hearings before the Commission were stayed due to the Joachim Proceedings and during an election period is indicative of apparent bias on the part of the Commissioner. The learned trial judge found that the Commissioner did not make a public release of the Interim Report nor indicate to the public that an interim report was sent. The fair minded and informed observer, she held, was not a suspicious person and would not without any supporting evidence conclude that the Commissioner had sent the Interim Report to the Governor-General and the DPP to put Sir James and his political party at a disadvantage.

[14] The question arose whether the failure of the Commissioner to disclose the statements in the Interim Report to Sir James, prior to his submitting it, itself reasonably gave rise to an apprehension of bias. The learned trial judge observed that Sir James had not yet testified. He was issued a Salmon Letter and was due to testify before the Commission on 10th September 2007. On 6th September 2007 he filed the application seeking leave to apply for judicial review. Further proceedings before the Inquiry were stalled. She concluded that, the hearing of Sir James' testimony or his cross-examination not having commenced, it could not be said that the Commissioner had failed to make a disclosure since the time for doing so had not yet passed. In any event, having found that the statements were not conclusionary and did not give rise to an apprehension of bias, she found that the Commissioner had no duty to disclose the Interim Report to Sir James.

- [15] The issue of procedural fairness arose. It is a well established principle of public law that a public body must adopt a fair procedure giving those affected a fair and informed say. The argument before the learned trial judge was that the principles of procedural fairness required the Commissioner to inform Sir James of the allegations which were made against him and to give him a reasonable opportunity to meet those allegations. This included giving him an opportunity to cross-examine those persons on whose evidence the allegations arose. The Commissioner, it was submitted, had a duty to disclose to Sir James that he proposed to make the report and to give Sir James an opportunity to respond to the facts which the Commissioner had in mind to make adverse to Sir James. The failure to do so constituted procedural unfairness.
- [16] On the issue before her whether Sir James had a right to be heard before the Commissioner submitted the Interim Report to the Governor-General and the DPP, the learned trial judge observed at paragraph 66 of her judgment that it was settled law that a Commission of Inquiry must give a person whose activities are being investigated a reasonable opportunity to put forward facts and arguments relating to his conduct before the Commission reached any conclusion which may adversely affect such person. The Commission must inform the person of the allegations made against him and give him a reasonable time within which to respond to the allegations both by way of cross-examination of the persons who made the allegations and putting forward evidence of his own to refute the allegations.
- [17] She concluded in paragraph 70 that, in the case of a report under clause 13 of the Terms of Reference, the Commissioner was simply required during the course of his investigation to inform the Governor-General and the DPP of any facts, circumstances, or evidence which showed that an offence may have been committed. He was not required at this stage to report his conclusion on any issue but simply to transmit information which he has received during his investigation. The Commissioner could have submitted several reports, since he was required to report immediately as the circumstances arose. She concluded that the

Commissioner was not required to disclose to Sir James that he intended to make an interim report on the facts and evidence that he had received thus far. He was not required to give Sir James a hearing before he transmitted the information. Procedural fairness required that Sir James be heard before the Commissioner made a conclusion adverse to Sir James. She noted that Sir James had been issued a Salmon Letter and a Summons to attend the Inquiry. He had been provided with a transcript of the evidence which has been led before the Commission. For these reasons, she found that Sir James was not entitled to the reliefs sought; she dismissed the application for judicial review with no order as to costs; and, she lifted the stay of the proceedings of the Commission of Inquiry.

The Argument in the Court of Appeal

- [18] Mr. Maharaj, SC, counsel for Sir James, submitted that the issues are whether the impugned statements are impeached on the grounds of apparent bias and/or procedural unfairness. He invited the Court, in determining these two issues, to consider the following:
- (i) On the question of apparent bias whether the statements and/or recommendations made by the Commissioner to the DPP were of a conclusionary nature and adverse to Sir James; whether the statements amounted to a prejudgment by the Commissioner of the issues which he had to determine in the Inquiry in relation to Sir James; and, whether the failure of the Commissioner to disclose to Sir James the fact that he made adverse findings against him in the Interim Report would colour the thinking of the fair minded and informed observer to believe that the Commissioner was biased against Sir James.
 - (ii) On the question of the failure by the Commissioner to follow the rules of procedural fairness, whether clause 13 of the Terms of Reference gave the Commissioner the lawful authority to make the statements in contravention to those rules and the principles of law which govern apparent bias.

