IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 8 of 2009

BETWEEN:

BELIZE ELECTRICITY LIMITED **Appellant**

AND

PUBLIC UTILITIES COMMISSION **Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Vincent Nelson QC and Mr. Anthony Sylvester for the appellant.
Mr. Derek Courtenay SC and Ms. Vanessa Retreage for the respondent.

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5, 8, 29 March and 8 October 2010.

MOTTLEY, P.

[1] Three questions were formulated by the attorneys-at-law who were then representing the Belize Electricity Limited (BEL) and Public Utilities Commission (PUC) and submitted to the Supreme Court for its determination. These questions were:

(1) Whether the PUC has the right, power or authority in law to order (whether or not in has done so) that BEL shall negotiate or enter

into a contract or shall not negotiate or enter into a contract with a particular potential supplier of electricity.

(2) Whether in the exercise of its duties and statutory functions the PUC is in law entitled to give or without its approval of power purchase agreements (whether or not it has given or refused to give approval) between a licensee and a supplier of electricity by which the cost of power to consumers of electricity may be effected;

(3) Whether the PUC has the right power or authority in law to dictate any particular term or condition of a contract between BEL and any particular potential supplier.

[2] The judge answered these questions in the affirmative. BEL appealed against the determination by the judge. The appeal was heard by this Court with a panel constituted by Mottley P, Morrison and Barrow J. At the conclusion of the appeal, the Court dismissed the appeal and indicated that it would put into writing the reasons for so doing. These reasons have not been handed down in view of the application made by BEL that the appeal should be reheard.

[3] Having ruled that this Court does have jurisdiction to entertain the application for rehearing, the question for the consideration of this court is whether, having regard to the participation of Justice of Appeal Barrow in the determination of the appeal in which it is being alleged that his son Kimano Barrow is associated and/or is involved and/or has an interest as a Commissioner of the PUC. There was an appearance of bias on the part of Justice of Appeal Barrow. Mr. Vincent Nelson, QC on behalf of BEL made it abundantly clear that his client was not alleging that Barrow JA was indeed biased. The issue for this court to determine is whether having regard to the circumstances there is an appearance of bias on the part of Barrow JA.

[4] The test to be applied was laid down by the House of Lords in England in **Porter v Magill [2002] 2 AC 357** as 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 at paragraphs 102 and 103).

[5] In **Regina v Abdroikoi [2007] 1WLR 2679** the House of Lords had occasion to deal with the issue of apparent bias in three appeals which were heard together. In the first appeal, the foreman of the jury informed the judge that he was a serving police officer and was due to report for duty at a time when the jury was considering its verdict and would likely come into contact with the police officer involved in the case. In the second appeal, the defendant had been convicted of assault occasioning actual bodily harm on a police sergeant. After conviction, it was discovered that a member of the jury had served as a police officer in the same borough as one of the police officers who had arrested the defendant although they were not known to each other. In the third appeal, the judge permitted a solicitor employed by the Crown Prosecution Service to serve on the jury, overruling an objection raised by the defence. The issue in each case was whether a fair minded and informed observer would "conclude that there was a real possibility that a juror was biased merely because he was involved in some capacity in the administration of justice".

[6] Lord Bingham of Cornhill dealing with the appearance of bias said at p. 2687:

> "In his extempore judgment in ***R v Sussex Justices, Ex p McCarthy [1924] 1KB 256, 259***, Lord Hewart CJ enunciated one of the best known principles of English law: "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." This principle was quoted with approval by the European Court of Human Rights in one of its very early decisions: ***Delcourt v Belgium {1970} I EHRR 355, 369***, para 31. There is, as Lord

