Recusing Yourself From Hearing a Case

The Hon Mr Justice David Hayton

Becoming a Judge with presumed impartiality

Becoming a judge starts with the memorable swearing-in ceremony. A judge will swear (or solemnly affirm) that he will faithfully exercise his office without fear or favour, affection or ill-will – and perhaps in accordance with the relevant Code of Judicial Conduct or Ethics if there is one.[1] The Judge will also be well aware of a citizen's fundamental constitutional rights to a fair and public hearing by an independent and impartial tribunal, judicial independence in itself being a means of ensuring impartiality, the two concepts being closely linked.

By virtue of their professional background leading up to their appointment, judges are assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances".[2] "It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions".[3] "The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views."[4] Judges should be selected as independent-minded persons of intellect and integrity. Thus there is a "presumption of impartiality" which "carries considerable weight."[5]

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[1] E.g. CCJ Code of Conduct www.caribbeancourtofjustice.org/codeofethics; Israel's Code of ethics for Judges 5767-2007; Code of Conduct for US (Federal) Judges; Guide to Judicial Conduct, England revised 2008; Guide to Judicial Conduct, Australia, 2002. They can be accessed via Google on the internet.

[2] *United States* v *Morgan* 313 US 409 (1941) at p 421 cited by L'Heureux-DubÉ and McLachlin JJ in *R* v *S* (*RD*) [1997] 3 SCR 484 at [32].

[3] *President of the Republic of S Africa v S African RFU* 1999 (7) BCLR (CC) 725 at 753 cited in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at[21]

[4] *Helow v Sec of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416 at [8].

[5] Per L'Heureux-Dubé and McLachlin JJ above at [32]. Also, see *Rees* v *Crane* [1994] 2 AC 173 (real possibility of bias not established against Bernard CJ of Trinidad and Tobago despite evidence of his acrimonious relationship with the suspended Justice Rees).

One must, however, distinguish from impartiality the concept of pure neutrality or objectivity – like that of Star Trek's Vulcan, Mr. Spock. Judges, like all human beings, have their unique perspectives: they cannot see things except through their own eyes. As Cardozo wrote[6], "Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions, which make the" individual who he or she is.

Impartiality, according to the Canadian Judicial Council,[7] covers "the wisdom required of a judge to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

Two limits upon presumed impartiality

There are, however, limits upon the cases that a judge can hear. Obviously, no person can be a judge in his own cause, and the House of Lords in *Pinochet (No. 2)*[8] has held that a judge is automatically disqualified from hearing a case in the outcome of which he or she has some financial or even personal interest, without any need to find that there was a real possibility that he or she was biased, even subconsciously.

[6] The Nature of the Judicial Process (1921) at p. 167 cited by L'Heureux-Dubé and McLachlin JJ above at [34].
[7] Commentaries on Judicial Conduct (1991) at p. 12 cited by L'Heureux-Dubé and McLachlin JJ above at [35]. In 1998 the Council produced an advisory Ethical Principles for Judges.
[8] *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No 2)* [2002] 1 AC 119.

It is also now well-established,[9] after some doubts as to the appropriate formula were deliberately left unresolved in *Pinochet (No. 2)*, that a judge must recuse himself or herself if "a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased." Previously, the viewpoint was that of the court varyingly concerned with a "real likelihood" of bias or a "real danger" of bias or a "real possibility" of bias or a "reasonable suspicion" of bias as opposed to a "fanciful possibility" of bias.

Of course, those seeking disqualification of a judge from hearing a case need only rely on this perception or appearance of a real possibility of bias without any need to try to establish actual bias.[10]

1. Cases where a judge has a pecuniary or personal interest in the *outcome* of litigation

Lord Hope stated in *Meerabux* v *Attorney-General of Belize*[11] "the rule that no man may be a judge in his own cause … extends to cases where it can be demonstrated that he has a personal or pecuniary interest in the outcome." Thus some pecuniary interest in a *party* does not of itself disqualify a judge. As Lord Bingham has written[12], "I do not think a judge would stand down on

[9] *Porter v Magill* [2002] UKHL 67, [2002] 2 AC 357 (modifying the *R* v *Gough* [1993] AC 646 test of bias tending to emphasise the court's view of whether there was a real danger of bias rather than the view of a reasonable person as to a real possibility of bias, so that English law fell more into line with Australian, Canadian, New Zealand, Irish and Scottish law); *Lawal* v *Northern Spirit Limited* [2003] UKHL 35 [2004] 1 All ER 187 at [14] per Lord Steyn; *Davidson* v *Scottish Ministers* (*No 2*) [2004] UKHL 34, 2005 SC(HL) 7 at [7] per Lord Bingham; *Meerabux v A-G of Belize* [2005] UKPC 12, [2005] 2 AC 513 at [22] per Lord Hope; *Gillies* v *Secretary of State for Work* & *Pensions* [2006] UKHL 2, 2006 SC(HL) 71 at [17] per Lord Hope; *Panday v Virgil* Mag App No 75 of 2006, 4 April 2007, T & T CA.

[10] See per Cory and Iaccobucci JJ in *R* v *S* (*RD*) [1997] 3 SCR 484 at [109].

[11] [2005] UKPC 12, [2005] 2 AC 513 at [21], also see Lord Goff in *R v Gough* [1993] AC 648 at 664.

[12] See R. Cranston, Legal Ethics and Professional Responsibility (1995) pp 40-41 endorsed in *Ebner v official Trustee in Bankruptcy* [2000] HCA 63, 205 CLR 337 at [56], after at [55] stating "where the outcome of the case would have no bearing upon the value of the shares held by the judge … then the judge does not have a direct pecuniary interest in the outcome of the litigation."

account of a shareholding in a litigant's company, or perhaps even disclose it, unless the shareholding and the action were such that the outcome could have more than a negligible effect on his fortune." The Court of Appeal subsequently stated[13], "In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause [ie case] before the judge, but whether the outcome of that cause[ie case] could, realistically, affect the judge's interest."

Any need to recuse oneself, however, may exceptionally be ousted by the fully-informed agreement of the parties[14] or by the operation of necessity (e.g. if all the judges are disqualified due to the case involving their salaries[15]) or by statutory authority.[16] There is also a developing *de minimis* exception: the need for recusal does not extend to a nominal and indirect interest[17] or a case where the connection between the pecuniary interest of the judge and the issue before him is very tenuous.[18]

[13] *Locabail (UK) Ltd v Bayfield Properties Ltd* [200] QB 451 at [8] per LCJ,MR and V-C
[14] *Locabail* (*UK*) *Ltd* v *Bayfield Properties Ltd* [2000] QB 451 at [15] per LCJ, MR and V-C
[15] *The Judges v A-G of Saskatchewan* (1937) 53 TLR 464; *Re Caccamo and Minister of Manpower and Immigration* (1977) 75 DLR (3rd) 720
[16] Though the nature and effect of the pecuniary interest will need to be investigated to determine whether there is still a real possibility of bias so that there should be a recusal on that basis: *R* v *Barnsley Licensing Justices* ex p *Barnsley* & *District Licensed Victuallers Association* [1960] 2 QB 167, CA
[17] R v *Bristol Betting and Gaming Licensing Committee* ex p *O'Callaghan* [2002] QB 451 at 500 (English CA) judge, who dealt only with costs issue, was non-executive director of family property company whose tenants included the defendant: his "nominal and indirect interest" did not disqualify him from hearing case.
[18] *Locabail* (*UK*) *Ltd* v *Bayfield Properties Ltd* [2000] QB 451 – part-time judge became aware huge law firm in which he was a leading partner was acting against one of the parties before him though on another matter: not disqualified by such tenuous connection at [50]. Neither was there any apparent bias. Also waiver of right by objector-cannot wait till reserved judgment given to raise issue of recusal that could have been raised earlier.

