THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-00868

IN THE MATTER OF AN APPLICATION FOR LEAVE TO MAKE A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES 1998 AND PURSUANT TO SECTION 5 OF THE JUDICIAL REVIEW ACT, 2000

IN THE MATTER OF DECISIONS OF THE SENIOR MAGISTRATE EJENNY ESPINET TO REFUSE TO DISCLOSE HER INTERESTS AND TO REFUSE TO RECUSE HERSELF FROM ADJUDICATING IN RELATION TO A JOINT PRELIMINARY ENQUIRY

BETWEEN

SADIQ BAKSH
BRIAN KUEI TUNG

CLAIMANTS

AND

HER WORSHIP THE SENIOR MAGISTRATE EJENNY ESPINET
THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

Before the Honourable Mr. Justice Gregory Smith

Appearances:
Mr. Fyard Hosein and Mr. Rishi Dass for the Claimants
Mr. Gilbert Petersen and Ms. Elaine Green for the Decendants

JUDGMENT

SECTION I:

INTRODUCTION

1. Before me is the Claimants' application for leave to bring judicial review proceedings.

The judicial review proceedings relate to a Preliminary Inquiry which the Defendant Magistrate (the Defendant) is conducting into charges of corruption leveled against the two Claimants and several other high profile persons and corporations. The charges of corruption stem from certain dealings in respect of the construction of the new Piarco Airport Terminal.

2. The Claimants allege that the ongoing Preliminary Inquiry should be quashed for the following three reasons.

(A) The appearance of bias in the Defendant conducting the Preliminary Inquiry.

(B) The failure of the Defendant to make full disclosure of her interests.

(C) The breach of natural justice as a result of the failure of the Defendant to disclose her interests.

3. For the reasons which follow, I find that the Claimants have failed to make out a case for judicial review that has a realistic prospect of success and I refuse to grant leave to make the application for judicial review.

SECTION II

THE BASIC FACTS:

4. Between 1995 and 2001, the United National Congress (U.N.C.) was the political party which formed the government of Trinidad and Tobago. The Claimants were formerly members of the U.N.C. Indeed, they were cabinet ministers in the U.N.C. government. During its tenure, the U.N.C. implemented the construction of a new Terminal at Piarco Airport.

While the U.N.C. formed the government between 1995 and 2001, the Peoples National Movement (P.N.M.) formed the opposition. In 2001 the P.N.M. formed the government of Trinidad and Tobago and still do to this day.

During the campaign which brought the P.N.M. to power, many P.N.M. officials made allegations of corruption against the U.N.C. government. One of these allegations concerned corrupt practices in and about the construction of the new Airport Terminal. Officials of the P.N.M. indicated their intention to prosecute members of the U.N.C. government for their alleged corrupt practices in and about the construction of the new Airport Terminal.

5. The Claimants and other high profile persons and corporations have been charged with corrupt practices in relation to the construction of the new Airport Terminal. The charges were laid indictably in 2004 and the Defendant has commenced hearing the evidence by way of a Preliminary Inquiry since May 2008. There have been over 60 hearing dates already. It is important to note that these charges were laid by the Director

of Public Prosecutions (DPP). The office of the DPP is not a political office and by virtue of the Constitution, it is independent of the government.

6. The Claimants allege that it had come to their attention that the Defendant is a trustee of a charitable Non-Governmental Organization (NGO) known as the Morris Marshall Foundation (the Foundation). The Claimants allege that the Foundation is closely affiliated to the P.N.M. and that the P.N.M. uses the Foundation to garner support for itself and to further the influence of the P.N.M. in the Laventille area. The Laventille area is a traditional P.N.M. seat of power. The Claimants have evidence from deponents of instances of the close affiliation of the Foundation to the P.N.M. So, for instance, during election campaigns in 2001 and 2002, P.N.M. supporters were seen using the offices of the Foundation as a sub-office for their campaigns. In other instances, persons who went to the Foundation to seek assistance were asked by a person at the Foundation's office whether they had P.N.M. party cards, and if not, they were not granted assistance.

7. The Claimants have also discovered that the Defendant's father was a cabinet minister and Member of Parliament under a former P.N.M. administration.

8. The Claimants have stated clearly that they make no allegation of actual bias against the Defendant. Their case is founded upon the perception of bias from the Defendant being a trustee of the Foundation and by her being the daughter of a former official of the P.N.M.

