[2012] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 107/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag.)

BETWEEN	**ROALD NIGEL ADRIAN HENRIQUES**	**APPELLANT**
AND	**HON SHIRLEY TYNDALL, OJ**	**1ST RESPONDENT**
AND	**PATRICK HYLTON**	**2ND RESPONDENT**
AND	**OMAR DAVIES**	**3RD RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**4TH RESPONDENT**
AND	**HON JUSTICE BOYD CAREY (Retired)**	**5TH RESPONDENT**
AND	**CHARLES ROSS**	**6TH RESPONDENT**
AND	**WORRICK BOGLE**	**7TH RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**8TH RESPONDENT**

Allan Wood QC, Mrs Daniella Gentles-Silvera and Miguel Williams instructed by Livingston Alexander and Levy for the appellant

Mrs Nicole Foster-Pusey instructed by Michael Hylton and Associates for the 1st respondent

Dave Garcia instructed by Michael Hylton and Associates for the 2nd respondent

Michael Hylton QC and Kevin Powell instructed by Michael Hylton and Associates for the 3rd respondent

Patrick Foster QC and Maurice Manning instructed by Nunes Scholefield DeLeon & Co for the 4th respondent

Dr Lloyd Barnett, Mrs Denise Kitson and Miss Sherese Gayle instructed by Grant Stewart Phillips & Co for the 5th respondent

Paul Beswick and Miss Lisa White instructed by Director of State proceedings for the 6th, 7th and 8th respondents

4, 5, 6, 7, 8, 11, 12 April 2011; 29 July 2011 and 30 March 2012

HARRIS JA

[1] The appellant, by his appeal and the 1st to 5th respondents, by way of counter appeals, challenge a decision of the Full Court delivered on 2 September, 2010. The orders made by the Full Court were in the following terms:

> "1. An order of prohibition preventing the continuation of the Commission of Inquiry into the collapse of financial institutions in Jamaica in 1990's [sic] (hereinafter referred to as "the Commission") as currently constituted with the 1st Defendant a member and Chairman;
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> 2. An order of certiorari quashing the decision of the 1st 2nd and 3rd Defendants to continue with the hearings of the Commission.
>
> 3. An order of certiorari quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission.
>
> 4. A declaration that the 1st Defendant by virtue of his having been a delinquent borrower whose debt was acquired and handled by FINSAC is presumed to be affected by bias and is automatically disqualified from being a member and Chairman of the Commission.

5. A declaration that counsel to the Commission by virtue of his, (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is automatically disqualified from acting as counsel to the Commission.

6. The court refuses to declare the proceedings thus far to be null and void."

[2] On 29 July 2011 this court made the following order:

> "The appeal is allowed. The counter appeal of the 5th respondent is dismissed. The counter appeal of the 1st to 4th respondents is dismissed."

The question of costs was reserved. A promise was made to reduce our reasons to writing. This obligation we now fulfil.

[3] Sometime during the second half of the 1990s the failure of several financial institutions resulted in serious consequences for the financial sector. In an effort to salvage the sector, the then government incorporated four entities, namely: FINSAC Limited, FIS Limited, Refin Trust Limited and Recon Trust Limited. Their role, mainly, was to manage the fiscal process. The Financial Institutions Services Limited (FIS), by way of a vesting order, assumed several non performing loans from FINSAC. These loans were originally acquired by FINSAC from intervened institutions. Century National Bank and Jamaica Citizens Bank were among these intervened institutions. At the time of the acquisition by FIS, the 5th respondent had an outstanding overdraft with Century National Bank. There is some dispute as to whether Bev Carey

Associates (1985) Limited, a company (Bev Carey Associates) in which the 5th respondent and his wife were shareholders and directors, had outstanding debts with Jamaica Citizens Bank.

[4] In October, 2008, a commission of enquiry was established. By instruments of appointment dated 24 October 2008 and 12 January 2009 respectively, the Governor General, in pursuance of the Commissions of Enquiry Act, nominated the 5th, 6th and 7th respondents to conduct the inquiry. The terms of reference of that inquiry are as follows:

> "(i) To examine the circumstances that led to the collapse of several financial institutions in the 1990s with particular regard to:
>
> (a) the extent to which these circumstances were directly influenced by domestic or external factors;
>
> (b) Government's fiscal and monetary policies;
>
> (c) the management practices and role of [sic] Board of Directors of the failed institutions;
>
> (d) the performance of Government's regulatory functions.
>
> (ii) To consider what actions, if any, could have been taken to avoid this occurrence and to evaluate the appropriateness of the actions which were taken by the authorities in the context of Jamaica's economic circumstances and in comparison to intervention by the State in other countries which have had similar experiences;
>
> (iii) To review the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally;
>
> (iv) To review the probity and propriety in FINSAC's management, sale and/or disposal of assets relating to delinquent borrowers;

(v) To review the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation;

(vi) To review the practices of the Jamaica Redevelopment Foundation in the treatment of delinquent borrowers and, in particular, the management, sale and/or disposal of their assets;

(vii) To assess the long term impact of the collapse of these institutions on the economy and on the businesses and individuals whose loans were involved as well as the economic and social impact of the actions taken by the Government with regard to the savers, depositors and investors of the failed institutions?

(viii) To review the steps that have subsequently been taken and make recommendations as to what further steps should be taken to prevent a recurrence of such widespread collapse of financial institutions and the resulting hardships."

[5] At the material time, the 1st respondent was the financial secretary, vice chairman and subsequently chairman of the board of directors of FINSAC Limited and FIS. The 2nd respondent was the managing director for FINSAC and FIS. The 3rd respondent was the Minister of Finance and Planning having the responsibility for the financial sector. The 4th respondent was, for a substantial part of the applicable period, the managing director of National Commercial Bank which acquired, by way of purchase, several debts from FINSAC.

[6] The Commissioners commenced sitting on 22 September 2009. A letter dated 31 December 2009, under the hand of the 1st to 4th respondents' attorneys-at-law, was transmitted to the secretary of the commission, in which they expressed some disquiet as to the 5th respondent's eligibility to continue participation in the proceedings. No written response was received. At a sitting of the commission on 19

January 2010, the 5th respondent acknowledged receipt of the letter of 31 December and indicated as follows:

> "The Solicitor General has advised that there is no factual substratum on which one can arguably base a claim on actual or perceived bias, or that the matters, the subject of the Enquiry cannot be heard in accordance with the doctrine of fairness. We will now proceed."

[7] Following this, the 1st to 4th respondents/attorneys-at-law endeavoured to make submissions highlighting certain concerns which they had, but the 5th respondent refused to hear them. The disappointment in not being afforded an opportunity to express their unease, led the 2nd respondent's attorney-at-law to send the following letter to the secretary of the commission on 20 January 2010:

> "**Re: Commission of Enquiry re Financial Institutions in Jamaica**
>
> I refer to my letter of January 19, 2010, and the events earlier that day.
>
> On January 19, 2010, the Commission indicated a decision in respect of the issues that had been raised concerning the Chairman. Hon. Michael Hylton, O.J., Q.C. invited the Commission to reconsider the position, and the invitation was declined. However, the Chairman later indicated that an opportunity could at some time be provided for counsel to be heard on the issues. These are differing positions, and I should be grateful if the Commission would clarify whether counsel may indeed be heard soon on the matter.
>
> Given the nature of the issues raised, they ought to be addressed before the sittings continue. As the Commission is scheduled to sit tomorrow, January 21, 2010, commencing at 9:30 a.m., I write to request that if the Commission is willing to hear counsel on the issues, we be

heard at that time, I am copying Mr Hylton, Mrs Minott-Phillips and Mrs Foster-Pusey, who join me in this request."

[8] No response to the letter was received. The inquiry continued. The 1st to 4th respondents, still being dissatisfied with the state of affairs, on 16 February 2010, sought and obtained leave to apply for judicial review and on the same date, by way of a fixed date claim form, sought the following orders and declarations:

"1. An order of *prohibition* preventing the continuation of the Commission of Enquiry into the Collapse of Financial Institutions in Jamaica in the 1990s (hereinafter referred to as "the Commission") as currently constituted of the 1st, 2nd, and 3rd Defendants;

2. An order of *certiorari* quashing the decision of the 1st, 2nd, and 3rd Defendants to continue with the hearings of the Commission;

3. An order of *certiorari* quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission;

4. A Declaration that the 1st Defendant by virtue of his:

(a) having been a delinquent borrower whose debt was acquired and handled by FINSAC;

(b) being or having been a shareholder of a company of a company (of which his wife was a director and the other shareholder) which either was or remains, or was handled by FINSAC on the basis of being, a delinquent borrower whose non-performing debt was acquired by FINSAC and then sold by FINSAC to Jamaican Redevelopment Foundation Inc.;

(c) having been a "close associate" of a director of an intervened institution's (according to documentation from the institution's filed signed by one of its officers) whose role and management practices are to be examined by the Commission, and who is scheduled to appear to give testimony before the Commission; and

(d) having, according to the said documentation, received special accommodation from the said intervened institution by reason of his relationship with the said director; is presumed to be affected by bias and is automatically disqualified from being a member of the Commission;

5. A Declaration that in the circumstances the 1st Defendant is also disqualified by virtue of apparent bias;

6. A Declaration that the proceedings that have occurred thus far in the enquiry are null and void.

7. Such further and/or other relief as the Court deems fit."

[9] The grounds on which the reliefs were sought were couched in the following terms:

"The Claimants seek the above relief on the following grounds which are not exhaustive:

i. The 1st, 2nd and 3rd Defendants have sworn to and have a duty under law to make a full, faithful and impartial enquiry into the matters that fall within the scope of the Commissions terms of reference;

ii. The 1st Defendant and a company, of which he was at the material time a member and his wife was at the material time a director and the other member, falls [sic] within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly;

iii. The 1st Defendant was a close associate of the executive chairman of an intervened institution, according to documentation signed by an officer of that institution. The management of the institution by its directors and, in particular, its executive chairman is to be considered by the Commission, and the said executive chairman is scheduled to appear to give testimony before the Commission;

iv. Counsel to the Commission falls within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly, in that he was a director and shareholder of a company which was indebted to an intervened institution, and he was allegedly a guarantor of its indebtedness;

v. Counsel to the Commission was some time prior to the intervention by the state, a director of an intervened institution;

vi. The Defendants did not disclose the above facts to the public, to the Claimants or in the proceedings of the Commission;

vii. The 1st, 2nd and 3rd Defendants have adopted procedures that are inconsistent, irregular and unfair;

viii. The 1st, 2nd, and 3rd Defendants have made statements which suggest that they have prejudged

some of the issues to be considered by the Commission;

ix. The 1st, 2nd, and 3rd Defendants have decided to continue as currently constituted despite the above facts;

x. There is a real and present danger that public confidence in the integrity of the Commission, its proceedings and ultimately its conclusions will be reduced or lost if it is allowed to continue as at present constituted.

xi. It is important that the integrity of the Commission be preserved in the light of the importance of the issues being examined;

xii. Substantial costs are being incurred on a daily basis by the Commission, and it would be in the public interest if the proceedings are stayed pending the determination of these issues.

xiii. The failure of the 1st, 2nd and 3rd Defendants to halt the Commission is unreasonable and irrational."

[10] On 17 September 2010 the appellant was granted leave to appeal paragraph 5 of the order of the Full Court.

The grounds of appeal are as follows:

"(1) In obtaining leave to apply for judicial review the Claimants had not made the Appellant a party to the proceedings or sought any relief against him and therefore since no leave was granted to proceed for any relief against the Appellant the Full Court ought not to have made any order which directly affected the Appellant.

(2) That the order made by the Full Court by way of a declaration that the Appellant as counsel to the Commission was presumed to be affected by bias and was automatically disqualified from acting as counsel directly affects and prejudices the Appellant in circumstances where no prior notice of the proposed order was given to the Appellant nor was the Appellant made a party to the proceedings. The Full Court acted in breach of the principles of natural justice in failing to give the Appellant prior notice of the aforesaid order which they contemplated making against him to afford him the opportunity to be heard.

(3) As a person who was directly and adversely affected by the judgment and order of the Full Court, the Appellant was entitled to have prior notice of the order that would be made against him and afforded an opportunity to be heard in accordance with s20 (2) of the Constitution of Jamaica. In making an order and findings that directly affected the Appellant without joining him as party to the proceedings and without giving him prior notice of the proposed order so as to afford him the opportunity to be heard, the Full Court breached the Appellant's fundamental right to a fair hearing accorded by s20 (2) of the Constitution of Jamaica.

(4) The Full Court proceeded to make the aforesaid order in breach of CPR 56.1(1) that provides that the claim form and affidavit in support must be served on all persons directly affected not less than 14 days before the date fixed for the first hearing. The aforesaid order made by the Full Court directly affected the Appellant and therefore the Appellant ought to have been joined as a party and served with a claim form and affidavit in support giving him adequate prior notification of the aforesaid order sought or contemplated against him in accordance with CPR 56.1 1(1).

(5) The finding that the Appellant was deemed by FINSAC to be a delinquent debtor is unsupported by the evidence and wholly unreasonable.

(6) The finding that the Appellant's resignation from the Board of Century National Bank did not take place at a time that was sufficiently far removed from the time that the Bank was intervened into by the Government to safely remove the Appellant from being within the class is unsupported by the evidence and wholly unreasonable. The Full Court failed to appreciate that the relevant period to be considered for [sic] purpose of determining whether there was an appearance of bias was the period that had elapsed up to the time of the proceedings in which disqualification was sought.

(7) The finding and order of the Full Court that the Appellant ought to be automatically disqualified as counsel to the Commission was wholly unreasonable, flawed as a matter of law, unsupported by the evidence and contrary to principle in that:

a) The Full Court quite clearly failed to have due regard to the nature of the proceedings, which was an investigative enquiry by the 5th, 6th, and 7th Respondents who were appointed under the Commissions of Enquiry Act and not proceedings to determine disputes between litigants as to civil rights and obligations to come to a judgment or determination between parties and/or to impose sanctions or penalties on anyone. The proceedings could not result in any pecuniary benefit or binding determination for or against anyone in respect of the matters being enquired into.

b) Given the investigative nature of the proceedings, there was no basis for presuming actual bias leading to the automatic disqualification of the Appellant by reason of his alleged association with any failed financial institution or delinquent debtor as there was no evidence that the Appellant had promoted or adopted or

sympathized with the cause, dispute or grievance of any failed financial institution or delinquent debtor or exhibited any hostility against any of the Claimants at any time in the intervening period up to the commencement of the proceedings seeking the disqualification of the Commissioners by reason of bias.

c) Further there was no basis for finding actual bias on the part of the Appellant by reason that the Appellant had been alleged to be a guarantor of a delinquent debtor when the Appellant had denied guaranteeing any debt, his response and explanation had not been disputed, and up to the time of the commencement of the proceedings seeking the disqualification of the Commissioners by reason of bias, no claim had been made against him and there was no dispute as to any such debt between the Appellant and anyone involved in the enquiry nor had the Appellant exhibited any hostility against anyone as a consequence.

d) The Full Court's finding that there was a possibility of the Appellant participating in decision making is wholly unreasonable and unsupported by any evidence and was contrary to the unchallenged evidence that it was the 5th, 6th, and 7th Respondents who were the duly appointed Commissioners. Quite clearly the Appellant had not been appointed a Commissioner and there was no basis to find that the Appellant would be participating in the decisions of the Commissioners.

e) Further, that on the proper test that ought to have been applied, no fair minded and informed observer considering the facts would conclude that there was a real possibility of bias on the

part of the Appellant or that the Commissioners' report could be infected with bias by reason of the participation of the Appellant as counsel.

(8) The Full Court failed to apply the proper test for determining whether there was appearance of bias by reason of the Appellant's alleged association with any delinquent debtor or failed financial institution which was whether a fair minded and informed observer considering the facts including the limited role of the Appellant as counsel would conclude that there was a real possibility of bias [sic] on part of the Appellant that would infect the Commissioners. Further that on [sic] totality of the evidence no fair minded and informed observer considering the facts would have concluded that there was a real possibility of bias on the part of the Appellant (as found by Campbell at pg 17 par.38)."

[11] The 1st to 4th respondents filed a counter notice of appeal, the grounds of which are couched in the following terms:

"i. In refusing to declare the proceedings null and void the Court failed to have any or any adequate regard to its' [sic] finding of bias and disqualification in respect of the Chairman and Counsel to the Commission and its effect on the continuation of the Commission in the eyes of the fair minded informed observer.

ii. The Court failed to have regard to the fact [sic] Commissioners Ross and Bogle participated in several questionable decisions including the decision to proceed with the Commission of Enquiry as constituted on January 19, 2010 and therefore could not be considered free of the taint of bias.

iii. The Court's finding that Commissioner Ross did not have a settled view on matters of economic policy was against the weight of the evidence and no sufficient regard was given to the fact that this evidence was unchallenged by Commissioner Ross, and failed to give any or adequate regard to the effect of Commissioner Ross' well publicized views on the fair minded informed observer.

iv. The Court erred in finding that the Terms of Reference required a lower level of procedural fairness having regard to the statutory provisions and the importance of the findings and recommendations of the Commission to all [sic] the affected parties.

v. The Court failed to have regard to the fact that the Commission was charged with determining whether debtors were treated fairly and equally and that in making that determination the Commission would be required to follow a higher standard of procedural fairness.

vi. The Court's finding that there was no procedural unfairness is against the weight of the evidence.

vii. The Court's finding that there was no failure to conform to legitimate expectations is against the weight of the evidence."

[12] The 5th respondent also filed a counter notice of appeal. The grounds are set out hereunder:

"(a) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that appended to the letter of the 31st December 2009, was a letter of demand dated 27th January 1992, and a further demand letter of December 28th 1993. Both

letters are addressed to the 1st Defendant (5th Respondent) and his wife, the account referred to is similar. The 1st Defendant (5th Respondent) denies receiving those letters but confirms receipt of the letter dated 10th June, 1997, which states, "as you are aware, your current account continues to be overdrawn as indicated above.'

(b) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that the actions of the 1st Defendant (5th Respondent) in his receipt of the letter of 22nd June, 1998 fixes him with knowledge that his debt has been taken over by FINSAC.

(c) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that on the applicants' case, the Bank had informed the 1st Defendant (5th Respondent) from the [sic] January 1992, and the debt was not discharged until March 1998 and in holding that On the 1st Defendant (5th Respondent's) case, they acknowledged receipt of the 10th January 1997 letter it was still almost eighteen months before the debt was extinguished. On either case I would have to say the 1st Defendant (5th Respondent) has defaulted on his debt, and could properly be described as a delinquent borrower. The fact that this debt was extinguished some twelve years ago does not assist the 1st Defendant (5th Respondent), as the enquiry concerns delinquent borrowings that were created in the 1990s."

(d) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that there is evidence before this Court to hold that a loan agreement existed between the 5th Respondent and the Bank (Pages 9-10, Para. 21) in the context of a loan with agreed terms which had been breached by non-payment.

(e) The Full Court misdirected itself and erred in finding at page 10, paragraph 24, that the 5th Respondent, Justice Boyd Carey was a delinquent borrower for the purposes of the Terms of Reference. Their Lordships [sic] formulation and analysis of the crucial issue to be probed in determining the class of persons affected by the Terms of Reference was inherently flawed and erroneous in that it failed to give due weight and consideration to the status of the alleged loan at the relevant times. The crucial questions for determination were:

(1) whether the 5th Respondent was a delinquent borrower' whose debt was acquired by FINSAC; and

(2) whether there was any relevant treatment of the 5th Respondent which falls within the Terms of Reference.

(f) The Full Court at pages 11-12, paragraph 28, erred in finding the 5th Respondent to have been a 'judge in his own cause' on the flawed test that the Appellant, Justice Boyd Carey merely needed to have been at some point in time a delinquent borrower of an intervened institution although there was no evidence that the intervened institution could properly or did so regard him.

(g) The Full Court erred in law in finding that the 5th Respondent had an interest in the outcome of the proceedings such as could amount to actual bias as there was no evidence that he was a delinquent debtor or that there was any treatment meted out to him by FINSAC Ltd., FIS or any FINSAC entity or any relationship which was contentious, strained or could be the subject matter of an investigation by the Commission.

(h) To the extent that the Full Court placed reliance on the alleged letter dated January 27, 1992 (page 10, para. 24) their Lordships erred in law as the said letter was not proved or properly authenticated.

(i) The Full Court erred in law in categorizing the case of the 5th Respondent, Justice Boyd Carey as "actual bias" when he had no pecuniary or other personal interest in the subject -matter of the inquiry.

Additionally the 5th Respondent adopts in full the grounds of appeal set out in the Appellant's Notice of Appeal."

[13] Before proceeding with the appeal and counter notices of appeal, it is necessary to make reference to an application made by the 1st to 4th respondents on 24 March 2011 for leave to adduce fresh evidence. The application was dismissed, the court having ruled that it was without merit. Costs were awarded to the respondent/appellant against the 1st to the 4th applicants/respondents on the ground that they acted unreasonably in bringing the application. No reasons were given for the decision. I now furnish such reasons.

[14] In their application, the 1st to 4th applicants/respondents sought the following orders:

"1. That leave be granted to the 1st – 4th Respondents to adduce as fresh evidence on appeal:

"(a) presentation by R.N.A Henriques O.J. Q.C. entitled **"JAMAICA'S MID 1990's FINANCIAL SECTOR CRISIS: REFLECTION ON CRISIS RESOLUTION STRATEGIES"** and (b) the cover page, list of persons present and the evidence before the Commission of Mr

George Hugh as extracted in pages 1, 127 and 143-154 of the Verbatim Notes of the February 24, 2011 sitting of the Commission of Enquiry.

2. The costs of this application be costs in the appeal."

[15] The orders were sought on the following grounds:

"1. The 1st – 4th Respondents became aware in March 2011 that the Appellant RNA Henriques Q.C presented at a conference held by the Jamaica Deposit Insurance Corporation (JDIC) in association with Caribbean Regional Technical Centre (CARTAC) on March 24 – 26, 2010.

2. Neither the 1st – 4th Respondents nor their Attorneys-at-Law attended the said conference or had knowledge of the presentation at the said conference. The evidence could not have been obtained with reasonable diligence for use at the trial.

3. The evidence regarding the Appellant shows that he may have prejudged issues to be considered by the Commission and ought not, by reason of a reasonable appearance of bias, to serve as counsel to the Commission. Accordingly, it would have had an important influence on the result of the case.

4. The evidence extracted from the Verbatim Notes of February 24, 2011 would have had an important influence on the result of the case as they show that the Commissioners have been procedurally unfair, particularly by following inconsistent procedures in relation to the cross-examination of witnesses.

5. The evidence is credible."

[16] The application was supported by an affidavit of Patrick Hylton of which paragraphs 3 –9 state :

> "3. One afternoon in February, 2011 Mr. Dave Garcia enquired of me as to whether I had been aware of a presentation by the Appellant, Mr. RNA Henriques, Q.C. entitled '**Jamaica Mid 1990's Financial Sector Crisis: Reflection on Crisis Resolution Strategies'** at a conference held by the Jamaica Deposit Insurance Corporation (JDIC) in association with Caribbean Regional Technical Assistance Centre (CARTAC) on March 24-26 2010. Mr. Garcia informed me that it had been brought to his attention earlier on the day he spoke to me. The conference was held in Montego Bay Jamaica under the theme 'Bank Insolvency in the Caribbean Best Law and Practice' with the sub theme 'Assessing and Managing Banking Crisis: Assessment of the Global Financial Crisis 2007 – 2009."
>
> 4. Upon discovering the fact of the presentation Mr. Garcia on my behalf conducted a search of the Jamaica Deposit Insurance website and obtained a copy of the presentation. I am not aware as to when the information became available on the website. I exhibit hereto marked with the letters **'PH 1'** a copy of the said presentation by RNA Henriques Q.C. entitled **'Jamaica Mid 1990's Financial Sector Crisis: Reflection on Crisis Resolution Strategies**.'
>
> 5. The application for leave for judicial review in the Supreme Court and the filing of the claim for judicial review was [sic] made prior to the presentation at the conference on the 24th – 26th of March 2010.
>
> 6. Until February 2011, I was not aware of the holding of the conference nor of the fact that Mr. Henriques made a presentation at same concerning some of the very issues which formed the Terms of Reference for the Commission

of Enquiry. I was not present at the seminar and I am informed and do verily believe that neither the 1st, 3rd nor 4th Respondents was present whether by themselves or by their representatives and Attorneys-at-Law at the said seminar, nor had knowledge of the fact that Mr. Henriques was a presenter at the said conference.

7. The issues addressed by Mr. Henriques at the said conference and on which he expressed opinions are the issues which form a part of the terms of reference of the Commission of Enquiry. Accordingly the evidence would have had an important influence on the result of the case.

8. I am advised by Mr. Garcia that on March 16, 2011, he received verbatim notes of the February 24, 2011 sitting of the Commission of Enquiry. I exhibit hereto marked **'PH-2'** a copy of the cover page, list of persons present and pages 1, 127 and 143-154 of the verbatim notes, which I in turn received from Mr. Garcia. Although the list of persons present shows Mr. Garcia as being present on that day on my behalf, this must be an error, as Mr. Garcia and I were in meetings that day at the National Commercial Bank Jamaica Limited Head Office and then at the Wyndham Kingston Hotel lasting from 9:00 a.m. until shortly after 500 p.m. I also note that the announcement of Attorneys-at-Law representing parties on that day does not refer to Mr. Garcia as being present.

9. The verbatim notes exhibited at **'PH-2'** show that the Commission decided that cross-examination by attorneys-at-law would be allowed only if the witness was making an allegation, claim or statement regarding their client, and was not receiving questions from members of the audience..."

