THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA
Claim No. SLUHCV2015/0129

IN THE MATTER of Section 57 and 58 of the Constitution of Saint Lucia

AND

AND IN THE MATTER of the December 2014 Report of the Constituency Boundaries Commission

AND

IN THE MATTER of a claim for declaratory and other reliefs pursuant to section 105 of the Constitution for Contravention of the Provisions of the Constitution

BETWEEN:

HONOURABLE GUY JOSEPH (In his personal capacity and in his capacity as Parliamentary Representative for Castries South East)
CLAIMANT

And

[1] THE CONSTITUENCY BOUNDARIES COMMISSION
FIRST DEFENDANT

[2] THE HONOURABLE PRIME MINISTER
SECOND DEFENDANT

[3] THE ATTORNEY GENERAL (acting in her capacity of the legal representative of her Excellency, the Governor General)
THIRD DEFENDANT

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Appearances

Mr. Garth Patterson Q.C. and Ms. Tammi Pilgrim and Mr. Thomas Theobalds, instructed by Gordon Gordon & Co.) For the Claimant/Applicant

Mr. Anthony Astaphan S.C. and Ms. Jahn Sifflet, instructed by Mondesir V. Leslie Chambers for the First Defendant/Respondent

Mr. Sidney Bennet Q.C. and Mr. Leslie Mondesir instructed by the Attorney General Chambers for the Second Defendant/Respondent[1]

Mr. Roger Forde Q.C. and Mr. Dwight Lay for the Third Defendant/Respondent

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2015: 22 April, 8, 27 May

Ethics and Advocacy - Attorney at Law – Court's Supervisory Role – Power of the Court to Restrain an Attorney from Acting for a Party to Litigation – Three Bases for Removal – Breach of Duty of Loyalty – Breach of Duty of Confidentiality – The Court's Inherent Jurisdiction to Supervise Its Officers and to Protect the Administration of Justice.

Exercise of the Court Inherent Jurisdiction to Remove Attorney – Exceptional Jurisdiction - Test – Perception of the Fair-minded and reasonably informed member of the Public – Perception of a Real Risk that Administration of Justice would be adversely affected – Matters which the Fair minded observer must be taken to know.

Application by Party to Remove Attorney of Opposing Party – Application not based on the Protection of any Personal Interest – Allegation that Attorney would be perceived as failing in his Duty to Opposing Client – Need for Circumspection and Caution – Whether good cause for Removal – Whether Application made for collateral or forensic advantage.

This application was made on the first hearing of a constitutional motion brought by a member of parliament from the opposition benches challenging the validity of a Report produced by the Constituencies Boundaries Commission recommending changes in the constituencies boundaries and an increase in the number of constituencies in St. Lucia. In this application the claimant has sought orders restraining the Commission from continuing to retain Senior Counsel Mr. Astaphan as its attorney in the substantive and interlocutory proceedings. In the underlying motion, the claimant has challenged the Report of the Commission on two main grounds, arguing first that when the Commission prepared its Report, it has not acted independently and has been improperly influenced by the Prime Minister and the ruling party, and second that the Commission had failed to consult or properly consult during the course of its functions under section 58 of the Constitution.

In this application, the claimant contended that having regard to the constitutional framework establishing the Commission and providing for its functions, it was required to act in an independent and impartial manner, and that if Mr. Astaphan was allowed to continue to represent the Commission, it would lead any fair minded and reasonably informed member of the public to perceive that the administration of justice would be adversely affected.

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[1] The second and third defendants were not respondents on this application and did not make any submissions.

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The claimant grounded this application on three factual contentions that it asked the court to find on the affidavit evidence before the court. First, the claimant contended the Mr. Astaphan had appeared for the Prime Minister and the Attorney General in her capacity as representative of the Governor General in the earlier pre-action application in these proceedings. Second, the claimant contended that Mr. Astaphan was a known political activist on behalf of the ruling political party and a close friend of the Prime Minister. Third, it was also contended that Mr. Astaphan appointment as counsel for the Commission had been decided or substantially influenced by the Attorney General and or the Prime Minister and that this was an interference with the independence of the Commission. The claimant argued that all these matters would lead any fair minded and reasonably informed member of the public to, at the very least, have a perception that Mr. Astaphan would use his affiliations to improperly influence the Commission in these proceedings with greater regard for the interests of the Prime Minister and the Governor General than for the interests of the independent Commission.

The application for the removal order was opposed. In oral arguments Mr. Astaphan contended he was in no way a political activist for the ruling party or the Prime Minister and that all public comments or statements made by him were within right legal right to practise his profession and to represent his clients interests. He further contended his earlier appearance in the pre-action application was expressly stated to be for the proceedings on that day only and that he had been asked by all of the parties including the Chairman of the Commission to appear in court and hold papers on its behalf. He contended that there could be no other inference to be drawn from the expressed terms of the court's order made that day. He further contended that this application was misconceived and designed to frustrate his client, and there was no basis in law for the claimant to seek to remove him as the underlying challenge was not aimed at reviewing the Commission's general conduct but only in relation to its functions performed under section 58 of the Constitution in the preparation of its Report; it was beyond dispute that Mr. Astaphan played no role in the functions of the Commission prior to these proceedings.

Held, dismissing the application:

1. A court has the power under the common law and statute to restrain an attorney from acting or continuing to act for a client in proceedings before the court on three bases. First, this jurisdiction may be exercised to restrain the attorney where it is shown that the attorney has breached or there is a real risk that he is likely to breach the duty of confidentiality as against its former or present client. Second, the attorney may be restrained where he or she has breached or is about to breach the duty of loyalty with regard an existing client. Third, in its duty to supervise its officers, a court has the inherent jurisdiction also given force by statute, to restrain an attorney from representing any client if there is a real risk that the administration of justice may be adversely affected by that attorney acting for the client in proceedings before the court.

2. Actual proof of conduct that has so affected the administration of justice aside, the test in this case is whether a fair-minded and reasonable informed member of the public may perceive that Mr. Astaphan would be unable to act his professional best in representing the

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Commission's best interest or as being unable to render the proper assistance to the court in keeping with his duties as an officer of the court.

3. The fair-minded person is 'reasonably informed' by being seized, not of suspicion or anecdotal information, but of those facts as are found by the court when considering whether to exercise this inherent jurisdiction. It is only then that the court puts on the mantle of such a fair-minded person to assess whether there is such a real risk. Further, the fair-minded and reasonably informed member of the public must be taken to know that an attorney has a right to accept employment. In this context he must also be taken to know that an attorney is always expected to act in the best interest of his client, and of the ethical rules governing every attorney's practice and high importance attached to these standards by attorneys and the courts. He or she must be taken to know of an attorney 'general independence and distance from his or her clients, his or her readiness to disagree with those who might be their closest professional and personal friends, to agree with arguments from colleagues for whom they have little respect and to make strong arguments on the instructions of others.'

4. In the exercise of this discretion the court should give due regard to several competing public interests, namely: that a litigant should be free to engage an attorney of his choosing; that an attorney has an entitlement to practice his profession and to accept a retainer from persons he is ready and able to represent – the essence of these competing public interests being that a court should not lightly interfere in the contractual relationship between a litigant and his attorney.

5. These competing public considerations require that this inherent jurisdiction is an exceptional one and 'one that should be exercised with circumspection and caution. Even more caution is required when the application to remove the attorney is not made by a present or former client, but it is an application by the opposing party in the pending matter who has no personal interest to protect; these being cases in which there is no duty owed to the party seeking the restraining order. Such applications must not be made lightly and the court must scrutinize them to ensure that in the circumstances of the case there is a real need for the removal of the attorney. The court on these types of applications, which if granted always results in the party being deprived of counsel of his choice and invariably causing him inconvenience (lesser or greater inconvenience depending *inter alia* on the timing of the application) must always take care to ensure that the applicant has satisfied the court that the application is not made simply for a collateral purpose to provide some forensic advantage to the opposing party. To allow 'this would be to detract from rather than advance, the policy which the jurisdiction is to be properly exercised'.

6. The evidence presented taken together with the Order of the Court dated the 27th February 2015, does not prove conclusively one way or the other that Mr. Astaphan was retained to represent any of the parties in the substantive matter until the Commission had decided to retain him. Further, having regard to the conflict on the affidavit evidence the court cannot be satisfied that the Commission was in any way directed or controlled by the Attorney General or any other person when four out of its five Commissioners resolved to retain him. Further, the evidence relating to (a) 'long standing relationship between Mr. Astaphan and the Prime Minister and the Chairman' etc. and (b) the newspapers reports exhibited,

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one of which quote Mr. Astaphan as denying that he is a political activist falls short of proving that he is in fact a political activist. Statements criticizing certain politician of one political party in the public domain do not make someone a political activist. Such a finding aside, a bare attorney client relationship between an attorney and a government and or a Prime Minister or current relationship with the Prime Minister cannot give rise to any perception in the fair-minded and reasonably informed person that he would be so biased in favour of these persons so that his continued representation for independent client such as the Commission would affect the administration of justice.

7. Even if any 'notorious relationship' exists which might make Mr. Astaphan partial to the Prime Minister or the ruling party, the issue is whether a fair-minded and reasonably informed person may perceive that there is a real risk that he would fail in his professional duties to his client and or to the court as regards his representation of the Commission. Here the Commission by a majority had approved a Report under section 58 of the Constitution. The Commission has no power to withdraw this Report, and a majority of its members, also seized with the general public perception as to who Mr. Astaphan is, had agreed to retain him. Mr. Astaphan was not advising the Commission on the performance of its constitutional functions; those were over. The possibility therefore that he might be partial to the Prime Minister and or the Saint Lucia Labour Party could not be perceived by any fair-minded person as being opposed to the Commission's interest before the court which was merely to defend the Report it had approved. The fact that Mr. Astaphan may have a secondary reason for defending the Report which is what the Commission has agreed it wishes cannot be perceived by any fair minded person as compromising his professional ability as regards the Commission. The fact that Mr. Astaphan could be opposed to the claimant is not relevant.

8. In the exercise of this jurisdiction, the court must be concerned with ensuring that the public perception of justice is not undermined as regards those issues before the court; not in relation to any extraneous issues which may be raised in relation to the Commission's conduct outside of its Constitutional functions which are outside the scope of the court matter. In this regard the fair-minded and reasonably informed member of the public must also be taken to know what are the issues in this case, which in this case is a challenge to the Commission's Report; a Report that was completed before Mr. Astaphan was retained.

9. His removal therefore, could do no more than to provide a forensic advantage to the applicant in this matter. It collides with the overriding objective having a real potential to delay the outcome of this highly contentious public matter and to increase the costs of this litigation. It does not further the protection of the administration of justice.

