

Citation: VC 2014 HC 52
Title: MITCHELL v. GEORGES
Country: St. Vincent and the Grenadines
Court: Privy Council
Suit No.: PCA 67 of 2013
Judge(s): Lady Hale; Lord Clarke; Lord Wilson; Lord Sumption; Lord Hughes
Date: December 18, 2014
Subject: Judicial review
Sub Subject: Decision made by the Commission of Inquiry – Whether the respondent showed apparent bias – Court considered that fair minded and informed observer – Having regard to the context and all surrounding circumstances – Appeal allowed.

Appearances:

James Guthrie, Q.C., Ramesh Lawrence, Maharaj, S.C.; Robert Strang (Instructed by Bircham Dyson Bell LLP)

Thomas Roe, Q.C., Hafsa Masood (Instructed by Charles Russell Speechlys LLP)

1. LORD CLARKE: The issues in this appeal centre upon whether the respondent showed apparent bias in his conduct of a Commission of Inquiry into what was known as the Ottley Hall Development or the Ottley Hall Project (“the Project”). The courts below held that he did not. The appellant challenges those decisions in this appeal and seeks an order that the respondent play no further part in the Commission.

2. The appellant was Prime Minister and Minister of Finance of Saint Vincent and the Grenadines for a long period, being elected for four successive terms between 1984 and 2000. After he stepped down, there was a change in government as a result of a general election held in April 2001 and the party which had been in opposition since 1984 came to power.

3. By a Commission dated 28 April 2003, the Governor General, acting on the advice of the Cabinet, commissioned the respondent, a retired High Court judge, to inquire into the failure of the Project. In the 1990s the government lost large sums of public money in what was said to be a fraudulent Project, which developed from a proposal put to the government by Dr. Aldino Rolla, an Italian engineer and shipyard owner, for the construction of a marina and shipyard at Ottley Hall. The funding of the Project came from a consortium of banks, secured by, among other things, a sovereign guarantee from the government amounting to over US\$50m. It is agreed between the parties that the loan finance was under the control of Dr Rolla and that he diverted large sums for his own purposes. The Project was a disaster and funds ran out with the development unfinished. The banks sued the government and obtained judgment on its guarantee. The extent of the responsibility of the government led by the appellant became a major issue between the political parties.

4. The issues in this appeal involve a detailed consideration of the way the respondent conducted the Commission.

THE COMMISSION AND ITS TERMS OF REFERENCE

5. The Commission was set up under section 2 of the Commission of Inquiry Act, Chapter 14 of the Revised Laws of Saint Vincent and the Grenadines 1990, as amended by the Commissions of Inquiry (Amendment) Act No 14 of 2002.

6. The Commission’s terms of reference included the following:

“6. To inquire into all of the facts and circumstances of and relating to the Ottley Hall Project and the role played by persons and corporate entities involved therein to establish whether or not any criminal act or offence was or may have been committed in Saint Vincent and the Grenadines.

7. To inquire into and establish the facts and circumstances in relation to the role or roles played by any Minister of Government, civil servant, and the directors and/or officers of the corporate entities and/or their agents who were involved in or concerned with the Project and in particular to inquire into and establish:
 - i. Whether or not there was any dereliction of duty, violation of any law of Saint Vincent and the Grenadines, conflict of interest and/or breach of trust on the part of any Minister of Government or civil servant.....
13. To report immediately in writing to His Excellency the Governor General and the Director of Public Prosecutions any facts, circumstances or evidence which in the opinion of the Commission may give rise to, show or establish that:
 - i. A criminal act, including any conspiracy to commit a criminal act or acts has been or may have been committed by any persons including any Minister of Government or public servant or corporate entity.
 - ii. Any person obtained a personal and unlawful benefit by way of any large, unusual or non-commercial payments, transactions, transfers or receipts or money; or other benefits were made to any persons or corporate entity, whether related to the Project or not.
 - iii. Any improper, corrupt or fraudulent relationship between Dr Rolla and/or any of the corporate entities owned or controlled by him or his nominees and/or any Minister of Government or public servant or any other person.
14. To issue an interim report to His Excellency the Governor General within six months of the date of the establishment of the Commission and a final report within twelve months.
15. To make such other and incidental inquiries which concern and relate to the subject matters of inquiry hereinbefore recited as the Commission may deem necessary to give effect to any findings made by the Commission and/or remedy or prevent any act or conduct as may be found by the Commission, and on the need, if any, for the enactment, amendment or repeal of any law of Saint Vincent and the Grenadines.”

