THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-02265

BETWEEN

BASDEO PANDAY
OMA PANDAY **Claimants**

AND

HER WORSHIP MS. EJENNY ESPINET **Defendant**

AND

DIRECTOR OF PUBLIC PROSECUTIONS **Interested Party**

Before the Honorable Mr. Justice V. Kokaram

Appearances:
Mr. G. Robertson Q.C., Mr. R. Rajcoomar and Mr. A. Beharrylal instructed by Ms. M. Panday for the Claimants
Mr. N. Byam for Her Worship Ms. Ejenny Espinet
Mr. D. Mendes, S.C. and Mr. I. Benjamin instructed by Ms. R. Maharaj for the Interested Party

JUDGMENT

1. Introduction:

1.1 Mr. Basdeo Panday ("the first Claimant") is one of the veterans in the political life of Trinidad and Tobago. He is the political leader of the United National Congress Alliance ("UNC-A"), the member of Parliament for the constituency of Couva North in the House of Representatives, the Leader of the Opposition in the Parliament of Trinidad and Tobago and former Prime Minister of the Republic of Trinidad and Tobago[1]. He has been a member of the House of Representatives since 1976 and in 1991 founded the United National congress ("UNC") the predecessor to the UNC-A. He together with his wife, Oma Panday ("the second Claimant") were both charged with the indictable offence of having committed an offence under the Prevention of Corruption Act No. 11 of 1987 namely: that on or about 30th December 1998, they corruptly received from Ishwar Galbaransingh and Carlos John, an advantage in the sum of GBP 25,000 as a reward on account for the first Claimant, for favouring the interests of Northern Construction Limited in relation to the construction of the then new Piarco International Airport[2].

1.2 The charges were laid during the administration of the People's National Movement ("PNM") which is the political opponent of the UNC. Her Worship Senior Magistrate Ms. Ejenny Espinet, ("the learned Magistrate") conducted the joint preliminary enquiry. After the prosecution closed its case, a no case submission was made

[1] The first Claimant was Prime Minister for the period 1995 to 2001

[2] The first Claimant was charged by information No. 6530 of 2005 sworn on 28th May 2005 by Acting Inspector John Telesford No. 9833 as follows: on 30th December 1998 did corruptly receive from Ishwar Galbaransingh and Carlos John an advantage in the sum of GBP 25,000 as a reward on account of the said Basdeo Panday, an agent favoring the interest of Northern Construction Limited in relation to Obstruction Package No. 3 in the new terminal development at Piarco Airport, a matter in which a public body, namely, the Airports Authority of Trinidad and Tobago was concerned contrary to section 3(1) of the Prevention of Corruption Act No. 11 of 1987.
The second Claimant was charged by information No. 6543/05 sworn on 28th May 2005 by Acting Inspector John Elmsford No 9833 as follows, namely, that she on 30th December 1998 aided and abetted Basdeo Panday by corruptly receiving from Ishwar Galbaransingh and Carlos John an advantage in the sum of GBP25,000.00 as a reward on account of the said Basdeo Panday, an agent favoring the interest of Northern construction Limited in relation to Construction Package No. 3 in the new terminal development at Piarco Airport, a matter in which a public body namely the Airports Authority of Trinidad and Tobago was concerned contrary to section 3(1) of the Prevention of Corruption Act No. 11 of 1987.

on behalf of the Claimants. This submission was dismissed on 30th November 2007 by the learned Magistrate who found that there was a prima facie case made out against the Claimants for the alleged offences. An application was then made by the Claimants for the learned Magistrate to recuse herself from conducting the proceedings on the ground that she is a Treasurer and Trustee of the Morris Marshall Development Foundation ("MMDF") a charitable organization which services the needs of the "PNM controlled constituency" of Laventille. On 19th March 2008 the learned Magistrate delivered an oral ruling rejecting that application. It was later discovered by the Claimants, that the father of the learned Magistrate was Mr. Alexander Chamberlain Alexis a former minister in the PNM government and member of Parliament "on a PNM ticket."

1.3 On 22nd July 2008, the Claimants obtained leave to apply for judicial review of the said decision of the learned Magistrate not to recuse herself from conducting the preliminary enquiry. The Claimants contend that the said committal proceedings are vitiated by the apparent bias of the learned magistrate. I should state at the outset that no allegation has been made in these proceedings of any actual bias on the part of the learned magistrate against the Claimants nor of any impropriety or misconduct or breach of the judicial oath in conducting the proceedings.

1.4 In the Machiavellian world of politics, the inference that the ruling political party in our parliamentary democracy may view the successful conviction of the Leader of Opposition as a "political victory" may be irresistible. However the challenge made in this case to a sitting magistrate to recuse herself on the ground that she is perceived to be aligned to the Claimants' political opponents brings into sharp focus the public perception of impartiality in adjudication in our system of justice.

1.5 Where there is a legitimate basis to conclude that an adjudicator is affected by apparent bias, he should recuse himself to remove any perception of rendering an improper verdict. The appearance of a fair trial is a fundamental feature of our adjudicative process and as Lord Hewart CJ in ***R v Sussex Justices, Ex p McCarthy*** reminds us "*it is not merely of some importance but is of fundamental importance that*

justice should not only be done but should manifestly be seen to be done." What is therefore at stake is the confidence which the courts in a democratic society must inspire in the public.[3] This is an essential underpinning of the rule of law and our administration of justice.

1.6 An accuser's right to a fair process is a constitutional guarantee that a Court must jealously protect at every stage. The accused may harbour fears that his adjudicator is "against him," but this is not an uncommon feature of criminal or civil proceedings. However, to say that his trial is unfair because his adjudicator is biased towards him is an allegation that must be objectively sustained. To do otherwise would be to concede to the accused or litigant, a monopoly over the choice of an adjudicator for his trial resulting in the loss of control by the Courts over its own process. The objective justification of an allegation of apparent bias is viewed through the lens of the "fair minded and informed observer." This observer is an artificial construct fashioned to distill fact from fiction and to render an intelligible assessment of the facts with full knowledge of all the circumstances balancing the interest of the appearance of a fair trial with the conduct of a trial that is fair.

1.7 To succeed in a challenge of apparent bias, it is he, the educated and knowledgeable observer, who must nod in the affirmative that he concludes forming his impression on objective criteria, that there is a real possibility that the learned Magistrate cannot impartially bring her mind to bear on the issues that fall for adjudication in relation to the Claimants. It is therefore the perception of this observer which is important.

1.8 But there is a difference between perceptions and conjecture, speculation and measured belief. At the core of the Claimants' case is the perception of bias by "association." The association of the learned Magistrate to the MMDF and to her estranged father, a former PNM Minister, without any evidence of a connectivity of views

[3] Per Lord Phillips of Worth Matravers MR ***Re Medicaments and Related Classes of Goods*** [2001] 1 WLR 700

and opinions between the learned magistrate and that of the PNM either as espoused by the MMDF or her father. The Claimants' proposition therefore automatically condemns a person to the political views of organizations whose political positions are unpublished or unknown and biological parents with whom one has had no physical contact. Such automatic censure is drawn without deference to the concept of independent thought or belief, the reality that a judge brings to the bench many existing sympathies or antipathies, the many associations that are formed over a legal career in a small society and the judicial oath to free oneself of prejudice and partiality in deliberations. To elevate the notion of mere associations without regard to a connectivity of views as evidence of apparent bias into a general principle of law will be unsound in principle and dilutes the principle of the independence of the judiciary.

1.9 The nature of the learned magistrate's associations must therefore be carefully examined and weighed to balance the public's interest in the appearance of a fair trial with the confidence the public must hold in the judiciary to faithfully discharge its oath. In this case I hold that the allegation of apparent bias has not been established. Because of the effect of this conclusion on the parties involved it is preferable if I first address the fundamental legal issue of Apparent Bias which is at the heart of this case. The judgment is structured as follows:

2. Bias and impartiality:

2.1 The word "impartial" connotes absence of bias; actual or perceived[4]. Realistically we are all imbued with an inherent bias from one's experiences. The American Judge, Jerome Frank, said "*if .....'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no-one has ever had a fair trial and no one ever will*"[5]. The concept of impartiality must be viewed in context as every human being is exposed to their own life experiences which shape their notions of reality and perceptions of truth. By a process of education and socialization, our attitudes and outlooks are shaped which will inform our decision making processes. "*Interests, points of view, preferences, like and dislikes, loves and hates, are the essence of living for all, except perhaps for those marooned on a desert island."*

[4] per Lydian R v Valence [1985] 2 SCR 673 at 685
[5] In Re J P Lineman Inc. 138F.2d 650 (1943)

2.2 The duty to adjudicate does not translate to an obligation to ignore one's own experiences. Mr. Justice Cory in **R v S (RD)**[6] usefully observed:

> "*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 who 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 probably 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."*

2.3 Although impartiality does not require that the judge is devoid of sympathies or opinions, it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[7] In ***Panton v the Minister of Finance*** Lord Clyde observed:

> "*Experience outside the law, whether in politics or elsewhere may reasonably be regarded as enhancing a judicial qualification rather than disabling it. In countries where it is recognized and accepted that judges may well have behind them a history of political affiliation or partisan interest it has also to be recognized that such historical associations can be put aside in the interest of performing a judicial duty with independence and impartiality*."

[6] [1997] 3 SCR 484 p.119
[7] [2001] 5 LRC 141

2.4 It is therefore a feature of our adjudicative process that the persons chosen to adjudicate have their own experiences outside the law but in the exercise of one's impartiality they are called upon to put those experiences aside.