10. The court will hear the parties on the issue of costs.

Cases Considered:

A v The Law Society of Tasmania *[2001] TASSC 55; (2001) 10 Tas R 152.*
Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd *[2005] NSWSC 550*
Attorney General v Observer Ltd *[1990] 1 A.C. 109*
Attorney General of Fiji v Director of Public Prosecutions *[1083] 2 A.C. 672*
Aussie Airlines Pty Limited v Australian Airlines Pty *Ltd 65 FCR 215*

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Bahonko v Nurses Board of Victoria *(No 3) [2007] FCA 491*
Beach Petroleum NL v Kennedy *[1999] NSWCA 408*
Belan v Casey *[2002] NSWSC 58*
Black v Taylor *[1993] 3 NZLR 403*
Boulting v. Association of Cinematograph, Television and Allied Technicians *[1963] 2 Q.B. 606*
British American Tobacco Australia Services Ltd v Blanch *[2004] NSWSC 70*
Coppola v Nobile *[2012] SASC 42*
Commonwealth Bank of Australia v Jackson McDonald *[2014] WASC 301*
D & Construction Pty Ltd. v Head *(1987) 9 NSWLR 118*
Everingham v Ontario *(1992) 88 DLR (4th) 755*
Fordham v Legal Practitioners' Complaints Committee *(1997) 18 WAR 467*
Freeman v Chicago Musical Instrument Co *689 F2d 715 (1982)*
Garde-Wilson v Corrs Chambers Westgarth *(2007) 27 VAR 271*
Gazley v Lord Cooke of Thornton and Others *[2000] 3 LRC 50*
Geveran Trading Co Ltd v Skjevesland *[2003] 1 WLR 912.*
Giannarelli v Wraith *(1988) 165 CLR 543*
Gugiatti v City of Stirling *[2002] WASC 33*
Hempseed v Ward *[2013] QSC 348*
Hosein's Construction v 3G Technologies *Claim No. CV2008-005660 (T&T)*
Holborow v Macdonald Rudder *[2002] WASC 265*
Ismail-Zai v Western Australia *[2007] WASCA 150*
Kallinicos v Hunt *(2005) 64 NSWLR 561*
Kooky Garments Ltd v Charlton *[1994] 1 NZLR 587*
MacDonald Estate v Martin *77 D.L.R. (4th) 249*
Magro v Magro *(1989) FLC 92-005*
McVeigh & Anor v Linen House Pty Ltd & Rugs Galore Australia Pty Ltd & Ors *[1999] VSCA 138*
Mitchell v Pattern Holdings Pty Ltd *[2000] NSWSC 1015*
Mitchell v Burrell and Anor *[2008] NSWSC 772*
Myers v Elman *[1940] AC 282*
Newman v Phillips Fox *(1999) WASC 171*
Ontario Inc. (Locomotion Tavern) v. Ontario (Attorney General) *2010 ONSC 1184*
Prince Albert v Strange *(1849) 1 Macnaghten & Gordon 25 41 E.R. 1171*
Prince Jefri Bolkiah v KPMG *[1999] 2 AC 222*
PhotoCure ASA v Queen's University at Kingston *[2002] FCA 905*
QGC Pty Ltd v Bygrave and Others *186 FCR 376*
Re a Firm of Solicitors *[1992] 2 WLR 809*
Spincode Pty Ltd. v Look Software Pty Ltd *[2001] VSCA 248*
Scallan v Scallan *[2001] NSWSC 1078*
S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd.
Talisman Resort GP Inc v Wolfgang Kyser and Others *2013 ONSC 1901*
Thevanez v Thevanez *(1986) FLC 91-748*
Village v BDW *[2004] Aust Torts Reports 81-726*
Viscariello v Legal Profession Conduct Commissioner *[2015] SASC 4*
Wan v McDonald *(1991) 33 FCR 491*
William Stewart Arnold Martin v William Hamilton Gray *[1990] 3 SCR 1235*

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__Westpac Banking Corporation v Newey__ [2013] NSWSC 533

Legislation Considered:

Constitution of St. Lucia – Section 57 and 58
Civil Procedure Rules 2000 – Part 1
Legal Profession Act, Chapter 2.04 of the Laws of St. Lucia ('Code of Conduct'), Section 42; Schedule 3 of the Act – Rules 9, 11, 12, 17, 20, 22, 25 and 34 of Part A of Code of Conduct; Rule 14 of Part B of the Code of Conduct.

DECISION

[1] **RAMDHANI J. (Ag.)** This application was heard on the 22nd April 2015, and on the 8th May 2015, I delivered an oral decision dismissing the application and informed the parties that a written decision will be delivered setting out my full order and reasons for my decision. This is that written decision.

[2] The application dated the 6th March 2015, is made by the claimant/applicant, the parliamentary representative for and a resident of Castries South East, for orders against the first defendant/first respondent, the Constituency Boundaries Commission of St. Lucia ('the Commission') created and constituted in accordance with section 57 of the Constitution.

[3] The claimant by this application seeks orders that the Commission be restrained from engaging or continuing to engage Mr. Anthony Astaphan S.C. as its attorney, and that it be directed that it should only retain an independent counsel, that is, one who is not connected with any of the political parties in St. Lucia or with any of the parties to these proceedings.

[4] The application is opposed. The first defendant has in brief contended that it is a frivolous application, mischievous and an abuse of the process of the court and that in seeking to remove its attorney, it is merely designed to frustrate first defendant.

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The Main Issues Raised

[5] This application raise as a general issue the extent of the court's jurisdiction to supervise attorneys at law in St. Lucia in the context of restraining them from acting for litigants in matters before the courts.

[6] As a specific issue, it has raised the question as to whether there is good cause to remove Mr. Anthony Astaphan from acting for the Commission in these proceedings.

The Grounds of the Application

[7] The claimant has asserted that Mr. Astaphan is disqualified from acting on behalf of the Commission on two principal grounds.

[8] First, he has grounded this application on the contention, that prior to being engaged to act for the Commission, Mr. Astaphan was already on record as representing the Honourable Prime Minister and Her Excellency the Governor General, and it is fit and proper that the Commission be independently and separately represented.

[9] Second, he grounds the application on the basis that Mr. Astaphan's 'close and notorious relationship with the Prime Minister and the Chairman of the Commission, as well as his documented political alignment with the St. Lucia Labour Party, will lead a fair minded and informed observer to conclude that there is a real possibility that Mr. Astaphan would not bring to the discharge of his duties an unbiased mind, and so would likely infect the Commission with his prejudice and predilections.

[10] In giving context to this application, the applicant has asked this court to have regard to the underlying substantive Constitutional Fixed Date Claim in which the applicant has sought orders to quash a report of the Commission dated December 2014, ('the Report') which was prepared by the Commission in fulfilling its Section 58 mandate under the Constitution.

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[11] That Report was laid before Parliament on the 10th February 2015, and in accordance with parliamentary and constitutional prescriptions, it received the approval of the majority of the House. The Report recommended the increase of the number of constituencies and delineation of new constituency boundaries.

[12] In the underlying claim, the applicant has challenged the Report on sundry grounds, including that preparing the Report the Commission did not act independently and impartially as it is required to do by section 57 of the Constitution.

[13] The applicant has contended as a factual matter that, after it had sought and obtained a without notice order for an injunction on the 17th February, Mr. Astaphan S.C. had sent email correspondence to the Registrar copied to the claimant's counsel advising her that, "I have been asked by the Honourable Attorney General to assist the Honourable Prime Minister and Her Excellency the Governor General in relation to the Without Notice Hearing and without notice order."

[14] The applicant further contended as a factual matter that Mr. Astaphan S.C. continued to send correspondence which 'confirmed' that he was acting on behalf of the second and third defendants in this matter. On the 24th February 2015, the Chairman of the Commission informed the members of the Commission that because to the urgency of the matter, he had 'requested' that Mr. Anthony Astaphan S.C. appear on behalf of the Commission at the hearing on 27th February 2015.

[15] The claimant further contended as a factual matter that on the 27th February 2015, the claimant's counsel took an objection to Mr. Astaphan 'holding papers' for the Commission on that day, as the Commission was required to be independently represented. The consent order that was agreed to that day, reflects that Mr. Astaphan appeared for all the defendants 'for the purposes of today only'.

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[16] It was further contended that immediately after the hearing on the 27th February 2015, Mr. Astaphan convened a meeting of all the Commissioners (except the Chairman who was out of State), which was held in the Lounge at Parliament Building. At that meeting Mr. Astaphan declared that he would prefer to act for the Commission, advised the Commissioners of the concerns raised by claimant's counsel, and said that, in light of those concerns, he would arrange for other counsel to represent the Prime Minister and the Governor General.'

[17] On the 1st March 2015, Mrs. Leonne Theodore John, one of the Commissioners, sent an email to the Chairman and other members of the Commission registering her strong objection to Mr. Astaphan acting as counsel for the Commission, since he was 'conflicted' by reason of having accepted instructions to act for the Honourable Prime Minister and Her Excellency, the Governor General. Further, by virtue of his long-standing relationship with the Honourable Prime Minister and [the Chairman]'. She indicated that the Commission never approved his appointment to act, and requested on an urgent meeting to decide on the question of legal counsel to represent the Commission. She also indicated that it was imperative that the Commission receive independent legal advice, and registered her strong objection to any counsel who is affiliated with and/or associated with either political party, or otherwise associated with the parties in the proceedings.'

[18] The meeting was held on the 4th March 2015, 'at which the majority of the Commissioners approved Mr. Astaphan's appointment.

[19] It is the claimant's contention that the Commission, not being a private person, is not free to act as it pleases. It must act in a lawful manner and is constitutionally bound to act independently and impartially and that in the circumstances, it is impossible for the Commission to retain its independence whilst being represented by Mr. Astaphan, since the real danger exists that Mr. Astaphan's personal allegiance to the Prime Minister, his personal and professional relationship with the Chairman and his professional duty as counsel on record for the Prime Minister and Governor General, will collide with the duty he owes to the Commission to advise it independently, impartially and objectively. The

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claimant has asked the court to note that Mr. Astaphan's name appears on the professional letterhead of the Chairman's personal law firm as a consultant.

[20] In supporting these grounds, the claimant has relied on an affidavit of Mrs. Leonne Theodore-John.

Claimant's Submissions

[21] Counsel for the claimant in written and oral submissions has argued that the court has an inherent jurisdiction to regulate its proceedings and this power includes the power to bar an attorney from acting in a matter before it. He argues that whilst every litigant has a right to counsel of his own choice, that right is not an absolute one, but it must be subject to the powers of the court to remove counsel for breach of the rules of professional conduct and for other good reason to protect the interests of justice and to ensure that public confidence in the administration of justice is not undermined. Where the question relates to the public confidence, the 'issue is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor'.

In making these arguments learned Queen's Counsel has relied on a number of authorities including, **Black v Taylor** [1993] 3 NZLR 403 approving dicta in **Everingham v Ontario** (1992) 88 DLR (4th) 755, and **Gazley v Lord Cooke of Thonrton and Others** [2000] 3 LRC 50

[22] The claimant has also pointed to this court that the overriding objective behind the Civil Procedure Rules 2000 ('CPR 2000') is to enable the court to deal with cases justly. He has argued that in 'the context of an application brought under section 105 of the Constitution for alleged contraventions by the Commission of its constitutional remit under sections 57 and 58, in dealing with the case justly, the Court has a duty to safeguard the underlying constitutional precepts, and to ensure that the framers of the Constitution in not defeated. The Commission is a creature of the Constitution, and it was intended to so conduct its affairs as to be free from political influence, direction or control. It is an equally important

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objective for public confidence to be maintained in the process of delimiting constitutional boundaries that the body charged with the responsibility for carrying out that function should appear to be doing so in an independent an impartial manner. In discharging its functions, therefore the Commission must not only act independently and impartially, it must also be seen to be so acting.'

[23] Learned Counsel argues that the facts and circumstances relevant to this application show that 'Mr. Astaphan S.C. is a friend and loyal supporter of the Prime Minister. It is a matter of public record that he has acted on numerous occasions on behalf of the Prime Minister in respect of matters pertaining to both his personal affairs and in his official capacity. He has also been retained by the Kenny Anthony led administration on numerous occasions to represent the Government of Saint Lucia. He has appeared publicly in support of the Saint Lucia Labour Party during the last election campaign, and has made disparaging and partisan statement against the United Workers Party and its leadership. His bias in favour of the Prime Minister and the Saint Lucia Labour Party is very apparent and, having regard to the constitutional remit of the Commission, and the very sensitive political issues at stake, it would be unsafe for the Commission to be represented by Mr. Astaphan because of the real danger that he would be perceived by the public as pursuing an agenda scripted by the Prime Minister and the Saint Lucia Labour Party.'[2]

[24] The claimant further submits that in "an attempt to justify the Commission's decision to engage Mr. Astaphan, the Chairman in his sworn affidavit has not denied the association between Mr. Astaphan and the Prime Minister or the Saint Lucia Labour Party, stating simply instead that 'Mr. Anthony W. Astaphan, S.C. has never acted for MR. Guy Joseph or the United Workers Party'."