Steyn on behalf of the House ruled in ***Lawal v Northern Spirit Ltd. [2003] ICR 856***, para 14, now no difference between the common law test of bias and the requirement under article 6 of the European Convention of an independent and impartial tribunal. As Lord Hewart's aphorism recognises and later case law makes clear, justice is not done if the objective judgment of a judicial decision-maker (whether judge or juror) is shown to be vitiated by actual partiality or prejudice towards any of the parties. But actual bias, hard as it usually is to prove, is rarely alleged, and is not alleged in any of the cases before the House. Neither of the police officers, nor the Crown prosecutor, is alleged by the respective appellants to have leant in favour of the prosecution side for any improper reason. The appellants rely on the second part of Lord Hewart's aphorism: that justice should manifestly and undoubtedly be seen to be done. This condition, the appellants say, is not met where one of those charged to decide whether the appellant was guilty or not, is employed full-time by a body dedicated to promoting the success of one side in the adversarial trial process.

The test of apparent bias has been developed through a succession of cases. In ***R v Barnley Licensing, Ex p Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167*****, 187**, Devlin LJ recognised that:

> "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

Lord Denning MR, in ***Metropolitan Properties Co. (FGG) Ltd. v. Lannon [1969] I QB 577, 599***, said:

> "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 …"

Lord Goff of Chieveley in, ***R v Gough [1993] AC 646***, formulated the test of apparent bias in terms a little different from those now accepted, but echoed, at p 659, Devlin LJ's observation in the ***Barnsley Licensing Justices*** case in referring to "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 …". Following the decision of the Court of Appeal in ***In re Medicaments and Related Classes of Goods (No 2) [2001] I WLR 700***, the accepted test is that laid down in ***Porter v Magill [2002] 2 AC 357***, para 103: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." As the House pointed out in ***Lawal v Northern Spirit Ltd. [2003] ICR 856***, para 14, "Public perception of the possibility of unconscious bias is the key", an observation endorsed by the Privy Council in **Meerabux v Attorney General of Belize [2005] 2AC 513**, para 22. 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 naïve nor unduly cynical or suspicious: see ***Lawal v Northern Spirit Ltd. [2003] ICR 856***, para 14; ***Johnson v Johnson (2000) 201 CLR 488 , 509***, para 53.

The analysis of the European court in Strasbourg has been to distinguish between a subjective test, directed to identification of actual bias, and what it calls an objective test, directed to what in this country would be called apparent bias: see, for instance, ***Hauschildt v Denmark (1989) 12 EHRR 266*, 279**, paras 46–49. The court has not regarded a defendant's perceptions as decisive, but has required that his suspicions of bias be objectively justified.

By this is meant that there must be some demonstrable and rational basis for what he suspects. The court has accepted that appearances are not without importance: see, for instance, ***Hauschildt*** , above, para 48.

[7] In **Helow v Secretary of State for the Home Department and Another [2008] 1 WLR 2416** Lord Hope of Craighead had occasion to make observations on the characteristic of the fair-minded and informed observer. His Lordship said at paragraph 2:

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed ***in Johnson v Johnson (2000) 201 CLR 488 , 509***, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she

will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[8] In determining what the fair-minded and informed observer knows when he is seeking to arrive at his conclusion, all the relevant facts must be taken into consideration. In order to do this, it is necessary to establish and examine all material facts. In **Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700** Lord Phillips of Worth Matravers MR said at paragraph 85:

> "85. 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 or a real danger, the two being the same, that the tribunal was biased."

> "86. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances. Where the explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes a further matter to be considered from the view point of the fair-minded observer. The Court does not have to rule whether the explanation should be accepted or rejected. Rather, it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

[9] How and by whom are these facts to be determined? In **Tibbetts v The Attorney General of the Cayman Islands [2010] UK PC8** a judgment of the Privy Council which was issued 24 March 2010 after the hearing and decision of this appeal, Lord Clarke sought to identify "the correct approach to the observer's knowledge of the facts". In rejecting the submission that it was for the observer

to conclude what the facts were, his Lordship adopted the summary of principles set out by Mummery LJ in **AWG Group Ltd. v Morrison [2006] EWCA Civil [2006] 1 WLR 1163** where at para 7 the Lord Justice said:

> "The test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must 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": ***Taylor v Lawrence [2003] QB 528***, para 60. See also ***R v Gough [1993] AC 646***; ***In re Medicaments and Related Classes of Goods (No. 2) [2001] I WLR 700***; ***Porter v Magill [2002] 2 AC 357***; and ***Lawal v Northern Spirit Ltd. [2003] ICR 856***."