[19] In *Flaherty v National Greyhound Racing Club Ltd.*,⁴ the Court of Appeal of England dealt with the question of context and material facts in an allegation of apparent bias. At paragraphs 26 to 30, the President, Scott Baker LJ said:

"26. There is no dispute about the law relating to this issue. The test is expressed by Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, 494 at para 103:

'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

This test, involving a slight adjustment to the test previously propounded in *R v Gough* [1993] AC 646, brings the law into harmony with the Strasbourg interpretation of the application of Article 6 of the European Convention on Human Rights, most Commonwealth Countries and Scotland.

"27. The test for apparent bias involves a two stage process. First, the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased: see Lord Philips of Worth Matravers MR in *Re Medicaments and Related Classes of Goods* (No. 2) [2001] 1 WLR 700, 726 para 83. An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see *Locabail (UK) Limited v Bayfield Properties Limited* [2000] 2 QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing. Lord Phillips in *Medicaments* at paragraph 83 stated the principles as follows:

(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. ...
(2) Where actual bias has not been established the personal impartiality of the judge is to be

⁴ [2005] EWCA Civ 1117.

presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.'

"28. Bias means a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue. In *R v Inner West London Coroner ex parte Dallaglio* [1994] 4 All ER 139, 151, Simon Brown LJ, as he then was, said:

'Injustice will have occurred as a result of bias if "the decision maker unfairly regarded with disfavour the case of a party to the issue under consideration by him". I take "unfairly regarded with disfavour" to mean "was pre-disposed or prejudiced against" one party's case for reasons unconnected with the merits of the issue.'

"29. The proceedings under consideration by the court in the present case are tribunal proceedings and not judicial proceedings. The context is critical. In *Modahl* para 128, Mance LJ said:

'The principles of natural justice or fairness must adapt to their context and can be approached with a measure of realism and good sense. Appendix B para (B7) of the defendant's rules makes clear that the disciplinary committee "will consist of members of the federation drug advisory committee, or its nominees". It was both natural and appropriate that the disciplinary committee should have among its members someone with experience of doping control and its procedures. Mr Guy was chosen for this reason, and because he spoke English and came from a different national athletic federation. There is no reason to think that he held or would hold any fixed or predetermined ideas on any of

the issues being raised by the claimant in her challenge to the Portuguese results.'

"30. The tribunal in the present case was exercising a domestic jurisdiction that involved a contractual relationship between the respondent and the NGRC. There were therefore special features that the hypothetical observer would have in mind. These include:

- (i) the nature, function and composition of the tribunal;
- (ii) the particular character of the tribunal's proceedings;
- (iii) the rules under which the proceedings are regulated;
- (iv) the nature of the inquiry; and
- (v) the particular subject matter with which the decision is concerned."

[20] Further guidance on the test for bias is provided by the case of **Patrick Thomas Tibbetts v The Attorney-General of the Cayman Islands**,⁵ where Lord Clarke said:

"3. ... The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the jury were biased: *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, per Lord Hope at paras 102 and 103. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: *R v Abdroikof* [2007] UKHL 37; [2007] 1 WLR 2679, per Lord Bingham at para 15."

The test for bias is thus the test of what the fair-minded and informed observer would conclude.

[21] And, in **Helow v Secretary of State for the Home Department and Another**,⁶ Lord Hope of Craighead said:

"2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and

⁵ [2010] UKPC 8.

⁶ [2008] 1 WLR 2416 at 2418B.

fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

"3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

"4. The context is crucially important in a case such as this.
..."

[22] Mr. Maharaj, SC submitted that the Commissioner's Interim Report was filed with concluded views adverse to Sir James. Clause 13 of his Terms of Reference required him to report immediately on the acts, circumstances, or evidence. His authority was limited to facts, circumstances and evidence, not to giving opinion or argument. He was required to report on the evidence, indicating what possible inferences might be made. He submitted that the Interim Report went far beyond this model. It did not report on the evidence. It did not recite the evidence given saying who said what. He merely said, "The evidence is that ..."; or, "The evidence discloses that ..."; or, "The evidence establishes that ...", without setting out the actual evidence. He was reporting his conclusions and not the evidence itself. There were no cautious indications as to what possible defences were disclosed. In this way, the Commissioner went beyond the requirements of clause

13. Clause 13 did not authorise him either to be biased or to come to conclusions. It did not authorise him to prepare a report which summarised the evidence and came to conclusions. He submitted that, taken as a whole, the Interim Report was an injudicious account of the evidence led before him. These were indicators of bias in the eyes of a fair minded observer. Such a fair minded observer would expect a cautious, judicious and unbiased approach if a Commissioner was required to make a preliminary report, bearing in mind that he was reporting only one side's evidence.

