

**STATE v PRESIDENT OF THE FIJI ISLANDS, JUDICIAL  
SERVICES COMMISSION, CHIEF JUSTICE OF FIJI, ATTORNEY-  
GENERAL, JAYANT PRAKASH;  
ex-parte Iftakhar Iqbal Ahmad Khan**

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High Court Civil Jurisdiction  
Gates, J  
12 October, 2000  
HBJ007/2000L

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*Constitutional law — Fiji — Courts and Tribunals — Chief Justice unlawfully and unilaterally directed Puisne Judge to transfer proceedings to another Judge — Appearance of justice sullied — Chief Justice a party to those proceedings — Chief Justice failed to disclose to other parties series of material memoranda to effect unlawful transfer — Puisne Judge disclosed the memoranda to all parties — Bias alleged — Civil procedure — Chief Justice swore affidavit before non-independent commissioner — Definition of cause of action — Proceedings properly commenced — Transfer refused — Administration of Justice Decree 2000 (Fiji), s2(2); Criminal Procedure Code (Fiji), ss 117(3), 345, Crown Suits Act 1908 (Fiji): High Court Act (Cap 13) (Fiji), ss 2, 6, 25(2); High Court (Amendment) Act 1998 (Fiji), s9; Interpretation Act (Cap 7) (Fiji), s2; Magistrate Court Rules (Cap 14) (Fiji), Ord XIII R 1; Rules of the Fiji High Court, Ord 4 R 1, Ord 32 RR 8, 9(k), Ord 33, 41 RR 5, 8, Ord 53 R 3; Rules of the High Court (Eng), Ord 4 R 3: Supreme Court Act (Eng), s65*

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The applicant, a lawyer, challenged by judicial review the appointment of the fifth respondent as an Acting High Court Judge. The proceedings were filed in the High Court Registry at Lautoka, where the fifth respondent would sit as a Judge. The first respondent (the President of Fiji), second respondent (the Judicial Services Commission), third respondent (the Chief Justice of Fiji and Chairman of the second respondent) and the fourth respondent (the Attorney-General) all filed a summons requiring the proceedings to be transferred to the High Court at Suva. The applicant and fifth respondent opposed the transfer. The swearing in of the fifth respondent had occurred in the Lautoka High Court, and the applicant both resided in and was a practising barrister in Lautoka.

While the transfer summons was pending adjudication, the Chief Justice issued a memorandum stating that all judicial business in the High Court was allocated by the Chief Justice or on his behalf by the Chief Registrar. The trial Judge, Gates J, disclosed to all parties that memorandum and another memorandum written by the Chief Justice stating that the instant proceedings were now unilaterally assigned to Scott J and transferred to the High Court at Suva. Gates J also disclosed a further memorandum from the Acting Chief Registrar in Suva to the Deputy Registrar in Lautoka stating the Chief Justice was concerned about the improper acceptance by officials in the Lautoka Registry for filing of three sets of proceedings, including the present judicial review; as they should have been filed in the Suva Registry. Counsel for the Chief Justice argued that as Gates J had disclosed to all the parties the series of confidential and highly material

memoranda, this disclosed that he was biased and asked Gates J to disqualify himself. The applicant and fifth respondent submitted that the Judge had properly and necessarily made the disclosure in the interests of justice.

A preliminary objection was taken to two affidavits filed on behalf of the Chief Justice, who had sworn the affidavits before the Acting Chief Registrar and a Deputy Registrar. It was argued that both commissioners were employees of the department headed by the Chief Justice and that this offended, if not the strict letter of Ord 41 R 8 of the High Court Rules, at least its spirit. The Chief Registrar had many duties, one of which was to work closely with the Chief Justice and be subject to his directions. The Deputy Registrar's name was attached to a letter to the *Fiji Times* newspaper seeking to explain the Chief Justice's role in the present application to transfer the case to the Suva High Court.

The commencement of the substantive judicial review proceedings was governed by Ord 4 R 1(1), which said proceedings must ordinarily be commenced in the High Court registry located in the division in which the cause of action arose. The application was to judicially review the decisions by the second respondent (the Judicial Services Commission, chaired by the Chief Justice) to recommend the appointment of the fifth respondent as Acting Puisne Judge and the President's decision to appoint him as a Puisne Judge. Those decisions were made in Suva.

**Held** (refusing to transfer the proceedings to the Suva High Court)

(1) The statement in the Chief Justice's memorandum that the position in law was that all High Court business was allocated by the Chief Justice and therefore could be unilaterally transferred at his insistence was wrong in law. There was no jurisdiction providing such a power. A Judge once seized of a matter must be left to decide alone whether he continued with it or whether he transferred it to another Judge.

(2) The appearance given to the other parties who were previously in the dark about the Chief Justice's memorandum directing that the case be transferred to Scott J in the Suva High Court, would be that one of the litigants was selecting his own venue and indeed his own Judge. Justice must palpably be seen to be done. It was obvious that a Judge who had agreed to hear a case at the instigation of one litigant only would be automatically disqualified from hearing the matter. Section 25(2)(k) of the High Court Act did not empower the Chief Justice to order the transfer of cases from one Judge to another.