2.5 Bias is the opposite of this notion, it connotes the closing of one's mind, being affixed to pre-conceived views and remaining inflexible in the face of argument. Lord Phillips of Worth Matravers MR reminds us in ***Re Medicaments*** that bias is an attitude of mind, which prevents the judge from making an objective determination of the issues that he has to resolve. He may be biased not necessarily in favour of an outcome of the trial but because he harbours a prejudice in favour or against a particular witness, it prevents an impartial assessment of the evidence of that witness. Devlin LJ recognized that bias "*is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."* Indeed, public perceptions of the possibility of unconscious bias, is the key concern with the need to maintain public confidence in the administration of justice.[8]

2.6 It is the perceptions of such unfairness, which is an insidious cancer on the system of justice which is difficult if not impossible to surgically detach from proceedings. At the other end of the spectrum, the concept of judicial independence connotes a freedom to adjudicate in a process where discharging the functions as a magistrate or judge, one is subject to nothing save the law and the command of one's conscience. It is referred to as the neutrality of mind of the judge and his total freedom from irrelevant pressures. [9]

2.7 The ability to be impartial is to adjudicate with an open mind, regardless of the prejudices acquired through the incidence of ordinary living and features of one's humanity. In the quest to free oneself of partiality or a propensity to pre-judge, the judge is enjoined in a duty to ensure that the process is not tainted with a sense of injustice which arises with a perception of unequal treatment. Lord Devlin observed:

[8] See ***Lawal v Northern Spirit Limited*** [2003] UKHL 35

"*The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he has is impartiality and next after that the appearance of impartiality. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all*"[10]

2.8 There is no price to be paid for the maintenance of the confidence in the integrity of judiciary. In ***S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*** (1988) 12 NSWLR 358 Kirby P (as his Honour then was) said, at 360:

"*But independence, with integrity, is the very heart of the matter. It is the reason why, in hotly contested disputes involving liberty, status, reputation, power and vast funds, our society entrusts decisions to judges and accepts their orders. Independence, and the manifest appearance of independence, is thus highly prized judicial qualities. At stake is not just the acceptance of a judge's decision by the litigants but also the acceptance by the community of the administration of justice by judges.*"[11]

2.9 Justice can only be done if there is in fact no bias. It can only be seen to be done if there is no appearance of bias. "*Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'*[12]

2.10 For this reason Codes of Judicial Conduct have recognized the impartiality of the judge as a valuable asset in the administration of justice. An examination of the formal codes which have been promulgated in some territories demonstrate the delicate balance

---

[9] See ***Metramac v Fawziah*** [2008] 2 LRC 290. In **R v Brantley Licensing Justices, Ex p Brantley and District Licensed Victuallers' Association** [1960] 2 QB 167, 187,

[10] Devlin The Judge (1979)

[11] See also *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293 - 294; *Johnson v Johnson* (2000) 201 CLR 488 at 492 - 493 and *Minister for Immigration v Jia* (2001) 205 CLR 507 at 547).

that must be maintained between the perception of bias and the duty to perform one's judicial functions in deciding the matters in controversy before him.[13] Suffice to say that it is well settled that a judge may carry out his duties in a manner that is wholly transparent to ensure public trust in the judicial process.[14]

2.11 It is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualifications of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favor.[15]To do otherwise would make the judicial system vulnerable to maneuvering by parties and to encourage "judge shopping."

3. Bias and Fairness

3.1 The bias rule is part of the broader rules of natural justice or procedural fairness. Section 20 of the Judicial Review Act requires an inferior court, tribunal, public body, public authority or a person acting in the exercise of public duty or function to act in

---

[12] Per Lord Denning MR in ***Metropolitan Properties Co (FGC) Ltd v Lannon*** [1969] 1 QB 577 at 599.

[13] 2.11 The Codes of Judicial Conduct of the CCJ states:" *Impartiality is crucial to the proper discharge of the judicial office. It applies not only to the making of a decision itself but also to the process by which the decision is made."*

Clause 4.6 " A judge shall disqualify himself or herself in any proceedings on which there might be a reasonable perception of a lack of impartiality of the judge….

Clause 4.10 Save for the foregoing a judge has a duty to perform the functions of the judicial office and litigants do not have a right to choose a judge."

[14] per Warner JA, Panday v Virgil. In Republican Party of Mann v White 536 US 765 (2002) "*Courts in our system elaborate principles of law in the course of resolving disputes. The power and the prerogative of court to perform this function rest in the end upon the respect accorded to its judgments. The citizen's respect for judgment depends in turn upon the issuing courts absolute probity. Judicial integrity is in consequence a sate interest of the highest order."*

[15] ***Locabail UK Limited v Bayfield Properties Limited*** [2000] 3 LRC 482

accordance with the principles of natural justice or in a fair manner. In ***Kanda v Government of Malaya***[16] Lord Denning makes the distinction between the right to be heard and the rule against bias. It is the twin pillars of "nemo judex in causa sua" and "audi alteram partem" that support the concept of natural justice." If there is apparent bias of the learned magistrate it constitutes a breach of natural justice.

3.2 Proceedings that are affected by bias is also a breach of the constitutional right to a fair trial guaranteed by section 5(2) (e), (f) (ii) of the Constitution of Trinidad and Tobago. Lord Steyn ruled in ***Lawal v Northern Spirit Ltd*** [2003] UKHL 35, that there is now no difference between the common law test of bias and the requirement under article 6 of the European Convention of an independent and impartial tribunal. Archie JA in Panday v Virgil opined that "*the common law and constitutional causes of action are opposite sides of the same coin."* Indeed if there is a legitimate claim that there is apparent bias, the Claimant has been denied due process.

4. The test of apparent bias

4.1 In ***Ebner v Official Trustee in Bankruptcy***[17] Gleeson CJ observed that in practice, the most effective guarantee of the fundamental right to a hearing before an impartial tribunal is afforded by rules, which provide for disqualification of a judge on the ground of a reasonable apprehension of bias.[18]

4.2 The test to determine whether the learned magistrate was affected by apparent bias has been developed consistently with the concept of maintaining the integrity of the judicial system by balancing the public interests of the appearance that justice is being done with the requirement of the judge to sit and not lightly abdicate his judicial oath.

[16] [1962] AC 322
[17] (2000) 205 CLR 337
[18] See also *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 475)

4.3 In this case however, the parties do not agree on what is the appropriate test for apparent bias in this jurisdiction. The Claimants contend that the test is formulated as follows:

> "*Whether a fair-minded lay observer aware of all the relevant facts might reasonably apprehend that there was a real possibility that the Defendant Magistrate might not bring an impartial and unprejudiced mind to the resolution of questions arising in the course of the committal proceedings against the Claimants."*

This follows the Australian jurisprudence emanating from the statement of Kirby J in ***Johnson v Johnson***[19]. The Defendant contends that the appropriate test is:

> *"Whether a fair minded and informed observer having considered the relevant facts would conclude that there was a real possibility that the Defendant magistrate would not bring an impartial and unprejudiced mind to the resolution of questions arising in the course of the committal proceedings against the Claimants."* [20]

This reflects the "***Porter v Magill***[21] test" which has received recent application in the House of Lords in ***R v Abdroikof***[22]*,* ***Helow v Secretary of State for the Home Department***[23] in our Court of Appeal in ***Panday v Virgil***[24] and [25]***Leon Nurse and ors v***

---

[19] (2000) 201 CLR 488

[20] **Porter & Another v Magill[2002] 2 WLR 37 (HL),** *per* Lord Hope of Craighead at pp.83-84 paras.102-103.**Director General of Fair Trading v Proprietary Association of Great Britain[2001] 1 WLR 700 (CA),** *per* Lord Philips at pp.722-723 para.69

[21] ibid

[22] [2008] 1 AER 345

[23] [2008] 1 WLR 2416

[24] MAg App no 75 of 2006

[25] CA 49 50 52 53 of 2007 per Mendonca JA "It is well settled that the test of bias is whether a fair minded and informed observer knowing all the facts would conclude that there was a real possibility of bias see Lawal v Northern Spirit [2003] UKHL 35

The Commissioner of Prisons and the AG and the Privy Council in ***Meerabux v AG of Belize***[26]**.**

4.4 The Claimants contend that in any formulation of the test they would have demonstrated that the learned magistrate was affected by apparent bias. It does not fall for me to make a determination as to which is the correct test as I am bound by the Court of Appeal's decision in ***Panday v Virgil***[27] in the application of the ***Porter v Magill*** *test* as the appropriate test. By way of observation however I make the following comments.

4.5 The distinction between the tests may well be one without a difference. Both tests call for an analysis of facts by a hypothetical observer who is objective, fair minded and informed. Such an analysis by that creature of the law quite appropriately renders moot the subjective views of the litigant or accused and the presiding adjudicator. Both tests require that person to consider all relevant facts and to draw a reasonable conclusion rather than speculate that there is a real possibility that the tribunal would not be impartial. The touchstones of both tests are therefore the notions of knowledge, objectivity, and reasonableness. Both tests give deference to the presumption that the adjudicator would abide by his/her oath of impartiality. Indeed it is the jurisprudence in Australia, which contributed to the modification of the former "real possibility of bias" test per **R v Gough**. It is perhaps for this reason that the Court of Appeal in ***Panday v Virgil*** had no difficulty in making liberal reference to the authorities in Australia while applying the *Porter v Magill test*.

