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	JAMAICA REDEVELOPMENT FOUNDATION	4TH APPLICANT
AND	HON. JUSTICE BOYD CAREY (Ret'd)	1ST DEFENDANT
AND	CHARLES ROSS	2ND DEFENDANT
AND	WORRICK BOGLE	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

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

Mr. Dave Garcia for the 2nd Applicant.

Mr. Michael Hylton Q.C. & Mr. Kevin Powell instructed by Michael Hylton for the 3rd Applicant.

Mr. Patrick Foster Q.C., Mr. Maurice Manning & Miss Ayana Thomas instructed by Nunes Scholefield DeLeon for the 4th Applicant.

Dr. Lloyd Barnett & Dr. Adolph Edwards for the 1st Defendant.

Mr. Paul Beswick & Miss Lisa Whyte instructed by Director of State Proceeding for 2nd, 3rd & 4th Defendants.

Heard: August 9th – 13th, 2010 & September 2, 2010

CORAM: CAMPBELL, J, Q.C.
P. WILLIAMS, J.;
PUSEY, J.

Campbell J., Q.C.

Background

1. In the 1990s, the Bank of Jamaica (BOJ) identified weaknesses in the financial condition of various entities within the sector it regulated. According to the BOJ there was a growing level of non-performing loans and significant decline in the profitability of several banks. There was evidence of imprudent accounting practices. Problems in the insurance industry impacted on the commercial banking system. The liberalization of the foreign exchange market, which was followed by the hike in inflation which moved to 100% in 1992, over the preceeding year which had recorded a 20% growth. The regulatory framework was considered inadequate where it existed and vital areas were unregulated.

2. The BOJ, recommended to the Ministry of Finance that certain actions be taken. Depositors and creditors, in the failed institutions were refunded. These funds, were paid through FINSAC, an agency established by government to deal with the intervention in the failed institutions. The resolution was claimed to be one of the costliest in the world in terms gross domestic product. The sector had some 29 institutions in the financial sector, eleven of which were commercial banks, six of those banks failed. According to the Mrs. Audrey Anderson, Senior Deputy Governor of BOJ in her testimony before the commission, "the country had never faced something like this before, and certainly the laws did not allow for intervention except in circumstances of insolvency which had to be beyond doubt"

3. Following on the election of September 2007, the then opposition was ushered into power after some eighteen years. On the 24th October 2008, by instrument under Broad Seal of Jamaica , His Excellency the Governor –General issued a commission under the Commission of Enquiry Act and appointed the 1st and 2nd Respondents and Mr. Dale Blair as Commissioners. The Commission was to examine the circumstances that led to the collapse of several financial institutions in 1990s. Mr. Blair did not assume the appointment. By an instrument dated January 12th, 2009, His Excellency appointed the 3rd Respondent as COMMISSIONER. Mr. Fernando Peralto was appointed Secretary to the Commission, and Mr. R.N.A. Henriques, Q.C. O.J. Q.C., as Counsel to the Commission.

4. The Terms of Reference

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

(a) The extent to which these circumstances were directly influenced by domestic or external factors.

(b) Governments fiscal and monetary policies.

(c) The management practices and role of the Board of Directors of the failed institutions;

(d) The performance of Governments regulatory functions.

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

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

(iv) To review the probity and propriety in FINSACs management, sale and or disposal of assets relating to delinquent borrowers.
(v) To review the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation.

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

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

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

The Applicants

5. The 1st Applicant, Hon. Shirley Tyndale, O.J., a retired Civil Servant, and Financial Secretary, from 1989 to 1st May 2005. She served as a member of the Board of Finsac Ltd. (finsac) and Financial Institutions Services Limited. (FIS). In 1998 she was elevated to the position of vice-chairman of both Boards. From April 2003, until her retirement in May 2005, she has served on the Board of the Bank of Jamaica. She was conferred with the Order of Jamaica in 1996.

The 2nd Applicant, Mr. Patrick Hylton, is Group Managing Director of National Commercial Bank Jamaica LTD. From 1995 to 2002, he served as managing director of Financial Institutions Services (FIS) and from 1998 to 2002 as managing director of Finsac Ltd.

The 3rd Applicant is a University Lecturer, and was the Minister of Finance, from 1993 to 2007. The 4th Applicant is a private corporation organized in accordance with the laws of the State of Texas, in the USA and registered in Jamaica.

6. The Commission of Enquiry started its public hearings on the 22nd September 2009. The Commission had public hearings for some 17 days. During the course of the hearings, the 1st, 3rd and 4th Claimants gave sworn evidence before the Commission. The 2nd Claimants is scheduled to appear to give evidence.

The letter of 31st December 2009

7. All the Applicants have provided affidavits of becoming aware "that the Chairman of the Commission had a debt owed to an entity that was taken over by FINSAC/FIS. As a result a letter dated 31st December, 2009 over the signature of their legal representatives, was addressed to the Secretary of the Commission. That letter expressed their concerns, that the Chairman, along with his wife, had an unauthorized, unsecured overdraft, on their joint current account with Century National Bank (CNB), an intervened institution. It was also stated that on the assumption of temporary management of CNB in 1996, an agreement was arrived at by which the outstanding balance would be settled by way of a set-off against a Certificate of Deposit (C.O.D.) held by the 1st Defendant with the bank .

8. The letter also expressed concern about an overdraft facility authorized by CNB which was subsequently converted to a debt owed by Bev Carey Associates (1985) Ltd. (the Company). The issued shares in the Company were held equally by the 1st Defendant and Mrs. CAREY. The letter stated that the debt was not serviced in accordance with the agreed terms and was amongst debts that were sold to Jamaica Redevelopment Foundation (JRF) in 2002 and later to International Asset Services (Limited (IAS). The debt, according to the letter, is still outstanding.

9. The letter also exhibited an internal document of the CNB that indicated that "Mr. Carey is a close associate of the Chairman of the Bank, Mr. Crawford. The letter reminded the commission that In a letter dated June 8th, 2009, the attorneys for the 4th Claimant had requested a written assurance" that none of the Commissioners or their family members was indebted to any of the banks that were re-structured or had its loan portfolio re-structured or was a director of a company that was so indebted. The letter invited the Commission and its legal adviser, to consider, "whether the Chairman could be seen as acting as a Judge in his own cause by virtue of his personal interest in the subject-matter of the proceedings."

To this letter, the Commission responded on the 18th January, 2010 that the Solicitor General had advised that "no factual substratum on which to base a claim on actual or perceived bias and/that the matters the subject matter of the enquiry can reasonably be heard and pronounced on."

The Request for Recusal

10. The Commission of Enquiry adjourned on December 10th, 2009 to recommence on the 19th January 2010. The transcript of the proceedings of the 19th January 2010, indicated that the Chairman after announcing the opinion of the Solicitor General, refused to entertain Mr. Hylton's application to reconsider his decision. The Chairman was adamant.

"No, we are not considering nothing. The procedure is what this Commission ordains and we have decided that we are proceeding." Mrs. Minott-Phillips attempt to address the Commission on the point was also unsuccessful. Counsel for the 1st and 4th Applicants also attempted to make submissions, at which point the Chairman, asked all counsel involved to consult with the Secretary, "so you may fix a date, when we can hear you." The following day Mr. Garcia wrote requesting that counsel be heard on the issue of bias on the 21st January 2010.

The Commission responded the following day, referring to Mr. Garcia's letter of the 20th January 2010, and stated that, the concerns raised in the letter of the 31st December 2009, were addressed in the Commission's letter of the 18th January 2010.

11. On the 10th February the Applicants were granted leave to apply for Judicial Review. On the 16th February 2010 the Applicants filed this application, seeking certain remedies against the Defendants, inter alia:

a. An order of *prohibition* preventing the Commissioners from continuing as currently constituted;

b. An order of *certiorari* quashing the decision of the Commissioners to continue with the hearing of the Commission;

c. An order of *certiorari* quashing the decision of the chairman whereby he refused to recuse himself from the commission;

d. A Declaration that the Chairman is presumed to be affected by bias and is automatically disqualified from being a member of the Commission;

e. A Declaration that in the circumstances the Chairman is also disqualified by virtue of apparent bias;

f. A declaration that the proceedings that have occurred thus far in the enquiry are null and void.

The Defendants

12. 1st Defendant, Hon. Justice Boyd Carey (ret) a former Judge of the Court of Appeal , Jamaica, President of the Commonwealth of Bahamas, a post from which he retired in 1999. Since 2001, a Justice of Appeal, in the Court of Appeal of Belize.

2ND Defendant, Mr. Charles Ross, a Civil Engineer, is a former Executive Director of the Private Sector Organization of Jamaica. Managing Director of Sterling Asset Management, (a security dealership).

3rd Defendant, Mr. Warrick Bogle, Chartered Accountant , and a fellow of the Institute of the Chartered Accountants of Jamaica and the Association of Chartered Certified Accountants of England. Also certified as a Public Accountant in the United States of America.

Pursuant to section 2, Commission of Enquiry Act, the Defendants were appointed members of the Commission of Enquiry into the collapse of the Financial Institutions in 1990s, with Hon. Justice Carey appointed as Chairman.

Judicial Review

13. An application for Judicial review is brought pursuant to Part 56 of the Civil Procedure Rules; CPR 56 .1 (1) This Part deals with applications – inter alia,

(a) for judicial review ;

(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body;

CPR 56.2. (1) provides;

(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, etc.

14. The decision that is being complained of is that of the Commissioners to continue with the hearings. How does that, adversely affect the Applicants in this matter? Do the Applicants have sufficient interest? The 1st Applicant, in her affidavit, filed on the 4th

February 2010, in support of her application to obtain leave for judicial review states at paragraph 17,

"It is open to the Commission to make findings in relation to actions taken and decisions made by me while I was Financial Secretary, Vice Chairman and Chairman of Finsac and FIS. My reputation could be affected by these findings. I am therefore very concerned about and wish to ensure that there is no question as to the impartiality of the members of the commission."

There are no arguments before this court on whether the prospect of an adverse report at the end of the commission's deliberations satisfies the requirements of **his being adversely affected** by the decision.

1st Defendants

15. All the reliefs sought by the Applicants were principally concerned with the chairman. It was argued that the Chairman was affected by actual bias and is automatically disqualified. That the Chairman is also disqualified by virtue of apparent bias and that his decision whereby he refused to recuse himself from further hearings of the Commission ought to be squashed.

The nub of Mr. Hylton's submission was that The Chairman falls within a class of persons in relation to whom the Commission is to determine how they were treated and whether they were treated fairly.

Mr. Hylton, Q.C. submitted that the mandate to the Commissioners as contained in, paragraph (iii) of the terms of reference was, to review the operations of FINSAC "in relation to delinquent borrowers", this review could not be undertaken by the Chairman, if he himself is/or was ever a member of the class of "delinquent borrower". The issue was therefore was the Chairman, a delinquent borrower whose debt was acquired by FINSAC?