9. With respect to the issue of disclosure, the Claimants allege that they heard of a similar judicial review application to the present namely, the case Panday v Espinet H.C. Cv 2008-02265. Those proceedings concern the former Prime Minister of Trinidad and Tobago, Mr. Basdeo Panday, and his wife. Those proceedings also relate to corruption charges in relation to the construction of the new Airport Terminal. In those proceedings the DPP challenged the grant of leave to bring judicial review proceedings against the same Magistrate on the ground of delay. In that case, (unlike the present) the DPP conceded that there was an arguable case on the merits. Leave was granted to apply for judicial review and the proceedings before the Magistrate were stayed. The Claimants say that they have asked the Defendant for disclosure of all the documents in that other matter and were never provided with the same. They have also asked the Defendant to give full details of her involvement with the Foundation and of her father's involvement with the P.N.M.. No disclosure has been forthcoming. As a result, the Claimants allege that they have been prejudiced in making a fully informed application for the Defendant to recuse herself. Further, they also allege that they have been denied natural justice by this failure to have all the documents revealed to them.

10. During the hearing of the Preliminary Inquiry, the Claimants applied to the Defendant to recuse herself and to give the full discovery they asked for. Both applications were refused. The Claimants now bring this application for judicial review to quash the hearing of the Preliminary Inquiry before the Defendant.

SECTION III

ANALYSIS

11. I will now proceed to analyse this application for leave under the three heads of challenge namely:

(A) The appearance of bias in the Defendant conducting the Preliminary Inquiry. (See paragraphs 12 to 28 below)

(B) The failure of the Defendant to make full disclosure of her interests. (See paragraphs 29 to 32 below)

(C) The breach of natural justice as a result of the failure of the Defendant to disclose her interests. (See paragraphs 33 and 34 below)

(A) THE APPEARANCE OF BIAS IN THE DEFENDANT CONDUCTING THE PRELIMINARY INQUIRY

The Claimants have not made out a case of apparent bias

(i) The Law

12. The law on the disqualification of a judicial officer on the ground of apparent bias is based on the principle that a man may not be a judge in his own cause. There are two types of bias which invoke the principle. Firstly, bias as a result of a judicial officer having a direct interest in the proceedings or in its outcome. In such a case, disqualification is automatic. Secondly, there may be bias where the judicial officer does not have a direct interest in the case, but in some other way, his associations or conduct

may give rise to a suspicion that he is not impartial. In this second type of case, the disqualification is not automatic.

The principles are best stated in the case R v Bow Street Magistrates, Ex Parte Pinochet No.2 [2000] 1 A.C. 1119 (H.L.) where Lord Browne-Wilkinson said at pages 132-133:

> *"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."*

13. The present matter is concerned with the second type of bias, namely apparent bias. The test for apparent bias is now established by the case Porter v Magill [2002] 2 A.C. 359 (H.L.) Per Lord Hope at page 494. ***"The question is whether a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased."***

The threshold for setting up a challenge based on apparent bias:

14. The present matter is at the stage of leave only. Given the test for apparent bias stated above, the issue for consideration is whether the Claimants have crossed the threshold to proceed with a case for apparent bias.

This threshold question has been considered in many cases. I will refer to two of those cases in detail because they have distilled the principles and they are also relevant to the present matter. These two cases are Sharma v Brown-Antoine [2006] UKPC 57 and Helow v Secretary of State for the Home Department [2008] U.K.H.L. 62.

15. In Sharma v Brown-Antoine (op cit) the Chief Justice of Trinidad and Tobago was alleged to have attempted to influence the course of a trial being conducted by the Chief Magistrate. The Chief Justice alleged that the charges were spurious and politically motivated and that the DPP was influenced by political pressure to proffer the charges against him. The Chief Justice challenged the decision to prosecute him by way of judicial review. The Privy Council dismissed the application for leave to apply for judicial review on the grounds that (1) the case was not properly made out and (2) the challenge should properly be made at the criminal hearing. At paragraph 14(4) of the judgment of the Privy Council, the threshold for leave to apply for judicial review was stated.

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar … But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application… the more serious the allegation or the more serious the consequences if the allegation is proved, the*

> *stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.*
>
> *It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen*: (emphasis added)

16. The Privy Council also considered the duty of a judge in examining the evidence in an exceptional case where cogent evidence is needed to obtain leave to apply for judicial review, as was the Sharma case. They stated that a judge "was wrong to assume, for the purposes of ascertaining whether there was an arguable case that the facts raised by the Chief Justice were true…" (see paragraphs 25 and 26 of the Sharma case). It was incumbent on the judge (a) to look at the evidence overall, rather than simply assume that the facts alleged were true and (b) to identify particular reasons for considering that the case was arguable(see paragraph 36 of the Sharma case).

