[2011] UKPC 36
Privy Council Appeal No 0054 of 2010

JUDGMENT

The Belize Bank Limited (Appellant) *v* The Attorney General of Belize and others (Respondents)

From the Court of Appeal of Belize

before

Lord Phillips
Lord Brown
Lord Kerr
Lord Dyson
Sir Patrick Coghlin

JUDGMENT DELIVERED BY
Lord Kerr
ON

20 October 2011

Heard on 6 July 2011

Appellant	*Respondent*
Nigel Pleming QC Jack Holborn (Instructed by Allen & Overy LLP)	Dr. Lloyd Barnett Mrs Lois Young SC (Instructed by Charles Russell LLP)

LORD KERR (WITH WHOM SIR PATRICK COGHLIN AGREES):

INTRODUCTION

1. On 7 February 2008, a general election took place in Belize. The outgoing government party was defeated and Mr Said Musa who, until the election, had been Prime Minister was replaced by Mr Dean Barrow who became not only Prime Minister but also Minister for Finance in the new administration.

2. During the campaign which preceded the election one of the principal issues on which vigorous debate had been engaged was the relationship between the appellant, the Bank of Belize (the bank), and the government, particularly in relation to a debt owed by Universal Health Services Company Limited (UHS), a private company operating a hospital in Belize. The financial arrangements between the government and the bank concerning the repayment of a loan from the bank to UHS were the subject of intense media and political interest. During the election campaign, Mr Barrow, who was then the leader of the opposition, was strongly critical of Mr Musa about these financial arrangements. He also acted as co-counsel for a group known as the Association of Concerned Belizeans in a legal action that the group took, challenging the lawfulness of those arrangements.

3. In the weeks following the election, a number of significant developments took place. First, on 28 February 2008, in a government press release it was stated that the Financial Secretary in the Ministry of Finance of the new government had written to the Venezuelan government about the transfer of US $10m from Venezuela to Belize. At about this time a letter had been received from officials in Caracas in which a query had been raised about how funds transferred from Venezuela to Belize had been dealt with. It is not clear whether this prompted the inquiry from the Financial Secretary. What is clear is that there was considerable suspicion and concern on the part of the new government that funds provided by Venezuela had not been devoted to the projects for which they were designed, namely housing and a sporting complex, but had instead been diverted to the bank in order to meet the former government's obligations under guarantee arrangements that it had entered into with the bank in relation to the bank's loan to UHS.

4. The press statement of 28 February concluded by quoting Prime Minister Barrow as having said that his government would "continue to pursue justice on behalf of the Belizean people and will leave no stones unturned to bring to account those who have robbed the people of this country".

5. On 5 March 2008 Mr Musa made a public statement in which he said that funds had been transferred from Venezuela to Belize in two tranches. One of these involved the transfer of US $10m from the Venezuelan Development Bank, Bandes, to the Central Bank's account for the government of Belize. This was to be used to assist with housing, home improvement and a sports facility. Mr Musa also said that a further US $10m dollars had been transferred from Bandes to the Belize Bank in order to settle the government's debt obligations to the Belize Bank. These, he explained, had arisen because of a government guarantee of a loan obtained by UHS. He claimed that there was an "understanding with the Venezuelan government that only the housing and sports facility grant of US $10m received by the Central Bank was to be announced until further notice". This claim must be viewed, even at this stage when the circumstances of the transfer remain to be fully examined, with some caution in light of what passed between the governor of the Central Bank and the President of the Bank of Belize which is discussed in the paragraphs which follow.

6. On 6 March 2008 a meeting took place between the governor of the Central Bank, Sydney Campbell, and the President of the Bank of Belize, Philip Johnson. The governor has said that at that meeting Mr Johnson told him that the bank had received US $10m from Bandes Bank but that the written wiring instructions did not indicate for whom these funds were intended. This is to be contrasted with the public statement of Mr Musa, referred to in the preceding paragraph, that one of the two tranches of US $10m had been earmarked for settlement of the government's debt obligations to the Belize Bank. Notwithstanding the absence of wiring instructions, the $10m was credited to one of the bank's accounts in the Turks and Caicos Islands. According to the governor, Mr Johnson also told him that in addition to the money from Venezuela, another US $10m had been received from Taiwan, which the bank had used, together with the Venezuelan $10m dollars, to settle a debt owed to the bank by UHS. The governor claims that, on receiving this information, he told Mr. Johnson that a special examination of the Belize Bank by the Central Bank would be required. It is hardly surprising that Mr Campbell reached that view. To transfer to the bank's account in another country such a substantial amount of money without the instructions as to how the funds were to be used seems, at first sight, to be a remarkable thing to do.

7. Mr Johnson did not confirm the details that Mr Campbell had given about this meeting in any of the affidavits filed on behalf of the appellant in these proceedings but he did not challenge them either. He contented himself with a somewhat cryptic observation in his first affidavit to the effect that he had attended a meeting with Mr Campbell "to explain what [the bank] knew about the transfer of funds not only from Venezuela but also from Taiwan."

8. On the same day that Mr Campbell has said the meeting with Mr Johnson took place (6 March 2008), the Central Bank notified the Bank of Belize that, in accordance with section 36(5) of the Banks and Financial Institutions Act (the Act), it

intended to carry out a special examination of the bank on 7 March 2008. That examination duly took place. Mr Campbell, in the meantime, had informed the Prime Minister that a special investigation of the bank was necessary and Mr Barrow had agreed that this was indeed required. Again, this is no cause for surprise in light of what Mr Johnson had told Mr Campbell about the circumstances in which the transfer of the $10 million to the bank's Turks and Caicos account had been made.

9. At a press conference on 7 March 2008 Mr Barrow revealed that he had been approached the previous day by an intermediary with a message that Mr Musa and the former Minister of Budget Planning, Mr Ralph Johnson Fonseca, wished to meet him "to discuss the missing Ten Million US Dollar tranche of the Venezuelan Housing money". He agreed to a meeting on condition that an official of the government should also be in attendance to record what transpired. In the event, the chief executive officer in the office of the Prime Minister, Miss Audrey Wallace, attended the meeting with Mr Barrow and she made notes of what took place.

10. In his opening statement to the conference, the Prime Minister said this about what had happened at the meeting:

> "Messrs Musa and Fonseca explained pretty much what was later said by Mr. Musa in a taped statement recorded for yesterday evening's newscast. In other words, he conceded at long last, he confirmed that it was Twenty Million US Dollars that had been given to Belize by Venezuela but that Ten Million US of the Twenty Million US had been diverted to the Belize Bank in connection, he said, with the UHS guarantee obligation that the Government of Belize had to the Belize Bank.
>
> It was my sense that these gentlemen knew and were, if only tacitly, admitting that it was an outrageous act on their part. Well if they didn't even know it, if they didn't even tacitly admit it, certainly these are my words, and this is how I characterize what has happened, and I believe that they are completely aware of this, that it was an outrageous act on their part to have lied all along so consistently to the. Belizean people in saying from the time of the initial announcement that it was Ten Million US Dollars that had been gifted to Belize by Venezuela for Housing. In fact the figure was from the start the Twenty Million US Dollars that's now been admitted.

> Furthermore, it is my sense that these gentlemen had no intention of ever coming clean, even after the general elections of February 7th, 2008, and it was only that fortuitous, or perhaps not so fortuitous, letter from the officials in Caracas that forced public and official scrutiny, that raised for the first time the fact that it was Twenty Million US and not Ten Million US. It was that that sweated Misters Musa and Fonseca and obliged them to crack now."

11. The Prime Minister then said that what the former Prime Minister and Minister of Finance, had done was "absolutely reprehensible. It is highly immoral and the product of a conspiracy …" Later during the same press conference, when asked whether the bank was complicit in the conspiracy, he said:

> "Well [the bank], it now turns out, was the recipient of these funds. The government paid the funds without first coming to the public. The government paid the funds by way of, in my view, an improper diversion when you look at what the contract reputedly contained. I would say that [the bank] might perhaps want to explain their position."

12. On 12 March 2008 Mr Barrow and the governor of the Central Bank held a further press conference. In the course of this Mr Barrow made a number of statements to the effect that he was convinced that the former Prime Minister and the former Minister of Budget Planning were guilty of improperly diverting funds that should have been used for the benefit of the Belizean people and were also guilty of procuring those funds without properly disclosing them. The Prime Minister then said this:

> "I've indicated to the Belize Bank that I wish to put them on notice, that the Government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the people of this country. I must say that, as far as I can understand, the Bank has been cooperating up to this point in time, and, ah-I don 't know if he is the Director of the Bank, but certainly, Mr Philip Johnson, with whom I met this morning, has indicated that he will take that position to his principals, that I am putting them on notice that (and I put it no higher than this), that we will be seeking legal advice as to whether they are not liable for the return of the US $10m."

13. Given the bank's position – that it had transferred $10m to an account outside Belize without express instructions from the source of the funds as to how they should be dealt with – the minister's statement about the bank might be regarded as, if anything, restrained.

