

EASTERN CARIBBEAN SUPREME COURT
THE FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2010

IN THE COURT OF APPEAL

HCVAP 2009/013

In the Matter of the Constitution of
St. Kitts and Nevis

and

In the Matter of the Commissions of
Inquiry Act Cap. 288 of the Laws of
St. Kitts and Nevis as amended

and

In the Matter of a Commission of
Inquiry Appointed on the 19th day of
May 2009

BETWEEN:

[1] Vance Amory

Appellant

and

[1] Thomas Sharpe, QC
[2] The Commission of Inquiry
[3] The Nevis Island Administration
[4] The Attorney General of St. Kitts and Nevis

Respondents

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mde. Janice M. Pereira
The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Dane Hamilton, QC, with him, Mr. Mark Brantley for the Appellant
Sir Richard Cheltenham, QC, with him, Mr. Jeffrey Nisbett for the first three
Respondents
Dr. Henry Browne, with him, Mr. Sylvester Anthony for the fourth Respondent

2010: September 14;
2012: August 27.

Judicial review appeal – Challenge to appointment of Commission of Inquiry - Sole Commissioner doing pro bono professional work for Nevis Island Administration – Sole Commissioner personal friend and public critic of Appellant - Commissioner characterizing inquiry as one involving possible corruption and mal-administration - Whether such characterization shows pre-determination or apparent bias - Support staff of Commission with the exception of senior counsel active supporters of governing party - Whether machinery of commission infected with bias – Apparent bias – Actual bias – Whether letter from Commission to applicant requesting copies of bank statements coupled with characterization of inquiry as one into possible corruption shows apparent bias – Whether Salmon Letter should have been issued - Section 10 of Commissions of Inquiry Act

Thomas Sharpe, QC was appointed sole Commissioner of a Commission of Inquiry to inquire and report into certain matters occurring during the time that Vance Amory served as Premier in the Nevis Island Administration. The support staff of the Commission with the exception of Senior Counsel to the Commission consisted of persons who were activists or closely associated with the Nevis Reformation Party at whose behest the Commission was appointed. Mr. Sharpe had in the past done professional work pro bono for the Nevis Island Administration and was also a close friend of one Mr. Gaskell, a public critic of Mr. Amory. Mr. Sharpe had characterized the inquiry as one involving possible corruption and maladministration. One of the matters Mr. Sharpe was to inquire into concerned the purchase by the Nevis Island Administration of the Marion Height Shopping Mall for conversion and use as government offices. Before the Commission's public hearing commenced, the Commission's secretary wrote to Mr. Amory asking him to submit legible copies of statements of all his bank accounts, specifically with respect to the purchase/sale of the Marion Height Shopping Mall. Mr. Amory did not comply but sought judicial review of the appointment of the Commission of Inquiry alleging bias on the part of the Commissioner and the support staff of the Commission as well as predetermination on the part of the Commission. The learned judge dismissed the claim for judicial review holding that Mr. Sharpe's appointment was constitutionally and legally valid and that a case of actual bias was not made out against him. Further, the fair-minded and reasonable observer having considered all the facts would not conclude that Mr. Sharpe or the Commission was biased towards Mr. Amory. Mr. Amory appealed.

Held: dismissing Mr. Amory's challenge to the constitutionality and legal validity of the appointment of Mr. Sharpe and allowing the appeal on the issues of apparent bias in the support staff/machinery of the Commission and apparent bias of the Commission, and ordering that the respondents save and except the Attorney General bear the costs of the appellant, costs to be assessed, in the absence of agreement, within 21 days, that:

1. An appellate court is well able to assume the vantage point of a fair minded and informed observer with knowledge of all the relevant circumstances. It must assess these circumstances and decide whether there is a real possibility of bias. The matters relied on as establishing bias have to be considered cumulatively. Having regard to the terms of reference of the Commission and the political context in which the Commission was established, the fair minded and informed observer would certainly regard the composition, activities and allegiance of the impugned support staff of the Commission as relevant and weighty factors in concluding that there was a real possibility that the machinery of the Commission was infected with bias and that there was apparent bias against Mr. Amory.

Sir Alexander Morrison & Anr v AWG Group Limited & Anr [2006] EWCA Civ 6 applied.

2. The letter of 28th May 2009 sought to establish a nexus between the sale of the Marion Heights Shopping Mall and Mr. Amory's bank accounts. The learned judge erred and misdirected herself on the evidence in failing to properly consider that the request in the letter for Mr. Amory's bank records specifically in relation to the purchase of the Marion Heights Shopping Mall, well before the public hearings of the Commission could only be referable to a premature inference and view that Mr. Amory was suspected of having corruptly obtained a financial benefit from the purchase and had to be investigated. This assumes even greater importance in light of Mr. Sharpe's characterization of the Inquiry as one involving possible corruption. In these circumstances a fair minded and informed observer would conclude that there was a real possibility of bias towards Mr. Amory.
3. In the circumstances of this case a Salmon Letter ought to have been sent to Mr. Amory. The letter of 28th May 2009 demonstrated that the Commission was satisfied that there were circumstances which affected Mr. Amory which the Commission proposed to investigate. Mr. Amory had therefore become involved in the Inquiry within the first principle in Salmon. Further, in accordance with the second principle, before Mr. Amory is called as a witness he should be informed of any allegation made against him and the substance of the evidence in support thereof.