(3) The allegation of bias was prompted by the trial Judge disclosing a series of memoranda revealing that the Chief Justice (third respondent) had arranged for his choice of Judge to adjudicate on the challenged decision of himself and the second respondent of which he was Chairman. This choice was neither revealed by the third respondent in his application to transfer the proceedings, brought by summons, nor subsequently explained after disclosure of it. But this information had to be divulged. The fundamental principle was that a man could not be a Judge in his own cause. Disclosure of the directive from the third respondent for the assignment of the case to the third respondent's choice of Judge was imperative. A trial Judge must always strive for absolute impartiality and his duty was to protect each and every litigant from potentially unfair or

improper advantages at the hands of other litigants. Such a striving for fairness and absolute impartiality was a radically different concept from bias. ;

*R v Bow Street Metropolitan Stipendiary Magistrate, ex pane Pinochet*  
*(No 2)* [1999] 2 WLR 272 (HL) applied.

a (4) The exercise of the power of transfer was discretionary. It was a decision for the Judge seized of the case to divest himself of it, in consultation with brother Judges, including the Judge who was to hear the case. In this case, the applicant and the fifth respondent, the parties with the most at stake in the litigation, expressly desired the case to remain in Lautoka. Both had to fund their own litigation and travel costs. The first to fourth respondents were all funded by the public purse. It was in the interests of justice that the matter remained in Lautoka. The application for transfer was refused.

b *Barclays Bank Plc v Bemister* [1989] 1 WLR 128 applied. *Dorney v Sunflower Airlines Ltd* (Fiji High Court. Suva Civil Action 460/89, 4 November 1999, Shameem J) considered.

c (5) It was not appropriate for the third respondent (Chief Justice) to swear affidavits in front of either the Chief Registrar or the Deputy Registrar. The administering of the oath to a deponent who swore to the truth of the contents of his affidavit was a judicial process or proceedings. The non-identification of interests of deponent as against the person before whom he swore the affidavit and the commissioner's independence from the deponent's cause were matters of some importance. The Chief Registrar's knowledge of the substantive judicial review proceedings could be inferred, as he was also Secretary of the Judicial Services Commission (the second respondent) by virtue of his office. The Deputy Registrar also lacked the necessary independence from and lack of knowledge of the evidence deposed before her, the issue of transfer. However, the affidavits of the third respondent had earlier been allowed in and they would be considered for the purposes of the transfer application. Both affidavits would be removed from the Court file and fresh affidavits sworn before independent commissioners and then filed and served.

*Bourke v Davis* (1889) 44 Ch D 110 and *Foster v Harvey* (1863) 46 ER 837 (CA) applied.

f (6) The proper Registry for commencement of High Court proceedings turned on the extended meaning of "cause of action". Identification of the place of any decision under challenge was less important than taking into account the whole factual matrix on which the applicant relied to show that the proceedings had been filed in the proper Registry.

*Read v Brown* (1888) 22 QBD 128 applied. *Bass v R* [1948] NZLR 777 and *Dillon v Macdonald* (1902) 21 NZLR 375 (CA) considered. *Gunac Hawkes Bay (1986) Ltd v Palmer* [1991] 3 NZLR 297 and *Colman v Attorney-General* (High Court, Wellington A 629/77, 3 August 1978, Quilliam J) distinguished.

g (7) The affidavits filed in support of the application to transfer the proceedings were of little assistance. An affidavit should have been filed establishing that the facts giving rise to the cause of action arose in Suva. There were proper circumstances permitting the applicant to commence his judicial review proceedings in the Lautoka High Court Registry. Every fact did not have to occur within a particular jurisdiction. So long as a plaintiff relied on facts that

were the basis of his claim, some of which occurred within the jurisdiction where he sought to commence his action, he could rightfully file an action within that jurisdiction.

**Jackson v Spittal** (1879) LR 5 CP 542 applied.

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### Application

This was an application by way of summons dated 22 August 2000 by the first, second, third and fourth respondents under Ord 4 of the High Court Rules to transfer judicial review proceedings from the Lautoka High Court to the Suva High Court. The applicant and fifth respondent opposed the application.

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**Editorial Note:** The third respondent (Chief Justice) did, subsequent to this judgment, re - file and re - serve the original affidavits though sworn on this occasion though before an independent commissioner.

This note extracted from [2002] NZAR 393

Application to transfer proceedings from Lautoka to Suva refused.

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### Cases referred to in judgment

folll *Amina Koya v State* [1998] CAV0002/97 26 March 1998

Cons *Auckland Casino Ltd v Casino Central Authority* (1995) 1 NZLR 142

Dist *Baker v Ambrose* [1890] 2 QB 372

Cons *Bass v The King* [1948] NZLR 777

folll *Bennett v White* [1910] 2 KB, 643

d

Appr *Bourke v Davis* (1890) 44 Ch D. 110

Cons *Coleman v Attorney-General Wellington* A 629/77 3 August 1978

Cons *Dillon v Macdonald* (1902) 21 NZLR 375

appl *Foster v Harvey* [1863] 46 ER 837

Dist *Gunac Hawkes Bay (1986) Ltd. v Palmer* [1991] 3 NZLR 297

appl *Jackson v Spittal* (1870) L.R. 5 C.P. 542

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appl *Re Kim Industries Limited* (No. 1) [2000] HBF0036/99L 7 July 2000

Cons *Livesey v N.S.W. Bar Association* (1983) 151 CLR 288

Appr *Read v Brown* (1888) 22 QB 128

Cons *Webb v Queen* (1994) 181 CLR 41

Foll *Barclays Bank Plc. v. Bemister & Anor.* [1989] 1 WLR 128

ref *Chandrika Prasad v Republic of Fiji and Attorney General* HBC 0217/2000

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ref *Ratu Isireli Vuibau & Anor v Ratu K.K.T. Mara and 4 Others* HBC 265/2000

appl *Regina v. Bow Street Metropolitan Stipendary Magistrate & Others Ex Parte Pinochet* (No. 2) [1999] 2 WLR 272

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*Iqbal Khan (applicant) in person.*

*William Calanchini with Janmai Udit and Sunil Kumar for the 1st, 2nd, 3rd and 4th respondents.*

*Chen B. Young for the 5th respondent.*

12 October 2000.

**RULING**

**Gates, J**

*a* This is a case concerning the appointment of an Acting High Court Judge. The Applicant challenges the appointment. He says he is better qualified, that there were others also qualified and he says the person appointed was not sufficiently qualified in accordance with the Constitution for appointment. He raises other challenges against the recommending authority, the Judicial Services Commission, inter alia alleging bias, breach of the doctrine of legitimate expectation, illegality, ultra vires the Administration of Justice Decree and procedural impropriety.