16. It was submitted that when the Applicants' attorneys wrote to Commission on 31st December 2009 included in that letter, were a number of documents, which it was alleged provided the basis for the concern about the impartiality of the Chairman. The letter indicated that documents that had been seen by the writers stated that the Chairman and his wife maintained a current account at Century National Bank. It also stated that, In January 1998, an agreement was arrived at between FIS and the Careys', by which the outstanding overdraft would be settled by way of a set-off against Certificate of Deposit held by the Chairman with the building society and the payment of the balance due. The letter also raised concerns, about the company a debt owed by, Bev. Carey & Associates (19850 LTD. (the Company). The Company was equally owned by the 1st Defendant and his wife. It was alleged that the debt was not serviced in accordance with the agreed terms and was among the debts sold to Jamaican

Redevelopment Foundation JRF in 2002. That debt presently stands at $1.7 million and remains unpaid.

17. Appended to the letter of the 31st December 2009, was a letter of demand dated 27th January 1992, and a further demand letter of December 28th 1993. Both letters are addressed to the 1st Defendant and his wife, the account referred to is similar. The 1st Defendant denies receiving those letters but confirms receipt of the letter dated 10th June, 1997, which states, "as you are aware, your current account continues to be overdrawn as indicated above." Mr. Hylton submitted, that there is sufficient evidence to support, the description of the 1st Defendant as being a bad debtor. He said that the debt was unsecured, unauthorized and had remained outstanding six years after the Bank first demanded payment.

18. In response, Dr. Barnett submitted that in the letter of 10th January 1997, the Bank had stated "that because of current policies they were unable to offset the overdraft against a Certificate of Deposit held in the Building Society. $36, 000.00 was deducted from the deposit and applied to the overdrawn account". After the deduction the certificate of Deposit amounted to $111,985.68. The overdrawn balance was the $29,880.84. By letter dated January 5th, 1998, the 1st Defendant requested the Bank to "advise by return post the amount of the outstanding balance on the above account so I may be in a position to discharge that obligation"

19. Dr. Barnett submitted that "the crucial question was whether the 1st Defendant was a "delinquent borrower "whose debt was acquired by FINSAC. According to Dr. Barnett, the court had to determine whether the 1st Defendant was a "delinquent borrower" as contemplated by the terms of reference. He submitted that there was no admissible evidence to prove that there was any loan agreement between the 1st Defendant and CNB, or that the 1st Defendant owed any debt to FINSAC. The Claimants had relied on the 2nd Defendant, Patrick Hylton's affidavit that he had checked the spreadsheets and they showed that as of November 1st, 2001 the 1st Defendant owed FINSAC a principal balance of $46,213.00. Dr. Barnett said the 1st Defendant had denied owing any debt to FINSAC as at November 2001. He relied on the evidence of 1st Claimant, Shirley Tyndale, who testified that, 'that the loans that FINSAC acquired were the non-performing loans. Those were loans where people signed a contract and did not make payments on time and so were deemed non-performing." There was no evidence of such a contract. There was no evidence of such non-performance on the part of the 1st Defendant.

20. The 1st Defendant has denied that there was an outstanding amount as of 1st November, 2001. The Defendants argue that the spreadsheet is not an original source document but a compilation of information purporting to relate to different customers. There is no evidence as to who compiled it and it is clearly inaccurate and inadmissible as to proving its contents.

The Defendants raised a challenge to the admission into evidence of several documents on which the Claimants relied.

(a) Letter dated 22nd January 1992 from Branch Manager to Carey, (b) Letter dated 28, ...1998 from Branch Manager to Carey; (c) Undated CNB memo; (d) January 10, 1997 from Junior Francis; (e) Exact spreadsheet; (f) Guarantee

The 1st Defendant has not denied receiving the letter of the 3rd March 1998, which acknowledges receipt of a cheque which the 1st Defendant had sent with a set off form in his letter of 12 February, 1998. In that letter, it is clearly expressed that he has a debt. The set off form the details of which have not been traversed states that the value of the COD is $40,594.99 was insufficient to liquidate the loan balance of $48,928.27 and required the sum of $8,333.28 which is the amount that is included in his cheque and serves to discharge his debt.

21. I find that the letter of the 3rd March, 1998, from FIS, confirming the clearing of the overdraft, conflicts with the spreadsheet produced by the 2nd Applicant and I accept that, the overdraft facilities were cleared and the account closed on the 1st November 2001. The 1st Defendant's letter of 5th January 1998, is an admission of "an outstanding balance "on his current account #7000375, which as the letter states, the 1st Defendant considers an obligation. This admission is based on the personal knowledge of the 1st Defendant, as the maker of the statement. This letter follows on the receipt of the letter of the 10th January, 1997, the contents of which 1st Defendant has not traversed. I find that there is evidence before this court to hold that a loan agreement existed between the 1st Defendant and the Bank.

22. Was the 1st Defendant a borrower, contemplated by the Terms of Reference? Hon. Shirley Tyndale, has testified that, The loans that FINSAC acquired were non-performing loans. It is common ground that FIS, in a letter dated 22 January 1998 advised the 1st Defendant that they were now managing the debt and assets of CNB, and had sent the 1st Defendant a set-off form. The 1st Defendant replies on the 12th February 1998, returning the completed set-off form. The actions of the Defendant in his receipt of the letter of 22nd June, 1998 fix him with knowledge that his debt has been taken over by FINSAC. FIS had assumed the 1st Defendants debt, on the 21 October, 1997. The vesting order of the Supreme Court is evidence that 1st Defendants debt to CNB, is an asset that has become vested in FIS as a consequence of the order.

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

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

Bev Carey Associates (1985) Ltd.

25. The Applicants allege that Bev Cary Associates (1985) Ltd was incorporated in 1985. The 1st Defendant holding one share and his wife another in the company. Mrs. Carey was also a director of the company. Two Bills of Sale were issued in favour of Jamaica Citizens Bank. They were dated 29th July, 1986 and 20th June, 1991 respectively. The Bills of Sale have not been discharged. Refin Trust Limited acquired from JCB rights JCB had in respect of various debts outstanding.

26. Ms. Farrow, CEO of the Jamaican Branch of the 4th Applicant, in an affidavit dated 4th February 2010, asserts that in reviewing the Excel files provided to the Commission she noted a Citizens Bank facility to THE COMPANY. Ms. Farrow claims that the amount due at the time of sale to IAS is $824,984.36. The Claimants submit that whether or not, the court finds that there is admissible evidence to prove the debt outstanding, the evidence shows there is an issue as to whether the company was indebted or not, and that puts them in a class of borrowers of whom the commissioners were to make an enquiry.

27. The 1st Defendant contends that, the Hylton's evidence of having seen a spreadsheet and Ms. Farrows evidence of the excel files, are not proper and admissible evidence sufficient to support these allegations. The 1st Defendant, has said he was a shareholder and unaware of any such loan. I find that the Excel files and the spreadsheet are inadmissible as bankers entry for reason of noncompliance with s34 of the Evidence Act. Mrs. Carey denies that either herself or the company had any such outstanding balance at JCB at the time FINSAC intervened in that bank. Mrs. Carey seeks to cast doubt on the banks claim, saying that the bank had not communicated any such debt to her since 1994, until the letter of 31st December, 2009. In respect of the Bills of Sale, they were retrieved from the Companies Office of Jamaica. I find that the documentation put forward by the Applicants are unauthenticated and unverified documents and contain hearsay evidence. I accept as correct Mr. Errol Campbell, General Manager of FINSAC,

when he stated that **FINSAC received a list with names and balances from the various intervened institutions, but those balances were never verified.** It seems to me that the evidence is tenuous, and no weight may be attached to it insofar as it purports to show that there was an outstanding amount.

28. Having found that the 1st Defendant was a delinquent borrower of an intervened institution, it follows that a man cannot be a judge in his own cause. I think it is appropriate to point out at this juncture that whereas the Court entertains no doubt that the Chairman would not consciously bring to the enquiry other than his utmost impartiality, bias is such an insidious thing that it pervades the subconscious and has the ability to taint a decision.

29. The Applicants had pointed to the Terms of Reference and alleged that the Chairman was a member of two class therein identified of which the Commission was mandated to enquire into, thus he was tainted with bias. They had complained that he was a (a) "delinquent borrower" and would have fallen under the purview of FINSAC, (b) that as a debtor, the treatment he was accorded by FINSAC, was open to review.

Actual Bias

30. It has often times been said that it is fundamental, a man may not be a judge in his own cause. If the judge is party to or has a financial interest in an action, he is sitting in his own cause. Once that determination is made of an interest, the judge is automatically disqualified. He is imputed with actual bias. This is such a case. Lord Clyde in **Donald Panton and Janet Panton vs Ministry of Finance Privy council of decision** delivered on 12th February **2001** at para. 5 says:

> "Once it is showed that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias."

Quoting with approval Lord Browne-Wilkinson in **R v Bow Street Metropolitan Magistrate, ex p. Pinochet (no.2), (1999) 1 All ER 577** at page 586 paragraph e - f and later, Lord Browne-Wilkinson at page 586c-f. The learned Law Lord, in stating the reasons for the rule, indicated that automatic disqualification is not only restricted to a situation where an economic or money interest is raised. It includes circumstances where a cause in which the judge is interested will be promoted by the decision he will make, whether in his personal capacity or as a director of a company. Lord Hutton, at page 597 h-j of the judgment, alluded to the fact that the interest that the judge has may have the effect of shaking public confidence in the administration of justice.

31. In **Davidson v Scottish Ministers (2004) UKHL 34.** The petitioner, Mr. Davidson, a convict, complained that the condition of his incarceration was in breach of European Convention of Human Rights. He sought judicial review and requested a transfer, the

Lord Ordinary refused the petition, one of the grounds being s21 of the Crown Proceedings Act 1947, precluded the grant of any coercive order against the Scottish Ministers. The petitioner, sought leave to appeal to the House of Lords, a majority of the House of Lords refused leave. Lord Hardie being a part of that majority. The petitioner later became aware, that Lord Hardie, in the Office of Lord ADVOCATE, whilst promoting the Bill in the House of Lords, had assured that House that section 21 of the Crown Proceedings ct 1947, was to prevent the courts in Scotland from making any order for specific performance against the appellants as part of the Crown. Mr. Davidson lodged a petition asking the court to set aside the decision in which Lord Hardie had participated in refusing leave to appeal. Lord Bingham recognized the need for tribunals to be in a position to resolve issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. He said at paragraph 6;

> **"Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest, which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled from personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judges judgment"**

Disclosure

32. The only circumstance in which an adjudicator with such an interest will not be automatically disqualified is if there was sufficient disclosure. There was no such disclosure in this case, perhaps the Chairman may have thought there was nothing to disclose.