In the "striking and unusual case" of *Pinochet (No 2)* it was made clear that a judge's *personal* interest in the promotion of a cause will also automatically disqualify him. Lord Browne-Wilkinson stated[19]

> "If, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge ["a man cannot be a judge in his own cause"] applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties."

He added[20]

> "It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order … would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I [Amnesty International] was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director [and unpaid chair] of a charity [Amnesty International Charity Limited] closely allied to A.I. and sharing, in this respect A.I.'s objects. Only in a case where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the

[19] [2000] 1 AC 119 at 135
[20] Ibid at 136

parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."

Such an exceptional case would, it seems, be one where the judge's wife was actively involved as trustee or director of a charity closely allied to and acting with a party to the litigation.[21] An actual exceptional case is *Re P (a Barrister)* [22] where one of the members of a disciplinary tribunal of the Council of the English Inns of Court had been a member of the Professional Conduct and Complaints Committee of the English Bar Council. This was the body responsible for the decision to prosecute the complaining barrister, though she had not attended the meeting at which the decision to prosecute had been taken. Nevertheless, each member of that body had a common interest in the prosecution and conviction of the complainant and so she was acting as a judge in her own cause.

By way of contrast is the Privy Council advice in *Meerabux* v *A-G of Belize*.[23] This case concerned a Belize judge removed from office by the Governor-General on the advice of the Belize Advisory Council. The Bar Committee of the Bar Association had led the Association to pass a resolution requesting the Government to invite the judge to resign his office before making further complaints in the name of the Association to the Governor-General to invoke the procedure for removing the judge from office.

At the hearing before the Advisory Council, objection was taken to the presence of the chairman, Mr. Arnold, on the basis that he was a member of the Bar Association and so should be automatically disqualified. This objection was rejected. The Privy Council upheld this. Mr.

[21] Ibid at 135 indicating that Lady Hoffmann was an employee of Amnesty International but there was no need to consider her situation since Lord Hoffmann's own situation disqualified him.
[22] *P* (*a barrister*) v *General Council of the Bar* [2005] 1 WLR 3019 at [89]-[91]
[23] [2005] UKPC 12, (2005) 66 WIR 113.

Arnold, in order to be chairman, was required by the Constitution to be an attorney, and all attorneys were required to be a member of the Bar Association. He had, however, not been at any of the meetings in which complaints of the judge were discussed and resolutions passed, and was not on the Bar Committee. Only if he had been actively involved in the institution of the proceedings before the Advisory Council would he have been disqualified. While s 54(11) provided "the chairman shall preside" at meetings of the Council, in circumstances where his active involvement would be making him a judge in his own cause his place as chairman could - and should - be taken by another person appointed under the proviso to the cited section.

Intriguingly, in delivering the advice of the Privy Council, Lord Hope went out of his way to comment upon *Pinochet* (*No 2*) in which he had sat as one of the Law Lords. In that case, rather than resolve the doubts as to the appropriate wording for the test of perceived bias and then apply the test, their Lordship made a decision which was "a highly technical one"[24] in "striking and unusual"[25] circumstances, leading to the automatic disqualification of their friend and colleague, Lord Hoffmann. This saved them from exercising their discretion on a review of the facts alleged to reveal some perceived bias.

In retrospect, it appears that Lord Hope would have preferred their Lordships' decision to have been based on such perceived bias rather than on extending the rule automatically disqualifying a judge. In *Meerabux* he went on to hold that the fair-minded and informed observer, having considered the facts, would not have considered that there was a real possibility that Mr. Arnold was biased.

[24] Ibid at [21].
[25] Ibid at [22].

Significantly, in Australia its High Court[26] has rejected the free-standing automatic disqualification rule in favour of the one fair-minded lay observer test. The High Court then stressed the need to focus upon (i) the identification of what is in issue as the matter that might lead a judge to decide a case other than on its factual and legal merits and (ii) the articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its proper merits. Only then should the court decide whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the issues before him. There seems much to be said for this focus on (i) and (ii) and for having only to apply the fair-minded observer test. This will avoid any need to determine whether or not a borderline case falls on the automatic disqualification side of the line as revealing a personal interest in a cause that could be furthered by a particular outcome of a case[27], while the recent extensions of the *de minimis* exception to the automatic rule afford the courts a discretion that should lead to the same result as applying the fair-minded observer test as to a real possibility of bias.

2. **Perception of a real possibility of bias, subconscious or otherwise**

The well-established principle[28] to be applied is "whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased." The observer's objective approach must not be confused with the approach of the complainant.[29]

[26] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8], *Smits v Roach* [2006] HCA 36, (2006) 228 ALR 262 at [53-54].
[27] Eg *Panday v Espinet, Helow v Sec of State for Home Dept,* and *Simmonds v Williams* in Appendix
[28] See fn 9 above.
[29] Emphasised by Lord Hope in *Helow v Sec of State for Home Dept* [2008] UKHL 62 at [2]

The attributes of a "fair-minded and informed observer"

Baroness Hale has emphasized[30] that the test is not concerned with matters from the viewpoint of a reasonable judge but from that of a reasonable lay observer, who is "not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J. put it in *Johnson v Johnson*[31], 'neither complacent nor unduly sensitive or suspicious'."

Earlier in the paragraph in which that comment was made, Kirby J considered the attributes of the fictitious bystander.

> "Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded the bystander, before making a decision important to the parties and to the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that the adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also be taken to have, at least in a very general way, some knowledge of the fact that the adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not

[30] *Gillies v Sec. of State for Work and Pensions* [2006] UKHL 2, [2006] I WLR 781 at [39]. "It is not enough to show that those in the know would not apprehend any bias": *Sengupta* v *Holmes*, Times 19 Aug 2002 per Laws LJ at [11] cited in *Re P* (*a barrister*) [2005] 1 WLR 3019 at [47].
[31] (2000) 201 CLR 488, [2000] HCA 48 at [53]

wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to parties or their representatives, which has been taken out of context."

As Archie JA, as he then was, further observed in *Panday v Virgil*[32], "The informed observer is a member of the community in which the case arose and will possess an awareness of local issues gained from the experience of having lived in that society. He will be aware of the social (and political) reality that forms the backdrop to the case."

