Judgment 39/2006 **Yaddehige v Credit Suisse Trust Limited, Partners of Collas Day and MPR Private Clients Limited – Royal Court (Civil Action File 983) – 9th August 2006**

Possible conflict of interest or bias as respects judge – test to be applied – held that a fair-minded and informed observer would not have concluded there was a real possibility of bias

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 9th day of August, 2006, before Alan Robin Winston Hancox Esquire, E.G.H., C.B.E., Lieutenant Bailiff, sitting alone

SENA YADDEHIGE……...Plaintiff

And

CREDIT SUISSE TRUST LIMITED
PARTNERS of COLLAS DAY……Defendants
MPR PRIVATE CLIENTS LIMITED

WHEREAS on the 25th day of July, 2006, the Lieutenant Bailiff stated that there might exist a conflict of interest which would preclude him from continuing the hearing of the *Exceptions de Forme and Declinatoire* filed respectively by Counsel appearing for each of the parties herein on the 27th day of February, 2006

AND heard the submissions of Counsel aforesaid thereon

(1) CONCLUDED that a fair minded and informed observer, being informed of all the circumstances relevant to the said issue, would not consider that there existed a real possibility of bias

(2) SET the aforesaid *Exceptions* for further hearing on the 30th day of August, 2006, and the 25th and 26th days of September, 2006, respectively

(3) ISSUED a formal written Ruling in the terms attached hereto

S.M.D.ROSS
Her Majesty's Deputy Greffier
IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

SENA YADDEHIGE……...Plaintiff

And

(1) CREDIT SUISSE TRUST LIMITED
(2) PARTNERS of COLLAS DAY……Defendants
(3) MPR PRIVATE CLIENTS LIMITED

Ruling on Conflict of Interest.

1. In brief outline this action arises from alleged negligent advice given to the Plaintiff as to the tax liability of the Sensor Trust Ltd both before he moved to Guernsey on or about the 15th April, 1999, and subsequent thereto. It is recited in the Amended Cause lodged in Court on the 6th January this year (for which leave was not opposed at the inception of the hearing on 15th May) that (a) prior to April of 1999 Dr. Yaddehige was the Settlor and a beneficiary of the former Sensor Trust Ltd, (b) a substantial part of the trust fund consisted of all the shares in a company known as Precision Varionics International Ltd (PVI) and registered in Guernsey with exempt tax status and (c) that until he moved to Guernsey Dr. Yaddehige was resident in the United Kingdom but was desirous of taking up residence in Guernsey.

2. The First Defendant, Credit Suisse Trust Ltd (Credit Suisse), was at all material times the trustee of the Trust, (now called the Karolis Trust Ltd, to which it will henceforth be referred). The Plaintiff sought advice from Credit Suisse on the tax implications of his proposed move both as regards his personal affairs and as regards the steps which would be necessary in order to preserve the exempt tax status of PVI, as the main asset of the Trust, in accordance with the provisions of Section 40A of the Income Tax (Guernsey) Law 1975, as amended, after the said move.

3. Credit Suisse referred the matter to the Second Defendants for legal advice, and they, in turn, recommended that the Third Defendant, as a local tax accountancy firm, be consulted. Each of the Defendants is then alleged to have given negligent advice to the Plaintiff. On 27th February this year each Defendant filed a Defence in the form of *Exceptions de Fond and Declinatoire*. Advocate Barnes, on the Plaintiff's behalf, has filed a Replique to those parts of the respective Defendant's *Exceptions* which plead that the claim is prescribed under the Loi Relative aux Prescriptions 1889 and Section 4(1) of the Law Reform (Tort)(Guernsey) Law 1979.

4. The initial Replique is at TAB 5 of the Pleadings Bundle, and a considerably expanded version thereof was lodged without objection at the commencement of the hearing on 15th May, 2006, and appears at TAB 8. It states, *inter alia,* that any alleged period of prescription did not begin to run until 4th March, 2002, which was the date on which an officer of the Third Defendant advised the Plaintiff that the Guernsey Tax Tribunal had decided that the Plaintiff would be treated as principally resident in Guernsey for the tax years of charge 1999 and 2000.

