IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 00474

BETWEEN	**HON. SHIRLEY TYNDALL, O.J.**	**1ST APPLICANT**
AND	**PATRICK HYLTON**	**2ND APPLICANT**
AND	**OMAR DAVIES**	**3RD APPLICANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION, INC**	**4TH APPLICANT**
AND	**HON. JUSTICE BOYD CAREY (RET'D)**	**1ST RESPONDENT**
AND	**CHARLES ROSS**	**2ND RESPONDENT**
AND	**WORRICK BOGLE**	**3RD RESPONDENT**

Mrs. Nicole Foster-Pusey for the 1st Applicant.

Mr. Dave Garcia for the 2nd Applicant.

Mr. Michael Hylton Q.C. and Mr. Kevin Powell for the 3rd Applicant.

Mr. Patrick Foster Q.C. and Miss Ayana Thomas of the firm of Nunes, Scholefield DeLeon and Co. for the 4th Applicant.

All of the Applicants instructed by the firm of Michael Hylton & Associates.

Mr. Lackston Robinson instructed by the Director of State Proceedings for the Respondents, appearing during part of the proceedings on the 5th February 2010.

Heard : 5th, 9th and 12th February 2010.

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW- ORDERS OF PROHIBITION AND CERTIORARI - COMMISSION OF ENQUIRY - WHETHER APPLICANTS HAVE SUFFICIENT INTEREST- THRESHOLD TEST - ALLEGATIONS OF BIAS AND PROCEDURAL UNFAIRNESS - WHETHER LEAVE TO OPERATE AS STAY OF PROCEEDINGS - NATURE OF STAY UNDER JAMAICAN CIVIL PROCEDURE RULES

Mangatal J:

1. The application before me is an application for leave to apply for judicial review of:

    a. The decision of the Respondents to continue with the hearing of the Commission of Enquiry into the Collapse of Financial Institutions in Jamaica in the 1990s (the "Commission") as currently constituted; and

    b. The refusal of the Chairman of the Commission, the Hon. Mr. Justice Boyd Carey (Ret'd) to recuse himself from the Commission.

2. Pursuant to Rule 56.3(2) of the Civil Procedure Rules 2002, the application was brought before the Court ex parte, that is, without notice to any other persons.

3. Amongst the orders which the Applicants seek are the following:

    (a). That the Applicants be granted leave to apply for an order of *prohibition* preventing the continuation of the Commission as currently constituted;

    (b). That the Applicants be granted leave to apply for an order of certiorari quashing the decision of the Respondents to continue with the hearings of the Commission;

    (c). That the Applicants be granted leave to apply for an order of *certiorari* quashing the refusal of the 1st Respondent to recuse himself from the Commission;

    (d). That the grant of leave shall operate as a stay of the proceedings of the Commission until the application for judicial review is heard and determined.

There are certain orders for declarations referred to in the application, but Counsel for the Applicants indicated that those applications are not being sought at this time and will be pursued at the substantive hearing if permission is granted.

4. It is important to have an understanding of the nature of the application for leave, which is what is before the Court at this time. This is not an application that can determine the substantive issues raised by the Applicants. This application is simply one that seeks the Court's permission or leave to apply for judicial review, seeking orders of prohibition and certiorari. The Court is here acting as a gatekeeper and decides whether an applicant's case meets the threshold and ought to receive the green light to bring a claim for judicial review. If that permission is granted, it is mandatory for the Court to direct whether the grant of leave shall operate as a stay of the proceedings being challenged. In this case the relevant proceedings are the proceedings of the Commission. If leave is granted, the Court must say whether the grant of that permission shall operate as a stay of those proceedings until the application for judicial review is heard and determined.

5. Judicial Review is the process by which the Courts exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or certain administrative powers which affect the public. This is the process that allows the private citizen to approach the Courts seeking redress against ultra vires or unlawful acts or conduct of the State, by public officers or authorities. By this process the Courts have a discretion as to whether to uphold a challenge to decisions or proceedings of such bodies on the basis, broadly speaking, of what may be termed grounds of illegality, irrationality, and procedural impropriety. The Court is not engaged on an analysis of the merits of the decisions themselves, but rather is concerned with the process by which the proceedings were conducted and by which these decisions were arrived at.

6. The remedy of judicial review is a remedy that lies exclusively in the public law. It is directed at the acts or inaction of persons or

bodies exercising public duties or functions. Hitherto Judicial review was not concerned with a citizen's private law rights. However the New Rules have combined with the process some private law remedies e.g. Injunctions and some dual purpose remedies e.g. Declarations, for convenience and where necessary or appropriate.

7. The judicial review procedure has special provisions designed for the protection of public bodies. Some of these are the short time limits within which applications are to be made and the need for the court's, leave or permission.

8. Unlike public law remedies, there was and is no requirement generally for persons pursuing private law rights against other parties to obtain the leave of the court before starting a claim in court. It is difficult to improve on the description of the purpose of the requirement of leave set out in the well-known decision of the English House of Lords in **Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Limited** [1981] 2 All E.R. 93, where at page 12-13 Lord Wilberforce stated:

> *The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.*

9. In the White Book Service, Civil Procedure 2007, paragraph 54.4.2, at page 1657, in relation to the English Rules on Judicial review, it is stated:

> *The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. ...Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground in seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (R v. Legal Aid Board Ex p. Hughes (1992 5 Admin.L.Rep.623).*

10. In **Sharma v. Brown-Antoine** (2006) WIR 379, a decision of the Judicial Committee of the Privy Council in relation to our Caribbean neighbour Trinidad and Tobago, at page 387, Lord Bingham of Cornhill and Lord Walker of Westinghope, indicated:

> *...The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v. Legal Aid Board, ex parte Hughes(1992) 5 Admin L.R. 623 at 628, and Fordham , Judicial Review Handbook(4th Edn, 2004), p.426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.*

11. It is to be noted that an arguable ground with a realistic prospect of success, is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success. " The discretion that the Court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."- Per Lord Wilberforce at page 6 of the House of Lords' decision in **Inland Revenue Comrs v. National Federation of Self-Employed and Small Business Limited**[1981] 12 All E.R.93.