JUDGMENT

- [1] BAPTISTE, JA: Vance Amory appeals the decision of a judge dismissing his claim for judicial review in respect of the appointment of Thomas Sharpe, QC as sole Commissioner of a Commission of Inquiry established under the hands of the Governor General of The Federation of Saint Christopher and Nevis. The Commission of Inquiry was established to enquire and report on certain matters occurring during the time that Mr. Amory served as Premier in the Nevis Island Administration. Mr. Amory had contended that Mr. Sharpe was not appointed by the requisite constitutional and or legal authority in that the Nevis Island Administration had no constitutional or other authority to advise the Governor General to establish a Commission of Inquiry and that Mr. Sharpe, as well as the machinery of the Commission were infected with actual and or apparent bias towards him. Further, Mr. Sharpe had predetermined the issues in relation to him.
- [2] The learned judge found that Mr. Sharpe's appointment was constitutionally and legally valid and that a case of actual bias towards Mr. Amory was not made against Mr. Sharpe. Further, a fair and informed observer having considered all the facts and circumstances would not conclude that there was a real possibility that Mr. Sharpe or the Commission was biased towards Mr. Amory. On appeal, Mr. Amory's counsel, Mr. Hamilton, QC, did not pursue the ground with respect to the constitutional or legal authority of the appointment of Mr. Sharpe having conceded, and agreed with Dr. Browne, counsel for the Attorney General of the Federation of Saint Christopher and Nevis, that the Nevis Island Administration had authority to advise the Governor General to set up a Commission of Inquiry. The judge's decision on that issue therefore stands. The appeal proceeded on the learned judge's findings on bias and was directed to the issue as to whether there was actual or perceived bias on the part of Mr. Sharpe or the Commission of Inquiry towards Mr. Amory.

Background

[3] Before dealing with the grounds of appeal it is useful to refer to the background facts as gleaned from the judgment of the learned judge. Mr. Amory is the political leader of the Concerned Citizens Movement and was the Premier in the Nevis Island Administration from June 1992 to July 2006. In July 2006, Mr. Amory's administration was replaced by the Nevis Reformation Party headed by Mr. Joseph Parry, the current premier of Nevis. Mr. Amory is now the Leader of the Opposition in the Nevis Island Assembly. On 19th May 2009, by Letters Patent under the Public Seal, the Governor General of the Federation of Saint Christopher and Nevis issued a Commission appointing Thomas Sharpe to enquire and report on certain matters occurring during the Amory administration, including:

- (a) the purchase by the Nevis Island Administration of the Marion Heights Shopping Mall under an agreement dated 18th August 1998 for conversion to and use as Government offices;
- (b) the compulsory acquisition of 24 acres at Pinney's Estate, Nevis by the Nevis Island Administration from Pinney's Investment Company Limited and its subsequent sale and/or transfer to Pinney's Beach Resort Limited;
- (c) the land sale of 80 acres at Pinney's Estate, Nevis to Hamilton Estates Development Limited by Pinney's Investment Company Limited;
- (d) the abandonment by the Nevis Island Administration of the legal proceedings against Pinney's Investment Company Limited;
- (e) the movement of US\$300,000.00 being held at First Caribbean International Bank formerly Barclays Bank PLC, Charlestown, Nevis, to the account of Mr. Mark Anderson at the National Bank of Jamaica;

- (f) the compromise of the action brought by the Nevis Island Administration against Mr. Mark Anderson for the return of US \$300,000.00;
- (g) the selection of the contractor and financial arrangements, including the alleged over payment of \$1.3 million to the contractor and/or its sub-contractors, for the construction of the terminal at the Vance W. Amory International Airport and the resolution and/or handling of disputes during and following the construction of the terminal.

[4] Mr. Sharpe was also to determine whether these matters were conducted in accordance with law, ordinances, regulations and good administrative practices. Additionally, Mr. Sharpe was to identify any deficiency in the functioning of the public administration of the Nevis Island Administration as a result of the inquiry into the matters and make observations and recommendations for their correction and for the improvement and strengthening of the system of public administration.