The terms of reference also included the following:

“AND I FURTHER DIRECT that you, the Commissioner shall make such report and recommendations in the premises as may to you seem fit, with all convenient dispatch, with leave and power in your absolute discretion to make such report and recommendations in whole or in part ad interim on any aspect or any topic of the matters as aforesaid before you[r] report and make recommendations finally and comprehensively.”

7. The terms of reference thus provided for three types of report: first, an immediate report under para 13; second, an interim report within six months under para 14; and third, a final report or reports under the last paragraph quoted above.

THE RELEVANT PRINCIPLES

8. The appellant's complaint is based on the contents of an Interim Report issued by the respondent, which was dated 18 November 2005. He says that the contents of that report evidence apparent bias on the part of the respondent. Whether that is so or not depends upon the application of the relevant legal principles to the contents of the report considered in its context.

9. The now classic formulation of the test to be applied is that stated by Lord Hope in *Porter v. Magill* [2001] UKHL 67, [2002] 2 AC 357 at para 103, namely:

“whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

10. The Board accepts the submission made on behalf of the respondent that in applying that test, the court must have regard to the context. As Rix, L.J. explained in *R (Lewis) v. Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, [2009] 1 WLR 83 at para 93, the test falls to be:

“applied to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome.”

11. Thus, as ever, all depends upon the context. As the Board sees it, the question here is whether, having considered the facts, the fair minded and informed observer would conclude that there is a real possibility that, in the light of the contents of the Interim Report, the respondent would not approach the remainder of the inquiry with an open mind or, put another way, that he would not conduct an impartial inquiry, at any rate so far as the conduct of the appellant is concerned.

THE INQUIRY

12. There was some correspondence between the appellant and the Secretary to the Commission before oral proceedings began on 14 November 2003. By a letter dated 14 August 2003 the Secretary asked the appellant to provide, within seven days, a written statement of his involvement in and/or knowledge of the preparation, planning, execution and subsequent failure of the Project, including any discussions and communications he had had with Dr Rolla. The appellant replied on 14 October 2003, acknowledging receipt of the letter and simply saying that he did not have any documents in his possession and that all the documents were in the Prime Minister's office. It might be thought that that response was less than co-operative.

13. On 13 November 2003 the Commission wrote to the appellant inviting him to attend for an interview conducted by an investigator on 19 November 2003. On 17 November 2003 Mr Maharaj SC, the appellant's attorney, replied saying that he was ready to assist the inquiry but needed to know on what matters it was proposed to interview him, to have sufficient time to consider and prepare and to have counsel present with him. Mr Maharaj SC asked for those details to be provided within 21 days and indicated that in the circumstances no useful purpose would be served by the appellant's attendance for interview on 19 November. So far as the Board is aware, there was no reply to that letter.

14. The Inquiry was opened in public by the respondent on 14 November. He was assisted by two counsel to the Commission, namely Mr Anthony Astaphan SC and Mr Joseph Delves. In opening the Inquiry he stressed the task of the Inquiry. In particular, he noted that it would cover about 12 years and embrace many activities of government and not only the discipline of law but also accountancy and financial administration. He added that it would touch on the diligence or otherwise of ministers, public officials and others and that the co-operation of those concerned would be required.

15. He noted that the Commission was not a court of law, that it was not engaged in an adversarial process or a prosecution and that it was not a political witch-hunt. He stressed the words of the oath he had taken, namely to conduct a “full, faithful and impartial inquiry”, adding in particular that there must be a level playing field and that this was the kind of inquiry he intended to conduct. His opening included the following:

“As Commissioner the Act empowers me to summon witnesses and to call for the production of books, plans or documents. Persons summoned are bound to obey. Any person who is in any way implicated in allegations before the Commission is entitled to be represented by counsel at the inquiry. A statement given by a person who appears as a witness in answer to any question

before the Commission may not be used in any civil or criminal proceedings. The answers given before the Commission are privileged. There is an exception and that is perjury, the object is to arrive faithfully at the truth or otherwise of the allegations. The inquiry is public and we invite persons to come and render any assistance possible.

If in the course of the inquiry it appears that a person's conduct is the subject of inquiry, and is liable to be criticized, a notice (known as a Salmon letter) will be sent to that person outlining the potential criticism. Such a person is entitled to be represented by counsel and to enlist the assistance of the Commission in securing the attendance of witnesses.

