

Sheku Bayoh Public Inquiry

Conduct and Procedure Hearing - 12 and 13 June 2025

Volume 3 [of 4] Authorities

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*29 The King v Divine. Ex parte Walton.



Positive/Neutral Judicial Consideration

Court

King's Bench Division

Judgment Date

17 March 1930

Report Citation

[1930] 2 K.B. 29



King's Bench Division

Talbot , Charles and Humphreys JJ.

1930 Feb. 10; March 17.

Coroner—Inquest—Jury—View—Depositions— [Coroners Act, 1887](#) (50 & 51 Vict. c. 70), s. 4, sub—s. 2; s. 6, sub—s. 1 — *Coroners (Amendment) Act, 1926* (16 & 17 Geo. 5, c. 59), s. 19.

By the [Coroners Act, 1887, s. 6, sub-s. 1](#) , the Court upon application made under the authority of the Attorney-General may order an inquest to be held if it is satisfied either (a) that a coroner refuses or neglects to hold an inquest which ought to be held; or (b) where an inquest has been held, that

"by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry or otherwise, it is necessary or desirable in the interests of justice, that another inquest should be held."

In exercising its powers under this section the Court will not attend to mere informalities, nor minutely criticize the summing up or the nature of the evidence or the procedure. But if the inquest is so conducted that there is a real risk that justice has not been done, the Court will not allow the inquisition to stand.

The duties of coroners in summoning a jury, holding a "view," taking evidence, and directing the jury, considered and explained.

RULES NISI for certiorari calling upon the coroner for Kingston-upon-Hull to show cause why inquisitions on inquests held by him on December 5 and 6, 1929, with a jury, into the deaths of two men should not be brought up *30 and quashed. The inquests resulted in a verdict of manslaughter against the applicant, who was committed for trial on the coroner's inquisitions.

The grounds of the rules were that the proceedings were irregular in the following particulars (inter alia): (1.) That the jury was improperly selected; (2.) that the coroner viewed and discussed a damaged vehicle before the inquest with a man who afterwards acted as foreman of the jury; (3.) that the coroner joined the jury in their inspection; and (4.) that the coroner failed to read over the notes of their evidence to the witnesses before they signed them. It was stated in one of the affidavits that the coroner confined his selection of jurors to a panel of sixteen or seventeen persons.

Sandlands for the coroner showed cause. The coroner's jury is not in the same position as the jury in a civil or criminal case. It is not improper for the coroner to view the scene of the accident or the surrounding circumstances, and the fact that jurymen accompanied him is not a ground for quashing the inquisition. The only grounds upon which, according to the authorities, inquisitions have been quashed are interference in the verdict of the jury or with their deliberations, corrupt misleading of the jury, or putting before them without warning evidence which is not upon oath: *Reg. v. Coroner of Staffordshire*.¹ In *Rex v. Wood*² the coroner interfered with the jury's deliberations in the jury room. As regards the reading over of the depositions by the coroner to the witnesses before they were signed, *Reg. v. Plummer*³ contains observations by Gurney B. which support the view that this is essential; but these are not justified by the language of the statute (7 Geo. 4, c. 64, s. 4), which was then in force, and they are certainly not applicable to the *Coroners Act, 1887*.

[He referred to Taylor on Evidence, 11th ed., vol. i., pp. 360-362.]

***31**

As to fresh evidence being admitted, the coroner here desires that a new inquest be ordered, if the evidence appears to the Court to be material.

Paley Scott in support of the rule. The coroner should have read over the depositions to the witnesses before they signed them: *Reg. v. Plummer*⁴, per Gurney B. Even before that case it was the settled practice that this should be done: Jervis on Coroners (1829), 1st ed., p. 235, where the author says that that is the usual practice, although it is not essential in order to render the depositions admissible in evidence. The duty of coroners as to evidence in cases of murder or manslaughter is stated in Umfreville's *Lex Coronatoria* (1761), vol. ii., p. 298, as follows:

"Which after you have fully taken down, read it publicly over to the witness, and desire his attention to what you read. When this is done, ask the witness if it be the whole substance and effect of his testimony, and agreeable to what he deposed. If he answer yes let him sign it under this Information, to the right hand; and in the same manner proceed with the rest of the witnesses."

[He referred also to Halsbury's Laws of England, vol. viii., "Coroners," para. 611.]

There is no express provision on this point in the Coroners Act, 1887, but s. 4, sub-s. 2, requires the deposition to be "signed by the witness and also by the coroner," and the reading over of the evidence appears to be a necessary preliminary.

Here there was such "irregularity of proceedings" that it is at least "necessary or desirable in the interests of justice that another inquest should be held": *Coroners Act, 1887, s. 6, sub-s. 1 (b)*. As to the new evidence, it is such that it is desirable that the previous inquisition be quashed, as provided in the Coroners (Amendment) Act, 1926, and another inquest be held.

[TALBOT J. referred to *Garnett v. Ferrand*.⁵]

Cur. adv. vult.

***32**

The Court (TALBOT

, CHARLES and HUMPHREYS JJ.) quashed the inquisitions and ordered new inquests to be held before another coroner.

March 17. TALBOT J. read the judgment of the Court, which was as follows: These Rules were moved pursuant to the fiat of the Attorney-General, and were granted, calling upon Dr. Divine (one of His Majesty's coroners for the City and County of Kingston-upon-Hull) to show cause why a writ of certiorari should not issue to remove into this Court two inquisitions taken before him in December, 1929, on the bodies of two men who had been killed in a collision in a public road in or near the city, and why other inquests should not be held.

The Rules were applied for under [s. 6 of the Coroners Act, 1887](#), and s. 19 of the Coroners (Amendment) Act, 1926, on the ground of (1.) irregularity in the proceedings at and connected with the inquest; and (2.) the discovery of new facts and evidence.

This second ground depends particularly on s. 19 of the Coroners (Amendment) Act, 1926, enacted "for the removal of doubts," doubts, that is, how far the "generality of the provisions" of s. 6 of the Act of 1887 empowered the Court to quash an inquisition and order a new inquest because of the discovery of new facts or evidence. The affidavits filed in support of the rule disclosed evidence as to which we will not say more than that it appears to be material and important; they also accounted satisfactorily for the fact that this evidence was not tendered at the inquests already held. [His Lordship read passages from the coroner's affidavit and continued:] Counsel who appeared to show cause stated that the coroner would prefer that if the Court thought fit to order new inquests so that this evidence might be considered, they should be held before the coroner of another district under s. 6, sub-s. 2, of the Act of 1887. In these circumstances we considered that the conditions laid down by the statute had been satisfied, and at the conclusion of the arguments we ordered new inquests accordingly. We ^{*33} wish to add that we must not be taken to give any encouragement to applications for fresh inquests merely on the ground that further evidence is available. We made absolute the rules in the present case, having regard to the nature of the evidence now disclosed, as to which for obvious reasons it is best to say nothing, and because the absence of it at the inquests is fully explained. The fact that the new inquests are ordered with the assent, and indeed we think we may say by the desire, of the learned coroner also weighed with us. We thought it right to give our decision at once upon this ground, which sufficiently supports it, as it was important in the circumstances of this case that there should be no delay.

We deferred our decision on the other points argued before us, and we now proceed to give it.

The first irregularity set forth in the order to show cause is that the coroner viewed and discussed a damaged vehicle before the inquest with a man who subsequently acted as foreman of the jury.

There is at Hull a peculiar practice as to the summoning of jurors for inquests which is described in Dr. Divine's affidavit, as follows:

"I may well have referred to the said Joseph Ralph as one of my regular jurymen. I hold many inquests with juries and the practice of my court is always to require 11 jurymen to be summoned. As these are selected by the coroner's officer from a list or panel of 16 or 17 only it necessarily happens that some of the same persons are summoned as jurors time after time, and it follows therefore that most of the jurymen who can and who do attend are regularly summoned and become regular jurymen. I have nothing to do with their selection in any way."

Though it is, we believe, common to use the Voters' List as a list of jurors to be summoned for coroner's inquests, no list is prescribed by statute, and so long as the coroner obtains the attendance of the statutory number of duly qualified persons, the method by which he does it is left very much to his discretion. This is probably to be explained by the ancient ^{*34} history of these inquests. Originally the coroner's duty was to go to the place where a death which was to be inquired into had occurred, to summon the inhabitants of the neighbourhood, and inquire of them upon oath what they knew of the matter. Every one of twelve years old or upwards in the townships summoned was bound to attend: see the Statute De Officio Coronatoris (4 Edw. 1) and the Statute of Marlebridge, c. 25 (52 Hen. 3), both now repealed. Gradually no doubt (as in the parallel case of the grand jury) the functions of jurors and witnesses were distinguished, and for many centuries a limited number of jurors has been impanelled. We are not told how or by whom the panel at Hull is formed, or whether the origin of the practice prevailing there is known, but we are bound to say that to confine the area of selection to sixteen or seventeen persons out of a great city appears to us to be very objectionable. Apart from the obvious risk of practical inconvenience, it is in our opinion quite contrary to the principle of the jury system, which is the determination of questions of fact by persons taken at haphazard from the general body of qualified

persons. It is an entire departure from this to have a small panel of "regular jurymen" who must be perfectly well known, and at any rate can easily be known, to every one in Hull who takes an interest in the matter. We are not called on to say whether or not the practice is actually illegal, and we express no opinion as to that, but it is in our view improper, and it has in fact led to what we hold to be an irregularity in the present case.

It appears from the evidence that on December 3, 1929, two days before the inquests were held, the coroner, accompanied by a man named Ralph, visited a garage belonging to one Bell, to whom the coroner introduced Ralph as "one of my regular jurymen," and desired to see a motor car which Mr. George Walton, against whom the jury afterwards brought in a verdict of manslaughter, was driving at the time of the collision. Mr. Bell showed them the car, and the coroner and Mr. Ralph then examined it together. They also examined the lorry in which the dead *35 men had been, and the scene of the collision. Ralph was foreman of the jury at the inquests. He had also served on the jury at another inquest held by the coroner on December 3, and the same jury appears to have been summoned and to have served on both occasions. [His Lordship then read from Dr. Divine's affidavit his account of the incident and continued:] It is evident that the coroner contemplated that Ralph would have at the inquest knowledge which the other jurors would not or might not have, and that the others might have to depend on Ralph for a report of what he had seen. We can accept without reserve the coroner's statement that no "discussion" of the circumstances or causes of the accident took place between him and Ralph, though we do not suppose that their examination of the vehicles and their visit to the place of the collision passed in total silence; but it is plain that there was ample opportunity for discussion if they had wished to discuss.

It was pressed upon us by counsel in showing cause that an inquest being a court not of trial, but of inquiry only, the procedure is much less rigid than at a trial proper whether criminal or civil, and it was argued that apart from dishonesty or deliberate partiality there was nothing to prevent the jury from satisfying themselves as to the facts in any way which they might think proper, so long as no material evidence was actually excluded at the inquest, and no evidence was formally taken except on oath. At common law the regular grounds on which inquisitions were quashed were defects appearing on the face of the verdict, and "misconduct" of the coroner or jury. "The verdict," says Sir J. Jervis, "is equivalent to an indictment and must be stated with the same legal certainty and precision": Jervis on Coroners, 1st ed., p. 253. This meant that one arraigned on a coroner's inquisition had the same right to have it quashed for defects as in the case of an indictment, and on such grounds it could be quashed either by the judge before whom he was arraigned or by the Court of King's Bench. The Court could also quash for misconduct, but this jurisdiction was kept within *36 strict limits. Ordinarily unless the inquisition was bad on its face, it would only be quashed on the ground of fraud: *Reg. v. McIntosh*.⁶ Even where unsworn evidence had been received the Court would not quash the inquisition unless it appeared that the verdict had been influenced by it: *Reg. v. Coroner of Staffordshire*⁷; *Reg. v. Ingham*.⁸ So in *Reg. v. Ingham*⁹ the Court refused even to grant a rule nisi on the ground either that the coroner had misdirected the jury on law, or that there was no evidence to warrant the verdict. Again it is clear that a coroner's inquest is not bound by the strict law of evidence.

In Ireland the Court, proceeding upon its common law jurisdiction - the [Coroners Act, 1887](#), never applied to Ireland - held that it was misconduct or irregularity for which an inquest should be quashed for the coroner to be in the jury room while they were considering their verdict: see *Reg. v. O'Brien and Bouchier (the Ballyragget case)*¹⁰; *In re the Mitchelstown Inquisition*.¹¹

These cases were followed by this Court in *Rex v. Wood*.¹² Lord Hewart C.J. there rested his judgment on the ground that it is "clearly contrary to public policy" for a coroner to go into the jury room after the jury have retired to consider their verdict. Morris C.J. in *In re the Mitchelstown Inquisition*¹³ used the same expression. The ground upon which the inquisitions were quashed in those cases is not exactly that upon which these rules were granted, though it is not unlike it. In our opinion it is "contrary to public policy" that a coroner should take, before an inquest is held, one or more persons who are to serve on the jury and privately investigate with them any of the facts of the case; and this whether or not it can be shown that there was anything in the nature of discussion. It is obvious that the condition of the vehicles involved in a collision and the aspect of the place at which it occurred, are among the facts material to be considered in an inquiry into the cause of the death *37 of a person killed in the collision. We think therefore that even at common law the conduct of the coroner and Mr. Ralph in this case was misconduct for which this Court would have quashed the inquisitions. But in our opinion the Coroners Act, 1887, has materially enlarged the powers, and therefore the duty of the Court in this matter. By s. 6, sub-s. 1, the Court may quash an inquisition, and order a fresh inquest to be held if satisfied "that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held."

These are very wide words, and their generality is declared and guarded by the Coroners (Amendment) Act, 1926, s. 19. Moreover the fact that the powers conferred by the section can be exercised only upon an application authorized by the Attorney-General indicates that they are powers beyond those which the Court already had. The same appears from s. 35 of the Act. The

words "necessary or desirable in the interests of justice" are the critical words. The Court is not to attend to mere informalities, nor to criticize minutely the summing up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such that there is real risk that justice has not been done, a real impairment of the security which right procedure provides that justice is done and is seen to be done, the Court ought not to allow the inquisition to stand. No doubt a coroner has considerable latitude as to the way in which he may conduct an inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else. It is unnecessary to go into this in detail, but we think the language of the Act of 1887 throughout confirms what we have just said. See (to take one example) the words "so far as such particulars have *38 been proved to them" in s. 4, sub-s. 3, where "proved" must mean "proved by sworn evidence" as provided by s. 4, sub-s. 1. It was argued that the words "and to the best of your skill and knowledge" in the form of jurors' oath in Sch. II. of the Act, when compared with s. 3, sub-s. 3, show that the jury is not confined to sworn evidence. We cannot think that there is anything in this. It would mean practically that a verdict could be properly based on anything which the jurors knew or could find out, and would in effect annul their obligation to give the verdict "according to the evidence." The argument gives to the words a significance much greater than they can fairly bear. It is of course no more possible at a coroner's inquest than at a trial, either criminal or civil, to secure absolutely that jurymen will not be influenced by things which they have heard or seen outside the Court. But at least nothing should be allowed which makes it certain that they will be so influenced; and it is clear that the proceedings of the coroner and Mr. Ralph in this case, however well intended, must have had this effect. It has been said over and over again that it is hardly more important that justice should be done than that it should appear to be done; and nothing is more certain to defeat this than that it should be evident that a jury have formed at any rate a provisional opinion on the case before hearing the evidence. The affidavits make it clear that that impression was necessarily conveyed by the part which Mr. Ralph as foreman of the jury took at the inquest. It would be wrong to impose a limit which the law has not imposed on the right of a coroner's jury to ask questions of witnesses; but no one can wonder that a man against whom a verdict of manslaughter has been found should feel that he has not been fairly treated, when questions are put to him by the foreman of the jury obviously based on information obtained outside the Court.

The next ground taken comprises three points: (1.) that the coroner joined the jury in an inspection and discussion of the damage to a vehicle involved in the collision; (2.) that he did not allow others to be present; (3.) that *39 he allowed a police constable to speak and point things out to the jury. We take these in order. (1.) There is of course no objection whatever to a view by the jury of the vehicles concerned in the collision and of the place. Nor can we say that the coroner is doing anything wrong if he goes with the jury; though we think that probably as a general rule it is better that he should not. If he does, he should carefully abstain from any discussion of the case with them. We accept the sworn statement of the coroner in the present case that he did abstain.

[As to (2.) the Court was of opinion that the allegation was not proved, but as to (3.) the Court considered it improper for the constable to give information to the jury outside the Court and held this to be a ground for quashing the inquisitions. The judgment then continued:] The last ground of objection was that the coroner failed to read over his notes to the witnesses before they signed them. This matter is now regulated by the [Coroners Act, 1887, s. 4, sub-s. 2](#). We do not doubt that if a coroner thinks that there is any uncertainty as to what a witness meant and particularly if a witness requests before he signs his deposition that it be read over to him, the coroner ought to do so; and no doubt a witness would be entitled to refuse to sign until this had been done. But we have no right to add a positive requirement such as is suggested to those which Parliament has enacted. We may notice that by the [Indictable Offences Act, 1848, s. 17](#) (reproduced by [s. 12 of the Criminal Justice Act, 1925](#)), the justices are expressly required to cause a witness's deposition to be read over to him. We must take it that this was deliberately omitted from the [Coroners Act, 1887](#).

We are of opinion that, apart from the new evidence, the irregularities mentioned about were good ground for making the rules absolute and quashing the inquisitions.

Representation

Solicitors showing cause: Collyer-Bristow & Co., for Laverack, Wray, Iveson & Co., Hull. Solicitors in support: Smith & Hudson, for Rollit & Farrell, Hull.

Rule absolute. (F. P. F.)

Footnotes

- 1 (1864) 10 L. T. 650 .
- 2 [\[1928\] 1 K. B. 302](#) .
- 3 (1844) 1 C. & K. 600 , 604.
- 4 (1844) 1 C. & K. 600 , 604.
- 5 (1827) 6 B. & C. 611 .
- 6 (1858) 7 W. R. 52 .
- 7 10 L. T. 650 .
- 8 (1864) 5 B. & S. 257 , 260.
- 9 (1864) 5 B. & S. 257 , 260.
- 10 (1882) 17 Ir. L. T. 34 .
- 11 (1888) 22 L. R. Ir. 279 .
- 12 [\[1928\] 1 K. B. 302](#) , 304.
- 13 (1888) 22 L. R. Ir. 279 .

(c) Incorporated Council of Law Reporting for England & Wales

RUSSELL v. DUKE OF NORFOLK AND OTHERS.

[COURT OF APPEAL (Tucker, Asquith and Denning, L.JJ.), December 6, 7, 8, 1948.]

Contract—Implied term—Racehorse trainer—Licence to train—Condition—Discretion of Jockey Club to withdraw licence—Need to hold inquiry before withdrawal—Conduct of inquiry according to rules of natural justice—Libel—Privilege—Qualified privilege—Racehorse trainer “warned off”—Publication in “Racing Calendar.”

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By r. 102 of the Rules of Racing of the Jockey Club: “(i) Every trainer of a horse running under these rules must obtain an annual licence from the stewards of the Jockey Club and pay a yearly subscription of one sovereign to the Bentinck Benevolent Fund. (ii) A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person.” Rule 17 empowered the stewards *inter alia* to grant and withdraw licences at their discretion, to inquire into and deal with any matter relating to racing, to warn off Newmarket Heath, and to authorise publication of their decisions in the RACING CALENDAR.

A trainer paid £1 and was granted a licence to act as a trainer during 1947. A condition of the licence was: “A trainer’s licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the RACING CALENDAR, for any reason which may seem proper to them, and they shall not be bound to state their reasons.” Following an inquiry into the circumstances in which one of the horses trained by him won a race, the stewards of the Jockey Club withdrew the trainer’s licence and published the fact of the withdrawal in the RACING CALENDAR. In an action against the stewards of the Jockey Club and the secretary of Club, who also published the RACING CALENDAR, for a declaration that the trainer’s name was wrongfully placed on the list of disqualified trainers, for an order to delete it, and for a declaration that the decision to withdraw the licence was void as contrary to natural justice, and also for damages for breach of contract and for libel:

HELD: (i) (TUCKER and ASQUITH, L.JJ.) assuming that the application for a licence and the licence itself together constituted a contract to permit the trainer to act as such, the stewards had power under the contract in their unfettered discretion to withdraw the trainer’s licence without any inquiry at all, and it was impossible consistently with an unfettered and absolute discretion to imply a term in the contract that an inquiry, if held, should be in accordance with natural justice, but (DENNING, L.J., *consentiente*) there was, in any case, no evidence that any principle of natural justice had been violated.

(ii) the defendants were protected from liability in respect of the publication in the RACING CALENDAR on the ground that the occasion was privileged, malice having been disclaimed.

Decision of LORD GODDARD, C.J. ([1948] 1 All E.R. 488), affirmed.

[AS TO IMPLIED TERMS OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322-3, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-616, Nos. 5028-5090.]

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AS TO QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 480-486, paras. 579-592; and FOR CASES, see DIGEST, Vol. 32, pp. 112-116, Nos. 1437-1478.]

Cases referred to:

(1) *Re Nott & Cardiff Corporation*, [1918] 2 K.B. 146; 118 L.T. 487; 82 J.P. 181; 12 Digest 612, 5053.

- (2) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 12 Digest 610, 5042.
- (3) *Green v. Blake and Others*, [1948] I.R. 242.
- (4) *Chapman v. Ellesmere (Lord)*, [1932] 2 K.B. 431; 101 L.J.K.B. 376; 146 L.T. 538; Digest Supp.
- (5) *Dawkins v. Antrobus*, (1881), 17 Ch.D. 615; 44 L.T. 557; 8 Digest 507, 18.
- (6) *Wood v. Wood*, (1874), L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 8 Digest 510, 29.
- (7) *Weinberger v. Inglis (No. 2)*, [1919] A.C. 606; *affmg.*, [1918] 1 Ch. 517; 87 L.J.Ch. 345; 118 L.T. 769; 8 Digest 506, 11.
- (8) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, 1046.

APPEAL by the plaintiff from a judgment of LORD GODDARD, C.J., dated Feb. 26, 1948, reported ([1948] 1 All E.R. 488).

On Mar. 6, 1947, the Jockey Club granted the plaintiff a licence to act as a racehorse trainer for one year. The possession of such a licence was necessary for any person training for meetings to which Jockey Club rules applied, which comprised practically all the meetings held. After a race at the Lincoln Spring Meeting in 1947 the winning horse, trained by the plaintiff, was examined on behalf of the Jockey Club. Subsequently, an inquiry was held by the stewards of the Jockey Club which the plaintiff attended, and the stewards withdrew the licence and published the fact of the withdrawal in the RACING CALENDAR. The plaintiff brought an action against the defendants, the stewards (sued on their own behalf and on behalf of all other members of the Jockey Club) and Messrs. Weatherby & Sons (as secretaries of the club and printers and publishers of the RACING CALENDAR) claiming a declaration that his name had been wrongfully placed on the defendants' list of disqualified trainers (as being "warned off Newmarket Heath"), an order that his name should be deleted from the list, and a further declaration that the licence had never been lawfully withdrawn and that the defendants' decision to withdraw it was void as contrary to natural justice. He also claimed for breach of contract and for libel. LORD GODDARD, C.J., ruled that the occasion of the publication of the statement in the RACING CALENDAR was privileged, and, in the admitted absence of malice, there was no case in libel to go to the jury. On the rest of the case he left to the jury only the question whether the inquiry held by the stewards was fair. The jury disagreed. LORD GODDARD then held that there was no case in contract to go to the jury and gave judgment for the defendants. The Court of Appeal now dismissed the plaintiff's appeal. The facts appear in the judgment of TUCKER, L.J.

Roberts, K.C., Geoffrey Howard and Dennis Lloyd for the plaintiff.

Sir Valentine Holmes, K.C., and Elwes for the defendants.

TUCKER, L.J.: This is an appeal from a judgment of the LORD CHIEF JUSTICE in favour of the defendants in an action in which the plaintiff, Mr. James Russell, who at all material times had been a trainer of racehorses under a licence issued by the stewards of the Jockey Club, claimed:

"... a declaration that his name has been wrongfully placed on the list of disqualified trainers (warned off Newmarket Heath), (ii) an order that the defendants do delete the plaintiff's name from the list of persons so disqualified as aforesaid, (iii) a further declaration that the licence of Mar. 6, 1947, was never lawfully withdrawn by the defendants, but that their decision to do so was void as contrary to natural justice, (iv) damages for breach of contract, (v) damages for libel,"

and further or other relief. At the trial the learned judge ruled that there was no case to go to the jury on the issue of libel, and he left to the jury a question whether an inquiry which had been held by the stewards of the Jockey Club was fair. On that question the jury were unable to agree, but the learned judge

entered judgment for the defendants on matters of law which he considered were concluded in favour of the defendants.

A The plaintiff, by an application dated Jan. 31, 1947, applied on a form provided by the Jockey Club for a trainer's licence. The application provides that : " The application on this form can only be made and accepted on the condition that the applicant, in all respects, subjects himself to the Rules of Racing," and then it gives spaces for particulars with regard to the applicant, and continues : " I hereby apply to the stewards of the Jockey Club for a
B trainer's licence under the Rules of Racing during the year 1947." At the top left hand corner there are the words " Annual fee £1." In response to that application the plaintiff received a licence (No. 333) headed " Rules of Racing. Trainer's Licence," giving his name and address, and showing that he is " hereby licensed
under the Rules of Racing, and, subject to the conditions appearing on the back hereof, to train horses to run under the Rules of Racing during the year 1947." On the back of that form there are conditions as follows :

" 1. Subject to the Rules of Racing for the time being, and the conditions specified below, this licence shall be in force until Dec. 31, 1947.
C 2. Every application for a new licence should be made on or before Mar. 1, 1948, and on the form which can be obtained at the registry office. Applications made after that date will not be considered, unless in very exceptional circumstances. 3. A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the RACING
D CALENDAR, for any reason which may seem proper to them, and they shall not be bound to state their reasons."

E Pursuant to that licence the plaintiff had in training on Mar. 26, 1947, a horse called Boston Boro which was owned by a Mr. Hardy. That horse ran in the Lincoln Spring Meeting in a race called the John o' Gaunt Plate. After winning that race, on the instructions of the stewards of the meeting, the horse was taken on one side and specimen swabs were taken of saliva and sweat for the purpose of analysis to ascertain whether or not the horse had been "doped." In due course the stewards of the Jockey Club received the report of the analysts to the Jockey Club on those swabs, and they caused a letter to be written on Apr. 11 by Messrs. Weatherby to the plaintiff in these terms :

F "The stewards of the Lincoln Spring Meeting have referred to the stewards of the Jockey Club the report made by the Jockey Club analysts on the samples of saliva and sweat taken from Boston Boro trained by you, after the John o' Gaunt Plate at Lincoln on Mar. 26. The stewards of the Jockey Club will consider the report at the Jockey Club Office at Newmarket at 12 noon on Apr. 15. I am instructed to request you to
G attend at that time and place. Please telegraph me that you have received this letter."

The plaintiff attended, together with Mr. Hardy, the owner of the horse, before the stewards of the Jockey Club on Apr. 15. He took with him a statement which he had written out before and he handed it to the stewards in the course of the hearing. It starts :

H "My Lords, with reference to your inquiry into the running of Boston Boro in the John o' Gaunt Plate at Lincoln and the subsequent report by the stewards at that meeting, following is exactly what happened that day."

He gives an account of the movements of the horse from 8.30 that morning until the time of the race, and then he goes on :

"Dope would be worse than useless used on Boston Boro. He is a very

free running horse, if anything too keen. He is a hard puller and runs until he is beat. He has never failed in any race to do his best."

He goes on to say that in 1945 the horse was examined by Mr. Beaumont, a veterinary surgeon, and was reported as having heart trouble. He was, therefore, a horse who should not be overstrained because of his heart. Then the plaintiff says that his bet on the horse in the John o' Gaunt Plate was £5 each way, and he won £37 10s., and adds :

"Would any trainer consider drugging a horse for this amount ? I was not in contact with the horse from 8.30 a.m. until I put the saddle on him for the race, and I would certainly never consider asking a stable lad to do any horse drugging."

It is clear from that letter that the plaintiff was well aware of the nature of the matter which was being inquired into and necessitated his attendance on Apr. 15, and that he would be called on to give an explanation with regard to his care and management of the horse and so forth.

The inquiry was conducted by the three stewards of the Jockey Club in office that year, Lord Willoughby de Broke, Lord Rosebery and the Duke of Norfolk. Their finding was expressed in these terms by Lord Willoughby de Broke :

"Mr. Russell, the stewards have given extremely careful thought to this case and also to the statements to them which you have made both verbally and in writing. The stewards must accept the report, which was submitted to them by their analysts, that both samples of sweat and saliva that were taken from your horse, Boston Boro, at Lincoln on Mar. 26 gave positive reactions for alkaloids. You are the trainer of the horse, and the stewards hold you responsible. They, therefore, have no option but to withdraw your licence as a trainer on the ground of negligence amounting to grave misconduct, and the horse Boston Boro will be disqualified from running again under the Rules of Racing. That is all."

Accordingly, the plaintiff was treated as a disqualified person within the Rules of Racing, r. 102, para. (ii), of which provides : "A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person." The stewards had withdrawn this licence, and they had intimated that it was withdrawn on the grounds of misconduct. The result was that the plaintiff became a disqualified person, and under r. 178 (d) the following consequences ensued :

"A disqualified person, so long as his disqualification lasts, shall not : (1) act as steward or official at any recognised meeting ; (2) act as authorised agent under these rules ; (3) enter, run, train, or ride a horse in any race at any recognised meeting, or ride in trials ; (4) enter any racecourse, stand or enclosure ; (5) except with permission of the stewards of the Jockey Club be employed in any racing stable."

In due course the defendants caused to be published in the RACING CALENDAR the following notice :

"The stewards of the Lincoln Spring Meeting referred to the stewards of the Jockey Club the report which they had received from the Jockey Club's analyst on an examination ordered to be made of Boston Boro after running in the John o' Gaunt Plate on Wednesday, Mar. 26. The stewards of the Jockey Club interviewed Mr. R. Hardy, the owner, and J. Russell, the trainer, on Apr. 15, and were satisfied that a drug had been administered to the horse for the purpose of the race in question. They disqualified Boston Boro from running again under their rules and withdrew Russell's licence to train."

Before considering the issues raised in this case, it is necessary to refer to

one or two other of the Rules of Racing subject to which this licence had been issued. The relevant rules are, I think, as follows. Rule 17, which is the all-important rule in the present case, is as follows :

- A "The stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys and race-courses . . . to make inquiry into, and deal with, any matters relating to racing, and to warn any person off Newmarket Heath ; and to authorise the publication in the RACING CALENDAR of their decisions respecting any of the above matters, and of the decisions and reports of stewards of meetings."

Rule 25 provides :

- B "The clerk of the course shall have in his possession, for the information of the stewards, a list of persons warned off Newmarket Heath, and of suspended jockeys, and also a copy of the latest monthly forfeit list, and he shall not allow any horse which, or the owner or nominator of which, is in the forfeit list to start for any race."

- C Rule 102 I have already referred to. Rule 176 deals with corrupt practices and disqualification of persons. One of the corrupt practices deals with the administration, for the purpose of affecting the speed of a horse, of "drugs or stimulants, internally, by hypodermic or other methods." It deals with conspiracy and any corrupt or fraudulent practice in relation to racing, and it provides : "Every person so offending shall be warned off Newmarket Heath and other places where these rules are in force." Rule 178 provides :

- D "When a person is warned off Newmarket Heath, and so long as his exclusion continues, he is a disqualified person." Then follow r. 178 (a), (b), (c), and r. 178 (d) which I have already read dealing with the position of a disqualified person.

The case for the plaintiff at the trial was that the application for and grant of his licence formed a contract between himself and the Jockey Club and he

- E said in para. 5 of the statement of claim :

- F "It was in the premises an implied condition of the said contract between the parties and a duty owing to the plaintiff by the three first-named defendants as stewards of the said club that they should not on the grounds of misconduct purport to disqualify the plaintiff as a trainer during the period covered by the said licence or to warn him off Newmarket Heath on such ground unless they had first fairly investigated and adjudicated upon any complaint made against the plaintiff on that behalf and/or that if they conducted an investigation or made an adjudication such investigation and adjudication as they might conduct should be in accordance with the principles of natural justice."

- G It was said on behalf of the plaintiff that the plaintiff had his licence withdrawn, and he had been found guilty of misconduct and become a disqualified person without an inquiry having been conducted in accordance with the principles of natural justice.

- H The first question that had to be decided, accordingly, was whether or not, assuming that there was a contract between the plaintiff and the defendants, it was a term or condition of that contract that he could not have his licence withdrawn or could not be disqualified on the ground of misconduct without an inquiry of that nature. LORD GODDARD, C.J., dealing with that contention said ([1948] 1 All E.R. 491) :

"I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If

there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry."

As I understood the case when originally presented by counsel for the plaintiff, he conceded that the stewards were at liberty under the Rules of Racing to do what they did in their discretion without holding any inquiry at all, but he said that, if they did hold an inquiry, then, as a result of this implied term in the contract, the inquiry which they held must be conducted in accordance with the principles of natural justice. Reading the judgment of the LORD CHIEF JUSTICE, it would appear to me that he had formed the same view with regard to counsel's argument in the court below as that which I formed when I heard the appeal opened, but, in his reply, counsel did present the case rather differently. The argument, as I understand it, is that, at any rate, with regard to the finding of misconduct, the Rules of Racing do postulate the necessity for an inquiry. I think he was disposed to concede that, if the stewards had merely withdrawn the licence for some unspecified reason, they could have done so under r. 17 without holding an inquiry, but, says counsel, an inquiry which accords with the principles of natural justice is a condition precedent to his being found guilty under r. 102 of misconduct, he thereby becoming a disqualified person and his licence being withdrawn.

That requires a consideration of the rules. The view I have formed is that it is clear that under r. 17 the stewards in their absolute discretion and by reason of the terms of the licence which was granted, which I, like the LORD CHIEF JUSTICE, am assuming for the purpose of this judgment constituted a contract (although I have some doubt whether it constituted a contract or whether it was not merely a licence issued on conditions binding both parties), had power to withdraw the plaintiff's licence without any inquiry at all. Furthermore, I think it is clear from r. 17 that equally, acting in their unfettered and absolute discretion, they could have warned the plaintiff off Newmarket Heath, and so far as one can see from the rules, the consequences of being warned off Newmarket Heath and of becoming a disqualified person are very much the same. At any rate, r. 178 provides that every person warned off Newmarket Heath is a disqualified person so long as his exclusion continues. So the result seems to be much the same. At any rate, if the stewards warn a man off he becomes a disqualified person in the same way as if he is convicted under r. 102 of misconduct. Therefore, it appears to me that much of the discussion in this matter is rather academic. The stewards clearly had power without any inquiry at all both to withdraw the licence and to warn off, but had it not been for r. 178, which provides that any person warned off becomes a disqualified person, I should have thought that there was a great deal to be said for the argument of counsel for the plaintiff that r. 102 does postulate an inquiry. Counsel for the defendants said that the power to deal with a person guilty of misconduct, a person who is subject to the rules by contract, is to be derived from r. 17. When one reads r. 17, which I have already quoted, it becomes clear that the power is derived from the words: "and deal with any matters relating to racing," but those words follow the words: "to make inquiry into," and, therefore, the power to find a person guilty of misconduct under r. 102 is derived from the words in r. 17 which give the stewards power to make inquiry into and deal with any matters relating to racing. I should have been disposed to the view that, so far as it is dealing with matters not otherwise expressly dealt with in the rules, that rule, read together with r. 102, would require and postulate an inquiry, but as I have said, it is a rather academic matter. I think, so far as the withdrawal of the licence and the warning off Newmarket Heath are concerned, that it is impossible to imply into the contract between the parties the term which the

plaintiff would seek to import. In my view, it is a term which is contradictory of the existence of an unfettered and absolute discretion because it would impose a very considerable fetter on the exercise of the discretion, if, although in their unfettered discretion the stewards can warn off or withdraw licences, none the less if they choose to make an inquiry they bind themselves to conduct the inquiry in a particular way and manner. I find myself in complete agreement with the views expressed by the LORD CHIEF JUSTICE on that part of the case, where, after referring to the judgment of PICKFORD, L.J., in *Re Nott and Cardiff Corporation* (1), and the judgment of LORD ESHER in *Hamlyn v. Wood* (2), he says (*ibid.*, p. 491) :

"It seems to me that in this case it would be impossible to say that the parties must have intended the term which is alleged here, because that would prevent the stewards from exercising the absolute discretion which the express term in the licence gives to them."

Somewhat similar language was used by BLACK, J., in an Irish case which has been brought to our attention, *Green v. Blake* (3). In the course of his judgment, dealing with one part of the case with regard to which he formed the view that no inquiry was necessary, BLACK, J., said this, and I should like, with respect, to adopt his language ([1948] I.R. 267) :

"If, then, the rules entitled the stewards to publish the facts of the warning off without conducting any investigation at all, it could hardly be said that they failed to observe the rules, because, having conducted a purely supererogatory investigation, they did so without due regard to the essentials of justice. If they were not obliged to investigate at all, they could not be obliged to conduct an investigation with due regard to the essentials of justice."

So, with regard to the withdrawal of the licence, that was a thing which the stewards were entitled to do without any inquiry, and they would have equally been entitled to warn the plaintiff off Newmarket Heath which would have resulted in his becoming a disqualified person. So much with regard to the case as founded in contract.

The plaintiff also sues in libel. On that issue the learned judge entered judgment for the defendants on the ground that the occasion was privileged, and that there was no evidence of malice to go to the jury. It is to be emphasised that from the first in this case counsel on behalf of the plaintiff had disclaimed alleging express malice, and he also, before the end of the trial, made it clear that he was not impeaching the honesty or *bona fides* of the stewards in their conduct of the inquiry. The learned LORD CHIEF JUSTICE held that the occasion was privileged, and that in the absence of malice that concluded the matter on the authority of *Chapman v. Ellesmere* (4) : see *per* LORD HANWORTH, M.R. ([1932] 2 K.B. 450), and *per* ROMER, L.J. ([1932] 2 K.B. 473). In my view, those words apply in every respect to the present case. The stewards having come to their decision, it was clearly their duty to communicate it to the racing public who had a corresponding interest in receiving the information. The plaintiff had assented by his contract to the RACING CALENDAR as the medium for the publication of the decision, and the publication is confined to matters which the stewards could indubitably have dealt with under their discretion without any inquiry at all. The notice merely stated that the licence had been withdrawn. That was a matter which, to my mind, is clearly covered by the language used by ROMER, L.J., and, in the absence of malice and any contractual provision in the rules requiring an inquiry before such a decision could be arrived at and published, the occasion is clearly privileged.

Counsel for the plaintiff says that the plaintiff only consented contractually to the publication of the decision of the stewards ; that part of the decision

of the stewards, namely, that the plaintiff had his licence withdrawn on the ground of negligence amounting to grave misconduct was omitted; and, accordingly, that there never was any consent by his client to the publication of the so-called decision. In my view, what was published in the RACING CALENDAR can properly be described as the decision of the stewards. They were not bound to publish the reasons why they arrived at that decision, and I think they might possibly have been open to criticism if they had. That is the view which I have formed with regard to that publication, but the matter does not rest there, because I think that this point is really covered by *Chapman v. Lord Ellesmere* (4), where the same question was raised. In the course of his judgment SLESSER, L.J. ([1932] 2 K.B. 463) points out that *Sir Patrick Hastings* had sought

" . . . to avoid the consequence of the apparent consent to publication in the RACING CALENDAR is as follows: he says that the plaintiff has only consented to the publication of the decision of the stewards, which I have quoted but repeat, that they 'considered the plaintiff as trainer directly responsible for the care of the horse'; that is to say, to a finding that he was under a duty to see that the horse was not drugged, which duty he failed to perform. *Sir Patrick* points out that the jury, having found that the statement in the RACING CALENDAR meant that the plaintiff was a party to the actual drugging of 'Don Pat,' it is a statement, as the jury have construed it, which is not the publication of the decision of the stewards, in that the stewards, to put it briefly, held that the plaintiff was negligent in not preventing the drugging of the horse, whereas the publication alleged that he had actually drugged it."

The argument there relied on by *Sir Patrick Hastings* seems to me identical with the argument of counsel for the plaintiff in the present case, namely, that the stewards had not incorporated in their publication in the RACING CALENDAR their finding that the plaintiff had been negligent. In *Chapman v. Lord Ellesmere* (4) the court none the less held that the occasion was privileged and LORD HANWORTH, M.R., deprecated the court being required to consider again and again the precise language used in a matter of this kind. Therefore, in my view, the learned LORD CHIEF JUSTICE was correct when he ruled that the occasion was privileged, and that in the absence of malice there was no case to go to the jury on the issue of libel.

I have expressed my views with regard to the issues in this case as they present themselves to me, but, if I am wrong in the conclusions which I have reached, and, if it was part of the contract between the parties that there should be an inquiry conducted according to the principles of natural justice and that such an inquiry was a condition precedent to the right of the stewards either to withdraw the licence or to find the plaintiff guilty of misconduct and disqualify him and such inquiry is necessary to support the plea of privilege, then, in my view, there was no evidence here that the inquiry conducted by the stewards was not in accordance with what is called the principles of natural justice. The LORD CHIEF JUSTICE, no doubt as a precaution and pressed by counsel so to do, left that question to the jury in the form to which I have referred, but here again I derive considerable assistance from the language which was used by BLACK, J., in *Green v. Blake* (3) to which I have referred, where he is dealing with this matter and the function of the jury in this connection. He says ([1948] I.R. 242):

"Moreover, I think he never had those materials even at the last moment when the jury answered his questions other than that of malice. What materials did the judge require? In my opinion he required to know the truth about what took place at and in connection with the investigation and having found that out, it was for him to say whether that did or did not amount to a disregard of the essentials of justice. How was he to find

out what took place? In my opinion he had to find that out from the jury; for it was a pure question of fact and of the credibility of the witnesses. I should deem it most unsafe to ask a jury to say whether the facts they had found did or did not amount to a disregard of the essentials of natural justice. I do not think the term is suitable for laymen to decide about."

- A** I am inclined to the view that this question "whether or not an inquiry has been conducted in accordance with the principles of natural justice is really one of law for the judge rather than for the jury. No doubt it is for the jury to find the facts, as BLACK, J., indicated, but, when once the facts are found, I am disposed to the view that it is really a matter of law for the court. However that may be, in my view on the admitted facts of this case, whether it be a matter of law or whether it be a matter of fact, there is only one possible answer, namely, that it has not been established that this inquiry was not in accordance with the principles of natural justice.
- B**

When the matter is narrowed down, it comes to this. The following are the matters complained of as showing that the inquiry did not accord with the principles of natural justice. It is said that the plaintiff had no sufficient

- C** information before he attended the inquiry as to the nature of the charge made against him; that he had not been supplied before the hearing with a copy of the analysts' report; that at the inquiry, although this matter might have been remedied if he had been shown a copy of the report and been given an opportunity to have an adjournment so that he could deal with it, only part of the report was read out; and, finally, that he was not given sufficient
- D** opportunity to present his case or call his witnesses. In dealing with this matter, I think it is essential to appreciate the precise nature of the inquiry. The evidence shows that in view of the danger of doping it is essential that the person in charge of a horse should have it carefully guarded and watched for two or three hours before the race, and, therefore, it may well be the view of those in racing circles that, if it be shown that a horse is doped, the person
- E** in charge of it, or the person who should have been in charge of it, two or three hours before the race must be held responsible, whatever his personal conduct in the matter may have been. It seems to me that, having got the analyst's certificate, the stewards have to consider, first, whether the horse has been doped, and, if it has, it may well be that unfortunate consequences may follow to the trainer, however personally blameless he may be in the matter.
- F** It is, however, right and proper that he should be given an opportunity of attending the inquiry and giving his explanation. It does not seem to me that at the outset there is necessarily any particular charge made against the trainer. The horse is said to have been doped. The stewards have evidence which satisfies them that there is a *prima facie* case of doping. They require the trainer and the owner to attend the inquiry and to give an explanation. If in
- G** the course of that explanation it is made manifest that there has been negligence or misconduct, a specific charge then emerges, and that is exactly what happened in the present case. The plaintiff's explanation showed on the face of it that the horse had been left unattended for something like 20 minutes during the vital period, and on that explanation given by the plaintiff himself it is not surprising that he should have been found to have been guilty of
- H** negligence. I only make those observations to indicate what, in my view, was the nature of the inquiry. I think it is a mistake to regard all these matters as if they were prosecutions with a prosecutor and a defendant. It was an inquiry in the course of which it emerged that there were matters for which the stewards held the trainer responsible.

As to the specific complaints that were made, it is clear from the letter I have already read, and from the evidence, that the plaintiff, who has been in racing circles for 40 years, knew perfectly well what was the nature of the

matter that was going to be inquired into. Complaint is made that only part of the analyst's certificate was read to him. It is clear that that is so, but I find it impossible to say that the mere fact that they omitted that part which dealt with the particular drug, *viz.*, whether it was morphine or heroin, is sufficient for any tribunal to say that this inquiry was not conducted according to the principles of natural justice, and was, therefore, void. The only other matter complained of is that it was not until after the stewards had conferred together and come to a decision as to the course which they proposed to take that the plaintiff was, in terms, asked whether he had any further evidence to offer. Throughout this inquiry he was, at every stage, it seems to me, given an opportunity of presenting his case and of asking any questions which he desired to ask. It is true that he was not in terms asked: "Have you got any witnesses? Do you want an adjournment?" A layman at an inquiry of this kind is, of course, at a grave disadvantage compared with a trained advocate, but that is a necessary result of these domestic tribunals which proceed in a somewhat informal manner. Counsel for the plaintiff, in the course of his forceful argument on this point, again and again said: "What would be said of local justices who acted in this way?" With all due respect, the position is totally different. This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law. The conclusion I have reached on this aspect of the case is that there was no material on which a jury could have arrived at a conclusion that this inquiry was conducted in a way contrary to the principles of natural justice. If, as I think is the better view, it really was a matter of law for the decision of the judge, I should unhesitatingly hold that there was nothing here which was contrary to the principles of natural justice as laid down in the various authorities which have been brought to our notice. There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity. The fact that the tribunal for all I know—I am not suggesting it is so—may have arrived at a totally erroneous conclusion, the fact that they may have attached quite a mistaken value to the certificate of the analyst, is altogether beside the point. The mere fact that at the trial it was, as I think it was, necessary to get the plaintiff's case on its legs to call an expert witness to controvert the meaning of this certificate in itself seems to me to show that his real complaint goes to the weight of evidence and the value to be attached to this analyst's certificate. That was a matter for the tribunal to deal with. They may have dealt with it erroneously and in a mistaken manner, but it is not for this court to intervene in a matter of that kind. Accordingly, even if it is a necessary condition, either under the heading of contract or to support the plea of privilege, that there should have been a properly conducted inquiry, then I find in this case there was such an inquiry. For these reasons I think this appeal fails.

ASQUITH, L.J.: I agree and like my Lord I am inclined to the view, reading the rules as a whole, that where what is involved is the proposed withdrawal of a licence for misconduct, an inquiry, and an inquiry which conforms to the principles of natural justice, is a necessary pre-condition, but it is unnecessary to decide the point because I agree with my Lord that there is no evidence in the present case that any principle of natural justice was

- violated. That is a conclusion which, if right, disposes automatically of all issues in this case, except one, in favour of the defendants. That one is the contention of the plaintiff that the announcement in the *RACING CALENDAR* did not accurately record the decision of the stewards. The actual decision, it is argued, was in substance that the plaintiff was not guilty personally of administering the drug, but merely guilty of negligence in not preventing its administration. It is said that the announcement actually published, by omitting reference to negligence, conveyed the contrary implication, that is, that the plaintiff was himself a party or privy to the administration of the drug. The plaintiff, the argument continues, by r. 17, had consented to the publication in the *RACING CALENDAR* of an accurate version of any decision, but had not consented to the publication of an inaccurate one. It seems to me that in substance this is exactly the argument that was put forward in *Chapman v. Lord Ellesmere* (4), and against which this court ruled in a decision that is binding on us. In that case, as in this case, words which said or clearly implied that negligence and not deliberate misdoing had been proved were omitted from the decision as published, yet the publication was held sufficient to embody the actual "decision," and to have been consented to as such by the plaintiff. I agree that the appeal should be dismissed.

- DENNING, L.J. :** The first question is whether, under the Rules of Racing, it was incumbent on the stewards of the Jockey Club to hold an inquiry before withdrawing the plaintiff's licence to train on the ground of misconduct. I do not think that the rules postulate an inquiry when the stewards merely withdraw a licence without inflicting any penalty. Condition 3 of the licence gives them an absolute discretion on that matter. In such a case they need hold no inquiry and need give no reasons. It is sufficient that they should act honestly and in good faith, but when they are exercising the far more serious power of withdrawing a licence under r. 102 on the ground of misconduct, they must, in my opinion, give the trainer an opportunity of defending himself. Rule 102 creates the offence of "misconduct" in a trainer, and prescribes the penalty, which is the withdrawal of his licence and disqualification. This penalty of disqualification is the most severe penalty that the stewards can inflict. It is the same penalty as that which is imposed on persons guilty of corrupt practices. It disqualifies the trainer from taking any part in racing and thus takes away his livelihood. Common justice requires that before any man is found guilty of an offence carrying such consequences, there should be an inquiry at which he has the opportunity of being heard. It might, perhaps, be possible for the stewards to stipulate expressly for power to condemn a man unheard, but I should doubt it. It may be that such a stipulation would be contrary to public policy: see the judgment of *BRETT, L.J.*, in *Dawkins v. Antrobus* (5) (17 Ch.D. 630), the judgment of *KELLY, C.B.*, in *Wood v. Wood* (6) (L.R. 9 Exch. 196) and of *LORD BIRKENHEAD, L.C.*, in *Weinberger v. Inglis* (7) ([1919] A.C. 616). It is very different from a mere dismissal of a servant or withdrawal of a licence or even expulsion from a club, which *MAUGHAM, J.*, had in mind in *MacLean v. Workers Union* (8) ([1919] A.C. 623). The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding responsibilities. Howsoever that may be, I find no stipulation here enabling the stewards to act under r. 102 without an inquiry. Nor, indeed, do the stewards themselves suggest they have such a power, or would wish to exercise it, if they had. Lord Willoughby de Broke was asked by counsel for the plaintiff: "You realise the extreme importance of seeing that a trainer does not have his licence withdrawn for misconduct, except after carefully inquiry," and he answered: "Most certainly." It has been argued that the stewards need have no inquiry at all, and that, therefore, it does not matter if they hold one which is not a proper one. I do not agree with that. I think there must be an inquiry at which the person concerned has an oppor-

tunity of being heard. The stewards should not act on information against him without giving him an opportunity of answering it. If an inquiry has been held in accordance with these essentials of justice, there is no reason why the result of the inquiry should not be published to all concerned with racing, and, indeed, it is in the interests of all that it should be. If the publication in the RACING CALENDAR is no wider than the occasion warrants, it is privileged. This might be the case even if the rules did not contain any provision on the matter, but any doubt is removed by the fact that the rules, to which the plaintiff has assented, empower the stewards to publish the decision in the RACING CALENDAR. That is, in effect, a consent by the plaintiff to this mode of publication, though consent cannot create a privilege where none would otherwise exist. If, however, the inquiry was not held in accordance with the essentials of justice, the privilege would be defeated, not on the ground of malice, for there might be none, but because the very foundation of the privilege is that there has been a proper inquiry. This result may be reached by saying the plaintiff has only consented to publication on the basis that there has been a proper inquiry, but I prefer simply to say that the defence of privilege in a case of this kind requires that an inquiry should be held in accordance with the essentials of justice.

Both the issues in this case, therefore—the issue whether the plaintiff was properly disqualified and the issue of privilege—depend on whether the inquiry was held in accordance with the essentials of justice. That, in my opinion, is a conclusion of law. It depends, of course, on what are the primary facts. If there is a difference about those, it must be decided by the tribunal of fact, in this case, the jury, but once the primary facts are found, the conclusion is a conclusion of law. It would be no easy matter for a jury to distinguish between the question whether there was a proper inquiry, and the question whether the decision of the stewards was right or wrong, whereas a judge is able to put aside the correctness of the decision as irrelevant. On this question, I am entirely in agreement that there is only one conclusion possible on the evidence, namely, that the inquiry was in accordance with principles of natural justice.

There remains only the question whether the privilege was defeated because the notice in the RACING CALENDAR omitted the finding that the plaintiff was guilty of negligence amounting to grave misconduct. Such an omission does not, in my opinion, defeat the privilege. A complaint as to the wording of the notice might go to malice, but would not itself defeat the privilege. Malice is not suggested here and the privilege holds good. I agree the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *W. R. Bennett & Co.* (for the plaintiff); *Charles Russell & Co.* (for the defendants).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. ELECTRIC AND MUSICAL INDUSTRIES, LTD.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.J.J.), November 22, 23, 24, December 13, 1948.]

Excess Profits Tax—"Income received from investment"—*Fees from licences to perform gramophone records in public collected and distributed to members by company limited by guarantee—Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1).*

To protect themselves against infringement of their copyright entitling them to the exclusive right of the performance in public of their records, groups of gramophone record manufacturers incorporated a company limited by guarantee and not having a share capital, with power under its memorandum of association to exercise and enforce on behalf of its

***223 University of Ceylon v E. F. W. Fernando on Appeal from the Supreme Court of Ceylon**



Positive/Neutral Judicial Consideration

Court

Privy Council (Ceylon)

Judgment Date

16 February 1960

Report Citation

[1960] 1 W.L.R. 223



Privy Council

Viscount Simonds , Lord Tucker , Lord Jenkins , Lord Morris of Borth-Y-Gest and Rt. Hon. L. M. D. De Silva

1960 Feb. 16

Natural Justice—Opportunity to meet charge—Whether accused entitled to question witnesses—University—Allegation of pre-knowledge of examination paper—Inquiry under domestic statute.

Education—University—Discipline—Domestic commission of inquiry—Duty to comply with natural justice.

After the respondent, a student of the appellant University of Ceylon, had sat for the final examination for the degree of Bachelor of Science, an allegation was made to the Vice-Chancellor that the respondent had had prior knowledge of the content of a passage in the German language which had to be translated in one of the papers. A commission of inquiry consisting of the Vice-Chancellor and two others, acting under clause 8 of the statute of the University, which required the Vice-Chancellor to be “satisfied,” inter alia, that any candidate had prior knowledge of the content of any paper, found that the allegation against the respondent was substantiated and, as required by clause 8, reported their finding to the Board of Residence and Discipline, who suspended the respondent indefinitely from all University examinations.

In an action by the respondent for, inter alia, a declaration that the finding of the commission of inquiry and the decision of the Board of Residence and Discipline were null and void, he alleged that the finding of the commission was contrary to the principles of natural justice in that, inter alia, the evidence of the various witnesses, including that of the person who had made the allegation, was taken in his absence, and he was not aware of the evidence led against him or of the case he had to meet. He was questioned about the matter by the commission. In evidence he denied the allegation:—

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Held, that in the absence in clause 8 of any express requirement as to the procedure to be followed at the inquiry, it must comply with the elementary and essential principles of fairness, which must as a matter of necessary implication be treated as applicable in the discharge of the Vice-Chancellor's admittedly quasi-judicial functions under clause 8, or, in other words, with the principles of natural justice. The Vice-Chancellor was not bound to treat the matter as a trial, but could obtain

information in any way he thought best, and it was open to him, if he thought fit, to question witnesses without inviting the respondent to be present, but a fair opportunity must have been given to him to correct or contradict any relevant statement to his prejudice. That last condition had on the facts of this case been complied with, in that the respondent had, by letter from the Vice-Chancellor and at interviews with the commission of inquiry, been adequately informed of the case he had to meet, and had been given at the interviews an adequate opportunity of meeting the case alleged against him (post, p. 234).

The fact that the commission failed to volunteer the suggestion that the respondent might wish to question the person who had made the allegation against him — or to tender her unasked for cross-examination by the respondent — was not an omission sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case. Here the mode of procedure adopted by the Vice-Chancellor in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8 sufficiently complied with those requirements (post, p. 235).

Dicta in *De Verteuil v. Knaggs* [1918] A.C. 557, at 560; 34 T.L.R. 325 ; *Local Government Board v. Arlidge* [1915] A.C. 120 , at 132; *Byrne v. Kinematograph Renters Society Ltd.* [1958] 1 W.L.R. 762, at 784; [1958] 2 All E.R. 579 , and *Board of Education v. Rice* [1911] A.C. 179, at 182; 27 T.L.R. 378 applied .

Osgood v. Nelson (1872) L.R. 5 H.L. 636 considered .

Judgment of the Supreme Court of Ceylon (1956) 58 N.L.R. 265 reversed.

The following cases, in addition to those referred to in the judgment, were cited in argument:

Weinberger v. Inglis ¹ ; *Rex v. Electricity Commissioners* ² ; *Maclean v. The Workers' Union* ³ ; *Nakkuda Ali v. Jayaratne* ⁴ ; *Errington v. Minister of Health* . ⁵

APPEAL (No. 17 of 1958) from a judgment of the Supreme Court of Ceylon (Weerasooriya and T. S. Fernando JJ.) (November 28, 1956) reversing a judgment of the District Court of Colombo (Kariapper A.D.J.) (August 31, 1954) which had dismissed the claim of the present respondent for a declaration (and other relief) that the appellant University of Ceylon had wrongfully suspended him from all examinations.

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of an action brought by the respondent E. F. W. Fernando as plaintiff against the appellant University of Ceylon as defendant for (inter alia) a declaration to the effect that a decision of the Board of Residence and Discipline of the University to suspend the plaintiff (a student of the University) from all University examinations for an indefinite period, and the finding of a commission of inquiry set up by the Vice-Chancellor, on which such decision was based, were null and void.

The action was heard in the District Court of Colombo by Kariapper A.D.J., who by a judgment and decree dismissed it with costs. The plaintiff appealed to the Supreme Court of *225 Ceylon, and that court (Weerasooriya and Fernando JJ.), by a decree dated December 13, 1956, giving effect to a judgment delivered on November 28, 1956, allowed his appeal and granted the declaratory relief claimed with costs. From that judgment and decree the University now appealed to the Board.

The circumstances leading up to the plaintiff's suspension from all University examinations, and the unfortunate litigation which had ensued, were as follows: The examinations procedure of the University was prescribed by its "General Act" No. 1, Chapter VIII, Part I, clause 8 of which Part provided that

“where the Vice-Chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination, or has attempted or conspired to obtain such knowledge, the Vice-Chancellor may suspend the candidate from the examination or remove his name from any pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the Board may decide to take.” By clause 14: “Where any matter is reported to the Board of Residence and Discipline under this Part, the Board may

- (1) remove the name of the candidate from any pass list; or
- (2) suspend the candidate from any University examination for such period as the Board may decide, or indefinitely; or
- (3) order that the candidate be suspended from the University for such period as the Board may decide, or indefinitely; or
- (4) do all or any of these acts.”

These clauses may conveniently be referred to as clause 8 and clause 14 respectively.

The plaintiff, who had been a student in the faculty of science in the University since 1948, presented himself at the end of March, 1952, as an examinee for the final examination in science, section B, Zoology, for the degree of Bachelor of Science, and completed the full examination in both theory and practical work. There were five papers in theory and two in practical work, and the plaintiff sat for Zoology Paper V, the last theoretical paper, on April 4, 1952. That paper was in two sections, consisting of (1) an essay, and (2) a passage in German and a passage in French, one of which the candidate was required to translate into English with comments thereon, 10 marks being allotted for the translation of and comments upon the selected passage, and 90 marks for the essay. The plaintiff chose the passage in German for his translation and comments, for which he was awarded eight marks. He appeared to have done well in all his papers and to have attained in the examination as a whole a standard which would normally have been held sufficient to place him in the first class.

After the examination was over, a woman student, Miss Balasingham, who had also been reading Zoology and had taken the examination at the same time as the plaintiff, made to Mr. Sivaprakasapillai, a lecturer in the engineering faculty and Miss Balasingham's brother-in-law, certain allegations concerning the *226 plaintiff which, if true, were only explicable on the footing that the plaintiff had acquired knowledge of the German passage in Zoology Paper V before the examination. Those allegations were passed on by Mr. Sivaprakasapillai to Sir Ivor Jennings, the Vice-Chancellor, it would seem in the first instance through Professor Pereira and Mr. Keerthisinghe, the senior lecturer in Zoology, though that was not important.

The Vice-Chancellor took a serious view of Miss Balasingham's allegations, which not only implicated the plaintiff but also suggested the possibility of negligence or misconduct on the part of some member or members of the staff of the University. On that aspect of the matter some embarrassment was caused by the circumstance that Professor Fernando, who was responsible for the German passage in Zoology Paper V, was the plaintiff's uncle. In those circumstances the Vice-Chancellor decided (as their Lordships thought quite rightly) that the matter called for action under clause 8.

To assist him in satisfying himself of the truth or falsity of the allegations the Vice-Chancellor set up a commission of inquiry, consisting of himself, Professor Mylvaganam, Dean of the Faculty of Science, and Mr. Keuneman Q.C., a member of the Council of the University, who was to lead the inquiry. That body seemed to have met on three occasions, viz., on May 21 and June 3, 1952, and on one other occasion between those two dates. The plaintiff attended on two of those three occasions, viz., on May 21 and June 3. Prior to the first meeting the Vice-Chancellor wrote to the plaintiff a letter dated May 16, 1952, which, omitting formal parts, was in these terms:

“Dear Mr. Fernando, An allegation has been made to me in writing that you had acquired knowledge of the content of one or more of the papers set at the Final Examination of Science, Section B, Zoology, before the date of the examination. Since this is a very serious allegation which may affect not only you but also one or more of the members of the University staff, I have consulted Mr. A. E. Keuneman Q.C., who agrees that the allegation is sufficiently circumstantial to justify a formal inquiry.

“I have therefore appointed a commission consisting of Mr. Keuneman, the Dean of the Faculty of Science, and myself, and have asked Mr. Keuneman to take the lead in the inquiry. He has asked that a meeting be held in the Board Room, College House, on Wednesday, 21st May, at 5 p.m., and that you be requested to attend. I should be glad if you would attend on this occasion and would report to Mr. Blok, who is acting as secretary to the commission. Yours sincerely, Sgd. IVOR JENNINGS, Vice-Chancellor.”

The reference in this letter to “one or more” of the papers set at the final examination appeared to have been due to the fact that Miss Balasingham had alleged fore-knowledge on the part of the plaintiff of the contents of another paper besides Zoology Paper V. At the outset of the inquiry the commission *227 came to the conclusion that there was no substance in this additional charge, which accordingly was not pursued.

In the course of their meetings the commission questioned (in addition to the plaintiff himself) Miss Balasingham and a number of other persons, including Professor Fernando and various lecturers and students, but none of them in the presence or hearing of the plaintiff. The second appearance of the plaintiff before the commission, that was, his appearance on June 3, was in response to a letter from the Vice-Chancellor inviting him to attend on that day and to bring with him all the exercise books he had used during his course, which he accordingly did. There seemed to have been a good deal of discussion regarding one particular book, in which Dr. Cruze (one of the lecturers in Zoology) had corrected drawings of the venous system of rats, but in the end the commission decided that it threw no light on the matter.

Miss Balasingham appeared to have adhered before the commission to the story she had originally told to Mr. Sivaprakasapillai, which, to quote from the Report made by them at the conclusion of their inquiry, was to this effect:

“3. Miss Balasingham states that, owing to Mr. Fernando's behaviour, she suspected that there was something in one of his notebooks which he did not wish the other students to see. On one occasion he left the book on the bench in the Section B laboratory and went out of the room. She seized the opportunity to glance through the book and saw a list of German words, in some cases with English equivalents. There were about 30 words and she copied nine of them into her own notebook, which she produced. She could remember only one of the words which she had not copied, *Zitronensaft*, a word which appeared almost at the end of the list. This word appears at the end of the German passage in Paper V. The other nine words appear in the passage, and in the order in which they are shown in the list in Miss Balasingham's book, except that the order of the eighth and ninth words is changed. The passage, with the ten words underlined, was as follows:-”

After setting out the German passage, with the crucial words underlined, the Report continued:

“4. This list in Miss Balasingham's book was apparently not shown to anyone until our inquiry began. It was then shown to Mr. Sivaprakasapillai and was produced to us at our request. A large

part of our inquiry was necessarily directed towards ascertaining whether the list really was in the notebook before the examination began. In our opinion it was. The following factors are relevant:

“(1) Miss Balasingham was able to describe the copying with a wealth of circumstantial detail, of no direct relevance to the story as such, which carried conviction. If the story was invented, it was a remarkably successful invention.

“(2) Another student, Miss Y. de Silva, was sitting next to Miss Balasingham on the occasion when the copying is said *228 to have been done. Miss de Silva denies that she saw Miss Balasingham copying, but she admits that Miss Balasingham told her about the list before the examination. Miss de Silva is a second-year student in Zoology, and we believe that she could have told us more. Another student, Mr. C. H. Fernando, also admits that Miss Balasingham told him about the list before the examination.”

The Report went on to say: “(3) Miss Balasingham's behaviour immediately after the examination was entirely consistent with her story...” and to give reasons for that view.

Satisfied as they were of the truth of Miss Balasingham's story, the commission of inquiry at the end of the Report expressed their findings to be to the effect that:

“(1) Mr. E. F. W. Fernando acquired knowledge of the nature or substance of the German question in Zoology Paper V before the date and time of the examination and must therefore be reported to the Board of Residence and Discipline... under clause 8;

(2) There was no evidence as to the manner in which this knowledge came to Mr. E. F. W. Fernando.”

By a letter dated July 21, 1952, the Vice-Chancellor informed the plaintiff that the Board of Residence and Discipline had found him guilty of an examination offence in connection with the Final Examination in science held in 1952 and had suspended him indefinitely from all University examinations.

After considerable correspondence between the plaintiff and the Vice-Chancellor in which the plaintiff sought without success a review of the decision of the Board of Residence and Discipline, the plaintiff on May 19, 1953, began the present action, in which, as already mentioned, he failed at first instance but succeeded on appeal.

Representation

1960. Jan. 11, 12. Dingle Foot Q.C. and C. Fletcher-Cooke Q.C. for the appellant University.
The respondent did not appear and was not represented.

LORD JENKINS

February 16. The judgment of their Lordships was delivered by who said: To their Lordships' regret, the plaintiff, it may be for financial reasons, has not appeared to support the decision in his favour pronounced by the Supreme Court, and although counsel for the University have done their best to make up for this by presenting the plaintiff's side of *229 the matter as well as their own, their Lordships have felt some anxiety in dealing with this not altogether easy case in the plaintiff's absence. [His Lordship then stated the facts set out above and continued:] In his amended plaint dated July 24, 1953, the plaintiff alleged that the decision of the commission of inquiry was null and void for a number of reasons. He claimed that the decision was contrary to the principles of natural justice on five grounds, two of which consisted of allegations of bias or disqualification against Professor Mylvaganam by reason of his alleged relationship to Miss Balasingham and Mr. Sivaprakasapillai, and the fact that he was a member of the board of examiners and of the scrutinising committee. The third ground was to the effect

that by reason of the first “the maxim that justice should not only be done but also appear to be done” had been violated. The fourth ground comprised the substance of the plaintiff’s case and was to the effect that the evidence of the various witnesses who appeared before the commission of inquiry, including the evidence of Miss Balasingham, was taken in the absence of the plaintiff, who was not aware of what evidence was led against him, and that in the circumstances one of the essential elements of natural justice was not observed, inasmuch as the plaintiff was not aware of the case he had to meet. The fifth ground was to the effect that the evidence of the various witnesses was not taken entirely before all the three members of the commission of inquiry, and that such evidence was acted on by the commission, and that this circumstance was also a violation of the elementary principles of justice. The plaintiff further alleged that there was no evidence upon which the commission of inquiry could reasonably find the charge against the plaintiff proved, that the finding arrived at against the plaintiff was one which had not been arrived at in conformity with clause 8, and that the finding and decision were therefore void and of no effect.

The allegations of bias or disqualification against Professor Mylvaganam as a member of the commission of inquiry were rejected in both courts as without substance. The allegation to the effect that there was no evidence upon which the commission could reasonably find the charge against the plaintiff proved was (so far as open to the court) clearly ill-founded. The allegation to the effect that the finding was not arrived at in accordance with clause 8 turned on the fact that the Vice-Chancellor appointed two other persons to sit with him as a commission of inquiry to investigate the matter, instead of proceeding to investigate it alone. It was held in both courts that this procedure was not open to objection, inasmuch as this was merely a method, which the Vice-Chancellor was free to adopt if he chose to do so, of satisfying himself of the truth or falsity of the charge, and the Report was a report by him for the purposes of clause 8 although signed by the two other members of the commission as well as himself. The plaintiff having taken no steps to appeal against *230 the decision of the court below on these matters of complaint, their Lordships need say no more about them.

There remain the complaints to the effect that the evidence, including that of Miss Balasingham, was taken in the absence of the plaintiff who was not aware of the evidence led against him or of the case he had to meet; and that the evidence of certain witnesses was taken by the Vice-Chancellor in the absence of the other members of the commission.

As to these, it is not in dispute that the plaintiff was not present, and was not invited to be present, at the examination of any of the witnesses, or that the Vice-Chancellor did in fact interview two witnesses, namely, Professor Fernando and Dr. Cruze, in the absence of the other members of the commission. Their Lordships may add that it is also admitted that the plaintiff did not at any stage question Miss Balasingham and was never offered an opportunity of doing so.

On the other hand, it is not in dispute that the plaintiff was interviewed and questioned at length about the matter by the three members of the commission on May 21 and June 3, 1952.

Before the trial judge and in the Supreme Court it was argued for the University that the Vice-Chancellor’s functions under clause 8 were administrative and not of the kind described, for want of a better term, as “quasi-judicial,” and, accordingly, that the Vice-Chancellor’s action in the matter was not open to review by the court. It was, however, argued further that if, contrary to this contention, the Vice-Chancellor’s functions under clause 8 were quasi-judicial, the Vice-Chancellor’s letter of May 16, 1952, coupled with the information given to the plaintiff at the two interviews, sufficiently apprised him of the nature of the complaint, that he was at these interviews given sufficient opportunity to state his case in rebuttal of it, and, accordingly, that there had been no such breach of the so-called principles of natural justice as was necessary to warrant the intervention of the court in such a case.

The trial judge was of opinion that the functions of the Vice-Chancellor in the matter were administrative and not judicial, and consequently that the court had no jurisdiction to interfere, but went on to hold that if he was wrong in this, and such functions were of a quasi-judicial character, the principles of natural justice had been sufficiently complied with by the commission.

The Supreme Court took the opposite view, holding that the Vice-Chancellor's functions were not administrative but quasi-judicial, and that the mode of inquiry adopted had violated the principles of natural justice, with the result that the court could and ought to declare the Report of the commission of inquiry, and the consequential decision of the Board of Residence and Discipline under clause 14, to be null and void.

At the hearing before their Lordships Mr. Dingle Foot, for the University, disclaimed the contention that the Vice-Chancellor's [*231](#) functions under clause 8 were administrative and not quasi-judicial, but submitted that, on the footing that these functions were quasi-judicial, the claims of natural justice had been fully satisfied.

Accordingly (apart from a subsidiary question as to the jurisdiction of the courts in Ceylon to grant declaratory relief in such a case), the present appeal resolves itself into the question whether this inquiry was conducted with due regard to the rights accorded by the principles of natural justice to the plaintiff as the person against whom it was directed.

These rights have been defined in varying language in a large number of cases covering a wide field. Their Lordships do not propose to review these authorities at length, but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. As Tucker L.J. said in [Russell v. Duke of Norfolk](#) ⁶ :

“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.”

In the earlier case of [General Medical Council v. Spackman](#) ⁷ Lord Atkin expressed a similar view in these words:

“Some analogy exists, no doubt, between the various procedures of this and other not strictly judicial bodies, but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man. I would, therefore, demur to any suggestion that the words of Lord Loreburn L.C. in [Board of Education v. Rice](#) ⁸ afford a complete guide to the General Medical Council in the exercise of their duties.”

With these reservations as to the utility of general definitions in this branch of the law, it appears to their Lordships that Lord Loreburn's much quoted statement in [Board of Education v. Rice](#) ⁹ still affords as good a general definition as any

of the nature of and limits upon the requirements of natural justice in this kind of case. Its effect is conveniently stated in this passage from the speech of Viscount Haldane L.C. in *Local Government Board v. Arlidge*, ¹⁰ where he cites it with approval in the following words:

“I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education v. Rice* ¹¹ he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of *232 Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.”

From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *De Verteuil v. Knaggs* ¹² :

“Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.”

The last general statement as to the requirements of natural justice to which their Lordships would refer is that of Harman J. (as he then was) in *Byrne v. Kinematograph Renters Society Ltd.*, ¹³ of which their Lordships would express their approval. The learned judge said this:

“What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more.”

Turning now to the actual terms in which the Vice-Chancellor is invested with the quasi-judicial function here in question, it is to be observed that all that clause 8 provides is that where the Vice-Chancellor is satisfied that any candidate has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination “the Vice-Chancellor... shall report the matter to the Board of Residence and Discipline...” The clause is silent as to the procedure to be followed by the Vice-Chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special directions in regard to the steps to be taken by the Vice-Chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed it is for him to determine the procedure to be followed as he thinks best, but, to adapt to the present case the language of the judgment of this

Board in *De Verteuil v. Knaggs*, ¹⁴ subject to the obvious implication that *233 some form of inquiry must be made, such as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out.

As was said by Lord Shaw of Dunfermline in *Local Government Board v. Arlidge*, ¹⁵ of the authority there concerned, it

“must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means.”

In the present case no shadow of doubt is cast upon the honesty and bona fides of the Vice-Chancellor or of those who sat with him in the commission of inquiry.

So far as the plaintiff is concerned, it appears to their Lordships that he must be taken to have agreed, when he became a member of the university, to be bound by the statutes of the university, including clause 8, and in the event of clause 8 being put in operation against him could not insist on the adoption by the Vice-Chancellor of any particular procedure beyond what the clause expressly or by necessary implication requires. In the absence of any express requirement he is thrown back on the necessary implication that the Vice-Chancellor's procedure will be such as to satisfy the requirements indicated in the passages from *De Verteuil v. Knaggs*, ¹⁶ *Local Government Board v. Arlidge*, ¹⁷ and *Byrne v. Kinematograph Renters Society Ltd.*, ¹⁸ to which their Lordships have just referred, and thus to comply with those elementary and essential principles of “fairness” which must as a matter of necessary implication be treated as applicable in the discharge of the Vice-Chancellor's admittedly quasi-judicial functions under clause 8, or in other words, with the principles of natural justice.

The question then is whether the Vice-Chancellor did in the course he took satisfy those principles.

The plaintiff's contention to the effect that he was not adequately informed of the case he had to meet, and was not given any adequate opportunity of meeting it, and that the course taken by the Vice-Chancellor or the commission of inquiry in these respects failed to satisfy the requirements of natural justice, depended almost entirely on the admitted fact that Miss Balasingham and the other witnesses were not questioned in the presence and hearing of the plaintiff, who consequently was not able to question them on the statements they made. The further admitted fact that two witnesses were questioned by the Vice-Chancellor alone and not by all three members of the commission does not, their Lordships think, add anything to this basic complaint.

But this did not, in their Lordships' view, in itself involve any violation of the requirements of natural justice. To adapt Lord *234 Loreburn's words in *Board of Education v. Rice*, ¹⁹ the Vice-Chancellor was not bound to treat the matter as if it was a trial, had not power to administer an oath, and need not examine witnesses, but could obtain information in any way he thought best.

It seems to their Lordships to follow that inasmuch as the Vice-Chancellor, when the alleged offence under clause 8 was brought to his notice, was not bound to treat the matter as a trial but could obtain information about it in any way he thought best, it was open to him, if he thought fit, to question witnesses without inviting the plaintiff to be present.

But, while there was no objection to the Vice-Chancellor informing himself in this way, it was undoubtedly necessary that before any decision to report the plaintiff was reached, he should have complied with the vital condition postulated by Lord Loreburn, which adapted to the present case may be stated as being to the effect that a fair opportunity must have been given to the plaintiff to correct or contradict any relevant statement to his prejudice.

The university's contention is that this condition, which resolves itself into the two requirements that the plaintiff should be adequately informed of the case he had to meet, and given an adequate opportunity of meeting it, was complied with in its first branch by the letter of May 16, 1952, and what plaintiff was told at the first interview on May 21, 1952, and in its second branch by what passed at that interview and at the second interview on June 3.

As to what took place at the two interviews, the trial judge accepted the evidence of the Vice-Chancellor in preference to that of the plaintiff. The Vice-Chancellor's evidence, and indeed the plaintiff's own admission, make it abundantly plain that at the outset of the first interview the plaintiff was told that Miss Balasingham had made this charge against him and the nature of the charge was explained to him in detail.

[His Lordship then referred to relevant passages from the Vice-Chancellor's and the respondent's evidence, and continued:] Their Lordships are satisfied that there is no substance in the complaint made by the plaintiff to the effect that the reference in the letter of May 16, 1952, to "one or more of the papers set at the final examination" left him under the impression that some additional charge was being made against him, the precise nature of which was not sufficiently explained. Apart from the fact that (according to the plaintiff) Mr. Keuneman asked him towards the end of the first day "how he had fared in his practical examination?" nothing was said to suggest that the commission was in any way concerned with anything other than the German translation. It must, therefore, have been clear to the plaintiff (as the fact was) that the only charge which was being pursued related exclusively to that matter.

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Their Lordships are, accordingly, satisfied that the plaintiff was adequately informed of the case he had to meet.

As to the adequacy of the opportunity of meeting the case alleged against him afforded by the two interviews, the plaintiff in his evidence complained that the interviews were not fairly conducted in the respects that he was plied with questions which he was not given a chance of answering fully and was prevented from saying all he wanted to say. The trial judge rejected these complaints and accepted the Vice-Chancellor's evidence to the effect that the two interviews were fairly conducted. Their Lordships see no reason for dissenting from this finding.

Their Lordships are therefore satisfied that the interviews, so far as they went, were fairly conducted and gave the plaintiff an adequate opportunity of stating his case. But it remains to consider whether in the course they took the interviews must be held to have fallen short of the requirements of natural justice on the ground that the plaintiff was given no opportunity of questioning Miss Balasingham. She was the one essential witness against the plaintiff, and the charge in the end resolved itself into a matter of her word against his. In their Lordships' view this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused. But he never made any such request, although he had ample time to consider his position in the period of 10 days or so between the two interviews. There is no ground for supposing that if the plaintiff had made such a request it would not have been granted. It therefore appears to their Lordships that the only complaint which could be made against the commission on this score was that they failed to volunteer the suggestion that the plaintiff might wish to question Miss Balasingham, or, in other words, to tender her unasked for cross-examination by the plaintiff. Their Lordships cannot regard this omission, or a fortiori the like omission

with respect to other witnesses, as sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case.

Counsel for the university very properly referred their Lordships to passages in *Osgood v. Nelson*²⁰ and in other authorities which tend at first sight to state the requirements of natural justice more favourably to the party charged than do the authorities to which their Lordships have so far referred; see in particular the references to cross-examination in *Osgood v. Nelson*.²¹ But their Lordships are satisfied that when the facts and circumstances of these cases are looked into they contain nothing to justify the conclusion that the requirements of natural justice were not sufficiently observed on the facts and in the circumstances of the case now before them.

In conclusion, their Lordships would observe that they are at *236 a loss to understand how the Supreme Court, while apparently accepting the trial judge's favourable assessment of the reliability of the evidence of the Vice-Chancellor, found it possible to reach the conclusion that not even the gist of Miss Balasingham's evidence was communicated to the plaintiff. Their Lordships would also venture the criticism that the Supreme Court tended to regard the case much as if it involved an appeal from or rehearing of a trial held before the commission rather than an invocation of the limited jurisdiction of the court to restrain the abuse of quasi-judicial proceedings, where the sole issue is whether the result, be it right or wrong, was arrived at with due regard to the principles of natural justice.

The plaintiff might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a court of law, which would have included as of course the tendering of Miss Balasingham for cross-examination. But that is not the question. The question is whether, on the facts and in the circumstances of this particular case, the mode of procedure adopted by the Vice-Chancellor, in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8, sufficiently complied with the requirements of natural justice. In their Lordships' opinion it has not been shown to have fallen short of those requirements.

Their Lordships' conclusion on the merits of the case makes it unnecessary for them to consider the university's submission to the effect that the court had no jurisdiction to grant the declaratory relief sought by the plaintiff.

For these reasons their Lordships are of opinion that this appeal should be allowed, the decree of the Supreme Court of Ceylon dated December 13, 1956, set aside and the decree of the District Court of Colombo dated August 31, 1954, restored, and they will humbly advise Her Majesty accordingly.

The plaintiff must pay the costs of the present appeal and also the costs of the action in the District Court and of the appeal to the Supreme Court.

C. C.

Representation

Solicitors: Stephenson, Harwood & Tatham.

Footnotes

- 1 [1919] A.C. 606 ; 35 T.L.R. 399 .
- 2 [1924] 1 K.B. 171 ; 39 T.L.R. 715 .
- 3 [1929] 1 Ch. 602 ; 45 T.L.R. 256 .
- 4 [1951] A.C. 66 ; 66 T.L.R. (Pt. 2) 214 .
- 5 [1935] 1 K.B. 249 , 264; 51 T.L.R. 44 .
- 6 (1948) 65 T.L.R. 225 , 231; [1949] 1 All E.R. 109 , 118.
- 7 [1943] A.C. 627 , 638; 59 T.L.R. 412 ; [1943] 2 All E.R. 337 .
- 8 [1911] A.C. 179 , 182.
- 9 [1911] A.C. 179 , 182.
- 10 [1915] A.C. 120 , 132–133.
- 11 [1911] A.C. 179 , 182.
- 12 [1918] A.C. 557 , 560; 34 T.L.R. 325 .
- 13 [1958] 1 W.L.R. 762 , 784; [1958] 2 All E.R. 579 .
- 14 [1918] A.C. 557 , 560.
- 15 [1915] A.C. 120 , 138.
- 16 [1918] A.C. 557 , 560.
- 17 [1915] A.C. 120 , 132.
- 18 [1958] 1 W.L.R. 762 , 784.
- 19 [1911] A.C. 179 , 182.
- 20 (1872) L.R. 5 H.L. 636.
- 21 15 Ibid. 646 , 660.

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A

[HOUSE OF LORDS.]

OFFICIAL SOLICITOR TO THE SUPREME
COURT

APPELLANT;

AND

B

K. AND ANOTHER

RESPONDENTS.

H. L. (E.).*

1963

June 11, 12,

13, 17;

July 23.

[APPEAL FROM *In re* K. (INFANTS).]

C

Infant—Ward of court—Evidence—Confidential reports—Statements by guardian ad litem—Official Solicitor—Disclosure—Whether parties entitled to disclosure—Right of court to see child or parents privately—Purpose and practice.

Infant—Ward of court—Paramount interest of infant—Whether overriding natural justice—Judicial or administrative process.

Natural Justice—Opportunity to meet charge—Disclosure of evidence—Whether right of party to see and challenge all information put before judge—Ward of court—Confidential report by Official Solicitor.

D

Official Solicitor—History and functions—Statement by—Whether on oath—Discretion of judge—Confidential report—Whether need for disclosure to parties—Guardian ad litem of ward of court.

E

The mother of two infant children applied by originating summons that the infants be made wards of court for custody, care and control, and access. The father was a respondent to the application, there being conflict between the parties as to custody, etc. On the issue of the summons, the infants became wards of court and the master subsequently ordered that they be joined as respondents, and that the Official Solicitor be their guardian ad litem. In due course, the Official Solicitor lodged a statement of facts in which he submitted that the mother should take the infants to be seen by a named medical specialist, and at the same time he lodged a confidential report. The master ordered that the mother take the infants to the specialist and subsequently the Official Solicitor lodged a further statement accompanied by a further confidential report annexed to which were reports of the specialist. Both statements but neither of the confidential reports were disclosed to the parties.

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The mother contended, on a preliminary point, that she was entitled as of right to see the whole of the reports of the Official Solicitor, including the confidential reports and medical reports annexed thereto.

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Ungoed-Thomas J. rejected the mother's contention. On appeal by the mother, the Court of Appeal allowed the appeal.

* *Present*: LORD REID, LORD EVERSHED, LORD JENKINS, LORD HODSON and LORD DEVLIN.

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The Official Solicitor appealed to the House of Lords:—
Held, allowing the appeal, (1) that the paramount consideration of the Chancery Division in exercising its jurisdiction over wards of court was the welfare of the infants; that this jurisdiction was of its nature a paternal jurisdiction, and that, therefore, a ward of court case partook of an administrative character and was not a mere conflict between parties (post, pp. 218D–219B, 234E–235C, 240A–G).

(2) That the disclosure of confidential reports was a matter of discretion for the judge, and that the mother was not entitled as of right to disclosure of the reports (post, pp. 219C, 232B–C, 234E–235C, 241E–F).

(3) That confidential reports should not be submitted as a matter of routine but only in exceptional cases when the Official Solicitor believed that the disclosure of certain information might be harmful to the infant (post, pp. 222D–F, 235E, 242D–E).

Dictum of Viscount Haldane L.C. in *Scott v. Scott* [1913] A.C. 417, 437; 29 T.L.R. 520, H.L. applied.

Decision of the Court of Appeal [1963] Ch. 381; [1962] 3 W.L.R. 1517; [1962] 3 All E.R. 1000, C.A. reversed.

APPEAL from the Court of Appeal (Upjohn, Davies and Russell L.JJ.).

This was an appeal by the Official Solicitor of the Supreme Court, who was a party in these proceedings as guardian ad litem of two infants, from an order of the Court of Appeal (Upjohn, Davies and Russell L.JJ.) dated October 30, 1962, reversing an order of Ungood-Thomas J. made on July 3, 1962, upon a preliminary point that arose and was determined by the judge at the hearing of the application by originating summons taken out by the infants' mother for an order that the infants be made wards of court and for orders for, inter alia, custody, care and control and access.

The question at issue in this appeal was one of principle, namely, whether a judge of the Chancery Division exercising jurisdiction over infants in wardship proceedings may receive, and treat as part of the evidence before him in reaching his conclusion, a confidential report submitted to him by the guardian ad litem of the infant without disclosing that report to any of the other parties to the proceedings in which the infant's interests are under consideration.

On October 28, 1960, the mother of two infant children, a boy born in June, 1952, and his sister born in July, 1953, applied by originating summons that the infants be made wards of court, and for orders, inter alia, for custody, care and control, and access. The marriage of the mother and father had taken place in December, 1951. In February, 1960, the mother had left the father,

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- A taking the children with her, and they had remained with her. The mother made the father and the children respondents to the summons and when the matter came before the master he directed that the children were not to be served with the proceedings. Evidence was filed by the parents in the usual way upon which the master considered that it was a case in which an order for the appointment of a guardian ad litem of the children should be made, they already technically being parties. On July 21, 1961, the Official Solicitor was appointed.
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- The Official Solicitor made inquiries and interviewed both parents and the children and on October 23, 1961, he made a report by way of a statement of facts to the court in which he stated that before he could make any recommendations he felt the need of medical evidence. He submitted that the mother should be directed to take the infants to see a named qualified medical practitioner in psychiatry. That statement of facts was communicated to both parents and no objection was taken to it at the hearing of the appeal. The statement of facts was accompanied by a confidential report by the Official Solicitor to the court which was not disclosed to the court at the hearing of the appeal or to either parent. On November 23, 1961, the master made an order for the children to attend the named doctor recommended by the Official Solicitor. The children, with their mother, attended the doctor on December 13, 1961. The doctor also saw the father on January 4, 1962, and the mother again on January 31, 1962.
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- The Official Solicitor made a further statement of facts on February 7, 1962, which, after briefly setting out those visits to the doctor by the parties, recommended: (a) that care and control of the infants be given to the mother on condition that she brought them to see the doctor at six-monthly intervals until further order; (b) that the infants continued to be educated at their present schools until further order; (c) that the father be allowed access to the infants every other Sunday between the hours of 2 p.m. and 7 p.m. or such other times as the mother and father might mutually agree. That statement of facts, which was disclosed to the parents, was accompanied by a further confidential report by the Official Solicitor to the court of the same date which was not disclosed to the parents. To that confidential report were annexed reports by the doctor in the form of letters addressed to the Official Solicitor.
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The summons was partly heard in chambers. Ungood-Thomas J. read the confidential reports (and annexures) by the

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Official Solicitor but decided that he ought not either completely to disregard them in reaching his conclusion nor to make a full disclosure of them to the mother personally. It was contended for the mother as a preliminary point that she was entitled as of right to see the whole of the reports of the Official Solicitor, including the doctor's reports annexed to them.

Ungoed-Thomas J. adjourned the matter into open court for judgment on the preliminary point and on July 3, 1962, held, *inter alia*, that the mother was not entitled as of right to insist on disclosure to her of the Official Solicitor's reports. The mother appealed contending that she personally was entitled as of right to see all reports placed before the judge by the Official Solicitor, at all events unless he was prepared completely to disregard their contents in reaching his conclusion, and she asked for an order accordingly. The Court of Appeal allowed the appeal. The Official Solicitor was granted leave to appeal to the House of Lords.

Peter Foster Q.C. and *W. J. C. Tonge* for the Official Solicitor as guardian ad litem. The question is whether in wardship proceedings a judge of the Chancery Division is entitled to receive a confidential report and not disclose it to the parties (the parents) if he considers that disclosure would be detrimental to the interests of the infant. The present is a rare type of case since it is only in the exceptional case that the infant is joined as a party and a guardian ad litem is appointed—usually this occurs where there is a marital battle and it is thought that the interests of the infant may be lost sight of. It is not the practice in the first instance for the infant to be made a party in wardship proceedings: *In re An Infant*.¹ For the case where the ward is forming an association with an undesirable person, see *Practice Direction (Parties to Wardship Proceedings)*.²

It is to be noted, (i) that it is only very rarely that there is need for a confidential report; (ii) that it is only in the exceptional case that it would be necessary in the interests of the infant not to disclose the report to the parent.

As to the jurisdiction in the Divorce Division relating to custody proceedings, see *Fowler v. Fowler and Sine*.³ It is to be observed that the divorce jurisdiction is purely statutory and that there is no provision for confidential reports. Wardship

¹ [1950] Ch. 629; 66 T.L.R. (Pt. 1) 1212; sub nom. *Re S. (An Infant)* [1950] 2 All E.R. 159.

² [1962] 1 W.L.R. 161.

³ [1963] P. 311; [1963] 2 W.L.R. 155; [1963] 1 All E.R. 119, C.A.

- A proceedings, however, are not the creature of statute save in two minor matters and the Chancery jurisdiction is unlimited except in so far as it is curtailed by statute.

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- B The appellant submits that the appeal should be allowed because the wardship jurisdiction now vested in the judges of the Chancery Division was originally paternal and not judicial at all and should only now be exercised in accordance with strict judicial principles and rules of evidence, but the judge may withhold from the parties information available to him which it is, in his view, imperative or necessary to withhold in the interests of the ward, because to disclose it would inevitably cause grave mental or physical harm to the ward.

- C The crux of the matter is: has the jurisdiction in wardship proceedings become wholly judicial proceedings and therefore subject to the normal strict rules of evidence?

The above submission can be divided into six propositions.

1. The origin of the jurisdiction as a purely parental or paternal jurisdiction comes from the Crown acting as *parens patriae*.
- D There is some doubt as to how the jurisdiction commenced before the establishment of the Court of Wards. It derives, it would appear, from the Crown prerogative: *Cary v. Bertie*⁴; *Wellesley v. Beaufort*⁵; *In re Spence*.⁶ That jurisdiction has been delegated to the Lord Chancellor, and by him to the judges of the Chancery Division. The court sitting in wardship proceedings
- E has a duty to protect the interests of the ward. It is a parental and administrative jurisdiction: *per* Viscount Haldane L.C. in *Scott v. Scott*.⁷ See also Chambers on Infants, 1st ed. (1842), p. 10. For the statutes which affect this jurisdiction: see Guardianship of Infants Act, 1925, ss. 1 and 2; Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. Accordingly, if
- F in the exercise of a domestic and paternal jurisdiction the difficult question has to be decided whether to disclose a confidential document then the paramount interest is that of the infant and not the interests of British justice. It is emphasised that this is a parental jurisdiction and not a dispute between parents as to their rights. In exercising this
- G jurisdiction it is not disputed that the judge may see in private the ward, the parents, and counsel. Why, therefore, if the circumstances make it advisable should not the judge visit the ward's home? The answer is that the judge obviously has not

⁴ (1696) 2 Vern. 333, 342.⁵ (1827) 2 Russ. 1, 19.⁶ (1847) 2 Ph. 247, 252.⁷ [1913] A.C. 417, 437; 29 T.L.R. 520, H.L.

H: L. (E.) the time to investigate in this manner and this is where the Official Solicitor comes in. A

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2. Throughout its history the welfare of the child has always been the paramount although not the sole consideration: *In re Thain*⁸; *In re J. M. Carroll*.⁹

3. The idea that it is a judicial proceeding arose from the fact that the Court of Chancery acted according to judicial principles and not arbitrarily. But this does not mean that the jurisdiction is to be exercised strictly under the normal rules in respect of principles and practice if so to do is not in the best interests of the child: *In re Fynn*¹⁰; *Reg. v. Gynghall*.¹¹ B

4. Issues of fact may arise in wardship proceedings between the parties whether one or the other is unimpeachable and such issues should be tried judicially only to the extent that the welfare of the child is not at risk. It is emphasised that these proceedings are not a *lis* in the usual sense. *Rossage v. Rossage*¹² and *In re J. (An Infant)*¹³ if rightly decided, establish that the rules of evidence must be strictly applied in wardship proceedings and that hearsay is inadmissible. The second respondent will challenge their correctness. The appellant does not so contend. If in wardship proceedings issues of fact arise between the parties as, for example, whether one of them is a drunkard, it is *those issues* which ought to be decided on the strict rules of evidence, but only to the extent that in so doing the welfare of the child is not at risk. See the observations of Viscount Haldane L.C. in *Scott v. Scott*.¹⁴ C D E

Alternatively, it is submitted that hearsay is admissible in this type of proceedings and the judge will give such weight to it as he thinks proper.

5. Since the parties to wardship proceedings may, and often do, use them as a battlefield for a fight between themselves without regard to the interest of the ward, the judge is entitled to inform himself from an independent source if the welfare of the infant is paramount. Thus, the judge is entitled to see the ward privately, and to receive a confidential report. F

6. If in so informing himself the judge gains knowledge of facts, which, if disclosed, may harm the infant, the judge has power to withhold disclosure in taking into consideration his G

⁸ [1926] Ch. 676, 682, 684, 689, 690, C.A.

⁹ [1931] 1 K.B. 317, 336, 342, 349, 350, 355, C.A.

¹⁰ (1848) 2 De G. & Sm. 457.

¹¹ [1893] 2 Q.B. 232, 239, 241, 242

¹² [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600, C.A.

¹³ [1960] 1 W.L.R. 253; [1960] 1 All E.R. 603.

¹⁴ [1913] A.C. 417, 437.

- A final decision. It is not a question, as the Court of Appeal held, of a balancing of two evils, namely, of harming the child or breaking the fundamental rules of British justice and coming down in favour of British justice. It is a beneficial practice that the judge should receive confidential reports from the Official Solicitor. The appellant has been unable to trace the practice further back than 1928. It is inconsistent to hold that the child's welfare is paramount and then to order disclosure although so to do would be detrimental to the child. Davies L.J.¹⁵ stated that the fact that in other jurisdictions one finds provision for the reception of confidential reports made by statute points to the conclusion that the power to receive such reports does not come within the Crown's prerogative. It is submitted that this is not so but rather that the true view is that in this type of domestic jurisdiction reports of this character *are* receivable unless a statute provides to the contrary.
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- As to Upjohn L.J.'s approval¹⁶ of the applicability here of *Board of Education v. Rice*,¹⁷ it is not that the usual rules of evidence do not apply in wardship proceedings but that occasionally in this type of domestic jurisdiction they have to give way in the interests of the welfare of the child.
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- W. A. Bagnall Q.C.* and *Mark Nesbitt* for the second respondent, the father. The appellant's argument is adopted in toto save in so far as it relates to *Rossage v. Rossage*.¹⁸
- E Even if the appellant's argument concerning the ambit of this jurisdiction is, as stated by the Court of Appeal, contrary to the principles of natural justice, this does not vitiate it because the Guardianship of Infants Act, 1925, made the interests of the infant paramount.

- There have been three different types of jurisdiction over infants: (1) At common law the father had the absolute right to the custody of his children as against the whole world unless there was grave and specific misconduct on his part. Before the Judicature Act, 1873, the common law courts were only concerned with enforcing the rights of the father. (2) Jurisdiction in Chancery before the Judicature Act, 1873. The Court of Chancery would decide an infant question in accordance with what was considered to be in the best interests of the child, subject to the qualification that as between a father and a mother the rights of the father should be superseded only if he had so
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¹⁵ [1963] Ch. 381, 413.¹⁶ *Ibid.* 403.¹⁷ [1911] A.C. 179; 27 T.L.R. 378.
H.L.¹⁸ [1960] 1 W.L.R. 249.

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conducted himself or had shown himself to be a person of such A
a description that it was essential that such a step should be
taken in respect of his parental rights. In other words, the
Court of Chancery was entitled to supersede, or interfere with,
a father's rights on wider grounds than at common law. (3) The
Guardianship of Infants Act, 1925, introduced a new principle B
into the law in that the welfare of the child was made the
paramount interest, and as between the parents the claims of
the father and the mother are equal, and neither of them has
rights capable of being superseded in favour of the other but
their respective claims must be weighed in relation to the best
interests of the child.

Accordingly, today, where an infant is made a party to C
proceedings involving a question of custody as between the
parents, and the infant's guardian ad litem submits a report to
the court, the judge is entitled to pay regard to its contents but
he is nevertheless entitled to refuse to disclose its contents in
whole or in part when so to do would be prejudicial to the infant's D
interests. On the other hand, the case is completely different
where the dispute is between the parents on the one side and
a third party, for example, an uncle, on the other, for in these
circumstances it would be quite wrong for the court not to
disclose a confidential report where its effect is to deprive the
parents of their joint legal right to the custody of their child.

R. W. Goff Q.C. and *N. C. H. Browne-Wilkinson* for the first E
respondent, the mother. A strict application of the rules of
evidence is in the best interests of the infant, for if there is
disclosure of the contents of a report its truth or otherwise can
be tested and the parents are not left with a sense of grievance.
The appellant's proposition is vitiated by the fact that the
statements in a confidential report may be false. Further, how F
is a judge to determine when it is imperative not to disclose the
contents of a report?

The court cannot receive a hearsay report: *Rossage v.*
*Rossage*¹⁹; *In re J. (An Infant)*.²⁰ Alternatively, if it is receiv- G
able there cannot be a confidential report; it must be disclosed so
that its contents may be tested by cross-examination in the usual
way. It is an admitted exception that the judge may see the
ward privately, but that is so as to ascertain the ward's wishes
and not so as to elicit facts. That exception should not be
widened.

¹⁹ [1960] 1 W.L.R. 249.²⁰ [1960] 1 W.L.R. 253.

A The court cannot receive a report because this being a judicial proceeding it violates the rules of evidence in that it is based on hearsay and is unsworn. Alternatively, if it is receivable, then it must be disclosed for otherwise it contravenes the rules of natural justice.

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B This jurisdiction no doubt derives from the Crown but its exact origin is obscure: *Wellesley v. Beaufort*.²¹ But it is plain that it is not a power delegated to the Chancery judges as an administrative or executive function of their office. In *In re Fynn*²² there is no suggestion that in exercising this jurisdiction the judge is sitting as an executive officer, indeed, it is emphasised that the court is there sitting as a court of justice administering the jurisdiction in accordance with the usual rules of a court of justice. This concept is developed in *Reg. v. Gyngall*²³ where it is significant to note that it was an application by the mother. Further, it is to be observed that although the proceedings started as habeas corpus proceedings the court stated that it was proceeding under the Judicature Act, 1873, and exercising the Chancery jurisdiction. The Court of Appeal recognised that the Chancery jurisdiction is a "judicially administrative jurisdiction." It is a *judicially* administrative jurisdiction which overrides rights and it is therefore particularly important that it should proceed in accordance with judicial principles and the rules of natural justice. There may be certain exceptions which arise in practice or under the rules, for example, that of the judge seeing his ward in private. But the fact that there is such an exception does not justify the establishment of a much wider and more serious exception such as that contended for here.

E *In re Thain*²⁴ endorses the view that these are judicial proceedings. It cannot be said that any court can be "judicially satisfied" if it is going to act on secret information which cannot be tested in accordance with the usual rules of evidence. See also *In re J. M. Carroll*,²⁵ *per* Greer L.J.. There is no authority which supports the proposition that the court is entitled here to override this fundamental principle of natural justice. The Guardianship of Infants Act, 1925, strengthens this respondent's argument for it gives to the mother rights equal to those of the father. It is emphasised that this is a judicial proceeding and that the mother and father have equal rights in contending what

²¹ 2 Russ. 1, 20.²⁴ [1926] Ch. 676, 682, 689-691.²² 2 De G. & Sm. 457, 474.²⁵ [1931] 1 K.B. 317, 343.²³ [1893] 2 Q.B. 232, 239.

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is for the child's benefit. If no one had any rights in the proceedings then different considerations might arise. A

The rules of court apply equally to this parental jurisdiction as they do to the equivalent divorce jurisdiction and reliance is placed on *Rossage v. Rossage*²⁶ and *In re J. (An Infant)*.²⁷ Alternatively, if they do not, the rules of natural justice apply. If the Official Solicitor proposes to put certain facts before the court then this should be done in the usual manner by way of affidavit. He cannot adopt a procedure of his own. *In re L. (Infants)*²⁸ underlines the fact that although the care and welfare of the child is a paramount consideration the claims of justice cannot be overlooked. The fact that in practice it is correct in certain cases from time to time to dispense with the strict rules of evidence does not vitiate the argument that those rules do apply to this jurisdiction. *In re E. (An Infant)*²⁹ and *In re B. (An Infant)*³⁰ show that even in adoption proceedings where there is special statutory provision for confidential reports there is no inherent jurisdiction to use them for purposes outside the ambit of the provision, namely, to ascertain whether a parent's consent to an adoption order had been unreasonably withheld. A confidential report cannot be used to deprive parents of their rights. B C D

Even if this jurisdiction be administrative, nevertheless it is one of a character to which the principles of natural justice apply since the judge is dealing with parental rights. The principles of natural justice do apply to administrative and executive officers and trustees where they have to make decisions concerning rights. The absence of a lis between the opposing parties is not a decisive feature. It follows that the judge must give all parties (i) a full opportunity to be heard; (ii) a fair opportunity to endeavour to correct or contradict any statement prejudicial to their interests. The principles of natural justice should never be departed from. If there are exceptions this is not one of them. For the general principles applicable to administrative tribunals and the like, see *Board of Education v. Rice*³¹; *Local Government Board v. Arlidge*³²; *Errington v. Minister of Health*³³; *Ceylon University v. Fernando*³⁴; *Kanda v. Government of Malaya*³⁵; *Ridge v.* E F G

²⁶ [1960] 1 W.L.R. 249.

²⁷ [1960] 1 W.L.R. 253.

²⁸ [1962] 1 W.L.R. 886; [1962] 3 All E.R. 1, C.A.

²⁹ The Times, March 24, 1960.

³⁰ The Times, March 25, 1960.

³¹ [1911] A.C. 179.

³² [1915] A.C. 120; 30 T.L.R. 672, H.L.

³³ [1935] 1 K.B. 249; 51 T.L.R. 44, C.A.

³⁴ [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.

³⁵ [1962] A.C. 332; [1962] 2 W.L.R. 1153, P.C.

A *Baldwin*.³⁶ The authorities establish that persons are entitled to know not only of that which is detrimental to them but also of those things which might be detrimental to their interests. *Scott v. Scott*³⁷ does not detract from this respondent's contention that the mother is entitled to learn of anything which affects her parental rights.

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B In fine: (1) This report is objectionable for it is a secret report made on behalf of a party to the proceedings. It is to be noted that, as admitted by the appellant, the furnishing of secret reports is not an old practice. (2) It cannot be for the welfare of the child in the long run to leave the parent with a sense of injustice. (3) How is the judge to decide that it is imperative or necessary to withhold a report in the interests of the ward on the ground that disclosure would be detrimental to the ward's interest? This cannot be decided on the balance of probabilities without it is tested. Further, this ground proceeds on the dangerous assumption that the contents of the report are true.

C *Peter Foster Q.C.* in reply. *Ceylon University v. Fernando*³⁸ shows that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. The requirements of natural justice ought not to be used to defeat the very inquiry under consideration, namely, where the welfare of the infant is the paramount consideration.

E It was contended that confidential reports should not be permitted at all because they are hearsay. This point is not open to the first respondent for the Court of Appeal held that there can be such reports but they must be disclosed and there is no cross-appeal against this decision.

F The appellant is prepared to contend if necessary that *Rossage v. Rossage*³⁹ and *In re J. (An Infant)*⁴⁰ were wrongly decided. There is no reason in principle why a judge should not be able to receive hearsay evidence from any person in wardship proceedings. If there be a limitation on the reception of such evidence it is that the hearsay rule should be strictly applied where allegations are made by one parent against the other.

G It was contended that as a matter of legal history wardship proceedings have always been judicial proceedings. It is to be

³⁶ [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.³⁸ [1960] 1 W.L.R. 223, 231.³⁹ [1960] 1 W.L.R. 249.³⁷ [1913] A.C. 417.⁴⁰ [1960] 1 W.L.R. 253.

H. L. (E.) noted, however, that the Lord Chancellor was not originally a legal personage and that in origin the Court of Chancery was administrative in character. A

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As to *In re L. (Infants)*,⁴¹ that was correctly decided because in the circumstances pertaining there the mother could not be said to be an unimpeachable parent. As to *In re E. (An Infant)*⁴² and *In re B. (An Infant)*,⁴³ the answer is to be found in the fact that Roxburgh J. was proceeding under section 7 of the Adoption Act, 1958. B

Their Lordships took time for consideration.

July 23, 1963. LORD REID. My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend Lord Evershed and for the reasons which he gives I agree that this appeal must be allowed. C

LORD EVERSHERD. My Lords, this case has come before your Lordships in circumstances that are most unusual and, as I venture to think, equally unsatisfactory and in a sense distressing. Your Lordships are asked to answer what is posed as "a pure question of law" with no knowledge of the facts save in the barest outline; and to do so in circumstances in which the question ultimately for the court's decision is the welfare and upbringing of two young children born respectively in June, 1952, and July, 1953, both of them wards of court. They were made wards of court in October, 1960, over two and a half years ago, upon the issue in the Chancery Division of an originating summons in appropriate form by their mother (who is a respondent before your Lordships) asking that her children be made wards of court and that their care and custody should be committed to her. The summons was served upon the applicant's husband, who has also been a respondent before your Lordships. The children were themselves (incorrectly) made parties originally to the summons but by order of the master in the Chancery Division the summons was not served upon them. D E F

The marriage of the respondents has unfortunately come to grief, the mother having in February, 1960, left the father, taking the two children with her. G

After the issue of the summons a considerable amount of evidence was put in by both the respondents. Your Lordships were given to understand that such evidence demonstrates a state

⁴¹ [1962] 1 W.L.R. 886.

⁴³ The Times, March 25, 1960.

⁴² The Times, March 24, 1960.

A of acute hostility now unhappily subsisting between husband and wife. Your Lordships, however, have seen none of it. It was in these circumstances—and due no doubt to the sharpness of the conflict between their parents—that the master on July 27, 1961 (10 months after the issue of the summons), felt obliged to order and ordered that the Official Solicitor should be appointed to act as guardian ad litem of the children. What followed was, as I understand, in accordance with the practice at present prevailing when the Official Solicitor is appointed as guardian ad litem. On October 23, 1961, the Official Solicitor put in a brief statement of facts stating no more than that he had been appointed guardian ad litem of the children and that since his appointment he had perused the “ voluminous evidence ” and personally interviewed the two infants and their parents. He asked, in order to assist him in making a recommendation to the court, that the mother be directed to take the infants to see the medical director of a child guidance clinic: and an order to that effect was made.

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The mother then attended upon the doctor with her two children on December 13, 1961, and thereafter the doctor saw separately both the father (on January 4, 1962), and the mother (on January 31, 1962). The next step was the submission by the Official Solicitor of another statement of facts dated February 7, 1962, reciting the attendances above mentioned upon the doctor and “ as a result of his investigations ” submitting that the care and custody of the two infants be committed to the mother on condition that she should take them to see the doctor at six-monthly intervals and that the father should be allowed to have access to the children at the intervals suggested in the statement.

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So far the case seems indeed straightforward enough and it is to be noted that the Official Solicitor’s proposal as regards care and custody of the children was in accordance with their mother’s application in the originating summons, subject only to the condition of her taking them twice a year to the doctor. It is, however, also the fact that upon each of the occasions when the Official Solicitor submitted his statements he presented also to the court (in accordance with what your Lordships were informed is not infrequently done by the Official Solicitor in such cases) reports described as confidential. These reports were seen by the learned judge, Ungood-Thomas J., but were not disclosed to either of the parents of the children and (if I may add and emphasise) they likewise have not been seen either by the Court of Appeal or by your Lordships. It was the view of the learned judge and the view also (as your Lordships

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H. L. (E.) were informed) of the Official Solicitor himself and his learned A
 1963 counsel that disclosures of these reports would be seriously harm-
In re K. ful to the children though it appears also that the learned judge
 (INFANTS). was proposing to take some account of them in arriving at his
 Lord Evershed decision.

No decision has, however, been made; for at this stage in B
 the proceedings the mother took the point that she was, as a
 matter of right, entitled to see the reports on the general ground
 that, in accordance with the principles upon which cases are
 determined by the judges in English courts, including the principles C
 of natural justice, it was wholly wrong to withhold from a party
 to the proceedings any statement or information made which
 reflected or might reflect upon that party or upon his or her
 qualities or character without giving to him or her an opportunity
 of challenging or correcting them. It was also said with some
 force by Mr. Goff on the mother's part that if the children's
 mother were given the care and custody of the infants on the
 condition of their seeing the doctor at six-monthly intervals she
 was at least as a "self-respecting parent" entitled to know D
 what it was in the condition of the infants which called for these
 repeated medical interviews—and that in the absence of such
 knowledge it would be very difficult for her properly to perform
 her parental duties and therefore would be to the disadvantage
 of the children themselves. But apart from, and indeed over- E
 riding, this point was Mr. Goff's submission that on the principles
 of justice she must as a party to the proceedings be entitled to
 see (and if necessary to challenge) all the material on which the
 judge would be acting. In so contending it is plain that the
 mother feels that the reports in some degree reflect upon her
 character or condition. Whether they so do in fact is, of course,
 wholly unknown to your Lordships who, as I have said, are asked F
 to decide this matter without reference to the facts and in sub-
 stance as an academic question. I should state that Mr. Bagnall,
 who appeared before your Lordships on behalf of the children's
 father, supported the argument of Mr. Foster for the Official
 Solicitor but reserved the right, if your Lordships' decision were
 adverse to the appellant, to contend before the judge in the G
 Chancery Division when the matter came again before him,
 that in the circumstances of the case care and custody of the
 children ought not to be committed to their mother. When the
 matter was before Ungood-Thomas J. the suggestion was made
 that the learned judge should disclose to the parties' legal advisers
 the contents of the confidential reports provided that they were

- A not disclosed to the parties personally; and the judge was indeed ready and willing so to do. As Upjohn L.J. observed ¹ in the Court of Appeal "this is an excellent and commonsense practice "and, until this case, I have never known any objection to it." But, unfortunately, when the judge suggested it in the present case the mother instructed her counsel that he should not receive
- B any information derived from the confidential reports unless such information were also made available to her. The learned judge went on to observe ¹ that this attitude of the mother "may seem "surprising having regard to the disclosed recommendation of the "Official Solicitor in his second statement of facts to the effect "that the mother should have the care and control of the chil-
- C "dren." But there, unfortunately, it is: and, as I have said, the learned judge was then invited, without making any decision on the substance of the originating summons, to decide whether the mother had in truth any such right as she claimed and alleged.

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- Ungeod-Thomas J. concluded the question in the Official
- D Solicitor's favour. In his Lordship's view ² the jurisdiction of the Chancery Court regarding wards of court being derived from the prerogative of the Crown as *parens patriae* was not to be treated as subject to the rules applicable to any ordinary lis between parties but partook "of an administrative character." In his view ³ "where the paramount purpose is the welfare of
- E "the infant, the procedure and rules of evidence should serve "and certainly not thwart that purpose." The learned judge noted the well-known statement of Viscount Haldane L.C. in the case of *Scott v. Scott* ⁴ justifying, in cases of this kind, departure from the ordinary rules of public hearing; and he derived support from the statutory powers of the court to receive confidential
- F reports under section 109 of the Mental Health Act, 1959, and rule 14 of the Adoption (High Court) Rules, 1959, promulgated under section 9 of the Adoption Act, 1958, which he thought were essentially analogous. He held, therefore, that the children's mother was not entitled as of right to disclosure of the Official Solicitor's reports. The learned judge went on further to conclude
- G that in cases of this kind hearsay evidence was properly admissible.

The Court of Appeal (Upjohn, Davies and Russell L.JJ.) arrived at a contrary conclusion. In his leading judgment,

¹ [1963] Ch. 381, 397.³ *Ibid.* 387.² *Ibid.* 386.⁴ [1913] A.C. 417, 437; 29 T.L.R. 520, H.L.

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Upjohn L.J.⁵ accepted the view taken by the learned judge of the ancestry of the jurisdiction in wardship proceedings of the Chancery judges and that such jurisdiction “. . . is not the “ordinary case of a lis between two contesting parties, it is “quasi-administrative”; and accordingly that the interests of the infant being paramount “the rights, claims or wishes (how- “ever you like to describe them) of the parents or other proper “parties must be . . . given such weight as the judge may consider “proper, in forming his final view.” So to say, however, was not, in the view of the learned Lord Justice, to conclude the matter; for since the proceedings were a judicial inquiry it was fundamental that a properly interested party should have the right to see all information put before the judge and, if need be, to challenge it. If the judge proposes to take such information into account “it cannot be withheld from [the properly interested “party] in whole or in part,”⁶ and the Lord Justice observed that if from such disclosure harm might result to the infant that was but “one of the many distressing results that may arise “when a home is broken.” Davies L.J. strongly supported the same conclusion, giving an unhesitating “no” as his answer to the question whether in wardship proceedings a judge was entitled to see reports or other material not disclosed to the other parties to the proceedings. In the view of Russell L.J., it was a matter of balancing two wrong things the one against the other—the wrong of harming the infant and the wrong of withholding from a person properly a party to the proceedings, especially if a parent, material upon which the judge was proceeding to act; and that such a balance must be tilted in favour of disclosure. Russell L.J. added support from his own experience to the desirability, in case confidential information were put before the judge, of his disclosing it in the first instance to the counsel of the parties in the hope that where disclosure might in truth be harmful to the infant the counsel concerned would be able to persuade their clients not to insist upon their right of disclosure to themselves. I should add that the learned judges in the Court of Appeal (in the case of Davies L.J. perhaps more guardedly) held that it is or may be proper in cases of this kind for the judge to see the infant privately and for him to receive also hearsay evidence and even confidential information (subject to the rights of the interested parties to see it if they

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⁵ [1963] Ch. 381, 403.⁷ Ibid. 406.⁶ Ibid. 405.

A wished and if the judge proposed to act upon it); though it was observed that the practice of submitting confidential reports appeared to be peculiar to the Official Solicitor acting as guardian ad.litem and that (in the view of the court) such practice should be sparingly exercised.

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B My Lords, I have referred in the terms that I have to the judgments in the courts below because, in large measure, they respectively represent the essence of the arguments put to your Lordships and also because I am well content to accept what was common to both as regards the history and nature of that very special and, as I believe, very useful jurisdiction of the Chancery judges. I do not need to recite again the authorities, and particularly the judgment of Lord Esher M.R. in *Reg. v. Gyngall*,⁸ for the view that the judge, in exercising this peculiar jurisdiction, must do so judicially, and also the authorities, and particularly that of Eve J. and the Court of Appeal in *In re Thain*⁹ that though in these cases the welfare of the infant is paramount, the parental position of its mother or father must also be considered. I agree too, wholly, with the Court of Appeal that to call the proceedings "administrative," or "quasi-administrative" is not thereby to justify the ousting of the principles properly applicable to a judicial inquiry; and also that no true assistance can in the present case be derived by way of analogy from the statutory powers conferred by or under the Mental Health Act, 1959, or the Adoption Act, 1958.

E But, my Lords, I cannot think, because this jurisdiction is essentially judicial in its exercise, that since there may arise a conflict between the paramount interest of the infant which the court is concerned to promote on the one hand and the rights on the other hand which according to proper principles of justice generally belong to other persons properly parties to the proceedings, and since therefore, in the language of Russell L.J., there has to be a "balancing" of these considerations, the process is one which, if no escape can be found, must inevitably be concluded by choosing the course thought likely to be harmful to the infant. My Lords, I think it not enough to say that the proceeding is a judicial proceeding. It is necessary to define or to have in mind what is the true character of this judicial proceeding and what is its end or purpose. In the recent case before the Privy Council of *Ceylon University v. Fernando*¹⁰ it was claimed that

⁸ [1893] 2 Q.B. 232; 9 T.L.R. 471, C.A.

⁹ [1926] Ch. 676, C.A.

¹⁰ [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.

H. L. (E.) 1963 <i>In re K.</i> (INFANTS). Lord Evershed	A B C D E F G	the determination on behalf of the university of an inquiry into the conduct of a student sitting for an examination, who was alleged to have had some access in advance to the contents of an examination paper, must be set aside because the student had not in accordance with natural justice been given the opportunity of cross-examining the witnesses against him. The plea was in the circumstances of the case rejected; and my noble and learned friend Lord Jenkins, in delivering the judgment of the Board, cited and applied¹¹ the observations of Tucker L.J. (as he then was) in the case of <i>Russell v. Duke of Norfolk</i>¹² as follows: “ There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. “ The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration, and so forth.” My Lords, I would adopt Lord Tucker’s language and apply it to the present case. It is not in doubt that a judicial inquiry concerning the proper steps to be taken for the care and maintenance of a ward of court is subject—and necessarily subject because of the nature and purpose of the inquiry—to a procedure in many respects quite special. The case is normally heard in private and it is conceded that the judge may properly see—that it may be his duty to see—the infant (and perhaps one or other or both parents) in private; and it is important to have in mind that in ordinary circumstances no final order is ever made. I venture to repeat and to emphasise that the aim and purpose of the judicial inquiry is the benefit of the infant and for such purpose to make a decision about its immediate future upbringing or control. For such purpose also the infant is in relation to the court in a special position distinct from that of other parties—for he or she is a ward of the court, a “ child-in-law ” of the court exercising the ancient prerogative and parental jurisdiction. If this be so, then it cannot, as it seems to me, be right that the court is always compelled in circumstances such as have arisen in the present case to choose the lesser of two evils, to do that which in the court’s view will be against the infant’s interest and to console itself in so doing by regarding the result as a distressing consequence of a broken home. If the court is compelled so to act then it is surely disqualifying and disabling itself from exercising the judicial function with which it is invested.

¹¹ [1960] 1 W.L.R. 223, 231.

¹² (1949) 65 T.L.R. 225, 231; [1949] 1 All E.R. 109, C.A.

- A My Lords, I should indeed be sorry to think that this ancient and most useful function of the Chancery judges should be so disabled. The jurisdiction is not only ancient but it is surely also very special, and being very special the extent and application of the rules of natural justice must be applied and qualified accordingly. The judge must in exercising this jurisdiction act judicially; but the means whereby he reaches his conclusion must not be more important than the end. The procedure and rules, in the language of Ungood-Thomas J., should serve and not thwart the purpose.
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- It follows, therefore, in my opinion, that there cannot be in circumstances such as exist or as are suggested in the present case, an absolute right on the mother's part to see the report of the Official Solicitor. On the other hand, I have equally no doubt that the judge must give very great weight indeed to the principle that he should not base a conclusion adverse to a proper party to the proceedings (and particularly a parent) upon information which that party has not seen and has had no opportunity of challenging or contesting. When a situation arises such as has in the present case arisen, there may well indeed have to be, in the language of Russell L.J., a "balancing" of the generally accepted right of a properly interested party, particularly a parent, to disclosure of information submitted to the judge upon which he proposes in some measure to base his conclusion (on the one hand) and the paramount interest of the ward of court (on the other hand). It may, however, be that, in such a situation, the latter consideration upon the balance should outweigh the former. But in reaching such a conclusion the judge must in the first place be well satisfied that the confidential information to which he proposes to pay regard is in truth reliable. When, therefore, the information is derived from some statement attributed to the ward, he should (I would say) see the ward himself. And I add that in cases such as the present where (it may be) the information is derived from the doctor, the judge will bear in mind that upon many matters medical opinion is apt to differ. In the second place the judge must plainly have in mind that if (as in the present case) information is withheld from a parent, he or she will or may go from the court with a sense of grievance which may well be to the real disadvantage of the infant. It must therefore follow that a judge should not reach such a conclusion without the relevant disclosure to the party or parent save in rare cases and where he is fully satisfied judicially that real harm to the infant must otherwise ensue.
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My Lords, I am well aware that this statement of my view will be regarded as extremely imprecise, though I hope in the end of all in this case it may not be unhelpful. But for my part I find it impossible to arrive at any greater definition and therefore prefer not to accept the amended formulation of his case by Mr. Foster to the effect that the withholding of information by the judge must depend upon his view that it is "imperative or "necessary" so to do in order inevitably to avoid causing grave mental or physical harm to the ward. I am concerned only to express my view that though the judge must indeed attach very great weight to the principle I have stated, there can be no unqualified right on the part of a parent or other proper party to disclosure of information supplied to the judge unless the judge wholly rejects such information in arriving at his conclusion. I accept entirely the view of Upjohn L.J.¹³ that "the rights, claims "or wishes (however you like to describe them) of the parents or "other proper parties must be . . . given such weight as the "judge may consider proper, in forming his final view." But I cannot deduce from that premise the conclusion that, if the conflict arises, the "right" of the parent to disclosure must inevitably override what the judge regards as the best interest of the ward. The interest of the infant is the paramount interest and purpose of the jurisdiction. Disclosure or no disclosure therefore must in the end remain a matter for the judge's discretion; but being such, its exercise will be subject to the right of the party who has been, or thinks he has been, adversely affected, to challenge the exercise of the discretion in the Court of Appeal; and it will then be for the Court of Appeal, seeing the information, to review the judge's exercise of his discretion upon it. It is at this point that I must emphasise the misfortune in the present case of the matter coming before your Lordships, as it has done, upon what is said to be a "pure question of law" but in truth as an academic question—almost, I should say, as an academic mystery. I venture to remind your Lordships that we are upon the appeal still exercising as regards the two infant wards of court the special jurisdiction of the court derived from the royal prerogative as *parens patriae* and that we cannot escape the duty, in answering "the pure question of law" posed before us, of treating the interests of the wards as the paramount consideration. I note also that during the period of more than 2½ years since the infants became wards of court they have continued to be in the care and

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¹³ [1963] Ch. 381, 403.

A custody of their mother and that it is now 18 months since they saw the doctor. Yet your Lordships were informed by Mr. Foster that the Official Solicitor as their guardian ad litem was satisfied with their condition and with the way in which they have been looked after.

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 Lord Evershed

B It follows, therefore, in my view, that your Lordships should allow the appeal and refer the matter back to the Chancery Division. In all the circumstances of the case it has on the whole seemed to me that the best course in the interests of all the parties concerned and, most of all, of the wards of court, will be that the case should be heard by some judge of the Chancery Division other than Ungood-Thomas J. In so saying it will be understood

C that I am not in any way whatever criticising or casting the slightest reflection upon the learned judge whom I have named and with whose decision I am indeed in accord. But I am aware that in these cases feelings are apt to run somewhat high. The mother of the wards, whose assertion of a right to disclosure I would reject but to whose care and custody the Official Solicitor

D has proposed that the wards be committed, may still entertain strong feelings in the matter. It has, therefore, seemed to me that with advantage to all concerned the case should be remitted to some other judge of the Chancery Division whose duty it will be to consider all the material available, including the confidential reports of the Official Solicitor, and to reach a conclusion upon

E the question raised in the originating summons. In so doing the judge must in the exercise of his discretion determine to what extent, if at all, he will regard it as proper, upon the principles which I have endeavoured to state, not to disclose to either parent anything in the reports which he will regard as material in reaching his conclusion. I express the earnest hope that if and

F so far as he may regard it as his duty not to disclose material in the reports relevant to his decision he will be able to avail himself successfully of the practice commended by Upjohn and Russell L.JJ. of disclosure to the learned counsel concerned. I find it difficult to believe that if their mother and father have the interests of these children truly at heart they will not permit

G their counsel at least to co-operate with the judge to this extent. But, as I have said, should it not be found possible by these or other means for the judge to reach a conclusion satisfactory to the parents and if, nevertheless, the judge in his discretion feels compelled to conclude that he should not disclose to the parents some material in the reports upon which he will at least in part found his conclusion, it will be open to either parent to challenge

H. L. (E.) in the Court of Appeal the correctness of the judge's exercise of his discretion. A.

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It remains for me to express my view upon certain other matters raised in the arguments before your Lordships. In the first place I agree with the learned members of the Court of Appeal in expressing some dissatisfaction with what your Lordships were told was the general practice of the Official Solicitor when acting as guardian ad litem to submit confidential reports. B

I am fully conscious of the responsibility and difficulty cast upon the Official Solicitor when required to act as guardian ad litem of wards of court in cases of this kind; and I have no doubt at all of the great service that has been rendered to wards of court by the Official Solicitor in that capacity. But your Lordships have been informed that the practice of submitting confidential reports is peculiar to the Official Solicitor and is not followed by other persons when acting as guardians ad litem and further that such practice cannot be traced further back than about the year 1928. C

Again I appreciate that the position of the Official Solicitor is in material respects special—he is a complete stranger to the wards and to their family. Nevertheless, the arguments in the present case have satisfied me that the submitting of confidential reports as a general practice is not to be recommended. I do not doubt that occasions may sometimes arise (having regard again to his peculiar position) when the Official Solicitor may strongly feel that information which he has obtained should be submitted confidentially to the court; and in such cases he will be entitled so to do. But in my opinion the “right” should be very carefully and strictly exercised—exercised, that is to say, only when in the Official Solicitor's view the information must in the interest of the ward be submitted to the judge but yet in his opinion should not without the judge's authority be communicated to the other parties to the proceedings; and in such cases the Official Solicitor should, in my view, state to the judge the reasons that have persuaded him to take such a course. D E F

There were also raised in the arguments before your Lordships certain other questions relating to the validity of the practice followed in wardship cases. It was conceded that the judge may properly see the ward in private and also, as I think, one or other of the parents and even other interested parties. But it was contended by Mr. Goff that the practice of receiving and acting upon hearsay evidence was wrong, and upon this point he relied particularly upon the decision of the Court of Appeal in the G

- A case of *Rossage v. Rossage*,¹⁴ followed by Cross J. in the case of *In re J.*¹⁵ Mr. Foster, on the other hand, strongly contended that in this special class of case the admission of hearsay evidence was well established and should be permitted—as indeed the Court of Appeal in the present case agreed; and Mr. Foster invited your Lordships if necessary to say that the case of *Rossage v. Rossage*¹⁶ was wrongly decided.

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- My Lords, as the Court of Appeal pointed out, the question of the propriety of admitting and acting upon hearsay evidence was not in truth at all involved in the present appeal. The decision in *Rossage v. Rossage*¹⁶ rested upon the view that a decision in a case concerning the upbringing of an infant was not properly an “interlocutory” matter within the meaning of Order 38, r. 3, of the Rules of the Supreme Court. But since the general question was not really in issue before the House, your Lordships have not had the advantage of any argument upon the meaning properly to be attached to the word “interlocutory” in the relevant rules. In the circumstances I prefer for my part to express no view upon this matter but am content, with the Court of Appeal, to accept the existing practice and let any decision upon its validity await an occasion when it is directly raised.

For the reasons which I have attempted to state I would allow the appeal.

- LORD JENKINS. My Lords, this unfortunate matter arises out of matrimonial differences between a husband and his wife, the immediate question, stated as simply as may be, being, in effect, whether the mother is entitled as of right to disclosure of two reports made by the Official Solicitor as guardian ad litem of the children. The spouses were married on December 31, 1951, and have two children, a boy born on June 19, 1952, and a girl born on July 19, 1953. The merits of the dispute need not detain us. Suffice it to say that in February, 1960, the mother left the father taking with her the two children, who have ever since remained in her care. On October 28, 1960, the mother made the two infants wards of court under the Guardianship of Infants Acts, 1886 and 1925, and the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. On July 27, 1961, the Official Solicitor was appointed guardian ad litem of the two children by order of the master, and appearances were duly entered on their behalf on

¹⁴ [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600, C.A.

¹⁵ [1960] 1 W.L.R. 253; [1960] 1 All E.R. 603.

¹⁶ [1960] 1 W.L.R. 249.

H. L. (E.) August 18, 1961. On October 24, 1961, the Official Solicitor—I
 1963 gather in accordance with the usual practice in such cases—lodged
In re K. in chambers a statement of facts in which he stated that he had
 (INFANTS). interviewed the mother, the father and the two infants, and sub-
 Lord Jenkins —mitted that the mother be directed to take the infants to a
 — named psychiatric specialist. On the same date the Official
 Solicitor also lodged the first of the two reports which have given
 rise to the present controversy. On November 28, 1961, the
 master ordered the mother to take the children for an interview
 with the same specialist and on February 7, 1962, the Official
 Solicitor lodged a further statement of facts in which he stated
 that the mother saw the doctor with the infants on December 13,
 1961, that the doctor saw the father on January 4, 1962, and
 also saw the mother again on January 31, 1962, and recommended
 (inter alia) that the care and control of the infants be committed
 to the mother upon condition that she took them to see the same
 doctor at six-monthly intervals until further order. On the
 same occasion (February 7, 1962) the Official Solicitor also lodged
 the second of the two reports giving rise to the present con-
 troversy, to which were annexed reports by the doctor in the form
 of letters addressed to the Official Solicitor. Both of the Official
 Solicitor's statements of fact were disclosed to the father and
 mother but (as stated above) neither of his reports was so
 disclosed.

On this question of disclosure Ungood-Thomas J., as the
 appropriate judge in chambers, delivered a reserved judgment in
 which (to put his views very shortly) he held that under the
 Guardianship of Infants Act, 1925, the welfare of the infants was
 to be regarded as the first and paramount consideration; that the
 jurisdiction in question was in its nature a paternal and adminis-
 trative jurisdiction as distinct from an ordinary lis between
 parties; that the disclosure of confidential reports was a matter
 for the judge's discretion and, accordingly, that the mother was
 not entitled as of right to disclosure of the reports. In the course
 of his judgment he referred to a well-known passage from
 Viscount Haldane's speech in *Scott v. Scott*¹⁷ to which further
 reference will be made later.

Ungood-Thomas J., in the course of the hearing before him,
 suggested that the reports might be disclosed to the mother's
 and father's counsel. The father was willing to accept this
 arrangement, but the mother was not, claiming that she was

¹⁷ [1913] A.C. 417, 437.

- A entitled as of right to full disclosure of both reports to herself personally. Ungood-Thomas J. was also of opinion that the judge in wardship proceedings should be able to obtain through a person appointed by the court for this purpose and comparable, as I understood the suggestion, to the welfare officer in the Divorce Division, information, impressions and so forth concerning the ward which the judge might not be in a position to get for himself.
- B In support of his view that the mother was not entitled as of right to the discovery claimed, Ungood-Thomas J. referred to certain reports made confidential by statute, in lunacy and adoption proceedings, the relevance of which in wardship proceedings may perhaps be open to question.
- C The matter thus reached an impasse, to resolve which the mother applied to the Court of Appeal. Her appeal came before Upjohn, Davies and Russell L.JJ. on July 25, 26, 27, 1962, and the Court of Appeal delivered reserved judgments on October 30, 1962, unanimously reversing the decision of Ungood-Thomas J., and the present appeal has resulted.
- D Upjohn L.J., at the beginning of the report of this case in the Law Reports, says this¹⁸: "The question is whether the judge " may receive, and treat as part of the evidence before him in " reaching his conclusion, a confidential report submitted to him " by the guardian ad litem of the infants without disclosing that " report to any other of the parties to the proceedings in which
- E " the infants' interests are under consideration.
- " However, it has not been suggested that it has ever been " the practice (and certainly in my experience I have never " known of it) for a guardian ad litem other than the Official " Solicitor to submit to the court any reports not at the same " time disclosed to the other parties to the proceedings, so that
- F " the real issue is whether the Official Solicitor, as guardian ad " litem, has the right to submit to the judge a confidential report " containing possibly material facts or material opinions of experts " which the judge may receive and take into consideration when " determining the proper order to be made without disclosing it " to any other party."
- G The learned Lord Justice then observed that the application came before the Court of Appeal as a matter of principle, and quite rightly only the barest outline of the facts was put before that court. In contrast to the wife, the father did not seek personally to see the reports.

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¹⁸ [1963] Ch. 381, 395.

Lord Jenkins

As we all know, the Official Solicitor performs many functions of great benefit and utility to the Court of Appeal and to the High Court, and I need only make passing reference to the well-known cases of *Harbin v. Masterman*¹⁹ and *Deutsche Bank v. Banque des Marchands de Moscou*.²⁰ Upjohn L.J.,²¹ however, went on to say that "These cases, though interesting, do not touch upon the point we have to consider, for there was no question of a confidential report being submitted by the Official Solicitor,

21 [1963] Ch. 381, 398.

- A “confidential, that is to say, in the sense of being a report which
 “might be acted upon or taken into account by the court without
 “full disclosure to the parties concerned.”

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- B Of the practice of the court Upjohn L.J. stated that it appears
 to have been the practice since 1806 for the Official Solicitor or
 his predecessor to put before the court when requested a state-
 ment of facts (or state of facts as it was called) and, the learned
 Lord Justice continued, no objection could be taken to that, as it
 was disclosed to both parties.

- C Continuing his observations Upjohn L.J.²² said this concerning
 the Official Solicitor: “For my part I can find nothing in the
 “history of the office of the Official Solicitor, nor in his status
 “nor in the practice of the court, which entitles the judge to
 “act on his confidential reports and any statements thereto
 “annexed without disclosing them to the parties to the pro-
 “ceedings. I can find nothing which places the Official Solicitor
 “in a better position in this respect than any other guardian ad
 “litem. It would indeed be strange if it were otherwise, for the
 D “right of the judge to receive such confidential reports would
 “depend upon the chance that the case is one where it is thought
 “right to appoint a guardian ad litem and the choice falls on the
 “Official Solicitor,” and went on to observe that liberty on the
 part of the judge to act on undisclosed confidential reports “must
 “therefore be justified, if at all, on more general grounds.”

- E The learned judge found support for the view that he could
 act on confidential reports without disclosing them to the parties
 by reference to proceedings in the Court of Protection (under the
 Mental Health Act, 1959), and in proceedings under the Adoption
 Act, 1958, in each of which cases confidential reports are made
 and are not disclosed to the patient in the one case or the natural
 F parents or adopting parents in the other. Upjohn L.J., on the
 other hand, was inclined to criticise Ungood-Thomas J. for
 attaching too much importance to these statutory cases. For my
 part I would regard them as providing little assistance either way.

- G Mr. Foster appears to have drawn the attention of the Court
 of Appeal to a number of ancient reports and authorities which
 Upjohn L.J.²³ did no more than mention because he accepted at
 once the general thesis, which of course could not be disputed,
 “that the Chancery Division is exercising the jurisdiction of the
 “Crown as *parens patriae* delegated to the Lord Chancellor and
 “through him to the judges of the Chancery Division”; and the
 learned Lord Justice went on to refer to Chambers on Infants

²² [1963] Ch. 381, 399.²³ *Ibid.* 401.

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(1842), p. 10, where there is an interesting account of the jurisdiction, and also to the comprehensive statement of the matter by Lord Eldon in *Wellesley v. Beauport (Duke of)*.²⁴

Upjohn L.J. went on to say that he accepted at once that in determining matters in wardship proceedings the court is not merely deciding a lis between two parties as in the ordinary contested action but is deciding what is the paramount benefit of infants. "This again," the learned Lord Justice observed,²⁵ "requires no lengthy recital of authority; it is to be found, of course, in section 1 of the Guardianship of Infants Act, 1925, and the well-known case of *In re Thain*²⁶ decided by Eve J. and approved by this court."

Upjohn L.J. went on to observe²⁷ that it was also clear that the court in infancy matters is exercising a quasi-administrative function and in that connection referred again to the case of *Scott v. Scott*,²⁸ particularly for the following passage from the speech of Viscount Haldane L.C.:

"In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect paternal and administrative, and the disposal of controverted questions is an incident only in the jurisdiction."

"But" (Upjohn L.J. continued²⁹) "it must always be remembered that their Lordships were referring to the practice of the courts in matters of infancy in relation to the question of publicity."

"As Lord Shaw said of such proceedings³⁰: 'The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognised that an appeal for the protection of the court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.'"

"Then," said Upjohn L.J.,³¹ "while it may be that there is no mere lis it is quite clear, as Mr. Goff further points out, that in cases in which the Official Solicitor is not a party as guardian ad litem the ordinary rules of evidence are applied." Support for this proposition is to be found, as Upjohn L.J. has told us, in *Rossage v. Rossage*³² and *In re J.*³³ As, however,

²⁴ (1827) 2 Russ. 1, 19, 20.

²⁵ [1963] Ch. 381, 402.

²⁶ [1926] Ch. 676.

²⁷ [1963] Ch. 381, 402.

²⁸ [1913] A.C. 417, 437.

²⁹ [1963] Ch. 381, 402.

³⁰ [1913] A.C. 417, 483.

³¹ [1963] Ch. 381, 403.

³² [1960] 1 W.L.R. 249.

³³ [1960] 1 W.L.R. 253.

A these cases were not argued before us, I prefer for my own part to express no opinion about them. H. L. (E.)

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I am reluctant to multiply citations but I feel that at risk of repetition I should refer at some length to two cases described by Upjohn L.J.³⁴ as being “of great weight” particularly for the way in which they demonstrate to his satisfaction that the judge (in any wardship proceedings before him) cannot treat the matter as though he were a private parent. If the learned Lord Justice meant to say that the flexibility commonly attributed to the wardship jurisdiction, and constituting its greatest advantage, has somehow been done away with, I cannot agree with him.

“In *In re Fynn* ³⁵ Knight Bruce V.-C. said: ‘Of the present case, I may say, that were I at liberty, as I am not, to act on the view which out of court I should, as a private person, take of the course likely to be most beneficial for the infants, I should have no doubt whatever upon the question of interfering with the father’s power. Without any hesitation I should do so—to what extent and in what manner I do not say. But there may and must be many cases of conduct, many cases of family differences, family difficulties, and family misfortunes, in which, though interposition would be for the interest and advantage of minor children, courts of justice have not the means of interfering usefully, or, if they have the means, ought not to interfere; and the jurisdiction to which the present petition is addressed is one that, infinitely various as are the possible circumstances in which it is applicable, is yet restricted, and I believe wisely restricted, by certain principles and rules from which there can with propriety be in its exercise no departure.’

“Then a little later on he said ³⁶: ‘Before this jurisdiction can be called into action between them it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word “essential” is too strong an expression, it is not much too strong.’

³⁴ [1963] Ch. 381, 404.

³⁶ *Ibid.*

³⁵ (1848) 2 De G. & Sm. 457, 473.

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" In *Reg. v. Gynghall* ³⁷ in this court Lord Esher M.R. said: A
 " " The court must, of course, be very cautious in regard to the
 " " circumstances under which they will interfere with the
 " " parental right. As Knight Bruce V.-C. said in *In re Fynn* ³⁸
 " " the court must not act as if it were a private person acting
 " " with regard to his child. It must act judicially in the exercise
 " " of its power. That its jurisdiction to interfere with the parental B
 " " right is not confined, as was argued, to cases where there has
 " " been misconduct on the part of the parent seems to me clear
 " " from many cases."

" Then after quoting the passage from *In re Fynn* ³⁸ that I
 " have just read, he continued ³⁹: 'That is a clear statement
 " that the court must exercise this jurisdiction with great care, C
 " and can only act when it is shown that either the conduct of
 " the parent, or the description of person he is, or the position
 " in which he is placed, is such as to render it not merely better,
 " but—I will not say "essential," but—clearly right for the
 " welfare of the child in some very serious and important respect
 " that the parent's rights be suspended or superseded; but that, D
 " where it is so shown, the court will exercise its jurisdiction
 " accordingly.'

" The inquiry is therefore judicial and the ordinary principles
 " of a judicial inquiry must therefore be observed. While the
 " welfare of the infants is the paramount consideration, the views
 " and wishes of the parents are entitled to the proper weight. E

" It is, of course, of the essence of the case of the Official
 " Solicitor that the judge would only withhold from the parties
 " information available to him when the welfare of the infants
 " makes it imperative that this course should be followed. Mr.
 " Foster really stated his case in one sentence: 'In such cases
 " 'trust the judge.' Not without reluctance I feel bound to F
 " reject that argument.

" It seems to be fundamental to any judicial inquiry that a
 " person or other properly interested party must have the right to
 " see all the information put before the judge, to comment on it,
 " to challenge it and if needs be to combat it, and to try to
 " establish by contrary evidence that it is wrong. It cannot be G
 " withheld from him in whole or in part. If it is so withheld and
 " yet the judge takes such information into account in reaching
 " his conclusion without disclosure to those parties who are

³⁷ 1893] 2 Q.B. 232, 242; 9 T.L.R.
 471, C.A.

³⁸ 2 De G. & Sm. 457, 473.

³⁹ [1893] 2 Q.B. 232, 242.

- A "properly and naturally vitally concerned, the proceedings cannot be described as judicial." H. L. (E.)

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- In conclusion Upjohn L.J. allowed the appeal. I would express my indebtedness to Davies L.J., who also allowed the appeal, for his careful and interesting judgment and hope that having regard to the fullness of the reports in the Court of Appeal he will not think me discourteous if I pass over passages which I would otherwise have dealt with in more detail.
- B

- It is interesting to note that Davies L.J. says ⁴⁰ some of the submissions made by counsel for the Official Solicitor struck him as astonishing and indeed shocking: "Some of the submissions made in this connection by counsel for the Official Solicitor struck me as astonishing and, indeed, shocking. It was said, for example, that, since the jurisdiction is paternal and administrative, the rules of natural justice are to be wholly excluded and that the judge is entitled to use and act upon—as would any natural parent or guardian—any knowledge or information however obtained, e.g., in his private capacity. These positions are, in my judgment, contrary to principle and authority." He thought the case would not appear to be much advanced by the discussion as to whether there is or is not a lis.
- C
- D

- He said ⁴¹ that "even apart from authority, it would appear obvious that any court adjudicating . . . upon or between such claims or interests must act judicially and in accordance with the ordinary principles and practice of our courts."
- E

- I need not refer again to the cases collected in the report,⁴² which have, I think, been sufficiently noticed. Unfortunately it is easier to pose these problems than resolve them, but some comfort may perhaps be derived from Davies L.J.'s statement ⁴³ to the effect that "the practice that the judge may interview the ward or child, if he thinks fit so to do, is, of course, well established" and . . . "It is obviously entirely different in kind from the receipt by the judge of secret information emanating from unidentified and unidentifiable sources."
- F

- Russell L.J., after balancing (as he put it) the considerations involved as best he could, arrived at the conclusion that it was less wrong that if a party to wardship proceedings insists on disclosure of aspects of a written report of the Official Solicitor which the judge (a) considers relevant to his decision and (b) considers inadvisable (as harmful to the ward) to be disclosed to the parties, the disclosure should be made. Russell L.J. was partly
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⁴⁰ [1963] Ch. 381, 408.⁴² *Ibid.* 409, 410.⁴¹ *Ibid.*⁴³ *Ibid.* 411.

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led to this conclusion by the consideration that, if the judge is misled by the information which he does not disclose, his decision may, unknown to him, lead in some other way to harm the infant. He held it to follow that in the present case the appeal must be allowed.

I must now return to the specific question whether the mother is entitled as of right to disclosure of the two reports made by the Official Solicitor as guardian ad litem of the children. It seems to me, as it did to Ungood-Thomas J., that this question must be answered in the negative, the disclosure (if any) to be allowed in any particular case being essentially a matter to be determined by the judge in the exercise of his discretion. If it were not so, there, so far as I can see, would be an end of any effective control of wards by the court.

If the mother is to be entitled as of right to disclosure of the two reports with which the present application is concerned, I do not see why by parity of reasoning she should not equally be entitled to insist on like disclosure of information from other sources however damaging to the ward such disclosure might be. I appreciate that the welfare of the infant is the paramount consideration, but surely this requirement can only be complied with if the judge or the master on his behalf is given a wide discretion to determine whether the disclosure sought by the parent in the particular case is in the best interests of the ward.

It is objected that the use by the court of undisclosed documents or information in wardship cases is objectionable as offending against the fundamental principle of justice to the effect that anyone against whom a charge is made must be given a fair opportunity of knowing and understanding what the charge is and on what evidence it is based. The question whether in a particular case compliance with that principle should be accorded greater or less importance than the probability, whatever it may be, of damage (if any) to the infant ensuing from such compliance, depends on the facts of that particular case; and any attempt to formulate general pronouncements applicable in all cases will be likely to create more difficulties than it solves.

In conclusion I will content myself by saying that in my belief the time-honoured Chancery jurisdiction in regard to wards of court has in the main worked well and that, speaking for myself, I would deprecate the introduction of major alterations merely for the sake of providing for cases which in actual practice are relatively rare.

I would allow this appeal.

A LORD HODSON. My Lords, this is an appeal from a declaration of the Court of Appeal that the parties to wardship proceedings are entitled as of right (if they so wish) to see the reports and statements of fact made to the court by the Official Solicitor in such proceedings. The court discharged the order of Ungood-Thomas J. to the opposite effect. The learned judge said that only such parts of those reports could be disclosed to the mother of the infants concerned as the court or judge might think fit.

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B This issue has never been raised in an acute form before, no doubt because if ever information has been given of a kind, the disclosure of which to a parent has been considered detrimental to the infant whose welfare is involved, the matter has been solved by disclosure to the legal advisers of one or both parents whose clients have accepted their advice and made no protest of their own. In this case the mother was not prepared to accept this position as, indeed, is understandable, maintaining that her relationship with the infants and to their welfare would be imperilled if she did not know what the information withheld might be.

C by disclosure to the legal advisers of one or both parents whose clients have accepted their advice and made no protest of their own. In this case the mother was not prepared to accept this position as, indeed, is understandable, maintaining that her relationship with the infants and to their welfare would be imperilled if she did not know what the information withheld might be.

D It is not, I think, relevant to the problem to consider the facts of this particular case for neither the Court of Appeal nor this House has sought to ascertain the nature of the reports and all that is known is that the infants, a boy of 9 and a girl rising 10 years of age, are living with their mother, that there is a contest between the parents as to which should have their care and custody, each attacking the other, and that the Official Solicitor acting as guardian of the infants has proposed that the mother should continue to have their care and custody on condition that she takes them to see a medical man, director of a child guidance clinic, at six-monthly intervals until further order. So far as your Lordships are aware, the mother had no choice in the selection of the medical man named in the order but has taken the infants to see him on the direction of the court pursuant to an earlier order and has herself made no counter suggestion based on medical evidence proffered on her behalf. I need only add that the father supports the Official Solicitor on the question now to be determined and expresses his intention to adhere to the stand he has taken hitherto, that is to say, that the infants should be transferred to his control.

E The argument for the appellant as put in his case was that the judge may in his discretion withhold confidential reports in whole or in part from the parties if in his view their disclosure to them would harm the infants. In addressing your Lordships the argument was put in the more restrained form that disclosure

A “and administrative, and the disposal of controverted questions
 “is an incident only in the jurisdiction. It may often be neces-
 “sary, in order to attain its primary object, that the court should
 “exclude the public. The broad principle which ordinarily governs
 “it therefore yields to the paramount duty, which is the care of
 “the ward or the lunatic.”