[10] Lord Clarke concluded that it was for the Court to establish what are the facts. His Lordship said at para. 6:

> "6. It is for the court to ascertain the circumstances. The court must approach the issues in two stages. First, it is for the court to find the facts on the balance of probabilities. It is then for the court to decide on a balance of probabilities whether, with knowledge of the facts so found, the putative observer would conclude that…..might accept…..evidence as a result of previous relationships and knowledge of him."

[11] It is therefore for the Court to find what are the facts that fair minded and informed observer should know. The fair-minded and informed observer would be aware that Kimano Barrow was the son of Barrow JA. He would know that the PUC is an organization established by statute for regulating utilities in Belize. He would know that one of the objects of the PUC is to issue instruments to BEL

[12] BEL is a public liability company incorporated in 1992 and is duly licensed under the Electricity Act Cap. 250 its licence having been issued on 30 June

2000. BEL is the sole supplier of electricity to the public in Belize. The electricity is generated from a number of sources including:

(i) from Mexico the Concsion Federal de Electricidad;

(ii) the Mollejon Hydro Electric Plant on the Macal River;

(iii) the Chalillo Damn also on the Macal River owned as the Mollejon Plant by Belize Electric Company Limited;

(iv) Diesel Generators in various parts of Belize which are owned by BEL and;

(v) A Gas Turbine Generator located at Mile 8 on Western Highway.

[13] BEL was originally incorporated with an authorized share capital of $1,000,000,001 with 51% of the authorized shares being vested in the Government of Belize. The Government eventually divested itself of its interest by selling its shares to Newfoundland Energy Cayman Inc. and Maritime Electric Cayman Inc. an affiliate of Fortis Inc. In the purchase agreement the Government of Belize undertook inter alia that, subject to the New Regulatory Framework, to take all necessary steps to cause bylaws for tariff periods to be developed substantially following principles outlined in Regulatory Study for Electricity Sub-Sector in Belize which governed the tariffs rates and charges and quality of serviced standards.

[14] The PUC was established under the provisions of the Public Utilities Act Cap. 223. The Commission comprised seven members appointed by the Governor-General acting on the advice of the Prime Minister after consultation with the leader of the opposition. The Chairman of the Commission is appointed by the Minister responsible for Public Utilities and is responsible for its day to day administration.

[15] Under section 22(2) of the PUC Act, the PUC is required to exercise its functions in a manner which is calculated to best:

"(a) secure that all reasonable demands for utility services are satisfied;

(b) secure that licence holders are able to finance the carrying on of the activities which they are authorized by their licences to carry on;

(c) protect the interest of consumers of-

(i) the tariffs charges….

(ii) the continuity of supply"

Section 6(2) of the Electricity Act is similar to section 22 of the PUC Act.

[16] The Methodology for Determining Electricity Tariffs Rates Charges Fees and Quality of Services Standards (Amendment) By-laws comprised in Statutory Instrument No. 141 of 2007 replaced the earlier by-laws and were as a result of extensive consultations, meetings and communications between the Government of Belize, PUC and BEL. These were subsequently repealed pursuant to the Electricity Tariffs Charges and Quality of Service Standards (Amendment) By-law. Statutory Instrument No. 58 of 2008 (2008 Amendment By-law). BEL asserts that the 2008 Amendment Bylaws were signed by the Minister of Public Utilities without consulting BEL.

