

JERSEY / JUDGMENT

# AG v Barra Hotel [2000]

## JRC 71 (17 April 2000)

[2000] JRC 71

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### JUDGMENT

THE BAILIFF: 1. On 16th March, 2000, the defendant company contended that I ought to disqualify myself from presiding over this trial. Having heard submissions from Mr. Barry Shelton, a director of the defendant company and from counsel for the Attorney General, I rejected that contention and stated I would give my reasons at a later date. This I now proceed to do. 2. The defendant company's argument is based upon the fact that the office of the Attorney General, in whose name this prosecution is brought, is now held by Mr. William Bailhache, who is my brother. Mr. Shelton contended that it was axiomatic that I should disqualify myself. He did not allege actual bias, but submitted that the relationship with the Attorney General gave rise to a real risk that a reasonable, fair-minded individual would perceive the Court as being biased. Mr. Shelton further contended that I ought to disqualify myself on the ground of personal embarrassment. 3. As a matter of fact, the summons in this case was issued by the previous Attorney General, Mr. Michael Birt QC, before he took up his appointment as Deputy Bailiff. In my judgment, nothing turns upon that. The objection is based upon the relationship between me and the current Attorney General. 4. I take first the contention that I ought to disqualify myself on the ground of personal embarrassment. This submission was founded upon a dictum of the Court of Appeal in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* and another

[2000] 2 All ER 65 CA at page 76 where the Court stated:- "In any case giving rise to automatic disqualification on the authority of *Dimes'* case and *Ex p Pinochet* (No. 2), the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case". 5. I must say that I feel no personal embarrassment whatever. Both the Attorney General and I have public duties to perform in the administration of justice arising out of the functions of the offices of the Crown to which we have respectively been sworn. I can see no conflict between those duties. On the contrary, it seems to me that to ensure the impartial administration of criminal justice is as much the duty of the one as of the other. This is not a case where the Attorney General is a witness or where his credibility is otherwise in issue. In such a case, I probably would disqualify myself on the ground of personal embarrassment. Mr. Shelton suggested that my withdrawal from the consultative process leading up to my brother's appointment as Attorney General was evidence of

"personal embarrassment". In as much as the process involved a weighing of the comparative merits of different applicants for the appointment, that suggestion is clearly right. I would have been embarrassed to play any part in the consultative process leading up to the appointment of the Attorney General given that Mr. William Bailhache was one of the contenders; and accordingly I did not do so. That situation is, however, clearly distinguishable from the performance of judicial duties in the context of a case where no appreciation of personal qualities arises. I experience no personal embarrassment in agreeing or disagreeing with any submissions which may be made by or on behalf of the Attorney General. 6. I turn to the principal submission which is that there is a "real danger or possibility of bias on the part of a judicial decision maker", arising from the relationship with the Attorney General. It is clear from the authorities that the test is an objective one. It seems to me furthermore that the test has to be applied in the context of a small jurisdiction with a relatively small bar and an even smaller judiciary. As Southwell JA stated in the Court of Appeal in *Greffier of the States v. Les Pas Holdings Limited* (24 th June, 1998) Jersey Unreported CofA:- "... I think it right to make these observations of general import on the developing habit of making *récusation* applications: (1) Those who live and work in Jersey have to accept that the administration of justice depends to a great extent on the two senior Judges, the Bailiff and the Deputy Bailiff. (2) No application for *récusation* should be made without strong grounds to support it, and no such application should be granted unless such strong grounds are clearly established...." 7. Paraphrasing the test laid down by the House of Lords in *R. v. Gough*

(1993) AC 646 , and adopted by this Court in *Re the Representation of the Bâtonnier* (14 th May, 1998) Jersey Unreported, I have to ask myself whether, having regard to all the relevant circumstances, a reasonable and well-informed person might apprehend a real danger of bias in the sense of my unfairly regarding with disfavour the case of the defendant company. 8. This test was the subject of further exhaustive analysis in the England Court of Appeal in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* and another

[2000] 2 All ER 65 at page 76 where the Court stated:- "... If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. We find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* 1999 (4) SA 147 at 177, even though these observations were directed to the reasonable suspicion test:- 'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial

mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." . The English Court went on to consider the type of factor which may or may not give rise to a real danger of bias. At page 77, the Court stated: "We cannot, however, conceive of circumstances in which an objection would be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFCIC v. Icori Estero SpA (Court of Appeal Paris, 28 June 1991, International Arbitration Report. Vol 6#8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case;....." 10. It is true, of course, that I am on friendly personal terms, as one would expect, with the Attorney General. I am also on friendly personal terms with many members of the bar; there is no doubt that in every jurisdiction judges are closely acquainted with counsel and indeed with appellate judges who sit in judgment upon their decisions at first instance. None of these relationships affects, in the generality, the independence or impartiality of the Court. In this case, the Attorney General is of course a party to the prosecution but he is not a " member of the public involved in the case ". He has no personal interest in the outcome of the proceedings. He has a public duty to present the case in accordance with his oath of office. In this jurisdiction, he is the "Minister of Justice". The suggestion that there is a real danger that I might, because of a family relationship, favour the cause of the prosecution in a criminal case seems to me necessarily to imply that I am unable to comply with my oath of office to administer justice without fear or favour. This is not a suggestion which I am able to accept. 11. In my judgment, the objection raised by the defendant company is, on analysis, without substance. For that reason, I declined to recuse myself. Authorities.

Mayo Associates & Ors-v-Anagram (Bermuda) Ltd & Ors (12 th January, 1998) Jersey Unreported. Representation of the Bâtonnier re Advocate Sinel (14 th May, 1998) Jersey Unreported. Representation of the Bâtonnier re Advocate Sinel (15 th May, 1998) Jersey Unreported. Greffier of the States-v-Les Pas Holdings, Ltd. (24 th June, 1998) Jersey Unreported CofA. R-v-Gough

[1993] 2 All ER 724 ; [1993]AC 646. R-v-Inner West London Coroner ( ex parte Dallaglio & Anor) (1994) 4 All ER 139. Locabail (UK) Ltd.-v-Bayfield Properties Ltd & Anor [2000] 2 All ER 65 CA. Le Maistre-v-Benest (9 th July, 1998) Jersey Unreported. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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