5-12-03

IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

C.I.C.A. (Civil) #s 17& 20 of 2003

BETWEEN:

(GC Cause # 625 of 2002)

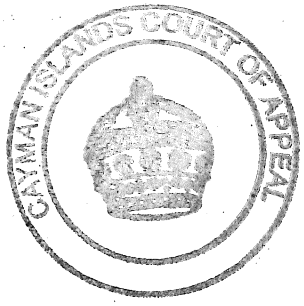
DR. CHRISTOPHER BROMLEY

1st Respondent

and

THE HEALTH SERVICE AUTHORITY

1st Appellant



(GC Cause # 428 of 2002)

DR. S. K. MOHANTY

2nd Respondent

and

DR. HEAP ET AL

2nd Appellant

(GC Cause # 604 of 2002)

DR. S. K. MOHANTY

3rd Respondent

and

THE HEALTH PRACTITIONERS' BOARD

3rd Appellant

(GC Cause # 863 of 2002)

DR. S. K. MOHANTY

4th Respondent

and

THE HEALTH PRACTITIONER'S BOARD

4th Appellant

BEFORE: **THE RT. HONOURABLE MR. JUSTICE E. ZACCA, PRESIDENT**
THE HONOURABLE MR. JUSTICE I. D. ROWE, J.A.
THE HONOURABLE MR. JUSTICE M. TAYLOR, J.A.

Stephen Hall-Jones, Solicitor General (Acting), and Mr Keith Myers, Crown Counsel (Civil) for the Appellants, Ramon Alberga Q.C. of Myers & Alberga and Simon Dixon of Quin and Hampson for the Respondents.

Heard: 14th & 15th July, 2003 **Delivered: 5th December, 2003**

Reasons for Judgment

ZACCA, P.

This was on application for leave to appeal against the Order of Sanderson J. whereby he dismissed an application that he recuse himself from hearing any cases in which the Health Service Authority (H.S.A.) was a party.

It was agreed that the hearing of the application for leave to appeal would be heard *inter partes* and the hearing treated as the hearing of the appeal.

The applicants who were the defendants in causes No. 428, 625, 604 and 863 sought judicial review of decisions made by the H.S.A. In these cases the doctors sought judicial review of certain issues involving administrative decisions made by the H.S.A. These decisions affected their employment and denial of hospital privileges. Dr. Mohanty was denied registration as a urologist and denied access to the hospital.

The defendants' application for recusal was on the basis that Sanderson J. had previously had a dispute with the H.S.A. regarding his health coverage.

Prior to the hearing, Sanderson J. sought to explain to the defendants' Counsel what had transpired in regard to his health coverage. This was to

give Counsel an opportunity to consult with the defendants as to whether they wished to pursue the application for recusal.

Sanderson J. informed Counsel for the defendants that he had never had a dispute with the H.S.A. He did however, have a dispute with the former Governor, over the terms of health coverage provided under his appointment as a Judge.

Under the terms of his appointment Sanderson J. was entitled to coverage with the doctor or dentist of his choice. When he was unable to get the necessary dental treatment from the Government dental clinic, he was advised by the Chief Medical Officer's Office that if the Governor would confirm by letter the terms of his contract, then the Government would pay for the dental treatment, which he required, from another dentist.

Sanderson J. reiterated that the H.S.A. and the Office of the Chief Medical Officer had informed him that they would provide or pay for whatever medical coverage was specified in the terms of his appointment but what they required was a letter from the Governor setting out what that coverage was. Counsel was informed further that the Governor agreed on two

occasions to provide the letter indicating the full nature of the coverage but subsequently decided not to do so.

Sanderson J. was of the belief that the Governor's decision was based on precedent setting considerations and the costs that it might incur. The Judge gave a full explanation as to what had transpired between himself and the H.S.A. and the Governor. He had no dispute with the H.S.A. The issue or dispute was with the former Governor.

Sanderson J. invited Counsel for the defendants to take time to consider this application and take instructions, which he did.

Upon the resumption of the hearing Counsel informed Sanderson J., that after consulting with the defendants he was instructed to pursue the application to have the Judge recuse himself on the basis of reasonable apprehension of bias.

It appears that having heard the explanation of the Judge, Counsel then submitted that although the "dispute" over the contractual terms of the health coverage was with the Governor and not the H.S.A., it nevertheless related to a health care issue and could subconsciously spill over and impair the Judge's impartiality in deciding the cases. Counsel conceded that his

"dispute" with the Governor's Office over contractual health care coverage would not, however, impair his impartiality in dealing with cases involving other branches of the Government.

Counsel advanced the argument that, because the Judge's "dispute" involved health care, he subconsciously might be prejudiced or at least there could be a reasonable apprehension of bias, because he had been unhappy with the health coverage "issue".

Sanderson J. accepted that if he had a dispute with the defendants over his health care coverage and that dispute was reasonably capable of creating a real danger of bias or reasonable apprehension of bias then he should disqualify himself.

Counsel submitted to this Court that a reasonable man sitting at the back of the Court having heard the explanation would not have drawn the fine contract distinctions used by the Learned Judge. He would have understood that the Learned Judge had "a dispute" with the "authorities" and not with any particular department or authority.

Sanderson J. concluded that on the evidence, there was no basis for any reasonable apprehension of bias. Whilst he did not disqualify himself on the

grounds of bias he was of the view that the defendants were Judge shopping and that they had been abusing the process of the Court in an attempt to have the cases tried by another Judge who they thought might view their cases more favourably.

In view of his finding as to the motives of the defendants he concluded that he would not hear the cases.

The House of Lords held in ***Porter v Magill*** [2002] 1 All E.R. 465, that in determining whether there had been apparent bias on the part of a tribunal, the Court should no longer simply ask itself whether there was a real danger of bias, but whether the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal had been biased.

In ***Locabail (UK) Ltd. v Bayfield Properties Ltd. and another*** [2001] 1 All E.R. C.A. 65, a judgment of the English Court of Appeal presided over by Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.C. the Court at page 77 in paragraphs 24 and 25 stated:-

> 24. "In the Clenae case [1999] VSCA 35 Callaway JA observed (para 89(e)):

'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application'.

25. 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. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies, or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6#8 8/91)). 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 could be significant in the decision of the case, or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (*see Vakauta v Kelly (1989) 167 CLR 568*; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the

> objection is raised, the weaker (other things being equal) the objection will be."

In our view the evidence was wholly inadequate to persuade the trial judge that the informed observer would apprehend the possibility of bias on the part of the judge. Sanderson J. was therefore correct in refusing the application to recuse himself from hearing the cases.

The institution or maintenance of the summons for recusal did not amount, in our view, to an abuse of the process of the Court. The evidence before the Court below did not support a finding of judge shopping. The defendants may well have honestly believed, that a dispute between the judge and the Governor concerning health coverage could have a bearing on the mind of the judge.

It appears to have been because he had already formed the conclusion that there had been abuse of process that the Judge declined to hear the application for judicial review. That was, in the circumstances, a proper course to adopt.

The appeals were dismissed with costs to the respondents to be taxed if not agreed.

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ZACCA, P.

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ROWE, J.A.

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TAYLOR, J.A.