Further, if on review of the evidence produced before the Commission it appears that an adverse finding may be made against a person, he will be notified of the preliminary finding and invited to submit in writing any additional evidence he/she may wish.

....

In a nutshell the purpose of this inquiry is to inquire into the reason or reasons for the failure of the project and the person or persons responsible and/or the degree of responsibility if any for that failure. The Commission is charged to make diligent inquiry into and to report upon all facts and factors relating thereto. The Commission is required to report and make recommendations finally and comprehensively on this matter. I now turn to counsel for the Commission who will outline to you the crux of this inquiry.”

16. The Board detects no unfairness in anything said by the respondent in opening the Inquiry. Mr Astaphan SC then opened the facts of the Inquiry in greater detail. In the course of doing so he observed that, so far as the Project was concerned, the key players were Dr Rolla and the appellant. He also gave particulars of the aspects of the appellant's conduct which merited investigation.

17. Between November 2003 and May 2004 the Commission heard evidence from a number of witnesses in the absence of the appellant. The hearings of the Commission were however suspended on 18 May 2004 when Mr Richard Joachim made a legal challenge to the appointment of the respondent as Commissioner which was finally determined by the Privy Council in a judgment delivered on 24 January 2007 in *Richard Joachim v Attorney General PC Appeal No 38 of 2005*. The challenge, which is not relevant to the issues now before the Board, failed.

18. During the period of suspension of the Commission, the respondent produced the Interim Report dated 18 November 2005 to which the Board will return in some detail below. It was sent to the Governor General and Director of Public Prosecutions purportedly pursuant to clause 13 of the terms of reference. The Interim Report was not sent to the appellant nor were the details of its contents made public. However, he was aware of its existence at or shortly after the time of its publication owing to references made to it in public statements and newspaper articles. He subsequently obtained a copy of the Interim Report which he was able to produce in these proceedings.

19. At a general election on 7 December 2005 the incumbent government of Prime Minister Dr Ralph Gonsalves retained power. The Commission resumed work after the Privy Council's judgment in Mr Joachim's appeal. On 21 March 2007 the Commission wrote to the appellant to say that public hearings would resume on 2 May 2007. It informed him that he would be required to testify on a mutually convenient date, but not at the upcoming hearing in May. Thereafter the appellant and his attorneys corresponded with the Commission concerning the date of his testimony. The appellant informed the Commission by letter dated 24 April 2007 that he and his counsel would not be available until after 15 August 2007. By letter dated 30 April 2007, the Commission requested the appellant to provide a written statement on or before 31 May 2007. On 4 May 2007 the Commission wrote to the appellant's attorney saying that its sitting had been adjourned to as soon as possible after 15 August 2007 and asked him to say what date he and the appellant would be available to attend.

20. On 8 June 2007, in what appears to the Board to be a somewhat remarkable turn of events, the Parliament of Saint Vincent and the Grenadines passed a Bill amending the Commission of Inquiry Act by repealing section 18(1)(b), which gave a person in the position of the appellant the right to payment of his reasonable costs. The only members of Parliament present were government ministers or members of the governing party and the Bill was taken through all its stages in one day's sitting and enacted as Act No 17 of 2007.

21. On 25 July 2007 the Commission wrote to the appellant's attorney to inform him that the inquiry would resume on 10 September 2007. On 31 July 2007 the attorneys for the appellant wrote to the Commission to ask it to commit in writing, by 20 August 2007, to paying the costs of the appellant's legal representation, on the ground that he had a vested right to the same before the repeal of section 18(1)(b) of the Commission of Inquiry Act. The Commission replied on 20 August 2007 refusing to make any such commitment, saying that it was guided by Parliament's decision in Act No 17 of 2007 and that "Parliament's position on the issue is explicit".

22. On the same date the Commission sent a Salmon letter to the appellant accompanied by a witness summons requiring him to attend to testify on 10 September 2007. It contained a number of allegations against the appellant. It identified a list of aspects of the Project in which it suggested he was aware or was involved. It also included a number of serious allegations as follows:

- “10. The lack of transparency and the shroud of secrecy which generally characterized the Ottley Hall Development Project especially in its early stages and the absence of involvement of Cabinet generally and key professional civil servants in particular in the planning and financing stages.
11. The absence of due diligence and good governance on the part of the main persons involved in the preparatory stages of both Projects including yourself.
12. The palpable absence of proper checks and balances to protect the interests of the Government and people of St Vincent and the Grenadines in the Ottley Hall Development Project thus placing the Government in financial jeopardy and the NCB facing grave financial loss.
13. The naked deceit displayed by yourself and others via the media when the people of St Vincent and the Grenadines were led to believe that SACE and not the Government of St Vincent and the Grenadines was the primary obligor for the loan of US\$50m from West LB to CCYY for which a Sovereign Guarantee had been given by you as a prerequisite for the said loan.

