EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0013

BETWEEN:

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

Appellant

and

[1] THE CONSTITUENCY BOUNDARIES COMMISSION
[2] THE HONOURABLE PRIME MINISTER
[3] THE ATTORNEY GENERAL (acting in her capacity as the (legal representative of Her Excellency, the Governor General)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Garth Patterson, QC, Ms. Tammi Pilgrim and Mr. Thomas Theobalds for the Appellant
Mr. Anthony Astaphan, SC for the First Respondent
Mr. Sydney Bennett, QC and Mr. Leslie Mondesir, instructed by the Attorney General's Chambers for the Second Respondent
Mr. Roger Forde, QC and Mr. Dwight Lay for the Third Respondent

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2015: June 24;
2016: April 6.

Interlocutory appeal – Constituency boundaries – Recommendations made by first respondent affecting boundaries of various constituencies including constituency represented by appellant – Counsel's professional duty to court and client – Inherent jurisdiction of court to restrain counsel from representing litigant – Application by appellant for order restraining first respondent from continuing to retain particular counsel – Whether there was any conflict with duty of said counsel to advise first respondent independently, impartially and objectively – Appellant's application for order dismissed by learned judge – Whether learned judge erred in exercise of his discretion

The appellant is a member of the House of Assembly. The first respondent, the Constituency Boundaries Commission ("the Commission"), is established under section 57 of the Constitution of Saint Lucia ("the Constitution") and comprises the Speaker of the House of Assembly (as Chairman), two members appointed by the Governor General acting in accordance with the advice of the Prime Minister and two members appointed by the Governor General acting in accordance with the advice of the Leader of the Opposition. Pursuant to section 58 of the Constitution, the Commission prepared a report in relation to the electoral boundaries of Saint Lucia ("the Report") which recommended an increase in the number of constituencies from 17 to 21 and also made changes to the boundaries of some constituencies. One of the constituencies affected by the Report was the Castries South East Constituency, which is represented by the appellant. On 10th February 2015, the draft order of the Governor General to give effect to the recommendations of the Report was laid in the House of Assembly by the Prime Minister. It was approved by the members of the House of Assembly.

On 17th February 2015, the appellant made a without notice application and obtained an order restraining the Governor General from issuing a proclamation to give effect to the recommendations contained in the Report. On 20th February 2015, counsel Mr. Astaphan, SC sent an email to the Registrar of the High Court copied to counsel for the appellant, stating that he had been asked by the Attorney General to assist the Prime Minister and the Governor General in relation to the without notice application and the order of the court which set the return date as 27th February 2015.

On 24th February 2015, the Chairman of the Commission, by email, advised the members of the Commission that, in view of the urgency of the matter, he had requested that Mr. Astaphan, SC represent the Commission at the hearing of 27th February 2015.

On 26th February 2015, the appellant instituted legal proceedings in the court below in which he challenged the legality of the Report on two main grounds: (i) the Commission, in preparing its report in accordance with section 58 of the Constitution, did not act independently and was improperly influenced by the ruling Saint Lucia Labour Party ("SLP"), of which the Prime Minister is the leader; and (ii) the Commission had failed to

consult or properly consult while exercising its functions under section 58 of the Constitution.

A consent order dated 27th February 2015 was prepared by the parties for the expedited hearing of the underlying claim. This consent order stated that Mr. Astaphan, SC had appeared for all of the respondents 'for the purposes of today only'. Subsequently, one of the Commission members appointed on the advice of the Leader of the Opposition, wrote to the Chairman objecting to Mr. Astaphan, SC representing the Commission on the basis that he was on record as representing the Prime Minister and Governor General and also that he had a close relationship with the Prime Minister and the Chairman of the Commission.

On 6th March 2015, the appellant applied for an order restraining the Commission from continuing to retain Mr. Astaphan, SC to represent it in the underlying claim, and an order that the Commission be independently represented by counsel who is not connected with any of the political parties or with any of the parties in the underlying claim. The application was made on two bases: (i) there was a conflict because Mr. Astaphan, SC was already on record as representing the Prime Minister and Governor General; and (ii) the appellant contended that Mr. Astaphan, SC had a close and notorious relationship with the Prime Minister and the Chairman of the Commission, and this personal allegiance to the Prime Minister and his professional relationship with the Chairman would conflict with the duty that he owes to the Commission to advise it independently, impartially and objectively.

The learned judge dismissed the application, having found that: (i) the evidence presented by the appellant, along with the consent order did not prove conclusively that Mr. Astaphan, SC was retained to represent any of the parties in the underlying claim prior to the Commission retaining him; (ii) the evidence was insufficient to prove that the Attorney General or any other person directed or influenced the Commission to retain Mr. Astaphan, SC; (iii) the evidence of Mr. Astaphan, SC's long standing relationship with the Prime Minister, the Chairman of the Commission, and newspaper reports, was not sufficient to prove that Mr. Astaphan, SC was a political activist; and (iv) the test was whether a fair-minded and reasonably informed member of the public may perceive that there is a real risk that Mr. Astaphan, SC would fail in his professional duties to the court as regards his representation of the Commission. The learned judge was of the opinion that it could not be perceived by the fair-minded informed member of the public that Mr. Astaphan, SC might be partial to the Prime Minister and/or the SLP and that means that he is opposed to the Commission's interest before the court which was merely to defend the Report it had prepared before Mr. Astaphan, SC was retained by the Commission. The fact that Mr. Astaphan, SC could be opposed to the appellant was not relevant. The learned judge concluded that there could not be any perception that there is a real and appreciable risk

that the administration of justice would be adversely affected if Mr. Astaphan, SC represented the Commission in the underlying claim.

The appellant appealed the learned judge's decision. He contended, inter alia, that that the learned judge ought to have applied a standard of proof that was lower than the balance of probabilities in considering the evidence before him. He argued that when the correct standard of proof is applied, the evidence adduced by the appellant was sufficient to provide an evidentiary basis upon which the court's jurisdiction to restrain Mr. Astaphan, SC from continuing to represent the first respondent, could have been exercised. He also argued that the learned judge had misstated the legal test that was applicable in this matter and accordingly, he erred in making a determination on whether or not Senior Counsel should be restrained from continuing to represent the first respondent. Further, the appellant challenged certain factual findings made by the learned judge as well as the manner in which he had exercised his discretion.

Held: dismissing the appeal and ordering that the appellant pay the Commission its costs in this Court and in the court below, such costs to be assessed if not agreed within 28 days, that:

1. The court always has an inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice. If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service.

   Holborow and Others v MacDonald Rudder [2002] WASC 265 applied; **Kallinicos and Another v Hunt and Others** [2005] NSWSC 1181 applied.

2. The test to be applied in this inherent jurisdiction 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 interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice. The jurisdiction is to be regarded as exceptional and is to be exercised with caution. Due weight should be given to the public interest in a litigant not being deprived of

the lawyer of his or her choice without due cause. The learned judge did apply the correct test in making a determination on whether Mr. Astaphan, SC was suitable to represent the Commission. There was no material difference between the test as outlined by the learned judge in his judgment, and that set out in the case of Kallinicos v Hunt and adopted in Viscariello v Legal Profession Conduct Commissioner.

Kallinicos and Another v Hunt and Others [2005] NSWSC 1181 applied.

3. The learned judge applied the correct standard of proof – the civil standard of proof – in considering the evidence in the case. The jurisdiction of the court to restrain an attorney from representing a litigant is an exceptional one and ought to be exercised with caution. Compelling evidence would be required for the court to make a determination that the counsel should be restrained from continuing to represent his client. Accordingly, the application of a lower standard of proof would not have been proper.