[5] On 21st May 2009, the Secretary of the Commission wrote to Mr. Amory advising him of the establishment of the Inquiry and its terms of reference, and, among other things, invited him to assist the Commission by submitting information he might consider relevant. On 28th May 2009, the Secretary again wrote to Mr. Amory referring to his earlier request for information and with specific reference to the purchase of the building located at Marion Heights, requested that Mr. Amory submit legible copies of statements of all his bank accounts in his possession by 5th June 2009. On 29th June 2009, Mr. Amory wrote to Mr. Sharpe expressing his concern that he, Mr. Sharpe, had no prior involvement or experience in Commissions of Inquiry and questioned his selection as Commissioner. Mr. Amory also complained that with the exception of Sir Richard Cheltenham, QC, the Commission members were intimately connected with the Nevis Reformation Party and or were its activists and there was apparent bias and actual bias in relation to him. Mr. Amory requested Mr. Sharpe to recuse himself

on that basis. By letter of 7th July 2009, Mr. Sharpe responded, detailing the circumstances leading to his acceptance of the position of Commissioner, his professional experience in public law and dismissed the allegation of bias against the staff of the Commission. On 9th July 2009, the Secretary again wrote to Mr. Amory concerning the Marion Heights Mall purchase describing it as a matter in which he had been directly or indirectly involved in his capacity as Premier. Mr. Amory was requested to appear at the public hearing of the Commission on 20th July 2009 and to make himself available to be questioned about matters which he was aware. Mr. Amory subsequently issued legal proceedings seeking injunctive and declaratory relief with respect to the establishment of the Commission of Inquiry and the legality of Mr. Sharpe's appointment.

Grounds of Appeal

- [6] Mr. Amory complained that:
- (a) The learned judge's finding that the Commissioner was not tainted with bias was against the weight of the evidence.
 - (b) The learned judge misinterpreted the evidence as it related to appearance of bias and misunderstood that no actual bias was being alleged.
 - (c) The learned judge erred in failing to understand that the perceived bias alleged tainted the entire machinery of the Commission of Inquiry.
 - (d) The learned judge erred in law and misdirected herself on the evidence adduced in that she failed to properly consider or give any consideration at all to -
 - (i) Mr. Sharpe's characterization of the Inquiry as one involving corruption and maladministration, and wrongly focused disjunctively on "maladministration" which she wrongly characterized as following from the terms of

reference in so far as such included improvements in the administration of Nevis;

- (ii) the premature request on 28th May 2009 by Commissioner Sharpe for Mr. Amory's bank records specifically in relation to the purchase by the Nevis Island Administration of Marion Heights Shopping Mall in August 1998 which the judge wrongly analysed as falling within the Commission's powers to call for the production of documents;
- (iii) that such a request made well before the public hearings of the Commission could only be referable to a premature inference and view that the appellant was suspected of having corruptly obtained a money benefit from the purchase of Marion Heights Shopping Mall and had to be investigated for misbehavior in public office.

[7] Mr. Amory's counsel, Mr. Hamilton, recognized that the primary finding was that any fair-minded and informed observer in the streets of Charlestown having considered all the relevant facts and circumstances would not conclude that there was a real possibility that Mr. Sharpe, or the Commission of Inquiry was biased towards Mr. Amory. Mr. Hamilton stated in the skeleton arguments that what is directly challenged is the learned judge's assessment of the facts and circumstances against the background of the applicable legal principles and the judge's application of the law.

The law with respect to bias

[8] I will deal first with the law relating to the bias. Lord Phillips MR defines bias as "an attitude of mind which prevents the judge from making an objective

determination of the issues that he has to resolve”.¹ In *Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail*,² Lord Justice Jackson stated at paragraph 44 that actual bias may arise from a variety of causes, such as a desire to decide a case one way or the other regardless of the legal merits. His Lordship pointed out that although pre-determination is sometimes treated as a species of bias there are conceptual differences between them. Pre-determination arises when a judge or other decision maker reaches a final conclusion before he or she is in possession of all the relevant evidence and arguments. His Lordship noted that in practice, findings of actual bias or actual pre-determination are rare because of the difficulties of proof. Apparent bias or apparent pre-determination is a more common basis for attacking judicial or quasi-judicial decisions.³ The modern law of apparent bias was definitively stated by Lord Hope in *Porter v Magill*,⁴ thus: “The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. The test of the fair minded observer also applies in cases of apparent pre-determination.

- [9] In *Flaherty v National Greyhound Racing Club Ltd*,⁵ Lord Justice Scott Baker stated that the test for apparent bias involves a two stage process. First, the Court must ascertain all the circumstances bearing on the suggestion that the tribunal was biased. The second stage involves the court asking itself whether those circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the tribunal was biased. An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided.⁶ The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the

¹ See *In re Medicaments and Related Classes of Goods No (2)* [2001] 1 WLR 700 at para. 37.

² [2011] EWCA Civ 1617.

³ *Ibid*, paras. 45 and 46.

⁴ [2001] UKHL 67, [2002] 2 AC 357 at para. 103.

⁵ [2005] EWCA Civ 1117 at para. 27.

⁶ *Locabail (U.K.) Ltd. and Another v Bayfield Properties Ltd. and Another* [2000] QB 451, 480 para. 25.

circumstances available to the hypothetical observer at the original hearing. As stated by Richards LJ in *National Assembly for Wales v Condrón*:⁷

“The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.”