...

Witness statements as well as both oral and documentary evidence before the Commission show/suggest that you used/misused your office as Minister of Finance and as such ex officio the majority shareholder of NCB by conspiring with Dr Rolla and another or others to obtain unsecured loans of considerable magnitude as start-up capital for the Union Island Project as well as working capital for and completion of the Ottley Hall Project when West LB ceased lending to Rolla/Valdettaro and other local banks in particular Nova Scotia showed no interest in the Union Island Project. By then Valdettaro was teetering on the verge of bankruptcy.

....

It is clear from the foregoing that the compelling inference to be drawn is that as Prime Minister and Minister of Finance you misused your office and were in breach of your fiduciary duty to protect the interest of the Government and people of Saint Vincent and the Grenadines and in so doing the evidence strongly suggests that you undoubtedly were an integral part of Dr Rolla's complicity and duplicity in at least some of his dealings.

The evidence available to the Commission is replete with instances of a singular lack of good governance, due diligence, proper judgment as well as accountability on your part. There is also deceit and evidence of conspiracy with Dr Rolla and others to deceive and/or defraud.

The Commission considers that because of your key position as Prime Minister and Minister of Finance and crucial role as a director of Frigate Island Investment Limited and Union Island Resorts Limited you are well suited to testify on Monday 10 September 2007 and a formal Witness Summons is attached.

You are specifically requested to note that you should come prepared in the course of your testimony to show cause why the Commission ought not to report adversely upon you for the reasons set out herein.”

23. On 3 September 2007 the attorneys for the appellant wrote to the Commission to complain that the Salmon letter contained such adverse findings against the appellant that it gave rise to an appearance of bias on the part of the respondent, and that the respondent appeared to have made findings in breach of the rules of natural justice. They informed the respondent that if the Inquiry continued they would issue proceedings in the High Court. They did not refer to the Interim Report. On the same day the Commission replied to say that it would proceed with the Inquiry.

THE PROCEEDINGS 2007 TO DATE

24. On 6 September 2007, the appellant filed an application for leave to apply for judicial review of: the respondent's decision to deny the appellant his costs of legal representation at the Inquiry; the decisions and findings contained in the Salmon letter; and the respondent's decision to continue with the Inquiry notwithstanding the appellant's request, on the grounds of apparent bias, procedural unfairness and breach of natural justice, that it not proceed any further. In relation to apparent bias the appellant relied upon the Salmon letter and the Interim Report.

25. The appellant sought relief that included: a declaration that the respondent had displayed apparent bias and was disqualified from conducting the Inquiry; orders of certiorari to quash the findings made against him; and a declaration that he was entitled to the payment of the reasonable costs of his representation before the Inquiry. In the same proceedings the appellant sought a declaration that Act No 17 of 2007 was unconstitutional and invalid in that it was a disproportionate interference with his rights and amounted to ad hominem legislation.

26. In a judgment delivered on 14 September 2007 Bruce-Lyle, J. refused leave to apply for judicial review and lifted the stay on the Inquiry (which he had granted a few days earlier), making no order as to costs. In respect of bias and procedural unfairness, he held that the Salmon letter conformed to the correct principles and contained only provisional criticisms. He further held that the same reasoning applied to the Interim Report. As to what was described as the appellant's constitutional claim, he held that Act No 17 of 2007 did not have retrospective effect and that the appellant's entitlement to costs was governed by the scheme in place before the amendment by the Act. He held, however, that the appellant's request for costs from the Commission was premature.

27. The appellant appealed. His appeal was heard by the Court of Appeal (Alleyne, C.J. (Ag); Rawlins, J.A.; Edwards JA (Ag)) on 29 November 2007. In a judgment delivered on 7 April 2008, the Court of Appeal allowed the appeal in part and granted the appellant leave to apply for judicial review in relation to the statements made in the Interim Report. The Court ordered that a stay of the Inquiry be maintained until determination of the application or further order and ordered the respondent to pay half the appellant's costs.