[25] The claimant has, in this context contended that 'Mr. Astaphan has formally announced to the court that he was acting for the Prime Minister and the Governor General, and he negotiated a consent order with counsel for the claimant on that basis. At no time during the negotiations for the consent order did he signify that he was acting for the Prime

[2] Paragraph 13 of the written submission of the Claimant.

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Minister and Her Excellency on a limited basis only, or that he intended to act for the Commission. He gave an undertaking on behalf of Her Excellency in his capacity as counsel for the Attorney General. His formal undertaking in meaningless unless understood within the context of his formal representation of the Attorney General as legal representative of Her Excellency."[3]

[26] Learned counsel for the claimant has asked this court to consider the evidence which shows that on the very night of the *inter partes* hearing of the matter on the 27th February 2015, 'there was broadcasted on television certain recorded statements made by Mr. Astaphan where he was reacting, in what could be regarded as 'platform politics mode', to comments made by the executives of the UWP…'. Counsel submits that this 'only reinforces the concern that he will not bring to the performance of his duties as counsel to the Commission as unbiased mind.' Learned counsel has asked the court to consider evidence which shows that the Attorney General and Mr. Astaphan wrongly presumed that the Attorney General would decide on which counsel would represent the Commission and inform the Commission accordingly.'

[27] The claimant has asked the court to consider all these matters and argues that it is' against the letter and spirit of the Constitution, for Mr. Astaphan to represent the Commission'. The claimant submits that 'the lack of independence and impartiality of the Commission is one of the fundamental grounds for the claimant's claim. The choice of Mr. Astaphan as counsel for the Commission only serves to highlight and exacerbate the very thing the claimant is complaining about. It demonstrates once again the very poor judgment of the Commission relative to its Constitutional duty, and exposes its fundamental lack of understanding of constitutional imperative that its acts independently and impartially at all times."

[3] The claimant in its original submissions had argued that Mr. Astaphan 'has never formally indicated to the court that he has ceased to act for the Prime Minister and Her Excellency.' This last point, however, is now moot as at first hearing of the Fixed Date Claim and the hearing of this application, Mr. Astaphan entered an appearance only for the Commission. The other defendants are separately represented.

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First Defendant's Submissions

[28] The first defendant has resisted this application. Learned counsel for the first defendant in written submissions argues that the purpose of the court issuing the order or removal must be to protect the claimant from the demonstrated threat of wrongful interference with a right which is vested in him. It is therefore essential for the court to identify the claimant's right and the nature of the threat to the right.

[29] The First defendant in its written submissions further contended that there are three bases upon which a court may intervene to remove counsel on record. The first is the risk of a breach of confidence of information of any former client in his representation of the present client. The second is the breach of a duty of loyalty where acting against a former client might be said to be inconsistent with the fiduciary duty to be loyal to that client. The third relates to the court's supervisory powers over its officers.

The First defendant relies here on the cases of **William Stewart Arnold Martin v William Hamilton Gray, administrator with will annexed of the Estate of John Edwin MacDonald** [1990] 3 SCR 1235 at pages 1258 to 1263; **Re a Firm of Solicitors** [1992] 2 WLR 809; **Talisman Resort GP Inc v Wolfgang Kyser and Others** 2013 ONSC 1901; **Hosein's Construction v 3G Technologies** Claim No. CV2008-005660 (T&T)

[30] The first defendant submitted that an attorney has a duty both to his client to advance his client's interest, and to the court to assist in the administration of justice. The authorities show that the court will restrain an advocate from acting for a party where it is demonstrated that there are circumstances which show a real risk that independence or objectivity of the advocate has or may have been compromised. The test to be applied in such cases is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting in the interest of the protection of the integrity of the judicial process and due administration of justice, including the appearance of justice.

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The first defendant relies on **Arthur J.S. Hall & Co. (a Firm) v Simons** [2002] 1 A.C. 615; **Kallincos & Anor v Hunt and Ors** [2005] NSWSC 1181

[31] The first defendant submitted that this jurisdiction is to be regarded as exceptional and the court should be careful to identify the breach or risk of breach whether to the former client or to the court, as challenges which do not relate to a breach of the duty of confidentiality and loyalty may be open to an 'adventitious challenge as a means of harassing an opponent in a cause.' Reliance was placed on **Halbarow v Rudder** [2002] WASC 265

[32] The first defendant argued that the application should be dismissed as an allegation that a lawyer is on friendly terms with one or more of the parties in a litigation without saying how such an allegation would cause him from properly discharging his duties to the client and the court, cannot be the basis for an order of removal.

[33] Further the first defendant argues that the 'concept of bias is misplaced. Bias relates to the state of mind of the decision maker governed by public law who is called upon to make a decision after considering and weighing all relevant factors, so as to arrive at the decision fairly and impartially. There is no decision for the Commission to make. In any event, the position of the advocate is different. The issue is whether circumstances exists which would affect the ability of the advocate to discharge his duty to his client and to the court with independence and objectivity. No such circumstances or evidence exists.

[34] The first defendant has further submitted that the allegations being made are no more than mischievous and an abuse of the process and has cited a number of reasons in support.

[35] Among the reasons the first defendant has contended that 'the alleged involvement in politics or relationships relied on by the claimant are superficial at best even if true. But if relationships with Prime Ministers or political parties give rise to bias on the part of counsel whose obligation it is to always act independently, most counsel would be disbarred or prevented from representing Attorneys General and other clients.'

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[36] The first defendant has also contended that 'counsel's representation at the hearing for directions before Mr. Justice Belle is entirely irrelevant and meaningless. This was an interlocutory hearing at which directions for trial were being requested, agreed and granted by the judge. At this stage there were no affidavits from the respondents or hearing, and no instructions were given to Mr. Astaphan by any respondents on the merits. Counsel made it clear to His Lordship that he had not at that stage received any instructions from any parties on the merits.

[37] The first defendant also contends that initially all of the members of the Commission had agreed to retain Mr. Astaphan and it was only afterwards that Commission member Mrs. Theodore John was approach by counsel for the claimant that she took objection to his representation. Incidentally, the first defendant submits that the 'contact' between counsel for the claimant and the Commission member raises potentially serious ethical considerations and possible contraventions of section 45 to 48 of the Code of Ethics of the Legal Profession Act, and in this matter should raise questions as to her credibility.

[38] The first defendant has contended that it is a significant matter[4] that 'counsel was retained by the Commission after the Report was signed and submitted to the Governor General. Prior to this he had no involvement whatsoever. How could any bias of the Commission be raised at this stage when the Commission had completed its Report and was at this stage not performing any functions under section 57 related to the reviewing of Boundaries?

[39] On this point the first defendant has also argued that if a member of the Commission's active political affiliation is without more, insufficient to ground a case of bias, there ought to be no question that counsel's associations, friendships or affiliations, even if true are completely irrelevant. This must be especially the case when counsel is retained after a Report has been submitted to the Governor General. By this time there is no decision of the Commission to be made. This application is therefore without merit. The first defendant has asked that this court dismiss the application and allow it to make an application for costs both against the claimant and his counsel, Mr. Patterson.

[4] In oral submissions supplementing the written submissions

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The Law, Analysis and Findings

The Bases upon which the Court may make an Order of Removal of Counsel

[40] As a starting point, having regard to the issues raised relating to the professional duties of an attorney to his client and the court, I have considered it useful to use this opportunity to set out the common law and statutory bases upon which a court may make an order of removal of counsel as representing any party in proceedings before the court.

[41] A court's power to discipline and exercise supervisory control of officers of the court saw its origins in the English Common law, arising in part from the necessary implied terms of the retainer agreement and in part in the ethical and moral duties of an attorney in relation to his client. Apart from specific rules governing conduct contained in the Code of Conduct found in Schedule 3 of the Legal Profession Act, Chapter 2.04 of the Laws of St. Lucia ('Code of Conduct'), section 42 of the same Act has incorporated into St. Lucia law, the general rules of the common law with respect to discipline and matters related to contempt of court.

[42] The common law cases show that a number of jurisdictions, including the United Kingdom, Australia, New South Wales and Canada have recognized that the relationship between a solicitor and his client gives rise to certain necessary obligations imposed on the solicitor that will exist during the currency of the retainer and that unique obligation which will continue well past the termination of the retainer.

The Duty of Loyalty Owed to the Client

[43] The English cases setting out the common law position, applicable to St. Lucia, have established that during the currency of any retainer agreement, an attorney as a traditional and necessary part of the retainer agreement is under a fiduciary obligation to be loyal to his client. St. Lucia has also incorporated this concept as a requirement of ethical behaviour by Rule 20 of Code of Conduct when it stipulates that an attorney shall always

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act in 'the best interest of his client and represent him or her honestly, competently and zealously and endeavour by all fair and honourable means to obtain for the client every remedy or defence authorized by law.'[5]

[44] This duty requires that an attorney may not place himself in a position where he may owe a conflicting duty with another client or a third party unless the attorney seeks and obtains the informed consent from the client who is owed the duty.[6] The duty of loyalty ends with the termination of the retainer, but during it currency, it provides the court with the jurisdictional basis upon which it may restrain the attorney from acting for another client or from continuing a relationship with a third party. As Lord Millett said in the House of Lords decision in **Prince Jefri Bolkiah v KPMG** [1999] 2 AC 222 at 234-235:

> *"… a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interests. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in this situation."*

[45] By virtue of the common law, it is only the client to whom the duty is owed who may make an application to the court for a restraint order. He must satisfy the court that as a result of the attorney's relationship with another client or a third party, there exists a conflict of interest.[7]

[46] A considerable body of case law from Australia has followed the English position accepting that the duty of loyalty does not survive the termination of the retainer agreement.[8]

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[5] See Rule 20 of the Code of Conduct

[6] See Rule 25 of the Code of Conduct. Rule 25(1) reads: 'An attorney-at-law may represent multiple only if he or she can adequately represent the interests of each and each consents to such representations after full disclosure of the possible effects of multiple representations." Rule 25(2) reads: "In all situations where a possible conflict of interest arises, an attorney at law shall resolve all conflicts by leaning against multiple representation." Speaking of informed consent, Upjohn L.J stated in Boulting v. Association of Cinematograph, Television and Allied Technicians [1963] 2 Q.B. 606, 636, that the client has given informed consent when he is "…of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them." See also Clark Boyce v Mouat [1994] 1 A.C. 428

[7] Note that 'any aggrieved person' may file a complaint under section 37 of the Legal Profession Act to the Disciplinary Committee. It would appear that such complaints may be brought beyond the termination of any retainer agreement in cases where the aggrieved person was the client.