[17] Mr. Rene Blanco, the Vice President and Chief Financial Officer of BEL attended the hearing of the appeal in the Court of Appeal on 27 October 2009. He was not, prior to the hearing, advised by counsel for BEL what would be the composition of the Court to hear the appeal. No objection was taken to the composition of the Court. Mr. Blanco stated that it was only after the hearing of the appeal had been completed and the oral decision given that he recollected that Mr. Kimano Barrow, a Commissioner of the PUC was the son of Barrow JA.

[18] The fair-minded observer would be aware that a dispute appears to exist between BEL and PUC as to the extent of PUC's powers to direct or authorize BEL to negotiate and/or enter a contract with a particular supplier of electricity. This dispute concerns in particular whether PUC is empowered under the statute (i) to order BEL to negotiate or enter a contract with a particular potential supplier

of electricity, (ii) to give or withhold approval of power purchase agreements between a licensee and a supplier of electricity by which costs to consumers may be affected (iii) to dictate any particular term or condition between BEL and a supplier.

In short, this dispute goes to the scope and extent of the powers of the PUC as a regulator of a public utility.

[19] The matters in dispute had been formulated in the form of three questions which were submitted to the High Court for its determination. All three questions were answered in the affirmative in favour of the PUC by Arana J. That decision of Arana J is now the subject matter of this appeal. In these circumstances, the fair-minded and informed observer may think that it is crucial to the operations of PUC that the verdict of Arana J be upheld. The PUC would therefore have an interest in the outcome of the appeal.

[20] In a statement dated 3 February 2010, Barrow JS confirmed that Kimano Barrow is his son. Mr. Kimano Barrow was appointed a Commissioner of PUC in April 2008. He stated that his son has no financial or any other personal interest in the PUC apart from the professional interest that he is required by law to have in the PUC by virtue of his appointment. He expressed the view that he did not see how his son could gain or lose by the outcome of any decision which that Court makes in relation to the PUC. He did not see how the appeal could affect his son personally.

[21] Barrow JA pointed out that the PUC was a creature of statute and its sole purpose and objective was to perform the duties imposed and exercise the powers conferred by and in accordance with the statute. He expressed the view that he did not understand that the PUC had or was capable of having as a matter of law any interest favorable or adverse to BEL as any other utility it was requires to regulate. Barrow JA expressed the view that he “did not see it was possible for me to be partial to Commissioner Barrow” in the matter which was

the subject of the appeal. After explaining his view of the issues in the appeal, Barrow JA concluded that he was unable to see how the personal views of a Justice of Appeal could affect him when considering these issues. He asserted that the question of law between the BEL and PUC arose in 2006 before his son was appointed Commissioner. He said that his son could not have had any view or preference insofar as the questions and answers. He was not aware that his son had any view or preference on the issue before the Court. Even if his son had any preference after becoming a Commissioner, such view or preference would have been of no significance to his consideration of the law. He explained that this was the reason which led him to believe that there was no need to inform BEL and PUC that Commissioner Barrow was his son and offer them the opportunity to apply to the Court for him to recuse himself from hearing the appeal. He pointed out that counsel for the appellant Mr. Michael Young SC knew that Kimano Barrow was his son. He expected that if Mr. Young was objecting to his sitting because of his familial ties to the Commissioner, Mr. Young would have notified him through the Registrar. Not having done so, Barrow JA concluded that Mr. Young did not consider that there was any merit in his requesting the Justice to recuse himself.

[22] Barrow JA stated without any reservation that the relationship with his son would have no effect on him since the decision on appeal is based on an interpretation of the law. But it must be remembered that BEL does not assert that the Justice was actually in fact biased. It complains about the appearance of bias which based entirely on the familial ties with Mr. Kimano Barrow. I am mindful of the observations of Lord Phillips of Worth Matravers MR in **Re Medicaments and Related Classes of Goods (No. 2) supra** where he observed:

> "37 Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for

> logical reasons, predispose a judge towards a particular view of the evidence or issues before him."

In **R v Barnley Licensing, Ex p Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167, 187** Delvin LJ stated that:

> "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

[23] While the Court is required to take into consideration the statement and the explanation which Barrow JA puts forward as to the effect the relationship with his son would have or might have had on his decision, it is of little value because "bias is or may be unconscious."