28. The Court of Appeal held that the Interim Report had been issued in different circumstances from the Salmon letter and that it called for different considerations. Unlike the Salmon letter, it had not been issued to the appellant and it could be argued that the findings in the Interim Report were not preliminary

in nature and included apparent direct indictments of the appellant. It held that the test to be applied in relation to bias was whether, given the special nature of the functions of the Commission, the impugned statements evinced a real danger of bias. The appellant was accordingly granted leave to apply for judicial review in relation to the statements contained in the Report on the grounds of apparent bias or procedural unfairness: see *Mitchell v. Georges* (2008) 72 WIR 161.

29. The appellant applied for judicial review and, by an amended claim form, alleged that the findings in the Interim Report were made as a result of a lack of procedural fairness and were vitiated by apparent bias. He sought relief disqualifying the respondent and preventing him from proceeding further with the inquiry. The respondent swore an affidavit in reply on 29 September 2008.

30. The application was heard by Thom J on 1 and 2 December 2010. In a judgment delivered on 23 June 2011 she dismissed the appellant's application. She correctly held that the test for apparent bias was whether the fair-minded and informed observer, having regard to the relevant circumstances, would conclude that there was a real possibility that the respondent was biased. However, she held on the facts that the fair-minded observer would not so conclude from the contents of the Interim Report. She further held that the proximity of the Interim Report to the date of the general election would not arouse the suspicion of the fair-minded observer and that the failure of the respondent to disclose the Interim Report to the appellant would not give rise to an apprehension of bias. Finally, she held that the Interim Report was produced under clause 13 of the terms of reference, and there was no procedural unfairness in the contents of the Report or the failure to give the appellant a hearing before production of the Interim Report because it did not contain concluded findings. Accordingly, Thom J dismissed the appellant's application for judicial review and lifted the stay on the Inquiry, while making no order as to costs.

31. By a notice of appeal dated 29 July 2011 the appellant appealed against those decisions. He challenged Thom J's findings as to apparent bias and procedural unfairness. He did so on the basis that the Interim Report contained findings and expressed opinions outside the remit of the respondent's terms of reference, that it displayed apparent bias against the appellant and that the respondent ought to have informed the appellant of the allegations being made against him and to have disclosed the Interim Report to him.

32. The appellant's appeal was heard by the Court of Appeal (Baptiste, J.A.; Mitchell, J.A. (Ag); Henry, J.A. (Ag)) on 28 February 2012. In a judgment delivered on 25 June 2012 the Court of Appeal dismissed the appeal. As to the test, it held that it was for the appellant to prove that the respondent had closed his mind and demonstrated irreversible prejudgment and prejudice. The appellant had to demonstrate that in the conduct of the proceedings as a whole it had been shown that the Commissioner was biased or unfair. The Court of Appeal held that nothing in the Interim Report suggested that the respondent had come to a concluded view, had shown a closed mind or had a particular view of the evidence amounting to a prejudgment. On the question of procedural fairness, the Court held that there was no obligation on the part of the respondent to hear from the appellant before making an Interim Report under clause 13 of his terms of reference. It further held that, having received the Salmon letter and witness summons, the appellant would now have the opportunity to answer the allegations against him. Accordingly, the Court of Appeal held that Thom J was justified in finding, both that the fair-minded observer would not conclude that there was a real possibility that the respondent was biased, and that there had been no procedural unfairness. By a notice of motion dated 11 July 2012, the appellant sought the leave of the Court of Appeal to appeal to Her Majesty in Council. Final leave to appeal was granted on 27 May 2013.

DISCUSSION

33. The Board has reached the conclusion that, contrary to the conclusions of the courts below, the Interim Report was expressed in such terms that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the respondent was biased such that he would not approach the remainder of the Inquiry with an open mind or, put another way, that he would not conduct an impartial Inquiry, so far as the conduct of the appellant is concerned. In reaching that conclusion the Board has considered the relevant context. It appreciates that the respondent is not

presiding over adversarial proceedings but over an Inquiry. However, the Inquiry involves a detailed examination of the conduct of the appellant (among others) over a considerable period and both the Salmon letter and the Interim Report make it clear that the appellant faces serious allegations of impropriety.

