REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeals No. 34 and 35 of 2009, CA 045/2009
Claims No. CV 2008-01268, CV 2008-667 and CV 2008-01269

BETWEEN

John Henry Smith
Barbara Gomes
Ishwar Galbaransingh
Amrith Maharaj
Northern Construction Limited

Appellants

AND

His Worship the Late Chief Magistrate Sherman McNicholls
The Director of Public Prosecutions
The Attorney General

Respondents

PANEL: **Gregory Smith J.A.**
Peter Rajkumar J.A.
Charmaine Pemberton J.A.

APPEARANCES
Mr. E. Fitzgerald, Fyard Hosein S.C, Ms. A. Mamchan instructed by Robin Otway on behalf of the first and second named Appellants

Ms. P. Maharaj on behalf of the third fourth and fifth named Appellants

Mr. A. Sinanan S.C. Mr. Lalla instructed by Mr. B. James on behalf of the first and third named Respondents

Mr. M. Daly SC leading Ms. Benjamin on behalf of the second named Respondent

Date delivered: 28th June 2017

I have read the judgement of Rajkumar J.A and I agree with it.

Gregory Smith
Justice of Appeal

I also agree.

Charmaine Pemberton
Justice of Appeal

Table of Contents

Delivered by Peter Rajkumar J.A.

Background

1. These proceedings, two applications for leave to apply for Judicial Review, and one Constitutional Motion, arose out of proceedings against the appellants[1], in a Preliminary Inquiry relating to several corruption charges arising out of the construction of the Piarco International Airport before the (now deceased) Chief Magistrate[2], and orders and rulings made by him therein. Both applications for Judicial Review, and the Constitutional Motion, were dismissed by the trial Judge. This appeal is against those dismissals.

The applications

First and second named appellants

2. A **constitutional motion** was filed by the first and second appellants on February 22nd 2008 in relation to the rejection of an application to him that he recuse himself. They sought inter alia a similar declaration as that in the subsequent application for judicial review, (namely that it was unconstitutional and likely to contravene their **constitutional rights** enshrined in s. 4(a), (b) 5 (2) (e) and (f) of the Constitution). In this matter also they sought an order (sic) that the **Preliminary Inquiry**, and subsequent **committal**, are **null** and **void**, on various grounds (addressed in detail further on), including **apparent bias,** which allegedly gave rise to breach of those constitutional rights.

[1] who were jointly accused with others
[2] "the presiding magistrate" or "the magistrate" or "the CM"

3. The application for leave to apply for **judicial review** brought by the **first and second named appellants** on April 7th 2008 alleged **apparent bias** on the part of the Chief Magistrate. They also sought, inter alia,

(a) a declaration that the decision of the Chief Magistrate on **January 7th 2008** to reject an application for his **recusal** from further adjudication on the Preliminary Inquiry, **(the recusal application)** was **unconstitutional** and in **breach of their constitutional rights**[3],

(b) a declaration that the Preliminary Inquiry (including the **committal** orders made on that date) is null and void as a result of inter alia, **bias**, in addition to

(c) an order of certiorari to quash earlier rulings of the Chief Magistrate in November 2006 **and July 9th 2007** (the ruling of July 9th 2007).

Third, fourth and fifth appellants

4. In the application for leave for **judicial review** filed by the **third, fourth and fifth appellants**, also **on April 7th 2008**, they sought (as had the first and second appellants in identical terms[4]) inter alia, a **declaration** that *the failure or refusal of the Chief Magistrate at the hearing of the Preliminary Inquiry on November 27th* ***2007*** ***(sic)*** *to make it known or sufficiently clear that he was actively considering the proposals of the prosecution of 3 additional charges and the amendment of 7 of the original charges coupled with his directions to the claimants to address their no case submissions to the 21 original charges, which in fact he knew or ought to have known, were to be discharged, was perverse, misleading and a denial of their right to a fair trial*. In fact, however, the hearing to which they refer was on November 27th **2006**. They too sought an order of certiorari to quash a ruling of the Chief Magistrate on **July 9th 2007** that there was a case to answer on certain additional and substituted charges.

[3] enshrined in s. 4(a), (b), 5 (2) (e), and (f) (ii) of the Constitution
[4] paragraph 3(b) (vii) of their application

Disposition by trial judge

5. The trial judge refused leave on all applications for judicial review on the bases of :-

a. **undue delay/ lack of promptitude**

b. **non disclosure/ breach of duty of candour**, and

c. **lack of arguability** with a realistic prospect of success.

d. that **no apparent bias** had been established.

The Constitutional Motion

6. The trial judge dismissed **the constitutional motion** on the ground that it was an abuse of process because there was an **alternative remedy**, and because **no apparent bias had been established**.

Issues

7.

a. Whether **leave** should have been refused for judicial review by the **third, fourth and fifth named appellants** (CV 2008 - 1269) on the ground of **lack of promptitude / undue delay.**
b. Whether **leave** should have been refused in its entirety for judicial review of the decisions of the Chief Magistrate **in January 2008** by the **first and second named** appellants (CV 2008 - 1268) on the ground of **lack of promptitude / undue delay.**
c. Whether **leave** should have been refused for judicial review by the **third, fourth and fifth named appellants** (CV 2008 - 1269) or **relief refused** on the basis of **non-disclosure** of previous and material judicial review proceedings.
d. Whether leave should have been refused in its entirety for judicial review by the **first and second named appellants** (CV 2008 -1268) on the basis of i. **non-disclosure** of the previous judicial review proceedings, and /or ii. **non-disclosure** of the **Constitutional** proceedings that

they had filed previously, **or** whether the ground and allegations of bias were severable from those matters not disclosed and therefore could survive.

e. Whether leave should have been refused for judicial review by the **first and second named appellants** (CV 2008 -1268) on the ground of **lack of arguability** with a realistic prospect of success in respect of the allegations that i. the evidence was insufficient to justify committal, ii. the charges lacked specificity and/or are not known to law, or iii. the procedure adopted by the Chief Magistrate contravened the Indictable Offences (Preliminary Inquiry) Act.

f. Whether leave should have been refused for judicial review by the f**irst and second named appellants** (CV 2008 -1268) on the ground of **lack of arguability** with a realistic prospect of success on the basis that the allegations of apparent bias were unarguable.

g. Whether the constitutional motion by the first and second named appellants (CV 2008-00667) should have been struck out on the basis that it was an **abuse of process**, or

h. Whether **apparent bias had been established**.

Conclusion

8**.** i**. As to the first issue, leave** was properly refused for judicial review by the **third, fourth and fifth named appellants** (2008 - 1269) on the ground of **lack of promptitude / undue delay.** The decisions in respect of which the **third, fourth, and fifth appellants** sought review were those of the Chief Magistrate on November 27th **2006**, (**wrongly stated to be November 27th 2007)**, and his ruling made on **July 9th 2007,** well before their applications for leave for judicial review.

ii. **As to the second issue, leave** should not have been refused for judicial review in its entirety by the **first and second named** appellants (2008 - 1268) on the ground of **undue delay** in respect of the decisions of the Chief Magistrate on **January 7th 2008** it was filed within the limit stipulated in the

Judicial Review Act of three months from the date of those decisions being challenged **by them**[5]. **Further, leave** should not have been refused for judicial review by the **first and second named** appellants (2008 - 1268) on the ground of **lack of promptitude.** Their application, (unlike that of the third, fourth and fifth named appellants), raised the issue of bias. Given the progressive and unfolding revelations in relation to the presiding magistrate it cannot be fairly contended that the appellants failed to act **promptly** in filing that application. Still further, there is no basis for requiring the appellants in this matter to be held to a higher standard of **promptitude**, over and above that imposed by the **Judicial Review Act**, requiring them to additionally file that application within a period shorter than three months.

iii. As to the third issue, the Judicial Review application by the **third, fourth, and fifth appellants** was in relation to the ruling of the Chief Magistrate on **July 9th 2007**. It did not raise the issue of bias. It could properly have been dismissed, or relief could have been refused, on the basis of **non disclosure** and **breach of their duty of candour,** (apart from the ground of undue delay).This was because it was not disclosed to the trial court that **they had been parties to a prior application for Judicial Review on the same subject matter** (the ruling of the Chief Magistrate on **July 9th 2007,** and his **jurisdiction** to substitute new and amended charges, -"the jurisdiction issue"), and that issue had been decided against them by the Court of Appeal.

iv. As to the fourth issue, whether the application for leave for Judicial Review by the **first and second named appellants** should also have been dismissed in its entirety on the basis of that **non-disclosure** of the previous Judicial Review proceedings, or whether the ground and allegations of **apparent bias** were severable and therefore could survive on their own, is now academic. This is because the

[5] Decisions of the Chief magistrate **in July 2007** and **November 2006** are also complained of by these appellants. In so far as these are common to all of the appellants, the reasoning in relation to these earlier decisions, and the impact thereon of delay and lack of promptitude would be the same.

additional issue of **apparent bias** that was raised in their Judicial Review was also raised in their Constitutional motion and both actions were before the same judge. That issue would therefore have had to be confronted in any event.

v. As to the fifth issue – (whether the evidence was insufficient to justify committal, the charges lacked specificity and/or are not known to law, or the procedure adopted by the Chief Magistrate contravened the Indictable Offences (Preliminary Inquiry) Act) - the trial judge's reasoning and conclusion that these were all matters which were within the discretion of the presiding magistrate and could properly and more appropriately be raised at further stages in the criminal proceedings, (see paragraphs 50-52 of his judgment in the judicial reviews) cannot be faulted.

vi. As to the sixth issue, a**rguability** with a realistic prospect of success in the **Judicial Review** by the first and second named appellants in relation to apparent **bias,** amounts to the same issue, (or in any event substantially overlaps the issue), as whether **apparent bias** had been **established** in the **Constitutional Motion**. In the circumstances of this case, given the several matters which had to be considered in detail, whether or not they could be ultimately substantiated, leave for Judicial Review by the first and second named appellants should not have been refused on the ground of lack of arguability with a realistic prospect of success.

vii. As to the seventh issue, the **constitutional motion** by the first and second named appellants should not have been struck out merely on the basis that it was an abuse of process without an examination of the merits of the allegation of bias, because any issue of overlap between the Judicial Review application and the Constitutional Motion could have been dealt with practically by their consolidation before the same judge and / or election between them.

viii. As to the eighth issue, on a fuller consideration of the allegations of apparent bias **on their merits**, whether on the Judicial Review application or on the Constitutional motion, the trial judge was entitled to find as he did that the allegations of bias and /or constitutional breaches of the right to a fair hearing and to due process, and to the protection of the law, were ultimately unsustainable.

Disposition and Orders

9. In the circumstances the appeals are dismissed.

Analysis and Reasoning

Chronology

10. It is important to set out the dates of some of the important events in order to appreciate the context in which the instant actions were filed.

Dates

4th April 2007 -written decision of Court of Appeal in **Panday v Virgil Mag App 75 of 2006 delivered.**

July 9th 2007 - Date of addition and substitution of new charges by CM in the Preliminary Inquiry proceedings (PI).

July 30th 2007 - Date of stay of proceedings by High Court in the case brought by **Maritime General (Maritime)** and **Fidelity Leasing (Fidelity)** in relation to **jurisdiction** of the Chief Magistrate (CM) to add and substitute charges.

August 2007 – date of charges initiated by **JLSC** against the CM.

On **18th and 19th September 2007** - the Chief Magistrate testified before the Mustill Tribunal -

Date of revelations before Mustill Tribunal re details of the land transaction and claim of an alleged conversation with the then CJ.

October 19th 2007 - Date of written decision of Court of Appeal, dismissing stay granted by the High Court in the Judicial Review brought by Maritime and Fidelity.

10th December 2007 - Date of oral recusal application.

21st December 2007 - Date of publication in the press of Mustill Report

January 7th 2008 - Date of refusal of recusal application.

January 7th 2008 - Date of committal.

Delay

11. Section 11(1) of the Judicial Review Act provides (all emphasis added):

*"An application for judicial review shall be made **promptly** and **in any event within three months** from the date when **grounds for the application first arose unless** the Court considers that there **is good reason for extending** the period within which the application shall be made".*

12. Section 11(2) of that Act provides:

*(2) The Court may **refuse** to grant **leave** to apply for judicial review if it considers that there has been **undue delay** in making the application, **and** that the grant of any **relief** would **cause substantial hardship** to, or substantially prejudice the rights of any person, or would be detrimental to good administration.*

13. Section 11(4) of that Act provides:-

*"Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, **the date** when the ground for the application first arose shall be taken to be the date of that judgment, **order**, conviction or **decision**[6].*

14. Section 25(1) of the Interpretation Act, Chapter 3:01 provides:-

*"Where in a written law a **period** of time is expressed to be reckoned from a particular day or event, that day or the **day of the event** shall **not be included** in the period".*

15. Section 25 (7) (c) of the Interpretation Act, Chapter 3:01 provides:-

(7) In a written law—

(c) a reference to a month shall be construed as a reference to a calendar month;

16. The Chief Magistrate's orders and decisions to refuse the recusal applications and commit the Appellants for trial were made on **7th January 2008**.

