

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT

SAINT LUCIA

CASE NUMBER SLUHCV 2004/988

BETWEEN:

HORACE FRASER

Claimant

and

- 1. Judicial & Legal Services Commission**
- 2. Chairman of the Judicial and Legal Services Commission**
- 3. Sir Dennis Byron**

Defendants

Appearances:

Claimant: Mr Leonard Ogilvy and Mr Alberton Richelieu on 28 January and Mr Colin Foster on 2 February 2005

First and Second Defendants: Mr. Sydney Bennett QC and Ms. Patricia Augustin on 28 January and Ms Patricia Augustin alone on 2 February 2005

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2005:
January 28,
February 2 and 4
.....

DECISION

The Claim

- 1. SHANKS J:** The Claimant is an Attorney and was a Magistrate in St Lucia from September 2000 until January 2004 when he was dismissed for alleged misconduct. The First Defendant Commission was established by section 18 of the West Indies

Associated Supreme Court Order 1967 and among many other things it is responsible for appointing, disciplining and removing Magistrates in St Lucia by virtue of section 91 of the Constitution of St Lucia. The Third Defendant is the Chief Justice of the Eastern Caribbean Supreme Court. As Chief Justice he is also ex officio Chairman of the Commission. Since June 2004 he has been on an extended leave sitting as a judge with the International Criminal Tribunal for Rwanda in Arusha in Tanzania. Adrian Saunders JA is currently acting Chief Justice and Chairman of the Commission in his absence.

2. Service of the claim has been acknowledged on behalf of the First and Second Defendants and they appear by Mr Sydney Bennett QC but there was a procedural wrangle as to whether he represented Sir Dennis personally or only the office of Chairman of the Commission. I believe that wrangle has now been sorted out at my prompting by Chong & Co obtaining express instructions to accept service of the proceedings on behalf of Sir Dennis personally.
3. The Claimant says that he has a claim for defamation against Sir Dennis and the Commission in that they accused him of misconduct in various publications made in connection with his dismissal as a Magistrate, namely (a) a letter dated 5 January 2004 from the Commission to the Ministry of Public Service (b) two letters of dismissal to the Claimant from the Ministry which it is said the Commission caused the Ministry to write, (c) a press release issued by the Commission dated 7 February 2004 and (d) statements by Sir Dennis at a meeting held on 20 February 2004 attended by judges of the Eastern Caribbean Supreme Court and members of the St Lucian Bar.

The Claimant's application

4. No defence to the claim has yet been filed but on 17 January 2005 an application was issued on behalf of the First and Second Defendants to strike out the claim on the grounds that it is prescribed (or statute barred) by Art 2124 of the Civil Code and that proper notice of the proceedings was not given under Art 28 of the Code of Civil Procedure; a point has also been raised to the effect that the Commission cannot be sued as such and that the individual members must be sued. I understand from Ms Augustin that the application based on Art 2124 is to be pursued by way of defence rather

than preliminary application but the other two points were to be dealt with at a hearing on 28 January. In the meantime, however, the Claimant applied for an order that the entire Eastern Caribbean Supreme Court recuse itself from sitting on the claim (including the strike out application) on the ground of bias and prejudice; he also asked that a list of outside judges should be provided from which he could choose one who would be specially appointed to deal with the case (see paragraph 15 of his Affidavit sworn 21 January 2005).

5. I do not think I have power to order that other judges of the Court recuse themselves from hearing a case or to order the Chief Justice (or the acting Chief Justice) or the Commission to appoint a judge to hear the Claimant's case. In those circumstances I propose to treat the application as one to recuse myself. It may be of course that if I were to recuse myself similar reasons for doing so would apply in the case of other judges of the Court.
6. The basis of the application by the Claimant is not, as I understand it, a contention that I or any other judge would actually be biased against him; rather it is based on the maxim that justice must not only be done but also be seen to be done and that the court must accordingly disqualify itself in a case of apparent bias. The test in a case like this is now well established: the court must ascertain the relevant circumstances and if, having regard to those circumstances, there is a real danger or possibility of bias on the part of the judge (in the sense that he might unfairly regard with favour or disfavour the case of a party before him) then he must recuse himself (see: *R v Gough* [1993] AC 646). The question must be approached objectively and the onus is on the party applying for the judge to recuse himself. A party can of course waive any objection to the judge hearing the matter. A judge must also recuse himself if for solid reasons he feels personally embarrassed in hearing a case (see: *Locabail v Bayfield* CA 17.11.99 paragraph 21).

