1312.) SCSL-03-01-A (156 – 176) 156

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 27 July 2012

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC

PROSECUTION RESPONSE TO CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny

Defence Counsel for the Accused:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

I. INTRODUCTION

1. The Prosecution files this response to "Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges".[1] The Motion is without merit, and should be dismissed.

2. The Motion does not meet the "high burden" required to overcome the "presumption of impartiality which attaches to a Judge", deriving from the Judge's oath of office and qualifications for appointment.[2] This presumption cannot easily be rebutted[3] and has not been rebutted. The Defence has not adduced reliable and sufficient evidence which "firmly establishes" a reasonable apprehension of bias by reason of prejudgement.[4] Although the standpoint of an accused is a relevant consideration, it is not decisive.[5] Where, as here, the Motion contains not a single fact or even a single allegation that would cause a reasonable informed observer[6] to doubt the impartiality

---

[1] Public with Public Annex A and Confidential Annex B, Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, SCSL-03-01-A-1302, 19 July 2012 ("Motion").

[2] *Prosecutor v. Norman*, SCSL-04-14-112, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 25; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija Appeal Judgement"), paras. 196, 197; *Prosecutor v Karemera et al.*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004 ("Karemera Bureau Decision"), para. 10.

[3] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, ("Judge Thompson's Disqualification Trial Decision") paras. 86, 94; *Prosecutor v Delali et al.*, IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement"), para. 707 establishes that "[t]he reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias."; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 ("Nahimana Appeal Judgement"), para. 48; Karemera Bureau Decision, para. 10.

[4] Furundžija Appeal Judgement, para. 197; Nahimana Appeal Judgement, para. 48; Judge Thompson's Disqualification Trial Decision, paras. 86, 94; Čelebići Appeal Judgement, para. 707.

[5] *Prosecutor v. Sesay et al.*, Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, SCSL-04-15-T-956, 24 January 2008 ("Judge Thompson's Disqualification Appeals Decision"), para. 10; Karemera Bureau Decision, para. 9.

[6] That is, "an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold". *See* Judge Thompson's Disqualification Appeals Decision, para. 11 citing Furundžija Appeal Judgement, para. 189, *Prosecutor v Brđanin*, IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, para. 7.

of any of the Judges of the Appeals Chamber of the Special Court for Sierra Leone, the Motion must fail.

II. SUBMISSIONS

3. The sole basis stated in the Motion to apprehend that each and every member of the Appeals Chamber is biased is "because they have already made an adverse finding in the plenary and therefore pre-judged a critical aspect of the credibility of a source of evidence", which the Defence states is fundamental to grounds 36 and 37 of Mr. Taylor's Notice of Appeal.[7] This basis must fail. First, the Defence misapprehends the nature of the "adverse finding". Further, assuming *arguendo*, issues in a ground of appeal concern a matter upon which a Judge of the Appeals Chamber has previously ruled, that alone would not establish an appearance of bias.

(i) JUDICIAL MISCONDUCT DECISION OF THE PLENARY DOES NOT DISQUALIFY THE APPEALS JUDGES

4. The Defence misapprehends the nature of the "adverse finding". The "adverse finding" alluded to in the Motion is the sanction of the Alternate Judge due to his conduct on 26 April 2012 after the oral pronouncement of the Judgement in open court.[8] The Motion fails to even attempt to explain how the finding of the plenary on the 7th and 10th of May 2012 that the Alternate Judge committed misconduct would be understood by an informed observer to be prejudgement of any argument the Defence intends to make *vis-a-vis* their Grounds of Appeal 36 and 37 or of any evidence the Defence may be allowed to submit.[9]

5. The Presiding Judge's public announcement of the decision of the plenary, prior to the commencement of Mr. Taylor's sentencing hearing on 16 May 2012, stated:

---

[7] Motion, paras. 2, 3.
[8] Motion, paras. 1, 12-13.
[9] The Motion fails to identify what "evidence" it wishes to submit, making any analysis of the potential link between the plenary and the evidence, pure conjecture. *See* Motion, paras. 3, 13-14.

> The plenary declares that Justice Malick Sow's behaviour in court on the 26th of April, 2012, amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court.[10]

6. Thus, it is clear that the subject of the decision of the plenary did not concern the credibility or rationality of the Alternate Judge's statement after the adjournment of the proceedings. Rather the decision solely concerned his conduct, which was unprecedented and amounted to actions clearly outside the bounds of the role of an Alternate Judge. The Defence has made no showing that the issue before the plenary was the credibility of the Alternate Judge or the correctness of the views he expressed, rather the issue concerned his clearly inappropriate conduct.

7. The delivery of a judgement in a criminal case is an extremely serious and solemn proceeding where the Judges of the Trial Chamber explain to the public, the Accused, and the victims the decision that they have reached. The role of the Alternate Judge, as clearly established by the Rules of Procedure and Evidence of the Special Court ("Rules"), is to be prepared to step in if one of the Trial Judges is unable to continue. The Rules make it clear that an Alternate Judge has no right to actively participate in proceedings or deliberation, rather only a right to be present.[11] The Rules also make it clear that the Alternate Judge has no right to vote in the deliberations.[12] For an Alternate Judge to use the solemn occasion of the delivery of the judgement to give his own views of the case, which cannot appropriately be described as a "dissenting opinion",[13] and his personal view of "the whole system",[14] is manifestly improper.