17. The first and second named Appellants, (though apparently not the third, fourth, and fifth appellants), are seeking (inter alia) orders of certiorari in respect of those orders and decisions. However the third, fourth and fifth appellants are seeking declarations based on decisions of the Chief Magistrate made on **July 9th 2007**, and November 27th **2006**[7]. The Judicial Review application by the first and second appellants, as well as the separate Judicial Review application by third, fourth, and fifth named appellants were both filed on 7th April 2008.

[6] Section 11 (3) of that Act could also have been relevant in the alternative in so far as the first and second named appellants rely on matters in the Mustill report coming to their attention in December 2007. However given our finding that they were within time it is not necessary to consider this further.

[7] Though repeatedly and incorrectly stated as November 27th, 2007. See Para. 11 (B) 2 of the Galbaransingh affidavit, and para 3(B) ii of the application itself. Cf – paragraph 35 of the grounds.

Delay by the third, fourth and fifth appellants

18. As to the first issue the decisions in respect of which the **third fourth and fifth appellants** sought review, were those of the Chief Magistrate on November 27th **2006**, (**wrongly stated to be November 27th 2007)**, and his ruling made on **July 9th 2007**. Therefore, (even separate and apart from these decisions being the direct subject of previous but undisclosed proceedings in the High Court and Court of Appeal), the institution of further proceedings in **April 2008** was well **out of time**, and leave for judicial review was properly refused to these appellants on the ground of lack of promptitude /undue delay.

19. In relation to the third, fourth and fifth named appellants they seek to challenge **decisions made** far **more than 3 months prior to the date of their applications**. No explanation was offered as to why they filed their application for Judicial Review more than 3 months after the last of those decisions- July 9th 2007.

20. In those circumstances in relation to the **application by the third, fourth and fifth appellants** for Judicial Review the trial Judge was clearly correct in dismissing their application for leave, on the ground of undue delay and lack of promptitude.

Delay by the first and second named appellants

21. As to the second issue the application for Judicial Review by the **first and second named appellants** should **not** have been dismissed on the ground of **undue delay**. It was filed within the limit stipulated in the Judicial Review Act of three months from the date of the decisions being challenged **by them** – January 7th 2008.

22. Further, the application for Judicial Review by the first and second named appellants **should not** have been dismissed on the ground of **lack of promptitude.** Unlike the application for Judicial Review by the third, fourth and fifth appellants, it raised the **additional** issue of **apparent bias**. Given the progressive and unfolding revelations in relation to the presiding magistrate it cannot be fairly contended that the appellants failed to act **promptly** in filing that application.

23. Finally, in the absence of any sustainable allegation of prejudice to the respondents, there is no basis for requiring the appellants in this matter to be held to a higher standard of **promptitude**, over and above that imposed by the **Judicial Review Act**, requiring them to additionally file that application within a period shorter than three months.

24. Time runs from the date of the decision to reject their recusal applications and the decision to commit them. The decisions that the first and second named appellants challenge were made on January 7th 2008.

25. The day of the decisions and orders is not counted. Therefore time began to run on the next day, 8th January 2008. This means that the three month period expired at earliest on 7th April 2008.

26. The claim was in fact filed on 7th April 2008 and therefore was within the three month time limit. To the extent that the 3 month period was calculated by reference to the 1878 case of **Migotti v Colville** 4 CPD 233, and the appellants were found to be out of time, we do not agree with that reasoning, nor with the application of the decision of Brett LJ. That case addressed only a sentence of one calendar month, not any period greater than that. It did not address a situation of a **statutory** calculation for periods for more than one month, and the reasoning of Brett LJ did not require the progressive deductions of one day for each subsequent month in such a case. It bears no relation to the

calculation of a period of 3 months for the purpose of computing of time periods under the Judicial Review Act in this jurisdiction. The application by the first and second appellants was therefore filed within 3 months of the date of the decisions being challenged.

Whether the three month period should have been calculated based on any date prior to January 7th 2008

27. Further we do not accept that the three month period for filing the challenge to those decisions should have been calculated on the basis of any **date prior** to the determinations, decisions and orders that are sought to be challenged.

28. The first and second named appellants challenge those decisions on the basis of apparent bias. That issue was formally raised by them on December 10th **2007**, based on matters which had progressively unfolded, culminating with revelations made before the Mustill Inquiry, and crystallised in the publication in the press of the report of that inquiry on December 21st **2007**.

29. It was contended that the allegations of apparent bias were based on matters which had existed in the public domain since April 4th 2007 (the date of the Court of Appeal's written judgments in **Panday v Virgil)**. However we accept that, in principle, matters arising subsequent to that decision, or in combination with that decision, could arguably have later tipped the scales so as to permit the appellants to subsequently raise a challenge on the ground of apparent bias. In principle it can be contended that the final matter subsequent to the decision in **Panday v Virgil,** could be the publication of the report of the Mustill Inquiry on or around December 21st 2007.

30. On that basis, even if it could be contended that the application should have been made when the last of the grounds giving rise to the allegation of apparent bias had crystallised on December 21st

2007, the appellants would then only have been less than three weeks out of time. As we have found however, the application was brought within three months of the decision or order challenged.

Promptitude – whether the application was nevertheless made promptly

31. The trial judge found that there had been undue delay and the Appellants had provided no reasons for extending time[8]. We have found to the contrary. In any event there has been no demonstrated prejudice to the respondent or reason for requiring a shorter time frame. Further in the context of proceedings which had been initiated since 2002, any saving of time at the expense of an examination of whether due process was being maintained, would be both unrealistic and unfair.

32. Given that the first and second named appellants had brought their application within the statutory three month period, to require, in the absence of demonstrated prejudice, a further explanation as to why it was not brought even sooner would be to impose an additional burden which is not justified in this case.

33. We accept the submission of the appellants that "when judicial review claims are brought within the prescribed three month period, there is a rebuttable presumption that they have been brought promptly", supported as it is by (*R (A1 Veg Ltd) v Hounslow LBC* [2003] EWHC 3112 (Admin), at [40]).

Non-disclosure/Compliance with the duty of candour

34. As to the third issue the Judicial Review application by the **third, fourth, and fifth appellants** was in relation to the ruling of the Chief Magistrate on **July 9th 2007**. It did not raise the issue of bias.

[8] see paragraph 26(1) and (2) of the judgment

It could also properly have been dismissed, or relief refused, on the basis of **non-disclosure** and **breach of their duty of candour.** This was because it was not disclosed to the trial court that **an application for Judicial Review on the same subject matter** (the ruling of the Chief Magistrate on **July 9th 2007,** and his **jurisdiction** to substitute new and amended charges, ("the jurisdiction issue"), had been made by **Maritime General** and **Fidelity Finance and Leasing (**the previous Judicial Review proceedings**)**.

35. Both **Maritime General** and **Fidelity Finance and Leasing** were their co accused in the preliminary inquiry. In that matter a stay of proceedings had been initially granted by the High Court on **July 30th 2007** and then set aside by the Court of Appeal on **October 19th 2007**. The casual reference[9] merely to a stay granted by the High Court between July 19th **2000** and October 19th **2000** (sic), without mentioning that the substantive matter had been dismissed, is not only insufficient to avoid a finding of blatant non-disclosure but was itself highly misleading. The Judicial Review application by the third, fourth and fifth named appellants was therefore properly dismissed on the basis of non-disclosure of the existence and disposition of the previous judicial review proceedings in which the Court of Appeal had decided the jurisdiction issue.

36. It was submitted on behalf of the appellants that *"The second basis on which Bereaux J refused leave for judicial review was that the Appellants had breached their duty of candour. His sole justification for this finding was that, at an **inter partes** application for leave, where the Chief Magistrate was the first respondent, an **authority** was not cited by the Appellants which appeared to determine one of the issues, though not the major issue of bias.*"

[9] in paragraph 45 of the grounds in support of their application

37. The authority referred to was the decision of the Court of Appeal in **Chief Magistrate McNicolls v Fidelity Finance and Leasing Co. Ltd & Anr, Civil Appeal No. 127 of 2007**. However this is not at all a proper characterisation of that case. That case was brought by two of the entities, co-accused with the instant appellants – **Maritime General** and **Fidelity Financing and Leasing**. Fidelity and Maritime, together with Mr. S. Ferguson- were parties to the application for judicial review before the trial court in CV 2008-1228.

38. They sought to challenge the decision and **jurisdiction** of the Chief Magistrate to substitute new and amended charges, (as he did on July 9th 2007), under s. 23 (2) of the Indictable Offences (Preliminary Inquiry) Act - (the jurisdiction issue). That issue was raised extensively in the judicial review application by the **first and second named** appellants. In the judicial review application by the **third, fourth and fifth named appellants** it was raised **to the exclusion** of all other grounds.

39. Yet mention of **McNicolls v Fidelity Finance Anor, Civil Appeal No. 127 of 2007** was completely omitted from each application, as was the fact that that decision had been successfully appealed to the Court of Appeal, that leave had been set aside, that the stay of execution granted by Justice Tiwary Reddy was vacated, and that a written decision had been delivered on October 19th 2007 on that very jurisdiction issue, (arising from the very decision on July 9th 2007).

40. Only at paragraph 45 of the grounds filed in support of the application by the **third, fourth, and fifth named appellants** was this dealt with- in a single paragraph as follows:

> *Between July 19th 2000 and October 19th 2000* (sic) *proceedings in the preliminary inquiry were stayed by orders of the high court following upon certain applications*

for judicial review which had been filed by two of the corporate defendants MGI and Fidelity.

The exact paragraph is found at paragraph 44 of the grounds of the **first and second named appellants** complete with errors, as even those dates were obviously inaccurate and misleading.

41. That written decision of the Court of Appeal would have been binding on the trial judge and dispositive of the entirety of issues raised in the judicial review brought by the **third, fourth, and fifth named appellants**. It was therefore imperative that it be disclosed. The contention that the CM was a party to those proceedings and would have known of them, and that the matter was heard inter partes, seeks to suggest that the likelihood of an order being made ex parte, in ignorance of the fact that the issue had been addressed before the Court of Appeal previously, was minimal. It mattered not that at an inter partes hearing the CM would have known of this authority. The appellants cannot seriously contend in effect that their duty of candour is satisfied because the opposing party would in due course have brought it to the attention of the court[10].

42. This can be no answer to what is a clear and obvious breach of the duty of candour. The possibility existed that the application for judicial review and interim relief could have been heard ex parte by a judge to whose attention it had not been drawn that the Court of Appeal had already determined the jurisdiction issue. What is relevant is that the potential existed, on an ex parte application for interim relief, for such relief to have been granted in ignorance of the fact that a significant issue had been determined by the Court of Appeal in a manner adverse to the appellants.

[10] 20. The contention must be rejected that: as stated in paragraph 34 of the Appellants' Skeleton Argument.
"there was never any prospect that the Court considering this application for judicial review would be led into error about what the Court of Appeal had held in Civil Appeal No. 127, because the first respondent to the Appellants' judicial review was the successful appellant in Civil Appeal No. 127 of 2007. Indeed CMM [the Chief Magistrate] referred to Civil Appeal No. 127 of 2007 in his submissions in response to the judicial review application".

43. The fact that mention was even made of the existence of a stay of proceedings up to October 19th (but misleadingly stated as 2000) begs the question why was mention not made of its dismissal on appeal, or the overlap[11], between those proceedings and the instant applications.

44. Even though those proceedings were filed in relation to co-accused, Maritime General and Fidelity Leasing, this would have been a matter known to those appellants as their own Preliminary Inquiry proceedings had been adjourned pursuant to a stay granted in those proceedings pending determination.

45. It is simply not sufficient, or even acceptable, to contend that the earlier decision of the Court of Appeal was well known to the Chief Magistrate, since he was the Respondent in that case, or even that it was a recent and well known authority of the Court of Appeal. The duty of candour rests on the party making the application.

46. **The breach of the duty of candour was sufficient to dispose of the Judicial Review application in relation to the third, fourth, and fifth named appellants**. The entirety of the Judicial Review application in relation to the third, fourth, and fifth appellants was therefore properly dismissed, as the **sole** issue of jurisdiction raised therein had already been determined by the Court of Appeal.

Failure to disclose by the first and second named appellants

47. As to the fourth issue, failure to disclose the existence of the **constitutional** motion in the proceedings filed by the **first and second named appellants** for Judicial Review was not a matter of

[11] in fact total overlap in the case of the applications by the third fourth and fifth appellants

such significance as to justify refusal of the grant of leave in the circumstances where, as here, the constitutional motion was in practice destined under the docket system to be listed before the same Judge.