The directives and the Appeal Board

14. On 14 March 2008, as a result of their investigation, the Central Bank issued two directives under section 36(5) of the Banks and Financial Institutions Act. Only the first of these is relevant in the present appeal. It was in the following terms:

> "[The Bank] should forthwith credit [the government's] account with [the Central Bank] with US $10m as per 'Payment Details' stated on wire transfer instructions sent by Bandes-Fideicomisos De Venezuela on the 'Cash Payment Confirmation' dated 28 December 2007"

15. On 18 March 2008 the bank responded to the Central Bank's directive. It challenged the Central Bank's powers to issue the directives under section 36(5) of the Act. It also complained that it had not been given sufficient time to make a proper response. By virtue of section 36(6) the bank had ten days in which to appeal. The Central Bank extended this to 3 April 2008.

16. In the meantime, on 25 March, the bank wrote to the Chief Justice of Belize, Conteh CJ, indicating its intention to appeal. The Chief Justice was presumably chosen by the bank because, under section 70(2) of the Act, the Appeal Board which hears any appeal against the issuance of a directive shall have as its chairman the Chief Justice or another judge of the Supreme Court nominated by him.

17. No Appeal Board had been constituted before the bank intimated that it intended to appeal against the directive. Under section 70(1) of the Act it was the responsibility of the Minister for Finance (in this instance the Prime Minister, Mr Barrow) to cause to be appointed a Banks and Financial Institutions Appeal Board to hear and determine all appeals in respect of matters which may be referred to it under the Act. These include an appeal against a directive made pursuant to section 36.

18. Mr Joseph Waight was then the Financial Secretary in the Ministry of Finance. He is a career civil servant who had served in that department for more than twenty years. In an affidavit filed on behalf of the respondent, Mr Waight deposed that on 26 March 2008 or thereabouts, the governor of the Central Bank, Mr Campbell, raised with him the matter of the appointment of the Appeal Board. It was Mr Waight's experience that whenever the Minister of Finance was required to appoint members to an administrative appeal board, such as the Income Tax Appeal Board, or the General Sales Tax Appeal Board, the Minister receives names from the Financial Secretary and makes his appointment from those thus nominated unless he has some fundamental objection.

19. On learning of the need to appoint an Appeal Board, therefore, Mr Waight turned his mind to the question of who would be suitable for this task. He reviewed what he described as "the cadre of persons" who had expertise in the areas required. He came up with the names of Mr Jaime Alpuche and Mr Jeffrey Locke. Mr. Alpuche is a former Financial Secretary and Mr Waight had served under him as Deputy Financial Secretary. Mr Locke had previously worked for the Central Bank. Both appeared to Mr Waight to be entirely suitable and he recommended them for appointment to Mr Barrow who accepted the recommendations and appointed both on 26 March 2008.

20. The appointment of both these men was described by Mr Pleming QC, on behalf of the appellant, as having been made in "unholy haste". That claim must be seen against the timetable that the Act prescribed for the presentation of appeals against the directives, however. Section 36(6) stipulated that an appeal must be made within ten days of the directive having been issued. In light of that requirement, the speed of appointment takes on a somewhat different complexion from that painted by the appellant.

21. The Honourable Mr Justice Awich is the third member of the Board. He was nominated by the Chief Justice under section 70(2) (a) of the Act. He is now the acting Chief Justice. Although he is the third respondent to the appeal, we were told by Mr Pleming that the Bank does not question his appointment in this appeal.

22. On 4 April 2008 attorneys acting on behalf of the bank wrote to the Ministry of Finance asking to be provided with, among other things, the curricula vitae of Mr Alpuche and Mr Locke and "confirmation from [them] of their independence and impartiality". Mr Waight replied on 11 April. He pointed out that section 70(1) of the Act required the minister to cause the Appeal Board to be appointed and that, in appointing Mr Alpuche and Mr Locke, Mr Barrow was merely discharging his statutory duty. The letter continued:

> "The law does not require the Minister to supply any information about the credentials of the members of the Appeal Board to any person. Nevertheless, in the interest of transparency, we have no objection in advising you that the members appointed by the Minister are both highly-regarded and respected members of the community, well versed in the relevant disciplines.
>
> Mr Jaime Alpuche is a former Financial Secretary, having held this top post from April 1994 to March 2000. In this capacity he was an ex officio member of the Board of Directors of the Central Bank of Belize. Mr Alpuche is also the Chairman of the Income Tax Appeal Board, the

> Chairman of the Board of Stamp Commissioners, and a member of the General Sales Tax Appeal Board. He holds a BSc degree in Economics from the University of the West Indies and an MBA from the Strathclyde Graduate Business School, Scotland. Mr Alpuche has been in the private sector for the last eight years, having retired from the public service.
>
> Mr Jeffrey Locke holds a MSc degree in International Management with emphasis on International Finance, International Marketing and Governance. He possesses a vast and varied experience of working as a business and management consultant in Belize and the Caribbean countries. He worked as management consultant with the First Caribbean International Bank (Barbados) from 2005 to 2007."

23. In a later passage of the letter, Mr Waight said this about the impartiality of Mr Alpuche and Mr Locke:

> "As for the impartiality of the members, it is normal practice for members of such Appeal Boards to take the Oath of Allegiance and Office prescribed in Schedule 3 of the Constitution – the same oath that is taken by Judges of the Supreme Court – before they enter upon their duties. This attests to their independence and impartiality. Apart from the oath, it would be most improper, in our opinion, to ask persons of such high integrity to declare their independence and impartiality."

24. The oath of allegiance and office is in the following terms:

> "Oath of Allegiance and Office
>
> I,_____, do swear that I will bear true faith and allegiance to Belize, and will uphold the Constitution and the law, and that I will conscientiously, impartially and to the best of my ability discharge my duties as [ ] and do right to all manner of people without fear or favour, affection or ill-will. [So help me, God.]"

The right to an independent and impartial tribunal

25. Section 2 of the Constitution of Belize asserts the supremacy of the Constitution:

> "This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

26. Sections 6(1) and (7) of the Constitution proclaim every citizen of Belize's right to a fair hearing before an independent and impartial tribunal, section 6(1) providing that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Section 6(7) provides:

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

27. It has not been in contention in this appeal that the bank is therefore entitled to a hearing of its appeal before an independent and impartial tribunal. It is likewise not in dispute that the appointment of the members of the Appeal Board and the members themselves should be free from the appearance of bias.

The procedures for the issue of directives and appeals

28. Section 36(5) of the Banks and Financial Institutions Act is the provision that deals with the issuing of orders and directives. As noted above, section 36(6) allows a ten day period for appeal against the issue of an order or directive. The powers under section 36(5) are exercisable by the Central Bank on it having reasonable grounds to believe that a financial institution, in conducting its business, is committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interests of its depositors or customers or a violation of the Act, or any regulation, circular, order, directive, notice or condition imposed by the Central Bank – section 36(1). The powers under section 36(5) are as follows:

> "(5) If the Central Bank determines that the acts or course of conduct in question may pose a serious risk to the condition of a licensee, cause a significant financial loss to a licensee or personal gain arising from the foregoing to the person which is the subject of the order or directive, or otherwise seriously prejudice the interests of a licensee's depositors or customers, the Central Bank may issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or

directive on whether the order or directive in question should be removed or varied."

29. Section 70(1) of the Act provides that the minister shall cause to be appointed a Banks and Financial Institutions Appeal Board to hear and determine all appeals in respect of matters which may be referred to it under the Act. At the time the directive was issued, the Board had not been appointed and it was therefore necessary that the minister exercise his power to bring one into existence.

30. Section 70(2) deals with the composition of the Appeal Board. It provides:

(2) An Appeal Board for the purpose of this Act shall be constituted of-

(a) the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board;

(b) two other members appointed by the Minister from among persons who have knowledge of banking, finance or other related disciplines:

Provided that no serving member of the Central Bank or of any other bank or financial institution in Belize shall be appointed as a member of the Board.

31. It is to be noticed that the minister's power of appointment is limited to the two members other than the Chief Justice or his nominee; that he is required to choose appointees who have knowledge of banking etc; and that, although he is not permitted to choose a serving member of the Central Bank or any other financial institution, by implication at least, he is entitled to appoint former members of the Central Bank or other financial institutions. This is unsurprising. According to the 2010 Housing and Population Census, the total population of Belize was 312,971. The pool of available appointees cannot have been large, especially since, as we were told, there are only five commercial banks operating in Belize.

32. The quorum for any sitting of the Appeal Board is two – section 73. The Chief Justice or his nominee must always be present. If only the other two members of the Board are available, the meeting would not be quorate. Section 74 is an important provision. It states that a decision may be taken by a majority of the Board's members but that the members constituting the majority must always include the Chief Justice

or the judge nominated by him. The members appointed by the minister can never together constitute a majority, therefore.

33. On an appeal, the Board may affirm or set aside the decision appealed against; it may also make any decision that the Central Bank could have made – section 75(1). An appeal from the Board's decision lies to the Court of Appeal but only on a point of law (section 77(1)) and the Court of Appeal may affirm or set aside the decision appealed against and may remit the matter to the Appeal Board for rehearing and determination – section 77(2).

The appearance of bias

34. The leading authority on the issue of apparent bias in this jurisdiction is still *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357. The essential principle is best expressed by Lord Hope of Craighead in para 103 of his opinion where he said:

> "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."