[10] In *Gillies (AP) v Secretary of State for Work and Pensions*,⁸ the House of Lords considered an allegation of apparent bias in respect of a tribunal member.

Lord Hope elaborated on the fair-minded and informed observer test by stating:

“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 a particular judge or tribunal member who is under scrutiny. It is to be assumed ... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too 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.”⁹

[11] In *Helow v Secretary of State for the Home Department and another*,¹⁰ Lord Hope returned to the attributes of the fair-minded and informed observer. He said:

“... the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral, ... she has attributes which many of us might struggle to attain to.”

“The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The “real possibility test” ensures that there is this measure of detachment. The assumptions that the complainant makes are not to be attributed to the observer unless they can be justified objectively.

⁷ [2006] EWCA Civ 1573 at para. 50.

⁸ [2006] 1 All ER 731.

⁹ *Ibid*, para. 17.

¹⁰ [2008] 1 WLR 2416, paras 1-3.

But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is “informed”. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

- [12] In *Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail* Lord Justice Jackson observed that:¹¹

“There are conceptual difficulties in creating a fictional character, investing that character with an ever growing list of qualities and then speculating about how such a person would answer the question before the court. The obvious danger is that the judge will simply project unto that fictional character his or her personal opinions.”

The fair-minded and informed observer is a legal construct upon whom remarkable qualities have been grafted geared no doubt to insulate the administration of justice from the contaminants of unfairness and partiality. The court no doubt is the touchstone and carries the mantle of the fair minded and informed observer.

Demonstrating bias

- [13] What are the circumstances bearing on the suggestion that the tribunal is biased? The matters relied on as demonstrating bias have to be considered cumulatively. The matters concern Mr. Sharpe himself and the support staff or machinery of the Commission. Mr. Parry asked Mr. Sharpe to serve as Commissioner. Mr. Sharpe came to Nevis and accepted the position. Mr. Sharpe’s connection with Nevis goes back to almost twenty years. Before serving as Commissioner, Mr. Sharpe was known to the Nevis Island Administration in a professional capacity, having

¹¹ [2011] EWCA Civ 1617, para. 52.

worked for the Parry led Administration on a pro bono basis on geothermal matters. Mr. Sharpe is a close friend of one Mr. Gaskell, who wrote prolifically in the local press and was a harsh and public critic of Mr. Amory and his administration.

- [14] With respect to the staff of the Commission, the judge found that the secretary's verbal attacks on Mr. Amory are on a level of worldwide circulation via the internet and were sufficient to give rise to a perception of bias as they spoke directly to an attitude of mind towards Mr. Amory. The judge considered the statutory functions of the secretary and concluded that the secretary's role was entirely administrative. The judge stated that the secretary was not part of the decision making function of the Commission and his bias towards Mr. Amory could not be seen as impacting on the Commission. The case of *Simmons and Others v Williams and Others (No 2)*¹² was referred to. In that case the allegation of bias included a complaint against the secretary of the Commission of Inquiry who was an unsuccessful candidate of the ruling political party and who had campaigned against the appellant. The Court of Appeal agreed that the fact of the secretary's involvement in competitive politics and his failed candidacy were not enough to impute biasness on his part. His role was purely administrative and he had no decision making function. Another staff member of the Commission, Myrna Liburd, is an executive member of Mr. Parry's Nevis Reformation Party and also his close business partner. The judge found that these factors without more were not sufficient to support an allegation of bias. In addition, Ms. Liburd's main role as the Commission's typist is exclusively administrative. Jeffrey Nisbett is the junior counsel to the Commission. The judge found that Mr. Nisbett's involvement and connections with the Nevis Reformation Party, which extended to appearing on its political platform, did not give rise to a perception of bias. The judge noted that Mr. Nisbett's integrity was not attacked neither was his ability to perform the role of counsel challenged. The evidence of Sergeant Hector, former lead investigator to the Commission, also fell for examination. In a letter dated 7th

¹² (1999) 57 WIR 95.

August 2009 to the Commissioner of Police, Sergeant Hector opined that the Commission's procedures and the directions given were influenced by political considerations. Mr. Hamilton argued that the judge should have treated Sergeant Hector's evidence as part of the equation whether there was sub-conscious bias in the Commission. The judge found, quite properly, I must say, that Sergeant Hector's evidence did not advance the matter. His concerns about political interference were not detailed in the letter.

