How does it look?

Lesage sets out what will hopefully be accepted as the correct approach to cases of apparent bias, say James Guthrie QC & Rowan Pennington-Benton

IN BRIEF

- When deciding on apparent bias cases, court should consider the particular facts of the case, the conduct of the trial and how the same would have been viewed by an informed and balanced member of the public.
- The current formulation for assessing apparent bias 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".

The doctrine of apparent bias requires that judges be free not only from subjective personal bias or prejudice, but also from potential public perception of the same. Tribunals must appear in an objective sense to be truly independent and impartial. This perception is essential to maintaining public confidence in the judiciary and the legal system as a whole. The legal system is a central social good in any successful state. Its substantive, as well as apparent, integrity is an important matter.

Porter v Magill

With this in mind, the House of Lords in *Porter v Magill* [2002] 2 AC 357, [2002] 1 All ER 465, rejected the previous tests of "reasonable likelihood" and "real danger" of apparent bias on the basis that they tended to place too much emphasis on the court's assessment of the facts, rather than public perceptions. It is, after all, these latter perceptions with which the doctrine is concerned. The current formulation 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".

> *"The legal system is a central social good in any successful state"*

Even this formulation has caused difficulties. Just how informed should our notional observer be? He is not a lawyer or a judge, but a member of the public. To what extent should he give the tribunal the benefit of the doubt? An ignorant and paranoid observer could no doubt see bias in almost any proceedings before any judge. On the other hand, focusing on the perceptions of an observer well versed in the checks and balances of the decision-making process, coupled with a supine regard for state authority, would render the doctrine toothless.

Gillies

Our notional observer has been held by the courts to be neither complacent nor unduly sensitive or suspicious. This tends to exclude the paranoid or nonchalant respectively. The primary difficulty has concerned the attribution of information and industry-specific knowledge to the observer. It has been held that s/he must be assumed to be in possession of "all the facts that are capable of being known by members of the public generally" (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781, at 787).

This is fine, as far as background or simple facts are concerned, such as the evidence given, the treatment of the parties by the tribunal and the terms of any decision made. It is problematic, however, when the intricacies of a particular field of decision making are attributed to the onlooker. These complex facts are unlikely to be known by anybody other than those who already practice in the particular field. The danger is that vested with this knowledge our notional observer will overlook matters that would otherwise appear to general members of the public as being suspicious. This is where confidence in the system is lost.

The observer has been held to know that judges take an oath to be independent and impartial. And perhaps more unlikely, the actual terms of that judicial oath *(R v Oldfield* [2011] EWCA Crim 2910, [2011] All ER (D) 165 (Nov)). He is held to be aware of the fact that judges have had years of relevant training and experience. In *Brunei Darussalam v Prince Jefri Bolkiah* [2007] UKPC 62, [2007] All ER (D) 170 (Nov) (*Prince Jefri* case) it was held that the observer must be taken to understand that the particular judge hearing the case was 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…'reasonably adequate' pension provision".

Belize Bank

The high watermark is the case of *Belize Bank Limited v The Attorney General of Belize* [2011] UKPC 36, [2012] All ER (D) 42 (Jan). In 2008 there was an election in Belize. Mr Barrow was elected as the new prime minister. Before the election, the previous government had entered into guarantee arrangements with the Belize Bank in respect of loans the bank had made to a company called UHS. There had been much public speculation about the propriety of those arrangements and

the relationship more generally between the government and the bank. It soon transpired that public funds had been used to pay off UHS's loan with the Belize Bank.

Once in office, Barrow was openly critical of the ex-prime minister and others describing what had been done as "absolutely reprehensible. It is highly immoral and the product of a conspiracy". He was also heavily critical of the Belize Bank for accepting the funds. An investigation was launched by the Central Bank, as a result of which the Belize Bank was ordered to repay the funds to the government. The bank appealed to the banks and Financial Appeals Board. Two out of the three members of the board were appointed by Barrow. The bank challenged the constitution of the board, alleging apparent bias. The case was simple: members of the public would surely question the impartiality of anyone directly appointed by Barrow, the main protagonist and leading critic of the former administration and its relationship with the Belize Bank.