8. Thus, the issue before the Plenary was not the credibility or the merit of the Alternate Judge's comments. The issue was his behavior in stating his views at a time and place when it was clearly inappropriate to do so and inconsistent with his responsibilities as an Alternate Judge pursuant to the Rules. The 10 May 2012 decision of the Plenary that this behaviour of the Alternate Judge on the 26th of April 2012 amounted to

---

[10] T. 16 May 2012, p. 49683.
[11] *See* Rule 16*bis*.
[12] *See* Rule 16*bis*(C).
[13] *See* Motion, Public Annex A, 65:5.
[14] *See* Motion, Public Annex A, 65:10.

misconduct does not support the Defence assertion that the Judges of the Appeals Chamber have made a judgement as to the credibility of the Alternate Judge.

(ii) PRIOR ADVERSE RULINGS DO NOT ESTABLISH BIAS

9. Assuming *arguendo* the issues in a ground of appeal concern a matter upon which a Judge of the Appeals Chamber has previously ruled, that fact alone would not establish an appearance of bias. The fact that a judge has previously ruled on a related issue contrary to the position of one of the parties does not establish a reasonable apprehension of bias. The Defence does not cite a single case where a judge was disqualified because of ruling on a similar issue in another case. It is common in all of the *ad hoc* tribunals for Judges in Trial Chambers to hear separate cases with some of the same witnesses, requiring them to assess credibility in each case. But the fact a Judge has previously made a ruling that one of the parties does not like, does not firmly establish a reasonable apprehension of bias.

10. Rule 15(D) of the Rules evidences the intent of the drafters not to preclude a Judge from sitting on a case where he has made prior findings or rulings. Thus, the fact that a Judge has made prior legal or factual findings against either party to a proceeding does not of itself disqualify the Judge from sitting on the same or different proceedings, where similar issues may arise.[15] What must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant.[16] In rejecting a motion to disqualify Justice Bankole Thompson from the RUF trial because of his opinion in the CDF case, the Trial Chamber held that "[t]he fact that a Judge hears two different criminal trials that arise out of the same series of

[15] Judge Thompson's Disqualification Trial Decision, para. 61 citing to *Prosecutor v Blagojevic et al.*,IT-02-60, Decision on Blagojevic's Application Pursuant to Rule 15(B), 19 March 2003, para. 14, and Karemera Bureau Decision, para 12: "Allegations of bias based on the content of judicial proceedings have also been considered by the Supreme Court of the United States, where the objective test is also well-established: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion....Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favouritism or antagonism that would make fair judgement impossible".

[16] Judge Thompson's Disqualification Trial Decision, paras. 62, 63 citing Karemera Bureau Decision, para 13.

events is not enough to merit disqualification".[17] In upholding the decision of the Trial Chamber, the Appeals Chamber found:

> It is inevitable that some connection can be made between judicial cases before the Special Court because each case ultimately relates to the same period of conflict. But a judicial opinion that merely has some connection to a case can not raise a question of bias nor can it raise a substantive claim for disqualification.[18]

11. In the *Brđanin and Talić* case, the Defence for Talić moved to disqualify Judge Mumba from the Trial Chamber on the grounds that she had sat on the Appeals Chamber in the *Tadić* case in which it was decided that the war in Bosnia and Herzegovina in 1992 was an international armed conflict. This motion was rejected.[19] Although international armed conflict was a challenged element of some of the crimes charged in the *Brđanin and Talić* case, the Trial Chamber found the issue for the disqualification motion was "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that Judge Mumba, having participated in the *Tadic* Conviction Appeal Judgement, might not bring an impartial and unprejudiced mind to the issues in the present case".[20] Since Talić's motion to disqualify was based solely on Judge Mumba's previous participation in the *Tadić* Appeal Judgement, the motion was found unwarranted and the application for disqualification rejected. The decision also quotes from national case law for the principle that judges are not deemed biased merely because they have ruled on similar factual or legal issues in other cases:

> There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is

[17] Judge Thompson's Disqualification Trial Decision, para. 55.
[18] Judge Thompson's Disqualification Appeals Decision, para. 15.
[19] *Prosecutor v. Brđjanin and Talić*, IT-99-36/1-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("Talić Disqualification Decision").
[20] Talić Disqualification Decision, para. 19.

> a reasonable apprehension that he will approach the issues in this way [....] Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[21]

12. The jurisprudence establishes that a Judge is not considered biased because of his role in confirming and indictment in one case and sitting in another, even if the indictment overlaps with the crimes of the current case. In *Galić*, the Accused submitted allegations that Judge Orie was biased because of his role in confirming the indictment for Ratko Mladić.[22] Galić had been named in the *Mladić* Indictment as a participant in a joint criminal enterprise.[23] Galić submitted that this overlap effectively lead to a presumption of guilt of him by Judge Orie.[24] The Appeals Chamber found that such a bias was not proved by the Accused and noted that there is a difference between reviewing an indictment and judging a case. The confirmation of an indictment does not determine the guilt of the accused, but rather requires the assessment of whether the evidence presented by the Prosecution, if accepted as true, is enough to establish guilt.[25] The Appeals Chamber also concluded that because a judge can confirm an indictment in a case and also try the same case, then bias is not established when a judge reviews the indictment of one case and sits in another case, even if it presents evidence related to the current case.[26]

13. Also, no bias is presumed for a judge sitting on a contempt case after previously convicting the same accused in a different contempt case. In *Šešelj* the Accused argued that because Judges Kwon and Parker had already convicted the Accused for contempt and sentenced him to 15 months imprisonment, the Judges were biased

---

[21] Talić Disqualification Decision, para. 18 quoting from Mason J of the High Court of Australia in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352. The same passage was quoted with approval in *Prosecutor v. Šešelj*, IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010 ("O-Gon Kwon and Kevin Parker Disqualification Decision"), para. 28.