Before the commencement of the public hearings the lawyers for the 4th Applicant had in a letter dated the 8th June 2009, requested members of the Commission to give written assurances that none of the commissioners or any immediate family members of theirs, is or was indebted to any banks or financial entity that were restructured or that had its loan portfolio restructured through FINSAC Ltd or any related entity of FINSAC Ltd. or was a director of a company that was so indebted. They wrote again on the 10th December 2009, there was none forthcoming. The letter of the 31st December, 2009, from all the Applicants was then sent. On the 18th January, 2010 the Commission responded that "the overdraft facility extended to Justice Carey was fully discharged. When the challenge was raised to the Commission continuing, it appears that the advice of the learned Solicitor General was taken and the commission, maintained there was

no "factual substratum" on which to raise a claim for bias. The fact of non disclosure even if it arises in circumstances that are understandable, if it ought to have been given will be a factor for the consideration of the fair–minded observer. See the observations of Lord Bingham in **Davidson v Scottish Ministers (supra) at page 10.**

> "Where a judge is subject to a disqualifying interest of any kind ("actual bias"), this is almost always recognized when the judge first appreciates the substance of the case which has been assigned. The procedure is then quite clear: the judge should, without more, stand down from the case. It is rare in practice for difficulties to arise. Apparent bias may raise more difficult problems. It is not unusual for a judge, at the outset of a hearing, to mention a previous activity or association which could not, properly understood, form the basis of any reasonable apprehension of lack of impartiality. Provided it is not carried to excess, this practice is not to be discouraged, since it may obviate the risk of misunderstanding, misrepresentation or misreporting after the hearing."

and at page 11

> "there are of course a number of entirely honourable reasons why a judge may not make disclosure in a case which appears to call for it, among them forgetfulness, failure to recognize the relevance of the previous involvement to the current issue or failure to appreciate how the matter might appear to a fair-minded and informed observer who has considered the facts but lacks the detailed knowledge and self-knowledge of the judge. **However understandable the reason for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer.**" (Emphasis mine).

Apparent Bias

33. The 1st Defendant's membership of a company in which his wife was a Director in addition to his close relationship to the Chairman of an intervened company placed him in a class that the Commission had to review. The test to determine apparent bias has been settled in Meerabux (George) v Attorney General (2005) 66 WIR 113, (2005) U.K. D.C. 12. Prior to the decision in Meerabux, the test had at various stages been subject to criticism. **In Berry v Director of Public Prosecutions (1995) 48 WIR193 AT PAGE 198 LETTER J,** which was affirmed in Judicial Committee of the Privy Council. Rattray J., approved the test as formulated in **RV Gough (1993) 2 ALL ER 724,** as a real danger of bias. He poses the question, "is there in fact in these circumstances a real likelihood or a real danger of bias." Lord Goff of Chively on whose judgment Rattray P. relied had hinged his preference for the "real danger test "instead of" real likelihood", in order to ensure that the court was thinking of possibility rather than probability of bias.

In Donald Panton and Janet Panton v Minister of Finance and the Attorney **General**, a judgment of the Privy Council delivered on the 12th July2001. Lord Clyde, who wrote the judgment of the court, recognized that the test to be applied has been a matter of dispute and noted that the formulation in R v Gough, of a real danger of bias has been subjected to some criticism. Alternatively, the test is that of a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that he would not discharge his task impartially. The Court did not consider it necessary to define with greater particularity the formulation of the test other than to say an approximation of both would be the preferred course.

In **MEERABUX (George) v Attorney-General (2005) 66 WIR 113;(2005) UKPC 12**

The court reviewed the decision in R V Gough 1993 AC 646, in light of subsequent decisions in Canada, Australia and New Zealand. And stated at paragraph 25, per Lord Hope of Graighead;

> "The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this is in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the Porter v Magill test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park (to adopt Blackman J's analogy), must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr. Arnold's membership of the Bar Association into its proper context. But the facts which he would take into account go further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed chairman, the facts that the first proviso to s54(11) of the Constitution directs the chairman to preside where the BAC is convened to discharged its duties under s98 and the fact that this direction is subject only to the special provision which the second proviso make for what is to happen if the BAC is convened to consider the chairman's removal. Their lordships are inclined to agree with Carey JA that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr. Arnold was biased. But they also agree with the Court of Appeal that there is another answer to this complaint."

34. What would the fair-minded and informed observer think, if it were known that the 1st Defendant's wife is contending that there are no balances outstanding with JCB. That no communication had been had from the Bank in relation to the so-called outstanding amount from 1994, until it surfaced in a document challenging the impartiality of the Commission which her husband chaired. That other than a spreadsheet and an excel

file, there is no other documentation supplied to evidence the loan. If that fair-minded observer knew that the Bills of Sale were from the Registrar of Companies and not the Bank, and that outside of these items the Claimants are unable to contradict Mrs. Carey's claim that she has repaid her loan. It is not unusual to have un-discharged bills of sale at the Registrar of Companies, even where he sum owing have been liquidated. Whether the fair–minded and informed observer, having considered all the circumstances would conclude that there is a real possibility that the Chairman was biased. Lord Bingham in **Porter v. Magil (2002 1 All ER 465**, said;

> **"...whether the fair-minded and informed observer, having considered them and the circumstances in which they were made, would conclude that there was a real possibility that he was biased in the sense that, having made these statements, he would be unable to bring an objective and undistorted judgment to bear on the issue raised by Mr. Davidson in his reclaiming motion".**

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

35. The relationship with Mr. Crawford is only mentioned in a document which does not identify its authorship. It's undated. It has been denied by the 1st Defendant, his wife and Mr. Crawford himself who has said he never met the 1st Defendant. These denials have not been traversed by the Applicants .I find that this allegation has not been proven. There is no factual basis to level such an allegation. The court recognizes, which is not the case here, that a baseless allegation leveled at a judge/adjudicator, may be done to facilitate "judge-shopping."

36. Some statements of the Chairman were raised as a ground, that during the hearing, the Chairman made a number of comments that would cause disquiet in the fair-minded observer. Among the statement were, that 'this is a coroner's inquest" and describing the "debtors" as "victims" and that FIS activities were a sort of obeah. When looked at in the whole, it shows that the proceedings were conducted in a civil courteous and fair manner. These are not judicial proceedings. The statements highlighted by Applicants when looked at against the background of the exchanges between the member and the witnesses could not be deemed to be unfair by a fair-minded observer who is aware of the nature of the proceedings.

The challenge to Counsel to the Commission

37. Counsel to the Commission, was challenged that he falls within a class of persons of whom the commission is required to make an enquiry into their treatment. If that were so, the question would then be, would a fair-minded and informed observer having considered the circumstances conclude that there was a real possibility of bias? Can the

appearance of bias on the part of Counsel taint the Commission with bias? Would there be real present danger that public confidence in the integrity of the Commission, its proceedings and ultimately its conclusions will be skaken? **In Simmonds v Williams (No.2) (1999) 57 Wir. 95.** At page 111 H, Georges JA (Ag);

> **"Clearly if counsel to the commissioner is biased he cannot fairly discharge his role and the commission would thereby be flawed and so would the findings and/or the conclusions of the commissioner. In his role as legal advisor to the commission a biased view of the facts which advice is proffered would in all likelihood result in a biased or erroneous conclusion being reached by the commissioner"**

38. I agree with the reasons of my sister, Williams J, in finding that counsel to the Commission is imputed with actual bias, which could mean his automatic disqualification were he a commissioner. On the question of the effect of actual bias on the commission I wish to add that bias may be unconscious. There were no acts complained of on the part of counsel to the commission during the hearing from which could be evinced any mala fides towards anyone. In Simmonds case, on the other hand there was a specific complaint by Simmonds that the counsel had hostility towards him and the court so found. In Simmonds case, the counsel was the person who collated the evidence and presented it in order to elicit the facts. A part of the complaint was that there was an inquiry conducted into private affairs. The fair-minded observer being aware of Mr. Henriques, Q.C.' termination of membership of the intervened company, and the documentary proof he has submitted to contradict his signature on the guarantees plus the evidence of Mr. Levy, a co-director of the intervened company that the only guarantee that had been signed by Mr.. Henriques, Q.C. had long been paid off would be inclined in those circumstances to say that there is no tainting with bias of the Commission.

Challenge to Commissioner Ross

39. I have read in draft the judgment of Pusey J and agree with the reasons therein.
Mr. Ross is a contributor to one of the islands daily newspaper. His contributions have largely been in the area of economic policy. The challenge to Ross, complains that in fulfilling the mandate in the terms of reference, the commission will be called upon to, examine (i) Governments fiscal and monetary policies (ii) The performance of Governments regulatory functions. That his publications touch and concern these same areas, that he has consistently held those views over a number of years. That this indicates an inflexibility that would demonstrate a pre-judgment of some of the issues. He has been described as a consistent critic of the government's economic policies who has long argued that the Jamaican currency is substantially over-valued.

40. It was submitted on behalf of the 2nd Defendant that his views are held by a body of recognised professional within his discipline. There are others with contending views,

shaped by training and experience. In so far as each individual will come to any deliberation with preliminary views, no objection is warranted unless there is evidence of a fixity and rigidity of view that will remain unshaken in face of the most formidable argument. The holding of such views by itself would not to be regarded as a disqualifying feature by the fair-minded observer. Lay persons acting as jurors are expected to put aside prejudices that they have.

41. **In Hewlow v Home Secretary (HL(SC)) (2008) 1 WLR2416.**, the petitioner a Palestinian refugee, claimed asylum in Britain, on the ground she would be attacked by Lebanese and Israeli agents because of her political beliefs. Her claim was refused by the Home Department, and that decision upheld by the Adjudicator. Her leave to appeal was refused. She petitioned to the Court of Sessions for statutory review. The Lord Ordinary dismissed her petition. She petitioned to set aside the Lord Ordinary's decision on the ground that the Lord Ordinary was a member of Jewish Lawyers Association whose members received a circulation of an extreme pro Israeli articles and pronouncements. She claimed the fair-minded and informed observer would conclude there was a real possibility that the Lord Ordinary was biased by reason of her membership of the association, Lord Mance quoted with approval RV S (1997) 3 SCR 484, where the court, after examining the significance of the judicial oath, had this to say;

> **"The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial "does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being which is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probable lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that judge have no sympathy or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind." (Emphasis mine)**

Can the Commission continue with Ross and Bogle

42. It was contended by the Applicants that the Proclamation appointing Bogle did not name a quorum. The indication of a quorum does not mean that the Commission can carry-on its work with just the quorum named. Al three Commissioners acted with one voice in all decisions and deliberations to date.

The Applicants allege in the circumstances where the court has found that the 1st Defendant and Counsel to the commission are biased, that taints the entire commission so as to disqualify the 2nd and 3rd Defendants from continuing. In support they rely on **R v Sussex Justices, ex parte Mc. Carthy (1925) 1K.B. 256.**, where a clerk attached to a firm that had conducted of civil damages case against the appellant, was involved in advising the magistrates in the criminal action in respect of the same collision in which the magistrates were inquiring in . The clerk retired with the magistrates to consider their verdicts. The court decided that it was not what actually was done, but what might appear to be done.