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B As the passage I have read shows, the subject under considera-
 tion in *Scott's* case⁴⁵ was the jurisdiction of courts to exclude
 the public, not, as here, one of the primary rules of natural justice
 expressed by the phrase *audi alteram partem*, but the conclusion
 I have reached after long hesitation is that one must approach the
 question now under consideration from the point of view expressed
 C by Viscount Haldane when discussing hearings *in camera*. In the
 last resort the welfare of the child must dominate and in those
 rare cases, of which this is one, where the judge has found himself
 unable to disregard a secret and unverified report yet has thought
 the report must not in the child's interest be shown to the parents,
 his view must prevail.

D I have been aided in reaching this conclusion by regard for the
 long established practice of a judge seeing children privately in
 his room when dealing with these cases. No one disputes that
 this practice is free from objection or that these interviews are
 confidential. Reports from other sources, whether from the
 Official Solicitor or from any other source, including the parents
 E of the infant, or welfare officers, should be sparingly and only in
 the most exceptional circumstances treated as confidential. For
 myself I should regard it as undesirable to see the parents
 privately at all except for the purpose of obtaining an introduc-
 tion to the child, but once one admits the existence of the paternal
 jurisdiction extending so far as to admit any confidential informa-
 F tion I do not see how the judge's discretion in this matter can be
 limited to receipt of communications from the infant. When
 there is a contest as to fact and the judge receives conflicting
 reports he will gain no assistance and he must rely upon proof.
 This will normally be given upon affidavit subject to cross-
 examination and the ordinary rules of procedure will be followed,
 G involving the exclusion of inadmissible evidence. See *Rossage*
v. Rossage,⁴⁶ where the Court of Appeal held that the provisions
 of Order 38 are applicable to affidavits sworn in such proceedings.

I would add that there can now be no doubt that there is no
 difference in the jurisdiction exercised by the various divisions of

⁴⁵ [1913] A.C. 417.⁴⁶ [1960] 1 W.L.R. 249.

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the High Court. It so happens that most of these cases are now dealt with in the Probate, Divorce and Admiralty Division where by a Practice Rule reports from welfare officers are received but, so far as your Lordships' information goes, have never been treated as confidential.

Since the Judicature Act the practice of the Chancery Division has prevailed and there is no difference in the manner in which this jurisdiction is exercised whether in the Chancery Division or the Queen's Bench Division or the Probate, Divorce and Admiralty Division. This, I think, has been clear at least since the decision of the Court of Appeal in *Reg. v. Gynghall*⁴⁷ on appeal from the Divisional Court of the Queen's Bench Division. It is implicit in what I have said that the objection to reports whether from the Official Solicitor or welfare officer or from any other source cannot be taken simply upon the ground that such reports will be based from their very nature almost inevitably upon hearsay. It does not follow, however, that the judicial function in infant cases can as a rule be exercised without evidence which when tendered is subject to the same limits as evidence given in other cases. I would allow the appeal. And although this means that the order of the learned judge will stand I do not dissent from the order proposed that in all the circumstances the exercise of his discretion should be reconsidered by another judge of the Chancery Division.

LORD DEVLIN. My Lords, the respondents in this appeal are the parents of two infants who are wards of court. The appellant, the Official Solicitor, is their guardian ad litem. In accordance with the usual practice in wardship proceedings the Official Solicitor, after conducting the necessary investigation, which included the obtaining of a report from the medical director of a child guidance clinic, filed a statement of facts containing his recommendations for the future of the wards. He recommended that the custody should be given to the mother on condition that she brought the wards to see the doctor at six-monthly intervals. No reason has been given for this condition which presumably arises out of something in the doctor's report. This report has not been disclosed. It was annexed to the confidential report, which, also in accordance with the usual practice, the Official Solicitor delivered to the judge in chambers.

In the course of the hearing before the judge the mother asked

⁴⁷ [1893] 2 Q.B. 232.

- A to see the confidential report and she pressed her request to the point of a contention that she had an absolute right to see it which could not be gainsaid. The learned judge, Ungood-Thomas J., was willing to show it to counsel but not to the parents because he considered it would not be in the interest of the wards to do so. He considered the point of principle raised by the mother and decided that he had a discretion to withhold the report. The Court of Appeal unanimously decided that he was wrong and that the mother had the right she claimed.
- B

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- Neither the Court of Appeal nor your Lordships have seen the reports, either that of the Official Solicitor or that of the doctor annexed to it. The question on appeal has not been the review of the discretion, whether it was exercised rightly or wrongly, but the bare point of principle whether there is any discretion at all. The Court of Appeal held, and I agree with them and the contrary has not been seriously argued, that no special privilege attaches to reports from the Official Solicitor. The question is whether the judge can have regard to evidence from any source that is not also laid before the parties. The first respondent, the mother (the father supports the appeal) relies on the fundamental principle of justice that the judge should not look at material that the parties before him have not seen. The appellant replies that this principle has no application to the special jurisdiction in the case of wards which comes from the Crown as *parens patriae*.
- C
- D This is the important issue before the House. But Mr. Goff, for the mother, supports the decision of the Court of Appeal also on the ground that the judge ought not to admit hearsay evidence; for this he relies on *Rossage v. Rossage*⁴⁸ and *In re J.*⁴⁹ The Official Solicitor's report is admittedly all hearsay; and if his argument means that the Official Solicitor cannot report at all,
- E
- F Mr. Goff is prepared to go that far.

- I shall consider first the important issue. Mr. Foster, for the appellant, said initially that the jurisdiction *parens patriae* was part of the prerogative, so that the judge could do as he thought fit except in so far as he was controlled by statute. To say this of the jurisdiction *parens patriae* is as true as, but no truer than, to say it of the administration of justice as a whole. All justice flows from the prerogative. Save in so far as their powers are limited by statute, all judges do as they think fit. But what "they think fit" is not determined by each individually and ad hoc; it is determined by their collective wisdom and embodied
- G

⁴⁸ [1960] 1 W.L.R. 249.⁴⁹ [1960] 1 W.L.R. 253.

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in judge-made rules. In the field of procedure these rules are those which Upjohn L.J. in the Court of Appeal rightly called "the ordinary principles of a judicial inquiry."⁵⁰ They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice. The rule in point here is undoubtedly one of those. There are also rules of less importance designed to aid in the administration of justice and to regulate procedure. They are rules of convenience rather than of principle; and the rule against hearsay, which I shall later have to consider, is among them. No one would suggest that it is contrary to natural justice to act upon hearsay.

But a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice. Obviously, the ordinary principles of judicial inquiry are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded. This is what was so clearly decided in *Scott v. Scott*.⁵¹ That case offers much more than authority for the view, not challenged before your Lordships, that wardship proceedings are an exception to the general principle that justice cannot be done in camera. Viscount Haldane L.C.⁵² sets out the terms on which such exceptions are to be made. After he had considered two exceptions to the general rule that justice must be done in public, namely, wardship proceedings and a case involving a secret process, he states the test which is applicable to both. He says⁵³: "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. "But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. "The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as

⁵⁰ [1963] Ch. 381, 405.⁵¹ [1913] A.C. 417.⁵² Ibid. 437.⁵³ Ibid. 437, 438.

- A “resting in his mere discretion as to what is expedient. The
 “latter must treat it as one of principle, and as turning, not on
 “convenience, but on necessity.”

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- Before I seek to apply this principle in the present case, I must
 deal with what I respectfully think to be a fallacy in the reasoning
 of the Court of Appeal. There is no doubt that whoever adminis-
 B ters the judisdiction *parens patriae* must act judicially, that is to
 say, that there are *some* judicial principles which he must observe.
 He may not, for example, investigate on his own, seek out his own
 sources of information and refuse to listen to what anyone else
 has to say. There is one principle in particular which he is
 required by authority to observe. It is not a principle of judicial
 C inquiry in the sense that it tells him how to conduct the proceed-
 ings. But it is of the same sort because it tells him the method
 he must follow so as to arrive at a just conclusion about the ward's
 welfare. He cannot, as Upjohn L.J. says rightly, treat the matter
 as if he were a private parent. He must be governed by the wishes
 of the natural parents in so far as they agree, or of one parent
 D alone if one only has to be considered, unless he is satisfied on
 good grounds that their wishes should be superseded. This
 principle is established by the authorities that Upjohn L.J. cites
 in his judgment: *In re Fynn*⁵⁴ and *Reg. v. Gynghall*.⁵⁵

- But it is, I think, with respect, erroneous to suppose that
 because the inquiry is judicial, *all* the ordinary principles of a
 E judicial inquiry must be observed. In the jurisdiction *parens*
patriae there are unquestionably some principles of judicial inquiry
 which are not observed. Contrary to ordinary principles, all ward-
 ship proceedings, either final or interlocutory, are held in camera
 and the practice permits the judge to see by himself not only the
 ward but also each parent separately. Mr. Goff disputed the pro-
 F priety of a judge seeing a parent by himself, though he agreed that
 it was something that was done. He did not challenge the pro-
 priety of his sitting in camera or of his seeing the ward. In my
 opinion the ordinary principles of judicial inquiry do not stand or
 fall as a whole. Each must be considered separately and each
 must be submitted to the test propounded by Viscount Haldane
 G L.C.

That test is not easy to pass. It is not enough to show that
 dispensation would be convenient. It must be shown that it is a
 matter of necessity in order to avoid the subordination of the ends
 of justice to the means. I think that the learned judge in this

⁵⁴ 2 De G. & Sm. 457.⁵⁵ [1893] 2 Q.B. 232.

H. L. (E.) case stated and applied the test correctly and I cannot do better A
 1963 than quote from what he said ⁵⁶:

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"The jurisdiction regarding wards of court which is now exer-
 "cised by the Chancery Division is an ancient jurisdiction
 "deriving from the prerogative of the Crown as *parens patriae*.
 "It is not based on the rights of parents, and its primary concern
 "is not to ensure their rights but to ensure the welfare of the B
 "children.

"... Now the legislature, by section 1 of the Guardianship
 "of Infants Act, 1925, has expressly enacted that where, in any
 "proceedings before any court, the custody or the upbringing of
 "an infant is in question, the court in deciding that question C
 "shall regard the welfare of the infant as the first and paramount
 "consideration. A ward of court case is not, therefore, an
 "ordinary *lis* between the parties but partakes of an administra-
 "tive character . . .

"In the ordinary *lis* between parties, the paramount purpose
 "is that the parties should have their rights according to law,
 "and in such cases the procedure, including the rules of evidence, D
 "is framed to serve that purpose. However, where the para-
 "mount purpose is the welfare of the infant, the procedure and
 "rules of evidence should serve and certainly not thwart that
 "purpose. Over a very large field in infant cases, the procedure
 "and rules of evidence applicable to a *lis* between parties serve
 "that purpose admirably and are habitually applied, but they E
 "should never be so rigidly applied as of inflexible right as to
 "endanger or prejudice the very purpose which they should
 "serve. Of course, in general, publicity is vital to the adminis-
 "tration of justice. Disclosure to parties not only enables them
 "to present their case fully but it provides in some degree the
 "advantages of publicity; and it further ensures that the court F
 "has the assistance of those parties in arriving at the right
 "decision. So when full disclosure is not made, it should be
 "limited only to the extent essential to achieve the object of the
 "jurisdiction and no further."

This is the essence of the matter. Where the judge sits as
 an arbiter between two parties, he need consider only what they G
 put before him. If one or other omits something material and
 suffers from the omission, he must blame himself and not the
 judge. Where the judge sits purely as an arbiter and relies on
 the parties for his information, the parties have a correlative

⁵⁶ [1963] Ch. 381, 386, 387.

A right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail.

B It is not necessary for the appellant to show that cases in which disclosure might harm the ward are likely to arise frequently. If it be shown that such cases may arise from time to time in numbers that cannot be ignored, that is enough to justify the conferment of a discretion, albeit one that has to be exercised occasionally and with great caution. In this respect I have no

C experience of my own on which I can draw. But I believe that your Lordships, who are more familiar with this jurisdiction than I am, consider that the possibility of such cases is something to be taken into account. Both the learned judge and the Official Solicitor and his counsel, who knew the contents of the report which has not been disclosed, considered that the

D present was such a case. Russell L.J., in the Court of Appeal, gave from his experience an example of a case of a type which I should think might not be uncommon. He said that he had not disclosed a report of psychiatric treatment of a ward (material to a decision as to the immediate future of the ward) in a case when he was certain that disclosure would result in an

E unbalanced mother badgering the ward for the contents of the report in a manner which could only harm the ward. I am therefore satisfied that the ordinary rule of disclosure ought not to be applied in wardship cases and that it should be permissible for the judge at his discretion to receive and consider material from any source without disclosing it to the parties in the case.

F I do not propose to your Lordships that you should lay down in vacuo any rules about the way in which this discretion should be exercised. But I have indicated that in my opinion it should be exercised with caution and I think therefore that some general observations may be of use. The basis of the discretion is a probability that harm would result to the ward from the disclosure.

G Granted that, there is, I think, a clear distinction to be drawn according to whether evidence or observations from the parents could or could not assist the judge in making up his mind on the point to which the material in question relates. Where there is no allegation against a parent, no point on which he could reasonably want to be heard or on which his evidence could throw light, there is no specific advantage to be gained

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from disclosure to put against the harm it might do. In such A
 a case the discretion can be freely exercised. But when these
 elements are present, the discretion should, in my opinion, be
 sparingly exercised. It must be remembered that the object of
 disclosure, as the learned judge reminded himself, is not merely
 to remove a sense of injury that might otherwise result from
 secrecy, but because secrecy may of itself prevent the point B
 from being fully canvassed and so possibly prevent that course
 being taken, which if the full facts were known would truly be
 in the interests of the ward. I do not think that there can be
 many cases in which a serious and relevant allegation is made
 against a parent which he should not be given the opportunity
 of meeting. But there may be some and it is then inevitable C
 that, towards that parent, justice will not be done. Unfor-
 tunately, in this jurisdiction, it must quite often be the case
 that justice is not done to a parent's claims. The parent who
 has behaved best and who has, as against the other parent,
 established the better right to the enjoyment of the child must,
 unfortunately, often leave the judge's chambers with the feeling D
 that bad conduct has prevailed over good.

The other observation I wish to make is that, in my opinion,
 confidential reports should not be submitted as a matter of
 routine but only in exceptional cases when the Official Solicitor
 believes that the disclosure of certain information may be harm-
 ful to the infant. The present practice can be justified only by E
 the test of convenience, which is not the right test; it cannot
 be justified by the test of necessity.

I turn now to consider the objection on the ground of hearsay.
 Here the test of convenience is the right one. It is agreed that
 the practice always has been to admit hearsay. None of the
 Lords Justices in the Court of Appeal disapproved of this practice F
 nor were they invited to do so. Reports on such matters as the
 conditions prevailing at the school to which it is proposed to
 send an infant or of a house in which he is to reside may often
 be of great assistance and I think that it might often adversely
 affect the interests of the infant if a judge were to be debarred
 from acting upon them. A judge in chambers is, of course, G
 quite capable of giving hearsay no more than its proper weight.
 An inflexible rule against hearsay is quite unsuited to the exercise
 of a paternal and administrative jurisdiction. The jurisdiction
 itself is more ancient than the rule against hearsay and I see
 no reason why that rule should now be introduced into it.

I agree that the liberty to tender hearsay evidence could be

- A abused. I cannot imagine that any judge would allow a grave allegation against a parent to be proved solely by hearsay, at any rate in a case in which direct evidence could be produced. I agree that in such a case if a lot of hearsay material was produced a party might be embarrassed by not knowing what steps he ought to take to meet it. But I think that it is well within the inherent powers of a judge exercising this sort of jurisdiction to deal with such a situation. He can, in a proper case, indicate in advance that he will pay no attention whatever to grave allegations that are based only on hearsay. I do not think that the possibility of abuse should be allowed to outweigh the benefits of continuing the existing practice.
- B

- C The difficulty appears to have arisen quite recently because of a consideration of the terms of Order 38 which deals with affidavits and depositions. Rule 3 prohibits hearsay in affidavits except on interlocutory proceedings. Order 38 contemplates, of course, the ordinary proceedings in which written evidence is not admissible unless on affidavit. Neither it nor any other order can be treated as imposing that restriction on wardship proceedings. Such proceedings are sui generis in this as in many other respects. There is no rule, for example, authorising a guardian ad litem to file a statement of facts or making it proper for him to set out material obtained from the other party to the summons. If, however, the parties in wardship proceedings wish to use affidavit evidence, they must, in my opinion, comply with the rules. I think, therefore, that *Rossage v. Rossage*⁵⁷ and *In re J.*⁵⁸ were rightly decided, but they need not be taken to mean that the judge must disregard altogether hearsay in affidavit evidence unless the proceedings are interlocutory. It would be pedantic for him to tell the party that the offending material must be written out all over again in an unsworn document before it could be received. But he should not attach to the material the superior value of sworn evidence unless it complies with the rules.
- E
- F

- G I would therefore allow the appeal and restore the order of July 3, 1962, made by Ungood-Thomas J. I hope, now that the point of principle has been finally determined and the mother knows that she has no absolute right to see the report, that she will accept the suggestion of the learned judge and allow the report to be shown to counsel only. That is the best way of minimising the risk of injustice being done to her, and I have

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⁵⁷ [1960] 1 W.L.R. 249.⁵⁸ [1960] 1 W.L.R. 253.

- A I think the justices here came to the right conclusion, and in my judgment this appeal should be dismissed.

BEAN J. I agree.

LORD PARKER C.J. I also agree.

- B *Appeal dismissed with costs.*

Solicitors: *Tobin & Co.; K. F. B. Nicholls, Town Clerk, Ilford, Essex.*

- C [COURT OF APPEAL]

REGINA v. GAMING BOARD FOR GREAT BRITAIN,

Ex parte BENAİM AND KHAIDA

- D 1970 March 16, 17, 18, 23 Lord Denning M.R., Lord Wilberforce and Phillimore L.J.

- E *Natural Justice—Statutory board—Duty to be fair—Gaming Board—Suitability of applicants for gaming licences—Duty to have regard "only" to specified matters of suitability—Confidential information received by board—Applicants interviewed—Matters troubling board disclosed to them—Opportunity to know and answer case—Board's refusal to disclose sources of information or give reasons for refusal of certificate—Whether board acting fairly—Gaming Act, 1968 (c. 65), Sch. 2, para. 4 (5) (6).¹*

- F Two French nationals who in 1967 took up residence in the United Kingdom, contracted to buy the controlling shares in Crockford's, an old-established London gaming club, and later became joint managing directors of the club. They applied to the Gaming Board for Great Britain for a certificate of consent to entitle them to apply for a licence for the premises, as required by the Gaming Act, 1968. At a four-hour interview with the board in December, 1969, the applicants were asked, and answered, a wide range of questions based on information

- G ¹ Gaming Act, 1968, Sch. 2, para. 4: "(5) Subject to sub-paragraph (4) of this paragraph, in determining whether to issue to an applicant a certificate consenting to his applying for the grant of a licence under this Act in respect of any premises, the board shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance. (6) For the purposes of sub-paragraph (5) of this paragraph the board shall in particular take into consideration the character, reputation and financial standing—(a) of the applicant, and (b) of any person (other than the applicant) by whom, if a licence were granted on the relevant licence application, the club to which the consent application relates would be managed, or for whose benefit, if a licence were so granted, that club would be carried on, but may also take into consideration any other circumstances appearing to them to be relevant in determining whether the applicant is likely to be capable of, and diligent in, securing the matters mentioned in that sub-paragraph."

already in the board's possession, though its source and detailed content were not disclosed to the applicants. They were then invited to supply further information in writing and did so; but on January 9, 1970, the board refused the certificate. Further requests to the board to indicate which of five specified matters still troubled the board and to consider a new or amended application were unsuccessful, though the applicants were again invited to make further representations on any matters considered relevant. On February 24 the board confirmed their refusal and declined to state their reasons.

The applicants moved the Court of Appeal, pursuant to leave granted by that court, for orders of certiorari to quash the board's decision and of mandamus to require the board to give them sufficient information to enable them to answer any case against them, on the ground that the board had acted unfairly and contrary to natural justice in a matter which would deprive the applicants of valuable rights of property.

At the hearing the board disclosed an outline of their adopted procedure, which stated that applicants were given the best possible indication of matters troubling the board but that the board would withhold the source or content of information which was confidential where disclosure was inconsistent with their statutory duty and the public interest:—

Held, dismissing the motion, (1) that the requirement that the board in determining whether to issue a certificate of consent should have regard "only" to the matters specified in paragraph 4 (5) and (6) of Schedule 2 to the Act of 1968 imposed on the board the duty to act fairly by giving an applicant sufficient indication of the objections against him to enable him to answer them.

Dicta of Lord Parker C.J. in *In re H. K. (An Infant)* [1967] 2 Q.B. 617, 630; [1967] 2 W.L.R. 962; [1967] 1 All E.R. 226, D.C. applied.

(2) That the board had acted fairly and in accordance with natural justice in relation to the present applicants and therefore the court would not interfere with their determination.

(3) That the board, being entrusted with the duty of controlling gaming in the public interest, ought to seek and use all reliable information to enable them to perform their duty; but they were not obliged to disclose the sources or details of their information to an applicant who was not being required to meet charges but only to satisfy the board as to his fitness to apply for a licence. Nor were the board obliged to give their reasons for forming the opinion that a certificate should be refused to a particular applicant.

The following cases are referred to in the judgment of the court:

Attorney-General v. Briant (1846) 15 M. & W. 169.

Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180.

Durayappah v. Fernando [1967] 2 A.C. 337; [1967] 3 W.L.R. 289; [1967] 2 All E.R. 152, P.C.

Hardy's Case (Rex v. Hardy) (1794) 24 State Trials 199.

H. K. (An Infant), In re [1967] 2 Q.B. 617; [1967] 2 W.L.R. 962; [1967] 1 All E.R. 226, D.C.

Kanda v. Government of Malaya [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.

Marks v. Beyfus (1890) 25 Q.B.D. 494, C.A.

Nakkuda Ali v. Jayaratne [1951] A.C. 66, P.C.

2 Q.B.

Reg. v. Gaming Board, Ex p. Benaïm (C.A.)

- A** *Reg. v. Metropolitan Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717, D.C.
Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338; [1952] 1 All E.R. 122, C.A.
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.).
Russell v. Norfolk (Duke of) [1949] 1 All E.R. 109, C.A.
- B** The following additional cases were cited in argument:
Board of Education v. Rice [1911] A.C. 179, H.L.(E.).
Capel v. Child (1832) 2 Cr. & J. 558.
Ceylon University v. Fernando [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.
De Verteuil v. Knaggs [1918] A.C. 557, P.C.
General Medical Council v. Spackman [1943] A.C. 627; [1943] 2 All E.R. 337, H.L.(E.).
- C** *Greene v. McElroy* (1959) 360 U.S. 474.
K. (Infants), In re [1965] A.C. 201; [1963] 3 W.L.R. 408; [1963] 3 All E.R. 191, H.L.(E.).
Liversidge v. Anderson [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).
Local Government Board v. Arlidge [1915] A.C. 120, H.L.(E.).
Maradana Mosque Trustees v. Mahmud [1967] 1 A.C. 13; [1966] 2 W.L.R. 921; [1966] 1 All E.R. 545, P.C.
- D** *Nagle v. Feilden* [1966] 2 Q.B. 633; [1966] 2 W.L.R. 1027; [1966] 1 All E.R. 689, C.A.
Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118; [1968] 2 W.L.R. 893; [1968] 1 All E.R. 763, C.A.
- E** *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81, C.A.
Reg. v. Sykes (1875) 1 Q.B.D. 52.
Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149; [1969] 2 W.L.R. 337; [1968] 3 All E.R. 795, Ungood-Thomas J. and C.A.
Weinberger v. Inglis (No. 2) [1919] A.C. 606, H.L.(E.).
Wiseman v. Borneman [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.).
- F**

MOTION for orders of certiorari and mandamus pursuant to leave granted by the Court of Appeal.

The facts are stated in the judgment of the court.

- G** The applicants, Gilbert Jacob Benaïm and Youssef Khaida, applied to the Queen's Bench Divisional Court (Lord Parker C.J., Ashworth and Donaldson JJ.) for orders of certiorari and mandamus directed to the Gaming Board for Great Britain. Their statement pursuant to R.S.C., Ord. 53, r. 1 (2), stated that they carried on business as, inter alia, managers and owners of gaming clubs. The relief sought was (a) an order of certiorari to bring up for the purpose of being quashed a decision made by the Gaming Board on January 9, 1970, whereby it was decided not to issue a certificate of consent to the applicants under the Gaming Act, 1968; and (b) an order of mandamus directed to the board requiring them (i) to give sufficient information to the applicants to enable them to answer the case against them and (ii) to reconsider the application in the light of
- H**

any further evidence or representations submitted on their behalf; and (c) all necessary and consequential directions.

The grounds on which the relief was sought were:—(i) that the board were wrong in law in refusing to give sufficient information to the applicants to enable them to answer the case against them; (ii) that the board were wrong in law in refusing to give them any or any proper or sufficient reasons for their decision; (iii) that they were wrong in refusing to reconsider their decision in the light of further evidence or oral representations submitted on the applicants' behalf; (iv) that notwithstanding that the board indicated to them, after purporting to make their decision, that they were willing to consider further written representations by reason of the matters in (i) and (ii) above, the board unfairly disabled the applicants from making any further written representations effectively to answer the case against them; and (v) that by reason of the matters above the board acted unfairly and/or contrary to the rules of natural justice in considering the application and purporting to make a decision thereon. The Divisional Court heard the application for leave *ex parte* and refused leave on March 3. On March 4 the application was renewed to the Court of Appeal (Lord Denning M.R., Widgery and Phillimore L.J.J.) which granted leave and directed that short notice be served on the board for the bearing of the motion.

Quintin Hogg Q.C. and *Anthony Lester* for the applicants. The rules of natural justice apply to statutory and domestic bodies as also to judicial or quasi-judicial bodies, and operate whenever the liberty of the subject or established rights of property or reputation or the right to earn one's living or to have a grievance investigated are in dispute. The courts will not impute to Parliament an intention to confer on a subordinate body like the board the right to depart from those rules without express words in the Act or a strong inference to be drawn from the Act; and there is no such express or implied intention in the Act of 1968. On the contrary, the board's jurisdiction in relation to the grant of a certificate is expressly limited by the language of paragraph 4 (5) of Schedule 2 which requires the board to have regard "only" to the matters specified. Sub-paragraph (5) sets out what the board *must* do and sub-paragraph (6) what they *may* have regard to. That language implies some sort of inquiry and imposes on the board at least the obligation to be fair. Whatever definition of natural justice is adopted, the board's conduct in relation to these applicants does not conform with what was said by Lord Reid and Lord Hodson in *Ridge v. Baldwin* [1964] A.C. 40, 66, 133 or by Lord Denning M.R. in *Kanda v. Government of Malaya* [1962] A.C. 322, 337. The board have not acted fairly in relation to the applicants who are being deprived of a right to seek to carry on what may be a profitable business, for the case against them has not been sufficiently disclosed to enable them to answer it; and though the rules of natural justice may not oblige the board to give reasons for their decision after it has been arrived at, the reluctance to do so invites the inference that the reasons are bad. Moreover, if no reasons are given and particulars of the case are not given it is not possible for the court to know whether the board have exceeded their limited jurisdiction by having regard to matters other than

- A those specified in paragraph 4. In the earliest relevant authority, *Capel v. Child* (1832) 2 Cr. & J. 558, Lord Lyndhurst C.B. stressed at p. 573 the necessity to state charges clearly, for unless that is done the rule "audi alterem partem" ceases to have any real or practical value. The obligation to be fair must involve the proposition that the body sitting in judgment does not act on the basis of information or belief which is not disclosed to the person on whom judgment is to be passed. [Reference
- B was made to *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180; *Board of Education v. Rice* [1911] A.C. 179, 182; *Local Government Board v. Arlidge* [1915] A.C. 120; *De Verteuil v. Knaggs* [1918] A.C. 557.] The distinction between administrative and judicial or quasi-judicial inquiries has been largely disposed of by *Ridge v. Baldwin* [1964] A.C. 40. All the authorities on natural justice insist that the man must know what is said about him in sufficient detail to be able to answer the case
- C against him.

[LORD DENNING M.R. Is there any qualification with regard to information so confidential that it cannot be disclosed?]

- The board in their outline procedure have stated that they are entitled to and do protect confidentiality and claim the right to tell an applicant only so much of the case against him as they regard as not confidential.
- D No complaint is made that the informants are not identified; but complaint is made that the board claims the right to act on information without disclosing its content. They only condescend to particulars once—in the letter of February 24 which appears designed to baffle and not to elucidate.

- Cases analogous to the present case which dealt with entry into a profession or calling—as distinct from deprivation of an existing right of property—where the courts said that natural justice should apply in that the person under inquiry should know the case against him: see
- E *Weinberger v. Inglis* (No. 2) [1919] A.C. 606; *Russell v. Norfolk (Duke of)* [1949] 1 All E.R. 109; and *Nagle v. Feilden* [1966] 2 Q.B. 633. Bodies which purport to control entry to a trade or profession ought not to act on information not disclosed to an applicant whose entry to a profession is being refused. That is analogous to the present case. Parliament has
- F set up a board by an Act which is based on the Jockey Club rules and has given that board powers similar to those of the Jockey Club, but has deliberately limited what the board may take into account by the use of the word "only." [Reference was also made to *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456 and *General Medical Council v. Spackman* [1943] A.C. 627.] The Privy Council decision in *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, which concerned the with-
- G drawal of a privilege, should no longer be regarded as safe law since Lord Reid's criticism of it in *Ridge v. Baldwin* [1964] A.C. 40, 77–79.

- On the board's duty to observe natural justice by at least being fair, reliance is placed on *In re H. K. (An Infant)* [1967] 2 Q.B. 617, per Lord Parker C.J. at pp. 629–630, on the duty of an immigration officer (who could not be said to be acting in any judicial capacity) to be fair. The
- H board in their outline procedure appear to say: "We will act as fairly as we think we can; but not quite fairly if we think we cannot." That is an attempt to get the best of both worlds. [Reference was made to *Maradana Mosque Trustees v. Mahmud* [1967] 1 A.C. 13; *Ceylon University*

v. *Fernando* [1960] 1 W.L.R. 223, and *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.]

The scope of possible exceptions, where the rules of natural justice may be overridden, was considered by Lord Reid in *Ridge v. Baldwin* [1964] A.C. 40, 70 et seq., as including ministerial acts, wartime legislation, and cases of the exercise of power on a large scale as a matter of policy where the treatment of an individual is only one of the factors to be considered. [Reference was made to *Liversidge v. Anderson* [1942] A.C. 206.] None of those exceptions applies to this case, where the board are enjoined to have regard only to the suitability of the individual applicant. There are three cases in recent years where the rules of natural justice have been held not to apply: *In re K. (Infants)* [1965] A.C. 201, where the disclosure of reports on an infant might have done harm to the infant and Lord Hodson, at p. 234, commented on the "acute conflict" between two principles in that case; *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, which was concerned with an alien who has no rights and the Home Secretary's exercise of an unfettered discretion; and *Wiseman v. Borneman* [1969] 3 W.L.R. 706, where a tribunal procedure was laid down by the Act and the House of Lords declined to interfere: see the citation in French by Lord Wilberforce at p. 719, which is adopted as apposite to the present case.

The board's outline procedure and the claim that neither the content nor the source of confidential information need be disclosed are dangerous in a trade where there are many unscrupulous people who make false accusations to injure their rivals. If the rules of natural justice apply, they have not been complied with in the present case. If the board have acted on anonymous or confidential information they should say so; their claim that they are not bound to do so is contrary to the express terms of paragraph 4 (5) of Schedule 2 which has been framed (a) to restrict the board's powers and (b) to enable the courts to intervene by inquiring into the board's conduct in a particular case.

Raymond Kidwell Q.C. and *Lionel Read* for the board. The board in the letter of February 24 set out the five matters troubling them, all of which are within the terms of paragraph 4 (5) and (6), and they have not taken into account any matter outside those five heads. In the following general observations on the board's duties and procedure it is emphasised that the present case does not raise any issue of confidentiality.

First, the board are not bound to observe the principles of natural justice contained in the maxim *audi alteram partem*. They are entitled to grant or refuse certificates of consent without giving the applicant an opportunity to be heard.

Secondly, even if the board are obliged to be fair within the terms of Lord Parker C.J.'s dictum in *In re H. K. (An Infant)* [1967] 2 Q.B. 617, 630, that does not import the requirement of *audi alteram partem*. Being "fair" does not preclude the board from being judge in their own cause; and there are other elements of fairness which are not imported into their procedure.

Thirdly, if the principles of natural justice and the duty to be fair do apply to the board's decisions, the court should consider their procedure in the context of the Act and the duties which it lays on the board. The extent to which the courts will require statutory bodies to implement the principle *audi alteram partem* will depend on all the circumstances.

Fourthly, the board, insofar as it had any legal obligation to be fair, has acted fairly in this case; and if in a different type of case they applied their outline procedure, the board would still be acting fairly.

Fifthly, the board are not required to give reasons for their decisions. In some cases there may be blank refusals without any reason given. Tribunals are not bound to give reasons unless directed to do so: see *Rex. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338. The board's inquiry does not come under section 14 of the Tribunals and Enquiries Act, 1958.

The crucial point is the issue of confidentiality. If the court decides that in every case the board must disclose the information on which they act and there are cases where disclosure is impossible because it will be a breach of confidence or will dry up a source of information or put the source in danger, will the board be required by the court to grant a certificate of consent? Concealment of sources is operated daily in all walks of life; and the practice of the board is consistent with the duties and powers given to it. The mischief at which the Act of 1968 was aimed was set out in the judgments of the court in *Reg. v. Metropolitan Police Commissioner, Ex parte Blackburn* [1968] 2 Q.B. 118. The Act of 1968 was passed to cure past errors by placing gaming on a healthy footing and to legalise it, and ensure that it is conducted by the right sort of people under the right conditions. Under the Act the board is made the pivot of control, dealing with the initial applications for certificates of consent and thereby making recommendations to local justices. The board's powers are very wide. They make many inquiries to get the necessary information about applicants for certificates; the main source is obviously the police; but they also receive many anonymous letters. They have to consider all the evidence and give it such weight as they think fit. That cannot be done by the procedure of licensing justices in open court, and that is why the board have worked out their own procedure to guide them in their task. If the court says that that procedure is wrong, the decision will kill both the board and the Act of 1968, for unless the board have wide powers to use confidential information the powerful interests involved in gaming will be able to stultify the intention of the Act.

It is accepted that the old distinction between judicial and quasi-judicial proceedings on the one hand and executive or administrative acts on the other is no longer decisive in the realm of natural justice; but the more executive the act and the further away the conception of a *lis inter partes*, the more discretion the courts incline to attribute to statutory bodies. The law is developing a sort of sliding scale. An immigration officer has to be fair, even if that requirement imposes limitations on what he can do. If the board are also under a duty to be fair, that duty is covered by the procedure they have worked out in pursuance of the powers given to them to regulate their own procedure. It will only be in the rare case that the board will not be able to give an applicant the substance of

the information in their possession. They give anxious consideration to all cases and do what they believe to be correct in performing their statutory duties. They are the final arbiters in this matter, for the Act gives no right of appeal from the board's determination on an application for a certificate of consent; and if they cannot form their opinion on information in their possession without disclosing every detail to the applicant, they will be gravely hampered in their onerous task.

It is not correct that the applicant for the initial certificate may be deprived of a right of property or a settled expectation of being able to continue gaming. For hundreds of years gaming has been an unlawful activity. Now it is being legalised, but only on the most stringent terms with wide powers given to the board to decide what kind of person should be allowed to apply for a licence. The licensing system is part of a change in the law; and in this new licensing system no one starts off with a right or even an inchoate right. The applicants are seeking to enter into a privileged field. The first group of cases starting with *Capel v. Child*, 2 Cr. & J. 558 are all distinguishable by the nature of the inquiry. The certificate is certainly a severe hurdle in the applicant's way; but it must be looked at against the background of the licensing cases, such as *Reg. v. Metropolitan Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150.

[LORD DENNING M.R. Lord Reid disapproved of that case and the *Nakkuda* case in *Ridge v. Baldwin* [1964] A.C. 40, 77-79.]

But the *Nakkuda* case was rehabilitated in *Durayappah v. Fernando* [1967] 2 A.C. 337, 349. [Reference was also made to *Reg. v. Sykes* (1875) 1 Q.B.D. 52.]

It cannot be right that in the case of the initial grant of a licence a judicial procedure must be applied and the applicants must be told everything that anyone has in his mind concerning them. This part of the Act in the Schedule is not dealing with rogues or villains; nor is the board making charges against the applicants. The requirement of paragraph 4 (5) is that the board shall have regard "only" to certain specified matters. Because of the large-scale matters of security involved and the fact that this is an area in which crime may flourish, particular care should be directed to the words of paragraph 4 (5): "in their opinion" is a difficult matter for the courts to interfere with by any supervisory act; "likely to be capable" does not involve wrongdoing but something which is essentially a matter of opinion. The board is enjoined to consider the applicant's reputation. How is that to be done? By asking a lot of people what they think of a particular applicant or asking: What is his reputation? How does the board convey to the applicant matters of reputation except by saying "X does not think much of you" or "A number of people don't think much of you." If the applicant then asks "Who said that?" what is the board to do where the case is one involving the duty of preserving confidentiality? Paragraph 4 (6) sets out the matters which the board *may* consider; and it gives absolute power to the board to make a decision without any reference to the applicant.

If the board is bound to be fair, fairness in the context of this Act requires the board to put the substance of their information to the applicant; and that is what the board have directed themselves to do, subject only to confidentiality and the public interest. The result of that procedure

2 Q.B.

Reg. v. Gaming Board, Ex p. Benaim (C.A.)

- A is that in some cases reasons are not given; the matter is left to the discretion of the board, and unless it is left to the board the situation will become unworkable. The board could have declined to put in any evidence on affidavit in the present case; but it has put in two affidavits and set out its procedure. It has frankly stated that the present case does not involve confidentiality. The court is asked to say that the board have gone further than anything in the Act requires them to go, and they should not be subjected to criticism.

- B *Hogg Q.C.* in reply. The policy of the Act of 1968 is not to forbid gaming but to recognise and regulate it. The mischief of the situation stated in the *Blackburn* case [1968] 2 Q.B. 118, has nothing to do with this case or the scope of paragraph 4 (5) and (6) of Schedule 2. This is not a licensing case, but a question of the power given to the board to allow people to apply for a licence after an inquiry into their suitability and of the procedure which the board is entitled to adopt in disqualifying certain applicants from applying for a licence. The subject of discussion is the annulment of a right which these applicants would otherwise possess, so that prima facie the rules of natural justice apply and the two pillars on which they are built should be observed in their entirety, viz., lack of bias and audi alterem partem, with the qualification that the second is useless unless the person whose rights are in danger knows what he has to deal with.
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- The board's arguments based on the desire to preserve confidentiality would not apply to their main source of information, the police. In criminal cases no one suggests that witnesses in the dock should not be confronted with informers. Why should the board be given inquisitorial powers denied to the Old Bailey judges? See *Greene v. McElroy* (1959) 360 U.S. 474, on the attitude of the courts of the United States to confidential reports not made available to the petitioner, in a case where the petitioner pleaded the Fifth Amendment and as a result lost his position and was almost destroyed; and the court held that it constituted unreasonable government interference within the liberty and property concepts of the Fifth Amendment. It is agreed that in modern times the natural justice rules have to be read in the context of the specific Act, its mischief, and the type of inquiry envisaged; but at the end the irreducible minimum is that where a decision adverse to a party has to be made for reasons in the board's possession, the party must be given sufficient information to enable him to displace those reasons. The application rests on the contention that the applicants have not been fairly treated.
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- G *Cur. adv. vult.*

March 23. The following judgment was read.

- LORD DENNING M.R. Crockford's is one of the most famous gaming clubs in London. It has premises of distinction at 16 Carlton House Terrace, which it holds from the Crown Estates Commissioners. It seeks a certificate to enable it to apply for a gaming licence. The Gaming Board have refused their consent. So Crockford's is faced with extinction. It applies to this court to quash the decision of the Gaming Board. It says that they did not act in accordance with the rules of natural justice.
- H

Three years ago, in 1967, the gaming clubs in England were having a very profitable time. They had found a way to avoid the Gaming Acts of 1960 and 1963. The courts had let through their devices. So much so that the police had given up any effort to enforce the law. The prospects were so promising that new clubs were springing up all the time. It was in this climate that in October, 1967, two Frenchmen came to England. They made a bid to take over Crockford's. Their names were Gilbert Benaim and Youssef Khaida. They had vast experience: for they had run gaming clubs in Algiers and in Paris. They obtained work permits from the Home Office. They became joint managing directors of Crockford's. They agreed to pay £185,000 for the shares to control it. They sought permission from the Bank of England to carry through the deal. But then there came a hitch. The Treasury were not prepared to grant permission at that stage. But this disappointment did not deter them. They went ahead with their plans. They still ran Crockford's.

In the next year, 1968, things changed. First, the House of Lords declared the device of "offering the bank" to be illegal. Next, this court warned the gaming clubs: "No longer will we tolerate these devices." Finally, the police declared that they would enforce the law. But the gaming clubs, or, at any rate, some of them, took no notice. They tried other devices, such as marker chips, or "kittyscoop." But the courts soon declared these to be illegal also. Crockford's themselves were among the transgressors. On January 24, 1969, they were summoned at Bow Street and fined £200 and costs.

Parliament itself also intervened. "Enough," it said, "of these devices. We are tired of this continual battle between the gaming clubs and the law—with the clubs always one jump ahead. We will try a new way altogether." So Parliament enacted the Gaming Act, 1968. By this statute there was to be no gaming at all except in premises licensed for the purpose; but, once licensed, gaming can take place without hindrance. The licence will be granted by the licensing justices; but, before any person can even apply for a licence, he must be certified as one who can be trusted. He must go before a responsible body, the Gaming Board, set up for the purpose. He must get a "certificate of consent" from the board. Else he cannot apply for a licence.

On February 28, 1969, Crockford's applied to the board for a certificate of consent. They filled in all the forms. They set out the games which they wished to play. We are by now familiar with them: chemin-de-fer, baccarat, roulette, blackjack, and craps. They also set out the stakes. They were high enough. They gave all the particulars about Mr. Benaim and Mr. Khaida and others who would be concerned in running the club. At first they put in the application in the names of two limited companies, who were legally the owners of the club: but on November 12, 1969, at the suggestion of the board, they amended the application so as to name Mr. Benaim and Mr. Khaida as the applicants.

On December 11, 1969, there was a meeting of the Gaming Board. It was a responsible body. There were present Sir Stanley Raymond, the chairman of the board, Sir Ranulph Bacon (former deputy commissioner of police of the Metropolis), Mr. Usherwood (deputy chairman of the Prudential Assurance Company), Mr. Ravenscroft (the accountant for the

A board), and Mr. Saunders (the secretary). There came to the meeting Mr. Benaim, Mr. Khaida and Captain Black, all representing Crockford's.

The chairman told them that they could be legally represented if they wished, but they did not so desire. The meeting lasted four hours. It was soon apparent that the board had gathered together a lot of information about Crockford's. They did not tell from whom they got it. But it is a fair guess that they had got a good deal from the police and no doubt other sources. They said they were troubled about it. They asked questions concerning it. This is how Mr. Benaim described it in his affidavit:

"We were questioned about the circumstances in which the application came to be made, our residence in the United Kingdom, our previous experience of the management of gaming clubs, our motives in wishing to purchase and run Crockford's, the staff whom we proposed to employ at Crockford's, certain transactions involving the taking abroad of cheques drawn on foreign banks, the expropriation of our assets in Algeria, our commercial interests and activities in France, and our relations with and the background of several named individual proposed employees and acquaintances. We answered all these questions in considerable detail to the best of our knowledge, information and belief. At the end of the meeting, the chairman . . . added that if we considered that there was any further information which we should supply, we should do so within 21 days."

In pursuance of that invitation Captain Black wrote a letter on December 12, 1969, covering some points which he said "were not fully answered yesterday"; and on December 31 he wrote on behalf of Mr. Benaim and Mr. Khaida offering to give assurances to the board.

On January 9, 1970, the board came to their decision. They refused their consent. The secretary wrote to Captain Black saying:

"When Mr. J. Khaida and Mr. G. Benaim attended with you for interview on December 11 last the matters troubling the board were discussed and their representations noted. Your letters of December 12 and December 31 have also been considered by the board, who, however, have decided not to issue a certificate of consent in this case."

Mr. Benaim and Mr. Khaida at once consulted their solicitors. On January 14, 1970, the solicitors wrote asking the board to reopen the case. On January 21, 1970, the board replied that they would not reopen it. They said they were not prepared "to entertain a new or amended application in respect of Crockford's in the current round." On February 13, 1970, the solicitors wrote again asking for the reasons for the board's decision. On February 24, 1970, the board replied in a letter which I must read, for it is a summary of the matters inquired into:

"As your clients are aware, the matters discussed with them at the interview on December 11, 1969, were: (a) the association of your clients with certain persons who are of unacceptable background and reputation, especially with Marcel Paul Francisci, Roland Francisci and Amende Darlay (or Attal); (b) the board's doubts as to the capacity of your clients to control the club effectively, having regard

to the extent of their business interests outside Great Britain, the time they spend outside Great Britain; and their imperfect command of the English language; (c) the misgivings raised by certain transactions involving the taking abroad of cheques drawn on foreign banks. The board sought to satisfy themselves that this was not done with the object of evading exchange control; (d) the uncertainty as to the legal ownership of Crockford's. While your clients appeared to be the de facto owners, it was necessary to establish their effective and lawful ownership, and to explore the circumstances of the purchase; (e) the doubt thrown on the character of your clients by their operations as hoteliers and casino managers in Algeria during and before the civil war in that country and their subsequent expulsion.

"The board made clear that these were the matters troubling them, and your clients showed by their replies that they understood this. They were given every opportunity to answer at length and at the end of the interview they were invited to make further representations in writing concerning any of these matters within 21 days, and were told that the board would then determine the application. Further representations were received in letters dated December 12 and 31. These were considered by the board and their decision that the application did not satisfy the requirements of paragraph 4 (5) and (6) of Schedule 2 to the Gaming Act, 1968, was conveyed by my letter of January 9."

The solicitors were still not satisfied. On February 25 they wrote asking the board to indicate which of the matters set out in paragraphs (a) to (e) were still troubling the board. To this the board replied at once, the same date, saying:

"The board are not obliged to give their reasons for the decisions they reach and it is not their practice to do so. They are not prepared to indicate to what extent they are still not satisfied in regard to any of the specific matters mentioned at (a) to (e) in the second paragraph of my letter of February 24. They are, however, prepared to consider further written representations on any of these matters if your clients wish to put further evidence before them."

Crockford's were aggrieved by this refusal. Mr. Quintin Hogg on their behalf now moves the court for an order of certiorari to quash the decision of January 9, 1970. He said that the board had not observed the rules of natural justice. He also asked for an order of mandamus requiring the board to give sufficient information to enable them to answer the case against them. He said that the board were quite wrong to make the charges in (a) to (e) and not specify which of them remained. It was asking the applicants, he said, to find a needle in a haystack or several needles in several haystacks.

Such being the facts, I turn to the law. To what extent are the board bound by the rules of natural justice? That is the root question before us. Their jurisdiction is countrywide. They have to keep under review the extent and character of gaming in Great Britain: see s. 10 (3). Their particular task in regard to Crockford's is to see if the applicants are fit to run a gaming club: and if so, to give a certificate of consent.

Their duty is set out in Schedule 2, para. 4 (5) and (6):

"... (5) ... the board shall have regard only to the question whether, in their opinion, the applicant is likely to be capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance.

"(6) For the purposes of sub-paragraph (5) ... the board shall in particular take into consideration the character, reputation and financial standing—(a) of the applicant, and (b) of any person (other than the applicant) by whom ... the club ... would be managed, or for whose benefit ... that club would be carried on, but may also take into consideration any other circumstances appearing to them to be relevant in determining whether the applicant is likely to be capable of, and diligent in, securing the matters mentioned in that sub-paragraph."

Note also that Schedule 1, paragraph 7, gives the board power to regulate their own procedure. Accordingly the board have laid down an outline procedure which they put before us. It is too long to read in full. So I will just summarise it. It says that the board will give the applicant an opportunity of making representations to the board, and will give him the best indications possible of the matters that are troubling them. Then there are these two important sentences:

"In cases where the *source* or *content* of this information is *confidential*, the board accept that they are obliged to withhold particulars the disclosure of which would be a breach of confidence inconsistent with their statutory duty and the public interest. ..."

"In the course of the interview the applicant will be made aware, to the greatest extent to which this is consistent with the board's statutory duty and the public interest, of the matters that are troubling the board."

Mr. Quintin Hogg criticised that outline procedure severely. He spoke as if Crockford's were being deprived of a right of property or of a right to make a living. He read his client's affidavit saying that "Crockford's has been established for over a century and is a gaming club with a world-wide reputation for integrity and respectability," with assets and goodwill valued at £185,000. He said that they ought not to be deprived of this business without knowing the case they had to meet. He criticised especially the way in which the board proposed to keep that confidential information. He relied on some words of mine in *Kanda v. Government of Malaya* [1962] A.C. 322, 337, when I said "that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

Mr. Hogg put his case, I think, too high. It is an error to regard Crockford's as having any right of which they are being deprived. They have not had in the past, and they have not now, any right to play these games of chance—roulette, chemin-de-fer, baccarat and the like—for their own profit. What they are really seeking is a privilege—almost, I might say, a franchise—to carry on gaming for profit, a thing never hitherto

allowed in this country. It is for them to show that they are fit to be trusted with it. A

If Mr. Hogg went too far on his side, I think Mr. Kidwell went too far on the other. He submitted that the Gaming Board are free to grant or refuse a certificate as they please. They are not bound, he says, to obey the rules of natural justice any more than any other executive body, such as, I suppose, the Board of Trade, which grants industrial development certificates, or the Television Authority, which awards television programme contracts. I cannot accept this view. I think the Gaming Board are bound to observe the rules of natural justice. The question is: What are those rules? B

It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter: see what Tucker L.J. said in *Russell v. Norfolk (Duke of)* [1949] 1 All E.R. 109, 118 and Lord Upjohn in *Durayappah v. Fernando* [1967] 2 A.C. 337, 349. At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin* [1964] A.C. 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *Reg. v. Metropolitan Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150 and *Nakkuda Ali v. Jayaratne* [1951] A.C. 66 are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in *Ridge v. Baldwin* [1964] A.C. 40, 77-79, 133. C

So let us sheer away from those distinctions and consider the task of this Gaming Board and what they should do. The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker C.J. in *In re H. K. (An Infant)* [1967] 2 Q.B. 617. He said, at p. 630: D

"... even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly." E

Those words seem to me to apply to the Gaming Board. The statute says in terms that in determining whether to grant a certificate, the board "shall have regard only" to the matters specified. It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in the subsection. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, as in *Ridge v. Baldwin* [1964] A.C. 40; or depriving him of his property, as in *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180. After all, they are not charging him with doing anything wrong. They are F

A simply inquiring as to his capability and diligence and are having regard to his character, reputation and financial standing. They are there to protect the public interest, to see that persons running the gaming clubs are fit to be trusted.

Seeing the evils that have led to this legislation, the board can and should investigate the credentials of those who make application to them. They can and should receive information from the police in this country or abroad who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need tell the applicant the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest. Even in a criminal trial, a witness cannot be asked who is his informer. The reason was well given by Lord Eyre C.J. in *Hardy's* case [*Rex v. Hardy*] 24 State Trials 199, 808:

“... there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed.”

D And Buller J. added, at p. 818: “... if you call for the name of the informer in such cases, no man will make a discovery, and public justice will be defeated.” That rule was emphatically reaffirmed in *Attorney-General v. Briant* (1846) 15 M. & W. 169 and *Marks v. Beyfus* (1890) 25 Q.B.D. 494. That reasoning applies with equal force to the inquiries made by the Gaming Board. That board was set up by Parliament to cope with disreputable gaming clubs and to bring them under control. By bitter experience it was learned that these clubs had a close connection with organised crime, often violent crime, with protection rackets and with strong-arm methods. If the Gaming Board were bound to disclose their sources of information, no one would “tell” on those clubs, for fear of reprisals. Likewise with the details of the information. If the board were bound to disclose every detail, that might itself give the informer away and put him in peril. But, without disclosing every detail, I should have thought that the board ought in every case to be able to give to the applicant sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the board must at all costs be fair. If they are not, these courts will not hesitate to interfere.

G Accepting that the board ought to do all this when they come to give their decision, the question arises, are they bound to give their reasons? I think not. Magistrates are not bound to give reasons for their decisions: see *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338, at p. 352. Nor should the Gaming Board be bound. After all, the only thing that they have to give is their *opinion* as to the capability and diligence of the applicant. If they were asked by the applicant to give their reasons, they could answer quite sufficiently: “In our opinion, you are not likely to be capable of or diligent in the respects required of you.” Their opinion would be an end of the matter.

H

Tested by those rules, applying them to this case, I think that the Gaming Board acted with complete fairness. They put before the applicants all the information which led them to doubt their suitability. They kept the sources secret, but disclosed all the information. Sir Stanley Raymond said so in his affidavit; and it was not challenged to any effect. The board gave the applicants full opportunity to deal with the information. And they came to their decision. There was nothing whatever at fault with their decision of January 9, 1970. They did not give their reasons. But they were not bound to do so.

But then complaint is made as to what happened afterwards. It was said that the board did not pin-point the matters on which they thought the explanations were not satisfactory. They did not say which of the matters (a) to (e) they were not satisfied about. But I do not see anything unfair in that respect. It is not as if they were making any charges against the applicants. They were only saying they were not satisfied. They were not bound to give any reasons for their misgivings. And when they did give some reasons, they were not bound to submit to cross-examination on them.

Finally, complaint was made that the board refused to consider a new or amended application in respect of these premises of Crockford's in the current round. They refused to consider applications in other names or in new names. But here again I see nothing unfair. Crockford's had full opportunity of putting their application in the first instance. If there had been a technical defect in it, I feel sure that the board would have allowed an amendment. But if the application fails in matters of substance, that should be the end of it. There must be an end to the claim to "cut and come again."

In all the circumstances I think that all the criticisms of the board's conduct fail, and in my opinion the application should be dismissed.

LORD WILBERFORCE. I agree.

PHILLIMORE L.J. I also agree.

*Application dismissed with costs.
Leave to appeal refused.*

Solicitors: *Theodore Goddard & Co.; Gregory, Rowcliffe & Co.*

M. M. H.



R v South London Coroner ex parte Thompson & Others [1982] Lexis Citation 1288

The Times 9 July 1982

QUEEN'S BENCH DIVISIONAL COURT

LORD LANE CJ, WATKINS LJ AND ROBERT GOFF J

8 JULY 1982

8 July 1982

I Macdonald for the Applicants Ruddock, Francis, Campbell & Cummings; M Mansfield for the Applicants Thompson, Brown, Hall & Collins; S Sedley for the Applicants Gooding, Henry, Lynch & Johnson; H Brooke QC and T Wormington for the Coroner; A Hill QC for the Metropolitan Police; S Brown as Amicus Curiae.

BM Bimberg & Co; Hempsons; The Solicitor, Metropolitan Police; The Treasury Solicitor.

LORD LANE CJ

This is the judgment of the Court.

On the night of 17th/18th January 1981 a birthday party was held at 439 New Cross Road, Deptford. It was a joint party for Yvonne Ruddock, whose mother was the owner of the house, and Angela Jackson. Most of the guests were coloured. Their ages, apart from their parents and their friends, ranged from about 11 to the early 20's. It started about midnight. There was food and comparatively moderate amount of drink. There was music amplified. There were scores of young people there. We are told that the total was 190 or so at various times, but not of course all at the same time.

There was a lot of noise. There were two complaints from neighbours, and two visits as a result by the police accompanied by the Environmental Health Officer.

Some of the guests started to leave at about 5.30 in the morning, and then disaster struck. At about 5.45 in the morning the front downstairs room was on fire and within a short time the whole house was ablaze. One has only to see the photographs which we have seen to realise the impact this tragedy must have had upon those affected, those who were bereaved. 13 youngsters, aged between about 14 and 22 perished. Most of them were affected by smoke or fumes, and some died from injuries suffered when they tried to jump to safety from the upstairs rooms. One can understand the depth of feeling and emotion which has resulted, much of which was voiced at the inquest, and a tiny bit of which we have seen here.

The inquest began on 21st April this year. It was conducted by Dr. Davies, and after a hearing lasting 13 days, sitting long hours in those days, of which 11 days were occupied by evidence, the jury returned an open verdict. Application is now made to this Court by counsel on behalf of the relatives to quash the verdict and to order a fresh inquest before a different coroner.

It must be rare indeed that complaint is made about an open verdict. It ascribes no cause and no blame of any sort. We were told by Mr. Macdonald, on behalf of some of the applicants, that they are "entitled to know whether the deaths were unlawfully caused or accidental", and counsel on their behalf presented here, and did present before the Coroner, a united approach and a common policy aimed at showing that this tragedy was caused by someone throwing an incendiary device through the window of the front downstairs room.

They are certainly entitled to have the matter investigated according to law and to know what conclusions, if any, the jury can reach. If the evidence is inconclusive, an open verdict is the only conclusion.

Our powers are derived primarily from the Coroners Act 1887. We have other powers of judicial review which have their origin in the Common Law. The occasion for use of those latter powers and their extent differ from the statutory powers under the Coroners Act.

The grounds of these applications may be summarised as follows. First, the Coroner misdirected the jury as to the verdicts open to them on the evidence. The submission is that if he had directed them properly, they would probably have returned a verdict of unlawful killing, either by someone outside the party or someone inside. Secondly complaint is made about irregularities of the Coroner's conduct of the inquest. The first of these particular complaints is that he formed a view as to the causes of the fire and therefore did not treat evidence to the contrary with sufficient impartiality. Secondly, he did not give the witnesses sufficient scope to tell their own story as they may wish. Thirdly, he failed to take a contemporaneous note of the evidence as required by rule 30 of the Coroners Rules 1953, which will have to be read in extenso in a moment. Fourthly, he failed to sum up the evidence in accordance with rule 33 of those Rules.

It was submitted by Mr. Macdonald -- perhaps this is a convenient place to mention this -- that the jury would have been entitled, if they thought fit, to return a verdict of unlawful killing and could have said in addition, "by a person from outside the house", or "by a person from within the house", and that "unlawful killing" was not necessarily the only way they could have described "how" the deaths took place. In rare cases, to avoid ambiguity such additions may perhaps be permitted by the Rules.

The Coroner's task in a case such as this is a formidable one, and no one would dispute that; that is quite apart from the difficulties which inevitably arise when feelings are running high and the spectators are emotionally involved and vocal. Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the Judge holding the balance or the ring, whichever metaphor one chooses to use.

It is perhaps helpful to read a passage from the Brodrick Report on Death certification and Coroners, Cmnd. 4810/1971. This report was written before the recent amendments to the Act and Rules. Paragraph 16.40, which may perhaps be helpful, reads as follows: "The conduct of any legal proceedings is inevitably affected by the character of the conclusions which they are required to reach, and inquests are no exception." Then at the foot of the same paragraph: "A continuing requirement to reach a conclusion in terms like those prescribed in the Coroners Rules would be inconsistent with this purpose. In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself." The function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires.

The facts of the present case, as one would expect in circumstances such as these, were not easy to ascertain. Enough has been said herpaps about the nature of the party, the numbers present and so on, to make clear that no

two witnesses, even doing their best, were likely to give the same version of events. Some evidence was not in dispute. Indeed there was a broad consensus of evidence up to about 4.30 a.m. in that house. The music room, where the dancing took place, was on the first floor at the front. It was not a large room. It scales at about 9 ft. by 14 ft. on the plan at the most. The ground floor front room was slightly smaller. That was Mrs. Ruddock's sitting room or parlour. This was by way of being a quiet room, or comparatively so, that evening. It was out of bounds, or meant to be out of bounds, to the ordinary youngster guests. The ground floor back room was the kitchen-cum-living room, so to speak, separated from the quiet room by doors covered with hardboard. The adults spent most of the evening here, though frequent visits were made by Mrs. Ruddock upstairs to keep an eye on the proceedings, and very properly so if we may say so. Mr. Hastings, a man who suffered from disability -- he had one leg -- and was a white man, said that he was resting in the quiet room round about 5.30 in the morning. The fire started, as we have already said, at about 5.45 in that room.

The scientific evidence indicated that the seat of the fire was roughly the centre of the room, where the flooring was intensively charred. The fire was said by the experts to have started there. Something had caused that part of the floor to suffer most severely. There were, upon examination, traces of some sort of volatile and inflammable liquid containing Toluene Ethyl Benzine on the carpet. There was a gas fire in the room. Later the switch was found to be in the 'on' position. There were differences of opinion as to whether the gas fire was actually lit or not at the material time. Mr. Hastings was of the view that the curtains proper -- I call these drapes for purposes of convenience -- were drawn back and were not across the windows. He was in a minority of one on that point, apart from those who said they could not remember one way or another. The general consensus was that the drapes were across the window. It was uncontroverted that the net curtains were across and that the windows were closed.

There were in those circumstances the following available theories as to the cause of the fire, and therefore of this terrible tragedy. First, that someone had thrown an incendiary device, for example a fire bomb, through the window. That was the projectile theory. Secondly, that someone had come into the house unbidden and had planted some sort of incendiary device in the front room: that would be the intruder theory. Thirdly, that one of the guests at the party had deliberately set the room alight, and fourthly, that one of the guests had accidentally set the room alight. The last two differ from each other, the first being a deliberate fire and the second being accidental.

There were suggestions made at the inquest in support of these theories. But in the end the jury had only three possible verdicts or results available to them. The first was unlawful killing with or without the suggested addition of the words to which we have already made reference. That would be a result if the jury came to the conclusion that the projectile theory was correct, or that a guest had deliberately set the room alight. Secondly, accidental death, if they came to the conclusion that a guest had by misadventure caused the fire. Thirdly, an open verdict, if they could not be sure either way.

It may be helpful to take the first complaint made against the Coroner at this stage of this judgment. This relates to the Coroner's final direction to the jury before they retired to consider the verdicts open to them. These, it is submitted by counsel for the families, and Mr. Mansfield specially, contain misdirections as to these verdicts by reason of which the jury was prevented from returning one verdict in particular. Accordingly, it is submitted, there was a material irregularity in the proceedings, on the basis of which this Court could, and should, exercise its power under section 6 of the Coroners Act 1887 to quash the inquisitions and order a fresh inquest.

We think we should interpolate here, that counsel were on this occasion, contrary to normal practice, given by the Coroner of his own volition considerable assistance to represent the families. This was by showing them, before the inquest started, copies of the statements made by scientists and firemen, and informing them of the factual issues involved in the inquiry.

The Coroner's direction to the jury upon the verdicts open to them is to be found at pages 1757 to 1758 of the transcript. This direction was preceded by an examination of the four possible theories about the cause of the fire, that is, a fire bomb attack from outside, a deliberate intruder attack, a deliberate arson inside the house by a guest, and finally, an accident arising from events in the house. In the course of his discussion of these four theories, the

Coroner quite rightly indicated to the jury that an opportunist attack from within appeared to be most unlikely -- that is the intruder theory. That in practice left alternatives (1), (3) and (4). He then suggested that the jury should approach their task as follows. First they had to consider whether the fire originated from without or from within the house. Next, if they decided that the fire started within the house, they had to consider whether it was a case of deliberate arson or an accident. If they felt that the fire started from an external cause, such as a fire bomb thrown through the window, their verdict must be unlawful killing. If they decided that it was due to events in the room from the activities of the youths there, they must decide, always of course if they could, whether the cause was a deliberate act of arson, in which event the verdict must be unlawful killing, or whether it was an accident.

In this connection he used these words: "I feel I must point out to you that if you decide that the fire arose from internal causes, there is insufficient evidence for you to say that the fire was deliberately caused....". But he repeated that it was for the jury to decide their verdict upon the evidence which they had heard in Court. If they thought that the fire originated from a cause within the front room, but they could not say whether it was accidental or deliberate, they should return an open verdict. He concluded his direction to the jury with this sentence: "If you cannot decide whether the fire originated from inside or outside the house, you will simply return an open verdict without saying how the fire originated."

It was to that last sentence that counsel, in the shape of Mr. Macdonald and Mr. Mansfield, directed their criticism. They submitted that the direction in that sentence was wrong, because even if they were unable to decide whether the fire had been caused from within or without the house, it was still open to the jury to return a verdict of unlawful killing on the basis that they were nevertheless satisfied that the cause was a deliberate act by some person. We found this a most unreal submission. Moreover Mr. Mansfield submitted that the evidence pointed strongly towards the conclusion that if the fire was caused from inside the house, that cause must have been a deliberate act, so that the Court should conclude that, if the jury were thus directed, a verdict of unlawful killing would probably have been returned.

This was a most surprising submission. At the inquest the case being advanced through cross-examination by all counsel for the families on instructions, and understandably so, was that the fire had been caused by a projectile thrown from outside the building. We were told by counsel for the families that their one desire was to find out the truth. The family of one particular boy, who died in the fire (a family whom Mr. Mansfield represented), had a particular interest because, if the conclusion was that the fire was caused deliberately inside the house, the finger of guilt might point at their boy. Accordingly the verdict which Mr. Mansfield now says should have been left to the jury is one which none of the families could have wanted. On this verdict the projectile theory would not have been proved; the truth would not have been found out; and suspicion that the boy we refer to might have been the cause of the fire would in no way have been allayed. The Coroner's indication to the jury that, if they concluded that the cause of the fire was within the house, there was insufficient evidence for them to conclude that it was deliberately caused, must have been very welcome to the family of this boy whom Mr. Mansfield represented, but it is wholly inconsistent with Mr. Mansfield's present submission.

We have little doubt that the direction of the Coroner now criticised by Mr. Mansfield and Mr. Macdonald, found its origin in the common sense view that if the jury could not decide whether the cause of the fire lay inside or outside the building, they could not hold that it was proved that the fire was caused in any particular way, deliberately or accidentally, and therefore the only verdict open to them was an open verdict. We do not consider that this approach can be legitimately criticised. We share the Coroner's opinion that there was no sufficient evidence upon which the jury could safely hold that it had been proved that the fire, if started inside, was started deliberately. From that it must follow that, if the jury could not decide whether the fire originated from inside or outside the house, they could not decide whether the fire was caused accidentally or deliberately, and so must return an open verdict. Accordingly there was in this respect no irregularity of proceedings as submitted by counsel.

If the jury (four of the ten we are told were coloured) had taken the view that the projectile theory was proved, they would, on this direction, have said so by a verdict of unlawful killing. They did not do so, and it is plain that they were unanimously not satisfied on this point. It is scarcely surprising. The scientific evidence was that if the net

curtains and drapes and windows were all closed, the projectile would not penetrate the necessary distance into the room to start the fire where it did start. Moreover, if a bottle, or some such projectile had been thrown, its neck and base would have survived the fire. There was no such base or neck found. The pattern of broken window glass militated against it having been broken by a missile. All in all, the scientific evidence alone, if accepted, and there seems no reason why it should not have been, effectively disproved the projectile theory.

There was one unexplained mystery. A small aluminium tube crimped at each end was found later in the garden. That tube had traces of sodium chlorate and sugar, which is an explosive mixture. It had not been involved in the fire and cannot have been a cause of it.

The other evidence supporting the projectile theory centred round a Mr. Daniels. Here I propose to read the agreed synopsis of events: "Mr. Daniels was a carpenter, living in Charlton, who had that morning taken his daughter, a woman police constable, to Deptford Police Station in his light coloured Austin Princes motor car. He dropped his daughter at 5.50 a.m. and drove home down Mornington Road, turning left into New Cross Road where he saw a young coloured boy and girl walking along the road from the direction of the Railway Station. He then noticed light coming from the ground floor windows of a house on the left and saw that the curtains were alight. He therefore pulled in and put his hazard lights on. He went up to the house and banged on the door with his fist and it came open. A coloured man walked towards him from a group in the corridor and then turned round and walked back again: there was a woman shouting in the background and Mr. Daniels thinks that this attracted the man's attention. There was no smoke in the entrance hall. He said that what appeared to be net curtains were blazing across the whole area of the window, and he could only see smoke and fire in the front room.

"Mr. Daniels thought that the best thing to do was to get into his car and go back to Deptford Police Station. As he turned round on the top step, the front window glass blew and he ducked away and put his arm up to protect himself from flying glass. He went back to his car.... To avoid delay at traffic lights Mr. Daniels decided to do a U-turn and go back down Mornington Road (which is a one-way only) the wrong way to get straight back to the Police Station by the shortest possible route to raise the alarm. He said he got back to the Police Station at 5.55 a.m. and the Desk Sergeant's message was produced at the Inquest corroborating this fact.

"Commander Stockwell described Mr. Daniels as being in his early 40's. He said his car did not have a roof rack.

"Mr. Forbes" -- he was one of the adults at the party -- "told the Inquest that when summoned by Mr. Morris from the kitchen" -- that was because of the fire -- "he went along the passage to the front door. He opened it and saw what he thought was a cream-coloured car parked outside the house, with the emergency lights on both sides going. He saw a white man standing by the driver's door looking quite concerned, as if he wanted to help. As Mr. Forbes came out of the house, the man got into his car and drove off towards Deptford."

One of the criticisms of the Coroner was that he had espoused the cause of Mr. Daniels and was not impartial in that respect. In fact what happened was that the Coroner asked Mr. Mansfield whether his not-so-veiled insinuations were intended to suggest that Mr. Daniels had thrown the fire bomb, and having been told that they were not, he exonerated Mr. Daniels and he was plainly right to do so. The timing showed clearly that the fire had already started when Mr. Daniels was at the front door of the house.

The Coroner was also criticised for not being impartial when he commented on the alternative theory that there may have been two Austin Princesses, or possibly more according to the applicants' schedule, but at any rate two Austin Princesses with hazard lights on doing a U-turn within minutes of each other. In our view these comments of the Coroner were justified.

It suffices to say that, on a review of all the evidence available to the jury, the theory of the projectile from outside was one which was not clearly proved. It would not be putting it too high, in our view, to say that it was disproved. The intruder theory was almost totally unsupported by evidence and was not argued with any enthusiasm before us.

There were two candidates for the position of intruder, neither of whom, on close examination, proved acceptable. This theory never got beyond the realms of pure speculation.

Next, did one of the guests cause the fire accidentally or intentionally? The answer to this question was complicated by the fact that six of the witnesses when making statements to the police suggested that a fight had taken place in the quiet room between two of the young guests. Whether such a fight took place or not is of no importance. But some of them described how the room had been partially vandalised and how articles had been stolen from the room and so on. There was a further suggestion that a substantial container, holding some sort of stone polishing liquid of a volatile and inflammable nature, was upset on the carpet and that had been set alight. But almost all these statements were retracted at the hearing before the Coroner. They were said to have been extracted from the witnesses by the police by improper means, and the police were subjected to vigorous cross-examination on that issue. There were counter allegations that some of the witnesses had put their heads together in order to suppress dangerous or unwelcome evidence, as they saw it.

There were two solid pieces of evidence that something untoward had happened in the quiet room. First of all a heavy coffee table, which was said to have required two people to carry, was found to be altogether missing from the quiet room after the fire, and secondly, one of the photo frames, which certainly earlier in the evening had been in that quiet room, was found in the garden untouched by the fire, and consequently not having been in the room when the fire took place.

It is true that the scientific evidence ran counter to the possibility that this had been an accident. But this conclusion was necessarily based upon a whole variety of assumptions as to the nature of the fluid and the possible igniting agent, none of which, in the nature of things, could be properly established. For example, the carpet could not have been set alight by any low intensity flame, but fluid similar to that of which traces were found on the carpet could have been ignited, so the test showed, by a spark some 6 inches away from the fluid itself, due to the vapour being given off.

Given that the projectile theory was discounted, as it plainly was, that left the possibility of a fire caused by a guest either accidentally or intentionally. The Coroner had fairly told the jury that there was no evidence of a guest causing the fire intentionally. They were not satisfied that it was a guest who had accidentally caused the fire. Hence, and properly on the direction, the open verdict.

That is by no means the end of the case. Before dealing with the other complaints, it is necessary to set out the background of law against which the Coroner was holding this inquest, and against which this Court must perform its functions.

Section 4 of the Coroners Act 1887 reads as follows:

"(1) The coroner shall, at the first sitting of the inquest, examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it expedient to examine."

"(3) After hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death."

Section 6

"(1) Where Her Majesty's High Court of Justice upon application made by or under the authority of the Attorney General, is satisfied either -- (a) that a coroner refuses or neglects to hold an inquest which ought to be held; or (b) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that

another inquest should be held, the court may order an inquest to be held touching the said death, and may, if the court think it just, order the said coroner to pay such costs of and incidental to the application, and where an inquest has been already held may quash the inquisition on that inquest."

The relevant rules to which reference should be made are, first of all, rule 16:

"(1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who satisfies the coroner that he is within paragraph (2) of this Rule shall be entitled to examine any witness at an inquest either in person or by counsel or solicitor: Provided that -- (a) the chief officer of police, unless interested otherwise than in that capacity, shall only be entitled to examine a witness by counsel or solicitor; (b) the coroner shall disallow any question which in his opinion is not relevant or is otherwise not a proper question." Then it sets out the persons who have the right conferred by paragraph (1), and amongst those are a parent, child, spouse or any person representing the deceased.

Rule 17 reads: "Unless the coroner otherwise determines, a witness at an inquest shall be examined first by the coroner and, if the witness is represented at the inquest, lastly by his representative."

Rule 26 reads:

"The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely - (a) who the deceased was; (b) how, when and where the deceased came by his death; (d) the particulars for the time being required by the Registration Acts to be registered concerning the death."

Rule 27: "Neither the coroner nor the jury shall express any opinion on any matters other than those referred to in the last foregoing Rule."

Rule 30: "The coroner shall take notes of the evidence at every inquest other than one at which he takes depositions."

Rule 32: "Where the coroner sits with a jury, he shall sum up the evidence to the jury and direct them as to the law before they consider their verdict and shall draw their attention to the provisions of Rules 27 and 33 of these Rules."

Rule 33: "No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability."

Finally, Rule 39: "A coroner shall, on application and on payment of the prescribed fee (if any), supply to any person who, in the opinion of the coroner, is a properly interested person a copy of any depositions taken by the coroner at an inquest, or of any report of a post-mortem examination or special examination, or of any notes of evidence, or of any document put in evidence at an inquest; or may, on application and without charge, permit such person to inspect such depositions, report, notes of evidence, or document."

One of the principal grounds of complaint is that the Coroner acted in breach of Rule 30 which I have just read. There is no dispute that the Coroner here took virtually no notes during the course of the evidence. It would indeed have been difficult for him to do so, having, as he had, the task of examining the witnesses from the statements which they had made to the police. All he did was on occasions to annotate the statements as he went along, and in the evening, after the hearing of the day was over, to make notes of what had happened during the day. However a tape recorder, in fact two tape recorders, were in operation throughout the whole of the inquest, and practically every word of the proceedings is in the transcript and before us in some 1800 pages of foolscap.

One must ask oneself what the purpose of Rule 30 is. Is it to provide a record and to enable the Coroner to be able to direct the jury accurately and adequately, or is it simply to provide a record of the proceedings when, without it, there would be no such record? Since Rule 30 applies even when there is no jury, it seems plain to us that the

purpose of the Rule is simply to provide a record, and this view of the Rule is shared by Mr. Simon Brown, who assisted the Court as Amicus, and Mr. Hill for the Commissioner of Police. It was not indeed dissented from by Mr. Macdonald.

The Coroner can himself take a note or can cause someone else to take a note for him -- a deputy, or a shorthand writer or an amanuensis -- or he can arrange for a tape recorder to be provided. The method is immaterial, so long as an adequate record is kept. In our judgment there was no breach of Rule 30 here, and the tape recording and the transcript was a compliance with the Rule, and this conclusion is supported by the terms of Rule 39 to which I have just referred.

That leaves Rule 32. A number of complaints are made about the way the Coroner set about this formidable task. First, that he read out statements in extenso, and included parts of the statements which had been qualified by the witnesses when they gave evidence or not spoken to at all by them when they gave their oral evidence. Secondly, it is suggested that he made complementary remarks about Mr. Daniels -- we have already dealt with that. Then it is said that he did not give witnesses a sufficient opportunity to say what they saw or heard or observed at the material time.

It is fair, we think, to say that the most experienced judge would have found it very taxing to measure up to the standards demanded by Mr. Macdonald and Mr. Mansfield. He has, as already pointed out by us, the task of examining witnesses himself. This he has to do from their statements. Depending on how controversial the evidence is thought to be, so he must tailor the nature of the questions which he asks. This Coroner was trying to carry out his functions against a background of noisy interruptions from the gallery which are evident from the transcript, and, to put it at its lowest, without very much help from counsel appearing on behalf of the relatives. The Coroner deposes ruefully that never in his long experience has he known anything approaching this, and of that there can be no doubt. In paragraph 12 of his affidavit there appears this passage: "In the circumstances I saw no reasonable alternative but to carry out my usual practice of examining the witnesses myself, which often involved condensing the evidence set out in the very long statements and interview notes with which I had been furnished and I also allowed Counsel very considerable latitude in asking leading questions of witnesses because feelings were running very high and Counsel were not permitted under the Rules to address me or the jury as to the facts."

As to his reading out portions of a statement and asking whether the witness agreed, the example to which we were referred was a witness who was thought to be uncontroversial. Hence the reason for what was done. We have been through much of the transcript. In the case of witness after witness, each is examined sentence by sentence perfectly properly, and the suggestion that they were not allowed to give their version can scarcely survive against the cross-examination conducted by Mr. Macdonald, Mr. Mansfield and Mr. Tanzie, which, to put it mildly, left no stone unturned.

Next it is said that the Coroner read out witness statements, or large portions of them by way of direction to the jury when some of the passages had not been confirmed in oral evidence and other passages had been qualified. Let it be said at once that there is nothing wrong in itself in reading out the witness statements to the jury, providing that they have been confirmed by the witness in evidence.

We have been carefully through the schedule which has been agreed between counsel for the Coroner, Mr. Brooke, and Mr. Macdonald for some of the families, as to these alleged errors. A large bulk of them are totally insignificant. The four instances upon which, on our invitation, Mr. Macdonald gave details as being his best examples or his best cross-section, are matters which could not have had any impact upon the course of the jury's investigations.

A passage in paragraph 26 of the Coroner's affidavit reads as follows: "I have already described the circumstances in which the inquest was held, to which Mrs. Peirce makes no reference in her affidavit. The Court will, I understand, be able to consider the transcript of what was said at the Inquest and what was contained in the Witness Statements to which Mrs. Peirce refers. I accept that on certain occasions I read to the jury extracts from Witness Statements which were not in fact given in evidence in Court, and I have asked my legal advisers to

prepare a list of these extracts, with the hope that agreement may be reached between the parties as to the extent of this failure on my part before the hearing before this Honourable Court commences." That schedule materialised.

Despite the difficulties facing him, this Coroner did manage, against the odds, to perform his duties with commendable skill, forbearance and tact. In the end one comes back to the wording of section 6 of the Act: "... where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held", and, as has already been read, may quash the inquisition on that inquest.

Has there been a material irregularity? Such irregularities as there were can have had no impact upon the course of the inquiry. It follows accordingly that they were not material. Even assuming that there were any material irregularities, is it necessary or desirable to order a new inquest? It certainly is not desirable to re-open this type of investigation on any ground, whether it be economic or social or humanitarian. Is it necessary? Is there a real risk that justice has not been done?

In this respect I refer to a case to which our attention was particularly drawn by Mr. Sedley appearing on behalf of some of the families, R v Divine Ex parte Walton [1930] 2 KB 29. That was a case concerning an inquest where there had been certain irregularities. One of the more startling irregularities was that the Coroner, quite outside the inquest had viewed and discussed the damaged car, which was related to the death, before the inquest with a man who afterwards acted as the foreman of the jury, and the coroner joined the jury in their inspection. At page 36 in the judgment of the Court which was delivered by Mr. Justice Talbot appears this passage: "Even where unsworn evidence had been received the Court would not quash the inquisition unless it appeared that the verdict had been influenced by it." Then there are two cases referred to. "So in R v Ingham (1864) 5 B & S 257 the Court refused even to grant a rule nisi on the ground either that the coroner had misdirected the jury on law, or that there was no evidence to warrant the verdict. Again it is clear that a coroner's inquest is not bound by the strict law of evidence."

Then at page 37 appears this passage: "The words 'necessary or desirable in the interests of justice' are the critical words. The Court is not to attend to mere informalities, nor to criticise minutely the summing up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such that there is real risk that justice has not been done, a real impairment of the security which right procedure provides that justice is done and is seen to be done, the Court ought not to allow the inquisition to stand. No doubt a coroner has considerable latitude as to the way in which he may conduct an inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else. It is unnecessary to go into this in detail, but we think the language of the Act of 1887 throughout confirms what we have just said."

We apply those words of Mr. Justice Talbot to the present case, and we conclude that such irregularities as there were did not impinge upon the fairness of the hearing, to adopt the apt expression used by Mr. Sedley in his submission to the Court. Nor did they offend the rules of natural justice. On the evidence we have formed the view that no reasonable jury could have come to any conclusion other than an open verdict. In the absence of any fresh evidence, even if there were a new inquest, the result would be the same.

Accordingly it is necessary to dismiss these applications.

Applications dismissed.

1 Q.B.

Polish S.S. Co. v. Atlantic Maritime Co. (C.A.)

Kerr L.J.

- A Admiralty actions should follow the course set by this court in *Jefford v. Gee* [1970] 2 Q.B. 130 in relation to interest on damages for personal injuries. Mr. Aikens for the defendants, on the other hand, submitted that the practice had changed since then, because of the much higher rates of commercial interest which have prevailed in recent years. In relation to commercial actions he referred us to my own decision in *Cremer v. General Carriers S.A.* [1974] 1 W.L.R. 341, which moved away from *Jefford v. Gee* [1970] 2 Q.B. 130 in relation to commercial cases, and also to the remarks of Robert Goff J. in *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 849D. He there awarded the equivalent of what is now the base rate plus 1 per cent. in accordance with the practice of the Commercial Court. This remains the practice in that court, and the practice of the Admiralty Court is now the same. In my view there is good reason for equating the rates of interest awarded in both these courts, since both deal with commercial disputes, and much of the litigation in the Commercial Court is also concerned with shipping. I should add, for the sake of completeness, that no question arises in the present case of awarding interest on a claim made in some foreign currency; both parties proceeded on the basis that the money of account was sterling. As against the sum of £194,072 of interest at the short-term investment account rate, an award at base rate plus 1 per cent. produces £223,178. In my view this is the correct award, and I would accordingly hold that this appeal should be allowed, but that the defendants succeed on their respondents' notice.

*Appeal allowed with costs in Court
of Appeal and below.
Leave to appeal refused.*

Solicitors: Elborne Mitchell & Co.; Holman Fenwick & Willan; Clyde & Co., Guildford; Waltons & Morse.

B. O. A.

REGINA v. GREATER MANCHESTER CORONER,
Ex parte TAL AND ANOTHER

- G 1984 Feb. 23, 24; Robert Goff L.J., McCullough and Mann JJ.
May 22

Judicial Precedent—Divisional court—How far binding—Supervisory jurisdiction of High Court—Doctrine of stare decisis—Whether divisional court free to depart from previous decisions
Judicial Review—Coroner's inquest—Application to quash verdict—Attorney-General not authorising application—High Court's common law supervisory jurisdiction—Whether applicable to inferior courts

During an inquest into the deaths of three men who died in a fire in a cell in Strangeways Prison in Manchester, reference

was made to a newspaper report which contained details of a rumour that one of the men's hands were tied. The coroner therefore decided to put before the jury all relevant evidence of that rumour, including direct evidence which allayed the rumour. At the conclusion of the evidence the jury indicated that they did not require further inquiries to be made regarding the rumour and the coroner went on to sum up without making further reference to it. A short time after the jury had retired a juror returned to court and had a discussion with the coroner. A few minutes later the jury returned verdicts of death by misadventure in the case of two men and an open verdict in the case of the man whose hands were allegedly tied.

On an application for judicial review by the families of the two men on the grounds that the coroner had committed errors of law within his jurisdiction which could be reviewed by a divisional court, namely, that the coroner had admitted hearsay evidence, had failed to warn the jury that they should not rely on that evidence and had a private conversation with a juror:—

Held, (1) that in exercising its supervisory jurisdiction by means of judicial review a divisional court was bound by the relevant principle of stare decisis in the same way as a puisne judge exercising jurisdiction at first instance would, although not bound to do so, follow a decision of a judge of equal jurisdiction unless the decision appeared to be clearly wrong; that there was no longer a requirement that an error of law within the jurisdiction had to appear on the face of the record before judicial review could be invoked and since inferior courts were clearly no longer excluded as a matter of principle from the scope of the High Court's supervisory jurisdiction there seemed to be no reason to exclude a coroner's inquest from that jurisdiction; and that, accordingly, it was right to depart from previous authority and consider the application on its merits (post, pp. 79B–F, 80F–81C, 82C–D, F–83B).

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, H.L.(E.) and *O'Reilly v. Mackman* [1983] 2 A.C. 237, H.L.(E.) applied.

Reg. v. Surrey Coroner, Ex parte Campbell [1982] Q.B. 661, D.C. not followed.

Huddersfield Police Authority v. Watson [1947] K.B. 842, D.C. and *Younghusband v. Luftig* [1949] 2 K.B. 354, D.C. distinguished.

(2) Refusing the application, that the coroner had not allowed hearsay evidence but had taken the proper course of putting all the evidence before the jury in order to allay rumour; that since the jury had indicated that they were satisfied by the evidence there was no need for the coroner to refer to it in his summing up; that the conversation between the juror and the coroner was not in private but in public and the applicants' representatives had not taken objection to it at the inquest; and that, accordingly, there was no basis for granting the application for judicial review (post, pp. 84A–C, F–85B, 86D–E).

The following cases are referred to in the judgment:

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.)
Fortescue v. Vestry of St. Matthew, Bethnal Green [1891] 2 Q.B. 170, D.C.

1 Q.B. Reg. v. Manchester Coroner, Ex p. Tal (D.C.)

- A *Huddersfield Police Authority v. Watson* [1947] K.B. 842; [1947] 2 All E.R. 193, D.C.
Kruse v. Johnson [1898] 2 Q.B. 91, D.C.
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)
- B *Racal Communications Ltd., In re* [1981] A.C. 374; [1980] 3 W.L.R. 181; [1980] 2 All E.R. 634, H.L.(E.)
Reg. v. Gould [1968] 2 Q.B. 65; [1968] 2 W.L.R. 643; [1968] 1 All E.R. 849, C.A.
Reg. v. Ipswich Justices, Ex parte Edwards (1979) 143 J.P. 699, D.C.
Reg. v. McIntosh (1858) 7 W.R. 52
Reg. v. Surrey Coroner, Ex parte Campbell [1982] Q.B. 661; [1982] 2 W.L.R. 626; [1982] 2 All E.R. 545, D.C.
- C *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29, D.C.
Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338; [1952] 1 All E.R. 122, C.A.
Rex v. Taylor [1950] 2 K.B. 368; [1950] 2 All E.R. 170, C.C.A.
Rex v. Wood, Ex parte Anderson [1928] 1 K.B. 302, D.C.
Williams v. Glasbrook Brothers Ltd. [1947] 2 All E.R. 884, C.A.
Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718; [1944] 2 All E.R. 293, C.A.
- D *Younghusband v. Luftig* [1949] 2 K.B. 354; [1949] 2 All E.R. 72, D.C.

The following additional cases were cited in argument:

- Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303; [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161, H.L.(E.)
- E *Boys v. Chaplin* [1968] 2 Q.B. 1; [1967] 3 W.L.R. 266; [1967] 2 All E.R. 665; [1968] 2 Q.B. 1; [1968] 2 W.L.R. 328; [1968] 1 All E.R. 283, C.A.
Jewison v. Dyson (1842) 9 M. & W. 540
Nicholas v. Penny [1950] 2 K.B. 466; [1950] 2 All E.R. 89, D.C.
Practice Direction (Judicial Review: Appeals) [1982] 1 W.L.R. 1375; [1982] 3 All E.R. 800
Reg. v. Immigration Appeal Tribunal, Ex parte Thomas (unreported), 13 July 1983, McNeill J.
- F *Reg. v. Ingham* (1864) 5 B. & S. 257
Reg. v. Ipswich Crown Court, Ex parte Baldwin (Note) [1981] 1 All E.R. 596, D.C.
Reg. v. St. Albans Crown Court, Ex parte Cinnamond [1981] Q.B. 480; [1981] 2 W.L.R. 681; [1981] 1 All E.R. 802, D.C.
Reg. v. Staffordshire Coroner (1864) 10 L.T. 650
Reg. v. Townsend [1982] 1 All E.R. 509, C.A.
- G *Rex v. Clarke, Ex parte Crippen* (1910) 103 L.T. 636, D.C.
Rex v. Huntbach, Ex parte Lockley [1944] K.B. 606; [1944] 2 All E.R. 453, D.C.

APPLICATION for judicial review.

- H The applicants, Ida Tal, the mother of Alan Tal, deceased, and Frank George Thomas, the father of Clinton Frank Thomas, deceased, applied for judicial review of an inquest on the deaths, after a fire in their cell at Strangeways Prison, of Carl Seiga, Alan Tal and Clinton Frank Thomas conducted by Leonard Malcolm Gorodkin, Her Majesty's Coroner for the County of Greater Manchester, on 15 September 1982.

The applicants sought an order of certiorari quashing the verdicts returned at the inquest and an order of mandamus requiring the coroner to conduct a fresh inquest on the deaths on the amended grounds inter alia, that (1) a short time after the jury had retired one of the jurors returned alone to the courtroom and had a private discussion with the coroner in the sight of those in court and a few minutes later the jury came back and returned verdicts which were as follows: Carl Seiga—an open verdict; Alan Tal and Clinton Frank Thomas—deaths by misadventure; (2) during the inquest the coroner allowed hearsay evidence to be received but in the course of his summing up failed to give any clear warning to the jury about the dangers of relying upon such hearsay evidence; (3) the coroner drew the jury's attention to an unsubstantiated rumour to which he knew the jury should pay no regard; (4) in so far as the grounds went to errors within the coroner's jurisdiction, the decision of the Divisional Court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661 ought not to be followed, (a) because it was wrongly decided and the doctrine of stare decisis did not govern decisions of the Divisional Court sitting at first instance; further and alternatively (b) because the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 had held that the principle of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 extended to judicial review of inferior courts, requiring the court to apply the second exception to the doctrine of stare decisis set out in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718.

Stephen Sedley Q.C. for the applicants. A jurisdictional point arises on this application. The Attorney-General's leave was not forthcoming under section 6 of the Coroner's Act 1887. The ambit of the court's common law powers in respect of proceedings in a coroner's court is therefore governed at present by *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661, where a divisional court held that the broad 'Anisminic' principles [1969] 2 A.C. 147 were not applicable to an inferior court such as a coroner's court. The following issues arise: (1) Is the divisional court bound by its own previous decisions? (2) If it is, do the *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 exceptions apply? (3) If not, does the present extent of the law, particularly *O'Reilly v. Mackman* [1983] 2 A.C. 237, allow judicial review of all errors of law committed by inferior courts or tribunals? (4) Is a coroner's court such an inferior court? (5) The coroner's conversation with the juror is an error of law within the narrow sense of a reviewable error in *Campbell's* case. (6) All errors of law are now subject to judicial review because (a) on *Anisminic* principles, all such errors are errors going to jurisdiction and (b) if errors of law are committed within the jurisdiction, they no longer have to appear on the face of the record to be justiciable. (1) Dealing first with whether the divisional court is bound by previous decisions, the divisional court in *Fortescue v. Vestry of St. Matthew, Bethnal Green* [1891] 2 Q.B. 170 held that the doctrine of stare decisis did not govern divisional court decisions because the court was dealing with a criminal case and was the final appellate court. However, in *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 844, it was

- A held that the divisional court was bound by its own decisions on the same ground as had led to the opposite conclusion in *Fortescue* (which was not cited). On an application for judicial review the divisional court sits at first instance to try an issue never tried before, and therefore by its very nature is not an appellate court. Appeals by way of case stated are obviously appeals and can be distinguished. Any judicial proceeding under R.S.C., Ord. 53, is a first instance jurisdiction to grant a prerogative order (see also section 29 of the Supreme Court Act 1981) and is a fundamental and original jurisdiction.
- B

- A divisional court has to be constituted of not less than two judges (see section 66 of the Supreme Court Act 1981) and when it is sitting in its original jurisdiction it is not bound by the principle of stare decisis but by considerations of judicial comity. (2) If a divisional court is bound by its own decisions, the exceptions in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 of a supervening decision of the House of Lords applies. (3) Judicial review is the sole means of attacking an administrative decision. See *O'Reilly v. Mackman* [1983] 2 A.C. 237, 283; *In re Racal Communications Ltd.* [1981] A.C. 374; *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 and *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338. Inferior courts have always been subject to judicial review of errors going to the jurisdiction and errors of law within the jurisdiction which appeared on the face of the record. Since *Anisminic*, the face of the record test is obsolete. It is questionable whether, since *Anisminic* [1969] 2 A.C. 147, all inferior tribunals and courts are subject to judicial review or whether some courts, e.g. ecclesiastical courts, are excluded.
- C
- D However, it is clear from the authorities that it was inferior courts, even before tribunals, which were amenable to the High Court's jurisdiction under what are now sections 29 and 31 of the Supreme Court Act 1981. Both are equally open to judicial review of all errors of law, whether committed within or outside the jurisdiction. (4) A coroner's court is an inferior court, and it is a court which comes within the *Anisminic* principles. In *Campbell's case* [1982] Q.B. 661 the divisional court considered that the coroner's court was a court of record (referring to *Coke's Institutes*, Pt. III (1817 ed.) and *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303); but compare *Jewison v. Dyson* (1842) 9 M. & W. 540 where there is some indication that it is not a court of record. The coroner's court makes no enforceable adjudications; its verdict is not evidence in civil proceedings; it determines nothing in terms of rights and obligations. (5) The coroner's conversation with the juror was an error of law which entitles the courts to quash the inquisition: see *Rex v. Wood, Ex parte Anderson* [1928] 1 K.B. 302 and *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29. The conversation was a material irregularity falling within *Reg. v. Townsend* [1982] 1 All E.R. 509 and should vitiate the inquisition. (6) The admission of evidence by a newspaper report relating to a man's hands being tied was not evidence which should have been allowed: *Rex v. Huntbach, Ex parte Lockley* [1944] K.B. 606. The circumstances in which a court will quash an inquisition have been considered in *Reg. v. Staffordshire Coroner* (1864) 10 L.T. 650; see also *Reg. v. Ingham* (1864) 5 B. & S. 257 and
- E
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Halsbury's Laws of England 4th ed., vol. 9 (1974), paras. 1105 and 1146. There is no other basis for a differential verdict other than the acceptance by the jury that one man's hands were tied. The coroner's failure to put aside that evidence casts serious doubt on the verdicts.

Simon D. Brown as amicus curiae. (1) The divisional court (whether sitting in a civil or criminal jurisdiction) is bound by its own decisions, whether exercising an appellate or original jurisdiction. (2) *Campbell's* case [1982] Q.B. 661 was wrongly decided. The correct approach is that the *Anisminic* principle applies to all inferior bodies amenable to judicial review provided only and always that in any particular case such an approach is consistent with the proper construction of the statute conferring on the inferior court its statutory power. In *In re Racial Communications* [1981] A.C. 374, 383, three categories of cases are set out: (a) superior courts to whom judicial review does not apply; (b) inferior courts to whom judicial review may apply although there may be statutory provisions which exclude it or restrict its permissible scope; and (c) tribunals and authorities to whom judicial review does apply. (3) Coroners' courts are inferior courts of law in the full sense referred to in the *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303. (4) Hearsay evidence, including documentary evidence, is admissible at inquests. Coroners are bound by less strict laws of evidence than courts. If hearsay evidence is admitted and it is material evidence, the coroner should warn the jury about the weight and reliability of such evidence but need not direct the jury to disregard it. The coroner's discussion with the juror might lead to a successful application for judicial review on the basis of *Rex v. Wood, Ex parte Anderson* [1928] 1 K.B. 302 and *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29.

Dealing with whether the divisional court is bound by its own decisions, contrast *Kruse v. Johnson* [1898] 2 Q.B. 91 and *Fortescue v. Vestry of St. Matthew, Bethnal Green* [1891] 2 Q.B. 170, where the divisional court declined to follow previous decisions, with *Younghusband v. Luftig* [1949] 2 K.B. 354, where a divisional court held that it was bound by its own decisions.

Under the Administration of Justice Act 1960 a right of appeal from the divisional court to the House of Lords was introduced, so that the divisional court is no longer a final court of appeal. Its jurisdiction is now comparable to the Court of Appeal (Criminal Division). The circumstances in which the court of criminal appeal would part from its own decisions is considered in *Rex v. Taylor* [1950] 2 K.B. 368 and *Reg. v. Gould* [1968] 2 Q.B. 65. In *Boys v. Chaplin* [1968] 2 Q.B. 1, 23, the Court of Appeal considered whether a decision of two Lords Justices was binding when it was discovered to be wrong. In *Nicholas v. Penny* [1950] 2 K.B. 466, 472-3, the divisional court did not follow a previous decision. The *Practice Direction (Judicial Review: Appeals)* [1982] 1 W.L.R. 1375 indicates that a divisional court considers itself bound by its own decisions and reflects the actual practice in the divisional court. There may be a distinction between a single judge sitting in the Crown Office list and a divisional court of the Queen's Bench Division: see *Reg. v. Immigration Appeal Tribunal, Ex parte Thomas* (unreported), 13 July 1983, *McNeill J. Huddersfield Police Authority v. Watson* [1947]

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- A K.B. 842 establishes that the divisional court is bound by its own decisions. The *Campbell* case [1982] Q.B. 661, 674–678 is clearly wrong. The distinction made there between administrative tribunals and inferior courts is not helpful. It was assumed that the coroner's court was an inferior court in *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303 on the basis of *Rex v. Clarke, Ex parte Crippen* (1910) 103 L.T. 636. The court's powers of review in respect of the
- B Crown Court are considered in *Reg. v. St. Albans Crown Court, Ex parte Cinnamond* [1981] Q.B. 480 and *Reg. v. Ipswich Crown Court, Ex parte Baldwin (Note)* [1981] 1 All E.R. 596. There is no reason to confine judicial review to the narrow basis suggested in *Campbell*. If the applicant is right, a coroner's court is bound by strict laws of evidence contrary to *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29; see also
- C Wills J.'s direction to the jury in the Crewe Murder case *Jervis on Coroners*, 9th ed. (1957), p. 508.

Sedley Q.C. in reply. There is no authority for the proposition that the divisional court is bound by its own decisions now that appeals to the House of Lords are available.

Cur. adv. vult.

- D 22 May. ROBERT GOFF L.J. read the following judgment of the court. There is before the court an application for judicial review, brought by leave of the single judge. The application is made by the families of two young men, Alan Tal and Clinton Frank Thomas who, together with another young man, Carl Seiga, died in a fire in a cell in
- E Strangeways Prison in Manchester, on 7 May 1982. The application relates to verdicts of a coroner's jury at the conclusion of an inquest on the deaths of the three young men, conducted by Leonard Malcolm Gorodkin, Her Majesty's Coroner for the County of Greater Manchester, on 15 September 1982. In the case of Tal and Thomas, the verdict was death by misadventure but, in the case of Seiga, an open verdict was returned. It is these differential verdicts which have prompted the
- F present application because it is thought by the families of Tal and Thomas that it might cast some reflection upon them as having possibly caused the death of Seiga. They seek an order of certiorari quashing the verdicts on all three of the victims and an order of mandamus requiring the coroner to conduct a fresh inquest on their deaths.

- G The main ground of the application relates to material placed before the jury by the coroner concerning a suggestion which had been made in a newspaper report that, at the time of the fire, one of the young men's hands had been tied. As to this matter, the grounds upon which relief is sought read:

- H “(ii) The three men died as a result of a fire in their cell at Strangeways Prison, Manchester. During the course of the inquest the coroner allowed hearsay evidence to be received in that he permitted the uncle of Carl Seiga, who as an interested party was questioning witnesses, to refer to a story published about the incident in the ‘Daily Star’ newspaper. This story contained allegations that at the time of the fire, Seiga's hands were tied.

There was no evidence before the court that any of the three men had ever been tied up. In the course of his summing up, however, the coroner failed to give any clear warning to the jury about the dangers of relying upon such hearsay evidence. (iii) During the course of the inquest, the coroner frequently made reference to the suggestion that Seiga's hands were tied. Further at the close of the evidence, the coroner read a small section of a statement taken from a prisoner in an adjoining cell who had not attended the inquest because, after his release, he had not been traced. The section read referred to the rumour that someone's hands were tied. In the course of his summing up the coroner failed to give a clear warning to the jury that this constituted hearsay and that they should not rely upon it. Furthermore, by his frequent reference to the suggestion and his reading from the statement at the close of the evidence the coroner thereby drew the attention of the jury to an unsubstantiated rumour to which he knew the jury should pay no regard."

The other, subsidiary ground of relief relates to an exchange which took place between the coroner and a member of the jury. The grounds of relief on this point read:

"(i) A short time after the jury had retired one of the jurors returned alone to the courtroom and had a private discussion with the coroner in sight of those in court. He then returned to the jury room. A few minutes later the jury came back and returned its verdicts which were as follows: Carl Seiga—an open verdict; Alan Tal and Clinton Frank Thomas—deaths by misadventure."

Before we turn to the substance of this application, we have to consider a jurisdictional problem. Under section 6 of the Coroners Act 1887, the High Court has wide powers to quash the inquisition on an inquest. However, those powers are only exercisable upon an application made by or under the authority of the Attorney-General, and no such authority was given in the present case. Here, the application is made under the common law jurisdiction of this court, preserved by section 35 of the Act of 1887, which provides that "Nothing in this Act shall . . . in any manner prejudice or affect the jurisdiction of the High Court of Justice or of any judge thereof in relation to or over a coroner or his duties."

However, in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661, a divisional court held that, although that power was exercisable where the inquest was bad on its face or where fraud was alleged (as to which see *Reg. v. McIntosh* (1858) 7 W.R. 52), or where it was shown that the coroner had exceeded his jurisdiction in the old, narrow, technical sense of that expression, nevertheless the broader *Anisminic* principle (see *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147), under which an error of law may go to the jurisdiction of the tribunal, had no application in the case of a coroner's inquest. They so held on the grounds that a coroner's inquest is a court, and that the *Anisminic* principle was not intended to apply to a court.

A The judgment of the divisional court was delivered by Watkins L.J. He said [1982] Q.B. 661, 674–675:

B “Mr. Webb argues that a coroner’s inquest is a court and that the *Anisminic* principle in terms relates to, and is restricted to, statutory tribunals, and that thus it has no application to any inferior court. In support of the contention that a coroner’s inquest is a court he relies not merely upon the common usage of referring to ‘the coroner’s court,’ but to passages in some of the speeches in the recent decision of the House of Lords in *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, in which several of their Lordships specifically said that the coroner’s court *is* a court: see Viscount Dilhorne at p. 338E, Lord Salmon at p. 342E–F, and Lord Scarman at p. 356A. Mr. Webb also refers to *Garnett v. Ferrand* (1827) 6 B. & C. 611, in which Lord Tenterden C.J. said, at p. 625: ‘The court of the coroner is a court of record of which the coroner is the judge; and it is a general rule of very great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions; . . .’

D “For his proposition that the *Anisminic* principle relates only to statutory tribunals, Mr. Webb relies not only on the passages from the speeches in that case to which we have referred, but to the speech of Lord Diplock in *In re Racial Communications Ltd.* [1981] A.C. 374, in which he said at p. 382G: ‘In *Anisminic* [1969] 2 A.C. 147 this House was concerned only with decisions of administrative tribunals.’

E “Mr. Sedley in reply submits that the issue is not whether a coroner’s inquest is a court, but whether it is a body to which the *Anisminic* principle applies. In *Coke’s Institutes*, Pt. III (1817 ed.), p. 271 Coke refers to the court of the coroner and states: ‘the court which he holdeth is a court of record.’ In his day it was a court with very considerable powers, some of which it does not now possess. However that may be, we have no doubt that a coroner’s inquest is still a court, though one having characteristics which are unique in the English legal system, in that its function is to investigate but not to reach a final decision such as a judgment order or verdict of guilt. In our judgment the *Anisminic* principle was not intended to be applied to a court. The passages from that decision and from *In re Racial Communications* which we have cited make it clear, in our view, that the principle is limited to tribunals established by statute, and probably to those tribunals from whose decisions, under the relevant statute, there is no right of appeal. Thus in our view the principle does not apply to coroners’ inquests.

H “There is, however, a second, more general, reason which leads us to the same conclusion. From most inferior courts—the county court, the Crown Court and magistrates’ courts—there is a statutory right of appeal. The High Court, in addition, exercises a supervisory role over these courts, but within a strictly limited sphere. The effect of *Anisminic* is that the High Court has powers to control the decisions of statutory tribunals, which extend over a wider field than the powers relating to courts because there is no, or only a limited,

right to appeal from the decisions of such tribunals. It is for this reason that in principle a wider power of intervention in relation to tribunals exists. They resemble in most respects the wide powers given by section 6 of the Act of 1887 to challenge decisions of coroner's inquests, subject only to the application being made by or under the authority of the Attorney-General. These powers were a considerable addition to those which existed previously and which were expressly saved by section 35."

Before this court, on behalf of the applicants, Mr. Sedley, to whose scholarly argument we are much indebted, submitted that the conclusion so reached in the case of *Campbell* was wrong in law and that we should not follow it. Mr. Brown, appearing as amicus curiae, agreed with Mr. Sedley that the divisional court in the *Campbell* case erred in concluding that the *Anisminic* principle did not apply to a coroner's inquest. He did not challenge the opinion of the divisional court in that case that a coroner's court was a court, but his submission was, in agreement with Mr. Sedley, that the *Anisminic* principle is applicable to an inferior court, such as a coroner's court, just as it is applicable to an inferior statutory tribunal. However, it was his submission that this court was bound by the earlier decision of the divisional court in the *Campbell* case and was not free to depart from it. The first question we have therefore to consider is whether we are so bound.

We have been taken through the authorities on this point by counsel. The earliest case to which we were referred was *Fortescue v. Vestry of St. Matthew, Bethnal Green* [1891] 2 Q.B. 170. In that case, a divisional court of five judges, presided over by the Lord Chief Justice, Lord Coleridge, declined to follow an earlier decision of a divisional court. Charles J., who delivered the judgment of the court, said of the earlier decision, at p. 179:

"The principle of this decision unquestionably applies to the case before us, and were it not that it is a criminal case in which no appeal is possible we should feel bound to act on the judgment of the majority of the court. But there being no appeal, and the matter being one of general importance, it has been considered right to have the question re-argued before a specially constituted divisional court of five members."

The same approach was adopted by a divisional court of five judges, also presided over by the Lord Chief Justice, then Lord Russell of Killowen, in another criminal case, *Kruse v. Johnson* [1898] 2 Q.B. 91, 102, *per* Lord Russell of Killowen C.J., where he accepted the principle in *Fortescue v. Vestry of St. Matthew, Bethnal Green* [1891] 2 Q.B. 170.

However, after the Second World War we see a different approach developing, when Lord Goddard was Lord Chief Justice, under the influence of the decision of the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718. We were referred to two cases. The first was *Huddersfield Police Authority v. Watson* [1947] K.B. 842, which was a civil case concerned with the right of a police officer to a special pension under the Police Pensions Act 1921. The matter came before a divisional court on appeal from quarter sessions, by virtue of a

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A statutory procedure under which the divisional court was the final court of appeal. The question arose whether the court was bound by a previous decision of a divisional court. Lord Goddard C.J., with whose judgment the other two members of the court agreed, considered that, whether the earlier decision was rightly decided or not, the court ought to follow it. He said, at pp. 846–847:

B “This court is made a final court of appeal in these matters, and I can imagine nothing more disastrous than that where the court has given a decision upon the construction or application of this Act another court should give a decision contrary to the decision already given, because there then would be two conflicting cases. You might get a court consisting perhaps of different judges choosing one of those decisions, and another court choosing the other decision, and there would be no finality in the matter at all. For myself, I think we ought to hold that we are bound by this decision . . .”

He then referred to *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 and continued:

D “If that is the rule which is applicable in the Court of Appeal—it is to be remembered that Court of Appeal judgments are reviewable in the House of Lords, at any rate by leave—and the Master of the Rolls [Lord Greene] pointed out in the course of his judgment that in some cases Court of Appeal judgments are final, as in bankruptcy, and in others are reviewable by the House of Lords, and yet he draws no distinction—and if, therefore, in a court most of whose decisions are reviewable, although it may be only by leave, in the House of Lords, those decisions are binding on the court, how much more important is it that this court, which is a final court, should follow its own decisions and consider that it ought to give full force and effect to them. Otherwise, as I have said, a great deal of uncertainty would be introduced into the law.”

F Four years later, in *Younghusband v. Luftig* [1949] 2 K.B. 354, a divisional court of five judges, again presided over by Lord Goddard C.J., applied the principle stated in *Huddersfield Police Authority v. Watson* [1947] K.B. 842 in a criminal case, on a case stated by justices. Lord Goddard C.J., who delivered the judgment of the court, said, at p. 361:

G “Before considering the law applicable to the case, we think it well to emphasise that a divisional court of five judges has no greater powers than one of three or even two. This court is bound by its own decisions as is the Court of Appeal whatever the number of judges that may constitute it: see *Huddersfield Police Authority v. Watson* [1947] K.B. 842. The principles of *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 apply equally to this court.”

H It is to be observed that, although that case was a criminal case, neither the *Fortescue* case [1891] 2 Q.B. 170 nor *Kruse v. Johnson* [1898] 2 Q.B. 91 appears to have been cited to the court. In those two earlier cases, it had been held that, because the court was a final court of appeal in a

criminal case, a full court could review earlier decisions of the court. In *Younghusband v. Luftig* [1949] 2 K.B. 354 the same premise appears to have led to precisely the opposite conclusion. A

It is, however, also to be borne in mind that, after the decision in *Younghusband v. Luftig*, appeals from divisional courts to the House of Lords in criminal cases became possible, provided the necessary certificate was given by the divisional court and leave to appeal was given either by the divisional court or the House of Lords: see section 1 of the Administration of Justice Act 1960. Since that statute, an appeal has lain from a decision of a divisional court in a criminal case in the same circumstances in which an appeal will lie to the House of Lords from the Court of Appeal (Criminal Division), formerly the Court of Criminal Appeal. B

It is of some interest to observe that, when sitting in the Court of Criminal Appeal, Lord Goddard C.J. took a somewhat different view of the circumstances in which that court could depart from its own previous decisions. In *Rex v. Taylor* [1950] 2 K.B. 368 he said, at p. 371: C

“I desire to say a word about the reconsideration of a case by this court. The Court of Appeal in civil matters usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction. For instance, it considers itself bound by its own decisions and by those of the Exchequer Chamber; and, as is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters this is essential in order to preserve the rule of stare decisis. This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present, and in this particular instance the full court of seven judges is unanimously of opinion that the decision in *Rex v. Treanor*, 27 Cr.App.R. 35 was wrong . . .” D E F

That approach was adopted and approved by the Court of Appeal (Criminal Division) in *Reg. v. Gould* [1968] 2 Q.B. 65, when a court consisting of three judges (two Lords Justices and one puisne judge) declined to follow an earlier decision of the Court of Criminal Appeal. Diplock L.J., who delivered the judgment of the court, said, at pp. 68–69: G

“In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we H

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- A should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case (*Rex v. Taylor* [1950] 2 K.B. 368). A fortiori, we are bound to give
- B effect to the law as we think it is if the previous decision to the contrary effect is one of which the ratio decidendi conflicts with that of other decisions of this court or its predecessors of co-ordinate jurisdiction.”

- C No material distinction can now be drawn between a divisional court exercising its appellate jurisdiction in criminal cases, on appeals from justices by way of case stated, and the Court of Appeal (Criminal Division) exercising its appellate jurisdiction in criminal cases, appeals now lying from both courts to the House of Lords under the same conditions. It is difficult to imagine that nowadays, in such cases, a divisional court would adopt a different attitude from the Court of Appeal (Criminal Division) in *Reg. v. Gould* [1968] 2 Q.B. 65.

- D We have to consider the impact of these authorities on the present case, which is concerned not with an appeal but an application for judicial review. Such applications may be made either in criminal or in civil matters. Where such an application is made in a civil matter, there is a right of appeal to the Court of Appeal (Civil Division); where it is made in a criminal matter, there may be an appeal to the House of Lords, but only upon the grant of a certificate by the divisional court and with the leave of either the divisional court or the House of Lords.

- E Having regard to the nature of this jurisdiction, we do not consider that there is any authority which decides that a divisional court in such a case is not free to depart from a previous decision of another divisional court. The only case which might be thought so to decide is *Huddersfield Police Authority v. Watson* [1947] K.B. 842. The foundation of the
- F decision in that case was, however, that the divisional court in question was there sitting as a final court of appeal. There must be some doubt whether, in the light of the change of policy in the House of Lords, evinced in the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234, the basis of the opinion expressed by Lord Goddard C.J. in the *Watson* case can still be regarded as valid. But, even if it were, it can in
- G our judgment have no application with regard to applications for judicial review.

- H In considering this question, it is not to be forgotten that there is no court known as “the Divisional Court”. We are not here concerned with a court such as the Court of Appeal, which is one court, though it usually sits in a number of divisions: see *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, 725, *per* Lord Greene M.R. A divisional court of a particular division, for example of the Queen’s Bench Division, is not *the* divisional court of that division. Whatever their historical background, the status of divisional courts today is to be found in the relevant provisions of the Supreme Court Act 1981.

Section 151(4) provides that “‘divisional court’ (with or without capital letters) means a divisional court constituted under section 66.” A

Section 66 provides:

“(1) Divisional courts may be held for the transaction of any business in the High Court which is, by or by virtue of rules of court or any other statutory provision, required to be heard by a divisional court. (2) Any number of divisional courts may sit at the same time. (3) A divisional court shall be constituted of not less than two judges. (4) Every judge of the High Court shall be qualified to sit in any divisional court. (5) The judge who is, according to the order of precedence under this Act, the senior of the judges constituting a divisional court shall be the president of the court.” B

Furthermore, under the heading “The High Court. General jurisdiction,” section 19 provides: C

“(1) The High Court shall be a superior court of record. (2) Subject to the provisions of this Act, there shall be exercisable by the High Court (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision). (3) Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is—(a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court; or (b) by rules of court made exercisable by a master, registrar or other officer of the court, or by any other person. (4) The specific mention elsewhere in this Act of any jurisdiction covered by subsection (2) shall not derogate from the generality of that subsection.” D E

From this it follows that every divisional court is simply a court, constituted of not less than two judges, held for the transaction of business of the High Court, which is (by rules of court or by statute) required to be heard by a divisional court. Among the business of the High Court required to be so heard are to be found applications for judicial review in any criminal cause or matter, or in other causes or matters where the court so directs: see R.S.C., Ord. 53, r. 5(1) and (2). It is also however to be observed that, when a divisional court is constituted to hear an application for judicial review, it is not sitting in an appellate capacity. It is not hearing an appeal from another court, nor is it considering a question of law on a case stated by another court, as in the case of appeals by way of cases stated by magistrates’ courts. It is exercising what is often called a supervisory jurisdiction. That jurisdiction is exercised by the High Court over inferior courts and tribunals. It is only exercised by a divisional court when required to do so by statute or by rules of court, and any decision made in the exercise of that jurisdiction may be the subject of appeal, either to the Court of Appeal in civil cases, or to the House of Lords (under the requisite F G H

A conditions) in criminal cases. If a judge of the High Court sits exercising the supervisory jurisdiction of the High Court then it is, in our judgment, plain that the relevant principle of stare decisis is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge

B of equal jurisdiction (see *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 848, *per* Lord Goddard C.J.), for either the judge exercising such supervisory jurisdiction is (as we think) sitting as a judge of first instance, or his position is so closely analogous that the principle of stare decisis applicable in the case of a judge of first instance is applicable to him.

C In our judgment, the same principle is applicable when the supervisory jurisdiction of the High Court is exercised not by a single judge, but by a divisional court, where two or three judges are exercising precisely the same jurisdiction as the single judge. We have no doubt that it will be only in rare cases that a divisional court will think it fit to depart from a decision of another divisional court exercising this jurisdiction. Furthermore, we find it difficult to imagine that a single judge exercising this

D jurisdiction would ever depart from a decision of a divisional court. If any question of such a departure should arise before a single judge, a direction can be made under R.S.C., Ord. 53, r. 5(2), that the relevant application should be made before a divisional court. These are, therefore, the principles which we propose to apply in the present case.

E We now turn to the question whether we should depart from the decision of this court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661. In that case, the court accepted a submission that a coroner's inquest is a court and that the *Anisminic* principle is restricted to statutory tribunals and has no application to any inferior court. For the latter part of their conclusion, the court relied in particular upon a dictum of Lord Diplock in *In re Racal Communications Ltd.* [1981] A.C. 374, 382, in which he said that "In *Anisminic* [1969] 2 A.C. 147 this

F House was concerned only with decisions of administrative tribunals." They considered that the reason why the effect of *Anisminic* was that the High Court had powers to control the decisions of statutory tribunals, which powers extended over a wider field than powers relating to courts was that there is no, or only a limited, right to appeal from the decisions of such tribunals: see [1982] Q.B. 661, 675.

G It is, however, now plain that, in his observation in *In re Racal Communications Ltd.* [1981] A.C. 374, relied upon by the court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661, Lord Diplock did not intend to say that the *Anisminic* principle did not extend to inferior courts as well as tribunals. In his authoritative statement in *O'Reilly v. Mackman* [1983] 2 A.C. 237, with which the remainder of their Lordships agreed, he referred, at p. 278, to *Anisminic* as

H "the landmark decision . . . which has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between

errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction.” A

Furthermore, the court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661, cannot, we think, have been referred to the speech of Lord Salmon in *In re Racal Communications Ltd.* [1981] A.C. 374, 386, in which he said that the *Anisminic* principle was confined to “decisions made by commissioners, tribunals or inferior courts which can now be reviewed by the High Court of Justice—just as the decisions of inferior courts used to be reviewed by the old court of King’s Bench under the prerogative writs.” Indeed, it is plain to us on what, we have no doubt, has been a fuller citation of authority than was available to the court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661 that, historically, inferior courts have always been subject to what we now call judicial review, though originally only in cases of error going to the jurisdiction and error of law within the jurisdiction which appeared on the face of the record: see the classic account of Denning L.J. in *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338. B C

Since *Anisminic*, the requirement that an error of law within the jurisdiction must appear on the face of the record is now obsolete. It follows that today, in principle, inferior courts as well as tribunals are amenable to the supervisory jurisdiction of the High Court under sections 29 and 31 of the Supreme Court Act 1981. Furthermore, so far as the point about a right of appeal is concerned, it is not to be forgotten that there is a right of appeal from a number of administrative tribunals, notably from the bodies specified in section 13 of the Tribunals and Inquiries Act 1971, with reference to Schedule 1 to the Act, and that sometimes there is no appeal from a court, as for example a coroner’s inquest. But it is unnecessary for us to explore the matter in any detail because we have the benefit (which the court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661 did not, and indeed could not, have) of the authoritative statement in *O’Reilly v. Mackman* [1983] 2 A.C. 237 which puts the matter beyond doubt. Hence the readiness of Mr. Simon Brown, as *amicus curiae*, to join forces with Mr. Sedley, for the applicants before us, and submit together with him that the court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661 erred in reaching its conclusion in that case. D E F

We wish to add that, although we think it right to conclude on the authority of Lord Diplock’s statement of the law in *O’Reilly v. Mackman* [1983] 2 A.C. 237 that, as a matter of principle, the *Anisminic* principle applies to inferior courts as well as inferior tribunals, nevertheless we do not wish to be understood as expressing any opinion that the principle will apply with full force in the case of every inferior court. In particular, we are aware, though the matter was not pursued in argument before us, that there is authority, decided since *Anisminic*, restricting the application of the principle in the case of committing justices: see, in particular, *Reg. v. Ipswich Justices, Ex parte Edwards* (1979) 143 J.P. 699, where the leading judgment was delivered by Geoffrey Lane L.J. G H

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- A But Lord Diplock's statement of the law in *O'Reilly v. Mackman* [1983] 2 A.C. 237 makes it plain that, in principle, contrary to the understanding of the divisional court in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661 inferior courts as opposed to tribunals are not excluded from the *Anisminic* principle and, with the benefit of that guidance, we can see no reason why the principle should not be applicable in the case of a coroner's inquest; though we wish to add the caveat that in every case the grant of an application for judicial review is discretionary and that it does not follow that an order of certiorari will be made merely because some error of law has been committed during an inquest.
- B

- In all the circumstances, we think that this is one of those rare cases where a divisional court should depart from an earlier decision of another divisional court. The present case does not, of course, fall within any one of the exceptions to the principle in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718: see *Williams v. Glasbrook Brothers Ltd.* [1947] 2 All E.R. 884. But, for the reasons we have already stated, we have the power to depart from an earlier decision of another divisional court. With the benefit of authoritative guidance from the House of Lords, the law is now clear and we consider that it would be right for this court not to follow the decision in *Reg. v. Surrey Coroner, Ex parte Campbell* [1982] Q.B. 661.
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- We now turn to the substance of the application. The first ground, as set out in paragraphs (ii) and (iii) of the grounds upon which relief is sought, is based, as we have already indicated, upon an allegation that the coroner admitted "hearsay evidence," in the form of a newspaper article, suggesting that, at the time of the fire, the hands of one of the victims, i.e., Seiga, were tied; that, in effect, the coroner gave currency to this story by the way in which he conducted the inquest; and that he failed to warn the jury when he came to sum up that they should not rely on this hearsay evidence.
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- It is important to set out first what actually happened at the inquest. We take the facts from the affidavit evidence of Mr. Lizar, the solicitor acting for the applicants, and of the coroner; but the facts are not in dispute. At the inquest, the families of Tal and Thomas were legally represented; however Seiga's family was not legally represented, his uncle (Mr. Carruthers) representing that family. He introduced the possibility of one of the victim's hands having been tied, by reference to a newspaper report. The matter having been raised, the coroner felt that it was right and proper that all appropriate witnesses should be questioned on the point, especially as the deaths had occurred in a prison cell. He bore in mind, in particular, that one of the functions of a coroner's inquest is to allay rumours and suspicion: see the Broderick Report on Death Certification and Coroners (1971) (Cmnd. 4810), paragraph 14.19(ii). He considered that in order to allay a rumour, one must have details of it. Accordingly, at the inquest, details of the rumour were heard and direct evidence brought to allay it. The coroner alerted the jury to the fact that direct evidence would be called, but informed them that, if they felt after hearing the witnesses that they were still not satisfied, further inquiries could be instituted. One witness, a prisoner in a neighbouring cell, stated that he heard a voice
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say: "One of them was tied." He continued: "It was something like that, but no names were mentioned. It could have meant the beds or something." Part of a statement of another prisoner, which referred to a rumour that someone's hands were tied, was also read to the jury. However, apart from these vague suggestions, there was no evidence to support the conclusion that Seiga's hands had been tied. The doctor who carried out the post mortem examination stated that he saw no marks to suggest that Seiga's hands had been tied, and direct evidence given by those who assisted in the release of the three deceased from the cell established, in the opinion of the coroner, that none of them had tied hands.

At the conclusion of the evidence, following an inquiry by the coroner, the jury expressed themselves to be satisfied with the evidence they had heard. On the evidence before them, it is difficult to imagine how the jury could have reached any other conclusion than that this was a mere rumour which was not merely unsupported, but contradicted, by the material evidence. Having, in our opinion with every justification, so understood the jury's assent to his inquiry, the coroner considered that there was no need to address them about the so-called "hearsay evidence" in his summing up.

We should add that the statement of Mr. Nolan, an assistant governor at the prison, contained the following passage:

"It is reasonable to believe that Tal and Thomas got on well together because they were together for some time. If there had been any problems they would have been split up into different cells. As far as Seiga is concerned it is difficult to say whether he got on well with Tal and Thomas because he had only been allocated the cell on the day of the fire and the staff had had no time to assess the position."

We consider that this evidence may have provided the origin of the differential verdicts returned by the jury in respect of Tal and Thomas on the one hand and Seiga on the other.

In the light of these facts, we do not consider that the coroner's conduct of the inquest in relation to this matter can be criticised. The coroner was, in our judgment, fully entitled to form the conclusion that once the matter had been raised by Mr. Carruthers his proper course was to ensure that all relevant evidence was laid before the jury. We do not think that it can fairly be said of the coroner that he allowed hearsay evidence to be received. What happened was that a relative of one of the deceased drew attention to the existence of a rumour to which currency had been given in a newspaper. Once that had been done, all direct evidence available was laid before the jury. But, even if the coroner had admitted hearsay evidence, we know of no rule precluding a coroner from admitting evidence of this kind. Rule 28 of the Coroners Rules 1953 (S.I. 1953 No. 205) contains provisions concerning documentary evidence, though not about oral evidence; but there is no general prohibition against admission of hearsay evidence, either in the Coroners Act 1887 (50 & 51 Vict. c. 71) or in the Rules. Indeed, there is authority that it is clear that a coroner's inquest is not bound by the

1 Q.B.

Reg. v. Manchester Coroner, Ex p. Tal (D.C.)

A strict laws of evidence: see *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29, 36 *per curiam*. Furthermore, it is in any event clear to us that, this rumour having been referred to by a relative of one of the deceased, not only was the coroner right to seek to allay it, but also the jury made plain to him that they were satisfied, on the evidence, that it had been allayed. In all the circumstances, we can see no reason why the coroner should have referred again to the matter in his summing up, because by that time the issue was dead. The differential verdicts must have had, we consider, some other basis, and we have already indicated the evidence which may have provided the origin of the difference between the verdicts. For these reasons, we are unable to accept the submission that this particular matter justified judicial review.

C We turn to the second ground of complaint, set out in paragraph (i) of the grounds on which relief is sought, which referred to "a private discussion" between the coroner and one of the jurors. Again, it is important that we should first set out the facts, derived from the affidavit evidence before us. Mr. Lizar referred to the matter in paragraph 12 of his affidavit, which reads:

D "After the jury had retired, a member of the jury returned alone (a few minutes later) to the courtroom where the coroner was still sitting, although the court was no longer in session. The juror had a private discussion with the coroner in sight of those in court. He then returned to the jury room. A few minutes later the jury came back and returned its verdicts."

In his note of the coroner's summing up, the relevant passage runs:

E "Following this summing up the coroner indicated that he could not see any reason for different verdicts in relation to the three men, but if the jury were considering that then he would address them again. The jury then retired. After the jury had been retired for a few minutes one member of the jury returned to the court room where the coroner was still sitting, although the court was not in session. This member of the jury engaged in a private discussion with the coroner, in view of the court, although it was not possible to hear exactly what was being said."

However, the coroner pointed out, with reference to this evidence, that the discussion was not in private. He stated:

G "The juryman was the foreman who addressed me from the body of the court albeit from the side whilst I remained in my judicial seat awaiting the verdict of the jury. The jury required confirmation that they could bring in different verdicts on the three deceased. I gave the confirmation as required."

H He went on to point out that Mr. Lizar, as representative of the families of Tal and Thomas, was present in the courtroom at the time of the exchange and, if he was not satisfied with what he saw, or wished to be informed of the details of the conversation, he should have made this known at the time to the coroner, but he did not do so.

In support of his application on this ground, Mr. Sedley relied upon *Rex v. Wood, Ex parte Anderson* [1928] 1 K.B. 302, where the court

made an order of certiorari quashing a coroner's inquisition on the ground that the coroner was in the jury's retiring room while they were considering their verdict, and there had been informed in private what the verdict of the jury was to be. He also relied upon a passage of the judgment of the court in *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29 with reference to the court's powers under section 19 of the Coroners (Amendment) Act 1926, at p. 37:

"The words 'necessary or desirable in the interests of justice' are the critical words. The court is not to attend to mere informalities, nor to criticise minutely the summing-up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such that there is real risk that justice has not been done, a real impairment of the security which right procedure provides that justice is done and is seen to be done, the court ought not to allow the inquisition to stand. No doubt a coroner has considerable latitude as to the way in which he may conduct an inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else."

However, in our judgment, the facts of this case do not fall within that principle. There is, we consider, no legitimate ground of complaint. We are satisfied that the exchange between the coroner and the foreman of the jury was not in private, but in public. It was conducted in the full view of those present. The coroner was sitting in his chair and was being addressed in his capacity as coroner, in the room where the inquest was taking place, and was replying as such, in public. It does happen from time to time, in the course of hearings before tribunals, that what is said is inaudible. Here, it appears that "it was not possible to hear exactly what was being said." But, if so, it is always open to those present to ask for the words to be repeated so that they can hear them. We can see no basis for this complaint.

For these reasons, the application for judicial review will be refused.

*Application refused.
Legal aid taxation.*

Solicitors: Robert Lizar, Manchester; Treasury Solicitor.

[Reported by Y. H. TAN, Barrister-at-Law]

THE ROYAL WELLS

[1983 Folio No. 826]

1984 May 4, 9; 18

Sheen J.

*Admiralty—Maritime lien—Priorities—Claims for wages—Claims by master and crew—Fund insufficient to meet claims in full—Whether master's claim postponed to claim of crew
Ships' Names—Royal Wells*

The plaintiffs, the master, officers and men of the motor vessel the *Royal Wells*, issued a writ in rem claiming moneys

1 A.C.

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[HOUSE OF LORDS]

LLOYD AND OTHERS APPELLANTS

AND

McMAHON RESPONDENT

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1986 July 9, 10, 14, 15, 16, Lawton, Dillon and Woolf L.JJ.
 17, 18, 21, 22; 31
 1987 Jan. 26, 27, 28, 29; Lord Keith of Kinkel, Lord Bridge of Harwich,
 Feb. 2, 3; Lord Brandon of Oakbrook, Lord Templeman
 March 12 and Lord Griffiths

C

Local Government—Member of local authority—Surcharge for wilful misconduct—Failure of local authority to make rate—District auditor notifying members responsible of consideration being given to issue of certificate of surcharge—Members' written representations invited—Oral hearing neither offered nor requested by members—Whether auditor's failure to offer oral hearing vitiating notices—Whether defect curable by appeal to High Court—Local Government Finance Act 1982 (c. 32), s. 20(1)(2)(3)

D

On 10 April 1985, the district auditor sent a report to the Liverpool City Council expressing concern at the council's failure to make a valid rate for the year 1985–86, drawing attention to the duties of councillors in that regard and possible warnings that he had made in 1984 regarding the possible consequences for individual councillors, both financial and by way of disqualification, if an inadequate or no rate were made or if there were unreasonable delay in making one. On 21 May 1985, he made a further report giving notice that unless the council made a lawful rate at latest by the end of May he would commence action under section 20 of the Local Government Finance Act 1982¹ to recover any losses occasioned by the failure to make a rate from the councillors responsible for incurring them. Copies of his report were sent to all councillors. On 6 June 1985, the Audit Commission directed that an extraordinary audit be carried out. On 14 June 1985, the council made a rate. On 26 June 1985, the auditor sent to each of the appellant councillors a notice stating that he had to consider whether he should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or on the delay in making it, as due from them on the ground that a loss or deficiency of such sum had been incurred or caused by their wilful misconduct. The councillors were notified that they might make representations in writing to the auditor before he reached a decision, and the auditor enclosed a note of the various matters to which he had had regard in issuing the notice. The note identified certain specific losses resulting from the delay, totalling £106,103, including the loss of interest on sums that would, but for the delay, have been paid earlier than had been the case. The appellant councillors were identified as persons who by their voting or absence might have failed to discharge their duty as members of the council and might, therefore, be

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¹ Local Government Finance Act 1982, s. 20: see post, pp. 704B–705C.

guilty of wilful misconduct resulting in the losses in question. The note stated that the facts showed that there had been no lawful justification for the delay in the making of the rate. The appellant councillors made a collective written and fully documented response to the auditor's notice prepared with the assistance of the council's chief executive. They relied on various matters that they claimed rebutted the auditor's provisional view that they had been guilty of wilful misconduct, including contentions that their obligation had been to make a rate within a reasonable time after the start of the financial year and that it had been reasonable to delay until 14 June 1985 because they had hoped or expected to be able to persuade central government ministers to make larger grants available to Liverpool than they had previously expressed themselves as willing to do, as had in fact occurred in 1984-85, and that they had been influenced throughout by a sincere desire to maximise the resources available to the people of Liverpool and thus to do their best to alleviate the unsatisfactory conditions prevailing there. They did not request an oral hearing. On 6 September 1985 the auditor issued a certificate under section 20(1) of the Act of 1982 certifying the sum of £106,103 to be due from the appellant councillors jointly and severally being the amount of a loss incurred or deficiency caused by their wilful misconduct. The certificate was accompanied by a statement of reasons that dealt in detail with the councillors' representations before concluding that the delay in making a rate had been deliberate, that the intention of the delay had been to attempt to obtain additional money from central government, that there had been no justifiable reason for supposing that the delay would so influence central government, that the council had known that to delay unreasonably had been a wrongful act or had been recklessly indifferent as to whether it was or not and that the loss of £106,103 had been a direct consequence of the delay in making a rate. The appellant councillors were identified as those responsible for the delay. They appealed against the notice to the High Court under section 20(3) of the Act of 1982, and the Divisional Court, dismissing the appeals, concluded that their wilful misconduct causing the loss of £106,103 was fully established, that they had had a sufficient opportunity to meet the case made against them by the district auditor and that there had been no procedural unfairness in the auditor's failure to offer them an oral hearing before reaching his decision. The councillors were invited by the Divisional Court to give oral evidence but declined to do so. The Court of Appeal dismissed further appeals by the councillors, affirming the view of the Divisional Court that they had been guilty of wilful misconduct causing the certified loss and rejecting their submission that the auditor's failure to offer them an oral hearing had made his certificate a nullity.

On appeals by the councillors:—

Held, dismissing the appeals, that in all the circumstances, including the facts that the councillors had not requested an oral hearing and that they had been able to make full written representations to the district auditor, the auditor had not acted unfairly in not affording them an oral hearing and they had not been prejudiced by his failure to do so; that they had had adequate notice of the matters on which the auditor had relied in issuing his certificate; and that he and the courts below had

1 A.C. Lloyd v. McMahon (H.L.(E.))

A been entitled to conclude that the loss of £106,103 had been shown to have been caused by the councillors' wilful misconduct (post, pp. 696B—697A, G—H, 702C—D, G—703B, 706C—707A, C—708C, 709H—710A, 714C—715B, 716G—H, 717B).

B *Per curiam.* The particular appeal mechanism provided for by section 20(3) of the Local Government Finance Act 1982, considered in its context, is apt to enable the court in its discretion, notwithstanding that it finds some procedural defect in the conduct of an audit that has resulted in a certificate based on wilful misconduct, to inquire into the merits of the case and arrive at its own decision thereon (post, pp. 697C—D, 709F—G, H—710A, 715G—716B, E—F, 717B).

Decision of the Court of Appeal, post, p. 634D, affirmed.

The following cases are referred to in their Lordships' opinions:

C *Calvin v. Carr* [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)

Leary v. National Union of Vehicle Builders [1971] Ch. 34; [1970] 3 W.L.R. 434; [1970] 2 All E.R. 713

D The following additional cases were cited in argument in the House of Lords:

Asher v. Lacey [1973] 1 W.L.R. 1412; [1973] 3 All E.R. 1008, D.C.

Asher v. Secretary of State for the Environment [1974] Ch. 208; [1974] 2 W.L.R. 466; [1974] 2 All E.R. 156, C.A.

E *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Builders Licensing Board (N.S.W.) v. Sperway Constructions (Sydney) Pty. Ltd. (1976) 51 A.L.J.R. 260

Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.

Colton v. District Auditor for Wembley Borough Council (1962) 60 L.G.R. 247, D.C.

F *Denton v. Auckland City* [1969] N.Z.L.R. 256

Fairmount Investments Ltd. v. Secretary of State for the Environment [1976] 1 W.L.R. 1255; [1976] 2 All E.R. 865, H.L.(E.)

George v. Secretary of State for the Environment (1979) 77 L.G.R. 689; 38 P. & C.R. 609, C.A.

Graham v. Teesdale (1981) 81 L.G.R. 117

G *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551; [1967] 2 W.L.R. 136; [1966] 3 All E.R. 863, P.C.

King v. University of Saskatchewan (1969) 6 D.L.R. (3d) 120; [1969] S.C.R. 678

London & Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182; [1979] 3 All E.R. 876, H.L.(Sc.)

Love v. Porirua City Council [1984] 2 N.Z.L.R. 308

Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278, H.L.(Sc.)

H *Maxwell v. Department of Trade and Industry* [1974] Q.B. 523; [1974] 2 W.L.R. 338; [1974] 2 All E.R. 122, C.A.

Pickwell v. Camden London Borough Council [1983] Q.B. 962; [1983] 2 W.L.R. 583; [1983] 1 All E.R. 602, D.C.

- Powell v. Streatham Manor Nursing Home* [1935] A.C. 243, H.L.(E.) A
Q.T. Discount Foodstores Ltd. v. Warley General Commissioners [1982] S.T.C. 40
Raymond v. Honey [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756, H.L.(E.)
Reg. v. Farmer, Ex parte Hargrave (1980) 79 L.G.R. 676, D.C.
Reg. v. Hackney London Borough Council, Ex parte Fleming (1986) 26 R.V.R. 182, D.C.
Reg. v. Liverpool City Council, Ex parte Ferguson, The Times, 20 November 1985, D.C. B
Reg. v. Secretary of State for Transport, Ex parte Gwent County Council [1987] 2 W.L.R. 961; [1987] 1 All E.R. 161, C.A.
Reid v. Rowley [1977] 2 N.Z.L.R. 472
Rex v. Browne, Ex parte Butler [1909] 2 I.R. 333, D.C.
Rex v. Local Government Board, Ex parte Arlidge [1914] 1 K.B. 160, C.A.
Rex v. Roberts, Ex parte Scurr [1924] 2 K.B. 695, C.A. C
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Roberts v. Hopwood [1925] A.C. 578, H.L.(E.)
Rothnie v. Dearne Urban District Council (1951) 50 L.G.R. 123, D.C.
Smith and Fawcett Ltd., In re [1942] Ch. 304; [1942] 1 All E.R. 542, C.A.
Taylor v. Munrow [1960] 1 W.L.R. 151; [1960] 1 All E.R. 455, D.C.
Twist v. Randwick Municipal Council (1976) 136 C.L.R. 106; 12 A.L.R. 379; 51 A.L.J.R. 193 D
Tyrer v. Middleton (unreported), 5 December 1973, D.C.; see *Jones, Local Government Audit Law*, 2nd ed. (1985), App.D. 7, p. 357; 230 E.G. 973
Westminster City Council, In re [1986] A.C. 668; [1986] 2 W.L.R. 807; [1986] 2 All E.R. 278, H.L.(E.) E

The following cases are referred to in the judgments of the Court of Appeal:

- Asher v. Lacey* [1973] 1 W.L.R. 1412; [1973] 3 All E.R. 1008, D.C.
Asher v. Secretary of State for the Environment [1974] Ch. 208; [1974] 2 W.L.R. 466; [1974] 2 All E.R. 156, C.A.
Bushell v. Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608, H.L.(E.) F
Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.
Denton v. Auckland City [1969] N.Z.L.R. 256
George v. Secretary of State for the Environment (1979) 38 P. & C.R. 609, C.A.
Graham v. Teesdale (1981) 81 L.G.R. 117
Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A. G
Jeffer v. New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551; [1967] 2 W.L.R. 136; [1966] 3 All E.R. 863, P.C.
King v. University of Saskatchewan (1969) 6 D.L.R. (3d) 120
Leary v. National Union of Vehicle Builders [1971] Ch. 34; [1970] 3 W.L.R. 434; [1970] 2 All E.R. 713
Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278, H.L.(Sc.) H
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

1 A.C.

Lloyd v. McMahon (C.A.)

- A *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain* (No. 2) [1979] 1 W.L.R. 1401; [1979] 3 All E.R. 545, D.C.
Reg. v. Hackney London Borough Council, Ex parte Fleming [1986] R.V.R. 182, D.C.
Reid v. Rowley [1977] 2 N.Z.L.R. 472
Rex v. Local Government Board, Ex parte Arlidge [1914] 1 K.B. 160, C.A.; sub nom. *Local Government Board v. Arlidge* [1915] A.C. 120, H.L.(E.)
- B *Rex v. Roberts* [1908] 1 K.B. 407, C.A.
Rex v. Roberts, Ex parte Scurr [1924] 2 K.B. 695, C.A.
Rothnie v. Dearne Urban District Council (1951) 50 L.G.R. 123, D.C.
Smith and Fawcett Ltd., In re [1942] Ch. 304; [1942] 1 All E.R. 542, C.A.
Twist v. Randwick Municipal Council (1976) 12 A.L.R. 379
White v. Kuzych [1951] A.C. 585; [1951] 2 All E.R. 435, P.C.
- C *Wiseman v. Borneman* [1971] A.C. 297; [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.)

The following additional cases were cited in argument in the Court of Appeal:

- D *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
Bromley London Borough Council v. Greater London Council [1983] 1 A.C. 768; [1982] 2 W.L.R. 62; [1982] 1 All E.R. 129, H.L.(E.)
Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.
Colton v. District Auditor for Wembley Borough Council (1962) 60 L.G.R. 247, D.C.
- E *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)
Dickson v. Hurler-Hobbs [1947] K.B. 879; [1947] 2 All E.R. 47, D.C.
Glynn v. Keele University [1971] 1 W.L.R. 487; [1971] 2 All E.R. 89
Indian Zoedone Co., In re (1884) 26 Ch.D. 70, C.A.
Jones v. National Coal Board [1957] 2 Q.B. 55; [1957] 2 W.L.R. 760; [1957] 2 All E.R. 155, C.A.
- F *Lamb v. Camden London Borough Council* [1981] Q.B. 625; [1981] 2 W.L.R. 1038; [1981] 2 All E.R. 408, C.A.
Maxwell v. Department of Trade and Industry [1974] Q.B. 523; [1974] 2 W.L.R. 338; [1974] 2 All E.R. 122, C.A.
Maynard v. Osmond [1977] Q.B. 240; [1976] 3 W.L.R. 711; [1977] 1 All E.R. 64, C.A.
Pentecost v. London District Auditor [1951] 2 K.B. 759; [1951] 2 All E.R. 330, D.C.
- G *Pergamon Press Ltd., In re* [1971] Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535, C.A.
Pickwell v. Camden London Borough Council [1983] Q.B. 962; [1983] 2 W.L.R. 583; [1983] 1 All E.R. 602, D.C.
Reg. v. Brent London Borough Council, Ex parte Gunning, *The Times*, 30 April 1985
- H *Reg. v. Ghosh* [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689, C.A.
Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer [1986] A.C. 484; [1986] 2 W.L.R. 259; [1985] 3 All E.R. 734; [1986] 1 All E.R. 467, C.A. and H.L.(E.)

- Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council* [1982] Q.B. 593; [1982] 2 W.L.R. 693; [1983] 3 All E.R. 321, D.C. A
- Ridge v. Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
- Roberts v. Hopwood* [1925] A.C. 578, H.L.(E.)
- Taylor v. Munrow* [1960] 1 W.L.R. 151; [1960] 1 All E.R. 455, D.C.

APPEALS from the Divisional Court of the Queen's Bench Division. B

By notices of motion dated 4 October 1985, 49 councillors of the Liverpool City Council including the appellant David John Lloyd sought by way of appeal an order that the certificate dated 6 September 1985 of the respondent, Thomas Irving McMahon, as district auditor, that the sum of £106,103 was due from the councillors jointly and severally, being the amount of loss incurred or deficiency caused by their wilful misconduct, be set aside and discharged, on the grounds that (a) the auditor had been wrong to conclude that the councillors had delayed in making a rate in order to use delay itself as a weapon or lever "to prise additional money from central government;" (b) alternatively, he had been wrong to conclude that that would have been a breach of duty, since delay for such a reason would have been a lawful exercise of the councillors' discretion, there being no legal requirement to make a rate by any particular date; (c) he had been wrong to conclude that there had been any loss to the council in the respects alleged and that, if there had been such a loss, it had been caused by the councillors, the loss having been caused by the unilateral and unlawful action of the Department of Health and Social Security and of the Treasury Valuer who each had not been entitled to withhold material payments to the council; alternatively, if those payments had been voluntary and the Department of Health and Social Security and/or the Treasury Valuer had not been obliged to pay them, the withholding of them had not been, and had not been capable of being, a loss caused by the councillors' misconduct; (d)(i) alternatively, if the alleged loss had been caused by the councillors, the auditor had been wrong to conclude that the same had been the result of wilful misconduct or any misconduct by them, or any mala fides on their part as was implied by him; (ii) he had been wrong not to conclude that in the exercise of their discretion as to when to carry out their duty to make a rate (there being no duty setting the date on or by which a rate must be made) the councillors had acted honestly and reasonably, taken into account the advice proffered to them and acted in the interests of the ratepayers and/or in what they had honestly and reasonably believed to be the interests of the ratepayers; (iii) he had been wrong to conclude that the councillors had acted unlawfully or wrongly, or that they had done so deliberately or with reckless indifference to the results; (iv) he had been wrong to conclude that the councillors had not believed and that they had not reasonably believed, that the efforts of themselves and the council officers and others to attempt to negotiate with the Secretary of State and others would or might produce an improvement in the financial situation before making a rate; and he had been wrong to conclude (implicitly) that the councillors had not believed, and that they had not C
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- A reasonably believed, that it had been in the interests of the ratepayers to attempt to negotiate with the Secretary of State and others to improve the financial situation and to delay the making of a rate until such time as they had believed that no or no further improvement would be forthcoming; (e) he had been wrong to substitute his judgment (made with hindsight) of the likely outcome of efforts to negotiate with the Secretary of State and others to improve the financial situation for the judgment of the councillors made during the period up to 20 June 1985; the councillors' political judgment of the actual and likely attitude of the Secretary of State had been a matter for them and they had been entitled to believe, and had had good grounds for believing honestly and reasonably (and had so believed), that the public statements of the Secretary of State did not necessarily reflect the real position then or in the future; (f) the auditor had been wrong in dealing with the question of whether the councillors had committed wilful misconduct by delaying making a rate whilst attempting to negotiate with the Secretary of State and others to improve the financial situation first: (i) by imposing the requirement that the councillors should have had a "reasonable expectation" of improvement in the financial situation as a ground for delaying the rate, the councillors' contention being that a realistic hope had been sufficient if honestly held after reasonable inquiry (as had been the case); (ii) by accepting at face value the public posture of the Secretary of State and giving no or no sufficient weight to the political judgment of the councillors as to their "expectations" or hopes of an improvement in the financial situation by continuing attempts to negotiate; (g) the auditor had been wrong to disregard as irrelevant the councillors' expectation that the Department of Health and Social Security payments would not be withheld since such an expectation reasonably and honestly held would have negated the allegation of wilful misconduct; (h) he had been wrong not to conclude that the councillors' expectation that the Department of Health and Social Security payments would not be withheld had been honestly and reasonably held and that the councillors had been entitled so to expect; (i) he had been wrong to reject the councillors' contention that the timing of the making of a rate should not be dictated by the unilateral decisions of government departments to withhold moneys that, on any basis, had been payable to the council; (j) he had been wrong to reject the "Representations on behalf of certain members of Liverpool City Council" in response to his notice to the councillors of 26 June 1985; in particular, he had been wrong not to accept the bona fides of the councillors in those "Representations"; (k) he had been wrong in his "Statement of reasons for the decision of the district auditor to issue a certificate dated 6 September 1985 . . ." to impugn, in effect, the bona fides of the councillors, he having given no prior notice (by way of notice of 26 June or otherwise) expressly or by implication that that had been the case against the councillors; the councillors had thus been effectively denied the opportunity to make representations to the auditor as to their good faith in delaying the making of a rate prior to his decision to issue a certificate; the councillors in making their "Representations" had justifiably considered that the case against them had been that they

could not have believed that their efforts to improve the financial situation whilst delaying making the rate were likely to be fruitful or sufficiently fruitful to justify the delay, whereas the case made in the auditor's "Reasons" had been, *inter alia*, that they *had not* so believed; (l) he had not been validly appointed to hold the extraordinary audit; (m) he had not been carrying out the audit of any accounts or the extraordinary audit when he had purported to issue the certificate; (n) he had had no power to and had been wrong to issue the certificate; (o) the procedure adopted by him had been unfair; (p) he had been wrong to issue a certificate when he had failed to give adequate particulars of the charge of wilful misconduct; (q) he had been wrong not to see or hear the councillors before reaching a decision to issue a certificate; (r) he had been wrong to consider only two aspects of the accounts; (s) he had misdirected himself as to the proper application of section 2 of the General Rate Act 1967 in concluding that a breach of duty by delay in making a rate arose regardless of whether there was a reasonable explanation for the delay.