   Dechant v Coulter 2000 ABCA 86 distinguished; **Kallinicos and Another v Hunt and Others** [2005] NSWSC 1181 applied; **Black v Taylor** [1993] 3 NZLR 403 applied.

4. The learned judge's findings of fact and his exercise of discretion cannot be faulted. The learned judge identified the correct applicable principles and in applying those principles he did not misdirect himself. He took into account all relevant matters. He attributed the relevant knowledge to the fair-minded and reasonably informed member of the public and, having adequately assessed the evidence, concluded that there was no basis to exercise the discretion to restrain the Commission from continuing to retain Mr. Astaphan, SC from representing it in the underlying claim. There is no basis to interfere with his findings.

   Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 cited.

JUDGMENT

[1] **THOM JA:** This is an appeal against the order of the learned judge wherein he dismissed the appellant's application to restrain the first respondent ("the Commission") from continuing to retain Mr. Astaphan, SC as its attorney in proceedings instituted by the appellant.

Background

[2] The Commission is established under section 57 of the **Constitution of Saint Lucia**[1] ("the Constitution"). It comprises the Speaker of the House of Assembly who is the Chairman, two members appointed by the Governor General acting in accordance with the advice of the Prime Minister and two members appointed by the Governor General acting in accordance with the advice of the Leader of the Opposition. Pursuant to section 58 of the Constitution, the Commission prepared a report in relation to the electoral boundaries of Saint Lucia ("the Report"). On 10th February 2015, the draft order of the Governor General to give effect to the recommendations of the Report was laid in the House of Assembly by the Prime Minister. In the Report, the Commission recommended an increase in the number of constituencies from 17 to 21 and made changes to the boundaries of some constituencies. The draft order was approved by the members of the House of Assembly. The appellant is a member of the House of Assembly representing the Castries South East Constituency. This is one of the constituencies that the Commission in its Report recommended changes to its boundaries.

[3] One week later, on 17th February 2015, the appellant applied by way of a without notice application and obtained an order restraining the Governor General from issuing a proclamation to give effect to the recommendations contained in the Report.

[4] On 20th February 2015, Mr. Astaphan, SC sent an email to the Registrar of the High Court and copied to counsel for the appellant stating that he had been asked by the Attorney General to assist the Prime Minister and the Governor General in

[1] Schedule 1 to the Saint Lucia Constitution Order 1978.

relation to the without notice application and the order of the court which set the return date as 27th February 2015.

[5] Between 20th and 27th February 2015, several emails were exchanged between Mr. Astaphan, SC and Mr. Patterson, QC with a view to expediting the hearing of the without notice application.

[6] On 24th February 2015, the Chairman of the Commission, by email, advised the members of the Commission that in view of the urgency of the matter, he had requested Mr. Astaphan, SC to represent the Commission at the hearing of 27th February 2015.

[7] On 26th February 2015, the appellant instituted proceedings (the underlying claim) in which he challenged the legality of the Report on two main grounds. Firstly, that the Commission, in preparing its report in accordance with section 58 of the Constitution, did not act independently and was improperly influenced by the ruling Saint Lucia Labour Party ("SLP") of which the Prime Minister is the leader. Secondly, the Commission had failed to consult or properly consult while exercising its functions under section 58 of the Constitution.

[8] A consent order dated 27th February 2015 was prepared by the parties for the expedited hearing of the underlying claim. The consent order shows that Mr. Astaphan, SC appeared for all of the respondents 'for the purposes of today only'.

[9] On 1st March 2015, Mrs. Theodore-John, one of the members of the Commission appointed on the advice of the Leader of the Opposition, wrote to the Chairman objecting to Mr. Astaphan, SC representing the Commission on the basis that he was on record representing the Prime Minister and the Governor General, and

also he had a close relationship with the Prime Minister and the Chairman of the Commission.

[10] On 6th March 2015, the appellant made an application for an order restraining the Commission from continuing to retain Mr. Astaphan, SC to represent it in the underlying claim, and an order that the Commission be independently represented in the underlying claim by counsel who is not connected with any of the political parties or with any of the parties in the underlying claim. The basis for the application was, firstly, there was a conflict since Mr. Astaphan, SC was already on record as representing the Prime Minister and the Governor General. Secondly, the appellant contends that Mr. Astaphan, SC has a close and notorious relationship with the Prime Minister and the Chairman of the Commission, and this personal allegiance to the Prime Minister and his professional relationship with the Chairman would conflict with the duty that he owes to the Commission to advise it independently, impartially and objectively.

Findings in the Court below

[11] The learned judge having heard the application dismissed it. In so doing he found that: (i) the evidence presented by the appellant along with the consent order did not prove conclusively that Mr. Astaphan, SC was retained to represent any of the parties in the underlying claim prior to the Commission retaining him; (ii) the evidence was insufficient to prove that the Attorney General or any other person directed or influenced the Commission to retain Mr. Astaphan, SC; (iii) the evidence of Mr. Astaphan, SC's long standing relationship with the Prime Minister, the Chairman of the Commission, and newspaper reports, one of which contained a quote from the Prime Minister describing Mr. Astaphan, SC as 'political dynamite', was not sufficient to prove that Mr. Astaphan, SC was a political activist; and (iv) the test was whether a fair-minded and reasonably informed

member of the public may perceive that there is a real risk that Mr. Astaphan, SC would fail in his professional duties to the court as regards his representation of the Commission. The judge was of the opinion that it could not be perceived by the fair-minded informed member of the public that Mr. Astaphan, SC might be partial to the Prime Minister and/or the SLP and that means that he is opposed to the Commission's interest before the court which was merely to defend the Report it had prepared before Mr. Astaphan, SC was retained by the Commission. The fact that Mr. Astaphan, SC could be opposed to the appellant was not relevant. The learned judge concluded that there could not be any perception that there is a real and appreciable risk that the administration of justice would be adversely affected if Mr. Astaphan, SC represented the Commission in the underlying claim.

Issues on Appeal

[12] The appellant, being dissatisfied with the findings of the learned judge, filed several grounds of appeal. The central issue is whether the learned judge erred in the exercise of his discretion. The grounds could be summarised as follows:

(1) the learned judge's findings of fact, including his finding that Mr. Astaphan, SC was not a political activist and that the appellant was seeking a forensic advantage, was against the weight of the evidence;

(2) the learned judge erred in law and misdirected himself in finding that the appellant had not established the legal and factual basis for the exercise of the court's inherent jurisdiction to restrain Mr. Astaphan, SC from continuing to represent the Commission;

(3) the learned judge erred and misdirected himself in finding that the fair-minded and reasonably informed member of the public would not conclude that the proper administration of justice required the removal of

Mr. Astaphan, SC as counsel for the Commission having regard to all of the circumstances of this case.

[13] The principles applicable to this appeal are well established and are not disputed by either party. It is common ground that the court has an inherent jurisdiction to restrain an attorney from representing a litigant in order to protect the interest of the administration of justice. Attorneys have a dual duty. They have a duty to their client and a duty to the court. This duty of the attorney has been expressed by Mason CJ in **Giannarelli v Wraith**[2] as follows:

> "The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground of appeal.
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> "It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. 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 epitomises 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, and deciding what question 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

[2] (1988) 165 CLR 543.