5. These *Exceptions*, the hearing of which had been estimated at two days in the Interlocutory Court on 7th April, were heard on 15th, 16th and 17th May when it became apparent that the Court time needed had been substantially under estimated, and that a further three days would be necessary. At the beginning of the review of the case on 25th July, 2006, I indicated that there might be a possible conflict of interest, and the text of this statement appears as Annexure A to this Ruling.

6. Counsel for each of the parties was good enough to say that he or she had no objection to my continuing to sit and decide the matter, but, while the lack of objection by the parties is a factor—an important factor—to be taken into account, it is axiomatic that it is ultimately a matter for the Court to decide an issue of a possible conflict, see Butterworth's Law of the European Convention on Human Rights [1995] at page 239, which states:

> **"The impartiality (or independence) of the court is a structural matter of general public interest which a particular party to court proceedings should not be permitted to waive."**

In determining the issue of possible bias, it is not the impression in the mind of the person sitting on the case in a judicial capacity, but the impression given to reasonable and fair-minded members of the public, which is determinative.

7. As appears from this quotation from the judgment of Lord Phillips M.R. (as he then was) in In re Medicaments & Related Classes of Goods (No 2) [2001] 1 WLR 700 the criterion is not the Court's own view of the circumstances, once they are known, but the Court's view of the view which would reasonably be formed by fair-minded members of the public. At paragraph 63 he said:

> **"….[the decisions of the Courts] 'indicate that it is the court's view of the public's view, not the court's own view which is determinative. If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored."**

9. If further support were needed that this is the correct approach in a case of this kind, it is to be found in Lord Goff of Chieveley's citation in R v. Gough [1993] AC 646 at page 666 D to G, of Lord Denning's statement in the earlier case of Metropolitan Properties Co (F.G.C Ltd) v. Lannon [1969] 1 QB 577 at page 599 B to D, as follows:

> **"In considering whether there' [is] 'a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there' [is] 'a real likelihood that he would……..in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit the decision cannot stand: see Reg. v. Huggins [1895] 1 Q.B 563; and Rex v. Sunderland Justices [1901] 2 KB 357 per Vaughan Williams L.J. at 373. Nevertheless there must appear a real likelihood of bias. Surmise or conjecture is not enough."**

10. It is true that two pages later Lord Goff said he thought Lord Denning had laid down too rigorous a test on the issue of bias, and continued [page 668 B to C] :

"In my opinion if, in the circumstances of the case (as ascertained by the court) it

> **appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand."**

Still later [page 670 E to F] Lord Goff, in conclusion, said:

> **"For the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."**

11. Having reviewed the speech of Lord Goff at length, in the Medicaments case Lord Phillips said at pages 726 and 727:

> **"85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v. Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. 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."**

12. It would seem that a further 'modest adjustment' was necessary when the House of Lords came to consider the second appeal in Porter v. Magill [2002] AC 447. Having reviewed all the decisions on the point, Lord Hope of Craighead said at paragraph 101:

> **"The English Courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in *R v. Gough*. In *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (no 2)* [2000] AC 119, 136A—C Lord Browne–Wilkinson said it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said at p142F—G that, although the tests in Scotland and England were described differently,' [the Scottish test being whether there is a reasonable apprehension of bias] 'their application was likely in practice to lead to results that were so similar as to be indistinguishable.**
>
> **The Court of Appeal, having examined the question of whether the 'real danger test' might lead to a different result from that which the informed observer would reach on the same facts, concluded in Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451, 477 that in the overwhelming majority of cases the two tests would lead to the same outcome.**
>
> **102. *In my opinion, however it is now possible to set this debate to rest*. [My italics]. The Court of Appeal took the opportunity in In re Medicaments & Related Classes**

> **of Goods (No 2) [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed at p 711A—B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty reflected in judicial decisions that had appeared in conflict, that the attempt to resolve that conflict in *R v. Gough* had not commanded universal approval.**

13. Lord Hope then referred to Lord Phillips' belief that the time had come to review R v. Gough to see whether the test laid down therein did conflict with the Strasbourg jurisprudence, and he then cited paragraph 85 which I have quoted above in paragraph 11. Lord Hope recommended to their Lordships that the House should approve the 'modest adjustment' of R v. Gough, but continued (paragraph 103):