On 5 March 1986 the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) (*sub nom. Smith v. Skinner; Gladden v. McMahon*, The Times, 6 March 1986; [1986] R.V.R. 45) dismissed the motions. 48 of the councillors lodged notice of appeal, one having died since the decision of the Divisional Court. One councillor died after notice of appeal had been lodged. The district auditor indicated that he did not intend to proceed against the estates of the deceased councillors. The grounds of appeal were:

A. Jurisdiction: (1) in law it was the duty of a person conducting an inquisitorial process capable of decisively affecting the rights of others to give proper notice to any person directly affected by it of any matter arising in the course of the inquiry and an opportunity to make representations on it, where appropriate in person; the district auditor's certificate had been issued in breach of that duty and the Divisional Court ought without more to have quashed it; (2) the auditor had failed to act fairly towards each of the councillors in coming to his decision; he had made a series of findings adverse to them and integral to his decision to issue a certificate when (a) he had given them no notice that those matters were to be or might be considered by him; (b) they had been matters that had called in question the good faith of the councillors' acts as councillors and the veracity of their representations to the auditor; (3) Glidewell L.J. had erred in explaining the new matters as merely the non-acceptance of the councillors' own contentions; in particular, (a) they had included a fresh charge, not put at any stage to the councillors, that their motives for deferral of the rate could be deduced from the allegedly unlawful character of the rate once made and the alleged reluctance of certain of the councillors to allow a report of the city solicitor to be circulated to other councillors; (b) they had included findings that the councillors were lying to him about their motives; the first of those had required full notice and a chance to respond; the second had been such as to require the auditor to give each councillor the opportunity to be seen and heard by him in person before he came to any conclusion thereon; (4) the different approach taken by

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Lloyd v. McMahon (C.A.)

A Caulfield J., namely, to ask whether there had been anything further that the councillors could have put forward to the auditor that would have been capable of affecting his determination, had been erroneous in law; it had also been erroneous in fact; (5) the findings of Russell J. that (a) the question of an oral hearing had been simply a matter for the auditor's discretion, and (b) there was "no merit" in the allegation that new material had been introduced without a further opportunity to
 B reply, had been erroneous, the first in law, the second in fact; (6) if, contrary to the foregoing, the auditor's certificate had had sufficient validity to found an appeal to the High Court, such appeal could only competently have proceeded on the issues and grounds and evidence lawfully entertained by the auditor; the Divisional Court had wrongly admitted evidence concerning the legality of the rate and based part of
 C its own decision on it.

B. Wilful Misconduct: (7) section 2 of the General Rate Act 1967 conferred a discretion as to the date of setting a rate; such discretion fell to be exercised on broad and ordinary principles of law, viz.: provided the councillors had had tenable *Wednesbury* grounds for deferral and had not deferred rate-making to a date that conflicted with other
 D statutory requirements, their exercise of discretion had been lawful; the multiplicity of conflicting demands on a local authority was a centrally relevant factor in determining the breadth of its discretion; (8) the Divisional Court had failed so to construe the legislation; instead they had erroneously limited the powers and discretions of local authorities with regard to rate-making so as to reduce or minimise the weight and relevance of such factors as critical urban decline and deprivation and
 E the performance of statutory functions for the benefit of the people of the area and so as to make the decisions and policies of central government determinative of or improperly influential on the exercise of local authorities' powers; (9) if the lawfulness of the rate had been properly before the Divisional Court the court's formulation of the need for a close approach to certainty in budgeting: (a) had been unwarranted by law, alternatively, if right, (b) underscored the need for a wide
 F discretion as to the timing; (10) on the evidence the councillors had not been guilty of wilful misconduct (a) because the relevant acts of their council had been intra vires, alternatively (b) because if the acts and omissions for which they had been responsible had been ultra vires, they had nevertheless believed them to be lawful; (c) because on the basis of advice given to them they had had a reasonable belief that the deadline
 G for setting a rate was 20 June; (11) the Divisional Court had failed sufficiently to distinguish between the acts of the council and those of the councillors; in particular, Glidewell L.J. had held (a) that since a council could only express itself by resolution, the want of a resolution setting out a particular intent meant that the council had had none; and (b) that the councillors likewise had expressed no intent; but (c) that if
 H it had been that deferral might cause the Secretary of State to produce additional funds it had been irrational; in fact, the evidence had made it plain that the councillors as individual councillors had tenably hoped for additional funds and had based their acts as voting councillors on that hope; Glidewell L.J.'s dismissal of the hope as "irrational" was not an

appropriate test of wilful misconduct, which remained that propounded by Webster J. in *Graham v. Teesdale* (1981) 81 L.G.R. 117 and required proof to a high standard that each councillor had known that or had been reckless as to whether he or she was doing wrong, i.e. voting for an unlawful measure; such knowledge, actual or constructive, was not supplied by a finding that it had been irrational to hold the material belief or hope. A

C. Loss or deficiency: (12) on the uncontested evidence, the temporary loss of income (reflected in the notional interest surcharged) had been brought about by the voluntary act of central government, undertaken as a discretionary political counter-measure to the decisions of local authorities to defer making a rate; it had not been caused in the appropriately proximate sense by the councillors. B

Louis Blom-Cooper Q.C., Beverley Lang and Heather Williams for the appellant councillors. C

Anthony Hidden Q.C. and Mark Lowe for the district auditor.

Charles Cross for the council.

Cur. adv. vult. D

31 July. The following judgments were handed down.

LAWTON L.J. This is an appeal by 47 councillors of Liverpool City Council, all being members of the majority party on that council, against the judgment of the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) whereby it was adjudged that a certificate dated 6 September 1985, issued by the district auditor pursuant to section 20(1) of the Local Government Finance Act 1982, should take effect in law. E

The issues

The appeal raises three issues. First, did the district auditor act fairly in issuing the certificate? Secondly, if he did not, did the appellants' appeal to the Divisional Court cure any unfairness? Thirdly, if any unfairness was cured, did the facts prove that the appellants, and each of them, had been guilty of wilful misconduct. F

The background to the appeal

Ever since 1979 the central government has wanted to curb local government expenditure. Parliament has passed three Acts which has enabled it to take action towards this end, the Local Government, Planning and Land Act 1980, the Local Government Finance Act 1982 and the Rates Act 1984. The way in which these Acts work is set out in the judgment of Glidewell L.J. *sub nom. Smith v. Skinner; Gladden v. McMahon* [1986] 26 R.V.R. 45, 48 and need not be repeated in this judgment. G

The central government's policy of curbing local government expenditure has been opposed by many councillors all over the country, H

A and in particular it has been opposed by the majority of the councillors on the Liverpool City Council. The main grounds of opposition have been that the central government was encroaching on the independence of local authorities and that it was preventing them from meeting what they considered to be the needs of their areas. The appellants were, of course, entitled to take such steps as they wished in order to persuade the central government to change its policy. What they were not entitled to do was to allow their political efforts in this respect to interfere with or impede the performance of their statutory duties, which included a duty to make a rate without unreasonable delay. The district auditor alleges that for the financial year beginning 1 April 1985, they unlawfully delayed making a rate, with the result that they had, by their wilful misconduct in that respect, caused the city council to incur a loss of £106,103.

C In the years before 1984 the city council had normally made a rate at the end of March or the beginning of April so that rate demands could go out in April. Delays in making rates are likely to cause loss to local authorities. There may be cash flow problems and a need to borrow money on the short term money market.

D In the spring of 1984 the majority on the city council were of the opinion that the central government, under the spending curbs imposed by the three Acts to which I have referred, had deprived Liverpool of large sums and that the rates ought not to be increased to cover the shortfall. On 26 March 1984, the Performance Review and Financial Control Subcommittee (which was the subcommittee primarily concerned with rate making), under the chairmanship of the appellant, Councillor E Byrne, proposed that for the rating year starting on 1 April 1984 there should only be a rate increase of 9 per cent. notwithstanding that such an increase would not provide for the estimated total expenditure which would be incurred during the coming rating year. A lawful rate would have to provide for such expenditure and it was the duty of the councillors to see that such a rate was made: see section 2 of the General Rate Act 1967, as amended. The chief executive, the city F solicitor and the city treasurer advised this subcommittee that this proposal, if implemented, would produce an unlawful rate. That advice was minuted and ignored by the subcommittee, who sent the resolution forward to the city council. The city council considered it at a meeting held on 29 March 1984. It was again advised to the same effect as the subcommittee had been. Once again the advice was minuted and G ignored. The resolution was passed. It was not put into effect because on 13 April 1984 negotiations started between the city council and the Secretary of State for the Environment with the object of getting more central funds made available to cover the shortfall in the rates. The city council did get more money from the central government and was able to make a lawful rate on 11 July 1984. The minutes and the reports circulated to all the members of the city council between March 1984 and 11 July 1984 show that they were told in clear terms that if they H delayed making a lawful rate or made an unlawful one they would not be performing their statutory duty and would be likely to cause a loss to the city council which might lead to their being surcharged for wilful

misconduct. The inference to be drawn from what happened in the summer of 1984—and it is a strong one—is that the majority on the council were using the rate making process to threaten the central government with financial chaos in Liverpool if the shortfall on the rates was not made good from central funds. The delay in making a rate in 1984 almost certainly caused some loss to the city council, but the then district auditor took no action against anyone under section 20(1) of the Act of 1982.

The history of the making of a rate for the financial year beginning 1 April 1984 is of importance in this case for three reasons. First, the appellants' case has been that the city council's success in 1984 in persuading the Secretary of State to make more money available from central government funds led them to think that they could repeat that success for the financial year beginning 1 April 1985. The needs which the Secretary of State in 1984 had recognised as needing alleviation still had to be met in 1985. Secondly, the district auditor's omission to take any action over the delay in making a rate in 1984 led them to think, at least until 16 April 1985, that the making of a rate could be delayed, and after 16 April that it could be delayed until 20 June. 16 April is an important date because on that day Woolf J. delivered a judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182. It got considerable publicity. It seems to me likely that many members of the city council would, about this date, have learnt something of what had been decided. The fact that judgment was going to be given on 16 April 1985 was reported to the Performance Review and Financial Control Subcommittee by the city solicitor on that very day. Woolf J. adjudged that for a local authority not to make a rate by the beginning of the rating year had obvious disadvantages of a financial nature which increased as the time went by. The members of the city council had been told this by the city solicitor in 1984. The law, however, said Woolf J., did not specify by what date a rate had to be made. He went on, at p. 184:

"No generally applicable period can be laid down as to by when the rate must in any event be made so that an authority can be said to be in breach of its duty by that date. The facts of each case must be examined. However, in the absence of a reasonable explanation, not to make a rate by the beginning of a financial year or within a reasonable time thereafter—I have in mind weeks rather than months—would prima facie be unreasonable and, therefore, in breach of duty."

The making of the 1985–86 rate

In November 1984 the district auditor perceived that the city council was likely to have difficulty in making a lawful rate for 1985–86 because the Performance Review and Financial Review Control Subcommittee had forecast that by 31 March 1985 expenditure would exceed the budget provision and a substantial deficiency would arise. He issued a report to the city council pursuant to section 15(3) of the Act of 1982. It contained the following warning:

- A "It is opportune for me to remind the council that they have a duty to levy a rate sufficient to provide for their estimated total expenditure to be incurred during the period covered by the rate together with such amount as is sufficient to cover expenditure previously incurred. The council does not now have the benefit of being able to levy supplementary rates to restore any shortfall in the original rate levy and it is therefore important that budget predictions are accurate and achievable, if a deficit which will affect the level of the subsequent year's rate is to be avoided . . . A number of opportunities to secure better value for money which may assist the council in the longer term have been identified in audit work during the current year. These have been discussed with your officers and will shortly be discussed with members. However, some four months only of the current financial year remain in which the council can act to contain expenditure within the original budget. Unless a determined effort is made now to achieve the budget intentions for the current year it is clear that the rate making process in the coming year will commence with the council in a seriously disadvantaged position. They are asked to review as a matter of urgency their achievements against budget expectations and to take corrective action."
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- E Despite that warning not much seems to have been done before 16 April 1985. During the early months of 1985 financial reviews were carried out from time to time and the Education and Social Services Committees did prepare budgets. At council meetings when budget matters were discussed the majority on the council seem to have had their thinking dominated by what they considered to have been the mandates upon which they had been elected. On occasions resolutions were proposed by members of the minority on the city council that progress should be made with the rate making procedure. These resolutions were always defeated. During the early part of 1985 the city council had been associated with a group of local authorities who were trying to put political pressure on the central government to change its policy about local government expenditure and to make more money available from central funds for local needs. On 7 March 1985, acting in concert with other local authorities, the city council passed a resolution which was nothing more than a political manifesto expressed in intemperate language. Resolutions in the same kind of terms had been passed in 1984 and earlier in 1985. The first, fourth and fifth paragraphs of this resolution were as follows:
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- H "(i) This council re-endorses the policies on which the people of Liverpool elected the Labour Party to power viz. (a) to defend existing city council jobs and services; (b) to create additional jobs and improve services; (c) to build houses for rent; (d) to end the threat of privatisation of city council services; and (e) to refuse to impose increases in rates, rents and charges to compensate for government cuts in grants.
- "(iv) This council requires a budget of £265.4 million but, with a target of only £222.1 million—representing another £90 million

stolen from them in grant penalties, this council considers it will be impossible to make a rate. The council therefore calls upon the Secretary of State to: (a) remove the meaningless and arbitrary targets; (b) remove the deliberately punitive penalties; (c) establish realistic level of rate support grant—the minimum being that which was offered in 1979; and (d) establish a level of housing environmental and partnership allocations commensurate with the needs of Liverpool; and

“(v) In particular, this council demands the return of resources stolen by the Tory Government since 1979 viz. (a) £170 million in rate support grants; (b) £24 million from further education; (c) £69 million in housing subsidy; and (d) £96 million in the housing investment programme.”

Those who voted for this resolution have only themselves to blame if it was construed as a threat to hold up rate making in order to put pressure on the central government.

On 16 April 1985 there was a meeting of the Performance Review and Financial Control Subcommittee. It had before it a joint report of the chief executive, city solicitor and city treasurer which set out what were the statutory duties of the city council in relation to rate making and what were likely to be the consequences of making a substantially insufficient rate or failing to make one. The subcommittee also had before it a budget report of the city treasurer and summaries of the committees' income and expenditure and the detailed summaries of the expenditure and income of the Education and Social Services Committees. Nothing effective was done at this meeting to carry the rate making procedure forward. Members of the minority party on the subcommittee moved a number of resolutions directed to the need to make progress with rate making. All were defeated, as was a resolution that all members of the city council should be sent a report by the city solicitor as to the significance for the city council of Woolf J.'s judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* which was expected to be delivered that day. No effective action towards rate making was taken between 16 April 1985 and 21 May 1985 when the district auditor who, on 1 May 1985 had succeeded his predecessor as district auditor, wrote to all the members of the city council drawing their attention to the serious consequences to them which would follow “from the continued delay in making a rate sufficient for the council's requirements for the current financial year ending 31 March 1986.” He suggested that a rate had to be made before the end of May 1985. This letter had effect. Committees did produce budgets before the end of May 1985. No committee met to consider what rate would be necessary to provide for the city council's requirements. There were, however, informal discussions between the city treasurer and the chairman of the Performance Review and Financial Control Subcommittee as to what the rate should be. At a special meeting of the city council held on 14 June 1985 it was resolved that the rate should be increased by 9 per cent. This increase did not begin to be sufficient for the city council's requirements. The estimated expenditure for 1985–86 was £265 million.

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A A deficit of £5.938 million had to be brought forward, making a total estimated expenditure of £270.938 million. With an increase of 9 per cent. the total rate was estimated to bring in £125.031 million which, after adjustments, left a shortfall of £117 million. This was clearly an unlawful rate. No explanation has ever been given as to why an increase of 9 per cent. was agreed upon.

B *The intervention of the district auditor*

The rate-making activities of the city council were much publicised. The Audit Commission, pursuant to section 22 of the Act of 1982, directed the district auditor to hold an extraordinary audit of the city council's accounts for the financial year commencing on 1 April 1985 insofar as they related to the failure to make a rate or the delay in the making of a rate for that financial year. As a result of what he found out when carrying out the audit it seemed to him that a loss to the city council might have been caused by the wilful misconduct of those members of the majority on the city council who, between January and June 1985, had voted for a number of resolutions before the city council which had held up rate making during 1985. Not all members of the majority party had so voted. He decided to exercise his powers under section 20(1) of the Act of 1982 in order to recoup this loss from those who had caused it. He sent each member of the city council whom he suspected of causing a loss a notice dated 26 June 1985, the relevant parts of which are as follows:

E "Notice is given that at the extraordinary audit of the accounts of the Liverpool City Council for the year commencing 1 April 1985 I have to consider in pursuance of my duty under section 20(1) of the Local Government Finance Act 1982 whether I should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or the delay in the making of the same for that financial year as due from you on the ground that a loss of such sum has been incurred or deficiency caused by your wilful misconduct. Notice is also given that you may make representations in writing to me before I reach a decision. Any such representations must reach me by no later than 19 July 1985. I enclose a note of the matters to which I have had regard in deciding to issue this notice."

The accompanying note set out what he was alleging, namely, that by delaying the making of a rate without lawful justification each of the recipients of the notice had acted in breach of statutory duty and that the breaches had caused two readily assessable losses which he identified in an appendix. He also identified the documents, mostly minutes and reports, which he thought revealed the breaches of statutory duty.

G The recipients of the notice decided that they would put before the district auditor a joint answer to the allegations made against them. This they did. There were advantages for them in putting forward a joint answer. It could be carefully drafted and there would be no danger of individuals contradicting one another. The answer was contained in a typed document on foolscap paper consisting of 29 pages, together with a number of appendices. One of them set out the text of a letter dated

29 June 1984 which the Secretary of State had written to the leader of the city council. The last paragraph of it was as follows: A

“Against that background, and bearing in mind the constraints set out in the two preceding paragraphs of this letter, I can give you an assurance that I will do my very best to ensure that allocations to Liverpool next year under the Housing Investment Programme and the Urban Programme, taken together, will enable the council to make positive progress in dealing with the city’s severe needs, having regard to the scale of your capital commitments and the resources (including possible proceeds of sales of council dwellings and freeholds) available to you.” B

No request was made to the district auditor for him to hear any of the appellants or for them to be legally represented. C

On 6 September 1985 the district auditor made a report to the city council pursuant to his duties under section 15(3) of the Act of 1982. He stated that he had considered the representation which he had received and had concluded that he had a duty under section 20 to certify that a sum of £106,103 was due from 49 members of the city council jointly and severally, being the amount of a loss incurred or deficiency caused by their wilful misconduct. Of the 49 members so certified, two have since died, leaving 47 appellants before this court. The district auditor’s way of exercising his powers under section 20 was said by the appellants to be unfair. Whether it was so necessitates this court considering what are the powers, duties and practices of district auditors. D

The powers, duties and practices of district auditors E

The office of district auditor was created by the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101). Before then the justices, either in petty or quarter sessions, had dealt with problems relating to the collection and administration of the poor rate. The district auditor was given powers to deal with illegality and misconduct in relation to the collection and administration of the poor rate and to “charge” persons in default. The Poor Law Audit Act 1848 (11 & 12 Vict. c. 91) specified what procedure the district auditor was to follow when exercising his “charging” jurisdiction. He was required, when he found possible cause to “surcharge” any person, to give him notice in writing of a right to attend to “show cause against” the making of a surcharge. After the hearing the district auditor was to determine the matter according to the “law and justice of the case:” see section 8. By the Public Health Act 1848 (11 & 12 Vict. c. 63) the district auditor’s jurisdiction was extended to the supervision of rates collected under that Act; but in it there was no provision similar to section 8. Between 1848 and 1929, when by the Local Government Act of that year great changes were made in the scheme for poor relief, the district auditor exercised in parallel two jurisdictions over rate making. In respect of one, the poor rate, he had been under a statutory obligation to offer oral hearings to those whom he was minded to surcharge; in respect of other rates he was not under any such obligation. The Poor Law Audit Act 1848 had been repealed by the Poor Law Act 1927; but section 8 of the Act of 1848 had been F
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A replaced by section 153 of the Poor Law Act 1927. In practice district auditors seem to have offered all suspects an oral hearing, whatever the nature of the rate: see *Carson Roberts, Audit Law and Audit Work* (1919), p. 112:

B “The principle laid down in section 8 of the Poor Law Audit Act 1848 is one which should be observed most punctiliously in every case where the auditor has to make any decision which involves the purse or character of any person who is not present at the audit. This principle should be followed in all cases and not only in poor law audits (Memo of 1909 para. 75).”

C The Local Government Act 1933 amended the Local Government Act 1929 and contained detailed provisions relating to the powers and duties of district auditors. The 19th century concept that an audit was a public proceeding which any local government elector could attend still continued: see section 226(1). Such an elector could object to the accounts before the district auditor. It is clear from the enabling section 226(1) that he was entitled to be present or to be represented. Section 228, which dealt with surcharging any person “by whose negligence or misconduct” the loss had been incurred or a deficiency had been caused

D contained no procedural directions as to how the district auditor was to discharge his duty; but it seems to have been accepted that he had to act judicially. In order to do so in practice district auditors offered oral hearings: see *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100, where there is a footnote in these terms: “In practice, district auditors invariably afford persons likely to be affected by their decisions an opportunity of being heard at audit.” From the context and certain forms which he suggested could be used, it is clear that by “heard” he meant heard orally.

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F The Local Government Act 1933 was repealed by the Local Government Act 1972 which came into force on 1 January 1974. It made some changes in relation to the law governing the powers and duties of district auditors. Those relating to objectors were substantial; but they continued to have a right to attend before the district auditor: see section 159. The power to surcharge was limited to a loss incurred or deficiency caused by “wilful” misconduct. Save for this change and the abandonment of the concept that audits were public proceedings, the Act of 1972 followed the provisions of the Act of 1933. *Jones, Local Government Audit Law* (1981) states, at pp. 277–278:

G “It would seem in principle that in order to give a person the fullest rights to answer a case against him it is necessary to hold an oral hearing so that witnesses may be seen and questioned. . . . However, some statutory tribunals have power to dispense with oral hearings and in other instances where matters have required judicial consideration it has been held that it is not contrary to justice to determine them on written communications only. . . . District audit

H practice has generally been to hold oral hearings. . . . But if all parties are agreeable to a matter being decided on the basis of written representations possibly after initial attendance by an objector . . . it seems, on the basis of the precedents cited above,

that this may be admissible, provided that all parties are given a fair opportunity to comment on statements adverse to them.” A

Between January 1974 and 1980, 14 certificates were issued by district auditors for wilful misconduct surcharges. In all but one of these cases an oral hearing was offered and in 11 of them the offer was accepted. All these cases, however, involved only one person. The case in which no oral hearing was offered related to a man who had been convicted and sent to prison for what was alleged to be his wilful misconduct. The history of the office and practices of district auditors establishes that certainly from about 1909 at least until 1982 it was the normal, perhaps invariable, practice for district auditors to offer oral hearings. The reported cases relating to surcharging, starting with *Reg. v. Roberts, Ex parte Scurr* [1924] 2 K.B. 695 and ending with *Asher v. Lacey* [1973] 1 W.L.R. 1412, all reveal that before issuing his certificate the district auditor gave the suspect an oral hearing. B C

The Local Government Act 1982 repealed the provisions of the Act of 1972 which dealt with the powers of district auditors. By section 11 an Audit Commission was established which was to be responsible for auditing the accounts of a large number of public bodies, including those of local authorities. The district auditor is an officer of the Audit Commission and is generally referred to as a district auditor. The Audit Commission is not an organ of the central government, nor are its officers servants of that government. By section 14 a code of practice was to be prepared and presented to Parliament for approval. This was done. As in the Acts of 1933 and 1972, the Act of 1982 envisaged that an objector to any accounts could appear before the district auditor (see section 17) and the Code of Practice envisaged too that any person adversely affected by an objection should be offered an oral hearing: see paragraphs 17 and 18. As in the Acts of 1933 and 1972, the Act of 1982 made no statutory provision for anyone suspected of wilful misconduct to be offered an oral hearing. D E

Fairness

When exercising his powers under section 20 of the Act of 1982 the district auditor had a constitutional duty to act fairly towards each of the appellants. There has been no dispute about that in this case. What did he have to do in order to act fairly? Mr. Blom-Cooper, on behalf of the appellants, submitted that when he sent out the notices dated 26 June 1985 he should have afforded each recipient an opportunity of an oral hearing and that his failure to do so was such a grave affront to fairness (I avoid using the words “natural justice”) that his certificate ought not to be enforced. Alternatively, Mr. Blom-Cooper submitted that even if it was permissible for the district auditor to start by inviting written representations, when he received them and appreciated that the appellants were giving explanations on matters which he thought pointed towards wilful misconduct, and above all when he learned that they were denying that they had done anything which could be reasonably adjudged to be wilful misconduct, he should then have given them, and each of them, an opportunity of an oral hearing or, at the very least, an F G H

A opportunity of having their cases presented by a lawyer. They were entitled, he submitted, to have a fair opportunity to comment on statements in the district auditor's reasons, given on 6 September 1985, which were adverse to them.

B Mr. Blom-Cooper's first submission of fairness was not put to the Divisional Court. Counsel then appearing had made his submissions in the alternative way in which Mr. Blom-Cooper has made his in this court. It seems that he did not know of the history of the office of district auditors which Mr. Blom-Cooper's research has revealed. It was on this history that Mr. Blom-Cooper based his first submission. His argument was that Parliament in 1933, 1972 and 1982 should be deemed to have known how district auditors in practice exercised their powers by always offering oral hearings. We should infer that Parliament intended that the practice should continue as an essential feature of district auditors' jurisdiction under section 20 of the Act of 1982. This reasoning can be turned upon itself. Between 1848 and 1929, probably for historical reasons going back to the days when justices sat in sessions, Parliament provided in relation to the poor rate that suspects should be given an opportunity of an oral hearing. It made no such provision in relation to other rates. I would infer from this legislative history that in the subsequent Acts Parliament left it to the discretion of district auditors what procedure to adopt when exercising their powers to surcharge. In exercising their powers they had to do so fairly, honestly and to the best of their ability: see *Bushell v. Secretary of State for the Environment* [1981] A.C. 75, 94-95, per Lord Diplock.

E In my judgment, on the facts of this case, the district auditor should not be criticised for the way he started his inquiry. It was likely to be complex. If he offered oral hearings at the outset and before he knew what kind of answers each of the appellants was going to make, his inquiry might take an inordinate time. Time did matter. If the appellants, or some of them, had been guilty of wilful misconduct, the sooner they were disqualified from holding public office the better; but if they had not been so guilty, the threat of disqualification should be removed without delay. Further, by inviting written representations the district auditor might have been able to discover quickly whether any of the appellants had a satisfactory answer or none at all. An appellant, for example, who claimed that making a rate was contrary to some political theory he believed in would have had no answer; it would have been a waste of his and the district auditor's time to give him an opportunity of explaining his answer in person. I infer from the facts of this case that the appellants themselves were content with the procedure adopted by the district auditor. As I have already commented, it had some advantages for them. Amongst the appellants there were two magistrates and a solicitor who would, I feel sure, have protested had they thought that there was anything unfair in not being offered oral hearings at the outset. I do not accept the first part of Mr. Blom-Cooper's submission.

H In order to deal with his alternative submission it is necessary to consider some of the reasons which the district auditor gave for his decision. In their joint answer the appellants made three basic averments: first, that they had acted in good faith and in the interests of the citizens

and ratepayers of Liverpool; secondly, that until 6 June 1985 they had believed that the central government would make funds available to them which would enable them to make a lawful rate; and thirdly, that this belief justified them in delaying making a rate until 20 June 1985 at the latest. The district auditor's findings on these averments were first, that they had not acted in good faith—they had followed “a course of conduct aimed at conducting a political battle without regard for statutory and other obligations and duties” (see paragraphs 55, 78 and 90 of his reasons); and secondly, that the reasons advanced to support the delay in commencing the budget-making process were not the real reasons for the delay (see paragraph 92). The district auditor was in effect saying that he did not believe their explanations. They were contrived excuses which hid the reality. He queried their credibility and honesty and found them wanting.

Mr. Hidden, on behalf of the district auditor, submitted that this followed inevitably from the facts which were set out in the city council's own minutes and documents. What the appellants were saying was wholly inconsistent with what was in these minutes and documents. An example is provided by their assertion that they had acted “in good faith and after taking advice from their officers.” They had not acted on the advice of their officers in March 1984, and again in April 1985 and on 14 June 1985. Their assertion that they believed until 6 June 1985 that the central government would provide further money was so contrary to the facts that no rational person could have believed anything of the kind. The evidence relied on by the district auditor for rejecting the appellants' assertion that they believed that more money would be forthcoming was strong; but it is a matter of human experience that political zealots, as some of the appellants seem to have been, can so delude themselves about reality that lying is unnecessary for them. The courts are chary, however, about disbelieving people and attributing bad faith to them without an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, per Lord Greene M.R. at p. 308, and *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551, 568, per Viscount Dilhorne. Had the appellants been given an opportunity of commenting on the adverse opinion of their conduct which the district auditor had formed they, or some of them, might have been able to persuade him of their good faith and credibility. Maybe on the facts of this case they would have had difficulty in so doing; but, in my judgment, they should have been given a chance of doing so. It was unfair not to have given them that chance.

The consequences of the appeal to the Divisional Court

Two questions now have to be answered. First, was the appellants' appeal to the Divisional Court capable of curing the unfairness which I have identified in the district auditor's conduct of the section 20 inquiry? Secondly, if it was, on the facts of this case did it?

The first of these questions raises a point of law which has been considered both in this country and in the Commonwealth and has engendered much academic comment: see *Wade, Administrative Law*, 5th ed. (1982), pp. 487–489, and *de Smith's Judicial Review of*

- A *Administrative Action*, 4th ed. (1980), pp. 240–246. There are two broad lines of authority bearing on the question whether unfairness at first instance can be cured by an appeal. I do not propose to review them because, in my opinion, the starting point in any inquiry of this kind is to construe the statutory provisions which confer the originating and appellate jurisdictions with the object of finding out whether Parliament intended to provide a legal framework in which aggrieved persons could be assured of justice. As I have come to a firm conclusion about the effect of the statutory framework in this case there would be no point in my examining the statutory or contractual frameworks which have been considered in other cases.
- B

- C The Act of 1982 is silent about the procedure to be followed by a district auditor when considering whether to surcharge anyone suspected of wilful misconduct. District auditors are required to have professional qualifications as accountants but not as lawyers. When exercising their powers under section 20(1) they may get both the law and the procedure wrong and take wrong-headed views of the facts. A mistake under any of these heads would be likely to give rise to a grievance. Parliament would have appreciated this. Hence the provision for appeals which is contained in section 20(3) of the Act of 1982. An appeal is available to
- D any person “who is aggrieved” by a decision of an auditor and on the hearing of the appeal “the court may confirm, vary or quash the decision and give any certificate which the auditor could have given.” This must mean that the court rehears the case. There are no limitations on what the aggrieved person can complain about. In this case the appellants wanted to complain, *inter alia*, about not having been afforded any
- E opportunity for an oral hearing. There was nothing in section 20(3) to stop them doing so; and they did. In my judgment the statutory framework of section 20 reveals an intention on the part of Parliament that all complaints, whatever their nature, against the decision of a district auditor, should be brought before the court so that at the end of the appellate process justice can be done. It would not have been right, as was submitted by counsel for the district auditor before the Divisional
- F Court, for the appellants, because of the alleged unfairness, to have applied for judicial review, instead of appealing. Glidewell L.J. was of the opinion that in principle they should have done so, but considered that he was bound by the decision of this court in *Asher v. Secretary of State for the Environment* [1974] Ch. 208. He was so bound and so are we. It is, however, my opinion that that case was rightly decided. In this
- G court Mr. Hidden reserved the point. In my judgment the Divisional Court was capable of curing such unfairness as there was in the way the district auditor exercised his powers.

Did the appeal cure the unfairness?

- H As the amount of the certified loss exceeded the amount over which county courts have jurisdiction the appeal was to the High Court: see section 20(9) of the Act of 1982. It was heard by a Divisional Court. The procedure to be followed on an appeal under section 20(3) is set out in R.S.C., Ord. 98. Rule 4(2) of that Order is in these terms: “Except insofar as the court directs that the evidence on any such

application or appeal shall be given orally, it shall be given by affidavit.” All the councillors filed affidavits: the leader of the city council, Councillor Hamilton, filed four; the chairman of the Performance Review and Financial Control Subcommittee, Councillor Byrne, filed three. Councillor Hamilton and Councillor Byrne put forward detailed explanations on comments and findings which were adverse to or critical of the appellants as a body or of themselves in particular. Some of the appellants who were chairmen of committees made detailed comments about matters of which they had personal knowledge. All deposed that they agreed with what Councillor Hamilton had sworn in his first affidavit. Before the Divisional Court all the appellants were represented by the same counsel, namely, Mr. Stephen Sedley, and Miss Beverley Lang. Mr. Sedley did not ask the court to direct that any evidence should be given orally. When the court itself asked counsel to consider whether there should be a direction for an oral hearing or for any deponent to be cross-examined, Mr. Sedley said that such a direction would not be appropriate. I am satisfied that the Divisional Court gave the appellants every opportunity of leading any evidence they wished and, through experienced counsel, of making all relevant submissions. The proceedings before that court were truly a rehearing and not, as Mr. Blom-Cooper suggested, a critical examination of a reasoned decision. In my judgment the appellants, and each of them, had a fair and adequate opportunity of dealing with any findings and comments which were critical of or adverse to them in the district auditor’s written reasons dated 6 September 1985. Such unfairness as there was in the way he performed his duties was cured by the appeal.

Were the appellants, and each of them, guilty of wilful misconduct?

It is trite law that when a number of persons are charged with having combined together to commit an offence the jury or magistrates must consider the case of each defendant separately. The same principle applies in this case. The application of it, however, is not difficult because those of the appellants, who were not leaders, by their votes at council and committee meetings, supported the leaders and encouraged them to go on pursuing the course of conduct which is under scrutiny in this case. Further, when the time came for answering accusations of wilful misconduct they expressly stated that they adopted what the leader of the council, Councillor Hamilton, had said in his and their defence. On the facts of this case I can see no valid reason for distinguishing between any of the appellants.

For the purpose of considering whether the appellants were proved to have been guilty of wilful misconduct I shall not review the evidence in detail. The Divisional Court did so. Reference can be made to the judgments there.

I start by considering what constitutes “wilful misconduct” and by what standard of proof it should be established. Wilful misconduct is a more serious charge than “negligence or misconduct,” which was the criterion under the Act of 1933. In *Graham v. Teesdale* (1981) 81 L.G.R. 117, Webster J. adjudged that for the purposes of section 161(4) of the Local Government Act 1972 (section 20 of the Act of 1982 is in

- A the same kind of context) wilful misconduct meant “deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not:” see p. 123. I agree. As to the burden of proof, although a section 20 inquiry is not a criminal proceeding, nevertheless, following what Denning L.J. said in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247 it should take a lot of evidence to tip the balance in favour of a positive finding because the accusation is serious and the consequences of such a finding are grave.

- B The appellants were elected to the city council on a manifesto which pledged them to maintain and improve jobs and services and to refuse to impose increases in rates. The evidence establishes that they tried to do what they had pledged themselves to do; but what they wanted to do cost money, which could only be got from the ratepayers or central government. There was, however, an insuperable difficulty in their way. Parliament had given the central government powers to curb local government expenditure. This it could do by reducing grants from central funds. In 1984 the majority party on the city council had made clear to the Secretary of State that if he did not authorise the payment of more money from central funds they would make an unlawful rate which would have caused financial chaos in Liverpool and might have had repercussions elsewhere. The Secretary of State did make more money available and wrote the letter dated 29 June 1984 to which I have already referred. When, at the end of 1984, the time was approaching for the city council to start thinking about rate making for the financial year beginning 1 April 1985 the majority on the city council decided to repeat the tactics which had been successful in 1984. The letter dated 29 June 1984 gave some hope of another success. An essential move in these tactics was to delay making a rate. Nothing effective was done about making a rate before 16 April 1985. In my judgment the reason for this inactivity, about which all members of the city council had been warned by the district auditor, was the wish of the majority party to exert political pressure on the Secretary of State. By 16 April 1985, however, no rational member of the majority party (and I assume all the appellants are rational) could have believed that there was any hope of persuading the central government to make further grants out of central funds to Liverpool. In January 1985 Parliament had approved the rate support grant report and the associated proposals intended to deter excessive spending. In February 1985 the Secretary of State in strong terms had written to the leader of the city council telling him that no more money was going to be made available. More letters in similar terms were written in March 1985. On 14 March 1985, in a written answer to a Parliamentary question, the Secretary of State said:

- H “I wish to make two things clear. First, there is no question of the Government reconsidering the rate limits or the present limits or the rate support grant settlement for 1985–86 all of which Parliament has approved. There will be no ‘negotiations’. Second, while I am prepared to meet the local authority associations to discuss issues of general concern or to meet individual authorities where they have genuine local issues to raise with me, I see no purpose in a further meeting with the ad hoc and unrepresentative group led by

Councillor Blunket . . . No rating authority can now have any excuse for delay in carrying out its duty to make a lawful rate. But if any authorities are still considering delay they should be clear about the consequences . . . Finally, I should remind all councillors that if a failure to make a rate leads to loss or deficiency and the auditor considers that this results from wilful misconduct, then those responsible may be surcharged.”

There was a local issue in Liverpool about grants under the Urban Areas Act 1978 but the maximum amount which could have been obtained was so small that it would not have made much difference to the rate which would have to be levied in order to comply with section 2 of the General Rate Act 1967 as amended. After that Parliamentary answer, in my judgment, it is inconceivable that any of the appellants could genuinely have believed that the central government would willingly make more money available. What they did believe, so I infer, was that the Secretary of State would in the end have to make more money available in order to avoid the financial chaos in Liverpool which would result if a rate was not made or there was a long delay in making a rate. What happened on and after 16 April 1985 supports this inference. Despite Woolf J.'s judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] R.V.R. 182, the advice of the city's principal officers and the efforts of the minority party, inactivity in the rate making process continued until the district auditor, by his letter dated 21 May 1985, made clear to all the members of the city council that if they did not make a rate soon they were likely to be surcharged. Then and only then did the majority on the city council bestir themselves to prepare budgets. When a rate was made it was an unlawful one, which all the appellants must have appreciated it was. The district auditor did not charge the appellants with making an unlawful rate but the fact that they did reveals their thinking during the six weeks before 14 June 1985. Pursuit of their political objectives was not a valid excuse for not performing their statutory duty under the General Rate Act 1967. In my judgment there was ample evidence on which the Divisional Court could find wilful misconduct.

As a result of the delay in making a rate until 14 June 1985 the city council did not receive at the beginning of that financial year either the rate rebate element of the housing benefit subsidy or any contribution from the Treasury in lieu of rates on Crown property. These were the two items of loss identified by the district auditor. The Department of Health and Social Security warned the city council early in 1985, as they had done in 1984, that the rate rebates element of the housing benefit subsidy would not be paid until a rate had been made. The Treasury Valuer had done the same in respect of contributions in lieu of rates on Crown property. As a result of the delay in making a rate these sums were not paid when otherwise they would have been. In my judgment the delay caused the resulting losses. It is immaterial that the central government were under no legal obligation to make these payments.

I would dismiss the appeal.

A DILLON L.J. This court has, in my judgment, to consider three questions on this appeal, viz. (1) Was the procedure of the district auditor, before he issued the certificate of surcharge of 6 September 1985, fair to the councillors? (2) If no, was the unfairness cured by the hearing on appeal in the Divisional Court? and (3) if the answer to either of those questions is in the affirmative, was the decision of the Divisional Court correct on the merits of the appellants' appeal against the district auditor's certificate?

B I have qualified the third question in this way because if the procedure of the district auditor was unfair and the unfairness was *not* cured by the hearing in the Divisional Court, the appellants are entitled to succeed in this appeal and have the certificate of surcharge set aside without further inquiry into the merits.

C I do not need to set out the facts in this judgment since they are comprehensively set out in the judgment of Glidewell L.J. in the Divisional Court [1986] 26 R.V.R. 45, 58 et seq., and have been summarised by Lawton L.J. so far as necessary for the purposes of this appeal.

I turn to the first question.

D It is not suggested that the district auditor was biased or prejudiced against the appellants, or that he intended to treat them unfairly. What is said is that the procedure which he adopted, and required them to follow, was, even if inadvertently, fundamentally unfair to them, and unjust in the result, because he should, either at the outset, or after considering their collective representations of 19 July 1985 and before making his findings, have given the appellants the opportunity of an oral hearing, or alternatively, at the lowest, he should, after considering their collective representations and before making his findings, have given them an opportunity to comment on the principal findings which he was minded to make. By one or other of these routes the district auditor should, it is said, have given the appellants a fair opportunity of correcting what he was minded to find against them, and of disabusing his mind of any misconceptions which he might have formed.

F Additionally or alternatively it is submitted that the procedure adopted by the district auditor lacked fairness, because in his statement of reasons which accompanied the notices of his certificate of 6 September 1985 he introduced new matters with which the appellants had had no opportunity of dealing.

G It is not in doubt that in deciding, in the course of carrying out an audit, whether or not a loss has been incurred by the wilful misconduct of any person, a district auditor is acting in a quasi-judicial capacity. He must, therefore, act fairly by that person or, as it used to be put, he must observe the requirements of natural justice. This has been established law for a very long time. It is equally well-established, however, that a person who has to decide a question in a quasi-judicial capacity can, in general, lay down his own procedure. Whether or not, therefore, the district auditor ought ultimately to have offered the appellants an oral hearing on any ground, I can see no objection whatsoever to the course he adopted in the first place of inviting written representations from the appellants.

H

The district auditor put to the appellants the case they had to meet fairly and in sufficient detail, by reference to the minutes and reports listed in appendix 2, in his note which accompanied each of the notices to the appellants of 26 June 1985. He asked for their written representations. The result was that they produced for him a very carefully drawn and thorough document which served to clarify the issues considerably. I cannot think that fairness required the district auditor to launch out on an oral hearing involving no less than 49 councillors, against a very complicated background, without any previous request for written representations or attempt to define the issues. A B

It remains to consider whether, after he had received and considered the appellants' representations and before he made his findings, he should have offered the appellants an oral hearing, or at the least an opportunity of commenting on the findings he was minded to make. Our attention has been drawn to the observations of Hamilton L.J. in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 191, that C

"the question whether the deciding officer 'hears' the appellant audibly addressing him or 'hears' him only through the medium of his written statements, is in a matter of this kind one of pure procedure." D

Conversely there are, I apprehend, cases where a fair chance of exculpation cannot be given without the offer of an oral hearing: see the observations of Geoffrey Lane L.J. in *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain* [1979] 1 W.L.R. 1401, 1407G.

Historically every person threatened with surcharge by a district auditor for negligence or misconduct has almost invariably been given, or offered, an oral hearing. This practice has no doubt arisen in part from the fact that the audits, in the course of which questions of surcharge arose, were, under the earlier statutes, required to be held in public: see, e.g. section 247 of the Public Health Act 1875 (38 & 39 Vict. c. 55). Also section 8 of the Poor Law Audit Act 1848 expressly required the district auditor, at poor law audits, to give notice to any person whom he saw cause to surcharge and to allow that person an oral hearing. But the practice has also, in my judgment, arisen from the recognition that the district auditor, in deciding on questions of negligence, misconduct and surcharge, is discharging a quasi-judicial function: see the successive books by Mr. Carson Roberts, Mr. Hurle-Hobbs and Mr. Reginald Jones on audit practice published by H.M. Stationery Office. Importance has been attached for over 75 years to the observations of Farwell L.J. in *Rex v. Roberts* [1908] 1 K.B. 407, 440, that E F G

"I fail to see how the auditor can discharge the duties put upon him . . . unless he hears and determines the questions of illegality, negligence and misconduct mentioned in the subsection in the only way consonant with the elementary principles of justice, viz., after hearing the evidence and the arguments of the parties." H

Mr. Hidden submits that this deep-rooted practice has been swept away, sub silentio, by the changes in the law, and to some extent in

A procedure, embodied in the Local Government Act 1972, as compared with the Local Government Act 1933 and earlier Acts. For my part, I have difficulty in accepting this, since the function of the district auditor in these matters remains a quasi-judicial function since the Act of 1972 as it was before, and in one important respect the burden on him is now increased, in that it is now for the district auditor to decide whether the misconduct of any person, referred to in section 20(1)(b) of the Act of 1982, was wilful. The information supplied to us indicates that it has continued to be the practice of district auditors since 1972 to offer an oral hearing to any person threatened with a surcharge for wilful misconduct. The present case of the Liverpool councillors, and the parallel case of the Lambeth councillors, are virtually the first cases where that practice has not been followed.

C Mr. Hidden submits alternatively that the practice of offering oral hearings to persons threatened with surcharge has rested on an unchallenged assumption since audits ceased being held in public and that the decision whether or not to offer an oral hearing is in truth a matter of pure procedure within the discretion of the district auditor.

D He claims that there is no valid basis for challenging the way in which the district auditor exercised his discretion in the present case, and he points out that none of the appellants ever asked for an oral hearing.

E As to this, there are in my judgment, three factors to be taken together. One is the practice of district auditors referred to above—though again there is no evidence from the appellants that any of them felt deprived of a legitimate expectation when he or she was not offered an oral hearing. The second is the seriousness of the surcharge to the individual appellants; it carries the penalty of disqualification from office for five years for people, many of whom have been active in local government in Liverpool for a long time, and it also carries a liability to pay an amount of £106,103 for which they are jointly and severally liable if the surcharge stands, which, though small compared with the annual needs of the City of Liverpool, could spell bankruptcy and financial ruin for many of the appellants. The third factor, which to my mind points strongly in favour of the view that the district auditor ought to have offered an oral hearing before he gave his certificate, is that what the district auditor did in his statement of the reasons for his decision to issue the certificate, was to reject as untrue the explanation of their conduct and motives which the appellants had put forward in their collective representations. He found in clear terms in paragraph 92 of his reasons that “the reasons adduced by members to support the delay in commencing the budget-making process are not the real reasons for the delay.” A court of law could not, in my judgment, in the circumstances of this case, have reached that stark conclusion of fact on mere documentary evidence without according the appellants at least the opportunity of an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, 308, *per* Lord Greene M.R.

H A district auditor is, of course, not bound to follow all the procedures of a court of law; but the gravity of the finding which he proposes to

make on documents alone is a factor which calls for an oral hearing to be offered. A

Because of these three factors, I am for my part inclined to the view that the district auditor ought, after he had considered the appellants' collective representations, to have offered them an oral hearing before he made his findings and issued his certificate. I find it unnecessary, however, to reach a final conclusion.

On the separate submission, to which I referred above, that the district auditor acted unfairly in that in his statement of reasons which accompanied the notices of his certificate of 6 September 1985 he introduced new matters with which the appellants had had no opportunity of dealing, I agree with Glidewell L.J. that there were no new matters: see [1986] 26 R.V.R. 45, 58. The point most strongly pressed as a new matter is that it is said that he found against the appellants that the rate for the year 1985-86, which by the appellants' votes the council set on 14 June 1985, was an illegal rate. I do not, however, read the statement of reasons as containing any such finding. The relevant paragraphs in the statement of reasons are paragraphs 9, 39, 40 and 61. The district auditor there records first that the rate made at the council meeting of 14 June 1985 was inadequate to meet the council's approved estimated expenditure for the year concerned and secondly that, before the resolution to make that rate was passed at the meeting of 14 June the city solicitor advised the council that if passed the resolution would be contrary to law. These are facts which appear from the minutes of the meeting of 14 June 1985, and those were among the minutes which the district auditor had listed in appendix 2 to his note which accompanied the notices to the appellants of 26 June 1985. The district auditor has used these facts as a test of the credibility of the appellants in the explanation of their motives put forward in their collective representations, and in particular he has contrasted the making of the rate despite the city solicitor's advice that it would be contrary to law with the assertion in paragraph 2 of the collective representations that in all these matters the appellants have throughout acted in good faith and after taking advice from their officers. But the district auditor has not found that the rate made on 14 June 1985 was illegal; it was not necessary for him to do so. I have already referred to the factor, as pointing in favour of an oral hearing, that the district auditor was in his findings rejecting the appellants' explanations as untruthful; I cannot see that the appellants make out the additional claim that the district auditor relied on new matter which they had not had a chance of dealing with. B C D E F

Before I pass to the second of the three questions listed at the outset of this judgment, I should refer to a point taken by Caulfield J. in his judgment in the Divisional Court. Caulfield J. had said that the question which had troubled him most in the case was whether natural justice required the district auditor to do more than to invite, as he did, the appellants to put forward written representations. He concluded that no more was required of the district auditor because there was no matter of fact or comment or argument which could have been added to the written representations and which might have affected the auditor's determination. With every respect, I am unable to agree with this G H

A conclusion. There were matters in my judgment which, if given a further opportunity, the appellants would have wanted to urge on the district auditor, such as their prospects, whatever they may have been in September 1985, of balancing the books despite the apparent short-comings of the rate fixed on 14 June, and the facts as to the progress made at the beginning of April 1985 in determining the estimated income and expenditure for the year 1985–86 of the various committees and in particular of the Education Committee and the Social Services Committee. It may be that no further facts which were available to be put forward, and no amount of argument, would in the event have caused the district auditor to change his mind; but that is not relevant if there was unfairness by their not being given a chance of putting forward further representations, oral or written, and if that unfairness has not been cured by the appellate hearing in the Divisional Court.

C I turn, therefore, to consider the effect, on the assumption that there was such unfairness, of the appellate hearing in the Divisional Court.

D The appeal is provided for by statute in section 20(3) of the Act of 1982, and the Divisional Court is given very wide power to confirm, vary or quash the decision of the district auditor and to give any certificate which he could have given. I agree entirely with the Divisional Court that the appeal hearing before the Divisional Court required an examination de novo of the questions which the district auditor had to consider and the appeal fell to be decided on the evidence and arguments placed before the Divisional Court, whether or not they had been placed before the district auditor. In that sense the Divisional Court was exercising an original as well as an appellate jurisdiction. Moreover any challenge to the fairness of the district auditor's decision on grounds of natural justice was within the scope of the appeal; this is clear from the decision of this court in *Asher v. Secretary of State for the Environment* [1974] Ch. 208, which is binding on us, and especially from the observations of Lawton L.J. at p. 228 with which I respectfully agree.

F It follows, incidentally—though it is not relevant to the disposal of this appeal—that with all deference to Glidewell L.J. I do not agree that a challenge to the fairness of a district auditor's procedure ought to be made by an application for judicial review rather than by an appeal to the Divisional Court. The procedure of an appeal is laid down by statute as the procedure for challenging a certificate of a district auditor, and questions of the validity of a district auditor's decision on procedural grounds should also be taken on such an appeal and not by other procedure. The “decision” of the district auditor referred to in section 20(3) of the Act of 1982 must mean his “conclusion”, which is susceptible of an appeal under the section, even if reached in breach of natural justice and therefore for certain purposes void: see the observations of Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574, 590F–G, and of Viscount Simon in *White v. Kuzych* [1951] A.C. 585, 600.

H The question whether a decision vitiated by a breach of the rules of natural justice—i.e., by unfairness, e.g. by failure to allow a person an opportunity to be heard—can be cured or made good by a subsequent hearing has been considered in a number of cases recently. It is plain that no clear and absolute rule can be laid down: see *per* Lord

Wilberforce in *Calvin v. Carr* [1980] A.C. 574, 592c–d, and *per* Barwick C.J. in *Twist v. Randwick Municipal Council* (1976) 12 A.L.R. 379, 384. A
If the scope of any permissible appeal is limited, so that it does not involve an examination of the circumstances of the case de novo on evidence not limited to that which was before the original tribunal, it may well be that the appellate hearing will not cure the defects of the original decision.

Where, however, as here, the appeal does require an examination of the circumstances of the case de novo on whatever evidence may be put before the appellate court, then the major question for consideration is, I apprehend, whether, in the context of this particular case, the procedure as a whole gave the appellants an opportunity for a fair hearing. B

As to that, the appellants' objections to the procedure of the district auditor are that they did not have an opportunity of an oral hearing and did not have an opportunity of dealing with the district auditor's proposed findings. But on the appeal they were able to put in, and did put in, as much evidence as they wished to deal with those findings and to answer every point taken against them by the district auditor, and they were given, though they did not take advantage of it, the opportunity of giving oral evidence. Their complaint on the ground of overall fairness therefore comes down to this, that to appeal after an order has been made is much less advantageous than an opportunity to advance reasons against the making of the order before it has been made. That as a fundamental ground of complaint on the score of fairness was rejected by the High Court of Australia in *Twist's* case, 12 A.L.R. 379; it could really only stand as a fundamental ground of complaint if, contrary to *Calvin v. Carr* [1980] A.C. 574, the observations of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 48f, 49d, were to be treated as validly laying down a rule of general application that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body. C
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In *Twist's* case, 12 A.L.R. 379, 387, Mason J. attached importance to the factor that, in certain Privy Council and Canadian cases, the party affected had elected to treat the decision of an administrative body as a valid, though erroneous, decision, by appealing from it in preference to asserting his right to a proper performance by the authority of its duty at first instance. That factor is not relevant in the present case, since in my view, as explained above, the appellants were bound to appeal against the decision of the district auditor if they wanted to challenge that decision. But the absence of that factor does not preclude the application to the present case of the reasoning of the members of the court in *Twist's* case, which was said in *Calvin v. Carr* [1980] A.C. 574 to be close to the views of their Lordships in the latter case. F
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The general principle is formulated in *Calvin v. Carr* [1980] A.C. 574, 594f–g as being that what is required is examination of the hearing process original and appeal as a whole, and a decision whether after it has been gone through the complainant has had a fair deal of the kind that he bargained for. *Twist's* case is of particular relevance to the present case in that the procedure was laid down by statute, rather than H

- A by contract or by the rules of a domestic body or trade union, and in that the appeal prescribed by that procedure was to a court of law rather than to a domestic tribunal. The reasoning in *Twist's* case is, however, as it seems to me, in line with the reasoning of the Supreme Court of Canada in *King v. University of Saskatchewan* (1969) 6 D.L.R. (3d) 120 to which we were also referred, where it was held that a hearing before the ultimate appeal tribunal, in which the appellant was accorded a full measure of natural justice, cured any absence of natural justice in the inferior tribunals.

- B Applying the law as I take it to have been laid down in *Calvin v. Carr* [1980] A.C. 574 and in *Twist's* case, 12 A.L.R. 379, I have no doubt that in the present case, if there was any failure of fairness on the part of the district auditor, either in not offering the appellants an oral hearing or not offering them an opportunity to comment on his proposed findings before he rejected the appellants' representations as untrue, that failure was fully cured by the hearing in the Divisional Court under the statutory appeal process.

- C There remains the third question in this appeal, namely, whether the decision of the Divisional Court was correct on the merits.

- D As to this, it has been common ground between the parties that the law as it was at the relevant time as to the duty of a local authority to make a rate has been correctly stated by Woolf J. in his judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182. In the absence of a reasonable explanation, it was a breach of duty for the Liverpool City Council not to have made a rate by the beginning of the financial year or within a reasonable time thereafter. It was accepted by leading counsel for the appellants in this court, as in the Divisional Court, that it was not a justifiable excuse for the council's delay in making the rate until 14 June 1985 to say merely that the council was endeavouring to exhort money from central government by the threat that the council would not perform its legal duty to make a lawful rate.

- E It is said for the appellants that there was a reasonable excuse for not making the rate earlier than 14 June 1985 because until very shortly before that date the council was negotiating, or endeavouring to negotiate, with central government to obtain more government money for Liverpool, as had been achieved in the corresponding months of 1984. It is said further for the appellants, and this is really the gravamen of their appeal on the merits, that the appellants were not guilty of "wilful misconduct," as that term was interpreted by Webster J. in *Graham v. Teesdale*, 81 L.G.R. 117, 123 in the light of the earlier authorities, because (a) the appellants genuinely thought that further government money would be forthcoming for the city and (b) the appellants, though realising that there was a duty to make that rate not later than 20 June, never appreciated that there was any obligation on the council to make the rate earlier than 20 June.

- H Finally, and as a separate point, it is said for the appellants that the loss to the City of Liverpool relied on by the district auditor in making the surcharge was not caused by any act or omission of the appellants, but was caused by the voluntary decision of the Government not to pay

estimated rate rebates or estimated sums in lieu of rates in respect of Crown property until the council had made its rate for the year. This last point I regard as unarguable. The loss was plainly foreseeable as the Government had repeatedly declared its intentions, and the prospective loss had also been mentioned in reports from the council's own officers. The loss was caused by the appellants' acts and omissions just as much as those acts and omissions caused other ratepayers—e.g., commercial ratepayers in the city—not to make payments in advance of the rate being set and the rate demands being sent out.

On the facts, the Government had again and again and again made its position as clear as anyone possibly could that there would be no extra money available for Liverpool for the year 1985–86 and that the Government would not go back on, or re-open, the rate support grant report which had been approved by Parliament in January or February 1985. The appellants say that it was to be expected that the Government would say that, and that the Government had said much the same in the spring of 1984 and yet had made further money available for Liverpool. But the council's principal officers had clearly pointed out, in their joint memorandum of 16 April 1985 to the key Performance Review and Financial Control Subcommittee, that the circumstances of 1985 were not necessarily comparable to those surrounding the deferment of the rate in 1984.

For my part, I have no doubt that, from 1 April 1985 to 14 June 1985, no reasonable person could have expected that any further government money, of any significant amount beyond what had already been specifically agreed, would be made available to Liverpool for the year 1985–86. If the appellants, despite all appearances and the utterances of the Government, believed to the contrary and deferred making the rate in that belief, they acted recklessly in so doing. They knew that there would be an element of loss to the city if the making of the rate was delayed and they had no reasonable prospect of achieving any countervailing benefit from the Government.

There is the further point that the only financial matter even tenuously under discussion in April and May 1985 with the Merseyside Task Force or the Department of the Environment in London was in the context trivial—how much the council would be allowed in respect of two outstanding items (management support and monitoring and enhanced maintenance of environmental sites) in the urban programme for the previous year 1984–85. The total amount of government money in issue was about £1.75m. and the expenditure had already been incurred by the council in 1984. If the Government was prepared to provide the money, a larger sum (because penalties would be avoided) of around £5m. would fall to be deducted from the city's opening deficit in its accounts for the year 1985–86, but there would be no other effect on the budget-making process for that year. The council had not yet got around, apparently, to putting forward specific urban programme projects for the year 1985–86.

It is said in the appellants' collective representations to the district auditor that the arrival of the letter of 8 May from the Merseyside Task Force confirming that no further government money would be

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A forthcoming in respect of these two outstanding items of the urban programme for 1984–85 “had a profoundly disruptive effect upon the approach to budget-making” for the year 1985–86. Without doubting Councillor Hamilton’s integrity, I cannot see how that can have been so, since the opening deficit for the year 1985–86 in the figures put before the council on 14 June 1985 when the rate was made was precisely the same as the figure for the opening deficit given in a memorandum of the city treasurer of 16 April 1985 prepared, obviously, on the footing that the amounts of government money available for the urban programme of 1984–85, even in respect of these two outstanding or final items, was already known. It would seem to be more correct to say that the receipt of the letter of 8 May, and of a further final warning from the district auditor dated 21 May 1985, accelerated the budget-making process which had been in abeyance since 16 April; we find that committees, such as the Library and Leisure Activities Committee, the General Services Committee, the Housing and Building Committee and the Planning and Land Committee, which had done nothing before, were all approving their budgets for 1985–86 in the last days of May.

I conclude therefore that the possibility or hope of obtaining further money from the Government does not on the facts provide any reasonable explanation or excuse for the failure to set a rate until 14 June and, furthermore, the appellants were acting recklessly in so far as they delayed setting the rate in the belief or hope that further government money would be forthcoming.

It remains to consider the appellants’ case that they were not guilty of wilful default because they never appreciated that there was any *obligation* on the council to make the rate earlier than 20 June.

The appellants were selected for surcharge because of the pattern of their voting at meetings of the council on 30 January, 27 February, 7 March and 14 June 1985 when a number of highly political resolutions were passed and an opposition amendment, on 7 March, which called for estimates to be prepared and considered and for a meeting to be held to fix a rate, was defeated. The case argued by Mr. Hidden for the district auditor was that, from at least 30 January, the appellants had been conducting a political battle without regard for statutory and other obligations and duties; this had been the finding of the district auditor in paragraph 55 of his statement of reasons of 6 September 1985.

Members of the council were told very many times by the district auditor and his predecessor throughout 1984 and in the first five months of 1985 that the council had a duty to make an adequate rate. There is no reason to doubt that all the members understood this. They were also told, in a report of 19 March 1984, of which a reminder was sent later, that they could be personally at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate. They were also told in June 1984 that a rate had to be set by 20 June at the latest because of the statutory right of ratepayers to discharge their rate liability by 10 instalments in the financial year. In fact in the year 1984 the rate was not made until July and in the circumstances of that year no action was taken on the score of delay in not having fixed the rate earlier.

Against that background, various of the appellants, such as Councillor A
Hamilton, Councillor G. A. Lloyd and Councillor Mrs. Adams have
deposed to the effect that they believed that so long as a rate was made
by 20 June they were not acting unlawfully or improperly. That may
well have been a tenable view up to 16 April 1985 when Woolf J. gave
judgment in *Reg. v. Hackney London Borough Council, Ex parte*
Fleming (1986) 26 R.V.R. 182. However, on 16 April the three principal B
officers placed a joint memorandum before the Performance Review and
Financial Subcommittee which made it clear to any councillor who read
it—(i) that there was this important and highly relevant case involving
the Hackney London Borough Council being decided that day; (ii) that
while 20 June remained the final date for fixing a rate there had to be
a good reason for deferring the making of the rate at all; (iii) that the C
circumstances of 1985 were not necessarily comparable to those
surrounding the deferment of the making of the rate in 1984; and
(iv) that deferment would involve loss to the council, not least in that
the Government had made it plain that rate rebates would not be paid
to any council so long as that council had not set a rate for 1985–86.

What actually happened, despite that memorandum, was that on 16
April 1985 progress towards making the rate for the year 1985–86
ceased. There had been progress in that on 26 March 1985 the Policy D
and Finance Committee had resolved that the city treasurer be requested
to prepare summaries of all committees' income and expenditure, and
that the income and expenditure of the Education and Social Services
Committees be submitted to special meetings of those committees for
consideration prior to the meeting—a special meeting—of the Perform- E
ance Review and Finance Control Subcommittee on 16 April; that had
all been done, the special meetings of the Education and Social Services
Committees which approved their budgets being held on 12 and 10 April
respectively. But on 16 April the Performance Review and Financial
Control Subcommittee rejected opposition proposals deploring the delay
in fixing the rate, demanding the calling within 10 days of a meeting of
the city council to determine the budget and fix a rate, and requiring the F
circulation to all members of the city council of, inter alia, the joint
memorandum of the three principal officers which I have mentioned
and, instead, the subcommittee carried a motion which, after a long
political preamble, referred the further budget-making process to
meetings of the committees (other than the Education and Social
Services Committees) and a further meeting of the subcommittee itself,
which in the event were never convened. These proceedings of the G
Performance Review and Financial Control Subcommittee were approved
by the Policy and Finance Committee, despite further opposition
amendments, on 7 May 1985.

In these circumstances, and as the appellants had every opportunity
of putting in as much evidence as they wished before the Divisional
Court in relation to the matters set out in the district auditor's statement
of reasons, including the opportunity of giving oral evidence, I would for H
my part conclude that those of the appellants (whichever they may have
been) who decided the policy of the majority party on the city council in
the first six months of 1985 knew perfectly well from 16 April onwards

A that they were acting illegally and in breach of their statutory duty in delaying setting an adequate rate; alternatively, if they were not deliberately acting illegally, they were acting with blatant recklessness in disregarding the principal officers' advice.

B As for the others—and I do not know which they were—they have chosen to follow their leaders. All the appellants joined in the collective representations to the district auditor. All have been represented together before the Divisional Court and in this court. In his judgment Glidewell L.J. records that in the hearing in the Divisional Court neither counsel for the Lambeth appellants nor counsel for the Liverpool appellants was able to point to any feature which distinguished any of their clients from the remainder; they both treated their task as being to present a single case on behalf of all their clients.

C The observations of Devlin J. in *Rothnie v. Dearne Urban District Council* (1951) 50 L.G.R. 123, 125–126 are, in my judgment, apposite where he said:

D “it may seem, on the face of it, to be very drastic that 17 out of 27 members of an urban district council should be disqualified from election for five years because they either voted for or failed to vote against an illegal resolution. I confess that I find it a little surprising that we are asked to determine the matter on the basis that the position of these 17 members is exactly the same. I should have thought that different considerations might well have applied in different cases; . . . But the case has been presented to us with one affidavit on behalf of all 17 members in which their state of mind is stated to be exactly the same, and upon that basis the order which my Lord has proposed is, in my judgment, inevitably the right one.”

E As they have all, whether leaders or not, chosen to stand together, without any being distinguished from the remainder, the conclusion must be that all acted recklessly in delaying the making of the rate until 14 June 1985. The finding which I have referred to in paragraph 55 of the district auditor's statement of reasons is, on the full evidence before the Divisional Court, justified in relation to all the appellants, and all were guilty of wilful misconduct, with the consequences which follow from that.

F I agree that this appeal should be dismissed.

G WOOLF L.J. I am fortunate in that as the facts leading up to this appeal have been fully set out in the judgment of Glidewell L.J. in the Divisional Court and in the judgment of Lawton L.J. in this court it is possible for me to turn directly to the principal issues raised on this appeal. They are: (a) whether the district auditor can lawfully issue a certificate under section 20(1) of the Local Government Finance Act 1982 without holding an oral hearing at which the persons to whom the certificate relates have an opportunity of presenting evidence and making representations (“the oral hearing issue”); (b) whether, if there is no statutory requirement to hold an oral hearing, the principles of fairness in the circumstances of this case require the auditor either to hold an

oral hearing or to give the councillors an opportunity to make additional representations, having regard to the conclusions to which the auditor was minded to come (“the fairness issue”); (c) whether the auditor and the Divisional Court correctly came to the conclusion that the councillors had been guilty of “wilful misconduct” (“the wilful misconduct issue”); (d) whether the auditor and the Divisional Court were correct in concluding that the alleged loss of £106,103 had been incurred or caused by the wilful misconduct of the councillors (“the loss issue”).

In his admirable opening argument in this appeal on behalf of the 47 councillors he now represents, Mr. Blom-Cooper contended with justification that in coming to a decision on the issues raised in this appeal it is necessary to have in mind the background of severe urban deprivation which undisputedly exists in the City of Liverpool. For this reason he referred to the report of the Archbishop of Canterbury’s Commission on Urban Priority Areas, *Faith in the City*, and in particular the passages in the report stressing the urgent need to stop the decay and begin the regeneration of inner city areas such as exist in Liverpool. He submitted that when viewed against this background his clients had behaved perfectly properly and were justified in stating on the first page of their representations to the auditor of 19 July 1985:

“In all these matters, the members of the council have, throughout, acted in good faith and after taking advice from their officers. They have never at any time sought to avoid their duty to make a rate, or introduce unnecessary delay in its discharge. They have at all times had at the forefront of their minds the interests of the citizens and ratepayers of Liverpool in seeking to maximise the resources available to finance services, and to make improvements in living conditions of Liverpool people. In doing so they claim that they were entitled to exercise the degree of discretion which, as elected representatives the law allows them—and which the courts have frequently protected from undue interference by outside bodies.”

With this submission in mind I now turn to deal with the principal issues I have identified.

The oral hearing issue

This issue can be dealt with as part of the next issue but I can deal with it separately since, as I understand Mr. Blom-Cooper’s submissions as developed in argument, he was submitting for the first time in this court that the auditor was required as a matter of statutory construction of section 20 of the Local Government Finance Act 1982 to hold an oral hearing. No such argument was advanced in the Divisional Court. Indeed, in that court it was conceded that there was no such statutory requirement. However, Mr. Blom-Cooper was entitled to advance the argument on the appeal and I recognise that the argument has considerable force. It can be summarised in this way: the origin of the present jurisdiction of the auditor can be traced to section 8 of the Poor Law Audit Act 1848, that section gave the person who it was proposed to surcharge the right to be notified and attend and make oral submissions before the auditor and although the express right no longer

- A appears in the current legislation it is unthinkable that Parliament intended to take away this right particularly as an objector is still given the right to attend before the auditor by section 17(3) of the Local Government Finance Act 1982. Mr. Blom-Cooper in support of his argument referred us to the successive editions of the authoritative textbooks on the law relating to district audits by Mr. Carlton Roberts in 1919, Mr. Hurle-Hobbs in 1949 and the more recent and current editions by Mr. Reginald Jones. These works are published by H.M. Stationery Office and are undoubtedly highly authoritative, and while they have become less dogmatic over the question of the need for an oral hearing in the more recent editions, the earlier editions certainly express the view that an oral hearing is necessary and the later editions regard such a hearing as highly desirable. Furthermore, they contain precedents which presuppose such a hearing. Mr. Blom-Cooper also strongly relies on the fact that as a matter of practice, of which Parliament should be taken to be aware (subject to a sole exception in 1978 when the person surcharged was already convicted and in prison in relation to matters giving rise to the surcharge) so far as is known an oral hearing has always been offered before persons are surcharged and in fact has normally taken place.

- D The terms of section 8 of the Act of 1848 are as follows:

- E “if an auditor shall see cause to surcharge any person now liable by law to be surcharged by him, and to whom no notice is now required by law to be given, with any sum of money in reference to any payment considered by him to have been illegally or improperly made, he shall, if the person be not present at such audit, cause notice in writing of his intention to make such surcharge to be given, by post or otherwise, to the person against whom he shall propose to make this surcharge . . . and shall adjourn the audit, so far as it shall relate to such particular matter, for a sufficient time to allow of such person appearing before him, and showing cause against such surcharge, and at such time the said auditor shall hear the party, if present, and determine according to law and justice of the case.”

- G It is to be noted that the obligations upon a district auditor now are greater than they were at the time of the original legislation because of the requirement in section 20 that not only must misconduct be established, it must also be established that the misconduct was “wilful” which clearly adds to the gravity of the finding.

- G Support for Mr. Blom-Cooper’s argument is to be found in *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100, where it states:

- H “The absence from the present statutory provisions relating to district audit of any requirement respecting the giving of notice to show cause against any action contemplated by the auditor can scarcely indicate an intention on the part of Parliament to withdraw from persons likely to be affected by his decisions the right to receive notice and be heard: a more likely explanation is that the obligation of any tribunal or person exercising judicial functions to

afford an opportunity for appearance and to listen fairly to both sides has become so fundamental a principle of English law as to render unnecessary any statutory provision in relation thereto;" A

The probable reason for the change of emphasis in the textbooks on this subject is that in *Graham v. Teesdale*, 81 L.G.R. 117, Webster J. when dealing with the question of fairness in an appeal arising out of the grant of a certificate by a district auditor under section 161(4) of the Local Government Act 1972 (the predecessor of section 20 of the Act of 1982), accepted that there was no statutory requirement to have an oral hearing. However, in that case the appellant appeared in person and the full argument advanced by Mr. Blom-Cooper before this court would not have been before Webster J. I therefore do not pay the attention which I otherwise would to the view expressed by Webster J. In addition, in *Asher v. Secretary of State for the Environment* [1974] Ch. 208, 219, Lord Denning M.R. assumed that there was to be an oral hearing and that the person to be surcharged should have an opportunity of answering questions and of calling witnesses if desired, but this comment was obiter. B C

In considering whether Mr. Blom-Cooper's submission is correct, it is possible to distinguish the position under the Act of 1848 from that under the current legislation because in the 19th century the auditor was conducting his activities in public and the process of surcharging therefore took place in the same way, and this is no longer the situation. It is also possible to contrast the provisions of section 17(3) of the Act of 1982 which expressly provides that "any local government elector for any area to which those accounts relate, or any representative of his, may attend before the auditor and make objections," with the absence of any express provision as to attendance where the auditor is exercising his power under section 20 without there being an objection. However, I do not regard these points as being of significance. Indeed the reference to an objector having to attend in section 17(3) is surprising and probably explicable because of the historical background to this legislation, which is detailed in the judgment of Lawton L.J. The fact that the elector is required to attend to make an objection does not mean that today the auditor is required to inquire into the objections in public or to hear oral representations or evidence relating to the objection. D E F

An objection can be made with the intention that the auditor should take action under section 19 or section 20 of the Act of 1982. However, the auditor can exercise his powers whether or not there is an objection and it appears to me clear that whether or not there is an objection the procedure under section 19 and section 20 must be the same. If an oral hearing is required where there is an objection an oral objection must equally be required where there is no objection. Likewise, if an oral hearing is necessary before the auditor exercises his power under section 19(1) to apply to the court for a declaration that an item of account is contrary to law, there must be a requirement for an oral hearing before the auditor exercises his powers to certify under section 20 which can G H

A have more immediate financial consequences to and can effect the status of the person to whom the certificate relates.

The solution has to be found in accordance with the general principles applied by the courts where they are considering supplementing the provisions of legislation so as to give effect to what must have been deemed to be the intention of Parliament in passing the legislation in the terms used. Undoubtedly, having regard to the function which the auditor has to perform under section 20, Parliament must be taken to have intended that he should perform his duties fairly, but must it have intended he should do so by an oral hearing? The judicial activity of supplementing the express provisions of the legislation as to fairness has now been the subject of many judicial comments of the highest authority. An example, in a case which was cited on this appeal, is to be found in Lord Reid's speech in *Wiseman v. Borneman* [1971] A.C. 297, 308:

“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.”

Applying this approach, it would only be right to establish a “hard and fast” requirement for an oral hearing in addition to the general requirement of fairness if this was necessary having regard to the auditor's function under section 20. In my view it is not so necessary. Mr. Blom-Cooper was not able to point to any precedent for inferring a statutory requirement for an oral hearing in the performance of a quasi-judicial function of this sort and there clearly can be cases where justice can be done and the auditor can certify under section 20 without the need for an oral hearing and Parliament cannot be presumed to have required an oral hearing in all cases, if it may not be necessary in some cases. In this situation implying into the legislation a general requirement to act fairly, which alters depending upon the circumstances provides all the protection that is needed and so, notwithstanding the legislative history, it is this general requirement of fairness that I would import into section 20 and not the rigid requirement for an oral hearing for which Mr. Blom-Cooper contends. In expressing my reasons on this issue I have not made reference to the Code of Local Government Audit Practice, since I did not find that it provided any assistance on this issue.

The fairness issue

H As there is no statutory requirement placed on the auditor to hold an oral hearing before he exercises his power to certify under section 20, he has a discretion as to whether to hold an oral hearing. This does not mean that the court's powers of intervention are limited to those which normally apply to the exercise of administrative discretions. The

discretion of the auditor is limited by the requirement that he must ensure that the proceedings are fair, and if in the view of the court the procedure adopted by the auditor is unfair, the procedure is unlawful and the court can intervene even though the auditor cannot be regarded as having acted unreasonably in adopting the procedure which he did. A

In deciding whether in any particular case there was unfairness it is necessary to consider the particular function which was being performed by the auditor in making the decision, the nature and consequence of the decision and the matters in issue. Therefore, before examining precisely what happened in this case, it is helpful to examine the statutory framework under which the auditor was operating and in particular the effect of the right of appeal which is given by section 20, which Mr. Hidden in his helpful submissions argued could cure any failure of fairness on the part of the auditor in this particular case. B C

The first point that has to be made with regard to section 20 in the circumstances of this case is a point to which I have already alluded. This is that although it gives the auditor other powers, the power which he was exercising in this case was to certify that loss or deficiency had occurred due to wilful misconduct. Such a certificate in itself could cast a serious reflection upon the character of the person to whom it relates, can have grave financial consequences and where, as here, the persons concerned are members of a local authority and the amount involved is in excess of £2,000 the certificate has the further consequence of disqualification for the substantial period of five years. It is next to be noted that both under section 19 and under section 20 of the Act of 1982, before the auditor exercises any of the powers given to him by those sections, the same initial requirement is laid down by the statute, namely, that "it appears to the auditor." I only draw attention to this because under section 19 the auditor has no direct powers other than to apply to the court for a declaration, whereas under section 20, where he decides to certify in the absence of an appeal, the certificate becomes the final decision. D E

Whether the auditor is acting under section 19 or section 20, his role is at least in part inquisitorial. While he would always be under an obligation to look fairly into the objection and deal fairly with any person who can be affected by his decision, both under section 19 and under section 20 his role is not identical to that of a judge in court. F

The power of appeal which is given by section 20 to the court is a wide one. It is accepted that the court grants a hearing *de novo*—a full re-hearing, and subsection (3) provides: G

"(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated . . . as if it had been given by the auditor . . ."

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A There has been some uncertainty as to the effect of an appeal provision of this sort in relation to the adoption of an unfair procedure which, in the absence of a right of appeal, would undoubtedly result in the quashing of a decision.

B In *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 Megarry J. dealt with the position with characteristic clarity. He was of the view that in general a right to appeal could not cure a breach of the rules of natural justice. He said, at p. 48:

“What is required is a venire de novo and not the process of appeal, whereby the person aggrieved may be treated as bearing the burden of displacing an adverse decision which, for the lack of natural justice, ought never to have been reached.”

C Megarry J. said, at p. 49:

D “That is not all. If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and law combine to give the member a right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

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G As a matter of general principle, bearing in mind the importance of the requirement of fairness to any adjudicating process, I have considerable sympathy with the approach adopted by Megarry J. where there is no right to a re-hearing. However, Mr. Hidden relied strongly on the decision of the High Court of Australia in *Twist v. Randwick Municipal Council*, 12 A.L.R. 379. That case concerned the power of a council to order the demolition of a building where there was a right of appeal against the order to a district court. Twist failed to exercise his right of appeal but instead sought a declaration that the order directing the demolition of his building was null and void, on the basis that before the order was made he should have been given an opportunity to be heard. The appellant’s appeal against the refusal of a declaration was dismissed by the High Court. Barwick C.J. was of the view that, because of the right of appeal there was no enforceable right to a hearing before the order was made. However, Mason J. and Jacobs J. took the view that the right of appeal did not in itself mean that there

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was no right to a hearing before the order was made, it merely alters the consequences of a failure to accord such a hearing. Mason J. said, at p. 387: A

“Further, the earlier cases should not be regarded as deciding that the presence of an appeal to another administrative body is an absolute answer to a departure from natural justice or the standard of fairness. The existence of such an appeal does not demonstrate in itself that an inferior tribunal is at liberty to deny a hearing. But if the right to appeal is exercised and the appellate authority acts fairly and does not depart from natural justice the appeal may then be said to have ‘cured’ a defect in natural justice or fairness which occurred at first instance.” B

The judge then referred to a series of cases, concluding with a reference to *Denton v. Auckland City* [1969] N.Z.L.R. 256 and the *Leary* case [1971] Ch. 34 where a different approach had been taken. Mason J. then went on to say that he preferred the earlier line of cases rather than the *Denton* and *Leary* cases: C

“first, because the party affected has elected to treat the administrative decision as a valid, though erroneous decision, by appealing from it, in preference to asserting his right to a proper performance by the authority of its duty at first instance; and secondly, because in some cases the court will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reasonable prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing—in appropriate cases that balance will be achieved if the individual secures a fair hearing on his appeal.” D E

Jacobs J. put it somewhat differently, saying, at p. 390:

“However the second question remains. Is an order made without giving any opportunity to be heard invalid, that is to say, void and a nullity? Whether or not an order made without an opportunity to be heard will be wholly invalid depends upon the legislative provision read in the light of the nature of the subject matter and the provisions for review. Though the nature of the subject matter would tend to support an intention of total invalidity, I regard the wide provision for appeal in subsection (5) as indicating a contrary legislative intention. The appeal is to a judicial body in the fullest sense of that term. The determination must be made upon the evidence before the district court. I do not think that it would at all accord with the legislative intention that an owner should be able to ignore rights of appeal of the kind given by subsection (5) and instead rely on an absolute invalidity in the order which a council had made. A different view might be open if the appeal were to anything less than a court of the wide jurisdiction and consequent legal standing possessed by the district court; but in my opinion it was not the legislative intention that an order under the section, subject to appeal to the district court, should, without any resort to F G H

- A the right of appeal, be able to be treated for all purposes as void and of no effect upon the ground that the principle of natural justice had not been observed.”

- B One of the cases which Mason J. preferred to the decision of Megarry J. in *Leary's* case [1971] Ch. 34 was the decision of the Supreme Court of Canada in *King v. University of Saskatchewan*, 6 D.L.R. (3d) 120. In that case Spence J., giving the judgment of the court, took the view that any failure of natural justice before inferior bodies of the university was unimportant

- C “when the senate, the appeal body under the provisions of the University Act, and also the body in control of the granting of decrees, has exercised its function with no failure to accord natural justice”: see p. 130.

- D In his judgment in *Leary's* case Megarry J. had distinguished *King's* case and preferred *Denton v. Auckland City* [1969] N.Z.L.R. 256, in which the High Court in New Zealand held that as the decision of a town planning committee lacked natural justice, the appeal board could not supply the deficiency of natural justice because the committee's decision was a nullity. However, although Megarry J. found some support in this decision, he was correctly careful in my view not to base his decision on the use of the terms “void” and “voidable” which was the approach adopted in the New Zealand case.

- E The final authority to which it is necessary for me to refer on this point is the decision of the Privy Council in *Calvin v. Carr* [1980] A.C. 574. That was a case involving the Australian Jockey Club. There had been a preliminary hearing before the stewards in which it was alleged that there was a breach of the rules of natural justice and there was then an appeal to the committee of the Jockey Club which was a hearing de novo when witnesses were present and available for cross-examination. The opinion was delivered by Lord Wilberforce who indicated, at p. 593, that Megarry J. had stated the position too broadly when he had said that a failure of natural justice of a trial body could not be cured by a sufficiency of natural justice in an appellate body. Lord Wilberforce also indicated, at p. 595, that the passage in the judgment of Mason J. in *Twist's* case, 12 A.L.R. 379, 387, to which I have already made reference was “close to their Lordships' views.”

- G The approach of the Privy Council, having analysed the various earlier decisions in different jurisdictions, was, as Lord Wilberforce stated at p. 592, that:

- H “no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be ‘cured’ through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so. There are, however, a number of typical situations as to which some general principles can be stated.”

Lord Wilberforce then dealt with three different categories:

“First there are cases where the rules provide for a rehearing by the original body, or some fuller or enlarged form of it. This situation may be found in relation to social clubs. It is not difficult in such cases to reach the conclusion that the first hearing is superseded by the second, or, putting it in contractual terms, the parties are taken to have agreed to accept the decision of the hearing body, whether original or adjourned. . . . At the other extreme are cases, where, after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment, etc.) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage.”

The third category was the intermediate category as to which Lord Wilberforce said, at p. 593:

“In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances where the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry . . . In such cases it would no doubt be right to quash the original decision.”

The appeal procedure under section 20 of the Act of 1982 obviously falls within Lord Wilberforce’s intermediate category.

Finally, Lord Wilberforce quoted with approval a judgment of Cooke J. in *Reid v. Rowley* [1977] 2 N.Z.L.R. 472 and, having done so, went on to say, at p. 596, that their Lordships did not

“understand the Court of Appeal [of New Zealand] to be subscribing to a view that cases of ‘insulation’ or ‘curing’ after a full hearing by an appellate body, may not exist: on the contrary, Cooke J. expresses the opinion that the court, in the exercise of its discretion, when reviewing the domestic or statutory decision, should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. This, though perhaps with some difference in emphasis, is their Lordships’ approach.”

Mr. Blom-Cooper criticises the reasoning advanced by Mason J. for his conclusion in the *Twist* case, 12 A.L.R. 379, and I consider that there is justification for that criticism and I certainly would not apply that reasoning to the present case. Mr. Blom-Cooper also sought to

A distinguish the *Twist* case and *Calvin v. Carr* [1980] A.C. 574, and while he does not quarrel with those decisions on the facts which were before the court he submits that there is a distinction to be drawn between domestic tribunals where contract has a part to play and bodies who are exercising judicial functions under a statute, particularly where the decision can affect the personal interests of the complainant. In this approach Mr. Blom-Cooper receives some support from Sir William

B Wade in his authoritative textbook on *Administrative Law*, 5th ed. (1982), p. 488. However, I do not regard it as right to treat what Lord Wilberforce stated as being confined to non-statutory tribunals and in my view the approach of Jacobs J. in *Twist's* case, 12 A.L.R. 379 and Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574 provides considerable guidance as to the approach to be adopted in this case.

C In my view in cases such as this the question the court should ask is whether, taking into account the complainant's rights of appeal, and if those rights have been exercised what happened on the appeal, the complainant, viewing the combined proceedings as a whole, has had a fair hearing? I regard this approach as appropriate because if Parliament makes provision for an initial hearing followed by appeal then what Parliament should be presumed to intend is that the persons affected by those proceedings should be treated fairly in the proceedings as a whole.

D Where there are shortcomings in the initial proceedings but the appellant has in fact been dealt with fairly when the proceedings as a whole are considered, to regard the proceedings as invalid would be to condemn something as being unfair because of a flaw in a part when if the whole was considered the flaw would be sufficiently insignificant to enable the whole procedure to be regarded as unblemished. Expressing the matter

E slightly differently, if the whole procedure is properly regarded as being fair, then to strike that procedure down because of a flaw in part will be to apply an unduly technical approach. My view of the test receives some support in *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 242 et seq. and is in accord with Lord Wilberforce's opinion in *Calvin v. Carr* [1980] A.C. 574. Furthermore it does not have

F the flaw to which Megarry J. referred in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 because it presupposes Parliament gave the complainant no more than a right to a fair hearing in the proceedings as a whole.

Mr. Hidden also submitted that in this case even if there was a breach of natural justice, the court should not intervene because the result would inevitably have been the same even if there had not been the defect in procedure. I recognise that there can be cases where such a submission will have to be considered by the court. However, I regard the authorities on which Mr. Hidden relies, including *George v. Secretary of State of the Environment* (1979) 38 P. & C.R. 609 and *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1595, as having application in very limited circumstances, and certainly I would not regard them as

H applying here.

What, then, is the result of applying this test to the circumstances of this case? Mr. Blom-Cooper submits that the auditor's decision in particular was unfair because he rejected the truthfulness of the

explanation which the appellants put forward without their knowing that he was minded to do this and without his having the opportunity to assess their credibility in the manner which would have been possible at an oral hearing. In addition in his reasons for his decision the auditor relied upon five matters of which the appellants did not have notice. The appellants, it is contended, were thus prevented from dealing with these matters. Finally Mr. Blom-Cooper says the period which the appellants had in which to make their representations was unduly short and that when the district auditor wrote to the appellants on 21 May 1984 he could have given more information than he did. I regard the last two complaints as being manifestly without substance and I do not propose to take up any more time dealing with them. The other points are, however, of greater substance.

In the circumstances of this particular case, having regard to the history as to oral hearings before the district auditor in the past, it is surprising that both in this case and in the *Lambeth* case* the councillors were not given the offer of an oral hearing. They could have but did not allege that they had a legitimate expectation of such a hearing. I appreciate that where 49 councillors are involved an oral hearing might give rise to administrative problems and create delay, and the situation which existed in Liverpool could have been regarded by the auditor as one which required prompt action. However, in my view it would have been preferable to have invited representations as to whether there should be an oral hearing. This does not mean, however, that the procedure was unfair as a whole because this was not done. In this country we attach considerable importance to the benefits of oral hearings in the administration of justice. It has been suggested that we attach excessive importance to orality. I would refer here to the dissenting judgment of Hamilton L.J., which was subsequently indorsed in the House of Lords [1915] A.C. 120, in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 192-193:

"It is said that a written argument is an illusory thing, that there is no eloquence or at least no persuasion but in speech. Parliament should know something about that, and it has left the matter to the Board. I find the contention bewildering. Are reasoning and writing mutually exclusive processes? The appellant desires to enjoy what Mr. Upjohn felicitously calls 'the bound and rebound of ideas and arguments between the Bench and the Bar'. This invests with authority a practice (or should I say a foible) of judges, which I had believed to be pardonable and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice. It is said again that the appellant is entitled to a reply. . . . I think this is only procedure again."

In this case, in the note accompanying his notice to each individual ratepayer dated 26 June 1985, the auditor sets out the charge, specifies the duty which is placed upon the council under section 2(1) of the

* *Smith v. Skinner*, The Times, 6 March 1986; [1986] R.V.R. 45. An appeal by certain councillors of the Lambeth London Borough Council against the decision of the district auditor, Mr. B. Skinner. The appeal was heard at the same time as the present appeal, then sub. nom. *Gladden v. McMahon* [1986] R.V.R. 45.

A General Rate Act 1967 and indicates that the rate was not made for the year commencing 1 April 1985 by the council until 14 June 1985 and then adds:

B “The facts leading up to this decision by the council are to be found principally in the minutes of the proceedings of meetings of the council, of its Policy and Finance Committee and of its Performance Review and Financial Control Subcommittee and also in reports of officers referred to in these minutes . . . The facts appear to show that there was no lawful justification for the delay in making of the rate. The council thus disregarded the advice and warning given by me my predecessors and its officers. On the evidence the council would appear to be in breach of its statutory duty. To the extent that a breach of statutory duty results from a deliberate failure by any member to discharge his or her own duty then such a member is guilty of wilful misconduct.”

D Finally the note identifies the loss which is alleged to arise as the result of the breach of duty. It is important that the note either in its appendices or by means of the documents which accompanied the note identifies the evidence on which the auditor relied.

E At the outset of this judgment I indicated the general nature of the appellants’ case advanced in their representations. If the representations which they were making were correct then they were inconsistent with the view which the district auditor was provisionally expressing as being his interpretation of the facts set out in the documents to which he referred. In these circumstances it should have been apparent that the representations could be rejected as being inconsistent with the contents of those documents. This is what happened and although the councillors may not have anticipated the district auditor’s precise reasoning it should also have been anticipated that he could reject their representations and in doing so could impugn their motives and credibility. With regard to the alleged unfairness due to the failure to offer an oral hearing my conclusion is that the proceedings remained fair notwithstanding the absence of an offer of an oral hearing at the earlier stage. It is quite clear, as the appellants themselves said, that they wished to make a collective response. Such a response can satisfactorily be made in writing. The appellants made no request for an oral hearing which they could have done although the district auditor had indicated that he intended to deal with the matter in writing. In the Divisional Court the appellants had their opportunity for an oral hearing and they were offered and declined the opportunity to give evidence. While, therefore, it may have been preferable to offer an oral hearing, justice did not require such an offer at the earlier stage, and it is doubtful whether even if an offer had been made it would have been accepted.

H I turn to the new matters on which Mr. Blom-Cooper relies. In his reasons the district auditor did not in fact find that the rate which was made was unlawful. He used the inadequacy of the rate as being an example of the contravention by the appellants of their officials’ advice, which was a matter referred to in the note.

The second matter on which Mr. Blom-Cooper relies is the events of 1984 and their significance for 1985 and 1986. As the auditor referred to various documents relating to the previous year, he had done sufficient, in my view, to make it clear that he was relying on the events in the previous year in coming to his conclusion as to what occurred in the year directly under consideration. A

The next matter relied upon by Mr. Blom-Cooper, namely, the lack of progress in the budget-making process I also regard as being adequately dealt with in the allegations of delay which appear in the note. The same is true on the remaining matters on which Mr. Blom-Cooper relies, namely, the failure to act on the advice from the officers and the negotiations with the Department of the Environment. I accept that there was further material which could have been put forward and was subsequently put forward before the Divisional Court by the appellants, but I do not consider that it can be said that the fact that there was not sufficient opportunity to put it forward earlier meant that the proceedings as a whole were rendered unfair or that the auditor was required to give an opportunity for further representations. B C

Accordingly I have come to the conclusion that when the proceedings, including the hearing before the Divisional Court, are considered as a whole the allegation of unfairness is not made out. D

The wilful misconduct issue

It is convenient first to consider the question as to whether there was misconduct on the part of the appellants and then consider whether the alleged misconduct was wilful.

The argument on behalf of the appellants that there was no misconduct stems from the fact that the rating legislation contains no express statutory provision setting out the date by which the rate has to be made. In my judgment given on 16 April 1985, in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182, I indicated what I considered to be the position. E

Subject to two qualifications made by Glidewell L.J. to which I should refer, both in the court below and before this court it has been accepted that what I said in the *Hackney* case generally reflected the legal position. The first reservation was that I may have been unduly generous in talking of weeks and it would have been preferable to talk of a few days rather than weeks. I would not dissent from this qualification. The second qualification arises because the General Rate Act 1987 as amended (section 50 and Schedule 10) gives to all ratepayers the right to pay rates by instalments and provides that a person wishing to pay by instalments may do so by not less than 10 instalments payable at intervals of at least one month. This provision did not arise for consideration in the *Hackney* case, and I agree with Glidewell L.J. that in order that ratepayers are able to complete their payments by the end of the following March they must start by the end of the preceding June, and as at least 10 days' notice must be given of the rate the last day on which a rate can be made is 20 June if the ratepayers are to have this opportunity of paying by instalments. However, whether the stricter approach indicated by Glidewell L.J. or the approach I indicated in the F G H

A *Hackney* case is adopted, it is quite clear in this case that the council would be in breach of duty unless there was a valid reason for deferring making the rate until 14 June 1985.

In their joint representations to the auditor, the appellants put forward as the explanation for the delay in making the rate that they wished to seek

B “to take maximum advantage of every avenue of negotiation open to them to maximise the resources available to the council. Negotiations in 1984–85 had had a marked measure of success. There was every reason to suppose in the light of that success that Liverpool could present its case in a manner which would again command respect and response. To attempt to add to Liverpool’s resources—or to shield Liverpool from the worst consequences of the target—and penalty system is in fact evidence on the part of those making the attempt that they have acted with the highest degree of public responsibility. In the present case the motivation of the councillors has been throughout to ensure that the resources available to combat the deprivation in Liverpool and to sustain the services it offers to Liverpool people are as large as possible.”

D This reasoning is amplified by Councillor Hamilton and Councillor Byrne in their affidavits. I do not propose to set out all the relevant paragraphs. However I should refer to what Councillor Hamilton describes in his first affidavit as being “our reasons for not making a rate until 14 June.” This, he said, could be stated very simply and shortly:

E “Our financial problems were so severe that it appeared that we could not meet our budget costs without an unacceptable rise in the rates or an unacceptable cut in jobs and services. We believed that there was a reasonable prospect of obtaining increased financial resources that would alter the calculations and hence the level of rate we would need to set. We believed this for a whole number of reasons which I will endeavour to set out below. Furthermore, we

F believed that there was no legal obligation to set a rate before 20 June 1985.”

This statement was accepted by the other deponents. Councillor Byrne, who was chairman of the Performance Review and Financial Control Subcommittee, which was the primary committee dealing with the finances of the city, concludes his first affidavit by saying:

G “The decision to delay making the rate whilst attempting to seek substantial financial resources for the City of Liverpool at the risk of incurring possible increased interest charges by the withholding of apparently discretionary payments was, in my opinion, a purely political decision which the council was entitled to make and which it believed (wrongly as it turned out) would be more likely to produce a financial advantage, and an enormously greater financial

H advantage of that, to the city.”

Although this may not be explicit in the passages to which I have made reference, it is implicit, and it was undoubtedly the case, that the

reason that it was the policy of the majority party to delay making a rate was to use the absence of a rate as a lever or weapon in the negotiations to obtain additional resources from central government. Even if the policy was adopted because it was thought that it was in the best interests of the people of Liverpool it does not alter the fact that to delay making a rate as part of this tactic is unlawful. As must have been appreciated by those who were responsible for choosing this tactic, it involves a threat that unless central government provides additional resources a rate would not be made and Liverpool's resources would be reduced so that eventually a state of financial chaos would result, as in fact very nearly happened as is illustrated by the purported dismissal of all teachers in Liverpool. What this amounts to is threatening not to perform a duty so as to take advantage of the undesirable consequences which will flow from the failure to perform that duty. This constitutes the clearest possible example of misconduct.

In addition, having regard to the history of the negotiations with the Secretary of State, and in particular the relatively small sum which it was hoped could be obtained as a result of the negotiations, when compared to the extent of the deficiency with which Liverpool was faced, the desire to negotiate could not be a reasonable explanation for the delay in making the rate. It would be wholly unreasonable to delay making a rate until 14 June merely to ascertain what additional provision, if any, by way of housing and urban benefit could be obtained.

The next question is whether this misconduct should be regarded as wilful? It would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not: *Graham v. Teesdale*, 81 L.G.R. 117.

Even without my judgment in the *Hackney* case it should have been obvious to any councillor familiar with the rate-making process that it was not lawful to use the deferring of making a rate as a weapon or lever in the way that I have described. I regard it as significant that there is no evidence that the appellants sought advice as to whether it was permissible to use tactics of this sort. In addition, I consider that if there was any doubt in the matter the position was made abundantly clear by the reports of the district auditor and the council's officers in 1984 and 1985. I do not propose to lengthen this judgment by citations from those reports. It is sufficient if I draw attention to the fact that in March 1984 the chief executive, city solicitor and city treasurer, in their joint report, dealt clearly and explicitly with the practical consequences not only of failing to make a rate but of delaying making a rate, and in the same officers' report of 16 April 1985 delay in making a rate was dealt with in terms which made it clear that, while there might have been good reasons the previous year for delay, that did not apply to the current year. As the district auditor pointed out in his reasons, the rate which was in fact made by the council indicated that the appellants were prepared to act in disregard of the advice which they received. I agree with the Divisional Court that if the appellants collectively were not acting knowing what they were doing was wrong they were most

A certainly acting recklessly as to whether what they were doing was wrong.

B So far I have dealt with the position on a collective basis. I was, at one stage, concerned, after having read all the affidavits of the appellants, whether it was right to condemn all the appellants merely because they were prepared to cast their votes for the critical resolutions because they were the policies of the party of which they were members. C However, although they filed individual affidavits, which in many cases indicate that they are otherwise not in the habit of indulging in unlawful conduct, I have come to the conclusion that it is not possible to distinguish between the appellants. They made collective representations as a matter of policy to the district auditor. They advanced a collective argument before the Divisional Court, and in this court no ground for distinguishing between them has been advanced. Therefore, although D regrettably steps were taken by the majority party to avoid the wider dissemination of the report of the officers on 16 April 1985 at the meeting of the Performance Review and Financial Control Subcommittee of that date, and the report which would have been a further warning was not seen by all the councillors, it is not possible, in the circumstances of this appeal, to make a distinction between any of the appellants.

The loss issue

E The argument of the appellants is that because it was a decision of central government to refuse to make the payments amounting to £106,103 this loss was not incurred or caused by the appellants' wilful misconduct. However, warnings had been given that the payments would not be made until such time as the rate was made, and undoubtedly the cause of the payments being withheld was the failure to make the rate. Although, therefore, decisions were no doubt made by the Department of Health and Social Security and the Treasury valuer not to pay the rate rebate element of housing benefit subsidy or to make the contributions in lieu of rates on Crown property, this was still the direct consequence of the council's action and therefore the resultant loss falls F within section 20 of the Act of 1982.

G There is one further matter with which I should deal which I consider of some importance. Before the Divisional Court Mr. Scrivener, on behalf of the district auditor, submitted that it was not open to the appellants to challenge the validity of the auditor's decision on the grounds of procedural impropriety on an appeal under section 20(3) of the Act of 1982 because he argued that an appeal presupposes that there has been a valid decision. He submitted that the correct procedure would be to apply for judicial review, and at the same time to enter an appeal which would only be heard if the decision were to be held H invalid.

H Glidewell L.J. considered, in principle, that this submission was correct. However, he regarded himself as being bound by the decision in *Asher v. Secretary of State for Environment* [1974] Ch. 208, a decision of this court, that the validity of the auditor's decision could be challenged on an appeal, but he went on to say that *Asher's* case was only authority for the fact that an auditor's decision

"may be challenged by way of appeal under section 20(3), not that A
it cannot be challenged in any other way. That challenge, of course,
arose after the appeal had been heard and decided. The decision,
therefore, does not prevent the procedure suggested by Mr.
Scrivener from being adopted, and it is my clear view that if the
same situation arises again, this is the course which should be
followed." See [1986] 26 R.V.R. 45, 55.

B
Before this court Mr. Hidden did not repeat Mr. Scrivener's argument
but reserved the point having regard to the *Asher* decision in case there
should be a further appeal.

C
In case the position is not clarified by a further appeal I feel it right
that I should make it clear that I do not regard Mr. Scrivener's argument
as being right in principle. Nor do I consider that it would be desirable
that in the normal way decisions as to the procedural propriety of an
auditor's decision should be challenged by judicial review and not by
way of statutory appeal. Mr. Scrivener, in support of his suggestion that
the only appropriate method of raising this matter was by way of judicial
review, relied upon *O'Reilly v. Mackman* [1983] 2 A.C. 237. However,
in that case there was no statutory right to appeal. The normal approach
in relation to judicial review is that if there is an appropriate statutory
procedure that procedure should be followed rather than judicial review. D
This is of importance in relation to appeals from district auditors. First
of all the ordinary time limit in respect of the statutory appeal is under
R.S.C., Ord. 98, r. 3(2), only 28 days, rather than the general
requirement on Order 53 that an application should be made promptly,
and in any event within three months. Of more significance is the fact
that the powers expressly given to the court under section 20 of the Act
of 1982, as has already been pointed out, are wide. In addition to the
power, which is equivalent to that on an application under Order 53, to
quash the decision, there is power to vary the decision and to give any
certificate which the auditor could have given. This could be of very
considerable significance in a case where a certificate has wrongly been
refused by an auditor because he had, for example, refused to hear an
objector fairly. If application has to be made first for judicial review by
the objector, if the objector was successful the matter would have to be
remitted to the auditor, whereas if the objector could appeal this would
be unnecessary and the court could give the certificate which the auditor
should have given if he had acted fairly. It can also be of significance in
the case of an allegation of unfairness where there is no objection, as
the facts of this case indicate. E
F
G

H
I appreciate that the additional inconvenience of bringing two sets of
proceedings is not a substantial argument against the course which was
recommended in the Divisional Court. However, if there is no
requirement to have two sets of proceedings I cannot see that there is
any advantage in recommending a course which must involve limited
additional expense. There are many statutory appeals by applicants in
respect of decisions by ministers and others where questions of fairness
are regularly considered by the courts without any necessity for judicial
review, and if the court considers that it is desirable for an allegation of

- A procedural impropriety to be taken first this can always be done. My principal concern, however, is that I can foresee considerable delay and disruption being caused to the very important role of the auditor under section 20 if persons aggrieved by a decision as to procedure can seek to apply for judicial review independently of the right to appeal. In the normal case it would certainly be most undesirable if the High Court should be asked to intervene by way of judicial review before the auditor had come to his decision on the merits.

For these reasons, as well as the reasons given in the judgments of Lawton and Dillon L.JJ. I agree that these appeals must be dismissed.

Appeals dismissed with costs.

Judgment of Divisional Court of Queen's Bench Division affirmed.

Any expenses incurred by district auditor not recoverable under order for costs in appeal to be paid by Liverpool City Council.

Leave to appeal.

D

E. M. W.

The councillors appealed.

- Louis Blom-Cooper Q.C., Beverley Lang and Heather Williams* for the appellant councillors. The issues arising on this appeal may be formulated as follows. 1. Is an auditor, in carrying out an audit under section 20 of the Local Government Finance Act 1982, obliged to offer any person who is likely to be adversely affected by the audit an oral hearing because: (a) on a proper construction of the statutory provision such a duty is to be imported (or implied); or (b) such a duty arises from a legitimate expectation? 2. If submission 1 is wrong, and the auditor has a discretion whether to offer a person who is likely to be adversely affected by the audit an oral hearing, should such an opportunity, in fairness, have been given to the appellant councillors by the district auditor? 3. If the district auditor was in breach of the principles of fairness, was such breach curable by the appellate process under section 20(3) of the Act of 1982, and, if so, was it so cured by the appeal to the Divisional Court? 4. Did the district auditor and the courts below, in concluding that the appellants were guilty of wilful misconduct in delaying the making of the rate for the financial year 1985–86, apply the right test in judging the decisions and actions of the appellants? 5. Has the auditor conducted an “audit” in accordance with section 20 such as to conclude that there has been a loss of notional interest?

- On 1, it is the duty of a district auditor conducting an ordinary or extraordinary audit under section 20 to offer to any person likely to be affected by the issue of a certificate an opportunity to make oral representations to him. The appellants had a right to make oral representations, if they wished to do so, and the auditor had no discretion whether to offer an oral hearing: he was bound to do so. He

failed to give the appellants any such opportunity; his certificate is therefore invalidated and should be quashed. A

The right to an oral hearing arises out of either one of two legal sources: legitimate expectation and statutory construction. (The appellants are content to adopt Lawton L.J.'s historical survey, which is a perfect analysis, adding just a few references.)

As to legitimate expectation: (a) since for 140 years district auditors have invariably offered persons affected by the audit an oral hearing, there was a legitimate expectation that the appellants would be so afforded. That constituted a public law right that could not be qualified save by express statutory provision. (b) The Poor Law Amendment Act 1844 (see sections 32 and 33) marked the inauguration of the office of district auditor, giving the auditor power to deal with illegality and misconduct in relation to the collection and administration of the poor rate. At that date, the poor law accounted for by far the major part of local expenditure. (c) The Poor Law Audit Act 1848 laid down procedure for the auditor in exercising his surcharge jurisdiction. Section 8 provided that, if an auditor saw cause to surcharge any person, he should give that person notice and allow him to appear before the auditor to show cause why he should not be surcharged; see also section 4. (d) The Act of 1848 was repealed in 1927. Section 8 was re-enacted in section 153 of the Poor Law Act of that year. (e) The poor law system was abolished by the Local Government Act 1929 and the Act of 1927 was repealed. (f) Between 1848 and 1929, district audit provisions had been applied to a wide range of public authorities in addition to the Poor Law. The Public Health Act 1848 introduced a code of district audit procedure that ran parallel to the poor law audit and did not contain a specific provision requiring an auditor to offer a person liable to be surcharged the opportunity of an oral hearing. However, in practice district auditors gave persons at risk an opportunity to attend to make oral representations even where there was no statutory requirement to do so. It appears that they were advised to do so in a memorandum issued by the Local Government Board: see *Carson Roberts, Audit Law and Audit Work* (1919), pp. 112, 166. (g) The audit legislation since 1929 has been silent on the question of an oral hearing. The appellants adopt the observation in *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100: "The absence from the present statutory provisions relating to district audit of any requirement respecting the giving of notice to show cause against any action contemplated by the auditor can scarcely indicate an intention on the part of Parliament to withdraw from persons likely to be affected by his decisions the right to receive notice and be heard: a more likely explanation is that the obligation of any tribunal or person exercising judicial functions to afford an opportunity for appearance and to listen fairly to both sides has become so fundamental a principle of English law as to render unnecessary any statutory provision in relation thereto; . . ." (h) The repeal of the express statutory requirement for an oral hearing has not made any difference to the practice of district auditors. From at least 1848 to 1985 it has been their invariable practice to offer the opportunity of an oral hearing to persons at risk of surcharge for misconduct: see *Carson Roberts, Audit Law and Audit Work*, pp. 112 et

- A seq., 166; *Hurle-Hobbs, The Law Relating to District Audit*, pp. 99, 100, n. 6, 103, 108–109 and precedents at pp. 160 et seq.; *Jones, Local Government Audit Law*, 1st ed. (1981), paras. 10-32 and 10-33, pp. 277–278, and 10-60, p. 287; 2nd ed., paras. 1-11–1-15, p. 5, 10-67, p. 294, and precedents at p. 376 (cf. paras. 10-35 and 10-36, p. 284, following the decision in *Graham v. Teesdale* (1981) 81 L.G.R. 117). The only occasion since 1972 on which an oral hearing has not been offered in a misconduct case (other than in the cases of the Liverpool and Lambeth councillors) was in 1978 in the case of a surcharge relating to Islwyn Borough Council when the person at risk was in prison. The failure to offer the hearing in that case was an error of law on the part of the auditor. [Reference was made to *Rex v. Roberts, Ex parte Scurr* [1924] 2 K.B. 695, 698; *Taylor v. Munrow* [1960] 1 W.L.R. 151, 156; *Asher v. Lacey* [1973] 1 W.L.R. 1412, 1415D and *Asher v. Secretary of State for the Environment* [1974] Ch. 208.] (i) The practice is an intrinsic part of the audit system, such that any person affected would have had a legitimate expectation that he would be offered the procedural safeguard against jeopardy of his interests: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. (j) The right to an oral hearing based on legitimate expectation has not been limited or restricted in any way by the local government audit legislation of 1933, 1972 and 1982. The legitimate expectation of an oral hearing survived each successive piece of legislation: see the Act of 1933, ss. 229, 230, 236 and 247, the Act of 1972, ss. 161(1)–(3) and 154–172 and the Act of 1982, ss. 11–25. [Reference was made to the Code of Local Government Audit Practice for England and Wales (made under section 14 of the Act of 1982), paras. 16 and 17.] Even if the auditor's decision is in favour of the councillor whose conduct has been objected to, he must give him the opportunity of making oral representations.

- E There was no fundamental change in 1972 from the position under the Act of 1933 except for section 161(1) to (3): see *Pickwell v. Camden London Borough Council* [1983] Q.B. 962. By contrast, see section 161(4). It cannot be that Parliament envisaged that there could not be an oral hearing before the auditor. Subsections (1) to (3) are not a mere alternative with regard to unlawful items of account: it is an entirely different procedure. Comparing the relevant provisions in the Acts of 1933 and 1972: (a) as to the duty of the district auditor, the only change of substance (as opposed to wording) was the removal of “negligence” and the insertion of “wilful” (section 161(4) of the Act of 1972); (b) as to disqualification, under both statutes the disqualification only took effect once the time for appeal had elapsed or the appeal was finally disposed of (section 161(7) of the Act of 1972); (c) as to payment and recovery, under both statutes the sum certified by the district auditor was due to be paid within 14 days unless there was an appeal, in which case it was payable once the appeal was finally disposed of (section 161(8) of the Act of 1972); (d) as to appeals, the only changes of substance were: (i) the Act of 1972 did not provide for “applications for relief” (section 230 of the Act of 1933); (ii) the Act of 1972 did not provide for an appeal to the Minister. The audit has in the past had a public character, and it did not lose that character after 1933. The

hallmarks of the public nature of the audit are: (1) provision for inspection of the accounts; (2) the right to attend and make objections; (3) public advertisements of the dates of inspection and audit. These provisions were introduced in the legislation of the 1840s and have remained in existence ever since. A

As to *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, see at pp. 401 (Lord Fraser of Tullybelton), 412c (Lord Diplock) and 415B and 419 (Lord Roskill). The following submissions are made on the case: (1) the claimants are the persons who form the class on whom the regular or invariable practice was designed to confer the benefit or privilege; (2) every person within that class at any one time is a proper claimant to the practice. Though there is no authority directly on the point, legitimate expectation is to be viewed objectively. [Reference was made to *Raymond v. Honey* [1983] 1 A.C. 1.] B C

As to statutory construction: (a) as a matter of statutory construction of section 20 of the Act of 1982, Parliament intended that the district auditor should be under a duty to afford the persons affected by the audit an opportunity for an oral hearing; (b) after 1972, the issue to be determined by the auditor became a more serious one: "wilful misconduct" replaced "negligence or misconduct." The change in the legislation has increased, not lessened, the necessity of an oral hearing, particularly since a finding of "wilful" misconduct involves a subjective judgment by the auditor. D

On 2, if, contrary to the appellants' submissions above, the auditor had any *discretion*, the requirements of fairness or natural justice dictated *either* that he should have offered the appellants an oral hearing at the commencement of the notice procedure on 26 June 1985, *or*, if he was initially entitled to seek written representations, that he should have offered each of the appellants an oral hearing subsequently to give them an opportunity to answer those allegations that subsequently appeared in his statement of reasons but had not appeared in his notice of 26 June. E

As to the requirements of fairness or natural justice: (a) the requirements of natural justice that bind an auditor in such circumstances as the present are conditioned by two main factors: (i) he sits as inquisitor on charges laid and evidence assembled by himself; (ii) the consequence of an adverse finding by him are of the utmost gravity both for the individuals concerned and for the citizens that they were elected to represent. (b) In consequence, the standards of fairness that he must adopt are high and the procedure giving them effect must be appropriately measured. The procedure adopted by the auditor did not meet the standard of fairness required by law. (c) The auditor wrongly deviated from the long-established practice of offering an oral hearing to those at risk of surcharge. (d) The auditor was under an obligation to give full notice of and a full opportunity to answer every adverse suggestion or material matter initially prompting his inquiry *and* every adverse suggestion or material matter that, although not initially canvassed by him, presented itself to his mind in the course of his inquiry. (e) He failed to observe those requirements. His findings included: (i) a finding or assumption that the amount of the rate made on 14 June was unlawful; its unlawfulness was a relevant factor in his decision; (ii) a F G H

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A finding that the true motive of the appellants in reaching their decisions to defer making a rate was not that set out in their evidence to him but a wholly or chiefly collateral motive. The auditor gave the appellants no notice that he was considering making such findings and no opportunity to be heard or even to make written representations about them. (f) Since the auditor disbelieved the truth of the appellants' assertions and decided that they had not been acting in good faith in reaching their decision to defer setting the rate, it was of the utmost importance that he should give them an opportunity to be heard (*In re Smith and Fawcett Ltd.* [1942] Ch. 304; *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551). He adopted a procedure that was unfair to the appellants and/or in breach of the rules of natural justice. Those defects of procedure were fundamental and vitiated the decision to surcharge. The certificate must, therefore, be quashed. Once Lawton and Dillon L.JJ. had concluded that the auditor had exercised his discretion wrongly and acted unfairly in not offering an oral hearing, they erred in holding that his wrong exercise of discretion did not invalidate his certificate: see *Leary v. National Union of Vehicle Builders* [1971] Ch. 34; *Wade, Administrative Law*, 5th ed. (1982), pp. 487-489.

D Further as to the duty to act fairly, see the report of the Royal Commission on Tribunals of Inquiry (1966) (Cmnd. 3121), para. 32, pp.17-18 (the six cardinal principles; see especially no. 2, also 3(a) and 4); and para. 48, p. 22.

E As to Woolf L.J.'s approach to the overall interpretation of section 20, the approach of simply going to the section and looking at it in its entirety may provide the answer to the question: what did Parliament intend to provide? Cf. *Twist v. Randwick Municipal Council* (1976) 136 C.L.R. 106: no requirement was imposed there for an inquisition before the order was made. Here, it is conceded that there was a requirement of inquisition. It is conceded that the auditor was performing a judicial function and had a duty to be fair. He had to give notice of the inquisition and some idea of the matters under inquiry. That is all implicit in section 20(1). Parliament is thus clearly contemplating that fairness will operate at the auditor stage, and, of course, on appeal to the High Court. Could Parliament, therefore, have been saying that the councillor might have to wait for the appeal to the High Court before he got fair treatment?

G The failure to give the councillors the opportunity to come before the auditor was a *fundamental* defect. That is why it could not be cured by appeal to the Divisional Court. It was such a fundamental flaw that the appeal court was *bound* to quash the auditor's decision, notwithstanding that its hearing was a rehearing and that it was entitled to substitute its own view for that of the decision-maker. It cannot be said that breaches of natural justice are permissible because Parliament has provided an appellate process.

H On 3, while there is no clear, absolute rule on the question whether procedural irregularity in the original hearing can be cured through the appellate process, the auditor's failure to conduct an oral hearing or to give the appellants an opportunity of an oral hearing, either initially on 26 June 1985 or afterwards on 9 July, was a failure, a procedural

irregularity, that was not curable by the appellate process on appeal to the Divisional Court. A

The appellants' submissions on the principles governing curability and the public/private law dichotomy are as follows. 1. In private law, where the courts are asked to resolve domestic disputes between private parties, they will be disinclined to introduce too great a measure of formal jurisdiction. Issues should be settled by reference to agreed procedures and do not require the formalities of the judicial process. B
(This is a summary of what Lord Wilberforce said in *Calvin v. Carr* [1980] A.C. 574, 593c–h.) 2. This private law approach is not apt and does not pertain in the field of public law. In private law situations the matter can be left to individuals and groups of people to negotiate a workable and equitable system for adjudication of their disputes arising out of contract. 3. In public law, the power of the administrative arm of government (and auditing of accounts of local authorities is such an arm), a stringent adherence to due process is called for. 4. Hence, the public law approach to defects in due process differ markedly and in legal principle from those in private law, if only because the role of the courts in the former case is to protect the citizen against incursions by government into civil rights. Courts stress the need for fair procedures that have not been “bargained for.” 5. The public law considerations D
come near to an absolutist rule along the continuum of cases of potential cure. 6. As to this absolutist view in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 47D et seq. (see particularly at p. 49F), Megarry J. stated the principle that “a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.” Of this principle, Lord Wilberforce in *Calvin v. Carr*, E
at p. 593, said that “it affirms a principle which may be found correct in a category of cases” but that it overlooked cases based on “the rules and on the contractual context.” Thus the absolutist rule has a definite role to play. The question is to define the occasion and limits of its applicability. It has a precise role in the public law field, where the courts are inclined towards intervention.

As to public law: 7. Where a person's rights are affected by a decision-making process under a statutory scheme, the principle is that on appeal a court of wide jurisdiction can cure a procedural irregularity of the tribunal a quo, but *only* if: (a) the appellate process is in reality a rehearing of all the evidence, and not just a review (special jurisdiction); (b) there is an expertise in the appellate body comparable to that statutorily required in the tribunal a quo; (c) there is express statutory language authorising an expeditious hearing; (d) “cure” must not be permitted if the effect is to endorse malpractice. F
G

As to special jurisdiction, the appellate jurisdiction must reflect the full extent of that jurisdiction enjoyed by the tribunal a quo. Thus, not only must the appellate court be empowered to make any orders that could have been made by the tribunal a quo but it must also do so after having heard de novo the evidence relevant to the issue before the tribunal a quo. It does not suffice to review the evidence already adduced, topped up (if necessary) by fresh evidence. If the appellate court had no power to remit a cure to the specialist tribunal a quo, then H

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A if it rehears the issue itself the decision can stand and the “cure” is applied, but not otherwise. Here, there is power to remit; see *Jones, Local Government Audit Law*, 2nd ed., para. 9.29, p. 265 and R.S.C., Ord. 55, 7(5).

B As to expertise, the special jurisdiction of curability is exercisable only in cases where the special knowledge, skills and experience of the tribunal a quo do not need to be employed in the appellate process. Otherwise, the appellate court will be arrogating to itself a function that Parliament has entrusted to the specialist tribunal a quo. The appellate court is statutorily restricted to curing minor errors that can be corrected without prejudice to the appellant. Since the appellate function is wholly a creature of statute, there can be no resort to any inherent jurisdiction or common law principle.

C As to expedition, principles of fairness are not inflexible in their application, especially where discretionary remedies are being sought. If this were a case of judicial review, and not the exercise of a statutory right of appeal, practical considerations might influence the court in the exercise of the jurisdiction not to enforce the principle of fairness to the full extent. One such instance is that of urgency, where the public interest demands swift action (see *per* Mason J. in *Twist v. Randwick Municipal Council*, 136 C.L.R. 106 (the C.L.R. report 13 preferable because it contains the argument), 117, where he relied heavily on this ground, and *Calvin v. Carr*, at p. 596H (Lord Wilberforce)). The principle of urgency may negative the presumption of fairness, but only where the statutory scheme clearly so indicates and the particular circumstances require the appellate body to assume primary discretionary power rather than causing the whole issue to be dealt with by the tribunal a quo. In public law, the urgency principle is parasitic on clear statutory words and demonstrable need. Thus R.S.C., Ord. 53, r. 4 (judicial review) places a time-limit on application. Here there is a statutory right of appeal under sections 19 and 20 of the Act of 1982. Orders 55 and 98 do not evince any comparable urgency. Ord. 55, r. 4(2) provides a time-limit of 28 days. Ord. 98, r. 2(2), calls for filing seven days after lodging notice of motion, but Ord. 98, r. 2(4), says that the motion shall be entered within six weeks but not ordinarily heard sooner than 28 days after service of notice; see also Ords. 54 and 59, r. 19(4). [Reference was made to *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243, *per* Lord Wright, and *Q.T. Discount Foodstores Ltd. v. Warley General Commissioners* [1982] S.T.C. 40, 43–46, *per* Vinelott J.]

G The appellants’ submissions on *Calvin v. Carr* [1980] A.C. 574 are: (i) it was clearly a case within the field of private law: a domestic or contractual dispute; (ii) the hearing before the committee of the Australian Jockey Club on appeal was a case of *venire de novo*, or not a case where the evidence was freshly given; here, there would not have been a *venire de novo* even if the appellants had elected to give evidence before the Divisional Court, if the hearing before the Divisional Court had been *de novo*, a fresh hearing, with all the evidence, the appellants would not argue to be inserted; (iii) emphasis was there placed on the urgency of the review procedure; (iv) great reliance was

H

placed on the fact that expertise on horse racing had been before both the stewards and the committee of the Australian Jockey Club; (v) Lord Wilberforce accepted that there were cases in the "second category" where the *Leary* principle applied; he did not in any way qualify that principle. A

In public law, it is essential that the principles of natural justice be observed at all stages, a possible exception being where the appellate hearing is a complete rehearing. What Lord Reid said in *Ridge v. Baldwin* [1964] A.C. 40 is still good law. As to the distinction between "void" and "voidable," see *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182. B

On 4 and 5, section 2 of the General Rate Act 1967 does not specify any time-limit within which the rate must be fixed. The council had, therefore, discretion as to the date of setting a rate. Such discretion fell to be exercised on the application of basic principles of law. Provided that the appellants did not infringe any statutory requirements or any legal rights of any person, they were entitled in their discretion to defer making a rate. That discretion was exercisable according to the principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. The only statutory constraint on the date of setting the rate was the right of ratepayers to pay their rates in 10 monthly instalments. C D

The council, in common with all other local authorities, had: (a) a range of statutory duties to perform, e.g. education, social services, housing; (b) a common law duty to advance the interests of its population; (c) a common law duty to protect the interests of its ratepayers; (d) a power and a duty to act within the ambit of those duties according to the political judgment of a majority of its members. E It had to have regard to the above duties, among other relevant considerations, when it exercised its discretion on the timing of the rate. As to that, it was doing its best within its legal powers to maximise the city's resources and to minimise the burdens on the people of Liverpool for the year 1985-86. The delay in making a rate was a bona fide and legitimate exercise of its discretion as to timing, directed to the above end. F The appellants both reasonably and rightly believed that to set a rate by 20 June would not be a breach of duty. In the period leading up to the making of the rate the appellants believed that the Government would provide additional resources because of their experience in 1984 and because of assurances given to them by Mr. Patrick Jenkin in meetings during 1984 and a letter of 29 June. The council was also negotiating with the Merseyside Task Force over two outstanding items in the 1984-85 programme, with a budgetary effect of some £4.6m. and thus, at all times, a major consideration in the minds of the appellants. G Without disregarding any of the relevant considerations or taking into account irrelevant considerations and without any breach of duty the appellants decided to defer making a budget and rate for as long as they considered reasonable, bearing in mind the "dead-line" of 20 June, to enable them to continue to negotiate with the Government for increased funds prior to the making of the budget and rate. The course of conduct adopted by them was a legitimate exercise of their discretion, and the H

A Court of Appeal, in deciding that the council had acted unlawfully in deferring the setting of the rate, failed to apply the correct legal principles when determining the legality of its actions.

In finding that the appellants' reason for deferring the setting of the rate was unreasonable or irrational the Court of Appeal wrongly: (a) drew conclusions on the facts that were not justified by the evidence; (b) determined the question of unreasonableness by regarding the facts as they had turned out to be and not as they had appeared to the appellants at the time when they had been making their decision; and in so doing the court: (c) substituted its own view of what was reasonable or sensible or prudent for the views of the appellants; (d) wrongly interfered with the exercise of the council's discretion and adjudicated on a political judgment by a local authority.

C If, contrary to the above submissions, the council acted unlawfully in deferring the making of the rate until 14 June, it is conceded that, for the purposes of section 20 of the Act of 1982, the appellants were guilty of "misconduct" by voting for that deferral. However, they were not guilty of "wilful misconduct" within the meaning of section 20, and, therefore, the certificate must be quashed. The appellants rely on the definition of "wilful misconduct" given by Webster J. in *Graham v. Teesdale*, 81 L.G.R. 117, 123: "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not." The appellants believed their decisions to be proper and within the law. They did not believe that the deferral of the rate was unlawful, nor were they recklessly indifferent as to whether or not it was unlawful.

E The auditor's approach to the issue of wilful misconduct was erroneous in law. (a) The proper inquiry is: (i) did the councillors do something unlawful? (ii) If so, did they know of or shut their eyes to its unlawfulness? (iii) If so, did any and what loss or deficiency result? (b) The auditor instead asked: (i) Was there deliberate delay in making a rate? (ii) If so, did some loss result? (iii) Did the councillors know or shut their eyes to the fact that loss would result from delay? (iv) Given the predictable consequence of delay, was there lawful justification for it? This analysis omits the essential element of wilfulness of misconduct and substitutes for it foresight of consequences. It also assumes that deliberate delay (if shown) is unlawful unless it can be justified in the light of its consequences: in public law, the opposite is assumed, namely that decisions are well made until successfully impugned.

G The authorities establish three propositions: (i) resolutions are not conclusive evidence of proceedings at a meeting of a local authority; what occurred may be proved by resort to extrinsic evidence. (ii) The question as to intention is of *corporate* intention, which is *expressed* in the resolution. (iii) The court will always adopt a much broader approach in determining *such intention* and will have regard to extrinsic evidence, e.g. affidavits from councillors: see *Pickwell v. Camden London Borough Council* [1983] Q.B. 962, *per* Forbes J. and Ormrod L.J., at pp. 991, 998 and 1004, and *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182, 184–185, *per* Woolf J.

As to loss, in law a deficiency is caused or a loss incurred “by” conduct only if, without the voluntary intervention of another, the legal and/or necessary result of the conduct was such deficiency or loss. Here, the deficiency or loss: (a) was not caused in this or any true legal sense by the appellants; (b) was brought about by the voluntary act of central government. On the uncontested evidence, the temporary loss of income (reflected in the notional interest surcharge) was brought about by the voluntary act of central government not to pay moneys that they could lawfully have paid. The loss was not caused, in the appropriately proximate sense, by the appellants but by the counter-measure against the council’s deferral of making a rate.

The appellants seek leave to argue the following points not argued in the Divisional Court or the Court of Appeal and to introduce fresh evidence in support of those points. (a) The auditor had not carried out the audit of any accounts or the extraordinary audit when he purported to issue the certificate, and, therefore, he had no jurisdiction to issue the certificate. (b) Alternatively, he failed to carry out the audit in accordance with the Code of Local Government Audit Practice, and, therefore, the audit and the certificate are invalid. (c) Further or alternatively, he erred in concluding that a loss had been incurred.

Anthony Hidden Q.C. and *Mark Lowe* for the district auditor. The first question is whether, on a proper construction of section 20 of the Local Government Finance Act 1982, a district auditor is required in all cases to offer to a person the subject of possible certification under the powers granted by that section an oral hearing before a certificate may be issued.

The statute law regarding the duties and powers of a council and councillors with regard to the making of a rate is contained in sections 1(2) and 2 of the General Rate Act 1967 and sections 83 and 151 of the Local Government Act 1972. As to the councillor’s oath, see section 83 of the Act of 1972 and Schedule 3 to the Local Elections (Principal Areas) Rules 1973 (S.I. 1973 No. 79). That is the duty that a councillor (a volunteer) binds himself with, and it is the control of those duties that is delegated to the auditor (see the Local Government Act 1933, ss. 226–229).

The Act of 1982 makes no express requirement on the auditor to appoint an oral hearing. The earlier practice of auditors to hold such a hearing was referable in part to the fact that the audit was a public proceeding held in an appointed place at an appointed occasion, and partly to the tradition of conducting all judicial and quasi-judicial proceedings orally. Audits no longer attract that public quality. It is the modern practice for audits to be conducted in private in a manner convenient to the public by means of publication by the auditor. The Act of 1982 does not require the auditor to proceed in public when hearing an objection made by an elector under section 17(3): see *Reg. v. Farmer, Ex parte Hargrave* (1980) 79 L.G.R. 676. The Act gives rise to no expectation of or right to a hearing. On the contrary, section 16 empowers the auditor to require persons to attend before him as he “thinks necessary” for the purposes of the audit. Had Parliament intended to make such a requirement on the auditor it would have done

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Lloyd v. McMahon (H.L.(E.))

A so expressly as it did in relation to his forebears by section 8 of the Poor Law Audit Act 1848 (11 & 12 Vict. c. 91). Parliament cannot be assumed to have incorporated into the Act a practice of the auditors to hold oral hearings in cases of surcharge without express words to that effect. In the absence of an express requirement in the Act to hold an oral hearing the need, if any, to provide such a hearing can only arise at common law, that is to say, if it is required by the rules of natural justice.

B It is not right to say that there was no change at all in 1972. Before 1972, there was inevitably an oral hearing, and it was the auditor's hearing. Under the Act of 1982, it is no longer his hearing. It is his certificate, accepted by the councillors or confirmed by the court (see the Act of 1982, ss. 19, 20). There was a public hearing up to 1972; the auditor came to the area and sat rather like an assize judge. He did the audit. There is a specific direction now regarding the exclusion of the public: see paragraph 19 of the Code of Local Government Audit Practice for England and Wales (1984). When the hearing was public, the auditor had to give the person an oral hearing; now that it is not public he does not.

C As to the duties and functions of the auditor, see *Asher v. Secretary of State for the Environment* [1974] Ch. 208 (*per* Lord Denning M.R.) and *Graham v. Teesdale* (1981) 81 L.G.R. 117. The auditor is really master of his own procedure, and whether he conducts an oral hearing or a hearing on documentation is in his own discretion. (A hearing on written representations could be fairer than an oral hearing.) [Reference was made to *Reg. v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 191; *In re Smith and Fawcett Ltd.* [1942] Ch. 304; *Jeffer v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551 and *Maxwell v. Department of Trade and Industry* [1974] Q.B. 523.]

E The second question is whether, if there is no statutory requirement for an oral hearing, the principles of natural justice required the auditor to offer such a hearing to the appellant councillors and each of them and what, if he ought at common law to have offered them such a hearing, the consequences are of his failure to do so.

F The auditor is under a duty to act fairly whilst exercising his powers under the Act, including those in section 20. There are no hard and fast rules relating to the procedure that he should adopt; these are matters within his discretion save where he is bound by the Code of Local Government Audit Practice (see *Rex v. Browne, Ex parte Butler* [1909] 2 I.R. 333, 351 and *Colton v. District Auditor for Wembley Borough Council* (1962) 60 L.G.R. 247). In the absence of the statutory requirement to hold an oral hearing, he is entitled to exercise a discretion as to whether to hold such a hearing. That discretion must be exercised fairly. The decision whether to hold an oral hearing is a matter of pure procedure (see *per* Hamilton L.J. in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 192–193). Whilst it is the common practice of the auditor to hold an oral hearing, it does not follow that it is required in the interests of fairness in all cases. Before the decision not to appoint such a hearing can be impugned as contrary to the requirements of natural justice, the decision must be scrutinised

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in the context both of the relevant facts and of the statute under which it arose. A

The auditor gave all the appellants written notice dated 26 June 1985 of the charge and identified the loss said to flow from their breach of duty in delaying in the making of a rate. The notice, by means of its appendices and the documents accompanying it, identified the evidence on which the auditor acted. He invited written representations in reply. None of the appellants, who included justices of the peace and a solicitor, made any request to the auditor to hear them orally. The appellants chose to make a single collective and detailed written submission. They have never contended that one individual's case can be separated from that of any other appellant. They adopted a common pattern of voting throughout. The evidence given to the Divisional Court was of the same character. The appellants all chose to reject the invitation extended by the Divisional Court to hear oral evidence from them. They have all appeared by the same solicitors and counsel. Their submissions to the Divisional Court and the Court of Appeal were collective, and their counsel indicated that he was not instructed to invite the court to distinguish between individual appellants, nor did he seek to do so. B C

It was neither unfair nor surprising that the auditor requested a written response to the charge. The charge of wilful misconduct by its very nature called into question the motives and intentions of the appellants. Faced with a collective response, and no request on behalf of the appellants to the effect that they desired to have an oral hearing before he determined the matter, it was not unfair of the auditor to fail to offer one. There is nothing in the evidence presented by the appellants to the Divisional Court to the effect that they had desired such a hearing nor as to what course they would have adopted had such an offer been made. The overwhelming inference from the history of the matter is that the appellants at the outset made a decision to make a single collective response rather than multiple individual answers to the charge. That was a positive election they have conscientiously followed throughout. For individual appellants to give oral evidence to the auditor is inconsistent with that strategy and could be positively harmful to it. The appellants collectively could not afford an oral hearing because they could not afford to be cross-examined on the documents. It is not correct that the auditor never looked at the books. [Reference was made to *Jones, Local Government Audit Law*, 2nd ed. (1985), paras. 1–18 and *Reg. v. Liverpool City Council, Ex parte Ferguson*, *The Times*, 20 November 1985.] D E F G

To sum up: 1. The auditor, in the course that he pursued in coming to his decision to issue his certificate, was (i) following the requirements of statute law; (ii) following the requirements of fairness inherent in the principles of natural justice. 2. It is this requirement of fairness that should be at the centre of the arguments before the House and not some other requirement. 3. The appellants' argument falls into the error of attempting to substitute a requirement for an oral hearing for the overall requirement of fairness; this attempted substitution is both artificial and incorrect. Such a requirement for an oral hearing does not exist; it is H

A a requirement that *never* was, for three reasons: (i) there was no requirement for an oral hearing made by statute; (ii) there was no requirement for an oral hearing made by natural justice; (iii) there was no requirement for an oral hearing made by the appellants. 4. The requirement of fairness does not avail the appellants unless they can show prejudice (“something of substance which has been lost”: *per* Lord Wilberforce in *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1595), which they cannot succeed in doing. 5. The decision not to seek an oral hearing was an election made by the appellants after due consideration before ever making their representations. 6. The belief that they had a right in law to an oral hearing was never asserted in evidence by them, nor was such a right claimed by counsel on their behalf until after the Divisional Court hearing.

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C As to curability (the auditor’s alternative submission if it should be held that the appellants should have had the offer of an oral hearing), Woolf L.J. correctly analysed the framework provided by the statute in his judgment. Section 20 provides one entire process relating to the certification of persons for losses caused by their wilful misconduct. By making provision for a full rehearing on appeal, Parliament has provided the means by which any want of law, evidence or procedure before the auditor may be remedied (see also *per* Lawton L.J., ante, pp. 645G—646E).

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E The correct approach in a case such as this is established by the reasoning of the High Court of Australia (*Twist v. Randwick Municipal Council* (1976) 12 A.L.R. 379) and that of the Supreme Court of Canada (*King v. University of Saskatchewan* (1969) 6 D.L.R. (3d) 120) and the New Zealand Court of Appeal (*Reid v. Rowley* [1977] 2 N.Z.L.R. 472), which was approved by the opinion of the Privy Council given by Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574, to the effect that a full rehearing of a matter on appeal can enable the court to conclude that at the end of the day no injustice or unfairness has resulted to the complainant. This approach is to be preferred to that of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 to the effect that in general a right to appeal can never cure a breach of the rules of natural justice.

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G Section 20 of the Act of 1982 and the principles of fairness at common law have created a two-stage process: first before the auditor and second the appeal to the High Court. It is therefore necessary to look at the nature of the appeal to the High Court. There is sufficient scope and flexibility in the High Court for the receipt of new evidence and the presentation of fresh argument to cure any deficiency in either respect before the auditor.

H There is a rehearing in the High Court of the entire matter *de novo*, except only that the court has a copy of the auditor’s reasons. The appellant has to start, but the onus must be on the auditor to establish what he has alleged. It is a high onus. The degree of probability needed is proportionate to the subject matter or commensurate with the occasion. [Reference was made to *Colton v. District Auditor for Wembley Borough Council* (1962) 60 L.G.R. 247.] The “fair crack of the whip” principle (*Fairmount Investments Ltd. v. Secretary of State for the*

Environment [1976] 1 W.L.R. 1255, 1265–1266, *per* Lord Russell of Killowen) requires a due degree of flexibility. As to curability, the appellate court has to look at what happened before the auditor and what has happened on appeal in the context of (i) what Parliament has provided for in section 20 and (ii) what the courts require under common law considerations of fairness. A

There are not two conflicting streams of law on curability: the *Denton v. Auckland City* [1969] N.Z.L.R. 256 and *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 stream on the one hand and the *Calvin v. Carr* [1980] A.C. 574 stream on the other. There is only one; the right approach is that in *Calvin v. Carr*. The principle, in short, is that an unrestricted appeal by hearing *de novo* can cure a procedural defect at first instance, including a breach of natural justice. [Reference was made to *King v. University of Saskatchewan*, 6 D.L.R. (3d) 120; *Twist v. Randwick Municipal Council*, 136 C.L.R. 106; *Reid v. Rowley* [1977] 2 N.Z.L.R. 472; *Love v. Porirua City Council* [1984] 2 N.Z.L.R. 308; *Reg. v. Secretary of State for Transport, Ex parte Gwent City Council* [1987] 2 W.L.R. 961 (the general principle stated there is correct); *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578 and *George v. Secretary of State for the Environment* (1979) 38 P. & C.R. 609.] B C D

As to whether the Divisional Court was entitled in law to make the finding on the evidence before it that the appellants had been guilty of wilful misconduct as certified by the auditor, and, if it was, whether it was entitled as a matter of law on the evidence before it to find that such conduct had caused a loss to the council, in order to find them guilty of misconduct it was necessary to find, first, that they had been causing the council to act unlawfully, secondly, that they had either known that the same was unlawful or had been recklessly indifferent as to whether it was unlawful or not (see *per* Webster J. in *Graham v. Teesdale*, 81 L.G.R. 117). There is a clear duty imposed on councillors to ensure that arrangements are made for the proper administration of the council's financial affairs (section 151 of the Act of 1972), to make an estimate of anticipated expenditure for the year in question and to balance that against the estimate of income anticipated during the year to meet that expenditure (section 2(1) of the Act of 1967). They, as the council, owe a fiduciary duty to their ratepayers (*Roberts v. Hopwood* [1925] A.C. 578). Local authority finance, particularly in respect of revenue, is of an annual character (*In re Westminster City Council* [1986] A.C. 668). The Act of 1967 contains no express provision fixing the date by which a rate must be made for a given financial year. Nevertheless, in the context of the above duties and the invariable practice of local authorities to make the rate for the beginning of the financial year the law was always understood to be that the rate should be made in time for the commencement of the year in question. That understanding was confirmed by the judgment of Woolf J. in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182 that in the absence of a reasonable explanation it was a breach of duty not to have made a rate by the beginning of the financial year or within a reasonable time thereafter. No such reason existed here. E F G H

A It is common ground between the parties that *Graham v. Teesdale* and the *Hackney* case were correctly decided and that the Divisional Court had applied the correct test in law to the question whether the appellants were guilty of wilful misconduct. The conclusion as to whether or not they were guilty was a conclusion of fact not susceptible to review on appeal unless it be established that no reasonable tribunal properly directed could have come to such a conclusion on the evidence before it.

B The only conclusion that could reasonably be reached on the evidence was that the appellants delayed in making a rate in 1985 in order to use that delay as a weapon to try to force central government to increase the funding of the council's expenditure. Such a weapon entails as an essential element the fact that the appellants were prepared to see the city thrown into financial and administrative chaos to achieve their ends.

C Such a reason for delay in making a rate was manifestly improper and contrary to law.

As appears from the judgment of Lawton L.J. in the Court of Appeal and Glidewell L.J. in the Divisional Court, there was abundant evidence from which the Divisional Court and the auditor could reach the conclusion that the conduct of the appellants was wilful in the sense that they knew it to be wrong and contrary to law. That conclusion was further supported by the subsequent conduct of the appellants in that they voted against the making of a lawful rate on 14 June 1985, approved a deficit budget and an unlawful rate in the face of advice from the city solicitor that to do so was unlawful and subsequently issued redundancy notices to the council's employees as a consequence of this campaign against central government.

E As to loss, for the purposes of this stage of the extraordinary audit the auditor restricted his certificate to ascertaining the amount of the loss resulting to the council by 24 June 1985 from the non-payment in the financial year 1985-86 by the Treasury Valuer of payments made by convention in lieu of rates for property occupied by the Crown and the non-payment of the rate rebate element of housing benefit by the Department of Health and Social Security under the provisions of the Social Security and Housing Benefits Act 1982. Both payments fall to be made either in respect of or in lieu of the rate levied in the current year. In the absence of a rate for the year there was no obligation either on the D.H.S.S. under the Act or the Crown under the convention to make those payments. The D.H.S.S. and the Secretary of State for the Environment had given clear and explicit warning early in 1985 that rate rebate payments would not be made if a rate was not made. The Crown had withheld payments in lieu of rates during the period that the council delayed after the commencement of the financial year 1984-85 to make a rate. The Secretary of State and the Treasury Valuer had given similar warnings with respect to those payments early in 1985. Non-payment of those sums was a direct consequence of the appellants' conduct in failing to make a rate at the beginning of the financial year.

H No new facts were found by the auditor: see *per* Glidewell L.J. [1986] R.V.R. 45, 58. The proper approach to the new documents is that of Woolf L.J. (*ante*, p. 671D). The proper approach is to look at the whole of the proceedings, before the auditor and before the

Divisional Court, to see whether the appellant councillors had a "fair crack of the whip," etc. A

As to the numbers of applicants, see *Rothnie v. Dearne Urban District Council* (1951) 50 L.G.R. 123.

Blom-Cooper Q.C. in reply. The appellant councillors put it in two ways: (1) if section 20(3) encompasses a judicial review function, the Divisional Court would have quashed the certificate if it had had the benefit of what the Court of Appeal said: see *per* Glidewell L.J., Caulfield J. and Dillon L.J.; (2) (an alternative argument) the fact that the Divisional Court dealt with the merits should not deprive the councillors of the result of the procedural irregularity. R.S.C., Ord. 55, r. 1, provides an appeal by way of rehearing, not a hearing afresh: see *Builders Licensing Board (N.S.W.) v. Sperway Constructions (Sydney) Pty. Ltd.* (1976) 51 A.L.J.R. 260 and *Tyrer v. Middleton* (unreported), 5 December 1973 (see *Jones, Local Government Audit Law*, 2nd ed., p. 265; App. D.7, p. 357; 230 E.G. 973). The court cannot have a fresh oral hearing; it has no jurisdiction to do so. The kind of hearing that it can have does not cure a breach of natural justice by the auditor. B C

As to *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578; *George v. Secretary of State for the Environment*, 38 P. & C.R. 609, etc., see *per* Woolf L.J. (ante, p. 669F). First, the partial exercise conducted by the House of Lords is wholly unsatisfactory to determine whether the appellant councillors should have had an oral hearing at some stage. Secondly, the Court of Appeal went through the whole of the documentation and affidavits. It was in a very good position to make its finding as to whether there had been any unfairness in the auditor's procedure: see *per* Lawton L.J. (ante, p. 644F-G), Dillon L.J. (ante, pp. 651H-652A) and Woolf L.J. (ante, p. 670C). If the Divisional Court and the Court of Appeal were entitled to look at the new material and form their conclusions on the whole material before them the appellant councillors cannot impugn their decision, but they were not entitled to rely on those materials in the absence of an oral hearing. D E

Charles Cross for the council addressed the House with regard to costs. F

Their Lordships took time for consideration.

12 March. LORD KEITH OF KINKEL. My Lords, the appellants are a group of Liverpool city councillors. The respondent is the district auditor for the city. In respect of the financial year beginning 1 April 1985 the appellants brought it about that a rate for the city was not set until 14 June 1985. The council were advised by their officers that the rate then proposed to be set was an illegal one, in respect that it fell far short, taken along with other sources of income, of meeting the city's expenditure for the year as then estimated. But that is not the point. The point is that the delay in setting the rate led to delay in receiving various items of income, including government contributions in respect of payments in lieu of rates on Crown properties and in respect of rate rebates. G H

A There had been trouble over the making of a rate also in respect of the financial year 1984–85, when in the event a rate was made on 10 July 1984. On 19 March 1984 the district auditor's predecessor had sent to the council a report expressing concern at indications that the council might deliberately make a rate for the year which would not be sufficient to meet its outgoings for that year. The report drew attention to possible consequences to individual councillors, both financial and by way of

B disqualification, if an adequate rate were not made. In the penultimate paragraph it was stated: "Members would in my view also be at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate."

C On 10 April 1985 the district auditor's predecessor had sent to the council a report expressing concern at the council's failure to make a valid rate for the year commencing 1 April 1985, drawing attention to his report dated 19 March 1984 and reiterating the duties of councillors and the possible consequences to the city and to individual councillors if these duties were not carried out. The report concluded by urging the council in its own best interests, as well as those of individual members, employees and the local community, that a rate should be made at a very early date. On 7 May 1985 the policy and finance committee of the

D council rejected a motion that the chairman of the committee submit proposals to the next meeting of the council to enable it to fix a rate, and this was approved at a meeting of the council on 21 May.

E On 21 May 1985 the district auditor had made a further report to the council, copies of which he sent to all councillors. In it he referred to earlier reports and gave notice that unless the council made a lawful rate at the earliest opportunity and in any event before the end of May he would forthwith commence action under section 20 of the Local Government Finance Act 1982 to recover any losses occasioned by the failure to make a rate from the members responsible for incurring them.

F On 6 June 1985 the Audit Commission directed that an extraordinary audit be carried out. On 26 June 1985 the district auditor sent to each of the appellants a notice stating that he had to consider in pursuance of his duty under the Act of 1982 whether he should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or the delay in making a rate for the financial year 1985–86, as due from the appellants on the ground that a loss of such sum had been incurred or deficiency caused by the appellants' wilful misconduct. The appellants were further notified that they might make representations in writing to the district auditor before he reached a decision, and that any such

G representations should reach him by 19 July 1985. There was enclosed with the notice a note of the matters to which the district auditor had had regard in deciding to issue it. This note set out the council's duty under section 2(1) of the General Rate Act 1967 to make a rate, and the district auditor's responsibility under section 20(1) of the Act of 1982 which provides:

H "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—. . . (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that . . . the amount of the loss or the

deficiency is due from that person and . . . both he and the body in question . . . may recover that . . . amount for the benefit of that body; and if the auditor certifies under this section that any . . . amount is due from two or more persons, they shall be jointly and severally liable for that . . . amount.”

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There were appended to the note copies of earlier reports by the district auditor and his predecessor, including those of 19 March 1984, 10 April 1985 and 21 May 1985, and also a list of minutes of meetings of the council and certain of its committees between March 1984 and June 1985 and of reports by the council's officers between the same dates. The facts gathered from these documents were stated to show that there was no lawful justification for the delay in the making of the rate for the year 1985-86. The note went on to identify certain specific losses resulting from the delay. These were the loss of interest on sums which would, but for the delay, have been paid at an earlier date than was actually the case by the Department of Health and Social Security, in respect of the rate rebates element of housing benefit subsidy and by the Treasury Valuer in respect of contributions in lieu of rates on Crown property. The total of such loss was stated to be £106,103. The appellants were identified as persons who by their voting or absence might have failed to discharge their duty as members of the council and might therefore be guilty of wilful misconduct resulting in the losses in question.