> 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."[3]

[14] The court has an inherent jurisdiction to protect the integrity of its processes and the administration of justice from the breach of this duty by attorneys. In the exercise of this jurisdiction the court may restrain an attorney from appearing for a client in a matter. In **Holborow and Others v MacDonald Rudder**,[4] Heenan J, having referred to the above statement of Mason CJ, stated:

> "If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service … ."[5]

[15] This jurisdiction and the principles applicable in the exercise of this jurisdiction have been stated in several cases such as **Kooky Garments Limited v Charlton**; [6] **Viscariello v Legal Profession Conduct Commissioner**.[7] These principles were succinctly summarised by Brereton J in **Kallinicos and Another v Hunt and Others**[8] as follows:

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[3] At p. 556.
[4] [2002] WASC 265.
[5] At para. 28.
[6] [1994] 1 NZLR 587.
[7] [2015] SASC 4.
[8] [2005] NSWSC 1181.

"● [T]he court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice [*Everingham v Ontario*; *Black v Taylor*; …]. …

● The test to be applied in this inherent jurisdiction 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 interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice [*Everingham v Ontario*; *Black v Taylor*; *Grimwade v Meagher*; *Holborow*; *Bowen v Stott*; *Asia Pacific Telecommunications*].

● The jurisdiction is to be regarded as exceptional and is to be exercised with caution [*Black v Taylor*; *Grimwade v Meagher*; *Bowen v Stott*].

● Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause [*Black v Taylor*; *Grimwade v Meagher*; *Willamson v Nilant; Bowen v Stott*].

● The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief [*Black v Taylor*; *Bowen v Stott*]."[9]

[16] This inherent jurisdiction enables the court to preserve public confidence in the judicial system. In the exercise of this jurisdiction it is the duty of the court to ensure not only that justice is done but as is often said that justice should be manifestly and undoubtedly be seen to be done. As the Ontario Full Court of Canada puts it in **Everingham v Ontario**:[10] 'The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public'.

[9] At para. 76.
[10] (1992) 88 DLR (4th) 755.

[17] This inherent jurisdiction is discretionary. The learned judge having exercised his discretion, it is settled law that an appellate court will not interfere with the exercise of a judge's discretion unless it is satisfied that the learned judge erred in principle or he/she has omitted to take into account some matters that he/she should have taken into account or took into account matters which he/she should not have considered and as a result exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. An appellate court is not to substitute its own discretion in place of the discretion already exercised by the judge merely because they would have exercised the original discretion differently. The onus is therefore on the appellant to show that the learned judge erred in the exercise of his discretion.

Issue No. 1: Findings of Fact

[18] Mr. Patterson, QC contends that the learned judge applied the incorrect standard of proof in considering the evidence and his findings that Mr. Astaphan, SC was: (i) not retained to represent the Prime Minister and the Governor General in the underlying claim prior to his being retained by the Commission; (ii) appointed by the Commission and not on the instruction of the Attorney General; and (iii) not a political activist; and (iv) that the appellant was seeking a forensic advantage; were erroneous as they were contrary to the evidence.

[19] The findings challenged being findings of fact, it is a well settled principle that an appellate court would be very reluctant to interfere with the findings of the judge unless the judge was plainly wrong. This principle has been stated in a number of decisions of the Privy Council and the UK Supreme Court and has recently been summarised by Baptiste JA in the case of **Margaret Blackburn v James A.L. Bristol**.[11]

[11] GDAHCVAP2012/0019 (delivered 12th October 2015, unreported).

Standard of Proof

[20] Learned Queen's Counsel contends that the application being an interlocutory application for an injunction, the relevant standard of proof was either a prima facie case, an arguable case or a serious issue to be tried, which are all lower than the civil standard of balance of probabilities which was applied by the learned judge. This approach led to the finding of facts and the inferences drawn from them being erroneous. Learned Queen's Counsel relied on the decision of the Alberta Court of Appeal (Canada) in **Dechant v Coulter**.[12] Learned counsel argues that when the correct standard of proof is applied, the evidence adduced by the appellant was sufficient to provide an evidentiary basis upon which the court's jurisdiction could have been exercised.

[21] Learned Senior Counsel for the Commission submitted in response that the learned judge had to make findings of fact and the appropriate standard was the balance of probabilities. In order for the court to make a finding that counsel infected the Commission and therefore infected the administration of justice requires compelling evidence: see **Kallinicos v Hunt** and **Black v Taylor**.[13]

[22] The case of **Dechant v Coulter** relied on by the appellant does not assist his case. In **Dechant**, the issue was whether a stay should be granted of the order of the judge where he stated that counsel ought not to represent a certain party, as that counsel and the party were joined as defendants in another action. The court stated that the test was tripartite: 'First is whether there is a serious issue to be argued. Secondly, whether there is irreparable harm if the application is not granted and thirdly, the balance of convenience.' The court granted the stay having found that all three aspects of the test were met. There was a serious

[12] 2000 ABCA 86.
[13] [1993] 3 NZLR 403.

issue to be tried, that being whether counsel who is also joined with a party in another action can represent the party. The harm would be irreparable since the damage would be to the administration of justice which cannot be compensated in damages and that the balance of convenience favoured a stay. In this instance, the relief sought by the appellant is not interim in nature, if granted it would effectively prevent counsel from appearing for the Commission in the underlying claim. Seeking a declaration was an alternative approach open to the appellant. The standard of proof is not dependent on the procedure adopted by the applicant. The authorities have all stated that the jurisdiction is an exceptional one and must be exercised with caution. I agree with the submission of the Commission that the evidence must be compelling. The learned judge applied the correct standard of proof being the civil standard of proof.

Representation of the Prime Minister and the Governor General

[23] Learned Queen's Counsel contends that the finding of the learned judge that Mr. Astaphan, SC was not retained to represent the Prime Minister and the Governor General prior to his retention by the Commission was inconsistent with the evidence of the email correspondence between Mr. Astaphan, SC and counsel for the appellant between 20th-27th February 2015. The appellant argues that the purport of those emails was that Mr. Astaphan, SC was negotiating the terms of the consent order to be made at the first hearing of the fixed date claim to be filed by the appellant. The appellant noted that the email did not indicate there was any instruction from the Chairman of the Commission for Mr. Astaphan, SC to act on behalf of the Commission although the email was copied to the Chairman. The evidence contained in the emails is consistent with evidence of the appellant and the statement of Mr. Astaphan, SC at the hearing on the return date where he stated that he was holding papers for the Commission for the purpose of the morning hearing only at which time a consent order was entered. Learned

Queen's Counsel argues that when the evidence is considered as a whole, it does not show that Mr. Astaphan, SC's instructions from the Attorney General were limited to arranging for consent directions. It was only consistent with Mr. Astaphan, SC taking steps preparatory to representing the Prime Minister and the Attorney General on the substantive claim. It also shows that up to the morning of the hearing of the application Mr. Astaphan, SC was appearing as counsel for the Prime Minister and the Attorney General and no counsel had been identified to appear for the Commission. In accepting instructions to represent the Commission, Mr. Astaphan, SC switched sides and the learned judge should have so found.

[24] The Commission, in response, submitted that the appellant in his submissions did not indicate in what manner the learned judge erred in the assessment of the evidence. The emails, when read in their entirety, together with the consent order made by Justice Belle, support the Commission's contention that Mr. Astaphan, SC was retained for the limited purpose to represent the Prime Minister and the Governor General at the return date of the without notice application. At that time the parties were not dealing with any issue of merit. There is no evidence of any written instruction given to Mr. Astaphan, SC on behalf of the Prime Minister and the Governor General in relation to the underlying claim.