[23] Mr. Maharaj, SC submitted that the Interim Report evidenced not merely concluded views and a closed mind, it showed a predisposition towards a particular view of the evidence. Sir James was accused of knowing that Dr. Rolla did not have the means and was using the Ottley Hall Project as a fraudulent means of raising funds. To describe Sir James' behaviour as being "inexcusable" was to say that he had no excuse. To say he "deliberately" acted in a certain way was to come to a conclusion. To find that Sir James was "reckless" and that his actions "amounted to misbehaviour in public office" were to offer concluded views. To find that Sir James "took no steps to protect the public interest" without hearing him as to what he knew and what steps he took was to demonstrate nothing but a concluded view. His mind was closed as to whatever Sir James would say. The reasonable observer must doubt that the Commissioner had an open mind when he concluded that Sir James "made unsupported and wild allegations". This was a prejudgment to the extent that the reasonable observer would find that there was a real possibility of bias. Whichever test is used, the closed mind test or the possibility of apparent bias test, it would, he submitted, show that the Interim Report constituted apparent bias. The Commissioner had concluded that Sir James permitted the fraud. This was an extreme case of a closed mind by a Commissioner. His remarks in his Interim Report suggest that nothing that Sir James could say would change his views.

[24] Mr. Maharaj, SC further submitted that the Interim Report purported to be a summary of the evidence. However, the language used was prejudicial and came

to conclusions. This case brought into focus the difference between preliminary findings and concluded findings. A tribunal may express a view and give an opportunity to the party to change that view. Preliminary findings are normally expressed to the parties. The findings are expressed to assist the parties to find answers to questions raised. The tribunal in such a case must be at pains to express the findings as preliminary and that they may change. Nowhere in this Interim Report does it state that the findings are preliminary or provisional. To write that the evidence was not complete was not the same thing as to write that the views may change. The language of the Interim Report was not the language of preliminary findings. To the contrary, he submitted, the Commissioner had already indicated that his views were strongly fixed.

[25] Mr. Maharaj, SC emphasised the chronology and timing of the Interim Report. The Interim Report was made some 18 months after the sitting of the Commission was suspended. Why, he asked, would the Commissioner decide during the suspension of the Commission to write a report and keep it secret, but send it to the Governor-General and the DPP? Why would he wait until November 2005 to decide he had sufficient evidence for a preliminary Report? The fact, he submitted, that the Commissioner could not report as soon as he had the evidence begged the question why not wait until he could put the allegations to Sir James?

[26] Mr. Maharaj, SC submitted that the Commissioner's impugned statements in his Interim Report ought to be quashed and for him to be prohibited from continuing the Inquiry on the ground of his failure to comply with the rules of procedural fairness. Mr. Maharaj, SC complained at the learned trial judge's finding that the failure of the Commissioner to disclose the contents of his proposed Interim Report to Sir James prior to sending it to the Governor-General and the DPP was not procedurally unfair. The judge found that the hearing of Sir James' testimony or his cross-examination of the witnesses had not yet commenced, and at the time of his Interim Report the time for him to make any such disclosure had not yet arisen. The evidence was that after the resumption of the Commission of Inquiry, the Commission sent a letter dated 20th August 2007 to Sir James requesting his

presence at a hearing of the Commission scheduled for 10th September 2007 (the Salmon Letter), and attaching a Witness Summons dated 24th January 2007 requiring his presence at the hearing. The Summons required him to give evidence with specific reference to his involvement in and knowledge of and more particularly his role in the preparation, planning, financing, execution and subsequent failure of the Ottley Hall Development Project as well as the Union Island Resorts Project, including any discussions and communications written or verbal with Dr. Rolla. The Salmon Letter informed him that witness statements, as well as oral and documentary evidence, before the Commission showed or suggested that he had used or misused his office by conspiring with Dr. Rolla and others to obtain unsecured loans for the Projects. The letter stated that it was clear that the compelling inference to be drawn was that he as Prime Minister and Minister of Finance had misused his office and was in breach of his fiduciary duty to protect the interest of the Government and people of Saint Vincent and the Grenadines and that the evidence strongly suggested that he was undoubtedly an integral part of Dr. Rolla's complicity and duplicity in at least some of his dealings.

[27] In response, Mr. Astaphan, SC, counsel for the Commissioner, submitted that the Interim Report did not disclose any final findings or prejudgment and was in any event in accordance with clause 13 of the Terms of Reference. Further, the title of the Interim Report, including as it did the phrase "possible criminal acts", suggested uncertainty. It could not be said that the Interim Report showed that the Commissioner had concluded that Sir James had in fact committed and was guilty of criminal acts. Further, the language of paragraph 2 showed that the Interim Report was not intended as a final report. Paragraph 2 read:

"2. No fewer than thirty persons have given evidence to date. However, not all persons mentioned or involved in the Ottley Hall or Union Island projects have been summoned or have yet given evidence. The evidence so far shows that persons who have not yet been called or given evidence have been specifically mentioned as key players, and may be implicated in the commission of offences under the Criminal Code and/or the common law."