[8] These cases include Beach Petroleum NL v Kennedy [1999] NSWCA 408; (1999) 48 NSWLR 1 at [204]-[205]; Belan v Casey [2002] NSWSC 58 at [21]; PhotoCure ASA v Queen's University at Kingston [2002] FCA 905; (2002) 56 IPR

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[47] There is also however, a significant body of case law from Australia and Victoria which have given scope to the duty of loyalty being prepared to grant restraint orders in favour of even former clients when there is a breach of the duty of loyalty, in cases where the attorney has taken a position which is hostile to former client in the same or related matter.[9] As Burchett J said in **Wan v McDonald** (1991) 33 FCR 491 at 513:

> *"a solicitor's duty of loyalty, … cannot be treated as extinguished by the mere termination of the period of his retainer, and the important consideration of public policy which gives special quality to the relationship of solicitor and client that the law will not generally permit to be stained by the appearance of disloyalty."*

[48] These Australian judges taking this path have reasoned that to allow an attorney to take a hostile position against a former client in the same or a related matter is a breach of the professional duty of loyalty and is 'of itself is likely to undermine the trust and confidence of the community in the legal profession.'[10]

[49] The line of cases that have recognized that the duty of loyalty continued beyond the termination of the retainer, have been criticized but not overruled. In **Ismail-Zai v Western Australia** [2007] WASCA 150, the Court of Appeal of Supreme Court of Western Australia stated that the weight of authority and the preferred position is the English Prince Jefri's principle that the duty of loyalty ends with the termination of the attorney client relationship. In **Ismail-Zai**, the court considered that from a practical standpoint there appears to no clear distinction between giving protection to a continuing duty of loyalty and restraining an attorney on the basis of the court's inherent supervisory jurisdiction to protect the integrity of the judicial process.

The Duty to Maintain the Confidentiality of the Client

86; British American Tobacco Australia Services Ltd v Blanch [2004] NSWSC 70; Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd [2005] NSWSC 550 at [54]-[55]; Kallinicos v Hunt (2005) 64 NSWLR 561 at [76] per Brereton J and A v The Law Society of Tasmania [2001] TASSC 55; (2001) 10 Tas R 152.

[9] See Fordham v Legal Practitioners' Complaints Committee (1997) 18 WAR 467 at 489; See Gugiatti v City of Stirling (2002) 25 WAR 349, 351 where Templeman J adopted the observation of the Victorian Court of Appeal and said: 'In other words, if a [lawyer] adopts a hostile position against a former client in the same or a related matter he should be restrained from acting'. See also McVeigh & Anor v Linen House Pty Ltd & Rugs Galore Australia Pty Ltd & Ors [1999] VSCA 138.

[10] Gugiatti v City of Stirling [2002] WASC 33

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[50] The other jurisdictional basis arising from the common law cases is founded on the attorney's fundamental obligation whether in contract or equity to maintain the confidentiality of all information made available directly or indirectly to him by the client. This principle is equally applicable to St. Lucia and in fact given recognition in Rule 22(2) of the St. Lucia Code of Conduct, breach of which may also give rise to sanctions under the Act.[11]

[51] The 'duty extends to ensuring that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances. This duty protects every person's entitlement to seek and obtain legal advice in the conduct of their affairs without the apprehension of being prejudiced by any later breach of confidence.'[12]

[52] The obligation means that the attorney is not ordinarily at liberty to divulge such information that is imparted to him by his client without the consent or against the wishes of his client.[13] Whether such a duty is grounded in contract or equity, the court have recognized that the attorney's duty to keep the client's confidential information, exists not only in cases where there has been some risk of disclosure to third parties but also in cases where the attorney has accepted a brief to act for another client who has an adverse interest to the client in a matter in which the information may be relevant.[14]

[53] An application to the court that is predicated on the protection of confidential information must be supported by proof that there is 'real risk of the disclosure or misuse of confidential information'. **Bolkiah** made the points that this risk must not be 'fanciful or theoretical' though there is no need to show that this risk is a 'substantial' one.

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[11] The Rule reads: "An attorney-at-law shall scrupulously guard and never divulge his or secrets and confidences." Section 35 of the Act provides that a breach of this provision may amount to professional misconduct.
[12] Prince Jefri Bolkiah [1999] 2 AC 222
[13] Attorney General v Observer Ltd [1990] 1 A.C. 109 the Spycatcher's Case; Prince Albert v Strange (1849) 1 Macnaghten & Gordon 25 41 E.R. 1171 -the Court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right or breach of contract or confidence.
[14] Prince Jefri Bolkiah [1999] 2 AC 222, 235-6 (Lord Millett).

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[54] Applications for the court's intervention to protect confidentiality, may be made by either the present or the former client as the obligation to maintain the confidentiality of the client information survives the termination of the retainer agreement.[15] As Lord Millet explained in **Bolkiah** that:

> *'… it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."*

[55] It has been accepted that there are three stages that need to be considered.[16] First, it 'must be shown that the firm or the attorney is in possession of information which is confidential to the former client.' Second, 'whether that information is, or may be, relevant to a matter in which the attorney is proposing to act for another party with an interest adverse to the former client.' Third, 'whether there is any risk that the information will come into the possession of those persons in the firm working for the other party.'

[56] The burden is on the party seeking the restraint or removal order to satisfy the court of the first two matters, 'the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party.'[17]

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[15] Prince Jefri Bolkiah [1999] 2 AC 222, 236-7 (Lord Millett); Spincode (2001) 4 VR 501, 508 (Brooking JA); Belan v Casey [2002] NSWSC 58 (Unreported, Young CJ in Eq, 4 February 2002) [21]

[16] PhotoCure ASA v Queen's University at Kingston [2002] FCA 905 56 IPR 86; 2002 WL 1613863 Federal Court of Australia

[17] Per Lord Millet in Bolkiah who also stated that: "There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm. In MacDonald Estate v Martin 77 D.L.R. (4th) 249, 269 Sopinka J. said that the court should restrain the firm from acting for the second client 'unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur.' With the substitution of the word 'effective' for the words 'all reasonable' I would respectfully adopt that formulation."

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[57] It is to be noted that some of the cases from Australia have made it clear that there is no reason why a present client could not also seek to restrain an attorney on the basis that there was a need to protect the confidentiality of the information disclosed during the retainer.[18]

Inherent Jurisdiction of the Court

[58] In addition to contractual and ethical obligations to be loyal to his client and to act in his best interest, every attorney who appears in the court in litigation owes the court an overriding duty to render the necessary assistance and to be 'answerable to the court for the conduct of the litigation'[19]; this last being regarded as an essential component of the court's ability to maintain control over the litigation before it.[20] These are the underlying matters which grounds the third basis relating to the court's inherent jurisdiction to supervise its officers to aid in the administration of justice. It is a power that has been recognized in all of the jurisdictions.

[59] In New Zealand, this jurisdiction arises 'where the interests of justice so requires'. Some of the Australian and Canadian cases have approached this jurisdiction on the basis that counsel may be restrained from acting in a matter where the circumstances are such that

[18] Village v BDW [2004] Aust Torts Reports 81-726, 65 338 (Byrne J)

[19] See Myers v Elman [1940] AC 282, where Lord Atkin observed at 302: "If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case."; See also QGC Pty Ltd v Bygrave and Others 186 FCR 376

[20] Note Mason CJ in Giannarelli v Wraith (1988) 165 CLR 543 where the Chief Justice said at 556 - 557: "The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court."

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'there is a risk that justice might not appear to be done'.[21] The jurisdiction has also expressed in terms of the 'public interest in the administration of justice",[22] 'to protect public confidence in the administration of justice" or to achieve the "unqualified perception of its fairness in the eyes of the public."[23]

[60] I accept that the good sense approach of these cases is equally applicable to St. Lucia and here the court has a duty to ensure that lawyers do not conduct themselves in such a manner as to adversely the administration of justice or the appearance of justice. I am prepared to adopt, as a proper approach to be taken, that a court in exercising its inherent jurisdiction to remove an attorney from a matter must approach the matter from the view of the fair-minded and reasonably informed member of the public.' The test has been framed as whether there is a real and appreciable risk that the fair-minded and reasonably informed person would perceive that the 'proper administration of justice requires that the attorney be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice.'[24] In these types of cases, it is an equally viable test for the court to ask whether the fair minded and reasonably informed member of the public may conclude "that the solicitor has acted improperly, in a manner so offensive to common notions of fairness and justice that restraint is warranted, having regard to the solicitor's conduct in its entirety."[25]

[61] As a matter of principle, the cases show that whilst the jurisdiction may be exercised in cases where there has been a breach of a legal or equitable right or ethical duty, it is not dependent that it be shown that there has been such a breach.[26]

[62] Where there is no such breach, there is some feature in the case that would affect either the justice or the appearance of justice **in the case**. Thus it may be properly exercisable in

[21] See D & Construction Pty Ltd. v Head (1987) 9 NSWLR 118; Thevanez v Thevanez (1986) FLC 91-748; Magro v Magro (1989) FLC 92-005; MacDonald Estate v Martin (1991) 77 DLR (4th) 249
[22] See Everingham v Ontario (1992) 88 DLR (4th) 755 cited with approval in 728654 Ontario Inc. (Locomotion Tavern) v. Ontario (Attorney General), 2010 ONSC 1184.
[23] See Everingham v. Ontario reflex, (1992), 8 O.R. (3d) 121 (Gen. Div. [Div. Ct.]), paragraph 27
[24] New South Wales Court in 2005 in Kallinicos v Hunt (2005) 64 NSWLR 561
[25] Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSCA 248
[26] In Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSCA 248

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a case where an attorney has switched side and though there was no allegation of a breach of the duty of confidentiality, the court was satisfied that the attorney had gained knowledge of the former client's personality including his weakness, fears and reactions, all of which would likely be used from that position of unfair superiority in cross examination to discredit the former client.[27]

[63] The jurisdiction has been exercised in cases where the attorney who is the party's advocate in proceedings was likely to be material and controversial witnesses in the proceedings. Some of the cases have stressed that restraint is not automatic on the simple basis that the attorney would likely be a material and controversial witness.[28] Each case must be dependent on its own circumstances; the nature of the evidence and the issue to which it is material will have a direct bearing on the restraint order. [29] In St. Lucia, this issue is addressed by Rule 34(1) of Part A of the Code of Conduct which states that:

> *"An attorney at law should not appear as a witness for his or her own client except as to merely formal matters or where such appearance is essential to the ends of justice."*

[64] The Code of Ethics Rule 34(2) makes it clear that if the attorney at law is a necessary witness for his or her client in matters which are not merely formal matter, 'he or she should entrust the conduct of the case to another attorney at law of his or her client's choice."

[65] The point was made in **Scallan v Scallan**[30] 'that the boundary marking the line where the court should intervene to restrain a solicitor from acting in a matter where he or she may be called to give evidence, separates the case where the mere interest of the solicitor is one that arises simply in supporting the success of his or her client (for example, in connection with advice about discovery or the commencement or continuation or abandonment of proceedings), from the case where the solicitor has an interest in the

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[27] Black v Taylor [1993] 3 NZLR 403

[28] The point was made in Scallan v Scallan [2001] NSWSC 1078 that 'it was not unusual for instructing solicitors in contested probate proceedings to give evidence of facts relevant to instructions for, and execution of a will. Similarly, in contested conveyancing proceedings, it is not unusual for solicitors who acted on the conveyance to continue to act in the proceedings for specific performance or rescission, and to give evidence in those proceedings.

[29] Coppola v Nobile [2012] SASC 42

[30] [2001] NSWSC 1078. A useful examination of some of the cases is to be found in Coppola v Nobile [2012] SASC 42.

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result of an action “additional to his interest in doing his best for a client to have success in an action”. It is the latter case where the court's intervention is required.