> **"I would, however, delete from it' [the test in R v. Gough] 'the reference to "a real danger". Those words no longer serve a useful purpose here, and they are used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."**

14. The objective of all the foregoing authorities is that every person, whether a party to a civil or criminal case, or any other proceeding, has an absolute right to a fair trial. Since the advent of the Human Rights legislation in the United Kingdom, this right is now enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [1953], which states:

"Right to a fair trial"

> **"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."**

15. Manifestly, if the person conducting the trial, that is to say the decision-maker, has an interest which conflicts with his duty to be impartial, then there is a breach of Article 6, as now embodied in English law by the Human Rights Act 1998. Although the Convention has not so far been incorporated into the municipal law of Guernsey I am content to follow the view taken by Talbot L.B. in Law Officers of the Crown v. Gary David Ogier [2002] 28th January, in which a similar issue had arisen as here, at paragraph 26, that:

> **"…….it is generally appropriate in Guernsey to take account of the jurisprudence relating to the Convention unless either existing Guernsey legislation or binding decisions of the Courts of Guernsey appear to have an effect contrary to the article of the Convention in question."**

As Talbot L.B. observed there were no such legislation or decisions there, and there are none such here. Day D.B in Law Officers of the Crown v. Benford & Carter [2002] 10th January, at page 31, is to similar effect:

> **"In the view of their Lordships in Looseley' [(2001) 1 WLR 2060 HL(E), the principles of English law now established with regard to staying proceedings as an abuse of process of the court, in the circumstances of entrapment, are in conformity with the Convention and its jurisprudence. As we should follow those English principles, so equally we must conform. I have already indicated that whilst we do not yet have in force our equivalent of the Human Rights Act, 1998, nevertheless, by our inter-**

national obligations we are obliged to apply the Convention, guided by its jurisprudence, unless in any particular matter we are bound by authority, statutory or otherwise, which would inevitably preclude our taking into account the Convention. There is no such binding authority with regard to abuse of process in circumstances of entrapment."

16. The question, therefore, which every court in this jurisdiction dealing with a case in which the circumstances raise the possibility of apparent bias, must answer, before it embarks on, or resumes, as the case may be, the hearing is enshrined in that comparatively short and simple sentence pronounced by Lord Hope at the end of the quotation in paragraph 13 hereof. I am acutely conscious of the fact that that in a small society such as Guernsey the incidence of contact between members of the Bench and members of the public, or of the profession, who are, or are likely to be, involved in litigation, whether civil or criminal, before them is greater than in larger societies such as the countries in the European Union.

17. It can, accordingly, be argued that, if the Courts were to decline to hear cases on the grounds of such contact, notwithstanding that the risk of partiality was ever so slight, the smooth functioning of the judicial system would be impaired, leading to the general prejudice of the public interest. Quite clearly, each instance where such contact, giving rise to a suggestion or impression of partiality, arises, must be considered on its own facts and in its own circumstances. Nevertheless, in my opinion, the test stated by Lord Hope must remain of paramount importance.

18. I return to the Medicaments case. Dr.Rowlatt (the member of the Restrictive Practices Court to whom the submissions of apparent bias related) disclosed to the presiding Judge on Tuesday, 7th November, 2000, that she had, the previous Friday, telephoned a senior member of Frontier Economics (one of the firms involved), who was an expert witness who was shortly to be called, with a view to securing employment. On the Judge's directions this information was faxed to leading Counsel for the parties, who immediately invited Dr.Rowlatt to recuse herself. The hearing had commenced on 2nd October, 2000.

19. Dr.Rowlatt having refused to comply, on 15th and 16th November the Applicants followed up their objection with applications that Dr.Rowlatt should withdraw and that the other members of the Court should stand down on the grounds that they were infected with her apparent bias. The Court rejected both applications, but the Court of Appeal reversed that decision, notwithstanding that by the time objection was taken the hearing had lasted nearly three weeks, plus two and a half weeks for pre-reading of the voluminous documents tendered to the Court. These consisted of 170 closely packed bundles of documents, lengthy statements of 39 witnesses and of 19 experts.