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The appellants chose to make a collective response to the district auditor's notice. This was prepared with the assistance of the chief executive of the council, who was legally qualified and had great experience in local government, and was sent to the district auditor on 19 July 1985. The appellants relied upon various matters which they claimed rebutted the district auditor's provisional view that they had been guilty of wilful misconduct. Their principal contention was that, considering that the relevant legislation laid down no date by which a rate must be set, it was sufficient if they did so within a reasonable time after the start of the financial year, and that the delay until 14 June 1985 had been reasonable because they had hoped or expected to be able to persuade ministers to make larger grants available to Liverpool than ministers had previously expressed themselves as willing to do. In this respect they founded upon the circumstance that in relation to the year 1984-85 their efforts in this direction had met with some success, and that the then district auditor in his report of 7 June 1984 had stressed the importance of 20 June as the latest date for making a rate, in order to permit of ratepayers exercising their statutory right to pay rates by 10 monthly instalments. It was contended that the appellants had been influenced throughout by a sincere desire to maximise the resources available to the people of Liverpool and thus to do their best to alleviate the unsatisfactory conditions prevailing there. There were sent along with the representations various documents to which it was desired that the district auditor should have regard as supporting the appellants' contentions. It is to be observed at this point that the representations did not face up to the circumstance that, whether or not additional funds

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A might be secured from government sources, delay in making a rate must inevitably have an adverse effect upon the city's finances through delay in the receipt of items of income which depended upon a rate having been set. Nor did the representations draw attention to any records, whether of meetings of the council and its committees or of meetings of the ruling political group represented by the appellants, describing the reasons for the delay in making a rate.

B On 6 September 1985 the district auditor issued a certificate under section 20(1) of the Act of 1982 to the effect that a loss of £106,103 had been incurred by the wilful misconduct of the appellants. The certificate was accompanied by a lengthy statement of reasons for its issue setting out the history of the matter and dealing in considerable detail with the appellants' representations before setting out the district auditor's conclusions. These were that the delay in making a rate was deliberate, that the intention of the delay was to use the non-making of the rate as a lever in an attempt to prise additional money from central government, that there was no justifiable reason for supposing that delay would influence central government to increase rate support grant, and that the council knew that to delay unreasonably was a wrongful act or was recklessly indifferent as to whether or not it was a wrongful act. Finally, D it was concluded that a loss of £106,103 was a direct consequence of the delay in making a rate and the appellants were identified as those responsible for the delay.

The appellants appealed to the High Court under section 20(3) of the Act of 1982. The appeal was heard by a Divisional Court consisting of Glidewell L.J., Caulfield and Russell J.J., together with a similar appeal E by a number of Lambeth councillors. Counsel then acting for the appellants appear to have concentrated upon the merits of the appeal rather than upon allegations of procedural irregularity on the part of the district auditor. Affidavits were lodged by all the appellants and also a considerable amount of documentary evidence which had not been before the district auditor. Though invited to do so by the court, none of the appellants gave any oral evidence. Counsel for the appellants F submitted that it would be inappropriate for the court to investigate the proceedings of the political caucus represented by the appellants. The Divisional Court dismissed the appeal, and their decision was affirmed by the Court of Appeal (Lawton, Dillon and Woolf L.J.J.), who gave leave to appeal to your Lordships' House.

The argument by counsel for the appellants did not invite your Lordships to enter deeply into the merits of the question whether or not G they had been guilty of wilful misconduct, nor was attention drawn to any details of the affidavits and other material placed before the Divisional Court. The substance of the argument was that the district auditor's decision had been vitiated by his failure to offer the appellants an oral hearing before reaching it, and should therefore have been quashed. The argument was supported by an examination of earlier H legislation in regard to local government audits, starting with the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101), where oral hearings were the order of the day, and by reference to the Code of Local Government Audit Practice for England and Wales, made under section

14 of the Act of 1982 and approved by resolution of both Houses of Parliament. The code, by paragraphs 16 to 20, contemplates that an oral hearing will be held where the auditor is dealing with a notice of objection given under section 17(3) of the Act of 1982, which itself refers to the objector attending before the auditor. The code does not deal with the procedure to be followed where the auditor takes action under section 20(1). Counsel produced a list of all instances since 1972 where a district auditor had occasion to consider an issue of wilful misconduct, indicating that in all but one of them an oral hearing had been offered. This had the effect, so it was maintained, of creating a legitimate expectation on the part of the appellants that they would be offered an oral hearing before the district auditor arrived at his decision.

My Lords, if the district auditor had reached a decision adverse to the appellants without giving them any opportunity at all of making representations to him, there can be no doubt that his procedure would have been contrary to the rules of natural justice and that, subject to the question whether the defect was capable of being cured on appeal to the Divisional Court, the decision would fall to be quashed. In the event, written representations alone were asked for. These were duly furnished, in very considerable detail, and an oral hearing was not requested, though that could very easily have been done, and there is no reason to suppose that the request would not have been granted. None of the appellants stated, in his or her affidavit before the Divisional Court, that they had an expectation that an oral hearing, though not asked for, would be offered. The true question is whether the district auditor acted fairly in all the circumstances. It is easy to envisage cases where an oral hearing would clearly be essential in the interests of fairness, for example where an objector states that he has personal knowledge of some facts indicative of wilful misconduct on the part of a councillor. In that situation justice would demand that the councillor be given an opportunity to depone to his own version of the facts. In the present case the district auditor had arrived at his provisional view upon the basis of the contents of documents, minutes of meetings and reports submitted to the council from the auditor's department and their own officers. All these documents were appended to or referred to in the notice of 26 June sent by the district auditor to the appellants. Their response referred to other documents, which were duly considered by the district auditor, as is shown by his statement of reasons dated 6 September 1985. No facts contradictory of or supplementary to the contents of the documents were or are relied on by either side. If the appellants had attended an oral hearing they would no doubt have reiterated the sincerity of their motives from the point of view of advancing the interests of the inhabitants of Liverpool. It seems unlikely, having regard to the position adopted by their counsel on this matter before the Divisional Court, that they would have been willing to reveal or answer questions about the proceedings of their political caucus. The sincerity of the appellants' motives is not something capable of justifying or excusing failure to carry out a statutory duty, or of making reasonable what is otherwise an unreasonable delay in carrying out such a duty. In all the circumstances I am of opinion that the district auditor did not act

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A unfairly, and that the procedure which he followed did not involve any prejudice to the appellants.

B It is to be added that counsel for the appellants founded upon certain matters which it was maintained were relied upon by the district auditor in his statement of reasons dated 6 September 1985 without having been included in the notice of 26 June 1985 so as to give the appellants the opportunity of dealing with those matters. In my opinion there is no merit in this point. One of the matters, the alleged unlawfulness of the rate made on 14 June 1985, was not founded on by the district auditor as a ground for issuing his certificate. The statement of reasons does not assert that the rate was unlawful. It does no more than mention that, as was the fact, the city solicitor had advised the council that the proposed rate would be unlawful. The substance of the other matters was broadly covered in the statement which accompanied the notice of 26 June 1985.

C Upon the view which I take, that the district auditor's decision was not vitiated by procedural unfairness, the question whether such unfairness, had it existed, was capable of being cured by the appeal to the High Court does not arise directly for decision. It is, however, my opinion that the particular appeal mechanism provided for by section 20(3) of the Act of 1982, considered in its context, is apt to enable the court, notwithstanding that it finds some procedural defect in the conduct of an audit which has resulted in a certificate based on wilful misconduct, to inquire into the merits of the case and arrive at its own decision thereon. Section 20(3)(b) empowers the court to "confirm the decision or quash it and give any certificate which the auditor could have given." The relevant rules of court enable a rehearing of the broadest possible scope to take place. Evidence may be given on oath, which is not possible before the auditor, and there is no limit to the further material which may be introduced so as to enable the whole merits to be fully examined. There is no question of the court being confined to a review of the evidence which was available to the auditor. In the circumstances, it would be quite unreasonable and not in accordance with the intendment of the enactment to hold that the court, where an issue is raised as to the fairness of the procedure adopted by the auditor, is confined to a judicial review species of jurisdiction so as to have power only to quash or affirm the auditor's certificate without entering upon its own examination of the merits of the case. No doubt there may be cases where the procedural defect is so gross, and the prejudice suffered by the appellant so extreme, that it would be appropriate to quash the auditor's decision on that ground. But in my opinion the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course. I may add that I agree entirely with all that is said upon this aspect of the appeal in the speech of my noble and learned friend Lord Bridge of Harwich.

H The final argument for the appellants was that the loss of £106,103 was not shown to have been caused by the wilful misconduct of the appellants. This argument was fully considered and rejected by the Divisional Court and the Court of Appeal. I agree entirely with their reasons for rejecting that argument, to which I find it unnecessary to add.

My Lords, for these reasons I would dismiss the appeal. The appellants must pay the district auditor's costs, subject to any protection available to those of them who hold legal aid certificates. This is a suitable case for directing, under section 20(3) of the Act of 1982, that any unrecovered costs shall not be paid by the City of Liverpool. A

LORD BRIDGE OF HARWICH. My Lords, on 6 June 1985 the Audit Commission exercised its power under section 22(1)(b) of the Local Government Finance Act 1982 to order an extraordinary audit of the accounts of the Liverpool City Council for the financial year which commenced on 1 April 1985 in so far as they related to the failure to make a rate or the delay in making a rate for that financial year. By notice dated 26 June 1985 the respondent district auditor informed each of the present appellants, who were members of the majority party on the Liverpool City Council, of the extraordinary audit and that he intended to consider in pursuance of his duty under section 20(1) of the Act of 1982 whether he should certify the sum of £106,103 or any other sum, consequent upon the failure to make a rate or the delay in making a rate for the financial year commencing on 1 April 1985, as due from him or her on the ground that a loss of such sum had been incurred or a deficiency caused by his or her wilful misconduct. The notice was accompanied by a note referring to the relevant statutory provisions, summarising the history, enclosing a number of reports made to the council by the district auditor and his predecessor, and identifying all relevant minutes of the council and its committees and reports made to the council by the council's own officers. The note indicated that this was the material to which the district auditor had had regard and continued as follows: B C D E

"5. The facts show that there was no lawful justification for the delay in the making of the rate. The council has thus disregarded the advice and warnings given by me, my predecessor and its officers. On the evidence the council would appear to be in breach of its statutory duty. 6. To the extent that a breach of statutory duty results from a deliberate failure by any member to discharge his or her own duty then such a member is guilty of wilful misconduct. My predecessor referred to the members' duty in his reports of 19 March 1984 and 10 April 1985." F

The note then proceeds to indicate how the district auditor had assessed such losses or deficiencies as he could then identify as caused by the delay in making a rate and concludes: G

"11. I have reviewed the resolutions of the council to determine how individual members discharged their duty. It at present seems to me that members listed below by their voting, abstention from voting or absence may have failed to discharge their duty as members and may therefore be guilty of wilful misconduct occasioning the loss or deficiency identified in paragraph 9 above. But I will defer making any decision until I have had the opportunity to consider any representations in writing you may wish to make." H

A The formal notice indicated that representations in writing should be made not later than 19 July 1985.

On 19 July the leader of the city council, Councillor Hamilton, wrote to the district auditor in the following terms:

B “The Liverpool Labour Group have held several meetings to discuss their response to your letter of 26 June 1985 regarding the audit of Liverpool City Council’s accounts 1985–86. It is the unanimous view of those concerned that our response to you should be a collective one and accordingly the Labour Group’s response is attached and signed by those councillors who are in receipt of your letter of 26 June. I would, however, wish to point out, that in the case of Councillor James Hackett, he has been away on holiday for the last three weeks and has not had the opportunity to sign the documents.

C It would therefore be appreciated if you would allow Councillor Hackett to reply to you upon his return.”

On his return from holiday a few days later Councillor Hackett adopted the response of his fellow councillors.

D The response enclosed with Councillor Hamilton’s letter was a carefully drafted and closely reasoned document of 30 pages accompanied by 349 pages of appendices. A paragraph headed “Conclusion” contained the following:

E “In preparing this response, and in assembling the accompanying material, the councillors have sought to comply with the relatively short time allowed in the district auditor’s notice. They would wish, however, to reserve the right to add to or develop their response, as appropriate, in the light of events.”

F Concurrently with the extraordinary audit of the accounts of Liverpool City Council a similar extraordinary audit had been ordered of the accounts of the Lambeth London Borough Council. In the course of that audit a notice similar to the notice dated 26 June 1985 in the Liverpool case had been sent to the Lambeth councillors and they too had made a collective response. On 7 August 1985 Councillor Hamilton wrote again to the district auditor saying:

G “The Liverpool councillors would wish, as part of their response to the notices issued to them and in exercise of the right reserved therein, to associate themselves with the legal submissions made by the Lambeth councillors in so far as they have not been explicitly covered in their own response.”

No individual Liverpool councillor submitted any separate written representations on his own behalf or asked for the opportunity to make representations orally.

H On 6 September 1985 the district auditor issued his certificate pursuant to section 20(1)(b) of the Act of 1982 that £106,103 was due from each of the appellant councillors on the ground that it appeared to him that a loss or deficiency in that amount had been caused by their wilful misconduct, accompanied by a statement in writing of the reasons for his decision to issue the certificate. The appellant councillors all

appealed against the decision under section 20(3)(a). A decision to issue a similar certificate in respect of a number of Lambeth councillors was also under appeal. The appeals were heard together by the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) over 10 sitting days from 3 to 14 February 1986. As in the written representations to the district auditor, so on the hearing of the appeals the stance adopted by the Liverpool appellants was a united and collective one. They were all represented by the same counsel. Although the affidavit material was voluminous and different appellants deposed in their affidavits to different detailed aspects of the facts, all expressed their agreement with the main affidavit made by Councillor Hamilton, the leader of the council, and neither by affidavit nor through counsel did any individual appellant invite the court to distinguish his responsibility for what the majority group on the city council had done or failed to do from that of any other member of the group.

The main issue canvassed in the Divisional Court was the issue on the merits whether the appellants had been guilty of wilful misconduct and if so whether it had caused any loss. The court took the view urged by counsel for the district auditor and supported by counsel for the Lambeth councillors that, in relation to that issue, the scope of the hearing on appeal was unlimited and that they could consider whatever evidence and arguments were put before them, whether or not they had been before the respective auditors. At an early stage in the hearing, the court raised the question whether any party wished to give oral evidence. None did. Counsel then appearing for the present appellants went further and submitted that it would be inappropriate for the court to hear oral evidence. When invited by the court to disclose when and in what circumstances the rate at a figure representing a 9 per cent. increase over the 1984 rate (which the Liverpool City Council had eventually adopted and which would have left a deficit of £117 million on estimated expenditure) had been decided upon by the appellants, he submitted that the court was not entitled to investigate the activities of a political caucus. As Glidewell L.J. put it:

“It is clear to me, therefore, that the highly experienced counsel who appeared for the appellants were satisfied that justice could be done by our hearing their clients’ appeals on affidavit and documentary evidence.”

The judgments in the Divisional Court examined the issue on the merits at length and concluded that wilful misconduct causing the loss certified by the district auditor was fully established.

Submissions that the district auditors’ certificates against both Liverpool and Lambeth councillors were vitiated by procedural unfairness, in that the councillors had not had a proper opportunity to answer some of the points relied on in the reasons for the respective decisions to certify, were made by counsel for both the Liverpool and the Lambeth appellants after their submissions on the merits. The court took the view that these should have been taken as preliminary points and, if well founded, would lead to the quashing of the auditors’ decisions. But they concluded that there had been no procedural unfairness and that the

A appellants had had a sufficient opportunity to meet the case put against them. The Divisional Court gave judgment dismissing the appellants' appeals on 5 March 1985.

The Liverpool councillors appealed. The Lambeth councillors did not. In the Court of Appeal there was both a change of counsel and a change of emphasis. Mr. Louis Blom-Cooper now presented the case for the Liverpool appellants, as he has done before your Lordships. The hearing occupied the court for nine days from 9 to 22 July 1986. The merits were once more fully canvassed and the Court of Appeal (Lawton, Dillon and Woolf L.J.J.) unanimously affirmed the view of the Divisional Court that the appellants had been guilty of wilful misconduct causing the certified loss. But my impression is that the procedural complaint by which the decision of the district auditor was sought to be impugned loomed much larger in the Court of Appeal than it had in the Divisional Court. Mr. Blom-Cooper introduced elaborate new arguments based on the history of the legislation relating to the auditing of local government accounts from the Poor Law Amendment Act 1844 to the Local Government Finance Act 1982 and on the practice followed by district auditors over a long period to support a submission, repeated before your Lordships, that a district auditor, before certifying that a loss or deficiency has been caused by the wilful misconduct of any person under section 20(1)(b) of the Act of 1982, is obliged, as a matter of law, to offer that person an oral hearing and that, if he does not do so, any certificate issued is a nullity. The Court of Appeal unanimously rejected this submission. They expressed marginally different views, however, on the complaint that there had been a lack of fairness in the proceedings. Put shortly, Lawton L.J. thought that, in so far as the district auditor's reasons for his decision impugned the good faith and credibility of the appellants' response to his notice of 26 June 1985, he ought, before taking the decision, to have given them the opportunity of addressing him orally on that issue. Dillon L.J. inclined to the same view, though he found it unnecessary to reach a final conclusion. Both based their decision on the ground that the full hearing on the merits before the Divisional Court could, as a matter of law, and did, as a matter of fact, remove any ground of complaint arising out of the procedure followed by the district auditor in reaching his decision. Woolf L.J. approached the matter more broadly. He went no further than to say that it would be preferable to have invited representations as to whether there should be an oral hearing. But he concluded that when the proceedings, including the hearing before the Divisional Court, were considered as a whole, the allegation of unfairness was not made out. The Court of Appeal gave judgment dismissing the appeals on 31 July 1986 but granted leave to appeal to your Lordships' House.

My Lords, it is appropriate to emphasise at the outset that the conclusion reached by the district auditor, the Divisional Court and the Court of Appeal that the appellants were guilty of wilful misconduct causing the certified loss is no longer the subject of any substantial challenge. I use the qualifying epithet "substantial" for two reasons. First, Mr. Blom-Cooper renewed shortly before your Lordships a submission made below to the effect that, if there was wilful misconduct,

it did not cause the relevant loss which the district auditor certified. The point is shortly dealt with in the judgments of Glidewell L.J. in the Divisional Court and Lawton and Woolf L.JJ. in the Court of Appeal. They demonstrate clearly that, if there was misconduct, the certified loss was caused by it. I need say no more than that I agree with and adopt their reasons. Secondly, the document headed "The Issues on the Appeal" which Mr. Blom-Cooper helpfully handed in at the opening of his submissions contains a paragraph which reads:

"Did the district auditor and the courts below, in concluding that the appellants were guilty of wilful misconduct in delaying the making of the rate for the financial year 1985-86, apply the right test in judging the decisions and actions of the appellants?"

Whatever faint argument, in the course of Mr. Blom-Cooper's oral submissions, may have been addressed to this issue, it signally failed to identify any misdirection in law by the courts below in their consideration of the issue of wilful misconduct. It seems to me abundantly clear that they applied the right test and the question whether they came to the right conclusion is one not of law but of fact. Your Lordships were never invited by Mr. Blom-Cooper to examine the voluminous material in the affidavits and exhibits on which any challenge to the finding of wilful misconduct must depend and the fact of wilful misconduct, therefore, must be accepted as established.

The only challenge which must now be considered is procedural. There are, I think, three facets to the challenge. First, it is said that, as a matter of law, there is an absolute obligation on a district auditor, before issuing a certificate under section 20(1) of the Act of 1982, to ask any person upon whom the certificate will impose a liability whether he wishes to make oral representations. Secondly, in the circumstances of this case, it is said that there were matters of complaint against the appellants relied on by the district auditor in his reasons for decision dated 6 September 1985 of which the appellants were not informed by, and which they could not have anticipated from, the terms of the notice given to them dated 26 June 1985. Thirdly, it is said that, apart from any general obligation to offer the appellants an oral hearing, the district auditor was under a particular obligation to do so before he could properly reject as unacceptable any explanation of their conduct put forward by the appellants relating to their intention, motivation, or good faith. If any one of these three propositions is established, then it is submitted that there was such a want of natural justice in the proceedings leading to the decision of the district auditor as to invalidate the certificate, with the result that, on appeal, the Divisional Court, irrespective of its view on the merits, was obliged to quash it.

My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established

- A that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. It follows that the starting-point for the examination of all the appellants' submissions on this aspect of the case is the Act of 1982. It will be convenient here to set out all the provisions which, in my opinion, throw light on the issues to be decided. They are as follows:
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- C "17(1) At each audit by an auditor under this Part of this Act any persons interested may inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them and make copies of all or any part of the accounts and those other documents. (2) At the request of a local government elector for any area to which those accounts relate, the auditor shall give the elector, or any representative of his, an opportunity to question the auditor about the accounts. (3) Subject to subsection (4) below, any local government elector for any area to which those accounts relate, or any representative of his, may attend before the auditor and make objections—(a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; . . . (4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously received written notice of the proposed objection and of the grounds on which it is to be made. . . .
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- E "19(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Secretary of State. (2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3) below, it may also—(a) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid; (b) if any such expenditure exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specified period; and (c) order rectification of the accounts. (3) The court shall not make an order under subsection (2)(a) or (b) above if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it. (4) Any person who has made an objection under section 17(3)(a) above and is aggrieved by a decision of an auditor not to apply for a declaration under this
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section may—(a) not later than six weeks after he has been notified of the decision, require the auditor to state in writing the reasons for his decision; and (b) appeal against the decision to the court, and on any such appeal the court shall have the like powers in relation to the item of account to which the objection relates as if the auditor had applied for the declaration. . . . (6) The court having jurisdiction for the purposes of this section shall be the High Court except that, if the amount of the item of account alleged to be contrary to law does not exceed the amount over which county courts have jurisdiction in actions founded on contract, the county court shall have concurrent jurisdiction with the High Court. . . .

“20(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount. (2) Any person who—(a) has made an objection under section 17(3)(a) above and is aggrieved by a decision of an auditor not to certify under this section that a sum or amount is due from another person; or (b) is aggrieved by a decision of an auditor to certify under this section that a sum or amount is due from him, may not later than six weeks after he has been notified of the decision require the auditor to state in writing the reasons for his decision. (3) Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above. (4) If a certificate under this section relates to a loss or deficiency caused by the wilful misconduct of a person who is, or was at the time of such misconduct, a member of a local authority and the amount certified to be due from him exceeds £2,000, that person shall be disqualified for being a member of a local authority for the period of five years beginning on the ordinary date on which the period allowed for bringing an appeal against a decision to give the certificate expires or, if such an appeal is brought, the date on

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A which the appeal is finally disposed of or abandoned or fails for non-prosecution. (5) A sum or other amount certified under this section to be due from any person shall be payable within 14 days after the date of the issue of the certificate or, if an appeal is brought, within 14 days after the appeal is finally disposed of or abandoned or fails for non-prosecution. (6) In any proceedings for the recovery of any sum or amount due from any person under this section a certificate signed by an auditor appointed by the commission stating that that sum or amount is due from a person specified in the certificate to a body so specified shall be conclusive evidence of that fact; and any certificate purporting to be so signed shall be taken to have been so signed unless the contrary is proved. . . . (9) The court having jurisdiction for the purposes of this section shall be the High Court except that, if the sum or amount alleged to be due does not exceed the amount over which county courts have jurisdiction in actions founded on contract, the county court shall have concurrent jurisdiction with the High Court."

D All these provisions except section 17(1) and (2) apply to an extraordinary audit under section 22 as they apply to an ordinary audit.

E I draw attention at the outset to two striking features of this statutory machinery. The first is that both the exercise of the power to declare items of account unlawful under section 19 and the ultimate power to control the issue of certificates under section 20 are entrusted to the regular courts, the county court if the amount in issue is within the county court's contractual jurisdiction, the High Court if it is not. Under section 19 the auditor can take no effective step without invoking the jurisdiction of the court. Under section 20 the auditor's certificate will be effective unless appealed against. The second striking feature is this. The auditor may act of his own motion either in applying to the court for a declaration under section 19 or in issuing a certificate under section 20. But where, for any reason, he fails or declines to act under either section, after he has been invited to do so by a local government elector exercising his right of objection under section 17(3)(a), that elector has an unfettered right to invoke the jurisdiction of the court himself. In a case under section 19 the court will in every case be exercising its jurisdiction at first instance, but the auditor may be either seeking or opposing the declaration. In a case under section 20, the auditor may, if he has been invited to act under section 17(3)(a), be described as the tribunal of first instance, but whichever way he decides, an unfettered right of appeal to the courts lies at the instance either of the aggrieved elector or of the party from whom the relevant loss has been certified to be due. In either case if the court falls into error the error can be corrected by the Court of Appeal or, if necessary, by your Lordships' House.

H So far as procedure is concerned, section 14 of the Act of 1982 provides for the issue of a code of audit practice to be approved by each House of Parliament. The code currently in force contains detailed provisions relating to objections under section 17, but none relating to

the procedure to be followed when an auditor contemplates the issue of a certificate under section 20 of his own motion. The gravity of the consequences of a certificate for the person from whom the amount of a loss is certified to be due, particularly if he is a member of a local authority and the amount exceeds £2,000, are obvious enough. No one doubts that the auditor must give to such a person adequate notice of the case against him and an adequate opportunity to present to the auditor his defence to that case. I followed with interest Mr. Blom-Cooper's carefully researched review of the history of local government audit legislation, but I did not find that it threw any light on what, in particular, is required to provide such an opportunity in the circumstances of any particular case under the statute presently in force. Still less do I attach any significance to the fact that since 1972, when provisions substantially to the like effect as those which we find in the Act of 1982 first reached the statute book, auditors have, as a matter of practice, always invited oral representations from members of local authorities before certifying the amount of any loss or deficiency as due from them. When a single individual is thought to have failed to bring a sum into account or by his wilful misconduct to have caused a loss or deficiency, it is no doubt a very appropriate practice to invite his explanation orally. But I fail to understand how that practice can constrain the courts to construe the statute as requiring an auditor proposing to act under section 20 to invite oral representations as a matter of law in every case. In this case the auditor seems to have intelligently anticipated that the Liverpool councillors who constituted the majority group would want to present a united front in their response to his notice of 26 June 1985 as they had done in their conduct of the city council's affairs during the previous year. Councillor Hamilton's letter of 19 July 1985 amply confirmed his expectation. If any councillor had wanted to put forward his own independent and individual grounds in rebuttal of the charge of wilful misconduct against himself, I have no doubt he would have done so. If any had asked to be heard orally and the auditor had refused, there would have been clear ground for a complaint of unfairness. I suppose it is conceivable that the appellants collectively might have wished to appoint a spokesman to present their case orally rather than in writing, though the case they did present, embracing as it did such a large volume of documentary material, clearly lent itself more aptly to written than oral presentation. It has never been suggested that it was unfair that the auditor did not invite the appellants to address arguments to him through solicitor or counsel. The proposition that it was, per se, in breach of the rules of natural justice not to invite oral representations in this case is quite untenable.

The second facet of the complaint of unfairness alleges that the notice of 26 June 1985 did not sufficiently particularise the case which the appellants had to meet and that new matters were relied on by the auditor in the reasons for his decision given on 6 September 1985. This is exhaustively examined in the judgments of the courts below and it would serve no good purpose to re-examine it in detail. The notice dated 26 June was sent with copies of all the previous reports to the council of the district auditor and his predecessor and identified by

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A reference all the relevant council and committee minutes and reports made to the council by their own officers. I am fully satisfied that this gave adequate notice of the grounds on which the auditor was provisionally minded to proceed against the appellants under section 20 and indeed the character of the response shows that they were in no doubt as to the nature of the case they had to meet. The point that troubled Lawton L.J. and, to a lesser extent, Dillon L.J. was that the auditor in giving the reasons for his decision rejected the protestations of good faith in the appellants' response to his notice of 26 June and did not accept that their motivation in acting as they did was as they claimed. The relevant passage from the judgment of Lawton L.J. reads, ante, p. 644c-g:

C "What the appellants were saying was wholly inconsistent with what was in these minutes and documents. An example is provided by their assertion that they had acted 'in good faith and after taking advice from their officers.' They had not acted on the advice of their officers in March 1984, and again in April 1985 and on 14 June 1985. Their assertion that they believed until 6 June 1985 that the central government would provide further money was so contrary to the facts that no rational person could have believed anything of the kind. The evidence relied on by the district auditor for rejecting the appellants' assertion that they believed that more money would be forthcoming was strong; but it is a matter of human experience that political zealots, as some of the appellants seem to have been, can so delude themselves about reality that lying is unnecessary for them. The courts are chary, however, about disbelieving people and attributing bad faith to them without an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, per Lord Greene M.R., at p. 308, and *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551, per Viscount Dilhorne, at p. 568. Had the appellants been given an opportunity of commenting on the adverse opinion of their conduct which the district auditor had formed they, or some of them, might have been able to persuade him of their good faith and credibility. Maybe on the facts of this case they would have had difficulty in so doing; but, in my judgment, they should have been given a chance of doing so. It was unfair not to have given them that chance."

G With respect, I cannot agree that the authorities referred to had any relevance to the circumstances of the instant case. There was here no room for dispute as to what the council, for whose action or inaction the appellants were responsible, had done or failed to do. There was no room for dispute as to the factual information and legal advice which had at all material times been available to the appellants. It was never claimed on behalf of the appellants that they acted under any misapprehension. In so far as there was an issue as to whether the course on which the appellants quite deliberately embarked was one in which they acted "in good faith" or as to the motives which underlay their action or inaction, it was in essence a matter for argument rather than for evidence. When a group of 49 people act collectively they may,

of course, have different subjective reasons for acting. But if they assert that their collective action was prompted by a single collective state of mind, this is inevitably to some extent a fiction. A group can have no single subjective mind. On the other hand, the objective state of mind of the group can only be inferred from what the group concurred in doing or omitting to do in given circumstances. In this case it would not have advanced the appellants' case at all if each appellant had appeared in person before the auditor and asserted his sincere belief in what had been said in the collective written response. On the other hand, if each had given his own explanation and volunteered to submit to questioning as to his own individual state of mind in relation to the council's proceedings, this would have been a departure from the collective stance which the appellants had deliberately adopted and to which they have throughout resolutely adhered. For these reasons I think the auditor was fully entitled to draw inferences from the undisputed facts which involved a rejection of the appellants' protestations of good faith and purity of motive and that his doing so without further reference to the appellants after he received their response dated 19 July 1985 involved no unfairness to them.

These conclusions would be sufficient to dispose of the appeals. But I return to the question of more general importance whether, if there had been any unfairness in the procedure followed by the auditor, this would necessarily have led, as the Divisional Court thought, to the quashing of the certificate or whether, as the Court of Appeal concluded, the full hearing of the appeal to the court on the merits was in law able to make good any deficiency in the auditor's procedure. It was in order to set this question in its proper context that I thought it necessary, earlier in this opinion, to set out the relevant statutory provisions in extenso. The question how far in domestic and administrative two-tier adjudicatory systems a procedural failure at the level of the first tier can be remedied at the level of the second tier was considered by the Privy Council in *Calvin v. Carr* [1980] A.C. 574 in which all the relevant previous authorities on the subject are reviewed. I do not find it necessary in this case to examine the general principles there discussed, nor would I think it appropriate in this case to seek to lay down any principles of general application. This is because the question arising in the instant case must be answered by considering the particular statutory provisions here applicable which establish an adjudicatory system in many respects quite unlike any that has come under examination in any of the decided cases to which we were referred. We are concerned with a point of statutory construction and nothing else.

As I have pointed out, the court acts at first instance under section 19 in deciding whether or not to make a declaration and so acts either on the application of the auditor or at the instance of an objector against the auditor's opposition. Under section 20, although the auditor acts at first instance in deciding whether or not to certify, either of his own motion or at the instance of an objector, the jurisdiction of the court may be invoked by a person aggrieved by either an affirmative or a negative decision. Once issued a certificate is valid until it is quashed or varied. This clearly follows from the provisions of section 20(6)

- A making the certificate conclusive evidence in proceedings for recovery of the certified sum or amount of the loss. Apart from the provisions for appeal in section 20(3) a certificate could, no doubt, be the subject of an application to the High Court for judicial review. But I cannot see any reason why it should be necessary to seek leave to invoke the supervisory jurisdiction of the court when any party aggrieved by the certificate is entitled as of right to invoke the much more ample appellate jurisdiction
- B which the statute confers. It is the very amplitude of the jurisdiction which, to my mind, is all-important. Whether the auditor has decided to certify or not to certify, the court is empowered to confirm or quash the decision, to vary the decision if a certificate has been issued by the auditor, and in any case to give any certificate which the auditor could have given. The language describing the court's powers could not
- C possibly be any wider. Procedurally there is nothing either in the statute or in the relevant rules of court to limit in any way the evidence which may be put before the court on either side. In the light of these considerations I can find no reason whatever to construe the statute in such a way as to limit the discretion of the court as to the action it will take to provide an appropriate remedy where the matter, or one of the matters, of complaint is of unfairness in the procedure followed by the auditor. I can well see that, if the auditor has certified of his own
- D motion without giving any proper notice to the person against whom the certificate operates, the court would probably decide to quash it without entering upon the merits. But if, on the other hand, a local government elector had objected under section 17(3)(a) seeking a certificate against a councillor whom he accused of wilful misconduct causing loss and the auditor had improperly dismissed his objection out of hand, it might
- E well be that the most expeditious and appropriate remedy would be for the court, on appeal by the objector, to determine the issue itself. If the court decided to proceed in that way, it would be effectively determining at first instance the issue whether the councillor had been guilty of wilful misconduct causing loss or deficiency. The councillor might, in such circumstances, have heard nothing of the matter until the proceedings
- F before the court, but, if the objector could prove the case against him, the councillor would have no ground of complaint on that score.

In every case it must be for the court, as a matter of discretion, to decide how in all the circumstances its jurisdiction under section 20(3) can best be exercised to meet the justice of the case. But I am clearly of opinion that when the court has, as here, in fact conducted a full

G hearing on the merits and reached a conclusion that the issue of a certificate was justified, it would be an erroneous exercise of discretion nevertheless to quash the certificate on the ground that, before the matter reached the court, there had been some defect in the procedure followed.

I would dismiss the appeals and make orders for costs as proposed by my noble and learned friend Lord Templeman.

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LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord

Templeman. I agree with all of them, and for the reasons which they A
give I would dismiss the appeal.

LORD TEMPLEMAN. My Lords, this appeal is the culmination of a
conflict between a local authority and Parliament. In 1985 the will of the
local authority, Liverpool City Council, was exercised by the appellants,
an united majority of elected councillors. The will of Parliament was B
exercised by ministers supported by an united majority of elected
members of the House of Commons. Liverpool's revenues mainly
consisted of grants from national taxes controlled by the ministers and
the products of local rates controlled by the councillors. The councillors
asked that Liverpool's grants from national taxes be made at a level
which the ministers declined to accept. The ministers asked that C
Liverpool's expenditure be maintained and Liverpool's budget balanced
at levels which the councillors declined to accept. The ministers could
lawfully make grants from national taxes at the level decided by the
ministers with the approval of Parliament. The councillors could not
lawfully maintain Liverpool's expenditure at a level which exceeded
Liverpool's income derived from grants, rates and other sources of
revenue. A local authority is created by Parliament; must perform the D
duties imposed by Parliament; and can only exercise powers conferred
by Parliament in the manner and for the purposes intended by
Parliament. If a majority of councillors who control the local authority
procure the local authority to reject or neglect its statutory duty, each
councillor is guilty of misconduct, even though the councillor may have
been democratically elected to oppose the performance of that duty. If E
a councillor is advised or is otherwise conscious that action contemplated
by him will amount to misconduct, he is guilty of wilful misconduct and
is liable to statutory penalties if he persists. In the present case the
appellants appeal against a finding of wilful misconduct.

By section 2(1) of the General Rate Act 1967:

"Every rating authority shall . . . make such rates as will be
sufficient to provide for such part of the total estimated expenditure F
to be incurred by the authority during the period in respect of
which the rate is made as is not to be met by other means . . ."

By section 1 of the Local Government Finance Act 1982 a rating
authority shall not have power "(b) to make a rate for any period other
than a financial year," and by section 7(1) of the same Act "financial
year" means a period of 12 months beginning with 1 April. Liverpool G
was a rating authority and was therefore under a duty to make a rate for
each year beginning with 1 April sufficient to meet its expenditure for
that year. Collection of rates and payment of other revenues begin as
soon as the rate is made and notified. The rates should be made by or
soon after 1 April in order to facilitate collection and payment. Any
delay in making the rate involves a loss to the authority of interest or
borrowing charges by imposing a delay on collection and payment. H

The Act of 1982 established the Audit Commission charged with
appointing auditors to audit the accounts of local authorities. Each
auditor must be a professionally qualified accountant. By section 20(1)

- A where it appears to the auditor carrying out an audit that “(b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person” the auditor is to certify the amount involved and the Act provides for the recovery of that amount from the person guilty of wilful misconduct. If a local authority does not make an adequate rate or delays in making a rate, then the resultant loss of revenue or of interest or borrowing charges may be investigated by the auditor. If a councillor
- B does not support the making of an adequate rate or shares responsibility for delay in making a rate, he shares responsibility for the loss thereby inflicted on the local authority and the auditor may find the councillor guilty of misconduct. If the councillor knows that he is failing in his duty to ensure that the local authority receives as much revenue from rates as is necessary and as soon as possible, the auditor may find that the
- C councillor is guilty of wilful misconduct.

In March 1984, the Liverpool City Council was under a duty to consider making a rate for the financial year beginning 1 April 1984. In a report dated 19 March 1984, sent to all councillors, the district auditor explained the duty of the local authority and the duty of the councillors, indicated the liability of the councillors for breach of duty and warned that

- D “I should find it difficult to see how the deliberate making of an inadequate rate could be anything other than wilful misconduct. . . . Members would in my view also be at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate.”

- E In the event, negotiations between the central government and the local authority for an increase in government grant continued long after 1 April and no action was taken to challenge the conduct of councillors, notwithstanding that no rate was fixed until July 1984. A copy of the report dated 19 March 1984 was subsequently sent to all councillors elected after that date in order that they too should be aware of their responsibilities and liabilities.

- F In December 1984 the council indorsed
“the policies upon which the people of Liverpool elected the Labour Party to power, viz. [inter alia] to refuse to impose increases in rates, rents and charges to compensate for government cuts in grants”

- G and called for the reinstatement of cuts in grants said to amount to some £216m.

On 27 February 1985 the council rejected the proposal that a meeting of the council be arranged in order to set a rate for 1985–86. On 7 March 1985 the council resolved that

- H “this council requires a budget of £265.4m. but, with a target of only £222.1m.—representing another £90m. stolen from the city in grant penalty—this council considers it will be impossible to make a rate.”

On 14 March 1985 in a Parliamentary answer which was drawn to the attention of the council, the Secretary of State for the Environment

made it clear that no more government money would be provided, that
 “no rating authority can now have any excuse for delay in carrying out
 its duty to make a lawful rate,” and that government grants for 1985–86
 would not be paid until a rate had been fixed. The minister reminded

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“all councillors that if a failure to rate leads to a loss or deficiency
 and the auditor considers that this results from wilful misconduct,
 then those responsible may be surcharged.”

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On 10 April 1985 the district auditor, in a report to the council,
 expressed his concern at “the council’s failure to make a valid rate for
 the financial year which commenced on 1 April 1985.” He advised that
 “failure to make a lawful rate would be a clear breach of duty and that
 deliberate failure to do so would be wilful misconduct.” He concluded
 by urging

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“the council in its own best interests, as well as those of individual
 members, employees and the local community, that a rate should be
 made at a very early date. That rate needs to be matched with plans
 to operate within available resources.”

In May the council again declined to consider making a budget or a
 rate. On 21 May 1985 the auditor made a further report to the council
 and sent a copy of his report to each councillor. After referring to the
 reports dated 19 March 1984 and 10 April 1985, the auditor continued:

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“By its continued failure to make a rate the council and individual
 members have placed themselves seriously at risk. . . . I must now
 give the council notice that unless it makes a lawful rate at the
 earliest opportunity and in any event before the end of May I shall
 forthwith commence action under section 20 to recover any losses
 occasioned by the failure to make a rate from the members
 responsible for incurring them. . . . Yet again and for the last time I
 urge the council most strongly to comply with its statutory duty to
 make a lawful rate and to do so with the utmost speed.”

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On 6 June 1985 the Audit Commission directed an extraordinary audit
 to be carried out.

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On 14 June 1985 the council considered a resolution that, *inter alia*:

“A rate increase of 9 per cent. be approved and the difference of
 £29m. be made up by the return of grant moneys stolen from the
 people of Liverpool by the Tory government since 1979.”

It appears from the revised budget summary, however, that the difference
 between budgeted revenue and budgeted expenditure on the basis of the
 increased rate proposed would amount to £117m. The rate proposed to
 be fixed was therefore inadequate and the city solicitor advised the
 council before they passed the resolution that the resolution would be
 contrary to law. The resolution fixing a rate based on a 9 per cent.
 increase was however passed with the support of the appellants.

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The respondent auditor was appointed auditor for the purpose of the
 extraordinary audit and on 26 June 1985 gave notice to each of the
 appellants that he was considering certifying that the appellants had
 been guilty of wilful misconduct. The auditor asserted that the

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A documentary evidence which he particularised and which consisted of the relevant minutes of the meetings of the council and its committees and the relevant reports of its officers including the reports of the district auditor

B “show that there was no lawful justification for the delay in the making of the rate. The council has thus disregarded the advice and warnings given by me, my predecessors and its officers.”

The auditor invited representations in writing by 19 July 1985 and intimated that he would defer making a decision until he had considered the appellants' representations.

C On 19 July 1985 the appellants submitted detailed and careful representations which had been drafted with the assistance of the chief executive of Liverpool. The facts to which the auditor had drawn attention could not be and were not disputed. The appellants denied wilful misconduct on three grounds. First they said that at all times they had acted in what they sincerely believed to be the best interests of the ratepayers and citizens of Liverpool. My Lords, political leaders from Robespierre, the sea-green incorruptible, to Gandhi, the prophet of non-violence, have acted in the sincere belief that it was necessary to break the nation's laws in the interests of the nation's citizens. Only Gandhi, who broke the salt laws, acknowledged in a celebrated exchange of courtesies with the British magistrate the correctness of his conviction and the appropriate imposition of a sentence of imprisonment which, however, hastened the repeal of the salt tax and the dawn of independence for India. The sincerity of the appellants provides no defence to a charge that they deliberately delayed after they had been warned that it was wrong of them to do so. Secondly, the appellants contended that they were entitled to delay in the hope and expectation that the government would thereby be compelled or persuaded to provide more money for Liverpool. But the government in March 1985 had made it quite clear that the councillors would be responsible if they did not make a rate based on current government grants. The appellants' belief that the government did not mean that which the government stated does not justify a delay which was bound to cause loss to Liverpool whatever the government might do. Thirdly, the appellants contended that they had delayed in 1984 without dire consequences to themselves, and were entitled to believe that they would escape from the consequences of delay in 1985. But both the government and the officers of Liverpool, at an early stage, made plain to the council that 1985 circumstances were different from 1984 circumstances, and that delay in 1985 would not be tolerated or excused. An offender cannot successfully plead by way of defence that he was not prosecuted for a similar offence on a previous occasion.

H The appellants did not ask the auditor for an oral hearing but it is now said that the auditor should have invited the appellants to make oral representations before he ultimately made up his mind. My Lords, a councillor might have persuaded the auditor, if he was not already

persuaded, that the councillor was sincere in his belief that he could not sacrifice the policy for which he had been elected and sincere in the belief that a rigid adherence to the policy would enure for the benefit of the citizens of Liverpool even if it entailed a breach of the councillor's duty promptly to make an adequate rate to provide for the year's expenditure. But the councillor's beliefs could not alter the councillor's duty or excuse a deliberate breach of that duty. In the voluminous evidence and in the addresses of counsel I have been unable to discern any grounds for the assertion that the oral representations of a councillor could have supplied a defence which was lacking from the written representations of the appellants or could have validated or reinforced possible defences foreshadowed in those written representations. The facts disclosed by the documents were incontrovertible and damning. The auditor had no choice but to find the appellants guilty of wilful misconduct. He certified on 6 September 1985 that the loss for which the appellants were liable amounted to £106,103.

Mr. Blom-Cooper, who appeared for the appellants, urged that the auditor should have invited the appellants to make oral representations before he reached the decision based on the written material. If any appellant had requested an oral hearing, I think that it would have been desirable for the auditor to have granted that request, first, so that the appellant could reiterate the sincerity of his motives and, secondly, so that the appellant might satisfy himself as to the judicial and impartial quality of the auditor. But sincerity is no excuse. An oral hearing could not detract from the force of the documentary evidence or supplement the written defence of the appellants in any material respects. I do not consider that the auditor was bound to follow a procedure which the appellants, acting under competent advice, did not suggest. The judicial and impartial qualities of the auditor are not in question.

Mr. Blom-Cooper urged that although the appellants did not request an oral hearing, they were deprived of a "legitimate expectation" of being invited to an oral hearing. Mr. Blom-Cooper does not allege that the appellants in fact expected to be invited to an oral hearing and does not speculate whether they would have accepted an invitation. Mr. Blom-Cooper submits that a legitimate expectation of being invited to an oral hearing is an objective fundamental right which, if not afforded, results in a breach of law or breach of natural justice which invalidates any decision based on written material. This extravagant language does not tempt me to elevate a catch-phrase into a principle. The true principle is that the auditor, like any other decision-maker, must act fairly. It was not unfair for the auditor to reach a decision on the basis of the written material served on and submitted by the appellants. In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 it was unfair for the government to decide to deprive a civil servant of his right to belong to a trade union without first consulting the civil servant or his union; this House would have quashed the decision but for the overriding interests of national security which justified the government's decision. My noble and learned friend, Lord

A Roskill, pointed out, at p. 415, that "legitimate expectation" is a manifestation of the duty to act fairly. A decision may be unfair if the decision-maker deprives himself of the views of persons who will be affected by the decision. In the present case the appellants were afforded ample opportunity to express their views, and the auditor was enabled to reach a decision in the light of every defence which it was possible for the appellants to urge.

B The certificate of the auditor that a loss of £106,103 had been incurred by the wilful misconduct of the appellant was given pursuant to section 20(1) of the Local Government Finance Act 1982. By section 20(3) any person who is aggrieved by a decision of an auditor to certify that an amount is due from him may appeal against the decision to the court and "the court may confirm, vary or quash the decision and give any certificate which the auditor could have given," and any certificate given by the court "shall be treated . . . as if it had been given by the auditor . . ."

C On 6 October 1985 the appellants appealed under section 20(3) to the High Court. By R.S.C., Ord. 98 the appeal was brought by notice of motion supported by an affidavit setting out the facts on which the appellants intended to rely at the hearing. Ord. 98, r. 4(2) provides that evidence at the hearing shall be given by affidavit, except in so far as the court directs that the evidence shall be given orally. The appellants filed numerous affidavits and there were exhibited all the relevant documents which were considered by the auditor or to which the appellants wished to refer. The appeal was heard by a Divisional Court (Glidewell L.J. and Caulfield and Russell JJ.). The appellants asked that the certificate given by the auditor be set aside and discharged. The appellants were invited to give oral evidence but declined the invitation. After a hearing lasting 10 days the appellants' applications were dismissed. The appellants appealed to the Court of Appeal (Lawton, Dillon and Woolf L.JJ.). The appeal was dismissed and, with leave of the Court of Appeal, this present appeal has been brought to this House. Any oral evidence which could have been given by the appellants to the auditor could have been given on affidavit or orally to the Divisional Court. In these circumstances, Mr. Blom-Cooper did not urge the merits of the appellants' case. Having submitted that the procedure of the auditor was defective because he did not invite the appellants to give oral evidence, he next submitted that in those circumstances the Divisional Court had no power to affirm the decision of the auditor.

E My Lords, in reaching a decision an auditor may make mistakes of fact, law, or procedure. The auditor does not take evidence on oath and the information available to him may be incomplete. On an appeal from his decision, the court is entitled to consider any evidence from any appellant or from any auditor or other expert. Such evidence is given on oath, either in the form of an affidavit or in the form of oral testimony. Evidence may be produced before the court which was never available to the auditor. The judges will draw their own conclusion from the

evidence before the court, will apply the law as judicially construed, and will adhere to court procedure. If the Divisional Court errs in law a further appeal lies. In my opinion, the court hearing an appeal under section 20 of the Act of 1982 is not powerless to confirm or vary the decision of an auditor merely because the decision of the auditor was defective, whether the defect relates to a matter of evidence, law or procedure. It is for the court to consider a certificate under section 20(3) in substitution for the certificate of the auditor.

Mr. Blom-Cooper relied on the dictum of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 49 that “a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.” This dictum was enunciated in connection with an appeal from one domestic tribunal to an appellate domestic tribunal. In *Calvin v. Carr* [1980] A.C. 574, 593, Lord Wilberforce, delivering the advice of the Board, demurred to this dictum as being “too broadly stated” and, at p. 592, recognised and asserted

“that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be ‘cured’ through appeal proceedings.”

My Lords, when by statute an appeal lies from a tribunal to a court of law, the statute must be construed to determine whether the court is free to determine the appeal on the basis of the evidence before the court or is bound by the evidence or information laid before the tribunal. In the present case I have no doubt that it was for the court of law to consider whether “wilful misconduct” was proved and for that purpose to consider the evidence laid before the court. The task of the court was to “give any certificate which the auditor could have given” (section 20(3) of the Act of 1982). The court was not concerned with any defects in the procedure adopted by the auditor because those defects (if any) did not hamper the prosecution or conduct of the appeal. Different considerations apply if a statute only allows an appeal to a court of law on a question of law, or entitles or obliges the court of law to rely on the facts found by the tribunal. And the defects in the inquiry conducted by the tribunal may be so prejudicial to the aggrieved person that the court in its discretion may decide to quash the decision and not to proceed with an appeal on the merits in the absence of the views of the tribunal after a proper inquiry. In the present case the Divisional Court was entitled to consider the appeal on its merits and on the basis of the evidence presented to the court.

The auditor on the basis of the information available to him came to the conclusion that the appellants were guilty of wilful misconduct. The Divisional Court on the basis of that information supplemented by the additional evidence put forward by the appellants affirmed the decision of the auditor. I would dismiss this appeal. As regards costs there are technically 47 appeals before this House. Some appellants are legally aided, some are not. I would order each appellant to pay one forty-seventh of the auditor’s costs of the appeal to this House, subject to the

A usual protection afforded by the legal aid certificates. If and so far as the auditor does not recover a due proportion from a legally aided appellant and subject to any application of The Law Society, the auditor should be entitled to recover from the legal aid fund pursuant to section 13 of the Legal Aid Act 1973.

B LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Templeman. For the reasons they give, I too would dismiss the appeal.

Appeal dismissed.

C *Each unassisted appellant to pay one forty-seventh of district auditor's costs in House of Lords; in each of appeals of assisted appellants one forty-seventh of district auditor's costs to be paid out of legal aid fund, order suspended for four weeks to enable The Law Society to object if wish.*

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Solicitors: Christian Fisher & Co.; Clifford-Turner; Solicitor and Secretary, Liverpool City Council.

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to determine whether or not there was an infringement of any privilege found to exist. In fact, neither the letter from the Clerk of the Commons nor the Attorney-General have identified or specified the nature of any privilege extending beyond that protected by the Bill of Rights. In the absence of a claim to a defined privilege as to the validity of which your Lordships could make a determination, it would not in my view be right to withhold from the taxpayers a decision to which, in law, they are entitled. I would therefore allow the appeal.

I trust when the House of Commons comes to consider the decision in this case, it will be appreciated that there is no desire to impeach its privileges in any way. Your Lordships are motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament.

Appeal allowed with costs.

Solicitors: Kenwright & Cox for Jagger Son & Tilley, Birmingham; Solicitor of Inland Revenue.

J. A. G.

[HOUSE OF LORDS]

REGINA RESPONDENT

AND

GOUGH APPELLANT

1992 May 14, 15; 22 Farquharson L.J., Alliot and Cazalet JJ.

1993 Jan. 27, 28; Lord Goff of Chieveley, Lord Ackner,
May 20 Lord Mustill, Lord Slynn of Hadley
and Lord Woolf

Crime—Jury—Bias—Juror next door neighbour of defendant's brother—Juror unaware of connection until after trial—Whether real danger of bias—Whether irregularity affecting trial

The appellant was indicted on a single count of conspiring with his brother to commit robbery. At the trial the brother, who had been discharged on the application of the prosecution at the committal hearing, was referred to by name and a photograph of him and the appellant was shown to the jury and

A.C.

Reg. v. Gough (H.L.E.))

A a statement containing the brother's address was read to the jury. After the appellant had been convicted and sentenced the brother, who was in the court, started shouting. One of the jurors then recognised him as her next door neighbour. He then informed the defence that a member of the jury was his next door neighbour. Those facts were placed before the trial judge but he held that he was functus officio. The juror was later interviewed by the police and swore an affidavit in which she stated that she was unaware of the connection until after the jury had delivered its verdict. On appeal by the appellant on the ground that the presence of the brother's next door neighbour on the jury was a serious irregularity, the Court of Appeal (Criminal Division) held that the correct test was whether there was a real danger that the appellant might not have had a fair trial and dismissed the appeal.

C On appeal by the appellant:—

Held, dismissing the appeal, that the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors, and, in cases involving jurors, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely, whether, in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand; that, accordingly, the Court of Appeal, in dismissing the appeal, applied the correct test (post, pp. 660D–E, 670C–F, H–671B, 673G).

Reg. v. Spencer [1987] A.C. 128, H.L.(E.) applied.

E Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.; Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167, C.A. and Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, C.A. considered.

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) and Reg. v. Box [1964] 1 Q.B. 430, C.C.A. distinguished.

F Per curiam. (i) That in the case of alleged bias on the part of a justices' clerk, the court, having considered whether there was a real danger of bias, should go on to consider whether the clerk had been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant (post, pp. 670F–G, H–671B).

G (ii) There is only one established special category where the law assumes bias and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings. The courts should hesitate long before creating any other special category (post, pp. 664E–F, 670H–671B, 673F).

Decision of the Court of Appeal (Criminal Division), post, pp. 649 et seq.; [1992] 4 All E.R. 481 affirmed.

The following cases are referred to in their Lordships' opinions in the House of Lords:

H Ardahanian v. Unifert International S.A. (The Elissar) [1984] 2 Lloyd's Rep. 84, C.A.
 Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199, C.A.

- Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, H.L.(E.) A
- Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586, H.L.(E.); sub nom. *Rex v. Bath Compensation Authority* [1925] 1 K.B. 685, C.A.
- Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937; [1970] 2 All E.R. 690, C.A.
- Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; [1968] 3 W.L.R. 694; [1968] 3 All E.R. 304, C.A. B
- Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.
- Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1959] 2 Q.B. 276; [1959] 3 W.L.R. 96; [1959] 2 All E.R. 635, D.C.; [1960] 2 Q.B. 167; [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.
- Reg. v. Box* [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A. C
- Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.
- Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.
- Reg. v. McLean, Ex parte Aikens* (1974) 139 J.P. 261, D.C.
- Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102, C.A. D
- Reg. v. Pennington* (1985) 81 Cr.App.R. 217, C.A.
- Reg. v. Putnam* (1991) 93 Cr.App.R. 281, C.A.
- Reg. v. Rand* (1866) L.R. 1 Q.B. 230
- Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, C.A.
- Reg. v. Spencer* [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 3 All E.R. 928, H.L.(E.)
- Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 21 June 1972, D.C. E
- Rex v. Sunderland Justices* [1901] 2 K.B. 357, C.A.
- Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, D.C.

The following additional cases were cited in argument in the House of Lords:

- Reg. v. Chapman (William)* (1976) 63 Cr.App.R. 75, C.A.
- Reg. v. Weaver* [1968] 1 Q.B. 353; [1967] 2 W.L.R. 1244; [1967] 1 All E.R. 277, C.A. F
- Rex v. Twiss* (1918) 13 Cr.App.R. 177, C.C.A.

The following cases are referred to in the judgment of the Court of Appeal (Criminal Division):

- Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C. G
- Reg. v. Bliss* (1986) 84 Cr.App.R. 1, C.A.
- Reg. v. Box* [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.
- Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.
- Reg. v. Longman* (1980) 72 Cr.App.R. 121, C.A.
- Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102, C.A. H
- Reg. v. Mulvihill* [1990] 1 W.L.R. 438; [1990] 1 All E.R. 436, C.A.
- Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, C.A.
- Reg. v. Spencer* [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 3 All E.R. 928, H.L.(E.)

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A No additional cases were cited in argument in the Court of Appeal.

APPEAL against conviction.

The appellant, Robert Brian Gough, was convicted in the Crown Court at Liverpool, before Judge Lynch and a jury, of conspiracy to rob. He was sentenced to 15 years' imprisonment. He appealed against conviction on the ground, inter alia, that there was a material irregularity in the conduct of the trial in that one of the jurors was the next-door neighbour of his brother, David Gough.

The facts are stated in the judgment.

Benet Hytner Q.C. and *David Boulton* (assigned by the Registrar of Criminal Appeals) for the appellant.

C *Andrew Moran* and *Andrew Downie* for the Crown.

Cur. adv. vult.

22 May. FARQUHARSON L.J. read the following judgment of the court. On 25 April 1991 at Liverpool Crown Court the appellant was convicted on an indictment containing a single count of conspiracy to rob and was sentenced to a term of 15 years' imprisonment. The indictment was based on the commission of eight robberies which had taken place in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity such that the prosecution contended they had all been committed by the same two men.

On each occasion the two men were masked, generally with a full face balaclava or a stocking. The premises which were being attacked were betting shops. The robberies were committed at a time, at the beginning or end of the day, when a large amount of money would be in the till. Besides being masked the two robbers were also armed, one with a sawn-off shotgun and the other with a large knife. The technique was usually for the former to vault over the counter and security screen, threaten the staff and demand money while the latter stood by the door keeping guard against anyone coming in or a customer going out. Sometimes the guard carried the shotgun.

The first, second and sixth robberies were committed at the same premises, the robbers using the same escape route along a railway embankment on each occasion. One member of the staff of the betting shop, a Mr. Mooney, was sure that it was the same two men on each occasion by reason of their movements, build and general behaviour. Similarly another witness, Mr. Forman, who worked at a betting shop which was the subject of the fourth and fifth robberies concluded that the same men were responsible on both occasions. A Mrs. Hunter was confident that the same two men were responsible for the fourth and seventh robberies of another betting shop. There was also evidence linking the offenders who committed robberies three and four by the garments one of them was wearing. In short the prosecution were able to present a strong case that each of the first seven robberies were committed by the same two men. It was the case for the Crown that the two responsible were the appellant and his brother, David Stephen Gough.

After the sixth robbery the two robbers were seen to conceal something in the undergrowth of the railway embankment. The witness who observed this reported what he had seen to the police. There were found a sawn-off double barrelled shotgun, with a cartridge in both barrels, a bag containing gloves and masks and two pairs of blue jeans. The shotgun, which was of a somewhat antique design, was identified by witnesses as having been used in the third, fourth and sixth robberies, while others described a similar weapon being used on some of the other robberies. A significant piece of evidence was a set of four keys which were discovered in the pocket of one of the pairs of jeans. It was found that these keys fitted the main door of the block of flats where the appellant's father lived, as well as the flat itself. Another key fitted the front door lock of the house of the appellant's sister. A B

The eighth robbery followed a different pattern from the first seven; although two masked men were involved, they were not armed, and the premises concerned was an off-licence rather than a betting shop. There was no evidence from the scene of the robbery which implicated the appellant. However, some 10 minutes after the robbery took place, a Mrs. Maher was walking along a road about a quarter of a mile from the off-licence when she saw an old Ford Capri motor car with a beige vinyl roof pull up in the middle of the road. As she watched she saw a man running from the direction of the road where the off-licence was situated and get into the front passenger seat of the vehicle. The car was driven away. After the appellant's arrest Mrs. Maher picked him out on an identification parade as the man she had seen running to the car. Furthermore she was taken by the police to a car park where there were a large number of vehicles and identified a Capri as being the vehicle she had seen. It transpired that the Capri belonged to David Gough's wife, Elaine, and up to the preceding January had been owned by the appellant. C D E

Both the appellant and David Gough were arrested on 22 March 1990. They had been kept under observation by the police and were seen to arrive at the block of flats, where their father lived, in the same Ford Capri with David Gough driving. The appellant went into the flats and was later joined by his brother. When they emerged the appellant was carrying two jackets, one a light grey tweed and the other dark grey. They were arrested when they got back into the car. The appellant had in his pocket a set of keys, two of which again operated the main door to the block of flats and his father's flat respectively. Witnesses who were present at the robberies later identified the tweed jacket as being worn by one of the robbers in the third and fourth robberies, and the dark grey jacket in the fifth. F G

The father's flat was searched by the police, who found a suitcase containing some of the appellant's clothing and correspondence, together with his cheque-book and cheque card. Hidden at the back of a cupboard in the kitchen the police discovered four shotgun cartridges. Microscopic examination subsequently revealed that one of these cartridges had at some time been loaded into the shotgun found on the railway embankment after the sixth robbery. H

Both the appellant and David Gough were charged with the robberies. At the committal proceedings the prosecution applied for David Gough

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A to be discharged on the grounds that there was insufficient evidence against him. We have not been concerned with the merits of this decision.

At the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Gough to commit robberies. By his notice of appeal the appellant claims that the judge of his own motion should have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. Mr. Hytner, for the appellant, has argued that on principle a defendant should not be tried on a conspiracy count when substantive counts are available. Apart from the artificiality of a situation like the present where the alleged co-conspirator has been discharged, it is unfair for a defendant to have to meet a global charge of this nature instead of counts which he can meet or attempt to meet individually.

C Furthermore if a jury convicts on a conspiracy count based on eight overt acts, that is the individual robberies, it is not possible to say which overt acts have been proved to the jury's satisfaction. In this case the evidence was very weak on some counts.

The prosecution have contended that the facts of the present case are an exception to the general principle in that the criminality of the enterprise is not sufficiently contained in an allegation of eight individual robberies. The range and number of these crimes are such that a conspiracy count is more appropriate.

D At the trial counsel for the appellant indicated at the outset to the judge that he would be challenging the conspiracy count in the indictment. However, for whatever reason, he did not in the result do so. We are clearly of the opinion that in such a situation it is not for the judge to order an amendment of the indictment. It is for counsel to say whether it is in his client's best interest to seek such an amendment. Mr. Hytner recognises that he cannot really sustain this ground of appeal before this court in the absence of an application to amend in the court below.

E Although David Gough was not tried with the appellant, he was referred to by name with some frequency during the proceedings. The court does not know how often David Gough attended his brother's trial but on an occasion when he was present he recognised one of the jurors as his next door neighbour. He did not draw this to the attention of those representing the appellant during the trial. After the appellant had been sentenced David Gough started shouting and it was at this point that the juror, Mrs. Smith, recognised him. The facts were placed before the judge who decided, correctly in our view, that he had no jurisdiction to take any action, the appellant having been convicted.

G However, a statement was taken from Mrs. Smith which was verified by affidavit. In this statement Mrs. Smith said (1) when she began her service on the jury she did not recognise the name "Gough" as she knew her neighbour as "Steve." Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours. (2) The name David Gough was mentioned on a number of occasions during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and had no idea he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley

H

Way—Mrs. Smith lives at no. 2—and concerned the Capri motor car. She wondered whether Steve was David Gough but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as “mug shots.” Mrs. Smith did not recognise David. (6) The fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury. A B

Another matter raised by Mrs. Smith in her statement was that her son-in-law’s brother was married to the sister of the Goughs. Although she knew the sister by her Christian name, Valerie, she was unaware of the connection.

Before us Mr. Hytner argues that the presence of Mrs. Smith on the jury constituted a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. He has demonstrated that there are two conflicting lines of authority on the question of bias, or the appearance of bias, in criminal proceedings. C

The test, according to the first line of authorities, when considering whether a conviction should be quashed on the grounds of bias is posed in the following question: was there a real danger that the accused may not have had a fair trial? If this be the correct question Mr. Hytner concedes that he cannot disturb this verdict, because the circumstances of the case are such that there was not such a danger. He contends however that the proper test is: would a reasonable and fair-minded person sitting in the court and knowing all the relevant facts have a reasonable suspicion that a fair trial of the defendant was not possible? D E

Mr. Hytner submits, applying that test, that the fair-minded observer would suspect in the present case that a fair trial was not possible. In this case Mrs. Smith in her affidavit evidence has stated that she was unaware of the relevant facts connecting her to the appellant until after the jury had delivered its verdict. This evidence was unchallenged. Accordingly this can be distinguished from the various authorities which have been cited to us in that in these latter cases the relevant “connecting” facts giving rise to the alleged bias have already been known to the particular member of the tribunal, against whom bias has been raised, throughout the trial in question. This did not apply in the present case. If the fact that Mrs. Smith was not aware of the relevant facts connecting her to the appellant had been known to the fair-minded observer, then surely the observer would, in those circumstances, have regarded the trial as having been a fair one. Should we impute knowledge of Mrs. Smith’s particular state of mind to the fair-minded observer? Mr. Hytner submits that such an observer would be bound to conclude that Mrs. Smith must have realised who the case concerned when she heard the address referred to in the statement and also when she saw David Gough’s photograph. Her claim of ignorance would be unacceptable to a fair-minded observer. We think there is force in this contention. Accordingly we do not seek to distinguish the instant case by imputing to the fair-minded observer *actual* knowledge of Mrs. Smith’s unawareness of the relevant facts until after the verdict had been delivered. F G H

- A Mr. Moran contends that the first of the two tests referred to above is the correct one to apply, at all events when one is dealing with a juror. If that be right the appeal fails ex concessis, but Mr. Moran claims that even if one applies the second test the question must be decided against the appellant. There was no prejudice real or apparent to the appellant by the presence of Mrs. Smith on the jury and no risk of an unfair trial. Furthermore, if there was any bias on the part of Mrs. Smith it was likely to have been exercised in favour of the appellant rather than against him, since, according to her statement, her relations with David Gough were friendly.
- B

- C We have been referred to a considerable number of authorities by counsel on both sides. In *Reg. v. Box* [1964] 1 Q.B. 430 a five-judge division of the Court of Criminal Appeal declined to disturb a conviction where the foreman of the jury knew that the appellants were villains, that they were ex-burglars and were associates of prostitutes. Counsel had argued that even if a fair trial had been possible justice had not manifestly been seen to be done, but the court took the view that there was no proof that the foreman was unable to do what he had sworn to do by his oath. Plainly the Court of Criminal Appeal were applying the "real danger test" rather than that of the independent observer, as on those facts it could hardly be said that the latter would not have had a suspicion that a fair trial was not possible.
- D

- E The same approach was taken by this court in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283. During the trial the chief prosecution witness and another witness spoke to three jurors in the court canteen. The judge investigated the matter and found that the witnesses had done little more than pass the time of day. In rejecting the appeal Lord Lane C.J., giving the judgment of the court, said, at p. 285:

- F "Upon those facts the judge had to decide whether or not there was a real danger that the appellant's position had been compromised by what had happened. Was there a real danger that she was or might have been prejudiced by what had gone on? The discretion which he undoubtedly had to stop the trial had of course to be exercised judicially and had to be exercised upon the facts as he knew them. It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger."

- In *Reg. v. Bliss* (1986) 84 Cr.App.R. 1 this court followed *Reg. v. Box* as well as *Reg. v. Sawyer*, 71 Cr.App.R. 283, Garland J. saying, at p. 6:

- G "It appears to us that the principle which emerges from these cases is that this court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not . . . have received a fair trial."

- H *Reg. v. Sawyer* was approved by the House of Lords in *Reg. v. Spencer* [1987] A.C. 128. The facts need not be repeated here but in his speech Lord Ackner said, at p. 144:

"The correct test is the one stated in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, 285 namely, whether there was a 'real danger' that the appellants' position had been prejudiced in the circumstances . . ."

From the other line of cases we turn first to *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549. In a case where a greengrocer was being prosecuted under the weights and measures legislation for giving short weight, the purchaser of the vegetables being a county council school, it was revealed that the chairman of the bench was on the education committee. Lord Widgery C.J. said, at p. 552:

“There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned. When an application is made to set aside a decision on the ground of bias, it is of course not necessary to prove that the judicial officer in question was biased. It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment to which I have referred.”

In *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119 the applicant was charged with criminal damage. The justices who were to try the case had been given sheets from the court register produced through a computer. These revealed that there were seven further charges pending against the applicant. Despite protests from the defending solicitors the bench decided to hear the charge. On an application for judicial review the Divisional Court held, at p. 123:

“the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery C.J. in a test which he laid down in *Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 20 June 1972 . . . Would ‘a reasonable and fair-minded person sitting in court and’ knowing all the relevant facts have a ‘reasonable suspicion that a fair trial for’ the applicant ‘was not possible’?”

The application was granted on those facts.

That test was applied in *Reg. v. Mulvihill* [1990] 1 W.L.R. 438 when a judge tried a robbery case where the loser was a bank in which he held shares, the court distinguishing between the role of the judge and the jury. The *Topping* test, if one can use that abbreviation, was also applied in *Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102 by this court. During a trial on indictment for theft from Marks and Spencer Plc. it emerged that one of the jurors was an employee of that organisation though working at a different branch. In quashing the conviction the court held that the judge when asked to discharge the juror had not gone into the question of “the appearance of bias.”

It is difficult to discover any basis on which these two lines of authority can live together. Mr. Moran has submitted that a distinction

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- A can be drawn between the test to be applied in jury cases and that which is appropriate for magistrates' courts or other inferior tribunals entrusted with fact finding responsibilities. We feel we must accept this distinction because there is no other way of reconciling most of the authorities, though it is difficult to understand why the test of bias should be any different in considering the position of a magistrate compared with that of a juror. The only case which cannot be fitted into this dichotomy is
- B the one last cited, namely *Reg. v. Morris (orse. Williams)*, in which giving the judgment of the court I applied the *Topping* test [1983] 1 W.L.R. 119 to the position of a juror. The decision in *Reg. v. Morris (orse. Williams)*, 93 Cr.App.R. 102 cannot stand with that of the five-judge court in *Reg. v. Box* [1964] 1 Q.B. 430; and, having regard to the decision of the House of Lords in *Reg. v. Spencer* [1987] A.C. 128, *Reg. v. Morris (orse. Williams)* should not be followed to the extent that it applies the *Topping* test to trials on indictment.
- C

Accordingly, the appeal fails on this point because of the application of the "real danger" test to jury trials in cases of bias. It is therefore not necessary to decide whether (a) the application of the *Topping* test would have caused a different result, or (b) whether there was in fact any bias.

- D A further ground of appeal alleging inconsistency of verdicts based on *Reg. v. Longman* (1981) 72 Cr.App.R. 121 was not pursued and could not in our view have assisted the appellant.

The appeal against conviction is dismissed.

Appeal dismissed.

- E *Certificate under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely, "Where a complaint is made after the conclusion of a trial that a juror may have been biased against the defendant what is the proper test for the Court of Appeal to apply in deciding whether or not to order a retrial?"*
- F *Leave to appeal refused.*

Solicitors: Crown Prosecution Service, Merseyside.

- G [Reported by MRS. CLARE BARSBY, Barrister]

The defendant appealed by leave of the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Browne-Wilkinson and Lord Mustill) granted on 20 July 1992.

- H *Benet Hytner Q.C.* and *David Boulton* for the appellant. Two tests have been applied when considering whether a conviction should be quashed on the ground of bias: (a) was there a real danger that the defendant may not have had a fair trial ("the real danger test") and

(b) would a reasonable and fair minded person sitting in the court and knowing all the relevant facts have had a reasonable suspicion that a fair trial of the defendant was not possible ("the reasonable observer test")?

The real danger test has its genesis in *Reg. v. Box* [1964] 1 Q.B. 430 and is supported by *Rex v. Twiss* (1918) 13 Cr.App.R. 177. The other authorities on that test include *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283; *Reg. v. Spencer* [1987] A.C. 128; *Reg. v. Pennington* (1985) 81 Cr.App.R. 217 and *Reg. v. Putnam* (1991) 93 Cr.App.R. 281.

The reasonable observer test is based on the old and well established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done: *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259. [Reference was also made to *Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 21 June 1972; *Reg. v. McLean, Ex parte Aikens* (1974) 139 J.P. 261; *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119 and *Reg. v. Morris (or. Williams)* (1990) 93 Cr.App.R. 102.] The reasonable observer test has its genesis in a line of authorities stating two apparently conflicting tests: was there a real likelihood of danger of bias (see *Reg. v. Rand* (1986) L.R. 1 Q.B. 230; *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 and *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41) and was there a reasonable suspicion of bias? The apparent conflict was reconciled in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599. [Reference was also made to *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167.]

The real danger test was developed in isolation from the reasonable observer test. In none of the real danger cases was any of the reasonable observer cases ever cited in argument. The reasonable observer test is to be preferred because it is more soundly based in jurisprudence. There is no justification for applying a different test to magistrates, members of inferior tribunals or arbitrators: see *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84 and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199.

Brian Leveson Q.C. and *Andrew Moran* for the Crown. The concept of bias covers a wide range of activity, so the first task of the court is to establish the facts. If there is no underlying substance to the allegation, that is the end of the matter: *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 258.

The test in relation to bias, other than in respect of pecuniary or proprietary interest, has been propounded in two different ways: (a) is there a real likelihood of bias (see *Reg. v. Rand*, L.R. 1 Q.B. 230; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84 and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199) and (b) is there a reasonable suspicion of bias? Recently the distinction has become less evident: see *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577 and *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937, but the

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A correct interpretation of the predominant principle is that the test should be whether the court should conclude objectively from all the facts that there was a real likelihood that the relevant tribunal was in fact prejudiced in some operative way. The test is objective: *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 21 June 1972 and *Reg. v. McLean, Ex parte Aikens*, 139 J.P. 261.

B In relation to the knowledge and conduct of a juror in a criminal trial the test of "real danger of prejudice" has been consistently applied. That is the equivalent of the objective real likelihood test (see *Rex v. Twiss*, 13 Cr.App.R. 177; *Reg. v. Box* [1964] 1 Q.B. 430; *Reg. v. Spencer* [1987] A.C. 128 and *Reg. v. Putnam*, 93 Cr.App.R. 281) and is in keeping with the exercise of parallel jurisdiction in other areas of criminal procedure.

C [Reference was made to *Reg. v. Weaver* [1986] 1 Q.B. 353 and *Reg. v. Chapman (William)* (1976) 63 Cr.App.R. 75.]
Hytner Q.C. replied.

Their Lordships took time for consideration.

D 20 May. LORD GOFF OF CHIEVELEY. On 25 April 1991, at Liverpool Crown Court, the appellant Robert Brian Gough was convicted on an indictment containing a single count of conspiracy to rob, and was sentenced to a term of 15 years' imprisonment.

E The indictment was based upon the commission of eight robberies in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity. In all seven cases the premises concerned were a betting shop; the robbery was committed by two masked men, either at the beginning or at the end of the day; the men were armed, one with a shotgun and the other with a knife; and the modus operandi was similar. The prosecution contended that the first seven robberies had been committed by the same two men, the appellant and his brother David Stephen Gough. There was however insufficient evidence to link this brother with the eighth robbery, and the evidence against him on the other seven was weak. In the result, at the committal proceedings the prosecution applied for David Stephen Gough to be discharged on the ground that there was insufficient evidence against him; and at the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Stephen Gough to commit the robberies.

G On appeal, the appellant claimed that the judge should on his own motion have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. That submission was rejected by the Court of Appeal. There was however another ground of appeal, which is the subject of the present appeal to your Lordships' House. This was that, by reason of the presence on the jury of a lady who was David Stephen Gough's next door neighbour, there was a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. That submission was also dismissed by the Court of Appeal, and the appellant now appeals to your Lordships' House from that part

of the decision of the Court of Appeal, with the leave of your Lordships' House. A

It was not until after the trial that it emerged that a member of the jury was David Stephen Gough's next door neighbour. In opening and in the indictment, he was referred to as David Gough; but in closing speeches he was referred to as David Stephen Gough. The defence case was based on the premise that David Stephen Gough was one of the robbers. He had a record of previous convictions, as had the appellant. During the trial, photographs of both brothers had been produced to the jury, and retained by them. Furthermore the vehicle alleged to have been used in the eighth robbery was owned by Elaine Gough, the wife of David Stephen Gough, and her statement including her address was read to the jury. The car must have been parked outside the juror's house for a number of months, and at the time at least of the eighth robbery. B C

After sentence was passed, David Stephen Gough, who was then present in court for the first time, started shouting; and it was at this point that the juror, Mrs. Smith, recognised him. He in his turn informed the defence that one member of the jury was his next door neighbour. This was drawn to the attention of the judge, but he rightly decided that he was by then *functus officio*. However the juror was later interviewed by the police, and subsequently swore an affidavit. The effect of the affidavit was summarised by the Court of Appeal, ante, pp. 651–652: D

“(1) when she began her service on the jury she did not recognise the name ‘Gough’ as she knew her neighbour as ‘Steve.’ Similarly she knew David’s wife as Elaine during the two years that they had been her next door neighbours. (2) The name David Gough was mentioned on a number of occasions during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and she had no idea that he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley Way—Mrs. Smith lives at no. 2—and concerned the Capri motor car. She wondered whether Steve was David Gough but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as ‘mug shots.’ Mrs. Smith did not recognise David. (6) The fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury.” E F G

The affidavit was and remains unchallenged.

It was on these facts that the question arose whether the courts should conclude that, by reason of the presence of Mrs. Smith on the jury, there was such a possibility of bias on her part against the appellant that his conviction should be quashed. As I have already recorded, that question was answered by the Court of Appeal in the negative. The Court of Appeal however identified in the cases two strands of authority, revealing H

- A that differing criteria have been applied in the past when considering the question of bias. The two tests have, as will appear, themselves been variously described. The Court of Appeal identified them as being (1) whether there was a real danger of bias on the part of the person concerned, or (2) whether a reasonable person might reasonably suspect bias on his part. In the end, the court concluded that the former test was to be applied in cases concerned with jurors, and the latter in those concerned with magistrates or other inferior tribunals. The court therefore applied the real danger test in the present case and, on that basis, held that the appeal must fail, as indeed had been accepted by counsel for the appellants.

- B In considering the subject of the present appeal, your Lordships have been faced with a series of authorities which are not only large in number, but bewildering in their effect. It is only too clear how great a difficulty courts of first instance, and indeed Divisional Courts and the Court of Appeal, must face in cases which come before them; and there is a compelling need for your Lordships' House to subject the authorities to examination and analysis in the hope of being able to extract from them some readily understandable and easily applicable principles, thus obviating the necessity of conducting on each occasion a trawl through authorities which are by no means easy to reconcile. It is on that exercise that I now propose to embark.

- C A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a jurymen was biased, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or jurymen. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the jurymen in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular jurymen actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias—a point stressed by Devlin L.J. in *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." I shall return to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether

there is such a degree of possibility of bias that the decision in question should not be allowed to stand.

My initial reaction to the conclusion of the Court of Appeal in the present case was one of surprise that it should be necessary to draw a distinction between cases concerned with justices and those concerned with jurymen, and to conclude that different criteria fell to be applied in investigating allegations of bias in the two categories of case. Evidently, the Court of Appeal was itself unhappy in having to reach this conclusion, which it felt bound to reach on the authorities. Of course, there are some distinctions between the two groups of cases. For example, in the case of jurymen there is the inhibition, to which I have already referred, against investigating the state of mind of a jurymen when reaching his decision in the privacy of the jury room. There is also the fact that the possibility of bias may come to light in the course of a jury trial—for example, a jurymen may have unwisely indulged in conversation with a witness, or previous convictions of the accused may have accidentally been revealed to the jury. Situations such as these have to be dealt with by the judge when they arise; and he may be able to deal with the situation on the spot, for example by issuing a warning to the jury, or by discharging the particular jurymen involved. And, if a verdict is challenged before the Court of Appeal on the ground of bias, the ultimate principles to be applied are to be found in section 2 of the Criminal Appeal Act 1968. But, even taking these matters into account, I am left with the feeling that there should be no reason, in principle, why the test of bias should be different in the two groups of cases—those concerned with justices and those concerned with juries. I shall however, as a matter of convenience, submit the authorities concerning these two categories of case to separate consideration, before reaching any final conclusion on this point.

The argument before the Appellate Committee was presented on the basis that there were two rival, alternative tests for bias to be found in the authorities, and that the result in the present case depended on the choice made by your Lordships' House between them. The first test, favoured by Mr. Hytner for the appellant, was whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial by the defendant was not possible. The second test, favoured by Mr. Leveson for the Crown, was whether there was a real likelihood of bias. I shall for convenience refer to these two tests respectively as the reasonable suspicion test, and the real likelihood test. It was recognised by Mr. Hytner before the Appellate Committee, as before the Court of Appeal, that if the real likelihood test is to be preferred, the appeal must fail.

In fact, examination of the authorities reveals that selection of the appropriate test does not simply involve a choice between the two tests formulated by counsel in the present case. Thus, when the appropriate test in cases concerned with juries fell to be considered by your Lordships' House in *Reg. v. Spencer* [1987] A.C. 128, a variant of the real likelihood test, viz. whether there was a real danger of bias, was adopted, as it was by the Court of Appeal in the present case. There are also to be found in the authorities variants of the reasonable suspicion

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A test; and sometimes the two tests seem to have been combined. At the heart of the present inquiry lies the need to identify the precise nature of these tests, and to consider what, if any, are the differences between them. For that purpose, I propose to consider first the cases concerned with justices and other inferior tribunals, where the principal problems appear to have arisen; and then to turn to the cases concerned with juries, of which *Reg. v. Spencer* is of great importance.

B Before I do so, however, I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter." The principle is expressed in the maxim that nobody may be judge in his own cause (*nemo iudex in sua causa*). Perhaps the most famous case in which the principle was applied is *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793:

E "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

F In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

G I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary first to put on one side the very rare case where actual bias is shown to exist. Of course, if actual bias is proved, that is an end of the case; the person concerned must be disqualified. But it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect,

and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts.

I turn first to the authorities concerned with justices, with whom I bracket members of other inferior tribunals. Of the authorities cited to the Appellate Committee in the course of argument, the first in point of time was *Reg. v. Rand*, L.R. 1 Q.B. 230, to which I have already referred, in which Blackburn J. stated the law in terms of the real likelihood test. He referred, at p. 233, to cases in which there was "a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties" in which event "it would be very wrong in him to act." That test was later approved by three members of the Appellate Committee of this House in *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 (a case concerned with licensing justices): see p. 591, *per* Viscount Cave L.C., p. 607, *per* Lord Atkinson (citing *Rex v. Sunderland Justices* [1901] 2 K.B. 357), and p. 610, *per* Lord Sumner (quoting from the dissenting judgment of Atkin L.J., sub nom. *Rex v. Bath Compensation Authority* [1925] 1 K.B. 685, 712). Furthermore Lord Shaw of Dunfermline agreed with Viscount Cave L.C.; and, although the other member of the Appellate Committee, Lord Carson, spoke simply of "a likelihood of bias" (see p. 617), there is no reason to suppose that he intended any different test.

At this stage, however, I must turn to the well known case of *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256. There the applicant came before justices charged with the offence of dangerous driving, which had involved a collision between his vehicle and another vehicle. The solicitor acting as magistrates' clerk on this occasion was also acting as solicitor for the other driver in civil proceedings against the applicant arising out of the collision. At the conclusion of the evidence before the magistrates, the acting clerk retired with them in case his help should be needed on a point of law; but in fact the magistrates did not consult him, and he himself abstained from referring to the case. The magistrates convicted the applicant, but his conviction was quashed by a Divisional Court. This is of course the case in which Lord Hewart C.J. let fall his much-quoted dictum, to which I have already referred. I think it helpful, however, to quote from his judgment in extenso, see pp. 258-259:

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was

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A so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that

B the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In

C those circumstances I am satisfied that this conviction must be quashed . . . "

The case was therefore concerned with the possibility that the acting magistrates' clerk, who plainly had such an interest in the outcome of the civil proceedings that he might well be biased against the applicant in the proceedings before the magistrates, might influence the decision of

D the magistrates adversely to the applicant. Lord Hewart C.J. clearly thought that the acting magistrates' clerk's involvement in the civil proceedings was such that he should never have participated in the hearing before the magistrates, and went so far as to indicate that "even a suspicion that there had been an improper interference with the course of justice" is enough to vitiate the proceedings, an observation which has been invoked as the origin of the reasonable suspicion test. Indeed,

E following the *Sussex Justices* case, there developed a tendency for courts to invoke a test requiring no more than a suspicion of bias.

However in a later case, also concerned with alleged bias on the part of a magistrates' clerk, *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, a Divisional Court, having received the assistance of the Solicitor-General as amicus curiae, approached the question on the basis

F that a real likelihood of bias must be established. In that case, the applicant was convicted of an offence under the Food and Drugs Act 1938. The information alleging the offence had been laid by a sampling officer, for the Cornwall County Council. The justices' clerk, who in the course of the hearing was invited into the justices' private room in order to advise them, was a member of the county council (though not of the relevant committee of the council, the Public Health and Housing

G Committee). For this reason, the applicant alleged that a reasonable suspicion of bias might arise, and that his conviction should be quashed. The court dismissed the application, holding that in the circumstances there was no real likelihood of bias on the part of the justices' clerk. Moreover the court was at pains to reject any suggestion that mere suspicion of bias was sufficient; and, while endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J.

H in the *Sussex Justices* case, nevertheless deplored the principle

"being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias:" see pp. 51-52, *per curiam*.

In the *Sussex Justices* case [1924] 1 K.B. 256 it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the court went on to hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the *Camborne Justices* case [1955] 1 Q.B. 41, in which it was held that, since there was no real likelihood of bias on the part of the justices' clerk, there was no ground for quashing the justices' decision. The cases can therefore be distinguished on the facts. But the question remains whether, in a case involving a justices' clerk, it is enough to show that there was a real likelihood of bias on the part of the clerk, or whether it must also be shown that, by reason of his participating in the decision-making process, there was a real likelihood that he "would impose his influence on the justices or give them wrong legal advice:" see p. 46, *per* Sir Reginald Manningham-Buller Q.C., S.-G., *arguendo* as *amicus curiae*. In my opinion, the latter view is to be preferred. Of course, nowadays a justices' clerk will not withdraw with the justices, but will only join them if invited to advise them on a question of law. If the clerk is not so invited, any bias on his part will ordinarily have no influence on the outcome of the proceedings; though if he has any interest in the outcome, it is obviously undesirable that he should be acting at all in the capacity of clerk in relation to those proceedings, in case his advice is called for. If however he is invited to give the justices advice, it is open to the court to infer that, having regard to the insidious nature of bias, there is a real likelihood of the clerk's bias infecting the views of the justices adversely to the applicant.

I have had the opportunity of reading in draft the speech of my noble and learned friend, Lord Woolf, and it follows from what I have said that I am in agreement with his conclusions both about the effect of the *Sussex Justices* and *Camborne Justices* cases, and that the only special category of case, in which it is unnecessary to inquire whether there was any real likelihood of bias, relates to circumstances where a person acting in a judicial capacity has a direct pecuniary interest in the outcome of the proceedings.

In *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 187, Devlin L.J. also preferred the real likelihood test, considering that the term "real likelihood of bias" is not used to import the principle in *Rex v. Sussex Justices, Ex parte McCarthy*, which had been invoked by Salmon J. at first instance [1959] 2 Q.B. 276, 286. It is, I think, desirable that I should quote the relevant passage from the judgment of Devlin L.J. in full, at pp. 186-187:

"Here is an application by the co-operative society and there is sitting to decide it a bench which is wholly composed of members of the society and one woman whose husband was a member of the

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A society, presided over by a chairman who had interested himself actively in the conduct of the affairs of the society or was desirous of doing so. Is there, in those circumstances, a real likelihood of bias? I am not quite sure what test Salmon J. applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done, I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias—not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term ‘real likelihood of bias’ is not used, in my opinion, to import the principle in *Rex v. Sussex Justices* to which Salmon J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. ‘Real likelihood’ depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.”

F It is plain from this passage that Devlin L.J. was concerned to get away from any test founded simply upon suspicion—“the sort of impression that might reasonably get abroad”—and to focus upon the actual circumstances of the case in order to decide whether there was in those circumstances a real likelihood of bias. His question—do the circumstances give rise to a real, likelihood that the justices might be biased?—suggests that he was thinking of likelihood as meaning not probability, but possibility; the noun probability is not aptly qualified by the adjective “real,” and the verb “might” connotes possibility rather than probability. Such a reading makes the real likelihood test very similar to a test requiring a real danger of bias. It is true that, at the conclusion of the passage which I have quoted, Devlin L.J. stated that the matter must be determined “upon the probabilities.” I do not however think that he meant “on the balance of probabilities,” but rather that he was emphasising that the question was to be answered by reference to the relevant circumstances.

H However nine years later, in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, the law took a different turn. The

case was concerned with a decision by a rent assessment committee, when determining fair rents for a block of flats in London. The rent so determined was substantially below the rent suggested even by the expert called by the tenants. The landlord sought to quash the decision on the ground that the chairman of the committee was a solicitor who had been concerned with advising tenants of flats in another comparable block of flats. The Court of Appeal, allowing the appeal from a Divisional Court, held that the facts were such as to give rise to an appearance of bias on the part of the chairman, and on that ground they quashed the decision of the committee, even though there was no actual bias on his part. In so holding, the court rejected the argument of counsel for the committee, who invited the court to proceed on the basis of the real likelihood test. Lord Denning M.R. and Edmund Davies L.J. both invoked the much quoted dictum of Lord Hewart C.J. in *Rex v. Sussex Justices*, and declined to follow Devlin L.J.'s approach in *Reg. v. Barnsley Licensing Justices*. Lord Denning M.R. stated the law as follows, at p. 599:

“In *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association*, Devlin L.J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg. v. Huggins* [1895] 1 Q.B. 563 and *Rex v. Sunderland Justices, per Vaughan Williams L.J.* [1901] 2 K.B. 357, 373. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, 48–51 and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird* [1953] 1 W.L.R. 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”

Edmund Davies L.J. said, at p. 606, that it was enough if “there is reasonable suspicion of bias on the part of one or more members of the adjudicating body;” and the third member of the court, Danckwerts L.J., appears to have, proceeded, despite some doubt, upon a similar basis, at pp. 601–602.

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- A I shall return to this case in a moment, but I have to say that it left a legacy of some confusion behind it. In two cases, *Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 21 June 1972, and *Reg. v. McLean, Ex parte Aikens* (1974) 139 J.P. 261, Lord Widgery C.J. was prepared to proceed on the basis of the reasonable suspicion test, though in neither case was the choice of test decisive. However, in *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549, Lord
- B Widgery C.J. did not feel able to decide whether the real likelihood test or the reasonable suspicion test was appropriate. In that case the appellants were convicted of offences of having sold vegetables by weight and having delivered a lesser weight to two county schools. The presiding justice at the trial was a member of the education committee, and was a governor of two schools, though not of those in question. A Divisional
- C Court quashed the convictions on the ground that the presiding justice should have disqualified herself from hearing a case where she had an active interest in the schools which were the victims of the offence. In so holding, Lord Widgery C.J. referred to both the real likelihood test and the reasonable suspicion test. However it was not clear to him from *Lannon* which of those tests fell to be applied. Furthermore, in *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119, in which
- D justices became aware of other unrelated charges against the defendant whose case they were about to consider, the Divisional Court applied a form of the reasonable suspicion test derived from the judgment of Lord Widgery C.J. in *Ex parte Burbridge*; but they prefaced their choice of this test with the observation that, in agreement with a view expressed by Cross L.J. in *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937,
- E 949, there was little if any difference between the real likelihood test and the reasonable suspicion test, because if a reasonable person with the relevant knowledge thinks that there might well be bias, then there is in his opinion a real likelihood of bias—a view which appears to assume that real likelihood of bias means no more than a real possibility of bias.
- F I have already quoted passages from the judgments of Lord Denning M.R. and Edmund Davies L.J. in *Metropolitan Properties (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599, 606, which show that they did not in fact state the same test, Lord Denning's test being really no more than an adaptation of the real likelihood test, and only Edmund Davies L.J. enunciating a test founded upon reasonable suspicion of bias. Furthermore Lord Denning M.R., while purporting to differ from
- G Devlin L.J. in the *Barnsley Licensing Justices* case [1960] 2 Q.B. 167, in fact differed very little from him. Thus, both considered that it was not necessary that actual bias should be proved, the court having therefore to proceed upon an impression derived from the circumstances; and that the question is whether such an impression reveals a real likelihood of bias. The only difference between them seems to have been that, whereas Devlin L.J. spoke of the impression which the court gets from the circumstances, Lord Denning M.R. looked at the circumstances from
- H the point of view of a reasonable man, stating that there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, was biased. Since however the court investigates the actual circumstances, knowledge of such

circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man. It is true that Lord Denning M.R. expressed the test as being whether a reasonable man would think it "likely or probable" that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally there is, so far as I can see, no practical distinction between the test as I have stated it, and a test which requires a real danger of bias, as stated in *Reg. v. Spencer* [1987] A.C. 128. In this way, therefore, it may be possible to achieve a reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals, and cases concerned with jurors.

I turn therefore to the cases concerned with jurors; and here the relevant authorities support the view which I have just expressed. It is true that, after the *Lannon* case, there were cases in which the reasonable suspicion test was adopted: see, e.g., *Reg. v. Pennington* (1985) 81 Cr.App.R. 217. However, it is appropriate to turn straight to the leading authority, which is the decision of your Lordships' House in *Reg. v. Spencer* [1987] A.C. 128. In that case the defendants, who were members of the nursing staff at a secure hospital, were convicted in two separate trials of ill treating patients at the hospital, contrary to section 126 of the Mental Health Act 1959. On appeal, the principal issue was one of corroboration. But in addition a question arose with regard to one of the jurors at the first trial. He had clearly demonstrated in the course of the trial that he was biased against the defendants. At first the judge, having consulted counsel, decided to take no action. However, it then transpired that the juror's wife worked at another mental hospital which figured in the evidence at the trial. The judge, fearing that the juror might have heard things from his wife which it would be better if he had not heard, decided to discharge him; but, discovering that the juror was in the habit of giving three other members of the jury a lift home, warned the members of the jury that they should not discuss the case further with him. On the following morning, however, defence counsel submitted that the remainder of the jury should be discharged; but the judge decided, in the exercise of his

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A.C.

Reg. v. Gough (H.L.(E.))

A discretion, not to do so. Counsel for the prosecution had submitted that the test which the judge should apply was that the jury should not be discharged unless it could be shown that there was a very high risk that the apparently biased jury had influenced any of his fellow jurors. Lord Ackner (with whom Lord Brandon of Oakbrook and Lord Mackay of Clashfern agreed) however held that the correct test was that stated by the Court of Appeal in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, 285, viz., whether there was a real danger that the appellant's position had been prejudiced in the circumstances. This was the test which had in fact been applied by the Court of Appeal, but they had concluded that there was no realistic chance that the three jurors who had travelled in the car had been prejudiced or biased by what they had heard. On this point, however, Lord Ackner found himself unable totally to dismiss that possibility, and he concluded, with the remainder of the Appellate Committee, that the verdict was unsafe and the appeal must be allowed [1987] A.C. 128, 146. Subsequently, the test so established in *Reg. v. Spencer* was applied by the Court of Appeal in *Reg. v. Putnam* (1991) 93 Cr.App.R. 281. I should add that in *Reg. v. Morris (or se. Williams)* (1990) 93 Cr.App.R. 102, in which the reasonable suspicion test was applied, it appears that *Reg. v. Spencer* was not cited to the court. In the light of the conclusion which I have reached, I do not think that it is necessary for me to consider any more of the earlier cases concerned with allegation of bias on the part of jurors. I only wish to say that *Reg. v. Box* [1964] 1 Q.B. 430, to which some criticism was directed in the course of argument, appears to have been concerned primarily with an allegation of actual bias, and to have reasserted the principle that knowledge by a juror of a defendant's character or previous convictions is not an automatic disqualification.

There are however two features of jury cases to which I will briefly draw attention. The first is that the possibility of bias on the part of a juror may, as in *Reg. v. Spencer* itself, come to the attention of the judge in the course of the trial. In such circumstances the judge, in deciding whether to exercise his discretion to discharge one or more members of the jury, should apply the same test as falls to be applied on appeal by the Court of Appeal, viz., whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror, and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury. It is unnecessary for me to say any more on this subject, to which no argument was addressed in the present case. Second, if any question of bias on the part of a juror arises on appeal, the Court of Appeal, having applied the real danger test, will then proceed in the light of its conclusion on that test to exercise its powers under section 2 of the Criminal Appeal Act 1968, in the normal way, as was done by your Lordships' House in *Spencer*.

I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, derived from *Ex parte Topping*

[1983] 1 W.L.R. 119, has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him: see *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84, and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199. Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. It would appear to have been so understood by Mustill J. in the *Bremer* case [1985] 1 Lloyd's Rep. 160, 164, where he referred to "an evident risk" of bias.

In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant.

It follows from what I have said that the Court of Appeal applied the correct test in the present case. On that test, it was accepted by Mr. Hytner that there was no ground for disturbing the jury's verdict. I would therefore dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

A.C.

Reg. v. Gough (H.L.(E.))

A LORD MUSTILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

B LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

C LORD WOOLF. My Lords, I have had the advantage of reading in draft the speech of Lord Goff of Chieveley and I agree that this appeal should be dismissed for the reasons which he gives. In particular, I agree that the correct test to adopt in deciding whether a decision should be set aside on the grounds of alleged bias is that given by Lord Goff, namely, whether there is a real danger of injustice having occurred as a result of the alleged bias.

D The test to be applied in each case has as its source the maxim that nobody may be a judge in his own cause. No distinction arises in the application of the test because it is the clerk to the justices rather than the justices themselves who are alleged to be biased. A clerk to the justices is part of the judicial process in the magistrates' court. This is accepted by Lord Hewart C.J., when he said in his judgment in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that the clerk's position "was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction." (The other position, being a member of the firm of solicitors acting for the other driver who was involved in the accident which gave rise to the prosecution.)

E This is also made clear in the judgment in *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, where the facts were very similar to those in the *Sussex Justices* case. The *Camborne Justices* case also involved a justices' clerk. The proceedings before the justices were the result of an information under the Food and Drugs Act 1938 laid on behalf of the county council. The clerk to the justices was at the time a member of the council, but not a member of the council's health committee responsible for laying the information. At the hearing he was sent for to advise the justices on a point of law, but according to the evidence put before the Divisional Court he did not discuss the facts of the case and having given his advice returned to the court. Unlike the *Sussex Justices* case, where the argument appears to have been limited (the applicant was not called upon to address the court) and the judgment was not reserved, in the *Camborne Justices* case the matter was fully argued, Sir Reginald Manningham-Buller Q.C., S.-G. and J. P. Ashworth appearing as amici curiae and a reserve judgment of the court was given by Slade J. on behalf of a Divisional Court which was presided over by Lord Goddard C.J. That judgment described the question which the court had to decide, at p. 47, as being:

H "What interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias?"

To that question the court gave the answer, at p. 51:

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“that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown.”

As the court concluded on the facts that there was no real likelihood of bias the application was dismissed. However, for present purposes the importance of the case is that the court did not consider they were dealing with a special category of case and applied a test which I regard as being the equivalent of the real danger test.

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The problem created by the *Sussex Justices* case [1924] 1 K.B. 256 arises because Lord Hewart C.J. preceded his celebrated remark, at p. 259: “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done,” with the comment, at pp. 258–259:

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“It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way.”

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and later added: “speaking for myself, I accept the statements contained in the justices’ affidavit.” If these passages in his judgment are taken at face value, then they are consistent with the court in the *Sussex Justices* case coming to the conclusion that there was no risk of actual bias and the court was therefore applying some different test from the real danger test when deciding that the decision had to be quashed. A similar situation arises in relation to the comment of Lord Campbell in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759, 793, when he, alone among the members of the House of Lords, said:

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“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.”

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It could well be that too much attention should not be attached to the remarks made as to the bona fides of Lord Cottenham L.C. in the *Dimes* case and the justices’ clerk in the *Sussex Justices* case, although, no doubt the Lord Chancellor and the clerk respectively found them comforting. It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual’s state of mind. It is not desirable because of the confidential nature of the judicial decision making, process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

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A It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed. This, therefore, should have been the result in the *Sussex Justices* case if Lord Hewart C.J.'s remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk.

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C The *Dimes* case, 3 H.L.Cas. 759, is different because it involved direct pecuniary or proprietary interest on the part of Lord Cottenham L.C. in the subject matter of the proceedings and this creates a special situation, as was pointed out at the beginning of the judgment in the *Camborne Justices* case [1955] 1 Q.B. 41, 47:

D "any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias."

E It was because Lord Hewart C.J.'s judgment in the *Sussex Justices* case [1924] 1 K.B. 256, 258-259, has created difficulties that in the *Camborne Justices* case [1955] 1 Q.B. 41, where exactly the same issue was involved, the court warned against the misuse of Lord Hewart's judgment since it was being "urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias:" see pp. 51-52. As the court pointed out the continued citation of Lord Hewart's maxim may lead to the erroneous impression that "it is more important that justice should appear to be done than that it should, in fact, be done."

F I therefore suggest that the *Sussex Justices* case [1924] 1 K.B. 256 neither creates, nor should it be placed in, a separate category. The proper test which Lord Goff has identified should have been applied in that case as it was in the *Camborne Justices* case [1955] 1 Q.B. 41. There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.

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H *Appeal dismissed.*

Solicitors: *E. Rex Makin & Co., Liverpool; Crown Prosecution Service, Headquarters.*

[PRIVY COUNCIL]

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SIR WILLIAM RANDOLPH DOUGLAS AND OTHERS . APPELLANTS
AND
SIR LYNDEN OSCAR PINDLING. RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF
THE BAHAMAS]

B

1996 March 18, 19, 20, 21; Lord Keith of Kinkel, Lord Jauncey of Tullichettle,
May 13 Lord Browne-Wilkinson, Lord Nicholls of
Birkenhead and Sir John May

Bahamas, The—Evidence—Bankers' books—Appointment of commission of inquiry—Commission issuing summonses to produce banking records—Test to be applied by commission—Basis for exercise of court's supervisory jurisdiction—Whether commission's decision to issue summonses justified—Banks and Trust Companies Regulation Act 1965 (No. 64 of 1965), s. 10(1) (as substituted by Banks and Trust Companies Regulation (Amendment) Act 1980 (No. 3 of 1980), s. 2)—Bankers' Books Evidence Act (Statute Law of The Bahamas, 1987 rev., c. 53), ss. 3, 4, 5, 6—Commissions of Inquiry Act (Statute Law of The Bahamas, 1987 rev., c. 172), s. 10(1)

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Bahamas, The—Practice—Appeal to Privy Council—Plaintiff's claim for constitutional and other relief dismissed—Court of Appeal allowing plaintiff's appeal on non-constitutional grounds—Whether defendants entitled to appeal as of right to Privy Council—Whether single judge of Court of Appeal having jurisdiction to grant leave to appeal—Bahama Islands (Procedure in Appeals to Privy Council) Order 1964 (S.I. 1964 No. 2042), s. 5—Bahamas Independence Order 1973 (S.I. 1973 No. 1080), Sch., art. 104—Court of Appeal Act (Statute Law of The Bahamas, 1987 rev., c. 40), s. 19(1)

E

The plaintiff was the head of the Government of The Bahamas for over 25 years. For two periods during that time he was chairman of the Hotel Corporation of The Bahamas, which was established by section 3(1) of the Hotel Corporation of The Bahamas Act. The Governor-General by letters patent subsequently appointed a commission of inquiry to inquire into the methods employed in the conduct and operation of that corporation and others with specific reference to various matters stated in the letters patent. The commission heard evidence relating to transactions involving the expenditure of large sums of public money in which the plaintiff had prominently participated. In order to determine whether or not there was any evidence to support or dispel any suspicion that he had benefited in any way out of the sale and purchase of a particular hotel, and rumours that he had received payments in connection with the awarding of contracts by the corporation, the commission asked the plaintiff for access to his bank accounts but he refused. The president of the commission issued summonses under section 10 of the Commissions of Inquiry Act¹ to the managers of two banks and to the plaintiff requiring production of all his banking records for a specified period. The plaintiff brought an action in the

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¹ Commissions of Inquiry Act, s. 10(1)(3): see post, p. 896F–H.

A.C.

Douglas v. Pindling (P.C.)

A Supreme Court of The Bahamas against the members of the commission and the Attorney-General of The Bahamas seeking a declaration that the summonses were ultra vires and redress for alleged infringements of his constitutional rights. The judge dismissed the action. The Court of Appeal of The Bahamas reversed that decision and quashed the summonses holding that by section 6 of the Bankers' Books Evidence Act² evidence as to the contents of any banker's book could only be given in accordance with an order made for special cause and the evidence did not justify the summonses being issued, but that the plaintiff was not entitled to constitutional redress. The defendants did not apply to the full Court of Appeal under section 19(1) of the Court of Appeal Act³ for leave to appeal to the Judicial Committee of the Privy Council but to a single judge of the Court of Appeal pursuant to section 5 of the Bahama Islands (Procedure in Appeals to Privy Council) Order 1964⁴ for leave to appeal as of right under section 104(2) of the Constitution of The Bahamas.⁵ The single judge granted them leave to appeal.

On the defendants' appeal to the Judicial Committee:—

Held, (1) that an appeal to the Judicial Committee of the Privy Council lay as of right under article 104(2) of the Constitution only where determination of a constitutional issue would be involved in that appeal, and since the defendants had not sought to raise such an issue they were not entitled to appeal as of right from the judgment of the Court of Appeal but could do so only with leave of that court under section 19(1) of the Court of Appeal Act, which had not been sought or granted, or by special leave of the Judicial Committee; that, accordingly, section 5 of the Bahama Islands (Procedure in Appeals to Privy Council) Order 1964 did not confer jurisdiction on the single judge of the Court of Appeal to grant the defendants leave to appeal and that leave was therefore invalid; but that since the defendants sought to raise important issues special leave to appeal would be granted by the Judicial Committee (post, pp. 899B–C, E–F, G).

(2) Allowing the appeal, that, despite the prohibition in section 10(1) of the Banks and Trust Companies Regulation Act 1965, as substituted, on disclosure of information about a customer's account, a bank merely owed a personal obligation of confidentiality to its customers, which could be overridden if the public interest appeared on good grounds to require disclosure; that sections 3 to 6 of the Bankers' Books Evidence Act enabled attested copies of entries in a banker's books to be admitted in evidence without production of the books and testimony by an officer of the bank, save in exceptional cases in accordance with an order made for special cause under section 6; that, having regard to those sections, the summonses under section 10 of the Commissions of Inquiry Act were to be interpreted as requiring attested copies of the relevant book entries to be sent to the commission and so special cause under section 6 of the Bankers' Books Evidence Act to justify the issue of the summonses did not have to be established; that, if material before the commission

² Bankers' Books Evidence Act, ss. 3, 4, 5, 6: see post, pp. 899H–900D.

³ Court of Appeal Act, s. 19(1): see post, p. 898F–G.

⁴ Bahama Islands (Procedure in Appeals to Privy Council) Order 1964, s. 5: see post, p. 899A–B.

⁵ Constitution of The Bahamas, art. 104: see post, p. 898E–F.

induced in its members a bona fide belief that the banking records of a person or company might be of assistance to the commission in its inquiry into matters within its terms of reference, it had a duty to issue a summons giving it access to the requisite entries in a banker's books, and, in the event of a challenge to that decision, the court in exercising its supervisory jurisdiction should set it aside only if it were one which no reasonable commission, correctly directing itself in law, could properly have made; that, in the circumstances, the commission had been entitled to decide that investigation of the plaintiff's banking records was desirable in order to promote its inquiry and to ascertain whether he had received any benefits from transactions in which he had participated involving the hotel corporation; and that, accordingly, there were no grounds for interfering with the commission's decision to issue the summonses, and the trial judge's order dismissing the plaintiff's action would be restored (post, pp. 900E-F, 901A-C, G-902B, 904B-D, 906B-C).

Dictum of Lindley M.R. in *Pollock v. Garle* [1898] 1 Ch. 1, 4, C.A. and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, C.A. applied.

Decision of the Court of Appeal of the Commonwealth of The Bahamas reversed.

The following cases are referred to in the judgment of their Lordships:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Commission of Inquiry v. Maynard (unreported), 19 October 1984; Court of Appeal of The Bahamas (Civil Side), Nos. 6 and 7 of 1984

Pollock v. Garle [1898] 1 Ch. 1, C.A.

Ross v. Costigan (1982) 41 A.L.R. 319

Ross v. Costigan (No. 2) (1982) 41 A.L.R. 337

The following additional cases were cited in argument:

Bankers' Books Evidence Act 1879, In re; Rex v. Bono (1913) 29 T.L.R. 635, D.C.

Fratr v. The Queen (Note) [1981] 1 W.L.R. 1468, P.C.

Norway's (State of) Application, In re [1987] Q.B. 433; [1986] 3 W.L.R. 452; [1989] 1 All E.R. 661, C.A.

Parnell v. Wood [1892] P. 137, C.A.

Reg. v. Blom-Cooper, Ex parte The Special Hospitals Service Authority (unreported), 4 December 1991, Schiemann J.

Reg. v. Grossman (1981) 73 Cr.App.R. 302, C.A.

Reg. v. Marlborough Street Stipendiary Magistrate, Ex parte Simpson (1980) 70 Cr.App.R. 290, D.C.

Reg. v. Moss (unreported), 31 March 1995; Court of Appeal of The Bahamas (Criminal Side), No. 29 of 1993

Reg. v. Nottingham Justices, Ex parte Lynn (1984) 79 Cr.App.R. 238, D.C.

South Staffordshire Tramways Co. v. Ebbsmith [1895] 2 Q.B. 669, C.A.

Waterhouse v. Barker [1924] 2 K.B. 759, C.A.

Williams v. Summerfield [1972] 2 Q.B. 512; [1972] 3 W.L.R. 131; [1972] 2 All E.R. 1334, D.C.

APPEAL (No. 9 of 1995) with leave of Gonsalves-Sabola C.J. sitting as a single judge of the Court of Appeal of the Commonwealth of The Bahamas by the first defendants, Sir William Randolph Douglas, Edwin

A.C.

Douglas v. Pindling (P.C.)

- A P. Minnis and Gerald Montes de Oca (collectively in their capacity as commissioners appointed by letters patent dated 30 December 1992 and 11 February 1993 issued by the Governor-General), and the second defendant, the Attorney-General of the Commonwealth of The Bahamas, from the judgment of the Court of Appeal (Melville P., Campbell J.A. and Worrell J.A. Ag.) on 15 July 1994, reasons being given on 21 October 1994, allowing an appeal by the plaintiff, Sir Lynden Oscar Pindling, from the judgment of Strachan J. delivered on 18 May 1994 in the Supreme Court (Equity Side) whereby the plaintiff's action against the defendants had been dismissed. The Court of Appeal had quashed the summonses dated 15 March 1994 issued to the manager of the Bank of Nova Scotia in Nassau and to the plaintiff, and the summons dated 31 March 1992 issued to the manager of Barclay's Bank in Nassau, to produce all the banking records of the plaintiff from 1 January 1976 to 31 December 1993, and had granted the plaintiff an injunction against the members of the commission restraining them from compelling the managers or any officers of the banks or the plaintiff from attending the inquiry for the purpose of providing information about the plaintiff's bank accounts.

The facts are stated in the judgment of their Lordships.

- D Sir Godfray Le Quesne Q.C., Michael Hamilton, Director of Legal Affairs, The Bahamas, and James Dingemans for the defendants. The single judge of the Court of Appeal had jurisdiction to grant the defendants leave to appeal to the Judicial Committee because an appeal lay as of right, under article 104(2) of the Constitution of The Bahamas, from the decision of the Court of Appeal. Since the plaintiff had sought relief on constitutional and other grounds, the case was one in which a final determination had been made by the Court of Appeal in the exercise of the jurisdiction conferred on it by article 28. If, however, the single judge acted ultra vires, the Board should grant the defendants special leave to appeal since important questions arise in relation to the Bankers' Books Evidence Act.
- E The Bankers' Books Evidence Act is in all material respects identical to the English Bankers' Books Evidence Act 1879, the purpose of which is to avoid the inconvenience to banks and the public of requiring bankers' books to be produced in court in connection with legal proceedings. Attested copies of entries in the books are sufficient evidence. The words "special cause" in section 6 of the Bahamian Act relate to production of the original banker's books instead of attested copies, and special cause is not a condition precedent to the making of an order under section 7. [Reference was made to *Pollock v. Garle* [1898] 1 Ch. 1; *Williams v. Summerfield* [1972] 2 Q.B. 512; *Waterhouse v. Barker* [1924] 2 K.B. 759; *Reg. v. Grossman* (1981) 73 Cr.App.R. 302; *Commission of Inquiry v. Maynard* (unreported), 19 October 1984; Court of Appeal of The Bahamas (Civil Side), Nos. 6 and 7 of 1984; *Reg. v. Marlborough Street Stipendiary Magistrate, Ex parte Simpson* (1980) 70 Cr.App.R. 290; *Ross v. Costigan* (1982) 41 A.L.R. 319; *Ross v. Costigan (No. 2)* (1982) 41 A.L.R. 337 and *Reg. v. Blom-Cooper, Ex parte The Special Hospitals Service Authority* (unreported), 4 December 1991.]
- H

An individual may be required to submit to closer investigation of his activities by a commission of inquiry than is justified in civil or criminal litigation. Although under section 10 of the Banks and Trust Companies Regulation Act 1965, as substituted by section 2 of the Banks and Trust Companies Regulation (Amendment) Act 1980, disclosure of a customer's banking affairs without his consent is prohibited, disclosure under compulsion of law is expressly allowed. If there is material before the commission leading to a bona fide belief that certain banking records may be of assistance to its inquiry, the commission is entitled, under section 10 of the Commissions of Inquiry Act, to issue a summons requiring evidence of them to be given or produced.

Lloyd Barnett and *Philip Davis* (both of the Bahamian Bar) for the plaintiff. A single judge of the Court of Appeal only has jurisdiction to grant leave to appeal to the Judicial Committee where an appeal lies as of right from a decision of the Court of Appeal. [Reference was made to sections 3 and 5 of the Bahama Islands (Procedure in Appeals to Privy Council) Order 1964; articles 28(1), 104 and 105(1) of the Constitution and section 19 of the Court of Appeal Act.] The subject matter of the present appeal is not a decision of the Court of Appeal relating to the enforcement of fundamental rights and freedoms. [Reference was made to *Frater v. The Queen (Note)* [1981] 1 W.L.R. 1468.] The words "any such case" in article 104(2) mean a case involving the determination of a constitutional issue. Accordingly, the leave granted by the single judge should be set aside.

A person whose right to confidentiality is prejudiced or affected by an order for production of documents is entitled to object to the order, and the court must then, in deciding whether to make the order, balance the public interest in the disclosure against the private interest in the maintenance of confidentiality. In ordering the production of banking records regard must be had not only to the common law rights of the bank's customer but also to the special statutory protection given to banking confidentiality as a matter of public policy. A banker or officer of a bank is not compellable to produce any bankers' books or to appear as a witness to prove banking transactions unless a judge, or the president of a commission of inquiry constituted under the Commissions of Inquiry Act, has made an order for special cause. For such an order to be made by the president there must be a substratum of evidence from which it can be inferred that there is a reasonable probability that further evidence needed for a faithful and diligent discharge of the commission's mandate may be disclosed by production of the documents in question. The commission could only properly require disclosure of the plaintiff's banking records if it had some evidentiary basis for allegations that the plaintiff had been personally involved, wittingly or unwittingly, in wrongdoing by or in connection with the organisations being investigated by the commission, and that there was some nexus between that wrongdoing and his banking records. No such allegation has ever been made. A commission of inquiry has the same powers to call for the production of documents as a judge of the Supreme Court, and a witness appearing before the commission is entitled to the same immunities and privileges as he has in civil proceedings: see sections 10(1)(b) and 13(2) of

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- A the Commissions of Inquiry Act. [Reference was also made to the English R.S.C., Ord. 24, r. 7 and Ord. 38, r. 13 and *Style and Hollander, Documentary Evidence*, 5th ed. (1995), pp. 353–355, 357–359.] The Bankers' Books Evidence Act 1879 has been consistently interpreted as requiring care to be exercised in making an order for the production of banking records. [Reference was made to *Pollock v. Garle* [1898] 1 Ch. 1; *In re Bankers' Books Evidence Act 1879*; *Rex v. Bono* (1913) 29 T.L.R. 635; *South Staffordshire Tramways Co. v. Ebbsmith* [1895] 2 Q.B. 669; *Parnell v. Wood* [1892] P. 137; *Waterhouse v. Barker* [1924] 2 K.B. 759; *Reg. v. Grossman*, 73 Cr.App.R. 302; *Reg. v. Marlborough Street Stipendiary Magistrate, Ex parte Simpson*, 70 Cr.App.R. 290; *Reg. v. Nottingham Justices, Ex parte Lynn* (1984) 79 Cr.App.R. 238; *In re State of Norway's Application* [1987] Q.B. 433; *Commission of Inquiry v. Maynard*, 19 October 1984; *Ross v. Costigan*, 41 A.L.R. 319; *Ross v. Costigan* (No. 2), 41 A.L.R. 337; Report of the Royal Commission on Tribunals of Inquiry (1966) (Cmnd. 3121), p. 44, para. 3(ii), p. 46, paras. 33 and 35 and Sir Richard Scott V.-C., "Procedures at Inquiries—The Duty to be Fair" [1995] 111 L.Q.R. 596, 602–603.]
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- C

Davis following. For the jurisdiction of the single judge to grant leave to appeal, see *Reg. v. Moss* (unreported), 31 March 1995; Court of Appeal of The Bahamas (Criminal side), No. 29 of 1993.

- D *Le Quesne Q.C.* in reply. The Bankers' Books Evidence Act 1879 affected procedure only and not the substantive power to order the production of banking documents.

- E The customer's right of confidentiality against his bank is merely one of the factors to be taken into account in considering whether the discretion to make an order for production of documents should be exercised. The balance which has to be held is between the public interest in maintaining the customer's private right, which is subject to any lawful requirement for disclosure by a court, and the public interest in the effectiveness of an inquiry. In the present case the general interest should outweigh the particular interest of the plaintiff. In reviewing the commission's decision the court must apply the principles laid down in
- F *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. [Reference was also made to *Commission of Inquiry v. Maynard*, 19 October 1984; *In re State of Norway's Application* [1987] Q.B. 433 and *Ross v. Costigan*, 41 A.L.R. 319.] Allegations did not have to be made against the plaintiff before the commission could properly order the production of his banking records. It is not possible to say that
- G the commission could not reasonably think that inspection of his banking records might assist it in its inquiry.

Cur. adv. vult.

13 May. The judgment of their Lordships was delivered by LORD KEITH OF KINKEL.

- H The first defendants are the members of a commission of inquiry appointed by the Governor-General of The Bahamas under letters patent dated 30 December 1992 and 11 February 1993. The second defendant is the Attorney-General of The Bahamas.

The letters patent required the commission to make a diligent and full inquiry into the methods employed in the conduct and operation of certain corporations, including the Hotel Corporation of The Bahamas, with specific reference to various matters set out, of which the following are relevant for present purposes:

“(a) the expenditure of public funds allocated to or received by them; (b) the awarding of contracts by them; (c) in relation to the Hotel Corporation of The Bahamas, the acquisition, repair, construction, renovation, refurbishment and operation of its various properties, including in particular (but not limited to) the Holiday Inn and the Lucayan Beach Hotels in Grand Bahama, the Ambassador Beach, Cable Beach and Balmoral Beach Hotels in New Providence, the Emerald Palms by the Sea Hotel in Driggs Hill, Andros, the Andros Town Yacht Club and Marina in Fresh Creek, Andros and the Winding Bay Beach Resort in Eleuthera; . . . (f) their procurement policies and practices; (g) their employment practices including but not restricted to the employment and dismissal of staff; (h) any and all allegations of fraud, corruption, breach of trust, conflict of interest or any wrongdoing whatsoever made by anyone against any person whatsoever arising out of and in connection with any or all of the affairs of . . . the Hotel Corporation of The Bahamas . . . (i) the examination of all banking arrangements entered into by them, and their financial activities generally, and more specifically the management, care and conduct of their financial affairs; (j) the examination, analysis and consideration of their practices, procedures, policies, systems and mechanisms, financial and otherwise, with a view to making such recommendations as may be considered appropriate in respect of any abuses or wrongdoings, or that would prevent any future abuse and wrongdoing and ensure the proper functioning and administration of the aforementioned public entities.”

The letters patent granted to the commission all the powers conferred on commissioners by the Commissions of Inquiry Act. Section 10(1) of that Act, so far as relevant, provides:

“Subject to the provisions of this Act, any commissioner shall have the powers of a justice of the Supreme Court to—(a) summon and compel the attendance of witnesses; (b) call for the production of documents or things including the power to retain and examine the same; (c) examine persons appearing before them on oath; . . .”

Section 10(3) provides:

“For the purpose of the exercise by a commissioner of any of the powers mentioned in subsection (1) references to a justice of the Supreme Court in any other law applicable thereto shall, subject to this Act, have effect as including such a commissioner save that, where any such power is exercised in respect to the summoning of any person to give or produce evidence as to any banker’s book within the meaning of the Bankers’ Books Evidence Act, such summons shall only be issued by the president of the commission.”

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A The plaintiff was head of the Government of The Bahamas from 16 January 1967 to 21 August 1992, first as Premier and then as Prime Minister. From 1 January 1975 until 24 January 1984 and again from 27 June 1987 until 1 October 1990 he was chairman of the Hotel Corporation of The Bahamas, a corporation established by Act of Parliament (the Hotel Corporation of The Bahamas Act).

B After having heard evidence from a number of witnesses about the affairs of the hotel corporation, the commission by letter dated 7 January 1994 made a request to the plaintiff for co-operation in giving access to all his bank accounts and other accounts over which he had control. The reasons for the request were stated to be:

C “(1) To determine whether or not there is any evidence to support or dispel any suspicion that you have benefited in any way out of the sale/purchase of the Emerald Palms by the Sea Hotel. (2) To determine whether or not there is any evidence to support or dispel rumours that you have received payments in connection with the awarding of contracts by the Hotel Corporation of The Bahamas.”

D The plaintiff replied by letter dated 10 January 1994 stating that such information as the commission had was speculation and no more than suspicion or rumours propagated for political reasons. Counsel to the commission then wrote to the plaintiff on 19 January 1994 setting out as grounds for suspicion that the plaintiff might have benefited from the purchase or sale of the Emerald Palms by the Sea Hotel, certain matters relating to the purchase of the hotel by a Mr. Benjamin Forbes and the subsequent sale of it by him to the hotel corporation.

E On 15 March 1994 the president of the commission, Sir William Randolph Douglas, issued to the manager of the Bank of Nova Scotia in Nassau and to the plaintiff a summons requiring production of all the banking records of the plaintiff from 1 January 1976 to 31 December 1993. A similar summons was issued to the manager of Barclays Bank in Nassau on 31 March 1994.

F The plaintiff then filed an originating summons seeking various forms of relief including (1) a declaration that the summonses to the banks were ultra vires of the commission, (2) a declaration that the issuance of these summonses contravened the plaintiff's constitutional rights and (3) an injunction restraining the commission from compelling the attendance of any officer of the banks or the plaintiff himself before the inquiry for the purpose of providing information about the plaintiff's bank accounts.

G On 18 May 1994 Strachan J. gave judgment dismissing the plaintiff's action. The plaintiff appealed, and by order dated 15 July 1994 the Court of Appeal of The Bahamas (Melville P., Campbell J.A. and Worrell J.A. Ag.) allowed the appeal. The order quashed the summonses issued by the commission to the bank managers and to the plaintiff, granted an injunction against the commission compelling the attendance before it of any officer of the banks or of the plaintiff for the purpose of giving information about the plaintiff's bank accounts, and required the commission to return to the Bank of Nova Scotia certain banking records which, as it happened, the commission had already obtained. The reasons for the Court of Appeal's order were not made available until 21 October

1994. In the meantime the defendants, within 21 days of the date of the order, as required by section 3 of the Bahama Islands (Procedure in Appeals to Privy Council) Order 1964, applied to Gonsalves-Sabola C.J. as a single judge of the Court of Appeal for leave to appeal to Her Majesty in Council, and he granted conditional leave on the usual terms on 11 August 1994. Gonsalves-Sabola C.J. granted final leave on 23 November 1994. The reasons for the decision of the Court of Appeal, when delivered on 21 October 1994, revealed that the plaintiff's appeal had failed so far as the claim for constitutional relief was concerned but had succeeded as regards the application of the Bankers' Books Evidence Act.

In the circumstances Dr. Barnett, for the plaintiff, argued as a preliminary point before the Board that the conditional leave to appeal granted to the defendants by the single judge of the Court of Appeal was invalid, since no appeal as of right was available to them.

The relevant enactments are these.

Article 28(1) of the Constitution of The Bahamas:

"If any person alleges that any of the provisions of articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Article 104 of the Constitution:

"(1) An appeal to the Court of Appeal shall lie as of right from final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms). (2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under article 105(3) of this Constitution from any decision given by the Court of Appeal in any such case."

Section 19 of the Court of Appeal Act:

"(1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of 4,000 dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court. (2) Save as is provided in this section the decision of the court in any civil proceedings brought before it on appeal shall be final. (3) Nothing in this section contained shall be deemed to restrict or derogate from

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- A the right of Her Majesty in Council in any case to grant special leave to appeal from the decision of the court in any cause or matter.”

Section 5 of the Order of 1964 provides:

- “A single judge of the Court [of Appeal] shall have power and jurisdiction—(a) to hear and determine any application to the court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the court; . . .”
- B

- Dr. Barnett argued that the case did not fall within article 104(2) of the Constitution because, although the plaintiff's originating summons had sought relief under article 28, the judgment of the Court of Appeal had refused such relief and granted it only on common law grounds. There was no cross-appeal against the refusal of constitutional relief, and no constitutional point was involved in the defendants' appeal. That appeal could accordingly lie only under section 19(1) of the Court of Appeal Act, and since it did not involve a dispute about property of the value of \$4,000 or upwards, or indeed any property, it could be brought only with the leave of the Court of Appeal. Thus section 5 of the Order of 1964 did not apply, and the single judge had no jurisdiction to grant leave to appeal.
- C

- D It appears that on 27 January 1995 the full Court of Appeal was moved by the defendants to vary or confirm the leave to appeal granted by the single judge but declined to interfere.

- Sir Godfray Le Quesne, for the defendants, argued that article 104(2) of the Constitution applied so as to give the defendants an appeal as of right to Her Majesty in Council because the case in which the Court of Appeal had given its decision was one in which a claim for relief under article 28 of the Constitution had been made, and there had been an adjudication upon that claim under the jurisdiction conferred upon the court under that article.
- E

- Their Lordships are of opinion that the true intendment of article 104(2) is that an appeal as of right under it should lie only where the appeal would involve the determination of a constitutional issue under article 28. Otherwise the jurisdiction exercised would not be the article 28 jurisdiction, but simply the ordinary jurisdiction of the Supreme Court.
- F

- However, Sir Godfray submitted that if his arguments on this point were unsuccessful the case was nevertheless a suitable one for the grant of special leave to appeal. Dr. Barnett did not object to this application being made without the presentation of a separate petition for special leave. Their Lordships considered it appropriate that they should advise Her Majesty to grant special leave, since the case raises important issues regarding the right test to be applied by a commission of inquiry in deciding to issue a summons under the Bankers' Books Evidence Act, and the nature of the supervisory jurisdiction of the court over a decision to issue such a summons. They proceeded to hear argument on the merits of the appeal on that basis.
- G

- H It is convenient to start by setting out the relevant provisions of the Bankers' Books Evidence Act, namely sections 3 to 7:

“3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie*

evidence of such entry, and of the matters, transactions and accounts therein recorded. A

“4. A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any notary public or justice of the peace or person authorised to take affidavits. B

“5. A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any notary public or justice of the peace or person authorised to take affidavits. C

“6. A banker or officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker’s book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause. D

“7. On the application of any party to a legal proceeding a court may order that such party be at liberty to inspect and take copies of any entries in a banker’s book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court otherwise directs.” E

The judges of the Court of Appeal took the view that the effect of section 6 was that no evidence about the contents of a banker’s books could be given otherwise than in pursuance of an order of a judge made for “special cause.” This was erroneous. The purpose of sections 3, 4, 5 and 6 was to enable attested copies of entries in a banker’s books to be made available in evidence without the necessity of the books themselves being produced in court together with an officer of the bank to speak to them. In relation to the United Kingdom Bankers’ Books Evidence Act 1879 (42 & 43 Vict. c. 11), which is in substantially identical terms to the Bahamian Act, Lindley M.R. said in *Pollock v. Garle* [1898] 1 Ch. 1, 4: F

“The Bankers’ Books Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers’ books. If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from that inconvenience. This is accompanied by the first six sections of the Act G H

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- A of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books.”

- Since attested copies of entries in the books were by the Act made capable of being given in evidence it would be only in exceptional cases that the books themselves could be required to be produced in court, together with an officer of the bank to speak to them. That is the significance of the reference to “special cause” in section 6. Section 7 enables a party to legal proceedings to obtain from the court an order allowing him to inspect entries in a banker’s books and take copies for any of the purposes of the proceedings. That provision is not apt to cover the situation where a commission of inquiry desires to obtain access to entries in a banker’s books, there being no legal proceedings to which anyone is a party. Yet section 10(3) of the Commissions of Inquiry Act is clearly designed to enable a commission to obtain such access in appropriate cases. The summons issued by the president in this case took the form of requiring the managers of the banks to attend before the commission and produce the books for the specified period. Having regard, however, to the terms of sections 3 to 6 of the Act, the summons is to be interpreted as requiring the sending of attested copies of entries in the books, as indicated by Lindley M.R. in the passage cited from *Pollock v. Garle*, and it seems that is what the Bank of Nova Scotia in fact did in this case.

- Given that no hurdle in the shape of special cause requires to be surmounted, consideration falls to be given to the manner in which a commission of inquiry should direct itself in deciding whether or not to issue a summons giving it access to entries in a banker’s books. In their Lordships’ opinion it is not helpful to approach the matter by drawing analogies with the rules which apply to discovery in contested civil litigation or with the approach adopted by the courts in connection with the production of bankers’ books evidence in criminal trials. In contested civil litigation there are specific issues identified by the pleadings which require adjudication, and the relevance to these issues of bankers’ book evidence may not be too difficult to determine. The same is basically true of criminal trials where specific charges are the subject of investigation. By contrast a commission of inquiry starts with no specific issues or charges. It has only its terms of reference, which may be extremely wide, as they are in the present case. Its function is inquisitorial, not adversarial. It must pursue lines of inquiry and in doing so may find that other lines of inquiry appear to be requisite, including investigation into some individual’s or company’s bank account. Bank accounts are subject to an obligation of confidence owed to the customer, and that confidence should not lightly be interfered with. Dr. Barnett for the plaintiff relied strongly on the Banks and Trust Companies Regulation Act 1965. Section 10 of that Act (as substituted by section 2 of the Banks and Trust Companies Regulation (Amendment) Act 1980) forbids, under pain of penalties, the disclosure without the consent of the customer by any officer of a bank of information about the customer’s banking affairs. There is an exception where the disclosure is lawfully required by any court of competent jurisdiction. No doubt this Act was passed in the public interest, as tending to promote confidence in The Bahamas as an important financial

centre. But in their Lordships' opinion it does not have the effect of requiring any balance of competing public interests in a case where a court is considering whether to make an order for disclosure. The confidentiality continues to be personal to the customer in the same way as if the Act had not been passed. The only balance which requires to be made is that between the public interest in the administration of justice or the promotion of the work of a commission of inquiry and the customer's personal interest. If the public interest appears on good grounds to require disclosure the customer's interest must give way.

In *Commission of Inquiry v. Maynard* (unreported), 19 October 1984; Court of Appeal of The Bahamas (Civil Side), Nos. 6 and 7 of 1984 the commission had been appointed to inquire into the extent and methods employed in the illegal use of The Bahamas for the trans-shipment of drugs. The commission had evidence from one Garcia, a self-confessed drug smuggler, that he had given a bribe to Senator Maynard to get himself removed from a stop list for entry into The Bahamas. The commission issued a summons for production of Maynard's banking records over a long period. Telford Georges C.J. quashed the summons on the ground that, while it might have been valid if confined to a short period before and after the date of the alleged bribe, it was invalid as covering too long a period. The Court of Appeal allowed an appeal by the commission. The leading judgment was delivered by da Costa J.A. He found assistance in *Ross v. Costigan* (1982) 41 A.L.R. 319, a decision of the Federal Court of Australia. A Royal Commission had been appointed to inquire into certain conduct by members of a trade union. The commissioner proposed to investigate allegations of a conspiracy to breach certain provisions of the New South Wales Companies Act 1961, in the context of tax minimisation schemes. The applicants sought review of that proposal and the commissioner's decision to summon and question certain witnesses in relation to it, upon the ground inter alia that the proposed decision was an improper exercise of the powers conferred on the commission. In this connection Ellicott J. considered whether the matter proposed to be investigated was relevant to the inquiry. He said, at pp. 334-335:

"In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken. In *McGuinness v. Attorney-General* (Vict.) (1940) 63 C.L.R. 73, 86, Latham C.J. said: 'The Royal Commissioner was appointed to inquire into a specified subject matter, namely, the

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- A suggested bribery of Members of Parliament. He was not appointed to determine an issue between the Crown and a party, or between other parties. The commission was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation—an inquisition as distinct from the determination of an issue. In the course of such an inquiry it would or at least might be a valuable step forward if the identity of the persons giving information to the editor of the newspaper could be discovered so that they could be summoned for the purpose of giving evidence on oath as to their knowledge, or as to the source of their information if they had no direct personal knowledge of the matters in question.' This does not mean, of course, that a commission can go off on a frolic of its own. However, I think a court if it has
- B power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the commission is required to investigate
- C under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the inquiry."
- D

The decision of Ellicott J. was affirmed by the General Division of the Federal Court: *Ross v. Costigan (No. 2)* (1982) 41 A.L.R. 337. In dealing with an argument for the applicants that there was no evidence linking them with the trade union or any relevant illegality, the court said, at

E p. 351:

- "This provides no reason why the commissioner should not inquire further, and require further evidence from them, if he considers these courses desirable in the performance of his function. We should add that 'relevance' may not strictly be the appropriate term; what the commissioner can look to is what he bona fide believes will assist him
- F in his inquiry."

Having quoted certain extracts from these judgments da Costa J.A. in the *Maynard* case, 19 October 1984 concluded: "Unless it is shown that the commission has gone off on a frolic of its own or is acting mala fide, certiorari ought not to go to the commission." Henry J.A. said:

- G "The issue here is whether in requiring the production of the documents specified in the summonses the commission exceeded its jurisdiction. In this regard it is important to bear in mind the terms of reference of the commission because in my view the commission is entitled to issue such summonses and to require the production of such documents or evidence as might be reasonably expected to be relevant to the subject matter of the inquiry which it is required to undertake. It cannot therefore arbitrarily require from a bank the production of all the accounts in that bank, nor can it arbitrarily require the production of a particular account. If however, for
- H example, the commission has reason to believe that a particular

account or the operator of a particular account directly or indirectly is involved in the illegal use of The Bahamas for the trans-shipment of dangerous drugs destined for the United States of America, the commission would be entitled to require the production of that account by the bank, and certiorari would not in those circumstances lie against the commission. Because the commission is an investigative body it must necessarily embark on what might otherwise be regarded as 'fishing.' "

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In their Lordships' opinion these passages correctly indicate the considerations which should guide a commission of inquiry in deciding on the issue of summonses for production of the banking records of an individual or a company. If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. The commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive.

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As regards the function of the court in the event that the commission's decision to issue a summons is challenged, the matter is to be approached upon the traditional judicial review basis. The applicable criteria are those set out in the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. In particular, the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at. It would appear that this is the test which Ellicott J. had in mind in *Ross v. Costigan*, 41 A.L.R. 319, 335, when he spoke of a commission going off "on a frolic of its own."

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In their Lordships' opinion the plaintiff has not established that this test is satisfied in the present case. Prior to the issue of the summonses the commission had before it a substantial body of evidence from various witnesses about certain aspects of the affairs of the Hotel Corporation of The Bahamas during the periods when the plaintiff was chairman of the corporation. In October 1981 the board of the corporation had under consideration the awarding of contracts for the construction of the Cable Beach Casino. Bids had previously been received from three contractors for certain works planned by the board's architect. The three contractors were E.R. Hanna/Stresscon, B & A/BAM and Blount/Cavalier. The bids were all in the region of \$16,000,000 to \$18,000,000 which was considerably above the budgeted figure. But at the same time Blount/Cavalier had made a proposal for the construction of more elaborate works at a cost of some \$32,700,000. The board desired that the other two contractors should submit bids for the more elaborate works subject to minor exclusions, and they did so, E.R. Hanna/Stresscon in the sum of \$30,247,442, and B & A/BAM in the sum of \$31,088,066. The Blount/Cavalier bid revised to take account of the exclusions came to \$30,300,000. At its meeting on 14 October 1981 the board considered the matter in some depth and eventually decided that the plaintiff should negotiate with Blount/Cavalier and report back to it. The plaintiff did not report back but on

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Douglas v. Pindling (P.C.)

- A 16 December 1981 signed and sent to Blount/Cavalier a letter of intent for construction by it of various works for the Cable Beach Casino at the price of \$33,425,000, and on 12 May 1982 the plaintiff on behalf of the corporation executed a contract with Blount/Cavalier for the construction of the works at that price. It does not seem that the plaintiff ever informed the board of the corporation of what he had done, though he attended a meeting of the board on 13 May 1982.
- B A further matter related to transactions in connection with the Emerald Palms by the Sea Hotel and four adjoining cottages. In February 1986 they were owned by a company called Crow Hill Development Co. Ltd., controlled by a Mr. Everette Bannister, a close friend of the plaintiff. In that month the hotel was agreed to be purchased from Crow Hill by a Mr. Benjamin Forbes through a company called Ocean View Developers Ltd. The purchase was made on the advice of the plaintiff, who was not at the time chairman of the Hotel Corporation of The Bahamas. The purchase price was \$550,000. Mr. Forbes financed this by a loan of \$300,000 from the Bahamas Development Bank and one of \$250,000 raised elsewhere. There was evidence that the Development Bank was initially reluctant to grant the loan of \$300,000 but eventually did so by reason of interest shown in the matter by the plaintiff, who as holding at the time the portfolio of Minister of Finance had responsibilities for the bank. Mr. Forbes's tenure of the hotel was not a success, an occupancy rate of no more than 10 per cent. being achieved. In 1989, when the plaintiff was chairman of the hotel corporation, the corporation purchased the Emerald Palms by the Sea Hotel from Mr. Forbes's company for \$650,000. There appear to be no minutes of the board of the hotel corporation relating to the purchase.
- E After the purchase substantial renovation work on the Emerald Palms by the Sea Hotel was carried out by a company called Bro-kell Construction Ltd., controlled by a Mr. Kelly, the contract price being \$1,600,000. It does not appear that competitive tenders were invited. About the same time Bro-kell Construction was also doing work on two of the four cottages which adjoined the hotel, which were still owned by
- F Mr. Bannister's company. Cottage No. 1 was occupied by the manager of the hotel and his wife. The hotel corporation paid Bro-kell Construction \$26,760 for work on this cottage. Cottage No. 2 was used by the plaintiff, upon terms which are not clear. Bro-kell Construction, on the instructions of the plaintiff, carried out certain work on this cottage also, for which, according to Mr. Kelly, the plaintiff paid about \$12,000. There was
- G evidence from Mr. Hingston, an independent surveyor, suggesting that the value of the work may have been significantly more. In December 1992, after the plaintiff had ceased to be chairman of the hotel corporation, he purchased the four cottages from Mr. Bannister's company for the price of \$50,000 through a company which he controlled called Dev-Pin Investments Ltd.
- H Finally there was evidence before the commission regarding the award of contracts worth many millions of dollars, though not all during the plaintiff's chairmanship of the hotel corporation, to a concern called Penn's Hotel Renovations Co. In some instances contracts were awarded to that company when it was not necessarily the lowest bidder and in

others when no bids had been invited. The plaintiff was personally acquainted with Mr. Penn. A

The foregoing represents only a brief summary of the relevant evidence which was before the commission when it issued its summonses. The totality of the evidence was very voluminous, and it was for the commission which heard it to assess its veracity and reliability, or the reverse, and the inferences capable of being drawn from it. The summary suffices to show that in connection with transactions involving very large sums of public money, in which the plaintiff played a prominent part, there were a number of unconventional features such as to raise doubts about the manner in which the affairs of the hotel corporation, under the plaintiff's aegis, were conducted. The commission was well justified in deciding that investigation into the plaintiff's banking records was desirable in order to promote its inquiry, with a view to ascertaining whether or not the plaintiff had received any benefits or favours in connection with the transactions in question. B C

For these reasons their Lordships will humbly advise Her Majesty that special leave to appeal should be granted, that the appeal should be allowed and that the order of Strachan J. should be restored. The plaintiff must pay the defendants' costs before the Court of Appeal and their Lordships' Board. D

Solicitors: Charles Russell; McKenna & Co.

S. S.

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Type Cases	Jurisdiction Commonwealth	Database High Court of Australia	Year 1998	Citation [1998] HCA 60

Lee v R [1998] HCA 60; 195 CLR 594; 157 ALR 394; 72 ALJR 1484 (30 September 1998)

Last Updated: 30 September 1998

HIGH COURT OF AUSTRALIA

GLEESON CJ,

GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

NATHAN LEE APPELLANT

AND

THE QUEEN RESPONDENT

Lee v The Queen [1998] HCA 60

30 September 1998

S20/1998

ORDER

1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal of New South Wales made on 5 May 1997 dismissing the appeal to that Court against conviction. In lieu thereof, order that the appeal to that Court be allowed, the conviction be quashed, and there be a new trial.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with S J Odgers for the appellant (instructed by Arden & Associates).

G S Hosking SC with D M Woodburne for the respondent (instructed by Office of the Director of Public Prosecutions (New South Wales)).

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Lee v The Queen

Evidence - Hearsay rule - Previous representation by witness including alleged confession by accused - Whether entire previous representation could be admitted as prior inconsistent statement - Whether report of confession could be used to prove the truth of the alleged confession.

Evidence Act 1995 (NSW), ss 60, 137.

1. GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. At the appellant's trial, evidence was admitted of out of court statements made by a witness which included a report of a confession made by the appellant to that witness. The evidence of these out of court statements was given because the witness gave evidence at the trial denying (or at least not admitting) that he had heard the appellant make these confessional statements. The evidence that the witness had made earlier statements



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in which he had said that he had heard the appellant confess was treated at the trial as evidence of the truth of the alleged confession.

2. At common law, evidence of prior inconsistent statements could not have been used in this way. It was held at the appellant's trial, and on appeal to the Court of Criminal Appeal, that [s 60](#) of the *Evidence Act 1995* (NSW) ("the [Act](#)") permitted the tribunal of fact to treat the evidence of the prior statements of the witness as evidence of the truth of the confession reported in those statements.

3. [Section 60](#) provides that:

"The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

The question in this appeal is whether [s 60](#) permitted an out of court statement that is itself a report of what someone else said, to be used as proof of the truth of what was reportedly said.

The facts

4. Nathan Lee (the appellant) was indicted in the District Court of New South Wales on a charge that on 21 March 1995, when armed with a pistol, he assaulted Patricia Edith Jones with intent to rob her. Mrs Jones was the owner of a video store in Paddington. Two men came into her shop at about 8.15 pm on 21 March 1995. One produced a gun and demanded money. She was later to describe this man as "Asian in appearance" with "a full round face ... black hair ... [and] hooded eyes". (It was common ground that the appellant was of Asian appearance.) Mrs Jones responded to the demand for money by picking up a cast iron tape dispenser and throwing it at the man with the gun and then picking up the stool on which she had been sitting and starting to jab at him across the counter. The man with the gun pointed it at her and made a motion with his hand. Nothing happened. He then made a stronger motion with his hand and the gun discharged. Mrs Jones smelt the gunpowder and was momentarily deafened and blinded by the discharge. Seeing that the man who had fired the gun had picked up the cash register, but had fallen on the floor, she again hit him with the stool. The men left empty-handed. Mrs Jones shut and locked the shop door behind them.

5. A short time later, at about 8.25 pm, two police officers saw the appellant and another man in Kings Cross Road. The appellant was found to have a handgun tucked in the front of his jeans and a further search revealed a black holster. He was sweating profusely. The two men were arrested.

6. The appellant told police that two other men "did the holdup and they ran out and gave me the gun". The other man who was arrested, Romeo George Calin, told police that he had seen the appellant in the street and asked him to repay \$80 he owed him. Mr Calin told police that the appellant had said "Don't bother me I have just done job, I fired two shots". Mr Calin was interviewed at the police station and a written statement was prepared for and signed by him. That statement repeated the same story, saying, in part:

"3. On Tuesday 21 March 1995, roughly eight thirty I was just walking up the street, near the Hyatt, where the Oz Rock is in Kings Cross. I saw this bloke who owes me eighty dollars. I only know him from the street, an acquaintance I met a couple of times and a few months ago I lent him the eighty dollars to help him out with rent and that.
4. He is Asian, pretty chubby, dark hair, I don't know his name I just know him from the street. When I saw him, he was walking fast up

past the Hyatt, He walked past me and I saw he was sweaty and that. I said to him, 'Where's my eighty dollars, you owe it to me.' He said, 'No leave me alone leave me alone.' I said, 'I'm not fuckin going to leave you alone, til you give me my eighty bucks, Where is it.' He said, 'I haven't got it, leave me alone, cause I'm running because I fired two shots.' I said, 'What do you mean you fired two shots.' He said, 'I did a job and the other guy was with me bailed out.'"

After giving this statement Mr Calin was allowed to go home.

7. In December 1995, Mr Calin told police he was still willing to give evidence about the matter but in March 1996 he told police that he was not willing to do so because he had heard that he was being called a dog.
8. At the trial of the appellant, the prosecution called Mr Calin to give evidence. He gave evidence in chief of speaking to the appellant just after 8 o'clock on 21 March 1995 and asking him when he was going to pay some money that he owed him (Calin). He said that he could not recall any other conversation with the appellant. The prosecution then sought leave to cross-examine Mr Calin about what he had said in the written statement to police.
9. Trial counsel for the appellant made a number of submissions in answer to the application but it is not necessary to notice all of these different aspects of the matter in any great detail. She submitted that the written statement of Mr Calin which it was sought to put to him in cross-examination and tender in evidence was a statement that Mr Calin denied making. Trial counsel contended that although Mr Calin had signed the document he was affected by alcohol at the time, he had not read it or understood it and he signed it simply to be able to leave the police station. (After a lengthy voir dire the trial judge ruled not just that there was evidence from which the jury could conclude that Mr Calin had made the statement relied on by the prosecution, but also that he was satisfied beyond reasonable doubt that Mr Calin had done so. It is not immediately apparent why the judge made such a finding. No point now arises about this, however, and we do not pause to examine it further.)
10. Trial counsel submitted that evidence of what Mr Calin had reported the appellant as saying to him was not admissible or, if it was admissible, should be excluded in the exercise of one or more discretionary powers to do so. The trial judge rejected these contentions.
11. The prosecution then cross-examined Mr Calin in front of the jury. Mr Calin admitted signing the document that had been prepared by the police but denied that the statements in it were his. The police officer who prepared the written statement gave evidence of the taking of the statement. Another officer deposed to Mr Calin having made a similar oral statement to him. The written statement that Mr Calin had signed was tendered in evidence.
12. The trial judge instructed the jury that if they accepted that Mr Calin had told police what the accused had said to him ("leave me alone, because I'm running, because I fired two shots ... I did a job, and the other guy was with me bailed out") that was evidence of the fact that the appellant did say those words to Mr Calin. Taken as a whole, however, the charge to the jury would have been understood as an instruction that if the jury were satisfied that the appellant said these words to Mr Calin, they were a confession by the appellant to the crime with which he was charged.
13. The appellant was convicted and sentenced to six years imprisonment with an additional term of two years. He appealed to the Court of Criminal Appeal. Of the grounds of appeal to that Court it is necessary to notice only the contention which

challenged the use of the evidence of what Mr Calin had told police (in writing and orally) to establish that the appellant had committed the offence.