This made it clear, he submitted, that persons including Sir James had not yet given evidence. In addition, Sir James had been served with a Salmon Letter. He now had the opportunity to answer the evidence and allegations made against him.

Apparent Bias and Commissions of Inquiry

- [28] The Canadian case of **Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)**⁷ is helpful on the question of bias in relation to Commissions of Inquiry. This was an appeal from an order of the High Court prohibiting the Chairman of the Commission of Inquiry into the Deployment of Canadian Forces in Somalia from making any finding adverse to the respondent, Brigadier-General Ernest B. Beno ("BGen Beno"), due to a reasonable apprehension of bias. BGen Beno testified before the Commission. During his cross-examination, the Chairman intervened to point out that what the witness had just said contradicted an answer he had previously given. As the witness maintained there was no contradiction, the Chairman interjected, "I might as well tell you that you won't gain much by fiddling around. It was a clear question and you won't gain much ...". The remark prompted BGen Beno's counsel to rise and assert that the witness had not contradicted himself and was not "fiddling around". The Chairman then put an end to the exchange by saying that he would take it from the manuscript.
- [29] Some days later, the Chairman was at a breakfast meeting when another Brigadier-General, who, like many others, had been watching the public hearings of the Commission on television, expressed the opinion that BGen Beno had been unfairly and aggressively treated by the Chairman. The Chairman replied that it was his opinion that BGen Beno had not given straight answers and that perhaps Beno had been trying to deceive. Sometime later at the same breakfast another friend of Beno took the opportunity to tell the Chairman that he had been irritated by the Chairman's reaction to Beno's evidence. He reported later that the

⁷ [1997] 2 FC 527.

Chairman then said that Beno during his testimony was very tense and seemed to be hiding things.

[30] The following day, the officers reported to Beno the substance of their conversations with the Chairman. Counsel for Beno met with the Commission and advised that the Chairman's "fiddling" remark, which they considered unjustified, had seriously damaged their client's reputation. They suggested that the Chairman should do something to remedy the situation. They also referred to the Chairman's conversations with the officers. They expressed their concern that the Chairman had already made up his mind that their client was not to be believed. The Chairman answered that his "fiddling" remark merely expressed the perception of the evidence that he had at the time and he assured them that he would read the transcript before reaching any definite conclusion. He denied having said to one of the officers that BGen Beno was hiding something.

[31] Subsequently, BGen Beno brought proceedings to disqualify the Chairman from inquiring into or participating in any way in the making of adverse findings in relation to him. The Commission dismissed the application. BGen Beno then brought an application for judicial review and seeking an order setting aside the decision that the Commission had just rendered and prohibiting the Chairman from continuing to act as or Commissioner or in participating in the making of findings adverse to him. In his judgment, the trial judge expressed the view that, as Commissioners have trial-like functions, the test for determining whether they have the required impartiality is not different from the test applicable to judges, namely, whether the evidence discloses circumstances giving rise to a reasonable apprehension of bias on their part. He concluded that a reasonable bystander considering all the evidence would say that BGen Beno had not and would not in the future be treated fairly by the Chairman because of his unjustified and entrenched negative opinion about BGen Beno's credibility.

[32] On appeal, the Court of Appeal of Canada held that the judge was wrong in assimilating commissioners to judges. It was wrong to hold the view that they both exercise trial-like functions. The court said:

"23. ... A public inquiry is not equivalent to a civil or criminal trial. In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only 'inquire' and 'report'. Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding by the Somalia Inquiry is that reputations could be tarnished

"24. It does not follow, however, that the impartiality of Commissioners should always be judged by applying the 'closed mind' test rather than the 'apprehension of bias' test. Rather, whatever be the applicable test, in assessing the behaviour of Commissioners, the special nature of their functions should be taken into account

...

"27. ... A commissioner should be disqualified for bias only if the challenger establishes a reasonable apprehension that the commissioner would reach a conclusion on a basis other than the evidence. In this case, a flexible application of the reasonable apprehension of bias test requires that the reviewing court take into consideration the fact that the commissioners were acting as investigators in the context of a long, arduous and complex inquiry. The judge failed to appreciate this context in applying the test.

...