[22] *Prosecutor v. Galić,* IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), paras. 27, 35.

[23] Galić Appeal Judgement, para 27.

[24] Galić Appeal Judgement, para 35.

[25] Galić Appeal Judgement, para 42.

[26] Galić Appeal Judgement, para 42.

against him in a second contempt case.[27] The Chamber concluded that "[s]imply stating that a judge is biased because he or she ruled in a particular way is an insufficient basis for disqualification."[28] If a conviction under the standard of beyond reasonable doubt and sentence of 15 months incarceration does not mean that Judges Kwon and Parker had "prejudged the professional credibility" of Šešelj, it certainly cannot be said that the Judges of this Appeals Chamber had prejudged the evidence or arguments of the Defence on Grounds of Appeal 36 and 37.

(iii) EVEN WHERE A JUDGE MIGHT OTHERWISE BE DISQUALIFIED, NECESSITY MAY JUSTIFY DENIAL OF THE MOTION

14. As set out above, the Defence has failed to adduce reliable and sufficient evidence which firmly establishes a reasonable apprehension of bias by reason of prejudgement[29] and thus has not overcome the "strong presumption of [...] impartibility"[30] afforded the Judges of the Appeals Chamber. However, even if the Defence had shown such a bias on all members of the Appeals Chamber, the motion would still lack merit, as appointing other Judges to hear the the two grounds of appeal at issue is not a reasonable alternative in this case. The doctrine of necessity, which has developed side by side with the general law of disqualification,[31] would allow the judges to hear and determine all the Defence's grounds of appeal, including Grounds 36 and 37. This doctrine has been applied by the highest courts of several common law jurisdictions.[32]

15. The Canadian Judicial Council has laid down the principle that disqualification is not appropriate if no other tribunal can be constituted to deal with the case or, because of

---

[27] O-Gon Kwon and Kevin Parker Disqualification Decision , para. 25.
[28] O-Gon Kwon and Kevin Parker Disqualification Decision, para. 28.
[29] Furundžija Appeal Judgement, para. 197; Nahimana Appeal Judgement, para. 48.
[30] *Prosecutor v. Šešelj*, IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orie, 7 October 2010, para. 27.
[31] *Remuneration of Judges of Prov. Court of PEI; Ref. re Independence & Impartiality of Judges of Prov. Court of PEI; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Prov. Judges Assn. v. Manitoba (Min. of Justice)*, 1998 CanLII 833 (SCC), [1998] 1 SCR 3, para 5.
[32] See, Laws v. Australian Broadcasting Tribunal (1990), 93 A.L.R. 435 (H.C.), p. 454; Manitoba Prov. Judges Assn. v. Manitoba (Min. of Justice), 1998 CanLII 833 (SCC), [1998] 1 SCR 3; *See also*, cases where the doctrine of necessity has been used: *Whitehead v. Pelican Lake First Nation*, 2009 FC 1270 (CanLII), para 2; *Bill v. Pelican Lake Appeal Board*, 2006 FCA 397 (CanLII), 2006 FCA 397, 154 A.C.W.S. (3d) 259, para 8; Sparvier v. Cowessess Indian Band, 1993 CanLII 2958 (FC), [1993] 3 FC 142; Panton &Anor v Minister of Finance &Anor [2001] UKPC 33 [Privy Council] para 16; [2001] All ER 178.

urgent circumstances, failure to act could lead to a miscarriage of justice.[33] The Canadian Judicial Council commented on this principle, noting one circumstance which might give rise to application of this principle would be where there is no other judge reasonably available who would not be similarly disqualified.[34]

16. The circumstances herein give rise to the application of this principle. There are no other judges in the Special Court who could sit on the appeal for these two grounds, as the Motion seeks to disqualify all five Appeals Chamber Judges and the Alternate Appeals Chamber Judge. For the same reasons, the request to refer the motion for disqualification to a separate panel of judges (where none exists) should be denied.[35]

17. In addition, in this case, it would not be appropriate to divide the Appeal process into one concerning Grounds 36 and 37 and another concerning the remaining forty-three grounds. Ground of Appeal 36 –claiming deliberations of the Trial Chamber did not take place, and Ground of Appeal 37 –claiming "recurring irregularities in the judicial process during the proceedings",[36] cannot be evaluated without considering the entire Trial Judgement and the effect that any of the claimed irregularities or lack of deliberation had on the legal and factual findings of the Trial Chamber. As such, it would create duplication of effort and confusion to have Grounds 36 and 37 decided by a separate set of Appeal Judges.

III. CONCLUSION

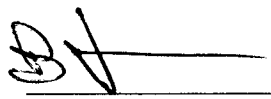
18. For the reasons set out above, the Motion is without merit. The Defence has not met the high burden required to overcome the presumption of impartiality which attaches to the Judges of the Appeals Chamber. It has not firmly established a reasonable apprehension of bias by reason of prejudgement. There is no support for the inherent

---

[33] Canadian Judicial Council, Ethical Principles for Judges, Principle E3, p 29.
[34] Canadian Judicial Council, Ethical Principles for Judges, Commentary E17, p 49.
[35] *See Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160 (9th Cir. 2006). Judge Trott noted the "underlying legal maxim for the rule of necessity is that where all are disqualified, none are disqualified." 453 F.3d at 1164-65.
[36] Public with Confidential Annex A, Notice of Appeal of Charles Ghankay Taylor, SCSL-03-01-A-1301, 19 July 2012, para. 107.

argument in the Motion that a finding of misconduct on the part of the Alternate Judge would firmly establish a reasonable apprehension that the Judges of the SCSL Appeals Chamber are biased and incapable of impartially evaluating all evidence and arguments in the Taylor Appeal. Therefore, the Motion should be dismissed.