12. It is because the Court is at the leave stage simply acting as a filter that sifts out claims that are made by busybodies, or that are misguided or have no arguable grounds demonstrating a realistic prospect of success, that the Rules permit applications for leave to be made ex parte. This leave stage is quite different from the stage where the substantive application for judicial review is heard. At that point, the Respondents have the right, and must certainly have been served, with all the documents and papers filed in the matter and they are entitled to be heard fully on an inter partes full hearing.

13. Originally, injunctions were exclusively a private law remedy and the remedy of a declaration was widely used in the private law. However, they have been adapted to serve special purposes in the field of public law. In our present Rules, the C.P.R., Part 56, Rule 56.1(3) "Judicial Review" is stated to include the remedies of certiorari, prohibition and mandamus. In addition to these orders,

the court may grant declarations, an injunction, damages and certain other remedies.

14. On the morning of the 5th of February 2010, the Attorneys at Law for the Applicants appeared before me. Mr. Lackston Robinson, the Deputy Solicitor General in the Attorney General's Department, also appeared. Mr. Robinson indicated that, instructed by the Director of State Proceedings, he appeared for the Respondents. Mr. Robinson indicated that his clients had not been served, and he submitted that the Respondents had a right to be heard. He went further and indicated that he was applying for the Applicants' application for leave to apply for judicial review to be adjourned. He further submitted that the application was not at all urgent and that the Enquiry is an extremely costly-procedure, with great costs being incurred every day.

15. In response to Mr. Robinson's application, Mrs. Foster-Pusey on behalf of the First Applicant, whose submissions the other applicants adopted, referred me to Rule 56.3(1) and(2) of the Civil Procedure Rules 2002, "the C.P.R."

16. Rule 56.3(1) states that a person wishing to apply for judicial review must first obtain leave. She pointed out that Rule 56.3(2) indicates that an application for leave may be made without notice. Rule 56.4(1) states that an application for leave to apply for judicial review **must** be considered forthwith by a judge of the Court(my emphasis). Rule 56.4(2) states that the judge may give leave without hearing the applicant. This means that the court can consider the application on the papers alone. It is only if the judge is minded to refuse the application, or the application includes a claim for immediate interim relief, or it appears that a hearing is desirable in the interests of justice that the judge **must** direct that a hearing be fixed(my emphasis). As a matter of practice, in our courts, the civil Registry has continued to set applications for leave

down for an oral hearing, with the applicant appearing before the judge. However, the point is that the rules contemplate the application being capable of being considered simply on the papers.

17. Rule 56.4(4) states that the judge **may** direct that notice of the hearing be given to the Respondent or the Attorney General(my emphasis). Mrs. Pusey points out that whilst this sub-rule indicates that the court may direct that the Respondent or the Attorney General be given notice, the notice is of the **hearing**, and does not expressly say that the Respondent or the Attorney General should even be served with all of the relevant papers as Mr. Robinson argued. She submitted that it was erroneous to suggest that the Respondents are **entitled** to be heard, it is a matter for the court's discretion. She also submitted that, given that the Applicants are entitled to make their application ex parte, if the Respondents or the Attorney General's representative turns up at the hearing, then they must come prepared to deal with the application, which the Applicants are entitled to make. Mrs. Foster-Pusey bolstered her submission by reference to the fact that the proceedings in respect of which the application is being made are continuing, ongoing proceedings, transpiring and occurring currently. They have received great publicity, and it has been very clear from media coverage, that the Applicants intended to make this application. Further, that the grounds for the application, and the intention to proceed to court were raised at the Commission Hearings and in correspondence, and have, to use her expression been "widely noised about" in the media.

18. I pointed out to the Applicants that, insofar as their application indicates that they seek permission to apply for an order of prohibition and orders of certiorari, sub-section 56.4(9) would come into play if leave were granted. I asked them to state their

position with regard to that factor and the question of any entitlement of the Respondents to be heard on the issue of a stay of proceedings. Rule 56.4(9) states:

> *56.4(9) Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings.*

19. Mr. Garcia responded to that aspect of the matter, and referred the court to Part 17 of the C.P.R. which deals with applications for "Interim Remedies". Rule 17.1(3) states that the fact that a particular type of interim remedy is not listed in paragraph 17.1(1), does not affect any power that the court may have to grant that remedy. However, as Mr. Garcia points out, there is no mention of a stay of proceedings amongst those remedies included as interim remedies in paragraph 17.1(1). Further, that whereas Rule 17.4 (4) circumscribes the limited circumstances, and duration in respect of which the court has power to order an ex parte interim order, for example an injunction, (the court may not, without more, grant an interim order which was applied for without notice for longer than 28 days), Rules 56.3 and 56.4 contemplate the application for leave being made without notice, and therefore that the Court may grant a stay of the proceedings(without such a time limit), without notice. The fact that under the Jamaican Rules, the C.P.R., the stay of proceedings is not to be considered an interim remedy is reinforced by the fact that, following right after Rule 56.4(9), is Rule 56.4(10), which states:

*56.4(10) The judge **may** grant such interim relief as appears just.*

20. In my judgment, and in all the circumstances, my ruling was that the Respondents do not have any **right** to be served with the application or to apply for an adjournment of an application which the Rules authorize and contemplate the Applicants bringing

without notice. As to the matter of entitlement to be heard, I agreed with the Applicants' submissions that it was not a matter of entitlement, but rather was a matter for the court's exercise of discretion and judgment.

21. To place the matters and relevant considerations in context, I note that at paragraph 15-016, and note 44 of the well- respected work of De Smith, Woolf, and Jowell, Judicial Review of Administrative Action, 5th Edition, 1995, dealing with the then Order 53 Procedures, the learned authors state:

> *Applying for leave*
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> *15-016-Order 53 requires the application for leave to be made ex parte, but, in some circumstances, a practice has developed for respondents to be represented at hearings. (Footnote 44-Ord.53, r.3(2). ..... In R.v.Secretary of State for the Home Department, ex pa. Doorga [1990] IMM. A.R.98,[1990] C.O.D., 109, Lord Donaldson M.R. said that where a judge was uncertain whether or not to grant leave, it was proper and reasonable for the application to be adjourned in order that it be further considered inter partes, but: "At such a hearing it is not for the respondent to deploy his full case, but simply to put forward, if he can, some totally knock out point which makes it clear that there is no basis for the application at all . However, the practice has to be followed with caution since it can result in a respondent being saddled with the expense and inconvenience of two sets of proceedings....*
>
> (my emphasis).