Lord Hewart C.J , "... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Sussex case concerned the trial of an accused, whose guilt was determined in the presence of a lawyer who was appearing for the person with whom he had collided. In the present case this was not a trial, or was it proceedings in a court of law. The commission is not enabled to determine guilt as was done in Sussex. Such decisions as were made by the Commissioners' were not done in a retreat, or in chambers but in a public forum.

43. Similarly, in **Stollery v Greyhound Racing Control Board (1972) HCA53.,** a person who had made the original complaint had remained in the board room whilst the accused guilt was being determined., and he was disqualified for twelve months. **Re Carruthers v Connolly (1997) QSC 132**, was relied upon by the Claimants, where a member of a two-man tribunal was disqualified, because of actual or apprehended bias, the other would be disqualified from continuing. In Carruthers, extensive consultations and deliberations had occurred over a period of nine months. The definition of the word "commission" in the regulations was perplexing, and was deemed to, "includes its members and a quorum thereof ..." The court concurred with the opinion of the commissioner, that;

> **"It is our opinion that in the present state of the law, neither of us can take evidence, without the participation of the other. Moreover, our ultimate decision and report should desirably be a joint one." The only reference to "quorum in the whole act, is to a quorum sitting for the purpose of the enquiry"**

44. On the other hand, the language of the Jamaican Commission of Enquiry Act is plain and unambiguous. The legislation poses no restriction on the remaining Commissioners continuing the hearing. It provides that, "the Governor General may appoint **one** or **more commissioners** or **any quorum** of them, to enquire into ...." It is clear that the quorum under the local legislation is afforded equal rights of enquiry as the full compliment of Commissioners have. It will not bear the construction that the Applicants would wish to place on it.

The process before the Commissioners was an inquisition, an investigation to ferret of facts. It was not adversial in nature. There would be no civil or criminal liability to be attached. The rules of evidence and procedure are less strict for an enquiry. There were no sanctions to be applied. As we have indicated persons may have their reputations tarnished, as the 1st Applicant fears. There was no evidence as to how that risk may arise, it is fair to say that commendations may also result as a result of the findings. The risk to an individual's reputation must be balanced with the social interest in permitting the Commission to conduct its inquiry and to inform and educate the public about the matter.

45. It was held in **Pelletier v Canada (Attorney General) [2008] FC803** (Can...), that, a lower content of procedural fairness will be called for where, the statute, (as the local Commission of Enquiry Act does), leaves the decision–maker the ability to choose his own procedure. The nature of the content of the enquiry to be undertaken will, to some extent determine the time of the standard of impartiality expected. Where the function is adjudicative, the standards should approximate those that maintain in the courts of law. However, when the contents that are before the board is more akin to policy, then a strict apprehension of bias test might undermine the very role which has been prescribed by the legislature. See Jean Pellitier, v The Attorney General of Canada, paragraph 65. This commission task is not adjudicative, and therefore would be more lenient and provide for flexibility on the part of the Commission.

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

47. The final challenged on The Commission was to allege breaches of procedural fairness. We have already pointed out the stark differences between a commission of enquiry and a court of law. In **Baker Canada v (Minister of Citizenship and Immigration. (1999) 2 S.C.R 817**, in which the court identified factors as pointing to the need for greater procedural protection such as, the nature of the decision being made. In **Baker**, the court said:

> **"the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making."**

Mr. Hylton is contending that the process provided for and the constitution of the body In this case is close to judicial making in many ways. I can't agree. In **Baker**, (Supra) mother and her Canadian born children were ordered deported. An application was

made for the children to remain in Canada, on compassionate and humanitarian grounds pending an appeal. The immigration authorities refused to exercise their discretion to have her stay pending the hearing of the appeal and gave no reasons for their decision. An application for judicial review was dismissed, but the court certified a question, as to the relevance of the International Convention on the Right of the Child, which gives supremacy to the children's welfare. That Convention was not incorporated into the domestic law of Canada. The court held that, There should an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Court held;

> **"the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision"**

48. The Court felt there were no legitimate expectations affecting the content of the duty of procedural fairness. The duty of fairness is more than minimal. The party must have opportunity to present evidence relevant to their case and have it fully and fairly considered. The lack of a hearing did not contribute to a violation. The decision-maker should give reasons, and should be made free from bias. In Baker's case, the immigration officer notes indicated he was swayed negatively by the mothers' psychiatric illness, and the fact of her being a single mom with several children. The court held further that; "considerable difference should be accorded to immigration officers ... given the fact-specific nature of the enquiry, and the considerable discretion evidenced by the statutory language".

49. The investigatory nature of the Commission, the contents and subject-matter of the investigation, the language of the Commission of Enquiry Act, moved it further away from the procedures of a court of law. The concerns of consistency and certainty, that the Applicant's alleges are inimical to the flexibility, that is necessary to facilitate the investigatory process. There are no allegations identified by counsel that any of the Applicants ought to be informed of. In any event in civil matters, until recently in this jurisdiction, the statements on which a plaintiff would rely would not be available to the Defendant before trial in any event, even if, there were allegations, the complaint is premature.

50. The fair–minded and informed members of the public, would be aware that despite the eminence of the Chairman, Commissioner Ross and Worrick Bogle were equipped to continue the hearing. That the nature of the enquiry was to examine the circumstances that led to the collapse of several financial institutions in the 1990s, an area with which

they were familiar. That observer would conclude that even other taken cumulatively there was no real possibility that the commission could not inquire into the Terms of Reference impartially. I make the following orders.

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

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

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

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

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

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

Cost to the 1st, 2nd, 3rd and 4th Applicants against the 4th Defendant to be taxed if not agreed.

P. Williams, J

I have read in draft the judgments of Campbell J. and Pusey J. and agree with their reasoning and conclusions.

1. The complaints in the grounds concerning the 2nd Defendant and the counsel to the commissioner are of the existence of bias hence I will consider the law as it relates to this area and glean the relevant principles to be applied.

2. By 2009, a tribunal in the case **BAA Ltd v Completion Commission [2009] W.L. 487672; 2009 C.A.T. 35** commented at page 24:

> *"The principles of law to be applied by English courts in order to determine whether a court or other decision-maker is affected by apparent bias have evolved over the years and are now reasonably settled."*

3. It is generally accepted that the starting point for any consideration of the law on this area must be the words of Lord Hewart C.J. in **R v Sussex Justices Ex. P McCarthy [1924] 1 K.B. 256** at page 259:

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

4. The test for apparent bias for many years was that which has set out in **R v Gough [1993] 2 All. E.R. 724** by Lord Goff at pages 737 – 738. This was referred to as the "reasonable likelihood" and "real danger" tests.
However in 2002 the House of Lords in **Porter v Magil [2002] 1 All.E.R.** reviewed the test and recommended an approval of the "... modest adjustment of the test **in R v Gough** ..." per Lord Hope at page 507.

5. In **Porter v Magil [2002] 1 All. E.R. 465** at page 506 Lord Hope acknowledge that the Court of Appeal in the case **In re Medicaments and Related Classes of Goods (No. 2) [2001] W.L.R**. had taken the opportunity to reconsider the question as to the relevant test. At page 507 Lord Hope had this to say of Lord Phillips of Worth Matravers M.R. who gave the judgment

> *"...[he] observed at (page 711 para. 35) that the precise test to be applied when determining whether a decision should be seta side on account of bias had given rise to difficulty reflected in judicial decisions that had appeared in conflict, and that the attempt In **R v Gough [1993] 2 All. E.R. 724** ... had not commanded universal approval. He said (at 711 para. 35) that as the alternative test had been thought to be more closely*

in line with Strasbourg jurisprudence which since 2nd October 2000 the English Courts were required to take into account, the occasion should now be taken to review ***R v Gough*** *to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusiveness (at 726 – 727 para. 85).'*

'When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in ***R v Gough*** *is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland, The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."*

6. This then was the modest adjustment of the test in **R v Gough** that Lord Hope suggested be approved. He went on to say ...

"It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. ... I would however delete from it reference to "a real danger".

Those words no longer serve a useful purpose here and they are not used in the jurisprudence of the Strasbourg Court. 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."

7. The Privy Council in **Meerabux George v Attorney General (2005) 66 W.I.R. 113** demonstrated its stance on the relevant test for our jurisdiction. Lord Hope of Craighead in delivering the advice of the board at page 127 had this to say:

"The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this is a case such as this where there is no suggestion that there was a personal or pecuniary interest, is to apply the ***Porter v Magill*** *test. The question is what the fair-minded and informed observer would think."*

8. This test involving "the fair-minded and informed observer" has given rise to discussions as to who then would be this putative observer.
In **Meerabux v Attorney General** (*supra*) the view expressed of him was that he was –

"The man in the street or those assembled in Battlefield Park ...
must be assumed to possess these qualities."
Page 127 per Lord Hope

9. In another Privy Council decision, out of the Cayman Islands, **Patrick Thomas Tibbetts v The Attorney General of the Cayman Islands PCA #0058 of 2009** delivered on March 24, 2010, Lord Clarke at para. 3 said –

> *"The question is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the jury was biased.* ***Porter v Magill 2001 UKHL 67 [2002] A.C. 357*** *per Lord Hope at paras. 102 and 103. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public neither unduly complacent or naive nor unduly cynical or suspicious:* ***R v Abdroikof*** *[2007] UKHL 37 [2007] 1 WLR 2679 per Lord Bingham at para. 15."*

10. The characteristic of this fair-minded and informed observer were also considered by Lord Hope in **Helow v Secretary of State for the Home Department and another (2008) 1 W.L.R. 2416 at page 2418.**

> *"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 C.L.R. 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 complainer makes are not to be attributed to the observer unless they can be justified objectively. But then she is not complacent either.*
>
> *She knows that fairness requires that a judge must be, and must be seen to be unbiased ...*
>
> *... Then there is the attribute that the observer is "informed". It make 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."

11. From the authorities, since the adoption and application of the test as adjusted in **Porter v McGill (supra)**, there is recognition of the fact that the test for apparent bias involves a two-step process.

Firstly there must be an identification of the facts, from the circumstances, on which the suggestion of bias can be based.

Then there must be the decision on the balance of probabilities whether the putative observer informed of all the facts so found would conclude that there was a real possibility that there was bias.

12. On the matter of actual bias **R v Bow Street Metropolitan Stipendiary Magistrates and others ex parte Pinochet Ugarte (No. 2) (1999) 1 All E.R. 577** remains the foremost authority.

Lord Browne-Wilkinson at page 586 said –

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

In that case the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification.

The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial for example because of his friendship with a party.

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

I will call this automatic disqualification."

13. This case is significant not only for the statement of the principle outlined above but even more so because of the extension of the principle beyond cases in which the judge had a pecuniary interest in the out-come.