Therefore, even though the Defendant has filed no affidavit in response in this case, it would be wrong merely to assume that all the facts were true. I would still have to look at all the evidence and identify reasons for considering the case to be arguable or not arguable. I will consider all the facts later in this judgment (see paragraphs 23-28 below).

17. In Helow v Secretary of State for the Home Department the House of Lords had to consider a case which bears a similarity to the present matter. In Helow's case the

Applicant was a Palestinian woman who had been refused asylum in Scotland. She applied for review of the refusal for asylum and this application was refused by the Lord Ordinary (Lady Cosgrove). The Applicant then challenged the decision of Lady Cosgrove on the ground of apparent bias. Lady Cosgrove was a high profile and founder member of the Scottish branch of the International Association of Jewish Lawyers and Jurists (IAJLJ). This association published articles, had a website, made speeches and messages and generally propounded causes related to Jewish Issues. In fact, its president espoused statements that were fervently pro Israeli. Some of the articles and other material issued by the IAJLJ espoused extreme and partisan views on Semitism and/or views that were antipathetic to the Palestinian cause. The Applicant claimed that the decision of Lady Cosgrove should be quashed for apparent bias since firstly, the fair minded observer, having considered all the relevant facts would conclude that by Lady Cosgrove's membership of the IAJLJ there was a real possibility of bias on her part. Secondly, there was a real possibility of bias by reason of Lady Cosgrove having been influenced by the views expressed in the publications. The Privy Council unanimously rejected these arguments.

With respect to the threshold for leave to apply for judicial review in a case of this nature, Lord Mance cited with approval the following at paragraph 57: *"courts have rightly recognized that there is a presumption that judges will carry out their oath of office… This is one of the reasons why the threshold for a successful application of perceived bias is high. However, despite this threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."* (Emphasis added).

Therefore, in the present case where there is an allegation of perceived or apparent bias in the Defendant there must be cogent evidence that gives rise to the apprehension of bias before leave to apply for judicial review is granted.

18. Their Lordships went on to state that in cases like this there should be some indication that the judicial officer by word or deed associated herself with fervent or extreme views so as to indicate that they were her views too (at paragraphs 5, 17, 18, 26, 27, 57).

Their Lordships also rejected the arguments expressed as osmosis or as noscitur a sociis, that the observer would identify Lady Cosgrove's views from the company she kept in an association whose president expressed extreme pro-Israeli sentiments. (See paragraphs 16, 17 and 56) Lord Rodger stated at paragraph 18.

> *"[18] But it is not suggested that Lady Cosgrove has ever said anything remotely comparable. Nor is it suggested that she has ever expressed support for the more extreme views expressed by the president of the association or in any of the articles in Justice. In that situation there is, as a matter of general principle, no basis for fixing her with the views of the president or other contributors. She is, quite simply, an intelligent and educated individual whose re-action to the articles--supposing that she had read them--is quite unknown."*

Similarly, in the present matter, there is no suggestion, the Defendant has espoused any political cause or even adopted the views of any employee or of the other persons who attend the Foundation. Her reaction to the other members or their causes "is quite unknown." Also, there is no suggestion that by word or deed, the Defendant has affiliated herself to the P.N.M. If anything the apprehension of bias takes on the nature of osmosis or "noscitur a sociis."

19. It is only where an organization has espoused extremist views that a case for apparent bias could be made out on the logic that it would be wrong to associate with such an organization. There is nothing objectionable about the aims and objects of an association which is primarily concerned with advancing positive human values (see paragraphs 43-45 of Helow's case).

In the present matter, there is nothing to suggest that the Foundation itself, is such an extremist organization so that to associate with it necessarily implies hostility or antipathy to the U.N.C. The expressed purposes of the Foundation are charitable and positive (see the Deed of Incorporation of the foundation, document S.B. 10 of the affidavit of Sadiq Baksh). (This will also be explored further in paragraph 26 below).

The Informed Observer:

20. Before applying the law to the facts I think it is necessary to make some observations about the fair minded and informed observer. It is from his standpoint that the court is to assess whether the threshold (or even the substantive case) has been made out. (See paragraph 13 above).

In the case Panday v Virgil (Magisterial Appeal 75 of 2006), Archie J.A., (as he then was) considered this question of the fair minded observer and noted the following (see paragraphs 9-13 of his judgment).