48. Further, whether the **Judicial Review** by the **first and second named appellants** should also have been dismissed in its entirety on the basis of that **non-disclosure** of the previous Judicial Review proceedings, or whether the ground and allegations of **apparent bias** were severable and therefore could survive on their own, is now academic. This is because the same points on apparent bias that were raised in the application for leave to apply for Judicial Review were also raised in the Constitutional motion and they were both before the same judge.

49. In relation to the Judicial Review leave applications on behalf of the first and second named appellants, it is correct that the **additional** issue of bias was raised by them, and that that issue had not been before the Court of Appeal in the prior matter. It is also correct however that there was a significant breach of the duty of candour in relation to the current matter also.

50. In the Judicial Review application on behalf of the first and second named appellants the issue of apparent bias is addressed in eleven paragraphs, 43-54, out of the 59 plus paragraphs in the "grounds"[12].

51. It is not necessary to determine whether that breach of the duty of candour was also sufficient to dispose of the judicial review application on behalf of the first and second named appellants, because the ground of bias raised therein was also raised in the constitutional motion filed by them, and both

[12] the others remarkably all dealing with the circumstances and jurisdiction of the magistrate to substitute new and additional charges as he did on July 9th 2007- the jurisdiction issue

matters were before the same judge. The trial judge found that the allegations of apparent bias in the Judicial Review by the appellants Smith and Gomes (2008-1268 Civ. App. 34 of 2009) and constitutional motion (Civ. App. 35 of 2009 - 2008-00667) (also by Smith and Gomes) were identical. In this specific matter therefore it makes no difference because the issue of apparent bias must be confronted, whether in both the judicial review and the constitutional motion, or **on the latter alone**.

Arguability with a realistic prospect of success

52. As to the fifth issue – (whether the evidence was insufficient to justify committal, the charges lacked specificity and/or are not known to law, or the procedure adopted by the Chief Magistrate contravened the Indictable Offences (Preliminary Inquiry) Act) - the trial judge's reasoning and conclusion that these were all matters which were within the discretion of the presiding magistrate and could properly and more appropriately be raised at further stages in the criminal proceedings, (see paragraphs 50-52 of his judgment in the judicial reviews) cannot be faulted.

53. As to the sixth issue **arguability** with a realistic prospect of success in the **Judicial Review** by the first and second named appellants (in relation to apparent **bias**) amounts to the same issue (or in any event substantially overlaps the issue) of whether **apparent bias** had been **established** in the **Constitutional Motion**[13]. Whether or not it could be ultimately substantiated, in the circumstances of this case given the several matters which had to be considered in detail, leave for Judicial Review by

[13] This was recognized in Panday v Virgil @ 21 by the Honourable Archie JA as he then was). As in that case "The Appellant's case was advanced on the alternative bases of '**apparent bias'** at common law and **breach of his constitutional right** not to be deprived of his liberty except by due process of law. In particular, it was argued that the existence of bias deprived him of his right to a fair hearing under section 5(2) (e) and his right to a fair and public hearing by an independent and impartial tribunal under section 5(2)(f)(ii) of the constitution.
…".

> 22) The common law and constitutional causes of action are opposite sides of the same coin. …… If there is a duty to disclose and the decision maker fails to do so then**, if** real or **apparent bias is found**, there would also be a valid claim **for breach of constitutional rights based on the facts that gave rise to the apprehension of bias**.)

the first and second named appellants should not have been refused on the ground of lack of arguability with a realistic prospect of success, [14]

The Constitutional Motion - The factual underpinning

54. There are allegations that s. 4 (a), 4 (b), 5 (2) (e), and 5(2) (f) of the Constitution were breached. **The factual underpinning** for each alleged breach was an allegation of apparent bias on the part of the CM arising from several matters detailed hereinafter.

55. The right to due process includes and encompasses natural justice. It was contended that notwithstanding earlier proceedings by Maritime and Fidelity the issue of apparent bias must be examined as (i) bias was not an issue in those proceedings and/or (ii) that no estoppel could arise as progressive and unfolding disclosures revealed only by December 2007 sufficient grounds to crystallize their argument on apparent bias. The contention was that although the factors giving rise to a bias challenge existed at the time of the proceedings instituted in July 2007 by Maritime and Fidelity, and although those factors included the matters which allegedly gave rise to the instant bias challenge, the instant bias challenge also included matters which arose or were revealed subsequent to that decision[15].

56. The major factual issue on the **constitutional motion** was whether there were *facts that gave rise to the apprehension of bias*. Therefore the issue of bias would have had to be confronted in any event in the constitutional motion, (even if leave for judicial review by the first and second appellants were to have been refused because of non-disclosure on the jurisdiction issue). This would be the case unless, as the trial judge found, the constitutional motion was itself an abuse of process.

[14] see Galbaransingh v AG Civ. App.207 of 2010 delivered December 17th 2010 @ 5 per Kangaloo JA -It must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its (sic) discretion in refusing to grant leave

[15] Feb. 2008 for the constitutional motion and April 2008 in the case of the judicial reviews.

Whether the constitutional motion was an abuse of process

57. As to the seventh issue ,we do not consider that it was an abuse of process, as it cannot be both the case that the judicial review was an inappropriate procedure as *the applicants could apply for leave (sic) in the usual way if they allege that their constitutional rights have been infringed* (paragraph 26 of the trial judge's judgment in the judicial review proceedings), **as well as** an abuse of process to have actually pursued the constitutional motion (See paragraph 12 of the trial judge's judgment in the constitutional motion). They cannot **both** be held to be inappropriate procedures without negating the right to due process.

The **constitutional motion** by the first and second named appellants should not have been struck out merely on the basis that it was an abuse of process without an examination of the merits of the allegation of bias. That issue would have had to be addressed whether on the Constitutional Motion or on the Judicial Review.

In so far as the trial judge found that the reliefs sought in the constitutional motion coincided with those in the Judicial Review applications, and that the allegations of bias and unfairness are effectively the same in both matters[16], he was entitled to adopt the practical course of staying the Judicial Review and proceeding with the constitutional motion which was already before him[17].

[16] para 39 of the judgment of the trial judge in the Judicial Reviews
[17] See para 26(5) of the judgment

58. Further it is established in this jurisdiction that an allegation of apparent bias can be raised by way of constitutional motion. See **Panday v Virgil**, Mag. App. No. 75 of 2006– per the Honourable Archie J.A. as he then was at paragraph 22[18]

The merits of the bias argument by the first and second appellants - the eighth issue

59. As to the eighth issue, **(**the merits of the applications), on a fuller consideration of that issue **on its merits**, whether on the Judicial Review application or on the Constitutional motion, the trial judge was entitled to find as he did that the allegations of inter alia, bias and /or constitutional breaches of the right to a fair hearing and to due process, and to the protection of the law, were ultimately unsustainable. The reasons for this are **summarised** as follows, and further examined thereafter.

Summary

60. It was contended that the Chief Magistrate should have recused himself from further hearing of the Preliminary Inquiry on the basis of apparent bias. The basis of such apparent bias allegedly arose from:

(i) Findings of the Court of Appeal in **Panday v Virgil** that he could have been perceived to be beholden to the then A.G,

(ii) Subsequent further revelations concerning the land transaction made by him in testimony under cross examination before the **Mustill Inquiry**,

(iii) (Also arising from that testimony) an alleged conversation with the then Chief Justice and an **alleged statement** to pay attention to Mr. Jenkins,

(iv) Disciplinary proceedings instituted against him by the **JLSC,**

(v) Publication of the report of the **Mustill Inquiry**.

[18]) ….. If there is a duty to disclose and the decision maker fails to do so then, if real or **apparent bias is found**, there would also be a valid claim for **breach of constitutional rights based on the facts that gave rise to the apprehension of bias**).

61. As to these:

The findings of the Court of Appeal in Panday v Virgil

(i) (a) These were publicly available since the written judgment delivered on **April 4th 2007**. The matters raised in **Panday v Virgil** involved allegations that the Chief Magistrate might have been perceived to be beholden to the then AG and therefore infected with apparent bias in relation to the appellant Mr. Panday. While there were comments on the conduct of the Chief Magistrate (the CM), those findings of apparent bias by him were in relation to the matter involving **the appellant in that case**. Therefore, those comments and findings bore no obvious relationship to the proceedings involving the instant appellants.

(b) All those findings and comments were public by the time of the institution in **July 2007** of the previous proceedings for Judicial Review (by Maritime General and Fidelity Leasing before Tiwary Reddy J. and the Court of Appeal).Yet no issue was raised before the Court of Appeal in those previous proceedings for Judicial Review, (filed in July 2007), that the decisions of the Chief Magistrate in relation to the decisions that he took on July 9th 2007 affecting the first and second named appellants[19], were influenced by his being beholden to the then A.G.

We are prepared to accept in principle that matters, which in July 2007 may not have sufficed for a bias challenge[20], could have been supplemented by further matters which tipped the balance in favour of launching such a challenge. The issue however is whether that in fact was the case here. We do not consider that issues of waiver or estoppel arise in relation to not raising these issues or the issue of apparent bias earlier.

[19] which were the subject of that appeal

[20] at the time that the initial judicial review by Maritime and Fidelity was instituted

We are persuaded that it is appropriate to examine whether the matters raised in **Panday v Virgil** were, whether by themselves, or in combination with the other matters outlined below, **sufficient** to justify an allegation of apparent bias, requiring recusal.

Matters subsequent to the decision of the Court of Appeal in Panday v Virgil- April 4th 2007

(ii) (a) As to the **further matters relating to the land transaction**s revealed in testimony before the Mustill Tribunal in **September 2007**, the revelations were, inter alia, that the CM had nevertheless immediately deposited the cheque, (a fact which had not been revealed previously), and that the certified copy of the Deed for the land, that he claimed that he had given to the purchaser, was dated months after he had returned the cheque and cancelled the sale transaction.

(b) Those matters may have gone towards the issue of whether the CM was beholden to the then A.G. in the eyes of the independent impartial observer because of, inter alia, his exoneration by the then A.G. from further investigation, (and the latter's assistance in securing a sale of the same land to another subsidiary of the conglomerate CLICO). The issue of his being perceived to be so beholden because of matters relating to the land transaction was **already** available in the public domain since the written judgments in **Panday v Virgil** on **April 4 2007**. The testimony, including that surrounding the details of the CM's land transaction and the receipt and deposit of the cheque was, in effect, tantamount to further and better particulars of that **already public** matter. Subsequently revealed **details** of that very matter add nothing to the fundamental finding of the Court of Appeal, (namely that the conviction of the appellant **in Panday v Virgil** had been

vitiated by apparent bias on the basis of matters which could have given rise to a **perception** of the CM being beholden to the then A.G).

Alleged conversation

(iii) As to the alleged conversation with the then Chief Justice (CJ), volunteered by the CM in his testimony to the Mustill Inquiry, and the alleged statement to pay attention to the prosecutor, it is clear that on examination, this statement, even if it had ever really been made, or even amounted to a direction, could not have led any reasonably **well informed** observer to conclude that it could have any bearing or influence whatsoever on the actions of the CM, in July 2007[21] or January 2008[22].

Further, the CM's accusations against the then Chief Justice had been made in statements given long before – in fact since May 2006. By July 2007[23] and certainly by January 2008 he and the then Chief Justice were openly at odds. The reasonably **well informed** observer could not therefore sensibly conclude that the CM was at all likely to be subject to any influence from that source.

Disciplinary proceedings instituted against the CM by the JLSC

(iv) As to the **disciplinary proceedings instituted against the CM by the JLSC** – the reasonable well informed observer with a basic understanding of (i) the constitutional independence of the JLSC from the Executive branch of the State and (ii) its lack of connection with any prosecution, would dismiss any possibility of influence from this factor on the CM. He would not contemplate any real possibility of bias in

[21] date of decision on additional and substituted charges
[22] date of decision on refusal to recuse himself and decision to commit
[23] date of decision on additional and substituted charges

relation to the instant appellants arising therefrom as it could not credibly be alleged that the JLSC, as a constitutionally independent body, could have any interest in any specific outcome of the Preliminary Inquiry.

Further, any contention that the CM may have wished to please the JLSC by either hastening or protracting the committal proceedings against these appellants must first provide a plausible explanation as to how either approach by the CM could demonstrably achieve or produce such an effect, given (a) the independence of the JLSC from those proceedings, and given further (b) the fact that those proceedings related to his failure to testify against the then Chief Justice in an ostensibly unrelated matter.