*b* These issues the applicant brings to court by way of judicial review proceedings first filed on 4 July 2000 at Lautoka High Court Registry. Leave was later given to amend the papers and amended papers were filed on 8th September 2000. With the original papers the applicant filed an affidavit verifying, which affidavit he swore on 3rd July 2000.

*c* When the matter first came on for mention on 14 July 2000 I allowed the Respondents an extension of time till 18th July 2000 in order to file their grounds of opposition to the grant of leave. Form 32 set out in the Rules [Ord. 53 r. 3] includes a note which allows only 2 days for the filing of grounds of opposition from the date of receipt of the Applicant's papers. In practice this would seem to allow too little time for the various bodies and Commissions to obtain legal advice and within which to respond. Although judicial review proceedings are intended to be prosecuted without delay, this rule could more profitably allow 7 days for the filing of grounds of opposition.

*e* On 14th July 2000 I allowed affidavits in opposition to be filed by the Respondents within 21 days with an affidavit in reply by the Applicant within 14 days thereafter. The leave application was set for hearing on 28 August 2000. The Notice of Opposition filed by the Attorney-General's office referred to Respondent in the singular, but it appears to have been filed on behalf of the 1st-4th Respondents. Notice of Opposition was also filed by the 5th Respondent [Jayant Prakash], whose appointment as an Acting Puisne Judge is challenged. The Chief Justice [3rd Respondent] filed an affidavit in reply on behalf of the Judicial Services Commission [the 2nd Respondent] himself on 10 August 2000, and the 5th Respondent filed his affidavit in opposition to leave on 22 August 2000.

*g* However by summons dated 22 August 2000 the 1st, 2nd, 3rd and 4th Respondents sought a transfer of the case to Suva. The summons referred to Order 33 as the governing Rule of the High Court Rules for transfer and to inherent jurisdiction. Later at the hearing, leave was given to amend this to Ord. 4. The affidavit of Sharmila Singh sworn on 22 August 2000 was filed in support of the summons.

The Applicant and the 5th Respondent opposed the transfer. Both filed affidavits in opposition. Following certain disclosures on 28 August 2000 to



which I shall revert later, I allowed the filing of further affidavits by all of the parties on the transfer matter.

The transfer summons came on for hearing on 6 October 2000. Mr. Khan, the Applicant, raised some preliminary objections to the affidavit material filed on behalf of the 1st - 4th Respondents in support of the transfer application. I do not deal with all of the objections, but the chief ones are as follows.

First it is said the Chief Justice's affidavit sworn on 7 September 2000 was incorrectly entitled or headed for judicial review proceedings. Almost all of the forms set out in Appendix 1 to the Rules state "Heading as in Action". In dealing with Form 27 [now Form 32] Practice Direction No.1 of 1981, issued by the Chief Justice, provided:

"for the purposes of an application under the High Court Rules Ord. 53, the forms set out in Atkin's Encyclopaedia of Court Forms (Second Edition) Volume 14 (1980 issue) at page 70 et sequentes shall be used where applicable with necessary alteration in the court of trial and with such variations as the circumstances of the particular case require."

A further Practice Note [No.1 of 1997 20 June 1997] also issued by the Chief Justice, emphasised the need for the title of the motion to include "The State v. ....Ex parte.....". The Practice Note concluded "In future no motions for Judicial Review will be accepted by the Registry unless they conform with this direction." The affidavit of the 3rd Respondent sworn on 7 September 2000 does not have the "heading as in action" or the format demanded in the Practice Note. This omission must have been an oversight. It is not a weighty omission and can be overlooked in spite of the strictures of the 1997 Practice Note. I grant necessary leave for the use in these proceedings of this affidavit with the irregularity of form, pursuant to Ord. 41 r. 4.

The second objection is to both affidavits of the Chief Justice on the ground that they offend the spirit of Ord. 41 r. 8, which rule states:

"No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor."

Objection is taken to the fact that the Chief Justice swore an affidavit:

- (i) on 10 August 2000 before Mr. Tabete, Acting Chief Registrar of the High Court, based in Suva.
- (ii) on 7th September 2000 before Ms Vandhana Narayan, the Deputy Registrar (Legal) also of the High Court in Suva.

It is argued that both Commissioners were employees in the Department of which the 3rd Respondent as Chief Justice was Head, and that this offended if not the strict letter of the Rule at least its spirit.

a First, it is obvious that neither Mr. Tabete nor Ms Narayan are barristers and solicitors employed by the solicitors on record namely the Attorney-General's Chambers who are acting for the 3rd Respondent. They are not the 3rd Respondent's solicitors whereby administering of an oath to the 3rd Respondent would come within the prohibition of the Rule, see **Baker v. Ambrose** [1890] 2 QB 372. Does it matter that the 3rd Respondent has sworn these affidavits before members of the same Government Department, namely Judicial Department?

b In his famous guidelines to the legal profession on the subject of affidavits, Kay J. said "The court requires the security of an independent commissioner." (**Bourke v. Davis** (1890) 44 Ch D. 110 at 126). This particular observation appears to have been directed at the importance of a deponent understanding what was in the affidavit and of accepting the statements therein as his or her true evidence, independently from the solicitor who assisted in drafting the affidavit. In **Foster v. Harvey** [1863] 46 ER 837 the Court of Appeal declined c to interfere with the order of the Vice-Chancellor in the court below in allowing into evidence the affidavit of a senior partner of a firm of Norwich solicitors who had sworn the affidavit before one of his clerks who was qualified to administer oaths in chancery.

d The firm of solicitors acting for the Senior partner was a different firm from his own, even though that firm was normally but not in this matter, the town agents for the deponent's firm. In the two judge appeal court, Lord Justice Knight Bruce dissented. Whilst stating that the rule in question should be confined to the case of solicitors on the record and their clerks, Lord Justice Turner siding with the Vice-Chancellor said:

e "but I apprehend that the principle upon which that rule was established is that a solicitor and the clerk must be presumed to have an intimate knowledge as to evidence which would prove material or immaterial to the success of the cause. That principle does not, as it appears to me, apply to the case of a person who happens merely to be in the employment of one of the parties to the cause, for there is no ground for assuming f that such a person is acquainted with the circumstances connected with the cause in consequence of that relationship."

g In the ordinary course of events the Chief Registrar (or a Deputy Registrar) could administer oaths as Commissioners for Oaths. Powers are provided for them to do so in civil jurisdiction by Ord. 32 r. 8, and Section 9 of the High Court (Amendment) Act 27 of 1998, and in criminal jurisdiction by Section 345 of the Criminal Procedure Code.