Filed in The Hague,
27 July 2012
For the Prosecution,



Brenda J. Hollis
The Prosecutor

INDEX OF AUTHORITIES

SCSL

Rules of Evidence and Procedure

***Prosecutor v Taylor*, SCSL-03-01-A**

Public with Confidential Annex A, Notice of Appeal of Charles Ghankay Taylor, SCSL-03-01-A-1301, 19 July 2012

Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges with Public Annex A and Confidential Annex B, SCSL-03-01-A-1302, 19 July 2012

Trial Transcripts

T. 16 May 2012

***Prosecutor v. Sesay, et al.*, SCSL-2004-15-T**

Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, SCSL-04-15-T-909, 6 December 2007

Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, SCSL-04-15-T-956, 24 January 2008

***Prosecutor v. Norman*, SCSL-2004-14-PT-112**

Decision on Norman's Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, SCSL-2004-14-PT-112, 28 May 2004

ICTY

Prosecutor v. Blagojevi , IT-0206-T, Decision on Blagojevic's Application Pursuant to Rule 15(b) (Bureau), 19 March 2003
http://www.icty.org/x/cases/blagojevic_jokic/tdec/en/030319.htm

Prosecutor v. Brđanin, IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004
http://www.icty.org/x/cases/brdanin/tdec/en/040611.htm

Prosecutor v. Brđanin and Talić, IT-99-36/1-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000
http://www.icty.org/x/cases/brdanin/tdec/en/00518DQ212937.htm

Prosecutor v. Delali et al., IT-96-21-A, Appeals Judgement, 20 February 2001
http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf

Prosecutor v. Furundžija, IT-95-17/1-A, 21 July 2000
http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf

Prosecutor v. Galić, IT-98-29-A, Judgement, 30 November 2006
http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf

Prosecutor v. Šešelj, IT-03-67R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010
http://www.icty.org/x/cases/contempt_seselj2/presdec/en/101119.pdf

Prosecutor v. Šešelj, IT-03-67R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orie, 7 October 2010
http://www.icty.org/x/cases/contempt_seselj2/presdec/en/101007.pdf

ICTR

Prosecutor v. Karemera et al., ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004
http://www.unictr.org/Portals/0/Case/English/Karemera/trail/040517b.pdf

Prosecutor v. Nahimana et al., ICTR-99-52-A, Judgement, 28 November 2007
http://unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf

Other

Canadian Judicial Council, *Ethical Principles for Judges* 2004.
http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

Re JRL; Ex Parte CJL (1986) 161 CLR 342.
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1986/39.html?stem=0&synonyms=0&query=Ex%20Parte%20CJL

Remuneration of Judges of Prov. Court of PEI; Ref. re Independence & Impartiality of Judges of Prov. Court of PEI; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Prov. Judges Assn. v. Manitoba (Min. of Justice), 1998 CanLII 833 (SCC), [1998] 1 SCR 3
http://www.canlii.org/en/ca/scc/doc/1998/1998canlii833/1998canlii833.pdf

Manitoba Prov. Judges Assn. v. Manitoba (Min. of Justice), 1998 CanLII 833 (SCC), [1998] 1 SCR 3
http://www.canlii.org/eliisa/highlight.do?text=doctrine+of+necessity&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1998/1998canlii833/1998canlii833.html

Whitehead v. Pelican Lake First Nation, 2009 FC 1270 (CanLII)
http://www.canlii.org/eliisa/highlight.do?text=doctrine+of+necessity&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/fct/doc/2009/2009fc1270/2009fc1270.html

Bill v. Pelican Lake Appeal Board, 2006 FCA 397 (CanLII), 2006 FCA 397, 154 A.C.W.S. (3d) 259
http://www.canlii.org/en/ca/fca/doc/2006/2006fca397/2006fca397.html

Sparvier v. Cowessess Indian Band, 1993 CanLII 2958 (FC), [1993] 3 FC 142
http://www.canlii.org/en/ca/fct/doc/1993/1993canlii2958/1993canlii2958.html

Laws v. Australian Broadcasting Tribunal (1990), 93 A.L.R. 435 (H.C.)
http://www.canlii.org/en/ca/scc/doc/1998/1998canlii833/1998canlii833.pdf

Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit, 453 F.3d 1160 (9th Cir. 2006)
http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/C29CCB4952CB43E3882571A800754A1D/$file/0317181.pdf?openelement

Panton &Anor v Minister of Finance &Anor [2001] UKPC 33 [Privy Council] [2001] All ER 178 (See attached hard copy)

1 of 1 DOCUMENT

Panton and another v Minister of Finance and another

PRIVY COUNCIL

[2001] UKPC 33, (Transcript)

HEARING-DATES: 12 JULY 2001

12 JULY 2001

CATCHWORDS:

Jamaica - Constitutional law - Natural justice - Judge - Bias - Disqualification of judge on grounds of bias - Issue before court concerning constitutionality of Financial Institutions Act 1992 - President of Court of Appeal previously holding office of Attorney General and signing pro forma certificate prior to Act being presented for assent stating that Act not contrary to Constitution - Whether bias established.