Publication of the report of the Mustill Inquiry and criticisms

(v) As to **publication of the report of the Mustill Inquiry**, criticisms therein of the CM related to his allegations against the then CJ had nothing to do with the instant appellants. It cannot be contended that there is any principle, far less any constitutional principle, (separate and apart from those already recognized in law such as those relating to bias), that would have required the CM to recuse himself on the basis of an **alleged lack of credibility** or moral authority. This is so a. because such criticisms were in a **matter unrelated** to the first and second named appellants, and/or b. the initiation of disciplinary proceedings against him by the JLSC, (again arising out of a matter unrelated to the first and second named appellants), did **not** result in a formal determination that he should be **interdicted from duty**.

Detailed Analysis -Law

Bias -The legal test

62. The test for apparent bias was considered extensively in the decision of the Court of Appeal in **Panday v Virgil**. See for example the judgment of the Honourable Warner JA at paragraph 12 (adopted from the case of **Porter v Magill** [2002] AC 357) as follows (all emphasis added):

> *whether the **fair minded** observer, **having considered the facts**, would conclude that there was a **real possibility** that the tribunal was biased.*

63. See also the Honourable Archie JA, (as he then was),in Panday v Virgil at paragraph 1, who described it as whether:

*"a **fair-minded** and **well informed observer** would conclude that there was a **real possibility** that the Chief Magistrate, before whom he [the appellant] had been tried, was biased*".

The fair-minded observer

64. The attributes of such observer were described at paragraph 86 of the judgement of Warner J.A. in *Panday v Virgil* at paragraph 86 as follows (all emphasis added):-

> *86) The English authorities support the formulation of Kirby J. in Johnson v Johnson 74 AL JR 1380 which was decided in the High Court of Australia, that the observer is "**neither complacent** nor is he **unduly sensitive or suspicious** when he examines the facts". It is useful to cite the entire passage of Kirby J. at para 53.*
>
> *"The attributes of a fictitious bystander to whom the 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 to 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****.... Finally, a reasonable member of the public is* ***neither complacent nor unduly sensitive or suspicious***[24]*."*

65. We are grateful to counsel for the first and second named appellants for his helpful distillation of some principles relevant to apparent bias, upon which we have drawn, with modifications, as follows:-

66. The consideration of whether there is an appearance of bias involves looking at all relevant matters, including events occurring and material coming to light **after** the impugned decision. See the Honourable Warner JA in that case at paragraph 59(iv) as follows:

The material facts were not limited to those which were apparent to the applicant. They were those facts as now known which were ascertained upon investigation by the court.

See also the Honourable Archie JA in **Panday v Virgil** at [20].

67. The risk of unconscious bias may suffice. As stated by Warner JA in **Panday v Virgil** at paragraph [26] of her judgment[25] See also judgment at paragraph 105[26].

---

[24] See also the decision of the Honourable Archie JA as he then was @ 11 in that case:- 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. In the present context that would include the knowledge that the Attorney General and the appellant, who at the material time was the Leader of the Opposition in the House of Representatives, stood on opposite sides of the political divide.

[25] An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings. Except where actual bias is alleged, it is not useful to investigate the individual's state of mind. The courts have recognised that bias operates in such an insidious manner that the person alleged to be biased may be **unconscious** of the effect. It is trite law that if a reasonable apprehension of bias arises, **the whole proceeding becomes infected**. Credibility issues no longer arise; the **reasonable apprehension of bias** remains and **the proceedings cannot be saved**.

[26] The matter went further. According to the Attorney-General, it was only after the decision was handed down that the Attorney-General concluded that there was no further cause for action at that time. The weight of existing authority speaks to **unconscious bias**. The fair-minded and informed observer would be aware that the Chief Magistrate gave his decision before the Attorney General came to a decision that there was no further cause for action. It would be too simplistic to say that the observer's fears would be allayed because of the presumption of impartiality. What then of the Chief Magistrate's suspicions?

68. The test for apparent bias, and the right to challenge the validity of proceedings on that basis also applies to committal decisions and other preliminary decisions prior to conviction. If such proceedings tainted by bias were nonetheless to be held valid then such proceedings, if capable of producing an outcome which was merely a foregone conclusion, would in effect be no more than a formality. Committal proceedings are capable of resulting in a decision either to commit or not to commit. They cannot be characterised as a meaningless formality. They involve the exercise of a judicial discretion. Parties are entitled to the exercise of that discretion free from apparent bias.

A decision that is vitiated by bias is a nullity

69. Per Warner JA at paragraph 26:

> *It is trite law that if a reasonable apprehension of bias arises, the whole proceeding becomes infected. Credibility issues no longer arise; the reasonable apprehension of bias remains and the proceedings cannot be saved.*

See also Archie JA in **Panday v Virgil** Mag. App. No. 75 of 2006 at page 5[27]

70. Apart from its extensive consideration of the legal principles applicable to apparent bias the decision in *Panday v Virgil* is of great relevance to the instant matter because it involves consideration of some of the very facts and matters on the basis of which it is alleged that the CM continued to be beholden to the then AG. It is those matters which it is alleged gave rise to an apprehension of bias by the CM, not only in relation to the appellant in that case, but **in relation to** the instant **first and second named appellants** also.

[27] 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 Court when investigating an allegation of apparent bias 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**.

71. We accept that, despite this matter having been instituted since 2002, the prospect of wasted costs of the preceding litigation, if the bias challenge were to succeed, is irrelevant. This has been recognised by Warner JA at paragraph 34 of her judgement in **Panday v Virgil**.[28](See also paragraph 59 judgement of Warner JA in **Panday v Virgil** [29] and paragraph 28 of the judgment in that case of the Honourable Archie JA as he then was.[30]

Linkage

72. A logical connection must be established **between the matters** which it is being alleged may give rise to lack of impartiality or the perception thereof, **and the decision** that it is contended may be affected. See for example the judgement of the Honourable Archie JA in **Panday v Virgil** citing **Ebner v The Official Trustee in Bankruptcy** at page 7

> *The case of **Ebner v The Official Trustee in Bankruptcy** (2000) 205 CLR 337 lays down a three-step test:*
>
> *• First, one must identify what it is said might lead a judicial officer to decide a case otherwise than strictly on its merits;*
>
> ***• Second, a logical connection between the matter/s and the feared deviation from impartiality has to be articulated;***
>
> *• Third, an assessment must be made whether a fair-minded observer would conclude that there was a real possibility that the case would not be decided impartially.*

[28] 64. *citing Morrison and another v AWG Group 2006 EWCA Civ 6 at para 29 per Mummery LJ who stated: - "In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public, to be fair and impartial. Anything less is not worth having".*

[29] *(viii) This Court had to decide whether, on an objective appraisal, the material facts gave rise to a legitimate fear that the Chief Magistrate might not have been impartial. If they did, the decision of the Chief Magistrate had to be set aside.*

[30] *…… It is true that the matters complained of arose at a late stage, but the inconvenience that might have been suffered by restarting the trial before another magistrate was not a sufficient justification for pressing on.*

Matters allegedly giving rise to the appearance of bias- Detailed analysis- Facts

73. The first and second named appellants contend that those matters were:-

a. The Court of Appeal's findings in *Panday v Virgil* -**on April 4th 2007***;*

b. The proceedings initiated by **the JLSC- August 2007;**

c. The evidence of CM before the Mustill Inquiry in relation to his land transaction- **September 2007**;

d. The further evidence of the CM before that inquiry - **September 2007** where he alleged for the first time that he had a conversation with the then CJ that touched upon the subject preliminary inquiry;

e. The publication of the Mustill Report- December 2007.

74. Further to the earlier summary it is necessary to examine each of those matters in detail to determine whether singly **or in combination** they give rise to:-

(i) the **perception** of bias in relation to the appellants; and/or,

(ii) **breach of any constitutional** right as alleged, including the right to due process of law and a fair hearing, arising from any alleged resulting discrediting of the CM.

75. In particular it would be necessary to consider whether, if not individually supportive of a bias challenge they can cumulatively, or in any combination, be sufficient to satisfy the test for apparent bias. In conducting this analysis **we are not concerned to make findings of fact**. (See paragraph 61 of the judgement of Warner JA in *Panday*[31], as well as paragraph 62. [32] See also paragraph, 6 of the

[31] 61) In Medicaments at para 86 the court had this to say:
"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 decide **whether or not the fair-minded observer** would consider that there was a real danger of bias notwithstanding the explanation advanced".

[32] 62) In Gillies v Secretary of State for Work and Persons 2006 1 WLR 781 at 789 Lord Hope said:

judgement of the Honourable Archie JA.[33]) In fact the Mustill Tribunal itself was unable to do so and was forced to conclude at paragraph 97 of its report that *"...the whole subject of the CM's conduct is shrouded in mystery which we have been unable to dispel."*

76. We are therefore concerned, like the Court of Appeal in **Panday v Virgil**, to ascertain what information would have been available to a fair-minded and well informed observer, and to assess whether such an observer would conclude, from that information, that there was a real possibility of bias by the CM in relation to the first and second named appellants.

The Court of Appeal's findings in Panday v Virgil

77. The Court of Appeal's written judgments in **Panday v Virgil,** were delivered on 4th April 2007. Those judgements related to an examination of the conduct of the Chief Magistrate in relation to the trial of Mr. Panday on charges based on the Integrity in Public Life Act. No finding of actual bias was made against the Chief Magistrate. It is contended by the first and second named appellants that the findings of that court, and its conclusion of apparent bias **in that case**, are also relevant to the issue of apparent bias **against them** by the CM in the instant matter. That contention must therefore be examined.

78. The conclusions of the Court of Appeal were all based on matters of public record, including press releases by the parties and statements by them in relation to receipt of a cheque by the Chief Magistrate in relation to the sale of his land, conversations that the Chief Magistrate had with the then

"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by the public generally bearing in mind that **it is the appearance that these facts give rise to that matters**, not what is the mind of the particular judge or tribunal member who is under scrutiny."

[33] 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. The reason was clearly explained by Lord Denning M.R. in R v London Rent Assessment Panel Committee [1969] 1 Q.B. 577 @ 599 in these terms:
"Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'the judge was biased' "

Attorney General (AG) and with the then Chief Justice (the CJ), (bearing in mind however that the latter alleged conversations were the subject of subsequent investigation by the Mustill Inquiry, which declined to accept the CM's version of them). Save for public press releases emanating from parties the Court declined to consider newspaper reports, as do we.

79. **In Panday v Virgil** the Court of Appeal found that based on the press release from the then AG, the statement of the CM, and the statement of the then CJ, it was clear that conversations had occurred in which the matter pending against the **appellant in that matter** had featured. In relation to those conversations it mattered not who had initiated those conversations, or who had initiated the statements concerning aspects of the matter. What was relevant was that even on the version of the CM there would have been such conversations. Yet not one of those conversations had been disclosed to counsel for the parties in that trial.

Judgement of Warner JA in Panday

80. The background to the matters being considered in Panday v Virgil is summarised as follows[34] "*In 2005, the Chief Magistrate had purchased a parcel of land from a CLICO subsidiary. He later had a change of plans and wished to resell the land. During the month of March 2006, he received a telephone call from someone who identified himself as a "Mr. (M) from CLICO" offering to buy the property. On 27th March 2006, he called Mr. (M). and asked him how soon the transaction could be completed and he replied 'very soon'. Later that day he received a cheque for $400,000 by way of down payment. According to the Chief Magistrate, he expected to receive a written and signed agreement for sale but when none was forthcoming by the end of March, he reflected on the matter and became suspicious that, to use the vernacular, he was being 'set up'. He returned the cheque". He also reported the matter to the then AG and held discussions with him."*

[34] and set out hereinafter in greater detail in the passages from the Honourable Archie JA as he then was

81. At paragraph 73 onwards of her judgment Warner JA considered the press release of the then AG. It is reproduced, so far as material, as follows (all emphasis added)**:-**

> *The Attorney General's Press Release*
> *70) In the first paragraph, the information published was that the Chief Magistrate visited the Attorney General on or about the 31st March, 2006, after the case was closed. The former wished to make a report on, "among other things", about what he described as a "suspicious sequence of events relating to a real estate transaction in which he had purchased a property in 2005". The release is strikingly vague about the "other things" which were discussed. A legitimate question to be considered would have been what was the precise nature of those discussions…*
> .
> *71) The second paragraph mentioned the name of a witness for the defence…*
>
> *72) The third paragraph related that the Chief Magistrate had* ***returned*** *a cheque recently sent to him as a deposit on account of the sale of his property which he had put on the market. The cheque was "that of a* ***CLICO subsidiary****". The Chief Magistrate, it was stated, informed the Attorney General "out of an abundance of caution* ***because of the judgment he was about to deliver****", so that the Attorney General could determine whether there should be any* ***investigation*** *into the matter.*
>
> *73) The first three paragraphs signalled the Chief Magistrate's concern about the delivery of the cheque; the fact that it came from a CLICO subsidiary; and the fact that someone with a connection to the CLICO group was a witness in the case.*
>
> *74) The fourth paragraph stated what action the Attorney General had taken:*
> *i. He had informed the Commissioner of Police and the Director of Public Prosecutions.*
> *ii. He took a decision that he should take no action until the Chief Magistrate delivered his judgment.*
>
> *75) The fifth paragraph:*
> *The Attorney General made inquiries immediately following the delivery of the judgment. He contacted all the parties. The Attorney General advised the Commissioner of Police, and the Chairman of the Integrity Commission about his inquiries and he [the Attorney General]* ***determined that there was no cause for any further action at that time****. It was noted that these inquires were carried out after the Chief Magistrate handed down his decision.*
>
> *76) The sixth paragraph The Attorney General noted attempts to tarnish the reputation of "persons involved in the matter".*
>
> *92) Counsel however submitted that there would be no purpose in telling the defence because the defence was bound to say "that has nothing to do with us". I was of the view however that the appellant would reasonably have had much cause for concern. The defence might have said much more than that; not only could he have expressed his views about the event, counsel could have made submissions on the law. Certainly, whether or not there was a* ***possibility of unconscious bias****, would have been be uppermost in counsel's mind. The appellant did not know the full extent of the matter the Chief*

Magistrate discussed. Those discussions could have conveyed material or impressions which had an influence on the Chief Magistrate's objectivity.