[17] The respondent/appellant, in an affidavit sworn by him on 1 April 2011, stated that a letter was sent to the 2nd applicant/respondent on 14 August 2009 by

the convener of the conference, Jamaica Deposit Insurance Corporation relating to sponsorship of the conference by the National Commercial Bank. By a letter of 28 July 2010 the Jamaica Deposit Insurance Corporation expressed its gratitude to the bank for the sponsorship. The bank's liaison officer attended the conference. He further related that his presentation was delivered to all persons who were in attendance. It was further averred by him that the presentation was uploaded to the Jamaica Deposit Insurance Corporation's website on 31 March 2010.

[18] In light of certain findings which I propose to make, I think it unnecessary to outline the contents of the paper. Submissions were made by Mr Foster QC on behalf of the 4th applicant/respondent which were essentially adopted by the attorneys-at-law for the 1st to 3rd applicants/respondents. Counsel argued that the authorities show that the principles laid down in ***Ladd v Marshall*** [1954] 3All ER 745 are still applicable, but are in a way tempered by the interests of justice. At the hearing before the Full Court, the respondent/appellant, he contended, swore an affidavit with respect to the question of bias but failed to disclose evidence of the statements made by him at the conference. The requisite document, he submitted, could not have been obtained prior to the filing of the claim form nor at the hearing of the claim, as there was nothing to put the 1st to 4th applicants/respondents on an inquiry of its existence and it would have been unreasonable to have them embark on a continuous search of the internet to fix them with knowledge of the existence of the document.

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[19] It was also counsel's contention that even if, with due diligence, the appellant's presentation was found, it could not have been placed before the court below. The interests of justice dictate that the evidence is credible and is likely to have an important influence on the outcome of the case and therefore ought to be tendered, he argued. He also contended that the transcript of proceedings are relevant and ought to be admitted.

[20] Rule 1.1(1) of the Civil Procedure Rules, he submitted, facilitates the admission of the fresh evidence and as a consequence, in the interests of justice and applying the overriding objective of the rule, the document ought to be tendered into evidence. The cases of ***Hamilton v Al Fayed*** **(No. 2)** [2002] EWCA Civ 665, ***Gillingham v Gillingham*** [2001] EWCA Civ 906 and ***Paterson v Howells and Anor*** [2005] EWCA Civ 1519 were cited by counsel in support of his arguments.

[21] Mr Hylton QC argued that there was nothing in the evidence before the court which would put the 3rd applicant/respondent on notice that the paper existed. The paper, he argued, was likely to have an important influence on the case. He further argued that the commissioners improperly relied on submissions received by them in which allegations were made against the 3rd applicant's/respondent's but these submissions were not brought to the 3rd applicant's/respondent's attention.

[22] Mr Wood QC submitted that the ***Ladd v Marshall*** principle, although of general application, permits the court to exercise a more flexible approach given by the overriding objective. This notwithstanding, he argued, the 1st to 4th

applicants/respondents failed to satisfy the first limb of the principle, as no evidence was advanced to show what steps, if any, were taken by these respondents to satisfy that limb. The evidence the applicant/respondents seek to adduce in respect of the paper delivered by the appellant was in existence five months before the trial, he argued, it having been published on the internet on 31 March 2010. As a consequence, it was incumbent on the applicants/respondents to demonstrate that all reasonable diligence had been taken to secure the evidence, he argued.

[23] The respondent's/appellant's role was not that of a decision-maker, nor was he a party to the proceedings, he further argued, and the paper, being benign, could not have influenced the result of the case in such a manner that it could have led the court below to have arrived at some other conclusion or would lead this court to do so.

[24] Mr Beswick adopted Mr Wood's submissions. He further submitted that what transpired in evidence after a judicial hearing by the court, cannot be relevant now. There is no link between the events which took place after the hearing and those which the 1st to 4th applicants/respondents now seek to adduce as fresh evidence, he contended. He also argued that ***Rose Hall Development Limited v Hananot*** [2010] JMCA App. 26, clearly sets out the relevant principles with regard to the admission of fresh evidence. The argument advanced by the 1st to 4th applicants/respondents that the overriding objective changed the picture, is untenable, as in ***Rose Hall Development***, the issue of the overriding objective dealt with the matter of due diligence taking place prior to the trial, he argued. If

the 1st to 4th applicants/respondents had made inquiries in August 2010, with due diligence, he contended, they could have obtained the evidence sought.

[25] Mr Hylton, in response to ***Rose Hall Development***, stated that it confirms that this court, adopted the modern approach which approved that of the first Civil Procedure Rules cases. The facts in that case are easily distinguishable from the present case as, in that case, the evidence was of satellite imagery and the photographs which were sought to be admitted as fresh evidence, were taken before trial, he contended. In the instant case, he argued the 1st to 4th applicants/respondents were not aware of the existence of the appellant's presentation and therefore would have had no reason to have searched the internet to ascertain whether it was made. The test, he argued, is whether the evidence, if believed, would have been of such weight, to have affected the judgment.

[26] The principles applicable for the admission of fresh evidence had been eminently propounded by Lord Denning in ***Ladd v Marshall*** when at page 748 he said:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not to be decisive : third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

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[27] I will now direct my attention to the first limb of the rule with respect to the paper delivered by the appellant. Could the 1st to 4th applicants/respondents with due diligence have obtained the information earlier? I would say that they could not. The fact that the paper was published on the Jamaica Deposit Insurance Corporation's website does not mean that it would have come to the attention of any of these applicants/respondents. The internet is a vast domain. The applicants/respondents, having had no prior knowledge of the document, could not be expected to have embarked on a search of the internet to unearth it. However, I must refer to submissions made by Mr Wood that the bank's liaison officer's presence at the conference, the letter of 28 July 2010 from the Jamaica Deposit Insurance Corporation addressed to the 2nd applicant/respondent, thanking him for the bank's sponsorship, are facts which would support the view that the 2nd applicant/respondent had been aware of the delivery of the paper. It may be that, with due diligence, prior to the judicial review hearing, the 2nd respondent could have discovered the existence of the paper, through his liaison officer or by reason of the bank's sponsorship. However, it could not be said that the 1st, 3rd and 4th applicants/respondents would have been aware of it by searching the internet. In my view, they could not have known of the existence of the paper before the judicial review hearing.

[28] Having disposed of the first limb of the rule, I now turn to the second limb. The question here is: if the contents of the respondent's/appellant's presentation had been before the Full Court, would it have made an important influence on the determination of the case? I think not.

[29] There can be no dispute that ***Rose Hall Development*** recognizes the court's powers to consider an application for fresh evidence within the context of the Civil Procedure Rules. This is also true of the cases of ***Hamilton***, ***Gillingham*** and ***Paterson*** in which Mr Foster placed reliance**.** In all four cases, the principles in ***Ladd v Marshall*** were considered by the court within the context of the overriding objective. In ***Rose Hall Development***, the court rejected the application to adduce fresh evidence as it was available prior to the trial. It obviously was not of the view that, in the circumstances of that case, the admission of the evidence would have been just. In ***Hamilton***, ***Gillingham*** and ***Paterson***, the court, acknowledging the need to do justice, ruled that the fresh evidence was admissible.

[30] There is, however, a marked distinction between those cases and the matter under review. In the circumstances of ***Hamilton***, ***Gillingham*** and ***Paterson*** it would have been fair and just to have allowed the admission of the fresh evidence sought as the evidence sought was relevant and important to the cases. The same considerations are not applicable in the present case. In this case, it is obvious that the evidence sought is to show bias on the part of the respondent/appellant. It cannot be said that the contents of the paper presented by him would have had any influence, or importantly, any significant influence on the outcome of the case. The appellant/respondent was never a party to the judicial review proceedings. Although there was, before the Full Court, an affidavit sworn by him, this in itself could not have made him a party to the proceedings. It follows that, his paper would have

been of no relevance to the case before the Full Court nor would it be relevant to this appeal.

[31] I now turn to the 1st to 4th applicants/respondents' application to have parts of the transcript of the proceedings taken on 24 February 2011, admitted into evidence. The transcript which the applicants/respondents sought to adduce into evidence related to events which occurred during the conduct of proceedings before the commission which was differently constituted from the previous commission. Curiously, the matter was raised subsequent to the completion of the hearing of the judicial review claim. The applicant/respondents' request is woefully misconceived.

[32] Even if the present commissioners departed from the procedure adopted during the sitting of the previous commission, it is of some significance to state that they were at liberty to fix the mode in which they proceeded as section 9 of the Commissions of Enquiry Act gives them the authority to make their own rules and regulate the proceedings in such manner as they deem fit.

[33] In the circumstances, the interests of justice as prescribed by rule 1.1 would not lend support to the contention that the evidence sought to be adduced would probably have a significant influence on the appeal as the admission of the fresh evidence sought would be of no effect. It follows that there is nothing which would justify the applicants/respondents being granted the orders they require.

[34] I will now direct my attention to the notice of appeal. It is first necessary to refer to the findings of the Full Court in respect of the appellant. The main complaint of the 1st to 4th respondents was with reference to bias on the part of the appellant. Actual bias was ascribed to him by the Full Court. At page 17 of his judgment Campbell J said:

> "I agree with the reasons of my sister, Williams J, in finding that counsel to the Commission is imputed with actual bias, which could mean his automatic disqualification were he a commissioner."

[35] Submissions were made by Mr Wood on behalf of the appellant, essentially, that the Full Court erred in making the order and although the appellant was affected by it, he was never named a party to the proceedings as no claim had been made against him, nor was he notified that the order would have been made. The appellant was counsel for the commission, he submitted, and being the legal adviser to the commission, he would not have been operating in the capacity of a decision-maker as to the facts. It was further urged by Mr Wood that the commission being chaired by an eminent and highly competent jurist, there would have been no necessity for the appellant to have in any way influenced the chairman in relation to his findings of fact. Nor would the appellant, he argued, be required to direct or induce the other two commissioners as to what facts they should find.

[36] It was also his submission that the rule of natural justice was not observed as the appellant, not being notified that the order would have been made, did not have an opportunity to be heard.

[37] After certain submissions were made by Mr Foster, Mr Hylton QC on behalf of the 1st to 4th respondents, acknowledging that they would have obviously faced an insurmountable hurdle to successfully defend their counter appeal against the appellant, graciously offered a concession that they would not proceed against him.

[38] I will now direct my attention to the counter notices of appeal. They may conveniently be dealt with simultaneously. The following are the central issues raised in the grounds of the counter notices of appeal:

[i] Whether there was actual bias or apparent bias on the part of the 5th respondent.

[ii] Whether there ought to have been disclosure by the 5th respondent.

[iii] Whether the comments of the 5th respondent amount to a prejudgment of the matter.

[vi] Whether there was actual bias or apparent bias on the part of the 6th respondent.

[v] Whether the 6th and 7th respondents were tainted with bias.

[vi] Whether the commission could have proceeded with the two remaining commissioners.

[vii] Whether there was a breach of procedural fairness in the conduct of the proceedings.

[39] As a starting point, an excursion into the law pertaining to bias would be appropriate. Over the years, there have been fundamental developments in the law. Prior to 1993, mixed views were expressed by the authorities as to the applicable test relating to the law. Happily, the divergence of views was settled by Lord Goff, in ***Reg. v Gough*** [1993] AC 646 by placing it in the following context, when at page 648 he stated:

> "In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

He went on to state at page 670:

> "In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man; because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer

> to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."

[40] The ***Gough*** test has been cited with approval and applied repeatedly in various cases, including the cases of ***R v Inner West London Coroner, ex parte Dallaglio*** [1994] 4 All ER 139 and ***Roylance v General Medical Council (No2)*** [2000] 1 AC 311. As can be readily appreciated, the test in proof of bias, as laid down in ***Gough***, is whether there is a real danger of bias, namely, a real possibility as opposed to a probability that there might not be a fair trial. The test applies not only to judges but also to justices, members of inferior tribunals, jurors and arbitrators. It underscores the principle that a man cannot be a judge in his own cause. It follows that a decision-maker, who presides over a hearing, in the execution of his functions, must display not only a semblance of impartiality but also an appearance of impartiality, thus cementing the age old principle "that justice should not only be done but should manifestly and undoubtedly be seen to be done", per Hewart CJ in ***Rex v Sussex Justices ex parte McCarthy*** [1924] 1 KB 256 at 259.

[41] For some time it had been mistakenly conceptualized that automatic disqualification was only applicable in cases in which a judge or a decision-maker had a financial or proprietary interest in the matter before him. This concept was dispelled by the House of Lords in ***Dimes v Proprietors of Grand Junction Canal*** (1852) 3 HL Cas 759, which demonstrates that there would be automatic disqualification in circumstances where the outcome of a decision could realistically

affect the decision-makers interest. In that case, the Lord Chancellor was a shareholder in the Grand Junction Canal company. The company sought and was granted an injunction by the Vice Chancellor which was affirmed by the Lord Chancellor. A motion was successfully brought by the defendant to set aside the Lord Chancellor's order. No inquiry was made by the court as to whether a reasonable man would consider the Lord Chancellor to be biased and neither was there an inquiry as to the circumstances which led him to sit on the matter. However, his order was set aside to avoid the appearance of bias. Lord Campbell said, at page 793:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

[42] The ***Gough*** test has not remained stagnant. It has, over the process of time, been modified and developed. In ***R v Bow Street Metropolitan Stipendiary and Others ex parte Pinochet Ugarte (No 2)*** [1999] 1 All ER 577, which is widely considered as one of the outstanding authorities on bias, the House of Lords reaffirmed the principle that a man may not be a judge in his own cause and their Lordships, although propounding that the rule is not restricted to pecuniary or proprietary interest, extended it to a limited class of non-financial interests.

[43] In that case, Senator Pinochet brought a petition to set aside an order made by the House of Lords in respect of his proposed extradition and the scope of his immunity. Lord Hoffman, who was a member of the Appellate Committee which sat on his appeal, had links with Amnesty International which was a party to the appeal. The appeal was allowed as Amnesty International's interest in the matter was to obtain a trial and possible conviction of Senator Pinochet and the connection between Lord Hoffman and Amnesty International was such as to give an appearance of bias. Lord Browne-Wilkinson said at page 586:

> "As I have said, Senator Pinochet does not allege that Lord Hoffman was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffman might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.
>
> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

> In my judgment, this case falls within the first category of case, [sic] viz, where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, *Judges on Trial* (1976) p. 303; De Smith, Woolf and Jowell, Judicial Review of Administrative Action, (5th edn, 1995) p. 525. I will call this automatic disqualification."

[44] ***Pinochet (No 2)*** makes it plain that even in circumstances where a decision-maker does not have a pecuniary or proprietory interest in the outcome of the matter before him, he may be disqualified if his attitude or behavior would generate suspicion of partiality or prejudice. His interest in the subject matter in the proceedings and his strong commitment to some cause could so operate as to endanger or reduce public confidence in the administration of justice.

[45] In ***Locabail (UK) Ltd v Bayfield Properties Ltd.*** [2000] QB 451, the English Court of Appeal gave affirmation to the rule that a decision-maker who has an interest in a matter before him wrongly acts in his own cause. At paragraph 7 it was said:

> "The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice: see the ***Dimes*** case, 3 HL Cas. 759, in

the passage quoted, at pp. 793-794, and ***Reg. v Gough*** [1993] A.C. 646, 661, per Lord Goff of Chieveley."

[46] Bias may be classified as falling into two categories, namely, actual and apparent. Actual bias is uncommon and is difficult to prove. So it would not be surprising that, as a consequence, there is a dearth of cases establishing actual bias. In **Locabail,** the court, in speaking to the matter of actual bias at paragraph 3 said:

> "Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called actual bias are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

[47] There can be no dispute as to the fundamental rule as to bias. Nor can the logical basis for the rule be a subject for any serious contest, as a man cannot be a judge if he has a substantial or personal interest in the outcome of an issue or proceedings over which he presides. If he actively engages in the proceedings, presumptively, he is effectively acting as judge in his own cause. It follows therefore that any proceedings over which he presides would be seen to undermine public

confidence in the administration of justice and the decision-maker would be disqualified without any inquiry or exploration as to whether there is bias on his part.

[48] In keeping with the learning to be extracted from the authorities, the court should be content to ascertain from the facts of the particular case whether any real danger, or reasonable suspicion of bias on the part of any member of the tribunal in question, exists. Where on the evidence, proof of bias is presumed, the decision-maker is automatically disqualified.

[49] In ***Locabail,*** the court, sounding, somewhat, a note of caution in the application of the test of bias, at paragraph 10 made the following observation:

> "While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings 'however small', there has in more recent authorities been acceptance of a de minimis exception: ***BTR Industries South Africa (Pty) Ltd etal v Allied Workers Union*** 1992 (3) S.A. 673,684; ***Reg v Innec West London Coroner, Ex parte Dellaglio*** [1994] 4 All ER 139 162; ***Auckland Casino Ltd v Casino Control Authority*** [1995] 1 NZLR 142, 148. This seems to us a proper exception provided the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification."

At paragraph 18 they said:

> "When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under the ***Dimes*** case 3HL Cas 759 and ***Ex parte Pinochet (No 2)*** and ***Ex parte Pinochet*** (No 2) [2000] 1 A.C. 119 it will be appropriate to enquire whether the judge knew of the

> matter relied on as appearing to undermine his impartiality because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled."

[50] Allegations of bias should not be made frivolously or spuriously. However, where grounds of real or apparent bias exist, a decision-maker ought not to act. What is the appropriate test for real or apparent bias? The test has been modified in ***Porter v Magill*** [2000] 2 AC 357 where it has been described as being one in which, a fair-minded and informed observer, having regard to the relevant circumstances would be of the view that there is a real possibility of bias. That is, whether such an observer, being fully cognizant of the relevant facts, would entertain a reasonable suspicion that a fair trial would not be possible. See also ***Pinochet (No 2)***; ***In Re Medicaments and Related Classes of Goods (No) 2*** [2001] 1 WLR 700 and ***Davidson v Scottish Ministers*** [2004] UKHL 34.

[51] In ***Tibbetts v the Attorney General of the Cayman Islands*** [2010] UKPC 8, delivered on 24 March 2010, Lord Clarke described the fair-minded observer and outlined the approach such person ought to adopt, in the following terms:

> "The fair minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: ***R v Abdroikof*** [2007] UKHL 37, [2007] 1 WLR 2679 per Lord Bingham at para 15."

[52] In assessing whether apparent bias can be imputed to a decision-maker, the public's perception of the real possibility of bias, is the distinguishing characteristic. The perception of the public of the possibility of unconscious bias is key, as observed by Lord Hope in ***Meerabux v Attorney General of Belize*** [2005] 2 WLR 1307. The focus of the court is the high standard demanded by the need for public confidence in the administration of justice. In ***Lawal v Northern Spirit Limited*** [2003] 1CR 856, at paragraph 22 Lord Steyn places this proposition in this context:

> "What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

[53] ***Porter v Magill*** proposes that, in considering the appropriate test, the court should be guided by a dual step process. First, it should examine the evidentiary material on which the allegation is founded. Thereafter, it should determine whether, on a balance of probabilities, a fair-minded observer would conclude that there is a real possibility of bias on the part of any member of the tribunal whose right to sit on the tribunal has been challenged. ***Porter v Magill*** has been followed in a number of cases including, ***Meerabux v Attorney General***, ***Lawal v Northern Spirit Limited*** and ***AWG Group Ltd v Morrison*** [2006] 1 WLR 1163.

[54] The test of apparent bias is an objective one. It presupposes that a decision-maker would be divorced from any semblance of partiality. The overall objective is fairness, since fairness is a highly relevant tool in the armoury of a

decision-maker. Since fairness is the hallmark of the administration of justice, a duty is imposed on a decision - maker, at all times, to guard against any perceived notion of bias.

The 5th respondent

His connection with Century National Bank

[55] For convenience, reference will be made to the appellants in the counter notices of appeal as respondents. Submissions were first made on the 5th respondent's cross appeal.

[56] Dr Barnett argued that where allegations are made impugning the character of a person, such allegations must be set out and strictly proved. The allegations advanced by the 1st to 4th respondents against the 5th respondent on the question of bias were based on hearsay evidence and statements made or appeared to have been made in documents which offered no assistance as to their authenticity or credibility, he argued. Their contents being unverified would make them inadmissible and it would be wrong for the court to have placed any reliance on them, he argued.

[57] Campbell J, he submitted, made two fundamental errors: first, by treating the 5th respondent as a bad or a delinquent debtor and secondly by asserting that the terms of reference do not mean what they say in relation to the treatment of delinquent debtors. On the basis of the correspondence passing between the 5th respondent and Century National Bank, he argued, it cannot be said that the he was a bad or delinquent borrower or that there was any proven demand which he had disregarded. There were no allegations that any agreed terms had been

breached, nor any amount proved to be outstanding, nor was any action taken against him, nor was there any dispute between the 5th respondent and the bank to show actual bias indicative of financial or proprietary interest, he contended.

[58] The 5th respondent's eminence and experience are unquestionable and the allegations of apparent bias on his part are tenuous and unsubstantiated, he submitted. The principle of fairness, he contended, would not allow that type of evidence which is sought to be admitted to be used to damage the reputation of someone against whom no imputation of wrong can be properly made. Alternatively, he argued, even if the allegations were founded on admissible credible evidence, they would not have led an informed observer to conclude that the 5th respondent was biased.

[59] Mrs Foster-Pusey submitted that the commissioners, in examining and carrying out the terms of reference were under a duty to be impartial, as, they were not only required to inquire into the facts but also to determine whether the debtors were fairly treated. In this case, she argued, the 5th respondent fell within the class of persons in relation to whom investigations were to be carried out by the commission and in respect of whom findings were to be made. Accordingly, his circumstances fell directly within the cause which was before the commission of enquiry and he would have been automatically disqualified, she argued. She further submitted that he would also have been a potential witness to give evidence in relation to a particular aspect of the terms of reference. There is no need to prove that he had a financial interest in the outcome of the inquiry, nor is it necessary to show that he is advancing

a particular cause, she contended. The Full Court, she argued, was correct in finding that he was 'imputed with actual bias' which disqualified him from remaining a member of the commission and the Full Court was correct in finding that he was subject to automatic disqualification.

[60] It was also submitted by counsel for the 1st to 4th respondents that there was adequate evidence to show that the 5th respondent was a bad debtor, primarily, evidence that he had an outstanding unsecured overdraft with Century National Bank which remained unpaid for six years after the bank demanded payment. Counsel further contended that the terms of reference related to the treatment of debtors and the operation and management of FINSAC, and the 5th respondent was a debtor, he having had personal experience with FIS. He was, however, required to investigate and decide whether other debtors were fairly treated by FIS and by other related entities, it was argued.

[61] First, it is necessary to address the 5th respondent's complaint as to the Full Court ascribing actual bias to him. Campbell J speaking to the question of actual bias, at paragraph 30 found as follows:

> "It has often time been said that it is fundamental, a man may not be a judge in his own cause. If the judge is party to or has a financial interest in an action, he is sitting in his own cause. Once that determination is made of an interest, the judge is automatically disqualified. He is imputed with actual bias. This is such a case "

[62] As distilled from ***Locabail,*** it is clear that actual bias can only be established where prejudice or partiality is actually shown. In ***Re Medicaments***, at paragraph 38F Lord Phillips put it this way:

> "The phrase 'actual bias', has been applied to the situation (1) where a judge has been influence by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party to the hearing."

[63] I am fully in agreement with Dr Barnett that in imputing actual bias, it must be shown that the decision-maker has a financial or proprietary interest in the outcome of the inquiry, and that clearly, there is no evidence of any personal advantage or disadvantage being attributed to the 5th respondent to affix him with actual bias. There is no evidence to establish that the 5th respondent had any financial or economic advantage in the outcome of the inquiry by which actual bias could be ascribed to him. It could not be said that he had a proprietary or monetary interest in the outcome of the inquiry, which would have caused him to be actually prejudiced or partial in his conduct of the proceedings. The Full Court was wrong in assigning actual bias to him, there being no evidence before the full court to support such a finding.

[64] A further question to be considered is whether the 5th respondent can be classified as a person who the inquiry intended to address. Did he fall within the scope of the terms of reference?

[65] Campbell J found that the 5th respondent was a borrower from Century National Bank and went on to find that he had defaulted on his debt, he was a delinquent borrower and was among the class of persons falling within the scope of the terms of reference. He said:

> "Was the 1st Defendant a 'delinquent borrower, for the purposes of the Terms of Reference? It was argued that the acceptance by FIS of the 1st Defendants [sic] offer to liquidate the overdraft, devoid of hesitation or dispute as it was, and would not qualify the loan as being delinquent. The set off form is evidence that the Certificate of Deposit was inadequate to liquidate the outstanding debt of the 1st Defendant. The CONCISE Oxford Dictionary defines 'delinquent' as defaulting. On the applicants' case, the Bank had informed the 1st Defendant from January 1992, and the debt was not discharged until March 1998. On the 1st Defendant's case [sic], they acknowledged receipt of the 10th January [sic] 1997 letter it was still almost eighteen months before the debt was extinguished. On either case I would have to say the 1st Defendant has defaulted on his debt, and could properly be described as a delinquent borrower. The fact that this debt was extinguished some twelve years ago does not assist the 1st Defendant, as the enquiry concerns delinquent borrowings that were created in the 1990s."

[66] After examining the law on disclosure and apparent bias, he continued by making reference to an extract from the speech of Lord Clyde in the Privy Council decision of ***Panton and Another v The Minister of Finance and Another*** [2001] UKPC 33, delivered 12 July 2001, which effectively demonstrates that a judge will be disqualified from hearing a matter without an investigation as to whether there was a likelihood or suspicion of bias.