"29. It should first be observed that there is nothing, absolutely nothing, in the evidence that might suggest that the remark made by the Chairman on that day was inspired by something other than his own honest, though probably mistaken, perception of Beno's evidence. The Chairman was clearly reacting to Beno's testimony; in the

circumstances, his comment cannot reasonably be seen as indicating a tendency to decide on some basis *other* than the evidence. There was certainly no evidence that could displace the presumption that the Chairman would act impartially. ...

"30. Moreover, that remark would have been entirely justified if, as the Chairman obviously thought, Beno had contradicted himself. It is entirely appropriate even for a trial judge to interject in order to clarify inconsistencies in the evidence

...

"33. ... There is no reason to believe that the Chairman had given any further thought to that incident or to Beno's evidence. One may assume that he had many other things on his mind. It must have been a shock for him to hear [the two officers'] criticisms of his behaviour. It is easy now to say that he should then have remained silent. But it is not abnormal for a person in that situation whose impartiality is openly put in question to try to explain the reasons that motivated his behaviour. It does not show that he was partial or had already reached a definite conclusion about Beno's evidence ..."

They accordingly allowed the appeal, set aside the decision of the trial judge, and dismissed BGen Beno's application for judicial review.

[33] In addition to that Canadian case, there is a series of two cases in the Court of Appeal of the Turks and Caicos Islands ("the TCI") which arose recently out of the Sir Robin Auld Report on allegations of corruption or serious dishonesty in relation to past and present members of the TCI House of Assembly. The cases dealt with allegations of bias on the part of Sir Robin, the sole Commissioner of Inquiry. They were brought by two overseas developers who challenged the making of an interim report by Sir Robin in circumstances similar to this case. The applications for judicial review were dismissed by the High Court and these decisions were appealed. The two appeals were heard in the Court of Appeal of the Turks & Caicos Islands and a single decision was given, cited as **Mario Hoffmann v Commissioner for the Turks & Caicos Islands Commission of Inquiry and**

The Turks & Caicos Islands Commission of Inquiry v Dr. Cem Kinay et al.⁸

Sir Robin's Terms of Reference required him to inquire into whether there was information that corruption or other serious dishonesty in relation to past and present elected members of the House of Assembly may have taken place in recent years. He was required to report to the Governor within sixteen weeks his preliminary findings and recommendations concerning instigating criminal investigations by the police or otherwise and to refer such information and/or evidence to the TCI prosecuting authorities.

[34] Sir Robin produced an interim report. So far as Mario Hoffmann, a banker and citizen of Slovakia, was concerned, he reported that he found there was information of possibly corrupt and/or otherwise seriously dishonest involvement, including misfeasance in public office, of the Hon. Michael Misick, Premier of the territory of the Turks & Caicos Islands, in relation to the Government's transactions with Mr. Hoffmann's companies. He found potential abuse of public office by the Premier by accepting lavish and disproportionate hospitality from Mr. Hoffmann, including the use of private aircraft and seeking and accepting a loan of \$6 million from Mr. Hoffmann's bank which was negotiating with Government over funding and participation in a local project. Sir Robin recommended criminal investigation by the police or others of the possibility of corruption and/or other serious dishonesty, including misfeasance in public office, in relation to the Hon. Michael Misick in respect of those matters.

[35] So far as Dr. Kinay, a citizen of Turkey and a successful hotel developer, was concerned, Sir Robin wrote that for the reasons set out he found that there was a possibility of corruption and/or other serious dishonesty, including misfeasance in public office in relation to a local project following a secret payment by Dr. Kinay of \$500,000.00 to the Hon. Michael Misick followed by the approval by Cabinet of the project. He accordingly recommended criminal investigation by the police or

⁸ Nos CL-AP 11/09 and CL-AP 8/09 (unreported). See also the Privy Council judgment: *The Queen ex parte Mario Hoffman v The Commissioner of Inquiry and the Governor of Turks & Caicos* [2012] UKPC 17.

others of the possibility in relation to the Hon. Michael Misick of corruption or other serious dishonesty, including misfeasance in public office, in relation to this matter.

[36] Both Mr. Hoffmann and Dr. Kinay complained about the opening paragraph of this interim report which read:

"1. There is a high probability of systematic corruption in government and the legislature and among public officers in the Turks & Caicos Islands in recent years. It appears, in the main, to have consisted of bribery by overseas developers and other investors of Ministers and/or public officers, so as to secure Crown Land on favourable terms, coupled with government approval for its commercial development. Breach and/or abuse of the Government's Belongers' Empowerment and Crown Land Policies appear to be frequent mechanisms of, and aids to, such transactions."