INTRODUCTION:

On appeal from the Court of Appeal of Jamaica

COUNSEL:

J Hines and R Codlin for the Appellants; B Hylton QC and L Robinson for the Respondents

PANEL: LORDS, SLYNN OF HADLEY, HOFFMANN, CLYDE, MILLETT, SIR CHRISTOPHER SLADE

JUDGMENTBY-1: LORD CLYDE

JUDGMENT-1:

LORD CLYDE (READING THE JUDGMENT OF THE COURT): [1] The appellants are shareholders in three financial institutions, namely, Blaise Trust Company and Merchant Bank Limited ("the Bank"), Blaise Building Society ("the Building Society") and Consolidated Holdings Limited ("Holdings"). During 1993 and 1994 various investigations were carried out by the regulatory authorities of the Bank's activities. These disclosed various improprieties in the management of the Bank and certain breaches of the Financial Institutions Act 1992. On 18 April 1994 the directors of the Bank, including the two present appellants, granted to the Minister of Finance and Planning a formal undertaking to the effect that they would take a variety of specified steps with a view to remedying the situation. The position however remained unsatisfactory and on 18 December 1994 the Minister of Finance and Planning assumed temporary management of the Bank under s 25 of the Act. It was then found that the affairs of the three institutions were so intermingled that it was impossible to separate them. On April 10th 1995 the Minister assumed temporary management of the Building Society and of Holdings. He subsequently proposed and with the sanction of the court

secured Schemes of Arrangement whereby the creditors and depositors of each institution were able to receive 90 cents in the dollar of the sums owing to them and the preferred creditors were paid in full. These arrangements were made possible by the making of enormous loans to the institutions by the Government of Jamaica.

[2] On July 18th 1995, before these arrangements were achieved, the appellants commenced proceedings whereby they sought redress under s 25 of the Constitution of Jamaica. The essence of their challenge was to the effect that the Act of 1992 was unconstitutional because it made no provision for compensating them as shareholders for the actions taken by the Minister. The case came before the Constitutional Court and was dismissed by that Court. The appellants then appealed to the Court of Appeal, presided over by Rattray P, and that court on 26 November 1998 dismissed the appeal. The appellants have now appealed to their Lordships' Board.

[3] The first point taken by the appellants is that as regards the hearing before the Court of Appeal there was a contravention of the Constitution in that they lacked an independent and impartial tribunal. Section 20(2) of the Constitution provides as follows:

"Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial . . . "

The appellants claim that there was a contravention of this provision in that the Court of Appeal was not an independent and impartial tribunal in respect of an apparent bias on the part of the President, Rattray J. The point arises in this way. At the time when the Financial Institutions Act 1992 was passing through Parliament Mr Rattray was a Member of Parliament and held the offices of Minister of Justice and Attorney General. As Attorney General he was, in terms of s 79(1) of the Constitution, the principal legal adviser to the government. He had served as Attorney General when his party was in power between 1976 and 1980, and was again appointed to that office in 1989 when his party regained power after a period in opposition. In December 1992 he signed a pro forma certificate prior to the presentation of the Financial Institutions Act 1992 being presented to the Governor-General for his assent in Her Majesty's name and on Her behalf. The certificate reads:

"I have examined the accompanying Act entitled The Financial Institutions Act 1992 and I am of opinion that the Act is one that is not contrary to the Constitution and that there is no legal objection to the Governor-General assenting thereto."

He signed this certificate in his capacity as Attorney General. The appellants now contend that this certification of the constitutionality of the Act was essentially a certification of the same issue which came before him in the present case and that he was disqualified from hearing the appeal since he could not be regarded as independent or impartial.

[4] It is not suggested that Rattray P was in fact partial or biased in his dealing with the case. There is not the slightest ground for imagining that there was here any actual bias. Nor was this a case in which there was anything in the way the appeal hearing was conducted or the way in which the president of the court behaved to give any basis for a conclusion that he was anything other than independent and impartial. Nor indeed does it seem to have occurred to anyone concerned in the appeal that there was any possibility of bias. The appellants evidently did not know until after the hearing that he had been Attorney General at the time when the legislation was passed. It is only in retrospect that they have come to submit that he was disqualified from sitting on the appeal.

[5] Counsel for the appellants argued that the present was a case of automatic disqualification. That expression was used by Lord Browne-Wilkinson in R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119, [1999] 1 All ER 577, at p 132 of the former report, to describe the case where in the literal application of the phrase a man is judge in his own cause: "If a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause". Later he observed at p 133, that "once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias". The present case is far

removed from such a situation. The constitutionality of the legislation can hardly be described as a cause to which the judge was party. The certification falls far short of equating him with the second respondent so as to make him a champion of the constitutionality of the measure. He had no financial or proprietary interest in the outcome.

[6] In many cases the question of bias may arise because of an interest which the judge has at the time when he is hearing the case. There can be an appearance of a conflict of interest which may be sufficient to disqualify him. One special feature of the present case is that the bias is said to arise from a past period. It was suggested that in so far as the second respondent was the holder of the office which at an earlier period had been held by Rattray P he was answering for the certification which had been given in December 1992. Reference was made to s 13(3) of the Crown Proceedings Act which provides that:

"No proceedings instituted in accordance with this Part by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General."

The continuity of the office in that regard was put forward to support the contention that Rattray P was acting as judge in his own case. But that is a false analysis. The second respondent is not engaged in order to defend anything that a predecessor in his office has done, but to respond to the particular attack on the constitutionality of the Act which has been put forward by the appellants. There is no ground for suggesting that Rattray P had any bias in favour of the current holder of the office which he had formerly occupied. He had no present interest in the constitutionality of the legislation when he heard the appeal. The appellant sought to found upon the view expressed by Lord Hutton in Pinochet (No 2) (at p 145) that there could be cases "here the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice" so as to constitute a case of automatic disqualification. But there is nothing to suggest that the present case can succeed even by that test. Their Lordships are not persuaded that this was a case of automatic disqualification. In no proper understanding of the phrase can it be said that Rattray P was judge in his own cause.