Respondents' contentions

- [15] Sir Richard submitted, on behalf of the first, second and third respondents, that on the evidence, neither Mr. Gaskell nor his articles were the subject of inquiry and Mr. Gaskell was not a witness. Further, Mr. Sharpe only became aware of the existence or content of Mr. Gaskell's articles after his appointment, when they were drawn to his attention by Mr. Amory. Sir Richard contended that the court was correct in applying the principle established by *Locabail (U.K.) Ltd. and Another v Bayfield Properties Ltd. and Another* that the real danger or possibility of bias on the part of a judicial decision maker will be eliminated and the possibility dispelled if it is shown that the judge was unaware of the matter relied upon as appearing to undermine his impartiality.
- [16] Concerning the pro bono assistance Mr. Sharpe provided to the Government of Nevis in respect of geo-thermal energy, Sir Richard argued in favour of drawing a distinction between assisting a Government on a pro bono basis on a matter within one's competence and assisting and or allying with a political party. Sir Richard stated that there was no allegation that Mr. Sharpe assisted or allied himself with the Nevis Reformation Party. Sir Richard contended that it seems to be a leap in logic to infer from the circumstance of doing pro-bono work for the Nevis Government that Mr. Sharpe shares a close association with the Nevis Reformation Party led Nevis Island Administration. Sir Richard urged upon the Court the observation of Dean-Armorer J, in *Urban Development Corporation of*

*Trinidad and Tobago v Kenneth Sirju et al*¹³ that, the fact that the Commissioner was a foreigner and a highly qualified professional would lead the fair minded and informed observer to conclude that he was a stranger to the political allegiances or animosities that might sway a national. The Commissioner in that case was a professor from England whose appointment was challenged on the basis of bias.

Discussion

[17] Having ascertained all the circumstances bearing on the suggestion that the Commission was or could be biased, the Court has to decide whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility of bias. An appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of all the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.¹⁴

[18] The matters relied on as demonstrating the requisite real possibility of bias must be considered cumulatively. Mr. Sharpe and the support staff of the Commission with the exception of its legal counsel Sir Richard are being challenged. The fair-minded and informed observer would not regard Mr. Sharpe's past professional involvement with the Nevis Island Administration as giving rise to a real possibility of bias against Mr. Amory. Mr. Sharpe's close personal friendship with Mr. Gaskell, a prolific writer in the local press and a harsh and public critic of Mr. Amory, also came up for scrutiny. At paragraph 25 of *Locabail (U.K.) Ltd. and Another v Bayfield Properties Ltd. and Another*¹⁵ the court addressed the issue of personal friendship and bias. It recognized that 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 a case; or if the judge were personally acquainted with any member of the public involved in the case,

¹³ CV 2009-3394.

¹⁴ *Sir Alexander Morrison & Anr v AWG Group Limited & Anr* [2006] EWCA Civ 6, per Mummery LJ, at para. 20.

¹⁵ [2000] QB 451 at 480.

particularly if the credibility of that individual could be significant in the decision of the case 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.

- [19] In paragraph 18 of *Locabail*, the court stated that in applying the real possibility test, it will very often be appropriate to enquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it, the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. The same theme is captured in *Auckland Casino Ltd v Casino Control Authority*,¹⁶ in which the court stated that if the judge were ignorant of the alleged disqualifying interest, there would be no real danger of bias. It was reasoned that no one could suppose that the judge could be unconsciously affected by that of which he knew nothing. In this matter, Mr. Sharpe acquired knowledge of Mr. Gaskell's writing very early in the proceedings when it was brought to his attention by Mr. Amory. If Mr. Sharpe's statement about his knowledge is, objectively viewed, cogent, that would be a basis on which the reasonable onlooker or the court personifying the reasonable onlooker will ask whether there was any real danger of bias. The insidious nature of bias would render any statement by Mr. Sharpe as to the impact of any knowledge on his mind or on his decision of little value. This Court would be inattentive to any such statement.¹⁷ It is for the court to assess the risk that some illegitimate extraneous consideration may influence Mr. Sharpe's decision. What was the risk here? Could Mr. Sharpe be unconsciously affected by Mr. Gaskell's writings? In considering that question, I take cognizance of the fact that Mr. Gaskell is not a witness before the Commission neither is he a subject of the inquiry. There is no suggestion that Mr. Sharpe endorsed or otherwise associated himself with the writings of Mr. Gaskell or that the writings represented Mr. Sharpe's views. In fact, Mr. Sharpe stated that he did not know of Mr. Gaskell's writing until it was brought to his attention by Mr. Amory. In these

¹⁶ (1955) 1 NZLR 142 at 148.

¹⁷ *Locabail (U.K.) Ltd. and Another v Bayfield Properties Ltd. and Another* [2000] QB 451, para. 19.

circumstances the learned judge was right in finding that the evidence did not support a case of actual bias by Mr. Sharpe towards Mr. Amory and that a fair-minded and informed observer would not conclude that there was a real possibility that Mr. Sharpe was biased towards Mr. Amory.