4.6 Archie JA[28] in ***Panday v Virgil*** stated:

> "*If the integrity of the judicial system and public confidence in the administration of justice is to be maintained, then fairness and impartiality must both be subjectively present and objectively demonstrated to the informed and reasonable observer. The duty of the*

[26] [2005] 2 AC 513
[27] Mag. Appeal No.75 of 2006 Basdeo Panday v Wellington Virgil
[28] As he then was

Court when investigating an allegation is to place itself in the shoes of a hypothetical observer who is both "fair minded" and "informed." If such an observer would conclude that there is a real possibility that the tribunal was biased, the system has failed and the proceedings are vitiated."

When considering the question of apparent bias, the court does not look at the mind of the decision maker; it looks at the impression that would be given to an objective observer. Therefore, although the judicial officer may have been as impartial as could be, if right thinking persons would think, that in the circumstances there was a real likelihood of bias, then that is sufficient. In considering this case, therefore, we have made no inquiry or finding as to whether the Chief Magistrate did in fact favour one side unfairly. It is sufficient that a fair-minded and informed observer might think that he did."

I can do no better than to adopt those statements.

4.7 The point of departure between the two tests, however, lies in the degree of knowledge ascribed to the objective observer and the nature of one's apprehension of bias. The *Porter v Magill test* requires more certainty from the objective observer in that "he would conclude" that there is a likelihood of bias. The Australian jurisprudence as in the Canadian jurisdiction, the requirement is for him to have a "reasonable apprehension" of bias.

4.8 Similarly, the notion of "well informed" in the *Porter v Magill test* may create some uncertainty as to the level of maturity of the hypothetical observer and may tend to set unrealistic expectations. In Australia the reference to the observer being "informed" is often omitted. ***Johnson*** underlies this in specifying a test based on a "fair minded lay observer." In the recent case of ***Gamage v The State of Western Australia*** [29] Steytler P

[29] [2008] WASCA 49

endorsed the test as whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. "*It is important to bear in mind that the fair minded lay observer is one who should be taken to have informed himself or herself on at least the most basic consideration relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances."*

4.9 In Canada equally the emphasis is on a reasonable thinking, neutral observer, who knows the relevant facts. Cote JA in the Alberta Court of Appeal emphasized the need to proceed rationally examining actual facts. The standard is the hypothetical informed observer who must view the matter realistically and practically and having thought the matter through.[30] "*One must neither rely on mere labels, mental rubber stamps, nor mechanical rules. One must weigh rationales, justice and practicality and not lose sight of them.*"[31]

4.10 In this context one must not lose sight of the fact that Lord Phillips in ***re Medicaments***, whose extensive examination of the development of the common law tests on bias was accepted in the test laid down in ***Porter v Magill***, was motivated by the premise that public confidence in the administration of justice is more likely to be maintained if the court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question. If pubic confidence in the administration of justice is to be maintained, the approach that is taken by fair minded and informed members of the public cannot be ignored.[32]

4.11 The Privy Council in an appeal from the New Zealand Court of Appeal, ***Man O'War Station Limited and anor v Auckland CC*** [33] was invited to adopt for New Zealand the *Porter v Magill test*. The Law Lords observed that the test is consistent with the European Scottish jurisprudence and "broadly in line with Australian jurisprudence."

---

[30] "Boardwalk Reitt LLP v Edmonton 2008 ABCA 176
[31] Per Cote JA
[32] See page 721
[33] [2003] 1 LRC 598

In that case, the trial judge knew personally one of the witnesses, whose father was described as the judge's "former employer, long term partner and mentor for some 30 years." Lord Steyn stated that an intensive review of the facts was essential and that hypothetical factual scenarios were unhelpful. Their Lordships' concluded that the observer would not anticipate a real possibility of bias.

4.12 Lord Steyn recognized adjustments to the test suggest a movement towards transparency and accountability in the judicial system to the person whom it serves. However, the Privy Council did not adjust the test leaving it for the New Zealand Court of Appeal. Subsequently the matter arose for consideration in the New Zealand Court of Appeal in ***Muir v Commissioner of Inland Revenue*** [34]where the Court of Appeal considered both the English and Australian positions. Hammond J concluded that the preferred approach was that of ***Porter v Magill*** *and* ***Webb v R***[35] as setting the appropriate window through which the relevant conduct is to be viewed. In their view the correct test is "*whether the circumstances as established might lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case*."

4.13 There are no policy reasons advanced in this case to further adjust the *Porter v Magill test* further in line with the Australian *position*. However, it is not unnatural for the Court to make adjustments to the wording of legal tests "not to change substance by subterfuge but in an endeavour to better articulate what it is that lies at the heart of the concern behind the test." In many cases the application of either test may lead to the same result. In any event even if I was free to adopt the Claimants formulation of the test, the distinction between the tests makes no difference to the outcome of this case. On the alleged distinctions between the two tests I say no more.

5. The duty to disclose:

[34] [2007] LRC 35
[35] (1994) 181 CLR

5.1 The quest to keep the streams of justice pure does not give a license to engage in judge shopping or to easily concede challenges to the impartiality of the judge. Indeed, this aspect of apparent bias places judges in difficult positions as to whether they should disclose personal information even when in his/her own mind the matters that may give rise to a perception of bias do not affect his impartiality. This challenge for the judge is expressed by Chadwick LJ in ***Dobbs v Triodos Bank NV***[36]:

> "*It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person- criticized them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticizing all the judges that they did not want to hear their cases."*

5.2 A failure to disclose is not of itself evidence of bias. A duty to disclose can only arise where there is something that can give rise to an apprehension of bias. The duty to disclosure is neatly analyzed by Archie JA in three general categories:

(a) If after a careful consideration of the matter, the decision maker concludes that no fair minded and well informed person could reasonably find that there is a real possibility of bias, then he should proceed with the matter and there is nothing to disclose.

(b) If he comes to the opposite conclusion, then subject to the doctrine of necessity or any other exceptional circumstances, he should recuse. It would be wrong to place the

[36] [2005] EWCA Civ 468

responsibility on counsel in enquiring whether they consent to the matter being tried…the purpose of disclosure here is simply out of courtesy to the parties to explain his decision.

(c) If the decision maker is genuinely uncertain whether there are arguable grounds for the hypothetical observer to form a perception of bias then he should disclose the relevant information and seek the assistance of counsel. The purpose of his disclosure is not to seek consent but to seek assistance on the question of whether the matter falls in category (a) or (b) above or whether the doctrine of necessity or some other special circumstances apply.

Whether the learned magistrate was required to disclose her association's hinges therefore on whether the fair minded observer could reasonably find that there is a real possibility of bias. See also ***Jones v Das Legal Expense Insurance Company Limited***[37]

6. The characteristics of the fair minded observer.

6.1 I now turn to the fair-minded observer. The allegation that the learned magistrate is biased on the ground that she is associated with the Claimants' political enemy resonates in the real world of politics. Disqualification is required if the fair-minded observer would entertain reasonable questions about the judge's impartiality. The fair-minded observer is another legal fiction such as the "reasonable man" in tort, and "the well informed reader" in libel. Lord Phillips in trying to characterize the "well informed observer" used the analogy of the man in "Battery Park." Similarly, I turn to the man on the Brian Lara Promenade and ask him whether he considers that there is a real possibility of bias. Before he gives the answer, he must be aware of the attributes which the law confers on him[38].

---

[37] [2003] EWCA Civ 1071

[38] *The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had*

6.2 From a review of the authorities[39] we can characterize the informed fair minded observer, generally as one exemplifying balance, intelligence and restraint.

(a) Character:

He is the sort of person who will always reserve judgment on every point until he or she has seen and fully understood both sides of the argument. He is therefore not unduly sensitive or suspicious, "*this is a critical caveat in a society such as ours that is deeply polarized and where conspiracy theories abound*[40]". He does not therefore associate with the views of the complainer unless it can be objectively justified. The well informed observer is not blinded by political affiliations. He is not complacent and he or she knows that fairness requires that a judge must be and must be seen to be unbiased.

(b) Knowledge

Being well informed means essentially that he or she must be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The observer will take the trouble to inform himself on all matters that are relevant before taking a balanced approach to any information that he receives. The sources of information will be chosen with care. In so doing, it is assumed that when exercising his judgment to decide what is relevant or irrelevant, he is able to decide what weight should be given to the facts that are relevant.

(c) Special knowledge

---

not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." Per Kirby J Johnson v Johnson

While he or she cannot be attributed with a detailed knowledge of the law, he or she is also not "a person wholly uninformed and uninstructed about the law in general or the issue to be decided" but rather must be taken to have a reasonable working grasp of how things are usually done. He will be aware of the legal traditions and culture of this jurisdiction and that those traditions and that culture have played an important role in ensuring the high standards of integrity on the part of the judiciary. Accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias:

(d) Assumptions

The fair minded observer will assume that a judge by virtue of his or her office is intelligent and well able to form his or her own views and be capable of detaching his or her own mind from things that he or she does not agree with. Nevertheless, he or she will be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. He knows that judges like anybody else have their weaknesses. Accordingly, he or she will not shirk from the conclusion if it can be justified objectively, that things judges may have said or done or associations that they have formed, may make it difficult for them to judge the case before them impartially. He would be tending toward complacency if he or she treated the fact of a judge having taken the judicial oath as a panacea. The judge's professional status and experience is one factor, which a fair minded observer would have in mind in forming his objective assessment. However the presumption is that judicial officers and other holders of high public office will be faithful to their oath to discharge their duties impartially and in accordance with the constitution. The onus of rebutting that presumption and demonstrating bias lies with the person alleging it. Mere suspicion is not enough. A real possibility must be demonstrated on the available evidence.