It is to be assumed too, as Lord Hope has stated[33] "that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant." He can also be expected to be aware of the legal traditions and culture of the jurisdiction,[34] the traditions of integrity and impartiality that form part of the background – and of the judicial oath.[35] "But he may not be wholly uncritical of this culture" as Lord Steyn has warned:[36] imputing too much of this culture uncritically to the non-specialised observer would not promote the confidence of the general public that the test is designed to produce.

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[32] Mag App No 75 of 2006, 4 April 2007, where the judgment of the Chief Magistrate was quashed because of the "inescapable conclusion" that there was a perception of bias on his part. In *Helow v Sec of State for Home Department* [2008] UKHL 62 Lord Hope at [3] also stressed that the informed observer "is able to put whatever [he or] she has read into its overall social, political or geographical context."

[33] *Gillies* (above) at 17.

[34] *Taylor v Lawrence* [2003] QB J28 at [61] – [64] per Lord Woolf CJ.

[35] *R v S (RD)* [1997] 3 SLR 484 per Cory and Iacobucci JJ at [111], *President of Republic of South Africa v S. African Rugby Union* 1999 (4) SA 147 at 177 para [48], *Helow v Advocate General* [2007] CSIH 5 at [35] but on appeal in [2008] UKHL 62 at [8] and [57] Lords Hope and Mance placed less emphasis on the oath.

[36] *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 at [22]

Laws LJ has endorsed[37] the view of Bleby J[38] that "the judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of a fair-minded lay observer, the judge much be clothed with the mantle of someone the judge is not … one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other." But he went on to say[39] "surely we should not attribute to him so pessimistic a view of his fellow man's own fair-mindedness so as to make him suppose that the latter cannot or may not change his mind when faced with a rational basis for doing so."

He therefore concluded, "Absent special circumstances, a readiness to change one's mind, whether upon new information or simply on further reflection, and to change it from a provisionally declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis."[40]

It followed that a Lord Justice who had refused permission to appeal on an initial paper application could sit on the English Court of Appeal to hear the appeal after permission to appeal had been granted by two other Lords Justices following an oral hearing. Similarly, where the Privy Council had remitted a case to the Jamaican Court of Appeal directing it to quash the accused's conviction and then decide whether to acquit him or order a new trial, and this Court comprised two members of the Court of Appeal that had originally dismissed the accused's

[37] *Sengupta v Holmes*, Times 19 Aug. 2002 at [10], cited in *Re* P (*a barrister*) [2005] 1 WLR 3019 at [46].
[38] *Southern Equities Corp Ltd v Bond* (2000) 78 SASR 339 at [126]
[39] *Sengupta v Holmes* (above) at [37] cited in *Re P (a barrister)* (above) at [48].
[40] Ibid [36] and [48] respectively

appeal against conviction with some strong views as to the correctness of the jury's verdict, the Privy Council[41] held that there was no real danger of any bias.

What are the "given facts"?

Lord Hope in *Gillies* v *Secretary of State for Work and Pensions* stated[42] "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

What matters is the public perception of the real possibility of subconscious impartiality[43] and this depends upon what is open to public view. Such a real possibility cannot be ousted by going behind the scenes to evaluate circumstances which would be hidden from an outside fair-minded observer.[44][Now note *Virdi v The Law Society* [2010] EWCA Civ 100 at [49].

The facts in the public domain often need to extend to the legal background as evidenced in publicly available documents e.g. relating to the nature and composition and operation of a particular tribunal.[45]

Where a judge's non-recusal is being reviewed, the given facts will be those ascertained up to the date of the review, though the court does not need to make any findings on disputed facts and

[41] *Berry v DPP* [1996] UKPC 37, (1996) 50 WIR 385
[42] [2006]UKHL 2, [2006] 1 WLR 781 at [17].
[43] *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2001] 1 All ER 187 at [14].
[44] *Re P (a barrister)* [2005] 1 WLR 3019 at [107].
[45] E.g. *Meerabux v A-G of Belize* [2005] UKPC 12 [2007] 2 AC 513 at [25], *Re P (a barrister)* [2005] 1 WLR 3019 at [108].

should ignore hearsay evidence[46]. The judge will normally provide an explanation as to his knowledge or appreciation of the material circumstances at any relevant time but "there can be no question of cross-examining or seeking disclosure from the judge."[47] The reviewing court may accept or doubt the judge's explanation depending on the nature of the fact of which ignorance is asserted, the effect of any corroborative or contradictory evidence, the inherent probabilities and all the circumstances of the case. The reviewing court will not pay any attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision – the insidious nature of bias makes such a statement of little value. It is for the reviewing court, not the judge, to assess whether the fair-minded informed observer would consider that there was a real possibility of bias.[48]

Where a judge is considering whether to recuse himself he should make a short statement of his position on the record. He should not descend into cross-examining a witness as if fighting his own case and in so doing give his own evidence e.g. as to the tone and context of e-mails from him to the witness as did Peter Smith J intemperately in *Howell v Millais*.[49]

General guidance on factors giving rise to real possibility of bias

It has been pointed out that it is dangerous and futile to attempt to define or list the factors which may or may not give rise to a real possibility of bias. As laid down by the strongest possible

[46] *Panday v Virgil* Mag Appeal No 75 of 2006, 4 April 2007, CA, T & T, Warner JA at [59], Archie JA at [16]
[47] *Locabail v Bayfield Properties Limited* [1999] EWCA Civ. 3004, [2000] QB 451 at [19]
[48] Ibid.
[49] [2007] EWCA Civ. 720.

English Court of Appeal (comprising the LCJ, the MR and the V-C) in *Locabail v Bayfield Properties Ltd*[50]:-

> "Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations, or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curial utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers[51] (KETCIC v. Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw

[50] [2000] QB 451 at [25]

[51] Nowadays the marketing of Chambers as a brand name could, however, affect matters.

doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

Ouster of need for recusal by necessity or waiver

In a rare case it may be necessary for a judge to act despite a perception of bias on his or her part eg because a quorum cannot be formed without that judge or because only the judge or judges can make the necessary ruling[52] eg as to the constitutionality of legislation rendering judges liable to pay more tax or as to the construction of a statute which may or may not require judges to file returns with an Integrity Commission. Similarly, an appellate court may dismiss an appeal

[52] See fn 15 and *Re Integrity in Public Life Act , The Integrity Commission v Att-Gen of T & T* HCA No 1735 of 2005, Jones J, 19 Dec 2005

based on the judge's failure to recuse himself where he only became aware of the conflict of interest possibility after reserving judgment and after the death of a key witness, making a fair re-trial impossible[53].

It is also possible for a person to waive his or her objection to a judge who would otherwise be disqualified on the ground of perceived bias, so long as the party waiving is aware of all material facts, of the consequences and the choices open to him, and is given a fair opportunity to reach an unpressurised decision, pressurized neither by the judge nor by his counsel[54].