34. The Board accepts the submission that Thom J correctly identified the test. It cannot quite say the same in the case of the Court of Appeal. In the opinion of the Board the Court of Appeal paid too much regard to the question whether the Interim Report showed that the respondent had come to a concluded view, showed a closed mind or had a particular view of the evidence amounting to a prejudgment. Although the Court of Appeal referred to the fair-minded observer, in the opinion of the Board it did not make it sufficiently clear that the sole question for decision is what view the fair-minded observer would or might take. The question is not whether the respondent was in fact prejudiced against the appellant; that would amount to actual bias. As already stated, the question is (and is only) whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the respondent was biased such that he would not approach the remainder of the Inquiry with an open mind.

35. The answer to the question depends upon the view the fair-minded observer would take of the Interim Report. He or she would no doubt have regard to the fact that the respondent was an experienced High Court judge who could be expected to act fairly and impartially, as indeed he said he would when he opened the Inquiry. Moreover both Thom J and the Court of Appeal placed emphasis upon the parts of the Interim Report which also point in that direction. Thus it is entitled "REPORT OF POSSIBLE CRIMINAL ACTS AND OFFENCES BY CERTAIN INDIVIDUALS" and para 1 refers to para 13 of the terms of reference quoted above, which required the respondent to report "any facts circumstances or evidence which point to the commission of a criminal offence of any person". Thom J and the Court of Appeal stressed that that is not the language of a person who has reached firm conclusions. Moreover, in para 2 it is noted that not all persons mentioned as involved in the Project had yet been summoned or given evidence.

36. It is submitted on behalf of the appellant that, notwithstanding those indications, the respondent used language in the Interim Report expressed in such strong terms adverse to the appellant that the fair-minded observer would conclude that there is a real possibility that the respondent had taken the view that the appellant was guilty of serious impropriety and would not be willing to change his mind. The appellant relies upon the fact that the Court of Appeal described the language as the "decisive language" of concluded findings. It is submitted that the respondent was not careful to express himself with qualifications or to leave his conclusions open, but instead used language which communicated conviction and strong disapproval.

37. In para 16 the evidence to date is said to disclose conspiracy to defraud or the obtaining of a pecuniary advantage by deception. In para 17 the principal offender is described as Dr Aldino Rolla. Reliance is placed on the following particular passages:

"18. The evidence indicates that Sir James Mitchell and Mr Bertram Commissioning QC knew or ought to have known of all of the matters mentioned in para 20 above (sic). What is significant is that armed with that knowledge, Sir James Mitchell and Mr Bertram Commissioning QC continued to provide assistance to Dr Rolla which facilitated his frauds. That raises strong issues of a conspiracy to defraud or the invocation of section 20 of the Criminal Code.

22. The evidence is that no due diligence was ever requested or conducted. In the words of the Members of the Cabinet and Parliament who have already given evidence, the person behind the projects was Sir James Mitchell, Prime Minister and Minister of Finance of St Vincent and the Grenadines. He was the moving light behind the Ottley Hall and Union Island projects and failure to properly inform and advise the members of Cabinet and Parliament is inexcusable. So too was the decision to exclude senior members of the Public Service. The decision not to so inform and to exclude them which was obviously made by Sir James Mitchell suggests that such action and deliberate failure to act in accordance with the law and his duties as a

Minister of Government is tantamount to misbehaviour in public office and therefore was not, in all of the circumstances, 'the Government of St Vincent and the Grenadines'.