35. This formulation has been followed by the Judicial Committee of the Privy Council in, for instance, *Attorney General of the Cayman Islands v Tibbetts* [2010] UKPC 8 [2010] 3 All ER 95, at para 3 and *Prince Jefri and others v The State of Brunei* [2007] UKPC 62 at para 15.

36. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased. In considering how the notional observer would approach this task, one should recall Lord Steyn's approval in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 of Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488 at 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

37. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 at para 17:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public

> generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

38. Of course, one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status. This theme was taken up by Baroness Hale of Richmond in *Gillies* when she said at para 39:

> "The 'fair-minded and informed observer' is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488, para 53, 'neither complacent nor unduly sensitive or suspicious'."

39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making process would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase "capable of being known" from Lord Hope's formulation holds the key, in my opinion. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As Lord Bingham put it in the *Prince Jefri* case at para 16:

> "The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done."

40. Translating these principles to the circumstances of the present case, it appears to me that it would be necessary for the informed observer to be aware of the general structure of the system of appeal from the Central Bank's directive; to be conscious that this is a procedure under which the minister is statutorily authorised to appoint members of the Board; to have in mind that there is a limited pool of candidates who

might fill the position; to be aware that the appointees are required to take the oath of office; and to take into account that the minister's appointees cannot outvote the chairman and that the appointment of the chairman has nothing to do with the minister.

41. The concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts. Moreover, while the judgment to be made is whether an ordinary, well informed member of the public would consider that there was a real possibility of bias, one should not neglect to take into account that a fair-minded assessment would include the knowledge that those performing the important task of serving on the Appeal Board are themselves professional people against whom no criticism has been levelled. Indeed, Mr Pleming was at pains to disavow any suggestion that a shadow fell over the integrity of the individuals chosen. It was on the identity of the person appointing (the minister) that the appellant's challenge was focused.

42. The appointment was made on the recommendation of Mr Waight. There is nothing to suggest that Mr Waight consulted anyone, much less the Prime Minister, before deciding whom to recommend for appointment. This is the basis on which a fair-minded observer would have to make his assessment of whether the appointment of the two men carried the inevitable appearance of bias. It is, of course, the case that Mr Waight was an ex officio member of the Central Bank. And by virtue of section 11 of the Central Bank of Belize Act the Governor of that Bank is appointed by the Governor-General on the advice of the Prime Minister and the Deputy Governor and other board members appointed by the Minister of Finance. The Central Bank is, in every sense, the government's bank and the government is its customer. But that is true of every government and successive governments of whatever political stripe have the power to make these appointments. Moreover, although he is Financial Secretary in the Ministry of Finance, Mr Waight is a career civil servant who is duty bound to serve whatever government is in power and bound also not to allow party political allegiance to dictate advice to ministers or the general discharge of his duties. Nothing in the material that has been put before the Board suggested that Mr Waight or the Governor of the Central Bank had any particular agenda to promote in the review of the appellant bank's conduct in relation to the funds which were subject to the first directive. On that account, the fair minded, neutral observer should approach his appraisal of whether there was the appearance of bias in the appointment of Mr Alpuche and Mr Locke on the basis that both Mr Waight and Mr Campbell had acted conscientiously in giving advice and information to the Prime Minister.

43. Mr Pleming submitted that because of his obvious and frequently stated commitment to recover the $10m, the Prime Minister was irredeemably unsuited to make the appointments to the Appeal Board, The minister could have delegated this

function. Section 59 of the Interpretation Act permitted it. This was unquestionably an occasion for such delegation, it was argued.

44. The Court of Appeal dealt with the argument in para 53 of Morrison JA's judgment as follows:

> "… I have not lost sight of Mr Nelson's submission that the Minister ought in the circumstances of this case to have considered delegation of his statutory powers, pursuant to section 59(1) of the Interpretation Act, but I consider it, with respect, to be wholly unrealistic. The fact is that the Minister's delegate would be duty bound to act entirely within whatever mandate he was given by the Minister and I doubt very much that resort to such a device could suffice to dispel an appearance of a lack of independence in the resultant appointments, if such existed."

45. The Board considers that the conclusion reached in this passage is not only tenable, it is irresistible. If appointment by the minister created the appearance of bias, why should appointment by his specially chosen delegate not do so also? But the circumstance that the minister was, in effect, statutorily *obliged* to make the appointment and could not insulate his decision from the charge of apparent bias by delegating that duty must inform the consideration of the fair minded observer as to whether there was an appearance of bias. Put simply, irrespective of the minister's already expressed view as to what should happen to the $10m, the fact remained that he *had to* make the appointment. The fair minded observer must take that into account in deciding whether the appointments that he made were tainted by the appearance of bias.

46. The dual role of the minister is critical in the overall consideration of this case, in the Board's opinion. As Prime Minister he had an obvious responsibility to recover money that he believed had been wrongly diverted from public resources. And as the Minister of Finance he was obliged to make appointments to the Board. In his position of Prime Minister he can hardly be criticised for informing the public that he was determined to recover the money for the people of Belize. This is the stuff of politics. Simply because he had a statutory obligation to make appointments to the Board, he should surely not be muzzled from public comment about what he perceived to be irregularities in relation to money which he believed should have been used for public works.

47. One way of looking at the matter is to imagine what the position would have been if the minister had said nothing publicly about recovery of the money before he made the appointments. Could it seriously be suggested that, in such circumstances, by making the appointments, as he was statutorily required to do, he would inevitably

create an appearance of bias simply because, as Prime Minister, he had an obvious interest in recovering money which he had every reason to believe should be devoted to the citizens of Belize? Surely not. That would be tantamount to saying that the minister could never appoint an Appeal Board to hear an appeal against the Central Bank's directive in relation to public money. If, as the Board considers must be the case, that cannot be correct, the appearance of bias charge in the present appeal can be seen to rest principally, if not solely, on the fact that the minister had made statements, both as leader of the opposition and later as Prime Minister, about the diversion of the funds. And if that is the real basis on which the challenge has to be made, a careful examination is needed of just what is objectionable about what the minister said and a judicious assessment must be made of whether this would inspire a suspicion in the mind of a fair and informed observer that there was a risk that the Appeal Board would be biased. But before turning to that, something must be said about the judicial decisions on which principal reliance has been placed by the appellant in its claim that the circumstances of the appointment of Mr Alpuche and Mr Locke created the indelible appearance of bias.

The circumstances of appointment as a basis for the appearance of bias claim

48. Mr Pleming discussed a number of authorities in advancing his claim that the circumstances in which the Prime Minister made his appointments to the Appeal Board created the appearance of bias on the part of the appointees. Ironically, in none of these was the claim of an appearance of bias upheld but, nothing daunted, Mr Pleming submitted that, in each of those cases, a crucial feature was present which prevented that charge being successfully made. He argued that no such factor was present in the present case which could protect the appointments from the claim. It is necessary to deal with only some of the cases that have been canvassed for a short review of these will demonstrate that the question whether the circumstances of appointment to a Board will give rise to an appearance of bias depends critically on the particular facts surrounding the individual appointment and that this question cannot readily be answered by analogy to other cases.

49. The first of the cases to which it is necessary to refer is *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165. In that case the applicants were convicted prisoners who were injured during a disturbance in prison and were afterwards charged with contravening prison disciplinary regulations. They were convicted by the Board of Visitors of the prison and sentenced to substantial loss of remission of their sentences. One of the applicants' complaints was that the Board of Visitors could not be considered to constitute an independent and impartial tribunal (as required by article 6 of ECHR) because its members were appointed by the Home Secretary and he was responsible for the administration of the prisons. Although the European Court of Human Rights did not uphold this complaint, Mr Pleming argued that this was because the Home Secretary's duty in relation to the maintenance of discipline in prisons was a general one and that he had no particular interest in the

outcome of individual adjudications by particular Board of Visitors. The Board does not accept that this is the basis of the court's decision.

50. At para 78 of the judgment, ECtHR said:

> "In determining whether a body can be considered to be 'independent' - notably of the executive and of the parties to the case - the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."

51. At para 79 the court said that the fact that members of Boards of Visitors were appointed by the Home Secretary, who is himself responsible for the administration of prisons, did not establish that the members were not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not independent. It is noteworthy in this context that judges appointed in Belize take precisely the same oath of office as did the appointees to the Appeal Board. At para 80 the court pointed out that, although the members of Boards of Visitors were appointed for a term of three years or such lesser period as the Home Secretary may decide, it was considered that this was "understandable" because they were unpaid and "it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer". Contrast this with the position in the present appeal. There is no time limit on the appointment of the two members that the Prime Minister appointed and therefore no possible compromise to their independence on that account. They too are unpaid and are therefore not dependent on the whim of the minister for continued remuneration. The pool of candidates for the "onerous" task that they have to undertake must surely be commensurately less than that from which members of the Board of Visitors could be drawn. No challenge to their integrity is made. They were selected by a civil servant without reference to the Prime Minister, in accordance with a well established practice. It appears to the Board, therefore, that the appointment of the members of the Appeal Board is an *a fortiori* case compared to *Campbell and Fell.*

52. Mr Pleming relied particularly on the decision of the Divisional Court in *R (Brooke) v Parole Board* [2007] EWHC 2036 (Admin); [2007] HRLR 1369 where three long term prisoners complained that the Parole Board lacked sufficient independence from the Executive at common law and under Art 5(4) of the ECHR because, among other things, members of the Board were appointed by the Secretary of State. Hughes LJ, delivering the judgment of the court, at para 31, observed that the appointment by Ministers of judges of differing tribunals and courts was a common practice in many countries and indeed had applied to the judges of the

ordinary English courts until very recently. He then said, "*[a]lone*, it need not detract from the independence of the judge when once appointed" (emphasis supplied). It is, of course, true that the appointment did not lie in the "personal hands" of the minister and an external recruitment exercise, conducted according to the Office of the Commissioner for Public Appointments (OCPA) principles, was the means by which members of the Parole Board were chosen. The Divisional Court found that if these arrangements were rigorously followed (and it decided that they had been), the power of appointment alone did not create any objective absence of independence.