Indeed, when the judge, looking at the issues raised by the papers or from matters raised at a case management conference, concludes that a fair-minded informed observer could reasonably object that there is a real possibility of bias, he should recuse himself and seek to have a replacement found. There is a strong public interest in seeing that all citizens have a fair and public hearing before an independent and impartial tribunal as provided in the Constitution (or under the Human Rights Act in the UK). Indeed, it seems to me, in the absence of any case law focusing on this issue[55], that this right to an impartial judge should not be capable of being waived in a criminal case[56] where the overriding public interest in public confidence in the administration of justice requires that there should not be loss of liberty or the imposition of penalties except after a constitutionally fair hearing before an independent and impartial tribunal[57]. If, however, the due administration of justice of necessity requires a judge affected by

[53] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [65]
[54] *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 1WLR 370 at [29]
[55] Though Isaacs J obiter in *Dickason v Edwards* [1910] HCA 7, (1910) 10 CLR 243 at 260 indicated waiver should be possible
[56] For the procedure to seek to have the judge recuse himself in a criminal trial see *R v Lewis* [2007] CCJ 3 (AJ), (2007) WIR 75 at [49]
[57] While one can appreciate that it is the jury that determines guilt or innocence and an appeal lies to appellate courts, a judge still has opportunities to throw out a case or in his discretion to admit or refuse to admit evidence

perceived bias to hear a case then so be it eg where a judge has to be put on trial before a fellow judge or is a key witness in a criminal case, so long as the trial judge's earlier involvement with that judge was as little as practicable.

In civil cases, where there are case management conferences, it is to be hoped that a replacement judge should be capable of being found so as to maintain the normal schedule for a trial or without delaying matters too much. If there is to be significant delay or the matter arises at the last minute (eg due to a change to a counsel with whom the judge has some problematical connection), and a party indicates a desire for the judge not to recuse himself or herself as he or she is minded to do, there should, so as to avoid later controversy, be a full written or otherwise recorded statement of (i) the matters that rationally create a real possibility of the judge not deciding the case on its proper merits and (ii) of the actual or likely alternative time schedule if the judge recuses himself. It should be explained to the litigant that if he chooses to object to the judge, which is his right, the judge will recuse himself and the case will be dealt with by another judge in accordance with a delayed time schedule. The litigant should be told that the burden of any wasted costs will normally fall on the losing party to the litigation. Some brief time should be given for the litigant to take advice from his counsel (or other available persons) who should not pressurize the litigant one way or another in explaining the options[58]. Both parties in my view need to consent to the judge continuing to hear the case; after all, there can be a legitimate fear that to avoid being seen to be partial to the party he would be assumed to side with, he will subconsciously strive to disfavour such party.

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and to influence a jury by body language, inflexions in his speech and by the manner of his summing up – and he imposes the sentence.

[58] *Jones v Das Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071at [35]

If the judge is genuinely undecided whether or not a fair-minded informed observer would conclude that there was a real possibility of bias, then he should disclose the relevant information in written or recorded fashion to counsel or litigants in person, being particularly careful to explain the significance of the information to a litigant in person. If, after consideration of submissions made to him, the judge concludes there was no such real possibility, he should proceed with the case. If he concludes there was such a possibility he should recuse himself, subject, only if a party raises it, to considering whether, exceptionally, waiver might be possible if pursued as discussed above.

The rationale for a party's effective waiver of the right to insist on recusal of a judge is holding a party to his election between two inconsistent positions[59]. It will be inconsistent with the waiver for a party subsequently to claim that the case was not heard by an impartial tribunal or that there was no due process protection of the law under the Constitution.

The rule against bias, however, is different from the right to be heard in a fair trial. Thus, in *Diedrichs-Shurland v Talanga Stiftung and Kohlkrautz*,[60] the plaintiff, Mr Kohlkrautz, after the judge had reserved judgment in a case where the credibility of the parties was at the heart of the matter, sent a letter to the judge setting out very damaging allegations about Dr Diedrichs-Shurland sending three "heavies" to see him to deter him from bringing legal proceedings. The Privy Council held that this did not raise issues of bias on the judge's part, but the right to fair trial requiring the opportunity at the trial to deal with such allegations. The Privy Council

[59] *Vakauta v Kelly* [1989] HCA 44, (1989) 167 CLR 568 per Toohey J at [17]. Where no express waiver was made but only a deemed waiver from standing by and not raising the issue, the other party could be regarded as suffering a detriment from having lost the opportunity to call for the recusal of the judge on the basis that, being regarded as the favoured party, the judge could well subconsciously strive to disfavour this apparently favoured party. This detriment could support an estoppel.

[60] [2006] UKPC 58

remitted the case to the Court of Appeal to determine whether or not the judge had actually read the letter found in the court file: if he had, then a new trial was to be ordered. The moral is for a judge to have a clerk/ secretary to intercept all mail to check that such damaging letters concerning a case where judgment has been reserved do not reach the judge. If such a letter does slip through, the judge should discard it as soon as he realizes it concerns a reserved judgment case. If he has read it so far as to become aware of damaging allegations, then he will need to afford the prejudiced party the opportunity to be heard in court before any judgment can be delivered.

As Mason J has stated[61], however, "The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge." Thus, a letter from an "oddball" litigant raising irrelevant matters can be ignored. If, however, the communication is by a party or his counsel as to some significant overlooked case or as to some case decided subsequently to reservation of the judgment, the judge should disclose this to the other side (if not already disclosed, as should have happened) and give the parties the opportunity to deal with the issues in open court or via written submissions.

What about discussions between judicial officers about ongoing cases? Archie JA, as he then was, provided the following useful guidance[62].

> "There is nothing wrong with discussing an ongoing matter with a judicial colleague or assistant provided that the decision-maker does not abdicate the responsibility to make

[61] *JRL ex p CJL* (1986) CLR 342 at 352
[62] *Panday v Virgil* Mag App No 75 of 2006, 4 April 2007 at [69]and [70]

the decision on his own. General discussion is permissible. Allowing someone to tell him or her how to decide is not.

The position is more complicated when the parties to the discussion are at different levels in the judicial hierarchy. It will generally be unacceptable to discuss evidence in a specific case with anyone who has a real possibility of becoming a member of a panel that will hear an appeal from a decision in that case. Even though the expression of a preliminary view does not bind the appellate judge to rule in a particular way if the matter later came before him for review, the mere knowledge that the person consulted might exercise a review power could create a subconscious desire to ensure his approval."

These remarks as to factual issues seem equally applicable to legal issues.

A judge needs to be firm-minded

If, whether before a case commences or during the course of the proceedings or while judgment is reserved, a judge becomes aware of any matter which could arguably be said to give rise to the real possibility of bias being apprehended by the fair-minded informed observer (as opposed to the judge), the judge should disclose the matter: but a matter that can raise only a fanciful possibility should not be disclosed[63]. Where the issue is raised by the judge or by a party, the judge ought to make a written or recorded statement (so as to avoid any later controversy) as to what are the facts alleged rationally to create a real possibility of the judge not deciding the case on its own proper merits[64]. If the judge, after hearing submissions, can then explain that a fair-minded and informed lay observer would consider that the circumstances raised only a fanciful

[63] See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [21] per LCJ,MR & V-C, *Panday v Virgil* Mag App No 75 of 2006, 4 April 2007 at [29a] per Archie JA

[64] Eg *Baker v Quantum Clothing Group* [2009] EWCA Civ B12, 5 June 2009

(or far-fetched) possibility of the judge not deciding the case on its own merits, the judge proceeds to hear the case or continues with the case and preparing his judgment. "He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance" as the English Court of Appeal has stated[65].