[66] In **Mitchell v Burrell & Anor**[31], the court considered there was reason to suppose that the solicitor's conduct may come under attack and review because of potential anomalies between the facts pleaded in the statement of claim and certified by him on the one hand, and the contents of his letter of advice. The court further considered that ‘there was a real chance that the solicitor could be called to give evidence by either the plaintiff or the defendants. He could be subjected to robust cross-examination if called by the plaintiff, or be the subject of an application for leave to cross-examine him as an adverse witness if called by the defendants, if his evidence-in-chief departed from the terms of the letter of advice he had provided to the plaintiff. If he was not called by the plaintiff, the failure to do so could give rise to a *Jones v Dunkel* submission. In the circumstances, his Honour considered that a fair-minded, reasonably informed member of the public would entertain serious reservations as to whether decisions about the conduct of the plaintiff's case would be made exclusively in the interests of the plaintiff, or to a greater or lesser extent, in the interests of her solicitor. In particular, there would be reservations as to whether decisions to call him or not to call him in the plaintiff's case were influenced by his own interests as well as, or in place of, the plaintiff's, and there would be concerns if he were called in the defendants' case as to whether the vigour of any cross-examination of him was influenced by concern for his interests as distinct from those of the plaintiff.’

[67] In this context Brereton J considered that the line is crossed only when the attorney has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involve the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings.

[68] This point was further developed in **Kooky Garments Ltd v Charlton** [1994] 1 NZLR 587 Thomas J making reference to the earlier cases, recognised the distinction between the

[31] [2008] NSWSC 772

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situation where solicitors were, in effect, called on to defend their own actions, or advice, on the one hand - in which case it was inappropriate that they act - and other cases, and continued:

> *"What I have said, of course, does not apply where the advice given is unrelated to liability or the question in dispute. Advising a client to prosecute or defend a claim does not attract these observations. They are restricted to the situation where the acts or omissions of the solicitors are an integral part of the other party's complaint or the client has been sued in circumstances where he or she was acting on the advice of their solicitors and it is effectively that advice which is in issue. In such cases, apart altogether from the position of the client, the Court is not receiving the assistance of counsel who are observably independent. Independence is a function of counsel. The Court is entitled to assume that solicitors and counsel appearing before it possess that independence."*

[69] I have also examined the recent decision from the Supreme Court of South Australia **Viscariello v Legal Profession Conduct Commissioner** [2015] SASC 4. In this case the plaintiff in an interlocutory application sought a restraint order against the Legal Professional Commissioner or his delegate from instructing Mr. Harris QC as counsel and that Mr. Harris not act as counsel for the Commissioner in the matter. In the primary action, the plaintiff was seeking orders compelling the Commissioner to investigate the conduct of certain legal practitioners, including personnel or former personnel of a firm, Minter Ellisson. It was undisputed that Mr. Harris was frequently instructed by the firm of Minter Ellison.' In dismissing the application for the restraint order, Parker J held that 'the fair-minded, reasonably informed member of the public would not conclude that the proper administration of justice requires that Mr. Harris should be prevented from acting in the present matter so as to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice."

[70] The court identified that the crucial issue is what is the 'level of knowledge that is to be attributable to the fair-minded and reasonably informed member of the public'. The court accepted that such a hypothetical bystander could not be reasonable if he did not inform himself of the way in which attorneys work.[32]

[32] See also New South Wales Court of Appeal in S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd.

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[71] The court further stated that the fair-minded person must be taken to know of the ethical principles upon which attorneys work and the high importance attached to those principles by attorneys, and the very courts before which they practice. The point is made by the St. Lucia's professional 'Code of Conduct', that an attorney is required to maintain the high traditions of his or her profession by being a person of high integrity and dignity.[33]

[72] The fair-minded person must therefore be taken to know that whilst an attorney has a right to decline employment[34] once he or she accepts a brief he or she owes the client a duty of fidelity and is to act in the best interests of his or her client. This requires that he or she 'shall defend the interests of his or her client without fear of judicial disfavour or public unpopularity and without regard to unpleasant consequences to himself or herself or to any other person.'

[73] The fair minded person must also be taken to know that the oath of office taken by an attorney when he or she is admitted to practice law is 'not a mere form but is a solemn undertaking to be strictly observed on his or her part.'[35]

[74] Arguments that the attorney in **Viscariello** should be disqualified on the basis that he might have hopes of being given new work by the solicitor who had sent him work in the past were rejected by the court as not amounting to any personal interest in the subject matter of the litigation. The court stated that:

> *"31 The fact that Mr. Harris has been instructed by Minter Ellison in other matters, and might desire to be briefed again, does not provide a basis upon which an independent and properly informed observer might reasonably conclude that he would not act strictly in accordance with his ethical and professional obligations. There is also no reasonable basis for a properly informed observer to conclude that the advice provided by Mr. Harris or how he conducts the defence of the proceedings might be influenced by partiality towards Minter Ellison or persons connected with that firm in the hope of gaining future work.*
>
> *32 There is also absolutely no basis upon which a reasonable observer might conclude that Mr. Harris would not carefully observe his professional duty to*

[33] See Rule 12 of Part A of the Code of Conduct.

[34] See Rule 9 and 17 of Part A of the Code of Conduct – so that there is no need for a cab rank rule to ground an attorney's duty to act in accordance with his oath, contractual obligations and the Code of Professional conduct.

[35] Rule 11 of the Code of Conduct

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maintain the confidence of information entrusted to him.

[75] The court acting on an application to restrain an attorney from acting in a matter in the exercise of its supervisory jurisdiction must have regard to, balance, and give due weight to a number of public policy considerations. These would include on the one hand the public interest concern to maintain the high standards of the profession and the integrity of the justice system and on the other hand the countervailing public interests that (a) a litigant has a right to attorney of his choice, and (b) an attorney has an entitlement to accept employment. A litigant's right to representation of his choice and his and the attorney's freedom to contract should not be interfered with except for good reason.[36]

[76] It is also equally a public interest consideration that the court have due regard to overriding objective to deal with cases justly and therefore efficiently, promptly and with a minimum of costs; to ignore this may easier lead to prejudice to the administration of justice.[37]

[77] It is for these competing public considerations that there is no doubt in my mind that this inherent jurisdiction to restrain an attorney from acting in a matter in which he has accepted a brief is an exceptional one and is 'one that should be exercised with circumspection and caution.[38] If this jurisdiction is to be exercised it must only be so where there is a real and appreciable risk of prejudice to the administration of justice.[39]

[78] The exceptional nature and the caution with which the court should approach the exercise of this jurisdiction becomes even more crucial when the application to remove the attorney is not made by a present or former client, but it is an application by the opposing party in the pending matter who has no personal interest to protect; these being cases in which there is no duty owed to the party seeking the restraining order. Such applications must

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[36] Garde-Wilson v Corrs Chambers Westgarth (2007) 27 VAR 271, 278 (Bell J)

[37] Civil Procedure Rules 2000 Part 1; see also QGC Pty Ltd v Bygrave 186 FCR 376 at paragraph 57. Note Geelong School [2006] FCA 1404 where the court stated at [51] that 'the cost, inconvenience or impracticality of requiring a legal practitioner to cease to act may provide a reason for refusing to grant relief.'; See also Kallinicos v Hunt (2005) 64 NSWLR 561; Black v Taylor [1993] 3 NZLR 403 and Bowen v Stott [2004] WASC 94; QGC Pty Ltd v Bygrave 186 FCR 376

[38] Black at 406 per Cooke P; Mitchell v Pattern Holdings Pty Ltd [2000] NSWSC 1015 at [34] per Bergin J; Kallinicos at [76] Per Brereton J; Geveran Trading Co Ltd v Skjevesland [2003] 1 WLR 912. See also Ismail-Zai at paragraph 35.

[39] Commonwealth Bank of Australia v Jackson McDonald [2014] WASC 301

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not be made lightly and the court must scrutinize them to ensure that in the circumstances of the case there is a real need for the removal of the attorney. The court on these types of applications, which if granted always results in the party being deprived of counsel of his choice and invariably causing him inconvenience (lesser or greater inconvenience depending *inter alia* on the timing of the application) must always take care to ensure that the applicant has satisfied the court that the application is not made simply for a collateral purpose to provide some forensic advantage to the opposing party.[40] To allow 'this would be to detract from rather than advance, the policy which the jurisdiction is to be properly exercised'.[41]

Application of the Law to the Circumstances of this Case

[79] In this application the claimant is not seeking to remove the first defendant's attorney from these proceedings on the basis that some right or obligation owed to the claimant would be breached if the attorney remains on record. Here is one of those rare and exceptional cases in which the opposing party is seeking to remove the attorney of the opposing party on the basis that that attorney would not be able to represent the opposing party properly, and curiously in so doing would be following a 'scripted purpose' aimed against the interests of the claimant.

[80] The complaint rests primarily on the fact that this Commission is required to act in an independent and impartial manner in the performance of its constitutional duties and that if it retains a lawyer who is, as is contended, a political activist and one who has appeared for other political players in the past, and as is contended, even in this case has appeared for the Prime Minister and the Governor General, then such an attorney ought not be allowed to act for the Commission; on the basis that he would not properly represent the Commission or at the very least be perceived by the fair-minded and reasonably informed member of the public that he would not be able to properly represent the Commission.

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[40] Hempseed v Ward [2013] QSC 348; Freeman v Chicago Musical Instrument Co 689 F2d 715 (1982); Bahonko v Nurses Board of Victoria (No 3) [2007] FCA 491; Commonwealth Bank of Australia v Jackson McDonald [2014] WASC 301

[41] Hempseed v Ward [2013] QSC 348

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[81] There was expressed in the application a further basis upon which the Commission should be restrained from retaining or continuing to retain Mr. Astaphan as its counsel. That was a contention that Mr. Astaphan was also appearing as counsel on record for both the Prime Minister and the Governor General. At the first hearing of the Fixed Date Claim, however, Ms. Astaphan only entered an appearance for the Commission. Mr. Bennett Q.C. and Mr. Forde Q.C. together with their own associates appeared for the Prime Minister and the Governor General respectively. Whilst present conflicts of interest with either the Prime Minister or the Governor could not be addressed from the point of view of protecting each of their interests, the application before the court still had that element that the past relationship of the Prime Minister and the Saint Lucia Labour Party had that debilitating influence on Mr. Astaphan's ability to act in the best interests of the Commission or at least there would be that perception by the reasonable observer he could not so act.

[82] The claimant has sought to contend that the fact that Mr. Astaphan effectively appeared for all of the respondents at an earlier stage of these proceedings is crucial to the court's exercise of the inherent jurisdiction in considering whether to grant this restraint order having regard to the status and constitutional obligations imposed on the Commission. In this regard, Mr. Patterson has asked this court to also consider that the lack of independence and impartiality of the Commission when it seen that it was the Attorney General and Mr. Astaphan who decided that Mr. Astaphan would appear for the Commission; this was not a decision of the Commission. Mr. Patterson has also contended that it is also crucial for the court's consideration the 'notorious fact' that Mr. Astaphan is a political activists aligned with the ruling party and opposed to the UWP and has a personal interest which may be perceived as opposed to the Commission. As I understand this last argument, Mr. Patterson must also have intended to say that this 'personal interest' may also be perceived as opposed to his duty to the court.

[83] As they have been raised, I will now consider whether the evidence supports such findings. First I will consider, what role Mr. Astaphan initially played in these proceedings prior to the first hearing of the Fixed Date Claim.

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Senior Counsel Mr. Astaphan's Role in These Proceedings

[84] From the evidence presented to the court by the affidavit of one of the Commissioners Ms. Leonne Theodore-John (6th March 2015), the issue of Mr. Astaphan representing any of the parties in the proceedings manifested itself by an email sent to the Registrar and copied to counsel for the claimant expressly saying that: "I have been asked by the Honourable Attorney General to assist the Honourable Prime Minister and Her Excellency the Governor General in relation to the Without Notice Hearing and the Without Notice Order."