26. The point man of all the discussions and arrangements between Dr Rolla and 'the Government of St Vincent and the Grenadines' was Sir James Mitchell ...
27. The Ottley Hall project had a most unfortunate beginning. The then Prime Minister and Attorney General visited Valdetarro Shipyard and publicly represented to the people of St Vincent and the Grenadines that Rolla and Valdetarro were bona fides. That was a complete misrepresentation of the true facts. That representation was made without any due diligence having been carried whatsoever. Further, there was no business plan, financial data, assessment, independent or otherwise of any of the Ottley Hall or Union Island Projects. On that the evidence is pellucid and confirmed by the Chartered Accountants who gave evidence.
29. Sir James Mitchell also spoke in glowing terms of the MV Istranka, but the evidence showed that he never actually saw the vessel and except for what he may have been told by Rolla, knew nothing about it. The evidence is that very early in the day Dr Rolla was using the MV Istranka as a vehicle of fraud.
32. ... neither Sir James Mitchell nor Mr. Bertram Commissioning QC took any steps to protect the interests of CCYY and the Government and people of St Vincent and the Grenadines. Instead, they both shut their eyes to the obvious.
33. The fraud is further aggravated by the fact that the then Prime Minister and Minister of Finance facilitated or permitted it by shutting his eyes to the obvious and acted recklessly in the extreme, if not deliberately. The Prime Minister and Minister of Finance (and Attorney General) permitted or allowed a framework, which gave total control to Dr Rolla and permitted him to freely execute his fraud. Companies owned by him prepared the 'plans' and 'estimates'. His companies supplied the 'equipment' and sought to 'construct' the facility. In light of the government's sovereign guarantee of US\$50m one would have expected some input and control to protect the interest of the Government and people of St Vincent and the Grenadines. Absolutely no checks or balances were put in place to protect the interest of the Government and people of St. Vincent and the Grenadines.
34. Further, the Prime Minister of St Vincent and the Grenadines ensured that there was no serious public service involvement and that the planning authorities were side-lined. However, he knew or ought to have known what was happening at Ottley Hall and Frigate Island. He publicly extolled the background and business acumen of Dr Rolla and the benefits of the projects well knowing that there was absolutely no independent due diligence to support his wild assertions.
43. There is also the question of the manner in which the former Prime Minister sought to coerce or mislead the Members of the Frigate Island Trust into transferring the land held in trust by them to an empty shell of a company with no assets or finances. The former Prime Minister knew or must have known that the lands were valuable natural habitat and environmentally sensitive. The members of the Trust refused to cooperate. Faced with that refusal Sir James used his commanding vote [in] Parliament to transfer or lease the land to Union Island Resorts Limited. The former Attorney General later sought to justify the 'parliamentary transfer' by the unacceptable and palpably absurd suggestion that Government itself had an 'equitable interest'. Dr Rolla enjoyed complete sway aided and abetted by Sir James and his cohorts who acted without any scruples or compunction.
44. The former Prime Minister and Minister of Finance engineered the lease of the land to Union Island Resorts Limited notwithstanding the fact that there was and is no due diligence. In fact, it was done when all the evidence suggests that Dr Rolla or the incorporated companies had

not raised, and were incapable of raising the equity or finance required for the Union Island project. ... A practical consequence of that gross misbehaviour is that the National Commercial Bank as a creditor of Union Lands Resort Limited cannot realize the land to recover the debt owed to it. The same unfortunate result applied to the MV Istranka.”

38. Reliance is further placed upon the respondent’s summary (in para 45) of the evidence “in so far as Sir James’ misbehaviour was concerned”:

- “(a) Failure to act in accordance with his duties as Minister of the Crown/Government.
- (b) Failure to ensure that Members of the Cabinet and Parliament were fully informed and able to properly participate and make informed decisions.
- (c) There was no due diligence. For example, at the time the former Prime Minister praised Dr Rolla, he and his companies were on the verge of bankruptcy. Not one inquiry was made of the relevant Italian or other Authorities of the financial standing of Dr Rolla or of Valdetarro.
- (d) There was no business plan, proper feasibility or environmental impact study. The result has been a crippling debt, a white elephant at Ottley Hall, and significant damage caused to the environment at Union Island.
- (e) There was no supervision or accountability. Dr Rolla was essentially dumping equipment at Ottley Hall. Attempts were made to hide the fact that the equipment was used and in some instances deteriorated. Also, equipment was sent which was unusable.
- (f) The same total dereliction of duty occurred during construction. The evidence of Mr Cyrus has not been contradicted although to be fair he has not been cross-examined yet.
- (g) The directions to the Chairman of the National Commercial Bank of St Vincent and the Grenadines.
- (h) There was substantial irresponsibility on the part of the former Prime Minister, and Chairman of the Board of the NCB, and Mr Commissiong QC as Chairman of CCYY. The evidence of Mr Floyd Patterson the Chartered Accountant from St Vincent and the Grenadines and Mr Gordon Moreau of Dominica amply bear this out.
- (i) Failure to ensure that the Chairman and Board acted prudently and in accordance with the Banking Act (Cap 63).
- (j) The former Prime Minister’s Cabinet and Members of Parliament were left completely in the dark. The projects were in substance ‘a Mitchell’ thing!
- (k) The former Prime Minister side lined the relevant planning authorities.
- (l) The former Prime Minister failed to act to protect the Treasury, taxpayers and the public interest.
- (m) His actions in relation to the Frigate Trust lands and unlawful transfer or lease to Union Island Resorts.”

39. Finally, in para 48 the respondent recommended that counsel should be retained by the Attorney General and/or NCB to determine whether civil proceedings could be instituted against the appellant to recover the monies lost. He concluded that it seemed that the appellant was civilly liable both in respect of the tort of misfeasance in public office and breach of trust.