The judge needs to be firm-minded in recusing himself or herself where there is an objection of substance and in not recusing himself where the objection is fanciful[66]. As emphasized by Mason J of the High Court of Australia[67]

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

Forum-shopping must be strongly discouraged.

Given the philosophy underlying the new civil procedure rules in Caribbean jurisdictions, with the emphasis on strong management of cases by the court needing occasionally to make inquiries about possible related applications and having extensive powers to deal with matters expeditiously, a fair-minded and informed observer will expect a court to be fairly robust in its assessment of the issues and its decisions on timetabling and on adjournments, taking account not just of attorneys' interests but also other litigants' interests and the public interest, without

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[65] *Locabial (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [21]
[66] *Ibid* at [21], *Panday v Virgil* Mag App No 75 of 2006 at [29b] per Archie JA
[67] *Re JRL ex p CJL (*1986*)* CLR 342 at 352 endorsed in *Locabail (UK) Ltd v Bayfield Properties Ltd [*2000*]* QB 451 at *[*22*]*

such robustness amounting to apparent bias[68]. The Court of Appeal can be expected to be supportive of trial judges in these matters. Would not the confidence of fair-minded people in the administration of justice be shaken by the waste of resources and the delays brought about by the setting aside of a judgment on the ground that the judge's robustly efficient approach to expeditious hearings disqualified him or her from trying the case and giving judgment?

Archie JA, as he then was, has pointed out[69] that in the Caribbean

> "judicial officers may from time to time be subjected to unsolicited approaches or comments. They can be expected to stoutly resist overtures that may be made from time to time to influence them. They have a duty to terminate any conversation that strays beyond legitimate boundaries and to disabuse their minds of the fact that an improper approach has been made.
>
> Each case will depend on its own facts but there is no justification for the general proposition that once such an approach is made it must be reported to counsel who must then be given the opportunity to make submissions. It is perfectly proper for judicial officers to report attempts to subvert the trial process for investigation and possible sanction if they do occur. However, if such an approach would automatically require judicial officers to recuse themselves, then the door would be open for any accused or other interested person to abort a trial he perceived was not going the way he wished by arranging a phone call or an encounter. To endorse such a rule would be to encourage forum shopping."

[68] Eg Jamadar J in *Re Sherman McNicolls , McNicolls v Judicial & Legal Services Commission* CV 2007-03132, Oct 2007

[69] *Panday v Virgil* Mag App No 75 of 2006, 4 April 2007 at [53] –[54]

What if the approach amounted to a threat or offer of a bribe? Apart from reporting it to the police, what should a judge do? This is such a serious remarkable issue that the judge should disclose it, rather than wait and see if the matter subsequently reaches the public domain so as only to have to explain himself then. One suspects that the threat or offer will almost invariably be denied by the side alleged to have made it who will submit that it was a manipulative move by the other side (or some interfering enemy) as calculated to prejudice the judge against them. It seems to me that, after hearing counsel's submissions, the judge will be in a position to hold that he need not recuse himself because he does not know the side that he is supposed to be biased against. If, amazingly, a party did not deny that he or his authorized agent made the threat or offer, then it seems to me that the judge should not recuse himself. After all, the criminal surely cannot be allowed to get away with putting forward his own unlawful conduct to gain the advantage of a different judge and another "bite at the cherry": he has brought his own problem upon himself.

Valediction

As emphasized in *Locabail (UK) Ltd v Bayfield Properties Ltd*, a judge's extra-curial views in books, articles, lectures or speeches do not require him to disqualify himself in a case where those views affect a disputed issue, unless the judge could be perceived as having adopted a clearly partisan view, as in one of the cases[70] before the Court in *Locabail*: this case concerned a barrister sitting as a part-time recorder who in four articles had revealed "pronounced pro-claimant anti-insurer views". I thus make it clear that my views expressed herein are purely provisional views that I have persuaded myself to take and have not been tested by forensic

[70] *Timmins v Gormley* in *Locabail* at [71] – [89], the recorder making favourable findings in favour of the claimant.

argument and my mind is open to be changed by persuasive arguments, just as was the mind of Megarry J when he rejected[71] the view he had expressed in his leading work, Megarry & Wade on Real Property.

Appendix with illustrative cases

(a) Earlier involvement of judge in enacting legislation he now has to construe

Panton v The Minister of Finance and the Attorney-General[72]

Rattray P. in the Court of Appeal of Jamaica had presided over rejecting an appeal on the constitutionality of a Jamaican statute. The appellant then discovered Rattray P had been the Attorney-General (and MP and Minister of Justice) who in 1992 had signed the standard certificate that the statute in question was not contrary to the Constitution before the statute was presented to the Governor-General for the royal assent. There was no evidence that in signing the certificate Rattray Attorney-General had taken account of the particular issue of construction raised by the appellant.

Privy Council held (1) even if Rattray A-G had given a legal opinion on the pure point of construction this of itself would not create an objective perception of a real possibility of bias, following *Kartinyeri v Commonwealth of Australia*[73] where Callinan J was held not to have had to recuse himself merely because of such opinion where no issues of fact or credibility were involved;

[71] *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 16
[72] [2001] UKPC 33, 59 WIR 418.
[73] (1998) 156 ALR 300.

(2) Nothing to show that Rattray A-G in his various capacities was actively engaged in promoting the Bill – no evidence of his playing any significant role in the enactment process. No real possibility of bias.

Davidson v Scottish Ministers (No 2)[74]

Lord Hardie was on an appellate bench of three holding that the effect of s 21 Crown Proceedings Act 1947 was to prevent courts in Scotland from making any order for specific performance against emanations of the Crown. The appellant then discovered that in promoting the Scotland Bill in the UK House of Lords, Lord Hardie as Lord Advocate in HM Government had assured the House that the effect of s 21 CPA was as above.

HL held "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 assurance he had given to Parliament". [Did he have personal interest in his own cause?]

(b) Friends and family relationships

Grant v The Teacher's Appeal Tribunal[75]

In Jamaican Court of Appeal appellant first raised claim of perception of bias from fact that Chairman of Board of Management of the school, responsible for dismissing him for good cause, is "a long-time friend and acquaintance of the judge's family."

[74] [2004] UKHL 34, 2005 SC HL 7
[75] [2006] UKPC 59

"Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the *Locabail* case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself."

"If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he 'may have encountered [the Chairman] no more than ten times over the last twenty years.' The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordship do not consider that such a degree of acquaintance in these

circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias."

Richard Cheney, V-P of USA v US District Court for District of Colombia[76]

Justice Scalia refused to recuse himself where a duck-hunting friend had invited V-P Cheney to join them at a duck-hunting shoot of about twenty persons 5-7 January 2004. V-P invited Scalia (and his son and son-in-law) to fly down in Government plane. They had communal meals but never hunted in the same blind. Case was against V-P in official capacity as concerns disclosure of documents relating to National Energy Policy Development Company.