[7] The alternative formulation of the appellants' case is that there was an apparent or potential bias, that is to say a possibility of bias, arising on account of Mr Rattray's earlier association with the Act. The test to be applied has been a matter of dispute. As was explained in Roylance v The General Medical Council (No 2) [2001] 1 AC 311 at p 319 the formulation preferred in R v Gough [1993] AC 646, [1993] 2 All ER 724, of a real danger of bias has been subjected to some criticism. An alternative test is that of a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge would not discharge his task impartially. But as was also noted in Roylance some approximation between the two formulations may be achieved by the placing of a proper emphasis on the reasonableness of the apprehension. It is not necessary for the determination of the present case to discuss in further detail the precise formulation of the test which ought to be adopted.

[8] The essence of the allegation of bias is based upon two factors; one is the granting of the certificate in December 1992 and the other concerns the position held by Mr Rattray during the period of the passage of the legislation. These are matters of past history not of present or concurrent interest. In principle a prior association or connection with the subject matter of the dispute may be sufficient to disqualify a judge from the determination of it. In such cases there does not have to be any conscious or even unconscious bias. What is of concern is the appearance of the judicial process. If there is a potential for bias that may be sufficient to disqualify the judge.

[9] So far as the certification is concerned it appears from such researches as counsel had made to have been a matter of custom rather than any formulated regulation that the Attorney General should sign a certification in the standard form before an Act was presented for the assent of the Governor-General. The form was in a printed style which left room for the date, the insertion of the name of the particular Act in question and the signature and name of the Attorney General. It is not obvious that the Attorney General would himself have applied his mind to every aspect of the Act and examined its constitutionality in every detail. Doubtless members of his office would advise him on the matter and from all that appears he may well have relied on his departmental advisors in putting his signature to the

certificate. It is a statement of his opinion. But it is not evident that it took any account of the particular issue which has now been raised by the appellants.

[10] It was accepted by the appellants that the fact that a person had, as counsel, given an opinion on a question of law did not disqualify him from sitting as a judge to determine that point of law when it came up in another case. Similarly it cannot be a disqualification for a judge in a court of appeal that he has in an earlier case at first instance given a decision on the same matter of law as that which is being canvassed in another case on appeal. In Locabail(UK) Ltd v Bayfield Properties Ltd [2000] QB 451, [2000] 1 All ER 65, at p 480 of the former report, the Court of Appeal set out examples of cases where danger of bias might and might not arise (para 25). In the former category the grounds on which at least ordinarily objection could not be soundly based included

"the judge's social or educational or service or employment background or history . . . or previous political associations . . . or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers) . . . ".

Their Lordships consider that the present case not only falls into the same category but that it presents a weaker example than those cases where the matter has been the subject of detailed consideration or argument. An opinion of counsel will proceed upon a thorough consideration of the relevant law and will probably be directed to particular issues raised expressly for counsel's consideration. A judicial decision will also be focussed upon a particular issue and be reached after consideration of arguments presented for and against a particular proposition. Both will be reasoned and considered decisions upon particular points. The certification by the Attorney General on the other hand, as has already been indicated, is made without consideration being directed to any particular element of the legislation and on a pro forma which does not envisage reasoning or justification, although it will of course be made responsibly and honestly.

[11] The appellants sought to distinguish the present case on the ground that the Attorney General was acting in an executive capacity, which was different from the act of a counsel giving an opinion or a judicial decision. But the essential element is the same, namely that in some capacity or other the person has expressed a view about the question in issue. It is that past expression of view which is said to disqualify him from sitting. An opinion can be obtained from counsel in a variety of different situations. He may, for example, be totally independent in private practice, or he may be regularly retained by a government department, or he may be treasury counsel, or he may be in the employment of a government department, or he may be a member of the government or an office-bearer in that government. Distinctions of that kind should not affect the principle that the independence of a judge is not to be affected by the fact that in a previous incarnation or even in his current capacity he has expressed a view on a point of law. It is not to be thought that a judge will have such mental allegiance to his earlier views or such lack of integrity as to be unable to approach the question with an open mind or to be embarrassed at the prospect of revising or rejecting the view which he had earlier expressed.

[12] It is important to stress the point that the issue which fell to be determined by the Court of Appeal was one purely of law. The challenge raised by the appellants was directed to a particular part of the legislation and the argument was wholly one of construction. No matters of fact or questions concerning the exercise of a discretion required to be determined. Where the issue involves the ascertainment of facts, the assessment of evidence, the credibility of witnesses or the drawing of conclusions or inferences from facts found, or the exercise of a discretion it may be more difficult for a person who has made a decision on such matters to appear independent and impartial if he is called upon on another occasion to adjudicate where the same factual matters are in issue or the same persons involved as witnesses. The risk of bias where the issue is purely one of law may be significantly less. Views on points of law may be seen as much more open to reconsideration. Opinions on points of law may be expressed without regard to any particular application of the law and there may be considerable room for differences in opinion. The degree of respect accorded to the findings of tribunals of fact is not echoed by a like respect for a decision in point of law. The greater uncertainty which attends matters of construction may justify a less anxious apprehension of bias. In Kartinyeri v Commonwealth of Australia (1998) 156 ALR 300 an unsuccessful application was made to have the judge disqualify himself because among other things he had as a practising lawyer given some advice and assistance in connection with

certain legislation the constitutionality of which he was now called upon to determine. Callinan J at p 305, para 38 concluded his decision with these words:

"The most important factors are that there were no issues of fact or credibility involved in any advice that I gave, that the issues in this case are exclusively legal ones and, that I played no part at all in drafting, advocating or in any way implementing the legislation that the court has to consider."