53. It would be quite wrong, in the Board's view, to take from the *Brooke* judgment a principle that, where a minister has the power of appointment to a Board, the appearance of bias can only be avoided by the engagement of outside agencies to conduct the appointments exercise. In the *Brooke* case, the minister was actually a party to the hearing before the Parole Board. In the present case the minister is not a party to the hearing before the Appeal Board. Of course, the Prime Minister may be anxious that money which he believes should have been devoted to public services should be recovered but that does not make him in any sense a contender before the Appeal Board as to how their review of the propriety of the bank's dealing with the funds from Venezuela should be conducted, whereas before the Parole Board, the Home Secretary was entitled to make representations as to how it should reach its conclusions on any of the cases that it has to consider. Moreover, the decision in *Brooke* is one which is very much dependent on its own particular facts. The Divisional Court concluded that the manner of appointment to the Parole Board provided the reason that no appearance of bias arose. The Board does not consider that it was seeking to propound any general principle to the effect that appointment to similar Boards could only escape the charge of apparent bias if a similar method of appointment was employed.

54. Much the same considerations arise in the case of *Lithgow v United Kingdom* (1986) 3 EHRR 329, another authority on which the appellant placed particular emphasis. The applicants in that case had certain of their interests nationalised under the Aircraft and Shipbuilding Industries Act 1977. They claimed that the compensation which they received was grossly inadequate and discriminatory. The arbitration tribunal established to determine the amount to which they were entitled was challenged on the basis that it could not be regarded as objectively impartial. Under the 1977 Act the tribunal was to consist of a legally qualified president (appointed by the Lord Chancellor) and two other members, appointed by the Secretary of State after consultation with all the stockholders' representatives, one being experienced in business and the other in finance.

55. Mr Pleming suggested that in *Lithgow's* case the court had held that the consultation exercise with the stockholders' representatives effectively neutralised any claim that the appointments carried the stigma of apparent bias. While this was a

factor in the court's judgment, it was clearly not the only reason in play. At para 202 the court said:

> "… it was contended that the close connection between the executive and the Arbitration Tribunal, especially the appointment of two of its members by the Minister who was a party to any proceedings, necessarily deprived the Tribunal of the character of an 'independent and impartial tribunal'.
>
> As the Court has often observed, independence of the executive is one of the fundamental requirements that flow from the phrase in question. As regards the present case, although two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives. In fact, criteria for the selection of members of the Tribunal were worked out jointly and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the Government in the negotiations, as is evidenced by the awards copies of which were supplied to the Court. In these circumstances, there is no warrant for finding a lack of the requisite independence."

56. It would appear, therefore, that the court was at least as exercised by the consideration that the tribunal could - and, more importantly, did – award more than the government offered in compensation, thereby demonstrating its independence in a clearly tangible way. In the present case, there is nothing to suggest that the two appointees of the minister will be in any way constrained to act other than in accordance with their oath simply because they have been appointed by the minister. This surely is the most important consideration.

57. A dispassionate, neutral observer in the present case should and, in my view, *would* conclude that there is no reason to believe that these two professional men, against whom no imputation has been made, and who will have sworn an oath to perform their functions conscientiously, would fail to do so. The circumstance that in *Lithgow's* case the members of the tribunal were appointed after apparent agreement by the stockholders was not, in my judgment, indispensable to the conclusion of the court. After all, there is no suggestion that they could not have been appointed even if the stockholders objected, the extent of the obligation being that they be consulted. This was merely a circumstance that reinforced the essential finding that all the evidence pointed towards the conclusion that the members of the Tribunal were not mere ciphers of the Minister and would behave properly. There is nothing in the circumstances of the present case which would justify a different conclusion.

The statements of Mr Barrow

58. Finally, the statements made by Mr Barrow must be examined in order to consider whether these make any difference to the Board's preliminary conclusion that the circumstances of their appointment do not create the appearance of bias.

59. Mr Barrow certainly was robust in his criticism of the former Prime Minister and two of his ministers. And it would be unrealistic to fail to recognise that there was political capital for him to extract on this subject. But, so far as the bank was concerned, there is nothing pointedly adverse in what he had to say. On the contrary, it appears to me that in his observations about the bank's role, he was not intemperate, in light of what had passed between Mr Campbell and Mr Johnson. Mr Barrow had met Mr Johnson on 12 March 2008 and, in the Prime Minister's estimation, the bank at that time was co-operative. The Board has decided that an informed and fair-minded observer would have no difficulty in concluding that the statements made by Mr Barrow did not give rise to the risk that Mr Alpuche and Mr Locke would behave other than in a perfectly proper fashion. The Board has therefore concluded that the appeal must be dismissed and the Board will humbly advise Her Majesty accordingly.

60. The parties will have 28 days in which to make submissions on costs.

LORD PHILLIPS:

61. I have found this a difficult case. Initially I was in sympathy with the judgment of Lord Brown, but I have been persuaded by the judgment of the majority that it would not be right to differ from the conclusion of Conteh C J.

LORD DYSON:

62. In these proceedings, The Belize Bank Limited ("BBL") seeks declaratory relief in relation to the question whether the Banks and Financial Institutions Appeal Board ("the Appeal Board") appointed to determine BBL's appeal against the directive issued by the Central Bank of Belize Limited ("the Central Bank") on 7 March 2008 was an independent and impartial body, as required by section 6(7) of the Constitution. The facts have been fully set out by Lord Kerr and Lord Brown. There is no need for me to repeat them.

63. On 1 August 2008, Conteh CJ dismissed the application. BBL appealed on the grounds that the Chief Justice had erred in law and misdirected himself inter alia when

considering whether the membership of the Appeal Board was independent and impartial. The Court of Appeal (Sosa, Carey and Morrison JJA) dismissed the appeal. BBL now appeals to this Board on the grounds that the decision of the Court of Appeal was erroneous in law.

64. BBL's case is not one of actual bias. It is of apparent bias. The test for apparent bias is not in doubt. The question to be asked 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": per Lord Hope in *Porter v Magill* [2002] 2 AC 357, 494, para 103. This is not a hard-edged test. It requires the court to make an assessment or judgment in the light of all the circumstances of whether the fair-minded and informed observer would conclude that there was a real possibility of bias.

65. Both Lord Kerr and Lord Brown approach the question of apparent bias as if we were deciding the issue as a first instance tribunal. The unspoken assumption is that there is a single universal answer to this question, whether it is being determined in an English court or any other court and regardless of where that other court might be and regardless of the traditions and culture of the country in which the court operates. I do not think that this is a correct assumption to make. Nevertheless, I shall start by approaching the matter as if the Board were indeed being required to decide the issue for itself at first instance in England. Even approaching the case on that basis, I would agree with Lord Kerr's conclusion largely for the reasons that he gives.

66. At the heart of the submissions of Mr Pleming QC that the Appeal Board lacked the necessary appearance of independence and impartiality is the fact that the two lay members of the Appeal Board were appointed by the Finance Minister, Mr Barrow. There are several strands to the argument: (i) Mr Barrow had previously stated in very strong language that the US$ 10m payment from Venezuela should have gone to the government, not to BBL; (ii) the government itself, of which Mr Barrow was Prime Minister as well as Finance Minister, had a direct interest in the outcome of the appeal to the Appeal Board; (iii) the possibility of bias was not eliminated by the fact that the two lay members were recommended by Mr Waight, since he was an ex-officio director of the Central Bank whose directive was the subject of the appeal; and (iv) the two lay members had worked at the Central Bank.

67. It is rightly conceded by Mr Pleming that there is no apparent bias so far as the judicial member of the Appeal Board is concerned. He is "the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board" (section 70(2) of the Banks and Financial Institutions Act).

68. The implications of this concession are important. Let us suppose that the statute had provided that the Appeal Board was to comprise a single judge appointed by the minister and the facts had in all other respects been as they are in this case. An argument that the judge was apparently biased would almost certainly have failed. The fact that the judge was appointed by the minister who had expressed strong views about the conduct of BBL and that the minister had a direct interest in the outcome of the appeal would not be sufficient to support a case of apparent bias. That is because, in the absence of any evidence to the contrary, the fair-minded and informed observer would have confidence in the independence and impartiality of the judge. The fact that judges have years of relevant training and experience and swear an oath to make decisions impartially would be likely to be fatal to an argument of apparent bias: see *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 per Lord Rodger (para 23) and Lord Mance (para 57) and *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 62 per Lord Bingham (para 21). From time to time, judges are appointed by government ministers to investigate allegations that have been made against the State. It might be said in such cases that the appointing body has an interest in the outcome of the investigation. But it would be absurd to suggest that the fair-minded and informed observer would conclude *on that ground alone* that there was a real possibility that the appointed judge would be biased.