At page 588 Lord Browne-Wilkinson further stated –

> *"..... although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale on the whole rule is that a man cannot be a judge in his own cause ...*
>
> *If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is minded whether personally or an a director of a company, in promoting the same causes in the same organization as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

14. The Privy Council in **Meerabux v Attorney General (supra**) considered the matters raised by the court in **Re Pinoched (No. 2) (supra**). At page 125 Lord Hope of Craighead stated:

> *"The decision of the House of Lords in the **Pinochet (No. 2)** case to apply the rule which automatically disqualifies a judge from sitting in a case in which he has an interest to the situation in which Lord Hoffman found himself appears, in retrospect, to have been a highly technical one.*
>
> *There was, of course, ample precedent for the proposition that the rule that no-one may be a judge in his own cause is not confined to cases where it can be demonstrated that he has a personal or pecuniary interest in the outcome, however small .....*
>
> *The extension of the rule was taken one step further when Lord Hoffman was held to have been disqualified automatically by reason of his directorship of a charitable company. That company was not a party to the appeal, nor had it done anything to associated itself with these proceedings but the company of which he was a director was controlled by Amnesty International which was a party and which was actively seeking to promote the case for the extradition and trial of senator Pinochet on charges of torture."*

15. His Lordship went on to consider the developments which had taken place regarding the test for apparent bias. He concluded his commentary by saying:

> *"The adjustment of the test **R v Gough** which was described by Lord Phillips of Worth Matravers M.R. (at pp. 726, 727) laid the basis for the final state in the formulation of the objective test which is set out in **Porter v McGill** (at page 103): whether the fair-minded and informed observer having considered the facts would consider that there was a real possibility that the tribunal was biased. As Lord Steyen said in **Lawal v Northern Spirit Ltd 2003 UKHL 35** ..... public perception of the possibility of unconscious bias is the key. If the House of Lords had felt able to apply this test in **Pinochet** case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule."*

16. The significance of this last sentence is not to be lost as it seems the Privy Council was casting some doubts on the application of this rule and its automatic nature.

The circumstances of such case must therefore always be carefully considered so as not to blur the line between actual bias which results in automatic disqualification and apprehended bias with its objective test.

17. It is useful to note that in that case of **Meerabux v Attorney General (supra),** the chairman of an Advisory Council was a member of the Bar Association of Belize, whose complaints had been part of those examined by the council. One of the grounds advanced for him to have recused himself was that he was automatically disqualified on the ground of apparent bias because of his membership in the Bar Association.

This argument relied on the way the principle of automatic disqualification was applied in **Re Pinochet (No. 2) supra**.

18. In reviewing the facts of the case their Lordships confronted the question as to whether it can be said simply because of his membership of the Bar Association – that the chairman could be identified in some way with the prosecution of the complaints that the Association – was presenting to the tribunal so that it could be said that he was in effect acting in his own cause.

They opined that at page 126:

> *"Only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified. Their Lordships are not persuaded that the facts lead to this conclusion leaving the bare fact of his membership on one side it is clear that [his]*

detachment from the cause that the Bar Association – was seeking to promote was complete."

19. Their Lordships considered the chairman's relationship with the Bar Association, found that he took no part in the decisions which led to the making of the complaints, had no power to influence the decision as to whether they should be brought, he was not a member of the Bar Committee on whose initiative the complaints had been brought.

He was found to be a member of the Association simply because as an attorney-at-law membership of the Association was I his case compulsory.
This membership did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide.

20. The 2004 House of Lords decision of **Davidson v Scottish Ministers 2004 UKHL 34** also addressed issue of actual bias is a manner which may prove useful in the resolution of this matter.

Lord Bingham of Counhill at page 3 [para. 6] stated:

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

21. Lord Hope of Craighead also made some observations which may prove instructive at page 18 para. 46:

"The word 'bias' is used as a convenient shorthand. But it would be a mistake to approach it in this context as if its only meaning were prerogative. The essence of it is captured in the convention concept of impartiality. An interest in the outcome of the case or an indication of prejudice against a party to the case or

his associates will of course be a ground for concluding that there was a real possibility that the tribunal or one of its members was biased. ....

But the concept is wider than that. It concludes an inclination or pre-disposition to decide the issue only one way, whatever the strength of the contrary argument. A doubt as to whether this is the case is enough, so long as it can be justified objectively."

Re the Grounds

Ground iv

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

Ground v

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

Submissions for the Claimants

22. Mr. Foster, Q.C. advanced the arguments on behalf of the Claimants on these grounds and from early in his submissions reminded the court that their complaints against the counsel for the commission did not involve allegations of misconduct and/or improper motive. Theirs was the concern that there was bias discernable from the circumstances and not any conduct.

He asserted that it was not disputed that the counsel Mr. R.N.A. Henriques, Q.C. was director of Island Victoria Bank and Century National Bank – both failed institutions.

He was also the Chairman, director and shareholder of a company Premier Food Limited which loan portfolio was transferred to the 4th Claimant.
Further it is alleged that he was indebted to the 4th Claimant by virtue of personal guarantees executed by him in favour of Premier Food Limited. Also it is contended that while his being a guarantor is being challenged, it is not challenged that Premier Food Limited had four (4) loan accounts with Island Victoria Bank at a time when he was director and shareholder. These loans were transferred to FINSAC and subsequently acquired by JRF. Only one of these loans has been satisfied and a suit has been brought against Premier Food by JRF for the balance.

23. Given the mandate of the Commission which calls for the Commission "to review the operations of FINSAC in relation to delinquent borrowers and to determine whether debtors were treated fairly and equally, the Claimants submit that the counsel for the Commission by virtue of the positions he had held with the failed institutions falls with the class of persons that a determination is to be made.

24. The existence of the dispute as to whether Counsel for Commission was in fact a guarantor of the indebtedness of Premier Foods is raised by the Claimants as another cause of concern that this depiction of him, might cause him to be less than objective towards the 4th Claimant.
Mr. Foster, Q.C. argued that how he was being treated by the 4th Defendant in light of his denying signing the guarantee could well have been looked into by the Commission.

25. Ultimately the submission is made that the fair-minded and observer having considered the facts would conclude that counsel is likely to be biased whether consciously or unconsciously in performing his duties and rendering his advice to the Commission for six specific reasons.

Three of these reasons are to do with matters already mentioned i.e. his role in two failed/intervened institutions, as well as in Premier Food whose debts were taken over by FINSAC and the issue of whether he had guaranteed loans to Premier Food.

26. Other reasons concern his relationship with persons who have appeared before the Commission and the fact that whether Premier Food was offered a chance to participate in the window of opportunity write off was canvassed before the Commission.

27. In answer to the question - Can the appearance of bias on the part of Counsel result in the appearance of bias in the findings of the Commission – the case of **Simmonds v Williams No. 2 (1999) 57 W.I.R. 95** is relied on. The words of Georges JA (Ag.) at page 111H is quoted:

> *"Clearly if counsel to the Commissioner is biased he cannot fairly discharge his role and the Commission would thereby be flawed and so would the findings and/or conclusions of the Commissioner in his role as legal advisor to the Commission a biased view of the facts which advice is proferred would in all likelihood result in a biased or erroneous conclusion being reached by the Commissioner."*

28. It is submitted that the principle is the same regardless of whether there is actual bias or apparent bias found on the part of counsel to the Commission.

29. Mr. Foster, Q.C. acknowledged that Mr. Henriques, Q.C., had resigned from Century National Bank board some seven (7) years before it was taken over by FIS but he submitted that given the nature of the inquiry to be embarked on by the Commission, it was difficult to determine at what time the enquiry into circumstances that led to the collapse in the 1990's would have to commence and it might well have encompassed that time Mr. Henriques, Q.C. was a director.

30. Further it was opined that the fact that Counsel was not a debtor himself but the debtor was a company of which he was director was of no real relevance.

31. In concluding it was urged that on the basis of the legal principle the answer to the question "if the circumstances demonstrate an appearance of bias on the part of counsel to the Commission, the issue is whether that appearance of bias would leas a fair-minded reasonably informed person to conclude that the Commission is also tainted by bias" – must be in the affirmative.

The Submissions for the Defendants

32. On behalf of the 1st Defendant Dr. Barnett and Dr. Edwards succinctly submitted that "In his affidavit dated March 19, 2010 Volume 3 page 45, Mr. Henriques, Q.C. states that he resigned as a director of Century National Bank seven (7) years before the take over of FINSAC. Accordingly he has no conflict with any intervened institution."

Also it was submitted that the terms of reference relate to the treatment of debtors, in this case Premier Food Company Limited, not a director or shareholder who does not by virtue of being director or shareholder have any personal debt.

33. In their skeleton submissions the point was made that the affidavits of Janet Farrow has gone beyond the pleaded grounds of the claim. She was there expressing a concern of possible bias by Mr. Henriques, Q.C. on the ground that he is the guarantor of loans by Island Victoria Bank to Premium Food Limited.

However they went on to submit that in any event he had completely refuted the allegation.

The documents relating to any guarantee were challenged for their authenticity since Mr. Henriques, Q.C., had denied signing any such.

It was however accepted that in July 2004 Mr. Henriques, Q.C., had given a comprehensive response to the allegation to Dennis Joslin when he had then been written to about the guarantees. He advised that he had not signed any of the guarantees and there was no further communications to him about them.
The suit to recover the debts did not involve Mr. Henriques, Q.C.,

In conclusion on this point it was submitted that "neither in law nor n fact is there any live issue about Mr. Henriques, Q.C. being a guarantor and indebted under the said guarantees."

34. Dr. Barnett submitted that the role of the counsel was such that there could be no chance of him tainting the enquiry. In particular there may be matters his advice might well be sought e.g. on issue of summons and preparation of questions and also as to matters of procedure.

For the 2nd and 3rd Defendants

35. Mr. Beswick's response to the Claimant's assertions began by considering the counsel to the Commission's effect on the Commission.

He argued that there was "a singularly disturbing failure on the Claimants to focus on both the *ratio decidendi* and the specific facts [of the cases] cited in support of their claim."

36. He identified the lynch pin of the Claimants contention that a reasonable apprehension of bias on the part of the 1st Defendant and or counsel to the Commission would faint the entire body as **R v Sussex Justices ex parte McCarty**. From this authority it was argued the Claimants contended that the continued presence of disqualified person is fatal to the validity of a decision taken as the result of deliberations in his presence.

37. It is submitted that what was in fact decided in the case was that "if a disqualified person is present during the tribunal's consultations, it is immaterial and irrelevant to enquire whether the disqualified person actually gave advice. This patently is a rule which only applies where the disqualified party is present during consultations and deliberations of the tribunal."

It was noted therefore that this rule can have no application to the counsel to the Commission where there had been no private consultations – the decisions complained of were made *ex tempore* in a public forum.

The facts of this case show that at no time is there asserted the presence of counsel to the Commission in circumstances where the Commission was privately engaged in any decision.

38. The Claimants' reliance on the authority of **Simmonds v Williams** was opined to be misplaced. It does not create any general rule relative to apparent bias of counsel and the extension of the principle from actual to ostensible bias as without foundation and unwarranted.