[20] Sir Richard sought to uphold the judge's findings in dismissing the challenge to the appointment of Jeffrey Nisbett as junior counsel to the Commission, Morrice Tyrell as Secretary to the Commission and Myrna Liburd as Assistant Secretary. In dismissing the challenge to their appointment, the judge treated each individual separately and made a determination as to the potential impact or absence of impact by each as a separate individual on the work or findings of the Commission. Mr. Hamilton submitted that the judge adopted the wrong approach. Noting that the Commission was a holistic entity and that Mr. Amory's case was that the entire machinery of the Commission was infected with bias against him, Mr. Hamilton stated that the issue for the court was whether a reasonable individual armed with that knowledge would consider that Mr. Amory would get a fair hearing. As stated earlier, the court has to consider the cumulative effect of the matters relied on as establishing bias. It is the appearance that these facts give rise to that matters. The judge would have adopted the wrong approach in not considering the cumulative effect of those matters. In the circumstances of this case, the observer would be alert to the fact that it was neither natural nor appropriate that the critical support staff of the Commission be constituted in the manner that it was. Thus the fact that Mr. Nisbett's integrity was not attacked is not a relevant consideration and ought not to have been relied upon by the learned judge. Further, the judge's statement that Mr. Nisbett's ability to perform the duties of counsel is not being challenged belies the fact that his ability to fairly perform the duties of counsel is being challenged in these proceedings. While making a finding of perceived bias in respect of the secretary, the judge concluded that the secretary's bias towards Mr. Amory could not be seen as impacting on the commission. To my mind, the judge's conclusion regarding absence of impact on the commission would be more germane to a case of actual bias as opposed to apparent bias.

[21] The fair-minded and informed observer would certainly consider the terms of reference of the Commission and the political context in which the Commission was established. While not being unduly suspicious, it would not be lost upon the fair-minded and informed observer that the support staff of the Commission with the exception of Sir Richard, the senior counsel, consist of known supporters, affiliates or activists of the Nevis Reformation Party, the party which opposed Mr. Amory when he was premier of Nevis and at whose behest the Commission was established. It is the appearance that these facts give rise to that matters. In paying regard to the political context within the milieu of apparent bias, the fair-minded and informed observer in Charlestown Nevis would certainly regard the composition, political connection, activities and allegiance of the impugned support staff of the commission as relevant and weighty factors in concluding that there was apparent bias against Mr. Amory. Accordingly the decision of the trial judge cannot be upheld.

Pre-determination

[22] An important plank of Mr. Hamilton's attack concerns the issue of pre-determination. This issue finds expression in a letter dated 28th May 2009, from the secretary of the Commission to Mr. Amory referring to the Marion Heights transaction and inviting him to submit legible copies of statements of his bank accounts in his possession not later than 5th June 2009. It also falls to be considered in Mr. Sharpe's characterization of the inquiry as one involving possible corruption and maladministration. Mr. Hamilton stated that the letter relates to one of the serious contentions being advanced by Mr. Amory. Mr. Hamilton observed that the letter required Mr. Amory to produce his bank records for an indefinite period and noted that Mr. Amory was not named in the terms of reference of the Commission and that no allegations of impropriety were set out in it as far as Mr. Amory was concerned. Mr. Hamilton argued that the Commission went on a fishing expedition in seeking to establish a connection between Mr. Amory's account and the sale of the Marion property. Mr. Hamilton

submitted that the learned judge dealt with the letter in a flawed way by, without any clearly defined reference to the context of the case and other circumstances, dismissing the request in the letter as a power given under section 10 of the Commissions of Inquiry Act (“the Act”)¹⁸ to summons witnesses and to call for the production of books and documents. Mr. Hamilton contended that the letter was not a summons and did not fall within the confines of section 10 of the Act, and no attempt was made to comply with section 10 of that Act.

- [23] Noting that the terms of reference did not mention Mr. Amory, Mr. Hamilton queried, why was Mr. Amory being asked to submit statements of all of his bank accounts? Mr. Hamilton contended that this demand is open to the inference that Mr. Amory may well be suspected of obtaining an illicit profit or benefit from the purchase of Marion Heights. This, taken with Mr. Sharpe's characterization of the inquiry as one involving possible corruption and maladministration led Mr. Hamilton to submit that well before the public hearings commenced on 20th July 2009, the Commissioner may well have exposed his mind consciously or unconsciously to the insidious and pervasive influence of bias.

Characterization of Terms of Reference as being related to corruption and maladministration

- [24] Mr. Sharpe described the terms of reference of the Commission as being related to possible corruption and maladministration. Mr. Hamilton contended that nothing in the terms of reference stated that the inquiry was about corruption and there is no evidence that other persons were required to produce their bank record. Mr. Sharpe however admitted that the word “corruption” did not appear in the terms of reference but testified that the use of the words “corruption” and “maladministration” was a paraphrase on his part. Mr. Hamilton contended that the judge dealt unsatisfactorily with Mr. Sharpe's characterization of the inquiry as one involving possible corruption and maladministration. Mr. Hamilton complaints are that the judge failed to consider the statement against the background of the

¹⁸ Cap 3.03, Revised Laws of Saint Christopher and Nevis 2002.

totality of the facts and circumstances adduced in the evidence; and placed no construction on the word “corruption” and only dealt with the word “maladministration”.