> *(i) "The fair minded observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. That is a critical caveat in a society such as ours that is deeply polarized and where conspiracy theories abound. The proper point of departure is the presumption that judicial officers and other holders of high*

> *public office will be faithful to their oath to discharge their duties with impartiality and in accordance with the constitution. The onus of rebutting that presumption and demonstrating bias lies with the person alleging it. Mere suspicion of bias is not enough; a real possibility must be demonstrated on the available evidence."* (Emphasis added).

The affidavits filed by the Claimants indicate that they may be suspicions or sensitive or share in this polarization of the society. Specifically, Lennox Smith, Clifford Critchlow and Naushad Ali have had conflict with the Foundation. Sadiq Baksh and Brian Kuei Tung have had conflicts with the P.N.M.. Their views may very well be partisan and not necessarily representative of all the community or even of the fair minded and informed observer. Archie J.A. went on to say:

> *(ii) "The fair-minded observer is not an insider (i.e. another member of the same tribunal system). Otherwise he would run the risk of having the insider's blindness to the faults that outsiders can so easily see. Although he will have a general appreciation of the legal professional culture and behavioural norms, he may not so readily take for granted, as judicial officers might, a judicial officer's ability to compartmentalize his mind and ignore extraneous information or circumstances."*

While the views of the deponents may not necessarily be those of a fair minded and informed observer, they are still relevant (and see iii below). They form part of the total package to be ascribed to the observer.

> *(iii) "The informed observer is a member of the community in which the case arose and will possess an awareness of local issues gained from the experience of having lived in that society. He will be aware of the social (and political) reality that forms the backdrop to the case."*

(iv) *"The informed observer, if he is fair minded will choose his sources of information with care."*

Again, the evidence of the deponents may not be neutral and some care is necessary in examining the same.

(v) *"The informed observer will make use of <u>all the available and relevant information</u>."* (Emphasis added).

This speaks for itself and I will refer to this later in the judgment. (See paragraphs 23-28 below).

(ii) *<u>The Law applied to the facts</u>:*

21. As I mentioned earlier (at paragraphs 6-8 above) the Claimants allege that the perception of bias in this case arises from (a) the Defendant's position as a trustee of the Foundation and (b) the fact that her father was a cabinet minister and a member of parliament under a former P.N.M. government.

22. Bearing in mind the observer test for apparent bias and the threshold requirements for leave to apply for judicial review, I find that the Claimants have not made out an arguable case for judicial review with a realistic prospect of success. I will now detail my reasons for this finding under the two heads of (a) the connection with the Foundation and (b) the Defendant's connection to her father.

(a) The Connection to the Foundation:

23. In keeping with the dicta in the Sharma case and the Panday v Virgil case (see paragraphs 16 and 20 above), I will now examine all the relevant facts which a fair minded and informed observer would face in respect of this limb of the Claimant's case.

(i) The Claimant's allege that the trustees of the Foundation were all notoriously affiliated to the P.N.M. (see paragraphs 31(iii)(5) of the submissions of the Claimants). An examination of the evidence in support of this allegation shows that it is unfounded. The Claimants refer to a document naming the trustees (document S.B.10 of the affidavit of Sadiq Baksh). There are 14 named trustees. Only eight are identified as being pro P.N.M. Nothing is said of the other six (including the Defendant). Further, of the eight mentioned allegedly pro P.N.M. trustees there is an obvious error. Morris Marshall (in whose memory the Foundation is established) is named as a trustee; this could not be correct. Mr. Marshall died in 1999 and the Foundation was created by Deed in 2005. The evidence presented does not establish that all the trustees of the Foundation are "notorious" P.N.M. supporters.

(ii) The Claimants allege that one Ishwar Galbaransingh and the Second Claimant, Brian Kuei Tung gave money to the Foundation as a pay back to P.N.M. supporters in the Laventille area. This too is unfounded. Mr. Galbaransingh and Mr. Kuei Tung gave money to Mr. Morris Marshall, the former Member of Parliament for the area, while he was alive. The money was allegedly used by Mr. Marshall in his NGO known as the Laventille West Foundation. Neither Mr. Galbaransingh nor Mr. Kuei Tung ever gave money to the Foundation. The Foundation was established some nine years after the

death of Morris Marshall. There is no evidence that any money given to the Foundation was used as "payback" for supporting the P.N.M.

(iii) There is evidence from Clifford Critchlow and Naushad Ali that when they went to the Foundation to seek assistance, an un-named lady asked them for a P.N.M. party card and even informed Mr. Critchlow that "this is a P.N.M. thing".