[85] Mr. Astaphan then wrote the following email the same day:

> *"Our position in the meantime is as follows.*
>
> *We agree over the weekend, by Tuesday or Thursday latest, to directions for the expeditious hearing of your client's claim. This will include the filing of the claim and affidavits, our affidavit evidence in reply, and submissions by all parties. We can agree to the abridgement of time for doing these things.*
>
> *If we agree to these directions soonest we will give an undertaking on behalf of her Excellency pending the determination of the claim before the High Court. This will enable us to submit consent directions to His Lordship for the trial of the substantive claim.*
>
> *Kindly let me have your view soonest as time is of the essence."*

[86] The claimant has asked this court to consider a draft consent order sent by Mr. Astaphan to counsel for the claimant containing the following recital:

> *"AND UPON HEARING Mr. Garth Patterson Q.C. appearing in association with Ms. Tammi Pilgrim and Mr. Thomas Theobalds, Attorney at law for the claimant, MR. [ ], attorney at law for the First Defendant, and Mr. Anthony Astaphan S.C. in association with [ ], attorneys at law for the Second and Third Respondent.*

[87] With regard to this recital in the draft order, Mr. Patterson has urged that regardless to what the later 'consent order' contained, it was already clear that Mr. Astaphan had been retained to represent the interests of the second and third named defendants on the substantive matter.

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[88] The claimant has also urged me to consider as an important matter, up until the 24th February 2015, the Commission had not agreed as a body to retain Mr. Astaphan.[42] All of this must therefore be seen as the agreement of the Prime Minister and the Attorney General and Mr. Peter Foster to retain Mr. Astaphan and foist his representation on the Commission. On this point reference was also made to the undisputed matter that Mr. Astaphan's appears on the letterhead of the Chairman's personal law firm as a consultant.

[89] Mr. Patterson also urged me to consider the matters contained in paragraph 11 of the second affidavit of Guy Joseph when he stated:

> *"I am informed by my said attorney, Mr. Patterson, and verily believe that at the hearing on February 27, 2015, in response to Mr. Patterson's query as to whom was representing the Commission, Mr. Astaphan said that that had not been decided, and that as a matter of convenience he would be holding papers for the Commission on that day only. I am further informed and verily believe that Mr. Patterson then told Mr. Astaphan that he was of the view that neither Mr. Astaphan nor Ms. St. Rose could properly act for the Commission, which he insisted should be separately represented."*

[90] On the events of this day at the hearing, Ms. Theodore-John narrated that when Mr. Astaphan said that for the purposes of that day only he would be holding papers for the Commission, the claimant's counsel admonished him… … since the Commission must be independently represented."

[91] The first defendant presented its own narrative of the events leading up to Mr. Astaphan representation of the Commission. First there is the affidavit of Mr. Peter I. Foster Q.C. field the 16th March 2015 where he states at paragraph 99 that

> *"Mr. Astaphan is one of the leading Silks in the OECS. He has been practicing law for over 30 years. He is widely recognized and accepted as a leader in Constitutional and Public Law. He has in recent times appeared in every boundaries case in St. Vincent and the Grenadines, Saint Kitts and Nevis, Dominica and Antigua and Barbuda."*

At paragraph 97(iv) he states that:

[42] Paragraph 41 d. of the affidavit of Ms. Theodore-John

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"I am informed by Mr. Leo Clarke and I verily believe to be true that the Political Leader and the Saint Lucia Labour Party did not consult with Mr. Astaphan."

A bit further along at paragraph 99, Mr. Foster states that:

"Prior to the hearing on Friday the 27th day of February 2015, I spoke with Mr. Astaphan about representing the Commission on the return date for the Without Notice Order. He agreed to do so because he had not been retained for the substantive matter by any party but agreed to act for the Prime Minister and Attorney General only for the purpose of securing directions for an expeditious hearing of the substantive claim on the return date."

[92] In his own affidavit dated the 10th April 2015, Mr. Leo Clarke stated whatever may have been the claimant's understanding of the email correspondence relevant to Mr. Astaphan's representation of the second and third defendants, 'at the hearing on the 27th February 2015 Mr. Astaphan informed Mr. Justice Belle that he had no instructions on the merits of the claim and that he had not been retained by any party for or in relation to the claim.

[93] Mr. Leo Clarke also stated that the chairman has requested Mr. Astaphan's,

'…assistance in securing directions at the hearing before Mr. Justice Belle. Directions were given on the 27th February 2015 and the Commission considers itself bound and have complied with these directions. All members met with the Commission after the directions were given. There was unanimous agreement that Mr. Astaphan represent the Commission. It was a few days after this meeting that Ms. Theodore-John sought to retract her agreement.[43]

And to the conversation between Mr. Patterson and Mr. Astaphan on the 27th February 2015, he stated:

"…the information if given to the claimant by Mr. Garth Patterson Q.C. is misleading. … I was standing close to counsel and other attorney at the bar table prior to Mr. Justice Francis Belle's arrival in the court room. I heard Mr. Patterson speak. I heard him address Ms. Renee St. Rose only. He never admonished Mr. Astaphan or told Mr. Astaphan that he was of the view that Mr. Astaphan should not represent the Commission as alleged or at all.

[94] What do I make of these bits of evidence?

[43] I also note paragraph 104 of the Peter Foster Affidavit which states inter alia that Mrs. Theodore-John also agreed initially that the Commission would retain Mr. Astaphan.

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[95] The matters related to this court by the claimant as occurring on the 27th February 2015, prior to the *inter partes* hearing and the version presented by the first defendant do not help me at all to resolve whether, first, any conversation took place between Mr. Patterson and Mr. Astaphan. None of the parties were cross-examined and I am unable to give credit to one side or the other on this point. I have commented in another matter, that counsel would do well not to set himself up as a witness in proceedings on matters which would be in issue or expected to be in issue. If that is to make any sense, the issue is not avoided if a third party swears an affidavit and repeat what the attorney has said.

[96] That aside however, whether Mr. Patterson may have admonished Mr. Astaphan or not does not really assist me to discover whether Mr. Astaphan did in fact appear for either the second or third defendants as regards the substantive issues at stake in the fixed date claim. The tenor of Mr. Astaphan's email correspondence gives rise to an equally viable inference that he was simply representing the second and third defendants for the purposes of moving the matter forward and for getting directions. The chairman's evidence that he asked Mr. Astaphan to 'assist' on the 27th February 2015, un-contradicted as it is, may also be taken in that light as regards the Commission that Mr. Astaphan had not been retained on the substantive matter.

[97] The crucial bit of un-contradicted evidence however, is what is actually contained on the consent order dated the 27th February 2015, and entered on the 18th March 2015 to the effect that:

> *"AND UPON HEARING Mr. Garth Patterson Q.C. appearing in association with Ms. Tammi Pilgrim and Mr. Thomas Theobalds, Attorneys at law for the claimant and Mr. Anthony Astaphan S.C. in association with Ms. Renee St. Rose and Mr. Leslie Mondesir, Attorneys at Law for the defendants* ***for the purpose of today only."*** [emphasis supplied]

[98] The emphasized portion are the representations that have been given to the court, and I am unable to use any inferences from the correspondence, conversations and alleged admonishments challenged as they are, to disprove the truth of the expressed representations given to the court. A draft order sent on to the other side for approval cannot be taken to disprove what actual representations were made to the court if those

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contradict the terms of the draft; it is an equally viable inference, that this was all part of the discussions ongoing between Mr. Astaphan and the second and third named defendants to settle the issue of representation.

[99] This court is very aware that it is usual part of such public law cases involving multiple defendants that discussions are often ongoing between various attorneys to secure representation in the litigation. It is not infrequent that attorney may act in initial and preliminary stages but may not appear in the substantive matter. I am unable to find as a fact that Mr. Astaphan did in fact accept instructions from the second and third defendants on the substantive issues in the fixed date claim. The evidence as presented does not lead me to conclude that when Mr. Astaphan appeared on the 27th February 2015, it was other than as the consent order states; that he was appearing for all of the defendants for the purpose of the day's proceedings only. In the face of such evidence I am unable to find as a fact that he was instructed in the substantive matter. **This finding of fact cannot be a matter of public perception or suspicion but must be a finding of fact for the court**.

Whether the Attorney General intervened in the Commission's Decision to Retain Mr. Astaphan?

[100] That brings me to consider what is to be made of the Chairman's decision to request Mr. Astaphan to 'assist' the Commission at the *inter partes* hearing, and the discussions between the chairman and the attorney general regarding Mr. Astaphan substantive representation of the Commission.

[101] In this regard I am of the view that the Commission when carrying out its constitutional mandate is required to act as a body and decision-making only requires a majority. Section 57(10) states:

> *10) A Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to*

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participate in those proceedings:

Provided that any decision of the Commission shall require the concurrence of a majority of all its members.

[102] This section is wide enough to include those decisions that do not fall within the remit of its constitutional functions. Even in the absence of such a provision, I would have thought that as a matter of law, however, all decisions of the Commission should be taken in the same manner, that is, at least by a majority of its members. Generally, constitutional, statutory and corporate bodies all have expressed provisions governing their individual method of decision-making. The body must follow these expressed stipulations. The court, however, can hardly disapprove of any decision by the body's chairman or his equivalent taken even contrary to such expressed provisions, which is later ratified in a timely manner by the decision-making quorum. Had this Commission met subsequent to the hearing and decided that Mr. Astaphan would not be retained to represent its interest in these proceedings **and** the decision taken by the Chairman would not be ratified, then there could be a valid complaint against the Chairman taking a unilateral decision to request Mr. Astaphan's assistance at the *inter partes* hearing.

[103] Even if there was some question regarding the Chairman's request of Mr. Astaphan to agree to some reasonable timelines to files various responses to a Fixed Date Claim yet to be filed, and for submissions to be filed, this has now become moot. On an incidental note, a Chairman who takes such decision for urgent reasons would do well not to share confidences or give instructions on substantive matters until he has had the agreement of the decision-making quorum. In this case on the evidence before me, I do not find that the Chairman was asking Mr. Astaphan to do more than this.

[104] This brings me to consider the contention that the Commission was directed or compelled to retain Mr. Astaphan by the Attorney General. It was argued that this was indeed the case, and that this was in breach of section 57(11) of the Constitution which provides that 'In the exercise of its functions under this Constitution a Commission shall not be subject to the direction or control of any other person or authority.'

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[105] In this regard, the claimant has asked this court first to consider the letter written by Mr. Astaphan to the Commission in response to Mrs. Theodore John letter objecting to representation of the Commission. He stated:

> *"I did write the email speaking of the Attorney General etc. However, this email only concerned the return date for the without notice order, it had nothing to do with the trial. In fact the Attorney General and I agreed that the issue of representation would be settled after the directions were agreed, I may have informed you accordingly. But I had to indicate something in my email to the High Court. Subsequently, I was also asked to hold papers for the Commission."*

[106] It was also argued that in any event at the very least, the fact that Mr. Astaphan and the Attorney General had these discussions meant that Mr. Astaphan would have split loyalties.

[107] The respondent argued however that the email correspondence do no more than to show what he had informed the court at the *inter partes* stage on the 27th February 2015, and what is reflected in the court order made that day that he was 'assisting' all the respondents at that stage 'for the purposes of [that day] only'. It was further contended that he was in discussions with the second and third respondents about initially representing them on the substantive matter but had yet to take instructions from anyone on the merit.

[108] It was further contended that no one had directed the Commission to retain Mr. Astaphan; he was well noted for his competence in these types of matters having represented governments and oppositions on these issues throughout the region. The respondent argued that there was nothing wrong with government being involved in discussions regarding the retainer of an attorney at law on matters that were outside the constitutional functions of the Commission. In making the point that there were indeed non-constitutional matters on which the Commission was not totally independent I was asked to note section 57(9) which provides as follows: **"**A Commission may regulate its own procedure, and, with the consent of the Prime Minister, confer powers and impose duties on any public officer or on any authority of the Government for the purpose of the discharge of its functions." The contention here was that ultimately there had to be governmental involvement for decisions to be taken on allocation of financial resources, but that whatever decision was

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taken for the retention of Mr. Astaphan was done by the Commission, initially by all the members until Mrs. Theodore-John had a change of heart.