[24] The Court of Appeal in England had cause in **Locabail (UK) Ltd. v Bayfield Properties [2000] 2 WLR 870** to make an observation as to the effect of bias on a judicial officer. At paragraph 19 the Court stated:

> "Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or decision, the insidious nature of bias makes such a statement of little value and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

[25] The statement of Barrow JA must therefore be given little weight by this Court in determining the impact which the familial relationship would have had on him.

[26] For my part, I accept the explanation which he has given concerning the reason why he sat. Barrow JA assumed that because Mr. Young was aware of the relationship and took no objection, that was an indication that BEL had no objection to his sitting.

[27] In **Taylor's** case Lord Woolf cautioned that at paragraph 4:

> "…….judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informal observed as raising a possibility of bias…….on the other hand, if the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider having heard the submissions of the parties whether or not he should withdraw."

[28] Where counsel for a litigant is aware that grounds exists for objecting to a judge sitting in a particular case, counsel has the responsibility to his client to inform him of the circumstances so that the client may make an informed decision. But this does not, in my opinion, absolve the judicial officer from himself bringing to the attention of the litigants the circumstances which he perceives that bias might arise so that they may make an informed decision on his participation in the proceedings. This perhaps may be done in Chambers and, if no objection is taken to the judge presiding, a record to that effect should then be made in open court.

[29] The suggestion by BEL is that the judge might have unconsciously accepted the case of PUC because of his relation with his son Kimano Barrow who is a Commissioner. BEL does not suggest that Justice Barrow was in fact biased because of the relationship of father and son. The question arises whether, in the circumstances, the decision of Barrow JA would, in any way, be

infected by any possibility of bias in favour of his son. As pointed out by Lord Steyn in **Lawal's** case (supra):

> "Public perception of the possibility of unconscious bias is the key."

[30] The Court of Appeal in **Locabail** at paragraph 25 pointed out that:

> "it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias".

However, the Court of Appeal went on to point out in the same paragraph that:

> "25……By contrast, a real danger of bias might well be thought to arise if there was a personal relationship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case."

[31] In **Tibbetts'** case, the Privy Council recognized that, even though there was a relationship between a witness and a juror who had gone on vacation together, nonetheless, in the circumstances of that case that relationship in itself was not sufficient to satisfy the fair-minded and informed observer that the decision of the jury was biased. Indeed their Lordships recognized:

> "…….that it is on the face of it striking that a defendant in a criminal trial can be convicted in circumstances in which a witness who knows and has been on holiday with a juror has given evidence for the prosecution."

The Board concluded that:

> "the putative observer with knowledge of the facts would not conclude that (the juror) might have accepted the witness's evidence as a result of his previous relationship and conversations with him".

The Board may well have been influenced in reading its conclusion by the fact that the evidence of the witness was not challenged by the defence at the trial.

[32] Armed with the knowledge that Barrow JA was a member of the panel which heard an appeal involving the PUC at a time when his son was Commissioner, the fair-minded and informed observer would, in my opinion, conclude that, because of this familial tie, there was a real possibility that Barrow JA was biased. In my opinion, it is indeed difficult to envisage circumstances which the fair-minded and informed observer who, having considered the facts would not conclude that there was a real possibility that a tribunal on which a judge with familial ties to one of the litigants would not be biased. The public perception of unconscious bias may very well be present if it is known that a father is presiding over a case in which his son has an interest, if only peripherally.

[33] While it is suggested that Commissioner Barrow had no interest in the out come of the proceedings beyond that of a professional interest, nonetheless that interest, as a Commissioner, may be identical to interest of the PUC in ensuring that the questions which were submitted to and answered in the affirmative by Arana J, were also answered in the affirmative by the Court of Appeal.

[34] Even though the decision for the Court of Appeal was mainly, if not entirely a matter of legal interpretation, in my view, the fair-minded and informed observer would conclude that there is a possibility of bias when regard is had to the familial ties.