In this matter however I find it was not appropriate for the 3rd Respondent to swear the affidavits in front of either the Chief Registrar or the Deputy Registrar (Legal). The administering of the oath to a deponent who swears to the truth of the contents of his affidavit is a judicial process or proceedings [see Section 2 Interpretation Act Cap. 7 and the offence of perjury, Section 117(3) of the Criminal Procedure Code]. The non-identification of interests of deponent as against the

person before whom he swears the affidavit, and the commissioner's independence from the deponent's cause are matters of some importance. I take heed of Kay J's opinion on the need for "the security of an independent commissioner".

If there is such a need it would have to apply unexceptionally irrespective of whether the deponent was an unsophisticated person or whether, as here, the deponent was a person well familiar with court practice, procedures and evidence.

The Acting Chief Registrar has many functions. But it is clear one of them is to work closely with the Chief Justice and be subject to his directions see Section 9 of the High Court (Amendment) Act 1998. At times he must act as supernumerary or aide-de-camp to the Chief Justice.

But his knowledge of the substantive matter here, the judicial review proceedings, can now be inferred from the duties, purportedly cast upon him by section 2(2) of the Administration of Justice Decree 2000 in which the Chief Registrar becomes the Secretary of the Judicial Services Commission, [2nd Respondent] by virtue of his office. Additionally on the transfer issue, he signed his name to a memorandum originating from his office of 24 August 2000 addressed to the Deputy Registrar Lautoka copied to the two High Court Judges at Lautoka, in which the alleged incorrect filing of this case was adversely referred to, besides "the purported revocation of the 1997 Constitution and the legitimacy of the present government."

These reflect that knowledge that Lord Justice Turner referred to "as to evidence which would prove material or immaterial to the success of the cause." [*Foster v. Harvey* supra at 838].

The Deputy Registrar may know nothing of the relevant evidence existing with the 2nd Respondent concerning the substantive judicial review matter. She has no obvious connection with the workings of the Commission. However when the issue of transfer reached the newspapers her name was attached to a letter to the Fiji Times of 31 August 2000, of which I take notice, seeking to explain the 3rd Respondent's role in the direction to transfer this case. Accordingly, on the issue of transfer, which is the subject matter of the 3rd Respondent's affidavit sworn before her on 7th September 2000 it must be concluded that the Deputy Registrar lacks the necessary independence from and lack of knowledge of the evidence deposed to before her.

I had earlier ruled that the 2 affidavits of the 3rd Respondent be allowed in, and stated that I would rule on what remedial action would have to be taken on any irregularities.

I will take heed of the affidavits for the purposes of the transfer application. However, both affidavits must be removed from the court file and fresh affidavits sworn before independent commissioners and then filed and served.

The third objection to the affidavits of the 3rd Respondent is that they were not indorsed in compliance with Ord. 41 r. 9(2) of the High Court Rules.



Ord. 41 r. 9(2) states:

9(1) .....

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(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

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I have dealt with this type of objection in a preliminary ruling **In the matter of Kim Industries Limited** (unreported) Lautoka High Court Winding Up No. HBF0036/99L 7 July 2000 pp1-4. In that Ruling I indicated that the information required by Ord. 41 is often conveniently noted on the backsheet in a variable format as follows:

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*AFFIDAVIT OF XYZ*

*In Opposition to Summons for Transfer*

*[Note Indorsed pursuant to Order 41  
r. 9(2) of the High Court Rules 1988  
(Fiji) as amended.]*

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Sworn by: XYZ  
Date sworn: 17 August 2000  
Date filed: 18 August 2000  
On behalf of: 3rd Respondent”

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In the ruling I had set out the reasons for, and efficacy of, such indorsement. The indorsement has not been made on either of the 3rd Respondent's affidavits. Since I have ordered the affidavits to be sworn before a commissioner not acquainted with the evidence, this omission can be corrected at the same time. Meanwhile pursuant to Ord. 41 r. 9(2) I grant leave for the affidavits to be used for the purposes of this transfer application, and I shall refer to them.

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I turn now to the transfer application itself.

Where should the proceedings have been commenced?

The commencement and progress of proceedings is governed by Ord. 4 r. 1(1) [amendment set out in Legal Notice 73/97] which states -

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“r.1(1)Proceedings must ordinarily be commenced in the High Court registry located in the Division in which the cause of action arises.”

It is noteworthy that *ordinarily* tempers somewhat the mandatory nature of the rule. Some causes of action will fit neatly into one location of the High Court without question. Others will require more consideration, whilst others could have reason to be commenced in either of two registries.

Cause of Action has been defined as “the fact or combination of facts

which give rise to a right of action" (Osborne's Concise Law Dictionary 6th Edition).

Pollock B in **Read v. Brown** (1888) 22 QB 128 at 129 said - 'The expressions "cause of action" and "part of the cause of action" have long been judicially defined as meaning respectively the material facts and any material fact in the case for the plaintiff'. The interpretation was confirmed on appeal in which Lord Esher MR at 131 said:

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has been suggested today in argument that this definition is too broad, but I cannot assent to this, and I think that the definition is right."

Fry LJ was of the same opinion. At 132 he commented:

"Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action. If the plaintiff in the present case were to fail at the trial to prove the assignment he could not succeed therefore part of his cause of action did arise in the City."

Finally, Lopes LJ at 133 said -

"I agree with the definition given by the Master of the Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. In the present case the plaintiff could not possibly succeed without proving the assignment; it would be useless for him to prove the mere delivery of the goods. The assignment was therefore part of his cause of action, and that part of the cause of action arose within the City."