14. The Court of Criminal Appeal rejected this and the other grounds of the appeal. The members of the Court (Cole JA, Dowd and Sperling JJ) agreed that the trial judge had not erred in permitting cross-examination of Mr Calin on his prior inconsistent statements^[1] and in permitting proof of the making of the statements^[2]. They concluded that once these statements were admitted "s 60 provided that the hearsay rule did not apply to the statement" of the appellant that was contained in those statements, and they "became evidence of the fact that the [appellant] had made the statement to him which Mr Calin recited to the police"^[3]. Although not said expressly in the Court's reasons, the rejection of the appellant's argument necessarily entailed accepting that the trial judge had rightly directed the jury that the evidence of what Mr Calin had said out of court was evidence that the appellant had committed the offence charged.

15. By special leave, the appellant now appeals to this Court.

16. Several grounds of appeal were canvassed in this Court. Again, it is necessary to deal only with the contention that evidence of what Mr Calin had said out of court reporting the appellant's statement to him did not establish the truth of this alleged confession.

17. The statements made by Mr Calin had several elements. Those elements can be most easily identified from his written statement but a similar analysis could be made of what he told police orally. First, in his written statement, Mr Calin gave an account of what he had done: "I was just walking up the street, near the Hyatt". The statement gave an account of what he saw: "I saw this bloke ... [h]e walked past me and I saw he was sweaty and that." It recorded matters that appear to have been intended to explain events: "I lent him the eighty dollars to help him out with rent and that." It recorded the conversation he had had with the appellant, part of which the prosecution contended amounted to an admission: "... leave me alone, cause I'm running because I fired two shots ... I did a job and the other guy was with me bailed out."

The hearsay rule

18. Examination of the relevant provisions of the [Act](#) must begin from consideration of the general exclusionary rule created by [s 59\(1\)](#) (which is referred to in the [Act](#) as "the hearsay rule"). [Section 60](#) is an exception to the general rule of exclusion created by [s 59](#). The hearsay rule does not apply to certain previous representations. But the exception operates upon the rule and it is to the rule that attention must be directed first.

19. [Section 59](#) of the [Act](#) provides:

"59 The hearsay rule - exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**."

20. A "previous representation" is defined in the Dictionary to the [Act](#) as "a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced". A "representation" is defined to include, among other things, "an express or implied

representation (whether oral or in writing)" [4], while a representation contained in a document is taken to have been made by a person if the representation "was recognised by the person as his or her representation by signing, initialling or otherwise marking the document" [5].

21. "Representation" is often used in the law to refer to words that are intended to induce action or inaction by the person who hears or reads them. It may, therefore, seem to be an unusual word to use in this context. But it is clear from the Interim Report of the Law Reform Commission on evidence [6] that, in the proposals that were later formulated in the [Act](#), the term "representation" was used to apply to statements and to conduct and was used to encompass all that those statements or that conduct would convey to the observer. It is also clear that the proposal was intended to resolve

"the issue of whether the proposed rules should apply to implied assertions as well as express assertions, by recommending that a distinction be drawn between intended and unintended implied assertions, with the latter outside any hearsay rule" [7].

In its Interim Report, the Commission went on to state why it excluded unintended implied assertions from the operation of a hearsay rule and its exceptions. Chief among those reasons was the conclusion that it is unlikely that the person making some implied assertion would deliberately attempt to mislead if the implied assertion was not intended [8].

22. [Section 59](#) must be understood in this light. The rule's operation requires consideration first of why it is sought to lead evidence of something said or done out of court (a previous representation). What is it that that "previous representation" is led to prove? In particular, is it sought to lead it to prove the existence of a fact that the person who made the representation intended to assert by it? The fact that the statement or the conduct concerned might unintendedly convey some assertion is not to the point. The inquiry is about what the person who made the representation intended to assert by it.

23. The previous representations made by Mr Calin that it was sought to adduce in evidence could be seen as being of two kinds: statements of what he had done or seen, and statements of what he had said or heard. Again it is convenient to treat the matter by reference to the written statement signed by Mr Calin. There can be little doubt that Mr Calin intended to assert that he had done the things recorded in the statement, that he had seen the things that were recorded in it and that he had said and heard the words set out in it. But there is no basis for concluding that Mr Calin intended to assert as a fact that the appellant had "fired two shots", had just done "a job" or that the "other guy" had "bailed out". Mr Calin had no way of knowing these facts. All Mr Calin intended to assert was that the appellant had told him these things and (perhaps, on one view of the matter) that Mr Calin believed (or at least did not disbelieve) what he had been told.

24. Mr Calin's belief (or lack of disbelief) in what he was told was of no relevance to the issues that arose at the trial. Accepting that Mr Calin believed what the appellant had told him would not, directly or indirectly, rationally affect the assessment of the probability of the existence of the facts in issue in the proceeding [9]. Knowing that Mr Calin had said out of court that the appellant had confessed to the crime was relevant only to the question whether he, Mr Calin, should be believed. No doubt, an assertion *by the appellant* that he had fired two shots, had done "a job" and that the "other guy" had "bailed out" would be relevant to the issues at the trial. But *Mr Calin's statement* contained no such assertion; it contained only an assertion that the appellant had said these things.

25. Even if the trial judge was right to conclude, as he did, that Mr Calin could be cross-examined about his prior inconsistent statements and was right to conclude that evidence could be given of those prior statements, it was necessary to identify how those prior statements might properly be used by the jury. There are several steps in that process of identification. They can be described in these terms.
26. Evidence that Mr Calin had seen what was recorded in his statements was relevant to the issues in the case. Mr Calin's representation out of court that he had seen these things was hearsay. Because his representation out of court (that he had seen these things) was relevant for the purpose of showing that he had made a prior statement that was inconsistent with his evidence in court, the hearsay rule did not apply and the representation was admissible to prove the existence of the fact that Mr Calin intended to assert by his earlier representation.
27. By contrast, Mr Calin did not, in his out of court statements, intend to assert any fact about his conversation with the appellant other than that he had said certain words and that he had heard the appellant say the words he attributed to him.
28. The nature of what Mr Calin said in his statements to the police was such that evidence of those statements was evidence both of representations made *by* Mr Calin to the police (about what Mr Calin had seen and heard) and of representations made *to* Mr Calin by the appellant (about what the appellant had done). By virtue of [s 59](#), the evidence was not admissible to prove the existence either of the facts which Mr Calin intended to assert to the police or of the facts which the appellant intended to assert to Mr Calin. [Section 60](#) operated only upon the former representations; it had nothing to say to the representations made by the appellant to Mr Calin. It was only the representations made by Mr Calin to the police that were relevant for a purpose referred to in [s 60](#): the purpose being to prove that Mr Calin had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to Mr Calin's representations, but not to the representations allegedly made by the appellant. And, of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by [s 81](#) because the evidence of these confessional statements was not first hand^[10].
29. To put the matter another way, [s 60](#) does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. And yet that is what was done here. Evidence by a police officer that Mr Calin had said, out of court, that the appellant had *said* that he had done a job was treated as evidence that the appellant *in fact* had done a job - a fact which Mr Calin had never intended to assert. (Of course, it would be different if Mr Calin had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court would be the appellant's, not Mr Calin's.)
30. It follows that evidence that Mr Calin had earlier reported that the appellant had confessed was not evidence of the truth of that confession. It should not have been received at the trial of the appellant, as it was, as evidence establishing that the appellant had committed the offence.
31. The conclusion that the evidence of the reported confession by the appellant was inadmissible as evidence of the truth of the alleged confession is consistent with basic principle and with the scheme of the [Act](#) as a whole; it is not to be seen as some retreat to outdated and outworn technical distinctions.
32. The common law of evidence has long focused upon the quality of the evidence that is given at trial and has required that the evidence that is given at trial is given orally,

not least so that it might be subject to cross-examination. That is why the exclusionary rules of the common law have been concerned with the quality of the evidence tendered - by prohibiting hearsay, by permitting the giving of opinions about matters requiring expertise by experts only, by the "best evidence rule" and so on. And the concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial^[11].

33. Over the years various inroads have been made on the rule that evidence at trial is essentially oral evidence of first-hand observation. Business record provisions of evidence legislation provide an obvious example.
34. It is not surprising, then, that Divs 2 and 3 of [Pt 3.2](#) of the [Act](#) provide certain exceptions to the hearsay rule. But the exceptions are of a limited kind. First, Div 2, which concerns the tender of certain hearsay statements at both civil^[12] and criminal trials^[13] is confined to "first-hand" hearsay: previous representations made by persons who had personal knowledge of the asserted facts^[14]. Division 3 makes other exceptions but they relate to business and like records.
35. The provisions for these exceptions are to be understood in light of the view expressed by the Law Reform Commission that "secondhand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility"^[15]. As the Commission went on to point out, where A gives evidence of what B said that C had said, the honesty and accuracy of recollection of B is a necessary link in the chain upon which the probative value of C's statement depends^[16]. Estimating the weight to be attached to what C said depends on assessing B's evidence about it.
36. Admissions are dealt with separately by [Pt 3.4](#) of the [Act](#). [Section 81](#) provides that the hearsay rule (and the opinion rule) do not apply to evidence of an admission. [Section 82](#), however, excludes evidence of admissions that is not first-hand. It provides:
- "Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:
- (a) it is given orally by a person who saw, heard or otherwise perceived the admission being made, or
- (b) it is a document in which the admission is made."
37. [Section 9](#) of the [Act](#) says that the common law in relation to evidence in a proceeding is to operate "except so far as this [Act](#) provides otherwise expressly or by necessary intendment". To hold, as was held by the trial judge and by the Court of Criminal Appeal, that the statements made by Mr Calin out of court could be admitted as evidence that the appellant had committed the crime with which he was charged because, in the evidence he gave in court, Mr Calin had denied making statements that the appellant had confessed, leads to a result that not only is sharply at odds with the other provisions of the [Act](#) to which we have referred but is at odds with the common law in relation to evidence in a proceeding. It is at odds with the common law because it shifts the focus of the process of proof away from what witnesses say in court that they have seen or observed to what a witness reports that another person earlier said had been heard. And the contention was that the evidence of the reports might be led in evidence, not because the person who was alleged to have heard the words was called to give evidence, but because that person denied that they had been said. The curiosity of the result can then be seen in stark relief.

38. Nothing in the reports of the Law Reform Commission that preceded the passing of the [Act](#) suggests that it was intended by [s 60](#) to provide for the tendering in evidence of reports of the kind contained in Mr Calin's out of court statements.
39. At common law, a previous inconsistent statement put to a witness was evidence only of the fact that the witness had made an inconsistent statement; it was not evidence of the truth of the contents of that earlier statement^[17]. It was evidence that went only to credit. The Law Reform Commission was very critical of this rule which, it said, imposed a "schizophrenic task" on the tribunal^[18] and its recommendations for change of the law must be understood in the light of its trenchant criticism of this aspect of the common law. Similarly, its recommendations must be understood in the light of its criticism of the result that follows from the application of the common law rule against hearsay to the evidence of experts. At common law, an expert (such as a medical practitioner) may give evidence about the factual basis for the opinion expressed (such as the history given by the patient) only as evidence showing the foundation for that opinion, not as evidence of the truth of the facts recounted^[19].
40. It is then clear that [s 60](#) was intended to work a considerable change to the common law. But there is no basis, whether in the considerations which we have mentioned as having influenced the Commission or otherwise, for concluding that [s 60](#) was intended to provide a gateway for the proof of any form of hearsay, however remote. As has been indicated earlier in these reasons, that that was not intended is made plain by the terms of [s 59](#) to which [s 60](#) is an exception.
41. Evidence of Mr Calin's prior statements of what the appellant had said should not have been admitted as evidence of the truth of the confession allegedly made by him to Mr Calin. Because those prior statements of what the appellant had said went only to Mr Calin's credit, the trial judge could either have rejected those parts of the statements^[20] or, if that course was not followed, would have had to give clear directions to the jury about the very limited use to which they could be put. In the circumstances of this case, the former course was to be preferred.
- The proviso
42. The respondent submitted that, even if the evidence of Mr Calin's report of the appellant's confession was wrongly admitted, the appeal should nevertheless be dismissed on the ground that the evidence against the appellant was so strong that the proviso to [s 6](#) of the [Criminal Appeal Act 1912](#) (NSW) should be applied.
43. The case against the appellant was strong. He was apprehended within a short time of the offence carrying a firearm that was almost certainly the weapon that had been used. His description accorded with the description the victim had given of one of her attackers. His photograph had been picked from a group of photographs shown to the victim and his photograph had also been picked by a man who had observed two men leaving the shop at the time of the offence. The appellant's explanation for having the firearm when arrested was an explanation that a jury might view with great scepticism.
44. It is, however, not possible to say in a case such as this, which depended to a significant extent upon evidence of identification, that the wrongful reception of evidence of an apparent confession did not deprive the appellant of "a real chance of acquittal"^[21] or "a chance which was fairly open to him of being acquitted"^[22]. That being so, this is not a case for application of the proviso.
45. The appeal should be allowed, the order of the Court of Criminal Appeal dismissing the appeal to that Court against conviction should be set aside and in lieu it be ordered that the appeal be allowed, the conviction quashed and a new trial be had.

[1] [s 43\(1\)](#) of the [Act](#).

[2] [s 43\(2\)](#).

[3] *R v Lee*, unreported, New South Wales Court of Criminal Appeal, 5 May 1997 at 10 per Cole JA, with whom Dowd and Sperling JJ agreed on this point.

[4] par (a) of the definition of "representation".

[5] cl 6(b) of [Pt 2](#) of the Dictionary.

[6] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985).

[7] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 684 (footnote omitted).

[8] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 684.

[9] [s 55\(1\)](#).

[10] [s 82](#).

[11] Smith and Holdenson, "Comparative Evidence - The Uniform Evidence Acts and the Common Law", (1998) 72 *Australian Law Journal* 363 at 364.

[12] [ss 63, 64](#).

[13] [ss 65, 66](#).

[14] [s 62](#).

[15] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 678.

[16] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 678. See also Great Britain, Law Reform Committee 13th Report, *Hearsay Evidence in Civil Proceedings*, (1966) Cmnd 2964 at par 15.

[17] *Taylor v The King* [1918] [HCA 68](#); (1918) 25 CLR 573.

[18] Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 334.

[19] See, for example, *Ramsay v Watson* [1961] [HCA 65](#); (1961) 108 CLR 642 at 647-649 per Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ.

[20] [s 137](#).

[21] *R v Storey* [1978] [HCA 39](#); (1978) 140 CLR 364 at 376 per Barwick CJ.

[22] *Mraz v The Queen* [1955] [HCA 59](#); (1955) 93 CLR 493 at 514 per Fullagar J.

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1 W.L.R.

A [COURT OF APPEAL]

*REGINA v. LORD SAVILLE OF NEWDIGATE AND OTHERS,
Ex parte A AND OTHERS

1999 July 6; 28

Lord Woolf M.R., Robert Walker
and Tuckey L.JJ.

B *Tribunal—Tribunal of inquiry—Evidence—Witnesses seeking anonymity
before tribunal on security grounds—Tribunal refusing to grant
anonymity—Whether refusal unreasonable*

C On 30 January 1972 British soldiers opened fire with live rounds during a march in Londonderry, and 13 civilians were killed and 13 wounded. Shortly afterwards, the Widgery inquiry was set up to inquire into the events of that day, which became known as “Bloody Sunday.” For security reasons the inquiry granted anonymity to all military witnesses, except for senior officers, and soldiers who had fired live rounds were designated by letters of the alphabet. Other soldiers were referred to by numbers. In 1998 the Bloody Sunday inquiry was set up to inquire further into the shootings, taking into account new information. The tribunal initially ruled that soldiers who had fired live rounds would be identified by their surnames only, unless particularly unusual. Following an application for judicial review by four soldiers, that ruling was quashed by the Divisional Court, whose decision was upheld by the Court of Appeal, and the matter was remitted to the tribunal for redetermination. The tribunal, finding that its duty to carry out a public investigation overrode the concerns of the soldiers, ruled that all soldiers previously granted anonymity would be referred to by their full names, subject to the right to apply for anonymity on special grounds. The applicants, 17 soldiers who had fired live rounds, sought judicial review on the ground that the tribunal’s decision was unreasonable. The Divisional Court allowed the application and quashed the tribunal’s ruling in so far as it applied to soldiers who had fired live rounds.

F On appeal by the tribunal:—
Held, dismissing the appeal, that in the absence of compelling justification it was unreasonable for a decision-maker to reach a decision which contravened or might contravene human rights, and where a fundamental right was engaged the options available to the reasonable decision-maker were curtailed; that the court would anxiously scrutinise the strength of the countervailing considerations and the degree of the interference with the human right involved, and the more substantial that interference the more the court would require by way of justification before being satisfied that the decision in question was reasonable; that since (i) the inroad on openness involved in granting anonymity would be limited, (ii) the tribunal might not have paid sufficient attention to the soldiers’ perception of the fairness of the inquiry, (iii) the tribunal might not have attached sufficient significance to the soldiers’ right to life and (iv) the tribunal might not have attached sufficient weight to the assurance of anonymity given by the Widgery inquiry, the only decision that had been open to the tribunal was to grant anonymity to the soldiers; and that, accordingly, the appeal would be dismissed (post, pp. 1866E–1867A, D–G, 1875E–1876B, E–F, 1877G–1878B, C–D).

H *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517, H.L.(E.) applied.

Decision of the Divisional Court of the Queen’s Bench Division affirmed.

Reg. v. Lord Saville of Newdigate, Ex p. A (C.A.)**[2000]**

The following cases are referred to in the judgment of the court:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General v. Leveller Magazine Ltd. [1979] Q.B. 31; [1978] 3 W.L.R. 395; [1978] 3 All E.R. 731, D.C.; [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.)

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

Lloyd v. McMahon [1987] A.C. 625; [1987] 2 W.L.R. 821; [1987] 1 All E.R. 1118, C.A. and H.L.(E.)

Pergamon Press Ltd., In re [1971] Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535, C.A.

Reg. v. Governor of Pentonville Prison, Ex parte Fernandez [1971] 1 W.L.R. 459; [1971] 2 All E.R. 24, D.C.; [1971] 1 W.L.R. 987; [1971] 2 All E.R. 691, H.L.(E.)

Reg. v. Lord Saville of Newdigate, Ex parte B (unreported), 16 March 1999, D.C.; The Times, 15 April 1999; Court of Appeal (Civil Division) Transcript No. 543 of 1999, C.A.

Reg. v. Ministry of Defence, Ex parte Smith [1996] Q.B. 517; [1996] 2 W.L.R. 305; [1995] 4 All E.R. 427, D.C.; [1996] Q.B. 517; [1996] 2 W.L.R. 305; [1996] 1 All E.R. 257, H.L.(E.)

Reg. v. Newcastle upon Tyne Coroner, Ex parte A, The Times, 19 January 1998

Reg. v. Panel on Take-overs and Mergers, Ex parte Guinness Plc. [1990] 1 Q.B. 146; [1989] 2 W.L.R. 863; [1989] 1 All E.R. 509, C.A.

Reg. v. Secretary of State for the Environment, Ex parte Hammersmith and Fulham London Borough Council [1991] 1 A.C. 521; [1990] 3 W.L.R. 898; [1990] 3 All E.R. 589, D.C., C.A. and H.L.(E.)

Reg. v. Secretary of State for the Environment, Ex parte National and Local Government Officers' Association (1992) 5 Admin.L.R. 785, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay [1986] 1 W.L.R. 155; [1986] 1 All E.R. 458, C.A.; [1987] A.C. 514; [1987] 2 W.L.R. 606; [1987] 1 All E.R. 940, H.L.(E.)

Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General [1975] Q.B. 637; [1974] 3 W.L.R. 801; [1975] 1 All E.R. 142, D.C.

The following additional cases were cited in argument:

Bolton Metropolitan Borough Council v. Secretary of State for the Environment (1990) 61 P. & C.R. 343, C.A.

General Mediterranean Holdings S.A. v. Patel [1999] 3 All E.R. 673

Reg. v. Legal Aid Board, Ex parte Kaim Todner [1999] Q.B. 966; [1998] 3 W.L.R. 925; [1998] 3 All E.R. 541, C.A.

Reg. v. Murphy [1990] N.I. 306, C.A.(N.I.)

Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696 [1990] 2 W.L.R. 787; [1990] 1 All E.R. 469, C.A.; [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

Reg. v. Taylor [1994] Crim.L.R. 680, C.A.

Scott v. Scott [1913] A.C. 417, H.L.(E.)

Vilvarajah v. United Kingdom (1991) 14 E.H.R.R. 248

APPEAL from the Divisional Court of the Queen's Bench Division.

With the leave of Collins J. granted on 26 May 1999, the Treasury Solicitor applied, on behalf of the applicant soldiers for judicial review by way of an order of certiorari to quash the decision of Lord Saville of Newdigate, Sir Edward Somers and William L. Hoyt, the members of the Bloody Sunday Inquiry, a tribunal established under the Tribunals of Inquiry (Evidence) Act 1921 to investigate the events on Sunday, 30 January 1972 which led to loss of life in connection with the

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A procession in Londonderry on that day, published on 7 May 1999 to withdraw anonymity from the applicants during the conduct of its proceedings. On 17 June 1999 the Divisional Court (Roch L.J. and Maurice Kay J.; Hooper J. dissenting) allowed the application and granted leave to appeal.

The tribunal appealed.

The facts are stated in the judgment of the court.

B

Christopher Clarke Q.C., Alan Roxburgh and Jacob Grierson for the tribunal.

Sir Sydney Kentridge Q.C., David Lloyd Jones Q.C., Michael Bools and Margaret Gray for the applicants.

Ian Burnett Q.C. and William Hoskins for the Ministry of Defence.

C *John Coyle* (of the Northern Ireland Bar) for the families of the deceased and injured.

Cur. adv. vult.

D 28 July. LORD WOOLF M.R. handed down the following judgment of the court. 1. This is the judgment of the court on an appeal from a decision of a majority of the Divisional Court (Roch L.J. and Maurice Kay J., Hooper J. dissenting).

The background

E 2. The order of the Divisional Court, made on 17 June 1999, partially quashed a decision of the tribunal sitting as The Bloody Sunday Inquiry ("the tribunal"). The tribunal was established under the Tribunals of Inquiry (Evidence) Act 1921 following a statement made by the Prime Minister in the House of Commons (Hansard (H.C. Debates), 29 January 1998, cols. 501–503) and a resolution adopted by both Houses of Parliament. The members of the tribunal are the Right Hon. Lord Saville of Newdigate (a Lord of Appeal in Ordinary), the Right Hon. Sir Edward Somers (a retired judge of the Court of Appeal of New Zealand) and the Hon. William L. Hoyt (a former Chief Justice of the Supreme Court of New Brunswick).

F 3. The resolution establishing the tribunal referred (following the language of section 1(1) of the Act of 1921) to: "a definite matter . . . of urgent public importance, namely the events on Sunday, 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day."

G 4. In the course of those events, thirteen persons (none of them a member of the British armed forces) were shot and killed and at least that number were shot and wounded on the streets of Londonderry. 30 January 1972 has become known as "Bloody Sunday." In the words of the written submission made to this court on behalf of the tribunal: "It is not in dispute that the majority, at least, of the casualties were the result of shooting by the British army, but the circumstances of the shootings are, and always have been, acutely controversial. In broad terms, the army version of events has been that soldiers fired only aimed shots at identified gunmen and nail and petrol bombers. The relatives of the dead and the injured, and many civilian witnesses, have maintained that the victims

were innocent of any wrongdoing and that the shootings were unjustified and criminal.”

5. Immediately after this very grave incident both Houses of Parliament resolved to establish a tribunal of inquiry under the Act of 1921, and Lord Widgery, then the Lord Chief Justice of England, was appointed to conduct the inquiry. He held public hearings at Coleraine (which is about 30 miles from Londonderry) during February and March 1972, and later heard submissions in London. During the hearings in Coleraine, 114 witnesses gave oral evidence and were cross-examined. The witnesses fell, as Lord Widgery recorded in his “Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day” (H.C. 220 (1972)), at paragraph 6: “into six main groups: priests; other people from Londonderry; press and television reporters, photographers, cameramen and sound recordists; soldiers, including the relevant officers; police officers; doctors, forensic experts and pathologists.”

6. Forty soldiers gave oral evidence to Lord Widgery. Five were senior officers who gave evidence under their own names, without making any application for anonymity. The others were permitted to identify themselves, and were referred to throughout the inquiry, by a system of code names. 28 soldiers admitted that they had fired live rounds on that day (rubber bullets were also fired) and 23 of them gave oral evidence; all these 28 were designated by letters of the alphabet (“lettered soldiers”). Other soldiers who gave evidence or were referred to in evidence were designated by numbers (“numbered soldiers”).

7. The anonymity accorded to the lettered and numbered soldiers does not appear to have been regarded by Lord Widgery as particularly controversial. He stated in his report, at paragraph 8:

“Since it was obvious that by giving evidence soldiers and police officers might increase the dangers which they, and indeed their families, have to run, I agreed that they should appear before me under pseudonyms. This arrangement did not apply to the senior officers, who are well known in Northern Ireland. Except for the senior officers, the individual soldiers and police officers are referred to in my Report by the letter or number under which they gave evidence in the tribunal.”

8. As a result of observations made when an earlier application was considered by this court, further inquiries have been made about the original grant of anonymity and an affidavit has been sworn by Lieutenant-Colonel Overbury, who then held the post of Assistant Director, Army Legal Services and was closely involved in the army’s preparations for Lord Widgery’s inquiry. Colonel Overbury makes clear that soldiers were ordered to give evidence.

9. Under section 1(1) of the Tribunals of Inquiry (Evidence) Act 1921 the tribunal presided over by Lord Saville has all the powers of the High Court in respect of enforcing the attendance of witnesses and compelling the production of documents. Under section 2(a) the tribunal “shall not refuse to allow the public or any portion of the public to be present at any proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given . . .”

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A 10. Because of the way in which this matter has evolved, it is necessary
to set out in some detail the course of the tribunal's proceedings since its
establishment. The tribunal delivered an opening statement in
B Londonderry on 3 April 1998. It has established an office in London and
has instructed solicitors and counsel to the tribunal. It has been engaged
on the very onerous task of gathering and analysing documentary and
written evidence (including films, sound recordings and still photographs),
C locating and interviewing witnesses (both civilian and military) and
selecting and instructing expert witnesses. The tribunal has also had to
deal with various preliminary matters, including applications for
anonymity. The public hearing was due to commence in September 1999
but has now been postponed.

C 11. The tribunal held a preliminary hearing in Londonderry on 20 and
21 July 1998, having first circulated a memorandum listing and
commenting on the matters to be addressed at the preliminary hearing.
The memorandum covered representation of interested parties,
documentary evidence and witness statements. Paragraphs 20, 21 and
22 dealt with applications for anonymity, for immunity from prosecution
and for evidence to be heard in camera. Paragraph 20 was in the following
terms:

D "20.1 If any potential witness wishes to give evidence without
revealing publicly his or her name and/or from behind a screen in
order to conceal his or her face, an application should be made to the
tribunal in writing, explaining the reasons why this is considered
E necessary. 20.2 Each such application will be considered on its merits
and, if anonymity is granted, the tribunal will state the reasons in
public. 20.3 If the interested parties have any general observations or
submissions to make as to the circumstances in which such
applications should or should not be granted, they are invited to do
so in their written summaries."

Paragraph 22 was in the following terms:

F "22.1 It would only be in exceptional circumstances that the
tribunal would accede to an application by a witness or interested
party for evidence to be given in camera. If the tribunal were to
accede to any such application, its reasons for doing so would be
publicly stated. 22.2 The parties are again asked to set out in their
written summaries any general submissions they may wish to make on
G this matter."

H 12. On 24 July 1998 the tribunal issued an 18-page document ("the
preliminary ruling") containing its rulings and observations on the matters
raised at the preliminary hearing. The tribunal rejected the suggestion that
it should approach its task on the footing that the inquiry should be
regarded as ordinary adversarial litigation between the families of the dead
and the wounded (on the one hand) and the soldiers and the Ministry of
Defence (on the other hand). The preliminary ruling quoted from the
Report of the Royal Commission on Tribunals of Inquiry chaired by
Salmon L.J. (1966) (Cmnd. 3121) and from a paper by Professor Walsh,
"The Bloody Sunday Tribunal of Inquiry—A Resounding defeat for Truth,
Justice and the Rule of Law," (1997), which was very critical of Lord
Widgery's inquiry. The tribunal agreed with Professor Walsh's general
views on the function of an inquiry of this kind:

“The tribunal of inquiry by contrast is set up specifically to find the truth. It is expected to take a positive and primary role in searching out the truth as best it can. Certainly, it will seek the assistance of any interested party who has evidence to give or who has an interest in challenging the evidence offered by another party. It must be emphasised, however, that it is the tribunal, and not the parties, which decides what witnesses will be called to give evidence. Indeed, strictly speaking there are no parties, no plaintiff and defendant, no prosecutor and accused, only an inquiry after the truth. It is the tribunal which directs that inquiry. All the witnesses are the tribunal’s witnesses, not the witnesses of the parties who wish them to be called. Whether any individual witness will be called is a matter for the tribunal. Moreover, the tribunal can be expected to act on its own initiative to seek out witnesses who may be able to assist in the quest for the truth. Ultimately, the task facing the tribunal is to establish the truth, not to make a determination in favour of one party engaged in an adversarial contest with another.”

13. The preliminary ruling explained in some detail how the tribunal intended to act on its own initiative—for instance in instructing experts in different fields, publishing both the instructions and the experts’ reports as they were received. It then addressed the issue of anonymity, noting that the Treasury Solicitor and the Ministry of Defence had already indicated that applications for anonymity were likely to be made on behalf of soldiers who had been serving in Londonderry on Bloody Sunday. The tribunal’s observations on this issue in the preliminary ruling are of such importance that they must be set out at length:

“It should be remembered that there are various different forms of anonymity. Depending on the circumstances, it might be appropriate to allow a witness to give evidence without stating his or her name and address in public, or perhaps to give evidence from behind a screen in order to conceal his or her physical appearance. It might also be necessary to preserve the anonymity of individuals by substituting letters or numbers for names in witness statements and other documents. Mr. Treacy [counsel for a group of families and wounded] referred us to a number of authorities in this field, including *Scott v. Scott* [1913] A.C. 417, *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440 and *Reg. v. Murphy* [1990] N.I. 306. He also annexed to his written submissions a copy of an article by Gilbert Marcus, “Secret Witnesses” [1990] P.L. 207. Mr. Treacy argued that the granting of any form of anonymity was a very grave step that should only be taken if justified on compelling grounds. In adversarial procedure, great importance is rightly attached to the principle of open justice. In particular, the courts require very strong grounds indeed before departing from the rule that a person charged with a criminal offence is entitled to know the identity of prosecution witnesses and to see them give their evidence. One of the reasons for this is to enable the opposing party to investigate and assess the credibility of those witnesses. The position in relation to an inquiry such as this one is, in our view, rather different. Nobody is being prosecuted before this tribunal, nor is it our function to do justice between parties competing in an adversarial contest. Our task is to do justice by ascertaining, through an inquisitorial process, the truth about what happened on Bloody Sunday. The proper fulfilment of

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A that task does not necessarily require that the identity of everyone who gives evidence to the inquiry should be disclosed in public. The tribunal will know the identity of all witnesses and, unlike a court, will itself take responsibility for investigating their credibility if there is reason to think that such an investigation is necessary. Indeed we think that there are likely to be circumstances in which granting anonymity will positively help us in our search for the truth.

B Witnesses are unlikely to come forward and assist the tribunal if they believe that by doing so they will put at risk their own safety or that of their families. Moreover it would be a mistake to suppose that the grant of anonymity would always operate to protect soldiers who are alleged to have been guilty of serious offences on Bloody Sunday. There may well be witnesses who wish to give evidence that is favourable to the interpretation of events for which the families and the wounded contend, but who will not co-operate with the tribunal without assurances as to their anonymity. We are aware, for example, of certain television programmes in which people describing themselves as ex-soldiers present on Bloody Sunday have criticised the conduct of the army on that day, but have done so anonymously, presumably for fear of reprisals by their former comrades.

C Accordingly, we will be willing to grant an appropriate degree of anonymity in cases where in our view it is necessary in order to achieve our fundamental objective of finding the truth about Bloody Sunday. We will also be prepared to grant anonymity in cases where we are satisfied that those who seek it have genuine and reasonable fears as to the potential consequences of disclosure of their personal details, provided that the fundamental objective to which we have referred is not prejudiced. As to the degree of anonymity that is appropriate, our current view is that restricting the disclosure of names and addresses ought to be sufficient in most, if not all, cases. We would regard the use of a screen as a wholly exceptional measure. The obligation nevertheless remains firmly on those who seek anonymity of any kind to justify their claim."

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14. Following on the preliminary ruling Mr. Anthony Lawton, an assistant Treasury Solicitor, applied by letter dated 2 September 1998 for anonymity on behalf of three lettered and four numbered soldiers, asking that "no information tending to disclose their identities, occupations, addresses or telephone numbers should be disclosed to any person other than members of the tribunal and its staff."

G 15. A similar application was made by the Ministry of Defence, by letter dated 23 October 1998, on behalf of soldiers not then represented before the tribunal. Since then the number of the Treasury Solicitor's clients (that is, those for whom the Treasury Solicitor is acting in the tribunal) has grown considerably. It is a much larger number than the 17 applicants for judicial review for whom the Treasury Solicitor is acting in these proceedings. Of the 28 soldiers who admitted firing live rounds on Bloody Sunday, five have died. All but one of the remaining 23 have left the army. Each of the 17 applicants is one of these 23 lettered soldiers. All but three of them were serving in the First Battalion of the Parachute Regiment.

H

16. The tribunal notified the other interested parties of the soldiers' applications for anonymity, and two rounds of written submissions and supplementary submissions were made to the tribunal in November and

early December 1998. The tribunal also had a written threat assessment dated 22 October 1998 provided by the Security Service. It is convenient to note at this point that none of the soldiers has applied for his evidence to be heard in camera, or for it to be given from behind a screen. Nor have any of the objectors to anonymity suggested that any soldier or ex-soldier should be required to disclose his present address, telephone number or occupation. The controversy has been limited to the issue of disclosure of witnesses' true names.

17. On 14 December 1998 the tribunal decided to grant only a limited form of anonymity, and on 17 December it published a written statement of further rulings and observations on venue and anonymity. The tribunal decided not to give any general permission for the military witnesses to give evidence in London (rather than Londonderry). The tribunal stated its reasons as follows: "Whatever the rights and wrongs of what occurred on Bloody Sunday, in our view the natural place to hold at least the bulk of the oral hearings is, in these circumstances, where the events in question occurred. We have concluded on the information presently available to us that this factor, so far as the soldiers generally are concerned, outweighs personal convenience and the expenditure required to make appropriate security and accommodation arrangements."

18. However the tribunal recognised that changing circumstances or particular matters affecting individuals might call for reconsideration of this general conclusion.

19. The tribunal's statement then set out its decision on anonymity. Since that decision has been quashed by the Divisional Court on an earlier application for judicial review (*Reg. v. Lord Saville of Newdigate, Ex parte B* (unreported), 16 March 1999), it is not necessary to set out the decision and the stated reasons in detail. It is sufficient to summarise it as follows: (a) The tribunal did not accept that the grant of anonymity before Lord Widgery's inquiry raised a presumption in favour of anonymity. (b) The tribunal accepted that the military witnesses' fears of reprisals were both genuine and reasonable, but saw "no concrete evidence of a specific threat." (c) The tribunal did not see anonymity as an encouragement to perjury: "there is a real possibility that it would, at least in some cases, have the opposite effect of encouraging greater candour." (d) The tribunal saw weight in the argument that the families of the dead and the injured were entitled to know the names of those who accused the dead and injured of having been armed with firearms, nail-bombs or petrol-bombs; but regarded that factor as significantly offset by the inquisitorial nature of the proceedings. (e) The tribunal attached great weight "to another factor, which appears in the submissions only in the form of an argument that to grant anonymity would diminish public confidence in the inquiry by creating the impression that the true facts are being concealed. We see the point of substance as being not the maintenance of public confidence as such, but rather the proper fulfilment of our public duty to ascertain what happened on Bloody Sunday . . . we are satisfied that, if anonymity in the strict sense were to be allowed on a widespread or blanket basis, that would represent a material derogation from the tribunal's public investigative function." Essentially the same reasoning lies at the heart of the tribunal's later decision which is now under review. (f) The tribunal's decision was, subject to further applications based on particular circumstances, to grant to the lettered soldiers only a limited form of anonymity under which a witness's

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A surname would be published (unless particularly unusual) but not his forenames.

20. On 5 February 1999 the Treasury Solicitor applied for leave to move for judicial review of the tribunal's decision on anonymity. The application was made on behalf of four lettered soldiers (B, O, U and V). On 16 March 1999 the Divisional Court (Kennedy L.J. and Owen and Blofeld JJ.) unanimously quashed the decision and remitted it to the tribunal for redetermination. The Divisional Court reached its conclusion on five grounds, the first of which was that the tribunal had misunderstood the nature and extent of the anonymity granted by Lord Widgery in 1972. The judgment of the court concluded:

C "We should however make it clear that we express no view whatsoever as to whether there should be any grant of anonymity of any kind. That is not our function. It is clear from the information before us that there are powerful arguments both ways. How those arguments should be resolved the inquiry must decide."

21. The Divisional Court refused leave to appeal. The members of the tribunal applied to this court for leave to appeal on one point only, that is the tribunal's understanding of the grant of anonymity by Lord Widgery. D The application was expedited and on 30 March 1999 this court (Lord Woolf M.R. and Otton and Ward L.J.J.) granted permission to appeal but unanimously dismissed the appeal: *Reg. v. Lord Saville of Newdigate, Ex parte B*, The Times, 15 April 1999; Court of Appeal (Civil Division) Transcript No. 543 of 1999.

E 22. So the question of anonymity was remitted to the tribunal for redetermination. The tribunal had already (before the hearing in this court) written to the Treasury Solicitor (with copies to all interested parties) indicating that it would reconsider the whole question of anonymity "entirely afresh" and inviting further submissions, especially on particular issues identified in the letter. These included the issue of derogation from the tribunal's public investigative function. The letter stated:

F "The tribunal regards it as its duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday and that this prima facie involves the giving of evidence by all witnesses under their proper name. The tribunal may well have to balance this consideration against competing considerations relating to the security of the relevant soldiers. But the tribunal would like to know whether you contend that the tribunal has misunderstood its duty and, if so, to explain why."

23. The letter also asked the Treasury Solicitor and the Ministry of Defence to arrange for a new threat (or risk) assessment in unambiguous terms.

H 24. The response of the Security Service was that the threat posed "to the U.K. mainland has risen since the previous assessment was made." It added that "the military has long been regarded as a legitimate target by republican terrorists, and numerous military personnel have been attacked on the mainland. Military targets are currently at a *significant level of threat*" (our emphasis). The assessment concluded by saying: "Whilst the soldiers involved in the events of Bloody Sunday remain unidentified, the threat to them will be potential rather than actual, since it will not be

possible for terrorists to undertake the planning which would be necessary in order to mount an attack against them.”

25. In answer to a response for clarification under the heading “Different categories of military personnel,” it was stated:

“In relation to the categories of soldiers identified by the inquiry, we would expect their attractiveness as targets to rank as follows (beginning with the least attractive): 1. current or former soldiers, 2. current or former soldiers from the Parachute Regiment, 3. soldiers or ex-soldiers who took part in Bloody Sunday, and 4. soldiers or ex-soldiers who fired live rounds on Bloody Sunday. This ranking is based upon the political and emotive significance of each category to the republican movement. In order to assess the threat to any *particular* soldier it would be necessary to carry out an individual assessment, on the basis of detailed personnel information provided by him. The names of the soldiers who fired live rounds on Bloody Sunday are not currently available to terrorists. Therefore there has been no possibility of terrorists attempting to target them. In the event of their being identified, they would be more likely, currently, to be at a significant level of threat, with the possibility of this rising in the event of the overall mainland threat also rising. In the event of the provisional I.R.A. returning to violence, then the overall level of threat on the mainland would certainly rise. When an *individual* is assessed to be at a particular level of threat, this is of more consequence than an assessment that the threat to a category of individuals is at that level. When the threat to military targets is assessed as significant, this means there is a significant chance of an attack taking place on any (unspecified) military target. When the individual is assessed to be as at significant threat, this means that there is a significant chance of him or her personally being targeted for attack.”

26. Further lengthy written submissions were made to the tribunal by the Treasury Solicitor, the Ministry of Defence, counsel acting for soldier H (who had been singled out for criticism by Lord Widgery) and counsel acting for the family of James Wray (one of those killed on Bloody Sunday), counsel acting for the family of Bernard McGuigan (one of those killed on Bloody Sunday), counsel for the family of Alexander Nash who is now dead but was wounded, and William Nash (one of those killed on Bloody Sunday), counsel for two of the injured, Mr. Michael Bradley and Mr. Michael Bridge, and counsel on behalf of the remainder of the deceased and injured. The tribunal held oral hearings in Londonderry on 26 and 27 April to consider the renewed applications for anonymity. It reached a decision on 5 May and published its ruling on 7 May. The general effect of the ruling was to require all military witnesses to be identified by their true names (both forenames and surnames).

27. After rejecting applications on behalf of a wider class the tribunal expressed its essential conclusion in relation to the lettered soldiers in paragraph 28 of the written decision:

“That leaves those who fired live rounds on Bloody Sunday. As to these there is a further consideration, which we pointed out in our December ruling. This is that the conduct of these soldiers lies at the very heart of this inquiry. It is the firing on the streets that was the

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A immediate cause of loss of life. It is that loss of life that we are publicly investigating. To conceal the identity of those soldiers would, as it seems to us, make particularly significant inroads on the public nature of the inquiry. As a group they are assessed as more attractive targets than the generality of soldiers and thus face a higher likelihood of terrorist attack if they are identified, but this increased threat is not considered sufficient, at least at present, to move them from the 'significant' to a higher category. On the basis of the general assessment, we have concluded that the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open inquiry."

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28. The Treasury Solicitor (by then acting on behalf of 17 lettered soldiers) again applied for leave to move for judicial review and Collins J. granted permission on 26 May 1999. On 17 June the Divisional Court by a majority quashed the tribunal's decision that the names of military witnesses should be disclosed, to the extent that that decision applied to the 17 applicants and other soldiers who fired live rounds in Londonderry on 30 January 1972: *Reg. v. Lord Saville of Newdigate, Ex parte A*, The Times, 22 June 1999. The tribunal has appealed to this court with the permission of the Divisional Court.

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The task of the tribunal

29. It is impossible to overestimate the difficulty of the task on which the tribunal is engaged. The issues which are involved are ones of great sensitivity. They are issues on which very entrenched but different opinions are held by those who have an interest in its outcome. There are undoubtedly among the public those who will be prepared to misinterpret any action of the tribunal. They will seize on any decision that they dislike as indicating that the tribunal is lacking in impartiality. The tribunal has the problem of overcoming the immense handicap of exploring events which have taken place over 27 years ago. The task is made immeasurably more difficult because of there having been a previous inquiry, which, instead of dissipating, may have increased the controversy which surrounds the events of Bloody Sunday.

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30. The tribunal has however the great advantage of its uniquely distinguished membership. It has also the advantage of the quality of the tribunal's own legal team and the fact that it has been able to make legal representation available to those likely to be directly affected by its activities. The tribunal has already been able to demonstrate the thoroughness and the openness of the inquiry which it is undertaking.

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The role of the court

31. It is accepted on all sides that the tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal. In exercising their role the courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts. However, subject to the courts confining themselves to their well-recognised role on applications for judicial review, it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues

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involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is consistent with the performance of its duty it should avoid interfering with the activities of a tribunal of this nature to any greater extent than upholding the rule of law requires.

32. One aspect of the courts' role in this case has been controversial. That is as to the intensity of the scrutiny which the courts are required to adopt when reviewing the reasonableness of the tribunal's decision as to anonymity. Is the role limited to ascertaining whether the decision is rational or does it involve adopting some other test? Is it correct to say that because a fundamental right of the soldiers is involved the threshold of irrationality is lowered? In answering these questions, it is as well to start by remembering that the reason for the usual *Wednesbury* standard (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223) being applied is because the body whose activities are being reviewed has the responsibility of making the decision and not the courts. In addition that body in the majority of situations is going to be better qualified to make decisions than the courts. It is only where the decision is unlawful in the broadest sense that the courts can intervene. The courts have the final responsibility of deciding (whether a decision is unlawful) and not the body being reviewed. The courts therefore can and do intervene when unlawfulness is established. This can be because a body such as a tribunal has misdirected itself in law, has not taken into account a consideration it is required to take into account or taken into account a consideration which it is not entitled to take into account when exercising its discretion. A court can also decide a decision was unlawful because it was reached in an unfair or unjust manner.

33. However, there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision-maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.

34. As to the appropriate test in this case, both Mr. Clarke, on behalf of the tribunal, and Sir Sydney Kentridge, on behalf of the soldiers, were agreed. It is the test adopted by Sir Thomas Bingham M.R. in the Court of Appeal (Civil Division) in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517, 554E-F. The test was based on submissions of Mr. David Pannick in that case. They were in these terms:

"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more

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A substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

B 35. Sir Thomas Bingham M.R. indicated that he regarded this statement as "an accurate distillation of the principles laid down by the House of Lords in *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514 and *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696" and we would respectfully agree with him.

C 36. In the Divisional Court in *Ex parte Smith* [1996] Q.B. 517 Simon Brown L.J. expressed agreement with what Neill L.J. had said in *Reg. v. Secretary of State for the Environment, Ex parte National and Local Government Officers' Association* (1992) 5 Admin.L.R. 785, 797–798 in regard to the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) before that Convention became part of our domestic law in the context of proportionality. Simon Brown L.J. said, at p. 538: "In short, I respectfully conclude with Neill L.J. that even where fundamental human rights are being restricted, 'the threshold of unreasonableness' is not lowered."

D However, Simon Brown L.J. added:

"On the other hand, the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised."

E 37. Again we would respectfully agree with the second quotation from the judgment of Simon Brown L.J. What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham M.R. in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 which is not in issue.

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H 38. Turning to the role of the courts on judicial review to ensure procedural fairness. This need for fairness was a matter central to the Report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Salmon L.J. (1966) (Cmd. 3121). The commission, having come to the conclusion that the Tribunals of Inquiry (Evidence) Act 1921 type of tribunal should be retained subject to the qualification set out in the report, went on to consider in detail how to improve the safeguards for witnesses and interested parties. Because of the need for fairness, many of the recommendations of the commission are now conventionally adopted, not only by statutory tribunals, but in the case of other inquiries, including departmental inquiries. The Royal Commission made it clear that they did not believe that it could ever be right for an inquiry of this kind to be held entirely in secret (paragraph 39). In *In re*

Pergamon Press Ltd. [1971] Ch. 388 Lord Denning M.R. said of Board of Trade inspectors that they must act fairly. He went on to indicate that inspectors have a duty to protect witnesses. He recognised, at p. 400, that inspectors “must be masters of their own procedure” but subject to the overriding requirement that “they must be fair.” Although we are here concerned with a very different type of inquiry from that being considered in the *Pergamon Press* case, it can equally be said of this tribunal that while it is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts. This is because there is an implied obligation on the tribunal to provide procedural fairness. The tribunal is not conducting adversarial litigation and there are no parties for whom it must provide safeguards. However the tribunal is under an obligation to achieve for witnesses procedures which will ensure procedural fairness: see *Lloyd v. McMahon* [1987] A.C. 625, 702–703, *per* Lord Bridge of Harwich and *Reg. v. Secretary of State for the Environment, Ex parte Hammersmith and Fulham London Borough Council* [1991] 1 A.C. 521, 598F. As to the content of the requirement of procedural fairness, this will depend upon the circumstances and in particular on the nature of the decision to be taken: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, *per* Lord Diplock, at p. 411H, and *per* Lord Roskill, at p. 415A–B, relied upon by Mr. Clarke on behalf of the tribunal in further submissions which he made to the court at its request. The requirement of procedural fairness for witnesses is well recognised in the courts by allowing witnesses to give evidence behind screens. A defendant opposing the evidence being given in this way could make this a ground of complaint on appeal. At this inquiry where there are no defendants the requirement of procedural fairness surely involves an obligation to be fair to witnesses, including, for example, protecting them when necessary or giving them notice in a Salmon letter of proposed findings of improper conduct.

39. After the conclusion of the hearing, it occurred to the court that an alternative approach to the issue on this appeal from that argued was, in addition to considering the reasonableness of the decision to which the tribunal had come, to also consider the fairness of that decision. The court therefore sought the assistance of the parties as to whether or not to grant anonymity to the soldiers was a question involving the fairness of the procedure which the tribunal was proposing to adopt and, if so, what was the court’s role in relation to this? In answer to the court’s questions, in addition to the helpful submissions from Mr. Clarke the court also received helpful submissions from Mr. Coyle on behalf of the families and Sir Sydney Kentridge and his team on behalf of the soldiers. Mr. Burnett on behalf of the Ministry of Defence indicated by letter that he did not dissent from this approach and accepted it would be for the courts to rule upon the question of unfairness as a matter of law, but he made it clear that the Ministry of Defence still maintained that the decision of the tribunal was unreasonable.

40. Mr. Coyle in his submissions stressed that procedural fairness must be viewed in the round and fairness to the former military witnesses was only one dimension of the question posed; it was also necessary to consider the interests of the dead and injured and the public interest. With this submission we are in agreement.

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A 41. The additional submissions on behalf of the soldiers relied upon the decision of this court in *Reg. v. Panel on Take-overs and Mergers, Ex parte Guinness Plc.* [1990] 1 Q.B. 146. In that case Lord Donaldson of Lymington M.R. said, at pp. 178–179:

B “As I have already indicated, I think that, at least in the circumstances of this appeal, it is more appropriate to consider whether something has gone wrong of a nature and degree which require the intervention of the court, rather than to approach the matter on the basis of separate heads of *Wednesbury* unreasonableness and unfairness or breach of the rules of natural justice: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. In passing I would, however, accept that whether the rules of natural justice have been transgressed is not to be determined by a C *Wednesbury* test: ‘Could any reasonable tribunal be so unfair?’ On the other hand, fairness must depend in part on the tribunal’s view of the general situation and a *Wednesbury* approach to that view may well be justified. If the tribunal’s view should be accepted, then fairness or unfairness falls to be judged on the basis of that view rather than the court’s view of the general situation.”

D Lloyd L.J. said, at p. 184:

E “[Counsel for the panel] argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal’s own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is F unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with [counsel for Guinness] that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached.” (Emphasis supplied.)

G Woolf L.J. added, at pp. 193–194:

H “On the application for judicial review it is appropriate for the court to focus on the activities of the panel as a whole and ask with regard to those activities, in the words of Lord Donaldson of Lymington M.R., ‘whether something has gone wrong’ in nature and degree which requires the intervention of the courts. Nowadays it is more common to test decisions of the sort reached by the panel in this case by a standard of what is called ‘fairness.’ I venture to suggest that in the present circumstances in answering the question which Lord Donaldson of Lymington M.R. has posed it is more appropriate to use the term which has fallen from favour of ‘natural justice.’ In particular in considering whether something has gone wrong the court is concerned as to whether what has happened has

resulted in real injustice. *If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it supervises.*" (Emphasis supplied.)

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42. Mr. Clarke, in his submissions, argues that while there is an entitlement to procedural fairness, this does not encompass a right to anonymity. Fairness requires no more than that the soldiers can apply for anonymity and be given a decision on the merits of their application reached by a fair procedure. Mr. Clarke's approach to the decision whether to grant or withhold anonymity is that it is not an issue of a procedural nature. He submits that this conclusion is supported by the fact that a decision to withhold anonymity could not result in the ultimate decision of the tribunal being quashed.

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43. We cannot accept Mr. Clarke's approach. The fact that a court would not quash the final decision of a tribunal on a procedural ground does not mean that a preliminary decision would not be quashed. The unfair refusal of an interpreter or an adjournment are very much the type of decisions which, if the subject of an immediate application for judicial review, will be reversed by the courts although the final decision would not be. The concern of the court is whether what has happened has resulted in real injustice.

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44. It may well be that in the majority of cases the decision will be the same whether the approach propounded by Sir Thomas Bingham M.R. in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 is adopted or whether the issue is regarded as one of fairness. However it is still important to recognise that a decision not to grant anonymity to the soldiers could result in their being treated in a manner which is genuinely unfair. Unfair because it requires them to undergo an unnecessary risk.

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The decision of the Divisional Court

45. Roch L.J. gave a judgment with which Maurice Kay J. was in substantial agreement: *Reg. v. Lord Saville of Newdigate, Ex parte B*, The Times, 15 April 1999. Roch L.J. considered the tribunal had adopted the right test. He accepted that Sir Sydney Kentridge had posed the right question for the court by asking:

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"Given the inquisitorial function of the tribunal, and given its clear finding that anonymity would not impede it in its fundamental task of discovering the truth, could a reasonable tribunal conclude that the additional degree of openness to be gained by disclosure of the names of the 17 soldiers who fired shots is so compelling a public interest as to justify subjecting them to a significant danger to their lives?"

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46. In answering this question he pointed out that the tribunal in its decision did not assess the inroads which withholding the names of the soldiers would make into the public nature of the inquiry and added that if it had assessed the inroad it would have found "that the derogation was with regard to the tribunal's duty to search for the truth, nil and with regard to the duty to hold a public inquiry, limited."

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47. Roch L.J. went on to indicate that the tribunal had departed from the correct test which they had propounded in July 1998. Instead they had adopted a different approach, which did not "accord to the applicants' fundamental human rights the required weight." This coupled with the

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A failure of the tribunal to analyse the extent to which granting anonymity to the soldiers would detract from the tribunal's obligation to conduct an investigation which would, in the eyes of responsible people, be public, open and thorough and lead to accurate findings meant the decision was flawed.

B 48. Maurice Kay J. for similar reasons came to the same conclusion. He added, however, that he saw considerable force in the submission that the tribunal had not done justice to the material which the Ministry of Defence had provided as to risk.

C 49. Hooper J., in his dissenting judgment, pointed out that what was involved here was a balancing exercise in which the tribunal had to weigh up various competing factors in deciding whether or not to grant anonymity. In particular, the risk to a soldier and his family of not granting anonymity had to be weighed as against the necessity to find the truth about Bloody Sunday and the requirements of open justice. He then compared the situation before the tribunal with that which arises before the criminal courts from time to time and he concluded that the tribunal had anxiously considered the matter and that sitting in London he would be most reluctant to interfere with the conclusion of such a distinguished and "international" tribunal.

D 50. In the course of his judgment, Hooper J. stated:

"Although the greater the danger the more weight must be given to the risk factor, the practice in the criminal courts to which I have already referred both in England and, more importantly, in Northern Ireland, shows that anonymity may not be granted even where risks are much higher than in this case."

E 51. For this statement he does not cite any authority and it does appear that he may be under a misapprehension since at least an examination of the authorities which were put before this court indicates that wherever there was risk to life anonymity was granted both in this jurisdiction and in Northern Ireland and the parties were unaware of any case where anonymity had not been so granted. The qualification that may be necessary is that where someone is a defendant to a criminal charge, his identity will be made known.

The second decision

G 52. Although all three judgments in the Divisional Court gave very careful consideration to the issues which are before us, in a case of this sort, the outcome of this appeal involves our having to analyse the second decision of the tribunal afresh. We have to form our own judgment as to whether it is flawed on the grounds of unfairness or lack of reasonableness. We therefore propose to consider the relevant paragraphs of the second decision in turn. In doing so we will single out particular passages of that decision for comment but we are at all times mindful that it is essential when engaging in an exercise of this kind to look at the decision as a whole.

H 53. We can start at paragraph 11 where the tribunal states that it "has as its fundamental objective the finding of the truth about Bloody Sunday. It regards itself as under a duty to carry out its public investigative function in a way that demonstrates to all concerned that it is engaged in a thorough, open and complete search for the truth about Bloody Sunday." To this statement of its duty it adds a reference to having to conduct the

inquiry in accord with “the principle of open justice in a democratic society.”

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54. The tribunal is undoubtedly right in identifying that it has these duties. However, having regard to what we have already said, it is clear that the tribunal is also under a further duty, and that is a duty to be fair to the soldiers.

55. In the next paragraph, paragraph 12, the tribunal indicates that:

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“in the absence of compelling countervailing factors, those who give evidence to the tribunal should do so under their proper names. This after all is an inquiry into events in which people lost their lives and were wounded by British army gunfire on the streets of a city in the United Kingdom. To withhold the names of those in the army who were concerned with that event must detract from an open search for the truth about what happened; and must need justification of an overriding kind. It is of course correct to bear in mind (as we said in December) that it is unlikely that the tribunal would be hampered in its objective of finding the truth about Bloody Sunday by granting anonymity (since the tribunal is an inquisitorial body and would itself know the identify of the witnesses), but this does not really take the matter much further forward, since what is presently at issue is the question of the duty laid on the tribunal as to the manner in which it should seek that objective. The tribunal must conduct what Salmon L.J. described in [the Report of the Royal Commission on Tribunals of Inquiry (1966) (Cmnd. 3121)] as a ‘public investigation.’”

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56. In relation to this paragraph it is important to note the reference to “compelling countervailing factors.” It is difficult to envisage a more compelling factor than that the withdrawal of anonymity could subject the soldiers to risk of a fatal attack. Furthermore, it is important not to overstate the extent to which the failure to name the soldiers would detract from the open search for truth. The soldiers would still give evidence openly in public. The tribunal and counsel for the tribunal would know their names. If any investigation as to their credibility was required, the tribunal could carry out this investigation. Having carefully considered Mr. Clarke’s submissions we are left with the clear impression that not only would the tribunal not be hampered in its objective of finding the truth, but in fact the open search for the truth would only be restricted in a marginal way. Like Roch L.J., we are concerned that the tribunal has not assessed what would be the real disadvantage of the soldiers giving their evidence under labels rather than in their own names.

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57. In the next paragraph of their decision (paragraph 13) the tribunal rejects the suggestion of Otton L.J. on the previous appeal to this court that it might be fairer “to impose the obligation on those seeking to remove the anonymity (rather than those seeking to sustain it).” The tribunal then states that while it is not making its decision on the basis of who has the burden of proof, it is bound to say that in its judgment “it is not open justice that needs to be justified, but rather any departure from open justice.” Again, this paragraph does appear to play down the significance which should be attached to the risk to the soldiers. Surely it could be said equally that the need for increasing the risk to the soldiers has to be justified.

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A 58. The tribunal then proceeds to consider the effect of Lord Widgery's agreement to afford anonymity. As to this the tribunal concludes that the assurance falls away because of the compelling unforeseen circumstance that the second inquiry could not be anticipated. The tribunal goes on to say "we consider that our ability to restore confidence will be undermined, unless we can form a wholly independent judgment, based on the facts before us, on the question of anonymity—and indeed on any other

B questions that we have to consider."

C 59. This approach of the tribunal is inconsistent with the first decision of this court: *Reg. v. Lord Saville of Newdigate, Ex parte B*, The Times, 15 April, 1999. However, it is not necessary to do more than note the position because the tribunal proceeded to consider what would be the situation if it was wrong in the approach it had adopted as to the assurance. As to this it says, at paragraph 20, that "although it is an important consideration, it does not of itself, or together with any other matters relied upon by the soldiers, amount to a compelling countervailing factor that should override our duty as we have stated it." The tribunal then compares the security position at the time of the Widgery Inquiry with that at the present time and points out that the present position is no way comparable. The tribunal concludes by saying: "of course no one

D knows what the future may hold, and the bad days may return, but whether or not they will is at best a matter of speculation." Again it may be said that this approach is not fair to the soldiers. The problem about the risk to which they are subjected is that once their identity is revealed, the die is cast and it is too late for the protection provided by anonymity to be restored. The increased risk referred to earlier has subsequently receded. It could again increase. This is a matter which the tribunal could

E be expected to have in the forefront of its mind.

60. It is to the degree of danger to the soldiers to which the tribunal then turns. Having stated, at paragraph 22, that it considered that the soldiers have "grounds for their assertion that they have genuine and reasonable fears" the tribunal indicates that this was a matter which it has considered with the greatest care. It says that "on the one side is our duty

F to carry out a public investigation; on the other the understandable fears for their personal safety and that of their families, which we accept that the soldiers have." Reference is then made to the fact that in their December 1998 ruling they had "attempted to square the circle by suggesting that those who had the greatest reason to fear reprisals (the soldiers who fired live rounds on Bloody Sunday) could give their surnames only, thus providing both openness and a measure of security, but this attempt has failed on the grounds that security of surnames only was speculative." It then indicates its conclusion that there is in fact

G "no way of satisfactorily reconciling the two considerations." It then goes on to set out its conclusions, which we should set out in full. Before doing so, it is right to point out that in setting out the conflicting interests there is no express reference to the Widgery assurance. Furthermore while

H the tribunal is right to say that no one is now advocating the use of surnames only, the previous decision implicitly recognised that the soldiers' identities should be protected. That is clear because the previous ruling accepted that if a soldier could be traced by his surname, because it was unusual, then the tribunal would consider the use of a different label. A surname which is so common that it would not result in a soldier being traced is no more revealing than a letter A, B or C. The reason why "surnames only" is no longer regarded as a method of squaring the circle

is because since the previous decision it has been shown that even common names can result in the person concerned being traced. What the tribunal has not expressly referred to in this paragraph is the fact that although the real risk to the soldiers has increased and the Widgery assurance has now been held to be a relevant factor which should be taken into account, the soldiers now find themselves in a worse position than they were in relation to the first decision although they have been successful in having the first decision set aside. Of course, this always can be the consequence of obtaining the quashing of any decision. You lose the benefit of the good as well as avoiding the bad. However soldiers and their families would be less than human if they did not perceive this as an unfairness.

61. The way the tribunal expressed its conclusion is as follows:

“After the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers and does so even if the Widgery assurance continues to apply; and that accordingly the present applications of the soldiers must fail.”

62. It will be noted that in their conclusion, the tribunal does refer to taking into account the Widgery assurance. The tribunal also indicates that it is prepared to consider applications for anonymity on special grounds; that it fully appreciates that the removal of anonymity is permanent and it is possible that the threat to the soldiers may increase; that the soldiers’ attractiveness as targets can be divided into four categories: (1) current or former soldiers; (2) current or former soldiers from the Parachute Regiment; (3) soldiers or ex-soldiers who took part in Bloody Sunday; (4) soldiers or ex-soldiers who fired live rounds on Bloody Sunday.

63. The tribunal states, at paragraph 27: “However, we do note that all serving or former soldiers fall within the ‘significant’ category, so all are ‘priority’ targets . . . the danger created by identifying soldiers is one that is borne and has for many years been borne by hundreds, if not thousands, of serving or former soldiers, and is not such as to override the tribunal’s duty to conduct a public investigation.”

64. In relation to soldiers who fired the live rounds, the tribunal says that these soldiers lie at the heart of the inquiry. It therefore considers that not to reveal the identity of those soldiers would make “particularly significant inroads on the public nature of the inquiry.” The tribunal concludes that the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify their duty to conduct a public open inquiry. The tribunal refers to the fact that while there had been a reprisal attack immediately after Bloody Sunday, there was no evidence to suggest that any of the soldiers involved in Bloody Sunday had been subject to an attack for that reason, though a number of the soldiers involved are known or could have been identified.

65. The tribunal then acknowledges, at paragraph 31, it could have deferred its decision on anonymity until it was making its report. It rejects that course because the tribunal regards it as its “duty not only to report what we believe to be the truth, but also to conduct an open and public investigation.” The tribunal states, at paragraph 34, that it has not forgotten its previous ruling in which it indicated that it was a real possibility that anonymity would have the effect of encouraging greater candour but again it says that this “is not sufficient to override our duty

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A to carry out a public investigation.” Finally it states, at paragraph 35, that, in accordance with its ruling, the names of the soldiers were to be given but their addresses, telephone numbers and other personal details apart from their names would not be published without the consent of the soldiers. This however it is accepted will not prevent their being recognised.

B 66. Having dealt with the soldiers’ application, the tribunal went on to deal with five applications for anonymity by officers of the Royal Ulster Constabulary. In their case, the tribunal indicates that it regards the officers’ fears as being genuine and reasonable and having “very considerable substance” and that the limited degree of screening which is sought was justified in their case.

C *Our conclusions*

D 67. Having considered in detail the decision of the tribunal and made our comments on the detail, before reaching our conclusion, we regarded it as important to look at the situation as a whole. When doing this, we repeat that we are conscious of the fact that the members of the tribunal start with the considerable advantage of being continually immersed in investigating the available evidence as to what happened on Bloody Sunday. We also attach importance to the fact that Hooper J. in a most carefully crafted judgment in the Divisional Court dissented from the views expressed by Roch L.J. and Maurice Kay J. We are mindful of the submission of Mr. Christopher Clarke directed to the majority of the Divisional Court but equally capable of being directed to this court (if we come to the same conclusion) that we would be acting unlawfully by usurping a decision which it was for the tribunal to take and not the courts.

E 68. None the less, we are satisfied that the decision of the majority of the Divisional Court was right for the reasons they gave and Hooper J.’s conclusion was wrong. We come to that view not primarily because of the points of criticism which can be made as to the reasoning of the tribunal. Those criticisms would not in our judgment in themselves entitle the court to interfere. As is to be expected, the reasoning in general is of a high order and indicates that the members of the tribunal were, as they indicated, struggling to reconcile the conflicting considerations. Notwithstanding this it appears to us:

G (1) The tribunal has failed to attach sufficient significance to the fact that by carrying out a meticulous investigation and being prepared to reconsider every issue the tribunal is manifestly not only performing its primary role of discovering the truth in so far as this can be ascertained, but also establishing public confidence in the result of its deliberations. Here it should be remembered that the Tribunals of Inquiry (Evidence) Act 1921 in section 2 itself recognises that there can be circumstances where the public are excluded because it is “in the public interest expedient so to do.” The statute itself is, therefore, acknowledging that an inquiry can perform its primary duty even though the public are excluded in part from its investigation.

H (2) The tribunal, having acknowledged in its July 1998 preliminary hearing and to a lesser extent in its first ruling in December 1998 that there can be inroads on openness in an inquiry of this sort, surprisingly seems to have lost sight of the fact that the inroad on openness involved in allowing

the soldiers to use letters instead of names is limited. This is because: (i) the evidence would still be given in public with the soldiers capable of being observed while giving their evidence; (ii) the tribunal knows their names and as Mr. Clarke accepted could investigate any matters going to credibility; (iii) their officers who were in charge and should have been controlling events will be named; (iv) if there was any reason for naming a particular soldier this could still be done; (v) the ability for the tribunal to reach the truth was as the tribunal acknowledged not going to be undermined.

(3) In such a situation, the tribunal would certainly be still conducting an inquiry in public. (If authority is needed, it is provided by *Reg. v. Newcastle upon Tyne Coroner, Ex parte A*, *The Times*, 19 January 1998.) Reasons why it is important for a court to sit in public which were identified in *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, 449–450 and *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637, 651–652 would not be contravened. The supervision by the public would still be present, providing the safeguard against arbitrariness or idiosyncrasy. The evidence would be communicated publicly; full reports of the proceedings would be possible. The names of the witnesses might be of interest but they would be of no real concern to the onlookers and if they became of concern then they could still be named. Hooper J. attached importance to the analogy of criminal proceedings. However, in criminal proceedings there is a defendant, and a defendant is entitled to know who is accusing him; but this consideration does not arise here. Furthermore, in many criminal cases including rape cases and blackmail cases the identity of the victim is routinely concealed.

(4) The tribunal is obviously concerned about the perception of the families and their supporters. It is true that it is their concerns which have led to the establishment of the tribunal. However, while of course the tribunal had fully in mind the risk to the soldiers, it does not seem to have paid sufficient attention to the fact that to deny the soldiers anonymity would certainly affect their perception of the fairness of the inquiry. It is here that the importance of the requirement of fairness to the soldiers and their families becomes significant. From the point of view of the families of the dead and wounded, the harm of concealing the names is objectively of no great significance. To the soldiers and their families it is of great significance. It is to be noted that Mr. Coyle in his argument on behalf of the relatives of the late Bernard McGuigan indicates: “The names of the principal military personnel including those who fired live rounds have been known by the family of Barney McGuigan for some considerable time, and by others with a common interest in the inquiry.”

If this be right and it is a matter which is in issue, then it is difficult to understand why they should object to the soldiers not being named. The soldiers on the other hand with one exception are no longer in the army. Some of their families do not even know they were involved in Bloody Sunday. For them to find themselves in a situation where it is accepted that they have reasonable grounds for being in fear for their safety, 27 years after the events, will clearly be immensely worrying. From their point of view it is what they reasonably fear which is important, not the degree of risk which the tribunal identifies. The Ministry of Defence considers there are significant risks and if the tribunal can properly perform its primary duty of finding the truth if they

1 W.L.R. **Reg. v. Lord Saville of Newdigate, Ex p. A (C.A.)**

A are not named, from the point of view of their perception, what is the justification for increasing the risk to which they are to be subjected? They can fairly ask whether the tribunal has taken into account the effects of withdrawal of anonymity upon their perception of and confidence in the inquiry.

B (5) The tribunal did not agree with the approach indicated by Otton L.J., in *Reg. v. Lord Saville of Newdigate, Ex parte B*, The Times, 15 April 1999, but we would endorse his approach. We agree with the tribunal that the issue is not to be determined by the onus of proof. However, in our judgment the right approach here once it is accepted that the fears of the soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk? It is here that Sir Sydney Kentridge
C rightly relies on Lord Diplock's opinion in *Reg. v. Governor of Pentonville Prison, Ex parte Fernandez* [1971] 1 W.L.R. 987. The case was concerned with a different situation from that being considered here, namely, should a person be returned under section 4 of the Fugitive Offenders Act 1967. However, Lord Diplock's words as to the prejudice a fugitive might be subjected to (not involving a risk to his life but a risk of his being inappropriately tried or punished) are none the less relevant. Lord Diplock
D said, at p. 994:

E "The degree of confidence that the events specified in [section 4(1)(c) of the Act of 1967] will occur which the courts should have in order to justify refusal to return the fugitive is not determined by the mere use of the subjunctive mood of the auxiliary verb 'may.' It should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting, and on the other hand of refusing, the return of the fugitive if the courts' expectation should be wrong."

Later Lord Diplock added:

F "My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of paragraph (c) [of section 4(1)] is that the court must be satisfied that is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed
G by the Divisional Court. 'A reasonable chance,' 'substantial grounds for thinking,' 'a serious possibility' . . ."

H When what is at stake is the safety of the former soldiers and their families, adopting Lord Diplock's approach, the risk is extremely significant. After all, the individual's right to life is, as Lord Bridge of Harwich stated in *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, 531, the most fundamental of all human rights. It does appear that the tribunal may well have failed to attach sufficient significance to this.

(6) The tribunal may not have attached to the Widgery assurance the weight which we consider it should. Sir Sydney Kentridge did not pursue the contention contained in his respondent's notice that the soldiers were entitled to say that the assurance gave them a substantive legitimate expectation. However we would attach more importance to it than the

tribunal appears to have done. The more time that elapsed without the soldiers' expectation being contradicted, the greater the significance of the assurance. For 27 years they had enjoyed anonymity. To take away that anonymity after that period of time is a very significant event. The tribunal pointed out the period of time which had elapsed without a serious incident. However it is inevitable that the holding of the tribunal with soldiers giving evidence will rekindle the flames of anger which have been smouldering for so long.

69. Examining the facts as a whole, therefore, we do not consider that any decision was possible other than to grant the anonymity to the soldiers. In referring to the soldiers we have been confining our conclusions to those soldiers who are most at risk, namely the soldiers who either admitted firing rounds or are alleged to have fired rounds. While they are the soldiers who Sir Sydney Kentridge represented, there are other soldiers who do not fall within this category. We were asked to indicate our views as to the position of other soldiers. We would like to do so because we are conscious that more attention has already been given to this issue than is desirable and further disputes should if possible be avoided. However, reluctantly we have come to the conclusion that it would not be right to say more than that we cannot say on the material before us that it would be unlawful for the tribunal to insist on other soldiers being named.

We dismiss this appeal.

Appeal dismissed.

No order as to costs.

Solicitors: John Tate, Solicitor to the Inquiry; Treasury Solicitor; Desmond J. Doherty & Co., Londonderry; MacDermott & McGurk, Londonderry; McCartney & Casey, Londonderry; Madden & Finucane, Belfast.

[Reported by BRENDAN WRIGHT ESQ., Barrister]

Mount Murray Country Club Limited, Conrad Hotels Limited, Mount Murray Homes Limited v Nigel MacLeod, Mark Solly, Martin Bradshaw (The Chairman and Members of the Commission of Inquiry into Mount Murray), Ian Q. Kelly (The Assessor of Income Tax)



No Substantial Judicial Treatment

Court

Privy Council (Isle of Man)

Judgment Date

7 July 2003

14 of 2003

Man (Staff of Government Division) The High Court of Justice of the Isle of Privy Council

2003 WL 21491812

Before: Lord Bingham of Cornhill Lord Hoffmann Lord Rodger of
Earlsferry Lord Walker of Gestingthorpe The Rt. Hon. Justice Tipping

7th May 2003, Monday 7th July, 2003

JUDGMENT

The background

- 1.. After a hearing on 6 May 2003 their Lordships announced on 7 May that they would humbly advise Her Majesty that this appeal should be dismissed for reasons to be given at a later date. Their Lordships now give their reasons.
- 2.. The appellants are three associated companies in a group which has been engaged, since about 1991, in obtaining planning permission for the development, and more recently in the actual development and management, of a substantial area of land at Mount Murray, Santon, Isle of Man. The most active of the three appellants seems to have been Mount Murray Country Club Ltd, which was incorporated in 1990 as Conrad Hotels (IoM) Ltd; it changed its name in 1991 to Radcon Village Resorts Ltd and again in 1993 to its present name. Information as to the beneficial ownership of each of the appellants' share capital has not been disclosed, but they have been accepted as eligible for group relief for the purposes of Isle of Man income tax. They have the same managing director, Mr Peter Willers.
- 3.. The first three respondents are the members of a commission of inquiry ("the Commission") appointed by the Lieutenant-Governor under the Inquiries (Evidence) Act 1950 ("the 1950 Act") following resolutions of Tynwald made on 19 February and 19 March 2002. The fourth respondent is (and has at all material times been) the Assessor of Income Tax, a senior official in the Isle of Man public service.
- 4.. The background to the litigation is complicated but can be summarised fairly briefly, since much of it is covered in detail in the Report of an Inquiry into Planning and Development and other matters at Mount Murray (30 December 2000) by Professor Stephen Crow (the "Crow Report") mentioned below. During the 1980s the rapid expansion in cheap overseas holidays, especially in Mediterranean resorts, adversely affected tourism in the Isle of Man and other "cold water" destinations. During that decade the number of bedrooms available for visitors in the Isle of Man almost halved, from almost 13,000 to just under 7,000. The policy of the Isle of Man government was to encourage tourism and to give the island a more up-market image.

In 1982 a site of about 7.2 ha at Santon was zoned for “tourist development in parkland”. By 1991 the persons controlling the appellants had become interested in undertaking this development.

5.. The planning history of the development was protracted and controversial. Planning control in the Isle of Man is the responsibility of the Department of Local Government and the Environment (“DoLGE”). Promotion of tourism is the responsibility of the Department of Tourism, Leisure and Transport (“the Department of Tourism”). The Department of Tourism has throughout strongly supported the appellants' proposals, and their efforts to have the terms and conditions of the original planning permission altered so as to make the development more profitable for the appellants.

6.. The initial decision of the Planning Committee (on 22 February 1991) was for the construction of a resort village on 16.8 ha (42 acres), but with the buildings limited to the 7.2 ha (18 acres) originally designated in 1982. The application included 120–140 houses, and was accompanied by various supporting documents including a “Buyer's Guide” about which the Crow Report had a good deal to say. There were various conditions, including a standard condition limiting the duration of the approval to four years, and a requirement that the accommodation should be for bona fide tourists. However by stages the concept of the development grew and changed so that it ended up as what the Crow Report described, at paragraph 1.2, as

“a commitment until April 2003 to a development of 175 dwellings for permanent residents spread over a site of 16.8 ha (42 acres) (which also includes an hotel, parkland and one ‘hole’ of a golf course).”

7.. The Crow Report subjected the planning history to close and critical scrutiny. Two paragraphs from the report's “Overview” give an indication of what went wrong. After stating that there was no evidence to substantiate any charge of corruption against any of the officials concerned, the report continued, at paragraphs 1.42 and 1.43:

“So what was it that made officials act as they did? It is clear that in the first instance nobody in DoLGE had read the documentation of the application in principle (PA90/1842) fully, and that everyone had been taken in by the assertion of the tourism value of the whole project. So far as the residential development was concerned, it was a tourist accommodation scheme.

For this original lapse the officials concerned may (in my opinion) be forgiven if not excused. The Buyer's Guide in its original typescript (as it was in the material applications) ran to 49 pages, including such anodyne material as the Isle of Man occupying ‘a central position not only in the Irish Sea but in the British Isles’ and also many pages about the ‘philosophy’ of the holiday development. Even if any of those concerned had taken the trouble to read the document from one end to the other, which nobody appears to have done, the one page on which permanent residential occupancy was far from directly stated could easily be missed. Of course this now looms large as a consideration, but it must be remembered that at the time the proposal was being ‘sold’ to the Island as wholly a tourist enterprise, and this now apparent fiction did not loom large as an issue at the time.”

8.. The appellants and those who controlled them also wished to make the development more profitable by securing more generous tax reliefs than were previously available in the Isle of Man. One source of information about the appellants' successful efforts to obtain tax incentives is files maintained and supplied (both to Professor Crow and to the Commission) by the Department of Tourism. The other source is a statement, enlarged on in a supplementary statement, which Mr Ian Kelly, the Assessor of Income Tax, provided to the Commission. His statement identified three measures which gave new reliefs:

(1) the Income Tax (Capital Relief) Order 1991 (Circular No 110/91) , approved by Tynwald on 16 April 1991, increasing first-year allowances on qualifying premises (including tourist premises) to 100% in respect of expenditure after 5 April 1991;

- (2) the Income Tax (Capital Relief) (Tourist Business Incentive Allowance) Order 1991 (Circular No 337/91) , approved by Tynwald on 15 October 1991, which granted additional relief at the rate of 50% for a further three years after the first-year allowance, in respect of expenditure after 5 April 1991; and
- (3) the Income Tax (Capital Relief) (Tourist Business Incentive Allowance) (Amendment) Order 1992 (Circular No 510/92) , approved by Tynwald on 20 January 1993, which extended the definition of qualifying capital expenditure to include the installation of sports and associated recreational facilities for use solely or mainly in connection with tourist business (compliance with that condition to be certified by the Department of Tourism).

9.. In his supplementary statement the Assessor said that proposals for the creation of new “taxation structures” aimed at encouraging investment in tourism had first been put to the Treasury by the Department of Tourism in November 1990. The Assessor also described extensive contacts and discussions between himself and his deputy, Mr Robbie Kennaugh, officers of the Department of Tourism (especially its Chief Executive, Mr Terry Toohey, and Mr Stuart Mitchell) and persons acting for the appellants, especially Mr Gary Spence and a chartered accountant, Mr John Nugent of Pannell Kerr Forster of Douglas, Isle of Man. The Income Tax Division first became involved in discussions about the appellants' development in May 1992, and it became apparent from documents supplied to the Income Tax Division that the appellants had already been discussing tax matters with the Department of Tourism. There were meetings with the Assessor or his Deputy on 18 May, 30 July and 27 August 1992. Certificates of compliance under the 1992 Order were issued by the Department of Tourism on 22 December 1992 (when it was still in draft), on 2 March 1993 and on 26 September 1994. The Assessor stated that he was concerned about the latter certificate, and raised the matter with Mr Toohey. This led to a surprisingly strongly worded letter dated 19 October 1994 from Mr Spence to the Chief Minister, complaining of what Mr Spence called “unauthorised interference by the Treasury”. The letter ended with a threat of litigation. Threats to withdraw from the development, and threats of litigation, seem to have been a weapon frequently used by the appellants' representatives and advisers in their dealings with the public service in the Isle of Man.

10.. The planning side of the history was also punctuated with similar threats. These are set out in detail in Annex 3 to the Crow Report. The origins of that report were that by 2000 there was serious public disquiet in the Isle of Man as to the Mount Murray development. On 18 August 2000 the Council of Ministers commissioned Professor Crow, a distinguished planning expert, to inquire into the history of the development. He undertook that task with great promptitude and (although assisted only by a single secretary) delivered his written report on 30 December 2000. It consists of five chapters and six annexes. All the chapters, and four of the annexes, have been published; two of the annexes have been kept confidential. Parts of the report have already been referred to. Professor Crow concluded that although there was no evidence of corruption of any officials, it was a “sad history”. He made various recommendations for administrative improvements, set out in the last chapter of his report.

11.. However the publication of the Crow Report (almost in its entirety) did not allay all public concern. The matter came to a head when Mr Peter Karran, the Member of the House of Keys for Onchan, put down a resolution in Tynwald for the appointment of a commission of inquiry under the 1950 Act. This resolution was moved by Mr Karran and debated on 19 February 2002. After debate it was carried unanimously by the House of Keys and the Council. On 19 March 2002 there was a further debate (mainly about the costs of the Commission). On this occasion an amendment to the resolution about the Commission's costs was proposed and carried unanimously; the resolution as amended was then carried by a majority.

12.. The terms of the resolution carried on 19 February 2002 were as follows:

- “(a) that Tynwald requests the Governor to appoint a commission comprising three independent persons to investigate and report on the Government's handling of the irregularities occurring at Mount Murray referred to in the Report of an Inquiry into Planning and Development and other matters at Mount Murray and to make any appropriate recommendations in relation thereto;
- (b) that the chairman of the commission so appointed be authorised to exercise all the powers set out in section 1(1) of the Inquiries (Evidence) Act 1950 with reference to requiring the attendance of persons to give evidence, the production of documents and the taking of evidence;
- (c) that the Commission be requested to report to His Excellency by 31 August 2002; and
- (d) that the report of the Commission be laid before Tynwald upon completion.”

The amendment to the resolution about costs carried on 19 March 2002 was as follows:

“and further that the commission of inquiry be requested to investigate the allegations of corruption made in Tynwald Court at its sitting in February 2002.”

In a letter dated 14 March 2002 to Mr Nigel Macleod QC, the Lieutenant-Governor His Excellency Air Marshal Ian MacFadyen set out the terms of the main resolution with the insertion in paragraph (d) of the words “save for any matters of commercial confidentiality” but they do not appear in the official report of the proceedings in Tynwald.

13.. Mr Macleod accepted the Lieutenant-Governor's invitation to chair the Commission, and Mr Mark Solly and Mr Martin Bradshaw agreed to serve as the other members of the Commission. They set to work with little delay and completed the first stage of their work (intended to clarify the matters to be investigated) in May 2002. During the first stage the Commission took evidence on oath from a number of witnesses including Mr Karran. Both Mr Willers and the Assessor were summoned to give evidence to the Commission during the investigative stage, the Assessor being asked to furnish it with documents from his files. The Assessor supplied these documents on 27 June 2002.

14.. The second, investigative phase began on 1 July 2002, when Mr Willers gave evidence on oath before the Commission. Mr Willers answered some questions put to him, but he met many questions with a blunt and uncompromising refusal to answer. He did not rely on any privilege against self-incrimination. He simply asserted that the questions were outside the Commission's remit.

15.. Shortly after he had given his evidence to the Commission (so far as he was prepared to answer questions) Mr Willers learned that the Assessor had passed documents to the Commission. The appellants promptly applied to the Chancery Division of the High Court of the Isle of Man, by petition dated 8 July 2002, seeking interlocutory injunctive relief against the Commission (prohibiting them from using any information on the appellants' tax affairs and requiring them to identify anyone to whom such information had been passed) and against the Assessor (prohibiting him from answering any questions about the appellants' tax affairs). The appellants' basic complaint appears from an affidavit sworn by Mr Willers on 8 July 2002 (para 17):

“Even if the Crow Inquiry was legitimate and even if this Commission of Inquiry is legitimate there is no part of the remit to Mr Crow or to this Commission which could lead to the legal disclosure by the Treasury of the tax affairs of any person. Even confidential disclosure is governed by section 106 of the Income Tax Act 1970 , and a Commission of Inquiry set up by Tynwald does not fall within any of the categories there listed where disclosure is permitted.”

The Statutory Provisions

16.. Before any summary of the proceedings below it is appropriate to set out the relevant statutory provisions. The 1950 Act is based on the rather more elaborate provisions of the [Tribunals of Inquiry \(Evidence\) Act 1921](#) of the United Kingdom. Section 1 is the 1950 Act's only substantive section and sub-sections (1) to (4) (as amended by section 17 of the Civil Evidence Act 1973 and [Schedule 6 to the Local Government Act 1985](#)) should be set out in full:

“(1) Where the Governor appoints a commission or committee to inquire into any cause or matter, or any Board of Tynwald causes an inquiry to be held relating to any of the duties or functions exercisable by such Board, the chairman, or vice-chairman, of such commission, committee or Board may, if authorised by a resolution of Tynwald —

(a) by summons require any person to attend at such time and place as is set forth in the summons, to give evidence, or to produce any document in his custody or under his control which relates to any cause or matter in question at the inquiry; and

(b) take evidence on oath, and, for that purpose, the chairman or vice-chairman of such commission, committee or Board may administer oaths, or may, instead of administering an oath, require the person examined to make and subscribe a declaration of the truth of the matter in respect of which he is examined.

(2) If any person refuses or wilfully neglects to attend in obedience to a summons issued under this section, or to give evidence, or wilfully alters, suppresses, conceals, destroys or refuses to produce, any book or other document which he may be required to produce for the purposes of this section, or does anything which would, if the commission, committee or Board had been a Court of law having power to commit for contempt, have been contempt of that Court, the chairman or vice-chairman of such commission, committee or Board may certify the offence of that person under his hand to the High Court, and the High Court may thereupon inquire into the alleged offence, and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court.

(3) A witness before any such commission, committee or Board shall be entitled to the same immunities and privileges as if he were a witness in civil proceedings before the High Court.

(4) The commission, committee or Board holding the inquiry shall not at any of its proceedings for which the attendance of any witness is enforced or for which the production of any document is compelled under this section, refuse to allow the public, or any portion of the public, to be present at such proceedings unless in the opinion of the commission, committee or Board holding the inquiry, it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”

Section 1 (5) enables the commission to make orders for costs and provides for their enforcement.

17.. Section 106 of the Income Tax Act 1970 (as amended by section 7 of the Income Tax Act Etc (Amendment) Act 1985 and [Schedule 2, to the Treasury Act 1985](#)) (“the 1970 Act”) is headed “Information secret and confidential”. Sub-section (1) , and the main part of sub-section (2) , are as follows:

“(1) Every person having any official duty under this Act shall regard and deal with returns, assessment lists and copies of such lists relating to the income, or items of the income, of any person, as secret and confidential documents.

(2) Every person having possession of, or control over, any return or assessment list or copy of such list, or information contained in, or extracted from such return or list, who at any time communicates or attempts to communicate anything contained in such return, list or copy to any person [subject to ten exceptions lettered (a) to (j)] shall be guilty of an offence against this Act.”

Three of the ten exceptions were relied on below, but only that in para (j) was relied on before the Board:

“(j) unless required or authorised to do so by any enactment or by order of a court in the Island.”

18.. Sections 106A and 106B of the 1970 Act (added by section 80 of the Income Tax Etc (Amendment) Act 1985 and section 78 of the Income Tax Act 1989 respectively) authorise disclosure of information by the Assessor to the Collector of Customs and Excise, and to the Assessor by the Department of Health and Social Security and the Collector of Customs and Excise.

The proceedings below

19.. The appellants' application for injunctive relief was heard by Acting Deemster King who gave judgment on 23 July 2002. He had before him an affidavit of Mr Macleod from which he quoted para 75:

“The Commission has read, but has not yet fully considered, the documents which are the subject of this application. In general, the documents fall into two categories. The first category is correspondence and memos between Government officials and the developers and their various agents as the development was planned and taken forward and those documents deal with tax and town and country planning. The second category is the tax assessments of the companies involved in the Mount Murray development. These require further study, but they identify the companies involved in the Mount Murray development and the other companies within the same group for tax purposes. They provide the final step of the audit trail which will enable the Commission to dispel or confirm the suspicions that are held by a Member of Tynwald about the tax aspects of Mount Murray. There would be no need to make the details of the tax affairs of the developers public unless the Commission is satisfied that the public interest requires it.”

20.. The Acting Deemster attached importance to the distinction between the documents connected with the development, and the granting of tax reliefs in order to make the development more financially advantageous (“the lobbying documents”) and the tax returns and associated material (“the tax return documents”). He held that section 106 of the 1970 Act could not apply to the lobbying documents, since they did not fall within the description of “returns, assessment lists and copies of such lists”. But he thought it “highly arguable” that not only were the tax return documents within section 106 (a point that has never really been in dispute), but also that section 106 (2)(j) did not make an exception for documents covered by a summons issued under the 1950 Act.

21.. The Acting Deemster also addressed arguments that the lobbying documents had not been validly requisitioned either because they were not relevant to the inquiry being conducted by the Commission, or because they were covered by public interest immunity. He rejected those arguments. On the subject of public interest immunity he said,

“Again, assuming for the moment section 106 does not apply, it seems to me that on any balancing exercise, so long as the documentation is patently relevant to the issues which I have raised in short form in this judgment — that is, the linkage between the planning permission and the development of the amended legislation in relation to tax reliefs — and the seeking out of tax relief on tourist business grounds (not the detail of quantum as such, but the linkage of the general development of the two

issues), there really is no sensible argument that the public interest demands, on a balancing exercise, that it be withheld from the Commission.”

22.. Accordingly the Acting Deemster granted an injunction restraining the documents falling within the description in section 106(1) , but not other documents. The parties' representatives failed to agree as to the practical effect of this order (in terms of which documents should be allocated to each category) but that controversy was overtaken by the appellants' appeal and the respondents' cross-appeal. The parties agreed to treat the outcome of the appeal to the Staff of Government Division as the final disposal of the proceedings (subject, no doubt, to any appeal to the Board).

23.. The Staff of Government Division (Judge of Appeal Mr Geoffrey Tattersall QC and Acting Deemster Mr Roger Kaye QC) gave judgment on the appeal on 1 November 2002. The judgment identified four issues as follows:

- (1) The documents issue: how should the documents supplied by the Assessor be categorised?
- (2) The gateway issue: could the documents be lawfully disclosed, in the light of section 106 of the 1970 Act and principles of public interest immunity?
- (3) The relevance issue: were the documents (however categorised) relevant to the inquiry which the Commission was conducting?
- (4) The conditions issue: could and should the Court impose on the Commission any conditions as to the use which it made of documents disclosed to it?

24.. On the first issue, the Staff of Government Division followed the Acting Deemster in distinguishing in principle between the tax return documents and the lobbying documents. Only the former fell within section 106 , although the latter were confidential material which the Assessor should not disclose without good reason and for a proper purpose. But on the second issue it differed from the Acting Deemster in accepting the respondents' submission that section 106(2)(j) did provide a gateway to disclosure. The summons issued by the Commission was merely machinery for giving effect to disclosure authorised by an enactment (that is, the 1950 Act).

25.. On the third issue, relevance, the Staff of Government Division rejected the argument that the test of relevance was akin to that applied to discovery of documents in civil proceedings (para 66):

“Such an investigation is not a form of civil proceedings; there is no *lis* or action between identifiable parties. The functions of the Commission are primarily to conduct an investigation and make recommendations, which, or at least the first of which, is essentially a fact finding matter, not the resolution of a dispute.”

On the fourth issue it declined to impose conditions which might fetter the Commission's discretion. Accordingly it dismissed the appellants' appeal and allowed the cross-appeal.

26.. Special leave to appeal was granted by Her Majesty in Council on 17 December 2002. The respondents agreed to the continuation of the injunctions until the giving of judgment by the Board.

Relevance

27.. Before their Lordships the issues have been much the same, but relevance has emerged as the most controversial issue, and it is best to deal with it first. As the Staff of Government Division observed, the task of the Commission is not to determine an issue, defined by pleadings, between two parties. It is to inquire into a matter of public interest and concern defined only by the terms of the two resolutions of Tynwald. The terms of the resolutions referred to the Government's “handling of the irregularities occurring at Mount Murray” and referred to the Crow Report. That Report had been limited to planning matters, and Mr Karran's allegations of corruption had been made in that context (although he seems to have expanded his allegations when he gave evidence on 23 May 2002 during the first stage of the Commission's work). But in their Lordships' view it cannot

have been Tynwald's intention, in the light of Mr Karran's allegations, to limit the Commission's inquiry in any way which might invite its being criticised as a cover-up. No government (and especially no government in a community as small as the Isle of Man) works in watertight compartments. The appellants' representatives appear to have raised issues as to tax reliefs with the Department of Tourism before they were raised with the Treasury. The Department of Tourism was closely involved in the planning process (although the Department responsible was DoLGE). In these circumstances it would not have been right for the Acting Deemster or the Staff of Government Division, with much less knowledge of the facts than the Commission, to intervene in order to impose on the scope of the inquiry restrictions which might prove arbitrary, or unworkable, or against the public interest.

28.. In taking that view their Lordships have derived much assistance from the decision of the Board (on an appeal relating to the powers of a commission appointed under the Commissions of Inquiry Act of Barbados) in *Douglas v Pindling* [1996] AC 890 . Lord Keith of Kinkel, delivering the judgment of the Board, quoted (at pp 902–903) from the judgment of Ellicott J in *Ross v Costigan* (1982) 41 ALR 319, 334–335, a decision of the Federal Court of Australia :

“In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference by doing so. This flows from the very nature of the inquiry being undertaken.”

Ellicott J then cited an earlier authority and continued:

“This does not mean, of course, that a commission can go off on a frolic of its own. However, I think a court if it has power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the Inquiry.”

29.. After referring to some other authorities Lord Keith of Kinkel summarised the position (at p 904):

“If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. The commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive.

As regards the function of the court in the event that the commission's decision to issue a summons is challenged, the matter is to be approached upon the traditional judicial review basis. The applicable criteria are those set out in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 . In particular, the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could

properly arrive at. It would appear that this is the test which Ellicott J had in mind in *Ross v Costigan* 41 ALR 319, 335, when he spoke of a Commission going off ‘on a frolic of its own.’”

Their Lordships see no reason to suppose that the Commission under the chairmanship of Mr Macleod is embarking on some unauthorised diversion into matters which could not be relevant. The two affidavits of Mr Willers provide no evidential basis for that supposition, and the affidavits of Mr Macleod indicate that the Commission is approaching its task in a responsible and focussed manner.

Disclosure and conditions as to use

30.. Their Lordships agree with both courts below that the documents fall to be dealt with in two categories, and that only the tax return documents are within the description in section 106(1) of the 1970 Act. On the basis that both categories may be relevant to the work of the Commission, it is necessary to consider whether section 106(2)(j) provides a gateway to disclosure by the Assessor of the tax return documents, and conversely whether public interest immunity or some kindred principle of confidence prevents the Assessor from providing documents not within section 106(1) .

31.. As regards the tax return documents which are within section 106(1) , Mr Venables QC submitted that there was an analogy with legal professional privilege, recently considered by the *House of Lords in R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 . That case concerned a notice under section 20(1) of the *Taxes Management Act 1970* requiring Morgan Grenfell to produce documents relating to a tax avoidance scheme, including documents containing the advice of leading counsel and solicitors as to the efficacy of the scheme. Section 20 , like section 106 of the 1970 Act of the Isle of Man, contains no specific reference to privileged documents, although section 20B(2) preserves a limited form of litigation privilege in relation to tax appeals, and a notice under section 20(1) or (3) or section 20A(1) may not be given to a lawyer. These and other similar factors complicated the interpretation of section 20(1) , but the House of Lords clearly stated the principle that legal professional privilege is a fundamental human right which, although capable of being overridden by an Act of Parliament, can be overridden only by express words or necessary implication. Lord Hobhouse of Woodborough (at p 616, para 45) pointed out that necessary implication is a stringent concept, being a matter of express language and logic, not interpretation.

32.. The decision in *Morgan Grenfell* was founded on the absolute nature of legal professional privilege. It does not depend on any balancing exercise, a point strikingly illustrated by *R v Derby Magistrates' Court ex parte B* [1996] AC 487 , in which legal professional privilege (not of the accused, but of a witness) was incapable of being overridden even in the context of a criminal prosecution for murder.

33.. A taxpayer's returns of income are not covered by legal professional privilege. In the hands of the Revenue they are entitled to be treated as confidential, and subject to public interest immunity, because they relate to a taxpayer's personal affairs and are obtained by the Revenue under statutory compulsion: *Lonrho plc v Fayed (No 4)* [1994] QB 775 , 786–788. At the end of that passage Sir Thomas Bingham MR (with whom Leggatt LJ agreed) said:

“I think that a claim made by the revenue to withhold documents relating to a taxpayer's tax affairs from production without his consent is properly to be regarded as a claim for public interest immunity. But what matters more than the label is the practice, and in this instance the practice seems to me to be very clear. For the reasons which Lord Reid gave [in *Conway v Rimmer* [1968] AC 910 , 946], the courts will give very great weight to preserving the confidentiality of such documents in the hands of the revenue. They will override that confidentiality only if, according to settled principles, the applicant shows very strong grounds for concluding that on the facts of the particular case the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the documents.”

34.. Section 106(1) of the 1970 Act imposes a strong statutory duty of confidence (“as secret and confidential documents”). But section 106(2) creates a considerable number of gateways, including para (j) — “unless required or authorised to do so by any enactment or by order of a court in the Island” — which recognise that the confidential nature of tax returns may in special circumstances have to give way to some other public interest. Their Lordships agree with the Staff of Government Division that section 106(2)(j) does permit the Assessor to disclose the tax return documents, despite their confidential nature, in obedience to the summons issued by the Commission. Disclosure is in that way authorised by an enactment, that is the 1950 Act, section 1(1)(a) of which confers on the Commission power to require the production of documents. In the context of the 1950 Act that power would be nullified if confidential documents were impliedly excluded.

35.. The lobbying documents are on the Assessor's files not because the appellants were under a statutory duty to submit them, but because they chose to do so for their own purposes. They are no doubt entitled to some limited degree of confidentiality simply in the sense that the Assessor as a responsible public servant would not, without good reason, reveal any of the contents of his files to any casual inquirer. But the Commission is not in the position of a casual inquirer. Their Lordships agree with both courts below that there was no possible reason why the lobbying material should not be produced to the Commission, in case it proves to be relevant. There is much to be said for transparency in any attempt by private interests to obtain special tax reliefs for their own financial advantage. Their Lordships are in general agreement with the observations of the Acting Deemster quoted at paragraph 21 above, but would substitute “potentially” for “patently”.

36.. Their Lordships also agree with the Staff of Government Division that it would not be appropriate to impose any conditions on the Commission as to the use of material which the Commission has not yet fully evaluated. In these circumstances the Commission is the guardian of the public interest. It has been given extraordinary powers in order to investigate what Tynwald must have seen as an extraordinary situation. The Chairman of the Commission has already indicated that the use which the Commission will make of any material will depend on the course and outcome of its investigations. The Commission, having been granted extraordinary powers, must be relied on to exercise them responsibly in the public interest. It would not therefore be right to impose any conditions on the use which the Commission makes of material disclosed to it. The Commission will of course respect the confidentiality of documents produced to it so far as is consistent with its public duty to report. Still less would it be appropriate to consider imposing any conditions on the Lieutenant-Governor, to whom the Commission's report is to be given in the first instance.

37.. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The parties have 14 days from the date of this judgment in which to lodge written submissions as to the costs of this appeal.

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[2006] 1 WLR

Gillies v Secretary of State for Work and Pensions (HL(Sc))

A

House of Lords

***Gillies v Secretary of State for Work and Pensions**

[2006] UKHL 2

B 2005 Nov 9; Lord Nicholls of Birkenhead, Lord Hope of Craighead,
2006 Jan 26 Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe
and Baroness Hale of Richmond

Tribunal — Bias — Disability appeal tribunal — Medical member also undertaking work as examining medical practitioner — Whether likelihood of bias in favour of views of other examining medical practitioners

C The claimant's application for renewal of disability living allowance was rejected by the adjudication officer. A disability appeal tribunal refused his appeal. The medical member of the disability appeal tribunal, which consisted of a legally qualified chairman and two other members including the medical member, was a doctor who had for a number of years provided reports on behalf of the Benefits Agency in disability living allowance and incapacity benefit cases as an examining medical practitioner. At the time of hearing of the claimant's appeal she was
D spending most of her working week either examining claimants and preparing reports or sitting as a tribunal member hearing appeals relating to disability living allowance and other benefits. Medical members of disability appeal tribunals did not take a judicial oath or give any other kind of formal undertaking as to the way in which they would carry out their duties. The claimant appealed from the decision of the disability appeal tribunal to the social security commissioners alleging that there was a reasonable apprehension that the medical member of the disability appeal
E tribunal had been biased. A tribunal of commissioners upheld that contention and allowed the claimant's appeal. The First Division of the Inner House of the Court of Session allowed an appeal by the Secretary of State for Work and Pensions and restored the decision of the disability appeal tribunal.

On appeal by the claimant—

F *Held*, dismissing the appeal, that the issue in law was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the medical member of the disability appeal tribunal would not evaluate reports by other examining medical practitioners objectively and impartially against the other evidence; that the medical member's relationship with the Benefits Agency was that of an independent expert adviser and there was no basis for a finding that there was a reasonable apprehension of bias on the ground that she had a predisposition to favour its interests; that the fair-minded observer would understand that there was a crucial difference between the medical member approaching the issues that the tribunal had to decide with a predisposition to prefer the views of the
G examining medical practitioner to any contrary evidence and drawing on her own medical knowledge and experience when testing those views against the other evidence; and that he would have no reason to think that she was likely to be unconsciously biased in favour of those views (post, paras 1, 17–21, 27–29, 33–35, 38–41).

Porter v Magill [2002] 2 AC 357, HL(E) applied.

H Decision of the First Division of the Inner House of the Court of Session 2004 SLT 14 affirmed.

The following cases are referred to in the opinions of Lord Hope of Craighead and Baroness Hale of Richmond:

Bradford v McLeod 1986 SLT 244

- Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All ER 279, CA A
- Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16; [2005] 1 WLR 967; [2005] 2 All ER 129, HL(E)
- Hoekstra v HM Advocate (No 2)* 2000 JC 391
- Johnson v Johnson* (2000) 201 CLR 488
- Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856; [2004] 1 All ER 187, HL(E) B
- Medicaments and Related Classes of Goods, In re (No 2)* [2001] 1 WLR 700; [2001] ICR 564, CA
- Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 AC 513; [2005] 2 WLR 1307, PC
- Nwabueze v General Medical Council* [2000] 1 WLR 1760, PC
- Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E) C
- R v Gough* [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E)
- R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13; [2005] 1 WLR 688; [2005] 1 All ER 927, HL(E)
- R (P D) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, CA

The following additional cases were cited in argument: D

- Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418; [2005] 1 All ER 723, CA
- Davidson v Scottish Ministers (No 2)* [2004] UKHL 34; 2005 SC(HL) 7; 2004 SLT 895, HL(Sc)
- Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372; [2004] 4 All ER 385, HL(NI)
- Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA E
- Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1939; [2003] 4 All ER 162, HL(E)
- Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306, CA
- Secretary of State for the Home Department v Akae* [2005] EWCA Civ 947, CA
- Secretary of State for Work and Pensions v Cunningham* 2004 SLT 1007 F

APPEAL from the First Division of the Inner House of the Court of Session

This was an appeal by the claimant, James Gillies, from the decision of the First Division of the Inner House of the Court of Session (the Lord President (Cullen), Lord Kirkwood and Lord Weir) on 28 November 2003 allowing an appeal by the Secretary of State for Work and Pensions from a decision of a tribunal of social security commissioners. The tribunal had allowed the claimant's appeal from the decision of a disability appeal tribunal refusing his appeal against the refusal by an adjudication officer of his application for renewal of disability living allowance. G

The facts are stated in the opinion of Lord Hope of Craighead.

Jonathan Mitchell QC and *Simon Collins* (both of the Scottish Bar) for the claimant. H

Colin Campbell QC and *Jonathan Brodie* (both of the Scottish Bar) for the Secretary of State.

Their Lordships took time for consideration.

[2006] 1 WLR

Gillies v Secretary of State for Work and Pensions (HL(Sc))
Lord Nicholls of BirkenheadA 26 January 2006. **LORD NICHOLLS OF BIRKENHEAD**

I My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree with them and for the reasons they give I would dismiss this appeal.

B **LORD HOPE OF CRAIGHEAD**

2 My Lords, in this case it is alleged that there was a reasonable apprehension that the medical member of a disability appeal tribunal was biased. The First Division of the Court of Session (the Lord President (Cullen) and Lords Kirkwood and Weir) on 28 November 2003 allowed an appeal from a decision of a tribunal of the social security commissioners (W M Walker QC, D J May QC and J N Wright QC) dated 15 June 2001 in which that argument was upheld: 2004 SLT 14. Holding that the facts were not such as to raise such an apprehension, the First Division restored the decision of the disability appeal tribunal of 15 July 1999 refusing the claimant's appeal against the decision of an adjudication officer that he was not entitled to a disability living allowance.

3 As the Lord President noted 2004 SLT 14, 18, paras 21 and 22, the common law test by which issues of this kind are determined has been simplified since the case was before the tribunal of the Social Security Commissioners. The possibility of a conflict between the English test as set out in *R v Gough* [1993] AC 646, 670 by Lord Goff of Chieveley and the Scottish test as set out in *Bradford v McLeod* 1986 SLT 244, 247 by Lord Justice-Clerk Ross and in *Hoekstra v HM Advocate* (No 2) 2000 JC 391, 399 by Lord Justice General Rodger has been removed. The test which this House approved in *Porter v Magill* [2002] 2 AC 357 is set out at p 494, para 103, where I said that the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The issue for determination in this case therefore is whether, on the facts of the case, this test has been satisfied.

F *Is there a question of law?*

4 I am conscious that a consequence of putting the issue in this way is to invite the question whether this is a question of law or a question of fact. Section 14(1) of the Social Security Act 1998 provides that an appeal lies to a commissioner from any decision of an appeal tribunal under sections 12 and 13 of the Act on the ground that the decision of the tribunal was erroneous in point of law. That was the route by which this case reached the tribunal of commissioners, as a direction was given under section 16(7) that it be heard not by a commissioner sitting alone but by a tribunal of three commissioners on the ground that the appeal involved a question of law of special difficulty. Section 15(1), read with section 15(4)(b) of the Act, provides that an appeal shall lie to the Court of Session from any decision of a commissioner. At that stage, and at the stage of any further appeal to this House as well, the question is the same as that which was before the commissioner. It is whether the decision of the disability appeal tribunal was erroneous in point of law.

5 The Lord President said that the court was satisfied that the appeal raised a question of law for the court. As he put it, at p 20, para 34:

“We are not concerned in this appeal with a question such as whether the tribunal of commissioners drew the correct inference of fact from the factual circumstances which were before them. We are concerned with whether there was a failure to provide the guarantee of impartiality on the part of the members of the disability appeal tribunal which the respondent [claimant] and the public were entitled to expect. For that purpose we require to apply the law to the factual circumstances. We have to take the viewpoint of a reasonable and well-informed observer who, in the words of Kirby J in *Johnson v Johnson* (2000) 201 CLR 488, is ‘neither complacent nor unduly sensitive or suspicious’. The argument presented by the appellant in this case [the Secretary of State for Work and Pensions] goes to the root of the decision of the tribunal of commissioners by asserting that, when that standard was applied, there was no basis for any suspicion of bias.”

Mr Mitchell for the claimant said that it was for the Secretary of State, who had brought the case to the Court of Session on the ground that there was an error of law by the tribunal of commissioners, to identify the error of law which had occurred. But he did not suggest that the Court of Session did not have jurisdiction to examine the question, and I think that he was right not to do so.

6 The question whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased cannot, of course, be answered without looking at the facts. The error of which the Secretary of State complains is not that the tribunal of commissioners asked themselves the wrong question, but that they reached the wrong answer. But the question whether a tribunal was properly constituted or was acting in breach of the principles of natural justice is essentially a question of law. It requires a correct application of the legal test to the decided facts. As Mr Campbell for the Secretary of State said, there can be only one correct answer to the question whether the tribunal was properly constituted. So to answer the question incorrectly is an error of law. If that argument is accepted, it must follow that there was an error of law which was open to correction by the appellate court.

7 This is how the matter is dealt with in practice. In *Lawal v Northern Spirit Ltd* [2003] ICR 856 objection was taken to the appearance in an appeal from an employment tribunal as counsel for the employers of a part-time recorder who in that capacity had sat as a part-time judge in the Employment Appeal Tribunal with one or both of the two lay members of the appeal tribunal panel. The question was raised whether there was a real possibility of unconscious bias on the part of the law member or lay members. This was treated throughout as a question of law for decision by the Employment Appeal Tribunal which was open to review in the Court of Appeal and in the House of Lords by the statutory appeal process. So I think that it is safe to proceed on the basis that a question of law has been raised in this case which is open for determination by your Lordships.

The question of bias

8 The factual background to this question can be stated quite simply. The medical member of the tribunal was Dr J F Armstrong. She was first appointed on 1 October 1993 to the panel of medical practitioners

A constituted under section 42(3) of the Social Security Administration Act 1992 from which medical members of disability appeal tribunals were drawn under section 43(2) of that Act. Following the expiry of her first appointment she was re-appointed to the panel for one more year with effect from 1 September 1998, in anticipation of the restructuring and reorganisation of the appeal tribunals which was provided for by sections 4 to 7 of the 1998 Act. It was by virtue of that appointment that she was sitting as a member of the tribunal which heard the claimant's appeal on 15 July 1999.

B 9 For a number of years Dr Armstrong had been providing reports for the Benefits Agency as an examining medical practitioner ("EMP"). Between 1990 and 1998 she was engaged for this purpose by the Benefits Agency Medical Services. In 1998 the Benefits Agency contracted out the provision of EMP reports in respect of a number of types of benefit to the SEMA Group, which subcontracted part of that work to another company, Nestor Healthcare Group plc and one of its subsidiaries (known collectively as "Nestor"). SEMA employed a number of doctors to act for them full-time on work for the Department of Social Security. It also contracted with Nestor to engage a separate pool of doctors to act for them on a part-time, sessional fee-paid basis. It was in that part-time, fee-paid capacity that Dr Armstrong, who had previously worked directly for the Benefits Agency Medical Services, was invited in 1998 to apply for a new contract with Nestor.

D 10 During the period from 1990 to 2000 Dr Armstrong provided an average of four EMP reports each month in disability living allowance cases. She carried out her examination of the claimants for the purposes of these reports in the claimants' own homes. Between 1995 and 2000 she also provided EMP reports in incapacity benefit cases at an average of four sessions per week, and thereafter at an average of seven sessions per week. Some of these reports involved an "all work" test which was carried out at a Benefits Agency medical centre. Medical members who prepared reports in these cases were advised that, to avoid any risk of embarrassment, they should not sit on a tribunal hearing "all work" test appeals. At the time of the hearing of the claimant's appeal, Dr Armstrong was spending the majority of her working week either examining claimants and preparing reports on them for Nestor on behalf of the Benefits Agency, or sitting as a tribunal member hearing appeals relating to disability living allowance and other benefits other than those in "all work" test cases. She was sitting as a tribunal member at an average of one session per week. Medical members of appeal tribunals did not require to take a judicial oath or give any other kind of formal undertaking as to the way in which they would carry out their duties as a member of the tribunal.

H 11 The tribunal which heard the claimant's appeal was constituted in the usual way. There was a legally qualified chairman, and there were two panel members, one of whom was Dr Armstrong. Its decision to refuse the appeal was unanimous. In its decision notice it was stated that the tribunal found the claimant to be a difficult witness, that there was a wealth of medical evidence to say that his condition was better than he claimed, that he was supported only by a report from a consultant cardiologist who did not examine him but accepted his claim that he was unable to walk and that it accepted the view of the EMP and the claimant's general practitioner who saw him regularly. These points were made again in the formal statement of

reasons for its decision, where the tribunal said that it found the claimant's evidence unreliable and that it had afforded greater weight to the opinions of the EMP and the general practitioner. A

12 The tribunal of commissioners said in para 77 of their decision that, on the basis of the information available to them, they had concluded that the objective bystander would have a reasonable apprehension of bias on the part of Dr Armstrong, even though they had no reason to think that she was consciously biased. They accepted that the arrangements under which doctors such as Dr Armstrong were engaged to provide EMP reports did ensure the provision of independent expert evidence which could be relied upon as such by the Benefits Agency. But they said that it was a different matter for one of those same doctors to be involved in assessing such reports prepared by other doctors and then adjudicating on conflicts of evidence between such reports and other evidence. In their view it would be reasonable for an informed member of the public to think that justice might not be done in such circumstances. B
C

13 Elaborating on this view, the tribunal of commissioners made it clear in para 79 of their decision that they rejected the submission that doctors who were in this position were to be seen as acting on behalf of the Benefits Agency. They were satisfied that, when they were acting as expert advisers to the Benefits Agency, the doctors were obliged to work objectively to prescribed standards. They were in a position of professional independence. Their reports were presented to appeal tribunals as independent reports, and they could properly be relied upon as such. D

14 But the tribunal of commissioners went on to find that doctors who held current engagements with Nestor were in a markedly different position from NHS doctors generally. In their view the bystander, considering situations where EMP reports were in competition with other evidence, would have a real apprehension or suspicion that doctors who prepared these reports would tend to lean in favour of accepting reports by other doctors in that class. They explained their decision that the test for apparent bias had been satisfied in this way in para 80: E

“We are thinking of situations where an EMP report is placed beside the appellant's oral evidence, or beside a consultant's evidence, both of which situations arose in the present case. There may of course be very good reasons to accept evidence which is objective and focused on the correct issues in preference to that of interested claimants. There may also quite often be circumstances in which the evidence of other doctors, even consultants, can be seen to be less well focused on the issues. However, the concern would be that a doctor in Dr Armstrong's position, because of the substantial current involvement in the same role as the reporting doctor, may start with an inclination to accept that evidence rather than objectively viewing the competing version. We may not necessarily take the same view ourselves, but if we find that our objective bystander would reasonably have that perception, we must apply the brocard ‘Justice must be seen to be done’. We do so find.” F
G
H

15 The Court of Session did not agree. As the Lord President explained 2004 SLT 14, 20–21, para 38, it could be assumed that the reasonable and well-informed observer would know that Dr Armstrong and the other EMPs were independent expert advisers when carrying out the work of examining

- A and reporting to the Benefits Agency. Why then, he asked, should they not be regarded as independent of each other when it came to assessing and adjudicating between competing medical opinions when sitting on the tribunal? Having examined the facts, the court concluded that the fact that Dr Armstrong carried out examinations and provided reports for the Benefits Agency as an EMP would not be sufficient to raise an apprehension as to her impartiality as a member of a disability appeal tribunal. The mere fact that the tribunal would require to consider and assess reports by other doctors who acted as EMPs would not raise such an apprehension.
- B

- 16 Mr Mitchell sought to persuade your Lordships that their Lordships of the First Division were in error and that the correct view of the facts was that which was reached by the tribunal of special commissioners. He built his argument up in this way. Dr Armstrong had been working for the Benefits Agency as an EMP for nine years, albeit as an independent adviser to the agency. She had been providing reports in that capacity in relation to claims for disability living allowance and invalidity benefit. The issues which she was having to consider in those cases were so similar as to be indistinguishable from the issues which were before the tribunal of which she was a member. She had been doing this as a colleague of an important witness before the tribunal who contradicted the claimant's evidence.
- C
- D Important institutional safeguards were lacking in her case, such as the taking of a judicial oath and evidence that she had been professionally trained in the work of the tribunals. She had also failed to make a proper disclosure when sitting as tribunal member as to the circumstances that might be thought to raise a question as to her impartiality. Taking these factors together, he said, the tribunal commissioners were right to hold that the test for apparent bias was satisfied.
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Discussion

- 17 The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as EMPs objectively and impartially against the other evidence. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.
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- 18 It is important to stress at the outset that the facts do not support the claimant's primary argument that Dr Armstrong was to be seen as a Benefits Agency doctor or that she was in some other way aligned with the Benefits Agency. The tribunal of commissioners and their Lordships of the First Division were in agreement on this point. Her relationship with the Benefits Agency was as an independent expert adviser. Her advice was sought and given because of the skills that she was able to bring to bear on medical issues in the exercise of her professional judgment. A fair-minded observer
- H

who had considered the facts properly would appreciate that professional detachment and the ability to exercise her own independent judgment on medical issues lay at the heart of her relationship with the Benefits Agency. He would also appreciate that she was just as capable of exercising those qualities when sitting as the medical member of a disability appeal tribunal. So there is no basis for a finding that there was a reasonable apprehension of bias on the ground that Dr Armstrong had a predisposition to favour the interests of the Benefits Agency. Nor, it must be emphasised, is there any suggestion that she did or said anything in the course of her work which might be thought to cast doubt on her impartiality or her integrity.

19 The question then is whether there were grounds for thinking that Dr Armstrong was likely to be unconsciously biased when she was examining the medical evidence because of a predisposition to prefer the EMP report as against any contrary evidence due simply to her current involvement in providing reports as an EMP. Doctors holding current engagements to provide these reports can be assumed, no doubt, to have a special interest and experience in this kind of work. The group of doctors to which they belong can also be distinguished from NHS doctors generally, as was pointed out by the tribunal of commissioners. But why should these facts be said to lead to the conclusion that there was a real possibility that she was biased in favour of the views expressed by the EMP?

20 The weakness of the argument that this was a real possibility is exposed as soon as the task that Dr Armstrong was performing as an EMP is compared with the task which she was performing on the tribunal. In each of these two roles she was being called upon to exercise an independent professional judgment, drawing upon her medical knowledge and her experience. The fair-minded observer would understand that there is a crucial difference between approaching the issues which the tribunal had to decide with a predisposition in favour of the views of the EMP, and drawing upon her medical knowledge and experience when testing those views against the other evidence. He would appreciate, looking at the matter objectively, that her knowledge and experience could cut both ways as she would be just as well placed to spot weaknesses in these reports as to spot their strengths. He would have no reason to think, in the absence of any other facts indicating the contrary, that she would not apply her medical knowledge and experience in just the same impartial way when she was sitting as a tribunal member as she would when she was acting as an EMP.

21 In *R (P D) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, the Court of Appeal held that the medical member of the review tribunal to which the applicant had applied for his discharge from detention under section 3 of the Mental Health Act 1983 who was a consultant psychiatrist was not disqualified from considering the applicant's case because he was employed by the Mersey Care National Health Service Trust. Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said, in para 33:

“We consider that [the reasonable and informed] observer would expect a consultant psychiatrist to apply the same concerns for the welfare of a patient, whether that patient was the consultant's own, or a patient whose liberty depended upon the objective clinical judgment of the consultant in the context of a tribunal hearing.”

- A I would apply the same reasoning to this case. The observer would appreciate that Dr Armstrong's experience of working as an EMP would be likely to be of benefit to her, and through her to the other tribunal members, when she was evaluating the EMP report. The exercise of her independent judgment, after all, was the function that she was expected to perform as the tribunal's medical member. Her experience in the preparation of these reports was an asset which was available, through her, for the other tribunal members to draw upon when they were considering the whole of the evidence.

- B 22 One of the strengths of the tribunal system as it has been developed in this country is the breadth of relevant experience that can be built into it by the use of lay members to sit with members who are legally qualified. In *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 15 Hale LJ paid tribute to the fact that specialist tribunals, chaired as they usually are by a lawyer, have an appropriate balance of experience and expertise amongst their members. The panel system that was provided for by section 42 of the 1992 Act for the appointment of persons to act as members of disability appeal tribunals, and is now to be found in section 6 of the 1998 Act for use under the new unified system, gives effect to that principle. There were to be two panels for each area, one composed of medical practitioners and the other composed of persons experienced in dealing with the needs of disabled persons in a professional or voluntary capacity or because they themselves are disabled. It would greatly undermine the practical utility of this system if panel members were to be disabled from sitting on cases because their experience was likely to give them an advantage when examining the evidence over those who did not have the same background.

- E 23 The fact is that the bringing of experience to bear when examining evidence and reaching a decision upon it has nothing whatever to do with bias. The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness. One guiding principle is to be found in the concept of independence. No one can be a judge in his own cause. That principle is, of course, applied much more widely today than a literal interpretation of these words might suggest. It is not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome. There is no suggestion that that principle was breached in this case. The other principle is to be found in the concept of impartiality—that justice must not only be done: it must be seen to be done. This too has at its heart the need to maintain public confidence in the integrity of the administration of justice. Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute. Therein lies the integrity of the adjudication system. But its integrity is not compromised by the use of specialist knowledge or experience when the judge or tribunal member is examining the evidence.

- H 24 Support for this approach is found in *Nwabueze v General Medical Council* [2000] 1 WLR 1760 where it was contended that there was a real possibility that a lay member of the Professional Conduct Committee was biased because she lived in or close to the area from which a medical centre where the doctor had worked when he was a trainee drew its patients and

her undisclosed period of office as chairman of a statutory body concerned with nursing and midwifery in Wales. It was also suggested that she showed bias in the manner of her questioning of the doctor when questions were being put to him at the end of his evidence by the committee. These allegations were rejected. Reviewing the evidence about her professional background, the Board said, at p 1771:

“From this summary it can be seen that Mrs Walker was and is eminently qualified to sit on the Professional Conduct Committee as one of its lay members. She brought to that membership an extensive knowledge of the health service in Wales, as a result of having worked there for many years as a nurse and midwife and her period of service as director of the South East Wales Institute. It is in the public interest that those who serve as lay members on disciplinary bodies of this kind should be well-informed and have experience of working in the area within which cases are likely to arise on which they may be called upon to adjudicate. It could not possibly be suggested that there was anything in Mrs Walker’s general background that would be likely to give rise to the danger or possibility of bias on her part when she was considering a case from Wales.”

25 In *Meerabux v Attorney General of Belize* [2005] 2 AC 513 one of the questions was whether the chairman of an advisory council to which a complaint against a judge had been referred by the Governor General was disqualified on the ground of apparent bias because of his membership of the Belize Bar Association. It was held that mere membership of the Bar Association did not disqualify him on this ground. But the Board also said, at para 25, that the facts which the observer would take into account included the nature and composition of the tribunal and the qualifications that a person must possess to be appointed chairman. So too in this case the fair-minded observer would take into account the nature and composition of the tribunal and the qualifications that Dr Armstrong had to have to be appointed as its medical member. This is the context in which her involvement as an EMP has to be viewed. It does not lead to the conclusion that she was likely to be biased.

26 I do not overlook the fact that concern has been expressed about the composition of mental health tribunals constituted under the Mental Health (Care and Treatment) (Scotland) Act 2003 on the ground that community psychiatric nurses who have been appointed to the panel of general members are drawn from the same profession as the psychiatrists appointed to the panel of medical members: Chris Turner, “Seen to be Fair?” *Journal of the Law Society of Scotland*, vol 50, no 11, November 2005, p 24. But whatever force there may be in this criticism, as to which I express no opinion, it cannot be based on the allegation that there is a real possibility that those chosen for membership of these panels are biased simply because they are community psychiatric nurses or psychiatrists. They are chosen for membership of these panels because they have the experience that is thought to be relevant to the issues that these tribunals are called upon to decide.

27 In my opinion the idea that Dr Armstrong was likely to be predisposed in favour of reports by EMP practitioners simply because she had a special interest in and experience of the preparation of these reports

- A has no objective basis in the evidence. The test for her disqualification on the ground of apparent bias has not been made out.

Conclusion

- 28 For these reasons, and for those given by my noble and learned friend Lord Rodger of Earlsferry, I would affirm the interlocutor of the First Division of the Court of Session and dismiss the appeal.

LORD RODGER OF EARLSFERRY

29 My Lords, I have had the advantage of considering the opinion of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeal. I add only one point.

- C 30 The claimant's objection to Dr Armstrong was that she was serving as a panel member while continuing, as an independent expert adviser, to provide reports for the Benefits Agency under the subcontract arrangements described by Lord Hope. The claimant did not suggest that there would be any objection to Dr Armstrong sitting on a tribunal if she had previously provided reports but was no longer doing so—at least if sufficient time had been allowed to elapse before she sat. In my view the currency of her involvement should not be regarded as a decisive factor.

- E 31 Dr Armstrong was originally appointed to the panel of medical practitioners under section 42(3) of the Social Security Administration Act 1992. Under section 42(4) the other panel was to comprise persons who were experienced in dealing with the needs of disabled persons (a) in a professional or voluntary capacity or (b) because they were themselves disabled. That legislation has been superseded by section 6 of the Social Security Act 1998 but the position remains the same since, in any appeal relating to disability living allowance, the panel must include a person who meets the same criteria as were prescribed by section 42(4): regulations 1 and 36(6) of, and para 5 of Schedule 3 to, the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991).

- F 32 Clearly, the class of people with experience in dealing with the needs of disabled persons in a professional or voluntary capacity could include people who were no longer actively involved in that kind of work. But people who qualify as members of the panel because they are themselves disabled will be disabled whenever they sit on a tribunal. So, on the claimant's approach, there would be an argument for saying that, because they were themselves disabled, they should be disqualified because they would be likely to be partial to the disabled person. In particular, consciously or subconsciously, they might be more receptive to the disabled person's account of his or her condition. It is important to emphasise, however, that Parliament has not endorsed that line of thinking. On the contrary, it takes the view that disabled people who have been selected to serve as members of a tribunal can act impartially and may bring valuable experience to its work—even though they are not legally qualified and have not taken a judicial oath. That will usually be the position in practice as well as in theory. If, exceptionally, it should turn out that the judgment of a particular tribunal member was so affected by his or her disability that the member could not display the necessary impartiality in reaching decisions, this would be a good ground for objecting to that member.

33 Similarly, the fact that Dr Armstrong was currently providing reports for the Benefits Agency, as an independent expert adviser, would not, of itself, be a reason why the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased. The position might have been different if there had been any reason to suppose that the members of the Nestor pool of doctors were a close-knit group sharing an esprit de corps. But there was nothing to suggest that and nothing to suggest that Dr Armstrong was actually predisposed, whether consciously or subconsciously, to accept the reports of her colleagues. In short, there was nothing in Dr Armstrong's outside activities or in the way that she conducted herself to show that she was unable to fulfil the duty of every tribunal member, which is to reach an independent judgment. In these circumstances, the appropriate conclusion is that the tribunal which included Dr Armstrong was properly constituted.

LORD WALKER OF GESTINGTHORPE

34 My Lords, I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I am in full agreement with them and for the reasons which they give I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

35 My noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry, have already said all that needs to be said in support of dismissing this appeal. I add a few words only because, as a former member of the Council on Tribunals, I take a particular interest in the tribunal system.

36 Tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system. They are mostly there to secure justice between citizen and state in a wide variety of contexts, the most numerically important of which is entitlement to the financial benefits provided by the welfare state. Since the Report of the Donoughmore Committee on Ministers' Powers (1932) (Cmd 4060), it has been recognised that tribunals can have important advantages over courts of law. These are "cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject": see the Report of the Franks Committee on Administrative Tribunals and Inquiries (1957) (Cmnd 218), para 38. The Report of Sir Andrew Leggatt's Review of Tribunals, *Tribunals for Users, One System, One Service* (2001), paras 1.11–1.13 suggests three tests of whether tribunals rather than courts should decide cases. The first is participation: that users should be able to prepare and present their own cases effectively. The third is the need for expertise in the area of law involved: users should not have to explain to the tribunal what the law is. The second is the need for special expertise in the subject matter of the dispute:

"Where the civil courts require expert opinion on the facts of the case, they generally rely on the evidence produced by the parties—increasingly jointly—or on a court-appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people

- A with a range of qualifications and expertise . . . users clearly feel that the greater expertise makes for better decisions.” (para 1.12.)

Expertise on the tribunal not only improves decision-making and reduces the need for outside expertise; it also thereby increases the accessibility and user-friendliness of the proceedings.

- B 37 Ever since the Franks Report, the watchwords by which any tribunal system has been judged are its “openness, fairness and impartiality”: “Take . . . impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?” (para 24). Thus, “impartiality [appears to us] to require the freedom of tribunals from the influence, real or apparent, of departments concerned with the subject matter of their decisions”: para 42. This is echoed in the Council on Tribunals Framework of Standards for Tribunals (November 2002), para 1(a): “Tribunals should be free to reach decisions according to law without influence (actual or perceived) from the body or person whose decision is being challenged or appealed, or from anyone else.”

- C 38 Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal’s approach to deciding the cases before it. Independence is the structural or institutional framework which
D secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public. The public are now represented by the “fair-minded and informed observer”. The approach to be adopted was explained by Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, para 85, and adopted (with the deletion of the words “or a real danger”) by Lord Hope of
E Craighead in *Porter v Magill* [2002] 2 AC 357, para 103:

“The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility . . . that the tribunal was biased.”

- F 39 The “fair-minded and informed observer” is probably not an insider (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider’s blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488, para 53, “neither complacent nor unduly sensitive or suspicious”.

- G 40 The relevant facts of tribunal life include the great advantage, both to its users and to its decision-making, of being able to call upon the people with the greatest expertise in the subject matter of the claim. Given the wide variety of disabilities which come before the disability appeal tribunals, it would not be practicable to have a specialist in the particular disability involved in the particular case. The greatest expertise in assessing the claimant’s condition and applying the statutory criteria to it is likely to be
H held by those doctors who are experienced in making these assessments at the point of claim. To have such expertise available on the tribunal can only be an advantage to it.

41 Another relevant fact of tribunal life is that the benefits system exists to pay benefits to those who are entitled to them. As counsel put it to us in

Hinchy v Secretary of State for Work and Pensions [2005] 1 WLR 967, the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less. The role of the examining medical practitioner (“EMP”) is to provide an independent assessment of whether the claimant meets the criteria for the benefit in question. She has no more interest in denying the claimant a benefit to which he is entitled than she has in granting him one to which he is not. No doubt, just as some judges are more lenient or more generous than others, some EMPs are kinder to claimants than others, but that stems from the individual’s character and personality, not from the nature of the role.

42 The tribunal of commissioners rejected the argument that Dr Armstrong was by virtue of her role as EMP a “Benefits Agency” doctor. She had very detailed obligations to work objectively to prescribed standards. Hence they concluded (para 79) that EMPs were “not . . . simply ‘Benefits Agency doctors’, but rather independent expert advisers, at that stage”. Their reason for holding that the objective bystander would have a reasonable perception of bias (para 80) was:

“the concern . . . that a doctor in Dr A[rmstrong]’s position, because of the substantial current involvement in the same role as the reporting doctor, may start with an inclination to accept that evidence rather than objectively viewing the competing version.”

43 But another relevant fact of tribunal life is that professional people are often called upon to adjudicate upon disputes concerning exactly the same sort of decisions that they regularly make in their own professional practice. In disciplinary tribunals they may be called upon to judge whether a fellow practitioner has met the required standards of professional practice and conduct. Doubts are sometimes expressed about whether professional solidarity gets in the way of impartial adjudication in such cases, but the professional members of such tribunals have not so far been held to be institutionally biased. In any event, this is not a disciplinary situation. The disability appeal tribunal is not holding the EMP to account. This is simply one doctor reviewing at appellate level in the same sort of decision that she is used to making on the ground.

44 The nearest parallel in the tribunal system is in mental health review tribunals. The medical member of the tribunal is a specialist in mental health, usually a consultant psychiatrist approved under section 12(2) of the Mental Health Act 1983 to make recommendations and reports for the purpose of compulsory admission to hospital. On the tribunal she is called upon to participate in a review of the clinical judgment of another consultant psychiatrist approved under section 12(2) who is in charge of the patient’s treatment and further detention in hospital. Consultant psychiatrists are also a comparatively small professional group, who might also be suspected of professional solidarity. Yet it has not been suggested that, for this reason alone, one psychiatrist is likely to be biased in favour of the views of another psychiatrist. The whole system depends upon there being a psychiatrist on the tribunal who is likely to know what the other psychiatrist is talking about and be able to make an informed but dispassionate judgment upon it. The fair minded and informed observer would see no reason why the capacity of an EMP to do the same should be any different.

A 45 In *R (P D) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, the medical member of the tribunal was, at the time the case came before the tribunal, employed by the same NHS trust which ran the hospital (in Liverpool) at which the patient was detained, but at a different hospital (in Southport). But there was nothing to suggest that the trust had any particular interest in the outcome of the case, that it was in a position to benefit or disadvantage the doctor if it disapproved of the decision, or that he had worked with the staff who were responsible for the patient at the hospital where he was detained. The judge dismissed the application. The Court of Appeal was left wondering why the case had ever been brought. I must have seen something in it at some time, because I had given permission to appeal. But I entirely accept the reasoning of the Court of Appeal and, given that the tribunal of commissioners had rejected the “Benefits Agency doctor” argument, consider that it applies equally strongly to this case. The Benefits Agency has no more interest than the trust in the outcome of any individual case. It is not realistically in a position to influence the doctor’s decisions one way or the other. And there is no more reason in this case to suspect Dr Armstrong of professional solidarity with the views of the EMP in this case than there was of the psychiatrist in that case. It might be different, of course, if she had had prior knowledge of the facts of the case. There is a distinction between knowledge of the particular facts and knowledge of the subject matter: see *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688.

46 It is also a fact of tribunal life that they are presided over by lawyers whose role is not only to conduct the hearing in a fair and user-friendly fashion, to understand the relevant law, and to explain it to their colleagues. It is also to assist those colleagues to address the relevant issues in a reasonable and fair-minded way and then write the reasons for their decision. It is now the responsibility of the President of the Appeals Service to arrange training, not only for tribunal chairs, but also for tribunal members. We have no evidence about the training that may or may not have been given to members of disability appeal tribunals before this case. But if the detailed obligation of EMPs to work objectively to prescribed standards was enough, in the view of the commissioners, to put the doctors in a position of professional independence at that stage, I find it difficult to understand what there could possibly be about the facts of tribunal life which would lead to a lessening of that professional independence and objectivity at the tribunal stage.

47 For those further reasons, in addition to those given by my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry, with which I agree, I too would dismiss this appeal.

Appeal dismissed.

Solicitors: Drummond Miller WS, Edinburgh, for C S A Brown & Co, Glasgow; Solicitor to the Advocate General for Scotland, Edinburgh.

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M G

Court of Appeal

***Secretary of State for the Home Department v AF (No 2)**

[2008] EWCA Civ 117

2008 Feb 19; 22

Sir Anthony Clarke MR, Rix and Keene LJJ

Human rights — Right to fair trial — Suspected international terrorist — Home Secretary issuing non-derogating control order — Court hearing to consider whether control order flawed — Whether court's findings binding between parties at subsequent hearing to consider whether further control order flawed — Whether starting point for court's consideration at subsequent hearing — Whether factor to be taken into account — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6 — Prevention of Terrorism Act 2005 (c 2), s 3(10)

The Secretary of State for the Home Department made a control order against AF, a dual Libyan and United Kingdom national, under section 3(2) of the Prevention of Terrorism Act 2005¹ on the basis of his alleged links with Islamist extremists. The order, which required AF, inter alia, to remain in his residence for 18 hours a day and in a restricted area for the other six hours, was revoked and replaced on the same day with an order under which the hours of curfew were reduced to 14 hours a day. At a full hearing under section 3(10) of the 2005 Act to determine whether the second control order was flawed, a judge found that on the closed material there were reasonable grounds for suspecting that AF was or had been involved in terrorism-related activity, that a control order was necessary to protect the public from the risk of terrorism, that the restrictions were necessary and that the hearing involved no breach of his right to a fair trial under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but the judge quashed the order on the ground that it deprived AF of his liberty under article 5 of the Convention. A third control order was made to replace the second. On appeal the House of Lords held that the second control order, which by that time would in any event have expired, did not amount to a deprivation of liberty in breach of article 5, but the question of whether there had been a breach of article 6 was remitted to the High Court for reconsideration. The third control order remained in place subject to modification by subsequent court orders. On a directions hearing prior to a hearing under section 3(10) to determine whether the third control order was flawed, a different judge declared that findings made by a court on issues arising on a section 3(10) hearing were in principle binding between the parties in relation to matters at the date of that hearing on a subsequent hearing under that subsection, subject to any relevant differences in the evidence on each hearing.

On appeal by AF—

Held, allowing the appeal in part, that in conducting a hearing under section 3(10) of the Prevention of Terrorism Act 2005 a judge had to consider whether he was satisfied at the date of the hearing that the facts relied on by the Secretary of State amounted to reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity, and to give intense scrutiny to the necessity for each of the obligations imposed in the order; that findings made about those matters at an earlier hearing under section 3(10) in relation to a previous control order did not bind the judge conducting a subsequent hearing under section 3(10), nor were they the starting point for his consideration to be departed from only if the circumstances were shown to be significantly different; but that the judge was to have such regard to those findings, as a factor to be taken into account, as was appropriate in all the circumstances of the particular case; and that, although

¹ Prevention of Terrorism Act 2005, s 3(10): see post, para 10.

- A it would be open to a judge in appropriate circumstances to refuse to revisit part of the evidence in an earlier hearing, since the judge was obliged to ensure that the proceedings were fair and since a contollee might know little of the case against him because of the reliance on closed material in the making of the control order the judge should be very reluctant to treat the findings made at an earlier hearing as determinative unless they were very recent (post, paras 30–33, 49–51, 60, 61, 62).
Secretary of State for the Home Department v MB [2007] QB 415, CA; [2008] 1 AC 440, HL(E) applied.
- B Decision of Stanley Burnton J [2007] EWHC 2828 (Admin); [2008] 2 All ER 67 reversed in part.

The following cases are referred to in the judgment of Sir Anthony Clarke MR:

- AA (*Somalia*) v *Secretary of State for the Home Department* [2007] EWCA Civ 1040; [2008] Imm AR 241, CA
- C *Bolkiah, Prince Jefri v State of Brunei Darussalam* [2007] UKPC 62, PC
Bullivant, In re [2007] EWHC 2938 (Admin)
Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702; [2003] Imm AR 1
JRL, In re; Ex p CJL (1986) 161 CLR 342
LD (Algeria) v Secretary of State for the Home Department [2004] EWCA Civ 804, CA
- D *Livesey v New South Wales Bar Association* (1983) 151 CLR 288
Secretary of State for the Home Department v AE [2008] EWHC 132 (Admin)
Secretary of State for the Home Department v AF [2007] EWHC 651 (Admin); [2007] UKHL 46; [2008] 1 AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)
Secretary of State for the Home Department v JJ [2006] EWCA Civ 1141; [2007] QB 446; [2006] 3 WLR 866, CA; [2007] UKHL 45; [2008] 1 AC 385; [2007] 3 WLR 642; [2008] 1 All ER 613, HL(E)
- E *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 415; [2006] 3 WLR 839, CA; [2007] UKHL 46; [2008] 1 AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)
Sengupta v Holmes [2002] EWCA Civ 1104; *The Times*, 19 August 2002, CA

The following additional cases were cited in argument:

- Chahal v United Kingdom* (1996) 23 EHRR 413
- F *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152; [2006] 1 All ER 39, HL(E)
R (Wilkinson) v Broadmoor Special Hospital Authority [2001] EWCA Civ 1545; [2002] 1 WLR 419, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

- G *A v Secretary of State for the Home Department* [2005] EWHC 1669 (Admin), DC
Arnold v National Westminster Bank plc [1991] 2 AC 93; [1991] 2 WLR 1177; [1991] 3 All ER 41, HL(E)
El Farag v El Farag [2007] EWCA Civ 1149; [2007] 3 FCR 711, CA
Hauschildt v Denmark (1989) 12 EHRR 266
Matadeen v Pointu [1998] 1 AC 98; [1998] 3 WLR 18, PC
Otschudi v Secretary of State for the Home Department [2004] EWCA Civ 893, CA
- H *R v Humphrys* [1977] AC 1; [1976] 2 WLR 857; [1976] 2 All ER 497, HL(E)
Secretary of State for the Home Department v E [2007] EWCA Civ 459; [2008] 1 AC 499; [2007] 3 WLR 1, CA; [2007] UKHL 47; [2008] 1 AC 499; [2007] 3 WLR 720; [2008] 1 All ER 669, HL(E)
Thomann v Switzerland (Application No 17602/91) (unreported) given 10 June 1996, ECtHR

APPEAL from Stanley Burnton J

On 11 September 2006 the Secretary of State for the Home Department made non-derogating control order PTA/33/2006 under section 3(2) of the Prevention of Terrorism Act 2005 in respect of AF. After a hearing under section 3(10) of the 2005 Act to determine whether the decision of the Secretary of State, that there were reasonable grounds for suspecting that AF was or had been involved in terrorism-related activities and that it was necessary to protect members of the public from a risk of terrorism to make a control order imposing conditions on AF, was flawed, Ouseley J held on 30 March 2007 that the restrictions imposed cumulatively amounted to a deprivation of liberty within article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and quashed the control order. It was replaced by non-derogating control order PTA/4/2007 made on 29 March 2007. On 31 October 2007 the House of Lords allowed the Secretary of State's appeal directly from Ouseley J, holding that the second control order did not breach article 5, but remitted the case to the Administrative Court for reconsideration of whether that control order complied with AF's rights under article 6 of the Convention, thereby reviving the second control order retrospectively and provisionally until its expiry on 10 September 2007. At a directions hearing before the substantive determination under section 3(10) of the 2005 Act of whether the Secretary of State's decision to impose the third control order was flawed, directions were also sought in relation to the case remitted by the House of Lords. Stanley Burnton J on 30 November 2007 declared that (1) a judge who decided issues arising under section 3(10) of the 2005 Act adversely to the controlee was not for that reason disqualified by prejudgment from adjudicating in subsequent proceedings under the Act to which that controlee was a party and (2) findings made by the court on issues arising on a section 3(10) hearing were in principle binding between the Secretary of State and the controlee in relation to matters at the date of that hearing on a subsequent hearing under section 3(10), subject to any differences in the evidence relevant to those issues before the court on each of those hearings.

By an appellant's notice dated 13 December 2007 and pursuant to permission given by the judge AF appealed on the grounds, inter alia, that (1) it was wrong in principle to treat findings at a previous hearing under section 3(10) of the 2005 Act as binding at a future hearing; (2) findings made at a previous section 3(10) hearing were irrelevant at a future hearing, and it was for the Secretary of State to make out a case for the control order afresh; (3) in the alternative, if the court were to have regard to findings made at an earlier section 3(10) hearing, the court was under an obligation to satisfy itself that the facts relied on by the Secretary of State amounted to reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity, and had to give intense scrutiny to the necessity of each of the obligations imposed; (4) only where there had been no change of any kind to the nature of the evidence adduced at the first section 3(10) hearing were the findings made at the first hearing be capable of being relied on by the court without reconsideration of the underlying evidence on which they were based; and (5) a judge who had made findings adverse to a controlee on a previous section 3(10) hearing should be recused from a subsequent hearing on the ground that a fair-minded and informed observer might entertain a reasonable apprehension of bias by reason of his

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A prejudice, particularly in the light of the use of closed material so that the contollee did not know the case against him and was unable to assess the fairness of the judge's findings, and where his liberty was substantially affected by the proceedings.

The facts are stated in the judgment of Sir Anthony Clarke MR.

B *Timothy Otty QC* and *Tom Hickman* for AF.
Kate Grange for the Secretary of State.

Cur adv vult

22 February. The following judgments were handed down.

SIR ANTHONY CLARKE MR

C *Introduction*

1 This is an appeal by AF from an order dated 30 November 2007 made by Stanley Burnton J. In the order the judge among other things refused an application that a hearing under section 3(10) of the Prevention of Terrorism Act 2005 ("the PTA") should be before a judge other than Ouseley J and made two declarations to which I refer below.

Background

2 AF has been the subject of three non-derogating control orders under section 3 of the PTA. The first was PTA/6/2006 which was imposed on 24 May 2006. It required AF, among other things, to remain in his residence for 18 hours a day and to remain in a restricted area for the remaining six hours. The order was revoked on 11 September 2006 by the Secretary of State for the Home Department following the decision of this court in *Secretary of State for the Home Department v JJ* [2007] QB 446.

3 It was replaced by PTA/33/2006 on the same day, 11 September 2006. This second order reduced the hours of curfew to 14 and relaxed some of the other restrictions in the first order. There followed a full hearing under section 3(10) of the PTA before Ouseley J. The hearing lasted seven days and involved both extensive oral evidence and legal submissions. It also involved both open and closed hearings and open and closed evidence. Ouseley J handed down his judgment [2007] EWHC 651 (Admin) on 30 March 2007. By an order of the same date, Ouseley J quashed PTA/33/2006 on the ground that the order constituted a deprivation of liberty under article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the course of his lengthy judgment, which ranged over a number of different issues, Ouseley J reached the following conclusions which are relevant or potentially relevant for present purposes. (i) On the closed material reasonable grounds existed for suspecting that AF was or had been involved in terrorism-related activity, although no such grounds were disclosed by the open material and it was not submitted that they were: para 131. (ii) A control order was necessary for purposes connected with protecting members of the public from a risk of terrorism "in view of the potential harm to the public if AF engages in terrorist related activity, and in view of his willingness and ability to do so": para 133. (iii) Had the control order not breached article 5, the court could be satisfied that the general run

of restrictions were necessary, but the detail and balance would have to be examined further: para 145. (iv) The process under the PTA was not one in which AF had been without a substantial and sufficient measure of procedural protection, so that there was no breach of article 6 of the Convention: para 167.

4 In anticipation of the judgment of Ouseley J and in the light of his conclusion on article 5 of the Convention, the third control order PTA/4/2007 was made on 29 March 2007 and served on the following day. It reduced the period of curfew to 12 hours.

5 Both parties appealed to the House of Lords under the leapfrog procedure contained in section 12(3)(b) of the Administration of Justice Act 1969 and the appeal was heard together with an appeal from a decision of this court in *Secretary of State for the Home Department v MB* [2007] QB 415. The House of Lords gave judgment in both cases on 31 October 2007 [2008] 1 AC 440. On the same day the House of Lords gave judgment in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385.

6 By a majority the House of Lords held in *Secretary of State for the Home Department v MB*; *Secretary of State for the Home Department v AF* [2008] 1 AC 440 (i) reversing the decision of Ouseley J, that PTA/33/2006 did not amount to a deprivation of liberty contrary to article 5 of the Convention for the reasons given in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; and (ii) that the question whether AF had been given a fair trial in accordance with article 6 of the Convention would be remitted to the Administrative Court for reconsideration in the light of the opinions of the majority. The majority comprised Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood. They also I think included Lord Bingham of Cornhill, albeit dubitante. Lord Hoffmann dissented.

7 Before the House of Lords gave its judgment on 31 October 2007, the second control order PTA/33/2006 expired on 10 September 2007. This was because control orders (like the PTA itself) only have a life of one year and the order had been imposed on 11 September 2006. In fact AF had not been subject to PTA/33/2006 since 31 March 2007 when it was quashed by Ouseley J and replaced by PTA/4/2007. PTA/33/2006 was (I suppose) retrospectively revived by the order of the House of Lords which reversed Ouseley J's order and at the same time remitted it for reconsideration in the light of the majority opinions. Since, even if retrospectively revived, the order expired on 10 September 2007, the decision of the court on remission, so far as I can see, only has historical significance or potential significance.

8 In the meantime, PTA/33/2006 was (as I have just said) replaced by PTA/4/2007 on 29 or 30 March 2007. That order was modified in some respects by Goldring J on 17 August 2007 and was further modified on 31 October and 9 November 2007. In particular, the number of hours of curfew was increased to 16 on 31 October in the light of the decision of the House of Lords.