22. I ruled that the matter is urgent and is a matter of great public interest. Indeed, the very costs involved in the Enquiry which the learned Deputy Solicitor General alluded to, coupled with the immense public interest and the desirability for certainty in relation to the integrity of the Commission's proceedings and

constitution, suggest that it cannot be in the interests of the Applicants, the Respondents, or of the public generally for the matter to be adjourned, and hence to remain dangling in an unnecessary state of uncertainty. See paragraph 27 of the Affidavit of the 2nd Applicant Patrick Hylton and Exhibits "PH 12" and "PH13" as to the budget and costs of the Commission. These applications are not directed to proceedings that are not yet started or that are finished. They are proceedings which are underway, and on-going and literally proceeding as this application was being considered-See paragraph 8 of Mr. Hylton's Affidavit and Exhibit "PH3" attached to e-mail from the Commission dated January 11 2010. It attached the planned Schedule which indicated Sittings presently, every week, from now until the end of March, set for Tuesday to Thursday of every week until then.

23. In my view, given the nature of the leave proceedings, and what would be involved, the appropriate way to meet the justice of the case and to exercise my discretion was to refuse Mr. Robinson's application for an adjournment, order that the matter commence at 2:00 p.m. and grant the Respondents, as requested by Mr. Robinson, the right to be heard. Given my mandate from the C.P.R. to deal with the application for leave forthwith, the urgency of the matter, and the limited role, if any, which in my view may be played by the Respondents at the leave stage, I felt it appropriate to commence the hearing of the matter. In my view, justice would not appear to be done, if the citizen's application, which he or she is entitled and authorized by the Rules to bring ex parte for permission in order to seek redress from alleged wrongs carried out by a public authority, were to be adjourned by the Court on the application of a representative of the very body whose decision and decision-making process is to be reviewed and alleged to be flawed. The presence of the Respondents' representative before me meant

that there was no need to consider whether the Respondents should be given notice of the hearing. I ordered that the application and all other documents filed be served on the Respondents and the Attorney General. The Attorney General's Department was ordered to be served on the same day, 5th February 2010. The Respondents were allowed until 2:00 p.m. on Monday the 8th February 2010 to file any Affidavits, if so advised. I ordered that the matter would commence on Friday the 5th February at 2: 00 p.m. and continue on Tuesday the 9th February 2010, which would allow for the Respondents to make such submissions as they may consider necessary or such as would assist the Court. I so ordered because I could not see any prejudice that could possibly be occasioned to the Respondents in the circumstances, and against the backdrop of our C.P.R.

24. Curiously, Mr. Robinson, having sought the court's permission to be heard, and been granted that permission and more, decided to withdraw himself from the hearing and to refuse to accept a complete bundle of documents offered to him in court by the applicants, separate and apart from any question of formal service. The fact that the Respondents, through their Attorney was granted permission to be heard, does not, and did not, convert the hearing into an inter partes hearing.

25. The matter proceeded in the afternoon on Friday the 5th and continued on the morning of the 9th February 2010 without any one from the Attorney General's Chambers presenting themselves, despite having sought and received the court's permission to be heard, and despite that Department being served with copies of the documents filed. Nothing has been filed on behalf of the Respondents.

26. I now turn to consider the application itself.

The Applicants

27. The Application, which was filed on the 4th February 2010, is supported and verified by the evidence on Affidavits of Shirley Tyndall sworn on the 2nd of February, 2010, Patrick Hylton sworn on the 3rd of February 2010, Omar Davies, sworn on the 3rd of February 2010, Kevin Powell sworn on the 2nd of February 2010, and Janet Farrow sworn on the 4th of February 2010. There were, as is common in matters where the circumstances are ongoing and unfolding, a number of Affidavits which were filed subsequent to the commencement of the application and I shall attempt to deal with those as their relevance arises.

28. I state from the outset that I am satisfied that the Applicants have set out all of the matters which are required by Rule 56.3 (3) to be stated in the application.

29. The Applicants are described as follows:
The 1st Applicant, the Hon. Shirley Tyndall, is the Former Financial Secretary, Former Vice Chairman of the Board of Directors of Finsac Limited and the Former Chairman of Financial Institutions Services Limited "F.I.S.". She was a member of the Boards of both Finsac Limited and FIS from their inception until her retirement in 2005.

30. The 2nd Applicant, Mr. Patrick Hylton, is a banking executive and former Managing Director of Finsac Limited and FIS. He was Managing Director of FIS from 1995 to 2002 and of Finsac Limited from 1998 to 2002, and continued as a consultant until May 2003.

31. The 3rd Applicant, Mr. Omar Davies, was the former Minister of Finance and Planning of Jamaica between the years 1993 and 2007 and is a University lecturer.

32. The 4th Applicant, Jamaican Redevelopment Foundation Inc., is a private corporation organized in accordance with the laws of the State of Texas in the USA and registered in Jamaica in 2002 under

Part X of the Jamaican Companies Act as a company incorporated outside of the island carrying on business within the island. The 4th Applicant acquired a portfolio of delinquent accounts from Finsac Limited, related entities and Workers' Savings and Loan Bank. The 4th Applicant is the entity to which reference is made in paragraphs (v) and (vi) of the Terms of Reference of the Commission.

33. The 1st Respondent is a retired Judge of Appeal. On the 24th of October 2008, he was appointed by the Governor General of Jamaica as a Commissioner and the Chairman of the Commission. The 2nd Respondent was appointed by the Governor General as a Commissioner on the 24th October 2008, and the 3rd Respondent was so appointed on the 12th of January 2009. These appointments were made pursuant to the Commissions of Enquiry Act.

34. Pursuant to the Instruments of Appointment, the Respondents have been authorized:

(1) To examine the circumstances that led to the collapse of the several financial institutions in the 1990s with particular regard to:

(a) the extent to which these circumstances were directly influenced by domestic or external factors;
(b) Government's fiscal and monetary policies;
(c) The management practices and role of Board of Directors of the failed institutions;
(d) The performance of Government's regulatory functions;

(2) To consider what actions (if any) could have been taken to avoid this occurrence and to evaluate the appropriateness of the actions which were taken by the authorities in the context of Jamaica's economic circumstances and in comparison to

intervention by the State in other countries which have had similar experiences;

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

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

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

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

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

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

35. According to the Applicants, in particular, the 2nd Applicant, "Finsac" has been understood and treated by the Commission as meaning and including Finsac, FIS and their affiliated companies.