This case was followed in **Bennett v. White** [1910] 2 KB, 643. Stroud's Judicial Dictionary 4th Edit. defines cause of action as "the entire set of facts that gives rise to an enforceable claim." Action is to be considered less wide than cause of action. Cause of action "is that which forms or relates to its basis."

It must be stated that the High Court place of commencement turns on the extended meaning of the plaintiff's cause of action. No guidance can be gained from an examination of the Magistrates Court Rules Cap. 14 which turn on the concept of where "the defendant or one of the defendants resides or carries on business." [Ord. XIII r.1]. The two tests are quite different.

Mr. Calanchini for the 1st - 4th Respondents referred me to **Bass v. The King** [1948] NZLR 777. In that case Gresson J. referred to the definition first enunciated in **Jackson v. Spittal** (1870) L.R. 5 C.P. 542 at 552 and approved by the NZ Court of Appeal in **Dillon v. Macdonald** (1902) 21 NZLR 375 and by a conference of Judges that a "cause of action" is:

a "the act on the part "of the defendant which gives the plaintiff his cause of complaint" In cases arising out of the handling of motor-vehicles, it is seldom one act which constitutes the negligence. It is more often a series of acts or a combination of acts or omissions which together constitute conduct."

b In **Bass v. The King** fresh facts came to light and leave was given to file an Amended Petition of Right under the Crown Suits Act 1908. The accident had happened in a different way from that first pleaded. It was said the original petition "...fulfilled its object of letting the respondent know definitely what the suppliant's alleged grievance was and out of which occasion it arose."

c A review of authorities by the court in **Gunac Hawkes Bay (1986) Ltd. v. Palmer** [1991] 3 NZLR 297 at 301, led to the conclusion that they appeared to be "somewhat divergent." Quilliam J. in **Coleman v. Attorney-General** (unreported) (Wellington, A 629/77, 3 August 1978) said in interpreting the meaning of "material part":

"I think the word was intended to have the kind of meaning ascribed to it as one of the definitions given in the Shorter Oxford English Dictionary (3rd ed. 1973), namely, 'pertinent, germane or essential to'. Plainly this must depend upon the circumstances of the case."

d The Applicant here is not limited to establishing "material part" but simply "cause of action" which has the wider meaning attributed to it by the English decisions. Therefore discovering place of execution or place of decision may be less crucial, when taking into account the entire facts on which the Applicant relies. The Gunac decision was concerned with a transfer application from the High Court to the District Court and not, which District Court was the appropriate  
e Court that should be seized of the matter. The High Court felt it should not deal with the application as if it were a transfer application from one District Court to another, but as if the case should be returned to that District Court where it considered under the District Court Rules the action should have been commenced in the first place. There did not seem to be any impediment preventing the High Court from remitting the case in accordance with normal principles of transfer,  
f since this would obviously have saved the parties time and cost. As it turned out, the parties were left to make a further application once back at the District Court.

g I turn now to the affidavit material. On 22 August 2000 one Sharmila Singh, described as a clerical officer in the Attorney-General's chambers in Lautoka, swore an affidavit in support of the summons for transfer. She deposes at paragraph 4 of her affidavit -

"THAT I am informed and verily believe that the cause of action of this judicial review application arose in the Suva Jurisdiction of the High Court of Fiji. The appointment of the 5th Respondent was done in Suva. Under the circumstances the jurisdiction to hear this case arose in the Suva Jurisdiction of the High Court of Fiji."

She does not name her sources of information. The affidavit offends thereby Ord. 41 r. 5. None of the salient facts are set out necessary for an application for transfer, bearing in mind the application for judicial review and the applicant's affidavit verifying, save to say "the appointment of the 5th Respondent was done in Suva." This affidavit is of little value and I derive no assistance from it.

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The second affidavit filed on behalf of the 1st - 4th Respondents in this transfer matter is that sworn by the 3rd Respondent on 7 September 2000. This affidavit appears to be directed largely at making a reply to an affidavit of Acting Judge Prakash [5th Respondent] in which the judge stated he had been denied Departmental financial assistance for his legal defence in these proceedings. On the "cause of action" issue, the 3rd Respondent deposed:

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"That the decision to appoint the 5th Respondent to Acting Puisne Judge which is the main issue in these proceedings was made in Suva pursuant to appointment processes and mechanism involving the 1st, 2nd, 3rd and 4th Respondents."

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The 1st - 4th Respondents should have filed an affidavit in support not from the clerical officer in Lautoka who would know nothing of the matter, but from the Secretary of the Judicial Services Commission [2nd Respondent] or from a member of the 2nd Respondent either of whom could have spoken with direct knowledge of the deliberations, processes and decisions of the 1st and 2nd Respondents in the matter. That affidavit should have addressed the facts in the Applicant's claim as set out in the motion and affidavit verifying in order to discharge the onus of establishing that the facts giving rise to the cause of action arose in Suva and that an order for transfer should be made.

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There was a third affidavit filed on behalf of the 1st - 4th Respondents on the transfer matter, that of Anare Tuilevuka, an Acting Senior Legal Officer in the Attorney-General's office at Lautoka, sworn on 4 October 2000.

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This like that of the 3rd Respondent was focused on replying to the affidavit of the 5th Respondent in opposition. It dealt with correspondence terminating in the Judge being refused Departmental funds for his legal representation in these proceedings. Paragraph 5 of the affidavit amounted to a submission as to why the case should more properly have been filed in Suva. He ended that paragraph at (g) by stating - "The Respondents carried out all the decision-making functions and processes in Suva." These otherwise hearsay statements were not attributed, in breach of Ord. 41 r. 5, and should, as I have indicated earlier have come from the Secretary of the Commission or a person directly acquainted with its workings on the particular decision challenged before this court. This affidavit was similarly of little value.