[37] The judgment of the Turks & Caicos Islands Court of Appeal gives the opinion of the Court on the complaint as to bias levied by Mr. Hoffmann and Dr. Kinay against the report in the following terms:

"23. They argue that that makes a finding to an unnecessarily high standard of proof ('high probability') and will inevitably be taken as referring directly to them, because they are 'overseas investors'. However, as to this opening paragraph, it has to be remembered that, pursuant to his second term of reference, the Commissioner was to make radical and far-reaching recommendations as to the governance of the territory, including the suspension of the Constitution. It is not suggested that those recommendations were outside his terms of reference. He was entitled to set the context for that in strong language.

"24. It is true that in the discussion leading up to the various recommendations there are points at which the Commission uses the decisive language of concluded findings. Thus, to take one example, complaint is made of paragraph 4.108 of the report:

'4.108 The submissions from the Hon Michael Misick and Mr. Hoffmann as to the relative lack of worth of the golf course are meaningless. The willingness of J&T Banka to lend \$6 million plus

interest against the security of the shares tells one all one needs to know about how valuable an asset was given away by the Cabinet at the behest of the Premier.'

- "25. Similarly both recommendations contain some findings that appear conclusive – examples from among the many relied upon include 'lavish and disproportionate hospitality' in the case of Mr Hoffmann, and 'well below market price' in the case of Dr Kinay. Complaint is made of these, and similar expressions of opinion by the Commissioner. However, it is hard to see how the Commissioner could have fulfilled his task without making some evaluation of the material before him. He had to find his way through a sea of gossip, rumour and misinformation and in order to do that effectively it was both necessary and permissible for him to weigh the evidence, rejecting some and accepting some. Nor was he bound to accept the explanations given by the witnesses, including Mr Hoffmann and Dr Kinay, and if he did not accept them, then he was obliged to explain why. We do not think he went beyond that, but even if he did in some instances, the overall context as noted above would correct it. Nor was it necessary for him to render the report unreadable by obsessively inserting qualifications, or by peppering the text with reservations.
- "26. Finally, as to the argument that the decisive terms of the report would have an adverse affect on any subsequent criminal proceedings, we consider that there are ample mechanisms for dealing with that in the trial process, if and when one is held."

Discussion and Findings

- [38] In the decision of the Court of Appeal (referred to at paragraphs 1 and 9 above) which gave leave for the bringing of this application for judicial review in the High Court, Rawlins CJ, in considering the impugned Interim Report in this case and in delivering the judgment of the Court, said this:

"[87] Although the Report is referred to [as] an 'Interim Report' it was not issued under the same conditions and for the same purpose as the Salmon letter. A reading of the report indicates that its nature and contents are different from the Salmon letter. For example, while the letter was issued to the appellant stating the

allegations that arose on the evidence and affording him the opportunity to attend to test them, the report was issued to the Governor General and the DPP, but not to the appellant against whom there are adverse findings in the report.

[88] In the second place, it may be argued that the report was not of a preliminary ... nature. The report stated, *inter alia*, that the evidence taken to date discloses certain offences contrary to provisions of the Criminal Code may have been committed. Paragraph 22 of the report is arguably a direct indictment of the appellant. It states, *inter alia*, that certain actions on his part, which the evidence discloses, are tantamount to misbehaviour in public office. Paragraph 27 of the report may also be argued to be a direct indictment of the appellant and be argued to conclude that the evidence with respect to the allegations was ‘pellucid and confirmed by the Chartered Accountants who gave evidence’. Paragraph 45 summarises the evidence of the appellant’s alleged misbehaviour in some detail. Notwithstanding their potential consequences for the appellant they were not brought to his attention as was done in relation to the allegations contained in the Salmon letter. In para 48 of the report, the commissioner recommended, on the basis of his ‘firm belief’ that the Attorney General and/or the National Commercial Bank should retain counsel to determine whether civil proceedings should be instituted against the appellant because it seemed to him (the commissioner) that the appellant is civilly liable.

...

[92] The court should not easily entertain an application challenging statements made by a commission prior to the issue of the final report because they are provisional findings, which the commission may change in the final report, if so persuaded. However, to the extent that statements contained in the report may be argued to be conclusionary and adverse to the appellant, I think that they present at least an arguable case, which requires that leave to apply for judicial review should be granted if an alternative remedy is not available to the appellant.”⁹

[39] Given the unanimous finding of the Court of Appeal above, the starting point for consideration of this Interim Report is that it is at least arguable that the Interim Report is a direct indictment of Sir James and is conclusionary as to his guilt. If I

⁹ Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) and Another (2008) 72 WIR 161.

am satisfied that this is a fair description of the language in the Interim Report, that finding might be indicative of sufficient bias on the part of the Commissioner as to disqualify him from continuing with the Inquiry.