[25] Mr. Hamilton argued that the characterization of the inquiry as one involving possible corruption and maladministration clearly pointed the finger at Mr. Amory, who was required almost immediately to produce his bank statements and attend for questioning. Mr. Hamilton contended that this was a clear demonstration of pre-judgment, prior to hearing of any of the 11 witnesses. The reasonable observer would conclude that Mr. Amory was suspected by the Commissioner of having profited from the sale. In the circumstances Mr. Hamilton contended that principles one and two of the Salmon principles ought to have been engaged: Before a person against whom there is adverse evidence is invited to give evidence, the Commission must be satisfied that there were circumstances affecting the person whom the commission proposes to investigate. Mr. Hamilton noted that no warning was given to Mr. Amory nor did the Commission inform him of any allegation which it proposed to explore and examine, nor did the Commission furnish him with the substance of the evidence that supports those allegations. This, in Mr. Hamilton’s view led to the clear conclusion that the Commission had already formed a pre-conceived view of Mr. Amory’s conduct which may or may not be supported by the evidence. Mr. Hamilton submitted that the judge wrongly rejected pre-judgment on the basis of the stage reached in the proceedings and the existence of adverse evidence.

[26] Sir Richard supported the judge’s view that the use of the words corruption and maladministration was unfortunate though not fatal. Sir Richard argued that on any reasonable interpretation of the terms of reference, it was likely that the inquiry could reveal both maladministration and corruption. I agree. Sir Richard reminded the court that among the qualities of the fair-minded observer is that she “would be taken to know common place things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without ... disqualifying

themselves”.¹⁹ Sir Richard remarked that the judge may have added that the Commissioner’s remark was an isolated one, inconsistent with what the hypothetical fair-minded and informed observer would regard as a disqualifying factor. Sir Richard pointed out that the fair-minded and informed observer would appreciate the remarks in the context in which they were made and also the social and political context in which the Commission itself was established.

Submission on letter

- [27] Sir Richard contended that the letter of 28th May 2009 was in the form of an application for information/discovery and not a Salmon letter. Sir Richard argued that there was a heavy duty on Mr. Amory to establish that the request in the letter to share his bank records was unreasonable or was informed by mala fides. Sir Richard argued that the court is not in a position to decide what informed the sending of the letter and cannot be asked to speculate or make the worst assumptions as to what informed that letter to Mr. Amory, Mr. Sharpe not having been asked what considerations informed its sending. Sir Richard, noting that Mr. Amory ignored the letter, submitted that no adverse inference could be drawn from the letter.
- [28] Sir Richard further stated that the Salmon letter stage is reached when all the evidence is in and there is evidence implicating or tending to implicate someone. That stage had not been reached. The letter also predated the commencement of the public hearings. At the time of the letter no evidence had been led even though witness statements were available to the Commission, which dealt with, among other things, the valuation of the Marion Heights property. The letter made no allegations against Mr. Amory and expressed no preliminary or concluded view about him. Sir Richard argued that the fair-minded and informed observer would have appreciated that at the time of the letter no evidence had been led and would have understood that the Commission was still engaged in fact gathering prior to public hearings. Sir Richard further submitted that the letter cannot be interpreted

¹⁹ See Kirby J in *Johnson v Johnson* 74 ALJR 1380 at para. 53.

as expressing any statement of opinion. The fair-minded and informed observer would know that both judges and the Commissioner are trained to suspend their judgment until all the evidence and submissions are in. Sir Richard submitted that the interpretation of pre-determination being put on the letter is baseless and the learned judge properly rejected the submission of apparent bias arising from the letter.

Judge's findings

- [29] The learned judge found that the Secretary's letter of 28th May 2009 was not a Salmon letter. The judge stated that any of the six cardinal principles which apply to Salmon letters can only be looked at in the context of the stage of proceedings under consideration. The judge noted that in *Mitchell v Georges* (sole Commissioner of the Ottley Hall Commission of Inquiry) and another²⁰ the commission's proceedings had begun and the letter was clear that there were allegations against the appellant that had been raised by the evidence which had already been presented. The judge observed that the existence of adverse evidence was clearly not an issue in this case. The judge stated that the letter to Mr. Amory must be considered in light of section 10 of the Act and the investigative powers of the Commission. The judge concluded that the Commissioner is legally entitled to request the bank statements within the ambit of section 10.

The letter of 28th May 2009 and section 10 of the Act

- [30] It is useful to reproduce the letter dated 28th May 2009 from the secretary of the Commission to Mr. Amory. The letter states:

"Dear Sir:

Pursuant to our conversation subsequent to the launching of the newly appointed Commission of Inquiry, I have sent you a copy of the Terms of Reference as you requested, as well as an invitation that affords you an opportunity to supply information pertinent to any and all of the issues under investigation.

²⁰ (2008) 72 WIR 161.

In addition, and specific to the circumstances surrounding the purchase/sale of the building located at Marion Heights, and currently occupied by the Department of Education, the Commission is asking you to submit legible copies of statements of all your bank accounts in your possession no later than June 5th, 2009. In anticipation of your usual cooperation, I offer my thanks.