93) With respect, I was not at all disposed to accept the approach advanced by Counsel for the respondent. I think that ***the Chief Magistrate had a duty in the circumstances to inform the parties about all the matters which were troubling him*** *— the cheque; his approach to the Attorney-General; and his fears about the conversations, which he said, he had with the Chief Justice.*

94) The fair-minded and informed observer would be presumed to know that ***Mr Duprey was a witness in the case and that the Chief Magistrate had made some connection between the cheque and that witness****. He would also know that a communication had been made which raised concerns in the Chief Magistrate's mind about the witness and that knowledge would lead to a feeling that the appellant had been unfairly treated, because* ***he did not know the circumstances and the extent to which the communication had influenced the Chief Magistrate.*** *In short the "****out of court communications****" would have reduced confidence in the impartiality of the decision.*

104) ***The fair-minded and informed observer would immediately have focused on the Chief Magistrate's reaction to the receipt of the cheque****.* ***It was the Chief Magistrate who sounded the alarm*** *— that his suspicions were aroused; that all was not right; that someone had acted improperly. What would the fair-minded and informed observer make of this unhappy situation? As regards the Chief Magistrate's financial transactions with a subsidiary of "CLICO", in the words of Lord Hutton in Pinochet No. 2, legal technicality is particularly to be avoided. The fair-minded and informed observer would not be concerned with whether or not CL Financial was a subsidiary of the CLICO Group of Companies. He would be aware however that:*

(i) A certain witness in the case was an influential person in the Group of Companies.

(ii) The Chief Magistrate entertained grave doubts about the timing and delivery to him of the cheque.

(iii) He had connected the witness and the cheque in a manner which may have led to adverse findings against the appellant.

(iv) His doubts were grave enough to impel him to report the matter to a third party, namely the Attorney-General who bore the responsibility for dealing with corruption, in the context of the case.

(v) The fair-minded and informed observer would be presumed to have had knowledge that the Attorney General and the appellant were on different sides of the political divide. The observer would have been aware that the functions of the Bureau were to deal with corruption in a holistic manner and that the Chief Magistrate would not have taken the serious step of reporting the cheque to the Attorney General unless he had given considerable thought to that course of action.

(vi) In the light of the sensitivity of the case, ***the fair-minded and informed observer would be concerned that the deliberations between the Chief Magistrate and the Attorney General were not at arms length****. Applying reasonable standards of propriety, but not being unduly suspicious, he would appreciate that* ***several matters were discussed***

which may have had a bearing on the case *and that the Attorney General in his Press release chose to be vague about them.*

105) The matter went further. According to the Attorney-General, it was ***only after the decision was handed down*** *that the Attorney-General* ***concluded that there was no further cause for action at that time***. ***The weight of existing authority speaks to unconscious bias***. *The fair-minded and informed observer would be aware that* ***the Chief Magistrate gave his decision before the Attorney General came to a decision that there was no further cause for action. It would be too simplistic to say that the observer's fears would be allayed*** *because of the presumption of impartiality. What then of the Chief Magistrate's suspicions?*

Issues relating to the out of court discussions

106) ***It seems to me to accord with common sense that the fair-minded and informed observer would regard the Chief Magistrate's alleged communications with the Attorney-General and the Chief Justice as a cause for concern; the fair-minded and informed observer's apprehension would be heightened by the nondisclosure of those matters.*** *The fair-minded and informed observer's sense of grievance would have been sharpened by the manner in which the out of court communications were brought to the appellant's attention. He would be aware that the Chief Magistrate failed to inform counsel not only about his suspicions, but of his conversations with the Attorney General and the Chief Justice and he would conclude that the failure to do so amounted to unfairness. The Chief Magistrate also remained convinced that the Chief Justice had attempted to influence his decision.*

107) ***It would have been stretching the presumption of impartiality too far to say that the fair-minded and informed observer would be reassured that the Chief Magistrate could do justice to the appellant's case when he had all these concerns. The fair-minded and informed observer would have concluded that the cumulative effect of these extraneous factors would have impaired the Chief Magistrate's objectivity with the result that there was a real possibility of bias on his part.***

Whether beholden to the then AG - Sale of Property

82. Apart from the issue of out of court communications and failure to disclose them, (which do not apply here) the issue was also raised as to whether there could be apparent bias based on a perception that the CM had become **beholden** to the then AG. In relation to this issue an examination of the circumstances relating to the sale of the Chief Magistrate's property cannot be avoided. In so far as those circumstances were considered by the Court of Appeal in **Panday v Virgil** they became a matter

of public record, readily available to the fair minded, well informed, and independent observer. They are set out as follows:-

36) (per the Honorable Archie JA as he then was) - I now go on to consider events that occurred and the conduct of the Chief Magistrate up to the time just before the decision of this Court, through the eyes of a fair-minded and informed observer. These events are considered in the light of the appellant's principal allegation that the Chief Magistrate may be regarded as biased, in the eyes of the hypothetical observer, because he was beholden to the Attorney General, the appellant's political adversary, who had improperly used his influence to assist him in a land transaction.

42) The background to that cheque is important. In 2005, the Chief Magistrate had purchased a parcel of land from a CLICO subsidiary. He later had a change of plans and wished to resell the land. Although it was apparently not normal company policy to repurchase lots company representatives agreed to assist him in locating a buyer. During the month of March 2006, he received a telephone call from someone who identified himself as a "Mr. M from CLICO" offering to buy the property. On 27th March 2006, he called Mr. M and asked him how soon the transaction could be completed and he replied 'very soon'. Later that day he received a cheque for $400,000 by way of down payment. According to the Chief Magistrate, he expected to receive a written and signed agreement for sale but when none was forthcoming by the end of March, he reflected on the matter and became suspicious that, to use the vernacular, he was being 'set up'. He returned the cheque.
43) His suspicion was clearly fuelled by the fact that Mr. D the chairman of the CL Financial Group (which includes CLICO) appeared as a witness on the last day of the trial (27th March 2006). This is corroborated by the Attorney General's account of their meeting.
45) In his release, the Attorney General reported that the Chief Magistrate had informed him of the cheque "out of an abundance of caution, given the importance of ***the judgment he was about to deliver****" [my emphasis] and that he (the Attorney General) had determined that he should take no action* ***until judgment had been delivered****. Immediately after the judgment, he made enquiries into the matter, including contacting all the parties. He ultimately formed the view that there was no cause for further action in the matter of the land transaction at that time and so advised the D.P.P, the Commissioner of Police and the Chairman of the Integrity Commission. ...*
46) The Attorney General's later account of his investigation is that, on 25th April 2006, the day after judgment was delivered,...(he took various steps)
47) He says further that he was concerned that if the transaction was bona fide the Chief Magistrate should not suffer from being overcautious in returning the cheque. He had several subsequent phone calls and meetings with Mr. Monteil. His primary concern was that he could not be accused of a dereliction of duty in failing to investigate the matter even though he considered it to be a matter with no "smoking gun" [my emphasis]. On one occasion Mr. Monteil said the issue had been sorted out. No details of the nature of the investigation that was carried out have been supplied.
49) The appellant's argument, in effect, is that the Attorney General did not take sufficient care because, having considered the matter suspicious in the beginning, he too readily came to the conclusion that there was no 'smoking gun'. This, by itself, may have no

sinister connotation but in the light of all the circumstances, the confidence of the ***hypothetical observer*** *that the Chief Magistrate would not, at least subconsciously, have some* ***reason to be grateful to him,*** *is shaken.*

51) The Chief Magistrate delivered a written judgment on 24th April 2006 in which he felt constrained to assert that he had not been influenced in his decision by anything that took place before, during or after the hearing of the evidence. The mere fact that he felt obliged to do so signals that he must have contemplated that if the circumstances that were known to him became known to third parties they would or might possibly have given rise to a perception of lack of impartiality. In keeping with my earlier analysis, he should either have recused or, if he was unsure of the possible effect, invited Counsel's assistance.

59) It would do nothing for the confidence of the hypothetical observer to note that the Chief Magistrate sought the intervention of the Attorney General when he no longer wished to testify and that the Attorney General thought it fit to intervene personally. It does not matter whether he urged the Chief Magistrate to fulfill his duty as a witness. He has no constitutional role in the discontinuance of prosecutions. His ***willingness to intervene personally, even to the extent of arranging meetings, in respect of both the criminal prosecution and the land matter****, however laudable the motive, is regrettable.*

60) It is true that a series of individual actions taken innocently, when juxtaposed, may present a picture that is far removed from the intention or contemplation of the actors. However, when dealing with the question of apparent bias, we are concerned with the composite picture. I make no judgment on the truth of conflicting assertions or the motivations for actions taken. I have, however, come to the inescapable conclusion that a fair-minded and well-informed observer would come to ***the conclusion that there was a real possibility*** *that when the Chief Magistrate decided* ***the appellant's case****, his mind was* ***affected by unconscious bias****.*

61) I say so for the following reasons:

• The Chief Magistrate clearly had a suspicion that the$400,000.00 cheque was in some way connected to the evidence of Mr. Duprey who a witness for the defence;

• That clearly had the potential of impacting negatively on his assessment of Mr. Duprey's evidence, if only by way of a subconscious desire to demonstrate that he was not influenced by the receipt of the cheque;

• At the same time he was subject, according to him, to improper pressure being exerted by the Chief Justice who is his administrative superior and chairman of the JLSC, which exercises disciplinary control over him;

• When delivering his judgment, he was sufficiently mindful of one or both matters to consider it necessary to mention that his judgment was not affected. The obvious question that would be asked by a fair-minded observer is – Why mention matters which have occurred without saying what they were if one has dismissed them from one's mind?

• An informed observer would be aware of the political sensitivity of the matter. Indeed the Attorney General alluded to it in his press statement. He would also be aware that there had been an attempt to launch section 137 proceedings in another matter involving the Attorney General;

• The Chief Magistrate's ongoing resolve to ensure that his complaint was treated in a certain manner when combined with his linkage of it with the land transaction raises the question whether he would not have been preoccupied about his own image or credibility when considering the present matter.

• That impression is reinforced by the Attorney General's willingness to become personally involved in both matters

83. On his own admission therefore it is not in dispute that the then Attorney General had taken active steps to assist the Chief Magistrate in selling his property, or that he had intervened in relation to his failure to testify against the then Chief Justice. This was revealed in the statements and press releases from the parties, which were considered by the Court of Appeal in *Panday v Virgil*. It is significant that his allegedly being beholden to the then AG was apparent since the decision in *Panday v Virgil* on April 4th 2007.

Perception of becoming beholden to the then Attorney General

84. In this case however the informed observer would not be able to discern a similar obvious link between the instant appellants and the then AG. This would be necessary as they allege that it is the CM's being beholden to the then AG that puts them at risk of the decision by him being tainted by apparent bias. It must be considered whether, viewed objectively those matters discussed in *Panday v Virgil* were sufficient ether by themselves or in combination with other matters to justify the instant allegations of apparent bias, and the link between them, (if any), and the instant matter.

85. This was addressed at paragraphs18 - 21 of the judgement by the court below.

The combination of:-

(i) conversations that the CM had with the then AG, and which he was then claiming to have had with the then CJ; and /or

(ii) interventions on his behalf by the then AG to secure a sale for his property by HCL or its subsidiary which had up to that point refused to repurchase it;

(iii) a personal exoneration from the then AG after a cursory investigation; and

(iv) conversation with the then AG around the same time about securing his testimony as a witness in another matter;

were all matters that were known or could have been known by the reasonable observer by April 4th 2007 when the judgments **in Panday v Virgil** were delivered.