[25] The evidence on which the learned judge had to determine this issue were emails between Mr. Patterson, QC and Mr. Astaphan, SC, a draft consent order prepared by Mr. Astaphan, SC, the consent order entered by Justice Belle and the affidavit evidence of the appellant and Mrs. Theodore-John on the one hand and Mr. Leo Clarke and the Chairman of the Commission on the other hand. The critical emails are two emails sent by Mr. Astaphan, SC on 20th February 2015. The first

email was sent to the Registrar and copied to counsel for the appellant, the Attorney General and the Chairman. The material part reads:

> "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 hearing and without notice Order …"

[26] The second email was sent to counsel for the appellant and reads:

> "Our position in the meantime is as follows.
>
> We agree over the weekend, by Tuesday or Wednesday 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 the 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 views soonest as time is of the essence."

[27] This email was followed by a draft consent order sent by Mr. Astaphan, SC in which he stated he was the attorney at law for the Prime Minister and the Governor General. If this were the only evidence before the learned judge there would be some merit in the appellant's submission. However the learned judge also had before him the consent order that was made before Justice Belle, which stated that Mr. Astaphan along with Ms. St. Rose and Mr. Leslie Mondesir were attorneys for the defendants 'for the purposes of today only'. In addition, the learned judge had before him the conflicting statements of the deponents. The appellant deposed that Mr. Patterson, QC had admonished Mr. Astaphan, SC about the need for separate representation for the Commission. Mrs. Theodore-John deposed similarly. The Chairman, on the other hand, deposed

that Mr. Astaphan, SC agreed to represent the Commission on the return date as at that time he was not retained by any party in relation to the substantive matter. It must be noted that none of the deponents were cross-examined. The learned judge, having analysed all of the evidence, concluded at paragraph 99:

> "This court is very aware that it is usual [sic] 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 [an] 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."

[28] The conclusion the learned judge arrived at was one that was open to him on the evidence. It cannot be said that his conclusion was plainly wrong. In **Beacon Insurance Company Limited v Maharaj Bookstore Limited**,[14] Lorde Hodge explained the phrase 'plainly wrong' as follows:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". … This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168 – 169."[15]

[14] [2014] UKPC 21.
[15] At para. 12.

[29] The affidavit evidence was conflicting. None of the deponents were cross-examined. The emails, when read conjointly, were amenable to the interpretation placed on them by the learned judge. Further, the learned judge accepted the very clear wording of the consent order of Justice Belle that Mr. Astaphan, SC's appearance was for the return date only. In these circumstances, it cannot be said that the learned judge's finding was plainly wrong. There is therefore no basis for this court to interfere with his finding.

Retention of Mr. Astaphan, SC by the Commission

[30] The appellant contends that the following statement in Mr. Astaphan, SC's email shows that the Attorney General and Mr. Astaphan, SC decided that Mr. Astaphan, SC would represent the Commission: 'In fact the Attorney General and I agreed that the issue of representation would be settled after the directions were agreed. … Subsequently, I was asked to also hold papers for the Commission.'

[31] Learned Queen's Counsel submits that the inference to be drawn from the above is that in retaining Mr. Astaphan, SC, the Commission acted under the direction and control of the Attorney General, the Attorney General and Mr. Astaphan, SC having previously agreed that Mr. Astaphan, SC would represent the Commission. Learned Queen's Counsel submits further that the Commission is not required to take directions or instructions from any person including the Attorney General. Further, section 57(11) of the Constitution does not envisage any intervention by the Attorney General in procuring personnel or financial resources for the Commission.

[32] The Commission, in response, submitted that the appellant applied a strained interpretation to the email. There was no evidence to support the interpretation of

the appellant. More so, the overwhelming evidence of the Chairman, Mr. Leo Clarke and Mr. Eldridge Stephens is that the decision was unanimous until Mrs. Theodore-John changed her position.

[33] I agree with the submission of Mr. Patterson, QC that pursuant to section 57 of the Constitution, it is not the duty of the Attorney General to select counsel to represent the Commission. The real issue, however, is whether the Commission in retaining Mr. Astaphan, SC, was acting under the direction and control of the Attorney General. In addition to Mr. Astaphan, SC's email, the learned judge also had the uncontroverted evidence of Mr. Leo Clarke, Mr. Eldridge Stephens and the Chairman, that the decision was the decision of the Commission. The learned judge found there was nothing wrong with the Attorney General suggesting an individual to the Commission once it is the Commission who makes the decision. Thus, even if the Attorney General and Mr. Astaphan, SC agreed that Mr. Astaphan, SC should represent the Commission, there was no evidence before the learned judge to contradict the evidence of Mr. Clarke, Mr. Stephen and the Chairman, that the decision to retain Mr. Astaphan, SC was the decision of the Commission made at a meeting of the Commission on 5th March 2015. There is no basis on which this Court could interfere with the finding of the learned judge.

Forensic advantage

[34] Learned Queen's Counsel submits that there was no evidential basis for the judge's finding that the appellant was seeking to obtain a forensic advantage or to cause delay. Rather, the appellant agreed to expedite the substantive claim. It was only when Mr. Astaphan, SC changed his representation that the application was made. This submission has no merit since the learned judge made no such finding. The learned judge made two references to forensic advantage at

paragraphs 136 and 137 of the judgment. At paragraph 136, in dealing with the submission of Learned Queen's Counsel, the learned judge stated:

> "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."

In paragraph 137, the learned judge stated:

> "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."

When the statements are read in context, in neither situation the learned judge made a finding as alleged by the appellant.

Political Activist

[35] The appellant's submission on this issue is two-fold. He argues firstly that it is a notorious fact that Mr. Astaphan, SC is a political activist and therefore the learned judge should have taken judicial notice of that fact. There was therefore no need for the appellant to lead evidence of that fact. Alternatively, the evidence led by the appellant was sufficient for the learned judge to find that Mr. Astaphan, SC was a political activist.

[36] On the issue of judicial notice, learned Queen's Counsel relied on section 118 of the **Evidence Act**[16] and the following passage from the decision of the Supreme Court of Canada in **Regina v Potts**:[17]

> "Judicial notice, it has been said, is the acceptance by a court or judicial tribunal, without the requirement of proof, of the truth of a particular fact or state of affairs that is of such general or common knowledge in the community that proof of it can be dispensed with. The doctrine is thus said to be an exception to the general rule that a judge or jury may consider only evidence which has been tendered in court and may not act on personal knowledge …
>
> "Thus it has been held that, generally speaking, a court may properly take judicial notice of any fact or matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact or matter which can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.
>
> "As to what constitutes general or 'common' knowledge, the following passage in McWilliams at p. 380, citing G. D. Nokes in "The Limits of Judicial Notice", 74 L.Q.R. 59 (1958) at p. 67, is, I think, instructive:
>
>> 'Judicial notice of matters of fact is founded upon that fund of knowledge and experience which is common to both judges and jurors and is not confined to the Bench. In many cases no reference is made during the trial to this aspect of judicial notice; if the fact is relevant, everyone in court will assume that rain falls, for example; and there is no ascertainable limit to the matters which are thus silently noticed by both judge and jury. But when a fact less obviously forms part of mankind's fund of common knowledge, it may be necessary for counsel to request the judge to take judicial notice; and in such cases the judge must exercise a discretion whether to do so, which is merely another way of saying that he must decide whether the fact falls within the rule as being notorious. ... [C]ommon knowledge differs with time and place, so a fact which was notorious a century ago may no longer be the appropriate subject of notice, and a fact may be common knowledge only among a class of the community, such as those interested in a particular sport … Thirdly, though a judge may

[16] Cap. 4.15, Revised Laws of Saint Lucia 2008.
[17] (1982) CanLII 1751 (ON CA).