[35] As Lord Hewart pointed out in **R v Sussex Justices, Ex p McCarthy** (supra) it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seen to be done." This is particularly so in small jurisdiction in the Caribbean.

[36] It is for these reasons that I concurred in allowing the application and ordering that the appeal be reheard and that BEL was entitled to its costs which is certified fit for two counsel; such costs is to be taxed if not sooner agreed.

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MOTTLEY P

SOSA JA

[37] On 19 March 2010 I agreed with the other members of the Court that (a) the order of the Court entered on 25 November 2009 should be set aside; (b) the appeal of Belize Electricity Limited ("BEL") should be reheard before a panel which does not include Barrow JA and (c) BEL should have its costs, certified fit for two counsel, to be agreed or taxed. Having now read, in draft, the judgments of Mottley P and Carey JA, I concur in the reasons for judgment set out by Carey JA in his judgment ("Carey JA's reasons) and, to the extent that they are consistent with Carey JA's reasons, in the reasons for judgment given by Mottley P in his judgment.

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SOSA JA

CAREY JA

[38] This was an application in which the appellant sought leave of the court to rehear the appeal in this matter which it had dismissed on 27 October last, before a panel which did not include Barrow JA. This court overruled an objection taken by the respondent to the hearing of the application on the ground that the court was *functus officio* on the determination of the appeal. Accordingly, we are now concerned, not with whether the court lacks jurisdiction, but rather, with the merits of the application. Having heard full submissions from counsel, we granted the application and promised to provide the reasons for that determination. My contribution to those reasons is hereunder.

The backcloth

[39] The appeal from which this application stems, was heard on 27 October 2009 before Mottley P, Morrison and Barrow JJA and dismissed. It related to a determination of the jurisdiction, powers, rights and authority of the respondents in the regulating of utility providers. The appellant is a utility provider within the meaning of the Public Utilities Act; the respondent is the statutory regulating body of utility providers. One of the members of this regulatory body is, Kimano Barrow, a son of Barrow JA. That relationship, the appellant contends, gives rise to a "reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Barrow JA lacked impartiality."

[40] It is right to say that although the appellant placed before the court other material in its skeleton argument as supporting the appearance of bias, Mr. Nelson QC abandoned that material and relied wholly on the familial tie between Barrow JA who was a member of the court and his son, who was a member of the respondent body, a party to the proceedings. In fairness to the judge, one might say that Mr. Kimano Barrow only became a Commissioner after the case giving rise to the appeal being argued in the court below, though before the long delayed judgment was delivered.

[41] The issue which is to be determined – is whether that circumstance would warrant this court in setting aside its order and directing a rehearing of the appeal before a differently constituted bench.

The Law

[42] I begin with a reference to two cases which are of importance and very helpful in this connection, viz, **Taylor v Lawrence [2002] 3 WLR 640** and **In re Uddin (Child) [2005] 1 WLR 2398**. In the former, a specially constituted court, comprising the Chief Justice, Lord Woolf, the Master of the Rolls Lord Phillips of Worth Matravers and three senior Lords Justices, Ward, Brooke and Chadwick LJJ considered the jurisdiction of the Court of Appeal to reopen an appeal which it had heard and determined. It held that it could do so where it was established that a significant injustice had probably occurred, and there was no alternative effective remedy. In the latter case, the court provided an example of significant injustice. In the course of its judgment, the Court at p. 2404 said –

> "But the **Taylor & Lawrence** jurisdiction can in our judgment only be properly invoked when it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined."
>
> …
>
> "We think this language appropriate because the jurisdiction is by no means solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case) but rather, at least primarily, with special circumstances where the process itself has been corrupted."
>
> …

> "And it is the corruption of justice that as a matter of policy is most likely to validate an exceptional recourse, …"
>
> …
>
> "In our view the case where the process has been corrupted is the paradigm case: not necessarily the only case."