The other reasons for contending the misplaced nature of the Claimants reliance on this authority are set out in terms that bears repeating as they were made –

> *"... the tests set out by counsel for the respondent in respect of finding that the Commission was infected by the bias of counsel were not rejected by the court, rather, it is that the court found those tests to have been satisfied being that there existed sufficient evidence on which a finding of the deposition to treat unfairly the complaining parties and that the bias affecting counsel leads to the real possibility of the Commission itself treating parties unfairly. Thirdly actual bias was found to exist in counsel to the Commission in that case which is the basis for the satisfaction of the first test. Fourthly, whereas in Simmonds it appears that the court gave its decision on the footing that the counsel to the commission had specific duties which might not be discharged fairly and impartially here there is neither statutory reference to counsel to the commission, nor is there evidence of such counsel's duties."*

39. Mr. Beswick submitted that it was plain that counsel to this Commission appears to be that of advocate sharing the duties of marshalling evidence for the Commission along with another counsel. There is no principle of law which prevents the Commission or any litigant from utilizing services of its chosen advocate. Alternately there is no evidence to suggest that any other role of the counsel is other than that of a ministerial responsibility.

40. The principle expressed by Deane, J in **Laws v Australian Broadcasting Tribunal** was adopted and so far as it applied to the counsel to the Commission, it is submitted that even if he was found to be a member of the class of persons so as to disqualify him from being engaged in the work of the Commission there is not a scintilla of evidence which would qualify as circumstances giving rise to a reasonable apprehension that the remaining members are affected b the ostensible bias of the counsel.

41. In concluding it is contended that the claim on this judicial review action should fail as it relates to these ground because counsel to Commission is not within the class of persons to whom the Commission is to make any determination there being no evidence to this effect. Further, the terms of enquiry of the Commission do not encompass him because he was either a director or shareholder of a company which was indebted to an intervened institution or an institution in which of which there was intervention, and there is no evidence that he was a guarantor of such institution.

42. It is important to note that Mr. Beswick joined in the challenge of the authenticity of documents seeking to establish the existence of any guarantees on the part of the counsel for loans made to Premier Food.

Finding of Facts and Application of the Relevant Laws

43. Mr. Henriques, Q.C., admits in his affidavit that he was a director of Premier Food Company Limited and resigned in 1998. He also mentions that he had resigned from Century National Bank Limited seven (7) years before the takeover by FINSAC. He has not denied the assertion that he was a director of Island Victoria Bank.

44. It is not disputed that both these banks "collapsed" in the 1990's.
As regard Century National Bank, the fact that it asserts were vested in Financial Institution Services Limited by an order of the Supreme Court dated October 21, 1991 was proven by the exhibiting of a copy of the order by the 2nd Claimant who had served as managing director of Financial Institution Services Limited and of Finsac Limited.

45. The terms of reference as may be relevant to this issue are:-

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

(a) ...
(b)
(c) the management practices and role of Board of Directors of the failed institutions.

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

46. Hence the Commission would have to enquire into the affairs of Century National Bank and Island Victoria Bank as being among the several financial institutions which had collapsed in 1990's.

Further the Commission would have to examine the management and practices and role of the Board of Directors of those failed institutions.

The terms of reference is silent as to what point in time such examination should commence.

47. The Commission of Enquiry Act does not speak to the duties of a counsel to the Commission. It speaks to the Governor-General's power to appoint a Secretary and his duties.
There was the recognition of 'the Hon. R.N.A. Henriques, Q.C., O.J., as counsel for the Commission and Mr. Ransford Braham as counsel who will marshall the evidence' before the Commission when the Commission commenced sitting.
There is no stated definition of the role and function of the counsel for the Commission.

48. From the portions of the official transcripts of the proceedings of the Commission, it is apparent that counsel for the Commission assisted in marshalling the evidence by asking questions intermittently.

Further at a meeting held prior to the actual commencement of the Commission's public sittings, to determine primarily the most efficient way of supplying information relative to the more than 25000 accounts in the JRF's portfolio, and other preliminary matters, counsel was present and participated in discussions along with the Commissioner's and the Secretary of the Commission.

49. The counsel at one time fell within one class of persons in relation to whom the Commission whose management practices and role was to be considered in the examination of the circumstances that led to the collapse of several financial institutions in the 1990's namely when he served on the Board of Directors of two failed institutions.

While it is true that he resigned from the Board of the Century National Bank, this resignation does not seem to have taken place at some time sufficiently far removed from the time the Bank was intervened into by the Government to safely remove the Counsel from being within the class.

50. As regards his position with Premier Food Ltd., it is unchallenged that the counsel received a letter on behalf of Refin Trust Limited, a wholly owned subsidiary of Finsac Limited in December 2008. At that time he was viewed by FINSAC as a debtor arising from his relationship, as they alleged it to be, with Premier Food Ltd. He did not respond to this letter.

There is also no dispute that some four and a half years later he was again contacted by Joslin Jamaica who had then acquired the account of Premier Food Ltd. So for this period of time although he was considered a debtor by FINSAC, nothing had been done to settle the debt through him.

This letter from Joslin Jamaica was responded to by counsel on July 13, 2004, when he categorically denied signing or authorising any one to sign on his behalf any of the guarantees and accordingly disclaimed any knowledge of or liability for the state of the account of Premier Food Ltd.

In his affidavit Mr. Henriques, Q.C., stated: -

> *"I have never received an answer to the letter of 13th of July, 2004. The only reasonable conclusion that I could draw is that the explanations I gave were accepted ...*
> *... No claim has been made on me. Since 13th of July 2004 by*

Joslin or by JRF and I have no dispute with them."

51. It is not disputed that proceedings have been taken against Premier Food Company Limited and Mr. Levy who guaranteed the debt in 2005 but Mr. Henriques, Q.C. was not made a party to the suit.

52. The circumstances to be considered then are that Mr. Henriques, Q.C., was viewed as a debtor by FINSAC. He responded, eventually, to their allegations of him so being and the matter is now viewed by him as being ended as he is satisfied his explanation has been accepted.

This set of circumstances seems to put Mr. Henriques, Q.C. into that class of persons who would be considered when the Commission was "to review the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally."

53. There are therefore two areas where if Mr. Henriques, Q.C. had been named as a Commissioner there would have been good grounds to call for his automatic disqualification – for actual bias.

However the fact is the role of counsel is so ill-defined and uncertain, which may well mean that the possibility exists for him to participate in decision-making. Hence, the question as to whether the appearance of bias on the part of counsel may result in the appearance of bias in the findings of the Commission must be seriously addressed and is not limited to the matter whether or not he was a decision maker.

54. The decision of the Court of Appeal in the case of **Panday v Virgil Magis** Appeal No. 75 of 2006, contains a statement by Warren, J.A. which provides some guidance in approaching this question at para. 26:

> *"The courts have recognised that bias operates in such an insidious manner that the person alleged to have bias may be unconscious of the effect. It is trite law that if a reasonable apprehension of bias arises the whole proceedings become infected. Credibility issues no longer arise, the reasonable apprehension of bias remains and the proceedings cannot be saved."*

55. The case of **Simmonds and Others v Williams and Others No. 2 (supra)** also proves useful in the manner in which the court considered the impact of a finding of bias on the part of legal advisers appointed by the sole Commissioner.

What Georges JA (acting) stated at page III has already been referred to and at page 112 he went on to say:

"... based on the unchallenged findings of trial judge of bias by counsel to the Commission in respect of that appellant; there is the real danger of counsel not discharging their functions fairly and impartially (including the render of proper advice, which could in all likelihood influence the judgment of the Commissioner on his finding of the facts. As Mr. Viera rightly pointed out bias is indeed such an insidious thing that a person may in good faith believe he is acting impartially, when his mind may unconsciously be affected by bias."

The counsel for the Commission has been found to be one whom automatic disqualification/actual bias affect given the position he held in "failed institutions" and his being deemed a debtor by FINSAC. The finding of bias then would arise not from any allegations of impropriety on the part of counsel but from the circumstances of the case.

This appearance of bias would lead a fair-minded and informed person to conclude that the role of counsel may result in findings of the Commission to be tainted by bias if he remains.

56. The case of **Simmonds and Others v. Williams and Others No. 2 (supra)** is distinguishable in that counsel was found to have had personal animosity towards the Claimant. There can be no suggestion of there being any *mala fides* on the part of counsel in the instant case.

Re Ground VIII

The 1st, 2nd and 3rd Defendants have made statements which suggest that they may have pre-judged some of the issues to be considered by the Commission.

Submissions for the Claimants

57. It was conceded in submissions for the Claimants that this complaint relates to the statements made by the 1st Defendant during the proceedings and by the 2nd Defendant prior to the commencement to the proceedings and indeed it turned out to be statements made prior to the announcement of the establishing of any Commission of Enquiry.

58. The complaints against the 2nd Defendant will be specifically addressed is he accused of making statements in articles he had written or at certain debates and in discussions which suggest he has prejudged some of the issues now to be investigated by the Enquiry.

Mr. Patrick Foster, Q.C. who advanced this ground on behalf of the Claimants point to statements made during the period 1996 and 2003.

59. The first in 1996 was an article purportedly discussing CNB's closure and whether changes were required to the existing policy framework to avoid similar problems in the near future. He is described as having diagnosed the problem and prescribed a plan of action and gave advice as to what the authorities should consider during in the event there was contradiction of liquidity following CNB's closure.

In 1998 he is described as making complaints about the high interest rates policy, and making comments as to why foreign manufacturers are leaving Jamaica. He is quoted as saying "if you have the right policies, the country will grow but if you don't, things will definitely contract.

60. It is submitted that these statements go to the heart of the mandate given to the Commission. Further it is submitted that they constitute an unwavering view held by the 2nd Defendant which were not open to persuasion by evidence led at the enquiry.

It is opined that he continued to hold the position for several years as illustrated in articles in the Gleaner 7th May 1998, February 2000, January 2001, February 2001, May 2003 and in the Observer 2009.

61. In advancing these submission for the Claimants the cases of **Re Carruthers 1997 Q.S.C. 132 (5th August 1997); Laws v. Australian Broadcasting Tribunal 1990 HCA 31 and Davidson v Scottish Ministers [2004] UKHL 34** are relied on.

62. The words of T. Thomas, J in Re Carruthers are noted:

> *"There is nothing objectionable in the formulation of a preliminary view or a particular question. This however is to be distinguished from pre-judgment or prejudice."*

63. From Laws v Australian Broadcasting Tribunal the opinion of Guadron and McHugh JJ is given -

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

64. It is submitted that as was the position in the case of **Davidson v Scottish Ministers**, the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the 2nd Defendant would "subconsciously strive to avoid reaching a conclusion different from that which he has been propounding for an extended period" and "was not open to change his consistently expressed opinion."

65. It was duly noted that there was no questioning of the right to make comments or the validity of them but rather whether these views are in fact not strong pre-judgments that would make it difficult for him to carry out a fair assessment.

Ultimately it is urged that one must consider what influence if any the view could have on the Commission.