The relevant circumstances

Statutory background

7. The Chief Justice of the Eastern Caribbean Supreme Court is appointed by the Queen by letters patent. The other judges (puisne and appeal) are appointed by the

Commission of which the Chief Justice is the ex officio Chairman. The Commission can appoint acting judges either for a specific period or until a full judge has been appointed or has resumed his functions (see section 6(3) of the 1967 Ordinance). Full judges hold office until retirement and can only be removed by the Commission following an investigation by a tribunal and a recommendation by the Privy Council (see section 8). The Chief Justice, as well as being Chairman of the Commission and the head of the judiciary, is expressly responsible for assigning puisne judges to states and territories within the OECS (see section 16).

My appointment and relationship with the Commission and Sir Dennis

8. I have been appointed by the Commission as an acting judge from 1 January to 15 August 2005 and have been assigned to sit in St Lucia. I have had three previous short term acting appointments with the Court, including a three month appointment in St Lucia in 2003.
9. I have had a good professional relationship with Sir Dennis during my various appointments up to his departure for Africa and, no doubt in common with my fellow judges, I have the highest regard for him as a judge and a leader. I have also had some limited but very enjoyable social contact with him. I also have a good professional and personal relationship with Adrian Saunders JA and Albert Redhead JA, who is also a member of the Commission. I do not know any of the other members of the Commission, whether current or in post in 2003/04 .

My knowledge of the background to the case

10. The misconduct which led to the Claimant's dismissal was that he allegedly revoked certain conditions which I myself had imposed on granting bail to a person accused of drug dealing in 2003. I have no recollection whatever of the bail application or the order I made and, apart from what I have read in the St Lucian press and in the court papers relating to this case and to the judicial review proceedings which I mention below, I know nothing about the Claimant or his dismissal. At the outset of an earlier directions hearing in relation to the judicial review I expressly raised with Mr. Ogilvy whether the fact that I was the judge whose order had allegedly been improperly

revoked caused any difficulty and he assured me it did not. I did not attend the meeting apparently called by the Chief Justice on 20 February 2004 (I was not an acting judge at the time and was not in the region, and I know nothing about what transpired.

The judicial review claim

11. As I have said, the Claimant has brought an application for judicial review arising out of his dismissal as a Magistrate in addition to this defamation claim. The Defendants are stated to be the Attorney General and the Commission “by its members” who include Sir Dennis Byron by name. In those proceedings the Claimant alleges among other things that any decision to terminate his appointment as a Magistrate was taken by the Commission in breach of the rules of natural justice in that he was given no opportunity to deal with the alleged misconduct. No objection has been raised to me or any other judge of the Court dealing with those proceedings and indeed Charles J, Edwards J and I have all made interlocutory orders and I have set the case for hearing by myself on 6 June 2005.

The consequences of a recusal

12. It is not entirely clear on the authorities to what extent (if at all) the consequences of a recusal are a relevant circumstance to be taken into account (compare for example: *Breeze Benton v Weddell* EAT 18.5.04 and *Locabail* at paras 58 and 59). In this case, assuming that I were to recuse myself and that the rest of the Court were to follow suit there is no doubt that it would create a real problem since the solution proposed by the Claimant is probably not feasible as the law stands. There is no specific power under the 1967 Order simply to appoint an ad hoc judge; further there is a limit on the number of puisne judges that may be appointed (see section 4) and an acting judge is appointed either for a specified period or until a full judge has been appointed or resumed office (see section 6(3)). Any ad hoc judge would in any event be by virtue of his appointment a member of the Court. What other solution can be devised is not for me to speculate at this stage.

13. Although I recognise these difficulties, on consideration I do not think it would be right to take any account of them in deciding this application. Under section 8(8) of the Constitution of St Lucia the claimant is entitled to have his claim determined by a court or other authority which is “independent and impartial” and which gives him a “fair hearing”; if I were to conclude that there was a real danger that a judge of the Court would be biased but to say that the claimant must nevertheless have his claim heard by such a judge because of the difficulty of finding another solution it seems to me I would be acting in a way which denied him this constitutional right.