[67] He also referred to the case of ***Davidson v Scottish Ministers*** and said that:

> "Lord Bingham recognized the need for tribunals to be in a position to resolve issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case."

He later cited an extract from Lord Bingham's judgment which essentially reiterates the principle that a judge will be disqualified from hearing a case if he has a personal interest therein, provided such interest is not negligible.

[68] After indicating that the 5th respondent had membership in a company of which his wife was a director (Bev Carey Associates) and stating that his close connection to the chairman of an intervened company placed him in that class which the commission had to review, he went on to review the test as to apparent bias making reference to a number of cases including ***R v Gough***, ***Meerabux Attorney General*** and ***Porter v Magill*** and then said:

> "What would the fair-minded and informed observer think, if it were known that the 1st Defendant's wife is contending that there are no balances outstanding with JCB. That no communication had been had from the Bank in relation to the so-called outstanding amount from 1994, until it surfaced in a document challenging the impartiality of the Commission which her husband chaired. That other than a spreadsheet and an excel file, there is no other documentation supplied to evidence the loan. If that fair-minded observer knew that the Bills of Sale were from the Registrar of Companies and not the Bank, and that outside of these items the Claimants are unable to contradict Mrs Carey's claim that she has repaid her loan [sic]. It is not unusual to have un-discharged bills of sale at the Registrar of Companies, even where he [sic] sum owing have

> [sic] been liquidated. Whether the fair-minded and informed observer, having considered all the circumstances would conclude that there is a real possibility that the Chairman was biased ...."

He then said:

> "The lack of any communication, and documentation from the bank would weigh in the circumstances to cause the observer to think the judge's objectivity could not have been impaired."

[69] I pause here to say that Campbell J was wrong to have found that the 5th respondent's connection with the chairman of the intervened institution placed him within the ambit of the terms of reference. Although there had been such an allegation by the 1st to 4th respondents. This had not been proved.

[70] I will now turn to the evidence. In an affidavit of Mr Patrick Hylton sworn on 3 February 2010, evidence was adduced by the 1st to 4th respondents in support of their allegation that the 5th respondent and Bev Carey Associates were debtors of FINSAC/FIS as of November 2001. Paragraphs 13 – 16 and 19 - 20 of the affidavit state:

> "13. In December 2009, certain matters, and documentation in relation to them, came to my attention in relation to the 1st Respondent [5th respondent]. Consequently, Mr. Garcia (on my instructions) along with attorneys representing the other Applicants and Jamaican Redevelopment Foundation Inc. ('JRF') wrote a letter dated December 31, 2009 to the Secretary of the Commission. The letter was copied to me, and a copy of it is exhibited hereto marked **'PH4'**. The relevant matters are as follows:
>
> a. The 1st Respondent [5th respondent] had a debt with Century National Bank Limited ('CNB') arising

from an overdraft facility and the facility was not repaid at the time the assets of CNB were vested in FIS. FIS subsequently communicated with the 1st Respondent in relation to the overdraft with a view to having it settled.

b. CNB's records in relation to the overdraft facility indicated that the 1st Respondent was a 'close associate' of CNB's chairman, Donovan Crawford who had advised that the 1st Respondent was to be treated well. The records further said, "Mr. Carey advised that some unexpected bills had occurred and he needed an assistance for 4 months. Although unsecured, because of the close relation and reliability of this gentleman this has been afforded.

c. Bev Carey & Associates (1985) Limited ('Bev Carey & Associates'), of which records at the Companies office show the 1st Respondent and his wife (Beverley Carey) to be its only shareholders and his wife a director, had a loan with Jamaica Citizens Bank Limited ('JCB'). (The letter incorrectly describes the debt as having been with CNB). The loan was outstanding and non-performing at the time of Finsac's intervention in JCB, and the debt was consequently among those sold by JCB to Refin Trust Limited (an affiliated company of Finsac).

14. Among the enclosures to the letter of December 31, 2009 were two letters from the 1st Respondent regarding his personal, then existing, debt written on the letterhead of the Court of Appeal of the Bahamas, being:

    a. One dated January 5, 1998 addressed to CNB; and

    b. The other dated February 12, 1998 to FIS.

15. I have also seen two bills of sale issued by Bev Carey & Associates in favour of JCB, one dated July 29, 1986 and the other dated June 20, 1991. A copy of each is exhibited hereto marked **'PH5'**. These copies were obtained from the Companies Office of Jamaica, and the company's register of charges does not show that these charges have been satisfied and/or discharged.

16. The records of FIS and Finsac showed the debts from the 1st Respondent and Bev Carey & Associates to be outstanding at the time of a sale of the non-performing loans from Finsac and its related entitles [sic] (including FIS and Refin Trust Limited) to Jamaican Redevelopment Foundation Inc. ('JRF'). They were therefore included in the schedule of loans sold to JRF. The agreement in connection with the sale was called an 'Agreement for Sale and Purchase of Assets' and was dated January 30, 2002. I have not exhibited a copy of the agreement because the schedule is extremely long and, more importantly, because it contains details of the debts of other persons. Although I was involved with the negotiation and execution of the agreement, I cannot remember details of the debts listed in the schedule as there were thousands of them. I have, however, checked a spreadsheet of the thousands of debts included in the schedule as having been sold by Finsac to JRF. The spreadsheet has the following information in relation to the debts of the 1st Respondent and Bev Carey & Associates:

Customer Name	FINSAC Acct #	Currency	Principal Balance as at Nov 1, 2001
BEV CAREY ASSOC LTD	10204322	JMD	370,563.24
CAREY JUSTICE BOYD	10207691	JMD	46,213.00

...

19. Following a conversation between Mr. Garcia and the Secretary of the Commission on the afternoon of January 18, 2010, Mr Garcia received on my behalf a letter dated January 18, 2010. I exhibit hereto marked **'PH8'** a copy of that letter.

20. That letter of January 18, 2010 is the first acknowledgement by or on behalf of the 1st Respondent that he was a debtor. There is no denial in the letter of his own debt, or of his close association with Donovan Crawford, or of the existence of the debt of Bev Carey & Associates. The letter did allege, however, that the existence of the loan to Bev Carey & Associates "has not been substantiated."

[71] Principal among the documents which were enclosed in the letter of 31 December 2009 from the 1st to 4th respondents' attorneys at law to the commission were: correspondence from Century National Bank to the 5th respondent dated 27 January 1992, 28 December 1993, letter of 10 June 1997 from Century National Bank to the 5th respondent and his wife and also letters passing between the FIS and him between 22 January and 12 February 1998. The contents of these letters are as follows:

"January 27, 1992

Justice Boyd Carey & /or
Beverley Carey
Court of Appeal
P.O. Box 629
Kingston

Dear Sir/Madam

RE: CURRENT ACCOUNT # 00-07-00027-5
BALANCE:$11,250.54

We write in connection with your account at caption and advise that same is overdrawn as indicated. In this regard, we are requesting that you make the appropriate lodgement within seven (7) days from the date of this letter, to cover the overdrawn position.

We look forward to your early response.

Yours truly
CENTURY NATIONAL BANK LIMITED

Paulette R. Glave
Branch Manager"

"December 28, 1993

Justice Boyd Carey A/or
Mrs Beverley Carey
"Ironshore Account"
Court of Appeal
P.O Box 629
KINGSTON

Dear Mr & Mrs Carey

Re: Account C/A#000700375 Pres. Balance $18,712.35.
plus interest at 90% or 120%

As you are aware the subject account continues to reflect an unsecured overdraft balance.

The Bank of Jamaica has dictated otherwise and although loans from commercial banks have been reduced, we would be quite willing to discuss a secured overdraft arrangement.

Finally, let us hear from you as we have to answer to the new Banking Act which does not cater to unsecured unauthorized overdrafts.

Yours sincerely
CENTURY NATIONAL BANK

C.E Betty Morant (Mrs)
Branch Manager"

"June 10, 1997

Justice Boyd Carey
Beverley Carey
PO Box 629
Kingston

Dear Mr and Mrs Carey,

Re Current A/c #4 7000375
Outstanding balance $65,880.84
Certificate of Deposit #9000005877
$111,985.68 (After Payment Deducted)

As you are aware your current account continues to be overdrawn as indicated above.

Under the current policies, we were unable to offset the same against the subject Certificate of Deposit ('B' Share) held in the Building Society. However, at this time we are pleased to advise that a payment of $36,000.00 representing the first payment from proceeds of the captioned deposit has been duly applied to the above balance. In effect, your balance is now $29,880.84 (Overdrawn).

We will continue to monitor the situation closely and will advise you of any further developments regarding the matter.

Yours truly

Junior Francis Vincent R Besley

"January 22, 1998

Justice Boyd Carey
Court of Appeal
P.O. Box 167
Nassau, Bahamas

Dear Sir

Re: Current Account No. 7000375

Please be advised that the Financial Institutions Services Limited (FIS) is now managing the assets and prescribed liabilities of Century National Bank Limited, Century National Building Society and Century National Merchant Bank and Trust Company Limited ('CFE's') pursuant to a Scheme of Arrangement approved by creditors/depositors of the CFE's on October 12, 1997 and sanctioned by the Supreme Court on October 16, 1997.

We refer to your letter dated January 5, 1998 and advise that the balance on your accounts are as follows:

1) Current A/C# 7000375 - $48,928.27 (overdrawn as at 31/12/97)

2) 'B' Share A/C# 9000005877 - $115,985.68 after deduction of interim payment for $36,000.00

Please note with regard to deposit 65% or $75,390.69 was remitted to the National Commercial Bank for you to access. As you should have heard, the balance of $40,594.99 will be made available to you in May 1998 under the Government Scheme of Arrangement.

We have enclosed a Set-off form for you to sign, should you choose to settle the debt from the deposit. Also see attached copy of our correspondence to you dated June 10, 1997.

We look forward to hearing from you soon.

Yours truly

Andrea Duncan (Mrs) Merline Patterson (Mrs)"

"12th February 1998

Financial Institutions Services Ltd
9 Trinidad Terrace
Kingston 5
Jamaica W.I.

Dear Sirs,

RE: CURRENT ACCOUNT NO. 7000375

Thank you for your letter of January 22, 1998 in respect of the above matter and hasten to respond as requested to prevent further accrual of interest which seems to grow ever alarmingly.

I return [sic] you herewith set off form duly completed and enclose as well my cheque for $8,333.28 which I trust wholly discharges my debt to Century Bank Ltd.

Please be good enough to let me hear from you as early as possible.

Yours faithfully,

Justice Boyd Carey."

[72] Although Dr Barnett stated that there was no amount proved to be outstanding by the 5th respondent, there is evidence that the 5th respondent, before becoming a member of the commission, had a debt with Century National Bank. In his affidavit, he denied receipt of the letters of demand from Century National Bank. It is possible that he had not received these letters but surely he would have known of the debt. His knowledge of the debt is evident, despite his averment in an affidavit sworn by him on 21 January 2010 in which he said that "there was never a loan to create a debt". On 5 January 1998 he wrote to Century National Bank seeking information on the outstanding balance for the purpose of discharging his obligation to that institution. It is significant that, in paragraphs 18 and 19 of his affidavit, he stated that his share account was in excess of his overdraft and that Century National Bank had the facility to apply the deposit to discharge the overdraft. There is evidence to show that the deposit in the share account was held with Century National Building Society and not on Century National Bank, an entirely different entity. As correctly argued by the 1st to 4th respondents, there is no evidence that the bank would have been at liberty to have utilized the funds with the Building Society to apply towards, or offset the debt without the 5th respondent's express permission. Further, there is evidence which reveals that at the time, the 5th respondent's indebtedness was in excess of the deposit in the share account and could not have been satisfied.

[73] The FIS, on 22 January 1998 wrote to the 5th respondent showing that he had an outstanding balance and made an offer for him to settle his indebtedness. On 12

February 1998, in response to the letter, he executed a set off form which was sent to him. He paid the requisite sum in full satisfaction of his obligation. There is nothing to show that he had failed to satisfy any demand made either to Century National Bank or the FIS. In light of this, a putative observer being aware of all the circumstances, would not hold that the 5th respondent was a delinquent or a bad debtor, as found by Campbell J but surely he would categorize him as a debtor of or a borrower from Century National Bank and also a debtor of FIS.

[74] Could he be classified as a person who the terms of the inquiry sought to address? In seeking to answer this question it is useful, at this point, to look at the mandate prescribed by the terms of reference. By these terms, the commissioners were directed to review the operations of FINSAC regarding delinquent borrowers and to determine whether borrowers were fairly treated. As dictated by their mandate, there is little doubt that the commissioners were enjoined to carry out a dual exercise. Their duty, on one hand, was to engage in the review of such persons who could be classified as delinquent borrowers and on the other hand, to carry out a review as to the treatment of borrowers. Clearly, the commissioners' duty would not have been restricted to a hearing relating only to delinquent debtors but also to give consideration to FINSAC's performance and its conduct in relation to the borrowers, namely the debtors.

[75] Significantly, as correctly submitted by the 1st to 4th respondents, the commissioners' mandate was not restricted to an inquiry into FINSAC's operations and conduct with reference to the treatment of the debtors. Further, as rightly stated by

them, the terms of reference expressly named FINSAC, not FINSAC Limited, as FINSAC Limited did not acquire any debts. The debts were acquired by FIS, Recon Trust and Refin Trust. The mandate clearly incorporated the debts acquired by these companies.

[76] The further question is whether it can be said that the 5th respondent would be presumed to be biased. In ***Re Medicaments*** Lord Phillips, speaking to the question of bias, said at paragraph 37:

> "Bias can come in many forms. It may consist of irrational prejudice or may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence before him."

In ***Panday v Virgil***, Warner JA at paragraph 26, in speaking to the principle, observed that:

> "An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings"

[77] As a member of the commission, would the 5th respondent effectually be acting as a judge in his own cause and as a consequence is automatically disqualified"? This question having been posed, the resolution lies in determining whether on the evidence, on the balance of probabilities, a fair-minded and informed observer, fully cognizant of all the facts, would conclude that he would be biased. It

has been long recognized by the authorities that bias may manifest itself in such a way that a person who is alleged to be biased may not be conscious of the impact.

[78] The 5th respondent was a debtor to the intervened institution and to FIS. Clearly, even after the debt had been discharged, logic dictates that he would be regarded as a debtor. It is without doubt that he, being a borrower from the intervened entity, must be treated as a person who falls within the category of persons, the treatment of whom, the inquiry was designed to investigate. He presided over the hearing of the commission of inquiry. In ***Dimes***, Lord Campbell said that the maxim that no one should be a judge in his own cause is not restricted to a cause in which he is a party but is also applicable to a cause in which he has an interest. Additionally, as shown in ***Pinochet (No 2)*** an interest may be direct or indirect. The Australian case of ***Ebner v Official Trustee in Bankruptcy*** [2000] HCA 63 cited by the 5th respondent, as to the meaning of the word "Interest" does not assist him. It does not reflect a true interpretation of the law as pronounced in ***Dimes and*** **Pinochet** ***(No 2).*** A fair-minded observer, not being unduly cynical, complacent or suspicious, being fully seized of the fact that the 5th respondent was a debtor of Century National Bank, would categorize him as a debtor of FINSAC and FIS and would be of the view that the inquiry was a matter in which the 5th respondent would have had an indirect interest. He would not regard his interest in the outcome of the inquiry as de minimis**.** The observer, obviously, would be likely to form the view that the 5th respondent could be apparently biased.

Disclosure

[79] The 5th respondent complained that the 1st to 4th respondents raised the issue of disclosure in their submissions but this was never presented as a ground of appeal. It is perfectly true that the 1st to 4th respondents failed to set out a ground regarding the non-disclosure of the 5th respondent. Under rule 2.2 (5) of the Court of Appeal Rules, a notice of appeal must set out the grounds on which an appellant relies. Rule 2.3 (2) prescribes that a counter-notice must be in compliance with rule 2.2. Despite the 1st to 4th respondents' failure to conform with rule 2.2 (5), this court may, in keeping with the prescription of rule 1.16 (3), entertain submissions on the question of disclosure advanced by the respondents. Rule 1.16 (3) does not confine the court to the grounds in the counter-notice of appeal, unless the party who objects to the court considering an issue raised, was not afforded adequate opportunity to contest the issue. In the case under review, the 5th respondent was aware that the issue of non disclosure would have been raised. He made full submissions in response to the issue of disclosure. He cannot now justifiably complain about the 1st to 4th respondents' omission to file a ground of appeal thereon.

[80] The Full Court ruled that certain documentary evidence presented by the 1st to 4th respondents in respect of Bev Carey Associates Limited namely: bill of sale, a spreadsheet and an Excel files were hearsay. It first ruled that the evidence was admissible but subsequently ruled that it was not. It was submitted by Mr Garcia that the Full Court, relying on section 34 of the Evidence Act, erred by treating the spreadsheet and Excel files as inadmissible.

[81] Dr Barnett argued that a judicial review court would only be at liberty to rely on hearsay evidence in circumstances in which a court, in reviewing the decision of a lower court, was not constrained to restrict itself to the strict rules of evidence and was required to give consideration to the evidence adduced before the tribunal, or where there was a challenge based on irrationality. In support of this submission, the 5th respondent relied on parts 30 and 56 of the Civil Procedure Rules; ***R v Williams*** RMCA No 27/1998, delivered 1 March 1999; ***Reid v Cable & Wireless*** CLR R 037/2000, delivered 21 July 2004; ***Ventouris v Mountain (No 2)*** [1992] All 3 ER 414; sections 31 E and 31 F of the Evidence Act; Phipson on Evidence and Cross on Evidence on admission of hearsay evidence, as well as paragraphs 23 and 24 of Judicial Review by Lord Clyde, which, in essence state that the evidence on which reliance can be placed should be first-hand and the best that can be presented.

[82] The 1st to 4th respondents submitted that in judicial review claims, the exclusion of documents as hearsay is not automatic as they ordinarily would be in civil claims, since a public body is not bound by rules of evidence governing a court of law. An inferior tribunal not being bound by the ordinary rules of admission may receive and consider hearsay evidence. It was further argued that in judicial review claims, the court is required to assess the manner in which the public body conducted itself. Accordingly, the court is at liberty to consider the material which was before the public body and in considering the claim, the court may take into account such evidence. Mr Garcia argued that there is good reason for the difference in the approach in that the present case is not one in which a decision on private law

rights is sought. In the interest of good administration, he submitted, parties to a judicial review claim may not be in a position to obtain the best evidence.

[83] The enclosures in the 1st to 4th respondents' letter of 31 December 2009 were considered by the commission before it arrived at a decision to proceed with the inquiry. The only documents which were not before the commission were the bills of sale, the deed of assignment in relation to FINSAC and the 4th respondent's spreadsheet. The existence of the bills of sale was not in issue. However, the spreadsheet and Excel files were.

[84] The cases cited by the 5th respondent were not matters which were heard within the context of judicial review proceedings and would therefore be inapplicable in giving consideration as to the admissibility of the documents. The references to Phipson and Cross offer no assistance. Parts 30 and 56 of the Civil Procedure Rules are unhelpful. The 5th respondent also relied on ***Douglas v Pindling*** (1996) 48 WIR 1 in support of his submissions. In that case, the main issue related to the admission of bankers' book evidence. The Privy Council found that, in an inquiry, it is unnecessary to resort to the approach adopted in private law or criminal law as to the production of bankers' books. The extract from the text of judicial review is merely an opinion of the learned authors which would not be necessarily followed by the court. As correctly stated by counsel for the 1st to 4th respondents, it is a general guide to practitioners as there is nothing to show that it has been tested and affirmed by judicial authority.

[85] The arguments of the 1st to 4th respondents are not without great force. I am attracted to their submissions and regard them as the correct approach and that by which the court should be guided. As rightly submitted by the 1st to 4th respondents, in judicial review proceedings, the focus of the court is the effect of the challenged decision on the public and on good governance. The authorities have shown that, in those proceedings a liberal approach is adopted as to the admission of hearsay evidence. ***R v Secretary of State for the Home Department, ex parte Lillycrop*** [1996] EWHC Admin 281; ***R v Secretary of State for the Home Department, ex parte Rahman*** [1998] QB 136 and ***Alliance Against the Birmingham Northern Relief Road v Secretary of State for the Environment, Transport and the Regions*** (1999) WL 477754, were cited by the 1st to 4th respondents in support of their submissions.

[86] The matter before the court was a claim for judicial review of FINSAC's operation with respect to delinquent and other borrowers and whether they were fairly treated. In such proceedings the court may permit the introduction of relevant hearsay evidence of which the court should be aware. In ***Alliance Against the Birmingham Northern Relief Road v Secretary of State for the Environment Transport and Regions***, Lord Woolf said, at page 5:

> "...it is not inappropriate in an affidavit in opposition to an application for judicial review or an application to quash a statutory decision to refer to hearsay. It happens regularly and is encouraged by the courts to enable respondents to place information which would not otherwise be available to the court of which the court should be aware..."

[87] The foregoing dictum gives affirmation to the fact that a judicial review court is at liberty to consider evidence of which the court should have knowledge, where such evidence would not have been otherwise available. The court is permitted to consider reliable and relevant evidence which is brought to its attention during its investigation into the proceedings. In ***Panday v Virgil***, a case which concerns the issue of bias, Archie JA (as he then was), speaking to this proposition, said at paragraph 16:

> "I agree with the learned President that the material facts are not limited to those known to the appellant at the time of the appeal but are such as are ascertained by the Court (and I would add 'up to the time of its judgment or decision'). That proposition follows from the fact that a principal concern is the protection of the Court's process and the maintenance of public confidence in the administration of justice. If there were any relevant and potentially reliable evidence available it would be illogical and inconsistent to ignore it."

[88] It is clear from Archie JA's dictum that relevant and potentially reliable evidence should be made available for the court's consideration . Such evidence could, of course, include hearsay evidence, provided it is capable of being relied upon. The 5th respondent submitted that in ***Panday v Virgil*** the court refused to admit hearsay evidence. It is true that certain information sought to be admitted in ***Panday v Virgil*** was by way of hearsay evidence from statements and newspaper articles. Obviously, it was not relevant to the case and was rendered inadmissible.

[89] I will now examine the material contained in the documents pertaining to Bev Carey Associates to make a decision on its effectiveness or otherwise.

[90] Counsel for the 1st to 4th respondents argued that the Full Court was asked to make a finding that Bev Carey Associates Limited was indebted to Jamaica Citizens Bank which debt was outstanding to Refin Trust and that FINSAC had proceeded on the ground that the indebtedness existed. It was argued that although such a finding would have been significant in relation to the question of bias, the court failed to so find. The evidence presented should have been held admissible and due weight accorded to it, counsel argued.

[91] Bev Carey Associates was incorporated in 1985. The 5th respondent and his wife are the sole shareholders and sole directors. In his affidavit, Mr Hylton stated that two bills of sale were issued by Bev Carey Associates in favour of Jamaica Citizen Bank, on 29 July 1986 and 20 June 1991, respectively. He further stated that the spreadsheet shows an indebtedness by Bev Carey Associates of $370,563.24 as of 1 November 2001. In an affidavit sworn by Janet Farrow, the Chief Executive Officer of the 4th respondent, she averred that on her review of Excel Files from FINSAC the amount due from Bev Carey Associates as of the time of the sale to FIS, was $824,984.36. Mr Errol Campbell, managing director of FINSAC, in cross - examination, stated that the balances recorded in the spreadsheet containing names of borrowers were unverified.

[92] The documents which were principally challenged by the 5th respondent were the spreadsheet and the two bills of sale. Mrs Carey was a signatory to the bills of sale but the 5th respondent was not a signatory to either bill. There was no dispute that Jamaica Citizen's Bank was one of the institutions into which FINSAC intervened, that Bev Carey Associates is recorded on the spreadsheet as being a debtor to Jamaica Citizens Bank and that the company is listed thereon in the schedule of debts assigned from FINSAC to the 4th respondent as owing $370,563.24. Although there is no dispute that the two bills of sale exist, Dr Barnett argued that they might not have been discharged for the reason that Bev Carey Associates may have felt free to sell the assets despite the charge, since there was no necessity to register the sale of personalty generally. In addition, he submitted, the Bills of Sale Act stipulates that a charge must be entered as satisfaction at the Island Record Office and the document was deposited at the Companies' Office.

[93] Section 5 of the Bills of Sale Act provides:

> "On the debt (if any) for which any bill of sale as aforesaid shall have been made or given, being satisfied or discharged, the grantee or holder of such bill of sale shall cause satisfaction to be entered on the margin of the record of the said bill of sale in the Record Office, otherwise it shall be lawful for any Judge of the Supreme Court on proof of the satisfaction or discharge of the said debt, to order a memorandum of satisfaction, to be so entered upon the margin of the record of the said bill of sale."

[94] In an affidavit sworn by Mrs Carey, she averred that she had personally obtained a loan from Jamaica Citizens Trust and Merchant Bank Limited. However,

the issue before the court relates to the loan to her company from Jamaica Citizens Bank and not from the Jamaica Citizens Trust and Merchant Bank. In dealing with the facility from Jamaica Citizens Bank, she stated that bills of sale were given to Jamaica Citizens Bank and these were not discharged. She, however, failed to advance a reason for the fact that they remained undischarged. If the holder of bills of sale fails to secure the entry of the satisfaction on the bills, section 5 of the Bills of Sale Act clearly gives Bev Carey Associates a right, upon an application to a judge, on proof of discharge, to order a memorandum of satisfaction. There is nothing to show that this was done. However, even if there was proof that the bills were satisfied, a debt was created thereunder and it cannot be said that Bev Carey Associates was not a Jamaica Citizen's Bank debtor and subsequently a FINSAC debtor. The bills of sale are admissible. So far as the spreadsheet is concerned, the balance reflected thereon is unverified and is at variance with the amount on the Excel files. It is therefore ruled inadmissible.