[109] On this matter I was also asked to consider the affidavit evidence of Mr. Leo Clarke filed on the 23 March 2015. At paragraph 8 he states:

> *"…The Chairman of the Commission requested Mr. Astaphan's assistance in securing directions at the hearing before Mr. Justice Belle. Directions were given by Mr. Justice Belle on the 27th February 2015 and the Commission considers itself bound and have complied with these directions. There was unanimous agreement that Mr. Astaphan represent the Commission. It was a few days after this meeting that Mrs. Theodore-John sought to retract her agreement.*

[110] This Court is unable to find that the email relied on by the claimant[44] meant that the Attorney General and Mr. Astaphan were deciding that Mr. Astaphan would represent the Commission.

[111] At the most, having regard to the nature of the conflicting evidence on the affidavits, it must be taken that Mr. Astaphan would be available, subject to the Commission's decision, to act on behalf of the Commission.

[112] The reality of the situation is that a proper decision regarding any retainer agreement with Mr. Astaphan would not only require the consent of the majority of the Commission but also, as a practical matter, an allocation of resources. The Constitution makes no provision for the allocation of resources for the retainer of any attorney on behalf of the Commission in matters such as this. There is no evidence before this court as to how these funds are to be paid, though it is expected that in the absence of any special provision it would be an expense of the Consolidated Fund by methods authorized whether by an appropriation bill or by payment from the budgetary allocation of some Ministry. It is therefore expected that the Commission would have to make a special request for financial allocation to be made to pay for these legal services. Having regard to the manner in which government works, it would be expected that the Commission or the line Ministry in Government would have to present a Bill to Parliament for approval. It is here that the Ministry of Legal Affairs and by

[44] Exhibited in the Affidavit of Peter Foster and marked 'PIF1'

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extension the Attorney General becomes relevant as someone in government had to move the process forward to pay for 'legal services' for a body performing the 'business of the government'[45]. There could be nothing wrong, for the Commission to be engaged in discussions on the engagement of an attorney. Equally, there could be nothing wrong with suggestions being made by the Attorney General making a suggestion as to the choice of an attorney once the final decision is left to the Commission.

[113] From all the evidence led in this matter, I find that the decision to retain Mr. Astaphan was a decision of the Commission and not of the Attorney General or anyone else.

[114] Before I leave this point, it is necessary for me to add that I did not regard the fact that Mr. Astaphan is a consultant to Mr. Peter Foster's law firm as tainting him in the vigilant eye of the fair minded observer. There is no merit to this contention. Mr. Peter Foster being the Speaker in Parliament and head of the Commission does not *ipso facto* mean that all members of his firm would be unable to represent the Commission on matters outside its Constitutional functions subject to the rule of disclosure. On this basis, and on the basis that it is being suggested that it might be perceived that Mr. Foster has an appearance of political bias, it is difficult to see how the fair minded person could conclude that every attorney simply by being employed with this firm, would be affected by this same bias, and could not properly represent the Commission and fulfill his or her duties to the court. In any event, there is no evidential basis to suggest that Mr. Astaphan is an 'employee' of the firm. He is referred to as a 'consultant'. In general usage this reference would mean that he is not an employee or partner of a firm, but is simply an attorney who consults with the firm on a case-by-case basis; in the usual sense of the term consultant, he is not to be taken as being generally involved in the day-to-day legal work of the firm. It would be a naive conclusion to saddle a consultant with the knowledge of the firm[46] and sympathies of the individual members of the firm. Further, the association between Mr. Astaphan and Mr. Foster created or evidenced by that consultancy cannot be taken to mean that Mr. Astaphan could be perceived as possessing any biases which Mr. Foster could be

[45] On what may be regarded as 'business of the government' see the case of Attorney General of Fiji v Director of Public Prosecutions [1083] 2 A.C. 672

[46] This is hardly relevant as there is no breach of the duty of confidentiality being alleged.

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perceived as having.[47] I can hardly see how this could be seen by anyone other than a non-disqualifying professional relationship.

Political Activist?

[115] I now turn to consider the contention that Mr. Astaphan's long-standing relationship with the Prime Minister and his public statements show that he is a political activist.

[116] Relying on his second affidavit dated the 23rd March 2015, the claimant has contended that Mr. Astaphan has had a long and notorious relationship with the Prime Minister and this shows that he is a political activist for the Saint Lucia Labour Party. He states at paragraph 5 that it is well known that 'he is the personal lawyer for the Prime Minister and has acted in most of the law suits involving the Prime Minister.'

[117] He goes at paragraph 6 to depose that Mr. Astaphan:

> *"…has involved himself in the politics of the country, and has spoken publicly of the Saint Lucia Labour Party. In particular on Monday November 7, 2011, during the last election campaign, Mr. Astaphan appeared on the Labour Party Red Zone TV programme, during which he attacked the policies of the then Stephenson King led United Workers Party Government, and voiced his support for the opposition Saint Lucia Labour Party. He also made other media appearances during that election campaign."*

He also exhibited several newspaper clippings to support these contentions.

[118] He also stated that Mr. Astaphan had been recently retained by the current administration to prosecute in civil court allegations of misfeasance against Mr. Allen Chastenet, the Political Leader of the United Workers Party. Again he relied on a newspaper article to put some context to this allegation.

[119] In oral arguments, Mr. Patterson forcefully argued that the claimant's evidence on this point was not contradicted, and all of this showed that Mr. Astaphan has been a political

[47] see generally Bahonko v Nurses Board of Victoria (No 3) [2007] FCA 491; Mitchell v Burell [2008] NSWSC 772

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activist for the Saint Lucia Labour Party and effectively that he is loyal to the Prime Minister in all relevant matters.

[120] In its evidential response to these allegations, the respondent has relied on the second affidavit of Mr. Clarke dated the 10th April 2015. He states at in his affidavit that:

> *"4. Mr. Anthony W. Astaphan, SC is not a member of the Saint Lucia Labour Party and does not attend Executive or other meetings of the Party.*
>
> *5. I recall Mr. Astaphan appeared on the Red Zone during the last election campaign in which he criticized certain policies of the last Government. He also appeared maybe a couple of times on other media outlets. But I know that Mr. Astaphan did not speak of boundaries and left Saint Lucia long before the campaign ended.*

[121] Mr. Astaphan asked this court to carefully review what the evidence was before the court and he submitted that this could not satisfy this court that he was indeed a political activist as is suggested or that his past affiliation with the Prime Minister and the Saint Lucia Labour Party was part and parcel of him rendering legal services of various legal matters. He argued that as an attorney it was part of his legal obligations in cases where it was merited to speak out on behalf of his client and that that the extent of his various public statements. His public views on matters of interest and his views on his client's positions, including those occasions when he has had to defend his client's position in the public domain, did not make him a political activist.

[122] I have examined the evidence and the newspapers articles. As regards the articles, the first is a copy of a letter published in 'The Voice' on the 10th November 2011. The letter writer, one Oswald Augustin, who describes himself as '1st Vice Chairman', states that the Saint Lucia Labour Party had engaged Mr. Astaphan to 'infect the election campaign with blatant lies calculated to deceive and insult the people of Saint Lucia.' The second is a copy of a news story published in 'The Observer 'dated the 15th November 2011, apparently responding to what was referred to 'public criticisms' over Mr. Astaphan involvement in the campaign.

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[123] There has been no denial that Mr. Astaphan said what was attributed to him though in the second report Mr. Astaphan public statements were defended. What is significantly missing from these articles is the context in which these statements were made and as such I am left with an equivocal impression on whether he went as far as being a political activist as is being urged.

[124] In fact the last article leans to a contrary view. It is a clipping from the Dominica News Online dated 4th February 2104 carrying the headline 'Astaphan says he has a right to be hired by St. Lucian Government.' Its quotes Mr. Astaphan as defending his right to be employed by government from around the region on constitutional matters as he is specialized in this area. It goes on to state that Mr. Astaphan 'brushed aside suggestions that he was only hired because he was a 'friend of the Prime Minister' and noted that there is an element of trust between them.' It also goes on to say that 'Astaphan said that while he believes his rights to freedom of speech he has never been on a SLP Political platform or campaigned for the party. He, however, admitted to being a guest on a few radio programs with SLP officials. 'This does not prejudice my mind or the court', he said."

[125] This denial is contained in one of the exhibits relied on by the claimant. Here is a statement, if this report, like the others can be relied on, that Mr. Astaphan is denying he is a political activist. I note that these articles are dated 2011, and nothing else has been presented to the court. They paint a contradictory picture and I am unable to resolve the contradiction from the standpoint of credibility; this is what conflicting newspapers articles do to the fair-minded reader. From the evidence before this court, **his conduct is equally consistent with that of a professional lawyer representing his client's interest in the public domain**.

[126] Having regard to all of the above, I am unable to find on the evidence presented that Mr. Astaphan was retained to represent any of the parties in the substantive matter until the Commission had decided to retain him. I am unable to find that the Commission was in any way directed or controlled by the Attorney General or any other person when four out of its five Commissioners resolved to retain him. (Having regard to the conflict on the affidavit

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evidence, I am unable to determine whether Mrs. Theodore also agreed that he be retained and then later changed her mind).[48] I am further unable to conclude from the statement that there is a 'long standing relationship between Mr. Astaphan and the Prime Minister and the Chairman', the other evidence led on this issue including the newspapers reports exhibited, that Mr. Astaphan is a political activist.

[127] On the basis of the above analysis, most of this factual contentions called in aid for this application do not exist.

[128] There is no doubt evidence of a relationship between Mr. Astaphan and the Prime Minister and his professional relationship with the present Government. Mr. Patterson is effectively arguing that having regard to what is in the public domain, at the very least it is still a notorious and long-standing relationship between Mr. Astaphan and the Prime Minister and Saint Lucia Labour Party. He argues that even this will be considered by the fair-minded and reasonably informed member of the public as tainting him. I will now turn to address that as the last remaining aspects of this application.

The Fair Minded and Reasonably Informed Person's Perception – Must be Relevant to the Issues Before the Court.

[129] It appears to me that the entire thrust of this challenge was based on the contention that Mr. Astaphan would be perceived by fair mind and reasonably informed man in Constitution Park in Castries, as following the agenda of the Prime and the Labour Party and compromising its independence. The claimant in his first written submission expressed it this way:

> *"His bias in favour of the Prime Minister and the Saint Lucia Labour Party is very apparent, and having regard to the Constitutional remit of the Commission, and the very sensitive political issues at stake, it would be unsafe for the Commission to be represented by Mr. Astaphan because of the real danger of the possibility that he would be perceived by the public as pursuing an agenda scripted by the Prime Minister and the Saint Lucia Labour Party."*

[48] See generally *Prince Jeffri Bolkhiah v KPMG (a firm)* [1999] 1 All ER 517 on the burden of proof.