---

[39] See ***Johnson, Porter, Hellow, Panday v Virgil,Giles v Secretary of State for Works and Pension [2006] 1 WLR 781, Taylor v Lawrence [2003] QB 528, R v Abdroikof.***

[40] ***Per Archie JA Panday v Virgil***

(e) Awareness

He will take what he has read or seen into context; the overall social, political and geographical context. He will appreciate that context forms an important part of the material which he must consider before passing judgment. As a member of the community in which the case arose he will possess an awareness of local issues gained from his experience of having lived in that society, and so be aware of the social and political reality that forms the backdrop to the case.

7. Bias by association

7.1 There are some relationships or associations with members of the community which speak for themselves as disqualifying a judge on the ground of apparent bias, such as a judge presiding over a matter concerning his spouse or child, attorneys appearing before a judge who are his spouse or a member of his immediate family. However, apart from special relationships, there must be cogent and rational links between the association and its capacity to influence the decision to be made in the particular case before a well informed observer can draw a conclusion that there is bias. It is the capacity to influence the decision rather than the association as such that is disqualifying. [41]

7.2 The Privy Council illustrates this point in ***Fraser v JLSC***

> "*A fair minded and informed observer would know that the judges of the Court of Appeal are members of an independent and impartial judiciary who have security of tenure; that having been appointed by the Commission neither the Commission nor the Chief Justice can remove them[10]; that they took an oath upon their appointment to do justice to all litigants without fear or favor; that the fundamental premise of their appointment was that they were possessed of the character to be true to their oath; and that it is of the essence of the judicial function to adjudicate in disputes that may*

[41] See Aussie Airline PTY LTD v Austria Airlines PTY and Another

involve parties with whom a judge may have some social, organizational or professional relationship that is not of such a nature as to require the judge to recuse himself. The fair minded and informed observer will have no difficulty with the commonplace notion that in those circumstances it is the duty of the judge to put aside such a relationship and do his duty. It could not be otherwise."

7.3 In ***Stephanie Baker v Quantum Clothing Group***[42] the Court of Appeal of the United Kingdom, considering test cases about noise induced deafness in the textile industry had to determine whether Sedley LJ should recuse himself as a result of his association with the British Tinnitus Association ("BTA"), he being its President. The Association was a charitable organization with, as Sedley LJ put it, "no axe to grind". It was also alleged that there were links between the judge and the claimant's attorneys who had co-authored a paper on tinnitus which was posted on the BTA's website. The co-author was also an expert for the claimant. It was alleged that the BTA acknowledged the work of the claimant's attorneys in the field of compensation. It was therefore the links (described as "the web of links") between the professionals involved in the case with the BTA and therefore by extension with the judge which was objectionable. The Court of Appeal held that the association did not lead a fair minded and informed observer to conclude that there was a real possibility of bias. The facts in relation to the association demonstrated that it was a charitable organization and its objects and purpose were quite unrelated to litigation. After examining closely the nature of the organization and its web site publications the Court of Appeal concluded that the "web of links" was tenuous and without substance. There was no link between the judge's association with the organization and its capacity to influence the judge in the case.

7.4 ***Helow*** confirms that a judge will not be regarded in the ordinary course of things, as adopting the views of an organization, which publishes views that may impact on a particular case merely because he is a member of it. Further evidence is usually required

[42] B3/2007/0795 Unreported UK dated 5/6/2009

to demonstrate that the judge endorsed the organisation's opinions. Joint membership or association, or knowledge or professional cooperation, or even friendship is not enough on its own.[43]

7.5 In ***Pinochet*** the connection to the charitable organization was not offensive because it was a party in the case, but that it was controlled by Amnesty International which was a party seeking to promote the case for the extradition and trial of the accused. In that case the House of Lords resolved the issue as one where the judge had a direct interest in the proceedings. However the application of the Porter v Magill test would have led to a similar result.

7.6 Similarly, in this case the argument is advanced that the learned magistrate is connected to a charitable organization which is controlled by the PNM seeking to promote the conviction of the accused. It is for the well informed observer to consider all the facts and to put the association with the organization in its proper context. But there must be a reasonable conclusion drawn by the informed observer of a connectivity of views before a recusal is necessary. Only then can one truly say that he is perceived to be a judge in his own cause. Mere association without a connection to the issues that are to be tried is not enough and it would be unsound in law to develop a general principle that would warrant automatic disqualification on that basis in this type of case.

8. Factual Backdrop

8.1 Having settled therefore these legal tests that lie at the heart of this dispute I return to the factual backdrop to this challenge.

9. The committal proceedings:

[43] The cases on bias by association are reviewed at length in *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, [2008] 8 W.W.R. 251, 91 Alta. L.R. (4th) 49 (Alta. C.A.)

9.1 The committal proceedings in relation to the charges against the Claimants commenced on or about 31st May 2006. After several adjournments were granted, the enquiry begun with several witnesses giving their evidence on behalf of the prosecution. The learned magistrate during the course of the proceedings made several rulings in relation to the admissibility of evidence and the conduct of the proceedings which were not unusual.

9.2 The magistrate dismissed a no case submission and on the said date the Claimants were asked whether they intended to call any witnesses. The first Claimant replied "*These charges are politically motivated*." On 12th February 2008 the Claimants made their application for the learned magistrate to recuse herself based on information they acquired of the magistrate's association with the MMDF. The learned magistrate delivered her oral ruling on 19th March 2008 refusing to recuse herself. The learned magistrate adopted the test of ***Porter v Magill*** and considered the authorities of ***Pinochet*** and ***Virgil v Panday***. The evidence which was used to demonstrate that the MMDF was a PNM institution included a brochure of its past members, its aims and objectives. The Court examined the evidence that was adduced to support the contention that the well informed observer would likely conclude that there is a reasonable apprehension of bias. Examining the issue through the lens of the well informed observer she concluded:

> "*An allegation of bias is a serious one. The authorities demonstrate that the threshold for finding bias is high. …. ill founded challenges to the bench are not to be entertained if there is no basis established for bias and there is nothing for this court to disclose...*"

9.3 The Claimants' attorney-at-law's application to refer that matter to the constitutional court was also dismissed by the Court, she having already found that the application was frivolous and vexatious, there was nothing for her to refer. The Court then proceeded to entertain the Claimants submission on the constitutionality of the legislation under which they were charged. The Claimants were not called upon to produce their evidence although the Claimants attorney-at-law indicated that there is

evidence which they intended to lead in their defence before the committal proceedings are concluded and that they intended to challenge the learned magistrate's oral ruling not to recuse herself. The proceedings were adjourned to 1st July 2008.

10. The judicial review proceedings:

10.1 The Claimants obtained leave to apply for judicial review on 10th July 2008 and a stay was granted of the criminal proceedings pending the determination of these proceedings by Moosai J. The interested party was given leave to be heard in these proceedings and contested these proceedings from the application for leave stage to the substantive hearing. Directions were given by Moosai J for the filing of affidavits and a hearing of the trial.

10.2 There are a few aspects of the management of this trial which I should mention. The trial which was scheduled on 29th April 2009 was rescheduled to deal with an application by the Claimants for further information. In that application for the first time mention was made to this Court that questions were being asked by the Claimants from the Defendant about her biological father and his political affiliations. The Court dismissed that application on 29th April 2009[44] and gave further directions to embark on the trial.

10.3 During the course of the subsequent pre trial review, leading counsel for the Claimants mentioned that the fact that the father of the learned magistrate was a Member of Parliament in the PNM, would be relied upon as proof of apparent bias. No application was made at that time to amend the grounds of the claim. Directions were given for the filing of an affidavit in reply by the Claimants. However, in the intervening period between that pre trial review and the trial on 28th September 2009, both parties filed further affidavits in relation to the issue of the political affiliation and status of the learned magistrate's father. Further the Claimants filed an affidavit of Mikela Panday on 15th September 2009 seeking to adduce expert evidence. This evidence was in the form of a statement of Dr. Susie Orbach, a distinguished Psychotherapist and Psychoanalyst,

exhibited to the said affidavit. The statement purported to give Dr. Orbach's expert opinion "*in a case in which the magistrate who is hearing a case of corruption involving the leader of the opposition and his wife, herself is the daughter of a former cabinet minister of the governing party."* The Defendants made no objections to the use of the further affidavits filed on the issue of the learned magistrate's father save for the expert evidence. On this basis the Court granted the Claimants leave to re-amend its claim form. With regard to the expert evidence, after hearing submissions from both parties I dismissed the application by the Claimants for permission to use that evidence.

10.4 The reason for doing so can be summarized briefly as follows:

(a) The application was being made on the morning of the trial after the Court had given extensive directions for the management of the case and when no previous application was made for permission to adduce expert evidence.

(b) There was no satisfactory explanation for the delay in making the application. On the face of the Mikela Panday's affidavit, instructing attorney had received instructions from leading Counsel since November 2008 to "*identify a suitably qualified psychologist who would be able to provide an expert opinion on a matter of relevance to the Claimants' claim for judicial review."*

(c) The evidence purported to give Dr. Orbach's expert opinion that she was of the view that the learned judge could not impartially adjudicate on this matter. This is a matter which falls squarely for determination by the Court that is whether it would be perceived by the informed fair minded observer that the magistrate may be biased on the ground that the learned magistrate's father was a member of Parliament for the PNM. This evidence in my view would have been unhelpful and would not further the overriding objective.