36. Under the heading **Who May Apply For Judicial Review**, Rule 56.2. of the C.P.R., so far as relevant, states as follows:

56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes-

(a) any person who has been adversely affected by the decision which is the subject of the application;...

37. The Applicants claim that they have sufficient interest in the subject matter of the application for the following reasons:

a. They have been requested to appear, and have either appeared or agreed to appear before the Commission;

b. The Commission's terms of reference require it to consider and make findings in relation to actions taken and decisions made by them while in their positions of responsibility;

c. The Commission's terms of reference require it to consider and make findings in relation to the terms and conditions of the sale of non-performing loans to the 4th Applicant as well as to review the practices of the 4th Applicant in the treatment of delinquent borrowers and the management, sale and/or disposal of their assets.

d. Their reputations could be affected by the Commission's findings;

e. They have significant public profiles;

f. They wish to ensure that the proceedings at the Commission are conducted in a procedurally fair and impartial manner;

g. The conduct of the Commission and the Commissioners is a matter of immense public interest.

38. Learned Queen's Counsel Mr. Hylton, on behalf of the 3rd Applicant submitted that his client plainly has sufficient interest. Mr. Hylton's submissions, along with the authorities he cited, were

adopted by the other Applicants. During the period under consideration by the Commission the government at the time established a series of companies to manage this process. They included Finsac and associated companies. Dr. Davies was the Minister responsible for Finance at the relevant time.

39. In September 2007 there was a change of government and in October 2008 the new government established the Commission to investigate various matters including the financial crisis previously referred to and the conduct of Finsac.

40. Mr. Hylton cited a number of authorities which I find instructive. In **Mitchell v. Georges** (2008) 72 W.I.R. 161, after a change of government in St. Vincent and the Grenadines, a Commission of Enquiry was established to enquire into two failed government projects. The applicant had been the Prime Minister at the time when these projects were implemented. The relevant Rule in the Eastern Caribbean Civil procedure Rules is in identical terms to our rule The judge who heard the application, refused the applicant leave to apply for judicial review and the applicant appealed. Rawlins J.A., who delivered the leading judgment of the Court of Appeal of the Eastern Caribbean States, observed at paragraph 3, : "It is clear from the terms of reference that the appellant is a person whose conduct is a subject of the enquiry".

41. See also **Simmonds and Others v. Williams and Others (No 2)** (1999) 57 W.I.R., 95, - former Prime Minister and the Minister of Finance were accepted by the Court as having sufficient locus standi to pursue the application.

42. I accept that the 3rd Applicant is a person who would plainly have sufficient interest in the subject matter of the application. It is clear from the terms of reference that the Commission will be considering the decisions he made when he was Minister of Finance in the 1990's. I also accept Mr. Hylton's submission that

the Commission clearly is of the view that Mr. Davies has an interest in the proceedings and that the Commission has certain duties in relation to his conduct. Prior to starting its hearings, the Commission wrote to him to send in written submissions regarding the terms of reference and then they wrote to him again, inviting him to appear before the Commission.

43. Mrs. Foster-Pusey, on behalf of the 1st Applicant, referred to the fact that her client was a former Financial Secretary of Jamaica between mid 1989 and May 1, 2005. She was a member of the Board of Finsac and FIS from their inception and was subsequently vice-chairman and chairman. At paragraph 7 of her Affidavit, the 1st Applicant indicates that she was invited by the Secretary to the Commission to provide written submissions in relation to certain aspects of the Commission's Terms of Reference. The 1st Applicant made written responses and has appeared before the Commission. She is to appear before the Commission on a date to be decided by the Commission. Mrs. Foster-Pusey submitted that it is clear that the decisions made by the 1st Applicant while she was on the relevant Boards will be considered. She is seen as a central figure and her reputation is at stake. I accept that the 1st Applicant is clearly a person whose conduct and decisions are a subject of the enquiry, as manifested by the Commission's request for responses, the 1st Applicant's supply of them, and the request for her to give evidence at the Commission.

44. On behalf of the 2nd Applicant, Mr. Garcia referred me to Mr. Patrick Hylton's Affidavit. Mr. Hylton has also been requested by the Commission to provide written responses and he has done so. He is expected to attend the Commission to give evidence at a date to be rescheduled. As Managing Director of both Finsac and FIS during years relevant to the Commission's terms of reference, it is clear that Mr. Hylton has sufficient interest in the subject matter of

the application, for the same reasons as do the 1st and 3rd Applicants.

45. On behalf of the 4th Applicant, learned Queen's Counsel Mr. Foster referred me to the Affidavit of Ms. Janet Farrow, including letters exhibited thereto from the Commission to the 4th Applicant requesting written responses, and to responses written on behalf of the 4th Applicant by their Attorneys. More recently, on the morning of the 9th February, a Further Affidavit was filed sworn to by Ms. Farrow, which was served by facsimile on the Attorney-General's Chambers. The Affidavit revealed that Ms. Farrow was on Friday the 5th February served with a Summons to Witness signed by the 1st Respondent and dated the 4th February requiring that she attend the Commission to give evidence and to bring with her certain documents pertaining to Thermo-Plastics Jamaica Limited. The Court was advised by Ms. Farrow's Third Affidavit, filed on the 10th February, that in obedience to the Summons Ms. Farrow attended and gave evidence. Mr. Foster also pointed to the fact that the conduct of the 4th Applicant is expressly the subject of certain of the Commission's Terms of reference. I accept that the 4th Applicant is plainly an entity with sufficient interest.

46. As regards the 1st – 3rd Applicants, I am of the view that their reputations can be adversely affected by determinations and procedures that may occur at the Commission. On this ground, as well as others previously discussed, I am therefore of the view that all four of the Applicants have surmounted the hurdle, if I may so term it, of proving that they have a sufficient interest in the subject matter of the application.