9 In these circumstances the matter was initially listed before Stanley Burnton J for directions in relation to the substantive hearing required under section 3 of the PTA in respect of PTA/4/2007. The control order was made under section 3(2). It follows that directions "for a hearing in relation to the order" were required under section 3(2)(c).

A 10 Section 3(10) provides:

“On a hearing in pursuance of directions under subsection (2)(c) . . . the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed— (a) his decision that the requirements of section 2(1)(a) and (b) were satisfied for the making of the order; and (b) his decisions on the imposition of each of the obligations imposed by the order.”

B It was held by this court in *Secretary of State for the Home Department v MB* [2007] QB 415 that section 3(10) should be construed so that the function of the court at such a hearing is to consider whether any of the decisions identified in section 3(10)(a)(b) is (not was) flawed as at the date of the hearing. By section 3(11) the court must apply the principles applicable on an application for judicial review. This court explained, at para 60 of *Secretary of State for the Home Department v MB*, that on the true construction of the PTA the review involved the court deciding whether the facts relied upon by the Secretary of State for the Home Department amounted (as at the date of the hearing) to reasonable grounds for suspecting that the controlee is or has been involved in terrorism-related activity.

D 11 It follows that the role of the court when considering PTA/4/2007 is to decide whether (a) the Secretary of State for the Home Department has reasonable grounds for suspecting that AF is or has been involved in terrorism-related activities; (b) it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on AF; and (c) the decision of the Secretary of State for the Home Department in respect of each such obligation is flawed. Those formulations are derived from sections 2(1) and 3(2)(10)(11) of the PTA as considered by this court in *Secretary of State for the Home Department v MB*. I will return below to the approach to be adopted by the court in reaching those decisions.

F 12 In the light of the recent jurisprudence there is an anterior question, namely whether the hearing of those questions will be a fair hearing in accordance with article 6 of the Convention. As already indicated, Ouseley J held that the hearing under section 3(10) in respect of PTA/33/2006 was fair. He did so on the basis of the decision of this court in *Secretary of State for the Home Department v MB* (to which I was a party together with Lord Phillips of Worth Matravers CJ and Sir Igor Judge P) that, although the case against AF depended on the closed material which he was not permitted to see and, although he was not permitted to be told even the gist of the case against him, the hearing was fair because of the role played by the special advocates, Mr Hugo Keith and Mr Jeremy Johnson. As I said earlier, the majority in the House of Lords took a somewhat different view. The principles applicable to the question whether the hearing under section 3(10) of the PTA in respect of PTA/4/2007 will be fair within the meaning of article 6 of the Convention will be different from those applied by Ouseley J in respect of PTA/33/2006. They will be the principles to be deduced from the speeches of the majority in *Secretary of State for the Home Department v MB* [2008] 1 AC 440. The same principles will be applicable to the question remitted to the Administrative Court by the House of Lords in respect of PTA/33/2006.

The hearing before the judge on 21 November

13 On 21 November Stanley Burnton J was invited to consider a preliminary question or questions said to arise or potentially to arise in relation to the hearings in respect of PTA/33/2006 and PTA/4/2007. The judge said [2008] 2 All ER 67, para 1 that two issues of importance arose in relation to hearings under section 3(10) and 10(4) of the PTA namely (a) whether a judge who decides issues arising on a hearing under section 3(10) of the PTA adversely to a respondent (or to the Secretary of State for the Home Department) is disqualified from adjudicating in subsequent proceedings under the PTA to which the respondent is a party; and (b) the status of findings made by a judge as a result of a hearing under section 3(10) of the PTA in subsequent proceedings under the PTA between the same parties.

14 The judge heard argument on 21 November, handed down a written judgment on 28 November and made an order on 30 November dismissing the application and making these two declarations in paras 2 and 3:

“2. A judge who decides issues arising on a hearing under section 3(10) of the Act adversely to the respondent (or to the Home Secretary) is not for that reason disqualified by prejudgment from adjudicating in subsequent proceedings under the Act to which the respondent is a party.

“3. Findings made by the court on issues arising on a hearing under section 3(10) are in principle to be regarded as binding between the Home Secretary and the respondent in relation to matters at the date of that hearing on a subsequent hearing under that subsection, subject to any differences in the evidence relevant to those issues before the court on each of those hearings.”

The judge granted permission to appeal.

Subsequent events

15 Since the judgment of the judge on 30 November a number of relevant events have taken place. A directions hearing took place before the judge on 5 February 2008, by which time it had been decided (for reasons which have nothing to do with the issues in these proceedings) that the section 3(10) hearing in respect of PTA/4/2007, including the hearing of the question whether such a hearing will satisfy article 6 of the Convention, will come before the judge (ie Stanley Burnton J) and not Ouseley J. So too will the hearing of the issue relating to PTA/33/2006 which was remitted by the House of Lords, namely whether the hearing before Ouseley J in 2007 satisfied article 6. This makes the appeal against para 2 of the order of the judge quoted above academic in this case.

16 Before the directions hearing the parties had exchanged skeleton arguments, which considered, among other things, how matters should proceed. It is not necessary to rehearse those arguments here. The judge decided that he would hold a closed hearing to consider the article 6 issues in relation to both control orders before deciding how to proceed thereafter. That hearing is to take place on 25 February. The remaining issues have been adjourned to 11 March. It is not clear whether the judge proposes to reach a decision on the article 6 issues before proceeding further. Nor is it clear, at any rate to me, whether he proposes to determine the article 6 issues

A only in relation to PTA/4/2007 or whether he also proposes to determine them in relation to PTA/33/2006.

17 Those are essentially matters for the judge. So far as I can see, if he were to conclude that the hearing in relation to PTA/4/2007 would be unfair and contrary to article 6, it would follow that the hearing before Ouseley J was also unfair. If he were to hold that the hearing in relation to PTA/4/2007 is or will be fair, he will of course proceed to conduct it and, whether in those
B circumstances it would be necessary to consider whether the hearing before Ouseley J was fair, might depend upon whether the resolution of that issue would or might be relevant to the other issues in relation to PTA/4/2007. Otherwise it is difficult to see what advantage there would be in expending time and money considering whether the hearing before Ouseley J was fair, since that order has expired and AF does not seem likely to have a
C historical claim based on the unfairness of the hearing because he was not in fact subject to PTA/33/2006 between 30 March, when it was quashed by Ouseley J, and 11 September, when it expired.

18 However, I recognise that it may not be possible for the judge to decide whether the PTA/4/2007 is or will be fair before considering at least some of the issues adjourned to 11 March. It may indeed be appropriate to proceed by stages, as suggested by Baroness Hale in *Secretary of State for the*
D *Home Department v MB* [2008] 1 AC 440, at para 72. Also, it may be that the Secretary of State for the Home Department will wish to rely upon the findings of Ouseley J in connection with one or more of the substantive issues which arise under PTA/4/2007. In that event it must be open to AF to argue that that would not be appropriate on the ground that the hearing before Ouseley J was unfair. These are all matters for the judge and not, as
E I see it, for this court in this appeal. In these circumstances we are not concerned in this appeal with article 6 issues or with the reasoning of the majority in *Secretary of State for the Home Department v MB*, as subsequently considered by Collins J in *In re Bullivant* [2007] EWHC 2938 (Admin) and by Silber J in *Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin).

F *Correct approach to previous section 3(10) hearing*

19 As things stand, the most important issue in this appeal is the correct approach to previous conclusions of a judge at a hearing under section 3(10). In this regard the judge's conclusion is stated in para 3 of his order quoted above:

G "Findings made by the court on issues arising on a hearing under section 3(10) are in principle to be regarded as binding between the Home Secretary and the respondent in relation to matters at the date of that hearing on a subsequent hearing under that subsection, subject to any differences in the evidence relevant to those issues before the court on each of those hearings."

H 20 Mr Otty submits on behalf of AF that it is wrong in principle to treat findings at a previous section 3(10) hearing as binding at a future such hearing. He goes further and submits that such findings are irrelevant at a future hearing and that the Secretary of State for the Home Department must establish her case afresh. Alternatively he submits that the court is entitled to have regard to findings made at an earlier section 3(10) hearing

but will itself (i) have to be satisfied that the facts relied upon by the Secretary of State for the Home Department amount to reasonable grounds for suspecting that the controlee is or has been involved in terrorism-related activity; and (ii) have to give intense scrutiny to the necessity of each of the obligations imposed. Mr Otty further submits as part of his alternative case that it will only be in a case where there has been no change of any kind to the nature of the evidence adduced at the first section 3(10) hearing that the findings made on that first occasion will be capable of being relied on by the court without reconsideration of the underlying material on which they were based.

21 At the hearing of the appeal the difference between the positions taken by the parties was less marked than had at first appeared. While the Secretary of State for the Home Department wishes or may wish to rely on previous findings as a starting point which should not be departed from in the absence of a change of circumstances, save perhaps in an exceptional case, Ms Grange accepted that it was wrong to treat such findings as binding and that the order of the judge would have to be altered to reflect that concession.

22 In considering the issues that remain it is I think of some importance to have in mind the exercise upon which the court is engaged under section 3(10) and to consider the circumstances in which there might be successive hearings under section 3(10). I consider first the statutory context.

23 I have already referred to the relevant parts of section 3, which requires a hearing on the issues stated above in the case of every non-derogating control order made by the Secretary of State for the Home Department with the permission of the court. By section 2(4)(a) such an order has effect for 12 months but, by section 2(4)(b), it may be renewed on one or more occasions in accordance with the provisions of the section. Those provisions include section 2(6), which provides that the Secretary of State for the Home Department may renew the control order, with or without modifications, if he:

“(a) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for an order imposing obligations on the controlled person *to continue in force*; and (b) considers that the obligations to be imposed by the renewed order are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity.”

Also, by section 7(2)(d) of the PTA the Secretary of State for the Home Department has the power to make such modifications to the obligations in the order as she considers necessary for the same purposes as are set out in section 2(6)(b).

24 I have put the words *continue in force* in italics because they point to one of the key differences between a renewed or modified order and the original order. The other key difference is that there is no equivalent in section 2(6), or elsewhere in respect of renewed or modified orders, to section 2(1)(a), which provides that before making a non-derogating order the Secretary of State for the Home Department must have reasonable grounds for suspecting that AF is or has been involved in terrorism-related activities. In the case of a renewal or modification the statute takes it for granted that the Secretary of State for the Home Department had such

A reasonable grounds, no doubt in part because there will have been a hearing under section 3(10), at which that question will have been tested.

25 It is significant to note that in such circumstances the controlee is not given the same rights as he has under section 3(10). His rights after renewal or modification are set out in section 10. Section 10(4), which relates to renewed orders, provides:

B “The function of the court on an appeal against the renewal of a non-derogating control order, or on an appeal against a decision not to revoke such an order, is to determine whether either or both of the following decisions of the Secretary of State was flawed— (a) his decision that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for an order imposing obligations on the controlled person to continue in force; (b) his decision that the obligations to be imposed by the renewed order, or (as the case may be) the obligations imposed by the order to which the application for revocation relates, are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity.”

Section 10(5) contains a similar provision in the case of an appeal against a modification.

D 26 Mr Otty submits that the differences between the functions of the court when a control order is first made and when an order is modified or renewed are significant because they show that, whereas in the first case the court must be satisfied that there are reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, there is no such requirement in the cases of modification or renewal. For my part, E I would entirely accept that the provisions are different and, indeed, that the statute provides that in every case of a new (as opposed to renewed) order the Secretary of State must have reasonable grounds for the belief just described. Moreover, I would accept that the effect of the decision of this court in *Secretary of State for the Home Department v MB* [2007] QB 415, in a part of the judgment which is unaffected by the views of the House of Lords, is that the court must be satisfied that such grounds exist at the time F of the hearing under section 3(10) of the PTA. It follows that the court must apply its mind to that question.

27 Further, it is true that the PTA does not treat the existence of such grounds as read, as it does in the case of a renewal or modification. However, it is not the Secretary of State for the Home Department’s case that the grounds should be treated as read, only that an earlier finding by G the court should be regarded as a starting point in the case of any new non-derogating order. While there is nothing in the PTA which provides that the earlier decision is decisive, there is equally nothing in the PTA which provides that it is irrelevant. I would reject the submission that the PTA contemplates that an earlier decision is irrelevant.

H 28 Such a conclusion would be very odd in the light of the provisions of the Act to which I have referred. Take a case in which, perhaps because of administrative oversight, the Secretary of State for the Home Department fails to renew the order in accordance with section 2(6)(7), which (as I read section 2) she must do before the order expires and then, after say three weeks, the error is discovered and a new order is made. There would have to be a hearing under section 3(10) and the court would have to be satisfied that

the security grounds set out in section 2(1)(a) were satisfied as at the date of the hearing. In these circumstances it would, to my mind, be startling if the court could disregard the findings of the court on the earlier hearing under section 3(10), when, if the order had been renewed three weeks earlier, those findings would be conclusive. The sensible approach would be for the court to have regard to them.

29 The only situation in which it was suggested on behalf of the Secretary of State for the Home Department that this situation might arise, save perhaps in the very unusual circumstances of this case, is where a control order expires and the Secretary of State for the Home Department decides not to renew it and then, say two or three years later, he or she decides to make a new order. In those circumstances there will on that hypothesis be a change of circumstances, so that, whatever approach is adopted, an historical decision would be likely to have comparatively little weight.

30 In all these circumstances, unless constrained by authority, I would accept Mr Otty's alternative submission, albeit with some modifications. I would hold, as he submitted, that the court is entitled to have regard to findings made at an earlier section 3(10) hearing but will itself (i) have to be satisfied that the facts relied upon by the Secretary of State for the Home Department amount to reasonable grounds for suspecting that the controlee is or has been involved in terrorism-related activity; and (ii) have to give intense scrutiny to the necessity of each of the obligations imposed.

31 A further part of Mr Otty's alternative submission was that it will *only* be in a case where there has been no change of any kind to the nature of the evidence adduced at the first section 3(10) hearing that the findings made on that first occasion will be capable of being relied on by the court without reconsideration of the underlying material on which they were based. There is I think considerable force in that submission but I do not think that it is possible to be so prescriptive. It seems to me that it will be a matter for the judge in each case to decide what weight it is appropriate to give to earlier decisions or findings. It will be a matter for judgment how far, if at all, it is appropriate to reopen issues which have been considered previously. Where the hearing is only a short time after the first hearing and little has changed, a judge will no doubt be very reluctant to revisit evidence which he has considered only very recently unless there is good reason to do so. It would I think be open to a judge in appropriate circumstances to refuse to revisit part of the evidence in an earlier hearing. It will be a case management decision how best to proceed.

32 The underlying objective in every case is of course to deal with the case justly and, especially in cases of this type, where the controlee may not be given the detail of the case against him, the judge must ensure that the proceedings are fair. The majority opinions in *Secretary of State for the Home Department v MB* [2008] 1 AC 440 make that very clear. Moreover, it does seem to me that the court should have in mind that, although proceedings under section 3(10) are civil proceedings, as Lord Bingham put it, at para 24 of *Secretary of State for the Home Department v MB*, a controlee is entitled to such measure of protection as is commensurate with the gravity of the potential consequences: see also per Baroness Hale, at para 65, Lord Carswell, at para 82, and Lord Brown, at para 90.

A 33 This approach seems to me to be supported by the approach to hearings under section 3(10) discussed by this court in *Secretary of State for the Home Department v MB* [2007] QB 415. Lord Phillips of Worth Matravers CJ, giving the judgment of the court, said, at para 67:

B “The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof. It is the procedure for determining whether reasonable grounds for suspicion exist that has to be fair if article 6 is to be satisfied.”

This is the exercise which must be carried out under section 3(10) in every case. It seems to me that, save perhaps in the case where the very same exercise has been carried out very recently, the findings at an earlier hearing will be only one factor to be taken into account. It is important not to be too prescriptive. All depends upon the circumstances of the particular case.

D 34 I turn to the reliance placed by the Secretary of State for the Home Department on the guidance given by the Immigration Appeal Tribunal (“IAT”) (now the Asylum and Immigration Tribunal (“AIT”)) as to the weight to be attached on a subsequent human rights challenge to the findings of the adjudicator who had rejected an earlier asylum appeal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 as approved by this court in *LD (Algeria) v Secretary of State for the Home Department* [2004] EWCA Civ 804 (in relation to cases where, as here, the parties are identical) and *AA (Somalia) v Secretary of State for the Home Department* [2008] Imm AR 241. It was submitted to the judge that the findings of Ouseley J in PTA/33/2006 are to be treated as “the starting point” for the consideration of the issues raised in PTA/4/2007, irrespective of the identity of the judge. The principal thrust of the submissions before the judge was that this was true in every case and that, given that that was the case, there was no basis for concluding that Ouseley J should be recused from holding the hearing under section 3(10).

F 35 The judge accepted those submissions. Moreover, he did so as the basis for his conclusion that Ouseley J should not be recused on the ground of pre-judgment. He said [2008] 2 All ER 67, para 17:

G “However, in my judgment this contrast, and the wording of section 3(10) itself, does not indicate that Parliament intended to exclude the normal principle of public law that a decision, and in particular a judicial decision, made between parties should be respected in subsequent proceedings. Clearer wording would have been used if this had been intended. The principle is demonstrated by the authorities cited by Mr Eicke referred to above, but is not confined to immigration or asylum cases (or indeed to public law): see the discussion in the judgment of Carnwath LJ in *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040.”

36 The judge then rejected, at para 18, Mr Otty's submission that there was a distinction between this type of case and asylum and immigration cases. For present purposes the critical part of the judge's reasoning is I think, at paras 19–20:

“19. It follows that on a hearing under section 3(10), where there has been a previous hearing under the section in relation to an earlier control order, the starting point will be the findings of the court on the earlier hearing. Assuming no successful appeal against the findings in the first hearing, in the unlikely event of there being no difference in evidence or issues between the two hearings, the court would treat the earlier findings as binding. That being so, there is no objective reason why the judge who decided the issues in the earlier hearing adversely to the respondent (or to the Home Secretary) should be disqualified by prejudgment from deciding the issues on the second hearing.

“20. This does not mean that in the present case on the section 3(10) hearing on PTA/4/2007 the court is bound to reach the same factual conclusions as those originally reached by Ouseley J in the hearing in relation to PTA/33/2006. The evidence will differ, in that it will have been brought up to date by both parties; there may be additional evidence quite apart from the consequences of the decision of the House of Lords; the Secretary of State may decide to disclose evidence that was previously closed, which may lead AF to supplement his evidence; he may decide to testify; the court may preclude the Secretary of State from relying on some evidence on which he was previously able to rely; and the court will have to consider the consequences of the passage of time during which AF has been subject to control orders. Inevitably, as all counsel recognise, the decisions of the court on the admissibility of evidence on which the Secretary of State seeks to rely will impact on the issue remitted by the House of Lords on PTA/33/2006.”

37 I would not cast doubt on the general proposition that in public law cases, where there has been a previous decision in proceedings between the same parties, and the same question arises in subsequent proceedings the starting point is likely to be the decision in the first proceedings. However, all will depend upon the circumstances. The present case does seem to me to be a very different kind of case from that discussed in the cases upon which the Secretary of State for the Home Department relied before the judge. Indeed a reading of what are known as the *Devaseelan* guidelines shows that they are not directly applicable, unsurprisingly since they are dealing with very different problems.

38 The guidelines are not unnaturally tailored to the particular problems involved in the case with which the *Devaseelan* case [2003] Imm AR 1 was concerned, namely where (under the legislation then in force) adjudicators of human rights challenges were inevitably reconsidering decisions of previous adjudicators on asylum claims arising out of the same facts.

39 In the *Devaseelan* case the IAT gave guidance as to the weight to be attached to the findings of the adjudicator who had rejected the asylum appeal. The IAT said, amongst other things, that the first adjudicator's determination “should always be the starting point”. Paras 37 and 38 of the IAT decision included:

A “37. . . . The first adjudicator’s determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the appellant was then making, at the time of that determination. It is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second adjudicator’s role to consider arguments intended to undermine the first adjudicator’s determination.

B
C “38. The second adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first adjudicator. In particular, time has passed; and the situation at the time of the second adjudicator’s determination may be shown to be different from that which obtained previously. Appellants may want to ask the second adjudicator to consider arguments on issues that were not—or could not be—raised before the first adjudicator; or evidence that was not—or could not have been—presented to the first adjudicator.”

D 40 In paras 39–42, under various headings, the IAT set out the guidelines as follows:

“ (1) The first adjudicator’s determination should *always* be the starting-point. It is the authoritative assessment of the appellant’s status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.

E “ (2) Facts happening since the first adjudicator’s determination can *always* be taken into account by the second adjudicator. If those facts lead the second adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first adjudicator and at that date, is not inconsistent.

F “ (3) Facts happening before the first adjudicator’s determination but having no relevance to the issues before him can *always* be taken into account by the second adjudicator. The first adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.

G “ (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection. An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first adjudicator’s determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first adjudicator.

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“(5) Evidence of other facts—for example country evidence—may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (4). Evidence dating from before the determination of the first adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the appellant’s own country at the time of that determination is very unlikely to be relevant in deciding whether the appellant’s removal at the time of the second adjudicator’s determination would breach his human rights. Those representing the appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

“(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the appellant at that time, the second adjudicator should regard the issues as settled by the first adjudicator’s determination and *make his findings in line with that determination* rather than allowing the matter to be re-litigated. We draw attention to the phrase ‘the same evidence as that *available to the appellant*’ at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the appellant, he must be taken to have made his choices about how it should be presented. An appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

“(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the appellant’s failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the immigration services commissioner under Part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An adjudicator should be very slow to conclude that an appeal before another adjudicator has been materially affected by a representative’s error or incompetence; and such a finding should *always* be reported (through arrangements made by the chief adjudicator) to the immigration services commissioner. Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second adjudicator would, in such a case, be able to

A build very meaningfully on the first adjudicator's determination, but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

B “(8) We do not suggest that, in the foregoing, we have covered every possibility. By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.”

C 41 I have set out those guidelines in detail because it can to my mind immediately be seen from them that the problems facing a judge conducting a hearing under section 3(10) of the PTA is much more complex than that with which the guidelines are concerned. This is apparent from the description of the exercise described in *Secretary of State for the Home Department v MB* [2007] QB 415, para 67 in this court and quoted above.

D 42 The distinction between the *Devaseelan* kind of case and this includes the fact that in asylum cases the appellant knows the case against him and very frequently gives evidence. His credibility is at the centre of the case both in respect of asylum and human rights. That is to be contrasted with the position of the controlee. Although his credibility may in one sense be in issue, he often knows little and sometimes (at any rate thus far) nothing about the case against him and (as in AF's case before Ouseley J) does not give evidence. Neither he nor his counsel is present during the critical part of the hearing, which is closed, and, once the closed material has been disclosed to the special advocate, neither he nor his counsel can discuss the case with the special advocate. Although I recognise that at a second hearing in respect of a new control order the judge and the special advocate will have a transcript of the evidence and submissions at the first hearing, neither the controlee nor his counsel will be able to see it. In these circumstances, a judge should in my opinion be very reluctant to treat the finding of the judge conducting the hearing under an earlier order as in practice determinative, save perhaps in the kind of case to which I referred earlier where the two hearings are for some reason very close together.

F 43 In any event the authorities to which I have referred show that the *Devaseelan* guidelines are themselves very flexible. This can be seen, not only from the guidelines themselves, but also from the later cases. It was for example stressed in *LD (Algeria) v Secretary of State for the Home Department* [2004] EWCA Civ 804, where the judgment of the court was given by Judge LJ. Although the court rejected a challenge to the guidelines, in doing so it stressed both the particular role of the guidelines and their flexibility. Thus Judge LJ said, at para 29:

H “In our judgment, the IAT, specialising in this field, was entitled to provide guidance to the entire body of specialist adjudicators about how they should deal with the fact of an earlier unsuccessful application when deciding the later one. Such guidance was essential to ensure consistency of approach among special adjudicators. The guidelines remedied an immediate and pressing difficulty, with direct application to, but not exclusively concerned with, the many cases in which, after unsuccessfully exhausting all the possible legal channels, asylum seekers remained in the United Kingdom, and put forward a case on human rights grounds after October 2000.”

The necessity for the guidelines thus arose out of very different circumstances from those with which we are concerned. A

44 Judge LJ said, at para 30:

“Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved. The guidance was expressly subject to this overriding principle.” B

He then set out both part of para 37 of the IAT decision in the *Devaseelan* case and guideline (8) quoted above and added:

“This is not the language of res judicata nor estoppel. And it is not open to be construed as such. In view of the argument, we must emphasise that in *Devaseelan* the IAT purported to do no more than provide guidance, and in our judgment, properly exercising its responsibilities, that indeed is what it did.” C

45 It is important to note that, as in the *Devaseelan* guidelines, the principle relied upon in this case is not a principle of res judicata or issue estoppel. That being so, I do not think that it is appropriate to speak of findings of a judge at a hearing under an earlier order as being “binding”. That seems to me to be the language of issue estoppel. It also raises the question what is to be binding. Is it every conclusion of fact and, if not, what is it? It was no doubt in these circumstances that the Secretary of State for the Home Department conceded that it was wrong to treat the earlier findings as “binding”. If they are not “binding” then how should they be taken into account? D

46 Carnwath LJ considered this problem in *AA (Somalia) v Secretary of State for the Home Department* [2008] Imm AR 241, para 54, in which he and Ward LJ comprised the majority with Hooper LJ dissenting. Carnwath LJ considered the status of the first decision in circumstances where there was no issue estoppel or res judicata. He said, at para 54: E

“As Hooper LJ has noted, this passage is prefaced by a statement that the first determination is not ‘binding’ on the second adjudicator. However, I understand this to be saying no more than that it is not binding in the technical sense of issue estoppel or res judicata. The whole purpose of the guidelines is to indicate the circumstances in which it is appropriate to follow the first decision rather than allow the issue to be relitigated. This is most explicit in the above extract from guideline (6) (directed specifically at an article 3 claim based on the same reasons as a refugee claim). The same point is underlined by the remainder of guideline (6), which explains the limits to the new evidence which might justify reopening the first decision.” F

Carnwath LJ then quoted from guideline (6), which is set out above. G

47 Carnwath LJ’s approach I think be seen from para 55:

“The legal considerations underpinning the guidelines can be seen in the tribunal’s treatment of the respective arguments. Mr Lewis for the applicant is recorded as submitting, at para 31, that—‘the previous determination is merely “a relevant matter to be taken into account” in the human rights appeal, but that neither the findings nor the conclusions H

- A of the first adjudicator are binding upon the second adjudicator . . .’
Miss Giovannetti, for the Secretary of State, accepted that the first
adjudicator’s determination ‘cannot be regarded as binding on the second
adjudicator’, but submitted that it was proper for a second adjudicator to
have regard to the first adjudicator’s findings, and that ‘the second
adjudicator should only differ from those findings where there is good
reason to do so’: ‘If the human rights claim was based on a different
factual matrix, it would generally be necessary to make new findings,
probably on additional evidence. The different factual matrix would itself
be a good reason for not following and applying the first adjudicator’s
determination. *Otherwise, however, legal and policy considerations*
demand that the appellant’s second appeal be determined in line with
his first.’ (Emphasis added.) Miss Giovannetti identified four ‘legal and
policy considerations’ leading to that proposition, at paras 33–34: ‘The
first is fairness: it would be unfair to an appellant, who had satisfied the
first adjudicator that his account of events was credible, to deprive him of
the benefit of that finding. If that is right, it must follow that an appellant
who has failed to satisfy an adjudicator of his credibility is not entitled to
have the same evidence reassessed by a second adjudicator. It is not fair
to the public for there to be a system in which favourable findings stand
but unfavourable findings are always questionable. Secondly, general
principles of consistency and finality in litigation are important even in the
absence of a rule of *res judicata*. Thirdly, the general approach to findings
of fact in immigration cases both on appeal to the tribunal and outside
the IAA (e.g. *Ex p Danaie* [1998] Imm AR 84) is that findings of fact
stand unless there is good reason to displace them. Fourthly, it would,
in Miss Giovannetti’s submission, be contrary to good administration
to have a system which allowed for the continuing existence of two
undisturbed determinations of the IAA containing inconsistent findings of
fact in relation to the same individual.’ The tribunal thought the answer
lay somewhere between the two submissions, but ‘considerably nearer’
that of the Secretary of State.”
- F 48 Finally in para 57 Carnwath LJ stressed, in the light of *LD (Algeria)*
v Secretary of State for the Home Department [2004] EWCA Civ 804 that
the guidelines were a proper exercise of the IAT’s role as a specialist body, in
order to secure consistency, while respecting the “fundamental obligation”
of each adjudicator to decide each case on its own merits. Carnwath LJ
also stressed the view stated in para 40 of the *LD (Algeria)* case that
the guidelines must be applied flexibly.
- G 49 I have already expressed my reasons for concluding that the
Devaseelan guidelines cannot simply be transferred wholesale to the different
context of a hearing under section 3(10) of the PTA. I have also expressed my
view that the findings in an earlier decision of a judge under section 3(10)
should be taken into account and that there may be circumstances in which
a judge might conclude that justice did not require the reopening of
conclusions reached earlier. However, the judge conducting a hearing under
section 3(10) does not make findings of fact in the way that an adjudicator
does (or did) on an asylum claim or a human rights claim. I do not think that
one can simply say that there has been no change of circumstances and that a
judge conducting a section 3(10) in respect of a second control order can
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properly be regarded as bound by such conclusions as were reached at an earlier hearing. The principle is simply that he must have such regard to those conclusions as is appropriate in the circumstances.

50 There is I think very little between this approach and that of the judge. Indeed, I entirely agree with his reasoning, at para 20 of his judgment, set out above. The only point upon which I respectfully differ from him is his formulation of the declaration in para 3 of his order:

“Findings made by the court on issues arising on a hearing under section 3(10) are in principle to be regarded as binding between the Home Secretary and the respondent in relation to matters at the date of that hearing on a subsequent hearing under that subsection, subject to any differences in the evidence relevant to those issues before the court on each of those hearings.”

I would set aside that declaration. It was accepted on behalf of the Secretary of State that a second judge was not “bound” by any part of the decision of the first and the declaration suggests that the role of the judge conducting a section 3(10) hearing in respect of a new control order is to start with the conclusions of the judge who considered the first control order and then identify whether the circumstances are now sufficiently different to depart from the conclusions of the first judge.

51 I do not think that that is the correct approach. It is the duty of the judge conducting the second section 3(10) hearing to consider the questions identified above as at the date of the hearing. In these circumstances I do not think that it is appropriate to treat an earlier decision on a different control order as a starting point. For the reasons I have given the judge should take it into account in the way suggested in paras 30–33 above.

Apparent bias

52 The only other issue in this appeal which it is appropriate to address is apparent bias, although it may be largely, if not entirely, academic in the events which have happened, since Ouseley J will not be conducting either the hearing under section 3(10) in respect of PTA/4/2007 or the matter remitted in respect of PTA/33/2006.

53 The general principle is not in dispute. It has most recently been stated by Lord Bingham of Cornhill, giving the judgment of the Judicial Committee of the Privy Council in *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 62 at [15]. It is a matter for the court to decide whether there is apparent bias or, as Lord Bingham put it, an appearance of bias. The court must first ascertain all the circumstances which bear on the suggestion that the judge was (or would be) biased. It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias; that is that the judge might have been (or be) influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case.

54 Mr Otty drew our attention to the judgments of Laws and Keene LJ in *Sengupta v Holmes* [2002] EWCA Civ 1104 at [25], [33]–[34], [44] respectively. Laws LJ had referred to two cases in the High Court of Australia, namely *In re JRL; Ex p CJL* (1986) 161 CLR 342 and *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. They

A show that the circumstances can be such that a judge who has made findings of fact against a party or reached conclusions as to the credit of a party in previous proceedings may have so conducted himself that a fair-minded and informed observer would conclude that he might be prejudiced against him.

B 55 However, as I read the authorities, it all depends upon the facts. I do not think that the mere circumstance that the judge has reached conclusions of fact which are adverse to a party of itself leads to the conclusion that there is an appearance of bias. Laws LJ put it thus, at para 32:

“If a judge has presided at a first instance trial and roundly concluded on the facts—after hearing disputed, perhaps hotly disputed, evidence—that one of the parties lacks all merit, everyone would accept that it would be unthinkable that he should sit on that party’s appeal.”

C 56 However, there are many cases in which issues of fact are remitted to the trial judge to consider or reconsider in the light of, say, a decision of an appellate court. It is a matter for judgment in each case whether the test identified above is satisfied. It seems to me to be very unlikely that the circumstances of successive hearings under section 3(10) of the PTA in respect of successive control orders would be such that a fair-minded observer would think that a judge who considered the first one might not be able fairly to consider the second one. On the contrary, it seems to me that justice is likely to be best served by having the same judge. I see no reason in principle why, in the ordinary case, a judge should not be able to consider the evidence available at the second hearing afresh entirely fairly, whether or not he had previously reached a conclusion in respect of an earlier control order where some of the evidence was the same.

E 57 This is not to say that there might not be particular circumstances which might lead to the conclusion that that was not so. Whether there are or not will depend upon the circumstances of the case concerned.

F 58 It is not I think necessary to say more than that, save perhaps to add that, if the point had been live, I would not have held that it was not appropriate for Ouseley J to conduct either the hearing in respect of PTA/4/2007 or the remitted hearing under PTA/33/2006 on the ground of apparent bias. I am not persuaded that a fair-minded and informed observer would think that Ouseley J might not conduct either such hearing fairly because of what Mr Otty called potential unfairness. When he reached his conclusions the relevant principles were those stated by this court in *Secretary of State for the Home Department v MB* [2007] QB 415, whereas they are now those stated by the House of Lords in *Secretary of State for the Home Department v MB* [2008] 1 AC 440. I see no reason why he should not be able conscientiously to reconsider his conclusions in the light of the judgments in the House of Lords. Lord Carswell appears to have thought that this was so, at para 85 of *Secretary of State for the Home Department v MB*. I am not sure whether it is now said that we should set aside the declaration in para 2 of the judge’s order but I would decline to do so.

H 59 I would only add that, in giving these reasons, I do not wish to prejudge in any way the issues before the judge, including any question whether the hearing before Ouseley J was fair: see the brief discussion below [2008] 2 All ER 67, paras 17, 18.

Conclusions

60 For the reasons I have given I would set aside the declaration in para 3 of the order made by the judge but not that in para 2. As at present advised I do not think that it is necessary to replace the declaration in para 3 with another form of declaration. I hope that judges will be able to approach section 3(10) hearings in respect of a second or subsequent control order in accordance with the approach which I have summarised in paras 30–33 above.

RIX LJ

61 I agree.

KEENE LJ

62 I also agree.

Appeal allowed in part.

Solicitors: Middleweeks, Manchester; Treasury Solicitor.

SLD

The Belize Bank Limited v The Attorney General of Belize and others



Positive/Neutral Judicial Consideration

Court

Privy Council (Belize)

Judgment Date

20 October 2011

Privy Council Appeal No 0054 of 2010

Court of Appeal of Belize

[2011] UKPC 36, 2011 WL 4966315

before Lord Phillips Lord Brown Lord Kerr Lord Dyson Sir Patrick Coghlin

20 October 2011

Heard on 6 July 2011

Representation

Appellant Nigel Pleming QC Jack Holborn (Instructed by Allen & Overy LLP).

Respondent Dr. Lloyd Barnett Mrs Lois Young SC (Instructed by Charles Russell LLP).

Judgment

Lord Kerr (With Whom Sir Patrick Coghlin Agrees):

Introduction

1. On 7 February 2008, a general election took place in Belize. The outgoing government party was defeated and Mr Said Musa who, until the election, had been Prime Minister was replaced by Mr Dean Barrow who became not only Prime Minister but also Minister for Finance in the new administration.

2. During the campaign which preceded the election one of the principal issues on which vigorous debate had been engaged was the relationship between the appellant, the Bank of Belize (the bank), and the government, particularly in relation to a debt owed by Universal Health Services Company Limited (UHS), a private company operating a hospital in Belize. The financial arrangements between the government and the bank concerning the repayment of a loan from the bank to UHS were the subject of intense media and political interest. During the election campaign, Mr Barrow, who was then the leader of the opposition, was strongly critical of Mr Musa about these financial arrangements. He also acted as co-counsel for a group known as the Association of Concerned Belizeans in a legal action that the group took, challenging the lawfulness of those arrangements.

3. In the weeks following the election, a number of significant developments took place. First, on 28 February 2008, in a government press release it was stated that the Financial Secretary in the Ministry of Finance of the new government had written to the Venezuelan government about the transfer of US \$10m from Venezuela to Belize. At about this time a letter had been received from officials in Caracas in which a query had been raised about how funds transferred from Venezuela to Belize had been dealt with. It is not clear whether this prompted the inquiry from the Financial Secretary. What is clear is that there was considerable suspicion and concern on the part of the new government that funds provided by Venezuela had not been devoted to the projects for which they were designed, namely housing and a sporting complex, but had instead been diverted to the bank in order to meet the former government's obligations under guarantee arrangements that it had entered into with the bank in relation to the bank's loan to UHS.

4. The press statement of 28 February concluded by quoting Prime Minister Barrow as having said that his government would "continue to pursue justice on behalf of the Belizean people and will leave no stones unturned to bring to account those who have robbed the people of this country".

5. On 5 March 2008 Mr Musa made a public statement in which he said that funds had been transferred from Venezuela to Belize in two tranches. One of these involved the transfer of US \$10m from the Venezuelan Development Bank, Bandes, to the Central Bank's account for the government of Belize. This was to be used to assist with housing, home improvement and a sports facility. Mr Musa also said that a further US \$10m dollars had been transferred from Bandes to the Belize Bank in order to settle the government's debt obligations to the Belize Bank. These, he explained, had arisen because of a government guarantee of a loan obtained by UHS. He claimed that there was an "understanding with the Venezuelan government that only the housing and sports facility grant of US \$10m received by the Central Bank was to be announced until further notice". This claim must be viewed, even at this stage when the circumstances of the transfer remain to be fully examined, with some caution in light of what passed between the governor of the Central Bank and the President of the Bank of Belize which is discussed in the paragraphs which follow.

6. On 6 March 2008 a meeting took place between the governor of the Central Bank, Sydney Campbell, and the President of the Bank of Belize, Philip Johnson. The governor has said that at that meeting Mr Johnson told him that the bank had received US \$10m from Bandes Bank but that the written wiring instructions did not indicate for whom these funds were intended. This is to be contrasted with the public statement of Mr Musa, referred to in the preceding paragraph, that one of the two tranches of US \$10m had been earmarked for settlement of the government's debt obligations to the Belize Bank. Notwithstanding the absence of wiring instructions, the \$10m was credited to one of the bank's accounts in the Turks and Caicos Islands. According to the governor, Mr Johnson also told him that in addition to the money from Venezuela, another US \$10m had been received from Taiwan, which the bank had used, together with the Venezuelan \$10m dollars, to settle a debt owed to the bank by UHS. The governor claims that, on receiving this information, he told Mr. Johnson that a special examination of the Belize Bank by the Central Bank would be required. It is hardly surprising that Mr Campbell reached that view. To transfer to the bank's account in another country such a substantial amount of money when the instructions as to how the funds were to be used seems, at first sight, to be a remarkable thing to do.

7. Mr Johnson did not confirm the details that Mr Campbell had given about this meeting in any of the affidavits filed on behalf of the appellant in these proceedings but he did not challenge them either. He contented himself with a somewhat cryptic observation in his first affidavit to the effect that he had attended a meeting with Mr Campbell "to explain what [the bank] knew about the transfer of funds not only from Venezuela but also from Taiwan."

8. On the same day that Mr Campbell has said the meeting with Mr Johnson took place (6 March 2008), the Central Bank notified the Bank of Belize that, in accordance with section 36(5) of the Banks and Financial Institutions Act (the Act), it intended to carry out a special examination of the bank on 7 March 2008. That examination duly took place. Mr Campbell, in the meantime, had informed the Prime Minister that a special investigation of the bank was necessary and Mr Barrow had

agreed that this was indeed required. Again, this is no cause for surprise in light of what Mr Johnson had told Mr Campbell about the circumstances in which the transfer of the \$10 million to the bank's Turks and Caicos account had been made.

9. At a press conference on 7 March 2008 Mr Barrow revealed that he had been approached the previous day by an intermediary with a message that Mr Musa and the former Minister of Budget Planning, Mr Ralph Johnson Fonseca, wished to meet him “to discuss the missing Ten Million US Dollar tranche of the Venezuelan Housing money”. He agreed to a meeting on condition that an official of the government should also be in attendance to record what transpired. In the event, the chief executive officer in the office of the Prime Minister, Miss Audrey Wallace, attended the meeting with Mr Barrow and she made notes of what took place.

10. In his opening statement to the conference, the Prime Minister said this about what had happened at the meeting:

“Messrs Musa and Fonseca explained pretty much what was later said by Mr. Musa in a taped statement recorded for yesterday evening's newscast. In other words, he conceded at long last, he confirmed that it was Twenty Million US Dollars that had been given to Belize by Venezuela but that Ten Million US of the Twenty Million US had been diverted to the Belize Bank in connection, he said, with the UHS guarantee obligation that the Government of Belize had to the Belize Bank.

It was my sense that these gentlemen knew and were, if only tacitly, admitting that it was an outrageous act on their part. Well if they didn't even know it, if they didn't even tacitly admit it, certainly these are my words, and this is how I characterize what has happened, and I believe that they are completely aware of this, that it was an outrageous act on their part to have lied all along so consistently to the Belizean people in saying from the time of the initial announcement that it was Ten Million US Dollars that had been gifted to Belize by Venezuela for Housing. In fact the figure was from the start the Twenty Million US Dollars that's now been admitted.

Furthermore, it is my sense that these gentlemen had no intention of ever coming clean, even after the general elections of February 7th, 2008, and it was only that fortuitous, or perhaps not so fortuitous, letter from the officials in Caracas that forced public and official scrutiny, that raised for the first time the fact that it was Twenty Million US and not Ten Million US. It was that that sweated Misters Musa and Fonseca and obliged them to crack now.”

11. The Prime Minister then said that what the former Prime Minister and Minister of Finance, had done was “absolutely reprehensible. It is highly immoral and the product of a conspiracy ...” Later during the same press conference, when asked whether the bank was complicit in the conspiracy, he said:

“Well [the bank], it now turns out, was the recipient of these funds. The government paid the funds without first coming to the public. The government paid the funds by way of, in my view, an improper diversion when you look at what the contract reputedly contained. I would say that [the bank] might perhaps want to explain their position.”

12. On 12 March 2008 Mr Barrow and the governor of the Central Bank held a further press conference. In the course of this Mr Barrow made a number of statements to the effect that he was convinced that the former Prime Minister and the former Minister of Budget Planning were guilty of improperly diverting funds that should have been used for the benefit of the Belizean people and were also guilty of procuring those funds without properly disclosing them. The Prime Minister then said this:

“I’ve indicated to the Belize Bank that I wish to put them on notice, that the Government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the people of this country. I must say that, as far as I can understand, the Bank has been cooperating up to this point in time, and, ah-I don’t know if he is the Director of the Bank, but certainly, Mr Philip Johnson, with whom I met this morning, has indicated that he will take that position to his principals, that I am putting them on notice that (and I put it no higher than this), that we will be seeking legal advice as to whether they are not liable for the return of the US \$10m.”

13. Given the bank’s position – that it had transferred \$10m to an account outside Belize without express instructions from the source of the funds as to how they should be dealt with – the minister’s statement about the bank might be regarded as, if anything, restrained.

The directives and the Appeal Board

14. On 14 March 2008, as a result of their investigation, the Central Bank issued two directives under section 36(5) of the Banks and Financial Institutions Act . Only the first of these is relevant in the present appeal. It was in the following terms:

“[The Bank] should forthwith credit [the government’s] account with [the Central Bank] with US \$10m as per ‘Payment Details’ stated on wire transfer instructions sent by Bandes-Fideicomisos De Venezuela on the ‘Cash Payment Confirmation’ dated 28 December 2007”

15. On 18 March 2008 the bank responded to the Central Bank’s directive. It challenged the Central Bank’s powers to issue the directives under section 36(5) of the Act. It also complained that it had not been given sufficient time to make a proper response. By virtue of section 36(6) the bank had ten days in which to appeal. The Central Bank extended this to 3 April 2008.

16. In the meantime, on 25 March, the bank wrote to the Chief Justice of Belize, Conteh CJ, indicating its intention to appeal. The Chief Justice was presumably chosen by the bank because, under section 70(2) of the Act, the Appeal Board which hears any appeal against the issuance of a directive shall have as its chairman the Chief Justice or another judge of the Supreme Court nominated by him.

17. No Appeal Board had been constituted before the bank intimated that it intended to appeal against the directive. Under section 70(1) of the Act it was the responsibility of the Minister for Finance (in this instance the Prime Minister, Mr Barrow) to cause to be appointed a Banks and Financial Institutions Appeal Board to hear and determine all appeals in respect of matters which may be referred to it under the Act. These include an appeal against a directive made pursuant to section 36 .

18. Mr Joseph Waight was then the Financial Secretary in the Ministry of Finance. He is a career civil servant who had served in that department for more than twenty years. In an affidavit filed on behalf of the respondent, Mr Waight deposed that on 26 March 2008 or thereabouts, the governor of the Central Bank, Mr Campbell, raised with him the matter of the appointment of the Appeal Board. It was Mr Waight’s experience that whenever the Minister of Finance was required to

appoint members to an administrative appeal board, such as the Income Tax Appeal Board, or the General Sales Tax Appeal Board, the Minister receives names from the Financial Secretary and makes his appointment from those thus nominated unless he has some fundamental objection.

19. On learning of the need to appoint an Appeal Board, therefore, Mr Waight turned his mind to the question of who would be suitable for this task. He reviewed what he described as “the cadre of persons” who had expertise in the areas required. He came up with the names of Mr Jaime Alpuche and Mr Jeffrey Locke. Mr. Alpuche is a former Financial Secretary and Mr Waight had served under him as Deputy Financial Secretary. Mr Locke had previously worked for the Central Bank. Both appeared to Mr Waight to be entirely suitable and he recommended them for appointment to Mr Barrow who accepted the recommendations and appointed both on 26 March 2008.

20. The appointment of both these men was described by Mr Fleming QC, on behalf of the appellant, as having been made in “unholy haste”. That claim must be seen against the timetable that the Act prescribed for the presentation of appeals against the directives, however. Section 36(6) stipulated that an appeal must be made within ten days of the directive having been issued. In light of that requirement, the speed of appointment takes on a somewhat different complexion from that painted by the appellant.

21. The Honourable Mr Justice Awich is the third member of the Board. He was nominated by the Chief Justice under section 70(2) (a) of the Act. He is now the acting Chief Justice. Although he is the third respondent to the appeal, we were told by Mr Fleming that the Bank does not question his appointment in this appeal.

22. On 4 April 2008 attorneys acting on behalf of the bank wrote to the Ministry of Finance asking to be provided with, among other things, the curricula vitae of Mr Alpuche and Mr Locke and “confirmation from [them] of their independence and impartiality”. Mr Waight replied on 11 April. He pointed out that section 70(1) of the Act required the minister to cause the Appeal Board to be appointed and that, in appointing Mr Alpuche and Mr Locke, Mr Barrow was merely discharging his statutory duty. The letter continued:

“The law does not require the Minister to supply any information about the credentials of the members of the Appeal Board to any person. Nevertheless, in the interest of transparency, we have no objection in advising you that the members appointed by the Minister are both highly-regarded and respected members of the community, well versed in the relevant disciplines.

Mr Jaime Alpuche is a former Financial Secretary, having held this top post from April 1994 to March 2000. In this capacity he was an ex officio member of the Board of Directors of the Central Bank of Belize. Mr Alpuche is also the Chairman of the Income Tax Appeal Board, the Chairman of the Board of Stamp Commissioners, and a member of the General Sales Tax Appeal Board. He holds a BSc degree in Economics from the University of the West Indies and an MBA from the Strathclyde Graduate Business School, Scotland. Mr Alpuche has been in the private sector for the last eight years, having retired from the public service.

Mr Jeffrey Locke holds a MSc degree in International Management with emphasis on International Finance, International Marketing and Governance. He possesses a vast and varied experience of working as a business and management consultant in Belize and the Caribbean countries. He worked as management consultant with the First Caribbean International Bank (Barbados) from 2005 to 2007.”

23. In a later passage of the letter, Mr Waight said this about the impartiality of Mr Alpuche and Mr Locke:

“As for the impartiality of the members, it is normal practice for members of such Appeal Boards to take the Oath of Allegiance and Office prescribed in Schedule 3 of the Constitution – the same oath that is taken by Judges of the Supreme Court – before they enter upon their duties. This attests to

their independence and impartiality. Apart from the oath, it would be most improper, in our opinion, to ask persons of such high integrity to declare their independence and impartiality.”

24. The oath of allegiance and office is in the following terms:

“Oath of Allegiance and Office

I,—, do swear that I will bear true faith and allegiance to Belize, and will uphold the Constitution and the law, and that I will conscientiously, impartially and to the best of my ability discharge my duties as [] and do right to all manner of people without fear or favour, affection or ill-will. [So help me, God.]”

The right to an independent and impartial tribunal

25. Section 2 of the Constitution of Belize asserts the supremacy of the Constitution:

“This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”

26. Sections 6(1) and (7) of the Constitution proclaim every citizen of Belize's right to a fair hearing before an independent and impartial tribunal, section 6(1) providing that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Section 6(7) provides:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

27. It has not been in contention in this appeal that the bank is therefore entitled to a hearing of its appeal before an independent and impartial tribunal. It is likewise not in dispute that the appointment of the members of the Appeal Board and the members themselves should be free from the appearance of bias.

The procedures for the issue of directives and appeals

28. Section 36(5) of the Banks and Financial Institutions Act is the provision that deals with the issuing of orders and directives. As noted above, section 36(6) allows a ten day period for appeal against the issue of an order or directive. The powers under section 36(5) are exercisable by the Central Bank on it having reasonable grounds to believe that a financial institution, in conducting its business, is committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interests of its depositors or customers or a violation of the Act, or any regulation, circular, order, directive, notice or condition imposed by the Central Bank – section 36(1) . The powers under section 36(5) are as follows:

“(5) If the Central Bank determines that the acts or course of conduct in question may pose a serious risk to the condition of a licensee, cause a significant financial loss to a licensee or personal gain arising from the foregoing to the person which is the subject of the order or directive, or otherwise seriously prejudice the interests of a licensee's depositors or customers, the Central Bank may issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or directive on whether the order or directive in question should be removed or varied.”

29. Section 70(1) of the Act provides that the minister shall cause to be appointed a Banks and Financial Institutions Appeal Board to hear and determine all appeals in respect of matters which may be referred to it under the Act. At the time the directive was issued, the Board had not been appointed and it was therefore necessary that the minister exercise his power to bring one into existence.

30. Section 70(2) deals with the composition of the Appeal Board. It provides:

(2) An Appeal Board for the purpose of this Act shall be constituted of—

(a) the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board;

(b) two other members appointed by the Minister from among persons who have knowledge of banking, finance or other related disciplines:

Provided that no serving member of the Central Bank or of any other bank or financial institution in Belize shall be appointed as a member of the Board.

31. It is to be noticed that the minister's power of appointment is limited to the two members other than the Chief Justice or his nominee; that he is required to choose appointees who have knowledge of banking etc; and that, although he is not permitted to choose a serving member of the Central Bank or any other financial institution, by implication at least, he is entitled to appoint former members of the Central Bank or other financial institutions. This is unsurprising. According to the 2010 Housing and Population Census, the total population of Belize was 312,971. The pool of available appointees cannot have been large, especially since, as we were told, there are only five commercial banks operating in Belize.

32. The quorum for any sitting of the Appeal Board is two – section 73 . The Chief Justice or his nominee must always be present. If only the other two members of the Board are available, the meeting would not be quorate. Section 74 is an important provision. It states that a decision may be taken by a majority of the Board's members but that the members constituting the

majority must always include the Chief Justice or the judge nominated by him. The members appointed by the minister can never together constitute a majority, therefore.

33. On an appeal, the Board may affirm or set aside the decision appealed against; it may also make any decision that the Central Bank could have made – section 75(1) . An appeal from the Board's decision lies to the Court of Appeal but only on a point of law (section 77(1)) and the Court of Appeal may affirm or set aside the decision appealed against and may remit the matter to the Appeal Board for rehearing and determination – section 77(2) .

The appearance of bias

34. The leading authority on the issue of apparent bias in this jurisdiction is still *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 . The essential principle is best expressed by Lord Hope of Craighead in para 103 of his opinion where he said:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

35. This formulation has been followed by the Judicial Committee of the *Privy Council in, for instance, Attorney General of the Cayman Islands v Tibbetts* [2010] UKPC 8 [2010] 3 All ER 95 , at para 3 and *Prince Jefri and others v The State of Brunei* [2007] UKPC 62 at para 15.

36. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased. In considering how the notional observer would approach this task, one should recall Lord Steyn's approval in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 of Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488 at 509 that “a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.”

37. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 at para 17:

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

38. Of course, one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status. This theme was taken up by Baroness Hale of Richmond in *Gillies* when she said at para 39:

“The ‘fair-minded and informed observer’ is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488 , para 53, ‘neither complacent nor unduly sensitive or suspicious’.”

39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making process would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase “capable of being known” from Lord Hope’s formulation holds the key, in my opinion. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As Lord Bingham put it in the Prince Jefri case at para 16:

“The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.”

40. Translating these principles to the circumstances of the present case, it appears to me that it would be necessary for the informed observer to be aware of the general structure of the system of appeal from the Central Bank’s directive; to be conscious that this is a procedure under which the minister is statutorily authorised to appoint members of the Board; to have in mind that there is a limited pool of candidates who might fill the position; to be aware that the appointees are required to take the oath of office; and to take into account that the minister’s appointees cannot outvote the chairman and that the appointment of the chairman has nothing to do with the minister.

41. The concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts. Moreover, while the judgment to be made is whether an ordinary, well informed member of the public would consider that there was a real possibility of bias, one should not neglect to take into account that a fair-minded assessment would include the knowledge that those performing the important task of serving on the Appeal Board are themselves professional people against whom no criticism has been levelled. Indeed, Mr Fleming was at pains to disavow any suggestion that a shadow fell over the integrity of the individuals chosen. It was on the identity of the person appointing (the minister) that the appellant’s challenge was focused.

42. The appointment was made on the recommendation of Mr Waight. There is nothing to suggest that Mr Waight consulted anyone, much less the Prime Minister, before deciding whom to recommend for appointment. This is the basis on which a fair-minded observer would have to make his assessment of whether the appointment of the two men carried the inevitable appearance of bias. It is, of course, the case that Mr Waight was an ex officio member of the Central Bank. And by virtue of section 11 of the Central Bank of Belize Act the Governor of that Bank is appointed by the Governor-General on the advice of the Prime Minister and the Deputy Governor and other board members appointed by the Minister of Finance. The Central Bank is, in every sense, the government’s bank and the government is its customer. But that is true of every government and successive governments of whatever political stripe have the power to make these appointments. Moreover, although he is Financial Secretary in the Ministry of Finance, Mr Waight is a career civil servant who is duty bound to serve whatever government is in power and bound also not to allow party political allegiance to dictate advice to ministers or the general discharge of his duties. Nothing in the material that has been put before the Board suggested that Mr Waight or the Governor of the Central Bank had any particular agenda to promote in the review of the appellant bank’s conduct in relation to the funds which were subject to the first directive. On that account, the fair minded, neutral observer should approach his appraisal of whether there was the appearance of bias in the appointment of Mr Alpuche and Mr Locke on the basis that both Mr Waight and Mr Campbell had acted conscientiously in giving advice and information to the Prime Minister.

43. Mr Fleming submitted that because of his obvious and frequently stated commitment to recover the \$10m, the Prime Minister was irredeemably unsuited to make the appointments to the Appeal Board, The minister could have delegated this

function. [Section 59 of the Interpretation Act](#) permitted it. This was unquestionably an occasion for such delegation, it was argued.

44. The Court of Appeal dealt with the argument in para 53 of Morrison JA's judgment as follows:

“... I have not lost sight of Mr Nelson's submission that the Minister ought in the circumstances of this case to have considered delegation of his statutory powers, pursuant to [section 59\(1\) of the Interpretation Act](#), but I consider it, with respect, to be wholly unrealistic. The fact is that the Minister's delegate would be duty bound to act entirely within whatever mandate he was given by the Minister and I doubt very much that resort to such a device could suffice to dispel an appearance of a lack of independence in the resultant appointments, if such existed.”

45. The Board considers that the conclusion reached in this passage is not only tenable, it is irresistible. If appointment by the minister created the appearance of bias, why should appointment by his specially chosen delegate not do so also? But the circumstance that the minister was, in effect, statutorily *obliged* to make the appointment and could not insulate his decision from the charge of apparent bias by delegating that duty must inform the consideration of the fair minded observer as to whether there was an appearance of bias. Put simply, irrespective of the minister's already expressed view as to what should happen to the \$10m, the fact remained that he *had to* make the appointment. The fair minded observer must take that into account in deciding whether the appointments that he made were tainted by the appearance of bias.

46. The dual role of the minister is critical in the overall consideration of this case, in the Board's opinion. As Prime Minister he had an obvious responsibility to recover money that he believed had been wrongly diverted from public resources. And as the Minister of Finance he was obliged to make appointments to the Board. In his position of Prime Minister he can hardly be criticised for informing the public that he was determined to recover the money for the people of Belize. This is the stuff of politics. Simply because he had a statutory obligation to make appointments to the Board, he should surely not be muzzled from public comment about what he perceived to be irregularities in relation to money which he believed should have been used for public works.

47. One way of looking at the matter is to imagine what the position would have been if the minister had said nothing publicly about recovery of the money before he made the appointments. Could it seriously be suggested that, in such circumstances, by making the appointments, as he was statutorily required to do, he would inevitably create an appearance of bias simply because, as Prime Minister, he had an obvious interest in recovering money which he had every reason to believe should be devoted to the citizens of Belize? Surely not. That would be tantamount to saying that the minister could never appoint an Appeal Board to hear an appeal against the Central Bank's directive in relation to public money. If, as the Board considers must be the case, that cannot be correct, the appearance of bias charge in the present appeal can be seen to rest principally, if not solely, on the fact that the minister had made statements, both as leader of the opposition and later as Prime Minister, about the diversion of the funds. And if that is the real basis on which the challenge has to be made, a careful examination is needed of just what is objectionable about what the minister said and a judicious assessment must be made of whether this would inspire a suspicion in the mind of a fair and informed observer that there was a risk that the Appeal Board would be biased. But before turning to that, something must be said about the judicial decisions on which principal reliance has been placed by the appellant in its claim that the circumstances of the appointment of Mr Alpuche and Mr Locke created the indelible appearance of bias.

The circumstances of appointment as a basis for the appearance of bias claim

48. Mr Fleming discussed a number of authorities in advancing his claim that the circumstances in which the Prime Minister made his appointments to the Appeal Board created the appearance of bias on the part of the appointees. Ironically, in none of these was the claim of an appearance of bias upheld but, nothing daunted, Mr Fleming submitted that, in each of those cases, a crucial feature was present which prevented that charge being successfully made. He argued that no such factor was present in the present case which could protect the appointments from the claim. It is necessary to deal with only some of the cases that have been canvassed for a short review of these will demonstrate that the question whether the circumstances

of appointment to a Board will give rise to an appearance of bias depends critically on the particular facts surrounding the individual appointment and that this question cannot readily be answered by analogy to other cases.

49. The first of the cases to which it is necessary to refer is *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 . In that case the applicants were convicted prisoners who were injured during a disturbance in prison and were afterwards charged with contravening prison disciplinary regulations. They were convicted by the Board of Visitors of the prison and sentenced to substantial loss of remission of their sentences. One of the applicants' complaints was that the Board of Visitors could not be considered to constitute an independent and impartial tribunal (as required by [article 6 of ECHR](#)) because its members were appointed by the Home Secretary and he was responsible for the administration of the prisons. Although the European Court of Human Rights did not uphold this complaint, Mr Fleming argued that this was because the Home Secretary's duty in relation to the maintenance of discipline in prisons was a general one and that he had no particular interest in the outcome of individual adjudications by particular Board of Visitors. The Board does not accept that this is the basis of the court's decision.

50. At para 78 of the judgment, ECtHR said:

“In determining whether a body can be considered to be ‘independent’ – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”

51. At para 79 the court said that the fact that members of Boards of Visitors were appointed by the Home Secretary, who is himself responsible for the administration of prisons, did not establish that the members were not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not independent. It is noteworthy in this context that judges appointed in Belize take precisely the same oath of office as did the appointees to the Appeal Board. At para 80 the court pointed out that, although the members of Boards of Visitors were appointed for a term of three years or such lesser period as the Home Secretary may decide, it was considered that this was “understandable” because they were unpaid and “it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer”. Contrast this with the position in the present appeal. There is no time limit on the appointment of the two members that the Prime Minister appointed and therefore no possible compromise to their independence on that account. They too are unpaid and are therefore not dependent on the whim of the minister for continued remuneration. The pool of candidates for the “onerous” task that they have to undertake must surely be commensurately less than that from which members of the Board of Visitors could be drawn. No challenge to their integrity is made. They were selected by a civil servant without reference to the Prime Minister, in accordance with a well established practice. It appears to the Board, therefore, that the appointment of the members of the Appeal Board is an *a fortiori* case compared to *Campbell and Fell* .

52. Mr Fleming relied particularly on the decision of the Divisional Court in *R (Brooke) v Parole Board* [2007] EWHC 2036 (Admin); [2007] HRLR 1369 where three long term prisoners complained that the Parole Board lacked sufficient independence from the Executive at common law and under [Art 5\(4\) of the ECHR](#) because, among other things, members of the Board were appointed by the Secretary of State. Hughes LJ, delivering the judgment of the court, at para 31, observed that the appointment by Ministers of judges of differing tribunals and courts was a common practice in many countries and indeed had applied to the judges of the ordinary English courts until very recently. He then said, “[a]lone , it need not detract from the independence of the judge when once appointed” (emphasis supplied). It is, of course, true that the appointment did not lie in the “personal hands” of the minister and an external recruitment exercise, conducted according to the Office of the Commissioner for Public Appointments (OCPA) principles, was the means by which members of the Parole Board were chosen. The Divisional Court found that if these arrangements were rigorously followed (and it decided that they had been), the power of appointment alone did not create any objective absence of independence.

53. It would be quite wrong, in the Board's view, to take from the Brooke judgment a principle that, where a minister has the power of appointment to a Board, the appearance of bias can only be avoided by the engagement of outside agencies to conduct the appointments exercise. In the Brooke case, the minister was actually a party to the hearing before the Parole Board. In the present case the minister is not a party to the hearing before the Appeal Board. Of course, the Prime Minister may be anxious that money which he believes should have been devoted to public services should be recovered but that does

not make him in any sense a contender before the Appeal Board as to how their review of the propriety of the bank's dealing with the funds from Venezuela should be conducted, whereas before the Parole Board, the Home Secretary was entitled to make representations as to how it should reach its conclusions on any of the cases that it has to consider. Moreover, the decision in Brooke is one which is very much dependent on its own particular facts. The Divisional Court concluded that the manner of appointment to the Parole Board provided the reason that no appearance of bias arose. The Board does not consider that it was seeking to propound any general principle to the effect that appointment to similar Boards could only escape the charge of apparent bias if a similar method of appointment was employed.

54. Much the same considerations arise in the case of *Lithgow v United Kingdom* (1986) 3 EHRR 329, another authority on which the appellant placed particular emphasis. The applicants in that case had certain of their interests nationalised under the [Aircraft and Shipbuilding Industries Act 1977](#). They claimed that the compensation which they received was grossly inadequate and discriminatory. The arbitration tribunal established to determine the amount to which they were entitled was challenged on the basis that it could not be regarded as objectively impartial. Under the 1977 Act the tribunal was to consist of a legally qualified president (appointed by the Lord Chancellor) and two other members, appointed by the Secretary of State after consultation with all the stockholders' representatives, one being experienced in business and the other in finance.

55. Mr Pleming suggested that in *Lithgow's* case the court had held that the consultation exercise with the stockholders' representatives effectively neutralised any claim that the appointments carried the stigma of apparent bias. While this was a factor in the court's judgment, it was clearly not the only reason in play. At para 202 the court said:

“... it was contended that the close connection between the executive and the Arbitration Tribunal, especially the appointment of two of its members by the Minister who was a party to any proceedings, necessarily deprived the Tribunal of the character of an ‘independent and impartial tribunal’.

As the Court has often observed, independence of the executive is one of the fundamental requirements that flow from the phrase in question. As regards the present case, although two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives. In fact, criteria for the selection of members of the Tribunal were worked out jointly and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the Government in the negotiations, as is evidenced by the awards copies of which were supplied to the Court. In these circumstances, there is no warrant for finding a lack of the requisite independence.”

56. It would appear, therefore, that the court was at least as exercised by the consideration that the tribunal could — and, more importantly, did — award more than the government offered in compensation, thereby demonstrating its independence in a clearly tangible way. In the present case, there is nothing to suggest that the two appointees of the minister will be in any way constrained to act other than in accordance with their oath simply because they have been appointed by the minister. This surely is the most important consideration.

57. A dispassionate, neutral observer in the present case should and, in my view, *would* conclude that there is no reason to believe that these two professional men, against whom no imputation has been made, and who will have sworn an oath to perform their functions conscientiously, would fail to do so. The circumstance that in *Lithgow's* case the members of the tribunal were appointed after apparent agreement by the stockholders was not, in my judgment, indispensable to the conclusion of the court. After all, there is no suggestion that they could not have been appointed even if the stockholders objected, the extent of the obligation being that they be consulted. This was merely a circumstance that reinforced the essential finding that all the evidence pointed towards the conclusion that the members of the Tribunal were not mere ciphers of the Minister and would behave properly. There is nothing in the circumstances of the present case which would justify a different conclusion.

The statements of Mr Barrow

58. Finally, the statements made by Mr Barrow must be examined in order to consider whether these make any difference to the Board's preliminary conclusion that the circumstances of their appointment do not create the appearance of bias.

59. Mr Barrow certainly was robust in his criticism of the former Prime Minister and two of his ministers. And it would be unrealistic to fail to recognise that there was political capital for him to extract on this subject. But, so far as the bank was concerned, there is nothing pointedly adverse in what he had to say. On the contrary, it appears to me that in his observations about the bank's role, he was not intemperate, in light of what had passed between Mr Campbell and Mr Johnson. Mr Barrow had met Mr Johnson on 12 March 2008 and, in the Prime Minister's estimation, the bank at that time was co-operative. The Board has decided that an informed and fair-minded observer would have no difficulty in concluding that the statements made by Mr Barrow did not give rise to the risk that Mr Alpuche and Mr Locke would behave other than in a perfectly proper fashion. The Board has therefore concluded that the appeal must be dismissed and the Board will humbly advise Her Majesty accordingly.

60. The parties will have 28 days in which to make submissions on costs.

Lord Phillips:

61. I have found this a difficult case. Initially I was in sympathy with the judgment of Lord Brown, but I have been persuaded by the judgment of the majority that it would not be right to differ from the conclusion of Conteh C J.

Lord Dyson:

62. In these proceedings, The Belize Bank Limited ("BBL") seeks declaratory relief in relation to the question whether the Banks and Financial Institutions Appeal Board ("the Appeal Board") appointed to determine BBL's appeal against the directive issued by the Central Bank of Belize Limited ("the Central Bank") on 7 March 2008 was an independent and impartial body, as required by section 6(7) of the Constitution. The facts have been fully set out by Lord Kerr and Lord Brown. There is no need for me to repeat them.

63. On 1 August 2008, Conteh CJ dismissed the application. BBL appealed on the grounds that the Chief Justice had erred in law and misdirected himself inter alia when considering whether the membership of the Appeal Board was independent and impartial. The Court of Appeal (Sosa, Carey and Morrison JJA) dismissed the appeal. BBL now appeals to this Board on the grounds that the decision of the Court of Appeal was erroneous in law.

64. BBL's case is not one of actual bias. It is of apparent bias. The test for apparent bias is not in doubt. The question to be asked is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": per Lord Hope in *Porter v Magill* [2002] 2 AC 357, 494, para 103. This is not a hard-edged test. It requires the court to make an assessment or judgment in the light of all the circumstances of whether the fair-minded and informed observer would conclude that there was a real possibility of bias.

65. Both Lord Kerr and Lord Brown approach the question of apparent bias as if we were deciding the issue as a first instance tribunal. The unspoken assumption is that there is a single universal answer to this question, whether it is being determined in an English court or any other court and regardless of where that other court might be and regardless of the traditions and culture of the country in which the court operates. I do not think that this is a correct assumption to make. Nevertheless, I shall start by approaching the matter as if the Board were indeed being required to decide the issue for itself at first instance in England. Even approaching the case on that basis, I would agree with Lord Kerr's conclusion largely for the reasons that he gives.

66. At the heart of the submissions of Mr Fleming QC that the Appeal Board lacked the necessary appearance of independence and impartiality is the fact that the two lay members of the Appeal Board were appointed by the Finance Minister, Mr Barrow. There are several strands to the argument: (i) Mr Barrow had previously stated in very strong language that the US\$ 10m payment from Venezuela should have gone to the government, not to BBL; (ii) the government itself, of which Mr Barrow was Prime Minister as well as Finance Minister, had a direct interest in the outcome of the appeal to the Appeal Board; (iii) the possibility of bias was not eliminated by the fact that the two lay members were recommended by Mr Waight, since he was an ex- officio director of the Central Bank whose directive was the subject of the appeal; and (iv) the two lay members had worked at the Central Bank.

67. It is rightly conceded by Mr Fleming that there is no apparent bias so far as the judicial member of the Appeal Board is concerned. He is “the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board” (section 70(2) of the Banks and Financial Institutions Act).

68. The implications of this concession are important. Let us suppose that the statute had provided that the Appeal Board was to comprise a single judge appointed by the minister and the facts had in all other respects been as they are in this case. An argument that the judge was apparently biased would almost certainly have failed. The fact that the judge was appointed by the minister who had expressed strong views about the conduct of BBL and that the minister had a direct interest in the outcome of the appeal would not be sufficient to support a case of apparent bias. That is because, in the absence of any evidence to the contrary, the fair-minded and informed observer would have confidence in the independence and impartiality of the judge. The fact that judges have years of relevant training and experience and swear an oath to make decisions impartially would be likely to be fatal to an argument of apparent bias: see *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 per Lord Rodger (para 23) and Lord Mance (para 57) and *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 62 per Lord Bingham (para 21). From time to time, judges are appointed by government ministers to investigate allegations that have been made against the State. It might be said in such cases that the appointing body has an interest in the outcome of the investigation. But it would be absurd to suggest that the fair-minded and informed observer would conclude *on that ground alone* that there was a real possibility that the appointed judge would be biased.

69. It follows that the real thrust of BBL’s case of apparent bias is directed to the two lay members of the Appeal Board and is focused on the question whether the fair- minded informed observer would conclude that there was a real possibility that they would be biased in a way in which the judicial member of the Appeal Board would not be. There are two aspects to consider. The first is the manner in which they were appointed. The second is the identity and characteristics of the lay members themselves.

70. As regards the manner of their appointment, the focus here is on the role of Mr Waight. That is because Mr Waight recommended Mr Alpuche and Mr Locke on 26 March 2008 and the minister accepted the recommendations on the same day. There is no evidence that the minister played any part in the selection of the lay members: he merely accepted the recommendations of Mr Waight. As for Mr Waight himself, I agree with what Lord Kerr says at para 42. Mr Waight was a career civil servant and there is no evidence which suggests, still less shows, that he was doing other than acting in a conscientious and professional manner in recommending two persons who in his opinion satisfied the statutory criteria, namely that they had “knowledge of banking, finance or other related disciplines” and they were not serving members “of the Central Bank or any other bank or financial institution in Belize”.

71. As for the lay members themselves, Lord Kerr has set out at para 22 the evidence about the credentials of Mr Alpuche and Mr Locke. This evidence has not been challenged by BBL. Both lay members are highly-regarded and respected members of the community who amply satisfied the statutory criteria. They were selected because they are well versed in the relevant disciplines. It is true that Mr Alpuche was Financial Secretary from 1994 to 2000 and in that capacity was an ex- officio

director of the Central Bank. But he had been in the private sector for the past eight years, having retired from the public service. He was also the chairman of the Board of the Income Tax Appeal Board and the Board of Stamp Commissioners and a member of the General Sales Tax Appeal Board. He therefore had experience of acting in a judicial or quasi-judicial capacity. Mr Locke was a businessman who by reason of his business experience was eminently well qualified to sit on the Appeal Board. He had had no connection with the government, although he had previously been an employee of the Central Bank. It is also relevant that it was normal practice for members of Appeal Boards to taken the same oath as that taken by judges.

72. Ultimately, it is a matter of impression and assessment whether the test of apparent bias is satisfied on the facts of any particular case. But if I had been sitting as a first instance judge in England, I would have reached the same conclusion as Lord Kerr on the issue of apparent bias. These are not easy cases. I have concentrated on the manner of the appointment of the two lay members and their qualities. But it is necessary to have regard to all the relevant circumstances. I accept that (i) the fact that the minister had expressed views about the issue that lay at the heart of the Central Bank's Directive and (ii) he made the appointments are both relevant factors to be taken into account in making the assessment. They are certainly matters which would cause the fair-minded and informed observer to reflect most carefully. But there are yet further factors that he would take into account as well. These include (i) the fact that the judicial member was the chairman and could not be outvoted by the lay members; (ii) the pool of available persons possessed of the relevant statutory qualifications was small; and (iii) the minister was obliged by the statute to make the appointments. As regards this last point, Mr Pleming submits that the minister could and should have asked a delegate to appoint the pay members on his behalf. But that submission is misconceived for the reasons given by Lord Kerr at paras 44 and 45.

73. I should add that I do not consider that the resolution of this case is to be found in an analysis of the facts of the authorities on which Mr Pleming relies. Some of these authorities are considered by Lord Brown at paras 102 to 109. In each of them, the complaints of apparent bias failed. There are substantial factual differences between these cases and the present appeal. That serves to demonstrate that the application of the test for apparent bias is intensely fact-sensitive. In my view, the factual differences between these cases and the present appeal are such that it is not possible to infer how the courts would have decided them if the facts had been closer to those in the present case.

74. But as I have said, the Board is not sitting as a first instance tribunal in England. It is hearing an appeal on a point of law from the Court of Appeal of Belize which itself was hearing an appeal on a point of law from the Chief Justice. The error of law has not been clearly identified. But it must simply be that the Chief Justice reached the wrong conclusion on the question of apparent bias. I would accept that the question whether there has been apparent bias raises a point of law which is a matter for the court to decide: see per Lord Mance in *Helow* at para 39. It is an aspect of procedural fairness which is always a matter for the court to decide. But it is a fact- sensitive issue of law and one on which (as evidenced by the fact that the Board is divided as to how this appeal should be decided) different judges within the same jurisdiction and (of particular importance in the present case) courts in different jurisdictions can hold different views.

75. Lord Brown has quoted from the lecture given by Lord Rodger (the Sultan Azlan Shah Law Lecture 2010) entitled *Bias and Conflicts of Interests—Challenges for Today's Decision-makers*. Lord Rodger says at p 21 in relation to apparent bias that the court should “adopt a course that can be expected to command the assent and respect of the general public”. A little later, he continues:

“Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise.”

76. I agree with Lord Rodger's salutary words. They are apposite in the present appeal. The issue is whether the fair-minded and informed Belizean would conclude that there was a real possibility that the Appeal Board would be biased. In determining this question, the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters, also bearing in mind that Belize is a small country with a small pool of persons who would be likely to satisfy the statutory criteria for appointment as lay members of the Appeal Board.

77. With that in mind, I turn to consider the decision of Conteh CJ in this case. The Chief Justice referred to a number of authorities on apparent bias. The principal arguments advanced by Mr Fleming to the Board were advanced on behalf of BBL to the Chief Justice. The Chief Justice concluded at para 28 that the arguments were not "without some merit", but that "after anxious consideration" he was unable to accept them "because of the facts of this case and the statutory regime for the appointment of the Appeal Board". But, he said, the statutory provisions for the appointment of a tribunal "do not alone immunise it from being impeached as not independent or impartial".

78. At para 29, he said:

"In this case, however, I find the provisions in Part X of the Act when read together, as I think they must, will engender, in my view, confidence in the ordinary person in Queen Square Market, as to the independence and impartiality of the Appeal Board itself and its members."

79. For the reasons I have given, the reference to the ordinary person in Queen Market Square is significant and apposite. The Chief Justice then gave a number of reasons to support this conclusion. First, the chairman of the Appeal Board was a Justice of the Supreme Court nominated by the Chief Justice. Secondly, the two lay members were appointed on the basis of their specialist qualifications and experience. They were not serving members of the Central Bank or any other financial institution in Belize. He was not persuaded that a fair-minded observer "who is not overly suspicious or finicky would think that the presence of these two gentlemen on the Appeal Board would convey the appearance of bias". He continued at para 31:

"The fair-minded objective observer should, I think, be given some credit for his intelligence not to be swayed by any and every fancy of bias. The fact that they were appointed by the Minister does not, in my view, make any difference except perhaps to feed into an overly suspicious fancy. Mr Joseph Waight in his first affidavit deposed as to how [Mr Alpuche and Mr Locke] came they came to be appointed. He suggested their names to the Minister. The Minister has to make the appointments. That is what is provided for in the Act. I do not think the robust common sense of fair-minded objective observer would read anything into the fact that Mr Waight discussed the appointment and it was done on the same day."

80. Thirdly, the Act provides that the majority should always include the judge chairman, who is also given the power to determine disputes as to procedure. Fourthly, there is a right of appeal to the Court of Appeal from decisions of the Appeal Board on a point of law. Fifthly, the Minister of Finance was not a party to the appeal to the Appeal Board. Finally, he accepted the account of Mr Campbell of the events which led up to the Central Bank's investigation of BBL. It was not the Minister of Finance who orchestrated that investigation which resulted in the issue of the Directives on 8 March 2008.

81. Lord Brown says at para 114 of his judgment that the existence of a right of appeal on a point of law is no answer to the complaint of apparent bias. I accept that, of itself, the right of appeal is a point of little weight. But it is not irrelevant that, if the Appeal Board makes an error of law, there is a right of appeal to an independent court. The fact that the court cannot substitute its own findings (but is limited to remitting the matter to the Appeal Board) does not mean that the right of appeal is of no value. In my view, Conteh CJ was right to regard the existence of a right of appeal as one of a number of relevant factors.

82. To summarise, Conteh CJ applied the correct test for apparent bias by reference to whether the fair-minded and informed observer in Belize would conclude that there was a real possibility of bias. The Chief Justice considered the arguments in favour of apparent bias. In his judgment they were not sufficiently cogent to outweigh the arguments that went the other way. The test was therefore not satisfied. He considered that this was a difficult and finely-balanced case. For the reasons I have already given, I would have upheld this decision even if this had been an English case. But the case for upholding it is all the stronger, since the assessment of the possibility of bias fell to be made by a Belizean court by reference to the perception of the possibility of bias by a fair-minded and informed Belizean. As I have said, the test for apparent bias involves a fact-sensitive exercise of judgment. The Board should be slow to interfere with the exercise undertaken by the courts of Belize and should only do so if satisfied that their decision was clearly wrong. In my view, their decision was not clearly wrong.

83. I have concentrated on Conteh CJ because his was the first instance decision. It was upheld by the Court of Appeal. I do not find it necessary to examine the reasoning of that court, since if the decision of Conteh CJ was correct, the appeal must be dismissed.

84. For the reasons that I have given as well as those given by Lord Kerr, I would dismiss this appeal.

Lord Brown:

85. On 28 December 2007 the appellant bank (BBL) received from the Banes Bank in Venezuela a transfer of US \$10m paid by the Government of the Bolivarian Republic of Venezuela. Was that a payment which BBL was entitled to keep (in settlement of a debt agreed to be owed to BBL by the Government of Belize pursuant to their guarantee of a loan made by BBL to Universal Health Services, a private hospital company) or was it a payment which should have been treated in the same way as another US \$10m payment by the Government of Venezuela transferred to the Central Bank of Belize (the Central Bank) generally for the benefit of the people of Belize? That basic question, one of acute political controversy within Belize, particularly after the change of government following Belize's general election on 7 February 2008, underlies the critical and very different issue now arising for decision on the present appeal: whether a particular Appeal Board is affected by the appearance of bias. Although, as will readily be understood, this apparent bias issue itself falls to be resolved without any consideration whatever of the merits of the underlying dispute, it is nevertheless necessary, for its proper understanding, to sketch in something more of the background to the case.

86. First, a word of explanation about the Central Bank itself. This bank, established under the Central Bank of Belize Act (Ch 262), is administered by a board of directors which consists, pursuant to section 11 of that Act, of the Governor appointed by the Governor-General on the advice of the Prime Minister, the Deputy Governor appointed by the Minister of Finance, the

Financial Secretary (all three being ex-officio members of the board) and three or four other board members also appointed by the Finance Minister. Amongst the Central Bank's powers are those conferred on it under Part VII of the Banks and Financial Institutions Act (Ch 263) (BFIA) including, under section 34 , the power to conduct a special examination of the affairs of a licensee where “the Central Bank has reason to believe that the licensee is carrying on its business in a manner detrimental to the interests of its depositors or customers”, and, if the Central Bank determines that a licensee has acted so as to “seriously prejudice the interest of a licensee's depositors or customers,” the power under section 36(5) to “issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or directive on whether the order or directive in question should be removed or varied.” Section 36(6) then provides that:

“Within ten days of the issuance of an order or directive under this section, the person who is the subject of the order or directive may appeal such order or directive to the Appeal Board.”

87. Returning then to the political background to this case, following the general election in February 2008, the Honourable Dean Barrow, formerly Leader of the Opposition, was sworn in as Prime Minister and Finance Minister, replacing the Honourable Said Musa in both roles. Already before the general election, Mr Barrow had been fiercely critical of Mr Musa, in particular for acknowledging that any debt was owing by the government to BBL. Mr Barrow had, indeed, acted as co-counsel for the Association of Concerned Belizeans in litigation brought to challenge the lawfulness of the government's financial arrangements with BBL. After the general election the transfer of the Venezuelan funds became a still more hotly contested issue as may readily be seen from a succession of government press releases and press conferences (parts of which at least must now be set out).

88. On 28 February 2008 a government press release concluded: “Prime Minister Barrow says his Government will continue to pursue justice on behalf of the Belizean people and will leave no stones unturned to bring to account those who have robbed the people of this Country.” Just a week later, on 7 March 2008, pursuant to notice given with Mr Barrow's agreement on 6 March, the Central Bank conducted a special examination of BBL under section 36 of BFIA , the justification for such examination being that the Government were “customers” of BBL. The same day, on 7 March 2008, Mr Barrow said at a press conference:

“in my view, in view of the government, what was done by Messrs Musa and Fonseca [the former Housing Minister], and to a lesser extent by Amalia Mai [the former Chief Executive Officer in the Ministry of Home Affairs], is absolutely reprehensible. It is highly immoral, and the product of a conspiracy that seemed to have had as its motive two things: to divert this huge chunk of money that was the property of the Belizean people once it was gifted by Venezuela, to divert it from its legitimate, and proper, and agreed upon use, to divert it so that they, in particular the almighty then Prime Minister and the almighty then Minister of Housing, might use the US\$10m as they saw fit.”

89. On 12 March 2008, at a press conference which Mr Barrow held together with the governor of the Central Bank, he said this:

“I begin by telling you that as this investigation [by the Central Bank under section 36 of BFIA] has progressed matters have become even more alarming ... there is the question of US\$10m wired to the

Belize Bank from Venezuela with the note on the confirmation notice that 'this was a disbursement for the Government of Belize for its use in the construction of new homes'. I have indicated to the Belize Bank that I wish to put them on notice, that the government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the people of this country (applause) ... The enormity of what Musa and Fonseca did and Amalia Mai (although I suppose she may be able to have resort to the Nuremberg defence that she was just following orders), but the enormity of what was done is compounded by this fact. US\$40m gifted to us by Venezuela and Taiwan was paid over to the Belize Bank."

90. Following the Central Bank's special examination of BBL on 7 March 2008, its Governor wrote to BBL identifying what were described as seven "main irregularities which came to light", and saying that in its view "BBL acted in gross violation of prudent banking practices in the implied conditions of its licence" and accordingly that, pursuant to section 36(5) , it was issuing directives to BBL including (only the first being relevant to these proceedings):

"BBL should forthwith credit [the government's] account with the Central Bank of Belize with US\$10m as per 'Payment Details' stated on wire transfer instructions sent by Bandes [Bank of Venezuela] on the 'cash payment confirmation' dated 28 December 2007."

BBL responded to the directives by challenging the Central Bank's power to issue them and by a letter to the Chief Justice indicating its wish to appeal to the Appeal Board (under section 36(6)), albeit noting that no Appeal Board in fact then existed.

91. It is necessary at this stage to set out the material provisions of Part X of BFIA , under the heading *Appeal Board* :

(1) The Minister [defined by section 2 of the Act as the Minister of the Government of Belize for the time being responsible for Finance] shall cause to be appointed [an Appeal Board].

(2) An Appeal Board for the purposes of this Act shall be constituted of

(a) the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board;

(b) two other members appointed by the Minister from among persons who have knowledge of banking, finance or other related disciplines:

Provided that no serving member of the Central Bank or of any other bank or financial institution in Belize shall be appointed as a member of the Board.

(3) The terms of office of the members appointed under paragraph (b) of subsection (2) shall be such as may be specified in their instruments of appointment.

71. Any person who is aggrieved by a decision of the Central Bank ... (e) made under section 36 ... may appeal against the decision to the Appeal Board.

(1) The Appeal Board may, with the approval of the Minister, make rules to regulate its procedure for hearing appeals, provided that such procedure shall comply with the rules of natural justice.

73. The quorum at any sitting of the Appeal Board shall be two members, one of which shall be the Chief Justice or the Judge nominated by him.

74. At any meeting of the Board, a decision may be taken by a majority of its members, provided that the members constituting the majority shall include the Chief Justice or the Judge nominated by him.

(1) Upon an appeal under this Act, the Appeal Board may affirm or set aside the decision appealed against or may make any other decision which the Central Bank could have made.

(1) Any party aggrieved by a decision of the Appeal Board may appeal to the Court of Appeal on the ground that the decision was erroneous on a point of law.

(2) On any such appeal, the Court of Appeal may affirm or set aside the decision appealed against and may remit the matter to the Appeal Board for rehearing and determination by it.”

92. On 26 March 2008, following BBL's statement of their intention to appeal, the Governor of the Central Bank raised with Mr Waight, the Financial Secretary (and thus, as already explained, an ex-officio director of the Central Bank) the matter of appointing an Appeal Board under section 70 . In an affidavit dated 25 June 2008, Mr Waight explains how he proceeded:

“I began to review the cadre of persons who I considered had expertise in the areas required by section 70. I came up with the names of Mr Jaime Alpuche and Mr Jeffrey Locke. I knew both gentlemen from past working experience.

Mr Jaime Alpuche is a former Financial Secretary. I served under him as Deputy Financial Secretary. Mr Jeffrey Locke is a former employee of the Central Bank before he went to work for SOL. I knew Mr Locke from his time at the Central Bank. I telephoned them and asked them if they would accept such appointment and they had no objection.

I suggested the names of Mr Jaime Alpuche and Mr Jeffrey Locke to the Minister of Finance and he accepted them and made the appointments on 26 March 2008.”

Mr Waight also wrote to the Registrar of the Supreme Court to ask the Chief Justice either to act as, or to nominate another judge to be, Chairman of the Appeal Court. In the event the Chief Justice nominated Mr Justice Awich.

93. Following a letter dated 4 April 2008 from BBL's attorneys to Mr Barrow expressing serious concerns as to whether the Appeal Board constituted in this way would comply with BBL's “constitutional right to a fair hearing by an independent and impartial tribunal” and requesting further information about the two members he had appointed, Mr Waight replied by letter dated 11 April 2008 that:

“Mr Jaime Alpuche is a former Financial Secretary, having held this top post from April 1994 to March 2000. In this capacity he was an ex officio member of the Board of Directors of the Central Bank of Belize. Mr Alpuche is also the Chairman of the Income Tax Appeal Board, the Chairman

of the Board of Stamp Commissioners, and a member of the General Sales Tax Appeal Board. He holds a BSc degree in Economics from the University of the West Indies and an MBA from the Strathclyde Graduate Business School, Scotland. Mr Alpuche has been in the private sector for the last eight years, having retired from the public service.

Mr Jeffrey Locke holds a MSc degree in International Management with emphasis on International Finance, International Marketing and Governance. He possesses a vast and varied experience of working as a business and management consultant in Belize and the Caribbean countries. He worked as management consultant with the First Caribbean International Bank (Barbados) from 2005 to 2007.”

He added that:

“These are not salaried appointments; the services provided by the members are on a purely voluntary basis. In fact, the Act makes no provision for any salary or stipend to be paid to the members.”

The letter concluded:

“Your letter is based on the unwarranted assumption that the members appointed by the Minister would not be impartial. This is not only most unfair but also amounts to an unjustifiable attack on the integrity of the persons concerned, who have accepted the assignments as a service to the community. There is absolutely no basis to impeach the integrity of the members whose credentials are beyond reproach.”

It should be made absolutely plain that BBL's case is not that Mr Alpuche or Mr Locke would *in fact* fail to act impartially on an appeal. Their personal integrity is not under attack. Rather the challenge asserts that an Appeal Board thus constituted does not present the *appearance* of independence and impartiality. No question is raised as to the propriety of Awich J's appointment. BBL's case is that the Appeal Board's two lay members lack the necessary appearance of independence and impartiality, not because of who they are, but because of how and by whom and the circumstances in which they were appointed.

94. These proceedings were instituted by BBL on 23 May 2008 claiming in particular that a hearing before the Appeal Board would breach their rights under section 6(7) of the Constitution of (which, by section 2 , is “the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.)” The same day, expressly without prejudice to their constitutional claim, BBL filed an appeal to the Appeal Board. Section 6(7) of the Constitution provides:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

95. BBL's claim was rejected by the Chief Justice on 1 August 2008 (following a hearing on 16, 17 and 18 July) and rejected again, following BBL's appeal, by the Court of Appeal (Sosa, Carey and Morrison JJA) on 4 June 2009 (following a hearing on 16, 19 and 20 March 2009). By this further appeal BBL renew their arguments before this Board.

96. As was acknowledged in both courts below, section 6(7) of the Constitution is in terms similar to [article 6\(1\) of the European Convention on Human Rights](#) so that the ECtHR's decision in *Findlay v United Kingdom* (1997) 24 EHRR 221 provides a useful starting point for the consideration of a tribunal's independence and impartiality. At para 73 (pp 244–245) the European Court said this:

“The Court recalls that in order to establish whether a tribunal can be considered as ‘independent’, regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The concepts of independence and impartiality are closely linked and the Court will consider them together as they relate to the present case.”

97. As already indicated, BBL here disavow any allegation of actual bias against any member of the Appeal Board so that the real question under consideration is the Board's impartiality “from an objective viewpoint”. The question to be asked is “whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” – per Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 , 494, para 103. As later noted by Lord Bingham of Cornhill in *R v Abdroikov* [2007] 1 WLR 2679 , 2688 at para 15:

“The characteristics of the fair minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naive nor unduly cynical or suspicious”.

Returning (less than a month later) to this same concept of “the fair-minded and informed observer,” Lord Bingham in his judgment delivered on behalf of the Board in *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 62 , para 16, added:

“The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.”

98. What then would this fair-minded and informed observer, with a reasonable working grasp of how things are usually done, think about the prospects of an Appeal Board, constituted in the way this Appeal Board had come to be appointed, fairly, independently and impartially adjudicating upon the underlying dispute arising here between BBL and the Government of Belize – the resolution of that dispute plainly being the determining factor in deciding the outcome of BBL's appeal against the Central Bank's direction that it should pay over the US\$10m to the Government's account with the Central Bank? Would this fair minded and informed observer think that there was a real possibility of that issue not being fairly decided? Or can it be said that the Appeal Board as constituted offers “sufficient guarantees to exclude any legitimate doubt in this respect”? (para 73 of the Strasbourg Court's judgment in *Findlay* cited at para 96 above.) That essentially is the question for the Board's determination and, in answering it, it should be recognised that the very concept of apparent bias is designed to give effect to Lord Hewart LCJ's aphorism in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259: “[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” Or, as Lord Steyn put it in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [2003] 1 CR 856, para 14: “Public perception of the possibility of unconscious bias is the key.”

99. Lord Hope in *Helow v Secretary of State for the Home Department* [2008] 2008 UKHL 62; [2008] 1 WLR 2416, 2417–2418, para 1, noted that “the fair minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively” and went on to point out that this observer has attributes which many of us might struggle to attain and above all, “informed”. In a characteristically thoughtful lecture subsequently given by Lord Rodger of Earlsferry (the Sultan Azlan Shah Law Lecture 2010 entitled *Bias and Conflicts of Interests – Challenges for Today's Decision-makers*) appears this, to my mind salutary, warning about the concept of the informed observer:

“Should we welcome this newcomer to our legal village? Not *particularly* warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation. Moreover, the informed observer is supposed to know quite a lot about judges – about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if this process is taken too far, ... the judge will be holding up a mirror to himself. To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public.”

100. The main considerations relied upon by BBL in its contention that this Appeal Board lacked the necessary appearance of independence and impartiality can be shortly summarised. The Minister appointing the two lay members was Mr Barrow

himself, a champion of the view that the US\$10m payment from Venezuela should have gone to the government, not BBL, and that the way it had been dealt with was a scandal: “robbe[ry]”, “absolutely reprehensible”, “highly immoral”, “a conspiracy”, an “enormity”. Mr Barrow personally had a large political stake in the Central Bank's directive being upheld. And the government itself, of course, of which Mr Barrow was Prime Minister as well as Finance Minister, was directly interested in the outcome of the appeal. The investigation had been commenced, and the directive subsequently issued, on the basis that the Central Bank considered BBL's business to have been carried on “in a manner detrimental to”, and so as to have “seriously prejudice[d]”, the interests of the government as one of BBL's customers. As for it being Mr Waight, the Financial Secretary, who actually suggested to Mr Barrow the names of the two lay members, this would have provided little reassurance to the fair-minded and informed observer (let alone BBL): he himself, after all, was an ex-officio Director of the Central Bank whose directive was the subject of the appeal. And the two lay members he suggested for appointment had themselves both worked with Mr Waight at the Central Bank, Mr Alpuche, indeed, as a former Financial Secretary. It is perhaps unsurprising that BBL's argument based upon these central considerations was acknowledged by the Chief Justice to be “not without some merit”.

101. It is, of course, the case that Mr Barrow himself is not a party to the appeal, that no criticism whatever is, or could be, made with regard to the appointment of Awich J as the Appeal Board's Chairman; that the two lay members satisfy the requirements of section 70(2)(b) of BFIA and its proviso; that, by virtue of section 74, no effective decision can be reached by the Appeal Board unless the Chairman agrees to it; and that, under section 77 of BFIA, anyone aggrieved by the Appeal Board's decision can appeal to the Court of Appeal on a point of law. All these were considerations pointed out by the Chief Justice at first instance and relied upon by him in his rejection of the challenge. None of them, however, submits BBL, can suffice to counteract the concerns which any independent observer would be likely to feel about BBL's prospects of securing an impartial outcome of its dispute with government and the Central Bank.

102. Amongst the many authorities cited to the Board on this appeal, five in particular seem to me of particular assistance, focusing as substantially they do upon the circumstances of the appointment of the respective tribunals there under challenge.

103. *Lithgow v United Kingdom (1986) 8 EHRR 329* concerned the compensation payable to the applicant companies following the nationalisation of their interests under the *Aircraft and Shipbuilding Industries Act 1977* and included a challenge to the objective impartiality of the Arbitration Tribunal established to determine the amount due. Under the Act the Tribunal was to consist of a legally-qualified president (appointed by the Lord Chancellor) and two other members, appointed by the Secretary of State after consultation with all the Stockholders' Representatives, one being experienced in business and the other in finance. As noted at para 29 of the Court's judgment:

“Criteria for the selection of members of the Tribunal – relating to their standing and experience and including a requirement that they should not have any connection with the companies nationalised – were worked out in consultation with the Stockholders' Representatives, who were also invited to make proposals as to suitable members.”

Rejecting the applicant's complaint under article 6, the Court at para 202 said this:

“[A]lthough two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives. In fact, criteria for the selection of members of the Tribunal were worked out jointly and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the government in the negotiations, ... In these circumstances, there is no warrant for finding a lack of the requisite independence. The

applicants did not allege that the members in question were not subjectively impartial. Having regard to the manner in which the appointment procedure was actually carried out, the court is of the opinion that their objective impartiality was not capable of appearing to be open to doubt.”

104. The compensation to be awarded by a Board of Assessors following government's compulsory acquisition of property was again the ultimate question at issue in *Lake et al v Attorney General of Anguilla* (claim no AXA HCV 2003/0074) (unreported) 5 April 2004 where the claimants similarly challenged the composition of the Board on the basis that it violated their fundamental right to have their civil rights adjudicated by an independent and impartial tribunal as guaranteed by section 9(2) of the Constitution. The Board there consisted of a High Court judge as Chairman and two other members, one nominated by the owner of the land acquired, the other appointed by the Governor in Council. Rejecting that part of the claimant's challenge, Baptiste J observed (para 38) that: “As chairman, a judge is both independent and impartial. His presence provides safeguard for the independence and impartiality of the Board.” The Judge then concluded (at para 40):

“Looking at the Constitution of the Board I am of the view that a fair minded and well informed observer, that is one who is neither complacent, nor unduly sensitive or suspicious, would come to the conclusion that the Board is impartial. Such an observer would undoubtedly consider that the Board is not stacked in favour of any one party. *Both parties have one member on the Board, undoubtedly to look after their interests*, and a judge of the High Court is the Chairman.” (Emphasis added)

Referring to Lake's case in his judgment below, Carey JA cited the above passage from para 38 of Baptiste J's judgment but somewhat surprisingly omitted to mention that the two lay members of the Board in that case were nominated, one by each party to the dispute.

105. The applicants in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 were two convicted prisoners whose complaints included the contention that Boards of Visitors are not independent and impartial tribunals, in part because their members are appointed by the Home Secretary, himself responsible for the administration of prisons. As to that the Court concluded (at para 79 of its judgment):

“The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not ‘independent’.”

106. In *R (Brooke) v Parole Board* [2007] EWHC 2036 (Admin); [2007] HRLR 1369 three long-term prisoners successfully contended that the Parole Board failed to meet the requirements of the common law that a court should demonstrate objective independence of the executive and the parties. One matter relied upon by the applicants was that Board members are appointed by the Secretary of State. As to this, however, Hughes LJ in the Administrative court noted that in practice the method of appointment is not normally in the Secretary of State's personal hands; instead, an external recruitment consultant is instructed after which shortlisted candidates are interviewed by a panel including someone from the Office of the Commissioner for Public Appointments (OCPA), appointment being governed by OCPA principles which include the requirements for appointment to be made on merit and for independent scrutiny – hence the OCPA member of the interviewing panel. In

these circumstances the Court endorsed the view expressed by the Strasbourg Court in *Campbell and Fell* in respect of prison Boards of Visitors and, with regard to the “appointment by Ministers of judges of differing tribunals and courts,” observed (para 31): “Alone, it need not detract from the independence of the judge when once appointed.” The Court then concluded:

“32. In the present case the appointing Minister is, significantly, not only responsible for the Board but also concerned as a party in every case it decides. We agree that that distinguishes the case from many others of ministerial appointment, and calls for clear evidence that in fact the appointing Minister demonstrably abjures any significant input into the selection of members. But if the arrangements which we have set out above for appointment are rigorously followed, we are unable to see that the power of appointment alone need create any objective absence of independence.”

107. The fifth decision which for my part I have found helpful is that of the Privy Council in the *Prince Jefri* case to which brief reference has already been made. The position there was that, when the Brunei Investment Agency applied to enforce a settlement agreement reached between the Agency and the Brunei government on the one side and Prince Jefri on the other, Prince Jefri requested the Chief Justice to recuse himself on the ground of apparent bias from adjudicating on the application and then challenged his refusal to do so. Roundly rejecting the challenge, the Board pointed out that, following the Chief Justice's initial three-year appointment in 2001, his appointment had twice been renewed, on each occasion for a further two years, that when asked to recuse himself he was aged 74 with five months of his extended term still to run, and that he had since accepted a further two- year extension. Lord Bingham's judgment on the point concluded:

“20. The thrust of Prince Jefri's argument on this point, briefly put, is that the fair-minded and informed observer, appreciating that the Chief Justice's prospects of further appointment depended on the goodwill of the Sultan, and that the Sultan could procure a reduction of his salary (against which there was no statutory protection), would apprehend a real possibility that the Chief Justice would be biased in favour of the Sultan in any matter in which his interests conflicted with those of Prince Jefri.

21. The Board has no hesitation in dismissing this submission. The fair-minded and informed observer must be taken to understand that the Chief Justice was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as ‘reasonably adequate’ pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation.”

108. It will readily be seen that in each of these five cases the complaints of apparent bias in the event failed. But what seems to me more striking still are the very substantial and highly significant factual differences between those cases and the present appeal (but for which their outcomes would likely have been different) and their implicit recognition of the importance of the principle that a tribunal's “objective impartiality [must not be] capable of appearing to be open to doubt” (para 202 of the Strasbourg Court's judgment in *Lithgow* cited at para 103 above).

109. Is it really to be supposed that in *Lithgow* the ECtHR would have sanctioned the Secretary of State's appointment of the Tribunal's two lay members had he *not* consulted with the Stockholders' Representatives (and, indeed, invited their proposals as to suitable members)? Or that the Board would have passed muster in *Lake's case* had *both* lay members been appointed by government, rather than one by each party? Or that the Administrative Court in *Brooke* would not have been altogether more troubled by the Secretary of State's appointment of the Parole Board's members had he personally been involved in their selection? And can it really be said that the Home Secretary's interest in the adjudications of Boards of Visitors, or even, indeed, of the Parole Board, is in any real sense comparable to the political and financial interests of the Belize Government and the Minister responsible for appointing the lay members in the present case?

110. The answers to all these questions seem to their Lordships to be a plain no. And there is surely a world of difference between acknowledging the obvious independence and impartiality of a longstanding Chief Justice reaching the end of his distinguished career (in the *Prince Jefri* case) and the appointment by a government Minister to an Appeal Board of two lay members (however distinguished) specifically to adjudicate on the very dispute which brings their appointment about and to which government is to all intents and purposes a party.

111. Naturally I recognise the difficulty (from the point of view of appointing an Appeal Board) which Mr Barrow was placed in by section 70 of BFIA in the context of this dispute. But BBL's constitutional entitlement to an independent and impartial tribunal to determine their appeal from the Central Bank's directive cannot be denied them by the provisions of BFIA, however constraining these may be thought to be – see section 2 of the Constitution cited at para 94 above. Nor is it a sufficient answer to BBL's complaint to point, as both Lord Kerr and Lord Dyson do (at paras 31 and 76 of their respective judgments), to the comparative smallness of the Belizean population. The circumstances of the present case were, in my opinion, such as to demand at the very least that BBL was consulted with regard to the appointment of the two lay members and, indeed, given the opportunity to participate in the selection process. Why should it not have been invited, as in *Lithgow*, to propose suitable members for consideration? And why, one wonders, could not suitably qualified lay members have been found (perhaps even from abroad) who (or at least one of whom) had *not* previously worked for the Central Bank and thereby become known to the Financial Secretary?

112. At all events, whatever the answers to these questions, I cannot but conclude that, in the light of the appointment procedure adopted, the objective impartiality of the Appeal Board as constituted would be likely to appear to a fair-minded and informed observer open to doubt. How could it not strike such an observer that Mr Waight may well have chosen these two Board members, and Mr Barrow so speedily have accepted his choice, because each felt confident that these two would instinctively be more sympathetic, ie predisposed, to the Central Bank's and government's cause than BBL's? In short, it is my opinion that such an observer, having duly considered all the facts, *would* conclude that there was *a real possibility* that the Appeal Board was biased – the *Porter v Magill* test as explained above.

113. Lord Dyson suggests (at para 76) that “the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters.” With the best will in the world, that seems to me to come close to urging an abnegation of this Board's proper role in so politically fraught a case as this (ironically the very last Belizean appeal to come before us). I had always understood that role to carry with it the responsibility for ensuring, to the benefit of Belizeans themselves and of their standing in the wider international community, that the highest international standards of justice are maintained in that country. On the issue of apparent bias there can certainly be no stronger case for deference to the Belizean judges than the Strasbourg Court would afford our judges on a complaint originating in the UK. I do not believe that the Strasbourg Court would reject a challenge to the UK in a comparable case.

114. I should deal with one final matter, the respondents' successful reliance in both courts below upon the fact that, under section 77 of BFIA, were BBL to be aggrieved by the Appeal Board's decision, it could appeal in point of law to the Court of Appeal. I regard this as an impossible argument, whether considered simply as a factor in the fair-minded observer's overall

appreciation of the possibility of bias or as a discrete basis upon which to conclude (as Morrison JA put it at para 73 of his judgment below) that “it is possible for suitable appellant procedures to compensate for any perceived lack of independence or impartiality.” The plain fact is that not merely does section 77(1) of BFIA confine any appeal to consideration of legal error but, still more important, section 77(2) prevents the Court of Appeal, assuming it were sympathetic to the appellants' case, substituting its own decision for that of the Appeal Board. Its power would be limited to remitting the matter to the Appeal Board “for rehearing and determination by it” – of scant comfort to the person aggrieved if one assumes that the Appeal Board itself is affected by apparent bias.

115. The position could hardly be more different from that arising in *Porter v Magill* itself where, in the context of a challenge to the impartiality of an auditor, Lord Hope said this at para 93:

“The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements [ie the requirements of the *Bryan v United Kingdom* (1995) 21 EHRR 342 line of authority]. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 52 Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case.”

116. It follows that for my part I would have allowed this appeal.

Crown copyright

A

Court of Appeal

***Resolution Chemicals Ltd v H Lundbeck A/S**

[2013] EWCA Civ 1515

B

2013 Oct 31;
Nov 25

Sir Terence Etherton C, Hallett, Sharp LJ

Natural justice — Bias — Apparent bias — Expert witness in patent action professor who had been trial judge's research supervisor — Whether real possibility of subconscious bias in assessing witness's evidence — Whether judge's decision not to recuse himself correct

C

The claimant brought proceedings against the defendant attacking the validity of its patent. During the course of the hearing of certain applications before the judge designated to try the action the claimant stated that it had an opinion from an expert who had been the judge's research supervisor at university. Before the trial the claimant notified the defendant that the expert would be one of its witnesses addressing the issue of the validity of the patent. The defendant applied to the judge to recuse himself from trying the action on the ground of the real possibility of apparent bias, contending that, since the witness had had a position of authority and influence over the judge in his student days, such influence should be presumed to continue unless there were factors negating that inference and that the judge would be subconsciously biased in his assessment of the witness's evidence by reason of that past association. The judge concluded that, applying the test of the fair-minded and informed observer who had considered the facts, there was no real possibility of bias and refused the application.

E

On the defendant's appeal—

Held, dismissing the appeal, that the test to be applied was whether a fair-minded and informed observer would conclude that there existed a real possibility of bias, whether subconscious or otherwise, and the test remained the same whether the objection of bias or apparent bias was made before or after a trial; that, although it was sensible for a judge pragmatically to apply a precautionary approach and to recuse himself in advance of a hearing on the basis that it was better to be safe than sorry, if a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the tribunal would be biased the objection to the judge had to fail even if that left the applicant dissatisfied and bearing a sense that justice would not or might not be done; that the factual context was critical and there was nothing which could give rise to any real concern on the part of the fair-minded and informed observer that there was a real possibility of subconscious bias on the part of the judge; and that, accordingly, there was no valid objection to the judge conducting the trial (post, paras 35, 36, 38, 39, 40, 44, 51, 53, 54, 55).

G

Porter v Magill [2002] 2 AC 357, HL(E) applied.

Lawal v Northern Spirit Ltd [2003] ICR 856, HL(E) considered.

Per curiam. The increasing pressure on limited judicial resources may mean that the easy option of voluntary recusal, irrespective of the strict application of the legal test, may from time to time have limited scope (post, paras 40, 54, 55).

H

Decision of Arnold J [2013] EWHC 3160 (Pat) affirmed.

The following cases are referred to in the judgment of Sir Terence Etherton C:

AWG Group Ltd v Morrison [2006] EWCA Civ 6; [2006] 1 WLR 1163; [2006] 1 All ER 967, CA

- Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA A
- Generics (UK) Ltd v H Lundbeck A/S* [2007] EWHC 1040 (Pat); [2007] RPC 32
- Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416; [2009] 2 All ER 1031, HL(Sc)
- L-B (Children), In re* [2010] EWCA Civ 1118; [2011] 1 FLR 889, CA
- Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856; [2004] 1 All ER 187, HL(E) B
- Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA
- Man O'War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, PC
- Mölnlycke AB v Procter & Gamble Ltd (No 5)* [1994] RPC 49, CA
- Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E) C
- R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, DC
- Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWHC 739 (Pat); [2013] EWCA Civ 924, CA
- Technip France SA's Patent* [2004] EWCA Civ 381; [2004] RPC 46, CA

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments: D

- Attorney General of the Cayman Islands v Tibbetts* [2010] UKPC 8; [2010] 3 All ER 95, PC
- Biogen Inc v Medeva plc* [1997] RPC 1, HL(E)
- Medimmune Ltd v Novartis Pharmaceuticals UK Ltd* [2011] EWHC 1669 (Pat)
- O'Neill v HM Advocate (No 2)* [2013] UKSC 36; [2013] 1 WLR 1992, SC(Sc) E
- R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)
- R (Condon) v National Assembly for Wales* [2006] EWCA Civ 1573; [2007] 2 P & CR 38, CA

APPEAL from Arnold J

On 7 November 2012 the claimant, Resolution Chemicals Ltd, commenced proceedings seeking revocation of the supplementary protection certificate SPC/GB02/049 for escitalopram in the name of the defendant, H Lundbeck A/S, on the grounds of the alleged invalidity of the basic patent on which the certificate was based, European Patent (UK) No 0 347 066. F

By an application dated 30 September 2013 the defendant applied to the designated trial judge, Arnold J, that he should recuse himself from trying the action which was due to start in a window commencing on 11 November 2013. On 22 October 2013 the judge refused the application. G

By an appellant's notice dated 23 October 2013 the defendant appealed on the ground that the judge had erred in not recusing himself from the trial of the action on the basis that he did not consider that his past connection with one of the claimant's expert witnesses, who had been his research supervisor at Oxford University between October 1982 and May 1983, gave rise to a real possibility of apparent bias, and in his decision that a fair-minded and informed observer would not conclude that there was a real possibility that the tribunal was biased. H

A At the conclusion of the hearing on 31 October 2013 the court dismissed the appeal and directed that the judge should conduct the trial, for reasons to be given later.

The facts are stated in the judgment of Sir Terence Etherton C.

Richard Gordon QC, Miles Copeland and Emily MacKenzie (instructed by *Wragge & Co LLP*) for the defendant.

B *Hugh Tomlinson QC* (instructed by *Olswang LLP*) for the claimant.

The court took time for consideration.

25 November 2013. The following judgments were handed down.

SIR TERENCE EHTERTON C

C 1 In these proceedings the claimant, Resolution Chemicals Ltd (“Resolution”), seeks revocation of the supplementary protection certificate SPC/GB02/049 (“the SPC”) for escitalopram in the name of the defendant, H Lundbeck A/S (“Lundbeck”), on the grounds of the alleged invalidity of the basic patent on which the SPC is based, namely, European patent (UK) No 0 347 066 (“the patent”).

D 2 This is an appeal against an order dated 22 October 2013 of Arnold J, the effect of which in substance was to refuse an application by Lundbeck that he recuse himself from hearing the trial of the action which was due to commence in a window commencing on 11 November 2013.

E 3 The essence of Lundbeck’s recusal application is that a fair-minded and informed observer would conclude that there is a real possibility that Arnold J would be subconsciously biased in his assessment of the evidence of Professor Sir Jack Baldwin FRS, formerly Waynflete Professor of Chemistry at Oxford University, who is to act as one of Resolution’s expert witnesses addressing the issue of the validity of the patent. Lundbeck maintains that the appearance of bias arises out of the association between the judge and Professor Baldwin when Professor Baldwin became the judge’s research supervisor in Part II of the judge’s undergraduate degree studies in natural sciences (chemistry) at Oxford University between October 1982 and May 1983.

F 4 In view of the proximity of the trial date, we announced our decision to dismiss Lundbeck’s appeal immediately following the oral submissions of Mr Richard Gordon QC, for Lundbeck, and Mr Hugh Tomlinson QC, for Resolution, on 31 October 2013. We said that our reasoned judgments would follow in due course.

G

Background

The attack on the patent

H 5 The general background to the current proceedings is set out in an earlier judgment of Arnold J (*Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWHC 739 (Pat)) on various applications in these proceedings given on 12 April 2013 (an appeal from part of which was dismissed by the Court of Appeal [2013] EWCA Civ 924 on 29 July 2013) and in a judgment of Kitchen J in another set of proceedings for revocation of the patent: *Generics (UK) Ltd v H Lundbeck A/S* [2007] RPC 32.

6 In short, Resolution attacks the validity of the patent on two grounds. The first ground is obviousness in the light of United States Patent No 4,650,884. The second ground is obviousness in the light of an article entitled “Quantitative structure—activity in a series of selective 5-HT uptake inhibitors” by Allan J Bigler et al published in the May-June 1977 edition of the *European Journal of Medicinal Chemistry*.

7 In determining those issues the court will have to consider whether certain steps were obvious to the notional “skilled person”. The “man skilled in the art” is a hypothetical skilled technician who has a very good background technical knowledge—the so-called common general knowledge—but he or she is uninventive: see generally the description by Jacob LJ in *Technip France SA’s Patent* [2004] RPC 46, especially at paras 6–15. Expert evidence is adduced in cases on the validity of a patent to educate the court in the technology but also to assist the court on whether or not the relevant step would have been obvious to the notional skilled person having regard to the state of the art: *Mölnlycke AB v Procter & Gamble Ltd* (No 5) [1994] RPC 49, 113 (Sir Donald Nicholls VC).

8 One of the matters in issue in the present case is what the skilled person would have thought about the applicability of “Baldwin’s Rules”. These are named after two papers written by Professor Baldwin. There is disagreement between the experts on that issue.

The procedural background

9 The present proceedings were commenced on 7 November 2012. On 24 January 2013 Roth J made an order which, among other things, gave directions for the trial of the claim. Para 30 of his order provided as follows:

“The trial of this action shall be listed on an expedited basis before Arnold J if available on the earliest possible date after 11 November 2013, with a time estimate of eight days and pre-reading estimate of two days with a technical complexity rating of 4”.

10 Patent actions are listed for trial in accordance with their technical complexity rated on a scale from 1 (simplest) to 5 (most complex). Cases with a technical complexity rating of 4 or 5 are listed before one of the two judges of the Patents Court who have science degrees and have specialised in intellectual property law throughout their career. Cases with a technical complexity rating of 1–3 may be listed before one of the other judges of the Chancery Division who have been assigned to the Patents Court who do not have that academic and professional background. At the time of Roth J’s order there were two specialist patent judges, Floyd J and Arnold J. Floyd J was precluded from hearing the case because, when in practice at the Bar, he had represented one of the parties at the trial of the previous claim for revocation of the patent which was heard by Kitchin J. It was for that reason that Roth J’s order provided for the trial to be listed before Arnold J. Birss J was subsequently appointed a High Court judge of the Chancery Division and is qualified to try patent actions with a technical rating of 4 or 5. He is, however, unable to hear the case due to a conflict of interests.

The recusal application

11 During the course of the hearing before Arnold J of certain applications on 14 March 2013 Resolution’s counsel stated that Resolution

A had an expert opinion of Professor Baldwin. Arnold J commented that Professor Baldwin was his Part II supervisor. Counsel for Resolution stated that, at that stage, he could not say whether Resolution would be calling Professor Baldwin as a witness, adding: “but I have no reason to think that he would not be prepared to give evidence”. There was correspondence between the solicitors for the parties in July 2013, in which Resolution’s
B solicitors stated that Resolution had been assisted by two experts, one of whom was Professor Baldwin, and that Resolution proposed to call a third expert to give evidence. On 19 July 2013 Resolution made an application for permission to call a third expert. That application was supported by a witness statement in which Resolution’s solicitor referred to experimental protocols which Resolution had obtained from Professor Baldwin and Professor Gerard Coquerel and stating that it would be necessary to call both
C those experts to give evidence at the trial and that Resolution needed to call a further expert. On 30 July 2013 Norris J made an order by consent giving Resolution permission to call a third expert.

12 On 6 September 2013, pursuant to the directions order of Roth J dated 24 January 2013, Resolution formally notified Lundbeck of the names of its expert witnesses, one of whom was Professor Baldwin.

D 13 On 11 September 2013 Lundbeck’s solicitors wrote to Arnold J requesting that he recuse himself from hearing the trial of the claim on the ground that his past connection with Professor Baldwin gave rise to a real possibility of apparent bias. That request was opposed by Resolution both on the merits and on the ground of waiver.

E 14 Accordingly, Lundbeck issued an application notice dated 30 September 2013 for a direction that the order of Roth J of 24 January 2013 be varied so as to provide that the trial of the action shall not be listed before Arnold J.

F 15 The principal evidence relied on by Lundbeck in support of its application comprised (a) the judge’s disclosure at the hearing on 14 November 2013 that Professor Baldwin had been his Part II supervisor, (b) some publicly available information about the curriculum vitae of Arnold J, (c) some general information concerning Oxford University’s chemistry course, explaining that Part II of the course consists of an academic year of research leading to an examined thesis, (d) a copy of the published paper co-authored by Professor Baldwin and the judge referred to below and (e) a copy of the rules for the appointment of DPhil examiners at Oxford University. Resolution’s evidence in reply included a letter from
G Professor Baldwin stating that he had no specific recollection of Arnold J and setting out his general practices with regard to the Part II students he supervised and his comments on the paper.

The hearing of the recusal application

H 16 In advance of the hearing of the recusal application the judge noted the following observations of Patten LJ in *In re L-B (Children)* [2011] 1 FLR 889, para 22:

“Where a judge is faced with an application that he should recuse himself on the ground of apparent [bias] it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application.

The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in *Helow v Home Secretary* [2008] 1 WLR 2416.”

17 That caused the judge to produce a note of his recollections, which he supplied to the parties shortly before the hearing. He reproduced the contents of the note in paras 23–32 of his judgment. They are as follows:

“23 It is difficult accurately to remember the events of more than 30 years ago, and my recollection has already been proved inaccurate in one respect. With the assistance of the evidence filed by the parties, however, I have done my best to recall the nature and extent of my contact with Professor Jack Baldwin FRS (he was knighted subsequently) when I was a student.

“24 I studied natural sciences (chemistry) at Magdalen College, Oxford from 1979–1983. At that time, Professor Baldwin was the Waynflete Professor of Chemistry, a professorship endowed by Magdalen. I had no contact with Professor Baldwin through the college, since he did not teach there. My first and only contact with Professor Baldwin during Part I of the degree (the first three years) was when I attended a course of lectures on synthetic organic chemistry which he gave in the third year. As I recall it, the main focus of the lectures was on ‘retrosynthetic analysis’, that is to say, analysing routes of synthesis by working backwards from the target compound. I found the content of the lectures interesting even though they were poorly delivered, and therefore asked Professor Baldwin to be my Part II supervisor (to the amusement of several of my contemporaries).

“25 The research project to which Professor Baldwin assigned me was a project to synthesise a cyclopentanoid isonitrile called ‘270’ which was a metabolite of *Trichoderma* fungi. This was a project on which two post-doctoral workers in Professor Baldwin’s research group, Dr David Kelly and Dr Carl Ziegler, were already engaged. It was a challenging project because of the presence of the sensitive isonitrile group in the target compound. As I recall it, Dr Kelly was pursuing one main route to the synthesis, while Dr Ziegler was pursuing another. Professor Baldwin assigned me to explore some variants of the route Dr Ziegler was pursuing.

“26 My research was undertaken during the period from early October 1982 to early May 1983. At that time, Professor Baldwin had a large research group. My recollection is that, including two other Part II students and myself, there were between 45 and 50 people in the group that year. There were periodic meetings of the whole group to discuss current research, but I do not recollect my research being discussed in that forum. My recollection is that I saw Professor Baldwin about once every four weeks for about half an hour. I think that Dr Ziegler was also present at most of these meetings. During the meetings, I updated Professor Baldwin on what I had done since our last meeting, and he gave me ideas for what to do next. On a day-to-day basis, I was supervised by Dr Ziegler and to a lesser extent by Dr Kelly. This recollection is supported by the fact that, in the acknowledgements to my thesis,

A I thanked Professor Baldwin for ‘his stimulating supervision’ and Drs Ziegler and Kelly for ‘endless advice’. (I note with sadness that I have discovered from the internet that both Dr Ziegler and Dr Kelly have since passed away, Dr Kelly in 2008 and Dr Ziegler in 2012.)

B “27 My abiding recollection of that period was that I found it quite demoralising. I did not find the laboratory environment congenial and I was frustrated by the fact that most of my experiments failed. By contrast, I found writing my thesis, which I presented in June 1983, more enjoyable. I have no recollection of asking for Professor Baldwin’s comments on a draft of my thesis, or even Dr Ziegler’s, but I think that I must have asked for Dr Ziegler’s comments.

C “28 One of the ideas which Professor Baldwin suggested at one point was to try to make an intermediate with a chloro-[3]-cumulene group by a particular method. This was one of the few experiments I undertook which was successful. After I had demonstrated the principle, Dr Ziegler did a series of further experiments to explore the utility of the method. This work was subsequently published as a short paper, “A facile preparation of chloro-[3]-cumulenes”, *J Chem Soc, Chem Comm*, p 152–153, 1984. Although the named authors of the paper were myself, Professor Baldwin and Dr Ziegler, so far as I recall, I was not involved in writing or submitting the paper, which I note was received by the journal on 3 November 1983. I presume it was written by Dr Ziegler.

D “29 My last contact with Professor Baldwin while at Oxford was a short interview to mark the conclusion of my Part II work at around the time I presented my thesis. Professor Baldwin offered me a place as a DPhil student despite the fact that I was predicted to receive (and did receive) a second class degree, but I declined this offer. After leaving Oxford in June 1983, I pursued a career in the law.

E “30 While I was at Oxford, I also attended a course of lectures given by the then Dr Steve Davies, later Professor Baldwin’s successor as Waynflete Professor. My recollection is not very clear, but I think that this was in my first year and that the lectures were relatively introductory lectures in organic chemistry. I also believe that at some point during the four years I had some contact with Dr Davies outside the context of those lectures. When the present application was first intimated in mid September, I thought Dr Davies must also have been a member of Professor Baldwin’s research group at the time. This has since been corrected by Professor Davies, and I now realise that it could not have been the case. I am unable now to recollect in what context I had contact with Dr Davies (if indeed this memory is accurate at all).

F “31 It has recently occurred to me that I may have met Professor Baldwin once since leaving Oxford. In September 2005 Magdalen College held a dinner for alumni chemists to celebrate the retirement of Professor Baldwin and of two of the college tutors who had taught me during Part I. I attended the dinner. I am not sure whether I spoke to Professor Baldwin on that occasion, but if I did, it was only briefly during pre-dinner drinks.

G “32 I am aware that Professor Baldwin has given expert evidence in at least two cases in the Patents Court (*Monsanto Co v Merck & Co Inc* [2000] RPC 709 and *SmithKline Beecham plc’s Patent (No 2)* [2003] RPC 33), but I was not involved in those cases in any capacity.”

The judgment of Arnold J

18 In his judgment under appeal the judge, having set out the background and described the role of expert witnesses in patent actions and the applicable principles for recusal on the basis of apparent bias, turned to the merits of Lundbeck's application. He said (at para 54) that he was entirely satisfied in his own mind that his past connection with Professor Baldwin would not affect his assessment of Professor Baldwin's evidence. He said that what matters, however, is not what he thought, but what the fair-minded informed observer would think. He then turned to consider the factors which such an observer would take into account. He addressed those in paras 56–68 of his judgment under the following headings: "the overall context", "Professor Baldwin's status as an expert witness", "the importance of Professor Baldwin's evidence", "the nature and extent of [the judge's] past connection with Professor Baldwin", "the passage of time and [the judge's] change in status", "the nature and extent of [the judge's] connection with Professor Davies", "Professor Davies' status as an expert", "specific aspects of the present case", "the judicial approach", "analogies", and "conclusion".

19 I do not propose to lengthen this judgment unduly by quoting all of those paragraphs. The following is a brief summary of the principal elements of the judge's reasoning. The judge observed that Professor Baldwin will be subject to the obligation of an expert witness, under CPR Pt 35, Practice Direction 35—Experts and Assessors—and the Protocol for the Instruction of Experts to Give Evidence in Civil Claims, to provide objective, unbiased opinions on matters within his expertise, and that the question for the court to assess will be the extent to which Professor Baldwin's opinions reflect the common general knowledge and perceptions of the notional skilled person, not whether they are genuinely held or scientifically correct. He said that Professor Baldwin supervised, but not closely, a research project lasting less than a year which the judge had conducted as part of his degree course. That research had led to the publication of a short paper in the joint names of Professor Baldwin, Dr Ziegler and himself but the judge was not involved in writing or submitting the paper and most of the work it reported was carried out by Dr Ziegler. The judge said that the fair-minded and informed observer would note that a little over 30 years have passed since his association with Professor Baldwin and that in that time he had become successively a barrister, Queen's Counsel and a High Court judge. The judge said that, as a judge assessing a witness, he would have a considerable measure of authority over Professor Baldwin. He observed that he had also been educated as a student by Professor Steve Davies, who is to be called as an expert witness by Lundbeck on the same issue as is to be addressed by Dr Baldwin, and who is Professor Baldwin's successor as the Waynflete Professor of Chemistry at Oxford University. He said that this is not a case in which there is a disparity in the authority of the respective experts.

20 The judge said that the fair-minded and informed observer would appreciate that the general training and experience of English judges in the practice of the law and in acting judicially equips them to identify and combat their own cognitive biases. He said that a judge of five years' standing like himself has considerable expertise in objectively assessing the evidence of the witnesses and, specifically, the assessment of evidence of expert witnesses in patent actions. The judge concluded that, taking into

A account those and other factors he mentioned in his judgment, he was in no real doubt that a fair-minded and informed observer would not conclude that there was a real possibility of the judge being subconsciously biased in his assessment of Professor Baldwin's evidence by reason of the judge's past association with him.

B 21 Finally, the judge rejected Resolution's further contention that Lundbeck had, in any event, waived any objection of apparent bias on the part of the judge by Resolution's conduct between 14 March and 11 September 2013. He said that, although Lundbeck had all the information it needed by 2 July 2013 and did not raise any objection to the judge hearing the trial until 11 September 2013, in the end he was not persuaded that Lundbeck's actions were sufficiently unequivocal to amount to a waiver. Resolution has not challenged that part of the judge's judgment
C on this appeal.

The appeal

22 Mr Gordon began his submissions with an acknowledgement that the test of apparent bias is well established, namely whether the fair-minded and informed observer would conclude that there is a real possibility of bias.
D He submitted that the following four concepts have a particular resonance in the present case: (1) justice must not only be done but be seen to be done; (2) that principle trumps any practical difficulties arising from, for example, lack of judicial resources; (3) if there is any doubt about the appearance of bias, the court must err on the side of caution, particularly where the trial has not yet begun; (4) apparent bias can take many forms, but the most insidious is subconscious bias.

E 23 Mr Gordon submitted that in the present case the critical issue is the link between that precautionary principle and subconscious bias. He submitted that, in examining that link, the important questions are whether there are material factors to suggest to the independent observer that Professor Baldwin exercised influence at any time in the past and, if so, whether other factors will have removed a real possibility of that influence leading to subconscious bias.

F 24 Mr Gordon laid considerable weight on the reasoning and decision in *Lawal v Northern Spirit Ltd* [2003] ICR 856. The issue in the House of Lords in that case was whether there was a real possibility of the two lay members of the Employment Appeal Tribunal ("the EAT") being subconsciously biased in favour of the submissions of a barrister, representing the employers, who was also a recorder and in that capacity
G had sat as a part-time judge in the EAT with one of the two lay members. The House of Lords, concluded that there was a real possibility of subconscious bias and that the practice permitting such appearance by counsel in such circumstances should be discontinued.

H 25 Mr Gordon submitted that *Lawal's* case is in the same territory as the present appeal, namely as illustrative of the proposition that past "additional authority" exerted by one person over another can raise a real possibility of subconscious bias. More specifically, Mr Gordon contended that *Lawal's* case is analogous to the present case because both cases concern the possibility of a tribunal being subconsciously biased by virtue of a former relationship with a person to whom the tribunal would be looking for guidance in the subject in question—in *Lawal's* case the law, and in the

present case organic chemistry—such that there is a perception of a risk that the arguments of that person might be preferred over the arguments of others.

26 Mr Gordon also relied on the use made of analogies by the House of Lords in *Lawal's* case, paras 15–18 (Lord Steyn giving the judgment of the appellate committee). He said there is a useful analogy in the present case, which the judge had been wrong to reject, namely that Oxford University's Regulations would have prohibited Professor Baldwin from assessing a doctoral thesis of the judge due to his role as supervisor and their co-authorship of the paper. Lundbeck's case is that the regulations suggest that a relationship such as that which existed between the judge (as a student) and Professor Baldwin would mean that there was insufficient objectivity and apparent fairness for the latter to evaluate the former's work.

27 Mr Gordon submitted that the present case is stronger than *Lawal's* case because that was a case concerning the relationship between the members of a tribunal and an advocate whereas the present case concerns the judge's assessment of the evidence of a witness. Mr Gordon emphasised that such an assessment is not merely related to the judge's evaluation of the truthfulness of a witness but in the present case also to the cogency of an expert's opinion.

28 Mr Gordon emphasised that the disqualification of a judge for apparent bias is not a discretionary matter for the judge, but depends on an assessment which an appellate court is well able to conduct for itself. He cited, in that connection, *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 20 (Mummery LJ).

29 Mr Gordon said that Baldwin's Rules are central to the issues in this case; and the genuine concern of Lundbeck is that the judge's view of them may be influenced by his historic relationship with Professor Baldwin. In that connection, Mr Gordon emphasised the following factors. He acknowledged that the attendance of the judge at lectures delivered by Professor Baldwin was not exceptional. On the other hand, he laid importance on the fact that the judge made a positive decision to have Professor Baldwin as his Part II supervisor, and so effectively joined Professor Baldwin's research team, just five years after the publication of Baldwin's Rules. Mr Gordon also laid emphasis on the fact that the judge, as a Part II student, had conducted a successful experiment that was in due course the subject of the published paper which I have mentioned and for which his contribution was acknowledged by Professor Baldwin by being named as a co-author. Mr Gordon considered that it was significant that Professor Baldwin offered the judge a place as a DPhil student and that the judge had been invited to attend, and did attend, a retirement dinner for Professor Baldwin and two other tutors organised by Magdalen College, Oxford University, in September 2005.

30 As an indication of the continuing influence of those student years and the possibility of subconscious bias, Mr Gordon pointed to the following comments by the judge during the hearing on 15 October 2013, as recorded in the transcript:

“ARNOLD J: It is a more particularised way of putting what one might label the mentor point because going back to what I was saying earlier, the Baldwin Rules are about stereoselectivity in SN₂ reactions and one of

A the key areas of differences in the case is whether—I do not think it is in dispute that the skilled person in the art would have been aware of the Baldwin Rules in 1988. They were famous. Everybody knew about them. But the question is, what the notional person skilled in the art, armed with the Baldwin Rules and the problem at hand would conclude.”

B 31 Mr Gordon focused on the judge’s statement that Baldwin’s Rules were “famous”. Mr Gordon said that was likely to be in dispute. Mr Gordon also submitted that the judge’s observation that Baldwin’s Rules were “famous”, coupled with his words “armed with Baldwin’s Rules”, suggested a conclusion that Baldwin’s Rules were indeed a basis for some further positive action on the part of the notional skilled person.

C 32 Mr Gordon referred to the expert evidence of Professor Davies on this aspect, and specifically the following passages in his report, at paras 86–87:

D “86 While I believe that the average skilled person would know that stereoelectronics mattered in this reaction . . . in the context of an experimental project, such as the synthesis of the enantiomers of citalopram, the average skilled person is unlikely to have spent time considering this. Baldwin’s Rules and the papers from which they derive are not the sort of information that the average person skilled in 1988 would have in their head—they would not have a recollection of the individual rules themselves, nor would they have thought them worthwhile to review in the context of such a project. In practice, the way the skilled person would work would be to look for analogous reactions reported in the literature and, for reasons set out below in paragraphs 98

E to 103 in the annex to this report, they would find none.

F “87 In any event, had the skilled person considered them in the context of the project in hand, they would see that Baldwin’s Rules do not even apply to this ring closure. The ring closure in the diol system involves an SN₂ nucleophilic substitution reaction at a tetrahedral carbon atom. Only Baldwin’s Rule 1 addresses *tetrahedral* systems, and is therefore the only one of the rules that could apply to SN₂ nucleophilic substitution reactions. Baldwin’s Rule 1 is clearly intended to apply to saturated systems and not unsaturated systems. If the skilled person was aware of Baldwin’s paper, they would know this and not take anything of use to this system from them.”

G 33 Mr Gordon submitted that there were no factors negating the persistence of Professor Baldwin’s influence over the judge or, rather, such as to leave no real doubt as to the possibility of such persistent subconscious influence. In that connection, he addressed and countered the judge’s reliance on such matters as the significance of the passage of time, the reversal of the positions of authority of the judge and Professor Baldwin, Professor Baldwin’s personal experience as an expert witness, the specialist nature of patent disputes, the fact that in the field of disputed patent

H revocation many of the participants are known to each other, the judge’s general training and experience as a judge, and the rules surrounding the giving of expert evidence. Mr Gordon submitted that the fair-minded observer would not be swayed by the first three of those matters and would regard the last four as irrelevant.

34 Mr Gordon also emphasised that in the present case the patent stands or falls by the expert evidence as to the situation in 1988, not long after the judge ceased to be an undergraduate.

Discussion

35 The following principles relevant to this application are clear. First, the test of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased: *Porter v Magill* [2002] AC 357, para 103 (Lord Hope of Craighead). There is no difference between the common law test of bias and the requirements of an independent and impartial tribunal under article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”): *Lawal v Northern Spirit Ltd* [2003] ICR 856, para 14 (Lord Steyn). Secondly, underlying both article 6 of the Convention and the common law principles is the fundamental consideration that justice should not only be done but should manifestly and undoubtedly be seen to be done: *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259. Thirdly, the fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, para 2 (Lord Hope). Fourthly, the facts and context are critical. Each case turns on an intense focus on the essential facts of the case: *Man O’ War Station Ltd v Auckland City Council* (formerly *Waiheke County Council*) [2002] UKPC 28 at [11] (Lord Steyn). Fifthly, if the fair-minded and informed observer would conclude that there is a real possibility that the tribunal will be biased, the judge is automatically disqualified from hearing the case. The decision to recuse in those circumstances is not a discretionary case management decision reached by weighing various relevant factors in the balance. Considerations of inconvenience, cost and delay are irrelevant: *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 6 (Mummery LJ).

36 In addition to those well established points of principle, I would add the following observations. The test is “a real possibility” of bias, whether subconscious or otherwise. Lundbeck’s skeleton argument describes that test as “a necessarily low threshold”. While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of “any possibility” but of a “real” possibility of bias.

37 As Lord Steyn observed in *Lawal’s* case [2003] ICR 856, para 15, analogies may sometimes be of assistance. On the other hand, they must be viewed with care and caution. Cases of subconscious bias ultimately turn on the particular facts of the case. An analogy will only have value if the factual situation is sufficiently comparable to enable a compelling link to be made with the case in hand.

38 Mummery LJ in the *AWG Group* case [2006] 1 WLR 1163, para 9 has pointed to the practical difference between an objection to the judge based on facts discovered during the course of, or only at the end of, the hearing and a situation, such as the present one, where the objection is taken before the hearing has begun. In the latter situation, as Mummery LJ observed, there is scope for the sensible application of the precautionary principle, that is to say prudence naturally leans on the side of being safe rather than sorry. Indeed, as was observed in *Locabail (UK) v Bayfield Properties* [2000] QB 451, para 16, judges routinely take care to disqualify

A themselves in advance of any hearing in any case where a personal interest could be thought to arise. The judge himself said at para 50 of his judgment that he has a strong inclination to accede to an application to recuse himself without further ado. The test, however, remains the same whether the objection of bias or apparent bias is made before or after a trial.

B 39 The precautionary principle is a sensible one in view of the obvious practical complications if there is an appeal from a refusal to recuse or if there is a challenge made on the basis of apparent or actual bias at the end of the case. The overriding objective that justice should be seen to be done and of the need to maintain the confidence of society in general, and of the parties in particular, in the administration of justice also promote a disposition of a judge to accede to a recusal application when it is made by a party's legal advisors.

C 40 It is important, none the less, to distinguish between a pragmatic precautionary approach and the application of the test itself. If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done.
D The increasing pressure on limited judicial resources, aptly reflected in the present case in the shortage of judges suited to try this complex patent action, may mean that the easy option of voluntary recusal, irrespective of the strict application of the legal test, may from time to time have limited scope.

E 41 The decision made by a judge as to whether or not to accede to an objection based on apparent bias is a multi-factorial decision. It is well established that an appellate court will normally be slow to interfere with a multi-factorial decision made by a judge: *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, para 16. The same considerations do not apply, however, in the case of a refusal by a judge to disqualify himself or herself for apparent bias. I agree with the comments of Mummery LJ in *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 20 that, on the issue of disqualification, an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances, and that the appellate court must itself make an assessment of all relevant circumstances and then decide whether there is a real possibility of bias. That approach is entirely appropriate since it is conventional for applications for recusal on the basis of apparent bias to be heard by the very judge in question. Neither side before us commented on the appropriateness of that convention.
F
G

H 42 As the judge noted, Patten LJ said in *In re L-B (Children)* [2011] FLR 889, para 22 that a judge faced with a recusal application on the ground of apparent bias should "explain in sufficient detail the scale and content of the professional and other relationship which is challenged on the application". It is plainly consistent with the policy underlying article 6.1 of the Convention and common law principles that, on such an application, the judge should provide to the parties relevant information. Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application. I consider that the judge in the present case went well beyond what was necessary. The consequence of an excessively wide factual disclosure is to enlarge the opportunity for

speculative arguments about the inferences to be drawn and the consequences that follow from the facts disclosed. That observation must be borne in mind when I address Mr Gordon's submissions about the factual context of the present case in the following paragraphs.

43 Against the background of those principles and matters, I turn to the facts of the present case. The first and most obviously striking feature is that the relationship between the judge and Professor Baldwin was formed when the judge was a university student and it came to an end when his undergraduate studies were completed some 30 years ago. Mr Gordon's submissions were advanced on the basis that Professor Baldwin was in a position of authority and influence over the judge in those student days and that such influence should be presumed to continue unless there were factors negating that inference. That seems to me to be an entirely artificial approach in the present case where the circumstances of the original relationship arose in a specific and limited context so very long ago and which bears no comparison whatever with the situation in which the judge will be trying a High Court action in which Professor Baldwin will be giving expert evidence.

44 The factual context is critical. Lundbeck accepts that it is irrelevant that the judge attended lectures given by Professor Baldwin. In conducting his Part II research project the judge was part of a large research group of 45 to 50 people. He sought advice and guidance primarily from two post-doctoral researchers in that group, Dr Kelly and Dr Ziegler. Although the judge was named as co-author of the paper mentioned above, he does not recall being involved in writing or submitting the paper. In the intervening 30 years there has been no personal or professional contact between the judge and Professor Baldwin other than the judge's attendance in September 2005 at a retirement dinner for Professor Baldwin and two other college tutors who had taught the judge during his undergraduate years. The judge is not even sure whether he spoke to Professor Baldwin on that occasion. Further, the judge, while an undergraduate, also attended lectures given by Professor Davies, Lundbeck's expert, who succeeded Professor Baldwin as Waynflete Professor and whose eminence the judge acknowledges.

45 Mr Gordon relied heavily on the decision and reasoning in *Lawal v Northern Spirit Ltd* [2003] ICR 856 as an analogous example of a situation where there was a real possibility of subconscious bias arising out of a former and different relationship. I do not agree that *Lawal's* case provides a useful analogy. That case was concerned with the continuing possible influence over the lay members of a tribunal of an advocate who had previously sat with those lay members as a part-time judge. In the first place, the original relationship of influence in that case was very recent (viz within the previous 12 months). That bears no relationship whatever to the 30 years gap in the present case. Secondly, the persistent potential influence in *Lawal's* case was of a part-time judge over lay members. In the present case, the real possibility of subconscious bias is said to apply to a High Court judge of five years' standing, who previously sat as a deputy High Court judge and for many years before that was in private practice as a barrister. Mr Gordon submitted that the difference between those situations is irrelevant. I do not agree.

46 I entirely accept that neither the judicial oath to "do right by all manner of people, after the law and usages of this realm, without fear or

- A favour, affection or ill-will” nor judicial experience and training, including the pervasive and persistent ethos of the independence of the judiciary, can wholly insulate even the most rigorous and fair-minded judge from subconscious bias. The fair-minded observer would be aware of that possibility: *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, para 2 (Lord Hope). That is not to say, however, that the
- B fair-minded and informed observer would wholly discount the matters of judicial training, experience and ethos. Taken to their logical conclusion, Mr Gordon’s submission and reliance on *Lawal’s* case would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a case in which a more senior member of his or her chambers was acting for one of the parties.
- C 47 The present case might be different if there was some specific continuing link between the judge’s studies under Professor Baldwin at university and the science involved in the present case, but there is none. There is nothing to indicate that the present dispute will turn on the subject matter of Professor Baldwin’s lectures attended by the judge or the Paper co-authored by the judge mentioned above.
- D 48 As I have said, Mr Gordon drew attention to the passage in the transcript of the hearing on 15 October 2013, in which the judge is recorded as saying that it is not in dispute that the notional skilled person would have been aware of Baldwin’s Rules in 1988 and that they were famous, and that the question is what the notional person skilled in the art “armed with Baldwin’s Rules” and the problem at hand would have concluded. I have also set out the passage in the expert evidence of Professor Davies, for
- E Lundbeck, in relation to that aspect. I pressed Mr Gordon in his reply submissions as to precisely what Lundbeck’s point is on this aspect. He said that there is a crucial difference between knowing about Baldwin’s Rules and using the rules for further action and that is the issue which is in contention and on which there is a real possibility of subconscious bias on the part of the judge.
- F 49 It is to be noted that there was absolutely no reaction by Lundbeck’s counsel in response to the statement of the judge at the hearing of 15 October 2013 now relied upon. Mr Gordon submitted that what the judge said on that occasion would give rise to “a non fanciful concern on the part of the informed observer”. I do not consider that to be the same as the test of “real possibility of bias”. Whether or not it is, I do not consider that the judge’s comments could possibly give rise to any concern on the part
- G of the fair-minded and informed observer.
- 50 It is common ground that Baldwin’s Rules were well known at the relevant time. In *Generics (UK) Ltd v H Lundbeck AS* [2007] RPC 32, which I have mentioned earlier, and in which Professor Davies again acted as the expert witness for Lundbeck, Kitchin J said, at para 85: “Finally, the existence of what had become known as Baldwin’s Rules were well known to organic chemists in 1988. How the skilled person would apply those rules
- H was, however, hotly disputed.” That seems to me to be no different from what the judge said on 15 October 2013. I do not regard the word “famous” as being anything other than an appropriate substitute for “well known”. Nor do I agree that the words “armed with Baldwin’s Rules” shows a subconscious disposition to give an answer to the question proposed by the

judge favourable to Resolution. It is relevant to note that at para 57 of his judgment the judge emphasises that the question for the court to assess “will be the extent to which Professor Baldwin’s opinions reflect the common general knowledge and the perceptions of the notional skilled person, not whether they are genuinely held or even scientifically correct”. In the course of his oral submissions Mr Gordon confirmed that was indeed a correct statement of the relevance of Professor Baldwin’s evidence. All this is consistent with there having been no immediate reaction by Lundbeck’s counsel to what the judge said on 15 October 2013.

51 Once those matters are out of the way, there is simply nothing left that could give rise to any real concern on the part of the fair-minded and informed observer. I do not consider in the circumstances of the present case that the Oxford University Regulation which would have precluded Professor Baldwin from assessing a doctoral thesis of the judge, in view of their relationship as supervisor/supervisee or their co-authorship of the academic paper, is of any relevance whatever to the interaction between the judge and Professor Baldwin as an expert witness some 30 years later.

52 The judge has given entirely cogent and persuasive reasons why the fair-minded and informed observer would not consider it significant that the priority date of the patent, 14 June 1988, was only five years after the judge presented his Part II thesis, or that Baldwin’s Rules were formulated by Professor Baldwin in papers published about five years before the judge started his Part II project, or that stereo chemistry was mentioned in the paper published jointly by the judge, Professor Baldwin and Dr Ziegler to which I have referred above: see paras 63–65 in the judge’s judgment.

Conclusion

53 For all those reasons, I would refuse the appeal.

HALLETT LJ

54 I agree.

SHARP LJ

55 I also agree.

Appeal dismissed.

CELIA FOX, Barrister

Ian Clarke Wilson v HM Senior Coroner for Birmingham and Solihull v Peter Brooks, Alan Tringham, Alan Lucas, University Hospitals Birmingham NHS Foundation Trust



No Substantial Judicial Treatment

Court

Divisional Court

Judgment Date

8 September 2015

Case No: CO/6004/2014

High Court of Justice Queen's Bench Division Administrative Court Divisional Court

[2015] EWHC 2561 (Admin), 2015 WL 5202259

Before: Lord Justice Burnett and Mr Justice Holroyde

Date: Tuesday 8th September 2015

Hearing dates: 22 July 2015

Representation

Neil Garnham QC (instructed by Radcliffes Le Brasseur) for the Claimant.
The Defendants and Interested Parties were neither present nor represented.

Judgment

Lord Justice Burnett:

1. Ian Wilson, the claimant in these proceedings, is a consultant cardiothoracic surgeon formerly employed by University Hospitals NHS Foundation Trust [“the Trust”] based at the Queen Elizabeth Hospital, Birmingham. This claim is concerned with the inquests held into the deaths of three of his patients by Her Majesty's Senior Coroner for Birmingham and Solihull between 23 and 26 September 2014. The claimant complains about a single sentence included by the coroner in her short narrative verdicts in respect of each deceased:

“An historic failure to accurately record post-operative data for all patients resulted in a missed opportunity to identify potential problems at an earlier stage which may have resulted in [the deceased's] operation being dealt with by a different surgeon.”

2. That part of the coroner's conclusion flowed from evidence which had been admitted at the inquest in the teeth of opposition from the claimant. Mr Garnham QC, who appears before the court in these proceedings, but did not appear before the coroner, advanced three grounds in support of the contention that the sentence should be removed by quashing it from each of the narrative conclusions.

- i) It was unfair to rely upon the evidence and reach the conclusion because the claimant was not given a meaningful opportunity to challenge it, in particular by exploring the underlying data which were said to support it;
- ii) The coroner failed properly to explore the evidence relating to the conclusion;
- iii) The conclusion of the coroner in this regard was irrational.

3. The coroner has taken no part in these proceedings but has provided a statement explaining her approach. Similarly, the families of the three deceased, each of whom was represented before the coroner, have taken no part but each has provided written support for the coroner. The Trust, whose medical director Dr David Rosser gave the material evidence, has also taken no part in these proceedings.