20. That the wastage of the time, money and effort which would occur as a result of the Court of Appeal's decision was very much present to Lord Phillips' mind is apparent from paragraph 12 of his judgment in which those matters are summarised, for he referred to the fact that the volume of the documentation had necessitated the setting aside of a special courtroom for the hearing. Consequently the issue of costs potentially thrown away in the instant case, while a factor to be considered, cannot materially affect this decision.

21. In Porter v. Magill the issue arose as to the position of the auditor who had certified that some £31.67million was due from Dame Shirley Porter and Mr David Weeks, who were Westminster City Councillors, for alleged wilful misconduct, in that they were the architects of a scheme to designate sales of council dwellings in the hope and belief that if more dwellings were owner-occupied in eight marginal wards, the more likely it would be that voters would support the Conservative party in those wards. The case went to the Court of Appeal and the House of Lords, to the latter mainly on the ground that the auditor was an interested party and should have recused himself.

22. It is apparent from the judgments, especially of the Court of Appeal, that a statement by the judge or other person who is invited to recuse himself or herself that he or she is not biased can be of little value—Schiemann L.J., while accepting that there was no question of actual bias on the part of the auditor, referred [page 400*C*] to the auditor's

> **"…….inevitably self-serving protestations when he refused to recuse himself……".**

I therefore address the question posed by Lord Hope, namely, considering the issue objectively—would a fair-minded and informed observer, having considered the facts, conclude that there is a real possibility that I will be biased in deciding the applications before me?

23. There are distinguishing features between the instant case and the position of Dr. Rowlatt in the Medicaments case, and between this one and the case of Gary David Ogier *(supra)*. In the former witnesses were involved. Here there are none at this stage, so there is no issue of credibility. Furthermore:

(i) the principal expert for Frontier Economics was Dr Zoltan Biro, with whom, had she been engaged by it, Dr. Rowlatt would have been closely associated;
(ii) Dr. Rowlatt was a member of the Court before which Dr. Biro was shortly to be called. He would be the principal expert witness for the Director-General, and the other potential expert witness had relied heavily on Dr. Biro's report
(iii) Dr. Rowlatt 'for completeness', as it was described, was driven to sending a personal statement further to the initial fax she had sent (on Lightman J's instructions) which contained more disclosures—namely details of two additional telephone calls between herself and Frontier, plus another letter from Frontier, all of which occurred *after* the initial disclosing fax.
(iv) Leading Counsel for the two appellant Associations strenuously objected, *at the hearing* that Dr. Rowlatt should continue to sit, contending—*inter alia*—
  (a) that the Frontier letter was intended to get Dr. Rowlatt off the hook by emphasising that she had no prospect of employment by Frontier and thus improve the prospect that the applications to discharge the orders of exemption that the D—G had made in their favour would fail, and
  (b) that the impression of partiality created by the foregoing could not by then be undone.

24. Coming to the Ogier case, Talbot L.B. acknowledged that the magistrate had briefly adjourned to consider the possibility of apparent bias on his part, having prosecuted and represented the IDC in proceedings against another individual, over seven and six years' earlier respectively, for an infringement of the Island Development Law 1966, as amended, in his then role of Crown Advocate, but had not taken sufficient time to reflect on the matter.

Moreover, he had not prepared a statement to deliver in open court at a separate hearing so that Counsel could then take informed instructions from her client before deciding whether or not to submit that the magistrate should recuse himself on the ground of his earlier involvement not, be it noted, with the particular accused before him, but with Mr. Ogier's predecessor in title to the property in question.

25. It is clear that Talbot L.B. had in mind the same principles which I have endeavoured to express, for he cited R v. Gough, the Medicaments case, and, in addition McGonnell v. The United Kingdom [2000] 8th February, and other cases which are in line with these. However it would appear that the House of Lords decision in Porter v. Magill might not have been available at that time, because it was delivered on 13th December, 2001, and Mr. Talbot's Ruling was on the 28th January, 2002—although the Court of Appeal judgment would have been available. But it seems to me that that which was referred to as the 'small but important shift' in the operative requirements of the test approved in Porter v. Magill in Lawal v. Northern Spirit Ltd [2004] 1 AER 187, by Lord Steyn at page 193f, would not have made any difference to the substance of Talbot L.B's Ruling in the Ogier case.