47. The issue to do with whether the Applicants have sufficient interest relates to their standing. A distinct but closely related issue is the question of whether the proceedings of a Commission of Enquiry are susceptible to judicial review and I think this is a convenient

juncture at which to consider this question briefly. In the two cases from the Eastern Caribbean Court of Appeal **Mitchell v. Georges** and **Simmonds and Others v. Williams and others** the Court clearly considered that such proceedings were capable of comprising the subject matter of an application for judicial review. Similarly, in the fairly recent Canadian case of **Pelletier v. Canada (Attorney General)** 2008, FC 803(Can LII), the Federal Court of Canada was of the clear view that judicial review was available in relation to the Fact Finding Report of a Commission of Enquiry in relation to a certain sponsorship programme and advertising activities. In that case, reference was made to the decision of the Judicial Committee of the Privy Council in **Mahon v. Air New Zealand Ltd.** [1984] 1 A.C. 808, in which Lord Diplock at page 814 discussed the differences between an investigative enquiry and ordinary civil litigation. All told, in so far as decisions are taken in an enquiry and procedures are adopted by persons carrying out public law functions, and which may affect members of the public, including their reputations, I am of the view that the proceedings at a Commission of Enquiry can be the subject of an application for judicial review.

48. Before I turn to the core question involved in this application, which is the question of whether the Applicants or any of them have reached the applicable bar, and have raised arguable grounds with a realistic prospect of success, I turn to consider whether there exists any discretionary bar, such as delay. Rule 56.3(3) sets out the matters which must be stated in an application. Rule 56.6(1) indicates that an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose. Rule 56.3(f) requires the applicant to state whether any time limit for making the application has been exceeded.

49. At page 8 of the Application, it is stated that the Respondents' decision to proceed with the enquiry notwithstanding concerns raised by the Applicants through a letter to the Commission dated 31st December 2009 was communicated by the Commission to the 2nd Applicant's Attorney-at-Law on the 18th day of January 2010 and to the other Applicants' Attorneys-at-Law on the 19th day of January 2010. This application was filed on the 4th of February 2010, just over two weeks after the date when it is alleged that grounds for the application first arose and I am therefore of the view that the application has been made within three months and has been made promptly.

50. Secondly the Applicants at page 8 state, as required by Rule 56.3(3) (d) that no alternative form of redress exists. I note that in **Mitchell v. Georges**, at page 193, the Court indicated that it would generally be appropriate to make objections to the Commission before applying for judicial review. However, the Court rejected an argument that such a course constituted an alternative remedy and went on to state per Rawlins JA " Accordingly, it would have been more appropriate for an appellant to have challenged the commission on the ground of bias by appearing before it.... However, I do not think that there is any practical advantage in asking the appellant to return to the commission for this purpose particularly because he is challenging the very jurisdiction of the commission to continue to hear the inquiry against them."

51. I note that in this case the Applicants say that they raised their concerns in their letter to the Commission dated December 31 2009, and that, when on the 19th January 2010, they attempted to raise the matters during the hearings and to make oral submissions they were not permitted by the Commission so to do- see Exhibit ST1, attaching to the 1st Applicant's Affidavit, excerpts of the Transcript for the Commission's hearings on January 19

2010. In addition, the Applicants rely upon the letter dated January 20 2010 and the response also dated January 2010, exhibits "PH14" and "PH15" respectively as evidence that the Commission did not intend to hear arguments from the Applicants' Attorneys on the issue of perceived and /or actual bias. See paragraphs 32 and 33 of the 2nd Applicant's Affidavit. I am satisfied that there is no alternative form of redress available to these applicants and so there is no bar to the exercise of the Court's discretion on that basis.

THE THRESHOLD - ARE THERE ARGUABLE GROUNDS WITH A REASONABLE PROSPECT OF SUCCESS

52. Broadly speaking, the grounds upon which the Applicants all rely may be divided under two main heads, that of Bias and other aspects of Procedural Fairness. I shall deal with the issue of Bias first.

BIAS

On this matter, Mrs. Foster-Pusey made the main submissions which were adopted by the other Applicants. She made reference to The Terms of Reference of the Commission

53. I agree with Mrs. Foster- Pusey's submission that the Terms of Reference suggest that the role of the Commission may be adjudicative to a considerable extent, in that the Commission is required to arrive at a number of findings, including the causes of the intervention of certain financial institutions and whether certain persons were treated fairly.

In the Canadian case **Pelletier**, at paragraph 71, the Court found that the applicable test was "a flexible application of the reasonable bias test". Justice Teitelbaum adopted a test enunciated in a previous Canadian decision and it was submitted to me that this is the test applicable in the present case. His Lordship stated:

The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information[...] [T]hat test is "what would an informed person, viewing the matter realistically and practically –and having thought the matter through, conclude. Would he think that it is more likely than not that Mr. Crowe [the Chairman of the Board], whether consciously or unconsciously , would not decide fairly.

54. Mrs. Foster-Pusey also referred to the well-known House of Lords decision in **re Pinochet** [1999] 1 All E.R. 577. She referred to a number of points made in that case in respect of automatic disqualification.

55. Reference was also made to a case concerned with the principles of apparent bias, **Porter v. Magill** [2002] 1 All E.R. 465, where at paragraph 103, Lord Hope stated: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

56. In relation to the question of bias, Mrs. Foster-Pusey submitted that the following facts were relevant to the 1st Respondent:

i. He had an unauthorized, unsecured overdraft at Century National Bank. After the Bank was taken over by the Ministry of Finance he engaged in correspondence with Finsac/FIS to arrange for the settling of this debt.

ii. A Century Bank Official noted in writing that he was a "close associate of the Chairman Mr. Crawford who advises me to treat well."

iii. He is a shareholder of Bev Carey & Associates (1985) Limited and that company had a loan with Jamaica

Citizens Bank which was subject to intervention by the Ministry of Finance. The debt was assumed and dealt with by Finsac/FIS, was sold to the 4th Applicant who later sold it to AIS.

57. The submission continues that the 1st Respondent's overdraft has been repaid and that there appears to be some doubt as to whether the loan to the company is still outstanding. The point, Mrs. Pusey submits, is however, that the undisputed facts place the 1st Respondent within the class of persons covered by the Terms of Reference, that is the delinquent borrowers and debtors in respect of whom the Commission is required to determine whether they were treated fairly and equally.

58. Reference was made to the letter dated December 31st 2009 to the Commission, signed on behalf of all the Applicants raising their concerns as to bias, and to all the enclosed documents which they say raise the issue –see exhibit ST1 attached to the First Applicant's Affidavit. Mr. Hylton also referred to the letter from the 1st Respondent to the FIS dated 12th February 1998, part of Exhibit ST1, and also part of Exhibit PH4 to the Affidavit of the 2nd Applicant in which the 1st Respondent refers to "further accrual of interest which seems to grow ever alarmingly." Mr. Hylton reminded that the issue of the policy in respect of the rates of interest is a subject of the enquiry.