69. It follows that the real thrust of BBL's case of apparent bias is directed to the two lay members of the Appeal Board and is focused on the question whether the fair-minded informed observer would conclude that there was a real possibility that they would be biased in a way in which the judicial member of the Appeal Board would not be. There are two aspects to consider. The first is the manner in which they were appointed. The second is the identity and characteristics of the lay members themselves.

70. As regards the manner of their appointment, the focus here is on the role of Mr Waight. That is because Mr Waight recommended Mr Alpuche and Mr Locke on 26 March 2008 and the minister accepted the recommendations on the same day. There is no evidence that the minister played any part in the selection of the lay members: he merely accepted the recommendations of Mr Waight. As for Mr Waight himself, I agree with what Lord Kerr says at para 42. Mr Waight was a career civil servant and there is no evidence which suggests, still less shows, that he was doing other than acting in a conscientious and professional manner in recommending two persons who in his opinion satisfied the statutory criteria, namely that they had "knowledge of banking, finance or other related disciplines" and they were not serving members "of the Central Bank or any other bank or financial institution in Belize".

71. As for the lay members themselves, Lord Kerr has set out at para 22 the evidence about the credentials of Mr Alpuche and Mr Locke. This evidence has not been challenged by BBL. Both lay members are highly-regarded and respected members of the community who amply satisfied the statutory criteria. They were

selected because they are well versed in the relevant disciplines. It is true that Mr Alpuche was Financial Secretary from 1994 to 2000 and in that capacity was an ex-officio director of the Central Bank. But he had been in the private sector for the past eight years, having retired from the public service. He was also the chairman of the Board of the Income Tax Appeal Board and the Board of Stamp Commissioners and a member of the General Sales Tax Appeal Board. He therefore had experience of acting in a judicial or quasi-judicial capacity. Mr Locke was a businessman who by reason of his business experience was eminently well qualified to sit on the Appeal Board. He had had no connection with the government, although he had previously been an employee of the Central Bank. It is also relevant that it was normal practice for members of Appeal Boards to taken the same oath as that taken by judges.

72. Ultimately, it is a matter of impression and assessment whether the test of apparent bias is satisfied on the facts of any particular case. But if I had been sitting as a first instance judge in England, I would have reached the same conclusion as Lord Kerr on the issue of apparent bias. These are not easy cases. I have concentrated on the manner of the appointment of the two lay members and their qualities. But it is necessary to have regard to all the relevant circumstances. I accept that (i) the fact that the minister had expressed views about the issue that lay at the heart of the Central Bank's Directive and (ii) he made the appointments are both relevant factors to be taken into account in making the assessment. They are certainly matters which would cause the fair-minded and informed observer to reflect most carefully. But there are yet further factors that he would take into account as well. These include (i) the fact that the judicial member was the chairman and could not be outvoted by the lay members; (ii) the pool of available persons possessed of the relevant statutory qualifications was small; and (iii) the minister was obliged by the statute to make the appointments. As regards this last point, Mr Pleming submits that the minister could and should have asked a delegate to appoint the pay members on his behalf. But that submission is misconceived for the reasons given by Lord Kerr at paras 44 and 45.

73. I should add that I do not consider that the resolution of this case is to be found in an analysis of the facts of the authorities on which Mr Pleming relies. Some of these authorities are considered by Lord Brown at paras 102 to 109. In each of them, the complaints of apparent bias failed. There are substantial factual differences between these cases and the present appeal. That serves to demonstrate that the application of the test for apparent bias is intensely fact-sensitive. In my view, the factual differences between these cases and the present appeal are such that it is not possible to infer how the courts would have decided them if the facts had been closer to those in the present case.

74. But as I have said, the Board is not sitting as a first instance tribunal in England. It is hearing an appeal on a point of law from the Court of Appeal of Belize which itself was hearing an appeal on a point of law from the Chief Justice. The error of law has not been clearly identified. But it must simply be that the Chief Justice

reached the wrong conclusion on the question of apparent bias. I would accept that the question whether there has been apparent bias raises a point of law which is a matter for the court to decide: see per Lord Mance in *Helow* at para 39. It is an aspect of procedural fairness which is always a matter for the court to decide. But it is a fact-sensitive issue of law and one on which (as evidenced by the fact that the Board is divided as to how this appeal should be decided) different judges within the same jurisdiction and (of particular importance in the present case) courts in different jurisdictions can hold different views.

75. Lord Brown has quoted from the lecture given by Lord Rodger (the Sultan Azlan Shah Law Lecture 2010) entitled *Bias and Conflicts of Interests—Challenges for Today's Decision-makers.* Lord Rodger says at p 21 in relation to apparent bias that the court should "adopt a course that can be expected to command the assent and respect of the general public". A little later, he continues:

> "Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise."

76. I agree with Lord Rodger's salutary words. They are apposite in the present appeal. The issue is whether the fair-minded and informed Belizean would conclude that there was a real possibility that the Appeal Board would be biased. In determining this question, the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters, also bearing in mind that Belize is a small country with a small pool of persons who would be likely to satisfy the statutory criteria for appointment as lay members of the Appeal Board.

77. With that in mind, I turn to consider the decision of Conteh CJ in this case. The Chief Justice referred to a number of authorities on apparent bias. The principal arguments advanced by Mr Pleming to the Board were advanced on behalf of BBL to the Chief Justice. The Chief Justice concluded at para 28 that the arguments were not "without some merit", but that "after anxious consideration" he was unable to accept them "because of the facts of this case and the statutory regime for the appointment of the Appeal Board". But, he said, the statutory provisions for the appointment of a tribunal "do not alone immunise it from being impeached as not independent or impartial".

78. At para 29, he said:

> "In this case, however, I find the provisions in Part X of the Act when read together, as I think they must, will engender, in my view, confidence in the ordinary person in Queen Square Market, as to the independence and impartiality of the Appeal Board itself and its members."

79. For the reasons I have given, the reference to the ordinary person in Queen Square Market is significant and apposite. The Chief Justice then gave a number of reasons to support this conclusion. First, the chairman of the Appeal Board was a Justice of the Supreme Court nominated by the Chief Justice. Secondly, the two lay members were appointed on the basis of their specialist qualifications and experience. They were not serving members of the Central Bank or any other financial institution in Belize. He was not persuaded that a fair-minded observer "who is not overly suspicious or finicky would think that the presence of these two gentlemen on the Appeal Board would convey the appearance of bias". He continued at para 31:

> "The fair-minded objective observer should, I think, be given some credit for his intelligence not to be swayed by any and every fancy of bias. The fact that they were appointed by the Minister does not, in my view, make any difference except perhaps to feed into an overly suspicious fancy. Mr Joseph Waight in his first affidavit deposed as to how [Mr Alpuche and Mr Locke] came they came to be appointed. He suggested their names to the Minister. The Minister has to make the appointments. That is what is provided for in the Act. I do not think the robust common sense of fair-minded objective observer would read anything into the fact that Mr Waight discussed the appointment and it was done on the same day."

80. Thirdly, the Act provides that the majority should always include the judge chairman, who is also given the power to determine disputes as to procedure. Fourthly, there is a right of appeal to the Court of Appeal from decisions of the Appeal Board on a point of law. Fifthly, the Minister of Finance was not a party to the appeal to the Appeal Board. Finally, he accepted the account of Mr Campbell of the events which led up to the Central Bank's investigation of BBL. It was not the Minister of Finance who orchestrated that investigation which resulted in the issue of the Directives on 8 March 2008.

81. Lord Brown says at para 114 of his judgment that the existence of a right of appeal on a point of law is no answer to the complaint of apparent bias. I accept that, of itself, the right of appeal is a point of little weight. But it is not irrelevant that, if

the Appeal Board makes an error of law, there is a right of appeal to an independent court. The fact that the court cannot substitute its own findings (but is limited to remitting the matter to the Appeal Board) does not mean that the right of appeal is of no value. In my view, Conteh CJ was right to regard the existence of a right of appeal as one of a number of relevant factors.

82. To summarise, Conteh CJ applied the correct test for apparent bias by reference to whether the fair-minded and informed observer in Belize would conclude that there was a real possibility of bias. The Chief Justice considered the arguments in favour of apparent bias. In his judgment they were not sufficiently cogent to outweigh the arguments that went the other way. The test was therefore not satisfied. He considered that this was a difficult and finely-balanced case. For the reasons I have already given, I would have upheld this decision even if this had been an English case. But the case for upholding it is all the stronger, since the assessment of the possibility of bias fell to be made by a Belizean court by reference to the perception of the possibility of bias by a fair-minded and informed Belizean. As I have said, the test for apparent bias involves a fact-sensitive exercise of judgment. The Board should be slow to interfere with the exercise undertaken by the courts of Belize and should only do so if satisfied that their decision was clearly wrong. In my view, their decision was not clearly wrong.