Faithfully

Morrice Tyrell MBA, M. A.cc

Secretary”

[31] Section 10(1) of the Act empowers the commissioner to summon and compel the attendance of witnesses; call for the production of documents or things including the power to retain and examine the same; examine persons appearing before the commission on oath and issue a commission or request to examine witnesses abroad. Section 10 provides a juridic basis for the Commissioner's request to Mr. Amory to provide copies of his bank statements. The section cannot be arbitrarily invoked. One has to pay regard to the investigatory character of a Commission of Inquiry and the bona fides of any connection the commission seeks to establish between certain facts and the subject matter of the inquiry. The documents requested must be reasonably expected to be relevant to the subject matter of the inquiry. The question is, was the power to request statements of Mr. Amory's bank accounts properly exercised in the circumstances of this case, having regard to the time and manner of its exercise? It appears to me that it was not. Does the exercise of that power lead to the conclusion that the Commission had pre-judged issues in relation to Mr. Amory?

[32] For pre-determination to arise, one would have to construe the Secretary's letter of 28th May 2009 to Mr. Amory, as constituting a final conclusion on the part of the Commission without the Commission being in possession of all the relevant evidence and arguments. Such a construction cannot be placed on the letter. The letter does not represent a final conclusion on the Commission's part. It made no allegations against Mr. Amory and expressed no preliminary or concluded view about him. The learned judge was quite right in rejecting the contention of apparent pre-determination that was placed on the letter.

[33] Section 10 imposes a duty on the Commission to issue summonses if there is material before it which induces a bona fide belief that the material may cast light on matters falling within its terms of reference. I note here that no summons was issued to Mr. Amory. At the time of the letter no evidence had been led and public hearings had not started, although Sir Richard stated that there were witness statements before the Commission which dealt with the valuation of the Marion Heights property among other things. There is no doubt that Mr. Amory had a powerful personal interest in the inquiry. His reputation was certainly at stake. There is much force in Mr. Hamilton's argument that Mr. Amory is being asked to attend a public inquiry, inquisitorial in nature at which his personal banking accounts over a period in excess of ten years would be exposed and he would be cross-examined as to his accounts although the Commission or its terms of reference has not pointed a finger at him in a culpable sense.

[34] It can be inferred that the letter of 28th May 2009, sought to establish a nexus between the sale of the Marion Heights Shopping Mall and Mr. Amory's account. In that regard, the learned judge erred and misdirected herself on the evidence in failing to properly consider that the request in the letter for Mr. Amory's bank records specifically in relation to the purchase by the Nevis Island Administration of Marion Heights Shopping Mall, well before the public hearings of the Commission, could only be referable to a premature inference and view that Mr. Amory was suspected of having corruptly obtained a financial benefit from the purchase of the Marion Heights property and had to be investigated. This assumes even greater moment in light of Mr. Sharpe's characterization of the inquiry as one involving possible corruption. In these circumstances, the fair-minded and informed observer could conclude that there was a real possibility of bias towards Mr. Amory.

Salmon principles

[35] Further, to make a worthwhile representation at the inquiry, Mr. Amory would require some knowledge of the factors which may weigh against his interest.

Procedural fairness would require that Mr. Amory be confronted with the matters which are adverse to him. This brings me to the Salmon principles. The six cardinal principles of fair procedure devised by Lord Justice Salmon, who in 1966 chaired a Royal Commission on Tribunals of Inquiry, are:

- “1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity to prepare his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes to call at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.”

[36] The judge rightly found that the letter of 28th May 2009 was not a Salmon letter. It appears to me that in the circumstances of this case a Salmon letter ought to have been sent to Mr. Amory. In that connection I do not accept the submissions of Sir Richard. The letter of 28th May 2009 demonstrates that the Commission was satisfied that there were circumstances which affected Mr. Amory which the Commission proposed to investigate. Mr. Amory had therefore become involved in the inquiry within the first principle in Salmon. Further, in accordance with the second Salmon principle, before Mr. Amory is called as a witness, he should be informed of any allegation made against him and the substance of the evidence in support thereof.

Order and Declaration

[37] Based on the opinions I have expressed above, I would grant the following orders:

- (a) A declaration that the staff of the Commission is, with the sole exception of Senior Counsel to the Commission, infected with

apparent bias against Mr. Amory so as to render the conduct of the Commission unfair, partial and biased against Mr. Amory.

- (b) An order of certiorari to quash the decision of the Nevis Island Administration appointing the staff of the Commission of Inquiry.
- (c) An injunction restraining the respondents or any of them, their servants, agents or officers and/or representatives from proceeding with the Commission of Inquiry appointed on May 19, 2009.

Costs

- [38] The respondents, save and except the Attorney General, to bear the costs of the appellant. Costs are to be assessed, in the absence of agreement, within 21 days.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice M. Pereira
Justice of Appeal