Background Facts

4. The claimant was employed as a consultant by the Trust between 1995 and October 2013. The three patients whose inquests were heard together were Peter John Brookes, Alan Charles Tringham and Alan Lucas. Each underwent cardiac surgery at the hands of the claimant. Mr Brookes' operation was on 2 September 2011. He died two weeks later. The coroner recorded a narrative verdict:

“The deceased underwent extensive open heart surgery on the 2nd September 2011. His surgery was more extensive than was necessary. Given the extent of his underlying heart condition he did not require 6 coronary artery bypass grafts. As a result of this additional element to his operation he had a prolonged operation and bypass time which, on balance of probabilities, resulted in additional damage to his heart. This contributed to further heart irritability, arrhythmias and cardiac arrest which occurred immediately after surgery. That episode of cardiac arrest caused a brain injury, which was further exacerbated by a series of cardiac arrests on arrival to the ITU which ultimately led to his death. An historic failure to accurately record post-operative data for all patients resulted in a missed opportunity to identify potential problems at an earlier stage which may have resulted in Mr Brookes operation being dealt with by a different surgeon”

Mr Tringham's operation was on 1 June 2012. He died on 6 June 2012. The narrative verdict was:

“The deceased underwent extensive open heart surgery on the 1st June 2012. His surgery was more extensive than was necessary. Given the extent of his underlying heart condition, he did not require the atrial fibrillation ablation procedure. As a result of this additional element to his operation he had a prolonged operation and bypass time. This coupled with a long cardioplegia time of 62 minutes on balance of probabilities, resulted in additional damage to his heart. This contributed to further heart failure postoperatively leading to multi organ failure and his death. An historic failure to accurately record post-operative data for all patients resulted in a missed opportunity to identify potential problems at an earlier stage which may have resulted in Mr Tringham's operation being dealt with by a different surgeon.”

Mr Lucas's operation was on 26 April 2012. He died nine weeks later on 29 June. The narrative verdict in his case was:

“The deceased underwent extensive open heart surgery on the 26 April 2012. His surgery was more extensive than was necessary. Given the extent of his underlying heart condition he did not require the tricuspid valve repair atrial fibrillation ablation and only 2 of the 3 coronary artery bypass grafts. As a result of these additional elements to his operation he had a prolonged operation and bypass time. This coupled with a long cardioplegia time of 77 minutes on balance of probabilities, resulted in additional damage to his heart. This contributed to further heart failure postoperatively leading to multi organ failure and his death. An historic failure to accurately record post-operative data for all patients resulted in a missed opportunity to identify potential problems at an earlier stage which may have resulted in Mr Lucas's operation being dealt with by a different surgeon.”

5. The hospital had an internal system which monitored the mortality rates for patients of its surgeons. In August 2012 that system picked up a higher than expected mortality rate amongst Mr Wilson's patients which led to an analysis by Professor Pagano of 15 of his patients who had died over a period of 14 months. An internal clinical review was conducted by a panel of three members established in September 2012. A change was made to the complexity of the procedures which Mr Wilson was permitted to undertake. In January 2013 an interim report was published followed by a final report in April 2013. That report identified significant and consistent inaccuracies in the recording of data by Mr Wilson in connection with the operations under scrutiny, in particular with cardioplegia (introduction of fluid into the heart during the procedure) and cardio-pulmonary by-pass times. Further investigation revealed discrepancies, which extended over a number of years, in the recording of aortic cross-clamp times. This resulted in Mr Wilson's dismissal.

6. The data thus far referred to were collected by staff (known as perfusionists) during the operations but subsequently entered onto a database by Mr Wilson. The investigation compared the manual records of the staff with the data subsequently inputted by Mr Wilson. Some of those data are used not only by a surgeon's employer, but collated centrally by the Society of Cardiothoracic Surgeons [“SCTS”] for its monitoring purposes. The suggestion was that Mr Wilson was not transferring the data accurately onto the database, a proposition he accepted during the course of the inquests. There was a dispute in the evidence about the consequences for the patients of the mis-recording of by-pass, cross-clamp and cardioplegia timings. Mr Wilson considered that the long operation times had no adverse impact on the patients' hearts. Others disagreed. Whilst these issues were explored during the inquests, the final sentence in each of the narrative conclusions refers to something else.

The Inquests

7. Dr Rosser is the Medical Director of the Trust. He produced a statement dated 18 July 2014 for the purposes of the inquests, which was disclosed to the interested persons on 4 September. Much of it dealt with the background to the investigation and the problems with the recording of the data already discussed. A further case review was commissioned by the Trust from Professor Wallwork. It was Dr Rosser who referred the information which had been reviewed to the coroner and also to the General Medical Council [“GMC”]. At paragraphs 33 and 34 of his statement, Dr Rosser dealt with the issue that gave rise to the sentence to which Mr Wilson objects:

“33. More recently, subsequent to the publication of more detailed data by the SCTS, concerns were raised that Mr Wilson may have provided inaccurate information to the database about certain aspects of the preoperative condition of some of his patients, specifically whether those patients were receiving intravenous nitrates, indicating unstable angina, and/or suffering from pulmonary hypertension.

34. Investigations into these concerns have demonstrated significant over reporting by Mr Wilson of both of these conditions. This has had the effect of raising the predicted ...rate of death, for Mr Wilson's patients over the last 3 years. Please see chart exhibited hereto and referred to as "DR 1". This consequently makes Mr Wilson's actual mortality rate look artificially low as it is compared to the inflated calculated risk. As the Trust does not have access to national data we are unable to calculate whether Mr Wilson's mortality rates would have triggered an alert from the SCTS, which would have led to an earlier intervention. We have, however, recalculated the Trust's internal monitoring process, run by Professor Pagano, and it is clear that Mr Wilson's mortality would have triggered an internal alert in 2011 which would have led to an intervention at that stage involving at least a restriction in practice."

It is to these matters that the coroner was referring in the impugned sentence. The coroner's interest in this issue was to explore whether Mr Wilson would have carried out the operations on the three deceased patients the subject of the inquests had the internal alert been triggered as suggested by Dr Rosser.

8. The chart exhibited to Dr Rosser's statement contains three lines. The first is the actual mortality rate of Mr Wilson's relevant cohort of patients. The second is the predicted rate produced by the data inputted in respect of the two features mentioned in paragraph 33 of Dr Rosser's statement. The third is the predicted rate for the corrected data. It was the disparity between the corrected data result and the actual mortality rates which it was said would have resulted in precautionary action being taken to restrict Mr Wilson's activities pending appropriate inquiry. In his oral evidence Dr Rosser corrected the relevant date from 2011 to 2010.

9. This issue was touched upon but lightly in Dr Rosser's oral evidence. His evidence covers over 70 pages of closely typed transcript. He was called as the Medical Director with overall responsibility for the quality of care within the Trust. He was questioned closely by the coroner and counsel for the various interested parties on a range of topics including, as one would expect, whether the systems in place within the Trust were adequate for monitoring surgical performance and picking up higher than expected mortality rates. He gave evidence relating the erroneous data entered in respect of the three deceased and also explained the procedures and investigations that followed the alert in the summer of 2012. He was asked questions about the procedures carried out on the three deceased, although he accepted that he was not a cardiologist and would defer to Professor Wallwork on all matters expert to do with the surgery itself. His evidence was punctuated by what seem from the transcript to be too many interruptions from the advocates including some sharp exchanges between advocates which called for adverse comment from the coroner. At times the flow of his evidence is lost and its meaning sometimes difficult to follow from the transcript.

10. On the point in issue in these proceedings arising out of his evidence in paragraphs 33 and 34 of his statement, Dr Rosser accepted that Dr Wilson had not seen the underlying data which had been analysed by different "informatics people". Those data related to a large number of patients. He considered the data "very solid". Dr Rosser explained that the data were entered post-operatively but illustrated a measure of pre-operative risk. In his oral evidence given in answer to questions from the coroner he did not identify Mr Wilson as the author of the incorrect data, as he had done in his statement. He said that had the entries been recorded as that analysis suggested they should have been, a flag would have gone up. The coroner asked what effect that would have had. He answered:

"It's quite a difficult question to answer precisely, because it's very difficult for me to take my mind back to where it would have been back in 2010 with everything I now know. I think it is fair to say that at the very least it would have triggered the same review process that was instigated and I described earlier that led to Mr Wilson's suspension and dismissal. I think this data is more of a flag than actually the flag that we got in 2012. I think it is probably reasonable to say that there's a high likelihood ... so on the balance of probability I think we would have taken more serious

action at that stage. I think the upshot of it being either we would have ended up with the same outcome i.e. Mr Wilson continued to work at [the hospital] or at the very least we would have seen significant alterations to his practice ... We would have stopped ... stopped these prolonged periods of cardioplegia at a minimum.”

The coroner asked whether had a flag gone up in 2010 Mr Wilson would not have performed these operations. Dr Rosser agreed. He referred to the mis-recording of by-pass and other data going back to 2003 (something discovered in 2012 following the deaths of the 15 patients).

11. It is important to unravel this evidence a little. Paragraphs 33 and 34 of Dr Rosser's statement are concerned with the mis-recording of data other than that which related to cardioplegia, cross-clamp and by-pass times. The point that Dr Rosser was making was that had a difficulty been picked up in 2010 about those other data, an investigation would have followed which would have exposed the wider problems with data recording. He said that

“the process of mis-recording of bypass and (inaudible) which were of course the key data in the disciplinary process, on the basis of the mis-recording going back to 2003, I don't see any reason why the outcome of those processes and the chain of events that I've described would be any different. So I think that a flag in 2010 would have most likely have ended, as the later flag did, in Mr Wilson's dismissal.”

12. He later indicated that the total number of patients, going back to 2003, in respect of which there was some mis-reporting was 539.

13. Counsel for Mr Wilson cross-examined Dr Rosser. Mr Garnham referred us to various passages in that cross-examination. He (and indeed the coroner in her statement) cautioned against taking gobbets from the transcripts out of context and emphasised the need to read the entirety of Dr Rosser's evidence.

14. There was an extended exchange between Dr Rosser and counsel about data relating to cardioplegia intervals, and research which had been conducted into a large number of cases (there was confusion about one issue, later cleared up by counsel for the Trust) involving other surgeons by way of comparison with Mr Wilson. The exchange culminated in a discussion about whether the Trust could produce some underlying material relating to that topic. Counsel for Mr Wilson wished to ask questions on that issue based upon an expert's report (Dr Sims) which was not in the possession of the coroner. It was attached to Dr Rosser's statement made for the purposes of the GMC proceedings. It was provided to the coroner and the other interested persons and Dr Rosser was asked questions about it. This topic covers pages 310 to 323 of the transcript. I have dwelt on it only to emphasise that the various references to raw data in this part of the transcript do not relate to the issues in this case.

15. In a passage which begins at page 328, at counsel's instigation, Dr Rosser returned to the point now in issue and paragraphs 33 and 34 of his statement. The context of counsel's questions was that Dr Rosser had explained that cardioplegia intervals and by-pass times were not monitored by the Trust. The trigger which prompted action in 2012 was the higher than expected mortality rate. The trigger or flag which would have prompted action in 2010 would also have been mortality related but by reference to the accurate recording of the use of heparin (a surrogate for unstable angina) and the incidence of pulmonary

hypertension. Dr Rosser recognised, as did the coroner, that neither of these factors was a feature in the cases of the three deceased. At page 332 Dr Rosser summarised the position:

“Concerns were raised about two of the seventeen data points ... One is a surrogate for unstable angina, the other is pulmonary artery hypertension. ... They were brought to me after one of the other cardiac surgeons ... looked at the new data released by the [SCTS's] website. ... [He] noted that Mr Wilson's average incidence of unstable angina and pulmonary hypertension were significantly higher than the national average. The message that relayed through Professor Bigano [said] ... they couldn't understand any legitimate explanation for that.

So I asked our informatics team again to look at the unstable angina issue. ... We could do that relatively quickly because all the prescribing is electronic. So that was the easiest way of seeing if there was any underlying concern behind this data anomaly. ... Two different analysts have to answer this question independently. They discovered 81 patients had been labelled by Mr Wilson on the PATS database receiving one of those two drugs, and therefore having unstable angina, when in fact only four of those patients had any valid prescriptions on the ... system that would appropriately have triggered that marker. Just for clarity, it is against Trust policy and would be an issue of gross misconduct for a nurse to give a drug on paper prescriptions. So it is highly unlikely ... if they were not prescribed on the only legal system for prescribing and giving drugs in the organisation.

The pulmonary hypertension data is not held electronically. So that was a more complex and slower process. We arranged for a cardiology research fellow who had ... no knowledge of the underlying process ... or why we needed this information ... to go through the notes and identify the patients who did have pulmonary hypertension, didn't have pulmonary hypertension ... or those patients [whose] pulmonary blood pressure had never been measured post-operatively. ... I believe it was sixteen who did actually have a measurement over 60 which is the EuroSCORE definition.

The other thing that comes out from that data is that it is 78 patients. I do have that data here. Of the 78 patients labelled as having pulmonary hypertension, 61 of them ... were entered on the database as exactly 65.”

16. This represents a more detailed explanation of the content of paragraphs 33 and 34 of Dr Rosser's statement. Stripped to its bare essentials it comes to this. 81 patients were recorded as being prescribed drugs for unstable angina when the prescription records confirmed that to be the position in only four cases. 78 patients were labelled as having hypertension when analysis of their records suggested it to be the case with only sixteen. The overstatement of these conditions amongst Mr Wilson's cohort of patients resulted in an expectation of higher mortality rates than the correct figures would have generated. That long answer having been given, the coroner again indicated that her interest in this topic was to determine whether “the flag” would have gone up. Dr Rosser added that the figures had been validated on a number of occasions and that the information had been provided to the GMC as part of his evidence and that of Professor Bigano and the Trust's Director of Informatics.

17. It had been the consistent position of those representing Dr Wilson that this evidence was irrelevant, but if it was relevant he should have been provided with all the underlying data to check whether the analysis in respect of both aspects was accurate. By that they meant the medical records of all the patients concerned. Dr Rosser did not have them with him. His reference to having the data with him was to the results of the analyses of both aspects. The coroner had (more than once) indicated her view that this evidence was relevant and also that it was inappropriate in these inquests to embark upon an investigation into the medical records of the 81 patients in the angina cohort and 78 in the pulmonary hypertension cohort. It is unclear to what extent the two overlapped, although it is likely to have been substantially. The coroner restated her position at this stage in Dr Rosser's evidence:

“He’s explained fully why he says the flag would have gone up. ... You’re perfectly entitled to suggest why it might not have gone up, but what we’re not going to be doing in this inquest is analysing all of those cases and all of that data, because that would not be an appropriate way forward, in my view. So you can challenge him generally on those figures.”

18. Counsel then explored the “long answer” and confirmed that two analysts examined the angina drug issue and that a cardiac research fellow had examined the pulmonary hypertension issue. There followed this exchange with the coroner at page 335:

“Coroner: ... Mr Wilson has been completely open throughout all his evidence about the inaccuracies of recordings. Does he have a view in relation to this? Does he accept that they are right or wrong, or not in a position to say so?

Counsel: He cannot do so because he’s not been shown it.

Coroner: Okay. I’m just asking. You might want to turn round. He’s got his hand up. Do you want to speak to him? Thank you.

Counsel: It’s self-evident he’s not in a position to deal with it.

Coroner: Okay.

Counsel: He has a view, but it’s self-evident he’s not in a position to deal with the substance of it. Of course, had it been the intention to lead this evidence then, or my learned friend, the expectation this evidence was going to be led, then I would have expected at least the broad proposition to be put to Mr Wilson by somebody. Anyway, I’ll move on.

Coroner: Well, it was in the statement.”

19. The position was that Mr Wilson had given discrete evidence three times in respect of each death separately. Dr Rosser’s evidence came later. The subject matter of paragraphs 33 and 34 had not been raised during any of those three evidence sessions.

20. Counsel continued his cross-examination of Dr Rosser and explored the precise circumstances in which the mortality rates, judged against the data suggested to be correct, would have caused a flag to go up. Dr Rosser readily accepted that his conclusions rested upon the integrity of the data analysis but added that “it’s been done to an extremely high level of integrity by a nationally and internationally valued team of informaticians.” Beyond observing that they were “employed by you” there was no challenge by counsel during the cross examination of Dr Rosser to the overall conclusions of that team. That observation was not a question but an insinuation which prompted a mild rebuke from the coroner. This led to a renewed request from counsel for all the underlying medical records. He added:

“There are two ways you can deal with this. One, you do what I may have to ask you to do, which is to give me an adequate period of time to address it. Alternatively, you take the view that this is an issue that is best addressed by the General Medical Council, and you know that Dr Rosser has referred this issue to the General Medical Council. I'm not suggesting you dismiss it, but whatever you do with it, you have to deal with it fairly for the family and fairly for Mr Wilson. That's all I'm suggesting.”

Counsel for all the other interested parties supported the coroner's stated approach.

21. There are two further aspects of what occurred at the inquests which I must note. First, at their outset, counsel for Mr Wilson developed submissions on paragraphs 33 and 34 of Dr Rosser's statement both as to relevance and the “more important ground”, fairness. The fairness argument was in support of the complaint about the absence of raw data. He added:

“We have some limited information from a separate source, but via Dr Rosser. From that, it appears that the Trust looked at 78 cases. Mr Wilson has not seen the notes for any of those cases.”

Mr Garnham has explained that that was a reference to an exhibit to a statement from Dr Rosser in the GMC proceedings which contained the results of the analysis of the data, albeit not the underlying medical notes. We have not seen it but it seems to be the “data” Dr Rosser himself suggested he had with him at the inquests. There was no authority from the GMC to disclose that exhibit into the inquest proceedings. It was, however, a document which came from Dr Rosser (as had Dr Sims' report which was produced into the proceedings) emanating from the Trust's investigation. The GMC were not asked by Mr Wilson's team to authorise the use in the inquest of any material which had come to him through them. Since it was the Trust's document and Dr Rosser indicated he had it with him, the Trust might have agreed to its being introduced in evidence. Dr Rosser's reference to it would suggest he was not concerned. If it was felt by Mr Wilson's team that its use in that way would place him in difficulty with the GMC, as to which I express no view, the coroner could have been invited to use her powers to compel its production: see [section 32 and schedule 5 of the Coroners and Justice Act 2009](#). Be that as it may, Mr Wilson, as was accepted by his counsel at the inquest, had sufficient insight into the exercise that had been undertaken to produce the analyses in question for it to be suggested that he might give evidence on the topic.

22. Secondly, towards the end of the inquest, counsel for Mr Wilson produced written submissions dealing with this issue and also returned to the topic in oral argument. Mr Garnham submits that there was confusion at the inquest over whether the historical mis-reporting related to angina and pulmonary hypertension or the issues concerning the deceased, namely cardioplegia, cross-clamp and by-pass times. I accept that it was a concern of counsel for Mr Wilson but time and again the coroner made clear that her interest was in the flag that it would have raised. For example, at 404:

“But we went over this so much yesterday and my understanding, which I think everyone else understands, is it doesn't apply to these three patients. The point is that accurate recording of the data would have flagged a trigger on other patients and mortality which would have put a chain of dominoes that would have fallen. That was Dr Rosser's evidence.”

23. In his oral submissions counsel repeated an argument that had been rejected by the coroner on multiple occasions, namely that Dr Rosser's evidence on this aspect was irrelevant. At page 411 counsel again pressed the point that the evidence did not relate to by-pass or cross-clamp times and yet again the coroner explained what its relevance was. Counsel's written submissions had been circulated in advance of the round of oral submissions. The first part of those written submissions repeated the relevance argument. The second part was entitled "Fairness". It included this paragraph:

"It should be understood that Mr Wilson does not accept the validity of the review. It is fundamentally unsound. The reasons for this can be set out in submissions or explored in evidence with Dr Rosser. Whilst Mr Wilson could be recalled to confirm that he does not accept the validity of the review it is suggested that this is probably not necessary."

Counsel submitted that it was unfair to expect Mr Wilson to deal with this in the absence of disclosure of all the underlying data; and that even were it to be disclosed it would not be possible to deal with it in the inquest. He submitted that the GMC was better suited to deal with the issue.

24. The explanation of why the review (I infer both as to angina and pulmonary hypertension) was fundamentally unsound was not given by counsel in his oral submissions. Nor was it suggested that Dr Rosser should be recalled so that the reasons could be explored with him. Furthermore, it was not suggested that Mr Wilson should be recalled to deal with it. As we have seen, Counsel had raised the latter possibility in his written submissions. Counsel for one of the interested persons indicated that he would be more than happy for Mr Wilson to be recalled, but the point was not pressed.

Submissions

25. Mr Garnham submits that the essential unfairness to Mr Wilson was that he was not given a proper opportunity to deal with the evidence of Dr Rosser which has resulted in a serious adverse finding against him. That finding has two components namely (a) a conclusion that data were mis-recorded; and (b) that had they been accurately recorded the consequence may have been that Mr Wilson would not have performed the operations on the three deceased. Mr Garnham submits that although not named in the sentence, the reference to a different surgeon is a clear contrast with him. He also submits that the use of the passive "an historic failure to record data" carries the implication that it was Mr Wilson himself who entered inaccurate data, rather than others. He relies upon dicta in *Vogon International Limited v the Serious Fraud Office* [2004] EWCA Civ 104 and *MRH Solicitors Ltd. v The County Court Sitting at Manchester* [2015] EWHC 1795 (Admin) concerning findings of dishonesty made by judges against a party (Vogon) and solicitors for a party (MRH) when it had not been suggested, pleaded or put. Mr Garnham also submits that in the absence of a proper exploration at the inquest of the underlying data supporting the conclusions advanced by Dr Rosser in his evidence the coroner failed in her duty of investigation and, furthermore, could not rationally conclude as she did.

Discussion and Conclusions

26. An inquest is the culmination of an investigation which must determine how, when and where the deceased came by his death: section 5 of the 2009 Act. As Sir Thomas Bingham noted in *R v North Humberside Coroner, ex parte Jamieson* [1995] QB 1, it is for the coroner fully, fairly and fearlessly to investigate deaths and it is for the coroner to set the bounds of the inquiry: see general conclusion 14. An inquest is an inquisitorial process and not comparable to a criminal trial or civil proceedings. Lord Lane CJ memorably stated in *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625, DC:

“Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should not be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.”

27. Fairness in an inquest must be fashioned in an environment where there are no pleadings and in which those given leave to appear as interested persons do not have a case to put. The evidence at inquests often takes an unexpected turn and calls for a degree of flexibility in the procedure to be followed as a consequence. The rules of evidence applied in criminal and civil proceedings do not apply. Questions of fairness to those involved in inquest proceedings must be judged against all these essential features and also in the context that the statutory scheme prohibits a finding of criminal liability on the part of a named person, or of civil liability.

28. Vogan is authority for the proposition that in civil proceedings a judge should not find that a claimant had pursued a dishonest claim when such a suggestion had not been made in the course of those proceedings or put to any witness. At paragraph 29 May LJ said:

“It is elementary common fairness that neither parties to litigation, their counsel, nor judges, should make serious imputations or findings in any litigation when the persons against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves.”

29. MRH concerned allegations of dishonesty made against the claimant's solicitors and others involved following a road traffic accident which the judge concluded was “staged”. The defendant, whilst pleading that the accident was staged and the claims were fraudulent, had pleaded expressly that it was not his case that the solicitors, or claims management or hire companies, were participants in the fraud. The judge encouraged the defendant's counsel in the course of the hearing to allege dishonesty against the solicitors and others. That invitation was declined. Dishonesty was thus never suggested in the course of evidence or argument. The judge nonetheless made findings of dishonesty against the solicitors and companies, which this court decided were impermissible.

30. Both these cases are far removed from the circumstances surrounding the evidence foreshadowed in paragraphs 33 and 34 of Dr Rosser's statement. I shall endeavour to explain why.

31. The starting point is that Mr Wilson was aware of the suggestion by the Trust that his data relating to angina and pulmonary hypertension had been inaccurately recorded, although we are told that he received evidential material relating to it only very shortly before the inquests began. The evidence relating to it had been provided to the GMC by Dr Rosser and served upon Mr Wilson, with detail of the underlying analysis albeit without the medical records of the 80 or more patients whose

records had been examined. Overshadowing all of the consideration of the issue at the inquest was the fact that the GMC was seized of a complaint relating to that very issue. Indeed, it is clear that the aim of Mr Wilson and his advisers, as the written submissions from which I have quoted make plain, was to keep this issue out of the inquest and reserve it to the GMC. Mr Wilson was not entirely taken by surprise when the matter emerged in Dr Rosser's statement for the inquest.

32. I readily accept that material provided to Mr Wilson in the GMC proceedings could not be used for a different purpose without authority. The status of Dr Sims' report, which the transcript suggests had also come to Mr Wilson through the GMC, did not prevent its use in the inquests. As I have already indicated, there were mechanisms that would have enabled the additional material attached to Dr Rosser's statement to the GMC to be deployed by Mr Wilson had he wished to do so. He did not wish to do that for reasons which are entirely understandable, but he cannot complain about any consequential disadvantage that flowed in the inquest proceedings. In the exchange quoted at paragraph 18 above, the coroner sought to understand whether Mr Wilson disputed the evidence relating to angina and pulmonary hypertension. Beyond being told Mr Wilson had a view about it, which was not explained, the opportunity to engage with the evidence was not taken up. The observation made by counsel that someone should have put Dr Rosser's paragraphs 33 and 34 to Mr Wilson whilst he gave evidence about the individual patients suggests an approach akin to civil or criminal proceedings which was not in keeping with the inquisitorial nature of the inquests and the status of interested persons (not parties). I read the coroner's intervention at this point as amounting to an invitation to Mr Wilson to explain his position regarding this evidence.

33. The written submissions suggested that counsel might explain Mr Wilson's reservations about the analysis which underpinned paragraphs 33 and 34 of Dr Rosser's statement, but that did not happen. The same written submissions canvassed the possibility of questioning Dr Rosser further on the topic but that too was not pursued. That Mr Wilson might give evidence on the topic, being recalled for the purpose, was mentioned but effectively discounted on his behalf.

34. The expanded answer given by Dr Rosser on the substance of the analyses suggested that only one in twenty patients noted as receiving drugs for unstable angina was confirmed by the prescription records. 78 patients were labelled as having pulmonary hypertension when the records suggested the true number was 16. Furthermore, there was the improbable fact that a large number of those so labelled had the same score, namely 65. In respect of both measures, the inaccurate data were far removed from the average expected. There is every reason to suppose that Mr Wilson could have explained, if it be the case, that the figure of only one in twenty confirmed by the computerised prescription records was wrong. So too the apparent substantial over-reporting of pulmonary hypertension and the coincidence of so many recordings at 65. For the purpose of dealing with these stark inconsistencies, the medical details of the patients were unnecessary. It was explicitly stated in the written submissions that Mr Wilson had serious reservations about the figures. The submissions indicated that an explanation would be provided but that did not happen.

35. In these circumstances I am unable to accept the submission made on behalf of Mr Wilson that he did not have adequate notice of the point or have an opportunity to deal with it before the coroner came to her narrative verdict. In reaching that conclusion I also reject the submission that the only way which the matter could be dealt with fairly, alternatively adequately (which I use as shorthand for the second way in which Mr Garnham advances the point), was to explore the individual medical records of the 81 or more patients and the prescription records. The coroner took the view that the purpose of exploring this aspect of the evidence was to determine whether an alert would have been triggered and that it was unnecessary to delve into the detail of the individual records (even had they been available). As Jamieson confirmed, it is for the coroner to determine the scope of the inquest. This decision was taken by the coroner in a context, it should not be forgotten, where Mr Wilson was aware of the issue and could have engaged with it. In my judgment there was no public law error in her approach.

36. Furthermore, whilst I accept that the impugned sentence clearly pointed to Mr Wilson as the surgeon who may not have operated on the three deceased patients had the "flag gone up", the coroner was careful not to identify him as the person who

recorded the inaccurate data. That was consistent with the original oral evidence of Dr Rosser, who also did not identify Mr Wilson as the source of the inaccurate data, albeit that his expanded explanation did so.

37. On the evidence before her, the coroner was entitled to come to the conclusion she did. It cannot be described as irrational.

38. Informing each of the three grounds advanced on behalf of Mr Wilson are two complaints about Dr Rosser. First, it is said that he was not independent because he reported the concerns about inaccurate data to the GMC and was involved in the process that led to Mr Wilson's dismissal. Secondly, he was not expert in the matters which were the subject of analyses in question. Both propositions are correct but do not lead to the suggested conclusion that his evidence of this issue should have been discounted by the coroner. The first might go to the question whether to accept the evidence, were there any suggestion that it was unreliable because of some animus, conscious or unconscious against Mr Wilson. The transcript does not support such a suggestion. The second raises the point that this part of Dr Rosser's evidence was hearsay. That might lead to some caution in accepting it but, as I have already indicated, no basis for questioning the underlying analyses of the raw data was ever given by or on behalf of Mr Wilson.

39. I would dismiss this claim for judicial review.

Mr Justice Holroyde

40. I agree.

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Court of Appeal

Sarabjeet Singh v Secretary of State for the Home Department

[2016] EWCA Civ 492

2016 May 11; 27

Davis, Beatson, Lindblom LJJ

Tribunal — First-tier and Upper Tribunals — Practice and procedure — Appeal to Upper Tribunal on grounds of bias or misconduct on part of First-tier Tribunal — Guidance as to procedure to be followed

Guidance as to the procedure to be followed by the Upper Tribunal when hearing an appeal on the grounds that there has been bias or misconduct on the part of the First-tier Tribunal (post, para 53).

APPEAL from the Upper Tribunal

The appellant, Sarabjeet Singh, appealed against a decision of the Secretary of State contained in a letter dated 5 August 2013 refusing his application for indefinite leave to remain. In a determination promulgated on 28 February 2014 the First-tier Tribunal (Immigration and Asylum Chamber) (Judge Cohen) dismissed his appeal. The appellant appealed on the ground of apparent bias. By a decision dated 21 August 2014 the Upper Tribunal (Deputy Judge Parkes) dismissed the appeal, determining that, inter alia, the appellant had had a fair hearing.

By an appellant's notice filed on 11 February 2015, and pursuant to permission granted by the Court of Appeal (Burnett LJ) on 19 May 2015, the appellant appealed on the grounds that the First-tier Tribunal judge had made remarks at the outset of the appeal hearing before him which indicated he had a closed mind and/or had prejudged the appeal and so the hearing was unfair and that on appeal to the Upper Tribunal the judge failed to apply the correct legal test to the issue raised and therefore failed properly to address the relevant points.

The facts are stated in the judgment of Davis LJ, post, paras 4–28.

Anton Van Dellen (instructed by *Abbott Solicitors LLP, Luton*) for the appellant.

Christopher Staker (instructed by *Government Legal Department*) for the Secretary of State.

The court took time for consideration.

27 May 2016. The following judgments were handed down.

DAVIS LJ

Introduction

1 This appeal is founded on an assertion of apparent bias. It is said that the First-tier Tribunal judge (“FTTJ”) of the Immigration and Asylum Chamber made remarks at the outset of the appeal hearing before him which indicated that he had a closed mind and/or had prejudged the appeal. It is said that the hearing was in consequence unfair. It is further said that, on appeal to the Upper Tribunal, the Upper Tribunal judge (“UTJ”), in dismissing the appeal, failed to apply the correct legal test to the issue raised and, in consequence, failed properly to address the relevant points.

2 Leave to appeal to this court was granted by Burnett LJ on 19 May 2015.

3 Before us the appellant was represented by Mr Van Dellen. The respondent Secretary of State was represented by Mr Staker. Neither of them appeared below. I would say at the outset that the way in which this issue was approached by the parties below and those who represented them has scarcely helped in its resolution, whether by the UTJ or by this court.

Background

(1) The decision of the FTTJ

4 The appellant was born in India in 1967. On 5 July 2012 he made an application to the Secretary of State for indefinite leave to remain, on the basis of asserted 14 year long residence in the United Kingdom. The appellant claimed to have arrived in the United Kingdom

clandestinely and unlawfully in March 1997 and to have resided in the United Kingdom since then. By a decision letter dated 5 August 2013 the Secretary of State refused the application. It was not accepted that the applicant had arrived in the United Kingdom in 1997 as he claimed. It was noted, among other things, that the appellant had provided no documentary evidence of residence prior to July 2008, notwithstanding a prior request by the Home Office for any such documentation. There was also a lack of other evidence relating to the alleged residence. Overall, the application was rejected by reference to paragraphs 276B and 276D of the 276B of the Statement of Changes in Immigration Rules (1994) (HC 395). The application was also refused on family life/private life grounds.

5 The appellant appealed. The matter came on for hearing before FTTJ Cohen sitting at Hatton Cross on 19 February 2014. The appellant was represented by counsel, Mr Mohsin Aslam. The Secretary of State was represented by counsel (although described on the front page of the determination as a presenting officer).

6 At the conclusion of the hearing, the FTTJ took time—as is the required practice—to produce his determination in writing. It was promulgated on 28 February 2014. It is, on its face, a detailed, careful and thorough determination, extending to 32 paragraphs.

7 The FTTJ recorded, in summary, the contents of the Secretary of State's decision letter. He then fully summarised the appellant's evidence and case. Among other things it had been said that the appellant had only secured long term accommodation in 2008 and so only had documentation from then: although he did produce at the hearing (although not previously produced to the Secretary of State) one medical attendance record for 2005. He said that he had lived and worked illegally, being paid in cash, keeping no bank account, paying all his bills in cash and not claiming benefits. From 1997, on his arrival in the United Kingdom, he had been offered accommodation by Sikh friends met at the Gurdwara in Hounslow.

8 In the course of his determination the FTTJ noted that the appellant had produced no documentary evidence to support his claim that he had arrived in the United Kingdom in 1997. The FTTJ said that there would be at least some documentation to support the claim of arrival before 2005. He said: "I find the fact that there is not to be indicative of the fact that the appellant simply did not come to the UK in 1997 as claimed by him."

9 The FTTJ further noted that, notwithstanding the asserted length of his residence, the appellant spoke only very broken English and required an interpreter. It was also noted that, aside from one witness (Mr Rashpal Singh Sidhu), the appellant adduced no evidence or even letters from people he had met at the Gurdwara or otherwise or with whom he had lived to support his claims.

10 It was the appellant's case and evidence that he had resided with Mr Rashpal between 1997 and 2002 at a room at his house. Mr Rashpal gave evidence to like effect, even claiming in oral evidence that he remembered the precise date—5 April 2002—when the appellant moved out. The FTTJ recorded, at some length, numerous and significant discrepancies both in and between the oral evidence of the appellant and of Mr Rashpal. The FTTJ did not find them to be witnesses of truth. He found as a fact that they did not reside together between 1997 and 2002. The FTTJ further found that the appellant had not started continuously to reside in the United Kingdom until 2008.

11 There was no evidence of the appellant having a family life in the United Kingdom. It was accepted that he had established a private life: but interference with that by removal was adjudged to be proportionate, in the circumstances of the case.

12 On the face of it, therefore, this was a thorough and properly reasoned determination, which had made unassailable findings of fact and which had drawn conclusions appropriate to those findings of fact.

(2) The appeal to the Upper Tribunal

13 The appellant sought permission to appeal to the Upper Tribunal.

14 After the hearing before the FTTJ and for the purposes of the proposed appeal Mr Aslam made a witness statement. It is dated 7 March 2014 (that is, over two weeks after the hearing). It reads as follows:

"1. I was the advocate at the above appellant's hearing on 19 February 2014 at Hatton Cross before Immigration Judge Cohen instructed by Gramdan Solicitors.

"2. At the beginning of the hearing I handed my skeleton argument to Immigration Judge Cohen. He addressed the appellant in the usual way and introduced himself. During his introduction he stated to the appellant that he did not agree with my skeleton argument that documentary evidence was of lesser importance in such

appeals. In his view documentary evidence was of utmost importance and the absence of documentary evidence could not satisfy him that the appellant had been in the UK. He went on to say that if I did not agree with him then I could appeal his decision.

"3. In my view the Immigration Judge's comments were wholly inappropriate as he was addressing the appellant before hearing any evidence and giving a clear indication that he had already made his decision. The Immigration Judge's comments visibly unsettled the appellant.

"4. During the course of the hearing the Immigration Judge continually interrupted both examination in chief and cross examination to ask his own questions to the appellant. The Immigration Judge was aggressive in his tone and manner, which I believe affected the evidence of the appellant. I declare that this statement is true to the best of my knowledge and belief."

15 Grounds of appeal were lodged. Among other things, it was said that the FTTJ had demonstrated bias in prejudging the appeal and addressing his views directly to the appellant at the outset of the hearing. It was also said that "undue pressure" was placed on the appellant during the hearing "adversely affecting his evidence." It was said that the appellant was "unsettled as a result of the judge's inappropriate comments and behaviour".

16 Those allegations comprised two paragraphs of the grounds. The remaining nine substantive paragraphs of the grounds were devoted to an attack on the FTTJ's findings and reasoning and on asserted failures on his part to deal properly with the evidence or with the appellant's article 8 rights.

17 Permission to appeal to the Upper Tribunal was granted by another judge on 6 June 2014. It was said: "Subject to establishing the facts, the way the judge conducted the hearing arguably amounts to an error of law". It was further stated that the remaining grounds could also be argued.

(3) The hearing before the UTJ

18 The appeal came on for hearing before Deputy Upper Tribunal Judge Parkes on 21 August 2014. The appellant had by now instructed new solicitors. He was (perhaps unsurprisingly) represented at the appeal by other counsel: not Mr Aslam. The Secretary of State was represented by a presenting officer: not the advocate who had appeared before the FTTJ.

19 Mr Aslam was not tendered to give oral evidence. No explanation for that is recorded in the UTJ's subsequent determination: and we ourselves, on inquiry, were given no explanation. There is, at all events, no suggestion that the respondent had stated in advance of the hearing that she agreed Mr Aslam's evidence and did not require his attendance. It looks, therefore, as though the appellant had simply proposed to proceed by reference, on this issue, to Mr Aslam's written statement: and the hearing then proceeded accordingly.

20 It may also be noted that the appellant himself put in no witness statement and gave no evidence about what had happened at the first hearing or to support Mr Aslam's assertions about the impact on the appellant.

21 A further feature of the hearing is that the UTJ was given no information, either in the form of a statement or note or even on instructions, of the recollections of the advocate who had appeared before the FTTJ. We asked Mr Staker about this. He was not able to assist. I did not gain the impression that that had been a deliberate decision on the part of the respondent in the light of what would be argued to be a wholly deficient statement of Mr Aslam: rather, it looks as though no one had applied their minds to obtaining the advocate's recollections.

22 Mr Staker did tell us that shortly before the hearing of the appeal before this court contact had been made with that advocate. Wholly unsurprisingly, she now has no recollection of events at the hearing before the FTTJ. Mr Staker also, during the course of the hearing before us, produced a short pro-forma document cursorily completed by the advocate after the hearing at Hatton Cross. Although we looked at it de bene esse, I would accept Mr Van Dellen's objection and would decline, in the circumstances, to have regard to it as evidence at this late stage.

23 In the event, the UTJ was left to deal with this issue, on the appellant's case, by reference to Mr Aslam's short written statement of 7 March 2014. However, the UTJ did have other material available to him. This was in the form of a note dated 22 July 2014 from the FTTJ himself. It appears that, entirely appropriately, the Upper Tribunal had caused such a note to be obtained from him in view of the appellant's present allegations.

24 This gives rise to another problem. For whatever reason, the note, or any copy, can no longer be located. The Upper Tribunal seems to have misplaced it. When eventually contacted on this, the FTTJ himself by then no longer had retained any of his papers. The parties had no

copy. Mr Van Dellen (who was himself instructed by solicitors other than those who represented the appellant below) in fact alluded to difficulties in obtaining papers—or indeed co-operation—from those previously instructed.

25 This court is thus reliant on the UTJ’s description of that note. The UTJ did not set out in his determination its contents verbatim. Instead, he summarised it: doing so, moreover, in a way which seems in places to have interwoven the UTJ’s own comments. Before describing that note, the UTJ had fully and accurately summarised the statement of Mr Aslam. Having done so, the UTJ said:

“The judge replied, and I have a note dated the 22 July 2014. He noted that there had been in fact no complaint about his behaviour to the resident judge at Hatton Cross and it follows obviously therefore no application to the First-tier that the hearing should simply be reheard by somebody else. He confirms that he had stated to the appellant and the representative that in long residence cases documentation was of great importance as one would expect someone who had resided in the UK for 14 years to have gathered significant documentation during that time, although I recognise that for someone [not] residing in the UK legally documentation may be more difficult to produce. He addressed both the appellant and the representatives. Obviously if there was a disagreement then that would lead to an appeal.”

26 The UTJ rejected this ground of appeal. He summarised the appellant’s case as being one that the FTTJ had conducted the hearing unfairly. The decision of the UTJ was that the manner of the conduct of the hearing was not flawed and that the appellant had had a fair hearing. The UTJ observed, in fact, that complaints often can apply the other way: viz that appellants are *not* sufficiently made aware of points which are on a judge’s mind. The UTJ went on to say that the FTTJ had been entitled to ask questions and entitled to find the appellant as “frequently evasive.” The UTJ found that it was not shown that the appellant had been unsettled or unable to put his case or that the FTTJ had prejudged the issue in question. The complaint was adjudged to have “no merit”. The UTJ said: “I have no hesitation in rejecting it.”

27 The remainder—indeed the majority—of the UTJ’s determination deals with all the other grounds. As to those, the UTJ found that the FTTJ’s assessment of the evidence was entirely proper and his determination gave entirely sufficient reasoning. Overall, there was no error of law in the determination.

28 For completeness, I should add that the appellant sought to pursue in his appeal to this court those further, substantive, grounds which had failed before the FTTJ and UTJ. Burnett LJ refused permission on those aspects, however: and so it is that this appeal is confined to the argument based on bias.

The legal approach

29 Mr Van Dellen made clear to us that he was not alleging actual bias on the part of the FTTJ. His argument was based on apparent bias.

30 There was no real dispute before us as to the relevant principle and required approach. It is conveniently encapsulated in the statement of Lord Hope of Craighead at para 103 of his speech in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The ultimate question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

31 We were also referred to *Southwark London Borough Council v Jiminez* [2003] EWCA Civ 502; [2003] ICR 1176. That was a case on rather special facts where, after much of the evidence had been concluded and when a two month adjournment was looming, the chairman of the employment tribunal made some observations, described as “preliminary views”, which were to a degree very critical of the employer and which encouraged settlement. It was held that such remarks, viewed objectively, did not give an appearance of bias.

32 In his judgment Peter Gibson LJ recorded that it was common ground that the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias: para 25. He also said, however, that he had “some difficulty” in understanding why a strongly held view could not be a provisional view: para 38 (he was, of course, speaking in the context of a case where the views were expressed to be preliminary views). He nevertheless alluded to the need for caution in a judge indicating current thinking as “it is easy to be misunderstood, particularly if the views are expressed trenchantly”: para 40.

33 The distinction between an objective approach and a subjective approach is well illustrated by the case of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330; [2007] ICR

1126. In that case it was accepted that the tribunal chairman's subsequent explanation to the appeal tribunal acquitted her of actual predetermination of the case. Nevertheless the position had become irretrievable; the subsequent explanation did not displace, in the light of the written pronouncements that had been made at the time, the perception that a fair-minded and informed observer would have formed, to the effect that there was a real possibility that the chairman had a concluded view or closed mind as to the employee's prospects of success: see, in particular, at paras 18 and 23–24 of the judgment of Maurice Kay LJ.

34 In *Arab Monetary Fund v Hashim (No 8)* (1993) 6 Admin LR 348, 356 Sir Thomas Bingham MR had said (in giving the judgment of the court):

“But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be.”

35 I would respectfully agree. Indeed, such statements sometimes can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed. In general terms, there need be no bar on robust expression by a judge, so long as it is not indicative of a closed mind. In fact, sometimes robust expression may be positively necessary in order to displace a presumption or misapprehension, whether wilful or otherwise, on the part of an advocate or litigant on a point which has the potential to be highly material to the case.

36 One other feature of the approach required to be adopted in this context is this. It is necessary to consider the proceedings *as a whole* in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased: see *Lodwick v Southwark London Borough Council* [2004] EWCA Civ 306; [2004] ICR 884, para 18 (per Pill LJ); *AB (Turkey) v Secretary of State for the Home Department* [2007] EWCA Civ 1535 at [25] (per Buxton LJ).

The arguments

37 Mr Van Dellen's arguments came to this. Closely and carefully read, Mr Aslam's statement showed that the initial remarks to the appellant by the FTTJ—made before any evidence had even been received—were, looking at the matter objectively, such as to give rise to a reasonable apprehension of bias. He submitted that such remarks gave rise to a perception, taking the required objective approach, that the FTTJ had either prejudged the case or had a closed mind. The FTTJ was, he said, indicating at the outset a settled view that the lack of documentation was fatal to the case: and the subsequent determination was simply the product of a mind which had been closed. Mr Van Dellen accepted that judges are within reason entitled, at an early stage of the hearing, to express preliminary views, even in trenchant terms. But in the present case, he submitted, the views were not stated to be preliminary or provisional and were expressed in unqualified terms: as reinforced by the reference to appealing. He further submitted that on appeal the UTJ had failed to deal with the matter by considering the objective approach laid down in *Porter v Magill*: even if the FTTJ had not in fact prejudged the case, the focus still had to be on the perception arising.

38 I must record that Mr Van Dellen did not pursue the complaints about the FTTJ continuously interrupting in the course of questioning in what was said to be an “aggressive tone and manner” or that the appellant's evidence was adversely affected. Not only were those allegations in Mr Aslam's statement wholly unparticularised they also had no support from any evidence of the appellant himself. It is clear enough that the appellant had been able to present his case in full.

39 For his part, Mr Staker queried if there was any real practical distinction which on occasion Mr Van Dellen maintained between prejudging a case and approaching a case with a closed mind. At all events, he said, viewing the matter both objectively and as a whole the appellant had simply failed to establish a case of apparent bias. The brief written statement of Mr Aslam was wholly insufficient to make out such a case.

Decision

40 It is regrettable that the way in which this case was dealt with below has meant that this court was in effect being required by Mr Van Dellen to construe the witness statement of Mr Aslam as though it were some statute or commercial contract.

41 The statement was made some two weeks after the hearing. It will have been based on Mr Aslam's recollection (he exhibits no contemporaneous note). He does not purport to set out the precise words which the FTTJ used; nor does he make clear if what was said was all said in one go or whether it was the product of an exchange.

42 In circumstances such as these the actual words used, just as much as the context and manner in which they are said, are all important. At all events, I can see no objection at all to the FTTJ stating, and at any early stage, that he did not agree with Mr Aslam's submission in his skeleton argument that documentary evidence was of lesser importance in these kinds of appeal. Not only was that a perfectly proper view for the FTTJ to hold, it was entirely in order for him so to say with a view to avoiding any misapprehension on the part of Mr Aslam in thereafter conducting the appeal to the appellant's best advantage.

43 I am not impressed by the assertion that these remarks were addressed "to the appellant". They may have been made in introductory comments. But they were of a legal nature and Mr Aslam would have been sitting or standing very close to the appellant. The UTJ's description of the FTTJ's note of 22 July 2014 also shows that was the FTTJ's own intention and perception. There is no reason whatever to reject that. The appellant himself, moreover, has given no evidence on that point or as to his understanding—if he had one—of what the FTTJ was saying.

44 The next sentence in paragraph 2 of Mr Aslam's statement is in indirect language. It does not purport to recite the actual words used. Mr Van Dellen latched on to the words "was of the utmost importance"; but that does not necessarily reflect the FTTJ's exact words. Moreover this sentence contains two separate propositions said to have been made by the FTTJ—and the incorrect grammar, furthermore, confirms that only the gist of what was recalled to be said is being attempted to put forward. It was in fact the second part of this sentence on which Mr Van Dellen particularly focused. However, it is noticeable that the FTTJ's Note of 22 July 2014 (as summarised by the UTJ), accepts in general terms that it was said that in long residence cases documentation was of "great importance". But it does *not* accept that it was said that, in the absence of such documentation, the FTTJ could not be satisfied that the appellant had been in the United Kingdom for the requisite period. It is true that there is then the reference to an appeal. But quite to what part of what had previously been said that comment (as recorded by Mr Aslam) attached is not, to my mind, at all clear: it could just as readily attach to the proposition that documentation was of great importance, which was the statement that the FTTJ himself accepted having made.

45 As I have said, the matter has to be looked at as a whole. What Mr Aslam seeks to say is also not consistent with the actual promulgated determination. It may be that there are cases where the statements or behaviour, as established, of a judge at the earlier stages of a hearing are such that they simply cannot be retrieved by the ultimate judgment itself. But reference to that judgment may, as in this case, be appropriate where the court considering an allegation of bias is seeking to ascertain the precise words which have given rise to the allegation. If the FTTJ's settled and stated view had been to the effect that the absence of documentation for the period before 2005 was fatal for the appeal he could have decided the appeal in short order on this point. But he did not. On the contrary, in his promulgated determination he said that the absence of relevant documentation was "indicative" of the fact that the appellant had not arrived in 1997. Thereafter the FTTJ went on to deal in considerable detail with the appellant's actual evidence, and the evidence of Mr Rashpal, in rejecting his case: as well as noting the appellant's very poor English and the failure to produce any other witness evidence and so on. Mr Van Dellen asserted that the mischief had by now occurred and that this determination was simply the product of an already closed mind. But that assumes that what Mr Aslam says is wholly accurate and complete. The point is that the promulgated determination of itself casts doubt on the accuracy and completeness of Mr Aslam's recollections. Moreover, Mr Van Dellen's approach scarcely acknowledges a judge's proper functions in accordance with his judicial oath.

46 It is also, to my mind, a noteworthy and relevant point that it seems that Mr Aslam at no stage at the hearing sought to protest or to ask the FTTJ to recuse himself. Nor was any subsequent application made to have a re-hearing.

47 Ultimately it is for an appellant to show, on the facts, that there is a real possibility of bias, applying the objective test set out in *Porter v Magill*. The witness statement of Mr Aslam, unsupported by any supplementary evidence of Mr Aslam or any evidence of the appellant himself and when set in the context of the FTTJ's own note (as summarised by the UTJ) and in the context of the proceedings taken as a whole, in my judgment is insufficient to show a real possibility of bias.

48 It is true that the UTJ did not expressly set out the *Porter v Magill* test. But in substance he was focusing on the issue of fairness and apparent fairness. The UTJ found that the evidence did not show that the FTTJ had prejudged the issues in question. The UTJ clearly had not been satisfied that the statement of Mr Aslam sufficed to make out the case. I think that his overall conclusion was a proper one; and in any event—given that the appellant’s case rested entirely on the witness statement of Mr Aslam—this court has been able to make its own assessment of the matter.

49 In the result, therefore, I would dismiss this appeal.

Postscript

50 In granting permission to appeal (on the “some other compelling reason” ground) Burnett LJ indicated that this case might afford an opportunity for this court to indicate how such allegations should be dealt with on an appeal to the Upper Tribunal (Immigration and Asylum Chamber). Mr Van Dellen adopted this suggestion. He said that such guidance could be very useful, especially where, not infrequently, parties act in person before First-tier Tribunals and where, necessarily, tribunals in practice have sometimes to take on something of an investigatory role. Mr Staker on instructions opposed, at least initially, any such suggestion.

51 There is, as we were told, no tribunal rule on this point. Nor is there any other practice direction or practice statement or Guidance Note issued in the Upper Tribunal (Immigration and Asylum Chamber) of a kind corresponding to that issued in the Employment Appeal Tribunal. That gives detailed guidance (at para 13) with regard to appeals based on an attack on an Employment Tribunal judge’s conduct or on alleged bias: *Practice Direction (Employment Appeal Tribunal: Procedure) 2013* [2013] ICR 1382. Presumably the volume of complaints of that kind in employment cases has been such as to cause it to be considered necessary to have a practice direction covering that point: which, of course, also creates a desirable consistency of approach. It may be that in the Upper Tribunal that has not thus far been the experience and so no practice direction or other guidance has been thought necessary. I would, however, refer to the very helpful observations of the President of the Upper Tribunal (Immigration and Asylum Chamber), McCloskey J, in the case of *Wagner v Secretary of State for the Home Department* [2015] UKUT 655 (IAC). This, at para 12 of the decision, sets out some of the difficulties and some of the ways in which the appellate tribunal can be assisted in ascertaining what occurred in the tribunal below, in circumstances where bias or misconduct is alleged.

52 It would not be appropriate, in my view, for this court to give, in the context of appeals to the Upper Tribunal, guidance of a kind replicating the detail of that found in the Practice Direction relating to Employment Appeal Tribunals. If this kind of appeal is to become more prevalent in this context then it would be much better for the Chamber Presidents, with their specialist expertise and their knowledge of the practicalities and in conjunction with the Senior President of Tribunals as appropriate, to decide whether or not to formulate any practice direction or practice statement or Guidance Note which may be considered necessary or desirable.

53 But that said, the problems that have been highlighted by the course of events in this particular case do for the present permit at least some observations to be made: and they are ones which, I think, should be made.

(1) An allegation of bias or misconduct can only too easily be raised by a disgruntled litigant. It is therefore important that any application for permission to appeal, if based (in whole or part) on such a ground, is closely scrutinised when consideration is given as to whether permission to appeal should be granted. Such an allegation, if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced.

(2) If an allegation of bias or misconduct is raised which is adjudged sufficient to merit the grant of permission to appeal then it should be normal practice for the Upper Tribunal thereafter to obtain the written comments of the judge concerned: both in fairness to the judge and to provide the Upper Tribunal with a fuller picture.

(3) Such written comments of the judge, where obtained, should be provided to the parties for the purposes of the appeal hearing in the Upper Tribunal. In addition, such written comments should be retained on the file pending any possible further appeal to the Court of Appeal (the present case indicates the potential awkwardness arising from that failure).

(4) Proceedings in the First-tier Tribunal are not ordinarily recorded (it is not a court of record) and no transcript of the hearing will be available. There may be some cases where it may also be necessary to obtain the Tribunal Judge’s own note or record of the entire hearing.

(5) It will normally be likely in such as the present cases to be of assistance to the Upper Tribunal to know what the advocate for the respondent has to say as to what happened or what

was said before the First-tier Tribunal. In the present case neither the Upper Tribunal nor this court had the assistance of any such observations. It should be borne in mind that to provide such observations is the more likely to help produce a fuller and more accurate picture of what actually happened or was said in the First-tier Tribunal. There may be cases where the advocate concerned has no precise note or recollection. In that case, the Upper Tribunal at least can be so told.

(6) Whether oral evidence is needed at the hearing of the appeal on the issue of what happened or was said below should be carefully considered by the parties.

(7) Reflecting all the foregoing, it is likely to be important, in appeals of this nature, for the file to be reviewed and any directions given by an Upper Tribunal Judge in good time before the substantive appeal hearing.

54 These suggestions which I make are borne out of this court's experience of what happened in this particular case. They are intended to be neither prescriptive nor exhaustive. The general position remains that it is for a party alleging bias (whether actual or apparent) to place before the appeal tribunal the evidence and materials necessary to make good—if he can—such an allegation; and the outcome for each such case will depend on its own facts and circumstances.

BEATSON LJ

55 I agree.

LINDBLOM LJ

56 I also agree.

Appeal dismissed.

NICOLA BERRIDGE, Solicitor

Bubbles & Wine Limited v Reshat Lusha



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

14 March 2018

Case No: B2/2016/2559

Court of Appeal (Civil Division)

[2018] EWCA Civ 468, 2018 WL 01307587

Before: Lord Justice Flaux and Lord Justice Leggatt

Date: 14/03/2018

On Appeal from the Central London County Court

His Honour Judge Freeland QC

Case number: 3QZ39784

Hearing date: 22 February 2018

Representation

The Appellant appeared in person (represented by its director, Mr Laurent Faure).

Ms Hannah Glover (instructed by Fieldfisher LLP) for the Respondent.

Approved Judgment

Lord Justice Leggatt:

1. The question on this appeal is whether a judge showed apparent bias by reason of a conversation held in private with one party's counsel alone during a trial.

The proceedings

2. The appellant, Bubbles & Wine Limited ("B&W"), engaged the respondent, Mr Lusha, to carry out building works at its premises in Moxon Street, London, between November 2012 and April 2013. Mr Lusha submitted invoices for the work in a total amount of £52,805, of which £28,000 was paid by B&W but the rest was not. In October 2013 Mr Lusha brought a claim for the balance in the Central London Country Court. B&W disputed the claim and also made a counterclaim for (i) losses allegedly caused by delay in completing the work, (ii) the cost of remedying certain alleged defects and (iii) loss said to result from inability to reclaim VAT due to Mr Lusha not being registered for VAT.

3. The case was listed for trial on 19 February 2015 before Deputy District Judge Wallis (the "trial judge"). The evidence was heard on that day but there was insufficient time for closing submissions. By agreement, these were subsequently made in writing. The trial judge handed down a written judgment on 28 April 2015. He found the claim proved, with the exception of certain sums claimed for materials, parking and payment of the congestion charge amounting in total to £1,155.40, which were not supported by documentary evidence. He dismissed the counterclaim, holding in summary that: (i) Mr Lusha did not cause delay in opening the premises as alleged and B&W had in any case failed to prove that the alleged delay had caused them any financial loss; (ii) B&W had failed to prove that any of the work done was defective; and (iii) whether or not Mr Lusha should have been registered for VAT, B&W suffered no loss through inability to reclaim VAT since none was charged. In the result, judgment was given in favour of Mr Lusha for £23,649.60 plus interest.

4. B&W appealed against the decision to the circuit judge. Although other grounds were argued, the main ground of appeal was that the trial judge ought to have recused himself by reason of actual or apparent bias. The appeal was heard by His Honour Judge Freeland QC, who dismissed it for reasons given in a judgment dated 2 June 2016. Although permission to appeal was initially refused on paper, following an oral hearing B&W was given permission to pursue a further appeal to the Court of Appeal solely on the issue of bias. At the hearing of this appeal, Mr Faure, a director of B&W who has represented the company in this court as he did before the circuit judge, made it clear that no allegation of actual bias is maintained and that B&W's case is put squarely on the ground of apparent bias.

The relevant circumstances

5. The circumstances relevant to the allegation of apparent bias are the subject of detailed findings made by the circuit judge and are clearly evidenced by a series of contemporaneous emails exchanged between the parties' respective counsel and the trial judge, by the account of the relevant events given by the trial judge in his judgment, and by a witness statement made by Mr Rahul Varma, the barrister who represented Mr Lusha at the trial. The relevant circumstances may be summarised as follows.

6. In July 2014 the trial judge's daughter did a mini-pupillage at the barristers' chambers of which Mr Varma was, at that time, a member and on one day she accompanied Mr Varma to court. On the morning of the trial on 19 February 2015, when he saw the name of the judge before whom the case was listed, Mr Varma explained this fact to Mr Niraj Modha, the barrister who was representing B&W on a direct access basis. Mr Modha took instructions from his client, who raised no objection to Deputy District Judge Wallis hearing the case.

7. Although the case was only set down for a day, it was not until after 6pm on 19 February 2015 that the court finished hearing the evidence. There was then a discussion between counsel and the trial judge in which it was agreed that closing submissions would be made in writing. The timetable was left to be discussed between counsel, who also agreed to draw up a list of issues. As counsel were packing up to leave court, the trial judge asked Mr Varma to remain behind saying that he would like to speak to him about a personal matter. Mr Modha agreed to this and Mr Varma then retired with the trial judge to his room. They had a conversation in which the trial judge thanked Mr Varma and his chambers for their hospitality towards his daughter and they then spoke about the judge's daughter for a few minutes. At the end of the conversation the trial judge asked Mr Varma if he knew or was off to join Mr Modha and, on being told that they knew each other from previous cases, the judge asked Mr Varma to pass on the following comments to Mr Modha insofar as it might help both counsel to compile a list of issues: (1) the counterclaim seemed weak; and (2) the claimant's case had several evidential gaps. Nothing more was said and Mr Varma then left.

8. On his return to chambers, Mr Varma sent an email to Mr Modha timed at 18:51 on 19 February 2015, in which he passed on what the trial judge had said. In the email Mr Varma stressed that he had not invited any comment about the case, had

made no submissions about it and was passing on no less detail than the judge had given him. He confirmed that they had otherwise spoken only about the judge's daughter and her choice of degree.

9. Mr Modha replied at 19:06. He said that he would have preferred for the judge to either not say anything or to have expressed his views on the case when all were present, although Mr Modha said that he did not criticise Mr Varma in any way and confirmed that "in my view you properly notified me of the quite uncontroversial personal connection between you and the judge before the hearing even began". Mr Modha also stated:

"As it happens, I do not think that the judge has said anything that might not have been reasonably anticipated by either of the parties following the evidence today. I think it probably does help to narrow down some issues..."

10. On the following day (20 February 2015) the trial judge himself sent an email to Mr Modha, copied to Mr Varma, in which he said:

"As you know, I spoke to Mr Varma after Court yesterday evening – the subject of our discussion was my daughter's mini-pupillage at Lamb Chambers last summer in which he played a part. I did, however, take the opportunity also to mention an aspect of the case and wish you to be aware of this.

As I explained to him, I would have done so in your presence had Mr Faure not remained in the room, but as you both have a considerable number of commitments in the next fortnight in addition to the unexpected burden of having to produce written final submissions, I felt – very exceptionally, I add – it might be helpful to share my immediate reaction to one aspect of the case. I stress it is no more than that. It is that regardless of the questions of causation, remoteness, etc., it did seem to me that the counterclaim suffers from an absence of evidence.

You may, of course, disagree, and I am not expecting you now to comment. I emphasise that no decision has been reached by me about the point and I assure you I shall dispassionately consider all the contentions and evidence when I have the final submissions."

11. Mr Modha was concerned that the trial judge's account of his conversation with Mr Varma differed from that reported by Mr Varma in that it referred only to the counterclaim and made no mention of any evidential gaps in the claimant's case. Accordingly, Mr Modha sent an email to the trial judge on 23 February 2015 expressing concern that it was not clear precisely what had been said about the case in the judge's conversation with Mr Varma and seeking clarification. The trial judge replied stating that, before the hearing, he had never met or spoken to Mr Varma and reiterated that his purpose in talking to Mr Varma after court was only to talk about his daughter. He confirmed that his recollection of what he had said to Mr Varma about the case was as he had already stated.

12. The next day (24 February 2015) the trial judge sent another email to Mr Modha (copied, as before, to Mr Varma) which read as follows:

"I have been giving further thought to our recent exchange of messages. It is, of course, fundamental that the Court is, and objectively is seen to be, impartial. For my part, I do not consider this principle has been compromised. However, after considering what I am about to state it has felt it has been, I fear I shall have to recuse myself. It would be better in those circumstances, I feel, to grasp the nettle now and set in motion obtaining a new trial date.

I have explained why I thought it would be helpful for you to know my initial concern and this was conveyed to you both by me and, at my request, Mr Varma. Indeed, B&W have benefited from knowing this so it can be dealt with in submissions. It may assist you to know I had like concerns with aspects of Mr Lusha's evidence. This would be seen from the list of points I would propose to send Mr Varma and you which, without in any way restricting what you would otherwise say, could (if wished) be dealt with in the submissions. It would, I think, demonstrate, if indeed that is necessary, that I am far from having made up my mind on either party's claim.

I should be grateful for your and Mr Varma's thoughts at your convenience."

13. In his judgment on the first appeal, the circuit judge concluded that, in the fourth sentence of this email, the word "if" had been inadvertently omitted and that the sentence was intended to read:

"However, if after considering what I am about to state it has felt it has been, I fear I shall have to recuse myself."

That inference seems to me incontrovertible. The trial judge had plainly not decided that he would have to recuse himself. Had that been his view, he would not have asked counsel for their thoughts on matters which, as the trial judge considered, demonstrated his impartiality.

14. Mr Varma replied to the email arguing that the position was quite innocuous and that there was no reason for the trial judge to consider recusing himself. Mr Modha replied to the email saying that he would need to take instructions as to how his client wished to proceed. Having done so, Mr Modha sent an email to the trial judge on 26 February 2015 conveying B&W's request that the judge should recuse himself from hearing the case. The reason given was that:

"the private conversation between yourself and Mr Varma, which was well-intentioned, trespassed into comment on the ongoing case. This was not appropriate, given that the comment was adverse, not in open court, and in the presence of only one party's legal representative."

15. On 27 February 2015 the trial judge sent an email to both counsel stating that he would not recuse himself and would give his reasons when delivering judgment. He then set out some points on which he said that he would welcome comment in closing submissions.

16. When he gave judgment on 28 April 2015, after dealing with the claim and counterclaim the trial judge gave an account of the circumstances which had given rise to the request that he should recuse himself and explained his reasons for declining to do so. He gave the following explanation of why he made comments on the case in his private conversation with Mr Varma:

"Our conversation was entirely social, save for this; I was concerned that Mr Modha should be made aware, as quickly as possible given his professional commitments, of my concern about the evidential weaknesses. I knew I would not be able to communicate with him until late that night. In an attempt to be helpful in preparing the closing submissions, I told Mr Varma that my initial view without deciding was that the counterclaims seemed weak and that there were also evidential gaps in Mr Lusha's case. I asked him to pass this on to Mr Modha urgently, which he agreed to do. I recall I said I would do the same myself the following morning, which in fact I did. I did not enlarge on what I had said or ask Mr Varma to comment, and he did not do so. It took no more than a few seconds."

The trial judge rejected any suggestion that any bias, whether actual or apparent, was manifested by or could be implied from his remarks. He expressed the view that his remarks were no more than repetition of what would already have been apparent to counsel. His explanation of why he had not made the comments in open court at the end of the hearing was that Mr Faure had been present in court and, "this is the irony of ironies, I did not wish him to conclude I had already made up my mind, as indeed I had not". He accepted that, in retrospect, "it would have been better to have taken the risk of possibly upsetting Mr Faure". The trial judge further stated that, while he appreciated that the consequences of a recusal could not themselves determine whether one should take place, the overriding objective and proportionality also had to be borne in mind and the cost of a rehearing would be wholly disproportionate. He also thought that, as the evidence had already been rehearsed, it would be extremely difficult, if not impossible, for a fair trial to take place. He concluded:

"There must be finality of resolving disputes and in this regard I am, I trust not immodestly, satisfied that my substantive decision shows that the issues have been fully explored and properly decided and the result is not susceptible to challenge."

The law on apparent bias

17. The legal test for apparent bias is very well established. Mr Faure reminded us of the famous statements of Lord Hewart CJ in *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" and that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities. These establish that the test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, paras 102-103. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see *Flaherty v*

National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, para 28; *Secretary of State for the Home Department v AF (No2) [2008] EWCA Civ 117; [2008] 1 WLR 2528*, para 53.

18. Further points distilled from the case law by Sir Terence Etherton in *Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 1515; [2014] 1 WLR 1943*, at para 35, are the following:

- (1) The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2003] ICR 856*, para 14 (Lord Steyn).
- (2) The facts and context are critical, with each case turning on "an intense focus on the essential facts of the case": *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 WLR 2416*, para 2 (Lord Hope).
- (3) If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council) [2002] UKPC 28*, para 11 (Lord Steyn).

19. In *Helow v Secretary of State for the Home Department* Lord Hope observed that the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the test ensures that there is this measure of detachment: [2008] UKHL 62; [2008] 1 WLR 2416, para 2; and see also *Almazeedi v Penner [2018] UKPC 3*, para 20. In the *Resolution Chemicals* case Sir Terence Etherton also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [2013] EWCA Civ 1515; [2014] 1 WLR 1943, para 40.

The appellant's case

20. Mr Faure, who presented B&W's case on this appeal with admirable moderation, submitted that, in circumstances where the trial judge had expressed his views on the case to Mr Lusha's counsel during an unrecorded private conversation without B&W's counsel being present, a fair-minded and informed observer would conclude that there was a real possibility that the judge was not impartial. Mr Faure also emphasised that in the emails which the trial judge himself sent to Mr Modha on 20 and 23 February 2015 (referred to at paragraphs 10 and 11 above) the only view which the trial judge expressed was that the counterclaim suffered from an absence of evidence and he made no mention of any concerns about any aspects of Mr Lusha's claim. Mr Faure submitted that this shows that the trial judge was in reality only concerned by the weakness of the counterclaim and had pre-judged the case.

21. Mr Faure also reminded us of the observation of Lord Steyn in *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2003] ICR 856*, para 22, quoted in *Watts v Watts [2015] EWCA Civ 1297*, para 14, that:

"What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

22. Ms Glover, who appeared for Mr Lusha, was realistic in not attempting to defend aspects of the trial judge's conduct and particularly the manner in which the judge chose to communicate his thoughts about the weaknesses in the evidence. But she marshalled very clearly her arguments for maintaining that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the trial judge was biased.

The trial judge's conduct

23. Before I come to the question of whether the test of apparent bias is satisfied on the facts of this case, I think it appropriate to make some comments on how the situation has arisen in which, at what will inevitably have involved considerable expense and inconvenience to the parties, this question has had to be decided by the Court of Appeal. It should be obvious that, in their handling of cases, judges need to be scrupulous not merely to refrain from conduct which will result in their recusal but to avoid creating a situation in which concerns about their impartiality can reasonably be raised at all. They need to bear in mind not just the hypothetical fair-minded observer who has ascertained all the relevant facts but actual litigants who cannot be blamed for lacking objectivity and who will only know the relevant facts if the judge behaves in a transparent way. In this case, the circuit judge, while rejecting the complaint of apparent bias, felt bound to record that what the trial judge did was "far from ideal" and "should be discouraged". I regret to say that this was, in my view, far too generous an assessment.

24. The first mistake which the trial judge made was to request a private conversation with counsel for one of the parties in the absence of the other while the case was continuing. It is difficult to think of circumstances in which this would be an appropriate thing to do. It risks fostering an impression of favouritism towards one party's advocate. It also encourages suspicion in the other party (even if the suspicion is in fact unfounded) by leaving the other party in the dark about exactly what has been or might have been said in the absence of its own representative. Certainly, there was no sufficient reason in the present case for the trial judge to solicit a private conversation with Mr Varma. To the contrary, in doing so he gave prominence to a connection (through his daughter's mini-pupillage in Mr Varma's chambers) which had not previously been any cause any concern. For the trial judge to go out of his way, during the trial, "personally to thank Mr Varma for his hospitality towards [his] daughter" was capable of suggesting that he felt a sense of obligation towards Mr Varma. Although judges can generally be counted on not to let their attitude towards a party's advocate affect their perception of the case which the advocate is arguing on behalf of his or her client, they ought to keep a proper distance when they are engaged in a trial.

25. The second and worse error which the trial judge made was not to confine his private conversation with the claimant's counsel to personal matters but to talk about the case and, more than that, to express views about the merits of the parties' respective cases. It is an important fact that the judge specifically requested that his comments should be passed on to B&W's counsel, and I will return to that fact when addressing the question of whether he showed apparent bias. But it ought to be obvious that it is wrong for a judge to express views about the merits of the case to one party's representative in the absence of the other, particularly when no recording is being made of what is said. Even where, as here, the comments were intended to be passed on, the other party is put at the disadvantage of not having actually heard what was said and being reliant on a second-hand account. It was all the more unfortunate that the trial judge in this case expressed opinions on the merits to counsel for Mr Lusha in the absence of B&W's counsel when the main comment that he made was to express an unfavourable view of the strength of B&W's case.

26. I am distinctly unimpressed by the explanation given by the trial judge in his judgment to seek to justify this conduct (quoted at paragraph 16 above). When the conversation took place, the trial had been adjourned for closing submissions and no timetable for these had yet been set. It had further been agreed that, before preparing their submissions, the two counsel would liaise with each other to compile a list of issues. It is very difficult to see how in these circumstances the judge's concern about the perceived evidential weakness of the counterclaim was a matter of which Mr Modha needed to be made aware "as quickly as possible" (whatever Mr Modha's forthcoming professional commitments). Furthermore, the suggestion that the matter was of such urgency that it needed to be passed on immediately and could not wait until the judge was able to communicate with Mr Modha himself late that night or the following morning is – to put it bluntly – absurd. The supposed urgency of communication is also at odds with the further excuse proffered by the judge that his remarks were "merely repetition and superfluous".

27. Equally unimpressive is the explanation given for why, if the trial judge thought it helpful to express some preliminary views, he did not do so in court at the end of the hearing. As mentioned, the judge said in his judgment that he did not

express his concerns about evidential weaknesses when Mr Faure was present because he did not wish Mr Faure to conclude that he had already made up his mind. (The judge described this as "the irony of ironies".) This was, however, a misguided approach. If a judge has concerns which he or she thinks it desirable to express in order to give counsel an opportunity to deal with them, then the parties, and not just their lawyers, are entitled to know those concerns. There is no space in a trial for communications to take place between the judge and counsel which form part of the decision-making process but of which the parties themselves are not told. Thus, as Mr Modha recognised when he received Mr Varma's email on the evening of 19 February 2015, Mr Modha's duty to his client required him to pass on to B&W Mr Varma's message about what the trial judge had said. If the judge thought that the risk of his comments being misinterpreted outweighed the benefits of making them, then he should not have made the comments at all. But if he thought it right to express his view about the evidential weakness of B&W's case, the judge could not sensibly have thought that the risk of misinterpretation would be less if Mr Faure learnt that the views had been expressed at the end of a private conversation with the other side's counsel than if Mr Faure heard the views expressed himself in open court. If there is any irony in what occurred, it is one which the trial judge brought upon himself.

28. The errors made did not end on 19 February 2015. The trial judge sent an email to Mr Modha the next day, as he had said that he would do. However, in his email the judge conveyed only his impression that the counterclaim suffered from an absence of evidence and did not mention the comment that he had also made to Mr Varma the previous evening that Mr Lusha's case had several evidential gaps. The judge never subsequently explained why he omitted to mention this further comment. There can be no doubt that the comment was indeed made to Mr Varma, as immediately after the conversation Mr Varma reported it to Mr Modha (as the judge had asked him to do). Moreover, the judge did later tell Mr Modha that he had concerns with aspects of Mr Lusha's evidence in his email dated 24 February 2015 (quoted at paragraph 12 above). That email was sent at a time when the judge had not seen the email sent by Mr Varma on 19 February 2015 and did not know what report Mr Varma had given of their conversation. It is possible that, as Ms Glover suggested, in his email sent on 20 February 2015 the judge was concentrating on the counterclaim because he thought that this was what was relevant from the point of view of Mr Modha and his client. It was nevertheless unhelpful that he gave only a partial account of what he had said to Mr Varma about the case. It was even more unhelpful that, when specifically asked by Mr Modha to clarify precisely what was said because of concern that the judge's account differed from Mr Varma's, the judge did not then mention his comment about Mr Lusha's evidence and simply replied that his recollection of what he had said about the case was as he had already stated. Mr Modha and Mr Faure could hardly be blamed in these circumstances for apprehending that they had not been given a full account of the relevant conversation.

29. The trial judge compounded his self-created difficulties by the email that he sent on 24 February 2015. Allowing for the evident typographical error, the message conveyed by that email was that, even though the trial judge did not believe that his impartiality had been compromised, if after consideration of the points made in the email it was felt that it had been, he would have to recuse himself. The trial judge thereby gave the impression that, if B&W was not satisfied by his assurances, the judge would withdraw from the case and there would be a new trial. However, when Mr Modha responded that B&W did indeed believe that "the fundamental principle of impartiality has been compromised" and requested that the trial judge recuse himself, the judge refused. It is true that a judge is not required to recuse himself just because a party believes that he is not impartial if the party's objection is not valid. But, for that very reason, the trial judge should never have encouraged B&W to think that he would recuse himself if they felt that his impartiality had been compromised regardless of what he himself believed. It was bound to create a sense of grievance to open the door for a re-trial in that way, only for it then to be shut again in the litigant's face.

30. I have already criticised the attempts made by the trial judge in his judgment to justify his conversation with Mr Varma. In addition, although he recognised that the consequences of a recusal could not be decisive, the trial judge was wrong to suggest that considerations of proportionality had also to be borne in mind. His suggestion that it would be extremely difficult, if not impossible, for a fair trial to take place if the case had to be re-heard does not bear scrutiny. Finally, the trial judge's expression of satisfaction (quoted at paragraph 17 above) that his judgment showed that the issues had been properly decided and the result was not susceptible to challenge was not merely complacent but displayed a complete lack of sensitivity to the importance of ensuring procedural as well as substantive fairness.

Was there apparent bias?

31. I have articulated these criticisms because it is essential to the administration of justice that errors in the handling of cases are exposed and lessons learnt. It is, however, a different question whether the fair-minded observer, informed of the facts set out at paragraphs 5 to 17 above, would conclude that the conduct of the trial judge was not only misguided but disclosed a real possibility that the judge was biased in favour of Mr Lusha or against B&W. I am satisfied that the fair-minded and informed observer would not reach that conclusion, for the following reasons.

32. First, the mini-pupillage undertaken by the trial judge's daughter could not sensibly have been thought to give rise to any risk of bias and B&W quite properly made no objection to the judge hearing the case when Mr Varma disclosed that fact to his opponent before the hearing. The fact that the judge, while the trial was continuing, requested a private conversation with Mr Varma in which he thanked Mr Varma and his chambers for their hospitality towards his daughter was tactless for the reasons I have indicated. But the conversation took place with the knowledge and consent of B&W's counsel and no fair-minded observer would have drawn from the fact that judge asked to speak and did speak to Mr Varma about his daughter any inference that the judge would decide the case other than impartially and on basis of his assessment of the merits.

33. Second, this is not a case in which there is any material uncertainty about the relevant facts. There may be cases in which, even after investigation, it is impossible to ascertain with confidence exactly what was discussed in a conversation between the judge and one party's representative to which no one else was privy. That information gap could itself be such as to lead a fair-minded observer to conclude that there was a possibility which could not be discounted that the judge had demonstrated bias. But this is not such a case. As mentioned earlier, the contemporaneous emails, the judgment and Mr Varma's evidence leave no doubt about what was said – and the limits of what was said – when the judge spoke privately to Mr Varma.

34. Third, it was perfectly proper for the judge to express preliminary views about the strength or weakness of each party's case during the proceedings and no criticism could reasonably have been made of him if his comments had been made in open court. There is nothing wrong with a judge indicating provisional views, and advocates are generally grateful for such indications as it gives them an opportunity to correct any misconception which the judge may have and to concentrate in their submissions on those points which appear to be influencing the judge's thinking. The expression of such views could only be thought to indicate bias if they are stated in terms which suggest that the judge has already reached a final decision before hearing all the evidence and argument. That was not the case here. The fact that the views expressed by the trial judge were themselves innocuous is further confirmed by the reaction of B&W's counsel to Mr Varma's email, quoted at paragraph 9 above.

35. Fourth, the fact that the trial judge expressed such views, not in court, but at the end of his private conversation with Mr Varma was misguided, again for reasons that I have given. Nor did the judge do himself any favours by advancing an explanation for this conduct in his judgment which was palpably bad. It is, however, of critical importance that the judge, in making the comments that he did (i) made it clear that his purpose was to assist both parties in preparing their closing submissions, and (ii) specifically asked Mr Varma to pass on the comments to his opponent (which Mr Varma did). This demonstrates that the trial judge was not giving or seeking to give one party a privileged insight into his thinking which was not being afforded to the other. In these circumstances a fair-minded observer would conclude that the communication of the comments to one party's representative in the absence of the other, though inept, did not suggest that the trial judge had formed a predisposition to decide the case in favour of Mr Lusha or against B&W for any reason other than the strength of their respective cases.

36. Fifth, it is also of the greatest importance that, as Mr Varma stressed in the email that he sent to Mr Modha following the conversation, Mr Varma made no submissions to the trial judge about the case. Nor did the judge invite him to do so. Even apart from the question of bias, hearing submissions on behalf of one party to which no one representing the interests of the

other party was privy would have been a breach of the basic duty of a court to follow a procedure which is fair as between the parties. However, no such breach occurred in this case.

37. Sixth, the fact that the trial judge himself sent an email to B&W's counsel the next day conveying to him directly the provisional view about the counterclaim which he had already communicated via Mr Varma confirms that the judge was not intending to give – and indeed was seeking to ensure that he did not give – one party assistance which the other was denied. I have criticised the judge for failing to mention in his email the further comment about Mr Lusha's case that he had asked Mr Varma to pass on. But I do not accept the argument made by Mr Faure that this omission suggests that the trial judge had already reached a final decision adverse to B&W. No such inference could reasonably have been drawn even if the judge had expressed no concerns about any aspects of the claimant's case to Mr Varma. As it is, he had in fact done so and there is no reason to doubt that the concerns were real – not least as the judge ultimately found that there was insufficient evidence to prove some elements of the claim made by Mr Lusha. Nor is there any reason to think that the trial judge was deliberately seeking to withhold his preliminary view on this point from B&W, since (i) he had already asked Mr Varma to pass on his concern about the claimant's case (which Mr Varma had done) and (ii) the judge did himself communicate his concern directly to B&W's counsel in his later email dated 24 February 2015.

38. I have also criticised the judge for creating an impression in his email sent on 24 February 2015 that he would recuse himself if B&W felt that his impartiality had been compromised, even if he did not himself consider that it had been. Again, however, the criticism is not one which supports a complaint of apparent bias. The judge was quite right ultimately to take the decision about whether to recuse himself on the basis of his own assessment of whether valid grounds for doing so had been shown and not on the basis that B&W felt that his impartiality had been compromised. His error was to suggest that he would do otherwise. That error showed lack of due forethought but does not suggest a possibility that he was biased.

39. Finally, I have criticised some of the reasons which the trial judge gave in his judgment for his decision not to recuse himself, including his suggestion that it was relevant to consider considerations of proportionality and cost in that regard. The judge's conclusion that it would be wrong to recuse himself was, in my view, nevertheless correct, and nothing said in the judgment itself gives rise to any inference that he lacked impartiality.

40. The facts of the present case are materially different from those of *Gill v Humanware Europe Ltd* (unreported 27 February 2009), on which Mr Faure placed reliance. In that case, an employment judge had two private conversations outside court with counsel for the respondent at which the claimant, who was acting in person, was not present. In the first conversation counsel and the judge discussed the timetable for the hearing and the order of witnesses and, in the course of the conversation, the judge commented that the evidence of one particular witness was central. In the second conversation counsel approached the judge privately to "provide an explanation" for some part of the evidence given by this witness. The judge could not subsequently recall, and it could not be established, exactly what was said except that it related to some "very personal issues", either in relation to the claimant or the witness. Neither conversation was passed on to the claimant.

41. On an appeal on the ground of apparent bias, the Employment Appeal Tribunal held that the test of apparent bias was satisfied on the basis that the employment judge had received submissions from and made comments to the representative of one party which were not revealed to the other party. That is very different from the present case where, as I have explained, no submissions were made privately by Mr Varma and where the trial judge's comments were intended to be, and were, communicated to B&W.

Conclusion

42. Applying the established legal test of apparent bias, I am satisfied that the fair-minded and informed observer, having considered all the relevant facts, would conclude that the conduct of the judge in this case, wrong-headed as it was, did not indicate any real possibility that he was biased. I would accordingly dismiss the appeal.

Lord Justice Flaux:

43. I agree.

Crown copyright

Court of Appeal

A

Regina (Maughan) v Oxfordshire Senior Coroner (Chief Coroner of England and Wales and another intervening)

[2019] EWCA Civ 809

2019 April 9;
May 10

Underhill, Davis, Nicola Davies LJJ

B

Coroner — Inquest — Standard of proof — Death by hanging in prison cell — Whether criminal or civil standard of proof applying to question of whether deceased dying by suicide — Whether standard of proof differing depending on whether conclusion given in short form or narrative form — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2¹ — Coroners and Justice Act 2009 (c 25), s 5(2)²

C

The coroner conducted an inquest into the death of a prisoner who had been found hanging in his prison cell. At the conclusion of the evidence the coroner ruled that a short-form conclusion of “suicide” should not be left to the jury, finding that a properly instructed jury could not, on the evidence, be satisfied to the criminal standard that the deceased had intended to take his own life. Instead he directed the jury to reach a narrative conclusion as to the circumstances in which the deceased had died, instructing them to apply the civil standard of the balance of probabilities to their findings. Giving a narrative verdict, the jury concluded among other things that the deceased had intended to kill himself. The claimant, who was the deceased’s brother, sought judicial review on the grounds that, in deciding whether a person had taken his own life, an inquest jury should apply the criminal standard of proof. The Divisional Court of the Queen’s Bench Division dismissed the claim, holding that the standard of proof to be applied in cases of suicide, both for short-form and narrative conclusions, was the civil standard.

D

E

On the claimant’s appeal—

Held, dismissing the appeal, that the standard of proof at an inquest in a case of suicide should be the same throughout, there being no logic in adopting a criminal standard of proof for a short-form conclusion but a civil standard of proof for a narrative conclusion, which would create difficulties for juries and confusion in terms of public perception of the outcome; that the standard to be applied should be the civil standard since (i) the essence of an inquest was investigative and was not concerned to make findings of guilt or liability, (ii) suicide was no longer a crime, (iii) the civil courts generally applied the civil standard of proof, even where the proposed subject of proof might constitute a crime or suicide, (iv) the importance of a proper investigation into the circumstances of death, pursuant to section 5(2) of the Coroners and Justice Act 2009, in a case involving the procedural duty under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms supported the application of the civil standard and (v) the civil standard would apply to other potential aspects of the narrative conclusion; that, therefore, at an inquest the standard of proof to be applied to the question of whether the deceased had deliberately killed himself intending to take his own life should be the civil standard, not the criminal standard, regardless of whether the conclusion was expressed by way of short-form conclusion or by way of narrative conclusion; and that, accordingly, the claim had been rightly dismissed (post, paras 51, 69–74, 88, 97, 99, 100, 101).

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¹ Human Rights Act 1998, Sch 1, Pt I, art 2.1: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

² Coroners and Justice Act 2009, s 5: see post, para 20.

- A *R v West London Coroner, Ex p Gray* [1988] QB 467, DC and dicta of Woolf LJ in *R v Wolverhampton Coroner, Ex p McCurbin* [1990] 1 WLR 719, 727–728, CA not followed.

Per curiam. In cases where unlawful killing arises as an issue coroners should continue to instruct juries by reference to the criminal standard of proof in the way in which they currently do (post, paras 95, 100, 101).

- B Decision of the Divisional Court of the Queen's Bench Division [2018] EWHC 1955 (Admin); [2019] 1 All ER 561 affirmed.

The following cases are referred to in the judgment of Davis LJ:

- B (*Children*) (*Care Proceedings: Standard of Proof*) (CAFCASS intervening), *In re* [2008] UKHL 35; [2009] AC 11; [2008] 3 WLR 1; [2008] 4 All ER 1, HL(E)
Braganza v BP Shipping Ltd (The British Unity) [2015] UKSC 17; [2015] 1 WLR 1661; [2015] ICR 449; [2015] 4 All ER 639, SC(E)
- C *D (Secretary of State for Northern Ireland intervening), In re* [2008] UKHL 33; [2008] 1 WLR 1499; [2008] 4 All ER 992, HL(NI)
H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)
Hornal v Neuburger Products Ltd [1957] 1 QB 247; [1956] 3 WLR 1034; [1956] 3 All ER 970, CA
R v City of London Coroner, Ex p Barber [1975] 1 WLR 1310; [1975] 3 All ER 538, DC
- D *R v Essex Coroner, Ex p Hopper* (unreported) 13 May 1988, DC
R v Galbraith [1981] 1 WLR 1039; [1981] 2 All ER 1060, CA
R v HM Coroner for Dyfed, Ex p Evans (unreported) 24 May 1984; [1984] Lexis Citation 259, DC
R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74; [1983] 2 WLR 321; [1983] 1 All ER 765, HL(E)
- E *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 625, DC
R v West London Coroner, Ex p Gray [1988] QB 467; [1987] 2 WLR 1020; [1987] 2 All ER 129, DC
R v Wolverhampton Coroner, Ex p McCurbin [1990] 1 WLR 719; [1990] 2 All ER 732, CA
R (Amin) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 AC 653; [2003] 3 WLR 1169; [2003] 4 All ER 1264, HL(E)
- F *R (Duggan) v North London Assistant Deputy Coroner* [2017] EWCA Civ 142; [2017] 1 WLR 2199; [2017] 4 All ER 104, CA
R (Lagos) v HM Coroner for London [2013] EWHC 423 (Admin); [2013] Inquest LR 34
R (Middleton) v West Somerset Coroner [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; [2004] 2 All ER 465, HL(E)
R (Wilkinson) v HM Coroner for Greater Manchester South District [2012] EWHC 2755 (Admin); [2013] CP Rep 5, DC
- G *Southall v Cheshire County News Co Ltd* (1912) 5 BWCC 251, CA

The following additional cases were cited in argument:

- Anderson v Blashki* [1993] 2 VR 89
Beckon, In re (1992) 93 DLR (4th) 161, Ontario CA
Davis, decd, In re [1968] 1 QB 72; [1967] 2 WLR 1089; [1967] 1 All ER 688, CA
- H *James v HM Coroner for Surrey* [2014] EWHC 2585 (Admin); [2014] Inquest LR 207, DC
Jenkins v HM Coroner for Bridgend and Glamorgan Valleys [2012] EWHC 3175 (Admin); [2012] Inquest LR 97, DC
R v Cardiff City Coroner, Ex p Thomas [1970] 1 WLR 1475; [1970] 3 All ER 469, DC

- R v HM Coroner for Ceredigion, Ex p Wigley* [1993] COD 364, DC A
R v HM Coroner for Derby and South Derbyshire, Ex p Hart (2000) 164 JP 429
R v HM Coroner for Newbury, Ex p John (1991) 156 JP 456, DC
R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1; [1994] 3 WLR 82; [1994] 3 All ER 972, CA
R v HM Coroner for North Northumberland, Ex p Armstrong (1987) 151 JP 773, DC
R v HM Coroner for Northamptonshire, Ex p Walker (1988) 153 JP 289, DC B
R v HM Coroner for Solihull, Ex p Nutt [1993] COD 449, DC
R v Huntbach, Ex p Lockley [1944] KB 606; [1944] 2 All ER 453, DC
R v Inner South London Coroner, Ex p Kendall [1988] 1 WLR 1186; [1989] 1 All ER 72, DC
R (Anderson) v HM Coroner for Inner North Greater London [2004] EWHC 2729 (Admin); [2004] Inquest LR 155
R (Cash) v County of Northamptonshire Coroner [2007] EWHC 1354 (Admin); [2007] 4 All ER 903, DC C
R (Jenkins) v HM Coroner for Portsmouth and South East Hampshire [2009] EWHC 3229 (Admin); [2009] Inquest LR 277; 112 BMLR 60
R (LePlege) v Assistant Deputy Coroner for Inner South London [2012] EWHC 1485 (Admin); [2012] Inquest LR 31, DC
R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening) [2015] EWHC 402 (Admin); [2015] 1 WLR 4497; [2016] 2 All ER 968 D
R (Lewis) v Mid and North Shropshire Coroner [2009] EWHC 661 (Admin); 108 BMLR 87; [2009] EWCA Civ 1403; [2010] 1 WLR 1836; [2010] 3 All ER 858, CA
R (O'Connor) v Avon Coroner (Visser intervening) [2009] EWHC 854 (Admin); [2011] QB 106; [2010] 2 WLR 1299; [2009] 4 All ER 1020, DC
R (Secretary of State for Justice) v HM Coroner for Eastern District of West Yorkshire [2012] EWHC 1634 (Admin); [2012] Inquest LR 76 E
R (Sharman) v HM Inner North London Coroner [2005] EWHC 857 (Admin); [2005] Inquest LR 77, DC; [2005] EWCA Civ 967; [2005] Inquest LR 168, CA
R (Smith) v Oxfordshire Assistant Deputy Coroner [2008] EWHC 694 (Admin); [2011] 1 AC 1; [2008] 3 WLR 1284
R (Sparrow) v HM Coroner for East Somerset [2006] EWHC 2718 (Admin); [2006] Inquest LR 194, DC
R (Sreedharan) v HM Coroner for the County of Greater Manchester [2013] EWCA Civ 181; [2013] Med LR 89, CA F
Sutherland, decd, In re [1994] 2 NZLR 242
Teoh Meng Kee v Public Prosecutor [2014] 5 MLJ 741
Willers v Joyce (No 2) [2016] UKSC 44; [2018] AC 843; [2016] 3 WLR 534; [2017] 2 All ER 383, SC(E)

The following additional cases, although not cited, were referred to in the skeleton arguments: G

- Ashley v Chief Constable of Sussex Police (Sherwood intervening)* [2008] AC 962; [2008] 2 WLR 975; [2008] 3 All ER 573, HL(E)
Daniel v St George's Healthcare NHS Trust [2016] EWHC 23 (QB); [2016] 4 WLR 32
HM Senior Coroner for South and East Cumbria v Smith [2015] EWHC 2465 (Admin); [2015] Inquest LR 235, DC H
R v Director of Public Prosecutions, Ex p Treadaway The Times, 31 October 1997, DC
R (Evans) v HM Coroner for Cardiff and Vale of Glamorgan [2010] EWHC 3478 (Admin); [2010] Inquest LR 217, DC
R (Fraser) v HM Coroner for North West Wales [2010] EWHC 1165 (Admin); [2010] Inquest LR 93, DC

- A *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955; [2001] 2 WLR 1674, CA
- R (Lin) v Secretary of State for Transport* [2006] EWHC 2575 (Admin); [2006] Inquest LR 161
- R (Mack) v HM Coroner for Birmingham and Solihull* [2011] EWCA Civ 712; [2011] Inquest LR 17, CA
- R (Maguire) v Assistant Coroner for West Yorkshire* [2018] EWCA Civ 6; [2018] Inquest LR 83, CA
- B *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin); [2013] HRLR 32, DC
- R (Sutovic) v HM Coroner for Northern District of Greater London* [2006] EWHC 1095 (Admin); [2006] Inquest LR 104, DC
- U (A Child) (Department for Education and Skills intervening), In re* [2004] EWCA Civ 567; [2005] Fam 134; [2004] 3 WLR 753, CA

C **APPEAL from the Divisional Court of the Queen's Bench Division**

By a claim form dated 11 January 2018 the claimant, Thomas Maughan, sought judicial review by way of an order to quash (i) the narrative verdict of an inquest jury that the deceased, the claimant's brother, James Maughan, who had been a prisoner at HMP Bullingdon, had intended to kill himself, and (ii) the direction of the coroner, the Senior Coroner for Oxfordshire, that the jury should answer questions posed by him and decide the outcome on a balance of probabilities, on the ground that the coroner (1) had erred in law in instructing the jury to apply the civil standard of proof when considering whether the deceased had intended to kill himself; and (2) should only have permitted the jury to reach such a conclusion by applying the criminal standard of proof. By a decision dated 26 July 2018 the Divisional Court of the Queen's Bench Division (Leggatt LJ and Nicol J) [2018] EWHC 1955 (Admin); [2019] 1 All ER 561 dismissed the claim on the ground that the standard of proof to be applied throughout in cases of suicide, both for short-form and narrative conclusions, was the civil standard.

By an appellant's notice dated 16 August 2018 and with permission of the Divisional Court the claimant appealed on the ground that the court had erred in law by wrongly concluding that the standard of proof for a conclusion of suicide whether as a short-form or narrative conclusion was the balance of probabilities.

By a respondent's notice dated 26 September 2018 the coroner sought to uphold the order on the additional/alternative ground that while the criminal standard of proof should apply to the short-form conclusion of suicide, the civil standard of proof should apply to all findings in narrative conclusions, including to the effect that a person had intentionally killed himself.

By permission of the Court of Appeal the Chief Coroner of England and Wales intervened on the appeal. INQUEST was given permission to intervene by written submissions only.

The facts are stated in the judgment of Davis LJ, post, paras 7–17.

H *Karon Monaghan QC and Jude Bunting* (instructed by *Matthew Gold & Co Ltd*) for the claimant.

The Divisional Court was correct that in cases of suicide it is illogical to apply the criminal standard to the short-form conclusion but the civil standard to the narrative conclusion. Such an approach would produce

confusion and inconsistency, both for juries and for members of the public having an interest in the outcome. Thus the standard should indeed be the same both for short-form and for narrative conclusions. The Divisional Court went wrong, however, by saying that the applicable standard throughout is the civil standard: rather, it is the criminal standard throughout.

That the criminal standard is the applicable standard reflects the understanding of Parliament which prescribed by rule 34 of the Coroners (Inquests) Rules 2013 (SI 2013/1616) that a jury's determination and findings be recorded on Form 2: Record of an Inquest. Form 2 is set out in Schedule 1 to the Rules and the accompanying notes, especially, note (iii) establish that standard: "The standard of proof required for the short form conclusions of 'unlawful killing' and 'suicide' is the criminal standard of proof. For all other short-form conclusions and a narrative statement the standard of proof is the civil standard of proof." It has the status of a rule governing the position.

The proposition that suicide in inquests must be proved beyond reasonable doubt also reflects the published guidance of the Chief Coroner in the *Coroner Bench Book* (2015) p 23; Guidance No 17 "Conclusions: Short-Form and Narrative", paras 56, 62, the opinions and approach of the present coroner, the contents of the main practitioners' textbooks and the approach of inquest practitioners.

In any event, that the applicable standard is the criminal standard is established by overwhelming authority, leading from cases where it was recognised that suicide had to be affirmatively proved to situations where the criminal standard is taken to apply. The Divisional Court had no reason not to follow those authorities. [Reference was made to *Southall v Cheshire County News Co Ltd* (1912) 5 BWCC 251; *R v Huntbach, Ex p Lockley* [1944] KB 606; *In re Davis, decd* [1968] 1 QB 72; *R v City of London Coroner, Ex p Barber* [1975] 1 WLR 1310; *R v Essex Coroner, Ex p Hopper* (unreported) 13 May 1988, DC; *R v HM Coroner for North Northumberland, Ex p Armstrong* (1987) 151 JP 773; *R v Inner South London Coroner, Ex p Kendall* [1988] 1 WLR 1186; *R v HM Coroner for Solihull, Ex p Nutt* [1993] COD 449; *R (Lagos) v HM Coroner for London* [2013] Inquest LR 34; *R (Jenkins) v HM Coroner for Portsmouth and South East Hampshire* [2009] Inquest LR 277 and *Willers v Joyce* (No 2) [2018] AC 843.]

In particular the Divisional Court decisions in *R v HM Coroner for Dyfed, Ex p Evans* (unreported) 24 May 1984 and *R v West London Coroner, Ex p Gray* [1988] QB 467 are pertinent. Even if the statements in those cases are not strictly binding on this court with regard to suicide, they were correct and should be followed. In any event, the Court of Appeal decision in *R v Wolverhampton Coroner, Ex p McCurbin* [1990] 1 WLR 719 is binding. [Reference was also made to *R (Cash) v County of Northamptonshire Coroner* [2007] 4 All ER 903; *R (Sharman) v HM Inner North London Coroner* [2005] Inquest LR 77; [2005] Inquest LR 168; *R (O'Connor) v Avon Coroner (Visser intervening)* [2011] QB 106 and *R (Secretary of State for Justice) v HM Coroner for Eastern District of West Yorkshire* [2012] Inquest LR 76.]

Further, there are good policy reasons for applying the criminal standard of proof in suicide inquests. Inquests are neither civil nor criminal

- A proceedings but sui generis proceedings with rules of procedure of their own. [Reference was made to *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 625.] Inquests are prohibited from deciding questions of civil or criminal liability: see section 10(2) of the Coroners and Justice Act 2009. Rather, their statutory role is to ascertain “who the deceased was”, “how, when and where the deceased came by his or her death”, and “the particulars (if any) required by the 1953 Act to be registered concerning the death”: see section 5(1). Where article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms is engaged, “how, when and where” includes the issue of “in what circumstances the deceased came by his or her death”: see section 5(2). [Reference was made to *R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2015] 1 WLR 4497.] This can require inquests to consider complex and serious questions, such as unlawful killing, suicide, and wider state misconduct.

- While it is correct that civil proceedings can decide serious questions, the parties in civil proceedings have greater procedural protection than grieving families at inquests. The application of the criminal standard provides an additional safeguard to protect those most at risk in serious inquest cases.
- D A verdict of suicide is a serious matter with consequences for both the living and the memory or reputation of the deceased. These are good reasons for weighting the fact-finding exercise against such a verdict. [Reference was made to the *Lagos* case [2013] Inquest LR 34; *Ex p Gray* [1988] QB 467; *Ex p Evans*; *R v Inner South London Coroner, Ex p Kendall* [1988] 1 WLR 1186.] Further, since death in custody inquests must be heard by a jury, the test of “beyond all reasonable doubt” provides clear guidance to that jury.

- E Such an approach does not involve an undue restriction on the need (in an article 2 case) for an investigation into the circumstances of the death in accordance with *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 and section 5(2) of the 2009 Act. The actual intent of a deceased may not necessarily be material for such an investigation or for the consideration of (for example) the reasonableness of the conduct of state agents in failing to prevent death. In any event, there is no principle that the procedural requirements of article 2 cannot be met by the application of the criminal standard of proof.

- F The logic of the Divisional Court’s reasoning that the civil standard pertains applies with equal force to unlawful killing cases. Either a coroner will have to lower the standard of proof in line with this case or tolerate an inconsistency of approach as between unlawful killing and suicide. Maintaining the criminal standard of proof in suicide cases avoids that policy problem.

- G The comparative common law cases cited by the Divisional Court do not assist. [Reference was made to *In re Beckon* (1992) 93 DLR (4th) 161 and *In re Sutherland, decd* [1994] 2 NZLR 242.] No uniform approach arises in other common law jurisdictions. [Reference was made to *Teoh Meng Kee v Public Prosecutor* [2014] 5 MLJ 741 and *Anderson v Blashki* [1993] 2 VR 89.]

- H In the event that the court is satisfied that the civil standard of proof applies, the court is invited to allow the appeal since the jury received no guidance on the presumption against suicide.

Jonathan Hough QC (instructed by *Chief Coroner*) for the first A
intervener.

A neutral position is adopted (a) to assist the court on the background to the short-form conclusions of suicide and unlawful killing, and on the interplay between short-form and narrative conclusions; (b) to explain coronial procedure and practice, and thereby to assist on the practical implications of different outcomes; and (c) to ensure so far as possible that the court receives full argument for and against each possible conclusion on the applicable standards of proof. B

There is no particular magic in differentiating between a short-form conclusion and a narrative conclusion, in the sense that both are directed at the actual overall conclusion, in particular the question of *how* a deceased came to die as he did. In that regard, note the requirements of *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, as now reflected in section 5(2) of the Coroners and Justice Act 2009. It would seem very desirable not to impose any undue restriction in terms of burden of proof on such an investigation into the circumstances of death; which circumstances may well include, among other things, the issue of intent. C

The approach taken by the Divisional Court that the civil standard of proof should apply both to the short-form conclusion of suicide and to findings in any narrative conclusion to the effect that a person intentionally killed him/herself has certain merits. D

First, it avoids the seeming illogicality of different standards of proof applying to short-form conclusions and narrative conclusions.

Secondly, it also avoids the potential result that separate findings within a single narrative conclusion may be reached by internally applying differing standards of proof: for example, concerning issues of intent and causation and the reasonableness of the preventative steps (if any) of the relevant state agents. E

Thirdly, it assimilates the standard of proof for suicide conclusions in inquests with that applicable to equivalent conclusions in civil proceedings: see *Braganza v BP Shipping Ltd (The British Unity)* [2015] 1 WLR 1661. [Reference was also made to *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74; *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *In re B (Children) (Care Proceedings: Standard of Proof)* (CAFCASS intervening) [2009] AC 11.] There are several arguments for the threshold of proof in inquests not generally to be set at the higher criminal standard. (a) An inquest is a fact-finding inquiry. Its purpose is not to find fault or establish liability, but to provide reliable answers for the public record. In that context, it is strange to set more demanding standards of proof for certain factual findings than for others. (b) Setting more exacting standards of proof for certain findings risks distorting statistics of deaths. The use of the criminal standard for suicide findings in particular risks under-recording of suicide, including in the custodial setting. (c) The criminal standard of proof may be said to serve a particular public interest; requiring that the state provide particularly cogent evidence before criminal sanctions may be imposed. That interest is not engaged in an inquest. (d) The balance of probabilities standard is applied in civil cases even where allegations are made that a person committed criminal acts and even where a finding of liability could bring financial ruin for the defendant. Accordingly, the fact F
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- A that a finding of suicide may carry stigma or bring adverse economic consequences (as Watkins LJ said in *R v West London Coroner, Ex p Gray* [1988] QB 467) should not prevent the civil standard being used. (e) The early cases, such as *R v Huntbach, Ex p Lockley* [1944] KB 606, drew upon civil cases (notably *Southall v Cheshire County News Co Ltd* (1912) 5 BWCC 251) in determining the proper approach to suicide conclusions in inquests. Similarly, in other jurisdictions the courts have sought to align the approach in inquests with that in civil cases. See, for example: *In re Beckon* (1992) 93 DLR (4th) 161, *Anderson v Blashki* [1993] 2 VR 89 and *In re Sutherland, decd* [1994] 2 NZLR 242.
- B

- Fourthly, it shows that the reasoning in the authorities is outmoded or unconvincing, especially *R v HM Coroner for Dyfed, Ex p Evans* (unreported) 24 May 1984 and *Ex p Gray* [1988] QB 467. The concern there was the inference of intention from insubstantial evidence. It is not necessary to have a higher standard of proof to avoid such errors. Nor is it needed to assist the direction of juries or the other justifications offered in the authorities. [Reference was made to *R v Wolverhampton Coroner, Ex p McCurbin* [1990] 1 WLR 719; *R v HM Coroner for Newbury, Ex p John* (1991) 156 JP 456; *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1 and *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1.] These authorities do not bind this court or compel a conclusion that the criminal standard applies in suicide cases.
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The claimant's case is that the criminal standard of proof should apply both to the short-form conclusion of suicide and to findings in any narrative conclusion to the effect that a person intentionally killed him/herself.

- E First, that position accords with a large body of authority at the Divisional Court level and with the reasoning in authority at Court of Appeal level. There is a long line of authorities to the effect that suicide must not be presumed, and in particular that positive evidence of intention should be required. There are indications in those cases that a high standard of proof was being demanded: see *Ex p Lockley* [1944] KB 606; *In re Davis, decd* [1968] 1 QB 72; *R v Cardiff City Coroner, Ex p Thomas* [1970] 1 WLR 1475; *Southall's case* 5 BWCC 251; *R v City of London Coroner, Ex p Barber* [1975] 1 WLR 1310; *Ex p Jamieson* [1995] QB 1; *Smith's case* [2011] AC 1 and *R v Essex Coroner, Ex p Hopper* (unreported) 13 May 1988. *Ex p Evans* and those cases which followed it were thus not introducing a new concept and are soundly based on previous authority. The proposition that the criminal standard of proof should apply to the short-form conclusion of suicide, because of its particular significance, was the foundation of the reasoning in *Ex p Gray* [1988] QB 467 and *Ex p McCurbin* [1990] 1 WLR 719. The same heightened standard should apply to unlawful killing conclusions. *McCurbin* is binding on this court. [Reference was also made to *R (Sreedharan) v HM Coroner for the County of Greater Manchester* [2013] Med LR 89.] In many later cases in the High Court it has been stated (*R v Inner South London Coroner, Ex p Kendall* [1988] 1 WLR 1186) or more usually assumed, that the criminal standard of proof applies to conclusions of suicide in inquests. [Reference was made to *R v HM Coroner for North Northumberland, Ex p Armstrong* (1987) 151 JP 773; *R v HM Coroner for Northamptonshire, Ex p Walker* (1988) 153 JP 289; *R v HM Coroner for Newbury, Ex p John* (1991) 156 JP 456; *R v HM Coroner for Ceredigion,*
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Ex p Wigley [1993] COD 364; *R v HM Coroner for Solihull, Ex p Nutt* [1993] COD 449; *R (Sparrow) v HM Coroner for East Somerset* [2006] Inquest LR 194; *Jenkins v HM Coroner for Bridgend and Glamorgan Valleys* [2012] Inquest LR 97; *R (Cash) v County of Northamptonshire Coroner* [2007] 4 All ER 903; *R (Jenkins) v HM Coroner for Portsmouth and South East Hampshire* [2009] Inquest LR 277; *R v HM Coroner for Derby and South Derbyshire, Ex p Hart* (2000) 164 JP 429 and *James v HM Coroner for Surrey* [2014] Inquest LR 207.]

Secondly, there are reasons of public policy for maintaining the higher standard of proof for the finding of suicide in an inquest. [Reference was made to *Ex p Gray* [1988] QB 467; *Ex p Kendall* [1988] 1 WLR 1186 and *R (Lagos) v HM Coroner for London* [2013] Inquest LR 34.]

Thirdly, there are rational grounds for distinguishing between inquests and civil proceedings in this regard. (a) In civil proceedings, the balance of probabilities is adopted because the courts are seeking to strike a fair balance between the interests (usually economic interests) of parties to a private lis. Setting a high standard of proof risks unfairly penalising a claimant. Similar considerations do not apply to inquests. (b) The effect of an inquest determination is to provide a conclusion as to a death for the public record. A short-form conclusion of suicide will be entered in the Register of Deaths, and irreversibly so (subject to a challenge to the conclusion by judicial or statutory review). (c) An inquest is an inquisitorial procedure, with particular restrictions on participation by interested persons (such as the bereaved family). For example, an interested person may not require the calling of a witness and may not address the coroner or jury as to the facts. It is undesirable that the members of a bereaved family should be left with a finding of suicide resulting from a process which they have been able to influence only to a limited extent, absent clear and convincing proof.

The coroner in this case, in adopting the approach that the criminal standard of proof should apply to the short-form conclusion of suicide whereas the civil standard should apply to all findings in narrative conclusions (including findings to the effect that a person intentionally killed him/herself), was following the notes to the prescribed form in the Guidance and the *Coroner Bench Book*.

First, that approach (like that of the Divisional Court, but unlike that of the claimant) avoids the anomalous result that a narrative conclusion may include findings of fact reached on different standards of proof.

Secondly, that approach (like that of the claimant, but unlike that of the Divisional Court) ensures that an unqualified “headline” conclusion of suicide will not be reached and will not be entered in the Register of Deaths unless the evidence satisfies the criminal standard of proof.

Thirdly, while it may at first blush seem illogical to adopt a higher standard for a short-form conclusion than for similar or equivalent findings in a narrative conclusion, there are rational grounds for doing so. (a) Coroners are given a wide discretion in deciding how to frame narrative conclusions or (if sitting with juries) how to elicit such conclusions: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 38. (b) By the same token, coroners have the power (but not the duty) to include circumstances in a narrative which may have been causally relevant to death but cannot be shown probably to have made any causal contribution at all: see *R (Lewis) v Mid and North Shropshire Coroner* 108 BMLR 87; [2010]

- A 1 WLR 1836, para 29 and *R (LePlage) v Assistant Deputy Coroner for Inner South London* [2012] Inquest LR 31, paras 44, 47. (c) Narrative conclusions may therefore be cast in an appropriately qualified or nuanced form. Limitations and complexities in the evidence may be reflected in the factual findings. For example, in a case involving suspected suicide, it may be recorded that a person committed a particular fatal act and did so deliberately, but that it is not clear whether he/she intended it to be fatal (rather than as a “cry for help”). (d) By contrast, a short-form conclusion of “suicide” is a stark finding that the person intentionally killed him/herself, without any qualifying or explanatory wording. That may, therefore, justify application of the criminal standard at least to a short-form conclusion.

- C It is helpful to consider the standard of proof applicable to cases at inquests where the issue of unlawful killing arises, as there are reasons to justify the retention of the criminal standard of proof. [Reference was made to *Ex p McCurbin* [1990] 1 WLR 719; *R (Anderson) v HM Coroner for Inner North Greater London* [2004] Inquest LR 155; *R (Sharman) v HM Inner North London Coroner* [2005] Inquest LR 77; [2005] Inquest LR 168; *R (Cash) v County of Northamptonshire Coroner* [2007] 4 All ER 903 and *R (Duggan) v North London Assistant Deputy Coroner* [2017] 1 WLR 2199.]

- D The unlawful killing conclusion is unlike all others which may be returned in inquests in several respects. (a) It is more than merely a finding of fact, or a composite of factual findings. It is a conclusion that the ingredients of a homicide offence are present and that there is no lawful excuse. In the case of unlawful killing by reference to gross negligence manslaughter, it also connotes a breach of a duty of care which is characterised as “gross” (ie a value judgment). (b) It survives from the time when a coroner’s jury could perform the function of a grand jury and commit an individual for trial for a homicide offence. (c) Whereas the normal function of an inquest is not to find fault or determine liability, Parliament chose in the Coroners Act 1988 and in the Coroners and Justice Act 2009 to legitimise the unlawful killing conclusion by only prohibiting a finding appearing to determine criminal liability of a named person. [Reference was made to *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2013] CP Rep 5.]

- G Despite the prohibition on any inquest conclusion appearing to determine criminal liability of a named person, it will often be obvious from the evidence and from the coroner’s summing-up who the coroner or jury considered had committed a homicide offence. In *R (Anderson) v HM Coroner for Inner North Greater London* [2004] Inquest LR 155, para 21 Collins J said that “a finding of unlawful killing will almost inevitably be regarded as a condemnation of the actions of one or a number of easily identifiable persons” and “is presented in the media and regarded generally as a positive finding that that person or those persons . . . have been guilty of a criminal offence . . .” He added that those features of the unlawful killing conclusion justified the application of the criminal standard of proof.

- H An unlawful killing conclusion may lead to a prosecution.

Although a factual finding that a person committed a criminal act may be reached in civil proceedings on the balance of probabilities, there are particular reasons to adopt a higher standard of proof for the unlawful killing conclusion in inquests.

Whereas it may arguably be unfair to weight the fact-finding process against a factual finding of suicidal intent (e.g. because a finding on that issue may affect the question of whether suicide could have been prevented by better precautions), no similar consideration applies to unlawful killing conclusions. That is because, as noted above, such a conclusion is not merely a finding of fact.

Alison Hewitt (instructed by *Director of Law and Governance, Oxfordshire County Council, Oxford*) for the coroner.

The submissions of the first intervener are adopted. Similarly a neutral position is taken. In the inquest the Guidance and the *Coroner Bench Book* were followed. That approach sought to reconcile the position on the perceived requirement for a criminal standard of proof (as thus far understood, before the decision of the Divisional Court in this case, to apply) on the one hand and the perceived requirements of *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 and section 5(2) of the Coroners and Justice Act 2009 on the other hand. In that latter respect, establishing the intent of a deceased may be a key aspect of the investigation of the circumstances of the death, and it may be thought that in such a scenario a requirement of the criminal standard of proof for a narrative conclusion could be a very undesirable restriction on the practical utility of such an investigation as recorded in a narrative conclusion.

Monaghan QC replied.

Adam Straw (instructed by *Hickman & Rose*) for the second intervener, by written submissions only.

The court took time for consideration.

10 May 2019. The following judgments were handed down.

DAVIS LJ

Introduction

1 This appeal involves questions of importance concerning the law and practice of coroners' inquests where an issue is raised as to whether the deceased died by suicide. The questions can be formulated as follows:

(1) Is the standard of proof to be applied the criminal standard (satisfied so as to be sure) or the civil standard (satisfied that it is more probable than not) in deciding whether the deceased deliberately took his own life intending to kill himself?

(2) Does the answer depend on whether the determination is expressed by way of short-form conclusion or by way of narrative conclusion?

Those are the questions falling for decision in this case; but to an extent they have also required some consideration of the position with regard to unlawful killing.

2 By its judgment [2018] EWHC1955 (Admin); [2019] 1 All ER 561 handed down on 26 July 2018 the Divisional Court (Leggatt LJ and Nicol J) decided that the standard of proof to be applied throughout in cases of suicide, both for short-form and narrative form conclusions, is the civil standard. In so deciding, at least with regard to short-form conclusions, it departed from a long line of Divisional Court and High Court authority,

A from practice guidance issued by the Chief Coroner and from statements made in the leading textbooks on the law relating to coroners. The Divisional Court itself granted leave to appeal to this court.

B 3 The claimant, who is the brother of the deceased in this case, challenges the correctness of that decision. His case is that the criminal standard should have been and should be applied throughout, both for the purposes of a short-form conclusion and for the purposes of a narrative conclusion, in deciding whether the deceased deliberately killed himself intending to take his own life.

C 4 The Senior Coroner for Oxfordshire, whilst maintaining a neutral position, has suggested arguments in favour of the civil standard applying throughout in cases of suicide (following the view of the Divisional Court) or alternatively (and as reflected in a respondent's notice) in favour of the civil standard applying with regard to a narrative conclusion.

D 5 With leave previously granted by this court, the Chief Coroner of England and Wales has intervened. His position too has been neutral; but he has very helpfully through counsel advanced detailed arguments representing the pros and cons of the respective positions. In addition, he has helpfully advanced arguments addressing the position of unlawful killing. The charity INQUEST has also previously been given leave to intervene on this appeal: in its case, by written submissions only. It has advanced arguments strongly advocating a position (if otherwise unconstrained by authority) that in principle the standard of proof at an inquest should be the same for unlawful killing and suicide: and that there is no proper justification for a higher standard of proof for issues of unlawful killing raised at inquests.

E 6 Before us, the claimant was represented by Ms Karon Monaghan QC leading Mr Jude Bunting. The Senior Coroner for Oxfordshire was represented by Ms Alison Hewitt. The Chief Coroner of England and Wales was represented by Mr Jonathan Hough QC (whose arguments Ms Hewitt adopted, with some supplementation). The case was very well argued.

Background

F 7 At around 5.20 in the morning of 11 July 2016 James Maughan was found hanging in his prison cell at HMP Bullingdon. A ligature had been tied to the bedframe and attached to his neck. He was pronounced dead shortly thereafter. There was evidence that in the past he had had mental health and other problems and that there had been previous attempts at suicide and self-harm.

G 8 In such circumstances, an inquest was required to be held and was held. The inquest took place between 9 and 12 October 2017 before the Senior Coroner for Oxfordshire and a jury. The claimant was not legally represented: but the deceased's wife, Kelly Shakespeare, was (as were various other persons) and members of the family were permitted to participate and to ask questions.

H 9 The principal issues raised at the inquest were whether the hanging was self-inflicted and deliberate; whether, if it was, the deceased intended to kill himself; and whether his death was caused or contributed to by failure to protect his life on the part of the prison authorities.

10 At the conclusion of the evidence the coroner received submissions from the various interested persons. Having done so, he accepted that the evidence was insufficient to enable a jury, properly instructed, to conclude to

the criminal standard that the deceased had intended to take his own life. He applied a modified version (“*Galbraith* plus”) of the principles of *R v Galbraith* [1981] 1 WLR 1039 in this regard. He ruled that a short-form conclusion of “suicide” should not be left to the jury. But, having so ruled, he further decided that it would not be appropriate simply to elicit an open conclusion from the jury. He considered that it was requisite that, so far as possible, the jury’s conclusion on the circumstances in which the deceased had died should be elicited by way of narrative conclusion from them. In so deciding, he followed the guidance contained in Guidance No 17 “Conclusions: Short-form and narrative” issued (in 2016) by the then Chief Coroner and in the *Coroner Bench Book* (2015). I will come on to those in due course.

11 After discussion with the legal representatives, the coroner posed the following questions for the jury:

“1. When, where and how was James Maughan found on 11 July 2016 and at what time and where was his death formally pronounced? (Approximate times will suffice if this is all that can be determined on the evidence.)

“2. What is the medical cause of death?

“3. Did James Maughan deliberately place a ligature around his neck and suspend himself from the bedframe?

“4. Are you able to determine if it is more likely than not that he intended the outcome to be fatal, or, for example, if it is likely that he intended to be found and rescued? If you are unable to determine his intention, please say so. [Additionally, the coroner directed the jury to add to question 4, and to consider, whether the deceased was unable to form a specific intent to take his own life through mental illness.]

“5. Were there any errors or omissions on the 10–11 July 2016 in the provision of care on the part of HMP Bullingdon/prison staff which caused or contributed to James Maughan’s death? If so, please state what they are and how they contributed to his death.”

In accompanying written instructions, the coroner again made clear that, in reaching their conclusions on the questions posed, the jury were to apply a standard of proof by reference to the balance of probabilities.

12 It will thus be seen that for the purposes of the narrative conclusion those questions and those instructions throughout were framed by reference to the civil standard of proof.

13 The jury’s eventual answers to those questions were set out in the record of inquest.

14 Typed item 3 on the standard form of record of inquest stated: “How, when and where and, for investigations where section 5(2) of the Coroners and Justice Act 2009 applies, in what circumstances the deceased came by his or her death.” The answer (completed in manuscript) of the jury among other things stated: “We believe that James deliberately tied a ligature made of sheets around his neck and suspended himself from the bedframe.”

15 Typed item 4 on the form stated: “Conclusion of the jury as to death.” In answer to that the jury among other things recorded in manuscript their conclusion, expressed to be a narrative conclusion, that the deceased had a “history of mental health challenges” and had been “visibly

- A agitated” on the night of 10 July 2016. They went on to say this: “We find that on the balance of probabilities it is more likely than not that James intended to fatally hang himself that night.” The jury further went on in their narrative conclusion to consider the conduct of the prison staff. The jury concluded that prison officers had, given what they knew and witnessed, acted reasonably in not opening certain suicide and self-harm prevention measures (known as ACCT) and had generally carried out their
- B duties in an adequate manner with regard to the deceased’s well being that night. The jury nevertheless indicated that they accepted that perhaps more might have been done but went on: “however, neither formally opening an ACCT nor increased vigilance generally would have likely prevented James’s death, given what we believe was James’s intent to end his life.” The jury further concluded that any lack of training or experience on the part of
- C particular staff on the relevant wing at HMP Bullingdon was not a significant factor in causing or contributing to the death.

16 It thus is clear that, faithful to the questions asked of them and instructions given to them, the jury had, for the purposes of their narrative conclusion, considered whether the deceased had intended fatally to hang himself by reference to the balance of probabilities.

- D 17 A conclusion that the deceased had committed suicide was, understandably, very distressing for the deceased’s family. (In fact, evidence was also permitted to be adduced in the Divisional Court to the effect that the Maughan family held strong Catholic beliefs. A statement of Deacon David Palmer dated 14 June 2018 indicated that the teaching of the Catholic Church is that suicide is contrary to love for the living God and is considered a grave sin.) His brother, by judicial review proceedings filed on 11 January
- E 2018, challenges the determination, contained in the narrative conclusion of the jury, that the deceased had intended to kill himself. The complaint in essence is that the jury were incorrectly instructed by the coroner: they should only have been permitted to reach such a conclusion by applying the criminal standard of proof.

- F *Coroners’ investigations*
(a) *The legislative scheme*

18 The purpose of a coroner’s investigation is set out in statute, in the form of the Coroners and Justice Act 2009 (“the 2009 Act”).

- G 19 By section 1(1) of the 2009 Act a senior coroner must conduct an investigation into a person’s death in certain specified circumstances. One of those circumstances is where the deceased died whilst in custody or otherwise in state detention. This, of course, was such a case. It was also a case whereby, by virtue of section 7, a jury was required at the inquest.

20 Section 5 of the 2009 Act provides as follows with regard to the matters to be ascertained:

- H “(1) The purpose of an investigation under this Part into a person’s death is to ascertain— (a) who the deceased was; (b) how, when and where the deceased came by his or her death; (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

“(2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c 42)), the purpose mentioned in subsection (1)(b) is to be read as including the

purpose of ascertaining in what circumstances the deceased came by his or her death. A

“(3) Neither the senior coroner conducting an investigation under this Part into a person’s death nor the jury (if there is one) may express any opinion on any matter other than— (a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable); (b) the particulars mentioned in subsection (1)(c). B

“This is subject to paragraph 7 of Schedule 5.”

21 So far as determinations and findings to be made are concerned, those are the subject of section 10. That provides as follows:

“(1) After hearing the evidence at an inquest into a death, the senior coroner (if there is no jury) or the jury (if there is one) must— (a) make a determination as to the questions mentioned in section 5(1)(a) and (b) (read with section 5(2) where applicable), and (b) if particulars are required by the 1953 Act to be registered concerning the death, make a finding as to those particulars. C

“(2) A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of— (a) criminal liability on the part of a named person, or (b) civil liability. D

“(3) In subsection (2) ‘criminal liability’ includes liability in respect of a service offence.”

22 In addition, section 45 confers a power to make rules (“Coroners rules”) for “regulating the practice and procedure at or in connection with inquests”. Such rules have been made, with effect from 25 July 2013: the Coroners (Inquests) Rules 2013 (SI 2013/1616). By rule 34, headed “Record of the inquest”, it is provided as follows: “A coroner or in the case of an inquest heard with a jury, the jury, must make a determination and any findings required under section 10 using Form 2.” E

23 Form 2, as appended, sets out under five itemised and numbered points the matters to be addressed in the record of the inquest. It is prefaced by the words: “The following is the record of the inquest (including the statutory determination and, where required, findings) . . .” Item 4 in that prescribed form as appended is worded: “Conclusion of the coroner/jury as to the death: (see notes (i) and (ii)).” Note (i) says that “one of the following short-form conclusions may be adopted”. These conclusions are nine in number: they include, among others, “lawful/unlawful killing” and “suicide”. Note (ii) then says: “As an alternative or in addition to one of the short-form conclusions listed under note (i), the coroner or where applicable the jury, may make a brief narrative conclusion.” Note (iii)—and I observe that note (iii) does not appear expressly to be referred to in the body of the prescribed form of the record of inquest itself—says: F

“The standard of proof required for the short form conclusions of ‘unlawful killing’ and ‘suicide’ is the criminal standard of proof. For all other short-form conclusions and a narrative statement the standard of proof is the civil standard of proof.” G

24 It at all events is absolutely clear, from the wording of section 5(2), that in an appropriate case where Convention points arise the inquiry must extend to “the circumstances” in which a deceased had died. The removal of H

A the previous limitations, in particular with regard to deaths in custody and deaths involving state agencies where article 2 considerations arose, as identified and decided in cases such as *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 and (in particular for present purposes) *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, has thus been given a statutory imprimatur.

B (b) *The conduct of inquests*

25 It is elementary, but nevertheless essential to emphasise in view of the issues arising on this appeal, that inquests are not to be regarded as litigation. They are not. They are not criminal proceedings. They are not civil proceedings. There are no “trials” and strictly no “parties” as such at all: rather, there are “interested persons”. The procedural rules and procedural safeguards which may be applicable in criminal or civil proceedings do not apply. As its name connotes, an inquest is essentially, even if not entirely, inquisitorial in nature: the object being to investigate the particular death or deaths (conventionally: “who, when, where, how?”). Thus—whilst the position can perhaps sometimes in practice appear to be less than clear-cut in some particularly highly charged inquests—it is not an adversarial procedure, let alone a criminal procedure, at all. (No doubt it is mainly for that reason that the conclusions of an inquest jury are nowadays ordinarily not even described as verdicts.)

D 26 Thus in *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 625 Lord Lane CJ had said this at p 2 of the official transcript of his judgment:

E “[It] should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use . . . the function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires.”

G 27 In this regard, coroners not only have the assistance of the Coroners rules but also have the assistance both of guidance provided from time to time by the Chief Coroner and of the *Coroner Bench Book*.

H 28 Guidance No 17 deals specifically with the use of short-form and narrative conclusions. At para 19 of that Guidance it is observed that the two types of conclusion are alternatives but that: “It is also permissible to combine the two types of conclusion”. At para 26 of the Guidance this is said: “Wherever possible coroners should conclude with a short-form conclusion. This has the advantage of being simple, accessible for bereaved families and public alike, and also clear for statistical purposes.” At para 32 this is said:

“Note (ii) also states that a narrative conclusion may be used ‘in addition’ to a short-form conclusion. This means that a narrative may be

used as a brief expansion of the stated short-form conclusion in Box 4, although in most cases this will not be necessary because of the words already used in answering ‘how’ in Box 3.”

Detailed guidance is later given with regard to inquests involving article 2 considerations. Among other things, this is said at para 47:

“A short-form conclusion may be sufficient to enable the jury to express their conclusion on the central issues canvassed at inquest. Frequently a narrative conclusion will be required in order to satisfy the procedural requirement of article 2, including, for example, a conclusion on the events leading up to the death or on relevant procedures connected with the death: see *Middleton*.”

29 The Guidance also deals with “standards [sic] of proof” at para 56. That states as follows:

“The standard of proof required for the short-form conclusions of ‘unlawful killing’ and ‘suicide’ is the criminal standard of proof. For all other short-form conclusions and a narrative conclusion the standard of proof is the civil standard of proof. See Note (iii), Form 2, Schedule to the 2013 Rules.”

Paras 60–63 then deal more specifically with conclusions of suicide. One specific form of suggested conclusion there set out (as justifying an open conclusion) involves expressly stating that it is more likely than not that the deceased intended to take his own life but that the decision-maker could not be satisfied so that he was sure that the deceased intended to do so.

30 Turning to the *Coroner Bench Book*, that follows a similar line. By way of specimen example of a form of words that might be used in summing up to a jury at an inquest involving a prison death where the deceased has died by hanging, the suggested direction with regard to suicide, at para 21, is that: “You may reach this conclusion if on the evidence you are sure that AB took his own life and intended to do so.” The suggested directions with regard to a narrative conclusion extend, by para 28, to cases “where, on balance, you find he intended to take his own life but you cannot be sure about it”. The suggested directions then following (at paras 29–30) include express reference to the balance of probabilities.

31 It is plain that in the present case the coroner had, very understandably, closely modelled his approach on the Guidance and on the *Coroner Bench Book*.

32 It appears from the guidance (and the cases there referred to in the footnotes) that the guidance that, for short-form conclusions, the standard of proof in suicide cases was the criminal standard was based on the legal authorities, as they then stood and as they were then understood. We inquired, however, as to the basis for the guidance to the effect that it was the civil standard of proof which was to be applied for the purposes of narrative conclusions. We were told that that did not derive directly from any decision of the courts but had been thought appropriate in the light of the perceived need to ensure compliance in a proper way with *Middleton* [2004] 2 AC 182 and now with section 5(2) of the 2009 Act.

A *The legal authorities*

33 We were presented with a great number of legal authorities. But I think that I need refer only to a selection.

34 It is plain enough, at least since the decision of the Court of Appeal in *Southall v Cheshire County News Co Ltd* (1912) 5 BWCC 251, that it has been established as a general proposition that suicide should never be presumed. Suicide must be affirmatively proved. That was over the years endorsed, with varying degrees of emphasis, in a number of subsequent authorities relating to inquests. But none of such authorities specifically held that the applicable standard of proof in suicide cases was the criminal standard: even if some came quite close to doing so.

35 However, in *R v HM Coroner for Dyfed, Ex p Evans* (unreported) 24 May 1984, a case where suicide was in issue, a Divisional Court (Watkins LJ and Forbes J) in terms accepted counsel's argument that it was not permissible for a jury at an inquest to bring in a finding of suicide on the balance of probabilities. Although not spelled out quite so specifically, that also seems subsequently to have been the approach of a Divisional Court (Parker LJ and Pill J) in *R v Essex Coroner, Ex p Hopper* (unreported) 13 May 1988. In the meantime, however, that unquestionably had been the approach of a further Divisional Court over which Watkins LJ presided (Watkins LJ and Roch J) in the case, decided on 19 December 1986, of *R v West London Coroner, Ex p Gray* [1988] QB 467.

36 *Ex p Gray* was a case where unlawful killing was in issue. Watkins LJ recorded that "we heard much argument" about the standard of proof. He noted a lack of direct authority on the point (it seems, incidentally, that he had not been reminded of his own earlier decision, unreported, in *Ex p Evans*). He stated of suicide, at p 477: "Suicide was then a crime. It no longer is. But it is still a drastic action which often leaves in its wake social, economic and other consequences." After referring to certain statements of Lord Widgery CJ in *R v City of London Coroner, Ex p Barber* [1975] 1 WLR 1310 (itself a case involving a verdict of suicide), Watkins LJ said this [1988] QB 467, 477-478:

"I cannot believe, however, that he [Lord Widgery CJ] was regarding proof of suicide as other than beyond a reasonable doubt. I so hold that that was and remains the standard. It is unthinkable, in my estimation, that anything less will do. So it is in respect of a criminal offence. I regard as equally unthinkable, if not more so, that a jury should find the commission, although not identifying the offender, of a criminal offence without being satisfied beyond a reasonable doubt.

"As for the other verdicts open to a jury, the balance of probabilities test is surely appropriate save in respect, of course, of the open verdict.

"This standard should be left to the jury without any of the refined qualifications placed upon it by some judges who have spoken to some such effect as, the more serious the allegation the higher the degree of probability required. These refinements would only serve to confuse juries and, in the context of a jury's role are, I say with great respect to those who have given expression to them, I think, meaningless. Such matter as that led the coroner astray in this case, by providing the jury with no plain standard of proof to be guided by. He cannot be blamed

for that, but it is another factor which must cause this verdict to be quashed.” A

37 The leading textbooks on the law and practice relating to inquests (including *Jervis on Coroners*, 13th ed (2014)) have all since then taken it that for a conclusion of suicide the criminal standard of proof applies. At the same time, none have really queried the suggestion in the Guidance issued by the Chief Coroner and in the *Coroner Bench Book*, or the statement in note (iii) to the prescribed Form 2 appended to the Coroners rules, to the effect that for the purposes of a narrative conclusion the civil standard, based on the balance of probabilities, can apply. B

38 Our attention was, however, also drawn to a decision which was not mentioned by the Divisional Court. This decision, unlike the others of potential relevance, is a decision of the Court of Appeal. It is *R v Wolverhampton Coroner, Ex p McCurbin* [1990] 1 WLR 719. C

39 In *Ex p McCurbin*, there had been a death in the course of a police arrest. The coroner was required to give directions on verdicts of unlawful killing and misadventure (it may be observed that suicide was not in issue). The jury reached a conclusion of misadventure. One of the issues raised on appeal was that of the standard of proof. It was argued that the standard of proof applicable to unlawful killing was not, as the coroner had directed, the criminal standard but was the civil standard: viz the balance of probabilities. It was among other things argued that *Ex p Gray* was wrongly decided. D

40 In his judgment Woolf LJ (with whom Stocker LJ and Lord Donaldson of Lynton MR agreed) referred to and discussed the civil cases *Hornal v Neuberger Products Ltd* [1957] 1 QB 247—a case which had itself been cited, although not expressly referred to in the judgment, in *Ex p Gray*—and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 (in particular the observations of Lord Scarman at p 112). Having cited at length from *Ex p Gray*, Woolf LJ went on [1990] 1 WLR 719, 727–728: E

“As appears from the passage from the speech of Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 112–114, which I have cited, in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision-making body who has the task of coming to the conclusion on the facts. As I have sought to indicate, whether in a case of a serious nature such as unlawful killing you adopt the standard of proof which is technically a civil standard but you elevate it because of the gravity of the issue, or whether you use the criminal standard of proof, the result will almost inevitably be the same. F

“I can see that there may be force in Mr Macdonald’s submission that perhaps in the case of a coroner’s inquest, theoretically speaking, the appropriate standard might be said to be a very high standard indeed on the basis of the civil standard of proof. However, whether that be right or not, what I am absolutely satisfied about is that the practical guidance which is given by Watkins LJ in *R v West London Coroner, Ex p Gray* [1988] QB 467 is correct, bearing in mind that it is given in relation to the G H

A coroner's role in respect of his duty to direct a coroner's jury as to how that jury is to perform its task.

B "I am quite satisfied that, in a case where it is open to a jury, as a result of a coroner's inquest, to come to a verdict of unlawful killing, the appropriate direction which the coroner should give to the jury is the simple one that they should be satisfied beyond all reasonable doubt or, as sometimes said, satisfied so that they are sure. That provides clear guidance to the coroner's jury which they will be able to follow, and it is not necessary for them to be involved with sliding scales which are more appropriate for a judge than a jury.

C "It is true that, in many cases where it is open to a coroner's jury to find a verdict of unlawful killing, they may also have to consider the question of death by misadventure. However, in my view, this does not and should not give rise to problems. The coroner should indicate to the jury that they should approach, initially, the question as to whether or not they are satisfied so that they are sure that this is unlawful killing. If they come to the conclusion that it is unlawful killing, there is no need for them to go on to consider death by misadventure. But, if they come to the conclusion that it is not unlawful killing, they are not satisfied so that they are sure that that verdict is appropriate, then they will consider the question of misadventure and, in so doing, they do not need to bear in mind the heavy standard of proof which is required for unlawful killing. They can approach the matter on the basis of the balance of probabilities. The situation is that, just as it is important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure."

E 41 It is the position of Ms Monaghan that in the present case we are bound to follow, or at any rate should follow, that decision.

F 42 Finally, we were referred to a number of subsequent decisions relating to inquests where it had in effect been assumed, without argument on the point, that at inquests the criminal standard of proof applies in cases of suicide. I do not think that I need refer to those decisions further. The point was, however, substantively discussed by Lang J in *R (Lagos) v HM Coroner for London* [2013] Inquest LR 34. In that case the husband of the deceased—perhaps unusually—was positively arguing for a conclusion of suicide. Lang J considered a number of the authorities. She found—indeed was bound to find, on the precedent of the Divisional Court cases cited to her—that it was the criminal standard of proof which applied to a conclusion of suicide.

G 43 I should perhaps also mention that we were referred to the position in a number of other jurisdictions. It suffices to say that there is no clear pattern. Some adopt the criminal standard; others a civil standard. They do not really advance the argument as to what the position is under the law of England and Wales.

H *A sliding scale?*

44 Another potential problem arises, however.

45 As can be seen from the discussion in the judgments in *Ex p Gray* [1988] QB 467 and in *Ex p McCurbin* [1990] 1 WLR 719, some consideration was given to whether there could be, as it were, a heightened standard of civil

proof: although in the event both decisions unequivocally plumped for directing the inquest jury to the criminal standard: at all events, in cases of unlawful killing. A

46 Whatever general difficulties that issue in the past may have generated (arising in particular from some observations in *Hornal* [1957] 1 QB 247) those have now been laid to rest in civil proceedings. The civil standard of proof, where that applies, is that of the balance of probabilities, without refinement. B

47 This was established by the decision of the House of Lords in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, as confirmed and supplemented by the decision of the House of Lords in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11. It is in fact noticeable that both those cases were care proceedings involving children and so did not just represent a private lis between parties but also involved an important public interest element. It was there decided that the ordinary civil standard of proof applied and that “there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not”: per Lord Hoffmann, at para 13. C

48 This, I observe, is not to say that in all non-criminal contexts the criminal standard of proof can never be appropriate. On the contrary, in some special contexts it can be (as certain authorities indeed indicate). All ultimately will depend on the context and underpinning purpose, statutory or otherwise. Thus, by way of example, in civil contempt proceedings the criminal standard is conventionally and appropriately applied. As stated by Lord Brown of Eaton-under-Heywood in *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499, 1515, after he had discussed various instances where the criminal standard of proof was applied: D

“Certainly, once it became established, as it finally was in *In re H* [1996] AC 563, that there is no such thing as an intermediate standard of proof, logic surely demanded that one standard or the other be applied and common sense dictates the rest.” E

Thus it remains the general position that there now are no intermediate positions for the civil standard of proof where the civil standard of proof falls to be applied. F

49 In *Braganza v BP Shipping Ltd (The British Unity)* [2015] 1 WLR 1661, Baroness Hale of Richmond DPSC, after referring to the decision in *Ex p Gray* and to the comments of Longmore LJ in the Court of Appeal in the instant case that *Ex p Gray* might itself “be said to be a little outdated”, stated firmly, at para 34, that G

“there is not a sliding scale of probability to be applied, commensurate with the seriousness of the subject matter or the consequences of the decision. The only question is whether something is more likely than not to have happened.” H

That case, I note, involved private law proceedings and a determination by an employer, for the purposes of the assessment of death in service benefit, as to whether a deceased chief engineer had committed suicide during a voyage by sea.

- A 50 As to the fact that we have different standards of proof at all, the underpinning rationale for the standard of proof in criminal cases being set at beyond reasonable doubt presumably does ultimately rest on the serious consequences: potential loss of good character and, in particular, of liberty for the defendant, coupled with concern for the risk of condemning the innocent. (Conversely, I might add, the potential grave consequences can, for example, require the application of a standard of proof even lower than the ordinary civil standard in tribunal cases.) The underpinning rationale for there being a lower standard (balance of probabilities) ordinarily applicable in civil cases rests on the fact that such cases generally concern disputes involving the private rights of parties without such potentially serious consequences, even though they still may be very serious. For reasons of consistency and certainty (and as discussed above) there can be no variable scale within the relevant standard applicable. The criminal standard is the same for a driving case in the magistrates' court as it is for a murder case in the Crown Court. The civil standard is the same for a claim for £5,000 in the County Court as it is for a claim for £50,000,000 in the Commercial Court.
- B
- C
- D 51 As I have stated, an inquest is not a criminal proceeding. Nor is it a civil proceeding. But, that said, the clear conclusion at least has to be that, surely, no "intermediate" standard of proof can apply with regard to inquests. Accordingly, either it is the civil standard both for short-form and for narrative conclusions; or it is the criminal standard both for short-form and for narrative conclusions; or—as the coroner here proceeded—it is the criminal standard for short-form conclusions and the civil standard for narrative conclusions. (No one could sensibly argue, or did argue before us, for a civil standard for the short-form conclusion and a criminal standard for the narrative conclusion.)
- E

The proceedings in the Divisional Court

- 52 Prior to the hearing in the Divisional Court, both parties—the claimant and the coroner—had proceeded on the assumption that a short-form conclusion of suicide could only be reached on the application of the criminal standard of proof. That was so because that was the settled practice and understanding: based on the weight of authorities going back over some 35 years and reflected also in the leading text books, in the Chief Coroner's Guidance and in the *Coroner Bench Book*. Mr Bunting thus had come prepared to argue that the criminal standard applied also to the narrative conclusion: Ms Hewitt had come prepared to argue in favour of the position set out in the Guidance and the *Coroner Bench Book* and as adopted here by the coroner.
- F
- G

- 53 But at the hearing the Divisional Court challenged that approach. It queried the mutual assumption of counsel that a short-form conclusion of suicide could only be returned by application of the criminal standard of proof rather than by application of the civil standard of proof. It appears that Mr Bunting and Ms Hewitt then had to adapt their arguments in pretty short order to meet this new point and had limited opportunity for further research.
- H

54 The judgment of the court (as delivered by Leggatt LJ) was a reserved judgment [2019] 1 All ER 561. It is characteristically thorough, thoughtful and erudite.

55 The judgment set out the background very fully. It dealt with the legislative scheme and rules and the Guidance and *Coroner Bench Book*. The court then indicated its initial view that it could be important, in determining the circumstances of death, to determine whether a deceased intended to take his own life: and if such a finding was important, the coroner or jury surely, it was indicated, must be entitled to record it in a narrative conclusion. The court went on to say, in para 24:

“We see force in the point made by Ms Hewitt that, in order to determine the causative relevance of any acts or omissions on the part of state agents, it may be necessary for a coroner or jury to make a finding on the balance of probabilities as to whether the deceased intended to take his own life. If such a finding is made and is important, the coroner or jury must be entitled to record it in a narrative conclusion. Yet it appears illogical to conclude (on the balance of probabilities) that the deceased intended to end his life in the context of deciding whether his death could have been prevented whilst at the same time concluding that he did not intend to end his life (because the coroner or jury is not sure of that fact) for the purpose of deciding whether he committed suicide.”

56 The court then went on to say this, at para 25:

“Nevertheless, if the premise of the claimant’s argument is correct, the conclusion is in our view irrefutable. A narrative conclusion to the effect that on the balance of probabilities the deceased did a deliberate act which caused his own death intending the outcome to be fatal clearly amounts to a conclusion that the deceased committed suicide whether or not the word ‘suicide’ is used. It is sophistry to say that such a conclusion is not one of suicide because the required standard of proof has not been met. The standard of proof even if referred to in the record of inquest, as it was in this case, is not itself part of the substantive conclusion adopted by the coroner or jury. It is simply a statement of the evidential test which must be met in order to reach a particular conclusion. If the standard of proof required to determine that the deceased committed suicide is the criminal standard and the necessary facts have been proved only on the balance of probabilities, this does not mean that a conclusion which records those facts is not one of suicide. It means that the coroner or jury cannot lawfully reach that conclusion.”

57 The court then reviewed the 2009 Act and the Coroners rules. It could find nothing in them to support a conclusion that the criminal standard of proof applied at either stage. After referring to the differences between coroner’s proceedings and criminal proceedings and the differences between coroner’s proceedings and civil proceedings, the Divisional Court then said this, at para 40:

“These differences, in our view, make it, if anything, less rather than more appropriate to apply in coroner’s proceedings a standard of proof higher than the civil standard. In circumstances where the function of an inquest is to determine the relevant facts concerning the death as accurately and completely as possible without determining even any question of civil liability, we can see no justification in principle for weighting the fact-finding exercise against any particular conclusion and

- A requiring proof to any higher standard than the balance of probabilities. That is so even if the facts found disclose the commission of a criminal offence. Given that in civil proceedings the standard of proof of criminal conduct remains the ordinary civil standard, we can see no principled reason for adopting a different approach in coroner's proceedings. The position is a fortiori where the conclusion under consideration is one of suicide as, although it was once a crime, suicide has not been a crime for over 50 years since that rule of law was abrogated by section 1 of the Suicide Act 1961."
- B

- 58 The court then turned to the authorities. Having assessed a number of them in detail (indeed, more detail than I have myself thought necessary) it found no case prior to that of *Ex p Gray* [1988] QB 467—it seems that *Ex p Evans* (unreported) 24 May 1984 had not been noted by the Divisional Court—to support the proposition that a conclusion of suicide at an inquest may only be reached if the necessary elements were proved to the criminal standard. As to *Ex p Gray*, the court felt able to conclude that the relevant remarks were dicta. But even if the statements of Watkins LJ as to proof of suicide were part of the ratio, those statements were, the court concluded, wrong. They were wrong because first, they involved a misunderstanding of Lord Widgery CJ's statements in *Ex p Barber* [1975] 1 WLR 1310; and second, because they did not engage with the proposition (as discussed in *Hornal* [1957] 1 QB 247) that the standard of proof in civil proceedings as to whether a criminal offence has been committed is the civil, and not the criminal, standard and thus that there was no reason why a different approach should apply in coroner's proceedings.
- C
- D

- 59 The court went on to hold that subsequent decisions such as *Lagos* [2013] Inquest LR 34 did not advance, and were no more correct than, *Ex p Gray*. As we have said, however, the Divisional Court had not been referred to—doubtless just because counsel had had relatively little time to research matters—and did not itself refer to the Court of Appeal authority of *Ex p McCurbin* [1990] 1 WLR 719.
- E

60 The Divisional Court stated, at para 73:

- F “although we recognise that a finding of suicide is a serious matter which can cause serious consequences, this is not a consideration which can in principle or consistently with the approach of the law in civil proceedings affect the legal standard of proof.”

Its overall conclusion was expressed in these terms, in para 75:

- G “In summary, we are unable to accept the claimant's contention that a conclusion of suicide at an inquest requires proof to the criminal standard. We are satisfied that the authorities relied on to support that contention either on analysis do not support it or do not correctly state the law. We consider the true position to be that the standard of proof required for a conclusion of suicide, whether recorded in short-form or as a narrative statement, is the balance of probabilities, bearing in mind that such a conclusion should only be reached if there is sufficient evidence to justify it.”
- H

Submissions

61 It was the submission of Ms Monaghan that this conclusion is not sustainable.

62 Her essential arguments can be summarised as follows:

(1) The Divisional Court was correct to find that, in cases of suicide, there was illogicality in applying the criminal standard to the short-form conclusion but the civil standard to the narrative conclusion. That would also be productive of confusion and inconsistency, both for juries and for members of the public having an interest in the outcome. Thus the standard should indeed be the same both for short-form and for narrative conclusions. But where the Divisional Court went wrong, she said, was to say that the applicable standard throughout was the civil standard: rather, it was the criminal standard throughout.

(2) That the criminal standard is the applicable standard was established by the notes to Form 2, which form had been prescribed by the Coroners rules.

(3) In any event, that the applicable standard is the criminal standard is established by authority, particularly in the form of the Divisional Court decisions in *Ex p Evans* and *Ex p Gray* and the Court of Appeal decision in *Ex p McCurbin*. Even if the former cases are not binding on this court the latter case is. In any event, the statements made in those cases, even if not strictly binding with regard to suicide, were correct and should be followed.

(4) Such an approach did not involve an undue restriction on the need (in an article 2 case) for an investigation into the circumstances of the death in accordance with *Middleton* [2004] 2 AC 182 and section 5(2) of the 2009 Act. The actual intent of a deceased may not necessarily be material for such an investigation or for the consideration of (for example) the reasonableness of the conduct of state agents in failing to prevent death. In any event, there is no principle that the procedural requirements of article 2 cannot be met by the application of the criminal standard of proof.