[95] Despite ruling that the spreadsheet is inadmissible I think it is of worth to mention that Mr Garcia argued that the 5th respondent disputed the reliability of the spreadsheet and that this amounts to actual bias as it shows that his wife and himself would have had a personal interest in questioning its veracity. In my judgment, even if the spreadsheet was admitted into evidence, a fair-minded observer, fully cognizant of the facts of this case would not impute actual bias to the 5th respondent, simply by his questioning its reliability.

[96] It was argued by counsel for the 1st to 4th respondents that the 5th respondent was a delinquent borrower of an intervened institution and having failed to make this disclosure, he would have been disqualified by being a judge in his own cause. Further, it was contended that the 5th respondent was a FINSAC debtor and this he ought to have disclosed and that even if he fell outside of the relevant class of persons, he ought to have disclosed that he had an unpaid debt to Century National Bank. It was also argued that he failed to disclose that Bev Carey Associates was indebted to Jamaica Citizens Bank notwithstanding that two opportunities were presented for him to have made the disclosure. It was also their contention that because of the nature of the inquiry, there ought to have been disclosure as it would be difficult to say that there could be a consent or waiver on their part for the commission to proceed.

[97] Following the commencement of the commission's sitting on 22 September 2009, it sat on 12 occasions up until 10 December 2009. The sitting on 10 December, 2009 was adjourned until 19 January 2010. The letter of 31 December 2009 shows that the 1st to 4th respondents had some disquiet about the 5th respondent's indebtedness with Century National Bank and in respect of certain transactions in which Bev Carey Associates was involved with an intervened institution. The correspondence, which has been mentioned in paragraph [70], passing between the 5th respondent and the intervened institution as well as FIS, was enclosed in that letter. In the letter dated 18 January 2010, from the secretary to the commission, it was stated that the 5th respondent's overdraft had been fully discharged and that

the loan to Bev Carey Associates could not be substantiated by FINSAC, FIS nor JRF. The statement in respect of Bev Carey Associates would not be accurate in light of the fact that there is no evidence that the bills of sale were discharged.

[98] Full disclosure is a prerequisite for the conduct of a fair hearing. Where a case requires disclosure, non disclosure "inevitably colours the thinking of a fair-minded observer" - see ***Davidson v Scottish Ministers***. This is a case in which disclosure ought to have been made.

[99] Before commencing the sittings, the 5th respondent was under an obligation to have made disclosure not only of his indebtedness but also that of Bev Carey Associates a company of which he was a shareholder and a director. It is of importance to state that the information as to the 5th respondent's indebtedness and that of his wife's company to the intervened institutions having come to the 1st to 4th respondents' knowledge subsequent to 12 sittings of the commission, it could not be said that they consented to him sitting or that they had waived their right to him being a member of the commission. It is without doubt that they sought to be afforded a hearing as to his eligibility to sit on the commission. This shows an endeavour on their part to have raised an objection to his sitting, his connection with the intervened institutions having come to their attention during the sitting.

[100] A fair-minded observer would have realized that FINSAC's record shows the existence of a debt from Bev Carey Associates of which the 5th respondent was a director and shareholder, by way of bills of sale and also that the 5th respondent

was a debtor or borrower from Century National Bank which he failed to disclose. On examining all the evidential material, as an independent and impartial observer, he or she, looking on, would entertain reasonable apprehension of bias on the part of the 5th respondent.

Comments by the 5th Respondent

[101] A further complaint of bias by the 1st to 4th respondents was that during the course of the hearing the 5th respondent made statements which would have been a cause for concern by a fair-minded observer. Mr Hylton argued that any of the statements, in itself, may not be of any moment but when taken cumulatively they could be regarded as prejudging the issues. The statements of the 5th respondent, it was argued, when viewed against the scope and purpose of the inquiry, an informed observer, would be of the opinion that the respondent had predetermined the issues and this would be unfair. Counsel relied on ***Pelletier v Attorney General of Canada*** [2008] FC 803 and ***Porter v Magill*** among others in support of the submissions.

[102] Dr Barnett contended that the comments were innocuous and did not indicate bias. The cases of ***Pelletier*** and ***Porter v Magill*** are unhelpful, he submitted. The comments, he argued, made by the commissioners in ***Pelletier***, were not on an equal plain with those made by the 5th respondent sufficiently to affix him with bias.

[103] The following items were catalogued as embodying the main statements surrounding the complaint of bias:

> "a. In response to Dr. Davies' assertion that 'the record will show that FINSAC has won every single one of these legal challenges, The Chairman responded 'I am not sure I am proud of that,'
>
> b. He repeatedly described debtors as 'victims' and as having been 'FINSAC'd,
>
> c. He asked Finsac GM Errol Campbell: 'Is that what these people were doing? Paying, paying, paying and when it gets to the mountain top and say, ah, I have paid off. Miss, you fool – you know the old Jamaican saying',
>
> d. He volunteered in apparent empathy with a debtor, 'people weren't told [that their debts had been transferred]. They woke up one morning got a letter saying you are now a Finsac character',
>
> e. He told Dr Davies 'Minister, when you are minister you are negligent,
>
> f. When Dr Davies testified that some entities successfully faced the challenges of the crisis, he said, 'if there is a plague some people survive',
>
> g. He described FIS activities as 'a sort of obeah', and as 'hocus-pocus',
>
> h. He said FINSAC 'is a government body, public body. It's not a sort of cold-supper shop business',
>
> i. In explaining the 'procedures' being followed, by the Commission, he asserted that 'we are not in a court of enquiry, court of law, this is a coroner's inquest'; and
>
> j. He asked rhetorically: 'So what's the purpose of it all; to kill people? Because that can only be the object'."

[104] The comments were not treated by the Full Court as evidence of bias. It found that they would not be regarded as unfair by a fair-minded observer who was aware of the nature of the proceedings.

[105] There is no gainsaying that a decision-maker must embrace and maintain an objective and impartial posture in the conduct of proceedings before him. He should refrain from indulgence in comments, observations and dialogue which may compromise the integrity of the proceedings. However, this does not mean that he is restricted from making comments or observations during the course of his engagement. He is entitled to enjoy some latitude in expressing his opinion. In the process of conducting an inquiry he may make comments or statements provided such statements are made within permissible boundaries.

[106] Individually, most of the comments made by the 5th respondent are benign. Others, namely, his reference to the debtors as 'victims', as well as his rhetorical question and answer thereto at (j) may be regarded as somewhat distasteful. In ***Pelletier***, the commissioner made several extremely reprehensible and highly prejudicial comments which were undoubtedly outside of the permissible boundaries. In fact he had pre-determined the matter. In that case, a report by the Auditor General outlining problems with the management of a sponsorship programme and the advertising activities of the Canadian government, among other things, prompted the government to establish a Commission of Inquiry to investigate these problems. Mr Pelletier was in charge of the programme. In 2004, following the first hearings, and before all the evidence was submitted and the witnesses testified, the

commissioner granted interviews to journalists and made public statements, arising from which several articles appeared in the newspapers.. In a newspaper article he was quoted as saying:

> "I am coming to the same conclusion as (Auditor General) Sheila Fraser that this was a government program which was run in a catastrophically bad way. I haven't been astonished with what I'm hearing, but it's dismaying..."

He was also reported to have made comments in which he referred to the commission as "an amazing spectacle" and said that "he had the best seat in the house for the best show in town" and that "the juicy stuff is yet to come". In 2007 he acknowledged that the statements in 2004 had been made in error. It was held that his comments, when viewed cumulatively, would cause a reasonable, informed person to view him as having prejudged some of the matters he had to investigate and that he was biased.

[107] It cannot be said that the comments of the 5th respondent ought to be classified as falling within the scope of those made by the commissioner in ***Petellier*** as contended for the 1st to 4th respondents. The comments of the commissioner in ***Petellier*** were severely objectionable in content and are incomparable to those made by the 5th respondent.

[108] In ***Porter v Magill*** the city council's auditor was requested to certify an amount due to the council. On completion of his investigations he made publicly his provisional findings by way of a press statement. He was requested to recuse

himself but he refused to do so and in reasons given by him he stated that he was not biased. It was held that he was not biased. As counsel for the 5th respondent rightly argued, despite Lord Hope stating that protestations of the kind made by the auditor were unlikely to be helpful, it was held that the applicant's had not shown that there was a real possibility that the auditor would be biased.

[109] When all the comments made by the 5th respondent are examined collectively, or, in other words, looking at the "composite picture", I would not say that they justify a cause for concern. In my opinion, in considering the cumulative weight of these comments, an impartial observer, being fully aware of all the circumstances of the case, in reviewing them collectively, would not infer from the statements that the 5th respondent had prejudged the issues. The observer may very well not impute apparent bias on the part of the 5th respondent.

The 6th to 8th respondents

[110] It was contended by the 1st to 4th respondents that there is evidence that the 6th respondent had a settled view on matters of economic policy which showed bias on his part. They submitted that for several years, commencing in August 1996, statements made by him in newspaper articles, constituted an unwavering view that the contraction in the economy was as a result of the macroeconomic policies being pursued, there being an emphasis on high interest rates and that the decline in the rates was not fast enough to stimulate investments. These statements, they contended, went to the heart of the mandate as they were not preliminary or tentative opinions open to persuasion by evidence to be led at the inquiry. The 6th

respondent, they argued, ought not to continue to preside over the tribunal, he having to decide questions of fact which he had decided on a prior occasion. In addition, it was argued, that he had been a steadfast critic of the government and further, his affidavit failed to address any of the articles attributed to him, which has shown that he was not prepared to change his mind, his evidence being demonstrably consistent with his views. It was argued that there was no evidence that Mr Ross' evidence was unchallenged as stated by Williams J.

[111] Mr Beswick submitted that a person, simply expressing a preliminary view by way of criticism of government policies, even if he does so vigorously, does not mean that he is disqualified from taking a fair and objective inquiry into that policy. Only an unwillingness to be disabused of a previously held view would qualify as a ground for disqualification, he argued. The 2nd to 4th respondents are disingenuous in stating that the 6th respondent is required to show that he is prepared to change his mind as the evidence points to the consistency of his view, which he was not prepared to contest by giving evidence to the contrary, counsel argued. An averment that he was not prepared to change his mind must be proved by evidence, he submitted. The 6th respondent's affidavit preceded that of Ayana Thomas in which she exhibited the extracts from the various articles forming the subject of the complaint and he would have been under no obligation to have furnished any further information in respect of these articles, he argued. Counsel further contended that prejudgment requires far more than the advancing of an opinion or a written contribution of articles in newspapers, and none of the articles challenged commits

itself to being objectionable or would qualify as a basis supporting prejudgment. The commissioners' mandate was a fact-finding inquisitorial one, counsel argued, and the 6th respondent, being a seasoned professional would have recognized that his formerly held views would have nothing to do with the mission in which he was engaged.

[112] It was also argued that the Commissions of Enquiry Act , in empowering the Governor General to create a Commission of Enquiry invokes a prerogative power of the Executive and that in Dicey, Law of the Constitution, 8th Ed., the learned authors in citing ***Council of Civil Service Unions et Ors v Minister for the Civil Service*** [1984] 3 WLR 1174 stated that the prerogative was described as the residue of the discretionary power which remains in the hand of the Crown. A ruling restraining the continuation of the commission, it was argued, would be a judicial restraint on the office of the Governor General and a distinction must be drawn between the discretion of the Governor General and that of the commissioners as the court cannot interfere with the Governor General's discretion. I must at this juncture hasten to state that although a residuary discretionary power resides with the Governor General, this does not mean that the court cannot intervene if the discretion is wrongly exercised, as the 1st to 4th respondents correctly submitted.

[113] The 1st to 4th respondents made reference to an article in the Gleaner, written by the 6th respondent, in August 1996, in which he characterized government's fiscal policy as a major shift in the in the middle of 1993, accompanied by high interest rates which eventually "had a profound impact on the quality of the financial

institutions". A synopsis of several other articles appearing in newspapers of May 1998, February 2000, January 2001, February 2001, May 2003 and November 2009 were extracted by the 1st to 4th respondents. The extracts which were highlighted are reproduced hereunder:

> "**The Gleaner May 1998** - Commissioner Ross is described as having become **more** critical of the rationale behind current economic policy.
>
> **The Gleaner February 2000** – Commissioner Ross, then Executive Director of the PSOJ, discussed the causes of the current economic crisis and suggested that interest rates can and must come down – if there is to be any semblance of economic recovery in our country.
>
> **The Sunday Gleaner January 2001** – Commissioner Ross is described as one who has consistently argued that Government should move more aggressively to pull down interest rates and he has said that the focus on the fiscal side to determine the direction of rates was misplaced.
>
> **The Sunday Glearner February 2001** – Commissioner Ross observed that 'if you are in a market economy what you want from your private sector are high levels of investment and that investment can only take place if the macro-economic conditions are valid. A lot of other institutional problems really pale into insignificance when you consider the dampening effect of the high interest rate policy. So if you want the private sector to get active you really have to have the enabling macro-economic policy environment. And that will require lower interest rates.'
>
> **The Jamaica Observer May 2003** – described Commissioner Ross as a consistent critic of the

> government's economic policies who has long argued that the Jamaican currency is substantially over-valued.
>
> **The Jamaica Observer – November 2009** – Commissioner Ross argued there was still scope for the Bank of Jamaica to lower interest rates dramatically ... and that the less painful solution than either debt restructuring or cutting 20,000 people is lower interest rates."

[114] The 1st to 4th respondents' assault on the 6th respondent, is primarily anchored on the premise that, he, as a decision-maker having written the articles, had a mindset in a particular way, in which event he would be incapable of fairly bringing a fresh mind to issues and would therefore be biased. In establishing that a decision-maker has pre-determined issues arising in a matter before him, it must be definitively shown that there is reasonable fear that by reason of his mindset he would not alter any conclusion which he had previously held concerning the matter, despite the evidence before him. In ***Laws v Australian Broadcasting Tribunal*** [1990] HCA 31, (1990) 170 CLR 70, Gaudron and McHugh JJ placed the foregoing proposition in the following perspective at paragraph 5

> "When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-makers mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her."

The court's inquiry in this case would be whether the articles would raise reasonable fear that the 6th respondent had a particular mindset and would bring a prejudiced mind to the commission of inquiry.

[115] It is of some assistance for me to refer to an affidavit sworn by Mr Ross, the 6th respondent, on 23 March 2010. In paragraphs 8, 10, 11 12, and 14 he averred as follows:

> "8. Based on my certain knowledge, the work already done by the Commission of Enquiry has been probative and investigatory. It has been impartial and fair to all witnesses and concerned persons who have attended the sittings. Further, the enquiry has been conducted in an open and public manner based on the mandate of the Commission of Enquiry and the delicate nature of the subject matter that concerns the Commission of Enquiry.
>
> 10. No allegation has been made that I was a debtor or a concerned person in relation to Finsac Limited or the 4th Claimant; or that I was associated with any institution that was a debtor to Finsac Limited or to the 4th Claimant. In addition, no allegation has been made that I was associated with any such debtor or institution in such a manner that I would not be in a position to execute my duties as Commissioner of Enquiry pursuant to section 5 of the *Commissions of Enquiry Act.* I am not part of the class of persons whose history and involvement form the subject matter of the enquiry as set out in the instrument of Appointment exhibited hereto and marked 'CR1'."
>
> 11. The Commissioners acting under section 9 of the *Commissions of Enquiry Act,* may make rules for the guidance, conduct and management of proceedings before us. As such this Commission of Enquiry has regulated its own proceedings. This included inviting various witnesses

including the Claimants or the Claimants' representatives to make submissions or answer questions. Further, the Commission supervised the marshalling of evidence and otherwise regulated our proceedings in an open and fair manner. The calling of witnesses and marshalling evidence from same was done in accordance with the provisions of the *Commissioners of* [sic] *Enquiry Act.*

12. As a Member of the Commission, I am not bound by the opinion or decision by any of the other Members on any question that may arise or has arisen in the enquiry. As such, I am engaged in the process of making a full, faithful and impartial enquiry that should continue in the circumstances.

...

14. 1 am a Civil Engineer by profession and hold a diploma in Management Studies and a Post Graduate Diploma in Business Administration. I spent nine (9) years as the Executive Director of the Private Sector Organisation of Jamaica. In that capacity, I oversaw the economic policy research of that organisation and spent much time focussing on macro-economic policy in the Jamaican context. I have been actively managing a licensed securities dealership (Sterling Asset Management Limited) a financial institution operating in Jamaica – for the last nine (9) years."

[116] There is no dispute that between 1996 and 2001, the 6th respondent wrote copious articles critical of the fiscal policies of government. A prior expression of a decision-maker of a concluded view or the exhibiting of a closed mind may be demonstrative of bias, as observed by Lord Hope in ***Porter v Magill***. However, where it is alleged that the mode and the quality of a decision-maker's conclusion in a matter would be clouded or coloured by prejudice, in that he will not depart

from his previous view or views despite the evidence or the arguments advanced, there must be proof substantiating such allegation.

[117] It cannot be said that in all cases a strongly expressed view should automatically be regarded as one which would be permanently held. Nor does it follow that a person, who has expressed strong views at one stage, could not change his views subsequently. Neither does it necessarily follow that a person who has voiced certain strong opinions in the past could be seen as one who would predetermine issues which later come before him for a decision to be made. Prejudgment demands more than a person simply expressing his or her views or opinion, orally or through articles which are published. However, the stronger the view, the greater the need for its examination to determine whether it was a concluded view, in order to determine whether a fair-minded observer, being cognizant of all the facts, would ascribe bias to the person who had expressed that view.

[118] It is not inappropriate for a financial analyst or anyone else to express his or her opinion critically, on any subject which attracts the public's attention. And of course, such person, would not be precluded from embarking on a critique as to the government's approach in the administration of its fiscal policies and the performance of its regulatory functions.

[119] As a professional analyst, the 6th respondent was entitled to express his views on economic issues even if in doing so he was critical of the government's

policies. No proof has been advanced to show that the 6th respondent has a mindset and was not prepared to change his mind as to the views earlier pronounced by him. I agree with Mr Beswick that the information contained in his affidavit as to his posture in the matter is adequate and he need not furnish anymore. Further, when he wrote the articles, he could not have known that he would have been called upon to sit on the commission of inquiry.

[120] The requirement for neutrality does not require judges to discount or ignore the very life experiences that may well qualify them to preside over a dispute - see ***R v S*** [1997] 3 S Cr 484. The 6th respondent's expertise and experience as an economist eminently qualify him to preside over the inquiry.

[121] The views of the 6th respondent as expressed in the articles published, in my judgment, would not supply sufficient proof to induce a fair-minded observer, knowing all the facts, to believe that he had prejudged the issues and ought to be disqualified from sitting as a commissioner.

The 6th and 7th Respondents

[122] It was also the 1st to 4th respondents' contention that the 5th respondent being tainted, this taint extended to the other commissioners and they all would be disqualified. Their attack against the 6th and 7th respondents is predicated on the premise that by reason of bias on the 5th respondent's part, they too would be affected, and if they continued to preside over the inquiry, this would erode public confidence in the commission's integrity. They relied on ***R v Sussex Justices ex***

parte McCarthy Stolley v Greyhoud Racing Control Board [1972] HCA 53 (1972) 128 CLR 509 and ***Carruthers v Connally and Others*** [1997] QSC 132 to support their submissions.

[123] Mr Beswick submitted that if there is a finding that the 5th respondent, as chairman, was biased, this does not mean that the remaining commissioners are biased as the commission's life does not expire by reason of the chairman's inability to act. It was argued that the constitution of the commission is the sole remit of the Governor General in accordance with section 3 of the Commissions of Enquiry Act. The issue as to bias of the commissioners must be determined individually, counsel argued. The remaining commissioners could only be disqualified where there is in existence some element which would impair their objectivity in a decision or a vote concerning issues, or questions arising during the hearing of the commission or to be determined and concluded on the report to be transmitted to the Governor General, and there is no proof of any such element to impute bias to either of these two commissioners, he argued.

[124] Campbell J, in dealing with the question of bias in relation to the 6th and 7th respondents said at paragraphs 44, 46 and 50 of his judgment:

> "(44). The process before the Commissioners was an inquisition, an investigation to ferret of [sic] facts. It was not adversarial in nature. There would be no civil or criminal liability to be attached. The rules of evidence and procedure are less strict for an enquiry. There were no sanctions to be applied. As we have indicated persons may have their reputations tarnished, as the 1st Applicant fears. There was no evidence as to how that risk may arise, it is fair to say that

commendations may also result as a result of the findings. The risk to an individual's reputation must be balanced with the social interest in permitting the Commission to conduct its inquiry and to inform and educate the public about the matter.

(46) The fair minded observer, would be aware that despite the eminence of the Chairman, Commissioners Ross and Bogle, by dint of their qualifications and expertise were very familiar with the environment and culture of the subject-matter of the enquiry, and would not have been unduly influenced and persuaded by the Chairman, as [sic] have been suggested by Mr. Hylton Q.C. Although the hearings were held over a period of four months, they were less than 12 full hearing dates, about half of the witness [sic] who have been summoned have already given evidence.

...

(50). The fair minded and informed members of the public, would be aware that despite the eminence of the Chairman, Commissioner [sic] Ross and Worrick Bogle were equipped to continue the hearing. That the nature of the enquiry was to examine the circumstances that led to the collapse of several financial institutions in the 1990s, an area with which they were familiar. That observer would conclude that even [sic] other taken cumulatively there was no real possibility that the commission could not inquire into the Terms of Reference impartially."

[125] The process which the commissioners were mandated to conduct was inquisitorial. By section 3 of the Commissions of Enquiry Act, one or more commissioners or any quorum of them may be appointed by the Governor General. The section reads:

"3. In case any Commissioner shall be or become unable or unwilling to act, or shall die, the Governor-General may appoint another Commissioner in his place; and any Commission issued under this Act may be altered as the Governor-General may

> deem fit by any subsequent Commission issued by the Governor-General or may be revoked altogether by a notification to that effect published in the *Gazette."*

[126] The cases cited by the 1st to 4th respondents are unhelpful to them. In all the cases there was in fact evidence of the taint of bias. This cannot be said to be true in the case under review. The Full Court was correct in finding that the 6th and 7th respondents would not have been influenced by the 5th respondent and that the hearing should be continued by them. The Full Court's findings would not have exacerbated the danger of public confidence being lost, as contended for by the 1st to 4th respondents. The 6th and 7th respondents are intelligent and experienced men, capable of assessing the evidence and making decisions of their own, un-swayed or influenced by any statements or views of the 5th respondent. An informed observer, knowing all the facts would not presume that the 6th or 7th respondents would say that they would not execute their duties impartially.

Procedural unfairness

[127] The gravamen of the 1st to 4th respondents' complaint as to procedural unfairness in the conduct of the proceedings was that the procedures instituted by the commissioners were unfair. It was argued by counsel that the process was uncertain and inconsistent. They contended that the commissioners unfairly permitted cross-examination. It was argued that allegations were made against the 2nd to 4th respondents to which they were not allowed to respond. The commissioners had in

their possession material which they failed to share with the affected or interested persons, they argued. Mr Hylton further argued that the 1st to 4th respondents were not advised of the procedure which the commissioners proposed to adopt and the 5th respondent had indicated that persons who wished to ask questions should submit the same in writing, but contrary to this, they allowed persons from the audience to cross-examine the 2nd respondent although previous witnesses were not cross examined. It was also contended that persons were allowed to give evidence under the pretext of asking questions.

[128] It was counsel's further submission that the procedure adopted by the commissioners in conducting the inquiry was unfair, as, the manner in which they proceeded lacked certainty and consistency. They failed to inform some of the 1st to 4th respondents of allegations against them and permitted cross examination to be conducted unfairly, he argued.

[129] It was submitted by Mr Beswick that the commissioners acted fairly and reasonably in permitting interested or affected persons to ask questions and by modifying the strictures of confining questions to those in which prior written notice had been given. Even if there are circumstances in which the strictest procedural steps are followed, he argued, it was not a requirement that questions be restricted to those in which written notification had been previously given. The commissioners, he argued, acted properly in revising the requirement which would have treated the affected persons unfairly.

[130] It also submitted by counsel that where the Commissions of Enquiry Act is silent, the commissioners, acting thereunder, are entitled to exercise their own discretion. Further, it was submitted, the use of the words "may from time to time think fit," in the Act shows the degree of flexibility accorded to the commissioners. The 1st to 4th respondents, in response, submitted that although the commissioners may make rules for their guidance and conduct the proceedings before them as they may think fit, from time to time, this does not mean that they are entitled to proceed as they wish without due observance of the principle of fairness.

[131] In ***Pelletier***, Teitelbaum, J in speaking to the matter of procedural fairness in the context of a hearing by a tribunal, said at page 6:

> "Procedural fairness is a basic tenant of our legal system. It requires that the public decision-makers act fairly in coming to decisions that affect the rights, privileges or interest of an individual. There is no exception of the application of this principle for commissions of inquiry."

He went on to state at page 9 that:

> "...commissions of inquiry are not synonymous to trials ... unlike trials, commissions of inquiry are inquisitorial in nature rather than adversarial... the nature of the Commission's report and recommendations are vastly different than judicial decisions... This suggests that a lower content of procedural fairness is required."

Then at page 11 he said:

> "A lower content of procedural fairness will be called for where the statute leaves to the decision maker the ability to choose its own procedure, or when the agency has expertise in

> determining what procedures are appropriate in the circumstances."

[132] Section 9 of the Commissions of Enquiry Act empowers a tribunal, acting thereunder, to make a choice as to its procedure. It reads:

> "9. The Commissioners acting under this Act may make such rules for their own guidance, and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their Commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their Commission."