Traditionally, no ground for recusal on grounds of friendship where the personal fortune or the personal freedom of the friend is not at issue, the action involving the friend only in his official capacity, no matter how important the official action may be for the ambitions or reputation of the Government officer: Justice White and Robert Kennedy the Attorney-General, and Justice Jackson and President Franklin D. Roosevelt.

"The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to thank that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."

Note: In Us Supreme Court if a justice recuses himself there is no one to take his place (unlike in lower courts), so Court proceeds with eight Justices. Recusing himself is effectively

[76] 541 US 367 (2004): hyperlink to this in http:// writ. news.findlaw.com/lazarus/20040401.html

the same as casting a vote against the petitioner who needs five votes to overturn the judgment below: makes no difference whether this fifth vote is missing because cast for other side or because not cast at all. An unnecessary recusal impairs the proper functioning of the court.

Caroni (1975) Limited v Association of Technical Administrative & Supervisory Staff[77]

Caroni appealed against orders made against it by the Industrial Court alleging the chairman's wife was one of its employees, so that one could perceive a real possibility of bias against it.

Court of Appeal of Trinidad and Tobago "The relationship of employer and employee does have the potential for engendering feelings of hostility by one party to the other, at least from time to time. There was no evidence, or even a suggestion in this case, that the judge's wife had any reason to bear, or did bear, any such feelings towards her employer, In the circumstances, there is no basis for finding that there was a danger of bias on the part of the chairman against the appellant, although an objection on this ground might have been made with greater justification by the respondent."

Indeed – because the Chairman might have subconsciously been led not to be too hard on his wife's employer in case it made life difficult for her, possibly leading to her ceasing her employment, with repercussions for family income for their lifestyle.

Smits v Roach[78]

[77] (2002) 67 WIR 223.
[78] [2006] HCA 36, (2006) 228 ALR 262

The Roach family employed huge legal firm, Freehills, to further their interests in the commercial exploitation of peat, but allegedly Freehills were negligent eg in allowing a competitor to sneak in and acquire the crucial mining licence. Roach family employed Smits legal firm to sue Freehills in major complex litigation for loss of profits, but there were funding problems, slow progress, mutual distrust, animosity, recriminations, leading Smits to sue Roach family after relationship breakdown, claiming professional fees and expenses.

McClellan J. delivered draft of his judgment to the parties and also Freehills to enable them only to comment on whether some matter he had referred to should not be referred to because the subject of legal professional privilege. He disclosed his brother was Chairman of Freehills. It turned out his brother was 72nd defendant in action against Freehills which had over 80 partners, but no evidence personally involved in advising on the peat venture or on the defence of the negligence action.

It also turned out that senior counsel of Smits from the outset knew McClellan J's brother was a senior partner of Freehills, and the Court of Appeal and the High Court of Australia held this had to be imputed to Smits and so amount to waiver.

Court of Appeal and Kirby J. considered that, otherwise, there should have been a recusal, the amount of any judgment in favour of Smits for their costs increasing the extent of Freehill's liability.

HCA (other than Kirby J.) at [52]: no demonstrable connection between costs of A $500,000 to A $675,000 payable to Smits and the amount of any costs Freehills might ultimately be called upon to pay. Uncertain part of Smits' costs related to case against Freehills, taking

account of champertous arrangements, while case against Freehills could fail or be settled or be covered by insurance – and brother affected only as to one eightieth.

(c) Association with causes

Panday v Her Worship Ms Ejenny Espinet[79]

The Magistrate hearing a preliminary inquiry was a trustee and treasurer of the Morris Marshall Development Foundation in Laventille. It was alleged that this was a PNM stronghold of predominantly Afro-Trinidadian ethnic composition and its premises and personnel were used in the 2007 election campaign. Two persons provided affidavit evidence that social assistance was refused to them, not having a PNM party card.

Before the inquiry were Mr. Basdeo Panday MP Leader of the UNC and Leader of the Opposition, and his wife. During the committal proceedings it was discovered that the Magistrate was trustee and treasurer but had not disclosed this. She refused to recuse herself.

At a hearing before Justice Moosai for leave to seek judicial review over this refusal, it was conceded by counsel for the DPP that there was an arguable case justifying the grant of leave but for issues of delay and non-disclosure. The Magistrate's interests could appear too close to those of the PMN which would be interested in Mr. Panday going to jail and being disqualified from sitting as an MP. Permission to seek judicial review granted.

[79] CV 2008 – 02265, 22/7/08.

Helow v Sec of State for the Home Department[80]

Scots High Court Jewish judge, in a written decision duly based on the papers only, rejected appeal of asylum seeker, Helow, a Palestinian, a supporter of the PLO and involved in helping to provide evidence for a Belgian criminal case against Ariel Sharon (before Belgium repealed the law making possible such prosecutions against non-resident foreigners).

Helow then alleged, the judge lacked necessary appearance of impartiality due to her membership of The International Association of Jewish Lawyers and Jurists. This has Objects, Policy Statements on its website, and a quarterly magazine, Justice.

No allegation that judge necessarily shared very partisan views of contributors in Justice, only she may have been "influenced" by them. "We see no reason to suppose that any intelligent and independent-minded judge of the Court of Session – having taken the judicial oath and being well able to form her own views – would be influenced."

"The fair-minded and informed observer might take the view that the judge, by reason of her membership of the Association, was likely to be sympathetic to the Israeli position and to desire fair treatment for Israel. It would, however, in our opinion be unduly sensitive to conclude that there was a real possibility of bias on the part of the judge in determining the petitioner's application."

This approach of the Inner House of the Court of Session was endorsed by the House of Lords, though placing less emphasis on mere fact of the judicial oath: see Lord Hope at [8] and Lord Mance at [57]. Lord Hope at [2]-[3] also made the point that the approach of the fair-

[80] [2007] CSIH 5, [2008] UKHL 62, [2008] 1 WLR 2416.

minded informed observer must not be confused with that of the complainant, and such observer is able to put whatever he or she has read into its overall social, political and geographical context.

Baker v Quantum Clothing Group[81]

Mrs Baker brought this test case concerning persons suffering from deafness and tinnitus as a result of working in the textile industry. It so happened at the outset of the CA hearing Sedley LJ thought he would just mention he was President of the British Tinnitus Association, a voluntary organization with no axe to grind. Was this OK? Counsel had no doubt it was.

Seven weeks after judgment had been reserved, the Defendant's solicitors wrote to allege that the judge should have recused himself. He suffered from mild tinnitus himself and it was alleged the Association aimed to further the interests of those suffering from tinnitus, while it was further alleged that BTA's firm of solicitors, Wake Smith, acted for Mrs Baker and was a firm recommended by BTA as a leading practitioner in the area and capable of being accessed via a link on the website of the BTA.

The judge refused to recuse himself but provided a written statement for his two appellate colleagues to consider when considering statements from the solicitors for the Defendant, solicitors for other defendants, and from Wake Smith.