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In his affidavit opposing transfer the Applicant refers to the appointment of the 5th Respondent as Acting Puisne Judge in Lautoka, that he resided in Lautoka, and that the 5th Respondent was sworn in at Lautoka.

a In his affidavit opposing transfer (affirmed on 25th August 2000) the 5th Respondent referred to his taking the oath of office by affirmation at Lautoka and the fact that the decision to appoint came about as a result of an exchange of correspondence. The 5th Respondent lives in Lautoka, worked as a Resident Magistrate in Lautoka and was appointed an Acting Puisne Judge to serve at Lautoka High Court.

The Amended Notice of Motion for leave seems to challenge two decisions, namely:

b “(a) The decision of the 2nd Respondent chaired by the 3rd Respondent to recommend to his Excellency the President of the Fiji Islands the 1st Respondent, to appoint the 5th respondent as Acting Puisne Judge of the High Court of Fiji, pursuant to Section 132 of the Constitution Amendment Act, 1997;

c (b) The decision of the 1st Respondent to appoint the 5th Respondent to act as a Puisne Judge of the High Court of Fiji Islands with effect from 1st June, 2000, which was duly Gazetted on the 19th day of May, 2000, in the Fiji Islands Government’s Gazette No. 32 (778).”

d It seeks various reliefs, declarations, certiorari, and mandamus. On first examination these decisions, though the evidence presented of them left much to guesswork, appear to have been made in Suva. The motion also seeks two orders in relation to the swearing in of the Judge:

e “(vii) A DECLARATION that the swearing in of the 5th Respondent as a Puisne Judge is unconstitutional and/or ultra vires the Administration of Justice Decree 2000 or otherwise illegal;

(viii) A CERTIORARI to go to quash the decision of the swearing in of the 5th Respondent as a Puisne Judge under the Constitution Amendment Act, 1997.”

f The swearing-in occurred in Lautoka. This part of the appointment procedure is challenged separately from the decision. These facts concerning the cause of action came within Lautoka’s jurisdiction. Then follow claims characteristic of judicial review, of ultra vires, arbitrary exercise of powers, illegality and procedural impropriety, and the taking into account of irrelevant matters and ignoring of relevant matters. At paragraphs a) (iv) and (v) there were claims that there had been a breach of a legitimate expectation that further vacancies would be advertised and there was a failure to accord an opportunity for other barristers of over 7 years experience to apply.

g The applicant is a practising barrister and solicitor of the High Court of Fiji. He resides in Lautoka and practises from offices in Lautoka and Nadi. He challenges the decisions of the 1st - 3rd Respondents which were made in Suva



to appoint the 5th Respondent to the position of Acting Puisne Judge. He says he had earlier applied for such a position. He had had an acknowledgment dated 6 May 1997 from the Secretary of the 3rd Respondent, stating that his application was "Currently under consideration and you will be informed once a decision has been made." He says the post was not advertised again, nor was he given an opportunity to apply for the same, such failure being a breach of the doctrine of legitimate expectation. This treatment, if true, occurred to him in Lautoka, he was not informed to re-apply and he suffered the breach of the doctrine, both occurring in Lautoka. This forms a separate part of his challenge to the decision, which has its basis in his suffering denial of expectation whilst in Lautoka.

He refers to the purported abrogation of the 1997 Constitution affecting the position of the President and Vice-President. He regards the ceremonial swearing in at Lautoka of the 5th Respondent as unlawful and illegal. The fact of the abrogation if established has the consequence that the loss of the Constitution occurs everywhere in Fiji not just in Suva.

Additionally the facts raised on the respective academic and work experience, qualifications of the 5th Respondent and the Applicant occur in Lautoka and other places. The decision on the recommendation and the appointment and the consideration or non-consideration of the facts on the other hand occur in Suva. There are other issues which I need not go into.

In conclusion, it is sufficient if a part of the facts giving rise to the cause of action occur within the jurisdiction - **Jackson v. Spittal** (supra). Though most of the facts of a case could concern foreigners and occur overseas the English courts have been prepared to entertain jurisdiction if they "were mixed and connected with it."

It was said at 550:

"And there is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless any fact necessary to be proved in order to support the action occurred within the jurisdiction."

Every fact does not have to occur within a particular jurisdiction. So long as the plaintiff relies on facts which are the basis of his claim, some of which occur in the jurisdiction where he seeks to commence his action, he can rightfully file action within that jurisdiction. He may of course face an application from the litigants he sues, for a transfer to another jurisdiction. I find therefore that there are proper circumstances permitting the Applicant to commence his action at the Lautoka High Court Registry.

#### Should the Case nonetheless be Transferred to Suva?

Transfers are governed by Ord. 4 r.1(4) which provides:

"Any action commenced in the High Court may be transferred by the

Court from one High Court registry to another or to a Magistrate's Court."

The exercise of the power of transfer is discretionary **Barclays Bank Plc. v. Bemister & Anor.** [1989] 1 WLR 128 at 132. For instance to obtain an expedited hearing and to cite delay is not sufficient unless a plaintiff is already granted an expedited hearing and the judge considers the transfer to achieve that aim is merited **Barclays Bank Plc.** at 131F.

Sir John Donaldson MR said at 131G:

"...it would be for the judge of his own motion to direct a transfer with the consent of his own head of division and that of the division to which the case would be transferred." (underlining added)

It is clear that it is the decision of the judge seized of the case to divest himself of it in consultation with brother judges, including the judge who is to hear the case.

In **Dorney & Anor. v. Sunflower Airlines Ltd. & Anor.** (unreported) Suva High Court Civil Action 460/89 4 November 1999, Shameem J. refused a transfer from Suva to Lautoka preferring inconvenience of witnesses, parties and expense over the likelihood of delay in hearing of a 6-week trial if it were transferred to Lautoka. The case had already taken 10 years to set down for

trial, and any further delay would overly prejudice the plaintiff.

The English Rules [Ord. 4 r.3] provide for transfer at any stage of the proceedings upon the order of "the court made in the Division in which the cause or matter is proceeding." A judge may transfer a case to another judge in accordance with section 65 of the Supreme Court Act (Eng.) "as rules of court may direct."