[133] The Full Court found that there was no procedural unfairness in the manner in which the commissioners conducted the proceedings in light of the statutory provision.

[134] The principle of procedural fairness places an obligation on a decision-maker to ensure his decisions do not give rise to reasonable apprehension of bias. It is a prominent feature of administrative law that a decision-maker should give to such persons who are affected or interested an opportunity to advance their views as well as their evidence. This is not cast in any rigid rule. It, not being confined to strictures of inflexibility, is subject to variation.

[135] The criteria demanded by procedural fairness is dependent on the circumstances of the particular case. A court, in considering whether there has been a breach of procedural fairness must take into account several factors. In ***Baker v***

Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817, cited by the 1st to 4th respondent, at paragraphs 23-25, the court identified several factors. I will only make reference to those which are relevant for the purpose of the appeal. These are:

(1) The nature of the decision being made;

(2) The nature of the statutory scheme; and

(3) The nature and extent of the duty of fairness owed to the affected persons.

[136] These factors must be considered within the context of the discretionary powers accorded to the decision-maker by statute, bearing in mind, as stated in ***Pelletier***, that a low content of procedural fairness will be invoked where the statute permits the decision-maker the right to select his own procedure. The circumstances in each case vary. The question, in a particular case, is whether the procedural approach by the commission is so unfair that no reasonable commission would have adopted it.

[137] In ***R v Monopolies and Mergers Commission ex parte Brown plc*** [1987] 1 WLR 1235, cited by the 6th to 8th respondents, the essence of the complaint was that one party submitted further statements to the tribunal on which the applicant had not been given the opportunity to comment. An issue for determination was whether there was blatant unfairness and breach of natural justice resulting in procedural impropriety. The court held, inter alia, that the failure to give the

applicant an opportunity to comment did not amount to manifest unfairness. At page 1242 Macpherson J stated:

> "The time table and conduct of the case by the commission must be looked at as a whole. It is wrong in my judgment to seek to impose on the commission any such uniform requirement that every piece of material put before the commission which may in any way influence its report must go to all parties or even to the opposing main participants in the bid."

[138] The language of the Commissions of Inquiry Act is unambiguous. The words, "as they deem fit", are clear. They afford the commissioners discretionary powers of setting their own procedural mandate in the conduct of the inquiry. Accordingly, it was for them to choose a procedure which was appropriate for the inquiry. The remit of the commissioners was investigative. Their duty was clearly to conduct an inquiry into the grounds advanced under the terms of reference, as directed, following which a report would be submitted to the Governor General. They were not required to impose any sanctions against the 1st to 4th respondents. There is nothing to show that the procedural path pursued by them resulted in any prejudice to any of the 1st to 4th respondents or that it was unduly unreasonable or unfair. It is of worth to state, as counsel for the 5th respondent pointed out, Mr Hylton had in fact stated that it was understandable that the public was permitted to ask questions orally as they were lay persons. As rightly submitted by the 5th to 8th respondents, the commissioners acted fairly and reasonably, as they permitted persons who were affected or who had an interest to ask questions and they modified the very

strict directions allowing these persons some latitude thereby not confining their questions to those contained in their written notices. In my judgment, it cannot be said that the commissioners, in the conduct of the inquiry, had displayed any undue unfairness which would unduly work prejudicially to the 1st to 4th respondents. I would not say that, in all the circumstances, they acted unreasonably or unfairly and a putative observer, being seized of all the facts, would ascribe bias to them.

[139] For the foregoing reasons, we allowed the appeal and dismissed the counter appeals. Although the 1st to 4th respondents succeeded on the issue of disclosure, it was not a ground of their appeal and further, even if they had filed such ground, it would not have affected the outcome of their counter-notice of appeal. The question of costs is reserved.

DUKHARAN JA

[140] We heard submissions from the parties in this matter and on 29 July 2011, we allowed the appeal. The counter appeal of the 5th respondent was dismissed as also the counter appeal of the 1st to 4th respondents. We reserved the question of costs and promised to give our reasons in writing. This is a fulfillment of that promise.

[141] The latter part of the 1990s saw a turbulent period for the financial sector in this country. Many financial institutions failed. According to the Bank of Jamaica (BOJ) there was a high level of non-performing loans and significant decline in the

profitability of several banks. The BOJ recommended to the Ministry of Finance that immediate action be taken resulting in an agency being formed called FINSAC for the purpose of dealing with the "failed institutions". Many depositors and creditors in these failed institutions were refunded. It was indeed a very costly exercise.

[142] The Governor General, by instruments of appointment dated 24 October 2008 and 12 January 2009, respectively, nominated the 5th, 6th and 7th respondents as commissioners to conduct an enquiry, with the 5th respondent as the chairman. The terms of reference are as set out as follows:

> "(i) To examine the circumstances that led to the collapse of several financial institutions in the 1990s with particular regard to;
>
> (a) The extent to which these circumstances were directly influenced by domestic or external factors;
>
> (b) Government's fiscal and monetary policies;
>
> (c) the management practices and role of [sic] Board of Directors of the failed institutions;
>
> (d) the performance of Government's regulatory functions.
>
> (ii) To consider what actions, if any, could have been taken to avoid this occurrence and to evaluate the appropriateness of the actions which were taken by the authorities in the context of Jamaica's economic circumstances and in comparison to intervention by the State in other countries which have had similar experiences;

(iii) To review the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally;

(iv) To review the probity and propriety in FINSAC'S management, sale and/or disposal of assets relating to delinquent borrowers;

(v) To review the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation;

(vi) To review the practices of the Jamaica Redevelopment Foundation in the treatment of delinquent borrowers and, in particular, the management, sale and/or disposal of their assets;

(vii) To assess the long term impact of the collapse of these institutions on the economy and on the businesses and individuals whose loans were involved as well as the economic and social impact of the actions taken by the Government with regard to the savers, depositors and investors of the failed institutions;

(viii) To review the steps that have subsequently been taken and make recommendations as to what further steps should be taken to prevent a recurrence of such widespread collapse of financial institutions and the resulting hardships."

[143] The enquiry commenced on 22 September 2009. It is to be noted that the chairman, (the 5th respondent) and his wife were shareholders in a company called Bev Carey Associates (1985) Limited which had an outstanding loan with Jamaica Citizens Bank (JCB), one of the failed financial institutions. Prior to the commencement of the enquiry, there were enquiries by the attorneys-at-law for the Jamaica Redevelopment Foundation (JRF) (the 4th respondent) as to whether the commissioners or any of their

family members were indebted to any of the failed entities. There was no response to these inquiries. Having that information, the 1st to 4th respondents on 19 January 2010, through their attorneys, requested that the 5th respondent should recuse himself, but he refused.

[144] The 1st to 4th respondents obtained leave for judicial review and by fixed date claim form, sought the following orders:

> "1. An order of *prohibition* preventing the continuation of the Commission of Enquiry into the Collapse of Financial institutions in Jamaica in the 1990s (hereinafter referred to as 'the Commission') as currently constituted of the 1st, 2nd, and 3rd Defendant;
>
> 2. An order of *certiorari* quashing the decision of the 1st, 2nd and 3rd Defendants to continue with the hearings of the Commission;
>
> 3. An order of *certiorari* quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission;
>
> 4. A Declaration that the 1st by virtue of his:
>
> (a) having been a delinquent borrower whose debt was acquired and handled by FINSAC;
>
> (b) being or having been a shareholder of a company (of which his wife was a director and the other shareholder) which either was or remains, or was handled by FINSAC on the basis of being, a delinquent borrower whose non-performing debt was acquired by FINSAC and then sold by FINSAC to Jamaican Redevelopment Foundation Inc.;

is presumed to be affected by bias and is automatically disqualified from being a member of the Commission;

5. A declaration that in the circumstances the 1st Defendant is also disqualified by virtue of apparent bias.

6. a Declaration that the proceedings that have occurred thus far in the enquiry are null and void.

7. Such further and/or other relief as the court deems fit.

[145] They sought the above relief on the following grounds:

"i. The 1st, 2nd and 3rd Defendants have sworn to and have a duty under law to make a full, faithful and impartial enquiry into the matters that fall within the scope of the Commission's terms of reference;

ii. The 1st Defendant and a company, of which he was at the material time a member and his wife was at the material time a director and the other member, falls [sic] within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly;

iii. The 1st Defendant was a close associate of the executive chairman of an intervened institution, according to documentation signed by an officer of that institution. The management of the institution by its directors and, in particular, its executive chairman is to be considered by the Commission, and the said executive chairman is scheduled to appear to give testimony before the Commission;

iv. Counsel to the Commission falls within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly, in that he was a director and shareholder of a company which was indebted to an

intervened institution, and he was allegedly a guarantor of its indebtedness;

v. Counsel to the Commission was some time prior to the intervention by the state, a director of an intervened institution;

vi. The Defendants did not disclose the above facts to the public, to the Claimants or in the proceedings of the Commission;

vii. The 1st, 2nd and 3rd Defendants have adopted procedures that are inconsistent, irregular and unfair;

viii. The 1st, 2nd and 3rd Defendants have made statements which suggest that they have prejudged some of the issues to be considered by the Commission;

ix. The 1st, 2nd and 3rd Defendants have decided to continue as currently constituted despite the above facts;

x. There is a real and present danger that public confidence in the integrity of the Commission, its proceedings and ultimately its conclusions will be reduced or lost if it is allowed to continue as at present constituted;

xi. It is important that the integrity of the Commission be preserved in the light of the importance of the issues being examined;

xii. Substantial costs are being incurred on a daily basis by the Commission, and it would be in the public interest if the proceedings are stayed pending the determination of these issues.

xiii. The failure of the 1st, 2nd and 3rd Defendants to halt the Commission is unreasonable and irrational."

[146] The Full Court having heard the application for judicial review, on 2 September 2010 made the following orders:

> "1. An order of prohibition preventing the continuation of the Commission of Inquiry into the collapse of financial institutions in Jamaica in 1990's [sic] (hereinafter referred to as 'the Commission') as currently constituted with the 1st Defendant as member and Chairman;
>
> 2. An order of certiorari quashing the decision of the 1st, 2nd and 3rd Defendants to continue with the hearings of the Commission;
>
> 3. An order of certiorari quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission.
>
> 4. A declaration that the 1st Defendant by virtue of his having been a delinquent borrower whose debt was acquired and handled by FINSAC is presumed to be affected by bias and is automatically disqualified from being a member and Chairman of the Commission.
>
> 5. A declaration that counsel to the Commission by virtue of his (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is automatically disqualified acting as counsel to the Commission.
>
> 6. The court refuses to declare the proceedings thus far to be null and void.
>
> 7. Costs of all four Claimants against the Defendant to be taxed if not agreed."

[147] On 17 September 2010, the appellant was granted leave to appeal paragraph 5 of the Full Court's Order. The following grounds of appeal were filed:

"(1) In obtaining leave to apply for judicial review the Claimants had not made the Appellant a party to the proceedings or sought any relief against him and therefore since no leave was granted to proceed for any relief against the Appellant the Full Court ought not to have made any order which directly affected the Appellant.

(2) That the order made by the Full Court by way of a declaration that the Appellant as counsel to the Commission was presumed to be affected by bias and was automatically disqualified from acting as counsel directly affects and prejudices the Appellant in circumstances where no prior notice of the proposed order was given to the Appellant nor was the Appellant made a party to the proceedings. The Full Court acted in breach of the principles of natural justice in failing to give the Appellant prior notice of the aforesaid order which they contemplated making against him to afford him the opportunity to be heard.

(3) As a person who was directly and adversely affected by the judgment and order of the Full Court, the Appellant was entitled to have prior notice of the order that would be made against him and afforded an opportunity to be heard in accordance with s20 (2) of the Constitution of Jamaica. In making an order and findings that directly affected the Appellant without joining him as party to the proceedings and without giving him prior notice of the proposed order so as to afford him the opportunity to be heard, the Full Court breached the Appellant's fundamental right to a fair hearing accorded by s20 (2) of the Constitution of Jamaica.

(4) The Full Court proceeded to make the aforesaid order in breach of CPR 56.11(1) that provides that the claim form and affidavit in support must be served on all persons directly affected not less than 14 days before the date fixed for the first hearing. The aforesaid order made by the Full Court directly affected the Appellant and therefore the Appellant ought to have been joined as a party and served with a claim form and affidavit in support giving him adequate prior

notification of the aforesaid order sought or contemplated against him in accordance with CPR 56.11(1).

(5) The finding that the Appellant was deemed by FINSAC to be a delinquent debtor is unsupported by the evidence and wholly unreasonable.

(6) The finding that the Appellant's resignation from the Board of Century National Bank did not take place at a time that was sufficiently far removed from the time that the Bank was intervened into by the Government to safely remove the Appellant from being within the class is unsupported by the evidence and wholly unreasonable. The Full Court failed to appreciate that the relevant period to be considered for [sic] purpose of determining whether there was an appearance of bias was the period that had elapsed up to the time of the proceedings in which disqualification was sought.

(7) The finding and order of the Full Court that the Appellant ought to be automatically disqualified as counsel to the Commission was wholly unreasonable, flawed as a matter of law, unsupported by the evidence and contrary to principle in that:

a) The Full Court quite clearly failed to have due regard to the nature of the proceedings, which was an investigative enquiry by the 5th, 6th and 7th Respondents who were appointed under the Commissions of Enquiry Act and not proceedings to determine disputes between litigants as to civil rights and obligations to come to a judgment or determination between parties and/or to impose sanctions or penalties on anyone. The proceedings could not result in any pecuniary benefit or binding determination for or against anyone in respect of the matters being enquired into.

b) Given the investigative nature of the proceedings, there was no basis for presuming actual bias leading to the automatic disqualification of the Appellant by reason of his alleged association with any failed financial institution or delinquent debtor as there was no evidence that the Appellant had promoted or adopted or sympathized with the cause, dispute or grievance of any failed financial institution or delinquent debtor or exhibited any hostility against any of the Claimants at any time in the intervening period up to the commencement of the proceedings seeking the disqualification of the Commissioners by reason of bias.

c) Further there was no basis for finding actual bias on the part of the Appellant by reason that the Appellant had been alleged to be a guarantor of a delinquent debtor when the Appellant had denied guaranteeing any debt, his response and explanation had not been disputed, and up to the time of the commencement of the proceedings seeking the disqualification of the Commissioners by reason of bias, no claim had been made against him and there was no dispute as to any such debt between the Appellant and anyone involved in the enquiry nor had the Appellant exhibited any hostility against anyone as a consequence.

d) The Full Court's finding that there was a possibility of the Appellant participating in decision making is wholly unreasonable and unsupported by any evidence and was contrary to the unchallenged evidence that it was the 5th, 6th and 7th Respondents who were the duly appointed Commissioners.

Quite clearly the Appellant had not been appointed a Commissioner and there was no basis to find that the Appellant would be participating in the decisions of the Commissioners.

e) Further, that on the proper test that ought to have been applied, no fair minded and informed observer considering the facts would conclude that there was a real possibility of bias on the part of the Appellant or that the Commissioners' report could be infected with bias by reason of the participation of the Appellant as counsel.

(8) The Full Court failed to apply the proper test for determining whether there was appearance of bias by reason of the Appellant's alleged association with any delinquent debtor or failed financial institution which was whether a fair minded and informed observer considering the facts including the limited role of the Appellant as counsel would conclude that there was a real possibility of bias on [sic] part of the Appellant that would infect the Commissioners. Further that on [sic] totality of the evidence no fair minded and informed observer considering the facts would have concluded that there was a real possibility of bias on the part of the Appellant (as found by Campbell J at pg 17 par.38)."

[148] Counter-notice of appeal was filed by the 1st to 4th respondents as follows:

"i. In refusing to declare the proceedings null and void the Court failed to have any or any adequate regard to its' [sic] finding of bias and disqualification in respect of the Chairman and Counsel to the Commission and its effect on the continuation of the Commission in the eyes of the fair minded informed observer.

ii. The Court failed to have regard to the fact [sic] Commissioners Ross and Bogle participated in several

questionable decisions including the decision to proceed with the Commission of Enquiry as constituted on January 19, 2010 and therefore could not be considered free of the taint of bias.

iii. The Court's finding that Commissioner Ross did not have a settled view on matters of economic policy was against the weight of the evidence and no sufficient regard was given to the fact that this evidence was unchallenged by Commissioner Ross, and failed to give any or adequate regard to the effect of Commissioner Ross' well publicized views on the fair minded informed observer.

iv. The Court erred in finding that the Terms of Reference required a lower level of procedural fairness having regard to the statutory provisions and the importance of the findings and recommendations of the Commission to all [sic] the affected parties.

v. The Court failed to have regard to the fact that the Commission was charged with determining whether debtors were treated fairly and equally and that in making that determination the Commission would be required to follow a higher standard of procedural fairness.

vi. The Court's finding that there was no procedural unfairness is against the weight of the evidence.

vii. The Court's finding that there was no failure to conform to legitimate expectations is against the weight of the evidence."

[149] The 5th respondent's grounds in support of its counter-notice of appeal were as follows:

"(a) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that appended to the letter of the 31st December 2009, was a letter of demand dated 27th January 1992, and a further demand letter

of December 28th, 1993. Both letters are addressed to the 1st Defendant (5th Respondent) and his wife, the account referred to is similar. The 1st Defendant (5th Respondent) denies receiving those letters but confirms receipt of the letter dated 10th June, 1997, which states, 'as you are aware, your current account continues to be overdrawn as indicated above.'

(b) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that the actions of the 1st Defendant (5th Respondent) in his receipt of the letter of 22nd June, 1998 fixes him with knowledge that his debt has been taken over by FINSAC.

(c) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that on the applicants' case, the Bank had informed the 1st Defendant (5th Respondent) from the [sic] January 1992, and the debt was not discharged until March 1998.; and in holding that "On the 1st Defendant (5th Respondent's) case, they acknowledged receipt of the 10th January 1997 letter it was still almost eighteen months before the debt was extinguished. On either case I would have to say the 1st Defendant (5th Respondent) has defaulted on his debt, and could properly be described as a delinquent borrower. The fact that this debt was extinguished some twelve years ago does not assist the 1st Defendant (5th Respondent), as the enquiry concerns delinquent borrowings that were created in the 1990s.'

(d) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that there is evidence before this Court to hold that a loan agreement existed between the 5th Respondent and the Bank (Pages 9-10, Para. 21) in the context of a loan with agreed terms which had been breached by non-payment.

(e) The Full Court misdirected itself and erred in finding at page 10, paragraph 24, that the 5th Respondent, Justice Boyd Carey was a delinquent borrower for the

purposes of the Terms of Reference. Their Lordships [sic] formulation and analysis of the crucial issue to be probed in determining the class of persons affected by the Terms of Reference was inherently flawed and erroneous in that it failed to give due weight and consideration to the status of the alleged loan at the relevant times. The crucial questions for determination were:

(1) whether the 5th Respondent was a 'delinquent borrower' whose debt was acquired by FINSAC; and

(2) whether there was any relevant treatment of the 5th Respondent which falls within the Terms of Reference.

(f] The Full Court at pages 11-12, paragraph 28, erred in finding the 5th Respondent to have been a 'judge in his own cause' on the flawed test that the Appellant, Justice Boyd Carey merely needed to have been at some point in time 'a delinquent borrower' of an intervened institution although there was no evidence that the intervened institution could properly or did so regard him.

(g] The Full Court erred in law in finding that the 5th Respondent had an interest in the outcome of the proceedings such as could amount to actual bias as there was no evidence that he was a delinquent debtor or that there was any treatment meted out to him by FINSAC Ltd., FIS or any FINSAC entity or any relationship which was contentious, strained or could be the subject matter of an investigation by the Commission.

(h) To the extent that the Full Court placed reliance on the alleged letter dated January 27, 1992 (page 10, para. 24) their Lordships erred in law as the said letter was not proved or properly authenticated.

(i) The Full Court erred in law in categorizing the case of the 5th Respondent, Justice Boyd Carey as 'actual

bias' when he had no pecuniary or other personal interest in the subject-matter of the inquiry."

[150] Before we heard the appeals, there was an application to adduce fresh evidence, from the 1st to 4th respondents, which sought the following orders:

> "That leave be granted to the 1st - 4th Respondents to include as fresh evidence on appeal (a) a presentation by RNA Henriques OJ, QC entitled **'JAMAICA'S MID 1990'S FINANCIAL SECTOR CRISIS: REFLECTION ON CRISIS RESOLUTION STRATEGIES'** and (b) the cover page, list of persons present and the evidence before the Commission of Mr. George Hugh as extracted in pages 1, 127 and 143-154 of the Verbatim Notes of the February 24, 2011 sitting of the Commission of Enquiry."

[151] The orders sought were on the following grounds:

> "1. The 1st - 4th Respondents became aware in March 2011 that the Appellant, RNA Henriques QC. presented at a conference held by the Jamaica Deposit Insurance Corporation (JDIC) in association with Caribbean Regional Technical Centre (CARTAC) on March 24-26, 2010.
>
> 2. Neither the 1st - 4th Respondents nor their Attorneys-at-law attended the said conference or had knowledge of the presentation at the said conference. The evidence could not have been obtained with reasonable diligence for use at the trial.
>
> 3. The evidence regarding the Appellant shows that he may have prejudged issues to be considered by the Commissioner and ought not, by reason of a reasonable appearance of bias, to serve as counsel for the Commission. Accordingly, it would have had an important influence on the result of the case.
>
> 4. The evidence extracted from the Verbatim Notes of February 24, 2011 would have had an important

influence on the result of the case as they show that the Commissioners have been procedurally unfair, particularly by following inconsistent procedures in relation to the cross-examination of witnesses.

5. The evidence is credible."

The application was supported by an affidavit of the 2nd respondent Patrick Hylton.

[152] Mr Foster QC, who appeared on behalf of the 4th respondent, submitted that Patrick Hylton, in his affidavit filed on 24 March 2011, deponed to the fact that he was informed by Mr Dave Garcia that the appellant made a presentation entitled; "Jamaica's Mid 1990's Financial Sector Crisis: Reflection on Crisis Resolution Strategies" at a conference held by the Jamaica Deposit Insurance Corporation (JDIC) in association with Caribbean Regional Technical Assistant Centre (CARTAC). A search was later conducted at the JDIC's website where a copy of the presentation was obtained. The conference was held on 24-26 March 2010 and none of the 1st to 4th respondents had knowledge of the conference nor the fact that the appellant was a presenter at the conference. Mr Foster further submitted that this information could not have been obtained prior to the filing of the claim and before the matter was heard by the Full Court. He said there was nothing to put the respondents on enquiry to conduct fresh searches in relation to the appellant. He further submitted that the evidence was credible and that its admission would be in the interest of justice. Mr Foster relied on the following cases: **Ladd v Marshall** [1954] 3 All ER 745, **Hamilton v Al Fayed (No 2)** [2000] and **Gillingham v Gillingham** [2001] EWCA Civ 906.

[153] Mr Hylton QC supported and adopted the submissions of Mr Foster and submitted that the paper was likely to have an important influence on the case and that there was nothing to indicate that the 3rd respondent knew that the paper existed.

[154] Mrs Foster Pusey supported and adopted the submissions of Mr Foster and Mr Hylton, contending that the 1st respondent was also in the same position as the 3rd respondent in so far as there was no suggestion that she was aware of the presentation or ought to have been aware of it.

[155] Mr Garcia also adopted the submissions of the others before him and submitted that although two letters were sent to Patrick Hylton about the conference, there was no evidence that he got them or read them. He further added that although National Commercial Bank sponsored the conference, the agenda stated that the appellant was only the moderator.

[156] Mr Wood QC opposed the application and submitted that the principles as set out in **Ladd v Marshall** are applicable and the 1st to 4th respondents had failed to satisfy the criteria. He further submitted that the paper delivered by the appellant was in existence for five months before the trial. The paper, he argued, was published on the internet and the 1st to 4th respondents did not exercise reasonable diligence in securing it to be used as evidence. He further submitted that the liaison officer of the National Commercial Bank received a copy of the paper which was presented by the appellant. He noted that Mr Hylton, as a banker, would have been interested in the paper. Mr

Wood highlighted the fact that the appellant was not named as a party in the matter before the Full Court.

[157] Mr Beswick for the 6th to 8th respondents adopted Mr Wood's submissions. He cited **Rose Hall Development v Hananot** [2010] JMCA App 26, which deals with the principles governing the reception of fresh evidence. He added that the respondents had failed to make enquiries in relation to the evidence which was sought and therefore failed to exercise due diligence.

[158] The reception of fresh evidence is governed by the principles as laid down in **Ladd v Marshall** where three conditions must be fulfilled. As Lord Denning LJ stated at page 748:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[159] The principles as laid down in **Ladd v Marshall** were adopted in this court in **Rose Hall Development**. In that case the appellant applied for permission to adduce into evidence satellite photographs which were admittedly in existence at the date of trial. It was argued on behalf of the appellant that the Civil Procedure Rules did not require the strict application of the principles from **Ladd v Marshall.** The court disagreed and dismissed the application. As Panton P stated:

> "In determining the fate of this application, the court was guided by the well known principles expressed in **Ladd v Marshall** ..."

Later he said:

> ... I am driven to the view that the satellite images were clearly available at the time of trial. ... No good reason has been advanced for the delay in sourcing and presenting this available evidence ..."

[160] I have carefully examined the affidavit of Patrick Hylton. I am of the view that reasonable diligence was not exercised. He was notified of the conference. The liaison officer of the bank was sent a copy of the paper. The paper was publicized on the internet and was available at least five months before the proceedings in the Full Court.

[161] The appellant's function at the commission was as a legal advisor. In my view, the appellant's presentation at the conference was not relevant to the proceedings before the Full Court.