(d) Considering the factors set out in rule 1.1(2) CPR this evidence being introduced at this late stage does not assist the Court in dealing with this cases justly. Expert evidence is not required on this issue. If it was, parties were

[44] *See this Court's written decision dated 29th April 2009*

required to seek the Court's permission at the case management conference. See r 33.5 CPR. See Jones J in ***Digicel v Telecommunications Authority of Trinidad and Tobago***

(e) If the purpose of the evidence was to demonstrate the package of "scientific" information that a well informed observer would possess, the Interested Party would have been prejudiced having been virtually ambushed with this new evidence resulting in an adjournment to prepare the cross-examination and to obtain its own expert evidence. In any event, the Claimants were allowed to make its point of the special knowledge of the well informed observer on the psychology of the daughter by reference to Wikipedia extracts of the "Electra" complex. They suffered no prejudice in the exclusion of this evidence.

(f) Parties are reminded that applications for use of expert evidence must be made at an early stage of proceedings and at the case management conference pursuant to r 33.5 CPR. One of the benefits of doing this is that the Court may itself exercise its option under Part 33 to appoint a single expert pursuant to those provisions for the further management of the case.

10.5 Another procedural challenge was raised by the Interested Party in which it applied by notice of 5th September 2008 to strike out certain paragraphs of the Claimants' affidavits filed on behalf of the Claimants on the ground of hearsay. I ordered that the evidence will be taken de benne esse. On examination of the impugned paragraphs and on consideration of the Court of Appeal's warning in ***Panday v Virgil*** against the use of hearsay evidence in an assessment of apparent bias as being "dangerous and unsatisfactory," I rule that the evidence contained in the impugned paragraphs are inadmissible. This ruling does not, however, significantly impact upon the force of the submissions of the Claimants as explained below.

10.6 The Claimants and the interested party filed several affidavits which focused on a keenly contested fact, that is whether the MMDF was a "PNM institution" or has links to the central government. The evidence in relation to the learned magistrate's father was

unexceptional and largely accepted. The learned magistrate herself did not file any affidavits but filed responses to specific requests for further information made by the Claimants.[45]

10.7 This case began therefore with a serious factual dispute and where both parties were given leave to cross-examine some 12 deponents in this case. The four main areas of dispute were:

- whether the MMDF in fact discriminates in favour of members of the PNM;
- whether the MMFD is in fact controlled by the PNM;
- whether the MMFD has permitted or permits its premises and staff to be used for obviously and purely partisan political purposes; and
- whether or not Alexander Chamberlain Alexis was an adviser to Dr Eric William and or is an advisor to the current PM Patrick Manning or is a current member of the PNM[46].

10.8 The parties filed an agreed statement of facts which rendered insignificant these factual disputes. Leading Counsel for the Claimants submitted that these agreed facts are a sufficient basis to mount the Claimants challenge to impugn the decision of the learned magistrate and therefore cross-examination of the deponents was not necessary.[47] The upshot of this is that it will be difficult for the Claimants to make any positive assertion on their version of the facts which fell within the four corners of the factual dispute.

10.9 During the course of his submissions Queens Counsel however, did make reference to some of the contentious issues raised in the Claimants affidavits in relation to

---

[45] Attorney for the learned magistrate indicated to this Court at the Pre Trial Review on 29th April 2009 that the affidavits on the learned magistrate's behalf will be filed if they were so required by the Court. I gave no directions for the magistrate to file any evidence.

[46] The parties notices to cross examine were focused on these factual disputes

[47] In its skeleton arguments the Claimants state: "***Note on contentious facts****: The Claimants consider that the facts set out in paragraphs 2 to 16 above are sufficient for the purposes of their argument that there is a real risk of apparent bias. There are a number of affidavits put in by both sides which relate to the contentious details of the foundation's operations and leave to cross examine has been duly given. In order*

the MMDF, which allegations are met with equal force, if not considerably weakened by the sworn evidence of the Interested Party. In the absence of cross-examination this Court sees no reasons why the sworn evidence of the interest party ought to be rejected. See ***R v Secretary of State for the Home Department ex Oladehinde***[48]. All the deponents of the interested party attended Court on the first day of hearing and were relieved by the Court after the Claimants' elected not to cross-examine them. As a result the Defendant naturally did not cross-examine the Claimants' deponents. Mrs. Rose Janneire, General Secretary of the PNM was the only deponent cross examined on her affidavit in relation to the membership of members of the MMDF and of Mr. Alexis in the PNM. Her evidence was uncontradicted and did not assist the case for the Claimants.

11. The grounds of challenge:

11.1 The grounds of the application are worth examination as they highlight the "pleaded case" asserted by the Claimants. Examining these extensive grounds the salient aspects of the Claimants challenge are as follows:

(a) The nature of the proceedings is politically sensitive as the Claimants have always maintained that the charges are politically motivated. The Claimants are publicly and politically opposed to the PNM. The prosecution of the Claimants emanated form the Anti Corruption Bureau which is under the direction, control or supervision of the Attorney General during the tenure of the PNM.

(b) The learned magistrate's father is Alexander Chamberlain Alexis a former PNM Member of Parliament and Cabinet Minister in the PNM Government.

(c) The learned magistrate is a trustee and treasurer of the MMDF. This foundation is dedicated to the empowerment of Laventille, a political stronghold of the PNM. The Foundation is an organization with links to the central government. It discriminates in the provision by it of assistance to members of the Laventille community who are PNM members. Its premises are used by the PNM in its

---

to save time and permit the court to concentrate upon the legal issues, the Claimants will invite the Defendant to agree to the above facts and to dispense with the need for any oral evidence.

electoral campaigns. The Claimants claim, therefore, that "the learned magistrate is accordingly connected to and involved in a voluntary organization which, while ostensibly charitable in nature, is intimately connected to the PNM for the provision of social assistance to its supporters and of electoral campaigning."

(d) The magistrate refused absolutely to disclose her involvement in the MMDF.

11.2 Based on these main grounds the Claimants asserted in its claim that *"the fair minded and informed observer would after ascertaining and considering the relevant circumstances conclude that there is a real possibility that the learned magistrate is biased."*

12. The submissions of the parties:

12.1 I trust I do no injustice to both leading counsels if I briefly summarise their most helpful submissions. Leading Counsel for the Claimants submitted that the first Claimant as leader of the UNC-A has been for all his political life a "full body enemy of the PNM" and the learned magistrate's father was the "founding father of the PNM." "Blood is thicker that water" and on that basis alone it is enough to disqualify the learned magistrate from dealing with the charges laid against the main opposition party. The learned magistrate has a number of PNM connections namely Debbie Jeremie, the cousin of the Attorney General who prepared the deed for the MMDF. She was invited to join the MMDF by the Attorney General and her father was a "senior figure in the PNM and probably a founding member of the PNM." However, she chooses not to disclose them at a time when it was unfair not to do so.

12.2 The Claimants argued that an allegation of political abuse would be made to the learned magistrate if the proceedings were to continue. The learned magistrate will also have to make assessments as to the credibility of the Claimants evidence if they call evidence in his defence. It is noted that the Privy Council has affirmed in ***S Sharma v Carla Browne Antoine*** that any complaint that the prosecution is

[48] [1991] 1 AC 254

politically motivated is to be resolved within the criminal process. The responsibility lies with the learned magistrate as with the judiciary, to have oversight of executive action in the form of a police or other prosecutorial decision to prosecute.

> "*If the Court is to have the power to interfere with the prosecution in the present circumstances, it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. I have no doubt that the judiciary should accept this responsibility in the field of criminal law."*

12.3 With this political backdrop and the issues that may fall to be determined the Claimants submits that the fair minded observer will believe that the learned magistrate is biased. Further the first Claimant deposes that by virtue of these facts, she is wholly incapable of judging him fairly and that she has been shown to be aligned to and or affiliated with and/or an active supporter of the PNM, his political enemy.

12.4 Senior Counsel for the Defendant submitted that the test for bias is not that advanced by the Claimant but is a more stringent test as examined above. He usefully set out the characteristics of the well informed observer. He further submitted that on the facts there is nothing which will cause a well informed observer to believe that the learned magistrate was biased. The resolution of the case will depend upon the findings of fact in relation to the activities of the MMDF and the Defendant's connection with her father. If the connection is minimal, tenuous or dated, the Claimants case fails. Even if the MMDF is intimately connected with the PNM or the father is still a member of the PNM, the Court must still determine if a fair minded observer would conclude that she is biased when she herself has espoused no view in association with the PNM or her father and has no knowledge of the political views of the MMFD or her father and holds no membership with the PNM.

13. The two stage approach:

13.1 The enquiry to determine whether apparent bias has infected these proceedings is a two stage one:

(a) To determine the facts and circumstances which give rise to the allegation that the magistrate may not be impartial.

(b) To determine whether the well informed observer would conclude that the magistrate is biased.

13.2 The first step calls for an intense focus on the essential facts of this particular case, to establish the actual circumstances which have a direct bearing on the suggestion that the learned magistrate may be seen to be biased. This is an area of the law where the context and the particular circumstances are of supreme importance. It is a factual inquiry which is rigorous "*in the sense that complainants cannot lightly throw the bias ball in the air."*[49]

13.3 The second step requires the Court to examine these facts through the lens or window of the well informed observer or, as I have put it, have the conversation with the man/woman on Brian Lara Promenade armed with the attributes I identified earlier in this judgment.