For The 2nd Defendant

66. Mr. Paul Beswick in challenging this ground on behalf of the 2nd Defendant, pointed out that merely holding preliminary views in and of itself does not create a disqualification even where the view are strongly held. He submitted that "it can only be an expression of complete unwillingness to be disabused of previous notions that would qualify as a basis for disqualification on the ground of prejudgment."

He too finds the comments of Thomas J in **Re Carruthers** noteworthy.

67. It is noted that the 2nd Defendant is "by among other bases, a professional analyst ... As such his economic views are at once both potentially profound as well as objectionable."

Moreover the view is given that is from similar professionals and analysts and experts that such appropriation and objection would come.

It is submitted that no reasonable and informed non-professional would view the 2nd Defendant's view on economic and fiscal policy as anything other than a differing view.

68. The mandate of he Commission is defined by Mr. Beswick as being a fact finding inquisitional mission.
It is therefore argued that the 2nd Defendant a seasoned professional would have recognised that his views on policy would not affect this mission. Further it is argued that it is inconceivable that an ordinary observer would be compelled to conclude that the views of the 2nd Defendant were likely to be the findings of the 2nd Defendant when engaged in a fact finding mission.

69. Mr. Beswick argued further that even if the 2nd Defendant was tempted to interpose his own views in respect to the part of the assignment which calls for making recommendations, neither he or his fellow Commissioners are constrained by any principle which requires any of them to offer their recommendations in an unbiased manner.

70 It is accordingly submitted that any attempt to ascribe the pre-judgment to the Defendant by setting out his differing approaches to economic policy must fail.

The submissions in August 1996 article are seen as the 2nd Defendant's own genuinely held views as to how to solve a problem with which the nation was then grappling.

It is opined that a careful perusal of the articles referred to reveal that they are written in the style of an academic – an analysis of facts and events followed by recommendations.

71. The case of **Locabail Ltd v Byfield Properties (2001) 1 All.E.R. 65** was relied on, it being described as being a case in which the allegation of bias turned on statements in articles written by a recorder, the court noted that there was nothing improper in the recorder being engaged in writing activities. It was as the court said "the tone of the recorder's opinion and the trenchancy with which they were expressed which is challenged."

72. The view is urged that in the instant case not a single one of the articles pointed to, as if a mode of expression or trenchancy which is objectionable.

73. Another aspect of Locabail that is highlighted, as where the court paid particular regard to the issue of time which had elapsed between the events relied on and the case in which objection was raised.

At page 91 of the decision the court said:

> *"we repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between he event relied on and the case in which the objection is raised, the weaker (other things being equal) the objection will be."*

It is therefore noted that the bulk of these articles occurred between 7 and 12 years before the appointment of the 2nd Defendant to the Commission.

74. After reviewing the articles in some detail, Mr. Beswick submitted that the Claimants have failed to provide any evidence which shows that the "2nd Defendant is of such a fixed and immovable position in relation to these economic issues that he can rightly be described as having pre-judged the issues."
Further there is no evidence that he has "irrationally held on to his points of view in the face of evidence which clearly contradicted him."

75. Finally the records of Deane, J in **Laws v Australian Broadcasting Tribunal** is referred to where he reviews the facts of the case in discussing the appearance of bias.

The conclusion thereafter drawn is that pre-judgment requires far more than the offering of an opinion or view or the writing of a contributor's article to a newspaper –

the threshold for a finding of pre-judgment is submitted to be far higher than any of the facts asserted in relation to the 2nd Defendant.

Finding of Facts and Application of Relevant Law

76. The 2nd Defendant in his affidavit dated the 23rd of March 2010 indicates that he is a Civil Engineer by profession and holds a diploma in Management Studies and a Post Graduate diploma in Business Administration.

It was while he served as the Executive Director of the Private Sector of Jamaica that he oversaw the economic policy research of that organisation and spent much time focused on a macro-economic policy in the Jamaican context.

77. The specific aspects of the terms of reference that has been identified as cause for concern relating to the statements of this Defendant are as follows:-

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

a. The extent to which these factors were directly influenced by domestic or external factors.

b. Government's fiscal and monetary policies.

c. The performances of government's regulatory functions.

78. It is apparent that given the 2nd Defendant's experience gained while serving in the capacity he did at the PSOJ, he could be viewed would have much to offer to the Enquiry's mandate.

79. There is no challenge to the fact that in some of the articles referred to the views described as being held by the 2nd Defendant were in fact held by him. Neither was there challenge to the fact that quotes attributed to him, were in fact made by him. It is recognised that some statements made in the articles may be viewed as the writer's own opinion or depiction of the 2nd Defendant's views.

80. The 2nd Defendant has not addressed the allegation made against him as expanded at the judicial review. The fact that in his second affidavit he addressed the question of pre-judging as it relates to things said or done during the sitting of the Commission, suggests that he had no prior notice of the specifics of these allegations.

81. The case of **Locabail Ltd v Bayfield Properties (supra)** has observations made which proves useful in considering these issue.

The court at page 77 para. 25 said:

> *"It would be dangerous and futile to attempt to define or test the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts which may include the nature of the issue to be decided ...*
>
> *... Nor, at any rate ordinarily, would an objection be soundly based on .... extra-curricular utterances (whether in textbooks, lectures, speeches, articles, Interviews, reports ....)*
>
> *By contrast, a real danger might well be thought to arise .... If on any question at issue in proceedings before him the judge expressed views, particularly in the course of the hearing in such extreme and un-balanced terms as to throw doubt on his ability to try the issue with an objective judicial mind."*

The court eventually went on to make the comments previously referred to by Mr. Beswick in his submission.

82. Another case decided at the same time as **Locabail Limited v. Bayfield Properties** demonstrates the court's approach where the allegations of bias was made against a Recorder who wrote some articles seen as touching the matter he was called upon to determine.

The case was **Timmins v Gormley at 2001 1 All E.R. 88.**

After reviewing the articles the court found that some were not couched in language which would be criticised as being inappropriate but did express strong views held by the Recorder.

One other was highly critical of conduct of certain parties similar to parties now before him and referred to them in trenchant term.

The court commented at page 91:

> *"Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has pre-conceived views which are so firmly held that it may not be possible for him to try a case with an open mind.*

This is the position notwithstanding the fact that ...
there can be very real advantages in having a judge
adjudicate in the area of law in which he specialises."

The Court found in the circumstances of that case that a lay observer with knowledge of the facts would not have ruled out the possibility that the pronounced views expressed by the recorder in the articles might have unconsciously leant in favour of one party against the other in resolving the factual issued between them.

This decision supports the basic fact that every application must be decided on the facts and circumstances of each individual case.

It should be noted that these cases were decided before **Porter v McGill** which changed the test for bias.

83. In the instant case the views of the 2nd Defendant needs be considered against the background of the information and the material then available to him. And the perspective from which he was then doing research and writing.

The mandate of the Commission was in deed firstly fact-finding and investigatory and it is fair to assume that the 2nd Defendant would be exposed to more information.

84. While it is true that the view shown to have been expressed by the 2nd Defendant appear to be consistent, the questions may well be asked as to whether from these views one can say that the availability of more information would have no impact.

The bare assertion that he has pre-judged the issues is not sufficient. There is nothing presented to show that the 2nd Defendant would not have been able to adjust or abandon them in the face of the information the inquiry would reveal.

Conclusion

85. Given the finding of my brothers on the grounds affecting the chairman of the Commission and relating to the issue of procedural fairness I agree with the orders made by my brother Campbell, J.

Pusey, J.

1. Polonius' advice to "neither a borrower nor lender be" is almost impossible to follow on modern societies. Few can afford to conduct commercial activities or to buy homes without debt. In the early 1990's the banking sector in Jamaica grew very quickly. In the middle 1990's some banks had difficulties and the government intervened in the banking sector. The government intervention was eventually lead by the Financial sector Adjustment Company (FINSAC).the intervention became commonly known as the FINSAC intervention. Despite the fact that more than one company was used by the government, in common parlance, the generic name of FINSAC was used for the government vehicles involved in the intervention.

2. The government intervention involved, among other things the restructuring of some banks, the dissolution of others and FINSAC management of the outstanding debt of these troubled banks. Eventually some of the debt was sold to an entity known as Jamaica Redevelopment foundation (JRF). However, many of the debtors complained about their treatment by the FINSAC entities and JRF.

    1) In 2008 a Commission of Enquiry was appointed to look into the collapse of the financial sector in the 1990's. The terms of Reference of the Commission of Enquiry were as follows:

        I. To examine the circumstances that led to the collapse of several financial institutions in the 1990s with particular regard to:

            a) the extent to which these circumstances were directly influenced by domestic or external factors;

            b) Government's fiscal and monetary policies;

            c) The management practices and role of Board of Directors of the failed institutions;

            d) The performance of Government's regulatory functions.

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

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

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

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

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

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

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

3. The first three Defendants were named as Commissioners. The First Defendant was named Chairman of the Commission. The Chairman is a very experienced and eminent jurist. He has served with distinction at all levels of the Jamaican judiciary. After retiring from the Jamaican Court of Appeal he has served at the appellate level in other Caribbean Jurisdictions. The Second Defendant is the managing director of a security dealership.

4. The Commission of Enquiry began its hearings in September 2009 and called several witnesses including representatives of the Central Bank, directors of some private sector entities and former and current government officials. Among the former government officials are the First Claimant and Third Claimant. The First Claimant is a former Financial Secretary and former Chairman of the Board of Directors of FINSAC. The third Claimant was the Minister of Finance at the time of the FINSAC intervention. The Second Claimant was Managing Director of FINSAC and currently manages a bank that has been the subject of an intervention.

5. The Commission of Enquiry adjourned on December 10 2009 to recommence on January 19 2010. On December 31 2009 attorneys representing the Claimants wrote to the Commission. They expressed concerns about the Chairman and his wife being either debtors to FINSAC and/or being connected to companies which were FINSAC debtors.

The Chairman in his opening remarks on the hearing on January 19, 2010 mentioned the letter of December 31 2009.

He stated that:

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

6. This statement echoed a letter of January 18 2010 which was set by the Commission to the Attorneys in response to their letter. The Attorneys for the Claimants attempted to be heard on the issue and were refused. They were invited by the Chairman to contact the Secretary of the Commission to arrange a time to be heard. Having done this they were referred to the January 18 letter which spoke of the Solicitor General's advice.

7. The Claimants sought and obtained leave to apply for judicial review of the decision of the Commissions of Enquiry. The Claimants advanced the following grounds at the hearing before this court.

1) The Chairman had an outstanding debt as a result of an overdraft account with century national bank. This overdraft was taken over by Financial Institution Services Limited at the time of the intervention. The Chairman was therefore of the class of persons who the Commission was to decide whether they were treated fairly or not and consequently ought not to sit on the Commission as he would be a judge in his own cause.