26. From the following passage at paragraph 32 of Talbot L.B's judgment, namely:

> **"……..I lean to the view that what' [the magistrate] ' needed to do, in order fairly to deal with the question, was to take the steps which I have mentioned in the previous two paragraphs of this judgment' [being those which I have just summarised],**

coupled with the preceding phrase that the magistrate could have decided then and there not to continue with the case, I consider it is reasonable to infer that Talbot L.B. was far from saying that the magistrate should not have continued with the hearing against Mr. Ogier, and then proceeded to convict and sentence him. His decision to my mind suggests that if the magistrate had taken the desired steps, the conviction would, on that ground at any rate, have been upheld. It also occurs to me that there was a lack of emphasis by the Crown representative that, while the same parcel of property was involved, the ownership thereof had changed, and that there was therefore a different accused.

27. There are two further relevant factors which distinguish the Ogier Case from this one: (a) it was a criminal case and thus the liberty of the subject might (though this was in fact unlikely) have been threatened, and (b) the relative inexperience of the accused's advocate was mentioned, a factor relevant to the waiver of the accused's right to object to the magistrate. Moreover, I observe that in Delcourt v. Belgium [1979] 1 EHRR 369, paragraph 31, cited in the Medicaments case at paragraph 724, the Court of Cassation said that it would be going too far to say that former officers in the public prosecutor's department would be unable to sit on the bench in every case that had been examined by the Department, even though the Judge had never personally dealt with the case.

28. In her work entitled 'Human Rights Law [2006]' under the heading:

'Test for Independence and Impartiality [of a Tribunal]'

in sub-title 8.1.2. entitled 'Objective Test' Merris Amos states at page 319:

"It is unnecessary to delve into the characteristics to be attributed to the observer. One is entitled to conclude that such an observer will adopt a balanced approach, Neither complacent nor unduly sensitive or suspicious."

This approach was approved by Lord Steyn in Lawal v. Northern Spirit Ltd *(supra)* at page 193g.

29. In the present case a prepared and typed statement was made by me at the outset of the review of the case on 25th July. Counsel were specifically invited to seek an adjournment in order to take instructions from their respective clients, and, if they so wished, then to prepare submissions as to recusation. They did not do so and each specifically said he or she had no need to take instructions. Furthermore each Advocate can be said to be well experienced (in two instances highly experienced) in civil matters and in Court practice and procedure. It cannot, in my view, be contended here that their respective waivers of the right to object were invalid.

30. It is inevitably a matter of some delicacy for a sitting judge to have to decide, albeit objectively, whether he would be affected by apparent bias or not. However, in the instant case, in the light of the considerations I have set out above, and having considered the issue as a whole with anxious care, I reach the conclusion that a fair-minded and informed observer, having considered all the circumstances, would not reach the conclusion that there is a real possibility of bias. Accordingly, in the hope that this will afford enough time for the arguments on these *Exceptions* to be concluded, I now set the case for continued hearing on 30th August, and the 25th and 26th September, 2006, which are dates on which all Counsel have intimated they will be free and available.

A.R.W.Hancox.
Lieutenant Bailiff
9th August 2006.

Annexure A.

Statement by ARWH: Sena Yaddehige v. Credit Suisse, Collas Day & MPR Ltd.

During the last week of May, in view of my impending retirement from the Royal Court, I received instructions that the matters in which I was involved, including this case, should be transferred to other Lieutenant Bailiffs who visit Guernsey from time to time. This case was apparently assigned to Mr. Talbot.

Accordingly, in mid June I had a discussion with a local firm regarding a possible connection in due course. The discussion was purely preliminary in nature and did not result in any firm arrangement. The firm in question is the Second Defendant.

Subsequently, due to a misunderstanding, I was asked to continue with the hearing of the instant case. Clearly, on the authority of the Medicaments Case [2001] 1 WLR 700, and the more recent House of Lords decision in Porter v.

McGill [2004] and in particular, Lord Hope at paragraphs 102 to 103, and under the general law, I have to declare a possible conflict of interest, and I do so.

Perhaps Counsel might wish to make submissions regarding this matter, and, if necessary, take instructions before doing so.