> consider a fact to be the appropriate subject of notice, he may not himself remember or profess to know it, and therefore he may take steps to acquire the necessary knowledge.'"

[37] The appellant also relied on the following statement of Lord Sumner in **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service**:[18]

> "Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."[19]

[38] Learned Queen's Counsel submits that the above authorities show that the learned judge had a duty to establish the notorious fact of Mr. Astaphan, SC's political activism by reference to appropriate sources of information which include: print media, video footage, radio recordings and the internet – see **R v Daley**[20] and **R v Ghaleenovee**.[21]

[39] The Commission submits in response that there are two hurdles which the appellant must cross and he has failed to do so. Firstly, the issue of judicial notice was not raised in the lower court. Secondly, it was not a matter of which the learned judge could have taken judicial notice. Learned Senior Counsel for the Commission submitted that sections 117 and 118 of the **Evidence Act** do not advance the appellant's case. Materials from Google or other internet sources cannot be considered notorious facts. For a fact to be notorious, it implies knowledge and acceptance on the part of every person in Saint Lucia without dispute or controversy. Learned Senior Counsel relied on the following passage in the case of **Holland and Another v Jones**:[22]

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[18] [1922] All ER 207.
[19] At p. 218.
[20] 2008 NBQB 21.
[21] 2015 ONSC 1707.
[22] (1917) 23 CLR 149.

> "The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not 'general' but 'particular' facts. As to 'particular' facts, even the Judge's own personal knowledge is not to be imported into the case: Hurpurshad v Sheo Dyal … To import knowledge of a particular fact in issue would be to import evidence in the strict sense regarding a matter as to which the Court is supposed to have no knowledge whatever of its own.
>
> "But if the fact is of such 'general' character as to give rise to the presumption mentioned, then a Judge is justified 'noticing' it. He must, however, be fully satisfied of the fact, and must be cautious to see that no reasonable doubt exists. To prevent doubt he may seek information in various ways… ."[23]

[40] Learned Senior Counsel further argues that the learned judge was required by law to confine himself to the evidence before him. It was not the duty of the judge to search Google and other internet sources for purported evidence. There was simply no evidence of notorious facts of political activism on his part.

[41] The **Evidence Act**, in section 118, makes provision for the court to take notice of matters of common knowledge. It reads thus:

> "(1) Proof shall not be required about knowledge that is not reasonably open to question or is capable of verification by reference to a document the authority of which cannot be questioned.
> (2) The Judge may acquire knowledge of the kind referred to in subsection (1), in any manner that the Judge thinks fit.
> (3) The court, if there is a jury, including the jury, shall take knowledge of the kind referred to in subsection (1), into account.
> (4) The Judge shall give a party such opportunity to make submissions, and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

[23] At pp. 153-154.

[42] The effect of this section is that a court can accept as fact information that is unquestionable or which is verifiable by reliable sources. While subsection (2) gives the judge a discretion in acquiring the knowledge, subsection (4) requires the judge to give a party the opportunity to make submissions about acquiring or taking into account of such knowledge. Thus, in **Ghaleenovee**, where a judge of his own volition accessed footage of a locus by google map and used it to draw adverse inferences against an accused without putting it to the accused, the Court of Appeal found that the judge's actions compromised the fairness of the trial.

[43] It is not disputed that the issue was not raised before the learned judge. The appellant sought to prove the fact by adducing certain evidence which the learned judge found was not sufficient. While I agree that sources which a judge could use to verify information of which judicial notice can be taken could include the internet, in my opinion, Mr. Astaphan, SC being a political activist is not a matter which it can be said is not reasonably open to question and is common knowledge of which the learned judge should have taken judicial notice. Whether a person is a political activist is a conclusion to be arrived at after considering certain facts. The learned judge was not required, without the issue being raised, to go on an expedition in search of facts from which he could conclude that Mr. Astaphan, SC was a political activist, more so when he found that the evidence adduced by the appellant was insufficient to prove Mr. Astaphan, SC was a political activist. That was not the role of the learned judge. I find there is no merit in the appellant's complaint on this issue.

[44] I turn now to the second limb of the appellant's argument that the learned judge erred in finding that the appellant did not lead sufficient evidence to show that Mr. Astaphan, SC was a political activist.

[45] Learned Queen's Counsel submitted that the evidence led by the appellant, together with the representations made by Mr. Astaphan, SC in open court during the hearing of the application, was sufficient proof that Mr. Astaphan, SC was a political activist. Learned Queen's Counsel referred the court to the following evidence led by the appellant:

(a) The appellant's affidavit, in which he deposed that: (i) Mr. Astaphan, SC has a long personal and professional relationship with the Prime Minister and his government. He has represented the government in innumerable cases and has acted as the personal lawyer for the Prime Minister; and (ii) during the last election campaign Mr. Astaphan, SC participated in a public manner that created 'a major uproar'.

(b) An article in the Saint Lucian Newspapers "The Voice" dated 10th November 2011, entitled 'Panic-stricken Kenny brings in Astaphan's venom'.

(c) An article in the Antiguan Newspapers 'Observer' dated 15th November 2011, and entitled 'Opposition Leader defends involvement of Dominican lawyer in campaign', and in which article the Prime Minister was quoted as saying 'Because one citizen of a country is such political dynamite you find fault with him?'

(d) An article in the Dominica News online newspapers dated 4th February 2014, in which Mr. Astaphan, SC is reported to have denied that he ever campaigned for the SLP but admitted to being a guest on a few radio programs with SLP officials.

[46] Learned Counsel also relied on the following passages in the transcript of the proceedings where Mr. Astaphan, SC is recorded as stating:

(a) At page 67 of the transcript:[24]

> "So, I had a short cameo appearance on, on -- during the campaign, I accept that; there was a major uproar, I took the first ferry out of town, like the cowboy fellas do, and I left. First ferry, I didn't even wait on LIAT. I went straight to the port, took a boat and I left.
>
> …
>
> -- and I don't like the boat, but I was so concerned about this uproar, my mere presence on two radio programmes …"

(b) At page 66 of the transcript:

> "Well, My Lord, if speaking out on matters of public interest as a Caribbean person under the Constitution makes me a political activist, fine, but I am in the privileged position of supporters and even members of political parties in every country in which I work speaking to me. So, I don't want to go down that road …."

(c) And at page 68:

> "My Lord, I submit, … that not there is no evidence of this activism, well, even if I was, so what. ….
>
> "To take two articles arising out of an election campaign two years ago or three years ago, to suggest that I am tainted forever with the badge, whether you call it a badge of honor or dishonor, political activist or pit bullist is complete utter -- I mean, I just don't know how to describe it. What does political activism means [sic]? Have I done anything contrary to the Code of Ethics?"

[47] The appellant contends that while the representation made in court is not evidence, nonetheless the judge ought to have taken them into consideration. Senior Counsel is bound by his oath to the court. He had a duty to respond honestly to a question posed by the court and no one can object to counsel answering a question from the court.

[24] Transcript of Proceedings for 22nd April 2015.