14. Circumstances giving rise to the allegation of bias

14.1 This enquiry was made simpler as both parties agreed a statement of facts. The Claimants contend that these are the relevant facts, which the fair minded observer will have in mind, in being asked to determine whether there is a real likelihood of bias. The agreed facts are as follows:

(a) The First Claimant is a Member of Parliament, a former Prime Minister, Leader of the Opposition and Leader of the United National Congress Alliance (UNC-A). He has been a member of the House of Representatives since 1976 and has been the chief political opponent of the PNM, which formed the government of

[49] Per Hammond J ***Muir v Commissioner of Inland revenue***

Trinidad from 1956 to the present, except for the periods 1986-1991, and 1995-2001.

(b) From 1986-1988 the First Claimant was a minister in the national government and from 1995-2001 he was Prime Minister. In 1991 he founded the United National Congress ('UNC'), the predecessor to the UNC-A, which he formed in 2007. The Second Claimant is the wife of the First Claimant and there is no dispute that she has been and is politically active in support of her husband.

(c) The co-defendants in the committal proceedings are Mr. Ishwar Galbaransingh, a political and financial supporter of the opposition UNC and Mr. Carlos John, a former UNC cabinet minister. The prosecution case arises out of the award of the contract to build Piarco International Airport when the UNC was in government and the PNM was in opposition.

(d) The Defendant is a trustee of the Morris Marshall Development Foundation ('the Foundation'), which is based in Laventille. She has been its Treasurer since 2005. The Foundation is named after a former PNM cabinet minister and MP who established it in 1991 and who had been a PNM MP for most of the area and was Minister of Public Utilities in the PNM government at the time of his death in 1994. The brochure exhibited by the applicant sets out the Foundation's aims.

(e) The Foundation is dedicated to the enhancement and empowerment of the community of Laventille. Laventille as a matter of historical fact has always been a strong PNM constituency, ever since independence in 1962. It is widely known that Laventille is a deprived area and Mr. John has provided financial support to the Foundation as explained in his affidavit.

(f) Morris Marshall was a political opponent of the First Claimant, who recalls that the initiative in setting up the Foundation was for the benefit of his community and his electoral constituency.

(g) The following persons who have been trustees of the Foundation have or have had connections with the PNM. They include:

    (i) Senator John Jeremie (a PNM senator and the Attorney General);

    (ii) Martin Joseph (a PNM senator and Minister for National Security);

(iii) Albert Joseph (former Laventille West Constituency, Chairman of the PNM);

(iv) Ms. Carolyn Washington (PNM local government councilor); and

(v) Ms. Donna Prowell-Raphael (a former PNM Senator).

(h) Linda Hollingsworth (an active local PNM activist and councilor) and Joslyn McCleod Smith (a former PNM youth activist) are currently trustees of the Foundation. Raphael George (who rents offices to the PNM) is also a Trustee.

(i) None of the trustees have any known connection with the UNC.

(j) The Chairman of the Foundation is Fr. Clyde Harvey. The Defendant has told the State Solicitor that she has never been a member of the PNM.

(k) The Defendant did not disclose to the Claimants or their legal representatives her involvement in the Foundation or the fact that her introduction to it was through Mr. John Jeremie in private legal practice. He later took up a position as Attorney General of Trinidad and Tobago, which he presently occupies. The Defendant's response, after the Claimants had informed the Defendant of the discovery of her connection to the Foundation when making their application for her to recuse herself, appears from the transcript of the proceedings annexed to the affidavit of Reeti Maharaj.

(l) The Defendant first learnt of the Foundation from Mr. John Jeremie. Mr. Jeremie later became a Senator and the PNM's Attorney-General from 2002 to 2007 and at present. The charges against the Claimants were laid by officers of the "Anti-Corruption Bureau" which falls under the Attorney-General's supervision and direction.

(m) Senator Jeremie's cousin Ms. Debbie Jeremie drew up the Foundation's 2005 Foundation deed.

(n) Senator Jeremie was the person who, as Attorney General, gave authority for the extradition proceedings to be brought against the co-defendant in the committal proceedings, Mr. Ishwar Galbaransingh.

(o) The Defendant has told the State Solicitor as follows: she first learnt of the work of the Morris Marshall Foundation through Mr. John Jeremie who was then in private practice. Mr. Jeremie invited her to become involved in the Foundation. She attended a meeting of the Foundation and decided to become involved. The Defendant was enthused by the fact that the Foundation was located in Laventille, where she grew up, and that its goal was to help residents of Laventille. This type of charitable work was consistent with her participation in civic organizations since she left University. She was also attracted to the Foundation because of the involvement of Father Clyde Harvey who she knew to be someone of integrity, who was interested in the betterment of the people of Laventille. The Defendant does not now recall whether she had ever met Father Harvey before she was introduced to the Foundation, but she knew of his reputation as a man of principle before then. The Defendant was made a Trustee of the Foundation and later its acting treasurer.

(p) The Defendant has further told the State Solicitor that as far as she is aware, the Morris Marshall Foundation does not cater exclusively for members of the People's National Movement. As far as she is aware, persons seeking the assistance of the Foundation are not required to produce PNM party cards.

(q) The Defendant has told the State Solicitor that she is not aware that Father Harvey has encouraged anyone to join the People's National Movement, if in fact he has done so. Neither is she aware that the Foundation's building was used as the campaign office of the PNM, if in fact it was so used.

(r) The Defendant is the daughter of Mr. Alexander Chamberlain Alexis, a former PNM MP and a minister in the PNM government. Mr. Alexis served as a member of the Legislative Council from 1956-1961 and as a member of the House of Representatives for the years 1961-1966, 1966-1971 and 1971-1976. Mr. Alexis is currently not an adviser to the Prime Minister nor does he hold any post in the Cabinet or within the PNM.

(s) The Defendant's mother was never married to her father. The Defendant has told the State Solicitor as follows: she did not live with her father but grew up in her mother and step-father's home. The Defendant knows that her father was once a member of Parliament on a PNM ticket and a Minister in a PNM Government but does not know for how long or during what period. The Defendant does not know whether her father was once an adviser to Dr. Eric Williams or has maintained his membership with the PNM since he left Parliament, or is still a member of the PNM, or advised the PNM after he left Parliament, or continues to render advice to the PNM, or is an adviser to Prime Minister Patrick Manning, or is still in active politics and does not know what her father's attitude is to the Claimants or the UNC, or whether her father can be properly considered Mr. Panday's political enemy. The Defendant does not know anything about her father's work related or personal relationships with any political party now or in the past. As far as she is aware, the Defendant further says she has not received any favourable treatment from any government. The Defendant never declared the fact of her involvement in the Morris Marshall Foundation or that Mr. Jeremie invited her to become a trustee of it, or that her father was a member of Parliament on a PNM ticket, or a Minister in a PNM government to the Claimants or their legal representatives either at the commencement of the committal proceedings or at the stage when the application for her recusal was made.

(t) On 30th November 2007 the Defendant magistrate issued a judgment dismissing the Claimants' submission that there was no case to answer, stating in the course of the judgment that although the First Claimant had been absent from the Cabinet, the decision is a collective one, whether he was absent or present."

14.2 The first Claimant claims that based on these facts, he is fearful that he will not receive a fair trial. The enquiry at this stage is not to place reliance on the Claimant's views as justifying a recusal but to determine whether those views are objectively justified. "*The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they lose*

their importance once the stage is reached of looking at the matter objectively." Per Lord Hope of Craighead ***Porter v Magill***.

Who is Alexander Chamberlain Alexis?

14.3 The answer to this question is considerably dated. The fact is that nothing is known about Mr. Alexis after 1976. What we know of Mr. Alexander Chamberlain Alexis has been gleaned from the "Who's Who" and the parliamentary records exhibited to the affidavits of Mikela Panday and R. Maharaj.

14.4 The relevant facts in relation to Mr. Alexis are as follows:

- He was born 15th October 1951 St. Patrick, Grenada. A former teacher and Postal Clerk, Grenada.
- His membership to various organizations in Trinidad and Tobago were wide and varied and not restricted to political associations. Member British Empire Citizens and Home Rule Party 1945-1956, member St. Patrick County Council 1953 – 1956, elected member Legislative Council for St Patrick Central 1956-1961. Former Assistant General Secretary and Grievance Officer, British Empire Workers Peasants and Ratepayers Union Patron Siparia Youth Movement, Hon. member coterie of social workers, committee member for the Aged. He takes a keen interest in community work and has organized South Troops. He was active in the Teachers Union, held offices in the Union until 1965. He was responsible for organizing the PTA for the Piccadilly EC School.

- In relation specifically to the PNM, he joined the PNM in 1960. He was General Council Member and Education Secretary for the PNM Diego Martin West constituency. Parliamentary Secretary in 1961-63. Ministers without portfolio with responsibility for West Indian Affairs 1961 to 1966. In the 1966 to 1976 term he served as Minister of Labour.

- He was described as an educator, community worker and politician.
- He fell off the political radar in 1976. He is not a PNM member as far as the records of the PNM goes[50] since 1993. He is not an advisor to the current political leader of the PNM and holds no position in Cabinet. His political affiliation after 1976 is unknown.