86. It is clear therefore that the **allegation** could have been made since April 2007 that the reasonable and informed observer could have perceived that the CM may have been beholden to the then AG.

Linkage in Panday v Virgil

87. It was contended that the Chief Magistrate was beholden to the Attorney General and the Government, and the likelihood was that "there would be at least a subconscious desire to do what he perceived might please the current political directorate" (citing **Panday v Virgil).** Even if for the sake of argument this is all accepted, the link between any such desire to please, and the outcome of the committal proceedings **in relation to these appellants** has not been demonstrated. In **Panday v Virgil** that link was demonstrated as follows:

a. **conversations** concerning the fact that the CM was about to deliver **judgment** in a matter involving **that appellant**;
b. an intervention by the then AG in relation to the land transactions of the CM (i) **first** to **exonerate him from further investigation,** shortly after delivery of judgement involving **that appellant, (**after an investigation of sorts into the circumstances in which he admittedly sought a deposit on the purchase price of his land, and then **received** $400,000.00 from a corporate entity, which was not a party to the oral agreement for the sale of that land, (but which was however **part of the group of companies**, whose **CEO** had **testified** before him that very morning)[35], and **then** (ii) to **overcome the refusal** of another one of the companies in that group to repurchase that land (which had by then been up for sale for months), resulting in their

[35] See Attorney General's press release published on 11th May 2006, which reported: "Ultimately the Attorney General determined that there was no cause for further action in this matter at this time"

not only repurchasing the land, but also reimbursing the stamp duty that the CM had paid to the BIR on the original transaction)[36].

c. his intervention in relation to the decisions of the CM concerning testifying in further proceedings in another matter.

88. In **Panday v Virgil** there were admitted conversations in which that appellant's matter featured (although their content varied depending on whose version was accepted), and in that matter it was found that the reasonable observer would have known that that appellant and the then AG were political adversaries, and would have considered the timing of the exoneration, the repurchase of his land, and the judgment he delivered in that matter.

Significance if any of not raising these matters in the previous Judicial Review proceedings

89. Although natural justice was raised in the first Judicial Review proceedings it was not pursued at the Court of Appeal. A logical possibility is that the Court of Appeal's findings on apparent bias in **Panday v Virgil** then were not sufficiently linked to the appellants' case, and that they continue not to be sufficient now, even when the further matters that were subsequently revealed are taken into account.

90. The most favourable inference is that it was insufficient then for a bias challenge but, coupled with matters that were progressively revealed in the unfolding series of events, became sufficient in combination with these, so as to crystallise in a sustainable challenge by way of judicial review on the ground of apparent bias by April 2008.

[36] As the Mustill Tribunal pointed out:-
"No third-party buyer could be found, and HCL expressed itself unwilling to repurchase lots previously sold, since it was in the business to sell land to new buyers, not to repurchase land already sold and then resell it…)

91. For the purpose of analysis, we are prepared to assume that most favourable interpretation of the failure to raise a bias challenge at the time of the first Judicial Review challenge by Maritime and Fidelity on the jurisdiction issue.

92. If so, the issue which must be confronted is whether that material, properly analysed, establishes a real possibility of bias on the part of the CM **in relation to these appellants** in coming to his decisions on the application for his recusal, and his decisions to commit them in the proceedings before him.

93. At the Mustill Tribunal, it was revealed by him under cross examination inter alia:-

a. that the CM had immediately deposited the cheque, and not as stated in the Press release of the then AG that it had been returned (see paragraph 72 of decision of Warner JA), despite the suspicions that he claimed to have had aroused by its receipt.

b. the certified copy of the Deed he claimed to have provided to the purchaser was dated two months after the cheque had been returned and the land transaction cancelled.

94. These details however add nothing to what was already a matter of public record after April 4 2007. The basis of an **allegation** that he could be perceived to be beholden to the then AG had already been laid in **Panday v Virgil**.

95. These details at (a) and (b) add nothing to the fundamental finding of the Court of Appeal, namely that the conviction of the appellant **in Panday v Virgil** had been vitiated by apparent bias on the basis of matters which could have given rise to a **perception** of the CM being beholden to the then AG.

Whether linkage established in the instant case

96. There is no allegation that there were similar conversations here with the then AG. Further no such link between these appellants and the then AG has been demonstrated in this case. Such a link is necessary between the alleged bias and the appellant raising it. Any suggestion that the third, fourth, and fifth named appellants were perceived to be connected to a party in opposition to the party of which the then AG was a member ignores the fact that:

a. those appellants have not raised an allegation of bias in their judicial review;

b. even if it were assumed (i) that the CM were for the purpose of argument, beholden to the then AG as a result of the matters above, which gave rise to his decision of April 24th 2006 to convict the appellant in *Panday v Virgil*, and it is further assumed, simply for the purpose of argument, that (ii) he had a non neutral interest in the outcome of the instant committal proceedings, it would not follow that the reasonable observer would conclude that the CM, more than a year after the **sale of his land** in May 2006 to a subsidiary of HCL, and his **exoneration** from further investigation in relation to the first aborted land transaction[37], would be so generally beholden and indebted to the then AG in January 2008 as to commit the instant appellants, whatever the merits of the case against them.

97. The appellants' contention was that the decisions of the Chief Magistrate, rejecting the recusal applications and committing the Piarco defendants might well have been seen as decisions that would please the Attorney General, the Government, and the "current political directorate" more widely. The difficulty with this submission is that it involves an extraordinary degree of speculation to supply the missing link between the outcome in this case and the wishes of the then AG. While that link was established in *Panday v Virgil* it is missing in this case.

[37] as indicated in the AG's press release dated May 10th 2006

98. Even assuming that the CM were to have been perceived to be beholden or indebted to the then AG for the reasons examined previously, the translation of that indebtedness into an **outcome** adverse to **these appellants** has not been made out. For example, in *Panday v Virgil* the dates and times were considered to be of significance to the reasonable informed observer[38].

99. It was contended that in the instant case that link had been established in the following manner.

i. *"the Attorney General's specific political interest in the Piarco prosecutions had been underlined by public pronouncements which were criticised for "overzealousness" by Warner JA in* **Ferguson & Anor v Attorney General & Anor,** Civ. App. No. 60 of 2007, at [58].

ii. *the Piarco cases (Nos 1 and 2) were* ***prosecuted under the jurisdiction of the Attorney General,*** *being brought by the Anti-Corruption Investigations Bureau ("ACIB"), which was established within the Ministry of the Attorney General .*

iii. *The then Attorney General had* ***invested substantially*** *in a successful outcome in the Piarco case having commissioned several* ***investigations*** *into the Piarco project, including the hiring of various foreign lawyers and experts, at considerable expense.*

iv. *The Attorney General brought civil proceedings in Florida against the Appellants' co-accused in connection with the Piarco corruption allegations.*

v. *He played a central role in the* **attempts to extradite** *two of the Appellants' co-*accused to the United States.

100. It was contended "*He therefore had an active and personal connection with the Piarco proceedings*" and that *"For all these reasons, a fair-minded observer would see* <u>*at least a real*</u>

[38] One example noted by the Court of Appeal was date of conviction of Mr Panday April 24th 2006 and down payment for CM's land - May 5th 2006

possibility that the Chief Magistrate was biased because he was beholden to the Attorney General and the Government."

101. However these are matters that cannot by themselves require attribution to the then CM or the then AG of an interest in procuring an outcome by means other than that recognised by law. The notional fair minded and informed observer would readily accept that while the process necessarily involves a prosecution by someone, and in this case that prosecution was under the aegis of the then AG, the actions of the CM cannot be **assumed** to be based on a desire to please the then AG. Items ii, iii, iv, and v. were all matters that were functions of the Office of the AG and without more could not of themselves be considered illegitimate. Neither can (i) - overzealousness in the pronouncements of the then AG, of itself, be presumed to infect the separate decision making capability of the actual decision maker, the CM.

102. While such an observer might contemplate that a possibility could exist that such an outcome generated by the CM might be based on a desire to please the then AG, that is not the test. A **real possibility** is what is required. The analysis of whether **a real possibility** exists must involve the notional observer applying his mind to the facts and circumstances which could give rise to such a real possibility. It is not enough to speculate that it might be so or could be so.

103. The extent to which the CM would have cause to be grateful to the AG in this case would not lead the notional fair minded observer to conclude that that level of gratitude or being "beholden", would translate to a desire to please the then AG at the expense of his professional reputation. In fact the matters that related to the creation of the perception of being beholden all arose in the context of the Panday trial, and then the attempted impeachment of the then CJ, as demonstrated by the summary of events set out in *Panday v Virgil*, and then the Mustill inquiry. (a) The **exoneration** by the then AG of

the CM in relation to what was characterised as a suspicious land transaction, (b) his assistance with the subsequent **sale of the land** in another transaction, (c) the support of the CM by the AG in his accusations against the then CJ, - were matters that were directly linked to the Panday trial and then the attempted impeachment proceedings in relation to the then CJ. However a link to the instant proceedings is not at all clear.

104. The appellants Smith and Gomes have not demonstrated that there is any particular reason why a reasonable observer would perceive that, in relation to them, that the CM, even if beholden to the then AG, would be predisposed to determine the matter against them or even their co accused. The reasonable observer would therefore struggle to discern such a link in this case. In fact such a reasonable well informed observer would dismiss such a link to the instant appellants in these circumstances as speculative.

105. It is necessary to establish a link[39] between the matters that would be of concern to the independent observer, and the appellants **in this case**. The trial judge was unable to discern a link between the matters in ***Panday v Virgil*** that gave rise to a perception that the CM could be beholden to the then AG in relation to the committal of the instant appellants. Notwithstanding the subsequent elaboration upon some of these matters in the CM's testimony before the Mustill Tribunal, we are also unable to discern such a link. Nevertheless we are mindful of the argument that it was an accumulation of matters progressively and subsequently disclosed, that led to the application for recusal on January 7th 2008, and will address this further on.

[39] referred to in the case of Ebner

Institution of disciplinary proceedings against the Chief Magistrate by the JLSC

106. On **March 14th 2007** the Judicial and Legal Services Commission (JLSC) issued a press release. It indicated therein that it had appointed Ventour J to investigate allegations of misconduct by the Chief Magistrate arising out of his refusal to give evidence in proceedings against the then Chief Justice (CJ)**.** Although the possibility of such proceedings had been signalled thereby, the next matter subsequent to the decision in *Panday v Virgil*, was that o**n 13th April 2007** the JLSC received Ventour J's report. It then decided to bring disciplinary charges against him[40]. His failure to give evidence at the Chief Justice's trial led to the JLSC directing its legal advisor to prefer charges against the Chief Magistrate and, on June 26th 2007, it considered his suspension (see Privy Council in *Sherman McNicolls v Judicial and Legal Service Commission* [2010] UKPC 6 at 21.

Confirmation of disciplinary charges against the Chief Magistrate

107. On 2nd August 2007 the Service Commissions Department wrote to the Chief Magistrate to inform him that the JLSC had preferred charges against him[41]. The Chief Magistrate was charged with six counts of misconduct arising from his refusal to give evidence against the then Chief Justice. The Commission's letter also informed the Chief Magistrate that it **proposed** to interdict him from duty on full pay. It invited the Chief Magistrate to respond to the charges and to **show cause**, if any, **why he should not be interdicted.**

108. On the 22nd August 2007 he issued an application to judicially review the decision of the JLSC (paragraph 2).

[40] See the Privy Council judgment McNicholls v JLSC delivered 17th February 2010, [2010] UKPC 6, at (18, and 21
[41] See paragraph 2 the Privy Council judgment of 17th February 2010, [2010] UKPC 6

Alleged Unfitness as a Constitutional Issue

Disciplinary proceedings

109. The appellant has contended that as the CM was facing disciplinary proceedings and that it had been reported that his interdiction had only been suspended until the conclusion of the preliminary inquiry, his credibility had been undermined- (see submission)[42]. This contention however ignores the fact that he had not actually been interdicted. Rather the letter from the JLSC calls upon him to show cause why he should not have been interdicted. In fact because of the proceedings instituted by the CM his interdiction from duty never actually occurred.

110. Even the basis of an allegation that his **credibility** as a judicial officer had been **undermined** requires something more – a basis for an allegation of apparent **bias** i**n relation to the instant committal proceedings**, or a **finding of unfitness**, even a preliminary one, by the appropriate constitutionally constituted body, entrusted with the determination of such an issue[43]. No such finding was ever made. On the face of it allegations / potential charges arising from a failure to testify in an unrelated matter, cannot by themselves satisfy the test for apparent bias.

The proceedings before the JLSC

111. The issue was explored on this appeal as to whether the CM had been so discredited by the institution of the JLSC proceedings that his continuing to sit in the committal proceedings against these appellants could amount to a breach of their right to due process, and in particular to a fair hearing before an independent and impartial tribunal.