[40] It is generally accepted that a Commission of Inquiry must not exceed its common law powers and where it does the Supreme Court in its supervisory jurisdiction will intervene. There are many instances where reports may be subjected to judicial review. The question is whether a body exercising statutory powers of investigation and report has erred in law, exceeded its statutory jurisdiction, or failed to observe natural justice, if applicable, or committed some other abuse of power. Where such an error is established, the courts will usually be prepared to use their judicial review jurisdiction and they are unlikely to be deterred by arguments that a report is not a determination.¹⁰

[41] The cases relied on by Sir James were mainly cases that dealt with the question of bias in courts or tribunals of a judicial or disciplinary nature. These included **In re Medicaments and Related Classes of Goods (No. 2)**;¹¹ **Basdeo Panday v Senior Superintendent Wellington Virgil**;¹² **George Meerabux v The Attorney General of Belize**;¹³ **Medical Board of Trinidad and Tobago v des Vignes**;¹⁴ **Davidson (AP) v Scottish Ministers**;¹⁵ **R v Kent Police Authority and Others Ex parte Godden**;¹⁶ and, **London Borough of Southwark v Jiminez**.¹⁷ In my view, the principles laid down in these cases have to be applied with great caution to the case of a commission of inquiry, and in the instant case I prefer the approach taken by the Canadian and the Turks and Caicos Courts of Appeal previously referred to above.

¹⁰ Clive Lewis, *Judicial Remedies in Public Law* (4th edn., Sweet & Maxwell) pp. 167-169.

¹¹ [2001] 1 WLR 700.

¹² [2008] UKPC 24.

¹³ [2005] UKPC 12.

¹⁴ (2000) 60 WIR 375.

¹⁵ [2005] UKHL 74.

¹⁶ [1971] 2 QB 662.

¹⁷ [2003] EWCA Civ 502.

[42] If there is one guiding principle on the law of bias to be drawn from the authorities, it is that the court determining that issue must have regard to the context. It would not be appropriate to apply across-the-board general principles of bias without regard for the statutory framework, the terms of reference, and the nature of the inquiry in question. The court must take into account the special nature of a Commission of Inquiry. This is an investigative body and not an adjudicatory one. It is relevant that this report was, as I am satisfied, a confidential, interim report which the Commissioner did not publish to the public. The Commissioner acted in compliance with his mandate which was to submit his Interim Report to the Governor-General and the DPP. Sir James had earlier been given every opportunity to participate in the hearings, but he had chosen not to come forward or to take advantage of the opportunity given to him. If his name was now mentioned in an interim report before he has had an opportunity to respond to a Salmon Letter, he cannot be heard to complain that he had been deprived of a right to be heard.

[43] In view of the relevant authorities, Sir James is required to prove much more than the formulation or expression of a provisional or interim view or opinion to establish that the Commissioner had a closed or prejudiced mind. These proceedings are an inquiry and not judicial proceedings. The principles of natural justice or fairness must, in the words of Mance LJ in **Diane Modahl v British Athletic Federation**¹⁸ “adapt to their context and be approached with a measure of realism and good sense.” Sir James must prove that, in view of the nature of the inquiry, the terms of reference, and the opportunities given throughout the proceedings to him, the Commissioner has closed his mind. He must establish on the part of the Commissioner irreversible prejudgment and prejudice in the expression of his views in his Interim Report to the DPP, and that the Commissioner will not alter these views irrespective of the evidence and arguments which may be presented to him by Sir James and his counsel. He

¹⁸ [2001] EWCA Civ 1447 at para. 128.

must demonstrate that in the conduct of the proceedings as a whole it has been shown that the Commissioner was biased or unfair.

[44] On the question of procedural fairness, the Commissioner's terms of reference required him, "to report immediately ... any facts, circumstances, or evidence which in the opinion of the Commission may give rise to, show or establish ..." any of the matters set out in clause 13. It seems clear that the Commissioner was required to submit his Interim Report once he formed an opinion on any fact or circumstance which may give rise to any of the matters in question. There was no obligation imposed on him to first hear Sir James before reporting. It is noteworthy that the Interim Report is entitled "Report on Possible Criminal Acts ..." (My emphasis). This would indicate at the outset to a fair-minded and reasonable observer that the Commissioner had not yet found or concluded that Sir James had in fact committed and was guilty of the criminal acts alleged. Indeed, Sir James has now been served with a Salmon Letter and a Witness Summons and now has the opportunity to answer the evidence and allegations made against him.