63 Mr Hough, as I have said, took a position of neutrality. However, he helpfully advanced submissions on the various scenarios arising. In doing so, he acknowledged the general importance of this case.

64 He pointed out at the outset—validly, in my view—that there is no particular magic in differentiating between a short-form conclusion and a narrative conclusion: in the sense that both are directed at the actual overall conclusion, in particular the question of *how* a deceased came to die as he did. In that regard, he drew attention to the requirements of *Middleton*, as now reflected in section 5(2) of the 2009 Act; and submitted that it would seem very desirable not to impose any undue restriction in terms of burden of proof on such an investigation into the circumstances of death; which circumstances may well include, among other things, the issue of intent.

65 In support of the Divisional Court's approach he observed:

(1) It avoids the seeming illogicality of different standards of proof applying to short-form conclusions and narrative conclusions.

(2) It also avoids the potential result that separate findings within a single narrative conclusion may be reached by internally applying differing standards of proof: for example, concerning issues of intent and causation and the reasonableness of the preventative steps (if any) of the relevant state agents.

(3) It assimilates the standard of proof for suicide conclusions in inquests with that applicable to equivalent conclusions in civil proceedings: see, for example, *Braganza* [2015] 1 WLR 1661.

- A (4) The imposition of a criminal standard runs against the grain of an inquest, which is concerned to find facts, not to establish culpability or liability on the part of anyone. Further, to set such a standard might distort statistics of death and thus undermine prevention for the future of (for example) deaths in prison: an important potential function of such an inquest. Further, the “stigma” argument should not be overstated, particularly in modern times. In any event, stigma and other adverse consequences, including social and financial ruin, can equally arise from findings (for example, of fraud or violence) in a civil case.
- B

(5) The authorities do not bind this court or compel a conclusion that the criminal standard applies in suicide cases. Nor is there any difficulty in instructing juries on the application of the civil standard.

- C 66 In support of the claimant’s approach Mr Hough readily acknowledged the points made by Ms Monaghan and the range of authorities supporting her arguments.

- D 67 As to the approach adopted by the coroner in the present case, Mr Hough pointed out that that followed the notes to the prescribed form, the Guidance and the *Coroner Bench Book*. Such an approach also at least meant that the same standard of proof applied to the entirety of the narrative conclusion. Further, the conclusions expressed in narrative form can also be appropriately qualified. A short-form conclusion of suicide, on the other hand, is a “head line” conclusion which by its nature carries no qualification or explanation: this may, therefore, justify application of the criminal standard at least to a short-form conclusion.

- E 68 For her part, Ms Hewitt, whilst likewise adopting a neutral position, also pointed out that the coroner here had followed the Guidance and the *Coroner Bench Book*. She emphasised that such approach sought to reconcile the position on the perceived requirement for a criminal standard of proof (as thus far understood, before this decision of the Divisional Court, to apply) on the one hand and the perceived requirements of *Middleton* [2004] 2 AC 182 and section 5(2) of the 2009 Act on the other hand. In this latter respect, she further emphasised that establishing the intent of a deceased may well be a key aspect into the investigation of the circumstances of the death:
- F and she submitted that it might well be thought that in such a scenario a requirement of the criminal standard of proof for a narrative conclusion could be a very undesirable restriction on the practical utility of such an investigation as recorded in a narrative conclusion.

Disposal

- G 69 In my opinion, the Divisional Court adopted a bold approach in departing from what had been regarded as settled law and practice, at least at Divisional Court level, for over 35 years. Moreover it did so without having regard to the Court of Appeal decision in *Ex p McCurbin* [1990] 1 WLR 719, of which it was not made aware. Nevertheless, I consider that it was right in the ultimate conclusion which it reached.

- H 70 I relatively briefly say, in my own words, why I reach that conclusion.

71 The prescribed form appended to the Coroners rules in terms acknowledges that (as has long been the practice) there may be one or other or both of a short-form conclusion and a narrative conclusion. The central point is then, in my view, that there seems a very real inconsistency in

adopting a criminal standard of proof for a short-form conclusion but a civil standard of proof in a narrative conclusion. Where is the logic and sense in that hybrid approach? I cannot discern any. Moreover, not only would it create difficulties for juries in having differing standards of proof relating to various findings within its conclusions, depending on their nature, but also it could tend to create difficulties or confusion in terms of public perception of the outcome.

72 In saying that, I have every sympathy for the approach taken by the Chief Coroner's Guidance and the *Coroner Bench Book*, and reflected also in the notes to the prescribed form: and which the coroner in the present case understandably followed. But that approach is predicated on it having been understood that it was a legal requirement that the criminal standard applies. That understanding immediately led to an appreciation that that could have a restrictive impact, at least in article 2 cases, with regard to the requirements of *Middleton* and of section 5(2) of the 2009 Act. It is this which, it seems, has then led to the awkward hybrid approach adopted in the notes to the prescribed form, the guidance and the *Coroner Bench Book*.

73 Thus there is everything to be said for one and the same standard of proof applicable at each stage to cases of suicide at an inquest. The question then is: should that be the criminal standard (the claimant's approach) or the civil standard (the Divisional Court's approach)?

74 In the absence of authority, I would be of the clear view, in agreement with the Divisional Court, that the appropriate standard of proof to be applied throughout in cases of suicide should be the civil standard. I say that for a number of reasons:

(1) First, the essence of an inquest is that it is primarily inquisitorial, that it is investigative. It is not concerned to make findings of guilt or liability (even though I accept that not infrequently a narrative conclusion may in practice, to an informed participant, operate to identify individuals as potentially at fault). The underpinning rationale for the *need* to have a criminal standard of proof in criminal proceedings simply has no obvious grip in inquest proceedings, given their nature.

(2) Second, since 1961 suicide has ceased to be a crime. Suicide will of course be dreadfully upsetting to the family of the deceased; it may perhaps in some quarters also carry a stigma (although one would like to think that the predominant feeling of most observers in modern times would be acute sympathy); it may have other adverse social or financial consequences. But it is not a crime.

(3) Third, whatever the prevarications in the past, the civil courts nowadays generally apply in civil proceedings the ordinary civil standard—that is, more probable than not—even where the proposed subject of proof may constitute a crime or suicide: see *In re B* [2009] AC 11 and *Braganza* [2015] 1 WLR 1661. There is no sliding scale or heightened standard. There is no discernible reason why a different approach should apply in coroner's proceedings, at all events in relation to suicide (which is not even a crime).

(4) Fourth, the importance in article 2 cases—although in my view there actually is no reason in principle to distinguish between standards of proof in suicide cases depending on whether or not article 2 considerations arise—of a proper investigation into the circumstances of death under section 5(2) of the 2009 Act strongly supports the application of the (lower)

- A civil standard. The approach intended to be applicable, viewed objectively, surely would be expected to be inclined towards an expansive, rather than restrictive, approach. That also would enhance the prospects of lessons being learned for the future: one of the functions of such an inquest. I accept Ms Monaghan's point that article 2 procedural requirements are not incapable of being met by the application of a criminal standard of proof.
- B But context is all: and the present context of an inquest relating to suicide, and the answer to the question "how?", strongly favours the imposition of a lower standard of proof than the criminal standard.

(5) Fifth, the application of the civil standard to a conclusion of suicide expressed in the narrative conclusion would cohere with the standard which is on any view applicable to other potential aspects of the narrative conclusion (for example, whether reasonable preventative measures should or could have been taken and so on).

- C 75 Ms Monaghan nevertheless briefly submitted that the point has been determined by the Coroners rules: in that rule 34 requires that the determination and findings required must be made using Form 2. Going, then, to Form 2, that, by note (iii), requires the criminal standard: and that, she says, has the status of a rule governing the position.

- D 76 That is a very two-edged argument, given that the self-same note provides for the application of the civil standard to narrative conclusions. But in any event I am in no doubt, in agreement with the Divisional Court, that the entire argument is wrong. If it was desired by the Coroners rules to make provision for the standard of proof (and it was common ground before us that section 45 of the 2009 Act would have so permitted) then the obvious place to do so would have been in the body of the Coroners rules themselves.
- E The notes appended to the prescribed form cannot, in my view, be given the substantive status of rules. They simply set out, for the convenience of coroners, an understanding of the law.

- 77 I might observe, in any event, that item number 4 in prescribed Form 2 ("Conclusion of the coroner/jury as to the death") as appended to the Coroners rules refers only to notes (i) and (ii): it does not in terms refer to note (iii). Moreover, we gathered that such notes to the form in any event are not ordinarily supplied to a jury. Certainly they were not in the present case: indeed item number 4 on the record of inquest here used as to the conclusion had also deleted reference to "see notes (i) and (ii)".
- F

- 78 That then leaves the question of whether authority compels a different result. Obviously this court does not have any constraint of binding precedent in the form of Divisional Court or Administrative Court decisions (although naturally we accord them persuasive respect). In such circumstances, it is pointless engaging in lengthy debate as to whether the statements there made were ratio or obiter in the way that the Divisional Court felt constrained to do.
- G

- 79 The decisions in *Ex p Evans* (unreported) 24 May 1984 and *Ex p Gray* [1988] QB 467 are clear that the criminal standard applies at an inquest in case of suicide. That is an express part of the decision in *Ex p Evans*; and whilst *Ex p Gray* was a case of unlawful killing, the reasoning is so structured that a conclusion that the criminal standard applies to suicide is, as I read it, a necessary part of the reasoning leading to the conclusion with regard to unlawful killing.
- H

80 But is that reasoning correct and is that conclusion justified with regard to suicide? I do not think so. A

81 I would not say that in *Ex p Gray* Watkins LJ ultimately had engaged in an impermissible adoption of a “sliding scale” of the civil standard of proof. To the contrary, he had unequivocally selected the criminal standard of proof: thus in principle adhering to an approach subsequently approved by Lord Brown of Eaton-under-Heywood in *In re D* [2008] 1 WLR 1499. But given that an inquest is not a criminal proceeding nowhere is it really explained *why* the criminal standard was thought appropriate. Watkins LJ necessarily had to acknowledge that suicide was no longer a crime. But he then provided no real rationale for a conclusion that the criminal standard applied apart from saying that suicide “is still a drastic action which often leaves in its wake serious social, economic and other consequences”: [1988] QB 467, 477. But that can be said of many other acts which attract the civil standard of proof: and consideration of such consequences surely cannot of itself determine the applicable standard of proof. B C

82 Moreover, the line of authorities cited in *Ex p Gray* had only been to the effect that there could be no presumption of suicide and that affirmative proof was needed. To the extent that Watkins LJ had, in going further, placed reliance on the observations of Lord Widgery CJ in *Ex p Barber* [1975] 1 WLR 310 those, on analysis and as pointed out by the Divisional Court, lend no real support for his conclusion. Moreover, whilst an instruction to the jury at an inquest on the criminal standard is doubtless easy to apply it can hardly be said that an instruction on the civil standard (eschewing, of course, all questions of a “heightened standard”) is any more difficult to apply. D E

83 The previous conclusion of Watkins LJ to like effect in *Ex p Evans* (which conclusion was announced without any real supporting reasons at all) can have no greater or better authoritative effect than his conclusion in *Ex p Gray*.

84 That leads me to the decision in *Ex p McCurbin* [1990] 1 WLR 719. That decision, being a decision of the Court of Appeal, does bind this court. But it only binds this court for what it actually decides. And in my judgment *McCurbin* does not decide that, in cases of suicide, the applicable standard of proof at an inquest is the criminal standard. F

85 *McCurbin*, like *Ex p Gray*, was a case on unlawful killing: not on suicide. Further, unlike *Ex p Gray*, *Ex p McCurbin* does not, as I read it, reason from a conclusion on suicide as a necessary part of the reasoning towards a conclusion on unlawful killing. G

86 The judgment of Woolf LJ is, with respect, in some places rather equivocal as to whether or not it is the civil standard, albeit to “a very high standard indeed”, which is being applied. But be that as it may the ratio of the decision in this respect, in my view, is found in the passage set out at p 728A–B: that is, that for a conclusion (or verdict) of unlawful killing the correct direction is by reference to the criminal standard. It is true that subsequently at p 728D, Woolf LJ said: H

“The situation is that, just as it is important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure.”

A But, set in context, the reference here to suicide is, in my view, clearly obiter. It does not form part of the actual decision, which had already been expressed by Woolf LJ: nor is it a necessary part of the reasoning for that decision, which was confined to unlawful killing.

B 87 To the extent that certain other cases have subsequently proceeded on the footing that, in inquest cases, the criminal standard applies to cases of suicide, that was on an assumed or agreed basis, without argument. The point was, it is true, specifically addressed by Lang J at first instance in *Lagos* [2013] Inquest LR 34. But as that decision was (necessarily) predicated on the decision in *Ex p Gray* it takes matters no further.

C 88 The upshot is, in my judgment, that the decision in *Ex p Evans* is to be overruled. The reasoning in *Ex p Gray* (in so far as it relates to suicide) and the dictum of Woolf LJ in *Ex p McCurbin* with regard to suicide are not to be followed. The standard of proof to be applied at an inquest where an issue of suicide arises is in all respects, and whether for the purposes of a short-form conclusion or for the purposes of a narrative conclusion, the civil standard of proof: that is to say, by reference to the balance of probabilities.

D 89 It may well be that the Chief Coroner will accordingly wish to reconsider, as a matter of expedition, the current Guidance and *Coroner Bench Book* in these respects; and so, likewise, may those having responsibility for the drafting of the notes to Form 2 as currently appended to the Coroners rules.

Unlawful killing

E 90 Although this case has been directly concerned only with a case of suicide, I think that it would be wrong, in the circumstances, not to comment (even if necessarily on an obiter basis) on the standard of proof applicable to cases at inquests where the issue of unlawful killing arises. In fact, Mr Hough told us that the Chief Coroner would welcome clarification from this court, in view of the Divisional Court's apparent indication—albeit in ignorance of the decision in *Ex p McCurbin*—in para 40 of its judgment that in such cases the civil standard applies.

F 91 As will have appeared from some of the observations made above, there is a very powerful case for saying that the civil standard of proof should apply to all inquests in all respects: and in particular, for these purposes, that it should apply to cases of unlawful killing. Such an approach would reflect the essentially inquisitorial nature of an inquest; would reflect the importance of the need to investigate the circumstances of death where section 5(2) applies; would promote consistency of approach both with regard to the findings reached within each potential conclusion and with regard to all other conclusions available to an inquest; and would accord with the general approach to proof of criminality adopted in civil cases. That position is also cogently advanced in articles of Paul Matthews (now Judge Paul Matthews), an editor of *Jervis on Coroners*, entitled “The Coroner and the Quantum of Proof” (1993) 12 CJQ 279 and “The Coroner and the Quantum of Proof—a Postscript” (1994) 13 CJQ 309. It is further cogently advanced in the written submissions prepared by Mr Adam Straw of counsel and submitted on this appeal on behalf of the charity INQUEST, as intervener.

H 92 But, attractive and cogent though those submissions are, I do not think that it would be justifiable to accede to them. Indeed, I think that

Mr Hough in turn made some powerful points against such an outcome for unlawful killing cases. A

93 There are these considerations:

(1) The first point is the fundamental point that, whilst inquests are not criminal proceedings, unlawful killing (in contrast with suicide and with all other conclusions open to an inquest, as enumerated in the notes to Form 2) connotes a crime. Thus unlawful killing can properly be considered to have its own special status, as it were, as a conclusion at an inquest. B

(2) Second, and linked to the first point, conclusions of unlawful killing appear to be confined to a relatively restricted class of cases: in effect, homicide (murder, manslaughter, infanticide). Thus it has been decided in the Divisional Court that cases of causing death by dangerous or careless driving cannot justify a conclusion of unlawful killing at an inquest: see *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2013] CP Rep 5. C

(3) Third, while section 10(2) of the 2009 Act precludes a determination having the appearance of determining any question of criminal liability on the part of a named person, a conclusion of unlawful killing has a strong “head line” connotation; and quite often—as a number of decisions have pointed out—the identity of the particular alleged perpetrator(s) will in reality have become manifest from the hearing itself. It could be thought fairer to such person(s) that the criminal standard applies. Moreover, whilst the procedural connection between a finding of unlawful killing by a named person at an inquest and a consequential indictment for homicide was abolished by the Criminal Law Act 1977, it remains the case that, under current procedures, a conclusion of unlawful killing at an inquest will ordinarily cause a reconsideration by the Crown Prosecution Service of whether charges should be brought. D E

(4) Fourth, since the wording of section 10(2) connotes that questions of criminal liability may be determined (even if persons are not to be named) that is consistent with a criminal standard of proof being contemplated as available.

(5) Fifth, that unlawful killing can be regarded as standing apart from all other conclusions available also is perhaps reflected in footnote 44 to para 56 in Guidance No 17. That refers to there being “ongoing [2016] discussion as to whether suicide should be proved to the criminal or civil standard. The Ministry of Justice are considering the alternatives”. We were told that, so far as is known, there is in fact currently (in 2019) no ongoing consideration of such alternatives. The point, however, is that the then ongoing discussion, in 2016, was confined to suicide. It apparently did not extend to unlawful killing. F G

(6) Finally, and not least, there is the question of authority. The courts have consistently taken it that, in unlawful killing cases, the applicable standard of proof is the criminal standard. For example, in *R (Duggan) v North London Assistant Deputy Coroner* [2017] 1 WLR 2199, the decision proceeded on the footing that the requirements (in the context of the issues of unlawful killing and lawful killing there raised) were appropriately consistent with the requirements of the criminal law: and thus that the jury was to be directed on the issue of self-defence by reference to the requirements of the criminal law as to that defence, not by reference to the requirements of the civil law as to that defence. In any event, I consider H

- A that the matter is concluded at this level by the decision of the Court of Appeal in *Ex p McCurbin* [1990] 1 WLR 719. The decision in that case with regard to unlawful killing is ratio. Nor can the decision be said to be necessarily incompatible with the subsequent decision of the House of Lords in *In re B* [2009] AC 111: for the decision in *Ex p McCurbin* does not, ultimately, depend on an (incorrect) adoption of a heightened civil standard but instead unequivocally finds that the criminal standard is to be applied: a
- B course which (as the comments of Lord Brown in *In re D* [2008] 1 WLR 1499 also show) remains available in what is considered to be an appropriate situation. Further, whilst *Ex p McCurbin* did not address article 2 considerations in the way that the House of Lords did subsequently in *Middleton* [2004] 2 AC 182 that factor also does not invalidate the decision on this point either. Indeed, as Ms Monaghan had, as I have said,
- C pointed out, the procedural requirements of article 2 are not incapable of being satisfied, in an appropriate case, by a criminal procedure or by the adoption of the criminal standard of proof.

- 94 In indicating these considerations, I should not be taken as necessarily agreeing myself that this *ought* to be the outcome. I can see a very powerful case for saying that the standard of proof applicable to unlawful killing cases in inquests should also be the civil standard (as for all
- D other available conclusions), both as a matter of principle and as a matter of practicality. But that, as I see it and in particular in the light of the decision in *Ex p McCurbin* [1990] 1 WLR 719, is not the current state of the law: a state of the law which, in fairness, cannot be said to be altogether devoid of supporting arguments.

- 95 Accordingly, my opinion is that coroners should, in cases where
- E unlawful killing arises as an issue, continue to instruct juries by reference to the criminal standard of proof in the way that they currently do.

- 96 All that said, it seems to me to be unfortunate that so important a matter as the standard of proof applicable in inquests (extending not only to unlawful killing but also to suicide) has thus far been left to, in effect, a piece-meal decision making process by the courts and by practice guidance. Given the availability of the relevant rule-making power in section 45 of the
- F 2009 Act, it surely would be greatly preferable, and would put matters beyond all debate, if the desired position was now explicitly articulated within the Coroners rules themselves.

Conclusion

- 97 In the result, I conclude that, in cases of suicide, the standard of
- G proof to be applied throughout at inquests, and including both short-form conclusions and narrative conclusions, is the civil standard of proof. Since, in the present case, that is how the coroner instructed the jury as to the narrative conclusion which they might reach, the present challenge by the claimant cannot be accepted.

- 98 Ms Monaghan did also briefly submit in her written argument that
- H even if that were this court's conclusion nevertheless the appeal should still be allowed, on the basis that the jury received no sufficient guidance on the presumption against suicide. But no such guidance was called for; indeed it might have been confusing for the coroner to have made any reference to starting presumptions. What mattered was that the jury in the present case were clearly told that they could not make a determination of suicide unless

they were satisfied that it was more likely than not, on the balance of probabilities, that the deceased deliberately killed himself intending to take his own life. That was the correct instruction. A

99 I would therefore, for my part, dismiss this appeal.

NICOLA DAVIES LJ

100 I agree. B

UNDERHILL LJ

101 I agree with Davis LJ's conclusion as regards the standard of proof to be applied in reaching both short-form and narrative verdicts in suicide cases and with his clear and comprehensive reasoning. I also agree with his observations, albeit necessarily obiter, on the standard of proof in cases of unlawful killing. Like him, I think it is a pity that the law in this area has been left to develop piece-meal in the way that it has, and I too would see value in it being authoritatively stated in the Coroners rules (quite apart from tidying up the position about the notes to Form 2, as he recommends at para 89). C

Appeal dismissed.
Permission to appeal. D

ALISON SYLVESTER, Barrister

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Neutral Citation Number: [2021] EWHC 3023 (QB)

Appeal No. 71 of 2021
Claim No. H02LV580

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER

1 Bridge Street
Manchester
M60 9DJ
11th November 2021

Before:

MR JUSTICE FORDHAM

Between:

SYLVIA DEBENHAM-SCHON
- and -
ANCHOR HANOVER GROUP

Appellant

Respondent

The Appellant in person
Vilma Vodanovic (instructed by Walker Morris) for the **Respondent**

Hearing date: 11/11/21

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an application for permission to appeal. The case came before me on the papers and, having read them, I made an order on 3 November 2021 exercising my power pursuant to CPR 52.4(1) to direct that there be an oral hearing to determine whether to grant permission to appeal and whether to continue the stay of the warrant of execution. I made provision in that order for the Appellant to state a preference for a remote hearing. Invoking that mechanism, she requested that today's hearing be a remote hearing by BT Meet Me, to promote her ability to access the court. I am satisfied that that mode of hearing was necessary and appropriate. The open justice principle has been secured. The case and its start time, and the mode of hearing, were all published in the cause list accessible publicly by the "courtserve" website. Also published was an email address usable by any member of the press or public wishing to observe this public hearing. Miss Vodanovic attended on behalf of the Respondent and addressed me briefly on four topics to which the Appellant had the opportunity, which she took, to assist me by way of submissions in reply.
2. The appeal arises from an order made by Recorder Rahman ("the Judge") at Liverpool County Court on 5 August 2021. That order gave the Respondent possession of a property known as Flat 32 at an address in Liverpool, the Respondent not to enforce by warrant of possession before 1 September 2021. The Appellant tells me that the date of 1 September 2021 was linked to an operation which she was expecting to take place within the near future. The order went on to deal with an injunction against the Appellant which had been made by Recorder Grundy on 21 December 2020 the duration of which continues until 4pm on 21 December 2022. The Judge ordered the Appellant to pay the Respondent's costs of the proceedings, to be assessed on the standard basis if not agreed. The Judge directed that a transcript of his judgment be provided to the parties, that being in the public interest. The order recorded the Court's finding that the Appellant's behaviour had satisfied Grounds 12 and 14 of Schedule 2 to the Housing Act 1988 and that there was no reason to apply the extended discretion under section 9 of that Act.
3. The transcript of the judgment was subsequently made available to the parties pursuant to the Judge's Order. By an Order dated 7 September 2021 HHJ Wood QC, upon considering the papers and noting the Appellant's Appeal Notice, and recording that the papers were unlikely to be considered by a High Court Judge (who alone could address the question of permission to appeal) before the start of the legal term in October 2021, extended the stay of the warrant of eviction pending consideration of the appeal papers by a High Court Judge. My Order of 3 November 2021 extended the stay of execution of the warrant of possession to today's hearing.

The judgment

4. The Judge's judgment is a detailed one. The judgment is the necessary focus of consideration of the question of permission to appeal. It is therefore important that I pay attention to the key passages within it, in considering whether to grant permission to appeal in light of the written and oral submissions made by the Appellant. The judgment extends over 17 pages single-spaced and contains 70 paragraphs. Among the features of the judgment are the following. The Judge recorded that the hearing

had lasted three days with two days of evidence. As the Appellant also explained to me, she gave live evidence and there were two other witnesses who also gave live evidence. There were four volumes of documents comprising the trial bundle with a total of 1,197 pages plus additional documents handed up during the trial. Additional documents included a witness statement from the Appellant dated 1 August 2021 and a handwritten list of some 34 videos (with a short written summary of those). The Judge recorded that a number of videos were played in the courtroom and that he had viewed other videos including 12 videos provided by the Respondent. By way of background, the Judge recorded that the papers before him included materials relating to a nine-day possession hearing in March 2018 involving a different landlord and culminating in a 102-page judgment of Recorder Earlam. The Judge also recorded that there had been a three-day hearing before Recorder Grundy, culminating in a 25-page judgment and the injunction of 21 December 2020 which featured in the Judge's Order (and to which I have already made reference).

5. The Judge made very clear in his judgment that: "This is not a judgment I actually want to give; it is not a judgment I hoped I would have to give"; that "the reality is there are no winners and losers in this case"; that it "is a sad case indeed, and one which I wish could have been avoided". But that: "[u]nfortunately, despite the best efforts of those involved, and I attribute no blame one way or the other, it has not proved possible to resolve the issues without the need for me to determine the matter on the evidence". The Judge explained that the Appellant is a 78-year-old woman resident in an independent living retirement scheme, having begun her assured tenancy there on 28 October 2018. He explained that the application for the injunction granted by Recorder Grundy, pursuant to the Anti-Social Behaviour Crime and Police Act 2014, had been preceded by a community protection notice in connection with anti-social behaviour which notice had been issued on 12 November 2019. The notice seeking possession had been served on 4 February 2021 and the claim for possession issued on 18 March 2021.
6. It was necessarily a key part of the Judge's function in determining the issues at the trial that he grapple with relevant questions of fact and relevant features of the evidence. It is clear from a reading of the judgment that the Judge addressed in a conscientious way the issues that were being raised. By way of one example, the Judge recorded an allegation which had been made about the Appellant deliberately blocking communal toilets. It was being said that that deliberate act by her had led to consequences including a resident falling. On that topic, the Judge explained that he accepted the Appellant's evidence. He explained that he was not satisfied that she had blocked the toilets deliberately. To give a second example, the judgment addressed allegations of behaviour at a bus stop in relation to residents who were in a barber shop. As to that, the Judge concluded that insufficient evidence had been provided to be satisfied that the alleged incident had taken place.
7. The judgment makes clear that the Judge was very well aware of the respects in which the Appellant was submitting that she was seriously wronged, by the actions of others. On that topic the judgment includes the following passage:

Lest it be said I have not considered the behaviour of others, I have done so and I say this in relation to that: I do not doubt that others in that scheme have behaved badly towards [the Respondent]. I do not say that such behaviour is justified or excused by the fact that they were provoked by [the Appellant]'s behaviour; they should have known better, as

indeed should have [the Appellant]. She believes they should be up here and be facing eviction but the reality is she is the catalyst which has generated this particular situation. The fact is there are no injunctions against their behaviours because those behaviours are not regarded as being sufficiently anti-social to justify any injunction. What I will say is, and perhaps this is a lesson to be learned by [the Appellant], that a little give-and-take on her part would have gone a long way to resolving this situation. An attempt to engage with [the Respondent] might well have gone some way to addressing her concerns.

8. As I have explained, the Judge – inescapably - needed to address factual questions relating to the Appellant’s conduct. It is important that I record some of the key passages in the judgment by which the Judge addressed those matters. I record them, recognising that they are strenuously challenged by the Appellant in her application for permission to appeal, and recognising that I will need to return to the key themes and points which are raised in that application for permission to appeal. I have not lost sight of any of that in recording the way in which the Judge dealt with the factual position relating to her conduct in key passages within the judgment. The judgment included the following passages on that topic:

I do not for one minute believe that the [Appellant]’s actions are malicious, and are intended to hurt other people. She undoubtedly, as she says to me, wants to live a quiet life, but the problem is, in her attempt to live a quiet life, she has insisted others comply with her rules and her ways of living. If they do not do so she reacts in a way which is unreasonable, disproportionate, unjustified, and will not listen to anyone else in an attempt to try and resolve the situation.

Referring to a dispute which had arisen out of the smell of air freshener or other substances, in the context of the Appellant’s asthma, the Judge said this:

[H]er reaction has been entirely unreasonable, disproportionate and unjustified. Instead of using proper means to try and resolve the issue, she has taken matters into her own hands and behaved in a way which has caused antagonism with fellow residents and has clearly caused a nuisance and annoyance and clearly, in my view, amounts to anti-social behaviour...

The Judge said:

The position seems to me to be this. The [Appellant] is fiercely protective of her health, fiercely protective of her cat, Puddycat, who sadly died on 27 December 2020. When she perceives there to be anything that interferes with that, she simply reacts or more properly, retaliates, and thinks she is entitled to do so. I am afraid she is not; that is simply not acceptable behaviour in a communal living situation, one cannot simply go round to a neighbour’s flat, on the corridor next door to you or otherwise, move their belongings, or take them away. Each and every allegation set out within the [Respondent’s] Scott Schedules I accept has been proved, proved not least because the [Appellant] admits she did interfere with them but that her defence is that she was justified. She was not, I am satisfied, justified in her behaviour which was again a clear breach not only of the injunction but also of her tenancy agreement, and this amounted to anti-social behaviour.

The Judge said this:

the [Appellant] has a campaign against anyone who smokes, wears perfume, uses ... air freshener spray ... Or objects to anything in relation to her cat at that time. Unfortunately, I have heard no evidence to suggest or even hint that the [Appellant] will cease from interfering with others’ belongings; that nuisance is one that will carry on, in my judgment.

The Judge also said:

It is also clear that throwing items out of the window is part of the pattern of behaviour of the [Appellant]; she admits, brazenly ..., throwing Dettol contaminated with, I think, some food, onto the window of Flat 6 below because, she put it, 'Dettol wouldn't stick on the window; it just rolled off the window'. She said to me in terms, 'So I added some food and yoghurt into it so it would stick on the window and leave a message'. This was in the context of her long-running complaint about someone smoking in the flat below which in fact is permitted. I am afraid that her behaviour was completely unacceptable and amounts to a clear breach, not just of the tenancy agreement, but clear evidence of anti-social behaviour. Perhaps more importantly in my view, it demonstrates someone who pays no heed to a court order. I am satisfied that, on the balance of probabilities, no matter what her denials might be, that the yoghurt or rice pudding or other dairy products thrown onto the vehicle as set out in the Scott Schedules was the fault of [the Appellant], along with the other spraying of liquids and each of the allegations within those two Scott Schedules that post-date the injunction I find proved. The [Appellant] has either admitted the allegations or as in the case of the yoghurt/dairy products I find the allegations proved to the requisite standard. There is in addition video evidence corroborating the continued spray of liquids.

The Judge found:

It is... abundantly clear, that every possible avenue of avoiding possession proceedings has been attempted by [the Respondent], all to no avail.

He explained that:

I have no alternative, in light of my judgment... but to grant possession immediately to [the Respondent].

The appeal

9. The Appellant has filed detailed grounds of appeal accompanied by a considerable volume of materials. Strong themes within her written grounds are: that the process before the Judge was an unfair one; that false claims were being made against her; that relevant matters were being ignored; that previous proceedings and orders were wrong and indeed fraudulent; and that the timing of the eviction was unjustified. In her grounds of appeal, she invites the Court to grant permission to appeal and subsequently to allow 7 days of court hearing time for the case to be heard, in its entirety, and by reference to all of the evidence. She submits: that the claim against her arose from vengeful action by her previous landlord, and the police, against whom she had made complaints; that the message was spread within the housing scheme that she was a "paranoid person" and to be dealt with as such; that her privacy and confidentiality were breached and that lies were told; that she has been lied against and treated disrespectfully; that false and manipulated videos were used against her; that key aspects of her defence and counterclaim were ignored; that the Respondent breached and abused its responsibilities owed to her; and that other tenants including leaders of a 'gang' of tenants breached their own responsibilities and acted unlawfully, to harm her. The Appellant in her grounds asks this Court to "annul the case completely", recognising "the criminality which it is, its gross abuse of the judicial system", and in any event to delay the eviction date and an "appeal trial" date until after surgery and her recovery from it. She also asks that the Court investigates what she says are false reports made by two psychiatrists.
10. In her oral submissions today, the Appellant has urged me to grant her permission to appeal, and to make directions that the appeal should take place after a medical operation which itself cannot take place until after an awaited medical examination

and report. She emphasised her wish, and the need, that this Court should consider – for the purposes of permission to appeal – all of the documents that she has provided and everything that she has written. In developing her oral submissions, key themes included the following, among others. She addressed me on the topic of her own conduct. She submits that what has been said about her conduct has been twisted and fabricated and involves fiction, perjury and contempt. She addressed me in relation to the conduct of others. She describes that conduct in terms which include criminality and sadism.

11. In the context of the conduct of others, she specifically drew my attention to the way in which she had filled out her “defence form” dated 9 April 2021, to which the Judge referred in the judgment (although there is a typo in the date which he gave it). The Appellant showed me how the defence form box asks whether any counterclaim is being raised against the landlord. She ticked the box “yes” and filled the space with a detailed manuscript description which she has helpfully subsequently typed up for ease of reading. The paragraphs of that counterclaim set out the basis on which she submitted that compensation should be awarded for a number of acts including: stalking; harassment; character assassination; crimes under the housing mental health Acts; racist abuse; disability hate crimes; animal cruelty. There are also claims for compensation for physical injuries, compensation for damage to property including clothing, and in respect of a number of further acts. In submitting to me that the Judge “didn’t deal with anything” and that he “didn’t pay attention”, the Appellant submitted that the counterclaim was not dealt with by the Judge.
12. A further distinct theme of the oral submissions developed by the Appellant at today’s hearing related to a diagnosis of paranoia. The Appellant submits that the purported diagnosis in that respect, to which two “shameful reports” (as she describes them) contain reference, is at the root of much of what has unjustly and unlawfully followed. She told me that medical documents and police actions have led to a “shameful” and unjustified stigmatising of herself, which is at the heart of what she submits has gone wrong in this case and has resulted in unjust recognition of what has been said to have been the actions of herself and others, by contrast with what she submits is the factual truth.

Discussion

13. Having considered the points made by the Appellant in writing and orally today, I can see no properly arguable ground of appeal in this case. In my judgment, there is no realistic prospect that this Court would overturn the Judge’s judgment or his order.
14. The Judge plainly grappled with matters of fact and evidence, and reached findings of fact on that evidence, in the light of all the materials including the live evidence and the videos. As the Appellant, in my judgment rightly, recognised, the points in the “counterclaim” were points which were connected to what she was submitting to the Judge on the central issues of the conduct on her own part and the conduct that she was submitting had taken place on the part of the Respondent’s officers and on the part of other tenants. It is clear that the Judge did not regard as substantiated by the Appellant factual allegations being made by her, whether relevant to the question of acts of wrongdoing done by her, or relevant to the question of acts done by other residents. I record this: it was the Respondent’s position on this application for permission to appeal that because no pleaded counterclaim in damages, accompanied

by a fee, was before the Judge at the trial, it would remain open to the Appellant to make a claim for damages for personal injuries or damage or loss to her property, if she maintains that she has a sustainable course of action. None of that would, however, constitute a basis for refusing the order for possession, in light of the unimpeachable findings of fact which, beyond argument, were plainly open to the Judge.

15. Nor can I accept that the Judge arguably went wrong in the way in which all he addressed the medical evidence. Again, it is important to have in mind the passages in the judgment which addressed the relevant considerations. I will record the Judge's conclusion, recognising that the Appellant strongly contests it. The Judge said this:

I am satisfied, as was Recorder Grundy, that the [Appellant] has a disability within the meaning of the Equality Act 2010 and, as [counsel for the Respondent] properly concedes on behalf of the [Respondent], that much of the conduct giving rise to the present proceedings is a direct result of, or related to, her condition, namely paranoid personality disorder. It is right that I also point out that I have seen nothing to suggest any change in the circumstances regarding the [Appellant's] capacity; she clearly has capacity to conduct the present proceedings and I have seen nothing to doubt that and have seen no evidence to suggest that her capacity is in question.

Not only was that approach, to the evidence before the Judge, plainly open to the Judge, but more importantly it is clear that the Judge focused directly and straightforwardly on the key factual questions about conduct. He plainly did not proceed from any evidence, still less any contested evidence, to reach factual conclusions based on any medical diagnosis. Instead, he evaluated the evidence and made determinations as to what in fact had happened, who had done what, and what the character and quality of those actions were. One clear example, which demonstrates this point beyond doubt, is that (as I have explained) there are clear examples in the judgment where the Judge accepted the Appellant's evidence and did not find substantiated that she had acted in certain ways that were being alleged. The Judge linked his findings of fact, as to conduct, to the direct evidence which he had heard and seen. Nor can I accept, even arguably, that the Judge was led into relevant error through "manipulation" or "fabrication", for example, of video evidence.

16. In the light of those conclusions, I am not going to grant permission to appeal in this case.

Continuing the stay

17. One topic which was raised and with which I now need to deal concerns the question of the stay, and continuation of the stay, in light of the refusal of permission to appeal. I was addressed on both sides on the topic of what this Court should do if it were not granting permission to appeal. The Appellant's submission was that, if that situation arose, there should be a stay for two months, or more, in light of what she says about the need for a medical report, an operation and recovery from that operation. Ms Vodanovic for the Respondent resists any stay. She says that the question of allowing time was a matter for the Judge and was addressed by the Judge. She submits that there is no medical evidence which supports the court granting any stay or continuation. She emphasises that, in any event, there would need to be a period of at least 14 days because of the need to apply for a new appointment in relation to the

bailiff. She accepted that steps of that kind could be taken in parallel with a continuation of the stay if the court were to grant it.

18. In my judgment, the appropriate course for this Court to take – in principle and, in any event, as a matter of my judgment and discretion – is to mirror the period which the Judge recognised as appropriate when he made the possession order that he did. His order was dated 5 August 2021 and he considered in the circumstances of the case that it was appropriate to direct that the Respondent was not to enforce possession by warrant of possession before 1 September 2021. That allowed a period of 26 days. I am satisfied that it is appropriate for me to allow a period of time which is a mirror image: 26 days from this determination which finally disposes of the question of any appeal. I am satisfied that no further stay is justified in circumstances where I am refusing permission to appeal. It is necessary in my judgment that the possession order should now be capable of execution and closure achieved, in light of the invocation of the right to seek permission to appeal which has, as a result of my judgment, been unsuccessful.

Post-judgment factual materials

19. I asked both parties whether materials which each of them has supplied, by way of communications with the Court, as to matters post-dating the Judge's judgment were, in their submission, relevant to my function. In my judgment, no such materials – at least in the context and circumstances of the present case – were of material assistance on the question of permission to appeal. The Appellant's position was that she is able to identify continued actions which she characterises as a continuation of everything that has gone before in this case. She submits, on that basis, that evidence was capable of shining a light on the question of whether the Judge was arguably wrong in the way in which he dealt with the issues in his judgment. In my judgment, to raise materials and seek to invite this Court to accept a characterisation – in one direction or another – of what is said to have happened 'on the ground' cannot possibly affect the question of permission to appeal. There is, in my judgment, no realistic prospect that "fresh evidence" could lead to this Court overturning the Judge's judgment and order. I am in no position to make findings of fact as to what has or has not happened, or who was responsible for it, in the period since the Court below gave judgment. This is not a fact-finding hearing. Nor does it need to be a fact-finding hearing.

Communications with the court (CPR 39.8)

20. The final topic with which I am going to deal in this judgment concerns communications with the court. This is not a topic which is capable of affecting the analysis on the question of permission to appeal or on the question of continuing the stay. Ms Vodanovic was quite right when she submitted that this topic, to which I am now turning, is not one which has material influence for the purposes of those two issues. But I regard it as a topic of some importance. It is, moreover, a topic which I specifically raised in my Order of 3 November 2021. I interpose, in that regard, that: I referred to CPR 39.8; I directed the Respondent's solicitors to supply a paginated bundle of all emails between the Respondent's solicitors and the Court (whether this Court or the county court) after 4.8.21 relating to this case, in which the Appellant was not cc'd"; and I stated in my observations in the order that: "Any explanation can and should be provided to the Court and the Appellant".

21. What happens in the High Court when an appeal judge is given papers relating to a proposed appeal is that the file is provided to the judge. The judge is thus in a position to see what is being said to the Court by the parties. In the present case there have been a number of emails sent by the Appellant, who on the face of it has been careful – on each occasion – to ‘copy in’ at least one of the solicitors acting for the Respondent. That is to her credit. What I saw in the file were some emails which had involved both sides, and some emails to the Court from the solicitors acting for the Respondent which did not. An example of an email which did involve all the parties was the email which the Judge himself sent on 7 September 2021. He wanted the parties to be made aware that he had received the transcript and intended to review it in the near future, in order to approve for provision to the parties the transcript of the judgment (for which he had made a direction in his order). A series of emails from the Respondent’s solicitors to the Court dealt with topics to do with the speed with which the Court was dealing with the known application from the Appellant for permission to appeal. The Respondent was (naturally) anxious to know the position and wanted to achieve promptness in relation to determination of the application for permission to appeal, not least in the context of the stay and any enforcement. There is absolutely nothing wrong with any of that. But what is very striking is that the decision was clearly taken not to include the Appellant’s email address on the ‘cc list’ for those communications. That is a cause of concern for at least two reasons. The first is that communications relating to the timing of the Court dealing with the application for permission to appeal were communications with the Court which would have consequences for the timing for the enforcement of possession action against the Appellant. The second is that some of the communications expressly relied on what was being said by the Respondent’s solicitors to be the position ‘on the ground’.
22. I am going to refer to those matters, in circumstances where the Respondent’s solicitors have had the opportunity to consider their position in relation to CPR 39.8, and where the position, taken in a letter to the Appellant (5.11.21), which they maintain before me today is that there was no contravention of CPR 39.8 on the basis that the email communications were “purely ... administrative”.
23. In considering that submission I have had regard to the following contents of the emails to the Court. In one email, there was this:

... our client is understandably keen for matters to be progressed in view of the ongoing situation at its sheltered housing scheme and the impact it is having on its residents (the police have made multiple attendances there since the start of September).

In another, this:

Hopefully we will have some more substantive news soon as the police are having to make repeated attendances at our client sheltered scheme due to the continual problems being caused by the [Appellant].

In another, this, in seeking:

..... an update on the status of the appeal ... I can then better manage expectations of our client, the police and all those affected at our client sheltered housing scheme.

Finally, in an email from the Respondent's solicitors to my clerk – when it was known that the papers were being placed before me – which drew attention to the email chain:

... you will see from the chain below that I have been seeking updates with regard to the status of this appeal, in view of the situation on the ground at our client's sheltered housing scheme, following the grant of the attached forthwith possession order of 5 August.

24. In my judgment, those contents cannot properly be described as being “purely ... administrative”. I agree with the Appellant that she should have been copied in on emails being sent to the Court; firstly, because they were advocating a prompt and expeditious dealing with a matter which would accelerate the date on which she had to give up possession; but secondly because they included the Respondent's side of things as to events “on the ground”, including by reference to the Appellant's conduct, and the police. It is not difficult to test the position. Suppose the Appellant had been legally represented by a firm of solicitors. I find it frankly unthinkable that solicitors could send communications of that kind while making the decision not to copy in their opponent's legal representatives. It is regrettable, in my judgment, that the opportunity was not taken, to recognise that the emails ought, under the rules, to have been cc'd to the Appellant. It is because that opportunity was not taken, and because the position taken has been maintained, that I have addressed the issue and dealt with it here, so that any necessary lessons can be learned.

Conclusion

25. For the reasons I have given, I am refusing permission to appeal but will continue the stay of the warrant of execution for the period to which I have referred, giving a precise date. The Order I made was: (1) permission to appeal is refused; (2) the stay on the warrant of eviction is extended to 6 December 2021 after which the Respondent may enforce the possession order of Recorder Rahman (5.8.21) by warrant of possession; (3) no order as to costs.



Neutral Citation Number: [2022] EWCA Civ 911

Case No: CA-2021-001878

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Honourable Mr Justice Keehan
WV19F00188

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE WHIPPLE

AZ (A CHILD) (RECUSAL)

Shiva Ancliffe QC and Sham Uddin (instructed by **Duncan Lewis**) for the **Appellant**
Tom Wilson (instructed by **Shoosmiths**) for the **First Respondent**
Timothy Bowe (instructed by **Glaisyers**) for the **Second Respondent** (written submissions)

Hearing dates : 4 May 2022

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 5 July 2022.

LORD JUSTICE UNDERHILL, LORD JUSTICE BAKER and LADY JUSTICE WHIPPLE :

INTRODUCTION

1. This is the judgment of the Court to which all its members have contributed.
2. It concerns an appeal against the refusal by Keehan J of an application to recuse himself made during a hearing in long-running private law proceedings under the Children Act 1989 about a boy, A, now aged four. At an earlier hearing when Peter Jackson LJ granted permission to appeal, the appellant, A's mother, made it clear that she was not inviting the Court to set aside the order made at the end of the hearing during which the recusal application was made. Rather, she sought an order that the judge would be recused from sitting on the next, and final, hearing in the proceedings, which were listed to start on 23 May 2022.
3. In view of the imminence of that hearing, having taken time to consider the merits, we informed the parties a few days after the hearing before us that we had decided to dismiss the appeal for reasons which would be given at a later date. This judgment sets out the reasons for our decision.

THE FACTUAL AND PROCEDURAL BACKGROUND

4. The following summary is taken substantially from earlier judgments in these proceedings, none of which have been the subject of an appeal.

FACTUAL BACKGROUND

5. A's parents met and married in 2009. After the mother had sadly suffered a series of miscarriages, they decided to try to have a child via a surrogacy arrangement. In April 2017, they entered into an arrangement with a surrogacy agency in Ukraine. In June of that year, they signed a written surrogacy agreement with a woman in Ukraine to whom they had been introduced by the agency. Thereafter, the process of creating an embryo started with the father providing sperm which was inserted into an egg provided by the donor. On 5 August 2017, the embryo was implanted into the surrogate mother.
6. At about the same time, the mother, with the father's knowledge and agreement, sent an email to the director of the agency asking if the father's unused genetic material could be stored for five months while they awaited the progress of the course of treatment then underway.
7. Ultrasound examination of the surrogate confirmed that she was pregnant and the parents returned to this country. On 21 November 2017, without informing the father, she sent an email to the director of the Ukrainian surrogacy agency enquiring about the possibility of using the remaining embryos for a second surrogacy. The director replied proposing that the parents execute a power of attorney authorising the agency's lawyer to sign the necessary papers.
8. On 7 December 2017, the mother and father executed a power of attorney authorising the surrogacy agency to sign documents on their behalf. It was the father's case in these proceedings, accepted by the judge, that he was told by the mother that the

purpose of the power of attorney was to assist with the registration of the expected child's birth and obtaining a passport.

9. The surrogate gave birth to A in Ukraine in April 2018. The baby was handed over to the parents shortly after birth.
10. A few weeks later, the director of the surrogacy agency sent an email to the mother enclosing a copy of a second surrogacy agreement. The mother replied asking the director not to discuss the second agreement with the father, asserting that he found it difficult to discuss the matter because of concerns about miscarriages. On 24 April 2018, the second surrogacy document between the agency and the parents was signed. The judge subsequently found that the father's signature had been forged.
11. On 7 July 2018, the parents flew back to this country with A. On 12 July they filed an application for a parental order under s.54 of the Human Fertilisation and Embryology Act 2008. By this stage, however, there were difficulties in the parties' relationship. On 23 July, the mother left the family home with A and the following day transferred £60,000 from the parents' joint account into her own account. A few weeks later, she and the child returned to the home and thereafter the parents attended couples counselling. Meanwhile, the parental order reporting officer carried out inquiries in accordance with the regulations and visited the family on several occasions. The mother did not inform the officer of the second surrogacy arrangement.
12. Meanwhile, another woman in Ukraine had been identified by the agency to act as the surrogate under the agreement. On 25 October 2018, a further surrogacy agreement was signed between the parents and the second surrogate. The agency's lawyer signed the agreement on behalf of the parents using the power of attorney which they had signed December 2017. The director of the agency sent an email to the mother that the agreement had been signed and enclosing a scanned copy. The email was neither copied nor forwarded to the father. On 9 January 2019, an ultrasound scan confirmed that the second surrogate was pregnant and that she was carrying twins.
13. It was the father's case accepted by the judge that it was not until 5 March 2019 that the mother informed him about the second surrogacy. On the same day, he telephoned the agency in Ukraine making enquiries about it. On the following day, the mother reported to the police that she had been assaulted by the father on 3 February 2019. She changed the locks of the family home to prevent the father gaining entry. On 15 March 2019, the mother made a without notice application for a non-molestation order against the father which was granted by a deputy district judge on 18 March. On 22 March 2019, the father applied for a child arrangements order in respect of A. No contact took place between the father and the child until a hearing in June 2019 when it was agreed that contact would start on a supervised basis. Meanwhile, in a further exchange of emails with the agency in Ukraine, the mother renewed her request to the director only to communicate with her and let her know if the father or someone on his behalf contacted the agency.
14. On 5 August 2019, the second surrogate in Ukraine gave birth to twins, a girl and a boy. For the next few months, the mother divided her time between caring for A in this country and travelling to the Ukraine to look after the twins. During this period, the father's contact with A was extended by a court order and by the end of the year A was having regular overnight stays with his father.

LITIGATION BACKGROUND

15. The three court applications (the joint application for a parental order, the mother's application for non-molestation and occupation orders, and the father's application for a child arrangements order) were listed for a composite fact-finding and welfare hearing over five days in January 2020. At the conclusion of the hearing, only the evidence relating to the fact-finding element of the hearing had been completed. The judge therefore adjourned for written submissions on that element, after which a reserved judgment would be delivered to be followed by a further hearing to determine the welfare issues. On 6 April 2020, prior to the delivery of the reserved judgment, the mother brought the twins to this country from Ukraine. At that stage, A moved to live principally with his father, and had regular weekly contact with his mother.

First Judgment

16. On 17 April 2020, the judge handed down his first judgment in these proceedings. Having summarised the background, the law and the evidence, he started his analysis by recording his impression of the parents' evidence (at paragraph 103):

“I found the father to be a measured and sincere witness who gave evidence in clear and precise terms, albeit he became very emotional when speaking about A. I regret to observe that I found the mother to be a most unsatisfactory witness who lied to the court in key parts of her evidence.”

17. He observed that the principal issue to be determined was whether the father knew about the second surrogacy agreement. The mother's case that the father had known of and consented to it was supported to some extent by the evidence of the director of the Ukrainian surrogacy agency. The judge found that the mother had lied extensively in her evidence about the second agreement. He said (at paragraph 115(vii)):

“the mother has serially lied in her evidence. I find no innocent explanation for these lies. She is, I find, a wholly unreliable witness who will tell lies with alacrity to achieve her objectives.”

The judge also found the director of the agency to be “a most unsatisfactory and ultimately unreliable witness” who had in some respects been untruthful in her evidence. He concluded that the father had not signed the agreement; that the mother had deliberately concealed the second surrogacy from the father until 5 March 2019 when it was too late for him to do anything about it because the surrogate's pregnancy was so far advanced; that the father had not consented to the extension of the period of storage of his genetic material by the agency; and that he had not consented to the second surrogacy arrangement.

18. The judge also considered the mother's allegations of domestic abuse on which she relied in support of her application for an injunction. He rejected these allegations, concluding (at paragraph 120):

“I consider it most likely, and find, that the father’s adverse reaction to the news of the second surrogacy so incensed and angered the mother that she sought to punish the father and/or exact revenge by: (i) making a false allegation of assault against the father to the police; and (ii) stopping all contact between A and his father, for no good or child focussed reason whatsoever.”

Second Judgment

19. The welfare hearing started on 22 April 2020. In the course of his evidence, it was put to the father that he had brought flowers to the mother at her brother’s home on the day after the end of the fact-finding hearing in January, and stayed for several hours. The father accepted that he had visited but denied that he had brought flowers or stayed for several hours. Counsel acting for the mother (not, we record, Mr Uddin) then informed the judge that there were CCTV recordings of the father’s visit and that the mother wished to apply to re-open the findings of fact made in the judgment of 17 April. The hearing was then adjourned for the recordings to be produced and transcribed. After a series of further case management hearings, the judge considered the mother’s application to re-open at a hearing on 13 July. He dismissed the application, indicating that he would give his reasons in the judgment to be delivered following the adjourned welfare hearing, but gave the mother permission to seek further findings of coercive, controlling and financial abuse. Subsequently, the adjourned hearing took place over three days from 22 to 24 July after which judgment was reserved and handed down on 3 August.
20. In this second judgment, having summarised the background, developments since the first judgment, and the relevant legal principles, the judge considered first the application for a parental order. All parties – the parents, the guardian representing A, and the local authority who had intervened in the proceedings – agreed that the order should be made, and the judge, after carefully considering how the unusual facts should be accommodated within the statutory provisions, concluded that all the provisions were met and agreed to make the order. There is no suggestion of any criticism of his decision and it is unnecessary to consider this issue any further.
21. The judge then set out his reasons for dismissing the mother’s application to re-open the earlier findings. At this point, he considered the evidence about the father’s visit to the mother on the day after the fact-finding hearing. The CCTV evidence had demonstrated that, contrary to the father’s evidence at the hearing in April (given before disclosure of the existence of the CCTV images), he had visited the property for several hours and had brought flowers for the mother. The judge recorded that in a subsequent statement and at the hearing in July the father had accepted that he had lied about this. The judge continued (paragraph 71):

“He said he deeply regretted lying to the court and explained that he had only done so because of his shame that he had failed to reconcile with the mother. He said he did not want the world to know of his failure. A witness lying to the court can never be condoned, but: (i) I accept the father’s explanation; and (ii) I find that it does not undermine or negate my previous overall finding as to the father’s credibility.”

The judge dismissed the application to re-open as totally without merit.

22. He then considered the additional allegations of abuse which he had permitted the mother to raise at the adjourned hearing, which included that he had required her to account for every penny spent and that he had made threats about her not being A's biological mother. The judge rejected these allegations and also concluded that there was no cogent or reliable evidence to support an allegation by the mother that the father was a flight risk and might abduct A to Bangladesh. He noted (paragraph 96) that, although the mother asserted that she accepted his earlier findings, she still maintained, contrary to those findings, that the father had assaulted her in February 2019 and that he knew all about and consented to the second surrogacy. The mother's application for a non-molestation order was dismissed.
23. With regard to the application for a child arrangements order, the judge accepted that the mother had the ability to meet A's physical needs, but found that she was "completely unable to accept the harm she had caused A, not least by pursuing the second surrogacy" which had taken her away from A for prolonged periods while she was looking after the twins in Ukraine. On the basis of the totality of her evidence, the prospects of A being allowed to enjoy a relationship with his father if he lived with her were "very poor". In contrast, the judge was

"entirely satisfied that that if A continued to live with his father, he would be enabled and encouraged to have a loving, positive and beneficial relationship with his mother."

He therefore concluded that it was in A's welfare interests to live with his father. With regard to the mother's contact, and the further issue of how and when A should be introduced to the twins who are living with her, the judge acceded to an application by the guardian for a report from a consultant clinical child and adolescent psychologist, Dr Pettle, and therefore adjourned to a further hearing the final decision on the extent of contact, together with an application by the father that the mother's exercise of parental responsibility for A should be limited by court order. In the interim, the mother's contact was to continue on the same basis as before – one visit per week lasting four hours in the father's home, with the father to be absent during the contact. The local authority was discharged as an intervenor. The judge concluded his second judgment in these terms:

"It was submitted on behalf of the mother that she had accepted the findings of fact which I made in the judgment of 17th April 2020 and that she wished to move forward with the father in the care of A. She now has the opportunity to demonstrate this resolve over the course of the intervening months before this matter returns to court when, hopefully, final orders will be made."

Events Between August 2020 and August 2021

24. On 1 October 2020, the mother filed an application in the family court in Wolverhampton for child arrangements orders in respect of the twins. She claimed an exemption for the requirement to attend a Mediation Information and Assessment Meeting (MIAM) on the grounds of domestic violence. Her application made no

reference to Keehan J's findings regarding the conception of the twins or his rejection of her allegations of domestic abuse.

25. On 7 October 2020, the mother telephoned the police and made allegations of domestic abuse against the father. On 13 October, she gave a statement to the police in which she set out her allegations, including those which the judge had found to be untrue in the family proceedings. She said that she had "serious concerns" about the father's treatment of A, adding:

"when someone knocks on my door I am worried it will be someone coming to inform me that my son has passed away".

As a result, the police attended the father's home to conduct a check on A's safety. Police logs recorded that they had "absolutely no concerns" about the father looking after the child, who was described as looking "healthy and happy as he should be". The note added: "there is potential of this being a malicious call". At around the same time, the mother made a complaint to the General Medical Council about the father (who is a doctor), repeating allegations of abuse which the family court had found to be untrue. The mother only disclosed that she had made this complaint to the GMC when she was giving evidence ten months later in August 2021.

26. Following the police visit to his home, the father applied to the family court for an order for police disclosure. At a further hearing before Keehan J on 11 November, an order for disclosure was made. The order included a recital that the mother had informed the court that "she did not make the referral to the police". Subsequently, the police applied for disclosure of the judgments given in the family proceedings in April and August 2020. An order for disclosure of those judgments was made following a closed hearing on 11 January 2021 attended only by the police. At a further hearing on 27 January, a further order for disclosure by the police was made and the mother was directed to file a statement explaining the circumstances of her report to the police.
27. The final hearing was listed for two days on 24 and 25 March 2021. At that time, of course, the country was in the middle of the Covid-19 pandemic. In the event, the hearing did not proceed. The mother was unable to attend as she was undergoing chemotherapy. Her application to adjourn was initially refused but ultimately granted at the start of the hearing on 25 March. The judge's approach to her application to adjourn is one of the instances now relied on as evidence of apparent bias. At the hearing on 25 March, the judge admonished the mother's counsel in terms that feature in the second instance relied on in support of this appeal. We shall therefore consider these matters in more detail below. Following further submissions, the hearing was adjourned to dates in August 2021. The judge made further case management directions, including requiring the mother to file updating medical evidence about her current state of health and treatment by 23 July.
28. In the following weeks, there were further email exchanges between the mother and the police in which she encouraged them to pursue their investigation. The emails are extensively quoted in the third substantive judgment delivered on 15 November 2021. In one email, the mother wrote:

“I am very concerned that the importance of the police investigation is critical to my eldest son’s welfare.”

In another, she wrote:

“I am concerned the two [family court] judgments ... did not give an accurate account or true reflection to all the evidence the court had been provided during the court proceedings.”

In a further statement made for submission to the CPS for a charging decision, she repeated her allegation that the father had signed the second surrogacy agreement, asserted that A had “suffered numerous accounts of child abuse through maltreatment from my ex-husband”, and continued:

“I now fear for A’s welfare and safety, as these concerns have been ignored by the family court proceedings”

and

“I am not happy with the outcomes of the family court, to this date. I do not believe that the judge has listened to my case fairly and that he has made his decisions based upon my ex-husband’s testimony and has not properly considered the evidential facts provided, including independent professional reports that my legal team have presented to him. I do not agree with their findings and I feel that the Judge has been biased throughout.”

29. Meanwhile, Dr Pettle had carried out her assessment as directed, looking in particular at whether, and if so how, A should learn about, and be introduced to, the twins, and how their relationship should be developed. Her recommendations, as explained in detail in her report and later in her oral evidence, as summarised subsequently in the third judgment, were that:
- (a) keeping secrets from children can be toxic and can have an extreme effect on close family relationships;
 - (b) there was no reason to delay giving an agreed simple narrative to A in which he was told about the twins which would be added to over time as a prelude to him meeting them;
 - (c) both parents should be involved in drafting the narrative;
 - (d) the sooner this piece of work was started with A, the easier it would be for him to assimilate the information he was being given;
 - (e) the narrative should be given to A over the next 3 to 4 months and that he should have his first meeting with the twins some 2 to 3 months thereafter;
 - (f) it was not a sustainable position for A not to be told about his half siblings and it would be better for A if the father could acknowledge the twins.

30. Plainly the continuing difficulties between the parents posed a significant obstacle to the implementation of this plan. Dr Pettle addressed this problem in her report (in a passage which was later quoted in the third judgment and, we infer, was of particular importance to the judge's exploration of the issues at the hearing in August 2021):

“While [the mother] accepts that judgments have been made, she has continued to pursue her allegations relating to domestic abuse with the Police. She also made serious comments about A's wellbeing which led the Police to undertake a welfare check, but they found absolutely nothing to substantiate her concerns. [The mother] shows little insight into the consequences of these actions, particularly the impact these were likely to have on her former husband and the implications for communication about A. [The father's] position of wanting nothing to do with the twins has become more entrenched, and he does not want A to know of their existence until he is much older. The circumstances have cemented the breakdown of trust between [the parents]. The only way to achieve a more positive outcome for A is for his parents to change their behaviours, and this appears unlikely to happen in the foreseeable future. This severely limits the options.

The attachment security and mental health needs of A need to be prioritised. The parental couple are each caught up in their own grievances about the other's behaviour and unless they find a different way forward A will end up carrying these conflicts into the future, and this is likely to cause him emotional distress. A is likely to become increasingly aware of the chasm between his parents and this can be damaging, and potentially leads children to feel that they need to take sides. Assuming that [the mother] remains the legal resident parent for the twins, she is the mother (social, legal and psychological) of all three children in addition to [the father] being the genetic link between them, and it could be beneficial for A to develop a relationship with [the twins]. This requires that constructive safe and positive contact be supported by both parents. It does not appear that this can be provided by these parents now. [The father] does not take A to handovers and his decision to avoid any direct communication with [the mother] appears to be predominantly based on self-protection. If the rift between them continues they would be unable to talk together about how to handle A's questions about his conception or that of the twins as he grows older. Furthermore, [the mother's] actions give little confidence that she will reliably follow agreed decisions.”

31. The mother did not comply with the direction to file updating medical evidence about her current state of health and treatment by 23 July. Instead, her solicitors sent an email to the judge's clerk asking that their client be permitted to attend the hearing remotely. The judge responded via his clerk that,

“in the absence of direct medical evidence on the adverse impact of [the mother] attending court, she will attend the hearing in person at least for the purposes of giving her evidence. Therefore this will be a hybrid hearing with the mother and father attending in person with the respective legal teams. Other parties are entitled to attend in person or to appear remotely.”

On 4 August, the mother filed an updating statement in the proceedings in which she gave details about the progress of her medical condition. She did not, however, file any medical evidence. On 16 August, two days before the hearing, her solicitor emailed the judge’s clerk again renewing the request that the mother give evidence remotely, saying that she had requested updated medical evidence which was not yet available, but citing the details set out in the mother’s statement. On 17 August, the judge responded via his clerk that “in the absence of cogent medical evidence my decision that both parents shall give evidence in person stands.” The mother’s counsel (by now Mr Uddin) responded immediately that “it is my firm instruction that my client will not be attending in person to give evidence” and seeking an indication of how the court wished to proceed. The judge’s clerk responded that “Mr Justice Keehan will, if necessary, order the mother’s attendance and attach a penal notice.” Later that afternoon, counsel emailed the judge’s clerk again saying that he had received instructions that the mother “cannot participate at the hearing either in person or by remote method because she instructs me that she is not physically and emotionally fit”. The judge’s clerk replied that, “absent any cogent medical evidence, His Lordship is minded to proceed as previously arranged.” Mr Uddin replied indicating that he wished to “make an application through this email to withdraw from the case as I feel professionally that I cannot continue or would his lordship want me to make that application in person at tomorrow’s hearing”. The judge’s clerk replied that any application could be made at the start of the hearing.

August 2021 Hearing and Afterwards

32. The hearing at the centre of this appeal took place over five days from 18 to 20, 26 and 27 August 2021. The full hearing has been transcribed and we shall consider those parts of the transcript relevant to this appeal in detail below. In summary, the hearing proceeded as follows. At the start of the first day, Mr Uddin did not make an application to withdraw as anticipated in the email exchange the day before. Instead, he asked the judge to put back the hearing until 2pm so that he could take further instructions from his client, who was attending remotely. The judge agreed. When the hearing started that afternoon, Dr Pettle gave evidence and was examined by all counsel. At the end of the afternoon, Mr Uddin made a further application for his client to give evidence remotely. By that point, a report had been received from the mother’s treating consultant concerning her attendance at court, apparently following a request from the solicitor for the child. After hearing submissions, the judge ruled in these terms:

“Mr Uddin, I think we have reached a stage in the case where I have to take a pragmatic approach. So the mother may give evidence remotely, subject to this caveat. If the technology does not work or we otherwise engage in difficulties with

trying to receive the evidence remotely, it is going to have to be in person.”

Mr Uddin confirmed that his client had no objections to the father giving evidence in person.

33. On the next day, the father gave evidence, in person. On the third day, the mother started her evidence, remotely. At the start of her evidence, Mr Uddin informed the court that his client wanted breaks every 20 minutes during her evidence. The judge replied that “we will do 40 minutes and see how we go.” It seems from the transcript that there were two breaks during the morning and none in the afternoon. The mother’s evidence had not concluded at the end of the third day, and the hearing was adjourned for six days, resuming on 26 August. On that date, the mother continued her evidence, with two breaks in the morning session, and concluded her evidence shortly after the short adjournment, after which the children’s guardian was examined in chief and cross-examined on behalf of the father. On the next day, the guardian returned to the witness box. A few minutes into the morning session there was an exchange between the judge and Mr Uddin in the course of which the judge again admonished counsel for his conduct. This incident is another matter on which the mother relies in this appeal and we shall consider it detail below.
34. After the guardian had completed her evidence, counsel on behalf of the police, who had attended at the judge’s request, entered the court. The judge asked a number of questions to establish when the police investigation would be complete and a charging decision taken. Counsel was unable to answer those questions. He informed the judge that the police were awaiting further information from the mother. The judge asked: “Six months have passed since that request was made. How much longer are the [X] Police Force proposing to give the mother before they send the papers to the CPS?” After a further exchange, the judge observed that “At the moment it strikes me as utterly indefensible that absolutely nothing has happened on this case for five months.” He directed that a senior officer should provide a statement answering the questions he had posed, and warned that he was likely to be highly critical of the police force in his judgment.
35. After counsel for the police withdrew, Mr Uddin applied to the judge to recuse himself. That application was refused. After further housekeeping matters, the hearing was adjourned with an order made (1) refusing the mother’s application to recuse, (2) directing the parties to file written submissions by 13 September and (3) granting the father permission to disclose certain documents to the GMC, the Medical Defence Union, the CPS and the police, including the first and second judgments in the proceedings.
36. On 2 September, the senior police officer responsible for the investigation sent a statement to the court saying that he had instructed the investigating officer to give the mother a further 28 days to provide outstanding evidence, failing which the file would in any event be sent to the CPS, and that it was anticipated that a charging decision would be taken within 28 days of receipt of the file.
37. On 3 September, the mother filed a notice of appeal against the judge’s refusal to recuse himself. In the notice, the mother stated that she was not legally represented, and the grounds of appeal consisted of a narrative statement written in the first person

apparently by the mother. Her complaint was summarised by a passage highlighted in bold typeface:

“I wish to appeal the decision of the judge not to recuse himself as I feel that he has not conducted himself in an impartial way and has been biased in his comments and conduct throughout the hearings. He has made inappropriate comments to me such as previously calling me malicious and continued to call [me] a liar on many occasions, throughout the hearings. He has also pressurised and intimidated me for reporting my abuse to the police.”

The mother set out in some detail her complaint about the judge’s treatment of her when challenging her about the police investigation. She said that in her opinion,

“he has even tried to interfere with the criminal investigation by telling me to withdraw my statement from the police for the criminal investigation, because he has ruled in the fact finding that there was no domestic abuse.”

She complained about the judge’s approach to her medical condition before and during the hearing. The grounds concluded:

“I feel that throughout the hearing I was treated unfairly, intimidated, interrogated for reporting to the police, bullied and the judge was not being impartial in his handling of the hearing. I feel that my ex-husband was treated differently during his cross-examination, with the judge even responding on his behalf on some parts and I was treated very negatively.”

38. On 26 September, a skeleton argument was filed in support drafted by Mr Uddin in which he raised additional grounds of appeal. A response was filed on behalf of the father inviting this Court to refuse permission to appeal. A response was also filed on behalf of the guardian in neutral terms but making some observations about the judge’s conduct of the proceedings. On 28 September, the mother filed an amended appeal notice seeking to rely on supplemental grounds. On the following day, the Civil Appeals Office granted the mother permission to amend.
39. On 27 October, the judge’s clerk sent the draft judgment to the parties’ lawyers for typographical correction. On 3 November, Mr Uddin had sent an email to the judge’s clerk in which he said that he understood that a transcript of the hearing was available. Mr Uddin continued:

“At this stage I have concerns that some of the narrative in the judgement does not accord with my recollection and notes. I therefore would like to know whether his lordship had the benefit of the transcripts when the judgement was drafted. I would also like to see copies of the transcripts before making my final editorial comments. I think it is both in the interest of justice and proportionate for the court to share the transcripts with the parties specially when “allegations” are levelled

against me in the draft judgment which in my view appear to be inaccurate.”

The judge’s clerk replied saying that the judge had the transcript when preparing the judgment, and that if counsel wished to see the transcript they should be ordered and paid for through the court office. Mr Uddin replied citing a particular part of the draft judgment which he contended did not accord with his notes of the hearing and adding:

“Therefore in my view it is essential for all counsel to have access to the transcripts before making editorial comments in view of the fact that the transcripts have been used when drafting the judgment.”

We were not told if there was any response to this email or how the issue of typographical corrections was resolved.

Third Judgment

40. The judgment was handed down on 15 November 2021 (although it was wrongly dated 25 October 2021). There is no appeal against the findings or decisions made by the judge, but since it provides the context in which the allegation of bias falls to be considered it is necessary to set out his reasoning in some detail.
41. Having identified the issues and summarised the relevant legal principles, the judge set out the history in some detail (paragraphs 19 to 95). He then turned to the application to recuse. We shall return to this part of the judgment when considering the merits of this appeal. At paragraphs 103 to 109, he set out Dr Pettle’s evidence, citing extensively from her report including the passages quoted above.
42. Between paragraphs 110 and 116 he summarised the father’s evidence. He recorded that the father did not accept Dr Pettle’s recommendations about introducing A to the twins in the near future. He said that the father’s view was that “he would know from A when his son felt ready and comfortable to meet with the twins”. The father was opposed to a family assistance order recommended by both Dr Pettle and the guardian. The father had said that part of his problem was that he still loved the mother. The judge observed that this had been apparent on each occasion that the father had given evidence. It was nevertheless the father’s position that, because of the mother’s false narrative, his lack of trust in her and her repeated applications that he thought contact should be restricted to six visits a year and that there should be an order restricting the mother’s exercise of parental responsibility.
43. Between paragraphs 117 and 130 the judge considered the mother’s evidence. He recorded that she had made allegations to the police that he found false either in earlier judgments or in this judgment, adding that she could not give a satisfactory explanation as to why she had reported the allegations other than to say that she had not lied to the police. At paragraph 122, he recorded:

“she asserted that the court had ignored the concerns for A’s welfare and safety in the care of the father. She then said that the family case and the criminal investigation were two separate matters. For the purposes of the family proceedings

she accepted the findings made in my two previous judgments – most pertinently that the allegations she had made against the father were false. However, for the purposes of the criminal proceedings she did not accept my findings, she asserted that those allegations which I had found to be false were true, she made further allegations against the father in respect of his care of A and she asserted that this court was biased against her.”

The judge recorded that the mother had said in evidence that she had also disclosed the same information to the GMC, justifying this on the basis that the father was “a danger to the general public”. In reply to the guardian’s counsel, she had said that it would be an end to the matter if the CPS decided not to prosecute.

44. The judge recorded that the mother’s primary case was that, once A had been introduced to the twins, he should move to live with her. She said that she accepted the report and recommendations of Dr Pettle and the guardian and would comply with everything the professionals suggested. At paragraphs 129 to 130 the judge said:

“129. When asked how she and the father could agree a narrative to be given to A when she believed in a different set of facts from the father (and having been asked this question five times) she eventually replied that she would have to accept the findings and judgements of this court. She continued that she would have to draw a line under past events and that she was willing to work with the father.

130. She was asked whether she accepted that the father did not pose a risk of harm to A. She agreed. This stance is completely contrary to many of the assertions and allegations made by the mother to the police”

45. The judge then turned to the guardian’s evidence, recording her recommendation for monthly contact between A and his mother, for A to be told about the twins in an agreed narrative and then having a meeting, and for this process to be under the umbrella of a family assistance order. She did not agree with the father’s proposal for an order restricting the mother’s parental responsibility. At paragraphs 133 to 134, the judge made the following critical comment about one aspect of the guardian’s evidence:

“133. In light of the allegations the mother had made to the police about the father and the overall tenor of the mother’s evidence, the children’s guardian was asked how the mother could contribute to the narrative for A. She responded that the mother was a very child centred lady who could separate out her views from A’s best interests. I asked in what sense was the mother ‘child centred’ when she had commissioned a second surrogacy without the knowledge or consent of the father but using his genetic material and bringing two innocent children into this world, she could not provide any satisfactory answer.

134. If this view of the mother has informed the children's guardian's analysis of the issues in this case, the foregoing evidence completely undermines her assessment of the case and her recommendations."

46. The judge then set out his overall analysis. He acknowledged the father's devotion to A, accepting his wish to promote the boy's welfare, but added (paragraph 138):

"There is but one caveat to enter and that relates to the twins. The father knows and acknowledges that he is their biological father, but he cannot yet see himself as a father figure to them. One cannot imagine the emotional and psychological impact on the father upon learning that, without his knowledge or consent, his genetic material had been used which resulted in the birth of two innocent children. His struggle to come to terms with what has happened and the fact that he is the father of twins is entirely understandable. It, however, clouds the father's thinking and judgment on the issue of introducing A to his half siblings."

The judge observed:

"It is the actions of the mother in commissioning a second surrogacy without the knowledge or consent of the father which has caused this very sorry state of affairs and which will result, in all likelihood, in emotional and psychological damage and harm for A and the twins. In the circumstances it beggars belief that the children's guardian should describe the mother as 'a very child centred lady'.

47. At paragraph 145, the judge made the following observation which is of direct relevance to this appeal:

"For the avoidance of any doubt my exchanges with Mr Uddin during the course of this hearing, which are set out above, and my observations upon his conduct have had no bearing whatsoever on my assessment of and findings about the mother and the evidence she gave to the court."

48. The judge accepted that the mother plainly loved all three children and that her physical care of them was "beyond question". He went on, however, (at paragraph 147),

"The real and substantive issue in respect of the mother is the level of risk that she poses to A's emotional and psychological wellbeing as a result of her views about and attitude towards the father. For the last three years or so, she has conducted a relentless campaign to vilify and denigrate the father. Her visceral hatred of the father is all consuming and in truth she will not willingly concede there are any positives about him as

a person or as a father. She has repeatedly lied about the father with alacrity and, I regret to find, she has continued to do so.”

He repeated his findings in the first and second judgment, noting that the mother had not sought permission to appeal against them. He noted that she had said she accepted his findings for the purpose of these proceedings but not for the purposes of the police investigation and had now made further allegations. He continued:

“153. It is deeply troubling that the mother gave no indication that she recognised or understood the utter absurdity and illogicality of this stance. In my judgement this stance is cogent evidence of:

- i) the depth of the mother’s hatred of the father;
- ii) the zeal with which she has relentlessly conducted a campaign to vilify and denigrate the father irrespective of the adverse consequences for A; and
- iii) the fact that she has not moved on and that there appears to be little or no prospect of the mother changing her views or approach in the foreseeable future.

154. In my judgment, it is self-evident that if the mother persists in maintaining her false accounts of past events and if these are communicated to A it would be likely to confuse him and cause him to question which of his parents he should trust. This would inevitably cause him emotional and psychological harm.

155. I have no confidence that as A grows older that the mother would not refrain from communicating some or all of this false narrative. Indeed, on the totality of the evidence it is more likely than not that she would do so.

156. The mother said in evidence that if the CPS decided not to prosecute the father, she would accept this decision. Based on past events, I consider this to be highly unlikely.”

49. The judge then set out his further findings of fact:

“163. On the basis of the totality of the evidence I have read and heard and my analysis of the same, I make the following findings of fact on the balance of probabilities:

- i) A is safe and well in the care of his father and is not at risk of suffering any harm as a result of the care given to him by his father;
- ii) the mother continues not to accept this court’s findings in relation to:

- a) the circumstances of the twins' conception and her deception and dishonesty in relation to the second surrogacy arrangement;
 - b) her false allegations of domestic abuse by the father; or
 - c) the father's ability to care for A.
- iii) From 7th October 2020 to date, the mother has knowingly, deliberately, and repeatedly lied to West Midlands Police by making false allegations against the father, despite this court having found that those allegations to have been fabricated by her;
- iv) the mother made those false allegations to the police in an attempt to secure A's return to her care;
- v) between 7th October 2020 and January 2021, the mother misled the police by failing to inform the investigating officers of the findings made by this court;
- vi) the mother attempted to stop the police from disclosing details of its investigation to this court and to the parties, in part at least because she did not want the court to know that she had lied to the police;
- vii) in addition to repeating false allegations, the mother has lied to the police as follows:
- a) on 28th November 2020, the mother told the police that she was 'very concerned that the father and his legal team are continuing to carry out his threats to jeopardise and stop my contact with my son'. No such threats were ever made;
 - b) on 8th December 2020, the mother told the police that the guardian's legal team were supporting an urgent hearing to stop her contact with A. The guardian has never supported stopping A's contact with the mother; and
 - c) on 21st January 2021, the mother told the police that the father had made 'further threats to stop my limited...contact'. No such threats were ever made.
- viii) the mother has lied to General Medical Council, repeating her false allegations about the father's behaviour. She did so in an attempt to discredit him;
- ix) the mother lied to this court during her oral evidence about the circumstances in which she reported her allegations to the police, in that:

- a) she stated in her written and oral evidence that her support worker told her that the police wanted to talk to her, and that that was why she got in touch with them;
 - b) in fact, she contacted the police unprompted to report her concerns.
- x) the mother lied to the court during her oral evidence, in that she stated that she had told the police about this court's findings in relation to her false allegations and credibility, when she had not done so;
- xi) the mother misled the Family Court at Wolverhampton when applying on 1st October 2020 for child arrangements orders in relation to the twins, in that, in her C100 application:
- a) she claimed a MIAM exemption on the grounds of domestic violence, without referring to the fact that this court had rejected her allegations of abuse as fabricated;
 - b) she referred to the circumstances of the Twins conception and the father's position in relation to them, but made no reference to this court's findings in relation to the same; and
 - c) she referred to a parental order having been made in respect of A within these proceedings, without making reference to any of the findings made by this court.
- xii) the mother misled this court at the hearing on 11th November 2020. One purpose of the hearing was to determine the father's application for police disclosure following the unannounced "safe and well check" on 14th October 2020. She informed the court that she did not make a "referral" to the police."

50. In the following section of the judgment, headed "X Police", the judge summarised the police investigation, including the information he had received following the hearing. He continued:

"169. The decision of the police to afford such latitude to the mother took no account of the adverse emotional and psychological stress upon the father of having an ongoing police investigation hanging over him, when he is the primary carer of A. Nor did it take any account that this court was awaiting the final outcome of this police investigation before it could make final welfare decisions and orders in respect in A.

170. The latitude given to the mother might, in other circumstances, be considered necessary and reasonable. On the facts of this case it was wholly unnecessary and wholly unreasonable. It has caused the father unwarranted and prolonged anxiety and it has delayed the conclusion of these proceedings. It will be for others to judge whether this police investigation was a meritorious or unmeritorious use of police time and of scarce public resources.”

51. Finally, the judge set out his analysis and conclusions. On the basis of his findings, the judge made a child arrangements order for A to continue to live with his father. He concluded, however, that it was not possible to make a final order about the mother’s contact. He ordered that it should continue to be by video during her chemotherapy but would then revert to face-to-face contact. He was, however, unable to define that contact, observing (at paragraph 183):

“The frequency and duration of this contact will very much depend on the extent to which the mother accepts my findings and my decisions as set out in this judgment. It will also be informed by the mother’s reaction to and the stance adopted by her once the police investigation and any criminal proceedings have concluded.”

He concluded, notwithstanding Dr Pettle’s recommendation, that there was no realistic prospect of the parties being able to work cooperatively to agree a narrative for A. He therefore gave a direction that the father should draft “a simple and straightforward account of the early life of A and his siblings” which should then be sent to the mother for comments which should be incorporated insofar as they were in accordance with the court’s findings. He indicated that a family assistance order should be made, recognising that this required the consent of both parents and expressing the hope that the father would now agree. He dismissed the father’s application for an order restricting the mother’s exercise of parental responsibility, observing that

“whilst I have found some of the mother’s actions to have been utterly appalling, there is no evidence or no cogent evidence that she has interfered with the father’s exercise of parental responsibility.”

He gave permission for the father to disclose information about the proceedings to other agencies. Finally, he directed that the matter be listed for a further case management hearing once the CPS had made a charging decision.

Events since November 2021

52. Subsequently the case was listed for a five day hearing starting on 23 May 2022. At the appeal hearing before this Court, we were told that following the police investigation the CPS have decided not to bring any charges against the father. The mother is exercising her victim’s right of review, and has asked the CPS to review their decision not to prosecute.

53. On 10 March 2022, Peter Jackson LJ directed that the mother’s application for permission to appeal against the recusal decision be listed for an oral hearing. At the conclusion of that hearing on 1 April, he granted permission to appeal on the basis of a re-drafted ground of appeal appended to his order. That ground was that the judge had showed bias against the mother as demonstrated in nine “instances” (set out and considered below). Peter Jackson LJ directed that a copy of the order be sent to the judge so that arrangements could be made for another judge to conduct the hearing on 23 May should the appeal be successful.

THE LAW RELATING TO RECUSAL

54. As Hildyard J observed in *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at paragraph 16:

“The right to a fair trial, both under the common law and Article 6 of the European Convention on Human Rights (the House of Lords in *Lawal v Northern Spirit Limited* [2003] UKHL 35 having confirmed that there is no difference between the requirements in each) includes the right to a trial and decision conducted and made by a decision-maker free not only from actual bias but also from the appearance of bias. Justice must both be fair and be seen to be fair.”

As Hildyard J noted, case law has established that an appellate challenge to the conduct of a judge during a trial may take two forms. The first is a broad challenge to the fairness of the trial which is a matter for judicial evaluation. The second is an assertion that the judge gave the appearance of bias. The test for bias is different and involves a well-established two stage process summarised by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at [17] in these terms:

“The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, paras 102-103.”

55. The application for recusal in this case and the subsequent appeal to this Court have been argued only on the basis of apparent bias. In identifying further guidance from the case law, we therefore mainly focus on those authorities relating to that category of case. Unsurprisingly, however, there is a degree of overlap between general unfairness and apparent bias and some of the dicta in cases concerning the former are plainly relevant to cases involving the latter.
56. The following points are of particular relevance to this appeal.
- (1) The overriding objective in Part 1 of the Family Procedure Rules 2010 requires a judge “to deal with cases justly, having regard to any welfare issues involved.” FPR 1.1(2), in substantially the same terms as the corresponding provision in the Civil Procedure Rules, provides that “dealing with a case justly” includes amongst other things ensuring that it is dealt with expeditiously and fairly,

dealing with it in ways which are proportionate to the nature, importance and complexity of the issues, and ensuring that the parties are on an equal footing. The rules require the court to further the overriding objective by active case management, which includes setting timetables or otherwise controlling the progress of the case, identifying the issues at an early stage, and deciding properly which issues need full investigation and hearing and which do not: FPR 1.4(2)(a), (b)(i) and (c)(i). Judges sitting in the family court have extensive case management powers which they are expected to exercise firmly. It follows that a judge in the modern era is permitted and indeed expected to intervene in proceedings to a far greater extent than in earlier times.

- (2) This is particularly so when the family court is deciding a question relating to the upbringing of a child. Whenever a court determines any such question, the child's welfare is the paramount consideration: Children Act 1989, s.1(1). Children's proceedings are, for the most part, quasi-inquisitorial rather than adversarial. They are therefore an exception to the general rule described by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 – "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large." It is common for a judge in family proceedings to decide that the welfare of the child requires the court to look beyond the issues and arguments identified by the parties. The judge is also required by s.1(2) of the 1989 Act to have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.
- (3) Apparent bias is an area of the law in which "the context, and the particular circumstances, are of supreme importance" and which requires "an intense focus on the essential facts of the case": *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, per Lord Steyn at paragraph 11.
- (4) The fair-minded and informed observer "will adopt a balanced approach" and "is neither complacent nor unduly sensitive or suspicious": *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, per Lord Steyn at paragraph 14.
- (5) "It is necessary to consider the proceedings *as a whole* in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased": *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183, per Davis LJ at paragraph 36.
- (6) Bias means a prejudice against one party or its case for reasons unconnected with the merits of the case: *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, per Scott Baker LJ at paragraph 28; *Secretary of State for the Home Department v AF (No2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528, per Sir Anthony Clarke MR at paragraph 53; *Bubbles and Wine*, supra, per Leggatt LJ at paragraph 17.
- (7) "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in

any case there is real ground for doubt, that doubt should be resolved in favour of recusal”: *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451, paragraph 25.

- (8) “[O]n the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be”: *Arab Monetary Fund v Hashim and others (No.8)* (1993) 6 Admin LR 348, per Sir Thomas Bingham MR at page 356, cited by Davis LJ in *Singh v Secretary of State for the Home Department*, supra, at paragraphs 34-5.
- (9) “If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done”: *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [2014] 1 WLR 1943, per Sir Terence Etherton C, at paragraph 40.
- (10) “Managing a trial can be challenging, even for an experienced judge, and it is sometimes necessary to react without much time for refined consideration. Generous allowance always has to be made for this and also for the fact that, even with counsel’s help, it is very difficult to tell from a transcript, or even from listening to a recording, precisely what was going on at all stages during the hearing. Furthermore, different judges have different styles and counsel and litigants can usually be expected to cope with the talkative, the uncommunicative, the robust, and even the irritated judge, provided the judge’s behaviour does not stray outside acceptable limits”: *Re G (A Child)* [2015] EWCA Civ 834, (a case concerning allegations of unfairness), per Black LJ at paragraph 31.

THE COMPLAINT OF BIAS AND THE JUDGE’S RECUSAL DECISION

57. The redrafted ground of appeal is in the following terms:

“The Appellant appeals on the sole ground that the Judge showed bias against the Appellant in the following instances:

- (1) By the Judge in calling the Appellant a liar on the 19th August 2019.
- (2) The Judge casting doubt on the Appellant’s medical diagnosis in early 2021.
- (3) Bullying, admonishing and threatening to report the Appellant’s counsel to the Bar Standard’s Board on the 25th March 2021.

- (4) Pressuring the Appellant for reporting the allegations of abuse to the Police.
- (5) The making of and not making of notes during the evidence.
- (6) Not allowing the Appellant to have regular breaks during the proceedings in August 2021.
- (7) Treating the Respondent father differently.
- (8) Bullying and threatening the Appellant's counsel with the Bar Standards Board on the 27th August 2021.
- [(9)] Misinterpreting and giving a different narrative to the evidence given by the Respondent father and the Guardian at the hearing in August 2021."

58. The recusal application made by counsel on 27 August focused on the matters now set out in instances (3), (5) and (8). After hearing the application, the judge immediately delivered a judgment dismissing it. That *ex tempore* judgment was subsequently incorporated into the third substantive judgment handed down on 15 November 2021. We now set out in full the passage in the third judgment dealing with the recusal issue:

"97. The background to this application commenced at a directions hearing on 25th March 2021. Mr Uddin had filed and served a position statement on behalf of the mother. I considered a number of passages in this position statement to be rude and impertinent to the court. I raised this matter with Mr Uddin at the commencement of this directions hearing. I told counsel that I considered his position statement to be impertinent and impudent and that if I received a like position statement from him in the future, I would consider reporting him to the Bar Standards Board.

98. During the early part of the mother's evidence there were occasions when she gave no or no satisfactory answer to questions. I told the mother what I had written down in my notebook in order to give her the opportunity to reflect on her evidence and to give a response. Mr Uddin objected to me taking this course of action and so I stopped doing so.

99. During the course of Mr Uddin's cross examination of the children's guardian he put a proposition to her which did not reflect her evidence. I raised the matter with Mr Uddin and in the exchange that followed there came a point when I considered he was being disrespectful. I told him so and invited him to continue with his cross-examination of the guardian. He did not do so. I repeated the request and on the final occasion I did so in an emphatic manner. He did not do so and, in terms,

said I was bullying him. I told him that he was coming close to being reported to the Bar Standards Board in respect of his conduct in the hearing.

100. Shortly thereafter Mr Uddin made a personal statement to the court relating to my comment about a potential referral to the Bar Standards and the risk that the mother may, as a result, have lost confidence in him. He confirmed she had not.

101. It was against this background that Mr Uddin made his application for me to recuse myself. He relied essentially on three grounds:

- i) the manner in which I had treated him at the directions hearing referred to above and at this hearing;
- ii) that the mother considered I was biased against her and that any fair minded and informed observer would conclude that there was a real possibility that I was biased against the mother: *Porter v Magill* [2002] 2AC 357; and
- iii) that I had treated the mother unfairly.

102. I refused the application. In giving a short extempore judgement I said:

“I have an application to recuse myself from this case made on behalf of the mother. I have well in mind the test to be applied from *Porter v Magill*, whether a fair-minded observer would consider that the court was biased. The application is essentially based on the mother’s perception that I am biased because I have made findings against her or I have held her to account to answers that she has not satisfactorily given to the court. That is no basis for recusing oneself. Reference was made by Mr Uddin to the occasions on a previous occasion and today when I had to admonish him for rude or offensive behaviour. I have only had to do that on one previous occasion in the twenty years that I have sat as a full-time or part-time judge. This application for me to recuse myself is utterly and totally without any merit whatsoever and it is refused. I note in so finding that the mother in the course of this case has perceived correspondence from the guardian to be a threat to stop her contact when no fair-minded person reading that document could possibly conclude. Therefore, her perception, it would appear, is skewed and is no basis for me to recuse myself after conducting this case for so many years. Application dismissed.”

THE APPEAL

59. At the start of the hearing, Ms Shiva Ancliffe QC, who came in to lead Mr Uddin for the purposes of this appeal, indicated that she would not be pursuing instance (1), because the transcript of the hearing on 19 August 2019 had not been produced, nor instance (6), because the transcript of the hearing in August 2021 demonstrated that, following discussion and a judicial ruling, there had in fact been breaks in the mother's oral evidence.
60. The remaining instances seem to us naturally to fall in to two groups, which have a rather different character. Accordingly, we will deal separately with those which turn on the judge's interventions in the evidence, or in one instance his attitude to an application, in a way which is said to show apparent bias against the mother – namely (2), (4), (5), (7), and (9) – and those which relate to his criticisms of the mother's counsel, Mr Uddin – (3) and (8).

(A) INSTANCES (2), (4), (5), (7) & (9)

THE INDIVIDUAL INSTANCES AND THE PARTIES' SUBMISSIONS

Instance (2)

61. Instance (2) is “the judge casting doubt on the Appellant's medical diagnosis in early 2021.” It is argued that the judge's response to the mother's application to adjourn the hearing in March 2021 for medical reasons was such as to give rise to an appearance of bias.
62. At a directions hearing on 16 March, during discussions about the form of the hearing, the mother informed the court that she would be unable to attend a hearing in court because she was shielding for medical reasons. The judge directed her to file an application to vacate the hearing with a statement supported by medical evidence (redacted to protect confidentiality) as to the diagnosis and treatment. The mother duly filed an application with a statement disclosing that she was suffering from fibromatosis, a non-malignant condition for which, she asserted, she would be undergoing chemotherapy starting that week.
63. At a further hearing on 19 March, the judge refused to vacate the hearing but agreed that it should be conducted entirely remotely. In a short judgment, he observed that, in the light of the background, he was very suspicious that she would be starting chemotherapy that week, adding that the mother had known about the diagnosis for several months but not raised it as a reason for an adjournment until he indicated that she would be required to attend the hearing. He added (according to an agreed note produced for this appeal):

“If incontrovertible evidence is produced before or at the hearing that the mother did in fact undergo chemotherapy today and that she is suffering side effects which impair her ability to participate in the hearing, it may well be that I have no choice but to adjourn. But I am not prepared to make that decision today on the basis of the inadequate information today. I am further persuaded to take this course by the fact that I do not know for how long I would have to be adjourning. Could be

many many months. I am not persuaded that that is in the best interest of the child.”

64. The mother did not attend the hearing on 25 March. Further evidence was filed on her behalf confirming that she had indeed started treatment, and that she had had a severe reaction to the treatment. Prior to the hearing her counsel, Mr Uddin, filed a position statement in which he asserted that the mother felt that the court would use any application for an adjournment against her and that it was apparent that the court had a “prima facie disregard for the mother’s position”. At the start of the hearing, the judge strongly criticised counsel for what was said in the position statement: this is the subject of instance (3), with which we deal later.
65. In the event, the judge agreed to adjourn the hearing and after exploring options decided that it should be listed in August 2021. It is clear from the transcript of the hearing that, in selecting those dates, the judge took into account the mother’s position, observing:

“given the circumstances of the mother, I do not consider it appropriate that she should have to yet again instruct other counsel. I am also concerned that given the reaction the mother has had to date from just taking a single course of chemotherapy as she has reported this morning, that if I list it in June, which is only three months away - just under three months - there is --- there must be a real risk that she will not be in a state of health where she could participate fairly in a hearing and I would face the prospect of having to adjourn the case off yet again, which would be well beyond August and would be into the new term in October.

Accordingly, on the basis of the availability of counsel for the mother and taking a prudent and cautious approach as to the progress the mother is going to make, I think the safer course is to list in the August dates. I regret that causes yet further delay and I regret the adverse impact on the father but I would be more confident that we would be able to conclude the matter then than if we listed the case in June.”

The judge made further case management directions, including requiring the mother to file updating medical evidence about her current state of health and treatment by 23 July.

66. On behalf of the mother, it is accepted that the judge was entitled to seek further information before deciding whether to grant the adjournment, but it is submitted that the manner in which he dealt with the issue gave rise to an appearance of bias. It was argued that the judge unfairly cast doubt on the mother’s diagnosis. On behalf of the father, Mr Wilson points out that the judge acceded to the application to adjourn, fixed the adjourned hearing for a date that accommodated the mother’s anticipated medical treatment and ultimately agreed that she could attend the August hearing. In his written submissions to this Court, Mr Bowe for the guardian submitted that the suggestion that the judge cast doubt on the diagnosis is pitching the situation too high

and that in the circumstances it had been appropriate for the judge to make relevant enquiries under his wide case management powers.

Instances (4), (5), (7) and (9)

67. Instances (4), (5), (7) and (9) concern the judge's interventions during the evidence. Central to the mother's appeal is the assertion that these interventions lacked balance and were unfair. Ms Ancliffe summarised the point succinctly in this way. The judge's interventions in the father's evidence were helpful to the father's argument. In contrast, his interventions in the mother's evidence were designed to challenge her case. Similarly, his interventions during the guardian's evidence were either helpful to the father or undermining of the mother. Ms Ancliffe submitted that a fair-minded and informed observer would conclude from these interventions that there was a real possibility that the judge was biased.
68. We shall consider this argument by first considering instances (4) and (5) which concern the interventions during the mother's evidence, and then comparing them with instances (7) and (9), which address issues arising out of the evidence of the father and guardian.

Instance (4)

69. Instance (4) is "pressuring the Appellant for reporting the allegations of abuse to the police."
70. At several points during the mother's oral evidence, the judge questioned her about her complaint to the police. It was her counsel who first asked her to explain why she had made a report against the father notwithstanding the findings in the family proceedings. After he had asked a series of questions, the judge then intervened and the following exchange took place:

"Judge: Why did you repeat your lies to the police?"

Counsel: Sorry, my Lord.

Judge: Why did [the mother] repeat her lies to the police?

Witness: Your Lordship, if you have a look at the welfare judgment that you made, you asked me specifically at a certain point, and it is documented in the welfare, did I lie about the second surrogacy and I answered to you and said "no" and you have documented that. You then asked me if I lied about the domestic assault and I said "no" and you then asked me about if I had lied about the domestic abuse, and I said "no", and you have documented that in your welfare, and I also told the police that and they said, "Well, has anybody documented that you have said that to the judge?" and I said, "Yes, it has

been documented in the welfare judgment”, but I cannot give that to them directly, the police have to request for them and, you know, when you made the final closing on that day, you did ask me those questions and I said to you, “I’ve never lied to the court at any point”.

Judge: What you are completely missing out is that whatever evidence you gave me I found against you and found that you were lying, did I not?

Witness: Your Lordship, you did, but you did ask me the question that, did I lie and I said to you that I did not lie.

Judge: You may well have done, but I found, on the totality of the evidence, that you had lied.

Witness: I also -- you are right, your Lordship, and I told the police that that is what your judgment said.

Judge: I, having found you lied, why did you go and repeat those lies to the police?

Witness: Because I went for therapeutic help and, when my counsellor looked at everything, she made independent enquiries and said that they are two separate issues and a criminal court does not affect the civil court and therefore----

Judge: --- please answer the question I have asked you. Why did you choose to repeat your -- what I have found to be your lies to the police?

Witness: Because I was told by my support worker that both the civil court and criminal court are separate and, therefore, anything happening in the criminal court does not affect the family court, and, if you will forgive me, your Lordship, I was under quite a lot of stress after what has happened and I was having counselling and at the time I went with professional guidance and recommendation.

Judge: I will ask one more time. Why did you repeat your lies to the police? You did it, you chose it, you made the statement. Why?

Witness: Your Lordship, the evidence I have provided to the police, the police told me that they will

decide, because it is not a family court, whether I lied or not and, if they felt that the investigation that they are doing did not have any merit, because my evidence does not prove it, then they will come up with that decision. It was not up to me to decide.

Judge: I am going to record that you have not given a satisfactory answer to my question.

Witness: Your Lordship, I do not know how else to answer it, apart from the truth of how it has happened and what I have been told by the police.

Judge: You tell me why you decided to repeat -- you decided, you gave the statement, why did you repeat your lies to the police?

Witness: Your Lordship, I did not lie to the police. I gave the evidence that I had, that I provided to family court, but, because the police told me that there are two separate issues between family and civil court, and it does not affect each other, and my support worker took me to the police station, I provided every evidence that you had before you and they said they will come up with a decision, the truth or not the truth, and, if there is no merit on the evidence that I have provided them, then they will stop the investigation within a few weeks. If there is any merit, then they will carry on the investigation independently and let me know what the situation is as it carries on.

Counsel: May I proceed, my Lord?

Judge: Yes.”

71. A little later, the judge asked whether it was the mother’s evidence that she did not know she had the right to withdraw her complaint. Mr Uddin objected, stating that in criminal proceedings the police do not require the victim’s consent to prosecute. The judge did not proceed with that point. Further on in her evidence, the mother disclosed for the first time that she had made a complaint to the GMC. The judge asked where there was any reference to this complaint in the eighteen statements that the mother had filed in the family proceedings. After further questions from counsel, the mother referred, in a series of lengthy answers, to further allegations against the father which she said had emerged from old medical records which had been disclosed to her during the police investigation. The judge then asked why these allegations had not been mentioned in any of the mother’s statements. After a break and further evidence, he repeated this question and, after the mother’s response, stated: “I have written in

my notebook that, once again, you have withheld material evidence from this court.” This led to the following exchange with Mr Uddin:

“Counsel: My Lord, I note your Lordship’s comment about writing in your Lordship’s book certain things and it is a matter entirely for your Lordship as to what your Lordship writes in your Lordship’s book and what your Lordship does not write in your Lordship’s book, but my concern is this. We should never be selective about anything and that applies to my client, obviously, but the point that I am making is this. My client has been giving evidence and your Lordship has said, more than once, “I am writing this in my book, I am writing that in my book”. I am concerned as to why your Lordship needs to say “I am writing this in my book”. What about the other evidence that she has been giving, is your Lordship going to write that in your Lordship’s book?

Judge: I say it in fairness to everybody, so that, if the mother wants to comment further, she can do. But she has accepted that she has medical records relating to A, which she has not disclosed to the court or to the other parties, and yet she has felt free in her oral evidence to refer to certain matters which she alleges are contained within those medical records, further allegations against [the father] which are not recorded in any statement she has provided.”

In a lengthy response, Mr Uddin reiterated his concern about the judge’s comments about writing in his book. The judge made no further comment.

72. The issue of the mother’s complaint to the police arose again in the course of Mr Wilson’s cross-examination. The judge intervened on several occasions. It is unnecessary to set out every intervention. At one point, the following exchange took place:

“Judge: It is an immensely simple question. Did you try and stop the police disclosing information to this court?

Witness: In terms of asking what is the purpose of showing that information to the family court when the family court proceedings has already gone through the fact finding and the welfare, in that instance, yes.

Judge: ---I will make a note in a minute that you are avoiding answering the question.”

After further questions from Mr Wilson, and further questions from the judge, the mother agreed that she had tried to stop police information being disclosed into the family proceedings. Mr Wilson continued with his cross-examination, during which the judge intervened on several further occasions, including questions about why the mother had alleged to the police that A had suffered maltreatment from the father.

73. The mother's evidence was adjourned part-heard and resumed the following Thursday. Mr Wilson resumed his cross-examination which continued without any intervention by the judge for a further hour and a quarter. After a break the mother was then cross-examined by Mr Bowe on behalf of the guardian. After some time, Mr Bowe asked questions about what A was to be told about the twins. At this point, the judge intervened for the first time that day, asking whether the narrative to be given to A should be as found in his judgments or as she had asserted in her statement prepared for the CPS. After a series of questions, the mother said that she wanted the judge to look at the further documents she had provided and reconsider his findings, but that, if the judge did not change his position she would have to accept his judgment and move forward with that.
74. At the end of counsel's questions, the mother asked the judge if he could "spare twenty minutes" to go through further documents she had produced that morning. The judge agreed, and at the start of the afternoon session the mother duly went through the documents, giving further evidence about information contained in them. The judge asked a number of questions as the mother was going through the documents.
75. In the original grounds of appeal drafted by the mother, she asserted that the judge repeatedly interrupted her evidence to the extent that she felt intimidated and bullied; that he tried to interfere with the criminal investigation by telling her to withdraw her statement from the police; and that he had wrongly accused her of misleading the court by not sharing information about the criminal investigation when her understanding was that the family court and criminal investigation were separate matters. In submissions to this Court, Ms Ancliffe accepted that the judge had been entitled to focus on the issue of whether the mother accepted the findings. The mother's answers, however, had been to the effect that she had gone to the police because she had been advised to do so by a domestic abuse counsellor. The judge had therefore been wrong to accuse her of not answering the question and his interruptions had been excessive and so as to give an appearance of bias.
76. On behalf of the father, Mr Wilson submitted two of the central welfare issues at the hearing were the mother's ability (i) to support A's placement with his father and (ii) to assist in providing A with a consistent, honest narrative about his life story in general and his relationship with his half-siblings in particular. The judge had therefore been entitled to question the mother about the contradiction between the assurances made by and on behalf of the mother that she accepted the findings and the manner in which she had initiated and pursued the police investigation. He had been justified in repeating the question because the mother's answers were evasive. He was equally justified in asking whether she was aware she could withdraw the police complaint because of the further contradiction between her evidence that the investigation was out of her control and her emails to the police which showed that she had been actively trying to influence the investigation. During the mother's evidence, the judge allowed her to adduce further documents. At the conclusion of her evidence, the judge permitted her to address him for twenty minutes. Mr Wilson

submitted that overall the judge's interventions occupied only a small proportion of the mother's evidence and were both relevant and proportionate.

77. In his skeleton argument prepared for this appeal, however, Mr Bowe informed us that, taking the circumstances in the round, the guardian considered that the judge disproportionately intervened in the mother's evidence. He submitted that this went further than the judge simply being 'robust' and crossed a line into apparent bias undermining the overriding objective. Mr Bowe informed us that the guardian considered that the judge's approach to testing this part of the evidence would cause the fair-minded observer to believe that he had adopted a negative or hostile position against the mother. He added that the guardian considered that the mother's perception, as a lay person, that the judge's style amounted to pressure when coupled with his overt warning to counsel for the police, could well be interpreted as an attempt to influence the outcome of an independent police investigation.

Instance (5)

78. Instance (5) is "the making of and not making of notes during the evidence." The transcript shows that on four occasions during the evidence the judge made a comment about recording the evidence in his notebook. The first occurred during the cross-examination of the father. When Mr Wilson objected that Mr Uddin was mischaracterising the father's evidence, the judge said "well my pen is resting on my notebook at the moment". The obvious implication of his comment was that he was not making a note because the line of questioning was not assisting him. The remaining three occasions all occurred in the mother's evidence. The second occurred in the passage quoted in paragraph 73 above when the judge said "I am going to record that you have not given a satisfactory answer to my question." The third occurred in the passage quoted in paragraph 74 above when the judge said "I have written in my notebook that, once again, you have withheld material evidence from this court." This led to the exchange between the judge and counsel quoted above. The fourth occurred during the passage in Mr Wilson's cross-examination quoted at 75 above when the judge warned the mother "I will make a note in a minute that you are avoiding answering the question".
79. In his skeleton argument for this appeal, Mr Uddin stated that it was observed that during the parents' evidence the judge rarely wrote down any notes and submitted that the judge's comments about making a note when the mother had not answered a question or withheld evidence were a further indication of apparent bias. In oral submissions Ms Ancliffe argued that there had been selective recording of evidence adverse to the mother's case.
80. In response, Mr Wilson submitted that on each of the four occasions the judge's comment had been warranted, either expressing a view about the utility of the questions being posed, or alerting the witness to his view that she was not answering the question and/or giving her an opportunity to provide a further explanation. When challenged by counsel, the judge explained that he had made the comment "in fairness to everybody, so that, if the mother wants to comment further, she can do so." In the event, the judge obtained a transcript of the hearing and therefore had a full record of the evidence before completing his judgment. In his written submissions, Mr Bowe acknowledged that though the mother may not have liked the judge's technique, it is

not uncommon for a judge to advise a witness how they will record their evidence in order to provide an opportunity to reflect on the answer.

Instances (7) and (9)

81. Instance (7) is “treating the father differently.” Instance (9) is “misinterpreting and giving a different narrative to the evidence given by the father and the guardian at the hearing in August 2021.” They overlap and can conveniently be considered together.
82. It is argued that, in contrast to the manner which he adopted towards the mother during her evidence – a manner which her counsel characterised as intimidating and bullying – the judge’s approach to the father was conciliatory and sympathetic. Particular attention is drawn to one point in the evidence when Mr Uddin was asking questions about when A should be introduced to the twins. It is suggested on behalf of the mother that the tenor of the father’s answers was that he would allow A to decide when to meet them, but the judge intervened, saying

“it is not a case of A making the decision, the father recognises that it is him who has to make the decision, and/or the mother. He is the child. But he will indicate to his father when he is ready to meet the twins.”

Counsel persisted with his questions and the judge intervened in the same vein again. As we understand the submission to us, it is contended that this interpretation put the father in a more favourable, less intransigent, light than his answers warranted.

83. On behalf of the father, it was submitted that the judge permitted each parent to give evidence, and to cross-examine the other, over a lengthy period of time. Mr Wilson conceded that the judge intervened more frequently in the mother’s evidence than during the father’s, but submitted that that was not objectionable given the welfare issues to be decided, the findings made against the mother in the earlier judgments, and the content of her evidence. With regard to the specific intervention in the father’s evidence about which complaint was made, Mr Wilson submitted that the judge’s summary of the father’s evidence was accurate. He also pointed out that, during this exchange, the judge expressed a preliminary view contrary to the father’s case, suggesting that his fears about the impact on A of a premature introduction of the twins were unfounded.
84. In oral submissions, Ms Ancliffe drew attention to several points in the guardian’s evidence when the judge intervened in a way which, it was submitted, gave rise to an appearance of bias. It should be noted that the guardian gave evidence for a lengthy period, mostly without any interruption by the judge.
85. In her evidence in chief, the guardian described the mother as being “very child-centred”. The judge challenged her about this, asking to what extent it was child-focussed to organise a second surrogacy without the father’s knowledge and consent. The guardian conceded that this had not been child-centred. She expressed the view that the mother would be able to “follow a narrative that’s in A’s best interests”. Later in answer to Mr Wilson, she said:

“I think you have to separate out her narrative that she’s told the police, which she clearly believes to be the truth. It doesn’t necessarily follow that she’s going to use that narrative with A. Many, setting aside this particular situation, many, many victims of domestic abuse do not give that narrative to their children because even if that’s what they believe they would never want their children to be harmed in that way, to affect their relationship with the other parent. So, I don’t-- I think where you’re going with this is that she would necessarily give all of this information to A. I don’t think she would.”

86. When Mr Uddin questioned the guardian, he returned to this issue and the following exchange took place:

“Counsel: again, if I misquote you, please correct me. I think you said no one could take away that feeling of being a victim from her. Do you remember that or something to that effect?

Witness: Yes, I do.

Counsel: Would you therefore agree with me that it is wrong for this court or anybody to weaponise that feeling and use it against her in these proceedings and in this-- in the (inaudible) these proceedings? Do you understand what I mean by that?

Witness: Yes. I think-- maybe I need to separate out what I’m trying to say. I think it was wrong of [the mother] to use examples that this court found should not be evidenced. Some of her allegations-- well, all of her allegations, the court didn’t uphold those but that doesn’t take away how she may feel she was treated by her husband in day-to-day life and that’s okay to share that with whoever she believes is the relevant people to do that, to share it with, so I’m trying to separate it out. I don’t agree that she should have used those examples that the court didn’t uphold but if she believes she was emotionally/physically abused by her husband, then she has to do what she believes is right in that respect.

Judge: Would you like to reflect on that? I have not only not upheld them. I have found all the allegations were false.

Witness: Yes.

Judge: Are you saying that she is therefore----

Witness: Yes, that's correct.

Judge: - free to go around repeating those false allegations?

Witness: No, and if I didn't express that in that way, then I should. I don't think she can do that. I don't think it's right or proper but what I'm trying to say is there may be other examples of her experiences that she believes was a form of abuse and-- and that's her belief and she-- no one can take that from her. I don't think it's right----

Judge: (inaudible) speculating (inaudible) other experiences the mother has that we have not been told about.

Witness: I'm not speculating. I'm-- I am aware and I'm sure it's in lots of documents that-- when she explains about her lived experience with her husband, so I don't think it's new information to the court.

Judge: What other allegations of abuse are you referring to that the mother has made which were not the subject of court findings?

Witness: Well, the mother talks about them having a lot of marital disputes to the extent they-- they went to see a counsellor. She talks about her husband being quite overpowering, shouting, being, in her view, controlling.

Judge: Yes. I found----

Witness: So that's a kind of----

Judge: --- (inaudible) allegations to be false. Have you not read the fact-finding judgment?

Witness: Yes, I have.

Judge: Then what other aspects of-- what circumstances of abuse has the mother referred-- talked to you about that were not considered by me in the fact-finding judgment?

Witness: I don't think there's a specific allegation. I think it is more general, general in terms of what she would describe as controlling behaviour.

Judge: I found that to be a false allegation. Are there any examples of the mother alleging abuse that were not the subject of the fact-finding judgment?

Witness: Not that I can recall.

Judge: No, so you are speculating when you say that there may be other matters.

Witness: I guess that could be how it's viewed. [The mother] may have other experiences that she's not shared with-- with people either through the papers or through conversation.

Judge: So you are speculating. You have no evidence on which to base the evidence you have just given?

Witness: Okay. I accept that.

Judge: Thank you."

87. Later in Mr Uddin's cross-examination, when the guardian was being asked about how the mother's contact could be extended, the judge intervened again:

"Judge: What happens if the mother does not agree a narrative that is in keeping with the findings of fact that I have made both in the fact-finding judgment and the welfare judgment?

Witness: Well I don't think that contact can progress under those circumstances.

Judge: Thank you."

When the guardian suggested that there could be a "movement towards more effective communication between them", the judge asked:

"How is he supposed to do that when he is facing a police investigation launched at the request of the mother?"

The guardian suggested that the father's proposal that contact should be limited to six visits a year was potentially shutting the mother out of A's life, but agreed with the judge that there was "no evidence that he had in fact done so."

88. Ms Ancliffe accepted that the judge was entitled to interrupt and challenge the guardian if he had concerns about her evidence but the manner in which he did so and the vigour with which he pursued the point gave rise to an appearance of bias. Mr Wilson submitted that these interventions were unobjectionable, given that the question whether the mother accepted the findings was of critical importance to the

welfare issues in the case. He observed that the guardian's counsel did not object to any of the judge's interventions.

DISCUSSION

Introductory Observations

89. Before turning to consider whether, individually or cumulatively, the instances relied on by the mother give rise to apparent bias, we identify a number of important points which the fair-minded and informed observer would take into account.
90. First, by the date of the hearing in August 2021 these proceedings had been going on for a very long time. The child arrangements application had been made in March 2019, nearly two and a half years earlier. For a case to continue for that length of time is wholly outside the norm for private children's proceedings. The issues of with whom A should live, how and when he should spend time with the other parent, and whether he should have contact with his half-siblings were still outstanding. The judge was understandably and rightly concerned to avoid further delay which could, as the statute warns, prejudice the child's welfare. He was plainly trying to manage the case in accordance with the statutory principles and the overriding objective.
91. Secondly, by August 2021 the judge was very familiar with the case and all its complex and unusual features. He had conducted two substantive hearings, plus a number of case management hearings, and delivered two lengthy judgments. It was unsurprising that he had formed some views about a number of the issues. It was equally unsurprising that he indicated what those views were. In doing so, he was acting in what Sir Thomas Bingham described as "the English tradition" which "sanctions and even encourages a measure of disclosure by the judge of his current thinking" (see paragraph 56(8) above). It does not follow from the fact that the judge disclosed his current thinking that his mind was closed.
92. Thirdly, in his two earlier judgments the judge had made a number of serious findings against the mother. In particular he had found that she had fabricated allegations of domestic abuse against the father and that she had through deception arranged for his genetic material to be used in the second surrogacy. There had been no appeal against these findings. The mother's dishonest and manipulative conduct was therefore part of the established factual matrix of the case. As Lord Hoffmann observed in *Re B (Children)* [2008] UKHL 35, [2009] AC 1 at paragraph 2:

"The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

Where a family court dealing with proceedings relating to a child finds on a balance of probabilities that an alleged fact did or did not happen, all decisions about the child's welfare must be based on that finding.

93. It was inevitable that the judge would have his earlier findings in mind at all points when making case management decisions and considering the ongoing substantive issues. His findings were reinforced by the clear-sighted and authoritative analysis and recommendations expressed in Dr Pettle's report which we have cited above. In those circumstances, it would have been wrong and contrary to the interests of the child if he had not taken those findings into account in his conduct of the proceedings. Insofar as the judge's criticisms of the mother during the hearing in August 2021 arose out of his previous findings, they were not evidence of bias. As this Court has said on a number of occasions (see paragraph 56(6) above), bias means a prejudice against one party or its case for reasons unconnected with the merits of the case.
94. Fourth, the obligation to deal with a case fairly and to ensure that the parties are on an equal footing does not mean that a judge is obliged to treat the parties in precisely the same way. By this stage, the principal aim of the proceedings was to resolve the dispute about A's living arrangements and determine whether and if so when and how A should be introduced to the twins. Dr Pettle had made a series of recommendations about the way forward but had also identified aspects of the attitudes of both parents which made it more difficult to achieve a resolution. She advised that the "only way to achieve a more positive outcome for A is for his parents to change their behaviours". It was evident that, so far as the mother was concerned, it was necessary to focus on the apparent contradiction between her assertion that she accepted the judge's earlier findings and her efforts to bring about the father's prosecution. Given his earlier findings, it is unsurprising that the judge challenged the mother about this apparent contradiction in direct terms. So far as the father was concerned, the focus was on what Dr Pettle described as his "entrenched" position of wishing to have nothing to do with the twins and wanting A to know nothing about them until he was much older. It is plain from the transcripts that the judge, whilst understanding the father's feelings about the mother's behaviour, was very doubtful about the wisdom of the father's position on these issues. He chose to tackle the father about this in a less directly challenging way than the approach he adopted when speaking to the mother. A judge is entitled to adopt different approaches when probing and testing the evidence of witnesses. The fact that the judge on this occasion took a more directly challenging approach to the mother's position than he took when probing the father's views would not by itself lead a fair-minded and informed observer to conclude that there was a real possibility of bias.
95. Fifth, in considering the proceedings as a whole to determine whether there was a real possibility that the court was biased, the fair-minded and informed observer would look at the judgment delivered at the end of the hearing under scrutiny and at the extent to which it was supported by the evidence. We recognise that, as Black LJ observed in *Re G*, supra, at paragraph 52,

"the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent ... of prejudicing the exploration of the evidence".

Nevertheless, in considering the question of apparent bias in this case, it is relevant to note that the judge rejected a number of submissions made on behalf of the father. In particular, he refused to make a final child arrangements order; he rejected the father's contention that A should not meet the twins at this stage; and he dismissed the father's application for an order restricting the mother's exercise of parental responsibility of

A. He also encouraged the father to relent and give his agreement to the making of a family assistance order. (Under the terms of s.16 of the 1989 Act, such an order cannot be made without the consent of those persons to be named in it.)

96. With those general observations in mind, we turn to the individual instances relied on which we consider, first individually and, then, cumulatively.

Instance 2

97. We do not agree that the judge's treatment of the application for an adjournment in March 2021, taken by itself, gives rise to an appearance of bias. In his position statement for the hearing on 25 March 2021 (which we consider in connection with another issue below), Mr Uddin cited the dicta of Gloster LJ in *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, [2002] IRLR 721, including the following passage at paragraph 22:

“If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question.”

The judge's approach to the issue at the hearings in March 2021 was firmly in line with that advocated by Gloster LJ.

98. In considering whether the judge's approach to this issue suggested a real possibility of bias, a fair-minded and informed observer, aware of the mother's assertion about her health and treatment but knowing about the history of the proceedings, would take into account (1) the findings which the judge had already made in his two earlier judgments about the mother's dishonest and manipulative behaviour; (2) the emerging evidence about her report to the police; (3) the fact that she had not disclosed her condition for eight months prior to 16 March; (4) the judge's finding that the medical evidence initially supplied was insufficiently clear, and (5) his concern about the impact of further delay on the child's welfare. It was not unreasonable for the judge to take the view that he needed to be satisfied about the genuineness of the mother's assertions about her condition and treatment. In the circumstances of this case, given his earlier findings, it is unsurprising that the judge was initially suspicious about a last-minute adjournment application based on the mother's late disclosure of a medical condition. When he was eventually satisfied about the genuineness of the mother's assertions about her condition and treatment, he duly adjourned the case for several months, making sure that the next hearing would be listed if possible to accommodate the mother's treatment and giving directions about the filing of further medical evidence in July (with which, we note, the mother initially failed to comply).

99. In oral submissions, when Whipple LJ pointed out that all the judge was really saying was that he wasn't satisfied about the medical evidence, Ms Ancliffe replied that he did not need to say it in that way. Having read the transcript and notes with which we have been provided, we do not agree that there was anything about the judge's approach to this issue in March 2021, or in the way he expressed himself during the hearing on 25 March, which would lead the fair-minded and informed observer to consider that there was a real possibility that he was biased.
100. In the amended ground of appeal appended to the order granting permission to appeal, instance (2) was expressed as "casting doubt on the Appellant's medical diagnosis in early 2021". In his skeleton argument for this appeal, drafted before Ms Ancliffe was instructed, Mr Uddin also submitted that the judge had "continued in the same vein" at the start of the hearing in August 2021, "doubting the appellant's medical condition and taking an unreasonable stance against the appellant". Ms Ancliffe did not pursue this argument at the appeal hearing but for the record we see nothing wrong with the judge's approach to this issue prior to or during the hearing in August 2021. The mother failed to comply with the direction to file updating medical evidence by 23 July 2021. Instead there was a flurry of emails which we have summarised above. It was only during the first day of the hearing on 17 August that a report from her treating clinician was produced. At that point, despite his clear views that it would be better for both parties to attend court in person to give evidence, the judge took the "pragmatic approach" and agreed to the mother giving evidence remotely. As the transcript shows, thereafter he allowed the mother reasonable breaks during her oral evidence. Contrary to Mr Uddin's submission, the judge's stance towards the mother's medical condition in August 2021 was entirely reasonable.

Instance (4)

101. The judge's interventions during the evidence on which the mother relies in support of this appeal have to be considered in the context of the whole hearing. There were lengthy periods in the evidence when the judge said nothing at all. He made no attempt to curtail the questioning of any of the witnesses and as a result the hearing substantially exceeded the time estimate. Many judges might have adopted a stricter approach, particularly in the current circumstances with substantial backlogs and delays in the family justice system. The judge did not prevent the mother introducing undisclosed documents during her evidence, and he allowed her to address the court for nearly twenty minutes at the end of her evidence when she went through the documents she had produced. Many, perhaps most, judges would have refused to admit the documents or to allow the witness to address the court in that way. All these features of the hearing would be taken into account by a fair-minded and informed observer when considering whether there was a real possibility of bias.
102. It is clear from the transcript that the judge adopted a different approach to the mother's evidence from that adopted during the father's. As we noted above, that by itself is unobjectionable. Treating the parties fairly does not necessarily involve responding to their evidence in precisely the same way. We have looked carefully to see whether the difference in approach was greater than justified so as to give rise to an appearance of bias. The judge's interventions during the father's evidence were less frequent and his challenges to the father were expressed in moderate terms. In contrast, his interventions during the mother's evidence were more frequent and his challenges were direct and at times robust. Given the history of the mother's dishonest

and manipulative conduct before and during the proceedings, the judge was understandably concerned that she was seeking to direct or influence the police investigation so as to circumvent his findings. The mother's assertions that she accepted his findings, that she only made the complaint to the police after her domestic abuse counsellor had arranged the appointment, and that the police investigation did not affect the family court was inconsistent with other evidence about her dealings with the police. Her assertions to the effect that the police investigation was out of her control were disingenuous. The documents disclosed by the police against her wishes showed that she positively and repeatedly encouraged them to pursue the investigation. In a series of emails to the police, she said that she was not happy with the outcome of the family proceedings, that her concerns about A being maltreated by the father had been ignored by the family court, and that the judge had not listened to her case fairly, had not considered the evidence and had been "biased throughout". Given those contradictions, her evasive answers in evidence, and the importance of establishing whether she genuinely accepted the findings, the judge's more direct and challenging approach during her evidence was, in our judgment, acceptable. We reject the submission that he was unfairly pressurising the appellant for reporting the allegations of abuse to the police or that he was interfering in the criminal investigation.

Instance (5)

103. There is no substance in the complaint about the judge's taking of notes or his references to his notebook during the hearing. It is entirely a matter for a judge to decide what notes to take of the evidence. Neither counsel nor anyone else in court is in any position to assess what a judge is writing down. It is not unknown for a judge to indicate to counsel that his line of questioning is not helpful by putting down his pen. This is an example of the disclosure of judicial thinking which, as Sir Thomas Bingham MR observed, is sanctioned in the English tradition. Criticising a witness's answer, and recording the criticism in his notebook, is a legitimate expression of scepticism which, to use Sir Thomas's words, "is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be". In this case, the judge's references to the notebook during the mother's evidence were made in the course of appropriate challenges about her reasons for reporting allegations to the police which he had found to be fabricated.

Instances (7) and (9)

104. We do not accept the submission that the judge's interventions in the course of the father's evidence were designed to shore up his account. In particular, we reject the argument that his interventions during Mr Uddin's cross-examination about when A should be introduced to the twins had the effect of putting the evidence more favourably than the witness's answers warranted. Having read the full transcript, we are satisfied that the judge's interpretation of the father's evidence was correct. Although the father at one point said that A "would take his own decision", having looked at the whole of this section of the transcript we are satisfied that his evidence overall was as summarised by the judge. The judicial interventions were measured and unobjectionable and there is nothing about them which suggests any apparent bias.

105. In our view, there was nothing wrong or improper in the judge's interventions during the guardian's evidence or anything about those interventions which might lead a fair-minded and informed observer to conclude that there was a real risk of bias. On the contrary, the judge was rightly concerned about a fallacy in the premiss in the questions put by Mr Uddin which was, to some extent, reflected in the guardian's answers. The premiss was that, irrespective of the court's findings against her, the mother had a feeling that she was a victim of abuse, that she was entitled to act on that feeling, and that it was, in counsel's words, wrong for the court to "weaponise" that feeling and use it against her in the proceedings. The premiss was untenable and, insofar as it formed part of the guardian's analysis, it was important in the child's interests that it be identified and challenged.
106. The court had found at the earlier hearing that the acts of abuse alleged by the mother did not happen and that she had fabricated them. The argument on behalf of the mother that she had a feeling she was the victim of abuse was therefore baseless. Counsel's assertion that "it would be wrong for this court or anyone to weaponise that feeling" was a scurrilous statement to which many judges (although not, we observe, this judge) would have raised immediate objection. In the circumstances, the judge was entirely justified in intervening to challenge the guardian's responses to this line of questioning. Her professional opinion was a very important part of the evidence on which the judge was being asked to make decisions about A's future. If a judge is concerned about the rationale behind a guardian's opinion, he is justified in raising his concerns. Like all professional witnesses, a guardian must expect her opinions to be challenged, sometimes robustly. In oral submissions, Ms Ancliffe conceded that the judge was entitled to take this course but submitted that there was an excessive vigour in his intervention. The intervention was certainly robust but in our view not excessively so. Consequently, we reject the suggestion that any of the judge's interventions during the guardian's evidence gave rise to an appearance of bias.

CONCLUSION ON ISSUES (2), (4), (5) (7) & (9)

107. We have considered these instances both individually and collectively. We are satisfied that they would not lead a fair-minded and informed observer to conclude that there was a real risk that the judge was biased against the mother. There is no doubt that the judge was very critical of the mother's conduct and that he expressed that criticism in forthright terms during her evidence and at other points in the hearing. But looking at the proceedings as a whole, those criticisms have to be seen in the context of his findings in his earlier judgments about her dishonest and manipulative behaviour. As noted above, bias means a prejudice against one party or its case for reasons unconnected with the merits of the case. Here the judge's criticisms of the mother during her evidence were plainly based on the merits of the case, which included the serious, unappealed findings which he had made against her. His justification in pressing her hard about the apparent contradiction in her words and actions was that A needed to have an agreed narrative, based on the judge's findings, so that he could have a clear idea about his identity and be prepared for the introduction of the twins.
108. In reaching that conclusion, we take into account the guardian's opinion about the matter, as expressed in Mr Bowe's skeleton argument to this court. The guardian was, of course present during the hearing and we have no doubt that she is both fair-minded and informed. But she is not an independent observer. In one important

respect, her evidence about the mother's actions was rightly criticised by the judge. Her views about the merits of this appeal are to be taken into account but they are not decisive.

(B) INSTANCES (3) AND (8)

THE INDIVIDUAL INSTANCES AND PARTIES' SUBMISSIONS

109. We start by setting out the facts of the incidents on which the mother relies and the parties' submissions on them. Both, as will be seen, arise out of criticisms made by the judge of the conduct of Mr Uddin and in particular of his reference to the possibility of having to report him to the Bar Standards Board ("the BSB").

Instance (3)

110. Instance (3) is "bullying, admonishing and threatening to report the appellant's counsel to the Bar Standards Board on 25 March 2021."

111. As stated above, prior to the hearing on 25 March, Mr Uddin on behalf of the mother prepared a position statement addressing the application for an adjournment. It is unnecessary to set out this document in full. In the course of summarising the circumstances in which his client's medical condition had come to the court's attention, counsel included the following observations:

- "The application for an adjournment is made by the respondent mother with some trepidation. The mother feels that this court will use against her any application for an adjournment."
- "It is apparent that the court due to issues at previous hearings has a distrust of the mother and to put it bluntly prima facie disregard for the mother's position."
- "It is one thing for the court to deny the mother to vary an interim contact order but another to disregard her application for an adjournment."
- "...she had ignored her own health conditions to avoid a delay in these proceedings and her weariness of this court due to her previous experience before this court."
- "The subsequent treatment of the mother by the court after her cancer disclosure has solidified mother's weariness of this court."
- "It is true the mother has raised questions about the conduct of the court at previous hearings, but it would be unfair and unjust for the court to use this against the mother which the mother feels the court is doing."

112. The transcript of the hearing shows that almost immediately after the start of the hearing, the following exchange took place:

"Judge: Yes, Mr Uddin?"

Counsel: May it please you Lordship, my Lord ---

Judge: It does not please me, actually, because I consider your position statement to have been impertinent and impudent and I should tell you now that if you ever dare file a position statement like that before me again, I will consider reporting you to the Bar Standards Board. Do you understand?

Counsel: Thank you, my Lord. My Lord, the position statement was done on instructions from my client

Judge: Yes, I am sure it was.”

113. Following this exchange, the judge, having heard submissions from the other parties, granted the adjournment and, as already noted, re-listed the hearing in August, rather than the dates preferred by other parties, partly to ensure that Mr Uddin could continue to represent the mother, for whom there had previously been a change of representation on at least two occasions, and partly in the hope that the mother’s medical treatment would be completed so that she could participate at the hearing.
114. In his skeleton argument drafted before Ms Ancliffe was instructed, Mr Uddin submitted that if a fair-minded and informed observer read the position statement they would regard the judge’s comment about the BSB as bullying and that this conduct in itself demonstrated an appearance of bias. On behalf of the father, Mr Wilson did not argue that the judge’s reference to the BSB had been either justified or proportionate. He suggested, however, that the fair-minded and informed observer (1) would be aware that, against the background of his findings of dishonesty against the mother, the judge had required proper evidence about her medical condition; (2) would therefore be surprised at the tone of the position statement filed on her behalf; (3) would note that the comment about the BSB did not prevent the mother’s case from being fully argued at the hearing; and (4) would also note that, despite admonishing counsel for his remarks in the position statement, the judge acceded to the mother’s request for an adjournment.

Instance (8)

115. This instance is described as “bullying and threatening the Appellant’s counsel with the Bar Standards Board on the 27th August 2021”. As all parties recognised, this was the most troubling incident during this difficult hearing. In argument before us, Ms Ancliffe placed particular weight on it in support of the appeal.
116. The background to this incident is a passage in the evidence given by the children’s guardian at the end of the previous day’s hearing. During questions from Mr Wilson on behalf of the father in which he was challenging the need for a family assistance order, the guardian had described the relationship between the mother and A as “so special and so close” and continued:

“I think we’re looking hopefully at a new chapter in this little boy’s life, one where he can resume a positive relationship with his mother and learn about his siblings. All of these things are

really important for A, for his sense of identity. He must have suffered trauma and loss losing his mother out of his life and all of his extended family, to whom he was very close and, again, I've observed that personally on more than one occasion. So, to have that back in his life would just be so good for him and I think the CAFCASS officer could assist with that."

117. On the following morning, shortly after Mr Uddin started his examination of the guardian, the following exchange took place:

"Counsel: Now, yesterday in evidence you said, and please correct me if you find me to (inaudible) in any way, that A did suffer trauma when he was moved away from [the mother] to the care of [the father] leaving behind----

Judge: If [the guardian] said that, I did not hear it.

Counsel: Well, I did-- I prefaced it, my Lord, with the "If I have misquoted you, please correct me."

Judge: Yes. All I am saying is I do not recall her saying that.

Counsel: Well, my Lord, she (inaudible). My Lord, I am asking a question but I did preface it and said, "If I misquote you." What would you like my Lord to do, not-- for me not to even ask the question because your Lordship has not heard it?

Judge: Well, she did not say it.

Counsel: Well, let us hear what she says then, my Lord.

Judge: Do not talk to me like that.

Counsel: My Lord --

Judge: You carry on and do what you want.

Counsel: Well, my Lord, how could I do anything I want? I am in your Lordship's court.

Judge: Yes. It would be helpful if you could remind yourself of that. Now ask the question.

Counsel: Well, no, my Lord. I----

Judge: Ask the question.

Counsel: Well, I want-- I think we need a five-minute break because I do not like being spoken to like

this. I am an officer of this court. I deserve respect. Your Lordship comes into this court and we all stand up because we show respect and I am an officer of the court. I will not----

Judge: No you are not --

Counsel: (inaudible)

Judge: --an officer of the court. You are not a solicitor. You are a member of the Bar.

Counsel: Well, my Lord, I---

Judge: I am not wasting any more time. Get on with your cross-examination.

Counsel: My Lord, I will make one further point. This is my workplace. This is my workplace, just like your clerks and----

Judge: Will you please just get on with asking your question?

Counsel: I will but can I have it affirmed from you that you will not talk to me in that way?

Judge: If you speak to me respectfully, I will speak to you respectfully.

Counsel: My Lord, I apologise if I have come across in any way disrespectful but this is my place of employment and I will not be spoken to in that way by anybody. When I have employees, I never speak to them in that way.

Judge: You are getting yourself close to being reported to the Bar Standards Board. Now please just get on with your cross-examination.

Counsel: May I ask that same question again or not?

Judge: Certainly.

Counsel: Yesterday - please correct me if I misquote you in any way - my understanding was that A suffered trauma when he was moved away from [the mother], away from the extended family and her. Am I quoting you right or am I misquoting you?

Witness: I think you're probably misquoting me. I don't remember using the word "trauma". I'm not saying A wouldn't have suffered trauma but I don't recall saying that in evidence yesterday.

Counsel: Okay. Well, I did say-- I said in fact-- I had a note of "trauma" and I will-- I stand to be corrected. Did you use the word "traumatic" then or-- can you recollect?

Witness: I can't recollect, I'm sorry.

Counsel: All right then. Well, then, in that case, in relation to the upheaval, how do you think that has affected A?

Witness: I think A because of his age would have been confused about the changes that took place moving from one residence to another residence. He already had formed a good relationship with his father so it wasn't as though he was going some-- with someone he didn't know. The environment would have been slightly different but, yes, I think it-- because he's preverbal and explanations couldn't really be given to him as to what was happening in his little life, you know, I think he would have been confused."

118. The guardian's evidence continued. A little later in the morning, following a short adjournment for unconnected reasons, Mr Uddin addressed the judge in these terms:

"My Lord, if I may be permitted to make this personal statement which is recorded here, in these proceedings today was the second time your Lordship has threatened me with the Bar Standards Board and I am concerned whether my client is losing confidence in me and whether I can continue. However, having spoken to my client, she has not lost confidence in me. I will continue with this case but, my Lord, I totally appreciate these kind of cases are not easy for anyone concerned, even your Lordship. These are dealing with the souls of people and, my Lord, I am also a human being with blood and salt running through my veins and if there is another threat, my Lord, I am going to have to consider-- I totally accept, if I am in any way inappropriate, then your Lordship should admonish me so, on that basis of that understanding, my Lord, I am going to continue. I feel my client has not lost confidence in me and I can carry on. I just wanted to put this marker down, my Lord. May I continue?"

The judge did not respond to this statement. Counsel resumed his examination of the guardian. There were no further episodes of conflict between him and the judge.

119. It was submitted on behalf of the mother that this incident would lead a fair-minded and informed observer to consider that there was a real possibility of bias for several reasons. First, the judge's initial intervention was wrong and unfair. Counsel's recollection of the guardian's evidence the previous evening was correct: she had referred to trauma. Secondly, the judge lost his temper with counsel and addressed him in a way that amounted to bullying. Thirdly, counsel was clearly unsettled by the way in which the judge addressed him and asked for an adjournment, which the judge refused. Fourthly, the judge's renewed threat to report him to the BSB was unjustified and wrong. Finally, the effect of the intervention was that the guardian wrongly said that counsel had misquoted her. The judge's intervention therefore materially undermined the evidence.
120. In response, Mr Wilson acknowledged that the judge's comments during this exchange may be the most troubling. He pointed out that counsel's summary of the guardian's evidence the previous day was not precisely accurate. He did not seek to defend the judge's reference to the BSB. He added, however, that, following this exchange, Mr Uddin had continued to cross-examine the guardian for an extended period recorded over a further 21 pages of transcript, during which there were further respectful and productive exchanges between judge and counsel. This was one incident over a five-day hearing and, in evaluating the question of apparent bias, a fair-minded and informed observer would have regard not just to this moment but to the whole hearing in the context of the overall proceedings.
121. In his written submissions to this Court, Mr Bowe informed us that, having carefully considered the transcript, the guardian could see that counsel's question did not strictly reflect the evidence that she had given the day before in that she had not said that A had suffered trauma "when he was moved away" from the mother to the father but rather that A must have suffered trauma having lost the mother and his extended family. He added, however, that the guardian's perception was that the judge unexpectedly shouted at counsel when telling him not to talk like that, causing counsel to request a five-minute break and that the style of the intervention, taken in combination with the previous admonition and reference to the BSB on 25 March, resulted in what Mr Bowe called a somewhat freezing effect on counsel. He also noted that the effect of the intervention was to cause the guardian to doubt her previous evidence and potentially deprive counsel of the opportunity to explore the issue of "trauma" more fully on the mother's behalf. For those reasons, it was his submission that a fair-minded observer would consider that instances (3) and (8) together do amount to apparent bias.

DISCUSSION

Introductory Observations

122. In this part of the case we are concerned with alleged bullying of counsel by a judge. Where it occurs, judicial bullying is wholly unacceptable. It brings the litigation process into disrepute and affects public confidence in the administration of justice. However, it inevitably remains the case that situations of conflict between bar and bench will sometimes arise. In that connection we make the following points.
123. First, counsel are sometimes obliged to object to, or be critical of, something said or done by the judge in the course of a hearing. Judges should, and almost always do,

appreciate that this is a fundamental part of the advocate's role and should entertain the objection with respect, even if they regard it as ill-founded. However, respect goes both ways. It is important that any such objection or criticism is expressed, however firmly, in a professional way. Most judges nowadays conduct hearings in a less formal manner than may have been usual in earlier generations, but that is not a licence to disregard the particular position of authority which they necessarily enjoy.

124. Second, trials are a very intense environment. Even the best counsel may in the pressure of the moment express themselves in ways which they did not really intend or say things which they would not have said if they had had time for reflection – whether in the context of an exchange with the judge of the kind discussed above or more generally. Judges should, and almost always do, recognise this. Many such lapses can simply be overlooked or corrected with a light touch.
125. Third, there will nevertheless be occasions when counsel's conduct requires explicit correction or admonishment. In such a case the judge should try to ensure that any rebuke is proportionate and delivered in measured terms, without showing personal resentment or anger. Even a merited rebuke may be unsettling for counsel; and it may also, even if unjustifiably, have an impact on the confidence of their client in the fairness of the hearing. That said, some such impact may be unavoidable, in which case it has to be accepted as a consequence of counsel's behaviour.
126. Fourth, a statement by the judge that they are considering referring counsel to the BSB is a particularly strong form of admonition and is accordingly particularly liable to have an adverse impact of the kind referred to above. For that reason, we believe that it will rarely be appropriate for a judge to raise the possibility of referring counsel to the BSB in the middle of a hearing. In the great majority of cases, the better course will be to wait until the end of the hearing, which will avoid raising the temperature more than is necessary and will also mean that the judge can evaluate counsel's conduct in the overall context of the hearing. In the rare case where an allegation of professional misconduct does have to be raised in the course of a hearing, the situation will require sensitive handling and the judge will be well advised to take time to consider carefully when and how to raise the matter.
127. Finally, since judges are human, and (as Black LJ observed in *Re G*, supra) hearings can be challenging for them as well as for counsel, they will sometimes lapse from these high standards, and incidents will occur which the judge should have handled better. But such lapses do not necessarily amount to bullying; still less does it necessarily follow that in such a case the hearing will have been unfair or that the judge should recuse themselves from any further involvement. On the contrary, it is fundamental to the culture and training of a professional judge that they will decide each case according to its objective merits. If judge and counsel rub each other up the wrong way, whether or not it is the fault of either or both, that can be, and almost always is, put to one side in the decision-making process. Likewise, the professional training and experience of counsel should enable them to deal with criticism from the bench, even if they may believe it to be unjustified.
128. We should add that although the mother's reference to bullying requires us to consider the judge's conduct, the dispositive question on this application is not whether he was guilty of misconduct in relation to either instance but whether his

conduct would give rise to a reasonable apprehension that he was biased against the mother, because of her counsel's behaviour.

Instance (3)

129. In his third judgment handed down on 15 November 2021 the judge said that parts of the position statement filed for the hearing on 25 March 2021 were “rude and impertinent”: the phrase he used at the hearing itself was “impudent and impertinent”. We might not have used those precise terms, but we agree that the passages that we have quoted from the position statement are objectionable. Although, as we have acknowledged above, there are occasions where it is counsel's duty to accuse a judge of unfairness, in the context of the adjournment application the accusation was not only unfounded but gratuitous. It did not advance the substance of the application to say that the mother feared that it would be unfairly “disregarded” because of the judge's previous findings, still less that she feared that he would use it against her. Those assertions did no more than vent the mother's personal feelings about the judge's findings (which findings were unappealed). We recognise that this may not have been an easy position statement for Mr Uddin to draft but if his response to the judge that it was drafted “on [the mother's] instructions” meant that he thought he was obliged to make offensive imputations of this kind merely because his client wanted him to do so, that was a serious misunderstanding of his duty.
130. It was in our view appropriate for the judge to admonish counsel about the tone of the position statement. He also acted appropriately by doing so succinctly, and in a way that drew a line before he moved on to the substance of the application. We have to say, however, that we do not think that his rebuke was well expressed. Although it is never easy to assess how things are said from a written transcript, the words used by the judge convey the impression that he felt personally affronted: that was not appropriate. As for his mention of the BSB, it is fair to say that the judge did not say that Mr Uddin's conduct merited a report (and we do not believe that it did) but only that he would report him if he did the same again. But it was, for the reasons set out above, inadvisable for him to mention a possible reference to the BSB in the course of the hearing.
131. Although we believe that the incident could have been handled better, we consider it to have been a limited incident, best characterised as an over-reaction to what was in our view a gratuitously offensive position statement.

Instance (8)

132. As we have seen, the parties before us were agreed that instance (8) was the most serious of the instances on which the mother relied. It is important to start by analysing exactly what went wrong.
133. The starting point is the judge's querying of whether in his question to the guardian Mr Uddin had accurately summarised an earlier answer she had given. The question began:

“Now, yesterday in evidence you said, and please correct me if you find me to (inaudible) in any way, that A did suffer trauma when he

was moved away from [the mother] to the care of [the father] leaving behind ...”

It was at that point that the judge intervened to say that he had not heard the guardian say that, though a little way into the exchange he said in terms that she had not done so.

134. Because of the way things developed, the judge did not specify exactly what it was in Mr Uddin’s formulation that he believed was wrong. When Mr Uddin eventually put the question again the guardian said that she did not believe that she had used the word “trauma”. As the transcript shows, she was wrong about that, and to that extent Mr Uddin’s question accurately reflected her evidence. But it is not clear to us that that was the judge’s point. Mr Uddin’s formulation was in fact inaccurate in a different way, because it suggested that the guardian had attributed the trauma to A being moved “to the care of [the father]” whereas she had referred only to it being caused by the loss of his mother and extended family. The difference is only slight, and it is fair to say that Mr Uddin had not finished his question when the judge intervened and he may well have been going on to refer to that aspect too (as he did when he eventually put the question again); but even if so his introduction of a reference to the father arguably carried the implication that the guardian had said there was something about the father’s care that caused trauma. It may well have been this perceived inaccuracy that the judge was objecting to. In any event, at this stage there was no more than a possible misunderstanding of a kind which sometimes occurs in the course of cross-examination, and no-one is to be criticised.

135. Mr Uddin responded to the judge’s intervention by saying:

“What would you like my Lord to do, not-- for me not to even ask the question because your Lordship has not heard it?”

That was in our view disrespectful and impertinent. The correct response from an advocate when his recollection of the evidence is questioned by the judge is to seek to clarify the position, most obviously by establishing exactly what the issue is and asking that the judge’s note be compared with those of counsel and solicitors. His further response “Well, let us hear what she says then, my Lord” also has a confrontational ring, at least as it appears in the transcript.

136. Thus far the criticism is entirely of Mr Uddin. But it is clear that his disrespectful response (or responses) caused the judge momentarily to lose his temper. Even without the tape, it is plain that his response (“Do not talk to me like that”) was angry – and that is confirmed by the guardian’s recollection recorded at paragraph 121 – and his replies in the course of the following exchange, culminating in the observation that Mr Uddin was coming close to being reported to the BSB, show that he did not immediately recover his poise. That exchange in its turn clearly unsettled Mr Uddin and caused him too to become heated – “I deserve respect”, “can I have it affirmed that you will not talk to me in that way?”, “I will not be spoken to in that way by anybody”. Although the judge tried to close the incident down and return to the evidence, Mr Uddin would not at first do as the judge asked. He requested a break, which the judge refused. Although Mr Uddin resumed his questions to the witness, he obviously remained troubled, hence his “personal statement” a few minutes later.

137. This was clearly a regrettable incident. It was started by Mr Uddin's disrespectful response or responses, for which the judge was fully entitled to admonish him. However, the way that the judge did so raised the temperature and clearly unsettled Mr Uddin. With the benefit of hindsight, we believe that he should have taken up the suggestion of a short break for "cooling-off". Instead, he warned Mr Uddin that he was getting close to being reported to the BSB. We have already observed that it is generally inadvisable to warn of the possibility of a reference to the BSB in the course of the hearing, and that was particularly so here when feelings were running high.
138. Miss Ancliffe submitted that the judge's intervention had led the guardian to wrongly disavow her earlier reference to A having suffered trauma by having been moved from her mother's care. That may be the case, even though the judge himself did not focus on that word, but it is in truth impossible now to know. Ultimately, it does not matter. We are not concerned as such with the effect of the judge's intervention but whether the incident to which it led gives rise to a reasonable suspicion of bias on his part. However, we should say that we do not consider that the guardian's revisiting of the issue had a material impact on the outcome. She was a professional witness well able to express her considered opinion and her subsequent answer, set out at the end of paragraph 117 above, described in more precise terms how A had been affected by the move from the mother.

CONCLUSION ON INSTANCES (3) & (8)

139. It will be seen that we have some criticisms of the judge's response in relation to both these instances, and in particular instance (8). However, the question on this appeal is whether what he said on those occasions would lead a fair-minded and informed observer to consider that there was a real possibility that he was biased against the mother. We do not believe that it would. In neither case was his conduct gratuitous: on the contrary, he was reacting, albeit inappropriately, to disrespectful conduct on the part of Mr Uddin. These were two short-lived and isolated episodes in separate hearings, the second of which lasted several days. They are just the kind of incident which may arise in the course of highly-charged proceedings but which, as we have said above, a professional judge will put to one side when assessing the merits of the case. As noted at paragraph 47 above, in his eventual judgment the judge said that the exchanges between him and Mr Uddin had had no effect on his decision-making. Of course that statement itself cannot be conclusive, but it is consistent with what the fair-minded and informed observer would expect of a professionally trained judge and there is nothing to suggest that it was not the case here. There is no complaint of any other inappropriate interchange between the judge and Mr Uddin. We refer also to paragraph 95 above. The mother and her legal representative were given a fair opportunity to put her case, and the mother was allowed to adduce extra evidence. At the conclusion of the hearing, the judge handed down a judgment in which he rejected a number of the proposals put forward by the father. All the evidence is that the judge reached his conclusions following the August 2021 hearing in a fair and balanced way, and there is no reason to suppose that he would not do so in the remaining stages of the case.
140. Having been critical of some of Mr Uddin's comments, we should record our impression that, despite the evident professional difficulties he was facing, he represented his client tenaciously and effectively.

OVERALL CONCLUSION

141. In relation to both groups of instances, we have concluded that they would not lead the fair-minded and informed observer to conclude that there was a real possibility that the judge was biased against the mother. For the avoidance of doubt, that remains our view if all seven instances are considered cumulatively. It is for those reasons that we concluded that there was no basis on which the judge should have recused himself and that this appeal should be dismissed.