[42] In fact "by the time he committed the Appellants to stand trial, the Chief Magistrate had been so discredited that he lacked the moral authority to give an impartial judgment as an independent judge abiding by the rule of law

[43] in this case the JLSC – see para 1 of UKPC matter above per Lord Clarke

112. The contention that the CM was biased as he would wish to please the *powers that be* cannot be sustained in relation to the JLSC as a. it is a constitutionally independent body, b. it is difficult to see how it could have any interest in a committal of the appellants, such that their committal could ingratiate the CM to it.

Disciplinary charges unrelated to the instant appellants

113. The disciplinary charges were **unrelated** to the instant appellants, and the outcome of those charges is not even remotely referable to the charges faced by the appellants. Those proceedings were based on his refusal to give evidence at a Preliminary Inquiry (PI) against the then CJ in relation to proceedings that his own statement had triggered. That matter had no obvious connection with the instant appellants or the PI involving their co accused.

114. Further, discerning a **link** between those proceedings and the instant appellants is difficult. There is the argument that the JLSC had, by indicating an intention to interdict him from duty signalled that it had lost confidence in him and that he was therefore not fit to conduct this PI or any proceedings. However the CM was never interdicted. He had been called upon to show cause why he should not be interdicted from duty. That was a different matter. He was not precluded from continuing his part heard matters.

115. We do not accept the submission that the JLSC would not have called upon him to show cause if they had not already considered that a prima facie reason existed for them to **interdict** him from duty. That would ignore the requirements of natural justice. He had 28 days to establish why they should not interdict him from duty. It was **not a decision** to interdict, but an indication of **intention** to do so **if** cause to the contrary had not been shown. It simply cannot be assumed therefore, without ignoring the right to the presumption of innocence and the right to a fair hearing, that a **decision** had

been taken by the JLSC and that it was based on their final **conclusion** of a lack of confidence in his ability to continue to hear any matter as a judicial officer.

116. The CM was entitled to a presumption that he had something to say about his fitness to continue to perform. He instituted his own proceedings and challenged that process but the fact remains that an intention to interdict **without a decision** to do so, or an actual interdiction, cannot give rise to an inference of **unfitness to preside generally**. This is even more so when the disciplinary charges were in relation to his refusal to testify in an unrelated matter.

Constitutional insulation

117. It was contended that the CM would certainly have wished to retain the support of both the Government and the DPP, who both had an obvious interest in the committal of the Piarco 1 defendants. But in fact this ignores the constitutional insulation between the Executive arm of government and the JLSC, (which is also a body constitutionally separate and independent from the DPP). The DPP is of course itself an office independent from the Executive arm of government.

118. The informed fair minded observer would know that any support that the CM may have been receiving, or anticipating from the then AG, or the Executive could hardly avail him in relation to proceedings proposed against him by the **constitutionally independent** JLSC. In any event the informed fair minded observer would know that the JLSC could have no preference in an outcome one way or the other concerning his decision whether or not to recuse himself or commit for trial.

<u>Alleged possible effects of impending interdiction</u>

119. Further, any alleged pressure from **the public** is simply speculation. Neither can there be any presumption as to its effect on a senior judicial officer who would be expected to be less sensitive to

pressure from such a source. Also, there is no basis for determining whether such pressure would have been in favour of or against any specific outcome of the Preliminary Inquiry (PI).

120. Further the fair-minded observer would be unlikely to conclude that his **impending interdiction** from duty, linked as it allegedly may have been to the conclusion of the committal proceedings, would cause the CM to **hasten** those proceedings. Even if such observer concluded that it might, he would hardly be able to discern a link between a hastening of the interdiction proceedings proposed and an outcome adverse to these appellants.

121. No credible link can therefore be established between proposed interdiction from duty by the JLSC, (a body constitutionally insulated from the Executive arm of the State), in relation to this failure to testify in an ostensibly **unrelated** matter that he had instigated, and the outcome one way or the other of the recusal application or the committal proceedings in relation to the instant appellants.

Criticisms – whether affecting Fitness to Sit

122. The appellants contend that "the question was whether it was appropriate for the Chief Magistrate to continue with the committal proceedings despite the fact that:-

(a) *He had been **criticised by the Court of Appeal in** Panday v Virgil.*

However that was in relation to matters that have no obvious connection to the instant appellants. It relates to proceedings separate from the instant proceedings, in respect of which a link to the instant proceedings has not been demonstrated.

(b) *He had been severely **criticised by the Mustill Tribunal** (see paragraphs 97-100 of the Mustill Report*).

The same applies as to the criticism by the Mustill Tribunal. This covered some of the same ground, namely aborted land transaction, exoneration by the then AG, conversations with the

then AG, conversations and alleged conversations with the then CJ, his conduct in relation to the same parties, and the timing of a subsequent successful attempt to sell his land. However it could not rationally be contended that his criticism by the Mustill Tribunal in relation to those matters could have resulted in pressure to produce any result adverse to the appellants in the instant case.

General resulting unfitness

123. It was alleged in effect that there can be a free standing assertion of unfitness to hear matters which, though it does not attain the threshold of bias, can yet rise to the level of a breach of a constitutional right to due process and the right to a fair hearing before an independent and impartial tribunal. This was effectively dismissed by Mr. Daly's argument that such a finding of unfitness could not survive independently, as such an assertion of unfitness could not be independent of the principles already recognised in law, namely either (a) a basis for a finding of bias, or (b) a determination of unfitness by the JLSC.

124. The questions that immediately arise in testing whether criticisms or allegations of unfitness are sufficient to disqualify from sitting are a) what level of unfitness is required to disqualify from sitting, b) who determines whether alleged conduct constitutes unfitness sufficient to disqualify someone from sitting.

125. The obvious answer must be the body constitutionally entrusted with appointing and monitoring the conduct of judicial officers.

126. Apart from general unfitness to sit however, there is the issue of specific unfitness to sit in a particular matter. Mr. Daly pointed out that this is already the subject of applicable legal principles – on bias – in which there is a recognised legal test and a body of case law as to its application.

127. There is no need for a separate, yet to be identified category of free ranging unfitness, which has not been determined **objectively** by the appropriate constitutionally specified and independent body, if it does not fall into the existing categories of law such as bias, unreasonableness, or illegality.

128. His submission in effect therefore was that an allegation of the CM's unfitness to sit, based purely on an alleged erosion and undermining of his credibility and moral authority, (even if based on the matters of public record considered by the Court of Appeal in **Panday v Virgil**, and the **Mustill** Inquiry), could find no traction as a constitutional right, independent of a finding of bias in this case.

129. We accept that there can be no free standing principle (unsupported by legal authority), of unfitness to hear a matter in the absence of either a determination by the constitutionally appointed body, the JLSC, or a basis for the recognised principles of bias. The CM was never precluded from sitting by any decision of the JLSC. Without a decision made by the JLSC,(after giving the CM an opportunity to be heard), that he was to refrain from sitting, a mere allegation that the CM was rendered unfit to continue to sit **in this case** in January 2008, based on perceptions and speculations relating to his integrity concerning the land transactions, cannot be entertained.

130. This principle was recognised in **Rees and others v Crane [1994] 1 All ER 833 at page 841 C**. *"The exercise of these powers, however, must be seen against the specific provisions of the Constitution relating to the suspension of a judge's activities or the termination of his appointment. It is clear that* ***s 137 of the Constitution provides a procedure and an exclusive procedure for such***

suspension and termination and, if <u>judicial independence</u> is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways."

131. It could hardly be otherwise, or else any sufficiently strident allegation of unfitness, from whatever the source, could call into question the validity of ongoing proceedings, with obvious serious and severe consequences for the independent and impartial administration of justice.

132. Further the slightly different contention that the fact that *he faced those proceedings created an appearance of bias because he had the sword of Damocles hanging over him* must also be addressed. It could not rationally be contended that the JLSC, a constitutionally independent body, had any interest in any specific outcome of those proceedings, such as to create any appearance of bias by the CM when he came to make his decisions in the instant matter. It must not be forgotten that those proceedings were in relation to failure to testify in a completely unrelated matter. This factor must therefore be ascribed zero weight in the scales of factors giving rise to apparent bias.

133. Furthermore, in this case the facts simply do not support the contention that the CM was unfit to continue to sit in January 2008. The test that must be held in view is whether there a real possibility of bias – as perceived by the reasonable fair minded observer. Such an observer might have been confused by the variety of entanglements in which the CM had found himself[44], and might have echoed the view of Lord Mustill that "*The whole subject of the Chief Magistrate's conduct is shrouded in mystery which we have been unable to dispel"* (paragraph 97 of the Tribunal's Report). Yet such observer would not have apprehended or been able to readily discern from these matters **a link** sufficient to ascribe a perception of a real possibility of bias by the CM in relation to the committal proceedings of **the instant appellants**.

[44] See the Chief Magistrate's testimony to the Mustill Tribunal on or around September 19th 2007.

Whether alleged guidance or direction by the then CJ

134. The Chief Magistrate claimed to recall that he was told by the then Chief Justice to "*pay particular attention to Mr Jenkins, (the prosecutor) because he was there to guide me*". The issue is whether a well-informed observer might reasonably conclude that there was a real possibility of bias.

135. The CM volunteered that statement in the course of his cross examination before the Mustill Tribunal. However when subjected to even the minimum of scrutiny that alleged direction from the then CJ cannot be considered to give rise to a real possibility of bias.

136. The fact that there was no prior complaint about guidance in the instant case suggests that either i. the alleged statement was not made, or ii. if it were made that it was dismissed from his mind, given that it was raised en passant for the first time in the course of cross examination before the Mustill Inquiry. The fair minded observer would consider the circumstances in which it was volunteered for the first time, apparently as an afterthought – in proceedings where the CM was attempting to defend his credibility in respect of serious allegations that he had made against the then CJ - (allegations which were not accepted by the Mustill Tribunal in relation to the Panday case).

Context

137. Even if there were such alleged intervention, it is not one that a fair minded observer could possibly believe would give rise to a real possibility of bias. If even the notional well-informed observer i. considered that this alleged statement could be elevated to "advice" or a "direction" and ii. ignored the suspicious timing of this revelation, revealed for the first time in cross examination when his motivations for the allegations against the then CJ were being challenged, he might reasonably

conclude, as did Bereaux J, that "*it is hardly likely that the first respondent would have accepted the Chief Justice's advice in relation to the instant Preliminary Inquiry and then complained about it*" (paragraph 54).

138. Further a fair minded observer with a minimum of common sense would not contemplate that the CM could remain subject to influence by this alleged guidance. Even if the fair minded observer were to assume that it had actually been given, or that it was an undistorted reflection of any comment that might have been made, such observer would ask himself how could any such alleged direction by a CJ (whose status as CJ in July 2007 was awaiting the outcome of the Mustill Inquiry which commenced on July 27th 2007), influence a magistrate in decisions made in January 2008, or even in July 2007. By those dates the CM was the main witness in proceedings to impeach that CJ, based on statements and complaints that he had made since **May 2006.**

139. The fair minded observer would assess the matter critically and conclude that Chief Magistrate who on **May 5th 2006** made statements complaining about a perceived direction or attempt to influence him by the then CJ in relation to another litigant, and who was actively pursuing that complaint in September 2007 before the Mustill Tribunal, would be unlikely to yet remain subject to direction and influence by that same person in the case of the instant appellants shortly before, in July 2007, (when he ruled on their no case submissions), and even subsequent to that testimony, in January 2008, (when he committed them to stand trial). To the fair minded observer possessed of a reasonable level of common sense the idea of such continuing influence and bias would strike him as absurd.

Manner in which charges were substituted – whether reflective of bias

140. It does appear that the Chief Magistrate did in **July 2007** adopt the amended and additional charges drafted by the Prosecution after initially indicating in November 2006 that those charges came too late to be considered.

141. While this decision comes too late to be judicially reviewed in the instant proceedings it still requires scrutiny in so far as it may be contended that this is a link in a chain of bias culminating in the actual decision in January 2008 which is the subject of this review. However, to the extent that the exercise of that jurisdiction is contended to be the product of a direction by the then CJ and therefore vitiated by **bias**, when the context is examined, this contention cannot withstand even the most basic scrutiny.

142. It has been noted that the CM had already **complained** about alleged interference by the CJ in the Panday matter **since May 2006.** He gave his ruling on the substituted and additional charges in the instant matter almost a year later in **July 2007**.

143. Given the lack of significance that would be ascribed by the notional well informed observer to the alleged direction by the then CJ, it would not be possible to complain about the **manner** in which charges were substituted on July 9th 2007, (if even not subject to a time bar), as reflective of bias.