59. Mrs. Foster-Pusey further submits that the evidence of the association of the 1st Respondent with the then Chairman of Century National Bank is also a matter for close examination by the court. Mr. Donovan Crawford, Chairman of the Board of Century Bank immediately prior to the intervention by the Ministry of Finance was due to appear before the Commission on the 4th of February 2010. That has not yet apparently materialized. However, Mrs. Foster-Pusey submits that the Commission is also

required to review the management practices of the Board while it was headed by Mr. Crawford. She submits that the informed person looking on would conclude that there is at least a "real possibility" that the 1st Respondent is likely to be biased, whether consciously, or unconsciously, in reviewing matters related to Mr. Crawford and Century National Bank.

60. I have looked at the Commission's letter to the Applicants dated January 18, 2010, Exhibit "PH8" to the Affidavit of the 2nd Applicant. In that letter the Commission, amongst other things, refers to advice received from the learned Solicitor General and states:

> *... The Solicitor General has advised that there is no factual substratum on which one can reasonably base a claim on actual or perceived bias and /that the matters, the subject matter of the enquiry can reasonably be heard and pronounced upon.*
>
> *The overdraft facility extended to Boyd Carey was fully discharged.*
>
> *As regards the loan to Bev Carey & Associates Limited, neither Finsac/FIS JRF nor IAS are in a position to substantiate the existence of this loan.*

61. At exhibit "PH 16" to the 2nd Applicant's Affidavit there is also exhibited a Gleaner news item headed "Carey Fires Back-Finsac Chairman says there was no Loan". In that article, there is a quotation from the 1st Respondent in which he is alleged to have stated, amongst other things, ".... I wish to state categorically that there is no unresolved family debt; there never was a loan to create a debt".

62. Based on the matters put before me, applying the appropriate threshold test, I am of the view that there are grounds which are arguable and with a real prospect of success in relation to allegations of bias concerning the 1st Respondent.

63. The Applicants also rely upon the matter of bias or apparent bias in relation to Counsel for the Commission. Reference was made to the case of **Simmonds and others v. Williams and others(No. 2)** . In that case the Applicant Dr. Simmonds, a former Prime Minister of St. Christopher and Nevis, submitted, among other things, that counsel to the Commission of Enquiry was Leader of Opposition while he was Prime Minister. The judge at first instance had taken the position that the bias shown would have had to relate to the commissioner himself. On appeal, Acting Judge of Appeal Justice Georges stated:

> *Dr Cheltenham submitted that since counsel would be given no role in writing of the report and played no part as such in the decision-making process, their bias could in no way infect the findings of the Commissioner. In short, it had not been proved that the bias affecting the counsel to the commission could lead to a real possibility that the commissioner himself would as a result treat unfairly and with disfavour the appellants in the course of his determination. The fallacy of that submission, as I see it, is that vis-a vis Dr. Simmonds, based on the unchallenged findings of the trial judge of bias by counsel to the commission in respect of that appellant, there surely is a danger of counsel not discharging their functions fairly and impartially (including the rendering of proper advice) which could in all likelihood influence the judgment of the commissioner on his findings of the facts. As Mr. Viera rightly pointed out, bias is such an invidious thing that a person may in good faith believe that he is acting impartially, when his mind may unconsciously be affected by bias.*

64. Mrs. Foster-Pusey argues that, as regards Counsel to the Commission Mr. Henriques, Queen's Counsel, there is documentary evidence, which she referred to in the First Affidavit of Janet Farrow that indicates that he was a guarantor of debts by Premier Food Company Limited, which debts have been handled by Finsac/FIS and the 4th Applicant. Mrs. Foster-Pusey points out that Counsel has denied that he signed the guarantees in question. Mr. Henriques' letter dated July 13 2004, to Dennis Joslin Jamaica Inc. and the enclosures thereunder, exhibit "JF12" of the Affidavit of Janet Farrow, sworn to on the 4th February 2010, were referred to in detail. However, Counsel for the 1st Applicant submits that Mr. Henriques' denial is irrelevant. Refin Trust has written a demand letter to Counsel in respect of the outstanding liability of Premier Foods. The 4th Applicant has sued Premier Foods to recover the sums owed, although Counsel is not a party to that Suit. Mrs. Pusey submits that the informed person looking on would conclude that counsel is likely to be biased, whether consciously or unconsciously in performing his duties and rendering his advice to the Commission. Mr. Hylton Q.C. also referred to Counsel's letter and indicated that in addition to his denial of signing the guarantees, Counsel denies that he ever requested the lender Island Victoria Bank Limited to make the facility of US $120,000 available. However, Mr. Hylton referred to a Resolution of Premier Food Company Limited which Counsel signed as Chairman of the Company, by which resolution the company resolved to make the loan request to Island Victoria Bank.

65. Whilst it is true that Counsel Mr. Henriques had long ago denied ever signing the Instruments of Guarantee and had even put forward documentation to show that he was not even in the island when he is alleged to have signed it, it appears to me that on this

ground also the Applicants have sufficiently demonstrated a case which merits full investigation at a full hearing with all the parties and all the relevant evidence.

OTHER ASPECTS OF PROCEDURAL UNFAIRNESS

66. In relation to this issue, Mr. Hylton Q.C. made submissions on behalf of all of the Applicants. Section 9 of the Commissions of Enquiry Act provides that the Commissioners "may make such rules for their own guidance, and the conduct and management of the proceedings before them...as they may from time to time think fit." However, it was submitted that this does not mean that they are at large in relation to the procedure to be followed. Mr. Hylton made reference to a number of authorities which he submitted indicate that the procedures to be adopted by a Commission must be fair. The closer the resemblance that the proceedings bear to judicial proceedings, the greater is the need for procedural protection and therefore more definite and fair procedures. It was submitted that the process provided for and the nature of the decision-making body in this case are very close to judicial decision- making in many ways. Reference was made to **Canada (AG) v. Canada (Commission of Enquiry on the Blood System)** [1997] 3 S.C.R. 440 and **Baker v. Canada (Minister of Citizenship and Immigration)** [1999] 2 S.C.R. 817. It was also pointed out that the conclusions arising out of the enquiry can also affect the reputations of the Applicants.