(iv) There is evidence from Lennox Smith and Clifford Critchlow that during the election campaigns of 2001 and 2002 the Foundation's building was being used allegedly as a campaign sub-office for the P.N.M.

24. Apart from items (iii) and (iv) above, the "evidence" of the connection of the Foundation to the P.N.M. is based on inference and hyperbole. Even accepting that the facts at (iii) and (iv) are correct, and that some link is established between the P.N.M. and the Foundation. This link in my view is not such as would be sufficient to create the apprehension of bias in the Defendant from the standpoint of the fair minded and informed observer. I say so for the following reasons.

25. Firstly, with respect to the Defendant being a trustee of the Foundation the following facts must be taken into account by the fair minded and informed observer.

(i) As was stated in paragraph 18 above, the Claimants have not presented any evidence whereby the Defendant has by word or by deed espoused any political cause or adopted the views of any employee of the Foundation. Her reaction to the matters mentioned in paragraph 23 (iii) and (iv) above "is quite unknown". The Defendant has

neither done nor said anything to excite an apprehension of bias (and see Helow's case at paragraph 17 above).

(ii) Further, the Claimants have failed to establish that the Defendant has by word or by deed associated herself with the P.N.M. Since the Claimants allege a P.N.M. "vendetta" against them, the failure to establish this link, more so in a judicial officer who is presumed to be able to disassociate her personal and professional views is extremely detrimental to their case (see Helow's case and paragraph 20(i) above. The Claimant's apprehension of bias in the Defendant being a P.N.M. supporter is unfounded.

(iii) As was stated in paragraph 23 (i) above, the evidence fails to establish that the trustees of the Foundation are all notorious supporters of the P.N.M. This further detracts from any link between the Defendant and the P.N.M. The Claimant's apprehension of bias in the Defendant because of her being a trustee of the Foundation is founded upon an extremely tenuous link between the Defendant as a trustee of the Foundation and the P.N.M.. This link is in the nature of an osmosis or a presumption of noscitur a sociis, both of which have been soundly rejected as objective bases of apparent bias in Helow's case (see paragraphs 17 and 18 above).

On the evidence presented, the Claimants' have failed to establish a case with a realistic prospect of success upon which a fair minded and informed observer would presume bias in the Defendant.

26. Secondly, with respect to a presumption of bias by simply being associated to the Foundation (as to this presumption in extreme cases see paragraph 19 above) the following facts must be taken into account by the fair minded and informed observer:

(i) The Claimants' case is based upon statements by officials of the P.N.M. that they would seek to prosecute U.N.C. officials for corruption in and about the construction of the new Airport Terminal. There is no evidence that the Foundation or its trustees have adopted these statements or sentiments or that the Foundation or its trustees as a body are in any way interested in such a prosecution. The connection between the Foundation and prosecution of the Claimants is based on an alleged osmosis of ideas or the presumption of noscitur a sociis. These have been rejected as objective bases for the apprehension of bias (see Helow's case at paragraphs 17 and 18 above). The Claimants have not shown that the Foundation is an extremist organisation or supports any or any extremist position with respect to their prosecution.

(ii) Further, with respect to the allegation by Messrs. Critchlow, Ali and Smith that the Foundation is only sympathetic to P.N.M. supporters (see paragraphs 6 and 23 (iii) above); even if this is correct, a desire to help party supporters does not necessarily translate to antipathy for the U.N.C.. Far less does it translate to a desire to prosecute U.N.C. officials.

Similarly the alleged use of the Foundation building as a sub office for the P.N.M. in election campaigns does not necessarily translate into antipathy for the U.N.C. or a desire to prosecute U.N.C. officials.

By helping party supporters or allowing its building to be used for P.N.M. campaign purposes, the Foundation has not been shown to be an extremist organization

or to be supportive of any or any extremist position with respect to the prosecution of the Claimants.

(iii) Even if the P.N.M. and by osmosis, the Foundation were shown to have a vendetta to prosecute the Claimants for corruption in and about the construction of the new Airport Terminal, they did not, and could not, influence the prosecution of the charges against the Claimants. These charges were laid by and are being prosecuted by the DPP. As was stated at paragraph 5 above, the DPP is entirely independent of political influence. Further, there is no suggestion that the DPP has misconducted himself in and about this prosecution. The Foundation has no influence in the outcome of this prosecution. Any supposed extremist view that the Foundation may take in respect of the prosecution of the Claimants is irrelevant.