In my view, the respondents failed to satisfy the guidelines as set down for the reception of fresh evidence. For the above reasons, I agreed that the application should be refused.

The Appeal

[162] The Full Court found that the appellant was imputed with actual bias which would mean his automatic disqualification were he a commissioner. Mr Wood for the appellant couched his arguments in the following way which covered grounds one to four. At no time was the appellant named as a party to the proceedings, since no claim

had been made against him. He was never informed that an order would have been made and that he received no notice that the court entertained making an order against him. He further submitted that there was a fundamental principle of law, that before an adverse decision is made against any person, he should be given the opportunity to be heard. Section 20(2) of the Constitution of Jamaica guarantees that procedural fairness must be observed by any court determining a person's right or civil obligations. Counsel cited **Mwamba v Attorney General of Zambia** [1993] 3 LRC 166.

[163] Grounds five to seven were argued by Mr Wood under the heading, "Inconsistent and Unsupported Findings and Orders". He submitted that errors and lack of consistency in the findings and orders were made against the appellant. This, he suggested, led to the inescapable inference that there was a lack of due consideration paid to the matter. He further submitted that on the issue of apparent bias, the judges were in conflict.

[164] In ground eight, Mr Wood submitted that the Full Court failed to apply the test of the fair-minded and informed observer and regarded the appellant as liable to be automatically disqualified.

[165] Mr Foster for the 1st to 4th respondents submitted that the appellant was an agent of the commission and there was no reason why an agent should be named as a party to the proceedings. He further submitted that the appellant well knew of the issues concerning him and he should not have acted as counsel to the Commission.

[166] It is quite clear that the appellant was not a party to the proceedings as no claim was made against him. The Full Court failed to have the fixed date claim amended to join the appellant and it was not served on him. He was never given an opportunity to be heard as to why such order should not be made. The Full Court gave no reasons to justify the breach of the appellant's right to due process.

[167] There was no evidence for the finding of actual bias on the part of the appellant for the reason that he was deemed a debtor to FINSAC. The appellant denied giving any guarantee for any delinquent debtor, nor did his name appear on FINSAC's list of delinquent debtors. The appellant's role in the hearings at the commission was minimal and there was nothing that could be regarded as exhibiting any bias.

[168] Mr Hylton quite candidly informed the court that the 1st to 4th respondents would not challenge the appeal.

[169] I hold the view that the Full Court erred in making an order against the appellant and for the foregoing reasons I agreed that the appeal should be allowed.

1st to 4th Respondents Counter Notice

[170] Counsel for the 1st to 4th respondents submitted that there was evidence to show that the 5th respondent was a bad debtor, in that he had an outstanding overdraft with Century National Bank which remained unpaid for over six years. It was further submitted that the company, Bev Carey Associates (1985) Limited, which was owned equally by the 5th respondent and his wife, Mrs Beverley Carey, was indebted to (JCB).

[171] Miss Janet Farrow, the chief executive officer of the respondent, and Patrick Hylton in their affidavits deponed that examination of a spreadsheet and Excel files revealed the indebtedness of Bev Carey Associates (1985) Limited. However, Campbell J in his judgment, found that the spreadsheet and Excel files were inadmissible as bankers' entry by reason of non-compliance with section 34 of the Evidence Act. Campbell J also found that FINSAC received a list with names and balances from the various intervened institutions, but those balances were never verified. He said, "It seems to me that the evidence is tenuous, and no weight may be attached to it insofar as it purports to show that there was an outstanding amount."

[172] Mr Garcia further submitted that the Full Court incorrectly treated this aspect of the evidence presented by the 1st to 4th respondents as being inadmissible. The section provides that evidence from bankers' books may be admitted using the procedure set out under that section. It does not say that the evidence cannot be admitted in another way. The court below, he argued, failed to give due weight, in relation to the findings proposed by the 1st to 4th respondents, to the evidence that was uncontradicted. It was not disputed that JCB was one of the entities that was the subject of intervention by and through FINSAC. It was not disputed, he further argued, that FINSAC had a schedule listing various persons which it understood to have outstanding debts. It was also not disputed that Bev Carey Associates (1985) Limited appeared on that list and that there had been a loan from JCB to that company.

[173] Mr Garcia, in further submissions, argued that if the Full Court had made the above findings, then the court would have considered that a person who disputed FINSAC's position as to indebtedness is no less likely to be biased than a person who accepts his indebtedness. It was also submitted that this court can and should find that FINSAC and JRF treated Bev Carey Associates as a debtor, bringing this matter within the terms of reference of the commission, with the consequence that the 5th respondent had a personal interest in the subject matter of the commission. This brings him within the category of being subject to actual bias. The circumstances relating to Bev Carey Associates, when taken as a whole, are also of such that the fair-minded observer would have to be apprehensive about the ability of the 5th respondent to impartially assess the treatment of debtors by FINSAC and JRF.

[174] In response, Dr Barnett submitted that there was no admissible evidence to support the allegation of apparent bias against the 5th respondent. He agreed with the Full Court that the evidence that Bev Carey Associates was indebted was inadmissible because the Excel files and the spreadsheets were never verified. Dr Barnett further submitted that allegations made putting the character of a person in issue must be proved. The allegations of apparent bias on the part of the 5th respondent were based on hearsay evidence in documents which were not verified or authenticated.

Counter Appeal of the 5th Respondent

[175] Dr Barnett argued grounds (a), (b), (c) and (e) together. He submitted that both the 5th respondent and his wife had a joint current account at the Montego Bay

Branch of Century National Bank (CNB) and were granted a modest overdraft facility. At that time the bank held a deposit to the credit of the 5th respondent. His affidavit shows clearly that the proposition that he was a bad or delinquent debtor is erroneous. There was a deficit of some $8,000.00 which the 5th respondent paid without any protest or controversy. Dr Barnett further submitted that it was fallacious to conclude that the 5th respondent and his wife fell within the class of persons in relation to when the commission was charged to determine how they were treated and whether they were treated fairly. In this case, there was express approval for the overdraft, so the mere existence of the debt did not make this customer delinquent, unless it was shown that there were terms of the facility which he had breached.

[176] Dr Barnett challenged a number of factual findings, the first was that " a letter of demand dated 27 January 1992, and a further demand letter of 28 December 1993" and the letter dated 10 January 1997, which stated, "as you are aware, your current account continues to be overdrawn as indicated above" amounted to a demand. The 5th respondent consistently denied receiving the letters dated 27 January 1992 and 28 December 1993. The 1st to 4th respondents were unable to adduce evidence that the 5th respondent received same. There was no finding by the Full Court that he received same. It was further submitted that a letter dated 10 June 1997 did not amount to a demand for payment, and although the 5th respondent proceeded to clear the balance, he was not in fact in default. There can be no default in the absence of a proper demand he argued. Case law indicates that a demand must be a clear and unconditional requirement to pay and this principle is confirmed by the Privy Council in

Financial Institutions Services Ltd v Negril Negril Holdings Ltd and Anor (Jamaica) [2004] UKPC 40. Dr Barnett submitted that the letter of 10 June 1997 did not amount to a clear request for payment but merely served to bring the overdraft amount to the attention of the 5th respondent.

[177] Dr Barnett submitted on ground (d) that there was no evidence of any special terms or schedule, and there had been no demand for repayment of the overdraft facility. There were no agreed terms which had been breached and accordingly, the Full Court made findings which had no evidential basis.

[178] On grounds (f), (g) and (i), Dr Barnett submitted that the 5th respondent was not a delinquent borrower under the terms of reference as he was not in default and therefore, was not affected by actual bias as found by the Full Court, which would mean an automatic disqualification. Dr Barnett relied on the decision in **R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)** [1999] 1 All ER 577 and **Locabail (UK) Ltd v Bayfield Properties Ltd** 1999 EWCA Civ 3004.

[179] It was further submitted by Dr Barnett, in his written submissions, that the 5th respondent was not a party to the enquiry proceedings. If that was so, he would have to have had a pecuniary, propriety or personal interest in the outcome of the commission's proceedings. The debt owed by the 5th respondent had been liquidated in a consensual and non-contentious manner and had been paid over 12 years before the

commission was formed. The 5th respondent, he added, could not therefore be affected by any bias, actual or perceived.

[180] On ground (h), Dr Barnett, in his written submissions, submitted that the original letter dated 27 January 1992 was not provided at the proceedings before the Full Court. It was not authenticated or 'produced' according to the rules of evidence under the Evidence Act. The affiant in question was not the author or recipient of the letter and he gave no evidence of witnessing the execution of the letter as evidence. Accordingly, no consideration ought to have been given to this letter to prove its contents.

[181] In his response to Dr Barnett's submissions, Mr Hylton supported the finding of the Full Court that the 5th respondent was a delinquent borrower. He submitted that the letters from CNB were authentic. The affidavits of Patrick Hylton and Miss Janet Farrow supported the fact that loan receivables in exhibit A of the deed of assignment to JRF included debts owed by Bev Carey Associates (1985) Limited. Mr Hylton further submitted that the 5th respondent's letter to the Financial Institutions Services Limited (FIS) acknowledged that he was a debtor and would fall within the category of persons whom the commission was mandated to enquire about. The failure of the 5th respondent to make the disclosure was also a further reason for disqualification, he contended.

[182] The fundamental principle is that a man may not be a judge in his own cause. Over the years, the law has divided persons who have to adjudicate into two classes, that is persons who demonstrate actual bias and those who demonstrate perceived or

apparent bias. This was demonstrated in the celebrated case of **Pinochet (No 2)** when Lord Browne-Wilkinson stated at page 586 paras c-e:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial ..."

And continuing at page 586 para f he said:

> "In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: ... I will call this 'automatic disqualification'."

[183] The case establishes that even in circumstances where a decision-maker does not have a pecuniary or proprietary interest in the outcome of a matter that is before him, he may be disqualified if his conduct would garner suspicion of partiality.

[184] In **Locabail (UK) Ltd v Bayfield Properties Ltd**, the court affirmed the rule that a decision maker who has an interest in a matter before him acts in his own cause. The court observed at para 21:

> "In any case giving rise to automatic disqualification on the authority of **Dime's** and **Pinochet (No 2)** the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. ... If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is, or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing ..."

[185] The question therefore is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge or tribunal has not brought or will not bring an impartial mind to bear on the adjudication of a matter.

[186] In **R v Gough** [1993] AC 646 Lord Goff said at page 648:

> "In my opinion, if in the circumstances of the case it appears that there was a real likelihood, in the sense of a real possibility of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

In continuing, he further said at page 670:

> " ... I think it possible, and desirable that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man ...; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."

[187] The case of **R v Gough** has been followed with approval in several cases see also **Roylance v General Medical Council (No 2)** [2000] 1 AC 311 and **Pinochet (No 2)**.

Disclosure

[188] On the issue of disclosure, it is to be noted that this was not a ground of appeal set out by the 1st to 4th respondents as it related to the non disclosure of the 5th respondent. However, this court entertained Dr Barnett's submission on the issue (see rule 1.16(3) of the Court of Appeal Rules).

[189] The Full Court had ruled that in respect of Bev Carey Associates (1985) Limited, certain documentary evidence sought to be exhibited by the 1st to 4th respondents was inadmissible. The inadmissibility of these documents was challenged by the 1st to 4th respondents on the basis that in a judicial review court, the exclusion of hearsay

documents is not automatic as in civil courts and is not subject to the rules of evidence in a court of law. It was argued that the Full Court erred when it refused to admit the documents. The authorities, they contended, have shown that in proceedings such as this, a more liberal approach is adopted as to the admission of hearsay evidence.

[190] It is clear that in such proceedings, the court may allow the admission of hearsay evidence relevant to the enquiry - see also **Alliance Against the Birmingham Northern Relief Road v Secretary of State for the Environment, Transport and Regions** (1999) WL 477754.

[191] It was strongly argued by the 1st to 4th respondents that the 5th respondent was a delinquent borrower and failure to make this disclosure would make him a judge in his own cause and he ought to have been disqualified. It is quite evident from the letters they received, from CNB, that CNB considered the 5th respondent to be a borrower. In a letter dated 5 January 1998 in response to a letter by CNB dated 10 June 1997, the 5th respondent acknowledged that he was indebted to CNB. It is also clear that when the debt portfolio of CNB was acquired by FIS, the respondent was advised of this. The 5th respondent in a letter to FIS dated 12 February 1998 wrote:

> "Thank you for your letter of January 22, 1998 in respect of the above matter and hasten to respond as requested to prevent further accrual of interest which seems to grow ever alarmingly.
>
> I return you herewith set of form duly completed and enclose as well as my cheque for $8,333.28 which I trust wholly discharges my debt to Century Bank Ltd."

[192] The question is: was the 5th respondent a debtor to FINSAC? As Campbell J said at para (23):

> "I accept that FINSAC must mean the groups of affiliated companies including FIS. Any other construction would restrict the Commissioner to an enquiry to Finsac Ltd. who had no debtors, and would iexclude debts acquired by FIS, Recon Trust Limited and Refin Trust Limited. I find that the 1st Defendant was a borrower from CNB, whose assets were acquired by FINSAC. That FINSAC would have had the debt from the date of the vesting order by FIS until it was discharged on the 3rd March, 1998."

[193] However, if one looks at the letter sent to the 5th respondent by FIS on 22 January 1998 and the response dated 12 February 1998, it is clear that the 5th respondent paid the sum required to satisfy his obligation. I am of the view therefore that the 5th respondent, having satisfied the debt, was not a delinquent or bad debtor as the Full Court found, but a debtor from CNB. In my view, the 5th respondent was under a duty to have made disclosure of his indebtedness and the indebtedness of a company of which he was a shareholder and a director.

[194] On the issue of actual bias, this can only be proved where partiality or prejudice is shown, - see **Re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700. Dr Barnett argued that to impute actual bias, it must be proved that the 5th respondent had a financial or proprietary interest in the outcome of the inquiry. It is my view, however, that there is nothing to prove that the 5th respondent had any such interest to cause partiality or prejudice in the conduct of the inquiry. The Full Court, in my view, was in error when they found actual bias on the part of the 5th respondent.

In **Panday v Virgil** Mag App No 75 of 2006, delivered 4 April 2007, Warner JA, at para 26 said:

> "An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings."

[195] It is clear that the 5th respondent would have an interest in the outcome of the inquiry. However, a fair-minded observer informed of the facts would that the 5th respondent would be biased and based on him being a debtor to CNB would come to the conclusion that the 5th respondent could be apparently biased. I would therefore hold that the 5th respondent would come under the category of being apparently biased.

[196] It was the complaint of the 1st to 4th respondents that the 6th respondent exhibited bias, in that, from 1996 he made several statements in newspaper articles criticizing the macroeconomic policy of the government and the high interest rates during the period under investigation.

[197] Mr Beswick for the 6th respondent submitted that expressing a view on government policies does not necessarily subject the 6th respondent to being disqualified. There was no evidence, he submitted, that the 6th respondent was not prepared to change his views. He further submitted that the criticism of government policy in and of itself, even vigourously, does not lend support to a conclusion that a party is therefore disqualified from undertaking a fair and objective enquiry into that

policy. He cited **Re Carruthers Conolly, Ryan and the Attorney General** [1997] OSC 132, a case relied on by the 1st to 4th respondents, where Thomas J said as follows:

> "There is nothing objectionable in the formation of a preliminary view on a particular question ... That however is to be distinguished from pre-judgment and prejudice."

[198] Having looked at the various articles and the views expressed by the 6th respondent, it is not enough basis in my view, for a fair minded observer cognizant of all the facts, to come to the conclusion that the 6th respondent had prejudged the issues and should be disqualified from sitting. There is no evidence to further suggest that the respondent is of such a fixed and immovable disposition or mindset in relation to the sundry issues to be addressed by the commissioner that he can be properly described as having prejudged the issues.

[199] The finding of apparent bias on the part of the 5th respondent does not in any way reflect on the character, reputation or credibility of the person. The 5th respondent is well known, is an excellent jurist and is well recognized in Jamaica and the Caribbean. There is no evidence to suggest that by being chairman, he would in any way taint the views of the other commissioners who are also well known and respected in the community. Both the 6th and 7th respondents by dint of their qualifications and expertise were very familiar with the environment and culture of the subject matter of the enquiry, and would not be unduly influenced and persuaded by the 5th respondent.

[200] For the foregoing reasons and as stated, we allowed the appeal and dismissed the counter appeals.

HIBBERT JA (Ag)

[201] In the late 1990s Jamaica's financial sector suffered a serious crisis resulting in the failure of a number of financial institutions and the need by others for state financial assistance.

[202] Consequently a commission of enquiry was established and on 24 October 2008 His Excellency, the Governor General, appointed the 5th and 6th respondents as commissioners along with Mr Dale Blair, and the appellant was appointed as counsel to the commission. Mr Blair, however, did not take up his appointment and consequently the 7th respondent was appointed to replace him. The 5th respondent was appointed as the chairman. Their terms of reference were as follows:

> "(i) To examine the circumstances that led to the collapse of several financial institutions in the 1990s with particular regard to:
>
> (a) the extent to which these circumstances were directly influenced by domestic or external factors;
>
> (b) Government's fiscal and monetary policies.
>
> (c) the management practices and role of [sic] Board of Directors of the failed institutions;

(d) the performance of Government's regulatory functions.

(ii) To consider what actions, if any, could have been taken to avoid this occurrence and to evaluate the appropriateness of the actions which were taken by the authorities in the context of Jamaica's economic circumstances and in comparison to intervention by the State in other countries which have had similar experiences;

(iii) To review the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally;

(iv) To review the probity and propriety in FINSAC's management, sale and/or disposal of assets relating to delinquent borrowers;

(v) To review the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation;

(vi) To review the practices of the Jamaica Redevelopment Foundation in the treatment of delinquent borrowers and, in particular, the management, sale and/or disposal of their assets;

(vii) To assess the long term impact of the collapse of these institutions on the economy and on the businesses and individuals whose loans were involved as well as the economic and social impact of the actions taken by the Government with regard to the savers, depositors and investors of the failed institutions;

(viii) To review the steps that have subsequently been taken and make recommendations as to what further steps should be taken to prevent a recurrence of such widespread collapse of financial institutions and the resulting hardships."

[203] By letter dated 8 June 2009, the attorneys representing Jamaica Redevelopment Foundation Inc (JRF) wrote to the commission asking for its "written assurance that none of the Commissioners or any immediate family members of theirs is or was indebted to any of the banks or financial entities that were restructured or that had its loan portfolio restructured through Workers Savings and Loan Bank, Finsac Limited or any of the related entities of Finsac Limited (eg Financial Institutions Services Limited, Refin Limited, Recon Trust Limited etc), or was a director of a company who was so indebted". There was no response to this letter. On 10 December 2009 the attorneys again wrote to the secretary of the commission stating "we once again request the written confirmation from you sought in ours of June 8, 2009". To this letter, after acknowledging receipt, the secretary in response stated that "the letter will be presented to the next meeting of the Commission". No further communication was had from the commission or its chairman. The commission started public hearings on 22 September 2009 and on 10 December 2009 adjourned the hearing to 19 January 2010.

[204] By letter dated 31 December 2009 to the secretary to the Commission, the attorneys-at-law representing the 1st to 4th respondents expressed certain concerns relating, in particular, to information and documents that had come to their attention. The information and documents concerned transactions between the 5th respondent, his wife and a company owned by them on the one hand (Bev Carey Associates (1985) Limited) and certain intervened institutions and FINSAC on the other. Enclosed in that letter were letters from Century National Bank to the 5th respondent and his wife, including letters dated 27 January 1992 and 28 December 1993, letters from the 5th

respondent and his wife to Century National Bank as well as other letters and banking documents. In reply to that letter, the secretary to the Commission, by letter dated 18 January 2010, stated that he had sought and obtained the advice of the Solicitor General. He further stated that:

> "The overdraft facility extended to Justice Boyd Carey was fully discharged.
>
> As regards the loan to Bev Carey & Associates (1985) Limited, neither FINSAC/FIS, JRF nor IAS are in a position to substantiate the existence of this loan."

[205] When the hearing resumed on 19 January 2010, the attorneys representing the 1st to 4th respondents submitted that the 5th respondent should recuse himself for the reasons stated in the letter dated 31 December 2009. The 5th respondent refused to recuse himself and the commissioners decided to continue as then constituted.

[206] Having obtained leave to apply for judicial review, the 1st to 4th respondents on 16 February 2010 filed a fixed date claim form naming the 5th to 8th respondents as the 1st to 4th defendants respectively. The orders sought and the grounds upon which they were sought are set out hereunder:

> "1. An order of *prohibition* preventing the continuation of the Commission of Enquiry into the Collapse of Financial Institutions in Jamaica in the 1990s (hereinafter referred to as "the Commission") as currently constituted of the 1st, 2nd, and 3rd Defendants;

2. An order of *certiorari* quashing the decision of the 1st, 2nd, and 3rd Defendants to continue with the hearings of the Commission;

3. An order of *certiorari* quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission;

4. A Declaration that the 1st Defendant by virtue of his:

   (a) having been a delinquent borrower whose debt was acquired and handled by FINSAC;

   (b) being or having been a shareholder of a company (of which his wife was a director and the other shareholder) which either was or remains, or was handled by FINSAC on the basis of being, a delinquent borrower whose non-performing debt was acquired by FINSAC and then sold by FINSAC to Jamaican Redevelopment Foundation Inc.;

   (c) having been a 'close associate' of a director of an intervened institution (according to documentation from the institution's file signed by one of its officers) whose role and management practices are to be examined by the Commission, and who is scheduled to appear to give testimony before the Commission; and

   (d) having, according to the said documentation, received special accommodation from the said intervened institution by reason of his relationship with the said director;

   is presumed to be affected by bias and is automatically disqualified from being a member of the Commission;

5. A Declaration that in the circumstances the 1st Defendant is also disqualified by virtue of apparent bias;

6. A Declaration that the proceedings that have occurred thus far in the enquiry are null and void.

7. Such further and/or other relief as the Court deems fit.

The 4th Defendant is joined, in respect of the Declarations sought, as a representative of the Crown pursuant to the Crown Proceedings Act.

The Claimants seek the above relief on the following grounds which are not exhaustive:

i. The 1st, 2nd and 3rd Defendants have sworn to and have a duty under law to make a full, faithful and impartial enquiry into the matters that, fall within the scope of the Commissions terms of reference;

ii. The 1st Defendant and a company, of which he was at the material time a member and his wife was at the material time a director and the other member, falls [sic] within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly;

iii. The 1st Defendant was a close associate of the executive chairman of an intervened institution, according to documentation signed by an officer of that institution. The management of the institution by its directors and, in particular, its executive chairman is to be considered by the Commission, and

the said executive chairman is scheduled to appear to give testimony before the Commission;

iv. Counsel to the Commission falls within the class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly, in that he was a director and shareholder of a company which was indebted to an intervened institution, and he was allegedly a guarantor of its indebtedness;

v. Counsel to the Commission was some time prior to the intervention by the state, a director of an intervened institution;

vi. The Defendants did not disclose the above facts to the public, to the Claimants or in the proceedings of the Commission;

vii. The 1st, 2nd and 3rd Defendants have adopted procedures that are inconsistent, irregular and unfair;

viii. The 1st, 2nd, and 3rd Defendants have made statements which suggest that they have prejudged some of the issues to be considered by the Commission;

ix. The 1st, 2nd, and 3rd Defendants have decided to continue as currently constituted despite the above facts;

x. There is a real and present danger that public confidence in the integrity of the Commission, its proceedings and ultimately its conclusions will be reduced or lost if it is allowed to continue as at present constituted.

xi. It is important that the integrity of the Commission be preserved in the light of the importance of the issues being examined;

xii. Substantial costs are being incurred on a daily basis by the Commission, and it would be in the public interest if the proceedings are stayed pending the determination of these issues.

xiii. The failure of the 1st, 2nd and 3rd Defendants to halt the Commission is unreasonable and irrational."

[207] The Full Court of the Supreme Court heard the application for judicial review and on 2 September 2010 delivered its decision, making the following orders:

"1. An order of prohibition preventing the continuation of the Commission of Inquiry into the collapse of financial institutions in Jamaica in the 1990's [sic] (hereinafter referred to as 'the Commission') as currently constituted with the 1st Defendant as member and Chairman.

2. An order of certiorari quashing the decision of the 1st, 2nd and 3rd Defendants to continue with the hearings of the Commission.

3. An order of certiorari quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission.

4. A declaration that the 1st Defendant by virtue of his having been a delinquent borrower whose debt was acquired and handled by FINSAC is presumed to be affected by bias and is automatically disqualified from being a member and Chairman of the Commission.

5. A declaration that counsel to the Commission by virtue of his (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is

automatically disqualified from acting as counsel to the Commission.

6. The court refuses to declare the proceedings thus far to be null and void.

7 Costs of all four Claimants against the 4th Defendant to be taxed if not agreed."

[208] On 17 September 2010 the appellant was granted leave to appeal and by a notice of appeal filed on 20 September 2010, he appealed the following order of the Full Court:

> "A declaration that counsel to the Commission by virtue of his, (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is automatically disqualified from acting as counsel to the Commission..."

The grounds on which this appeal was based were stated as follows:

> "(1) In obtaining leave to apply for judicial review the Claimants had not made the Appellant a party to the proceedings or sought any relief against him and therefore since no leave was granted to proceed for any relief against the Appellant the Full Court ought not to have made any order which directly affected the Appellant.
>
> (2) That the order made by the Full Court by way of a declaration that the Appellant as counsel to the Commission was presumed to be affected by bias and was automatically disqualified from acting as counsel directly affects and prejudices the Appellant in circumstances where no prior notice of the proposed order was given to the Appellant nor was the Appellant made a party to the proceedings. The Full

Court acted in breach of the principles of natural justice in failing to give the Appellant prior notice of the aforesaid order which they contemplated making against him to afford him the opportunity to be heard.