67. The Applicants' attack on the procedures adopted at the Commission are quite wide-ranging, and numerous references were made to excerpts of the Official Transcript of the proceedings exhibited to the Affidavit of Kevin Powell sworn on the 2nd February 2010.

68. Mr. Hylton submitted that the Respondents have adopted procedures that are unfair and in breach of natural justice in at least four ways:

(a). The procedures being followed are uncertain;

(b). The procedures being followed are inconsistent;

(c) The Defendants have failed to inform Dr. Davies, the 3rd Applicant of the allegations against him; and

(d). The defendants have allowed cross-examination to be carried out in a way that is patently unfair.

69. It is the Applicants case, particularly that of the 3rd Applicant, that both orally and in writing requests have been made of the Commission that they advise what procedures will be adopted and followed at the hearings. In response to one of the letters written by Counsel on the 3rd Applicant's behalf, the Commission responded saying that they would "determine and advise of the procedures to be followed" prior to the continuation of the hearings. This has still not happened.

There is reference to the fact that during the first week of the hearings, a direction was given that questions were to be submitted in writing prior to being asked of a witness. However, when the 3rd Applicant came to give evidence, that requirement was not enforced as both members of the public and an attorney were allowed to ask questions of which they had not given prior notice. See also paragraph 16 of the First Affidavit of Janet Farrow.

70. It is also alleged that certain comments by the Commissioners from time to time have suggested that they may have prejudged some of the issues which are the subject of the Commission. For example, on page 5 of the Transcript of the proceedings for December 9th 2009, and on a number of other occasions, the 1st Respondent refers to debtors and customers as "victims".

71. It is also alleged that the Commissioners have had regard to material and statements which they have received outside of the hearings and which they have not passed on to any of the Applicants. One example that Mr. Hylton cites is the statement that "Eagle Commercial Bank was not insolvent", notes of Transcript for November 25 2009, pages 33-35.

72. The 4th Applicant has also added a charge that in relation to a number of matters in respect of which there are cases pending in Court, and where the matters concerned fall generally under the principle that the matters are *sub judice* , or under consideration by the court, the 1st Respondent's position has been that "It doesn't matter, this enquiry can hear the evidence"-Notes of Transcript for December 9, 2009, page 17. The 4th Applicant complains that this is unfair and prejudicial to its rights.

73. In relation to the question of the need for procedural fairness at Commissions of Enquiry, there is the very instructive decision from our own Courts, in the unreported decision of Harris J.(as she then was) in Suit No. M. 063/2000, **Jennifer Carolyn Gomes et al v. The Attorney General**, delivered July 3rd 2000. Whilst these were not proceedings for judicial review, there are some very useful pointers as to the powers and duties which the Commissioners have in relation to procedures. At pages 4-5 of the Judgment, her Ladyship stated:

> *It is the intention of the legislature that the Commissioners have the authority to formulate rules which govern the supervision and control of all steps and procedural processes in matters over which they preside. It was intended that such rules would effectively direct, in an orderly manner, the matter before the Commission. In the management and control of the proceedings, the Commissioner has the power to impose conditions with*

> *respect to all members of the public in attendance, if he deems fit. However, such discretion must be exercised within the constraints of the law* (my emphasis).

Again, at page 6 the learned Judge states:

> *The Commissioner must also demonstrate fairness and impartiality in the conduct and management of the proceedings. The public has the right to attend the Enquiry, which includes a right to take notes. The Commissioner permitted the attorneys-at-law and the journalists to take notes, yet, he prohibited the Applicants from so doing. The procedure by which he conducts his Enquiry must be done with fairness and impartiality. It must be acknowledged that when he had excluded them from the note taking exercise, that this procedure was one of unfairness and impartiality.*

74. I agree with Mr. Hylton that this decision is useful because it demonstrates that not only must the rules be certain, but they must be applied with consistency and even-handedly.

75. In my view, there are a number of arguable grounds relating to procedural unfairness and irregularities which merit further consideration at a full hearing and which appear to have real prospects of success.

76. I am of the view that the Applicants ought to be granted leave to apply for judicial review as prayed in their Application. The matters raised in the grounds supporting this application are neither frivolous nor vexatious.

77. I wish to make it clear that in deciding to grant leave I have not made any findings of fact whatsoever and the evidence relied upon by the Applicants may yet turn out to be incorrect or incomplete and so I have not made, and cannot make, any decision on the merits of the grounds at this stage of the proceedings.

STAY

78. The Court clearly has jurisdiction pursuant to Rule 56.4(9) to order that the grant of leave operates as a stay of the proceedings. In my view, our Jamaican Rules in relation to Judicial Review, are quite different from the English Rules. Unlike the English Rules where a stay of the proceedings being challenged is treated as an interim remedy, our Rules do not suggest that a stay is an interim remedy at all. Indeed, this is perhaps why at paragraph 54.10.4 of the English Civil Procedure Practice, Volume1, the learned authors are driven to comment under the heading **Test for Granting a Stay,** " The criteria for granting a stay and, in particular, the relationship between stays and interim remedies, remains to be worked out." See also Paragraph 53.3.4.

79. Under our Rules, the Court is to decide whether the **grant of leave** operates as a stay of the proceedings, whereas under the English Rules, notably, Rule 54.10, where permission to proceed is given the Court may give directions which may include a stay of proceedings (my emphasis). It does appear to me that our Rule makers have helped to avoid the uncertainty and murky waters in which the English Courts may find themselves. Our Rules reinforce the fact that the question of whether to order that the grant of leave operate as a stay is really for the purpose of facilitating the court's review of the challenged proceedings. It is designed to allow for an appropriate pause so that the Court can carry out its review work unhindered and is not there for the benefit of the parties per se. This has implications on the question whether the Court need hear from the parties at all in considering this question. Rule 56.4 (4) gives the Court a discretion whether to direct that notice of a hearing should be given to Respondents or to the Attorney General. However, it is clear from Rules 56.3 and 56.4 that the Court can decide whether the grant of leave to apply for judicial review should

operate as a stay of proceedings without hearing from the Applicant. If the Court is not forced to hear from the Applicant in deciding whether the grant of leave should operate as a stay of the proceedings, it would seem illogical for it to be said that the Court is bound to give notice to the Respondent or the Attorney General every time the grant of leave requires the Court to consider whether the grant of leave shall operate as a stay.