[48] The Commission in its response acknowledges that the evidence of the appellant in relation to the relationship between Mr. Astaphan, SC and the Prime Minister and the Chairman and the fact that Mr. Astaphan, SC has represented the Prime Minister in several cases and also his government is not disputed. The Commission submits that this is not a reason for removal of an attorney having regard to the principles in the legal authorities such as **Kallinicos v Hunt**. In relation to participation in the campaign leading to the last election, the Commission contends that Mr. Astaphan, SC's participation was limited to appearance on a few radio programmes, however there is nothing in the Legal Profession Act which prohibits an attorney from participating in politics or speaking on matters politically.

[49] In relation to the newspaper articles, the Commission contends that the articles are premised on a letter written by the Vice Chairman of the UWP and are hearsay, they have no probative value and are inadmissible. Further, the articles were dated since 2011. The Commission relied on the case of **Medcalf v Mardell & Others**.[25]

[50] In relation to the statements of Mr. Astaphan, SC in court, the Commission contends that when the statements are read in context it shows that the escape by boat episode was merely 'aside court room banter' by Mr. Astaphan, SC. More importantly, the Commission contends that the appellant having objected and challenged the admissibility of the statements in the lower court, and the learned judge having accepted the objection and agreed to disregard the statements, the appellant ought not to be permitted to challenge the judge's finding on the ground that the learned judge did not consider them. This conduct of the appellant, the Commission says, is improper and an abuse of the process of the court. The

[25] [2001] PNLR 14.

Commission further contends that there was nothing said by Mr. Astaphan, SC which constitutes an admission, or provides evidence of political activism or bias or supports the appellant's allegations that Mr. Astaphan, SC is a 'notorious political activist' and therefore incapable of professionally representing the Commission. Admissions must be clear and unequivocal. The denial and explanations given must be taken into consideration. The learned judge did not err in his assessment of the evidence.

[51] When the evidence is examined closely, I am of the view that the learned judge's finding cannot be faulted. The appellant, in his affidavit, speaks of Mr. Astaphan, SC criticising the policies of the UWP. Criticism of the policies of a political party on isolated occasions during the period of a political campaign does not make a person a political activist. A political activist is a person who is continuously engaged in political activities. The newspaper articles contained a number of quotations without the context in which the statements were made as the learned judge found. Without the context, the learned judge rightly found that he could not determine the true purport of the statements. In relation to the statements made in open court by Mr. Astaphan, SC, when read in context, these statements do not amount to an admission by Mr. Astaphan, SC that he is a political activist. In fact, Mr. Astaphan, SC denied that he was a political activist. Mr. Astaphan, SC's relationship with the Prime Minister has not been denied. However mere relationship with the leader of a political party or the Government, and representing him and his government in matters before the court does not make an attorney a political activist.

Issues 2 and 3: Exercise of the discretion of the Court

[52] Learned Queen's Counsel submitted that in the exercise of his discretion the learned judge misstated the test when he stated the test as follows:

> "The test is whether there could [be] 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 [sic]** ***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**."[26]

And:

> "[I]n 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."[27]

[53] Learned Queen's Counsel submitted that the correct test is whether there is a real risk that Mr. Astaphan, SC, although very experienced in constitutional and electoral matters, may not be a suitable person to represent the Commission because of his association with the Prime Minister, the SLP and the Chairman, the principle being it is a matter of perception not integrity.

[54] Learned Senior Counsel for the Commission submits that the test applied by the learned judge was correct and referred to the following passage in the judgment of Lord Hope of Craighead in the case of **Arthur J S Hall & Co (a Firm) v Simons**:[28]

> "But it remains the case that duty [sic] which the advocate undertakes to his client when he accepts the client's instructions is one in which both the court and the public have an interest. While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice. The measure of his duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged. His duty in the conduct of his professional duties is to do that which an advocate of ordinary skill would have done if he had been acting with ordinary care. On the other hand his duty to the court and to the public requires that he must be free, in the conduct of his client's case at all times, to exercise his

[26] At para. 139 of the learned judge's judgment.
[27] At para. 142.
[28] [2002] 1 AC 615.

independent judgment as to what is required to serve the interests of justice."[29]

[55] Learned Senior Counsel submits further 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 the independence or objectivity of the advocate has or may be compromised. He argues however, that such circumstances do not obtain in this case.

[56] As stated earlier at paragraph 15, the test to be applied in the exercise of the court's inherent jurisdiction, is the test outlined in the case of **Kallinicos v Hunt**.

[57] The learned judge stated the test as follows:

> "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][*New South Wales Court in 2005 in Kallinicos v Hunt (2005) 64 NSWLR 561*] 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][*In Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSCA 248*]"[30]

[58] When the test outlined by the learned judge is examined, there is no material difference between it and the test outlined in **Kallinicos v Hunt** and adopted in **Viscariello v Legal Profession Conduct Commissioner**. In fact, the learned judge in stating the test, referred to both cases.

Application of Principles

[29] At p. 726.
[30] At para. 60.

[59] The appellant contends that the learned judge, in applying the principles in the exercise of the court's jurisdiction, misdirected himself in several respects. The learned judge failed to attribute to the fair-minded and reasonably informed observer the following knowledge: (i) the perception of those persons whose rights or interests will be affected by the outcome of the substantive claim which included the populace representing the supporters of the UWP; (ii) the notorious political activism of Mr. Astaphan, SC over the past 30 years on behalf of the SLP; (iii) his notorious reputation as a regional political activist; (iv) his close personal and professional relationship with the Prime Minister and the Chairman of the Commission: (v) his change of sides from representing the Prime Minister and Governor General to the Commission: (vi) the allegations of interference by the Prime Minister; (vii) Mr. Astaphan, SC's controversial role in the last elections which culminated in his beating a hasty retreat from the island by boat. These matters, counsel argues, were relevant to the exercise of the court's discretion and would have been a reasonable basis for fearing that Mr. Astaphan, SC would not be able to represent the Commission independently and impartially.

[60] The Commission, in response, submitted that the considerations to which the appellant referred were not supported by any evidence. The learned judge analysed all of the evidence and rejected the appellant's contentions as being baseless. Specifically, in relation to item (i), the Commission submits that there was no need for the learned judge to attribute knowledge of the perception of supporters of the UWP. In relation to items (ii) and (iii), the commission submits that no evidence was led to support these allegations. In relation to item (iv), the Commission submits that this issue was considered and rightly rejected by the learned judge. In relation to item (v), based on the evidence led and the consent order, the learned judge rightly rejected this argument of the appellant. The emails

show that discussions were taking place with a view to directions to expedite the matter. The consent order did not go beyond the emails. Also, the claim by the appellant had not yet been filed. There was therefore no switching of sides. In relation to item (vi), there was no evidence of interference by the Prime Minister. In relation (vii), this is contrived by the appellant. The evidence of the appellant was that Mr. Astaphan, SC criticised 'policies' of the UWP. Also, there was the evidence of Mr. Leo Clarke who deposed of the very limited role Mr. Astaphan, SC played in the last election. Mr. Clarke's evidence was not contradicted.

[61] In some instances the knowledge the appellant complained of which the learned judge failed to attribute to the fair minded observer were matters which the learned judge found were not established on the evidence. The learned judge having considered the evidence, found, in my view, rightly, that the following allegations were not proved: (i) the notorious political activism of Mr. Astaphan, SC; (ii) that Mr. Astaphan, SC played a controversial role in the last election which culminated in him beating a hasty retreat by boat; (iii) that Mr. Astaphan, SC switched sides from representing the Prime Minister and the Governor General to representing the Commission. The appellant's complaint in relation to the judge's findings on these matters were considered earlier and found to be baseless.