144. In the earlier (non-disclosed) judicial review proceedings by Fidelity and Maritime) his **jurisdiction** to adopt this course was considered by the Court of Appeal. It found no fault with his **jurisdiction** to do so. Despite the matters in ***Panday v Virgil*** being public the apparent bias point was not raised at the stage of the proceedings before Justice Tiwary Reddy or before the Court of Appeal in that matter. The inference is that those matters in ***Panday v Virgil*** by themselves were not sufficient for

a bias challenge. This is even more so where the matters **additional** to those revealed in ***Panday v Virgil***[45], revealed subsequent to that decision, as analysed above, do not themselves individually give rise to the appearance of bias.

145. We wish to make it clear that this is not an issue of waiver or estoppel. It is a matter of logical analysis. We are prepared to accept that the findings in *Panday v Virgil*, taken in **combination** with further subsequent or subsequently revealed matters might yet, as a matter of logic provide a basis for a subsequent challenge on the ground of apparent bias. However the internally inconsistent allegation of the CM's being subject to a direction or influence from the then CJ simply cannot stand up to any scrutiny and must therefore be ascribed zero weight in the scales of apparent bias.

Whether Cumulative effects

146. It was contended that there was the confluence of pressures on the Chief Magistrate from both the Chief Justice and the Attorney General, which in this case were aligned against the Appellants. However this too does not withstand scrutiny. The very fact of the Mustill Inquiry clearly demonstrates that the interests of the then AG and the then CJ were very much opposed. The contention that in this specific case they were nevertheless somehow aligned certainly requires more than the bare statement that they were, (especially given that even the alleged direction to pay attention to Mr Jenkins simply cannot stand up to critical scrutiny).

147. It is fully accepted that the CM in January 2008 was at the confluence of a series of pressures. However while the independent and fair-minded observer would be extremely concerned about many of the admissions that were made by the Chief Magistrate under cross examination, and the findings, and criticisms that were made in relation to him in the Panday proceedings by the Court of Appeal, and

[45] JLSC proceedings , testimony before Mustill Tribunal re land transactions , alleged guidance from the then CJ, report of Mustill Tribunal

by the Mustill Inquiry in relation to its investigations of his allegations against the then Chief Justice, such observer would be hard pressed to perceive any link between these matters , and the actions and decisions of the CM in **relation to these appellants**.

148. These were in fact the succinct conclusions of the trial judge at paragraphs 54 - 57 inclusive of his judgment in the judicial review applications. We have found no reason, despite exhaustive and lengthy analysis, to differ therefrom.

Conclusion

149.

i**. As to the first issue, leave** was properly refused for judicial review by the **third, fourth and fifth named appellants** (2008 - 1269) on the ground of **lack of promptitude / undue delay.** The decisions in respect of which the **third, fourth, and fifth appellants** sought review, were those of the Chief Magistrate on November 27th **2006**, (**wrongly stated to be November 27th 2007)**, and his ruling made on **July 9th 2007,** well before their applications for leave for judicial review.

ii. **As to the second issue, leave** should not have been refused for judicial review in its entirety by the **first and second named** appellants (CV 2008 - 1268) on the ground of **undue delay.** In respect of the decisions of the Chief magistrate on **January 7th 2008** it was filed within the limit stipulated in the Judicial Review Act of three months from the date of those decisions being challenged **by them**. (Decisions of the Chief magistrate **in July 2007** and **November 2006** are also complained of by these appellants. In so far as these are common to all of the appellants, the reasoning in relation to these earlier decisions, and the impact thereon of delay and lack of promptitude would be the same, although they may form part of the factual background). **Further, leave** should not have been refused for judicial review by the **first and second named** appellants (CV 2008 - 1268) on the ground of **lack of**

promptitude. Their application, (unlike that of the third, fourth and fifth named appellants), raised the issue of bias. Given the progressive and unfolding revelations in relation to the presiding magistrate it cannot be fairly contended that the appellants failed to act **promptly** in filing that application. Still further, there is no basis for requiring the appellants in this matter to be held to a higher standard of **promptitude**, over and above that imposed by the **Judicial Review Act**, requiring them to additionally file that application within a period shorter than three months.

iii. As to the third issue, the Judicial Review application by the **third, fourth, and fifth appellants** was in relation to the ruling of the Chief Magistrate on **July 9th 2007**. It did not raise the issue of bias. It could properly have been dismissed, or relief could have been refused, on the basis of **non disclosure** and **breach of their duty of candour,** (apart from the ground of undue delay). This was because it was not disclosed to the trial court that **they had been parties to a prior application for Judicial Review on the same subject matter** (the ruling of the Chief Magistrate on **July 9th 2007,** and his **jurisdiction** to substitute new and amended charges), and that issue had been decided against them by the Court of Appeal. .

iv. As to the fourth issue, whether the application for leave for Judicial Review by the **first and second named appellants** should also have been dismissed in its entirety on the basis of that **non-disclosure** of the previous Judicial Review proceedings, or whether the ground and allegations of **apparent bias** were severable and therefore could survive on their own, is now academic. This is because the **additional** issue of apparent **bias** that was raised in their Judicial Review was also raised in their Constitutional motion and both actions were before the same judge.

v. As to the fifth issue – (whether the evidence was insufficient to justify committal, the charges lacked specificity and/or are not known to law, or the procedure adopted by the Chief Magistrate contravened

the Indictable Offences (Preliminary Inquiry) Act) - the trial judge's reasoning and conclusion that these were all matters which were within the discretion of the presiding magistrate and could properly and more appropriately be raised at further stages in the criminal proceedings, (see paragraphs 50-52 of his judgment in the judicial reviews) cannot be faulted.

vi. As to the sixth issue, a**rguability** with a realistic prospect of success in the **Judicial Review** by the first and second named appellants in relation to apparent **bias,** amounts to the same issue, (or in any event substantially overlaps the issue), as whether **apparent bias** had been **established** in the **Constitutional Motion**. In the circumstances of this case, given the several matters which had to be considered in detail, whether or not they could be ultimately substantiated, leave for Judicial Review by the first and second named appellants should not have been refused on the ground of lack of arguability with a realistic prospect of success.

vii. As to the seventh issue, the **constitutional motion** by the first and second named appellants should not have been struck out merely on the basis that it was an abuse of process without an examination of the merits of the allegation of bias, because any issue of overlap between the Judicial Review and the Constitutional Motion could have been dealt with practically by their consolidation before the same judge and / or election between them.

viii. As to the eighth issue, on a fuller consideration of the allegations of apparent bias **on their merits**, whether on the Judicial Review application or on the Constitutional motion, the trial judge was entitled to find as he did that the allegations of bias and /or constitutional breaches of the right to a fair hearing and to due process, and to the protection of the law, were ultimately unsustainable.

The merits of the applications by the first and second appellants

150. It was contended that the Chief Magistrate should have recused himself from further hearing of the Preliminary Inquiry on the basis of apparent bias. The basis of such apparent bias allegedly arose from:

a.. Findings of the Court of Appeal in **Panday v Virgil** that he could have been perceived to be beholden to the then A.G,

b. Subsequent further revelations concerning the land transaction made by him in testimony under cross examination before the **Mustill Inquiry**,

c. (Also arising from that testimony) an alleged conversation with the then Chief Justice and an **alleged statement** to pay attention to Mr. Jenkins,

d. Disciplinary proceedings instituted against him by the **JLSC,**

e. publication of the report of the **Mustill Inquiry**.

151. As to these:

The findings of the Court of Appeal in Panday v Virgil

(a) These were publicly available since the written judgment delivered on April 4th 2007. The matters raised in **Panday v Virgil** involved allegations that the Chief Magistrate may have been perceived to be beholden to the then AG and therefore infected with apparent bias in relation to the appellant Mr. Panday. While there were comments on the conduct of the Chief Magistrate (the CM), those findings of apparent bias by him were in relation to the matter involving **the appellant in that case**. Therefore, those comments and findings bore no obvious relationship to the proceedings involving the instant appellants.

All those findings and comments were public by the time of the institution in July 2007 of the previous proceedings for Judicial Review (by Maritime General and

Fidelity Leasing before Tiwary Reddy J. and the Court of Appeal).Yet no issue was raised before the Court of Appeal in those previous proceedings for Judicial Review, (filed in July 2007), that the decisions of the Chief Magistrate in relation to the decisions that he took on July 9th 2007 affecting the first and second named appellants[46], were influenced by his being beholden to the then A.G.

We are prepared to accept in principle that matters, which in July 2007 may not have sufficed for a bias challenge[47], could have been supplemented by further matters which tipped the balance in favour of launching such a challenge. The issue however is whether that in fact was the case here. We do not consider that issues of waiver or estoppel arise in relation to not raising these issues or the issue of apparent bias, earlier. We are persuaded that it is appropriate to examine whether the matters raised in **Panday v Virgil** were, whether by themselves, or in combination with the other matters outlined below, **sufficient** to justify an allegation of apparent bias, requiring recusal.

Matters subsequent to the decision of the Court of Appeal in Panday v Virgil- April 4th 2007

(b) As to the **further matters relating to the land transaction**s revealed in testimony before the Mustill Tribunal in **September 2007**, the revelations were, inter alia, that the CM had nevertheless immediately deposited the cheque, (a fact which had not been revealed previously), and that the certified copy of the Deed for the land, that

[46] which were the subject of that appeal
[47] at the time that the initial judicial review by Maritime and Fidelity was instituted

he claimed that he had given to the purchaser, was dated months after he had returned the cheque and cancelled the sale transaction.

Those matters would have gone towards the issue of whether the CM was beholden to the then A.G. in the eyes of the independent impartial observer because of, inter alia, his exoneration by the then A.G. from further investigation, (and the latter's assistance in securing a sale of the same land to another subsidiary of the conglomerate CLICO). The testimony, including that surrounding the details of the CM's land transaction and the receipt and deposit of the cheque was, in effect, tantamount to further and better particulars of that **already public** matter. The **issue** of his being **perceived to be so beholden** because of matters relating to the land transaction was already available in the public domain since the written judgments in **Panday v Virgil** on **April 4 2007**. That issue was not raised before the Court of Appeal in the initial proceedings for judicial review.

Alleged conversation

(c) As to the alleged conversation with the then Chief Justice (CJ), volunteered by the CM in his testimony to the Mustill Inquiry, and the alleged statement to pay attention to the prosecutor, it is clear that on examination, this statement, even if it had ever really been made, or even amounted to a direction, could not have led any reasonably **well informed** observer to conclude that it could have any bearing or influence whatsoever on the actions of the CM, in July 2007[48] or January 2008[49]. Further, the CM's accusations against the then Chief Justice had been made in statements given long before – in fact since May 2006. By July 2007, and certainly

[48] date of decision on additional and substituted charges
[49] date of decision on refusal to recuse himself and decision to commit

by January 2008, he and the then Chief Justice were openly at odds. The reasonably **well informed** observer could not therefore sensibly conclude that the CM was at all likely to be subject to any alleged influence from that source.

Disciplinary proceedings instituted against the CM by the JLSC

(d) As to the **disciplinary proceedings instituted against the CM by the JLSC** – the reasonable well informed observer with a basic understanding of (i) the constitutional independence of the JLSC from the Executive branch of the State and (ii) its lack of connection with any prosecution, would dismiss any possibility of influence on the mind of the CM from this factor.

He would not contemplate any real possibility of bias in relation to the instant appellants arising therefrom as it could not credibly be alleged that the JLSC, as a constitutionally independent body, could have any interest in any specific outcome of the Preliminary Inquiry.

Any contention that the CM may have wished to please the JLSC by either hastening or protracting the committal proceedings against these appellants must first provide a plausible explanation as to how either approach by the CM could demonstrably achieve or produce such an effect, given (a) the independence of the JLSC from those proceedings, and given further (b) the fact that those proceedings related to his failure to testify against the then Chief Justice in an ostensibly unrelated matter.

Publication of the report of the Mustill Inquiry and criticisms

(e) As to **publication of the report of the Mustill Inquiry**, criticisms therein of the CM related to his allegations against the then CJ had nothing to do with the instant

appellants. It cannot be contended that there is any principle, far less any constitutional principle, (separate and apart from those already recognized in law such as those relating to bias), that would have required the CM to recuse himself on the basis of an **alleged lack of credibility** or moral authority. This is so a. because such criticisms were in a **matter unrelated** to the first and second named appellants, and/or b. the initiation of disciplinary proceedings against him by the JLSC, (again arising out of a matter unrelated to the first and second named appellants), did **not** result in a formal determination that he should be **interdicted from duty**.

These were in fact the succinct conclusions of the trial judge at paragraphs 54 - 57 inclusive of his judgment in the judicial review applications. We have found no reason, despite exhaustive and lengthy analysis, to differ therefrom.

Disposition and Orders

152. In the circumstances the appeals are dismissed.

Peter A. Rajkumar

Justice of Appeal