[13] That quotation leads immediately to consideration of the second aspect of the association which Mr Rattray had with the legislation. It is accepted that he was at the time of the passing of the Act a Member of Parliament and Attorney General and also Minister of Justice. But there is nothing to show that he was actively engaged in the promotion of the Bill, indeed there is nothing to show that he took any part in the process of its passing at all. He may well have voted for it as a member of the government whose Bill it was but there is nothing on which the appellants found as demonstrating any particular participation in the legislative process. Had he introduced the Bill, or campaigned for it, been responsible for securing its passage through Parliament, or adopted it as a particular cause which he was determined to promote, there might have been some material on which the appellants could have founded an argument. But, apart from the matter of the certificate, they look only to the fact of his membership of the government and the Parliament when the Act was passed. That cannot be sufficient to constitute a disqualification from his sitting as a judge on the issue of constitutionality which has now arisen. His past political history is, as was pointed out in the passage in Locabail quoted earlier, not ordinarily a ground for disqualification.

[14] The absence of any significant role played by Mr Rattray in the passing of the legislation is a point of some importance. In Kartinyeri Callinan J at p 304, para 29 contrasted his position with another where the judge had been led to stand aside. That other case was of a person,

"who, before coming to the bench, has been directly involved in the preparation of legislation that has to be construed by the court, and who has taken active steps as principal law officer of the Commonwealth to seek to ensure the passage of a bill and to propound to the Governor-General the Senate's failure to pass it as a basis for a double dissolution".

A like contrast can be made with the absence of any significant active promotion of the Act in the present case. In McGonnell v United Kingdom (2000) 30 EHRR 289 the Bailiff had presided over the States of Deliberation when the detailed development plan which was to be in issue in the later case was debated and adopted, and the issue before the Royal Court of Guernsey over which in his judicial capacity he presided involved consideration of the wording of the plan and of the policy which lay behind it. It may be noted that Sir John Laws in his concurring opinion stressed at p 309 that the violation of art 6(1) of the Convention which was found by the Court in that case depended entirely on the fact that the Bailiff had earlier presided over the States of Deliberation when the plan was adopted.

[15] Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Mr Rattray's conduct in connection with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case. In Locabail the court stated at p 480 para 25, that,

"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be".

It appears that Mr Rattray retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

[16] It has also to be recognised that the purity of principle may require to give way to the exigencies and realities of life. In extreme cases the doctrine of necessity may require a judge to determine an issue even although he would

otherwise be disqualified. An example can be found in The Judges v The Attorney-General for the Province of Saskatchewan (1937) 53 TLR 464 where this Board held that the court in Saskatchewan was acting properly in deciding whether the salaries of judges were liable to income tax. Such cases where resort has to be had to the doctrine of necessity are of course rare and special. But at a less extreme level it is right that account should be taken in assessing the independence of a judge of the likely responsibilities and interests which he or she will invariably have had during the course of a professional career which has preceded a judicial appointment. In those countries where there is not an exclusively career judiciary judges are likely to have held offices or appointments in which they may have given public expression to particular points of view. This will necessarily be so where the career has involved an engagement in political life.

[17] Experience outside the law, whether in politics or elsewhere, may reasonably be regarded as enhancing a judicial qualification rather than disabling it. In countries where it is recognised and accepted that judges may well have behind them a history of political affiliation or partisan interest it has also to be recognised that such historical associations can be put aside in the interest of performing a judicial duty with independence and impartiality. That has to be one of the considerations which should weigh in the mind of a reasonable or fair-minded person in deciding whether or not a court may be biased or in deciding whether there is any real danger of bias. As was observed in Kartinyeri at p 304, para 33:

"Some members of this court have come to it directly from a career in politics and in government. Inevitably, in Cabinet and in the Party Room, they must have had a very close association with members of the government whose legislation they have had from time to time to interpret. Sometimes the legislation may be in implementation of long-standing policy to which the former politician has subscribed and has perhaps even advocated. A particular association of itself, and even a current, proper one which observes the punctiliousness required in respect of a case and issues actually before, or which may be before, the court should not ordinarily give rise to a reasonable apprehension of bias."

[18] Their Lordships accordingly conclude that the appellants' case of bias has not been made out and they turn next to consider the main point on the merits of the appeal. This relates to the constitutionality of the Financial Institutions Act. The particular section of the Constitution which is relied upon is s 18(1). That section reads as follows:

"No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that -

a. prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and

b. secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -

i. establishing such interest or right (if any);

ii. determining the amount of such compensation (if any) to which he is entitled; and

iii. enforcing his right to any such compensation."

[19] The section of the Act under which the Minister acted was s 25. In that section the word "licensee" means a company duly licensed under the Act (s 2 (1). Section 25(1) states:

"The Minister after consultation with the Supervisor may in relation to a licensee which is or appears likely to become unable to meet its obligations or in relation to which the Minister has reasonable cause to believe that any of the conditions specified in Parts A and B of the Second Schedule exists take such steps as he considers best calculated to

serve the public interest in accordance with this section."