These are the facts unearthed concerning Mr. Alexis after an exhaustive search by both instructing attorneys-at-law.

14.5 Politics is not an exact science and it would be unfair to characterize Mr. Alexis as a PNM today or at the time the magistrate gave her decision, or at any time after 1976 without facts as to his current political status. Indeed the portrait of his picture as a PNM minister sitting next to Dr Eric Williams also includes a striking picture of ANR Robinson, who the Court takes judicial notice of, became the PNM's "political enemy" from the 1980's. The "flip flops" of politics is a natural feature of that landscape.

14.6 The learned magistrate has given information concerning her relationship with her father. This was done by way of responses to requests made by the Claimants for information pursuant to Part 35 CPR. Those responses form part of the record as they were exhibited to the affidavits of Mikela Panday and Reeti Maharaj. These responses are useful in providing further facts for the well informed observer. However, the determining factor is not whether the learned magistrate's statements are truthful, it is rather the impression of her conduct and her explanation on the fair minded observer which is key. Lord Phillips explained in ***Re Medicaments***: "*the material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to*

[50] The records were computerized in 1991 and there is no documentary record evidencing his membership from 1967

decide whether or not the fair minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

14.7 Does the learned magistrate have a relationship with Mr. Alexis? The evidence answers this question in the negative. The learned magistrate was born of Mr. Alexis and her mother but they were never married and the learned magistrate never lived with her father. She grew up in her mother's and step father's home. The evidence discloses that save for the learned magistrate's genetic makeup, there is no fact of association with her father whatsoever. There is no evidence of any communication between the two, or the intimate sharing of old political war stories. There is no evidence of a political duo embraced in the bosom of the PNM. This fiction of association is perhaps good fodder for a tabloid but is indigestible for the well informed observer.

14.8 If we accept the Claimants' invitation to enter the world of science, would the well informed observer view an association with Mr. Alexis by biology, as raising the inference that the learned magistrate shares the views, ambitions and policies of the PNM, or moreover, a desire to see the present Leader of Opposition convicted? Would this "inference of biology" overwhelm the learned magistrate's legal ability to assess facts and legal submissions? To so hold would in my opinion be a stretch of logic, which challenges even the realms of speculation. To contend even remotely that the well informed observer knows that the learned magistrate suffers from the "Electra complex" makes the well informed observer, not the balanced observer as identified earlier in this judgment but a suspicious one armed with theories. "Daddy issues" in American slang refers broadly to the long term influence exerted by a woman's father-daughter relationship in childhood.[51] There is no evidence that the learned magistrate shared a childhood with Mr. Alexis. Even if she has "daddy issues" what would objectively convince her to dust off the old 1976 PNM archives and to hold it triumphantly over the heads of the Claimants, when she herself shares no political membership with the PNM

[51] Reference is made to the Wikipedia extract on "the Electra complex"

nor has she espoused any affiliation by conduct or expression with the views of the PNM. The argument is fanciful and adds nothing to the debate for the well informed observer.

15. The MMDF

15.1 The agreed statement of facts constitutes the Claimant's platform to support its argument of apparent bias. In assessing the evidence in this case, I hold that the Claimants' assertions of the "web of links" of the MMDF to the central government have not been supported. Mr. Lennox Smith's evidence spearheads the charge for the Claimants that the MMDF discriminates in favor of PNM members, is a tool of the PNM, designed to secure the dominance of the PNM and has always made its premises available to the PNM election machinery. These contentions are expressly refuted in the affidavits of Father Clyde Harvey, Joslyn Mc Leod Smith and May-Innis filed on behalf of the Interested Party. Mr. Smith's evidence was considerably weakened by the fact that he made serious allegations against Father Harvey of political allegiances with the PNM and expressions of political views in favour of the PNM but they were all stoutly denied by Father Harvey. There was no cross examination of Father Harvey. I am not inclined to believe Mr. Smith in light of Father Harvey's testimony.

15.2 The other witness' for the Claimants were Sterling Chase, a member of the UNC-A, Clifford Critchlow and Alva Bowen. Their allegations of political links between the MMDF and the PNM were either unsubstantiated, vague on its face, denied with equal force by the witness' for the interested party or not pursued having regard to the manner in which the Claimants presented its case on an agreed statement of facts.

15.3 From the evidence disclosed in these proceedings a considerable amount of information was provided about the operations of the MMDF. Mr. Morris Marshall was a well known politician. He passed away in March 1994. At that time he was a Member of Parliament for the constituency of Laventille West in the PNM and the Minister of Public Utilities in Cabinet. In the "eulogy" for Mr. Marshall in the House of

Representatives, the Prime Minister characterized Mr. Marshall as a person concerned about the community and the working class. His memory was punctuated with references which demonstrated his interest in both the PNM and the community as a whole. "*These two, namely, the rejection of inequality, together with his recognition of the Parliament as central to the articulation of the people's concerns, must make his memory especially significant.*" His life was characterized with the pursuit of justice, peace and righteousness. He was remembered as one who had a special concern for *the small man, the poor and the disadvantaged*. That being said, the Claimants placed heavy reliance on the statement of the Prime Minister in Hansard, that Mr. Marshall received his political education within *the bosom of the PNM Youth League*; he was its principal spokesman and activist. "*He died as he lived, utterly PNM to the very core and centre of his person*."

15.4 After his death, the MMDF was formed by Trust Deed dated 1st December 2005 continuing the work of the Laventille West Foundation established by Mr. Marshall. Ms. Mc Leod-Smith explains that Morris Marshall always had a vision for the role of education in the community of Laventille. That reflected his focus on education and was the reason why he first set up the First Scholarship Fund.

> "*When he came to set up the Laventille West Foundation it was because he wanted to go beyond the confines of the Scholarship Fund and tackle some of the problems that had been identified at a meeting of the Laventille Community. This would have been around 1991. That meeting was entitled 'Laventille Great As We Think' and it was a meeting of Community Organisations all from Laventille. So that it included Religious groups from all of the denominations, the Steelband groups and all the civic organizations. That meeting was a success and the various committees that were established at that meeting caused the Laventille West Foundation to crystallize.*

The genesis therefore of the Laventille West Foundation was not political and in setting up the organization, Morris Marshall was determined to reach out to interests beyond that of his, … that there were three schools in the Laventille area that had 100% failure rates at the Common Entrance/Secondary Examination Assessment. These young men were therefore leaving school vulnerable to the attraction of prestige and power that the life of crime and the possession of a gun would provide. This was the challenge taken up by the Foundation."

The affidavits of Father Harvey, Ms. Innis and Joslyn Mc Leod Smith set out in detail the nature of the operations and objects of the MMDF and the philosophy of the organization.

16. The membership of the MMDF:

16.1 The Chairman is Father Clyde Harvey who is the Parish Priest of Rosary Roman Catholic Church. He is not registered as a member of the PNM. I hold that his association with the MMDF coincided with his work in charitable objects of the MMDF and bore no relation to the world of politics. This is evinced in many of his statement in his evidence. The current members with whom the learned magistrates associate are Attiba Braithwaite and Raphael George who are not registered as members of the PNM. Ms. Smith however was active in the PNM at the youth level. According to Father Harvey if trustees wished to become politically active they ceased to be active as trustees. Indeed he asserts that "*to become politically partisan is untenable for the Foundation we simply would lose credibility overnight*..". There is no nexus between the PNM and the appointment of the trustees of the MMDF. The persons who are actively associated with the PNM are no longer trustees of the MMDF. There are no allegiances to the UNC either. The fact that the active trustees, the learned magistrate, Mr. R. George, Ms. Braithwaite and Fr. Harvey are not registered as members of the PNM corroborates Fr. Harvey's statements of the non partisan composition of the trustees. This gives the lie to the assertion that the members of the MMDF are PNM and it is a

tool of the PNM. It gives credence to the views that the MMDF's objectives are genuinely charitable in nature and not a sham.

17. The objects of the MMDF are not political

17.1 The objects of the MMDF were to fulfill that aspect of the philosophy of Mr. Marshall, that education was the source of social change. It is a charitable organization in particular "*To promote for the benefit of communities in the island of Trinidad and in particular the community of Laventille, the advancement of education, the furtherance of health and the relief of poverty, distress and sickness*." The Trust Deed for the MMDF articulates the social and charitable objectives of the MMDF. It is not a political group, party or association. It is not funded by the PNM government. It receives funding from various sources including UNC financiers.

17.2 The MMDF is not a party to the committal proceedings over which the learned magistrate is presiding. Its interests are not being advanced in that litigation. The learned magistrate in participating in the activities of the MMDF is not associating with the advancement of any philosophy that is inimical to the interests of the Claimants in his criminal proceedings. There is no evidence that it espoused views that were pro-PNM institution, or that it published any political views whatsoever. Its public position as articulated in its brochures is consistent with it being a non aligned charity and non governmental organization ("NGO").

18. The public views of the MMDF espoused was not political

18.1 Any allegation that the MMDF was a political tool was neutralized by the sworn testimony of its officials, none of whom were cross examined. The views of the MMDF have been expressed by its officers who are deponents in this case. There are no

expressions of allegiance to the PNM or against the Claimants, nor of interest in the criminal prosecution of the Claimants. The public statements made by the MMDF through its programmes and publications do not espouse any political views.