(3) As a person who was directly and adversely affected by the judgment and order of the Full Court, the Appellant was entitled to have prior notice of the order that would be made against him and afforded an opportunity to be heard in accordance with s20 (2) of the Constitution of Jamaica. In making an order and findings that directly affected the Appellant without joining him as party to the proceedings and without giving him prior notice of the proposed order so as to afford him the opportunity to be heard, the Full Court breached the Appellant's fundamental right to a fair hearing accorded by s20(2) of the Constitution of Jamaica.

(4) The Full Court proceeded to make the aforesaid order in breach of CPR 56.11(1) that provides that the claim form and affidavit in support must be served on all persons directly affected not less than 14 days before the date fixed for the first hearing. The aforesaid order made by the Full Court directly affected the Appellant and therefore the Appellant ought to have been joined as a party and served with a claim form and affidavit in support giving him adequate prior notification of the aforesaid order sought or contemplated against him in accordance with CPR 56.11(1).

(5) The finding that the Appellant was deemed by FINSAC to be a delinquent debtor is unsupported by the evidence and wholly unreasonable.

(6) The finding that the Appellant's resignation from the Board of Century National Bank did not take place at a time that was sufficiently far removed from the time that the Barık was intervened into by the Government to safely remove the Appellant from being within the class is unsupported by the evidence and wholly unreasonable. The Full Court failed to appreciate that the relevant period to be considered for [sic] purpose

of determining whether there was an appearance of bias was the period that had elapsed up to the time of the proceedings in which disqualification was sought.

(7) The finding and order of the Full Court that the Appellant ought to be automatically disqualified as counsel to the Commission was wholly unreasonable, flawed as a matter of law, unsupported by the evidence and contrary to principle in that:

a) The Full Court quite clearly failed to have due regard to the nature of the proceedings, which was an investigative enquiry by the 5th, 6th, and 7th Respondents who were appointed under the Commissions of Enquiry Act and not proceedings to determine disputes between litigants as to civil rights and obligations to come to a judgment or determination between parties and/or to impose sanctions or penalties on anyone. The proceedings could not result in any pecuniary benefit or binding determination for or against anyone in respect of the matters being enquired into.

b) Given the investigative nature of the proceedings, there was no basis for presuming actual bias leading to the automatic disqualification of the Appellant by reason of his alleged association with any failed financial institution or delinquent debtor as there was no evidence that the Appellant had promoted or adopted or sympathized with the cause, dispute or grievance of any failed financial institution or delinquent debtor or exhibited any hostility against any of the Claimants at any time in the intervening period up to the commencement of the proceedings

seeking the disqualification of the Commissioners by reason of bias.

c) Further there was no basis for finding actual bias on the part of the Appellant by reason that the Appellant had been alleged to be a guarantor of a delinquent debtor when the Appellant had denied guaranteeing any debt, his response and explanation had not been disputed, and up to the time of the commencement of the proceedings seeking the disqualification of the Commissioners by reason of bias, no claim had been made against him and there was no dispute as to any such debt between the Appellant and anyone involved in the enquiry nor had the Appellant exhibited any hostility against anyone as a consequence.

d) The Full Court's finding that there was a possibility of the Appellant participating in decision-making is wholly unreasonable and unsupported by any evidence and was contrary to the unchallenged evidence that it was the 5th, 6th, and 7th Respondents who were the duly appointed Commissioners. Quite clearly the Appellant had not been appointed a Commissioner and there was no basis to find that the Appellant would be participating in the decisions of the Commissioners.

e) Further, that on the proper test that ought to have been applied, no fair minded and informed observer considering the facts would conclude that there was a real possibility of bias on the part of the Appellant or that the Commissioners' report could be infected with bias by reason of the participation of the Appellant as counsel.

(8) The Full Court failed to apply the proper test for determining whether there was appearance of bias by reason of the Appellant's alleged association with any delinquent debtor or failed financial institution which was whether a fair minded and informed observer considering the facts including the limited role of the Appellant as counsel would conclude that there was a real possibility of bias on [sic] part of the Appellant that would infect the Commissioners. Further that on [sic] totality of the evidence no fair minded and informed observer considering the facts would have concluded that there was a real possibility of bias on the part of the Appellant (as found by Campbell I at pg 17 par.38)."

[209] On 5 October 2010 a counter notice of appeal was filed on behalf of the 1st to 4th respondents appealing the following order of the Full Court:

> "The Court refuses to declare the proceedings thus far to be null and void."

To support this, the following grounds of appeal were filed:

> "i. In refusing to declare the proceedings null and void the Court failed to have any or any adequate regard to its' [sic] finding of bias and disqualification in respect of the Chairman and Counsel to the Commission and its effect on the continuation of the Commission in the eyes of the fair minded informed observer.
>
> ii. The Court failed to have regard to the fact [sic] Commissioners Ross and Bogle participated in several questionable decisions including the decision to proceed with the Commission of Enquiry as constituted on January 19, 2010 and therefore could not be considered free of the taint of bias.

iii. The Court's finding that Commissioner Ross did not have a settled view on matters of economic policy was against the weight of the evidence and no sufficient regard was given to the fact that this evidence was unchallenged by Commissioner Ross, and failed to give any or adequate regard to the effect of Commissioner Ross' well publicized views on the fair minded informed observer.

iv. The Court erred in finding that the Terms of Reference required a lower level of procedural fairness having regard to the statutory provisions and the importance of the findings and recommendations of the Commission to all [sic] the affected parties.

v. The Court failed to have regard to the fact that the Commission was charged with determining whether debtors were treated fairly and equally and that in making that determination the Commission would be required to follow a higher standard of procedural fairness.

vi. The Court's finding that there was no procedural unfairness is against the weight of the evidence.

vii. The Court's finding that there was no failure to conform to legitimate expectations is against the weight of the evidence.

AND FURTHER TAKE NOTICE that the 1st, 2nd, 3rd, and 4th Respondents being the Claimants in the Court below will contend that paragraphs 1-5 of the decision of the Court below should be affirmed on the following ground:

The Court erred in excluding from its consideration as hearsay and treating as tenuous the evidence regarding FINSAC's and the 4th Cross-Appellant's treatment of Bev Carey Associates (1985) Limited as being indebted to them, particularly having regard to the Court's earlier ruling on a preliminary objection relating to the same evidence and having regard to the nature of the proceedings as a claim for judicial review."

[210] On 11 October 2010 a counter-notice of appeal was also filed on behalf of the 5th respondent, appealing all the orders of the court below. These were the grounds on which reliance was placed:

> "(a) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that appended to the letter of the 31st December 2009, was a letter of demand dated 27th January 1992, and a further demand letter of December 28th 1993. Both letters are addressed to the 1st Defendant (5th Respondent) and his wife, the account referred to is similar. The 1st Defendant (5th Respondent) denies receiving those letters but confirms receipt of the letter dated 10th June, 1997, which states, 'as you are aware, your current account continues to be overdrawn as indicated above.'
>
> (b) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that the actions of the 1st Defendant (5th Respondent) in his receipt of the letter of 22nd June, 1998 fixes him with knowledge that his debt has been taken over by FINSAC.
>
> (c) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that on the applicants' case, the Bank had informed the 1st Defendant (5th Respondent) from the [sic] January 1992, and the debt was not discharged until March 1998.; and in holding that 'On the 1st Defendant (5th Respondent's) case, they acknowledged receipt of the 10th January [sic] 1997 letter it was still almost eighteen months before the debt was extinguished. On either case I would have to say the 1st Defendant (5th Respondent) has defaulted on his debt, and could properly be described as a delinquent borrower. The fact that this debt was extinguished some twelve years ago does not assist the 1st Defendant (5th Respondent), as the

enquiry concerns delinquent borrowings that were created in the 1990s.'

(d) The Full Court misdirected itself on the facts and made findings or drew inferences which are unreasonable in holding that there is evidence before this Court to hold that a loan agreement existed between the 5th Respondent and the Bank (Pages 9-10, Para. 21) in the context of a loan with agreed terms which had been breached by non-payment.

(e) The Full Court misdirected itself and erred in finding at page 10, paragraph 24, that the 5th Respondent, Justice Boyd Carey was a delinquent borrower for the purposes of the Terms of Reference. Their Lordships [sic] formulation and analysis of the crucial issue to be probed in determining the class of persons affected by the Terms of Reference was inherently flawed and erroneous in that it failed to give due weight and consideration to the status of the alleged loan at the relevant times. The crucial questions for determination were:

(1) whether the 5th Respondent was a 'delinquent borrower' whose debt was acquired by FINSAC; and

(2) whether there was any relevant treatment of the 5th Respondent which falls within the Terms of Reference.

(f) The Full Court at pages 11-12, paragraph 28, erred in finding the 5th Respondent to have been a 'judge in his own cause' on the flawed test that the Appellant, Justice Boyd Carey merely needed to have been at some point in time 'a delinquent borrower' of an intervened institution although there was no evidence that the intervened institution could properly or did so regard him.

(g) The Full Court erred in law in finding that the 5th Respondent had an interest in the outcome of the proceedings such as could amount to actual bias as there was no evidence that he was a delinquent

debtor or that there was any treatment meted out to him by FINSAC Ltd., FIS or any FINSAC entity or any relationship which was contentious, strained or could be the subject matter of an investigation by the Commission.

(h) To the extent that the Full Court placed reliance on the alleged letter dated January 27, 1992 (page 10, para. 24) their Lordships erred in law as the said letter was not proved or properly authenticated.

(i) The Full Court erred in law in categorizing the case of the 5th Respondent, Justice Boyd Carey as 'actual bias' when he had no pecuniary or other personal interest in the subject-matter of the inquiry.

Additionally the 5th Respondent adopts in full the grounds of appeal set out in the Appellant's Notice of Appeal."

Fresh Evidence

[211] In addition to the appeal and counter appeals, on 24 March 2011, a notice of application was filed on behalf of the 1st to 4th respondents seeking leave to adduce as fresh evidence on appeal the following:

"(a) ... presentation by R.N.A Henriques O.J. Q.C. entitled '**JAMAICA'S MID 1990's FINANCIAL SECTOR CRISIS: REFLECTION ON CRISIS RESOLUTION STRATEGIES**' and (b) the cover page, list of persons present and the evidence before the Commission of Mr George Hugh as extracted in pages 1, 127 and 143-154 of the Verbatim Notes of the February 24, 2011 sitting of the Commission of Enquiry."

The orders sought were on the following grounds:

"1. The 1st - 4th Respondents became aware in March 2011 that the Appellant, RNA Henriques Q.C

presented at a conference held by the Jamaica Deposit Insurance Corporation (JDIC) in association with Caribbean Regional Technical Centre (CARTAC) on March 24-26, 2010.

2. Neither the 1st - 4th Respondents nor their Attorneys - at-Law attended the said conference or had knowledge of the presentation at the said conference. The evidence could not have been obtained with reasonable diligence for use at the trial.

3. The evidence regarding the Appellant shows that he may have prejudged issues to be considered by the Commission and ought not, by reason of a reasonable appearance of bias, to serve as counsel to the Commission. Accordingly, it would have had an important influence on the result of the case.

4. The evidence extracted from the Verbatim Notes of February 24, 2011 would have had an important influence on the result of the case as they show that the Commissioners have been procedurally unfair, particularly by following inconsistent procedures in relation to the cross-examination of witnesses.

5. The evidence is credible."

This application was supported by an affidavit sworn to by the 2nd respondent and was heard before the appeals.

[212] Mr Foster QC submitted that the evidence sought to be adduced met all the criteria for admission. Relative to the presentation by the appellant, he submitted:

(i) That the evidence could not have been obtained with reasonable diligence for use at the trial because the presentation was made at a conference more than a month after the filing of the Fixed Date Claim Form. Additionally none of the applicants attended or were aware of the conference or that the appellant was to

make a presentation. There was, therefore, nothing to put the applicants on enquiry to conduct fresh searches in relation to the appellant.

(ii) That if admitted it would probably have an important influence on the case, because throughout the presentation the appellant expressed very strong opinions on the issues which forms a part of the mandate of the Commission under its terms of reference. The views expressed by the appellant, he said, would cause one to conclude that the appellant had pre-judged the issues which the Commission was to consider.

(iii) That the evidence is credible, and

(iv) That the admission would be in the interest of justice.

He also submitted that in relation to the verbatim notes, the criteria for admission had also been met. In support of his submissions, he cited for the consideration of the court, the decisions in **Ladd v Marshall** [1954] 3 All ER 745, **Hamilton v Al Fayed (No 2)** [2002] EWCA 665 and **Gillingham v Gillingham** [2001] EWCA Civ 906.

[213] Mr Hylton QC adopted the submissions of Mr Foster as they related to the application of **Ladd v Marshall**. He added that a perusal of the presentation of the appellant shows a reliance by the appellant on submissions subsequently made by Dr Paul Chen Young. This, he submitted, indicated that the commission was in possession of submissions from Dr Chen Young and failed to notify the 3rd respondent or to disclose them to him. He argued that this would impact on whether or not the enquiry was being fairly conducted and, therefore, the application ought to be allowed.

[214] Mrs Foster Pusey and Mr Garcia adopted the submissions of Mr Foster and Mr Hylton. Mr Garcia added that although a letter was sent to the 2nd respondent informing him of the conference and seeking the sponsorship of National Commercial Bank, it did not mean that he received and read that letter. He further submitted that although the conference was sponsored by National Commercial Bank and a letter was sent to the 2nd respondent thanking him for the sponsorship, this took the matter no further. The agenda, he submitted, merely identified the appellant as the moderator.

[215] Mr Wood QC, in opposition to the application, submitted that the criteria for admission of the presentation made by the appellant had not been met. He submitted that:

(a) the evidence was in existence for about five months before the trial;

(b) the 2nd respondent was notified of the conference about a year before it was held;

(c) the liaison officer of National Commercial Bank received a copy of the paper which was presented;

(d) the paper was published on the internet on 31 March 2010, and

(e) the subject matter of the conference was one which the 2nd respondent would be interested in.

He, therefore, submitted that the evidence adduced on behalf of the 2nd respondent was insufficient to show that reasonable diligence was employed, and no evidence was elicited from any of the other respondents as to the efforts made by them.

[216] He further submitted that it should be borne in mind that the function of the appellant at the enquiry was to give legal advice to the commissioners, that he was not named as a party in the proceedings before the Full Court and that the only allegation made against him in an affidavit was that he had an interest in an entity whose debt was taken over. Consequently, he argued, the presentation, which could only relate to a predetermination by the appellant, could have had no bearing on the outcome of the case before the Full Court.

[217] Mr Beswick on behalf of the 6th to 8th respondent, adopted the submissions made by Mr Wood and added that the attempt to adduce evidence of the proceedings of the commission in February 2011 was an attempt to have this court conduct a judicial review. He also submitted that there was no basis for admitting the transcripts as they would not be relevant to the issues before this court.

[218] The principles governing the admission of fresh evidence have now been well-established. In **Ladd v Marshall**, Denning LJ (as he then was) at page 748 of the judgment stated:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive : third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[219] The position taken in **Ladd v Marshall** was somewhat softened with the introduction of the UK Civil Procedure Rules, Morrit LJ in **Banks v Cox** [2000] EWCA Civ 5565 July 2000 stated:

> "In my view the principles reflected in the rules of **Ladd v Marshall** remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Curt below."

This approach was adopted in **Gillingham v Gillingham** and by this court in **Rose Hall Development Limited v Hananot** [2010] JMCA App 26. Panton P, in his judgment in the latter case which was delivered on 26 November 2010, after reviewing the decisions in **Hamilton v Al Fayed**, **Gillingham v Gillingham** and **Paterson v Howells and Anor** [2005] EWCA Civ 1519, at paragraph [17] stated:

> "An analysis of these cases would suggest that the court is not placed in the straight-jacket of **Ladd v Marshall** when considering whether the special conditions have been satisfied and must be considered in the light of the overriding objective of the Civil Procedure Rules."

[220] I have noted that the only evidence of efforts made to discover the evidence which the 1st to 4th respondents sought to adduce was contained in the affidavit of Patrick Hylton, which was filed on 24 March 2011. Having examined this affidavit and having considered the submissions which were made, I formed the view that the

publication of the appellant's presentation could have been obtained for use at the trial if reasonable diligence was employed.

[221] The role of the appellant in relation to the commission was to provide legal advice. He was not made a party to the proceedings in the Full Court and the only concerns which were expressed as they related to him was that he was at some time associated with one of the intervened companies. In my opinion, the presentation made by the appellant could not have properly had an important influence on the outcome of the proceedings before the Full Court.

[222] There is no challenge to the credibility of the evidence which was sought to be adduced. However, in light of my views which have been stated, I do not believe that it would be in the interests of justice to allow the admission of this evidence.

[223] Similarly, I do not believe the admission of transcripts of proceedings before the commission would be in the interests of justice as they would only show the conduct of the commission subsequent to the determination of the proceedings before the Full Court and could only serve to possibly impeach the commission for its conduct after the proceedings before the Full Court were completed.

[224] It is for these reasons that I agreed that the application should be refused.

The Appeal

[225] Before this court, Mr Wood on behalf of the appellant dealt with the grounds of appeal under three heads:

1. Breach of natural justice/due process;

2. Inconsistent and unsupported findings and orders; and

3. Failure to apply the correct test of bias.

[226] The breach of natural justice/due process head covered grounds one to four. Mr Wood submitted firstly that whereas enquiries were made in respect of the 5th respondent who was the chairman of the commission, none was made in relation to the appellant. Thereafter, when the request was made for the 5th respondent to recuse himself, none was made in relation to the appellant. Additionally, the fixed date claim form filed after leave for judicial review was obtained, did not name the appellant as a defendant, neither was he served with documents which were filed in the proceedings. The involvement of the appellant was limited to an affidavit filed by him in response to one filed by Miss Janet Farrow (chief executive officer of the 4th respondent) in respect of grounds iv and v of the fixed date claim form. Consequently, Mr Wood submitted, the decision and order made by the Full Court in respect of the appellant were in breach of the principles of natural justice and were not in keeping with the provisions of part 56 of the Civil Procedure Rules (CPR). In support of his submissions, Mr Wood cited several authorities including **Mwamba v Attorney General of Zambia** [1993] 3 LRC 166 and **The Northern Jamaica Conservation Association and Others v The Natural Resources Conservation Authority and Another (No 2)** HCV 3022 of 2005, judgment delivered on 23 June 2006.

[227] Relative to the second head which covered grounds five to seven, Mr Wood submitted that the lack of consistency in the findings and orders made against the appellant lead to the conclusion that there was a lack of due consideration paid to the matter. In seeking to support this, he drew the court's attention to findings made by each judge of the Full Court and submitted that they, at times, were in conflict with each other. He further submitted that in making the orders against the appellant, the learned judges failed to properly analyse the case law relating to automatic disqualification.

[228] The third head concerned ground eight of the appeal. Mr Wood argued that the Full Court failed to properly apply the test of the fair minded and informed observer in making a determination of whether or not the appellant could be held to be tainted with bias.

[229] A challenge to the appeal was mounted on behalf of the 1st to 4th respondents. Mr Foster in addressing the issue of natural justice/due process submitted that the proceedings were directed to the commission and its actions, whether done by itself or through its agents, and as such there was no compelling reason an agent to the commission should be named as a party to the proceedings.

[230] Mr Foster further submitted that no rights of the appellant were threatened as he had no right to act as legal adviser and counsel to the commission. The court's order, he stated, was directed at the commission that the appellant was not qualified to act as counsel to the commission. Additionally, he submitted, the appellant was aware of the

issues concerning him and submitted an affidavit in response to that of Miss Farrow thus putting before the court all the contentions he could advance.

[231] Relative to the Full Court's finding of bias on the part of the appellant, Mr Foster submitted that there was sufficient uncontroverted evidence that the appellant was a member of the class of persons subject to the commission's mandate. Consequently, he submitted, the fair-minded and informed observer, having considered the facts, would conclude that the appellant was likely to be biased, whether consciously or unconsciously in performing his duties and rendering his advice to the commission.

Natural Justice/Due Process

[232] Part 56 of the CPR governs proceedings relating to judicial review. Rule 56.9(1) stipulates that an application for judicial review must be made by a fixed date claim form and rule 56.11(1) states:

> "The claim form and the affidavit in support must be served on all persons directly affected not less than 14 days before the date fixed for the first hearing."

[233] This provision of the CPR was addressed by Sykes J in the **The Northern Jamaica Conservation Association and Others v The Natural Resources Conservation Authority and Another**. At paragraphs 11-13 of his judgment he said:

> "11. The next step in the analysis is whether "must" in rule 56.11(1) means must or may. It would seem to me that the obligation to serve is mandatory. Service of

the claim form and affidavit in support is the accepted means, laid down by the rules, by which persons who are defendants or persons directly affected are notified of the challenge to the decision from which they benefited. This must be so because a person directly affected ought to be given the opportunity to make such representations as he sees fit. The representations may affect the remedies granted even if the applicants for judicial review are successful in establishing their case.

12. Mrs. Minott-Phillips referred to the fifth point made by Lord Mustill in the case of **Regina v Secretary of State for the Home Department, Ex parte Doody** [1994] 1 A.C. 531, 560 where he said:

> *'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*
>
> To this I would add the sixth which impacts the service point also found at page 560:
>
> *Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'*

13. These are natural justice principles and once it is clear that a party who ought to have been served was not served then it matters little whether or not the party knew of the proceedings. The party not served may decide not to take the point."

I believe that this is a correct statement of the law.

[234] Was the appellant a person 'directly affected' as described in rule 56.11(1)? Assistance in answering this question may be had from the decision of the Supreme Court of Zambia in the case of **Mwamba v Attorney General of Zambia**. In that case the appellants sought a declaration that the President had acted in breach of the Constitution by failing to act with dignity in the discharge of his executive functions, when appointing two members of the National Assembly, M and W, as government minister and deputy minister respectively despite the findings by a detainees' tribunal established by the former head of state implicating both in dealing with a dangerous drug. The judge at first instance found that the adverse findings by the tribunal could not be equated with criminal convictions by a competent court and so did not operate to disqualify them from taking their seats in Parliament.

[235] The appeal to the Supreme Court was dismissed. Ngulube CJ in his judgment at pages 172-173 said:

> "We must now comment on the form and direction taken by these proceedings. Although the motion ostensibly questioned whether there was dignity and leadership in the exercise by the President of his constitutional power to appoint the two Minister [sic], the blows were landing on two individuals who have never been heard and who stood to be condemned unheard and stripped of office. No court of justice can be called upon to make a declaration, which is always a discretionary remedy, when obvious injustice would be visited upon persons who have not been heard but who would be directly affected by a declaratory order

> in proceedings to which they have not been made parties. In the normal course, for example under Order 53 of the Rules of the Supreme Court (see *The Supreme Court Practice* (10th edn, 1993)), the person alleged to be acting in a public office for which he is not qualified would be the respondent in judicial review proceedings to oust him under the procedure which has replaced the old Quo Warranto proceedings. In a case from Kiribati, ***Speaker v A-G*** [1988] LRC (Const) 1 at 7, Maxwell CJ identified certain general principles which the courts have evolved to guide them in exercising their discretion to grant a declaration and one of them he expressed as follows:
>
> '... that the court will not make a declaratory judgment, unless all the parties interested are before it; even if a competent defendant is before the court, as in this case, the court will decline to make a declaration affecting the interests of persons who are not before it ...'
>
> We respectfully share the learned Chief Justice's view. The facts of the Kiribati case, briefly stated, were that the Speaker of the legislative assembly (called the Maneaba ni Maungatabu) applied by an ex parte originating summons (the Attorney General being joined by court order as defendant) challenging the eligibility to assume office of the person re-elected as President and Head of State (known as Beretitenti), since the Constitution limited the number of presidential terms. The Speaker was unsuccessful for a number of reasons, but for present purposes our interest is limited to the principle already discussed.
>
> It follows from the foregoing that the learned trial judge was not in error when she refused to make a declaration."

[236] Clearly, the appellant was a person who was directly affected by the proceedings before the Full Court. He should, therefore, either have been made a party to the proceedings, as was the case with the three commissioners, or served with the claim

form and affidavit as is required by rule 56.11(1) of the CPR. It is my opinion that the Full Court erred in making an order adverse to the appellant in the circumstances and on this basis alone the appeal had to be allowed.

[237] As Mr Hylton has indicated to this court that the 1st to 4th respondents will not be seeking to uphold the declaration made against the appellant as no declarations were sought against him in the court below, the question of bias on his part now becomes moot.

Counter Notice by the 1st to 4th Respondents

[238] The 1st to 4th respondents by their counter notice of appeal sought to have this court affirm the 1st to 5th orders of the Full Court on a ground which was in addition to those accepted by the court. This ground, which is relevant to the 5th respondent, concerned the assertion that the company Bev Carey Associates (1985) Limited, which was owned equally by the 5th respondent and his wife, Mrs Beverley Carey, was indebted to Jamaica Citizens Bank Limited (JCB) and that Refin Trust Limited acquired the right which JCB had to recover the debt.

[239] The affidavits of Patrick Hylton and Miss Janet Farrow spoke of their seeing and examining a spreadsheet and Excel files which showed the indebtedness of Bev Carey Associates (1985) Limited. About these, Campbell J at paragraph 27 of his judgment said:

> "I find that the Excel files and the spreadsheet are inadmissible as bankers [sic] entry for reason of noncompliance with s34 of the Evidence Act."