It should be noted that by the time **In re Uddin (A child)** (supra) came to be decided, rules of court governing the reopening of final appeals were in effect. Civil Procedure Rule 52.17(1) provide as follows:

> "The Court of Appeal or the High Court will not re-open a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

[43] Mr. Courtenay SC accepted that if the process had been corrupted, then the jurisdiction could be invoked. But strangely, as it seems to me, he proceeded to submit that in the instant case, the appellant was obliged to establish, not only that a significant injustice had probably occurred but that a wrong result had arisen as a result of the allegation of the appearance of bias imputed to Barrow JA. With respect, that approach seems, in my opinion to be in conflict with the clear language in **Taylor v Lawrence** (supra) and cited with approval in **In re Uddin (A child)** (supra). In the former case, the court observed that the reopening of an appeal should only take place where there is a real requirement for that to happen and then said –

> "One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice, the need to maintain confidence in the administration of justice, makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify the court in taking the exceptional course of re-opening proceedings which it has already heard and determined." [2003] QB para. 55)

What in my view is to be established is that a significant injustice has probably occurred and there is no alternative effective remedy. The real possibility of the appearance of bias constitutes that significant injustice and puts the case in the "exceptional category" which will incline the court to grant an application to re-open.

[44] I turn then to consider whether the circumstances alleged in this case raise the question of the perception of bias. The appellant relies exclusively on the familial tie between Barrow JA and his son. The case of **Locabail (UK) Ltd v Bayfield Properties Ltd [2000] WLR 870** which was concerned with formulating guidelines for persons who exercised judicial office with respect to disqualification on the ground of bias, is very helpful. So important was this issue considered, that a special court was convened to hear the matter; consisting of the Chief Justice, Lord Bingham, the Master of the Rolls, Lord Woolf and the Vice Chancellor, Sir Richard Scott. The court set out those circumstances which, it thought, would not constitute any basis for recusal and then stated as follows (p. 888);

> "By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the

> case, particularly if the credibility of that individual would be significant in the decision of the case …"

If personal friendship can be seen to result in that conclusion, then close family ties could not be seen in any other light. In Judicial Review of Administrative Action by Smith, Woolf and Jowett (5th Edition), the learned authors dealt with family relationships. At para. 12-025, they observed –

> "Kinship has always been recognised as a ground for challenging a juror, and in 1572 a court went so far as to uphold an objection to proceedings in which the sheriff who had summoned the jury was related in the ninth degree to one of the parties. Despite a seventeenth century case that kinship did not operate as a disqualification for a judge, it is now well established it does disqualify where it is close enough to cause a likelihood of bias. **R v Rand (1866) LR QB 230**."

They also cite a Canadian case, **Ladies of the Sacred Heart of Jesus v Armstrong's Point Association (1961) 21 DLR (22) 373** in which the decision of a tribunal was set aside because the chairman was the husband of an executive officer of a body which was a party to proceedings before the tribunal.

The authorities and the learning in this regard, in my opinion, leave no doubt whatever that the appearance of bias can arise or arises in such circumstances.

[45] It may be that I have taken more time than is really necessary to deal with this issue. Mr. Courtenay did not urge anything significant to the contrary. I would hold that the fair minded and informed observer would instinctively think that there was an appearance of bias in the instant case. What he did maintain was that the appellant was obliged to show that there was no alternative remedy and contended that there was, in the instant case, an alternative remedy, namely an appeal to the Privy Council.

[46] Mr. Nelson QC pointed out, correctly, as I think, that for all practical purposes, this is the final court. It cannot be gainsaid that there is no appeal as of right to the Privy Council: leave would have to be sought and obtained. In my opinion, alternative remedy, in the context of the principles articulated in **Taylor v Lawrence** (supra), can only refer to a remedy which the appellant can invoke without first seeking leave to do so.

[47] In the result, and for these reasons, I would set aside the order of dismissal by this court and direct a rehearing before a differently constituted court.

CAREY JA