Smith & Jacob LJJ strongly rejected the grounds for recusal as fanciful: the fact that a judge suffered or had suffered from a problem of the kind in the case he was hearing was unexceptional and no ground at all for recusal; the BTA was a voluntary self-help organization,

[81] [2009] EWCA Civ B12, 5 June 2009

putting sufferers in touch with other sufferers and specialists and sponsoring research, and not a campaigning body; Wake Smith had made it clear that it was not BTA's solicitor and that it was not a 'nominated' solicitor recommended by the BTA, while the web link on the BTA site was only to "Other Sites of Interest." Even if the alleged BTA - Wake Smith links had existed their connection with Sedley LJ was far too tenuous to support any real possibility of bias on his part.

The fact that within two weeks of the substantive appellate hearing the Defendant's solicitors knew of all the allegations they were to make but delayed five weeks indicated they did not think the recusal grounds were serious. In any event the delay meant it was too late to object.

Right Honourable Dr. Kennedy Simmonds v Randolph Williams, Commissioner, The Attorney General of St Christopher & Nevis, Honourable Dr. Denzil Douglas, Prime Minister[82]

The incoming Labour Government set up a Commission of Inquiry to investigate certain conduct of the previous Government, appointing Professor Randolph Williams as sole Commissioner. The appellant, Dr. Simmonds was the outgoing Premier.

The Secretary, concerned only with administrative matters, was William Dore who had been involved in politics and had unsuccessfully contested a seat for the Labour Party.

Lee Moore QC and Dr. Henry Browne were legal advisers to the Commission to review witness statements collected by investigators and to assist in adducing and presenting oral testimony by way of examination, cross-examination and re-examination of witnesses summoned by Commissioner - who summoned Dr. Simmonds.

[82] Civil Appeals Nos 4, 5, 6, of 1998.

Lee Moore was former Labour Party Premier and then Leader of Opposition. At a public election meeting he had vowed totally and utterly to destroy Simmonds.

Dr. Browne was a failed Labour candidate, an opposition Labour Senator and had been Deputy Political Leader of the Labour Party: after the Commission had started sitting he shouted at Dr. Simmonds from a public bar "Simmonds is a common thief" and swore at him.

These political opponents were in charge of the collation and presentation of evidence, involving also the withholding of evidence for good reason.

Court of Appeal held a fair-minded and informed observer would reasonably apprehend bias on the part of Lee Moore and Dr. Browne. True, it was not they, but the Commissioner who would write the report and who was the decision-maker. There was, however, a real possibility that the legal counsel would not discharge their functions fairly and impartially, including the rendering of proper advice, so that biased or erroneous conclusions could be reached by the Commissioner. It seems that "garbage in, garbage out", as computer people say, becomes "bias in – bias out." Thus the Commission was not validly constituted.

(d) Personal animosity

Compton v A-G of St Lucia and Monica Joseph[83]

Sir John Compton, former Prime Minister of St. Lucia, complained that a former High Court judge, Monica Joseph, had been appointed sole Commissioner of a Commission of Inquiry set up by the opposing party as the new Government looking into matters involving the conduct of Sir John Compton.

[83] Civ App No 14 of 1997, 9 Feb. 1998.

The judge had applied for an extension of her appointment beyond the age of 62, to the OECS Heads of Government Authority so that her 13 years could rise to 15 years to get a full pension. The application was not unanimously accepted, so it failed. There was no admissible evidence as to how Sir John Compton voted, though the judge asserted she believed he had voted for her.

Court of Appeal unanimously held there was a real possibility of bias, the Commissioner each month being reminded she was drawing a pension significantly less than if her tenure had been extended, so that subconsciously she could be biased against Sir John. Decision of Commissioner not to disqualify herself was quashed.

Vaughn Williams v AG of St. Lucia and Monica Joseph[84]

In this related case, where judgment was delivered on the same day as that in the Compton case, payments to the wife of Dr. Vaughn Lewis were also the subject of the Inquiry. Dr Vaughan Lewis had succeeded Sir John Compton as Prime Minister and had previously been Director General of OECS when the OECS Authority took the decision preventing Monica Joseph obtaining an extension of her tenure.

Dr Vaughan Lewis in his advisory role as OECS Director General had been present when the Authority took the decision which allegedly hurt and disappointed Monica Joseph severely.

Byron CJ (ag) in a dissenting judgment considered that the focus of Monica Joseph's feelings would be the decision-makers, the Prime Minister, members of the OECS Authority, and

[84] Civ App No 12 of 1997, 9 Feb. 1998.

she would not brand the advisory Director General with the effects of a decision he did not make: he would have dismissed the appeal.

Redhead JA (with whom Singh JA concurred) on the basis that Dr. Vaughn Lewis was present and advised the Prime Ministers at the meeting of the Authority (rejecting the contrary view of the trial judge), held there was a real possibility that "subconsciously she would be incapable of that high standard of objectivity which strips any action of hers of any element of bias." Decision of Commissioner not to disqualify herself quashed.

Rees v Crane[85]

The Chief Justice of Trinidad and Tobago did not place Crane J. on the judicial roster for the Michaelmas Term 1990, and gave no indication that Crane J would thereafter be put on roster. The Judicial Services Commission later endorsed the Chief Justice's action. The Chief Justice referred to the Commission (of 5 persons which he chaired) the issue of recommending the President of Trinidad and Tobago to appoint an ad hoc tribunal which could then recommend to the President that the question of removing the judge should be referred to the Privy Council, so that if the Privy Council advised removal from office, the President could then remove the judge from office.

The judge was not given an opportunity to deal with the case against him before the Commission referred the issues to the President, though he would have the opportunity to deal with the case against him before the ad hoc tribunal and then the Privy Council.

[85] [1994] 2 AC 173, (1994) 43 WIR 444.

Privy Council held exclusion from the roster not a mere administrative arrangement but an indefinite suspension which ultra vires the Chief Justice and the Commission; furthermore, judge must have opportunity to be heard before the Commission decides whether or not to take the stigmatising action of referring the question of the judge's removal to the President.

PC then dealt briefly with alleged bias of Bernard CJ. While there was evidence of personal animosity towards Crane J 1986-1990, "it is not lightly to be assumed that he would allow personal hostility to colour his decision to suspend the respondent or to recommend to the Commission that the matter be referred to a tribunal" via the President: "their Lordships are not satisfied that a 'real danger' of bias has been established", seemingly on presumption CJ bona fide doing best impartially in the interests of the efficient administration of justice in the judicial system.

As to the alleged bias of Commission members, with Bernard CJ not acting as chair once he had put evidence before Commission that had been requested by Commission, "their professional backgrounds are such that an assumption of bias should not lightly be made"; the fact they had agreed to endorse CJ's suspension of Judge did not mean they were not capable of looking at matters afresh and fairly in light of fuller material on further investigation – nor to be assumed they would be unduly influenced by Bernard CJ as member of Commission.

[Note nowadays the focus is not on whether the *Court* thinks there is a *real danger* of bias on the part of the judge but on whether a *fair-minded informed observer* in the particular jurisdiction would think there is a *real possibility* of bias on the part of the judge or tribunal.]