The present case fell within the conditions set out in Pt B of that Schedule. In such a case s 25(3) provided that "the Minister may . . . assume the temporary management of the licensee in accordance with Part D of that Schedule". Pt D requires in para 1(1) that the Minister shall serve on the licensee concerned a notice announcing his intention of temporarily managing the licensee from such date and time as he may specify. It later provides in paras 1(4) and (5) as follows:

"(4) Upon the date and time specified in the notice referred to in sub-paragraph (1), there shall vest in the Minister full and exclusive powers of management and control of the licensee, including, without prejudice to the generality of the foregoing, power to -

(a) continue or discontinue its operations;

(b) stop or limit the payment of its obligations;

(c) employ any necessary officers or employees;

(d) initiate, defend and conduct in the name of the licensee, any action or proceedings to which the licensee may be a party;

(e) initiate, defend and conduct in the name of the licensee, any actions or proceedings to which the licensee may be a party.

(5) Not later than sixty days after the Minister has assumed temporary management of the licensee he shall apply to the Court . . . for an order confirming the vesting in the Minister of full exclusive powers of management of the licensee as described in sub-paragraph (4)."

[20] It may also be noted at this stage that para 3 of Pt D required the Minister within sixty days from the date specified in the notice given under para 1, or such longer period as the court might allow, either to restore the management to the directors or owners, or to present a petition for winding-up, or propose a compromise or arrangement between the licensee and its creditors.

[21] The Act makes no provision for compensation in a case where the Minister assumes temporary management of a licensee. The appellants claim that that constitutes an infringement of s 18(1) of the Constitution.

[22] The point here is a short one and admits of an immediate answer. The appellants have to show that the statutory provision constitutes a taking of their property. But what the Act empowers, and what the Minister did, was a taking over of the control of the company. The appellants were and remained shareholders of the company. Their shares would doubtless qualify as property, but their shares were not taken away. They no longer had the control of the company which was inherent in the shareholdings which they possessed. But the assumption of temporary management by the Minister did not involve the taking of any property of the appellants. That the regulation of the company was in the hands of the Minister did not mean that the appellants had had any of their property taken away from them. A comparable situation can be found in Belfast Corporation v OD Cars Ltd [1960] AC 490, [1960] 1 All ER 65, where a restriction imposed by a local authority on the use to which land could be put was held not to be a taking of property without compensation. Viscount Simonds (p 517) stated that anyone using the English language in its ordinary signification,

"would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property' and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a 'taking', 'taking away' or 'taking over' of 'property'".

The appellants sought to found upon Attorney-General of St Christopher and Nevis v Lawrence (1983) 31 WIR 176. But that case concerned the removal from office of one who was not only a shareholder but a managing director who drew a percentage of the profits from the business. In that case a taking of property could be identified. In the present case no one has been dismissed and nothing has been taken. The shareholders remained holding their shares. The statutory provisions were, as the Court of Appeal recognised, of a regulatory not a confiscatory nature, and no obligation for compensation arises.

[23] Counsel who presented this part of the case for the appellants put at the forefront of his argument an attack upon the view taken by two of the judges in the Court of Appeal that the case could fall within the exception to s 18(1) of the Constitution contained in s 18(2)(f). That provision is to the effect that s 18(1) is not to affect any law which provides for the taking of property "as an incident of a lease, tenancy, licence, mortgage . . . ". The view taken below was that since the institutions in question were subject to licences granted to them by the government, the taking could be seen as an incident of a licence. But that view was only expressed on the hypothesis that there had been a taking of property, an hypothesis which the judges rejected. The view is quite incidental to their reasoning on the main issue and while the view about the applicability of s 18(2)(f) may well be open to challenge, that does not advance the appellants' case on the main issue. Counsel for the respondent submitted that s 18(3) might be invoked. That subsection excepts the making of any law so far as it provides for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others. Their Lordships recognise the force of that submission but do not consider it necessary to explore the possible exceptions which might apply if there was here a taking of property.

[24] One further point requires to be considered. It arises from the judgment of Downer JA and can be identified from the question which he raised at p 1057 of the Record "Was there any evidence that the Provisional Temporary Management of the Building Society and the Provident Society was confirmed?" The point here has to do with the wording of the orders issued by the court. In the case of the Bank the order, granted on 15 February 1995 by Mr Justice Reckord, stated under reference to para 1(5) of Pt D of the Second Schedule to the Financial Institutions Act that "the vesting in the Minister of full exclusive powers of the Management of (the Bank) . . . be confirmed", and that the time limit in para 3 of Pt D be extended to sixty days from the date of the order. In the case of the other two institutions however the orders granted by Mr Justice Smith on 8 June 1995 were in terms that the powers "be vested in the Minister of Finance for a further period of sixty days from the date of this Order as described in" the relevant regulations applicable to Building Societies and to Industrial and Provident Societies respectively. Those regulations in each case echoed the terms of Pt D of the Second Schedule to the Act. The orders, also in accordance with the provisions of the respective regulations, extended the time for taking the kinds of action specified in para 3 of Pt D of the Second Schedule to the Act. The argument then is that no order has been made confirming the vesting of powers in the Minister so far as the Building Society or Holdings are concerned. There are two answers to this objection. In the first place it is possible to construe the orders as being the confirmation statutorily required to be obtained from the court. Secondly, and in any event, this is not a point which was raised or canvassed before the Constitutional Court. The complaint made there was about an alleged failure to give notice to the institutions. Rattray P took the view that the Court of Appeal could not embark on or decide "a civil matter with regard to a question which was never made an issue between the parties and in respect of which no submissions have been made either before us or in the Court below". Their Lordships consider that that was a proper view to take on the matter.

[25] On the whole matter their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants should pay the costs of the appeal.

DISPOSITION:

Appeal dismissed.

SOLICITORS:

Simons Muirhead & Burton; Charles Russell