83. I have concentrated on Conteh CJ because his was the first instance decision. It was upheld by the Court of Appeal. I do not find it necessary to examine the reasoning of that court, since if the decision of Conteh CJ was correct, the appeal must be dismissed.

84. For the reasons that I have given as well as those given by Lord Kerr, I would dismiss this appeal.

LORD BROWN:

85. On 28 December 2007 the appellant bank (BBL) received from the Bandes Bank in Venezuela a transfer of US $10m paid by the Government of the Bolivarian Republic of Venezuela. Was that a payment which BBL was entitled to keep (in settlement of a a debt agreed to be owed to BBL by the Government of Belize pursuant to their guarantee of a loan made by BBL to Universal Health Services, a private hospital company) or was it a payment which should have been treated in the same way as another US $10m payment by the Government of Venezuela transferred to the Central Bank of Belize (the Central Bank) generally for the benefit of the people of Belize? That basic question, one of acute political controversy within Belize, particularly after the change of government following Belize's general election on 7 February 2008, underlies the critical and very different issue now arising for

decision on the present appeal: whether a particular Appeal Board is affected by the appearance of bias. Although, as will readily be understood, this apparent bias issue itself falls to be resolved without any consideration whatever of the merits of the underlying dispute, it is nevertheless necessary, for its proper understanding, to sketch in something more of the background to the case.

86. First, a word of explanation about the Central Bank itself. This bank, established under the Central Bank of Belize Act (Ch 262), is administered by a board of directors which consists, pursuant to section 11 of that Act, of the Governor appointed by the Governor-General on the advice of the Prime Minister, the Deputy Governor appointed by the Minister of Finance, the Financial Secretary (all three being ex-officio members of the board) and three or four other board members also appointed by the Finance Minister. Amongst the Central Bank's powers are those conferred on it under Part VII of the Banks and Financial Institutions Act (Ch 263) (BFIA) including, under section 34, the power to conduct a special examination of the affairs of a licensee where "the Central Bank has reason to believe that the licensee is carrying on its business in a manner detrimental to the interests of its depositors or customers", and, if the Central Bank determines that a licensee has acted so as to "seriously prejudice the interest of a licensee's depositors or customers," the power under section 36(5) to "issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or directive on whether the order or directive in question should be removed or varied." Section 36(6) then provides that :

> "Within ten days of the issuance of an order or directive under this section, the person who is the subject of the order or directive may appeal such order or directive to the Appeal Board."

87. Returning then to the political background to this case, following the general election in February 2008, the Honourable Dean Barrow, formerly Leader of the Opposition, was sworn in as Prime Minister and Finance Minister, replacing the Honourable Said Musa in both roles. Already before the general election, Mr Barrow had been fiercely critical of Mr Musa, in particular for acknowledging that any debt was owing by the government to BBL. Mr Barrow had, indeed, acted as co-counsel for the Association of Concerned Belizeans in litigation brought to challenge the lawfulness of the government's financial arrangements with BBL. After the general election the transfer of the Venezuelan funds became a still more hotly contested issue as may readily be seen from a succession of government press releases and press conferences (parts of which at least must now be set out).

88. On 28 February 2008 a government press release concluded: "Prime Minister Barrow says his Government will continue to pursue justice on behalf of the Belizean

people and will leave no stones unturned to bring to account those who have robbed the people of this Country." Just a week later, on 7 March 2008, pursuant to notice given with Mr Barrow's agreement on 6 March, the Central Bank conducted a special examination of BBL under section 36 of BFIA, the justification for such examination being that the Government were "customers" of BBL. The same day, on 7 March 2008, Mr Barrow said at a press conference:

> "in my view, in view of the government, what was done by Messrs Musa and Fonseca [the former Housing Minister], and to a lesser extent by Amalia Mai [the former Chief Executive Officer in the Ministry of Home Affairs], is absolutely reprehensible. It is highly immoral, and the product of a conspiracy that seemed to have had as its motive two things: to divert this huge chunk of money that was the property of the Belizean people once it was gifted by Venezuela, to divert it from its legitimate, and proper, and agreed upon use, to divert it so that they, in particular the almighty then Prime Minister and the almighty then Minister of Housing, might use the US$10m as they saw fit."

89. On 12 March 2008, at a press conference which Mr Barrow held together with the governor of the Central Bank, he said this:

> "I begin by telling you that as this investigation [by the Central Bank under section 36 of BFIA] has progressed matters have become even more alarming. . . there is the question of US$10m wired to the Belize Bank from Venezuela with the note on the confirmation notice that 'this was a disbursement for the Government of Belize for its use in the construction of new homes'. I have indicated to the Belize Bank that I wish to put them on notice, that the government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the people of this country (applause). . . . The enormity of what Musa and Fonseca did and Amalia Mai (although I suppose she may be able to have resort to the Nuremberg defence that she was just following orders), but the enormity of what was done is compounded by this fact. US$40m gifted to us by Venezuela and Taiwan was paid over to the Belize Bank."

90. Following the Central Bank's special examination of BBL on 7 March 2008, its Governor wrote to BBL identifying what were described as seven "main irregularities which came to light", and saying that in its view "BBL acted in gross violation of prudent banking practices in the implied conditions of its licence" and accordingly that, pursuant to section 36(5), it was issuing directives to BBL including (only the first being relevant to these proceedings):

> "BBL should forthwith credit [the government's] account with the Central Bank of Belize with US$10m as per 'Payment Details' stated on wire transfer instructions sent by Bandes [Bank of Venezuela] on the 'cash payment confirmation' dated 28 December 2007."

BBL responded to the directives by challenging the Central Bank's power to issue them and by a letter to the Chief Justice indicating its wish to appeal to the Appeal Board (under section 36(6)), albeit noting that no Appeal Board in fact then existed.

91. It is necessary at this stage to set out the material provisions of Part X of BFIA, under the heading *Appeal Board*:

> "70(1) The Minister [defined by section 2 of the Act as the Minister of the Government of Belize for the time being responsible for Finance] shall cause to be appointed [an Appeal Board].
>
> (2) An Appeal Board for the purposes of this Act shall be constituted of
>
> > (a) the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board;
> >
> > (b) two other members appointed by the Minister from among persons who have knowledge of banking, finance or other related disciplines:
>
> Provided that no serving member of the Central Bank or of any other bank or financial institution in Belize shall be appointed as a member of the Board.
>
> (3) The terms of office of the members appointed under paragraph (b) of subsection (2) shall be such as may be specified in their instruments of appointment.
>
> 71. Any person who is aggrieved by a decision of the Central Bank . . . (e) made under section 36 . . . may appeal against the decision to the Appeal Board.

72(1) The Appeal Board may, with the approval of the Minister, make rules to regulate its procedure for hearing appeals, provided that such procedure shall comply with the rules of natural justice.

73. The quorum at any sitting of the Appeal Board shall be two members, one of which shall be the Chief Justice or the Judge nominated by him.

74. At any meeting of the Board, a decision may be taken by a majority of its members, provided that the members constituting the majority shall include the Chief Justice or the Judge nominated by him.

75(1) Upon an appeal under this Act, the Appeal Board may affirm or set aside the decision appealed against or may make any other decision which the Central Bank could have made.

77(1) Any party aggrieved by a decision of the Appeal Board may appeal to the Court of Appeal on the ground that the decision was erroneous on a point of law.

(2) On any such appeal, the Court of Appeal may affirm or set aside the decision appealed against and may remit the matter to the Appeal Board for rehearing and determination by it."

92. On 26 March 2008, following BBL's statement of their intention to appeal, the Governor of the Central Bank raised with Mr Waight, the Financial Secretary (and thus, as already explained, an ex-officio director of the Central Bank) the matter of appointing an Appeal Board under section 70. In an affidavit dated 25 June 2008, Mr Waight explains how he proceeded:

"I began to review the cadre of persons who I considered had expertise in the areas required by section 70. I came up with the names of Mr Jaime Alpuche and Mr Jeffrey Locke. I knew both gentlemen from past working experience.

Mr Jaime Alpuche is a former Financial Secretary. I served under him as Deputy Financial Secretary. Mr Jeffrey Locke is a former employee of the Central Bank before he went to work for SOL. I knew Mr Locke from his time at the Central Bank. I telephoned them and asked them if they would accept such appointment and they had no objection.

> I suggested the names of Mr Jaime Alpuche and Mr Jeffrey Locke to the Minister of Finance and he accepted them and made the appointments on 26 March 2008."

Mr Waight also wrote to the Registrar of the Supreme Court to ask the Chief Justice either to act as, or to nominate another judge to be, Chairman of the Appeal Court. In the event the Chief Justice nominated Mr Justice Awich.