2) A company operated by the Chairman's wife and of which he is a shareholder was a FINSAC debtor. The documentation shows that the Bills of Sale which secured these loans are still outstanding. It was argued that a fair minded observer would conclude that the Chairman would not be able to impartially assess the treatment of debtors as he is so closely associated with a company which was treated as a debtor.

3) Counsel to the commission was closely connected to an intervened institution and was also a director and shareholder of a company that was indebted to an intervened institution.

4) Commissioner Ross was a consistent critic of government policy between 1996 and 2003. As such he had prejudged the

issues to be determined by the Commission and was not open to changing his consistently held opinion.

5) The Commission was conducted in a manner which was unfair to the Claimants and as such should not be allowed to continue.

8. I have read in draft the judgments of Campbell J. and P. Williams J. and agree with their reasoning and conclusions. I agree with the orders made by my brother Campbell, J. I will address the issue of procedural fairness of the tribunal.

9. Two point of emphasis need to be made in relation to the law in relation to bias.

10. Firstly, it bears emphasizing that the rule against bias is intended to preserve the Rule of law. It is aimed at ensuring that a person is not a judge in his own cause or does not decide on a matter that he is too close to. It does not speak to the personal integrity of the person who is said to have offended the rule.

11. Secondly, in relation to applications for recusal it is the duty of a judge to deal clearly and fully with an application to recuse him. Even if he considers the application frivolous and unwarranted it is his responsibility to treat fully with the allegations and rule on the recusal as quickly as possible. If the adjudicator merely brushes aside the allegations or tries to dismiss them out of hand without hearing the assertions he may heighten any perception of bias.

12. The approach of **Sedley LJ in Baker v Quantum Clothing Group & Ors. [2009] E.W.C.A. Civ. 566** should be recommended to all judges. He disclosed any likely conflict at the earliest possible stage. Then when an allegation was made against him, he provided a statement which met the contentions of the party. After his refusal to recuse was contested, he then requested the other judges in the panel should determine whether he should sit on the matter.

13. In the instant case, the Chairman's refusal to hear an oral application from the Claimants' attorneys on the issue of his suitability to sit on the hearing of the Commission was likely to open him to greater criticism.

Procedural Fairness

14. The Claimants argued that the procedures adopted by the Commission were unfair and in breach of natural justice. This was grounded on the following assertions.

1) The procedures of the Commission were uncertain. The Claimants point out that despite the request made before the hearings commenced the Commission failed to fix or publish procedural rules.

2) The procedures of the Commission were inconsistent. Microphones had been removed from the audience when other witnesses were giving evidence but were replaced when the Third Claimant was to be cross examined. At one stage persons were told that they needed to provide the questions in writing which they wished to ask. That requirement was dropped by the Commission when The Third Claimant was being cross examined. The third Claimant was the only witness before the Commission to be cross examined by the members of the public present at the Enquiry.

3) The Commissioners failed to inform some of the Claimants of the allegations against them. The third Claimant gave evidence that during his testimony the Commissioners referred to documents that he had not seen. The Claimants found out that Dr. Paul Chen-Young had made submissions to the Commission but these where not disclosed to the witnesses.

4) The Commissioners allowed cross-examination to be carried out in a way that was patently unfair. In addition to the points mentioned in 2 above the Third Claimant was cross examined by members of the audience about individual cases which he could not have had personal knowledge of. He was also asked questions by the member of a political group who had no personal interest in the subject of the Enquiry.

15. In response to this the Defendants point out that the Commission was an information gathering exercise and not a trial. Therefore there needed to be a degree of latitude in the procedure while it gathered information. For example, the Commission originally asked for questions to be put in writing but because the members of the audience were asking questions this requirement was thought too rigorous.

16. The Commission felt that since the Third Claimant was an elected official who was responsible for the policies that were the foundation of the FINSAC intervention, then it was appropriate to have him questioned by members of the public. The Commission restricted questions to the third Claimants to those he could reasonably answer. It also allowed him time and accessed resources for him to answer particular question. When a person who was not affected by the intervention attempted to ask the Third Claimant questions the Chairman attempted to stop him. It was Dr Davies himself who assented to answering the question.

17. The Defendants point out that the Commission was unable to get statements ahead of time and had to compose question for some of the significant individuals whose evidence the Commission required. This forced the Commission to obtain evidence from some witnesses then recall them for additional evidence at some stages. This is the approach the Commission took with the third Claimant.

18. The issue of procedural fairness, the Defendants argue must be looked at as a whole as it would be inappropriate to look at isolated incidents to determine fairness.

19. The Commissions of Enquiry Act at Section 9 gives the Commissioners extensive discretion to regulate their procedure.

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

20. This wide remit is circumscribed by the principles of natural justice. The view of the Supreme Court of Canada as enunciated by Cory J in **Canada (Attorney General) v Canada (Commission of Inquiry on Blood System) [1997] 3 SCR 440** is instructive.

He states that:

> "The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Decary J.A. when he stated at para. 32 "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". This means that no matter how important the work of an inquiry maybe, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly."

That position is applicable to Jamaican Law. Although a Commission of Enquiry is an Investigative tribunal and as such must be given greater latitude than a court, it must follow the principles of Natural Justice in its rules and procedures.

The question then is what level of procedural fairness that is owed to the parties.

21. In **Pelletier v Canada (Attorney General) [2008] FC 803** (CAN LII) at paragraph 46, 50 – 54 the Canadian Supreme Court held that the duty of fairness was variable. The court held citing **Baker V Minister of Citizenship and immigration [1999] 2 SCR 817** that there are five non-exhaustive factors in determining the content of the Duty of fairness (paragraph 41). These are:

(i) The nature of the decision and the decision making process;
(ii) The statutory scheme;
(iii) The importance of the decisions to the individuals affected;
(iv) The legitimate expectation of the parties;
(v) The choices of procedure made by the decision making body

(1) The nature of the decision and the decision making process

22. In relation to this factor the Canadian Supreme Court opined that the more the process and the determinations resemble a judicial decision "the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness." (Paragraph 43).

23 The court goes on to indicate that commissions of inquiry are not trials. They are inquisitorial rather than adversarial. The conclusion of the court in relation to this factor is very applicable to this case.

> "Although there are similarities in procedure, the role played by Commissioners is distinct from the role of a judge presiding over a trial. The nature of a Commissioner's report and recommendations are also vastly different than judicial decisions. This suggests that a lower content of procedural fairness is required".

When one looks at the wording of the Terms of Reference it is clear that the Commission of Enquiry was not judicial. With the risk of being tedious the wording of the terms are set out with added emphasis.

(i) To **examine the circumstances** that led to the collapse of several financial institutions in the 1990s with particular regards 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.

1. **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;

2. **To review** the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally;

3. **To review** the probity and propriety in FINSAC's management, sale and or disposal of assets relating to delinquent borrowers;

4. **To review** the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation;

5. **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;

6. **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;

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

24. In my view the phrases "to examine...", "to consider..." to review..." and "to assess..."indicate that the Commission was investigative and the decisions to be made were not very similar to judicial functions.

(2) The Statutory Scheme

25. In **Pelletier** the Court held that a high degree of fairness was owed as the Commission's findings were determinative of the issues. The **Canadian Inquiries Act** also provided for legal representation and for notices to be sent to persons against who there were allegations of misconduct.

As stated before that based on the Terms of Reference this Commission is not determinative of anything. This is a Commission of examination, recommendation and

review. It is not determinative of any rights and responsibilities and does not purport to make findings of law. In my view therefore, the degree of procedural fairness required is not high.

(3) The importance of the decision to the individuals affected

26. It has been argued that the reputations of the Claimants can be adversely affected by the findings of the Commission. Certainly it is important to the reputation of these former government servants how their actions would be reviewed in the light of time.

27. Conversely there have been some very emotional tales of financial ruin allegedly caused by the FINSAC intervention. For the individuals who had their loans dealt with by FINSAC, it is of immense importance what the Commission decides.

It is this need to balance these and other competing interest that it is very necessary for the Commission to ensure that it is careful in applying the principles of fairness.

(4) The legitimate expectation of the parties

28. Where rules of procedure are established a participant may have a legitimate expectation that these rules will be followed.

> "... the doctrine of legitimate expectations does not create substantive rights. But, where decision-makers act in contravention of representations as to procedure, or backtrack on substantive promises without according significant procedural rights, the decision-maker will generally be seen to have acted unfairly."

Pelletier paragraph 55.

29. The Third Claimant indicated to the Commission through his counsel that the rules in terms of question s had been inconsistent in relation to him. In particular mention was made of the asking of questions without them being put in writing beforehand and the cross examination from the audience. These complaints where dealt with by the chairman who explained the Commissions reasons for making those changes.

30. There is no basis for the view that the Commission held it self out of a procedure then did not follow through with it. Consequently, there could be no finding of failure to conform to legitimate expectations.

(5) The choices of procedure made by the decision making body

31. Where the right to determine procedure is left to the Commission there is a lower content of procedural fairness. (Pelletier Para 55) Section 9 of the Commissions of Enquiry Act gives the Commissioners full discretion to set the procedure.

Having taken into consideration all the factors as set out in Pelletier and Baker a lower content of procedural fairness was required.

32. It is my view therefore that the procedures of the Commission were not procedurally unfair by reason of being uncertain or inconsistent. It would have been advisable for the Commission to set out procedural rules in this inquiry. In the cases of **Pelletier and Canada (Attorney General) v Canada (commission on Inquiry on the Blood System)** the Commissions set out rules in consultation with the parties who were likely to appear before them. However due to the lower content of procedural fairness required in this Commission and the latitude given to the Commission by the Act and the Terms of Reference it is not fatal to have failed to publish rules.

33. In relation to the requirement to have all the information relevant to the parties set before each witnesses it was noted previously that the Commission had difficulty in acquiring evidence. The Commission indicated that it had many documents to go through. It also indicated that it was willing to recall witnesses (including the Third Claimant) to deal with particular aspects of evidence not available when the person gave evidence. Therefore the fairness to the witnesses in terms of accessibility to contradictory statements must be looked at over the whole Enquiry process as a whole and not in relation to a particular stage.

34. There is no doubt that the Third Claimant faced somewhat hostile questioning from some members of the audience. As stated before, the Chairman moderated these questions and limited them to those which were relevant and within the witness's ability to answer. He also provided resources and time to answer questions that the witnesses had difficulty answering. It cannot be said therefore that the Commission was unfair in relation to the manner of cross-examination.

35. The Commission explained the allowance of audience cross examination of the third Claimant. This speaks to the flexibility available to the Commission. It is noteworthy that the third Claimant (who was represented by counsel) did not object to being cross examined by the audience although his counsel later expressed "concerns".

36. In conclusion although a Commission of Enquiry has a duty to be fair to all parties especially those whose reputations might be affected by its report the publication of rules of procedure, while advisable is not mandatory. In this instant case based on the Terms of Reference the Commission owed a lower level of Procedural fairness to the participants including the Claimants. When the activities of the Commission are examined on a whole there is no procedural unfairness to the Claimants.