Perkins v Irving[86]

Ellis J was hearing a libel action brought by a Resident Magistrate against the defendant, Perkins. 18 years earlier Perkins had attacked the judiciary over a particular case in a strongly worded newspaper article leading Ellis as Sen Asst Att-Gen, echoing the remarks of Sir Edward Coke in the treason trial of Sir Walter Raleigh reported in Edwards' Law Officers of the Crown, to say in Court, "When your Lordships are assailed by viperous vermin who seek to gnaw at the entrails of your integrity your Lordships should stand firm."

At the outset, on the Monday morning, Perkins' attorneys made an application for an adjournment on the basis that (i) just before the weekend Perkins had changed his attorneys and (ii) the defence was defective as it stood and needed amending to raise specific defences. This application was summarily rejected when, in the opinion of Forte and Downer JAA, there were solid grounds for allowing the application. Perkins' attorneys, who only had verbal instructions from Perkins, then asked the judge to recuse himself, having believed that the adjournment application would be allowed, saving the embarrassment of the recusal application without thorough preparation. There was evidence that Ellis J had commented on Perkins' attorneys having allowed themselves to be manipulated by Perkins.

Forte & Downer JJA held Ellis J should have recused himself, though Gordon JA dissented, focusing upon the 18 year-old rhetoric of Ellis. If this rhetoric had stood alone that approach would be fine, but not in the light of the other circumstances in the context of a libel action brought by a member of the judiciary.

(e) Prejudice as to expert witness' views

[86] (1997) 34 JLR 396

It is not uncommon for a judge to have regularly before him an expert witness accustomed to being either a plaintiff's witness (eg acting for employers or insurance companies) or a defendant's witness (eg acting for employees or individuals), so that an issue arises as to prejudgment of the credibility of the witness.

Vakauta v Kelly[87]

A judge regularly having certain medical witnesses before him on behalf of an insurer made comments in the course of the trial which were just on the right side of the borderline (so counsel did not raise a recusal issue), but the actual judgment took the case over to the wrong side of the borderline.

Brennan, Deane and Gaudron JJ.

"2.It is inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequent witnesses in his or her court. In some cases and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the evidence of a particular medical expert. That does not, however, mean that the judge is disqualified from hearing the particular action or any other action involving that medical expert as a witness. The requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation. That requirement will not be infringed merely because a judge carries with him or her the knowledge that some medical witnesses, who are regularly called to give evidence on behalf of particular classes of plaintiffs (e.g. members of a particular trade union),

[87] [1989] HCA 44, (1989) 167 CLR 568

are likely to be less sceptical of a plaintiff's claims and less optimistic in their prognosis of the extent of future recovery than are other medical witnesses who are regularly called to give evidence on behalf of particular classes of defendants (e.g. those whose liability is covered by a particular insurer). If it were so infringed, the administration of justice in personal injuries cases would be all but impossible. In that regard, both necessity and common sense require that a distinction be drawn between the case where a judge has some preconceived views about the expertise or reliability of the professional opinions of an expert medical witness and the case where a judge has preconceived views about the credit or trustworthiness of a non-expert witness "whose evidence is of significance on … a question of fact" which "constitutes a live and significant issue" in the case (see Livesey v. New South Wales Bar Association [1983] HCA 17; (1983) 151 CLR 288, at p 300).

3.Nor will that requirement of the reality and appearance of impartial justice be infringed if a judge with preconceived views about the general reliability of the evidence of a particular medical witness discloses the existence of such views in the course of the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case. In the course of an eloquent passage in his judgment in *Reg*. v *Watson*; *Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248, at p. 294, Jacobs J. expressed the view that judicial "silence" is a "counsel of perfection." We respectfully disagree with the application of that observation to a trial judge sitting without a jury. It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.

4.On the other hand, there is an ill-defined line beyond which the expression by a trial judge of preconceived views about the reliability of particular medical witnesses could threaten the appearance of impartial justice. In the passage in his judgment in *Watson* to which we have referred, Jacobs J. pointed to the undoubted fact that "it is confidence in his own integrity which supports (a Judge) not only in his judgment but in all his words and conduct." Knowledge of his or her own integrity can sometime lead a judge to fail to appreciate that particular comments made in the course of a trial may wrongly convey to one or other of the parties to the litigation or to a lay observer an impression of bias. For example, he appearance of impartial justice could be compromised if the words or actions of a trial judge conveyed the impression that preconceived adverse views about a particular medical witness were influencing the judge's approach to the case to an extent that the judge was entering the arena to denigrate the witness or to oppose the witness' views or that the judge was biased against the party who had called that particular witness or that the judge was likely to be concerned, in the judgment actually deciding the case, to vindicate the preconceived adverse views about the witness by findings contrary to whatever views that witness might express.

5.Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a part has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge

may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavorable to him or her.

6.The learned trial judge's adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong: "that unholy trinity"; the G.I.O's "usual panel of doctors who think you can do a full week's work without any arms or legs"; whose "views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously." His Honour indicated that he regarded those three medical practitioners as falling within a "particular category of doctors" to whom he had an adverse attitude. He stated that he expressed his views "for the benefit of the present parties in the negotiations which were taking place." The implication of that last comment would seem to have been that the parties should negotiate any settlement on the basis that his Honour would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Revai's written report was received in evidence. No evidence from Dr. Dyball was received.

7.If the above comments made by the learned trial judge in the course of the trial had stood alone, we would have been of the view that the appellant, having taken no clearly stated objection to them at the time and having stood by until the contents of his Honour's judgment were known, could not now found upon them in order to have that judgment set aside on the

grounds of a reasonable apprehension of bias. The statements which the learned trial judge had made about his preconceived views of Dr. Lawson were, however, effectively revived by what his Honour said in his reserved judgment. The appellant's failure to object to the comments made in the course of the trial cannot, in our view, properly be seen as a waiver of any right to complain if comments made about Dr. Lawson in the judgment itself would, in the context of those earlier comments, have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer. While, as we have indicated, the line between comments which would be likely to have that effect and comments which would not is necessarily an imprecise one, we have come to the conclusion that, when they are read in the context of what was said in the course of the trial, his Honour's comments in his judgment fall on the wrong side of that line, In particular, it seems to us that such a lay observer would be likely to see the derogatory and wide-sweeping references to Dr. Lawson in the judgment – "Even Dr. Lawson"; "his evidence, which was as negative as it always seems to be – and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain" (emphasis added) – as indicating that his Honour was concerned to vindicate his preconceived and very strong adverse views about the reliability of Dr. Lawson as a witness and had allowed those views to prejudice his whole approach to the case to the detriment of the defendant. An experienced lawyer would appreciate the ability of a trial judge to ensure that preconceived views do not cause the actual decision to be tainted by prejudgment or bias. The likelihood that the lay observer would not lies at the heart of the requirement of the appearance as well as the reality of impartial justice. To borrow and adapt words used by Mahoney J.A. in his dissenting judgment in the Court of Appeal, the comments in the judgment were such as to cause

"reasonable apprehension" on the part of a lay observer that the judgment itself was, "in the end", affected by bias."