93. Following a letter dated 4 April 2008 from BBL's attorneys to Mr Barrow expressing serious concerns as to whether the Appeal Board constituted in this way would comply with BBL's "constitutional right to a fair hearing by an independent and impartial tribunal" and requesting further information about the two members he had appointed, Mr Waight replied by letter dated 11 April 2008 that:

> "Mr Jaime Alpuche is a former Financial Secretary, having held this top post from April 1994 to March 2000. In this capacity he was an ex officio member of the Board of Directors of the Central Bank of Belize. Mr Alpuche is also the Chairman of the Income Tax Appeal Board, the Chairman of the Board of Stamp Commissioners, and a member of the General Sales Tax Appeal Board. He holds a BSc degree in Economics from the University of the West Indies and an MBA from the Strathclyde Graduate Business School, Scotland. Mr Alpuche has been in the private sector for the last eight years, having retired from the public service.
>
> Mr Jeffrey Locke holds a MSc degree in International Management with emphasis on International Finance, International Marketing and Governance. He possesses a vast and varied experience of working as a business and management consultant in Belize and the Caribbean countries. He worked as management consultant with the First Caribbean International Bank (Barbados) from 2005 to 2007."

He added that: "These are not salaried appointments; the services provided by the members are on a purely voluntary basis. In fact, the Act makes no provision for any salary or stipend to be paid to the members."

The letter concluded:

> "Your letter is based on the unwarranted assumption that the members appointed by the Minister would not be impartial. This is not only most unfair but also amounts to an unjustifiable attack on the integrity of the

> persons concerned, who have accepted the assignments as a service to the community. There is absolutely no basis to impeach the integrity of the members whose credentials are beyond reproach."

It should be made absolutely plain that BBL's case is not that Mr Alpuche or Mr Locke would *in fact* fail to act impartially on an appeal. Their personal integrity is not under attack. Rather the challenge asserts that an Appeal Board thus constituted does not present the *appearance* of independence and impartiality. No question is raised as to the propriety of Awich J's appointment. BBL's case is that the Appeal Board's two lay members lack the necessary appearance of independence and impartiality, not because of who they are, but because of how and by whom and the circumstances in which they were appointed.

94. These proceedings were instituted by BBL on 23 May 2008 claiming in particular that a hearing before the Appeal Board would breach their rights under section 6(7) of the Constitution of Belize (which, by section 2, is "the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.)" The same day, expressly without prejudice to their constitutional claim, BBL filed an appeal to the Appeal Board. Section 6(7) of the Constitution provides:

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

95. BBL's claim was rejected by the Chief Justice on 1 August 2008 (following a hearing on 16, 17 and 18 July) and rejected again, following BBL's appeal, by the Court of Appeal (Sosa, Carey and Morrison JJA) on 4 June 2009 (following a hearing on 16, 19 and 20 March 2009). By this further appeal BBL renew their arguments before this Board.

96. As was acknowledged in both courts below, section 6(7) of the Constitution is in terms similar to article 6(1) of the European Convention on Human Rights so that the ECtHR's decision in *Findlay v United Kingdom* (1997) 24 EHRR 221 provides a useful starting point for the consideration of a tribunal's independence and impartiality. At para 73 (pp 244-245) the European Court said this:

> "The Court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner

> of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concepts of independence and impartiality are closely linked and the Court will consider them together as they relate to the present case."

97. As already indicated, BBL here disavow any allegation of actual bias against any member of the Appeal Board so that the real question under consideration is the Board's impartiality "from an objective viewpoint". The question to be asked 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" – per Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, 494, para 103. As later noted by Lord Bingham of Cornhill in *R v Abdroikov* [2007] 1 WLR 2679, 2688 at para 15:

> "The characteristics of the fair minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naive nor unduly cynical or suspicious".

Returning (less than a month later) to this same concept of "the fair-minded and informed observer," Lord Bingham in his judgment delivered on behalf of the Board in *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 62, para 16, added:

> "The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done."

98. What then would this fair-minded and informed observer, with a reasonable working grasp of how things are usually done, think about the prospects of an Appeal Board, constituted in the way this Appeal Board had come to be appointed, fairly, independently and impartially adjudicating upon the underlying dispute arising here between BBL and the Government of Belize – the resolution of that dispute plainly being the determining factor in deciding the outcome of BBL's appeal against the

Central Bank's direction that it should pay over the US$10m to the Government's account with the Central Bank? Would this fair minded and informed observer think that there was a real possibility of that issue not being fairly decided? Or can it be said that the Appeal Board as constituted offers "sufficient guarantees to exclude any legitimate doubt in this respect"? (para 73 of the Strasbourg Court's judgment in *Findlay* cited at para 96 above.) That essentially is the question for the Board's determination and, in answering it, it should be recognised that the very concept of apparent bias is designed to give effect to Lord Hewart LCJ's aphorism in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259: "[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Or, as Lord Steyn put it in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [2003] 1 CR 856, para 14: "Public perception of the possibility of unconscious bias is the key."

99. Lord Hope in *Helow v Secretary of State for the Home Department* [2008] 2008 UKHL 62; [2008] 1 WLR 2416, 2417-2418, para 1, noted that "the fair minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively" and went on to point out that this observer has attributes which many of us might struggle to attain and above all, "informed". In a characteristically thoughtful lecture subsequently given by Lord Rodger of Earlsferry (the Sultan Azlan Shah Law Lecture 2010 entitled *Bias and Conflicts of Interests – Challenges for Today's Decision-makers)* appears this, to my mind salutary, warning about the concept of the informed observer:

> "Should we welcome this newcomer to our legal village? Not *particularly* warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation. Moreover, the informed observer is supposed to know quite a lot about judges – about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if this process is taken too far, . . . the judge will be holding up a mirror to himself. To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public."

100. The main considerations relied upon by BBL in its contention that this Appeal Board lacked the necessary appearance of independence and impartiality can be shortly summarised. The Minister appointing the two lay members was Mr Barrow himself, a champion of the view that the US$10m payment from Venezuela should have gone to the government, not BBL, and that the way it had been dealt with was a scandal: "robbe[ry]", "absolutely reprehensible", "highly immoral", "a conspiracy", an "enormity". Mr Barrow personally had a large political stake in the Central Bank's directive being upheld. And the government itself, of course, of which Mr Barrow was Prime Minister as well as Finance Minister, was directly interested in the outcome of the appeal. The investigation had been commenced, and the directive subsequently issued, on the basis that the Central Bank considered BBL's business to have been carried on "in a manner detrimental to", and so as to have "seriously prejudice[d]", the interests of the government as one of BBL's customers. As for it being Mr Waight, the Financial Secretary, who actually suggested to Mr Barrow the names of the two lay members, this would have provided little reassurance to the fair-minded and informed observer (let alone BBL): he himself, after all, was an ex-officio Director of the Central Bank whose directive was the subject of the appeal. And the two lay members he suggested for appointment had themselves both worked with Mr Waight at the Central Bank, Mr Alpuche, indeed, as a former Financial Secretary. It is perhaps unsurprising that BBL's argument based upon these central considerations was acknowledged by the Chief Justice to be "not without some merit".

101. It is, of course, the case that Mr Barrow himself is not a party to the appeal, that no criticism whatever is, or could be, made with regard to the appointment of Awich J as the Appeal Board's Chairman; that the two lay members satisfy the requirements of section 70(2)(b) of BFIA and its proviso; that, by virtue of section 74, no effective decision can be reached by the Appeal Board unless the Chairman agrees to it; and that, under section 77 of BFIA, anyone aggrieved by the Appeal Board's decision can appeal to the Court of Appeal on a point of law. All these were considerations pointed out by the Chief Justice at first instance and relied upon by him in his rejection of the challenge. None of them, however, submits BBL, can suffice to counteract the concerns which any independent observer would be likely to feel about BBL's prospects of securing an impartial outcome of its dispute with government and the Central Bank.

102. Amongst the many authorities cited to the Board on this appeal, five in particular seem to me of particular assistance, focusing as substantially they do upon the circumstances of the appointment of the respective tribunals there under challenge.

103. *Lithgow v United Kingdom* (1986) 8 EHRR 329 concerned the compensation payable to the applicant companies following the nationalisation of their interests under the Aircraft and Shipbuilding Industries Act 1977 and included a challenge to the objective impartiality of the Arbitration Tribunal established to determine the amount due. Under the Act the Tribunal was to consist of a legally-qualified president

(appointed by the Lord Chancellor) and two other members, appointed by the Secretary of State after consultation with all the Stockholders' Representatives, one being experienced in business and the other in finance. As noted at para 29 of the Court's judgment:

> "Criteria for the selection of members of the Tribunal – relating to their standing and experience and including a requirement that they should not have any connection with the companies nationalised – were worked out in consultation with the Stockholders' Representatives, who were also invited to make proposals as to suitable members."

Rejecting the applicant's complaint under article 6, the Court at para 202 said this:

> "[A]lthough two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives. In fact, criteria for the selection of members of the Tribunal were worked out jointly and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the government in the negotiations, . . . In these circumstances, there is no warrant for finding a lack of the requisite independence. The applicants did not allege that the members in question were not subjectively impartial. Having regard to the manner in which the appointment procedure was actually carried out, the court is of the opinion that their objective impartiality was not capable of appearing to be open to doubt."