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[130] In his supplemental submissions, the claimant expressed it this way:

> *"The claimant has, on reasonable grounds, challenged the report, and the public interest and the administration of justice requires an unqualified perception of the fairness in the eyes of the general public. Having regard to the Prime Minister's close (and arguably incestuous) relationship with Mr. Astaphan, and Mr. Astaphan's notorious and well publicized association with the Saint Lucia Labour Party and hostility towards the United Workers Party, a fair-minded and reasonably informed member of the public would conclude that the proper administration of justice required the removal of Mr. Astaphan as counsel for the Commission. It is impossible to suggest that justice will be seen to be done when a significant cross section of the populace representing the committed supporters of the United Workers Party, would entertain significant apprehension about Mr. Astaphan's ability to advise the Commission in an objective and impartial manner, free from partisan influences."*

[131] In fact in oral arguments, Mr. Patterson continued in this vein when he said that whilst a litigant is generally free to choose any attorney it wishes this is not so '*in the context of a Commission established by the Constitution, whose mandate is to act in an impartial manner and must be seen as acting so at all times, not only in relation to the preparation of the Report, but throughout its entire tenure, it must act in this way, because it performs a vital constitutional role in the electoral process, and the significance of that role would be undermined by any suspicion or appearance that it is in any way compromised from …the standpoint of impartiality."*

[132] With respect, I consider that on principle even on the evidence of the 'notorious and well publicized association' as presented by the evidence led before this court, this application was misconceived for the following reasons.

[133] The challenge on the underlying claim relates to the Report of the Commission dated December 2014. In that Report the Commission has made recommendations to increase the number of constituencies from seventeen (17) to twenty one (21); recommendations have been made for the delineation of new boundaries. There has been no dispute that this Report has been laid before Parliament that has resolved to approve of the recommendations. All that is left to be done for the number of constituencies to be increased from seventeen (17) to twenty one (21) is for the Governor General to act on Parliament's Resolution.

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[134] As it is expressed in the claim, the challenge is grounded in two contentions. The first is that the Commission failed to act in an independent and impartial manner as is required by Section 58 of the Constitution in performing its functions to review the existing constituencies and existing boundaries and make recommendations. The second is that in preparing its Report, the Commission failed to, or to adequately consult all the relevant stakeholders.

[135] It is not disputed that **Mr. Astaphan played no part prior to the Report** being submitted to Parliament and Parliament resolving to accept it without modification. There is therefore no issue at all that a possibly biased Mr. Astaphan may be perceived as having influenced the Commission in any way in performing their functions under section 58 leading up to the Report. Mr. Patterson, however, has submitted that whilst Mr. Astaphan could not regarded as being perceived by the fair minded and reasonably informed person as having actually influenced the Commission, such a person could reasonably concluded that his presence even at this stage could affect the administration of justice as he could influence what positions the Commission may take in responding to this claim.

[136] In this regard Mr. Patterson even took the hypothetical, and in a startling and overreaching comment, he suggested that it might be possible that a completely impartial attorney might even concede the allegation being made against it and advise the Commission to agree that the Report was prepared in an unconstitutional manner. (Would that be in the best interests of the Commission having regard to its decision to defend the Report?) This would be a rather amazing reason for a court to remove any attorney from any matter and in particular this type of matter; that counsel on the opposite side is suggesting a possibility that new counsel may suggest that defending the Report is without merit. This sounds very close to a hope for a forensic advantage by the success on this application. **It was surely not a suggestion that Mr. Astaphan would be perceived as acting against the best interest of the Commission, only that he might be following his perceived scripted agenda with the effect of being opposed to the claimant. Whether Mr. Astaphan is opposed to the claimant is irrelevant to this application.**

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[137] It also appears that by this application the claimant seems to be expanding the scope of his challenge on the Fixed Date Claim to one that requires the court to rule on the validity of actions taken by the Commission outside its Constitutional functions. If the application is without merit, all that is left is another forensic advantage - namely the making a significant point that the Commission has in fact had its independence compromised. Surely this court is not being required to tell this Commission how to act in all matters?

[138] In my view, in this case, the test is not whether supporters of one political party would entertain a significant apprehension about an attorney's ability to represent the Commission's interests. In these types of political matters the court must be careful not to be improperly swayed by the sentiment of any cross section of the public where such a sentiments are more founded on political support than on sound principles of law and an application of those principles to the facts as found by the court in any given case. At the end of the day, it is for the court to make these difficult decisions in political matters which one or way or another, and without a doubt, appear inevitably these days likely to receive the disapproval of those supporting the losing side.

[139] The test is whether there could a perception held by the **fair-minded and reasonably informed person** that he would be **unable to act his professional best** in representing the **Commission *best interests*** in defending its Report and **render the proper assistance to the court** within his competence with regard to the **issues before the court**. This Commission has by a majority vote adopted this Report. The Commission now has no Constitutional authority to recall its Report. Whether the Commission's interest (and this must be taken to be the interest of the majority who voted for the adoption of the Report) may coincide with a third party, the Prime Minister or the ruling party, and opposed to the claimant in this case is not the overriding consideration for the determination of this issue. Mr. Astaphan has no duty to the claimant; he could be as opposed to the claimant as his client instructs and the rules of legal professional conduct allow him to be.[49] Further,

[49] As EM Heenan J stated in Holborow v Macdonald Rudder [2002] WASC 265, at [30]: "The duty of the legal practitioner is not to his client's opponent and he is not answerable to his client's opponent. His duty is to the court and he is certainly answerable to the court and to his or her professional and disciplinary bodies."

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whether Mr. Astaphan is keen on supporting the Commission's Report (and therefore representing his client's interest) because he also hopes to get more work from the ruling administration is not a reason to remove him as he would neither on this basis be perceived by the fair-minded person as failing to represent his client's interest nor in failing to render the necessary assistance to the court.[50]

[140] When the fair minded and reasonably informed member of the public considers any long standing relationship between Mr. Astaphan and the Prime Minister and the Saint Lucia Labour Party and the lawyer client relationship now existing between him and government in certain matters, he or she, the fair minded observer must be taken to know that the Commission's decision must be given due weight. He or she must also be taken to know that Mr. Astaphan has the right to accept employment, no less when it is in his field of specialization. This reasonable observer must also be taken to know that an attorney is expected to always act in the best interests of his or her client, and of the ethical rules governing every attorney's practice and the high importance attached to these standards by attorneys and the courts. The fair-minded observer must be taken to know that an attorney is aware that he or she shall not act in any manner in which his professional duties and personal interests conflict or are likely to conflict unless he or she has the specific approval of his or her client given after full disclosure and that if he or she does so he or she commits an act of misconduct punishable under the Legal Profession Act.[51]

[141] The fair-minded observer must be taken to know that the professional duties of an attorney require him or her to maintain his or her general independence and distance from his or her clients. The fair-minded observer must also be taken to know that the attorney must always be ready, where it is appropriate and proper for him or her to do so, to disagree with those who might be his or her closest professional or personal friends, and even to agree with arguments from colleagues for whom he or she has very little respect, and

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[50] See Viscariello v Legal Profession Conduct Commissioner [2015] SASC 4 discussed above.

[51] See Rule 14(1) of Part B of the Code of Conduct. Rule 14(2) states: "An attorney at law shall not accept or continue his or her retainer or employment on behalf of 2 or more clients if their interests are likely to conflict or if his or her independent judgment is likely to be impaired."

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further to take justifiable legal positions as instructed even though he or she may personally hold a contrary view.[52]

[142] On a separate and important point, in the exercise of this jurisdiction, the court is concerned with ensuring that public perception of the administration of justice is not undermined as **regards the particular issues before the court** and not in relation to all extraneous issues which may be raised in relation to any of the party's general conduct of public law functions outside of the court matter. **The fair-minded and reasonably informed member of the public must be taken to know what are the issues before the court, which in this case is a challenge to the Report of the Commission** – the Constitutional function which was completed before Mr. Astaphan came on the scene.

[143] I have considerable difficulty in seeing how Mr. Astaphan could be perceived by the fair-minded and reasonably informed person as failing to give the Commission proper advise or by affecting the impartiality or independence of the Commission in the performance of its Constitutional functions under section 58 of the Constitution when we are well past the Constitutional functions of the Commission. On the Fixed Date Claim, there is no challenge that the Commission is employing a biased attorney **and one** who will interfere with the work of the Commission outside its Constitutional functions. It is even arguable whether a cause of action could at all arise where such questions are in issue.

[144] In this regard, once the administration of justice as regards the case before the court is not affected, the court is not concerned with telling any person or statutory or Constitutional body who they employ for the conduct of their business or representations before a court on any matter. That is a matter for that person or authority in his or its own respective and individual judgment. The fair-minded observer must be taken to be able to separate these two things.

[52] See Aronson and Groves in Judicial Review of Administrative Act (5th ed., 2013) at [9.90] where the learned authors were speaking in the context of disqualification of judges based on past work as a barrister.

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[145] During the course of legal arguments, Mr. Astaphan made the salient point that if attorneys were to be restrained from acting for government simply on the basis of being familiar with current Attorneys General or any given Prime Minister from across the region, there may hardly be a regional attorney who could stand before a court to defend a government. I am of the view that the fact that an attorney has appeared for a government and a Prime Minister in the past or at present, in unrelated matters cannot be elevated to a factual finding that he or she is biased or that there could be an apprehension of bias in favour of that government or Prime Minister.[53]

[146] Further, and significantly there has been no suggestion really that Mr. Astaphan would be perceived by anyone as being unable to properly assist the court in his duties as an officer of the court. From the affidavit of Mr. Foster, it is clear that the Commission was well aware of Mr. Astaphan's status, character as well as his experience in constitutional, and in particular, cases involving the work of boundaries commissions. They would well be aware of his public perception, and possibly his varying popularity rating. Based on the decision that the majority of the Commissioners have taken, he would be high on the list of suitable attorneys in this region to defend the Commission on this Report. In fact, I would venture that with his experience in these types of matters, the perception of the fair-minded and reasonably informed person would no doubt be that his involvement as representing the Commission together with that of eminent counsel for all parties would likely inure to the development of sound jurisprudence. I could hardly see how the administration of justice would not be properly served by his presence.

[147] This is a discretionary jurisdiction. It is no light matter that an attorney is to be restrained from acting for a client. When these applications are brought by the opposite party with no

[53] Speaking to the issue of disqualification by association, one court in Australia stated: "For so long as judicial appointment in Australia is made primarily from the senior ranks of the legal profession the circumstances of an appearance before a judicial appointee of a fellow member of, for example the Bar, who is a longstanding friend, possibly from the same Chambers, sharing in some common long-term investments with continuing financial obligations in respect of those investments, will be far from unusual."
"That is not to suggest that that fact is critical to the issue of whether disqualification should occur — it is not. However it does demonstrate the importance of establishing with precision and clarity the underlying principles which should govern disqualification by association as well as the rationale for them." See Aussie Airlines Pty Limited v Australian Airlines Pty Ltd 65 FCR 215 135 ALR 753. This case made the point that the adjudicator will have a duty to disclose of any such facts that might give rise to an apprehension of bias.

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interest to serve, the court has to exercise this exceptional discretion with circumspection and caution. This Court, wearing the mantle of the fair-minded and reasonably informed observer, cannot see how, insofar as the issues in the matter before the court are concerned, that there could be any perception that there is a real and appreciable risk that the administration of justice would be adversely affected. The law, the courts and its officers could easily fall into disrepute if the courts were to readily accede to such application without there being a proper basis; 'there must be a realistic sense of impropriety about the circumstances; something that sensibly justifies the conclusion that unless an injunction were granted, the integrity of the judicial process would be impaired.'[54]

[148] I believe that Steytler J in **Newman v Phillips Fox**[55] made an appropriate and relevant comment well worth repeating here. He said:

> *"Judges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the publics respect. The opposite effects are just as likely – encouragement of vexatious tactics and increased cynicism by the public."*

[149] For all the reasons given above, this application is dismissed. I will hear the parties on the issue of costs.

[150] I am as usual grateful for all the assistance rendered to the court.

……………………………………
Darshan Ramdhani
High Court Judge (Ag.)

[54] Pembroke J in Westpac Banking Corporation v Newey [2013] NSWSC 533 at [22]
[55] (1999) WASC 171 at paragraph 45

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