40. As stated above, the question for decision is whether, in the light of the Interim Report, the fair-minded observer would conclude that there is a real possibility that the respondent (a) had already decided that the appellant was guilty of serious impropriety and (b) would not be willing to change his mind. The Board appreciates that such an observer would have regard to the fact that the respondent is an experienced High Court judge well versed in the analysis of complex facts. Nevertheless it has concluded that on the facts of this case the respondent went too far. It does not do so on the basis that the appellant had not yet given evidence (which has been called the “procedural fairness issue”) because the terms of reference show that it was contemplated that reports might be made on an interim basis.

41. The problem here was that, as the Court of Appeal put it at para 47, “the Commissioner’s interim report was replete, as the judge noted, with strong and colourful language” and that it was true that the Commissioner “used the decisive language of a concluded finding”. The extracts from the Interim Report set out above strongly support those conclusions. However, in the opinion of the Board, the Court of Appeal was wrong not to go on to hold that the fair-minded observer test was satisfied. In the opinion of the Board the fair-minded observer would conclude that there is a real possibility that the respondent had made up his mind that the appellant was at the heart of the wrongdoing which led to the Project and its collapse.

42. The Board has set out detailed extracts from the Interim Report above. It contains far too many firm statements of the misbehaviour of the appellant. The respondent’s conclusions may be summarised in this way. Armed with knowledge of Dr Rolla’s deception the appellant “continued to provide assistance to Dr Rolla which facilitated his frauds” (para 18). The appellant was the moving light behind the Project; his failure properly to inform the Cabinet and Parliament was inexcusable; the decision to exclude senior members of the public service was obviously made by the appellant, which suggested that such action and deliberate failure to act in accordance with the law was tantamount to misbehaviour in public office (para 22). The appellant’s public representation of the bona fides of the participants in the project was “a complete misrepresentation ... made without any due diligence having been carried out whatsoever” (para 27). He took no steps to protect the public interest and shut his eyes to the obvious and acted recklessly in the extreme, if not deliberately. He permitted or allowed a framework “which gave total control to Dr Rolla and permitted him to freely execute his fraud” (para 33). “He publicly extolled the background and business acumen of Dr Rolla and the benefits of the projects well knowing that there was absolutely no independent due diligence to support his wild assertions” (para 34). “He sought to coerce or mislead the [trustees] into transferring the land held in trust by them to an empty shell of a company ... Dr Rolla enjoyed complete sway aided and abetted by [the appellant] and his cohorts who acted without any scruples or compunction.” (para 43). The appellant’s conduct amounted to “a pattern of gross misbehaviour” (para 44). Finally, in para 45 quoted above, the respondent variously described the appellant’s “misbehaviour” as amounting to a total dereliction of duty and to substantial irresponsibility and described the projects (including the Project) as being in substance “a Mitchell’ thing!”

43. While the opinion of the Board depends upon the contents of the Interim Report, that opinion is confirmed by the surrounding circumstances, in particular the proximity of the Report’s release to the election and the Salmon letter. The Salmon letter was relied on in the courts below on the “procedural fairness” issue, as evidence of the fact that the appellant had been invited to rebut the evidence against him and so it did not matter that he had not given evidence by the time of the Interim Report, but (as appears from the passages quoted above) in the opinion of the Board it is also evidence of the fact that the respondent had not changed his mind. The fair-minded and informed observer would be fortified in his conclusion based on the Interim Report on reading the similarly strong language contained in the Salmon letter, with its reference, for example, to “the naked deceit displayed by yourself [i.e. the appellant] and others”.

CONCLUSION

44. The extracts from the Interim Report set out above strongly support the conclusion that, having regard to the context and all the surrounding circumstances, the fair-minded observer would conclude that there is a real possibility that the respondent had made up his mind by the date of the Interim Report

that the appellant was at the heart of the wrongdoing which led to the Project and its collapse and would not be willing to change his mind, so that his final report would not be impartial.

45. In these circumstances the Board will humbly advise Her Majesty that the appeal should be allowed. The parties should make written submissions on the appropriate form of order and on costs within 21 days of this judgment being handed down. The provisional view of the Board is that, in addition to an order that the appeal be allowed, the only other order which it would be appropriate to make (apart from costs) is a direction that the respondent should take no further part in the Commission. As to costs, it is the provisional view of the Board that the respondent should pay the appellant's costs before the Board and in the courts below.