By virtue of Ord. 32 r. 9(k) the Registrar (Chief Registrar and Deputy Registrars) in Fiji can also make orders for transfer of proceedings. Such orders are appellable to a judge in chambers, by issuance within 5 days of the order of a notice to attend before the judge on a day specified.

Whilst this transfer summons was pending the 3rd Respondent issued Chief Justice's Circular Memorandum No.1 of 2000 [31 August 2000]. It appears to pronounce upon the matter in which I am called on to rule, and in which the 3rd Respondent as a litigant seeks my ruling on his application for transfer. This is unfortunate. It would appear to be put forward as persuasive material for me to consider since it is exhibited with the affidavit of Mr. Tuilevuka of 4 October 2000. Mr. Calanchini accepts this is not retrospective procedural law, but urges the court to be persuaded by it.

In summary, the judge presently appointed [5th Respondent] residing at Lautoka wishes to have the case remain at Lautoka. The person wishing to



Subject: High Court Rules

24/8/00

I would like you to know that the Hon Chief Justice was very concerned about the acceptance for filing of the following three cases at the Lautoka Registry namely:

- ( i )                      Judicial Review No. 007 of 2000  
                                  **(The State v President of Fiji & 4 Others);**
- ( ii )                      Originating Summons (?) - Civil Action No. 0217  
                                  of 2000 **(Chandrika Prasad v Republic of Fiji  
                                  and Attorney General);**
- (iii)                      Originating Summons - Civil Action No. 265 of  
                                  2000 **(Ratu Isireli Vuibau & Anor v. Ratu K.K.T.  
                                  Mara and 4 Others).**

In fact, these cases should have been filed in the Suva High Court Registry. The filing of those cases at Lautoka was clearly in breach of Order 4 rule 1(1) which reads:

“1-(1) Proceedings must ordinarily be commenced in the High Court registry located in the Division in which the cause of action arises. Where a cause of action arises in the Eastern Division Proceedings must ordinarily be commenced in Suva.”

A cursory perusal of the abovementioned cases would show that the cause of action in each case arose in the Central Division. By not complying with the High Court Rules, the Lautoka High Court Registry has created a lot of administrative and procedural difficulties in the proper management of these cases which raise the same important issues i.e. the purported revocation of the 1997 Constitution and the legitimacy of the present government.

I must stress that you should be more careful and exercise proper responsibility in the future in regard to the filing of cases at the Registry.

M. Tabete  
Acting Chief Registrar

cc. Mr. Justice Gates  
Mr. Justice Prakash”

I replied on 28.8.2000 to the Acting Chief Registrar as follows:

“From:    The Hon. Mr. Justice Gates            660771  
To:        Acting Chief Registrar High Court Suva  
re: HIGH COURT RULES                            28.8.2000

I refer to your faxed memorandum of 24 August 2000 on acceptance of cases for filing by registry staff at the Lautoka High Court.

I note that you recorded that “the Hon. Chief Justice was very concerned about the acceptance for filing” of three cases, then named.

Since the 3 cases you mentioned are all before me, two of which with current Motions for transfer, I do not wish to make any comment on them.

You quoted Ord. 4 r. 1(1) from LN67/93. This has been replaced by LN73/97 which omits the second sentence of the old rule. The principle stated however remains the same, and is the issue that I have to rule on. To determine where a cause of action arises is not always a straightforward exercise. Many factors have to be considered before a sound decision can be arrived at.

My earlier general directions to the Lautoka registry staff were not to reject documents for filing. There are exceptions. But Private practitioners have occasionally suffered at the hands of registry clerks, who are not legally qualified, and who have purported to express bold opinions on this or that point of procedure. I have previously advised the staff to pin a note to what they regard to be the offending document, indicating the nature of the irregularity. When the matter comes on before the judge in the presence of counsel, any irregularity can be ventilated either by counsel or by the judge, and the judge can then rule on the matter. Similarly solicitors should not be deterred from filing their actions where they believe they are entitled to do so. There should be no over the counter rejections, save in the clearest cases, and then only after referral to a judge. This at least has been the practice of the Lautoka High Court.

Since the point you seek to make was made without prior reference to the resident judges at Lautoka who have the duty of regulating proceedings and practices in their court, it must appear as if we are at odds.

Anthony Gates  
Judge

cc. The Hon. Mr. Justice Prakash  
Deputy Registrar Lautoka”

The memorandum of 13.3.2000, says Mr. Calanchini, is merely the Chief Justice wearing his Chief Justice hat and exercising lawful powers allocating the business of the court. I shall come back to those powers shortly. The Applicant and the 5th Respondent however knew nothing of this out of court directed transfer by the 3rd Respondent. If the 3rd Respondent was exercising valid powers by a “long established convention”, why did he not persist with the exercise of those powers. The Lautoka Registry could have been instructed again to forward the case file to Suva, and the judge who was seized of the case reminded of such convention. If it were possible to wear two hats without embarrassment, and lawfully to order transfer to a named judge of his choice, then there would be no indelicacy either in tackling the judge and asking



him to divest himself of the case to the preferred judge. But this was not ventured.

a The impression left with the other litigants however, who were in the dark about these arrangements, would be that one of the litigants, the 3rd Respondent, was selecting his own venue and his own judge. It is of course essential that justice be done. But it is even more important that justice palpably be seen to be done.

b Judge Scott apparently "agreed to hear and deal with this application for leave...". Asked at the instigation of one only of the litigants to hear the case and having agreed with the litigant to do so, it is obvious such a judge would be automatically disqualified from hearing the matter.

c No affidavit material has been filed explaining what was going on here, or for what reason. Simply counsel for the 3rd Respondent has advanced argument that the Chief Justice was exercising powers which he possessed to transfer a case out of one judge's court to that of another.

d What were those powers? It is clear this being a jurisdiction matter it cannot simply be governed by longstanding practice. In any event there is no evidence of any longstanding practice. Of course a judge could always be approached by a brother judge indicating that the brother judge has particular expertise or commercial knowledge in a matter, and the judge seized of the matter could then order the case to be transferred from himself to his brother. But the divesting of the case is done only by the judge seized of the case.

e Section 6 of the High Court Act Cap. 13 deals with the equality of powers as between Judges:

"6.-(1) All the judges of the Court shall have in all respects save as is herein expressly otherwise provided, equal power, authority and jurisdiction under this Act."