[45] I am fortified in this view by the very language of paragraph 2¹⁹ of the Interim Report which shows that it was not intended as a final report or making findings of criminal liability. Similarly, when at paragraph 16 the Commissioner said that "the evidence to date" disclosed a conspiracy to defraud and the obtaining of property by deception, the sole Commissioner, experienced judge that he was, was clearly indicating that he was aware that further evidence might lead him to change his opinion as necessary. His words at paragraph 21, "the evidence ... which so far has not been contradicted," further confirm that this is not in his view a final report setting out his conclusions. It is certainly to be regretted that the Commissioner did not show in his language the same circumspection that Sir Robin Auld so admirably did in writing his interim report on his investigations into allegations of corruption at the highest levels of government in the TCI. However, I am not persuaded that the strong language of the Interim Report, even as demonstrated

¹⁹ See paragraph 27 above.

in paragraph 10 above, shows that he had come to conclusionary findings indicative of bias.

[46] Sir James has not satisfied me that clause 13 of the Terms of Reference required the Commissioner merely to list the facts, circumstances and evidence, without making any comment on them. The Commissioner was entitled to draw inferences and to make comments which may be of a conclusionary nature on the evidence that he had heard to that date. While the language of the impugned Interim Report is considerably more robust than the language used by Sir Robin in his TCI Report, it would seem clear to a fair-minded and reasonable observer giving it a fair reading that the report was not intended as a final report consisting of concluded findings of criminal liability on the part of any person, including Sir James. Nothing in the Interim Report suggests that the Commissioner had come to a concluded view, showed a closed mind, or had a particular view of the evidence amounting to a prejudgment. Nor is there anything to suggest that there was other than co-incidence in the timing of the Interim Report. Sir James had long retired from active politics. There is no reason to believe that the Commissioner had any animus to Sir James' political party, or wished to do it any harm.

[47] The Commissioner's Interim Report was replete, as the judge noted, with strong and colourful language. In the words of the Court of Appeal in the **Mario Hoffmann** case,²⁰ it is true that the Commissioner used the decisive language of a concluded finding. However, it is hard to see how the Commissioner could have fulfilled his mandate of reporting on the facts and evidence to the Governor-General without making an evaluation of the material before him. Even if his language was not as cautious and reserved as it should have been for an interim report, prepared before all the evidence was in, the overall context would correct it. There is no hint in the evidence that he intended the Interim Report to be other than an interim one in accordance with his Terms of Reference. Perhaps more conclusively, I have heard nothing from counsel and read nothing in the Interim

²⁰ Referred to at paragraph 33 above.

Report that would give a fair minded and informed observer a reasonable apprehension that the Commissioner would at the end of the Inquiry reach a conclusion based other than on the evidence. It would appear to such an observer that the Commissioner's language indicated at most his shock and dismay at the extent of the dereliction of duty as he saw it evinced by the testimony that he had heard up to that point in the Inquiry. His strong language would suggest to such an observer the Commissioner's natural feelings of hurt for the injury which the testimony to that date indicated the public weal had suffered. This does not suggest that once he had heard Sir James' side of the story, if there was anything that could be said by Sir James in answer to the testimony given against him by among others his Ministers and senior public servants, he would not have ensured that his final report had a more balanced view of the evidence. I see no indication that the Commissioner would have decided in his final report on some basis other than the evidence. There was simply no evidence that could displace the presumption that the Commissioner would act impartially.

[48] Given the nature of the inquiry, the legislative framework, the terms of reference given to the Commissioner, the conduct of the Commissioner both before and after the delivery of his Interim Report, the duty of the Commissioner to make provisional findings and to form provisional views on the evidence and to give persons adversely affected an opportunity to be heard before making final findings and completing the Inquiry, the duty of the Commissioner to submit interim reports, the fact that the Commissioner had made it clear that his views or findings were provisional, the Commissioner's clear indication in his Interim Report that Sir James had not yet given evidence, the Commissioner's demonstration that his mind was not closed by his issuing a Salmon Letter and giving Sir James an opportunity to show cause why an adverse report should not be made against him, and the setting out in the Salmon Letter of the allegations made against Sir James as well as the substance of the evidence adduced in support of them, I am satisfied that the Commissioner cannot be said to have prejudged the issues so that he is prevented by the law on bias from continuing with the Inquiry.

Conclusion

[49] In conclusion and for the reasons given above, I am satisfied that the learned trial judge was justified in finding as she did that the fair-minded and informed observer would not conclude that there was a real possibility that the Commissioner was biased, or that there had been procedural unfairness. I would dismiss the appeal and bring to an end the earlier order prohibiting the Commissioner from proceeding further with the Inquiry. As in the High Court, I would make no order as to costs. Public interest litigation should not normally be inhibited by questions of costs.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Clare Henry
Justice of Appeal [Ag.]