80. In relation to the history of judicial review proceedings, the analysis of our C.P.R. Rules on Judicial Review, and the nature of a stay, I found an article written by Attorney-at-Law Mr. Gordon Robinson, which appeared in the October, November and December 2005 Issue of "Jambar", published by the Jamaican Bar Association, at Volume 22, No. 10, "Don't Leave Me This Way", extremely useful. See also the unreported decision of Sykes J. in Claim No. 2009 HCV 04798 **R v. I.D.T.(ex parte J.Wray & Nephew Ltd.)**, delivered October 23 2009. I understand that an appeal has been filed but not yet determined.

81. In England, there have been decisions that suggest that where the grant of a stay may detrimentally affect a third party, the court should treat the application for a stay as akin to an injunction-see **R v.Secretary of State for Education and Science, ex parte Avon County Council** [1991] 1 Q.B.558, and **R v. Inspectorate of Pollution and another, ex parte Greenpeace Ltd.** [1994] 4 All E.R. 321.

82. I agree with Mr. Garcia's submission that, even if this Court should consider whether a stay is really in the nature of an injunction, in this case, if the Court were to order that the leave operates as a stay, it would not have the effect of an injunction. It would not affect any third party operations. Similarly, the principle in **NWSL v. Woods** [1979] 1 W.L.R. 1294, at 1307 that a more stringent

threshold for granting interim injunctive relief is required where the effect of the interim remedy application will be final, is not applicable here. This is because the stay in this case is a "true" stay, and not "an injunction by a sidewind" see **Minister of Foreign Affairs v. Vehicles and Supplies** [1991] 1 W.L.R. 550, where differences between stays and injunctions are discussed. The stay is in any event temporary, not final, in effect.

83. Subject to observing caution in relation to wholesale adoption of the principles discussed in the English cases in this area of the law, I can indicate that I endorse the statement of Dyson L.J. in **R(on the Application of Ashworth Hospital)v. Mental Health Review Tribunal for West Midlands and Northwest Region** [2002] EWCA 923, at para 42, that

> *The purpose of the stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that if a party is ultimately successful in his challenge, he will not be denied the benefit of his success.....*

84. I agree with Mr. Garcia that the effectiveness of the judicial review proceedings would be enhanced by a stay of proceedings. If, as the Applicants contend, the principles of natural justice are being breached by the ongoing sittings of the Commission, the proceedings properly ought not to continue. If the Applicants are correct, the matters of which they complain may be further compounded, and absent a stay, the damage of which the Applicants complain may already have been done. The task of the Court in reviewing the proceedings of the Commission may be at a great disadvantage, and unwieldy, if the proceedings are allowed to continue. If the Applicants are later held by the Court to be wrong

in their challenge, although the Commission has clearly been set up to enquire into some most important matters of great concern to the nation, the proceedings of the Commission would not be harmed pending that determination. Indeed, it would then allow the Commission to proceed without such concern about its impartiality, and without being shrouded in a cloud of uncertainty and tension.

85. From a cost perspective, it would appear that less harm would be done by staying the proceedings now rather than allowing them to continue until the determination of the Applicants' challenge. An examination of the Budget of the Enquiry (paragraphs 26-27 of Mr. Hylton's Affidavit and exhibits "PH11-13") does reveal that the expected costs of sitting each day vastly exceed the costs incurred if there is no sitting. For persons who pay for legal representation before the Commission, there would be sums incurred for each day's sitting. If the proceedings of the Commission continue without being stayed but are later invalidated, there would have been a considerable waste of public and private resources. I daresay this country can ill afford to lose and squander any resources.

86. The other matter that I have considered is that this is not a Commission that has sat continuously. There were approximately 12 sittings last year, up to the end of December, with breaks in between. There has not been any indication made at the hearings that there is any difficulty in sitting beyond the end of March, the last of the dates set on the Schedule. It is also clear, that there would in any event have had to be further sittings since some of the witnesses have been told to come back, and have not yet been slotted into the schedule up to March. Also, some of the witnesses slated for appearance in the current schedule have not attended. If they are to be heard, their evidence will also require further

sittings. There is nothing to indicate that this Commission is time sensitive and no deadline has been indicated. Further, in her Affidavit sworn to on the 10th February 2010, Ms Farrow indicates that, after she left the sitting of the Commission on the 9th February 2010, she was advised by one of the lawyers representing the 4th Applicant at the Commission, Mr. Gavin Goffe, and she verily believes, that on the same day the 1st Respondent adjourned the proceedings. This occurred after it was indicated that one of the witnesses, Mr. Robert Martin, the Chairman of Finsac, had not been provided with the questions he would be asked and was therefore not prepared to give evidence. Ms. Farrow was advised that the proceedings of the Commission were adjourned to a date to be fixed without there being any indication given of the reason for departing from the dates outlined in the Schedule. Nor was a reason provided for not fixing a specific date for the next sitting of the Commission.

87. It seems clearly appropriate for the plug to be pulled temporarily on these proceedings, right now. I therefore make the following orders:

The Applicants are granted leave to apply for judicial review as follows:

a. To apply for an order of prohibition preventing the continuation of the Commission as currently constituted;

b. To apply for an order of certiorari quashing the decision of the Respondents to continue with the hearings of the Commission;

c. To apply for an order of certiorari quashing the refusal of the 1st Respondent to recuse himself from the Commission.

d. I grant this leave on all of the grounds set out in the application at pages 7-8 save for ground "l" which seems to relate to the stay.

e. The grant of leave shall operate as a stay of the proceedings of the Commission until the application for judicial review is heard and determined.

f. Costs are to be costs in the Claim.

88. As the matter is urgent and of great importance to the public, I direct that the Full Hearing be given an Expedited Date, to be Fixed at the First Hearing. The First Hearing is fixed for the 9th day of March 2010 at 10:00 a.m. for 1 hour.

89. The Court has power under Rule 26.1(2) (c) of the C.P.R. to shorten the time for compliance with the Rules. I also note that the Applicants have advised that they are quite ready to proceed forthwith, the Draft Fixed Date Claim Form having been exhibited to the 1st Applicant's Affidavit. I therefore shorten the time referred to in Rule 56.4(12) of the C.P.R. and order that Leave is conditional on the Applicants making a claim for judicial review by Thursday, the 18th of February 2010.