18.2 On an assessment of the evidence presented in this case I have resolved any remaining disputes of fact on the evidence in relation to the MMDF against the Claimants and hold:

- That the MMDF is not an association which uses its premises for electoral purposes for the benefit of the PNM,
- The MMDF does not discriminate in favor of PNM members,
- The MMDF does not advance the political objectives of the PNM,
- The trustees and members of MMDF are not used for obvious and purely partisan political purposes.

19. The missing link

19.1 The missing link in the chain of connectivity is evidence that the MMDF is a political tool of or controlled by the PNM. Even if it is perceived to be a "PNM institution" which I have held on the facts is not open to inference, mere association does not take the Claimants further. Unlike in ***Ex p Pincohet***, the MMDF is not a party to or concerned with the proceedings involving the Claimants.[52] In ***Helow*** the International Association of Jewish Lawyers and Jurists of which the Lord Ordinary, Lady Cosgrove was a member, had expressed extremist pro Israeli views and in particular, by its President. She presided over and dismissed an application of Fatima Helow, a Palestinian refugee who was seeking asylum in the UK on the ground that she feared that if she returned, she would be attacked by Lebanese and Israelite agents. The issue that

[52] "*Mere membership of an association as opposed to active involvement in its affairs or in the institution of the proceedings may not bring the principles of ex p Pinochet into play*. See ***Meerabux***.

arose was whether the fair minded and well informed observer would conclude that there existed a real possibility that Lady Cosgrove, by reason of her membership of the Association of Jewish Lawyers expressing pro Israelite views was biased against her. The House of Lords answered in the negative based on the facts of that case. The House of Lords concluded that there was no association of the views of Lady Cosgrove with the views of the President. Some of the expressions used by the House of Lords to conclude that she could not fairly be said to be biased included: "the absence of support," "the lack of basis to fix her with the views of the president", "the absence of any connection", "active involvement", "no close or overt commitment to the cause". I take from this case that there must be something more than mere membership to an association, which espouse prejudicial views, to link or connect the judge to those prejudicial views. If there is none, or the evidence is tenuous, it simply would not be sufficient to rebut the inference that a judge would be faithful to her judicial oath and any prejudices are akin to one's life experiences which the judge is trained to ignore, or at the very least, there is no real risk that she will not execute her functions judicially.

20. The whole picture

20.1 The Claimants submitted that the well informed observer must step back and take these facts in cumulatively to determine whether there is apparent bias. In doing so, the images of an association with old PNM members, of Mr. Marshall "PNM to the core" and the Attorney General, Mr. John Jeremie was suggested by the Claimants to be enough to trigger automatic recusal as the learned magistrate would be perceived to have an interest in the prosecution. Further, her father was, to continue the analogy of **Helow**, *a famous Zionist*. She is connected to a founding father of the PNM, a "PNM Pantheon" Leading Counsel submitted that on all the facts, "the blood of the PNM courses through the veins" of the magistrate.

20.2 These hyperboles will not excite the well informed observer on Brian Lara Promenade as I described him earlier in this judgment. I turn to him and ask having considered the facts as set out above, the facts which we now know as to the relationship

with Mr. Alexis and the MMDF, do you consider that there is a real possibility that the learned magistrate is biased? He would be surprised to know that she did not share a relationship at all with her biological father or that nothing is known of him since 1976. He would not be surprised to know that magistrates do from time to time, come in contact with members of the legal profession including the Attorney General. He must draw from his experience about the political and social life of Morris Marshall of Laventille. The fair minded and informed observer will think more about it. He will reflect on the magistrate's association with a charitable organization that has no political views whatsoever, but where some of the past members were PNM and others are not. He will digest the fact that the Claimants say that the charges are politically motivated, but ask how is it that this magistrate is enjoined in a political battle against the Claimants? How is this magistrate given her associations, as we now know, unable to professionally judge the committal proceedings impartially?

20.3 This case therefore is a perception about a perception. A perception of bias by the magistrate being associated to an association, which is perceived to be connected to the PNM and perceived to be advocating its views and motivations, and perceived to share the vision of the party to send the leader of opposition to jail without any facts to sustain the perception. As Lord Jacob observed "zero plus zero is zero."[53] The connection to establish an apprehension of bias is tenuous. By including the notion of "well informed" the law has sanitized the propensity to draw ill informed conclusions. Challenges such as these that are premised on speculation would not cross the bar. In this case the positive evidence demonstrates a connection to an organisation whose political views are at best unknown and to a biological father whose political affiliations since 1976 are equally unknown. The political villains with an axe to grind, are mere phantoms and the well informed observer sitting on Brian Lara Promenade and engaged in this dialogue will draw this conclusion.

21. Best practice and the duty to disclose

[53] ***Baker v Quantum para 34***

21.1 There is one aspect of this case that deserves special consideration; the treatment of the application to recuse by the learned magistrate and the refusal to disclose information which was readily available from the magistrate herself. The Claimants contend that the failure (a) to disclose her involvements with the MMDF and her biological parent at the very outset; or (b) to disclose those facts when called upon to do so by the Claimant, further demonstrates that the learned magistrate was biased. It was contended by leading counsel that the practice normally would be to disclose these associations prior to the commencement of the proceedings.

21.2 Magistrates and judges must be robust in its dealings with applicator for recusals but at the same time exercise a degree of care and caution so that its handling of the application does not give rise to further suspicion of an inability to bring a partial mind to bear on the issues in the substantive matter.

21.3 During the course of dealing with the recusal, the learned magistrate dealt with matters of evidence, giving the impression that it was not true when they fell clearly within her ambit of knowledge. So that referring to the brochure of the MMDF that was presented the learned magistrate stated:

> "*The document itself in terms of the members as outlined there, it says nothing in terms of the members, their affiliations, nothing about them. We have two persons identified as office holders, one holding the office of chairman and holding the office of secretary. The person who is holding office as chairman has the abbreviation FR and that in terms so far the Court can take as judicial notice, FR used usually stands for father. So that if there is any inference to be drawn itself, there being no other information concerning the members and the organization save what is stated there, any inference to be drawn is that it is an association that is affiliated, seeing that it is chaired by somebody, a priest for the church, that it is something affiliated to the church*."

21.4 This stands in contrast with her own knowledge of the origins, operation and the chairmanship of Father Harvey. This does not, however, translate to a breach of the duty to disclose or that it raises an apprehension of bias. It may be a case where the learned magistrate "doth protest too much" but as in ***Porter v Magill*** it is not in itself objectionable as I view this as her attempt to make an objective assessment of the evidence that was presented to her. The short point being there was no evidence of an association with the PNM by the chairmanship. The inference of it being a church run organisation was in her view an inference which the objective observer, not the judge, may draw.

21.5 However, having come to the conclusion that the well informed fair minded observer would not have concluded that there was a likelihood of bias by the magistrate based on the facts in this case there was no legal duty to disclose any connection to the MMDF or her biological father.

21.6 What should be the best practice in dealing with the sensitive matter of recusals? Queen's Counsel raised this issue in his final reply. Adjudicators may declare to litigants as a matter of practice, personal connections to matters that may relate to the case that falls for determination. It is usually done in clear cases. That is far removed from saying it should do so in all cases pursuant to a legal obligation for disclosure.

21.7 Some measure of comfort is provided by the House of Lords in ***Jones v DAS*** in dealing with possible conflict of interest by adjudicators:

> "*The first task is coolly to assess the circumstances. If the thought crosses the judge's mind that the conflict of interest could actually affect his mind, then he should recuse himself. More usually the judge will know he is unaffected and he must then assess how strong the appearance of bias is. Sometimes he will be confident that the fair-minded observer in the back of his court would never object. Sometimes he may be quite unsure what the reaction will be and much may depend on the stance adopted by the parties. He must be sensitive to the need for*

justice to be seen to be done. But ***one can be sensitive while remaining thick-skinned. Judges must be robust and do what they are paid to do without fear as well as without favour, faithful to their judicial oaths.”***

21.8 Best practice may well call for the introduction of a code of ethics that sets out guidelines for the conduct of judges with a useful checklist which can assist in doubtful cases rather than to have recourse to hypothetical assessments of a legal persona constructed by the court. The House of Lords in ***Jones v DAS*** has usefully set out a guide which, together with the observations of Archie JA noted earlier, may be of assistance, with the strict caveat that the guidelines are not to be used by disgruntled litigants as a mantra for complaint about ill treatment.

> *“i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.*
>
> *ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.*
>
> *iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid the kind of controversy about what was or was not said which has bedevilled this case.*
>
> *iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given*

as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.

v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.

vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person, the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizens Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it.

22. Conclusion

22.1 In this country there is a tendency for persons to draw conclusions without ascertaining all the facts or parrot beliefs without ascertaining the accuracy of its origins. Sentimentality may sweep aside logic when the political drum is beating. The well informed observer constructed by law requires us not to be those persons in assessing our adjudicative process. It calls upon the fair minded observer when judging our judicial system to be fair, to calmly weigh in the balance our beliefs in our judicial officers to

adjudicate faithfully in accordance with their oath of office with the apprehension of bias based on objectively justified criteria and evidence.

22.2 Here the balance between confidence in the judiciary and the perception of a fair trial would meet its waterloo if the well informed observer is hasty in his deliberations. A civilized society must not be quick to draw irrational or hasty conclusions, restraint rather than swift condemnation is the hallmark of mature deliberation. Educated conclusions and not rumor mongering must continue to be the feature of a democratic society.

22.3 The application is dismissed. The effect of this would be to remove the stay on the criminal proceedings. I will now hear Counsel on costs.

Dated this 22nd day of October 2009

Vasheist Kokaram
Judge