As was stated at paragraph 19 above, the Foundation is a charitable body with positive objectives. Bearing in mind the failure to link the Foundation to the prosecution of the Claimants, the fair-minded and informed observer would conclude that the Foundation itself is not such a body that mere association with it will lead to an apprehension of bias in and about the prosecution of the Claimants.

(b) The Defendant's connection to her father:

27. The Claimant's case for presumed bias here is even weaker than the failed case with respect to the Defendant's connection to the Foundation. There is no evidence whatever that the Defendant has any type of relationship with her father. There is nothing to found an apprehension of bias on the part of a fair minded and informed

observer. The Claimants have failed to make out a case with any realistic prospect of success based on this allegation.

28. Further the reasoning from Helow's case as applied in paragraph 23 above is also relevant here; namely, there is no evidence that the Defendant has by word or deed adopted or espoused any ideology or acts of her father or of the P.N.M. There is not even proof of osmosis or noscitur a sociis here. This allegation cannot meet the threshold of arguability with any realistic prospect of success so as to merit the grant of leave. In fact, it adds nothing to the case to merit consideration along with the Defendant's connection to the Foundation as together being relevant to the issue of bias.

B. THE FAILURE OF THE DEFENDANT TO MAKE FULL DISCLOSURE OF HER INTERESTS:

The Claimants have no case based on an alleged duty of disclosure.

29. *"A duty to disclose only arises if there is already something that can give rise to an apprehension of bias. Otherwise there is no obligation to disclose."* (See Archie J.A. at paragraph 23 in Panday v Virgil, Magisterial App. 75 of 2006).

Helow's case is also relevant on this question of disclosure. At paragraph 58 Lord Mance observed:

> *"Lady Cosgrove did not volunteer a reference to her membership of the association … Again this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded observer would not have thought that there was anything even to consider disclosing."*

Having found that the Claimants have failed to make out a case based on the apprehension of bias in the Defendant there is and was no duty on the Defendant to

disclose her interests. (See also Ebner v Official Trustee in Bankruptcy [2000] 205 CLR 337).

30. Even assuming that the Defendant was under a duty to make disclosure, on the present facts, the Claimants had the disclosure that they needed. In Jones v DAS Legal Expenses Insurance Co. Ltd [2003] EWCA civ 1071 the Court of Appeal of England and Wales decided that disclosure in this context means disclosure of all essential facts and not disclosure of all facts.

> *"What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he needs to know which is invariably different from all he wants to know."* (See paragraph 36 of Jones v DAS Legal Expenses)

In the present matter the Claimants allege that the Defendant ought to have disclosed to them all the documents in the case Panday v Espinet Cv 2008-02265. But this was unnecessary as they had the judgment of the Court and they already had all the relevant facts to make the challenge of bias. These facts are (a) that the Defendant is a trustee of the Foundation and (b) the Defendant's father was a member of Parliament and cabinet minister under a former P.N.M. government. The Claimant's knew the nature of the case they wished to advance; they were seeking detail.

31. In any event, the Claimants have obtained all the documents in the Panday v Espinet case before the hearing of this application for leave. They no longer need relief for this aspect of their claim.

32. The failure to disclose all the documents asked for by the Claimants raises no ground of challenge that has a realistic prospect of success.

C. THE BREACH OF NATURAL JUSTICE AS A RESULT OF THE FAILURE OF THE DEFENDANT TO DISCLOSE HER INTERESTS:

The Claimants have no case based on a breach of natural justice.

33. As with the case of disclosure, a breach of natural justice would occur only if there was already something that gave rise to an apprehension of bias and which would therefore prejudice the Claimants in the Preliminary Inquiry.

Having found (i) that the Claimants have failed to make out a case based on the apprehension of bias of the Defendant and (ii) that there was no breach of the duty of disclosure, it follows that there was no breach of natural justice by the failure of the Defendant to disclose all the documents that the Claimants sought.

Further, like in Helow's case, even if disclosure which satisfied a test of natural justice were made, it would not avoid an objection to a judge who ought not to hear a case; and non-disclosure in breach of any alleged natural justice principle would not be relevant if a fair minded and informed observer would not have thought that there was anything even to consider disclosing.

34. The alleged failure of the Defendant to disclose documents to the Claimants in this case raises no independent case for a breach of the principles of natural justice that has a realistic prospect of success.

CONCLUSION

35. The Claimants have failed to make out a case for judicial review that has a realistic prospect of success.

I therefore refuse to grant leave to the Claimants to apply for judicial review.

Dated this 16th day of June 2009

Mr. Justice Gregory Smith
JUDGE