Should I recuse myself?

14. The Claimant’s application is based mainly on the submission that the close personal and professional relationship between the judges of the Court and Sir Dennis and his position as head of the judiciary mean that there is a real danger that no judge of the Court will be able to act fairly and impartially. It is also based on the fact that the judges attended a meeting with the Chief Justice on 20 February 2004 and discussed the Claimant’s dismissal privately at a time when it was known that he was contemplating proceedings. Mr. Ogilvy says that in the light of these matters the court should recuse itself. Mr Bennett adopted a neutral stance.
15. As I have said, I did not attend the meeting on 20 February 2004 and I do not believe that this is a matter which can possibly disqualify me from sitting. However, but for the approach taken by the Claimant to the judicial review proceedings, I think it is likely that I would have felt constrained to recuse myself on one or none of the following grounds: (1) I have been appointed on a short term basis by the Commission which is a Defendant in the proceedings and which is the body with power to give me a full time appointment: there is (objectively speaking) a risk that I might be influenced in favour of the Commission by a desire not to undermine the possibility of such an appointment; (2) Sir Dennis, the other Defendant, is in a loose sense my “boss” and I have a good professional relationship with him and a high regard for him: there must be a risk (again, objectively speaking) that this would lead me to favour his case over that of the Claimant and also to start with a predisposition to accept any evidence he might give where there was a conflict (3) Sir Dennis, and Adrian Saunders JA and Albert Redhead

JA with whom I also have good relations, are also members or acting members of the Commission.

16. However, the Claimant's approach to the judicial review proceedings seems to me to make a very material difference. The Claimant has made it quite clear that he does not object to me or any other judge dealing with the judicial review proceedings. Those proceedings are against the same Defendants (as well as the Attorney General) and they arise out of the same matters. It seems to me that, unless there is some material difference between the two sets of proceedings, the Claimant's position in relation to the judicial review must amount to a waiver of any objection in these proceedings and/or must demonstrate that there is in fact no real danger of bias.
17. The Claimant, who I allowed to address me in person on the point on 2 February, maintained that Sir Dennis is more personally involved in the defamation claim than in the judicial review claim because the former raises issues about his words and intentions whereas the judicial review is just a matter of whether a proper procedure was followed. I am afraid I cannot accept the premise of that point. It seems to me that Sir Dennis, as a judge and as Chairman of the Commission, is likely to be just as personally interested in an allegation that the Commission (including himself) breached the rules of natural justice and acted unfairly towards the Claimant as he would by an allegation that, by repeating an allegation which formed the basis of the Commission's decision to terminate, he had defamed the Claimant.
18. The only relevant distinction which I do see between the two sets of proceedings is that in the judicial review claim there is no realistic chance that there will be any contested issue of fact on which Sir Dennis (or any other member of the Commission) will give evidence and no issue as to his or the Commission's good faith, whereas in the defamation claim such issues may possibly arise, depending how the parties decide to conduct the proceedings. It seems to me that, given the Chief Justice's position as head of the judiciary and my relationship with him, there would be a real risk of bias if I were to have to decide a (genuine) issue of fact which was to turn on his credibility or a (genuine) issue as to his good faith. The same would go for the other Justices of

Appeal currently members of the Commission. If such issues were to arise I therefore believe at the moment that I would feel obliged to recuse myself.

19. This conclusion also accords with my subjective assessment of the situation, in that I consider that I would have no problem deciding any issue of fact or law adverse to the Defendants unless they turned on Sir Dennis's credibility or good faith in which case I would feel personally embarrassed in making any decision.

Next step

20. As I have indicated, no Defence has been filed as yet in the defamation claim and there has been no answer to the highly technical applications made by the Defendants. There are therefore no factual issues in existence at the moment that I consider require me to recuse myself and there may never be. I therefore direct that the case be re-listed at an early stage for the hearing of the Defendants' applications and for directions to be given if the claim remains in being. Ideally the case will be listed for trial along with the judicial review claim but that might not be possible. If when the statements of case are complete or at any other stage it emerges that there is a genuine problem further consideration can then be given to the issue of recusal.

MURRAY SHANKS
High Court Judge (Acting)