104. The compensation to be awarded by a Board of Assessors following government's compulsory acquisition of property was again the ultimate question at issue in *Lake et al v Attorney General of Anguilla* (claim no AXA HCV 2003/0074) (unreported) 5 April 2004 where the claimants similarly challenged the composition of the Board on the basis that it violated their fundamental right to have their civil rights adjudicated by an independent and impartial tribunal as guaranteed by section 9(2) of the Constitution. The Board there consisted of a High Court judge as Chairman and two other members, one nominated by the owner of the land acquired, the other appointed by the Governor in Council. Rejecting that part of the claimant's challenge, Baptiste J observed (para 38) that: "As chairman, a judge is both independent and impartial. His presence provides safeguard for the independence and impartiality of the Board." The Judge then concluded (at para 40):

> "Looking at the Constitution of the Board I am of the view that a fair minded and well informed observer, that is one who is neither

> complacent, nor unduly sensitive or suspicious, would come to the conclusion that the Board is impartial. Such an observer would undoubtedly consider that the Board is not stacked in favour of any one party. *Both parties have one member on the Board, undoubtedly to look after their interests*, and a judge of the High Court is the Chairman." (Emphasis added)

Referring to *Lake's* case in his judgment below, Carey JA cited the above passage from para 38 of Baptiste J's judgment but somewhat surprisingly omitted to mention that the two lay members of the Board in that case were nominated, one by each party to the dispute.

105. The applicants in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 were two convicted prisoners whose complaints included the contention that Boards of Visitors are not independent and impartial tribunals, in part because their members are appointed by the Home Secretary, himself responsible for the administration of prisons. As to that the Court concluded (at para 79 of its judgment):

> "The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not 'independent'."

106. In *R (Brooke) v Parole Board* [2007] EWHC 2036 (Admin); [2007] HRLR 1369 three long-term prisoners successfully contended that the Parole Board failed to meet the requirements of the common law that a court should demonstrate objective independence of the executive and the parties. One matter relied upon by the applicants was that Board members are appointed by the Secretary of State. As to this, however, Hughes LJ in the Administrative court noted that in practice the method of appointment is not normally in the Secretary of State's personal hands; instead, an external recruitment consultant is instructed after which shortlisted candidates are interviewed by a panel including someone from the Office of the Commissioner for Public Appointments (OCPA), appointment being governed by OCPA principles which include the requirements for appointment to be made on merit and for independent scrutiny – hence the OCPA member of the interviewing panel. In these circumstances the Court endorsed the view expressed by the Strasbourg Court in *Campbell and Fell* in respect of prison Boards of Visitors and, with regard to the "appointment by Ministers of judges of differing tribunals and courts," observed (para 31): "Alone, it need not detract from the independence of the judge when once appointed." The Court then concluded:

> "32. In the present case the appointing Minister is, significantly, not only responsible for the Board but also concerned as a party in every case it decides. We agree that that distinguishes the case from many others of ministerial appointment, and calls for clear evidence that in fact the appointing Minister demonstrably abjures any significant input into the selection of members. But if the arrangements which we have set out above for appointment are rigorously followed, we are unable to see that the power of appointment alone need create any objective absence of independence."

107. The fifth decision which for my part I have found helpful is that of the Privy Council in the *Prince Jefri* case to which brief reference has already been made. The position there was that, when the Brunei Investment Agency applied to enforce a settlement agreement reached between the Agency and the Brunei government on the one side and Prince Jefri on the other, Prince Jefri requested the Chief Justice to recuse himself on the ground of apparent bias from adjudicating on the application and then challenged his refusal to do so. Roundly rejecting the challenge, the Board pointed out that, following the Chief Justice's initial three-year appointment in 2001, his appointment had twice been renewed, on each occasion for a further two years, that when asked to recuse himself he was aged 74 with five months of his extended term still to run, and that he had since accepted a further two- year extension. Lord Bingham's judgment on the point concluded:

> "20. The thrust of Prince Jefri's argument on this point, briefly put, is that the fair-minded and informed observer, appreciating that the Chief Justice's prospects of further appointment depended on the goodwill of the Sultan, and that the Sultan could procure a reduction of his salary (against which there was no statutory protection), would apprehend a real possibility that the Chief Justice would be biased in favour of the Sultan in any matter in which his interests conflicted with those of Prince Jefri.
>
> 21. The Board has no hesitation in dismissing this submission. The fair-minded and informed observer must be taken to understand that the Chief Justice was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as 'reasonably adequate' pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief

> Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation."

108. It will readily be seen that in each of these five cases the complaints of apparent bias in the event failed. But what seems to me more striking still are the very substantial and highly significant factual differences between those cases and the present appeal (but for which their outcomes would likely have been different) and their implicit recognition of the importance of the principle that a tribunal's "objective impartiality [must not be] capable of appearing to be open to doubt" (para 202 of the Strasbourg Court's judgment in *Lithgow* cited at para 103 above).

109. Is it really to be supposed that in *Lithgow* the ECtHR would have sanctioned the Secretary of State's appointment of the Tribunal's two lay members had he *not* consulted with the Stockholders' Representatives (and, indeed, invited their proposals as to suitable members)? Or that the Board would have passed muster in *Lake's* case had *both* lay members been appointed by government, rather than one by each party? Or that the Administrative Court in *Brooke* would not have been altogether more troubled by the Secretary of State's appointment of the Parole Board's members had he personally been involved in their selection? And can it really be said that the Home Secretary's interest in the adjudications of Boards of Visitors, or even, indeed, of the Parole Board, is in any real sense comparable to the political and financial interests of the Belize Government and the Minister responsible for appointing the lay members in the present case?

110. The answers to all these questions seem to their Lordships to be a plain no. And there is surely a world of difference between acknowledging the obvious independence and impartiality of a longstanding Chief Justice reaching the end of his distinguished career (in the *Prince Jefri* case) and the appointment by a government Minister to an Appeal Board of two lay members (however distinguished) specifically to adjudicate on the very dispute which brings their appointment about and to which government is to all intents and purposes a party.

111. Naturally I recognise the difficulty (from the point of view of appointing an Appeal Board) which Mr Barrow was placed in by section 70 of BFIA in the context of this dispute. But BBL's constitutional entitlement to an independent and impartial tribunal to determine their appeal from the Central Bank's directive cannot be denied them by the provisions of BFIA, however constraining these may be thought to be – see section 2 of the Constitution cited at para 94 above. Nor is it a sufficient answer to BBL's complaint to point, as both Lord Kerr and Lord Dyson do (at paras 31 and 76 of their respective judgments), to the comparative smallness of the Belizean population. The circumstances of the present case were, in my opinion, such as to demand at the very least that BBL was consulted with regard to the appointment of the two lay members and, indeed, given the opportunity to participate in the selection

process. Why should it not have been invited, as in *Lithgow*, to propose suitable members for consideration? And why, one wonders, could not suitably qualified lay members have been found (perhaps even from abroad) who (or at least one of whom) had *not* previously worked for the Central Bank and thereby become known to the Financial Secretary?

112. At all events, whatever the answers to these questions, I cannot but conclude that, in the light of the appointment procedure adopted, the objective impartiality of the Appeal Board as constituted would be likely to appear to a fair-minded and informed observer open to doubt. How could it not strike such an observer that Mr Waight may well have chosen these two Board members, and Mr Barrow so speedily have accepted his choice, because each felt confident that these two would instinctively be more sympathetic, ie predisposed, to the Central Bank's and government's cause than BBL's? In short, it is my opinion that such an observer, having duly considered all the facts, *would* conclude that there was *a real possibility* that the Appeal Board was biased – the *Porter v Magill* test as explained above.

113. Lord Dyson suggests (at para 76) that "the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters." With the best will in the world, that seems to me to come close to urging an abnegation of this Board's proper role in so politically fraught a case as this (ironically the very last Belizean appeal to come before us). I had always understood that role to carry with it the responsibility for ensuring, to the benefit of Belizeans themselves and of their standing in the wider international community, that the highest international standards of justice are maintained in that country. On the issue of apparent bias there can certainly be no stronger case for deference to the Belizean judges than the Strasbourg Court would afford our judges on a complaint originating in the UK. I do not believe that the Strasbourg Court would reject a challenge to the UK in a comparable case.

114. I should deal with one final matter, the respondents' successful reliance in both courts below upon the fact that, under section 77 of BFIA, were BBL to be aggrieved by the Appeal Board's decision, it could appeal in point of law to the Court of Appeal. I regard this as an impossible argument, whether considered simply as a factor in the fair-minded observer's overall appreciation of the possibility of bias or as a discrete basis upon which to conclude (as Morrison JA put it at para 73 of his judgment below) that "it is possible for suitable appellant procedures to compensate for any perceived lack of independence or impartiality." The plain fact is that not merely does section 77(1) of BFIA confine any appeal to consideration of legal error but, still more important, section 77(2) prevents the Court of Appeal, assuming it were sympathetic to the appellants' case, substituting its own decision for that of the Appeal Board. Its power would be limited to remitting the matter to the Appeal Board "for rehearing and determination by it" – of scant comfort to the person aggrieved if one assumes that the Appeal Board itself is affected by apparent bias.

115. The position could hardly be more different from that arising in *Porter v Magill* itself where, in the context of a challenge to the impartiality of an auditor, Lord Hope said this at para 93:

> "The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements [ie the requirements of the *Bryan v United Kingdom* (1995) 21 EHRR 342 line of authority]. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 52 Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case."

116. It follows that for my part I would have allowed this appeal.