He further stated:

> "I accept as correct Mr. Errol Campbell, General Manager of FINSAC, when he stated that FINSAC received a list with names and balances from the various intervened institutions, but those balances were never verified. It seems to me that the evidence is tenuous, and no weight may be attached to it insofar as it purports to show that there was an outstanding amount."

[240] Mr Garcia, on behalf of the 1st to 4th respondents, submitted that the Full Court ought to have considered that relevant to the issue of bias, is the evidence in relation to one of the FINSAC entities having purchased the right to recover a debt alleged to be outstanding from Bev Carey Associates (1985) Limited before later selling that right. He further submitted that the Full Court was asked to make two findings which he submitted were supported by the evidence. The first was that there was a credible dispute as to whether Bev Carey Associates (1985) Limited had been indebted to JCB, with the debt remaining outstanding to Refin Trust Limited at the time Refin Trust Limited acquired the right which JCB had to recover the debt. The second was that FINSAC (especially Refin Trust) had proceeded on the basis that Bev Carey Associates (1985) Limited was so indebted.

[241] Had the court made those findings, he submitted, then the court would have considered that a person who disputed FINSAC's position with respect to indebtedness is no less likely to be biased than a person who accepts his indebtedness. He further submitted that the fair-minded observer might well think that the person who disputes is less likely to be fair than the person who accepts.

[242] In reply, Dr Barnett submitted that the Full Court was correct in holding that the evidence that Bev Carey Associates (1985) Limited was indebted was inadmissible and tenuous because the spreadsheet and Excel files were never authenticated or verified. He further submitted that although exceptions to the general rule regarding admissibility of documents are created by sections 34 and 35 of the Evidence Act, the preconditions for admissibility were not in relation to the spreadsheet and Excel files.

[243] Accordingly, Dr Barnett submitted, there was no admissible or credible evidence to support the allegation of apparent bias on the part of the 5th respondent.

The 5th Respondent's Counter Appeal

[244] Dr Barnett structured his submissions around groupings of the grounds which were filed. He commenced with grounds (a), (b), (c) and (e). He submitted that although the 5th respondent had an overdraft with Century National Bank (CNB) which was taken over by Financial Institutions Services Ltd (FIS), he could not be considered a delinquent borrower. He submitted that for the 5th respondent to be classified as a delinquent borrower, there would have had to be a demand for the repayment of the sum owed. He submitted that no such demand was made and referred to the affidavit of the 5th respondent in which he denied receiving a letter from CNB dated 27 January 1992 requesting that he make a lodgment within seven days to cover the overdrawn position. Also, in his affidavit, the 5th respondent denied receiving a letter from CNB dated 28 December 1993, which sought to remind him of his unsecured overdraft balance which was not sanctioned by the new Banking Act and expressed a willingness

on the part of the bank to discuss a secured overdraft arrangement. The 5th respondent, however, admitted that he received a letter dated 10 June 1997 which stated:

> "As you are aware, your current account continues to be overdrawn as indicated above.
>
> Under the current policies, we were unable to offset same against the subject Certificate of Deposit ('B' Share) held in the Building Society. However, at this time, we are pleased to advise that a payment of $36,000.00 representing the first payment from proceeds of the captioned deposit has been duly applied to the above balance. In effect, your balance is now $29,880.84 (Overdrawn).
>
> We will continue to monitor the situation closely and will advise you of any further developments regarding the matter."

This letter, Dr Barnett submitted, did not contain a demand for repayment and consequently the 5th respondent could not be said to have been a delinquent borrower as there was no default. He cited, in support, the decision of the Privy Council in **Financial Institutions Service Limited v Negril Negril Holdings Ltd and Anor** (Jamaica) [2004] UKPC 40.

[245] Dr Barnett further submitted that the overdraft amount which was found to be the "delinquent debt" was transferred to FIS and not FINSAC, hence, the 5th respondent would, in the event that this court should find that there was a demand, not be a "delinquent borrower whose debt was acquired by FINSAC". Consequently, he submitted, Campbell J erred when he stated at paragraph 23 of his judgment that:

> "I accept that FINSAC must mean the group of affiliated companies including FIS. Any other construction would restrict the Commissioner to an enquiry to Finsac Ltd., who had no debtors, and would exclude debts acquired by FIS, Recon Trust Limited and Refin Trust Limited. I find that the 1st Defendant was a borrower from CNB, whose assets were acquired by FINSAC. That FINSAC would have had the debt from the date of the vesting order by FIS until it was discharged on the 3rd March, 1998."

[246] Relative to ground (d), Dr Barnett submitted that there was no evidence of any special terms such as a repayment date or a schedule, nor was there a demand for repayment of the overdraft, so no agreed terms had been breached. Accordingly, he submitted, the Full Court made findings which had no evidential basis.

[247] Dr Barnett grouped grounds (f), (g) and (c) for the purpose of his submissions. He argued that even if the 5th respondent was a delinquent borrower (which is denied), he was not affected by actual bias, as found by the Full Court, which would result in his automatic disqualification. He submitted that the 5th respondent could only be said to be affected by actual bias if he is deemed to be a "judge in his own cause" in that he had a pecuniary, proprietary or personal interest in the outcome of the case. For this proposition, Dr Barnett relied on the decision of the House of Lords in **R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No 2)** [1999] 1 All ER 577, for the meaning of the term "interest". Dr Barnett also relied on the decisions of **Ebner v Official Trustee in Bankruptcy** [2000] HCA 63 and **Locabail (UK) Ltd v Bayfield Properties Ltd** [1999] EWCA Civ 3004.

[248] Dr Barnett further submitted that any debt which was owed by the 5th respondent was paid off in a consensual and non contentious manner over 12 years before the commission was formed and as such the 5th respondent had no pecuniary, proprietary or personal interest in the outcome of the enquiry.

[249] Ground (h) concerned the Full Court's reliance on the letter dated 27 January 1992 from CNB. Dr Barnett questioned the authenticity of this letter and submitted that the court erred in placing any reliance on it. He submitted that the copy letter which was exhibited to the affidavit of Patrick Hylton, dated 3 February 2010, was not authenticated or 'produced' according to the rules of evidence or the provisions of the Evidence Act. In addition to the provisions of the Evidence Act, Dr Barnett relied on the Court of Appeal decisions in **R v Kenneth Williams** RMCA No 27/1998, the judgment in which was delivered on 1 March 1999, and the decision of Anderson J in **Curtis Reid v Cable & Wireless** CLR-037/2000, given on 21 July 2004.

[250] Mr Hylton responded to the submissions made on behalf of the 5th respondent. He maintained that the Full Court was correct in finding that the 5th respondent was a delinquent borrower and that the commission did not disclose that fact. He also maintained that the court erred in finding that statements made by the 5th respondent "... could not be deemed to be unfair by a fair minded observer who is aware of the nature of the proceedings" and that the commission could continue with the hearings following the disqualification of the chairman.

[251] Mr Hylton submitted that the authenticity and provenance of the letters from CNB were established. To support this submission he referred to paragraph 2 of the affidavit of Patrick Hylton, who was the managing director of FIS, sworn to on 9 July 2010, in which he stated that consequent on the assets of CNB being vested in FIS, FIS obtained the files previously maintained by CNB in respect of debts outstanding to CNB. These included correspondence between CNB and its debtors and would have included the letters dated 27 January 1992 and 28 December 1993. He also made reference to the affidavit of Janet Farrow, in which at paragraph 3 she stated that by a deed of assignment made between JRF as purchasers and FIS, Workers Savings and Loan Bank and Refin Trust (collectively as seller), JRF acquired from the seller, loan receivables itemized in exhibit A to the said deed of assignment. Those included debts owed by "Bev Carey Associates Limited" and "Carey Justice Boyd".

[252] Concerning the letters dated 27 January 1992 and 28 December 1993, addressed to the 5th respondent, Mr Hylton referred to another letter which was addressed to the 5th respondent at the same address. This letter was dated 10 June 1997 and to which there was a response from the 5th respondent on 5 January 1998. This, he suggested, indicated that a letter of demand was in fact sent to the 5th respondent.

[253] Mr Hylton also submitted that there was sufficient evidence to show that the 5th respondent was a delinquent borrower. He further submitted that even if that was not so, the 5th respondent by virtue of his letter to FIS, acknowledged that he was a debtor and would therefore fall within the category of persons whom the commission was

mandated to enquire about. He further submitted that the 5th respondent was a FINSAC debtor as the term FINSAC could only mean the groups including FIS, Refin Trust Limited and Recon Trust Limited which acquired the debts of the intervened entities. Additionally, Mr Hylton submitted that the failure of the 5th respondent to make the disclosure even after a request was made was a further ground for disqualification.

The Law

[254] Justice demands fairness. In keeping with the acceptance of this demand, Lord Hewart CJ in **R v Sussex Justices ex parte McCarthy** [1924] 1 KB 256 at page 259 stated:

> "... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In keeping with this, the law has developed to exclude from the process of adjudication certain classes of persons. The development of the law in this area has led to the division of such persons into two broad classes – those who are affected by actual bias and those affected by perceived or apparent bias.

[255] In **Pinochet (No 2)** at page 586 b-d, Lord Browne-Wilkinson said:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its

> outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial..."

In that case a previous decision of the House of Lords in which Lord Hoffman sat was set aside. Their Lordships found that Lord Hoffman, who was a director and chairman of an organization which was controlled by Amnesty International, was affected by actual bias since Amnesty International's interest was to achieve the trial and possible conviction of Senator Pinochet. Lord Browne-Wilkinson went on to say at paragraph f:

> "... once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure..."

[256] The term "interest" was examined by the High Court of Australia in **Ebner v Official Trustee in Bankruptcy** [2000] HCA 63; 205 CLR 337. Having examined the decisions in **Dimes v Proprietors of Grand Junction Canal** (1852) 3 HL Cas 759; 10 ER 301 and its rejection or modification made by the House of Lords in **Pinochet (No 2)**, the court stated at paragraph 26 of its judgment:

> "As a matter of principle, in considering whether circumstances are incompatible with the appearance of impartiality, there is no reason to limit the concept of

> interest to financial interest, and there may be cases where an indirect interest is at least as destructive of the appearance of impartiality as a direct interest."

[257] A divergence in the development of the common law in England and Australia was shown in paragraph 33 of the judgment where the court stated:

> "The common law in both England and Australia in relation to this subject has come a long way since the middle of the nineteenth century. In Australia the common law has developed along lines somewhat different from the development in England. In this country, an issue such as that which arose in **Pinochet (No 2)** would be resolved by asking whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide. That is the test to be applied in the present appeals, and it reflects the general principle which is to be applied to problems of apprehended bias, whether arising from interest, conduct, association, extraneous information, or some other circumstance."

[258] In **Pinochet (No 2)** Lord Browne-Wilkinson stated that where a judge is found to be a party to the cause or has a relevant interest in the subject matter, this would lead to his automatic disqualification. Where apparent bias is contemplated, the position is different. The appropriate test to be applied was considered in **Porter v Magill** [2002] 2AC 357. In his judgment in the House of Lords, Lord Hope at page 494, paragraph 103 suggested to their Lordships that they should approve an adjustment to the test in **R v Gough**. He then stated:

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

[259] In **Davidson v Scottish Ministers** [2004] UKHL 34, the issue of bias also arose. Mr Davidson was detained as a convicted prisoner in Scotland. His request for a transfer was refused so he lodged a petition for judicial review seeking an order requiring the Scottish Ministers to secure his transfer. The Lord Ordinary refused to make an interim order against the Scottish Ministers on the ground, among others, that section 21 of the Crown Proceedings Act 1947, precluded the grant of any coercive order against the Scottish Ministers. Subsequently, a motion which was heard by the Extra Division of the Court of Sessions was refused; the focus of the argument was on the competency of granting an interim order of specific performance against the Scottish Ministers. His application for leave to appeal to the House of Lords was refused by the majority of the Extra Division (Lord Marnoch and Lord Hardie; Lord Weir dissenting).

[260] Mr Davidson later became aware that Lord Hardie had, when holding the office of Lord Advocate, in the context of piloting and promoting the Scotland Bill in the House of Lords, advised the House that the effect of section 21 of the Crown Proceedings Act 1947 was to prevent the courts in Scotland from making any order for specific performance against the Scottish Ministers as part of the Crown. During the motion and application for leave to appeal, Lord Hardie at no time adverted to his previously expressed views to the Westminster Parliament as Lord Advocate and made no offer to recuse himself. Mr Davidson then lodged a petition to the Court of Sessions asking that the decisions of the Extra Division be set aside on the ground that they were vitiated for

apparent bias and want of objective impartiality on the part of the court as a result of Lord Hardie's participation in them. The Second Division unanimously set aside the decisions of the Extra Division. The Scottish Ministers' appeal to the House of Lords was dismissed, their Lordships holding that, "The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament".

[261] Lord Bingham in his judgment at paragraph 6 stated:

> "The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues or their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since 'bias' suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."

[262] At paragraph 9 Lord Bingham stated:

> "There is no reason to doubt that Lord Hardie's opinion was orthodox, and when the point comes to be finally decided it may be held to be correct. The question is not, however, whether Lord Hardie's statement were reasonable and proper but whether the fair-minded and informed observer, having considered them and the circumstances in which they were made, would conclude that there was a real possibility that he was biased in the sense that, having made these statements, he would be unable to bring an objective and undistorted judgment to bear on the issue raised by Mr Davidson in his reclaiming motion."

[263] The issue of the failure of a judge to make disclosure also arose in **Davidson**. In addressing this issue Lord Bingham at paragraph 19 said:

> "There are of course a number of entirely honourable reasons why a judge may not make disclosure in a case which appears to call for it ... However understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer."

[264] The issue of non-disclosure also arose in **Panday v Virgil**, Mag App No 75 of 2006 delivered 4 April 2007. The appellant was convicted and sentenced to a term of imprisonment by the Chief Magistrate of Trinidad and Tobago. On the final day of the trial, the Chief Magistrate, who had been a party to a land transaction with a well-known company, received a cheque in the sum of $400,000.00 drawn in his favour by another company with connections to the former. The Chief Magistrate was concerned about the timing and delivery to him of that cheque and spoke to the Attorney General about the cheque. The Chief Magistrate also spoke to the Chief Justice before the

conclusion of the case about matters related to the case against the appellant. As events unfolded, it emerged that the Chief Magistrate had concluded that the Chief Justice had attempted to influence his decision in the matter. The Chief Magistrate disclosed none of the matters. The appellant became aware of these after he was convicted. The non-disclosure was one of the factors which led the Court of Appeal to find that there was bias on the part of the Chief Magistrate.

[265] The 5th respondent challenged the finding of the Full Court that he was a "delinquent borrower" on the basis that such a finding was against the evidence presented. This is in keeping with the evidence contained in the affidavit of the 5th respondent that he never received the letters dated 27 January 1992 and 28 December 1993 and the absence of proof of their delivery. It is quite clear that CNB, from its letters, considered the 5th respondent to be a delinquent borrower. In my opinion, he could only have been a "delinquent borrower" if he had defaulted in making his payment after receiving or being aware of a demand for payment.

[266] Even if the 5th respondent was not a delinquent borrower, this does not mean that he was not a member of the class of persons whom the commission was mandated to enquire about. Paragraph (1) (d) (iii) of the terms of reference of the commission was not confined to "delinquent borrowers" but was also concerned with whether "debtors" were treated fairly and equally. The 5th respondent, in a letter to CNB dated 5 January 1998, in response to the letter to him dated 10 June 1997, clearly acknowledged that he was indebted to CNB when he stated, "Please advise by return of

post the amount of the outstanding balance on the above account so that I may be in a position to discharge that obligation".

[267] There was a further acknowledgment of the debt after FIS acquired the debt portfolio of CNB. By letter dated 22 January 1998, the 5th respondent was advised as follows:

> "Please be advised that the Financial Institutions Services Limited (FIS), is now managing the assets and prescribed liabilities of Century National Bank Limited ..."

In response, the 5th respondent in a letter to FIS dated 12 February 1998 stated:

> "Thank you for your letter of January 22, 1998 in respect of the above matter and hasten to respond as requested to prevent further accrual of interest which seems to grow ever alarmingly.
>
> I return [sic] you herewith set off form duly completed and enclose as well my cheque for $8,333.28 which I trust wholly discharges my debt to Century Bank Ltd."

[268] The fact that the 5th respondent was a debtor to CNB and remained a debtor after CNB's debt portfolio was acquired by FIS having been clearly established, the question which arose was whether he was a debtor to FINSAC. At paragraph 23 of his judgment Campbell J stated:

> "I accept that FINSAC must mean the group of affiliated companies including FIS. Any other construction would restrict the Commissioner to an enquiry to Finsac Ltd., who had no debtors and would include debts acquired by FIS, Recon Trust Limited and Refin Trust Limited. I find that the 1st Defendant was a borrower from CNB, whose assets were

> acquired by FINSAC. That FINSAC would have had the debt from the date of the vesting order by FIS until it was discharged on the 3rd March, 1998."

I can find no other reasonable conclusion that could be drawn. The commissioners themselves undoubtedly concluded likewise by allowing persons whose debts were taken over by FIS, JRF and Refin Trust Limited to give evidence and to cross examine other witnesses such as the 3rd respondent. Additionally, in the terms of reference and in correspondence from the commission, the term "FINSAC" and not "Finsac Limited" was used.

[269] One would expect that the letters dated 8 June 2009 and 10 December 2009 to the commission would have come to the attention of the 5th respondent as chairman of the commission. These would have provided the 5th respondent with opportunities to make disclosure. Unfortunately, the opportunities were not grasped. The response from the secretary to the commission in his letter dated 18 January 2010 that "the overdraft facility extended to Justice Boyd Carey was fully discharged", in my view, was not enough. This non-disclosure, in my opinion, was compounded when the 5th respondent, on 21 January 2010 stated, "There never was a loan to create a debt".

[270] The questions also arose as to whether the company Bev Carey Associates (1985) Limited, was indebted to JCB and whether Refin Trust Limited had acquired the right to recover the debt. I agree with the submission of Dr Barnett that the evidence of Patrick Hylton and Miss Janet Farrow, that they acquired the information from examining Excel files and a spreadsheet, could not provide proof of the alleged

indebtedness. Campbell J stated "... no weight may be attached to it insofar as it purports to show that there was an outstanding amount" [Emphasis mine]. This, in my opinion, does not mean that the evidence is entirely worthless. If the 5th respondent is falsely accused of being indebted then this could be considered in determining the issue of apparent bias or his disability "by personal experience" as mentioned by Lord Bingham in **Davidson v Scottish Ministers.**

[271] The finding by the Full Court that statements made by the 5th respondent during the proceedings of the Commission could not give rise to a finding of apparent bias was also challenged by the 1st to 4th respondents. The complaint was that the 5th respondent, on several occasions, referred to persons whose debts were acquired as "victims". On another occasion, in commenting on the activities of the FINSAC entities he asked rhetorically, "So what's the purpose of it all; to kill people? Because that can only be the object." Campbell J at paragraph 36 of his judgment stated:

> "The statements highlighted by [sic] applicants when looked at against the background of the exchanges between the member and the witnesses could not be deemed to be unfair by a fair-minded observer who is aware of the nature of the proceedings."

[272] In my view, Campbell J took a too narrow and simplistic view of the comments mentioned as well as others complained of. He should have examined the statements, not merely as an exchange between the 5th respondent and witnesses, but to see whether or not, in all the circumstances there was an indication of a prejudgment. A "victim" is defined in the Concise Oxford Dictionary as a person who is killed, injured,

destroyed or duped. This would suggest that a victim is a person who has been wronged. Could this not be looked at as a finding which was made before all the evidence had been presented? These comments should be looked at against the back-ground that from as early as 12 February 1998, his letter to FIS spoke of his desire "to prevent further accrual of interest which seems to grow ever alarmingly", his non disclosure of the fact that he was a debtor whose debt was acquired by FIS and his assertion that Bev Carey Associates (1985) Limited, of which he was a 50% shareholder was said to be indebted although this could not be substantiated. In my view, if this is done, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the 5th respondent was biased.

[273] Let me, however, hasten to add by borrowing the words of Warner JA at paragraph 26 of her judgment in **Panday v Virgil**:

> "An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings. ... The courts have recognized that bias operates in such an insidious manner that the person alleged to be biased may be unconscious of the effect."

[274] It is my opinion that the 5th respondent, being a FINSAC debtor who had failed to disclose his indebtedness and whose personal experience with FINSAC would disable him from bringing an objective judgment to bear on the enquiry, was subject to automatic disqualification.

[275] It is for the reasons stated that I agreed that the cross-appeal of the 5th respondent should be dismissed.

[276] In the counter-notice of appeal filed on behalf of the 1st to 4th respondents, the following were listed as the orders sought:

> "i. An order setting aside the Court's refusal to declare the proceedings thus far to be null and void.
>
> ii. An order declaring that the proceedings that have occurred thus far in the enquiry are null and void.
>
> iii. Costs to all Cross-Appellants to be agreed or taxed."

In ground iii of the grounds of appeal filed on their behalf, the impartiality of the 6th respondent and the finding of the Full Court on this issue were also challenged. To support this challenge, several newspaper articles published in the mid 1990's were exhibited to the affidavit of Miss Ayanna Thomas, attorney-at-law, in response to the affidavits of the 6th respondent. Only one of the published articles was written by the 6th respondent. In it he criticised the high interest rate policy of the Government, stating that it was bad for the economy. In the other articles he is quoted as being opposed to the high interest rate policy and was described as a critic of the Government economic policies. It is to be noted that at the time the 6th respondent was the executive chairman of the Private Sector Organization of Jamaica (PSOJ).

[277] Having read the published articles, I agree with Campbell J when he found that they did not disclose 'a fixity and rigidity of view that will remain unshaken in face of

the most formidable argument'. The 1st to 4th respondents therefore fail on this ground.

[278] Relative to this issue, the Full Court found that there was no procedural unfairness in the conduct of the commission and that despite its finding that both the 5th respondent who was the chairman, and the appellant, who was the counsel to the commission, were tainted with bias and were therefore disqualified, this did not render the proceedings so far null and void, nor did it preclude the other commissioners from continuing.

[279] Mr Manning in his submissions placed reliance on the judgments in **R v Sussex Justices ex parte McCarthy; Stollery v Greyhound Racing Control Board** [1972] HCA 53 and **Re Carruthers v Connolly, Ryan and The Attorney General** [1997] QSC 132. These cases, he submitted, support the contention that a tribunal may be held to be tainted where a member is found to be tainted with bias. This is so even when the person who is deemed to be tainted with bias is not a decision maker. It is important to examine the facts of these cases.

[280] In **R v Sussex Justices ex parte McCarthy**, the applicant was charged for dangerous driving as a result of a collision between his motor car and one belonging to W. At the hearing, the acting clerk to the justices was a member of a firm of solicitors who were acting for W in a claim for damages against the applicant for injuries received in the collision. At the conclusion of the evidence, the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on

any point of law. The justices convicted the applicant and it was stated in an affidavit that they came to that conclusion without consulting the acting clerk. The conviction was quashed on the ground that it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

[281] In **Stollery v Greyhound Racing Control Board**, Mr Smith, a member of the board made a complaint against the appellant alleging an attempt at bribery. The appellant was, by letter, required to attend a meeting of the board. At the meeting the chairman of the board informed him that the board had opened an enquiry. Mr Smith then reported the incident which led to the complaint. The appellant made a statement as to the circumstances. The appellant then withdrew from the boardroom but Mr Smith did not and remained during the board's deliberation. The appellant was then recalled to the boardroom after the other members of the board resolved that the appellant be charged. The appellant, having returned to the boardroom, had the charge read to him. He opted to have the matter resolved that day and addressed the board asserting his innocence. Thereafter, it was resolved by the members of the board, excluding Mr Smith, that the appellant was guilty. The High Court of Australia overturned this decision as a result of the continued presence in the boardroom of Mr Smith, whom the court found to be a disqualified person during the deliberations.

[282] In **Re Carruthers v Connolly, Ryan and The Attorney General**, a two member commission of inquiry consisting of Mr Connolly QC and Dr Ryan QC was

established to examine and make recommendations in relation to the future role, structure, powers and operations of the Criminal Justice Commission. After months of consultations and deliberations and many public utterances by Mr Connolly, the impartiality of Mr Connolly came in for questioning. The question therefore arose as to whether, if adverse findings were made against Mr Connolly, Dr Ryan could continue to the conclusion of the investigation and make his report alone. The Supreme Court of Queensland held that:

> "Despite the perception of Dr Ryan as a person without personal predispositions to views that would disqualify him, his extensive association with Mr Connolly makes a reasonable apprehension of unfairness and lack of impartiality in the result inevitable to the circumstances."

[283] In my opinion, these cases may easily be distinguished from the one under consideration. In **R v Sussex Justices ex parte McCarthy** as well as **Stollery v Greyhound Racing Control Board**, the person deemed to be tainted with bias was present during the deliberations and making of a final decision by the tribunal. This definitely was not the position in the case before us. In **Re Carruthers v Connolly, Ryan and the Attorney General**, there were extensive consultations and deliberations over a period of about nine months. In the instant case, there is no evidence of such consultations or deliberations, neither is there any evidence of any decisions made relative to the subject matter of the enquiry.

[284] In my view, in order for this court to find, contrary to the findings of the Full Court, that the proceedings of the commission should be declared null and void,

evidence with greater cogency would be required. Although, undoubtedly the 5th respondent is an eminent jurist who is widely respected in Jamaica and other parts of the world, it cannot be said, without more that the other commissioners who are eminent persons in their own right would themselves be tainted by his presence and position as chairman. I can find no basis to disturb the findings of the Full Court on this point. Consequently, I agreed that the 1st to 4th respondents must fail on this ground.