Section 2 of the Act (after amendment in 1998) defines a judge to be:

f "...a judge of the High Court, including the Chief Justice."

g A Chief Justice is sometimes said to be "first amongst equals" in relation to his brother judges. In court he has equal jurisdiction. Certain legislation imposes particular duties and burdens on him, one of which is to make Rules of Court. Mr. Calanchini says section 25 (2) (k) of the High Court Act empowers him to order cases from one judge to another.

Section 25(2) (k) states:

- "(2) It shall be lawful for the Chief Justice to make rules of Court carrying this Act into effect and in particular for all or any of the following matters (that is to say) -
- (k) generally for regulating any matters relating to the

practice and procedure of the Court or to the duties of the officers thereof or the costs of proceedings therein.”

This does not provide the necessary authority for the unilateral power to direct a case out of one judge’s court into that of another. Nor, with respect, can I accept the bald statement in the Circular Memorandum No.1 of 2000 that:

“Until the present arrangements are changed the position in law is that all business of the High Court is allocated by the Chief Justice or on his behalf” (underlining added).

There is no law providing such a power. Judges accept however that if they cannot act, are on long leave, sick, indisposed or die, arrangements may have to be made for re-allocation of their cases, and apart from the last occurrence this would be done, if possible though it is not always possible, with their consent. Such a housekeeping task would fall upon the Registrars and the Chief Justice may have a guiding role in such matters.

Otherwise a judge once seized of a matter must be left to decide for himself whether he continues with a matter or whether he transfers it to a brother or sister judge.

#### The Allegation of Bias

Upon instructions of the 3rd Respondent apparently, Mr. Calanchini said the 3rd Respondent considered I had manifested bias against him. The grounds for this allegation were that I had disclosed the two memoranda, the 3rd Respondent’s ordering of the transfer of the case to Suva to Judge Scott and that I had responded by memorandum in reply to that of the Acting Chief Registrar. It was said that accordingly I should disqualify myself from hearing the case. The Applicant did not agree and submitted that it was in the interests of justice that I had disclosed copies of these memoranda to the other litigants. Mr. Young for the 5th Respondent indorsed what Mr. Khan said and stated that the Chief Justice, when a litigant, cannot give a direction such as he gave. Because of it, the court must of necessity reveal the directive to the parties.

At the hearing I rejected the notion of bias and said I would give my reasons later.

In my memorandum of 28 August 2000 in reply to that of the Acting Chief Registrar who had expressed his and the 3rd Respondent’s criticism of the Lautoka Registry staff, I had stated the current practice at the Lautoka High Court. I had particularly avoided any comment on the current cases then before me in these words:

“Since the 3 cases you mentioned are all before me, two of which with current Motions for transfer, I do not wish to make any comment on them.”

There have been many tests for bias. In Australia, the test is whether a

a fair minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case (**Livesey v. N.S.W. Bar Association** (1983) 151 CLR 288 at 293, 294, 300; **Webb v. The Queen** (1994) 181 CLR 41). The test as formulated in **R v. Gough** (1993) AC 646 was favoured in New Zealand see **Auckland Casino Ltd. v. Casino Central Authority** (1995) 1 NZLR 142. In **Amina Koya v. The State** (unreported) Supreme Court Criminal Appeal No. CAV0002/97 26 March 1998 the Fiji Supreme Court said of the two tests at 13:

b "...there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias."

c These are judicial review proceedings. Where is the evidence of bias that in sifting the evidence and facts that I as trial judge will be prejudiced against the decision of the 2nd Respondent of which the 3rd Respondent is Chairman. Obviously the Applicant and the 5th Respondent do not believe such exists yet one of these opposed litigants inevitably must lose the case before me.

d What has prompted this allegation of bias is the fact that I as trial judge have disclosed material which hitherto was not known by the Applicant and 5th Respondent in particular. The information revealed that the 3rd Respondent had arranged for his choice of judge to adjudicate upon the challenged decision of himself and the 2nd Respondent. This choice had not been either revealed by the 3rd Respondent in his transfer application, nor subsequently explained after the disclosure. But this information had to be divulged. The failure of Lord Hoffmann in the House of Lords to reveal an existing association with one of the litigants meant that he was automatically disqualified from hearing the case. (**Regina v. Bow Street Metropolitan Stipendiary Magistrate & Others Ex Parte Pinochet** (No. 2) [1999] 2 WLR 272. No allegation of actual bias was put forward.

f The fundamental principle is that a man may not be a judge in his own cause. For a judge litigant to select his own judge unbeknownst to the other litigants, however innocent his intentions, results in an automatic disqualification of the selected judge.

Of Lord Hoffmann's predicament, Lord Browne-Wilkinson in the Pinochet Case at 281 he said:

g In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure; see Shetreet, *Judges on Trial* (1976), p. 303; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed. (1995) p. 525. I will call this "automatic

disqualification”.”

Lord Browne-Wilkinson stated the historical reasoning for the disqualification at 284A:

If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies, a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.’s famous dictum is to be observed, it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” see **Rex v. Sussex Justices, Ex parte McCarthy** [1924] 1 KB 256,259.”

For these reasons, disclosure of the directive from the 3rd Respondent for the assignment of the case to the 3rd Respondent’s choice of judge was imperative. A trial judge must always strive for absolute impartiality and his duty is to protect each and every litigant from potentially unfair or improper advantages at the hands of other litigants.

But such a striving for fairness and absolute impartiality is quite a different concept from bias.

*Application refused.*

Gerard McCoy, QC