[62] I will now deal with the remaining complaints. Firstly, the perception of those persons whose rights or interests will be affected by the outcome of the underlying claim which included the populace represented by the supporters of the UWP. Undoubtedly, the persons whose rights and interests would be affected by the outcome of the claim would include both those who support the UWP and those who support the SLP. Learned counsel advanced no reason why it was necessary to attribute knowledge of the perception of the supporters of the UWP to the fair-minded observer and in my view, there is no basis for selecting one group of

political supporters. Secondly, in relation to the issue of Mr. Astaphan, SC's relationship with the Prime Minister and the Chairman, the learned judge did attribute such knowledge to the fair-minded observer at paragraph 140 of the judgment. The learned judge stated thus:

> "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][*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.'*]"

Thirdly, in relation to knowledge of the allegation of interference by the Prime Minister, this was also attributed to the fair-minded observer at paragraph 142 of the judgment where the learned judge stated as follows:

> "**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** …."

One of the planks on which the challenge to the Report is based is the interference of the Prime Minister's SLP in the preparation of the Report.

[63] Learned Queen's Counsel next submitted that the learned judge misconstrued sections 57(11) and 58 of the Constitution. This he contends is evident from the following statement of the learned judge:

> "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 [sic] 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."[31]

Counsel argues that the wording of section 57(11) is very wide and embraces all of the functions of the Commission including its participation in legal proceedings.

[64] The statement of the learned judge must be read in the context of the judgement. The learned judge was in the process of emphasising that the court, in the exercise of its inherent jurisdiction, is concerned with the public perception of the administration of justice as regards the particular issues before the court. The learned judge was not seeking to place an interpretation on section 57(11) or section 58 of the Constitution. The issue with which the fair-minded observer is to be attributed knowledge is the particular issue before the court. In this case, the issues in the underlying claim which, as indicated earlier, based on the pleadings, are: (i) whether the Commission, in discharging its constitutional duties in preparing the Report, failed to act independently and impartially as they are mandated to do by section 58 of the Constitution and (ii) whether the Commission failed to consult adequately before preparing the Report. The fair-minded observer is not required to be attributed knowledge of issues with which the court is not engaged.[32]

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[31] At para. 143.

[32] Viscariello v Legal Profession Conduct Commissioner [2015] SASC 4 at paras. 33-34.

[65] Learned Queen's Counsel further submitted that the learned judge approached the matter from the perspective of the principles governing attorney-client relationships and attorney's duties owed to the court. Counsel argues that in view of the Commission's constitutional duties, there is the further requirement that the Commission, in retaining counsel, must do so in a manner consistent with its constitutional mandate to act independently and impartially. In view of the evidence, the Commission failed to so do.

[66] It is not disputed that the members of the Commission other than Mrs. Theodore-John agreed to the retention of Mr. Astaphan, SC at a meeting of the Commission held on 5th March 2015. The appellant's complaint that the learned judge erred in finding that the Commission was acting under the direction and control of the Attorney General in retaining Mr. Astaphan, SC was rejected earlier as having no merit.

[67] Learned Queen's Counsel also submitted that there is no evidence that Mr. Astaphan, SC disclosed to the Commission the fact of his association with the Prime Minister, the SLP or the Chairman, or that he had campaigned in the last election for the SLP. This duty of disclosure is important in the administration of justice. Learned Senior Counsel rightly pointed out that this issue was not raised in the court below. There is no denial of the relationship between Mr. Astaphan, SC and the Prime Minister and the Chairman, however, association with the SLP and that Mr. Astaphan, SC campaigned for the SLP is disputed. What is admitted is that Mr. Astaphan, SC appeared on radio and television programmes with officials of the SLP. While there is no evidence of disclosure by Mr. Astaphan, SC, there is likewise no evidence that he did not. In these circumstances where the issue was not ventilated in the court below, an appellate court cannot presume that he did not. Moreover, Mrs. Theodore-John, in her affidavit, deposed that

before the meeting of 4th March 2015, she had brought to the attention of the members of the Commission by email, Mr. Astaphan, SC's long standing relationship with the Prime Minister and the Chairman and insisted for that reason among others the Commission should not retain Mr. Astaphan, SC.

[68] Learned Queen's Counsel next submitted that the learned judge placed undue focus on the professional attributes or abilities of Mr. Astaphan, SC, when those factors are not germane to the exercise of the court's inherent jurisdiction. The learned judge limited the enquiry to the question of Mr. Astaphan, SC's ability to assist the commission in defending the report. No or insufficient emphasis was placed on the role of counsel to advise the Commission whether to defend the Report and as to the viability of such defence. Learned Queen's Counsel posited that it may not be in the interest of the Commission to defend the Report, but in the interest of the Prime Minister and the SLP to do so. The question is not one of integrity but appropriateness. In determining appropriateness, this must be done against the background of Mr. Astaphan, SC's political relationships and his political activities. Counsel referred to the following: (i) the appellant's evidence of Mr. Astaphan, SC's statement to the media after the consent order was made, when he was the lawyer for the Commission at the hearing; (ii) under the Constitution, the Chairman of the Commission is appointed by the Prime Minister and Mr. Astaphan, SC is a consultant of the Chairman's Law Firm; and (iii) the underlying claim relates to the misconduct of the Prime Minister and the SLP, as the appellant contends that the Report was prepared by the SLP. In this context Mr. Astaphan, SC's association with the Prime Minister, and the Chairman of the Commission and his political activities make him unsuitable to represent the Commission. Further, the principles in the cases of **Constituency Boundaries Commission and Another v Baron**[33] and **The Hon. Gaston Browne, Leader of**

[33] (1999) 58 WIR 153.

the Opposition et al v The Constituencies Boundaries Commission et al[34] referred to by the Commission are not applicable. The exercise of the inherent jurisdiction to control the processes of the court is not dependent on apparent bias, although this could be a factor.

[69] Learned Queen's Counsel argues further that having regard to the entrenched position of the Commission under the Constitution, the Commission should be represented by an attorney with no obvious personal, professional or political ties with any of the parties in the action and/or any of the political parties that have an interest in the outcome of the underlying claim. To do otherwise would inevitably expose the administration of justice in this case to the real risk of opprobrium and engender the distrust of right thinking and fair-minded men and women of the society.

[70] Mr. Astaphan, SC, in his arguments in response, reminded the court of the exceptional nature of the inherent jurisdiction and referred to the following statement of Heenan J in **Holborow v Rudder**, where he explained the exceptional nature of this jurisdiction in the following manner:

> "[W]hen an application is made to restrain a legal practitioner from acting in a cause for reasons other than the risk of disclosure or misuse of information provided to the practitioner in confidence by the former client, it is of importance to identify precisely what obligation towards the former client or to the court may be breached or imperilled by the practitioner acting in the cause or against the former client. This approach is important because, otherwise, there may imperceptibly develop an expectation that the freedom of a client to engage a legal practitioner of his or her own preference, and the freedom of a legal practitioner to act even against a former client, where such a course does not involve any breach of his fiduciary obligations arising from the earlier retainer, is open to adventitious challenge as a means of harassing an opponent in a cause."[35]

[34] ANUHCVAP2013/0026 (delivered 28th April 2014, unreported).
[35] At para. 26.

[71] Mr. Astaphan, SC submitted that he was retained by the Commission after the approval of the Report by the House of Assembly. His function is not to advise the Commission on the exercise of its constitutional functions. He was not involved with the Commission at any stage of the process of the preparation of the Report. He was not consulted by the Prime Minister, the SLP or the Attorney General on the preparation of the Report. There is therefore no conflict or any possibility of him having obtained confidential information or being a material witness. Mr. Astaphan, SC further argues that the learned judge having examined all of the evidence, found that there was no basis to exercise the inherent jurisdiction and the appellant has failed to show in what manner the learned judge erred in the assessment of the evidence and the exercise of his discretion.