Lesage

The issue of apparent bias was considered again by the Privy Council in the recent case of *Lesage v Mauritius Commercial Bank Ltd* [2012] UKPC 41, [2013] All ER (D) 23 (Jan). Mr Lesage had been employed by the bank for many years as a member of its management. In 2003 it was announced that a large scale fraud had been perpetrated at the bank. The bank issued civil proceedings against Lesage and others. The core of Lesage's defence was that he had only ever acted with the authority of, and in accordance with, instructions issued by senior members of the bank's management.

The trial court found against Lesage. The "most damning piece of evidence" was said to be an answer given by Lesage in cross-examination in which he purportedly conceded that on at least one occasion he had acted without instructions. Lesage appealed to the Privy Council alleging unfair trial and apparent bias. There were a number of difficulties with the trial. In particular, Lesage's counsel withdrew from the case shortly before trial. While acting in person and in an effort to obtain an adjournment, Lesage sent a letter into court setting out the advice of his previous counsel to the effect that he ought to capitulate. It was the failure to follow that advice that led to his counsel abandoning Lesage. It was argued before the Privy Council that an informed observer would find it a real possibility that the judge might have been swayed by the contents of that letter.

> *"Just how informed should our notional observer be? He is not a lawyer or a judge but a member of the public"*

The Privy Council rejected the challenge noting that the observer would 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". With respect, that is somewhat unrealistic and falls prey to the criticisms highlighted above.

Lord Brown dissented noting that "Barrow personally had a large political stake in the Central Bank's directive being upheld". He concluded that it would strike an observer that the two board members were selected because the present government felt "confident that these two would instinctively be more sympathetic, ie, predisposed, to the Central Bank's and government's cause than [the Belize Bank's]".

The board allowed Lesage's appeal. Lord Kerr held that: "It is difficult to suppose that an informed observer would not conclude that there was at least the possibility that a trial judge, on considering the material in Mr Lesage's letter to the court, is bound to be more doubtful and sceptical of the defence."

This conclusion appears to be something of a departure from previous authority. It seems unlikely that someone with the kind of knowledge and understanding assumed in the *Prince Jefri* or *Belize Bank* cases would have any real concern that the judge might have been swayed by counsel's private thoughts on the case. It is, after all, the very core of the judicial function to choose between two or more competing cases, advocated often with equal vigour and intellect by opposing counsel.

Lord Kerr emphasised the importance, however, of looking at the proceedings as a whole. The position might have been different, for example, had the judge openly confronted the issue in court. This may have served to help allay any fears of a subconscious disposition towards the bank's case. Instead, however, any initial concerns as to judicial impartiality would have been "reinforced by…the way in which the trial was conducted and the manner in which… the court dismissed the appellant's defence as unworthy of belief".

The board had "misgivings" about the way in which the court had dealt with applications for adjournment, which were required it was said to give Lesage's replacement counsel time to prepare. The trial court rejected the need for more time, noting that if counsel stepped into the case at the last minute that was "his problem". There were also some "unseemly" exchanges between Lesage's counsel and the trial judge. Finally, the board referred to that part of the cross-examination upon which the court had placed so much reliance. On closer analysis Lord Kerr concluded that, rather than making the concession alleged, Lesage had actually attempted to explain his defence in more detail, breaking down the particular transaction in question into its constituent parts. He was cut short by the judge and forced to give a "yes or no" answer. He ought instead to have been given the opportunity to explain this crucial part of his case. These latter factors would have compounded rather than allayed any concerns held by the notional observer. Overall the proceedings would have created at least the impression of bias and unfairness.

Conclusion

The board's judgment in *Lesage* is refreshingly free of generalised reliance upon judicial oaths and assumptions of professional integrity. It is similarly free of an account of the particular judge's career and standing in the community. It confines itself instead to a nuanced and realistic assessment of the particular facts of the case, the conduct of the trial and how the same would have been viewed by an informed and balanced member of the public. It is hoped that it sets out what will be accepted as the correct approach to cases of apparent bias in the future. NLJ

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