[72] I agree that Mr. Astaphan, SC's integrity and professional ability to represent the Commission and to assist the court is not being questioned. The question is whether, having regard to the relationship existing between Mr. Astaphan, SC and the Prime Minister and the Chairman, there is a real and appreciable risk that the fair-minded and reasonably informed member of the public would conclude that Mr. Astaphan, SC should be restrained from acting in the interest of the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice.

[73] The fair-minded member of the public would not only have knowledge of the relationship of Mr. Astaphan, SC and the Prime Minister and the Chairman, that Mr. Astaphan, SC appeared on occasions for the Prime Minister and for his government, and that Mr. Astaphan, SC is also a consultant for the Chairman's law firm, but he/she will also have knowledge of the matters as outlined in **Viscariello v Legal Profession Conduct Commissioner**. In **Viscariello**,

guidance was given of the matters to be attributed to the fair-minded observer in the application of the test. The list is by no means an exhaustive list and matters to be attributed will depend on the circumstances of each case. At paragraph 23, the court referred to the following statement in **Judicial Review of Administrative Action** by Aronson and Groves:[36]

> "The observer is however, credited with an understanding of barristers' working conditions in general, … their general independence and distance from their clients, their readiness to disagree with those who might be their closest professional and personal friends[4] [*Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd (1996) 135 ALR 753 at 767*], to agree with arguments from colleagues for whom they have little respect[5] [*IOOF Australia Trustees Ltd v SEAS SAPFOR Forests Pty Ltd (1999) 78 SASR 151 at 183*] and to make strong statements on the instructions of others.[6] [*Gascor v Allicott [1997] 1 VR 332; Setka v Gregor [2011] FCAFC 64 at [12] – [13]*]"

[74] He or she would also have knowledge of the issues in the underlying claim. He/she would know that one of the main issues is whether the Commission, in the exercise of its function under section 58, acted under the direction and control of the Prime Minister's SLP. He/she would know that Mr. Astaphan, SC was not involved in advising nor did he play any part in the Commission's exercise of its constitutional function under section 58 of the Constitution. The learned judge attributed knowledge of all of the abovementioned matters to the fair-minded reasonably informed member of the public.

[75] It has not been pleaded nor has any evidence been shown that Mr. Astaphan, SC has any personal interest in the outcome of the underlying claim, or that Mr. Astaphan, SC has acted for the appellant in previous proceedings and therefore, confidential information has been entrusted to him or he has acquired personal

[36] Mark Aronson and Matthew Groves, Judicial Review of Administrative Action (5th edn., Thompson Reuters Australia 2013).

knowledge of the appellant due to a previous attorney-client relationship as was the situation in the case of **Black v Taylor**.

[76] There is also no evidence that could provide a basis upon which it could be concluded that Mr. Astaphan, SC would not act strictly in accordance with his ethical and professional obligations or that he would lack the objectivity and independence required to discharge those obligations. The mere fact that he may be desirous of being retained by the Prime Minister and or his government in the future is not a proper basis to so conclude – see **Viscariello v Legal Profession Conduct Commissioner**. Neither is there a proper basis to conclude that Mr. Astaphan, SC would conduct the defence of the Commission in a manner partial to the Prime Minister. Mere association without more is not a proper basis to so conclude.

[77] The appellant grounded his application on there being a conflict of interest since Mr. Astaphan, SC had a relationship with the Prime Minister and the Chairman and allegations of political activism on behalf of the Prime Minister's SLP and Mr. Astaphan, SC being previously retained to act for the Prime Minister and the Governor General in the underlying claim, which allegations the learned judge, in my view, correctly found not to have been proved. What was left remaining was evidence of a relationship. In the small societies of the Caribbean, it is not unusual for counsel appearing to have a relationship with one or more than one party involved in the litigation. What must be shown in those circumstances for the court to exercise this very exceptional jurisdiction is that as a result of that relationship, having regard to the issues before the court, there is a risk that counsel would not perform his/her obligations to the court with the objectivity and independence required of him/her.

[78] In **Holborow v Rudder**, Heenan J stated:

> " …that while a properly informed and advised client, not under any disability, may waive or ratify any breach of duty due to it by the legal practitioner, the practitioner's duty to the court cannot be waived, so that if the particular disqualifying feature involves a conflict between the interests of the practitioner and his duty to the court which could give rise to a situation where the independent administration of justice may be put in jeopardy, the court will restrain the practitioner notwithstanding the wishes or interests of the client. However, it by no means follows that every conflict of interest between the legal practitioner and a client will give rise to a concurrent conflict of interest between the legal practitioner and his duty to the court, or, even where it does, that there is a risk that the practitioner will disregard his overriding duty to the court in favour of his client's interest. It seems to me that if it can be demonstrated that there is a risk that a practitioner will disregard his overriding duty to the court that this will usually, if not always, require action by the court to avoid such a risk by preventing the practitioner from acting even if the relief is sought by an opposing party in the litigation. But these principles do not render counsel or solicitors generally examinable at the suit of their client's opponents. **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.**
>
> "**Consequently, if an opposing party asserts that a legal practitioner should be restrained from acting for his opponent it is necessary for a clear case to be made that the practitioner concerned is in a position where he is fixed with an interest which conflicts with his duty to the court and that that interest is one of such a nature that the solicitor or counsel may fail in his overriding duty to the court**."[37] (My emphasis).

[79] Mr. Astaphan, SC owes no duty to the appellant. His duty is to the Commission and the court. In my view, the appellant has not established that Mr. Astaphan, SC is fixed with an interest which conflicts with his duty to the court and as a result he may fail in the discharge of his overriding duty to the court. Mere friendship does not establish such an interest.

[37] At paras. 30-31.

[80] In **Black v Taylor**[38] the solicitor was restrained on the ground of conflict of interest where it was shown that the solicitor who had acted for the family over the years and who was in receipt of confidential information relevant to the issue in the proceedings was retained to act for one member of the family in a family dispute.

[81] Similarly, in **Kooky Garments Limited v Charlton**, the court restrained a solicitor from representing a client where the litigation related to steps taken by the client on advice of the solicitor. The court found that the solicitor's interest in defending their own action being their advice, conflicted with their duty to represent the party with the objectivity and independence which their professional responsibilities and obligations to the court require of them. There was therefore a real risk that the integrity of the judicial process would be undermined. The risk of the integrity of the judicial process being undermined must be real, not fanciful or theoretical, although the risk need not be a substantial risk – **Gugiatti v City of Stirling**.[39]

[82] In my view, the learned judge's findings of fact and his exercise of discretion cannot be faulted. The learned judge identified the correct applicable principles and in applying those principles he did not misdirect himself. He took into account all relevant matters. He attributed the relevant knowledge to the fair-minded and reasonably informed member of the public and having adequately assessed the evidence, concluded that there was no basis to exercise the discretion to restrain the Commission from continuing to retain Mr. Astaphan, SC from representing it in the underlying claim. I find that there is no basis to interfere with his findings.

[38] [1993] 3 NZLR 403.
[39] (2002) 25 WAR 349.

[83] Accordingly the appeal is dismissed. The appellant shall pay the Commission its costs in this Court and in the court below, such costs to be assessed if not agreed within 28 days.

Gertel Thom
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal