INDUSTRIAL COURT OF MALAYSIA

CASE NO:15/4-338/01

BETWEEN

INTRAKOTA CONSOLIDATED BERHAD

AND

KASSIM BIN OMAR

AWARD NO.: 500 OF 2004

Before	:	**N. RAJASEGARAN - Chairman (Sitting Alone)**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	22.3.2001.
Dates of Mention	:	24.5.2001, 2.7.2001, 23.1.2002, 24.9.2002 and 28.7.2003
Dates of Hearing	:	24.3.2004 and 8.4.2004.
Representation	:	Ms. Maisurah binti Murad from M/s Zul Rafique & Partners, Counsel for the Company. Mr. V.K. Raj from M/s P. Kuppusamy & Co., Counsel for the Claimant.

Reference:

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Kassim bin Omar** (hereinafter referred to as "the Claimant") by **Intrakota Consolidated Berhad** (hereinafter referred to as "the Company").

AWARD

PROLOGUE

1. This case emanates from the termination of employment by Intrakota Consolidated Berhad ('the Company') of Kassim bin Omar ('the Claimant') on 5.8.98 consequent upon which the Minister of Human Resources acting under s.20(3) of the Industrial Relations Act 1967 ('the Act') by a decision arrived at on 22.3.2001 referred the dispute to the Industrial Court for an award which reference was allocated to Industrial Court No. 15 ('the Court') on 10.4.2001.

2. The Court was without a Chairman for the period commencing on 1.2.2003 until 15.1.2004 on which date I, the current Chairman ('the Chairman'), was appointed under s.23(2) of the Act and assigned to the Court, both of which occurred on that same date.

3. It is the Claimant's pleading that he was employed by the Company as a driver and at the time of his dismissal earned a basic salary of RM835.00.

4. At the first and second mention of the case called on 24.5.2001 and 2.7.2001 respectively, the Company was represented by the solicitors on record. The Claimant was represented by a representative from the Malaysian Trade Union Congress (MTUC). On the date of the second mention hearing was fixed for 23 and 24.1.2002.

5. On 23.1.2002, hearing did not commence and instead the case was called for re-mention; this time the Claimant represented by P. Kuppusamy & Co. ('the firm PKC') who remain to date as counsel on record. At that mention hearing was fixed for 10 and 11.10.2002.

6. A further mention was called on 24.9.2002 at which mention hearing was re-scheduled for 28 and 29.7.2003. Thereafter at another and final mention called on 28.7.2003 hearing was fixed for 24 and 25.3.2004.

7. Pleadings as directed were filed and the Court was geared for hearing on the scheduled dates in March 2004. But this was not to be. For on 17.3.2004 the Court received a letter dated 16.3.2004 from the firm PKC. Being relevant to what follows hereafter, the material part of the letter is repeated below:

> " Untuk makluman pihak Tuan kami juga adalah firma peguamcara yang bertindak bagi kes pertikaian **All Malaysian** (sic) **Estate Staff Union [AMESU] lwn. Rajasegaran a/l V.N. Rajah & 2** lagi di Mahkamah Tinggi Malaya di Kuala Lumpur dalam tindakan O.M. No. R2-25-05-2004.
>
> Seperti yang pihak Tuan mungkin sedia maklum, pihak Responden di Kes Mahkamah Tinggi tersebut adalah Tuan Pengerusi Mahkamah Perusahaan No. 15, Tuan Rajasegaran a/l V.N. Rajah.
>
> Oleh yang demikian, untuk mengelakkan sebarang tuduhan berat – sebelah dari mana-mana pihak, kami dengan rendah diri ingin membuat permohonan kepada pihak Tuan agar kes ini dipindahkan ke Mahkamah Perusahaan lain. "

8. The Court replied the firm PKC by letter dated 18.3.2004 requesting the firm PKC to make an application to the Court for a decision at the commencement of the hearing on 24.3.2004.

CLAIMANT'S APPLICATIONS

9. Over a period of two days hearing, learned counsel for the Claimant, Mr. V.K. Raj ('Learned Counsel') made a total of 3 applications as follows:

i. For the transfer of the case to another Division of the Industrial Court. ('1st application')
ii. For the disqualification of the Chairman from hearing and deciding on an application for the Chairman's recusal. ('2nd application')
iii. For the Chairman to recuse. ('3rd application')

10. Save for the application for a transfer of the case as stated in the firm PKC's letter dated 16.3.2004 hereinbefore recorded, no notice nor affidavit in support was filed in connection with the other applications.

Mode of Application

11. For convenience I dispose of the requirement of notice and or affidavit at this stage.

12. ***Halsbury's Laws of Malaysia, 2001 Edn., Vol. 9 paragraph 160.099*** reads:

> *" Interest and likelihood of bias, like other defects going to jurisdiction, are established by affidavit" [see **R. v. Nat Bell Liquors Ltd (1922) AC 128 at p. 160, PC; R v. Aberdare Canal Co. (185) 14QB 854**]. "*

13. Notwithstanding, I find statutory backing to hold that the absence of affidavit is not fatal for an application or preliminary objection to be raised in the Industrial Court, from ***Section 30(5) of the Act*** which provides :

> *" (5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. "*

Court's Jurisdiction

14. I next dispense with the issue of the Court's jurisdiction to hear and decide upon the 3 applications, two of which, namely the 2nd and 3rd applications deal with defects affecting jurisdiction of the Court.

15. Gopal Sri Ram JCA sitting in the Supreme Court case of ***Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd. (1997) 2 MLJ 685*** held that the reference of the Minister constitutes the threshold jurisdiction and once seized of the dispute in the threshold sense the Court is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. His Lordship referred to this as *"the jurisdiction to decide whether there is jurisdiction."*

16. There being a reference of this dispute under the Act by the Minister, the Court is seized of threshold jurisdiction. Learned Counsel did not challenged this threshold jurisdiction; and correctly so since the forum for such a challenge is not in this Court. His several challenges of the Court's jurisdiction fall therefore under the wider *Anisminic* sense.

17. I rule that the Court has jurisdiction to enter and decide upon the preliminary objections taken by Learned Counsel. Any decision

otherwise will fly against the judgement arrived at in the Supreme Court cases of ***Enesty Sdn. Bhd. v. Transport Workers Union (1986) 1 MLJ 18*** and ***Kathiravelu Ganesan & Anor (supra)***.

Company's Response

18. And I also dispense at this stage with the response to the Claimant's 3 applications by the learned counsel for the Company, Ms. K. Rajeswary who on the first date of hearing on 24.3.2004, with a brief "I leave it to Yang Arif to decide", made no further contribution. And on adjournment on 8.4.2003 Cik Maisurah bte Murad, learned counsel representing the Company on that date, with a "we will let the Court to decide", fell silent thereafter.

Court's Discreation

19. Having removed out of my way the foregoing, I will now deal with each of the 3 applications and the issues contained therein, simultaneously exercising the cautions that I am required to whilst dealing with the same.

20. The Court is empowered to decide on the various issues tied up with the 3 applications by virtue of s. 30(1) of the Act. And in so doing the Court should be mindful of the requirements of s.30(5) *ibid*. The substance of the 3 applications are such that the Court's power to decide on the same is essentially discretionary. That discretion should be exercised with due care and extreme caution. [***Smeeton v The Attorney General (1920)1 Ch 348; Byrne v Herbert and another (1965) 3 All ER 705***]. It must also be exercised judicially and in a judicial manner [***Guarantly Trust Co. of New York v. Hannay & Co.; Hanson v. Radcliffe UDC (1922) 2 Ch 390***]. In exercising the Court's discretion,

regard must be given to all circumstances of the case [***Dyson v. AG (1911) 1 KB 410; Burghes v. Attorney General (1911) 2 Ch 139***].

21. Before embarking further, I take special heed of the salutory advice of Gopal Sri Ram JCA in ***Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors (1995) 2 MLJ 213-*** where his Lordship at page 222, commenting on the principles which a judge should act upon in arriving at a decision on recusal said:

> *" Secondly, a judicial arbiter must decide any question presented to him for decision in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene. Criticism of a judge is part of the territory in which he operates. So long as that criticism is made bona fide, based on fact and in conformity with law, none, least of all judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear of criticism is to abdicate duty. These are matters that form part of a well-recognized judicial philosophy and should require no reiteration. "*

1ST APPLICATION

22. On the first date of hearing on 24.3.2004 Learned Counsel's submission and the Court's comments, recorded verbatim, read:

> " V.K. Raj says that he has an "application for Yang Arif to recuse yourself from hearing this matter on 2 grounds:

(a) Yang Arif's appointment to position of Chairman is being challenged by way of OMR2-25-05-04. By way of an application of a writ of quo warranto. Applicant is AMESU.

(b) As we are the solicitors engaged to act on behalf of the applicant in the High Court in the matter mentioned, there could be a likelihood of bias in this matter which may prejudice the Court's case.

We humbly apply for the aforesaid application. "

23. Here now in Court, Learned Counsel applied for a recusal of the Chairman whilst the notice in the form of the letter dated 16.3.2004 from the firm PCK, the material part of which had been mentioned earlier, was for the transfer of this case to another Division of the Industrial Court. The Court sought clarification and Learned Counsel replied as recorded below:

" Court: Reminds VKR that the application now made in court appears not to be similar to the application contained in the firm's letter dated 16.3.2004 (enclosure 27 in file).

Court's Question: Is your application today to ask the Court to transfer this case to another court or is your application for me to recuse?

V.K. Raj: My application is to transfer to another court. If the application is not allowed then I will be making second application which is for Yang Arif to recuse. "

Save for this reply, no further submission was made by Learned Counsel in support of the 1st application, i.e. for transfer of the case to another Division of the Industrial Court.

24. The Court then inquired of Learned Counsel as to whether the application for transfer was supported by any legislative authority, meaning whether the application was being made pursuant to any particular Act, regulations or rules. Learned Counsel's response was that there was no legislative authority and that the application was based on "common law and the two grounds mentioned earlier."

25. The Court's request to Learned Counsel to proceed with his submission on the Chairman's recusal so as to avoid delay in the event of the Court deciding against the application for a transfer per se, was met with the following reply:

> " V.K. Raj: With due respect, if I were to submit before Yang Arif on the recusal, there is likelihood of a breach of natural justice arising as Yang Arif would be the judge in Yang Arif's own cause. Having said that if the Court will not grant the application for transfer then I will be making the application for recusal and seeking an adjournment of the matter today. To make the formal application. And if we fail on that application we will also be seeking for an adjournment for us to file a writ of revision in the High Court against Yang Arif to hear this matter. "

26. The Court then ruled that in the absence of any provision in the Act, Regulations thereto and the Industrial Court Rules to enable a party to apply for a transfer per se of a case from one Division to another, the application for transfer is dismissed. In arriving at this decision the Court was amongst others, mindful of the fact that the reason of the "two grounds mentioned earlier" canvassed by Learned Counsel stood bare, naked at that stage, without any evidential support of the facts constituting the two grounds.

27. The Court then granted Learned Counsel's application for an adjournment to prepare his application for recusal and further hearing was fixed at the earliest date convenient to Learned Counsel i.e. 8.4.2004.

2ND APPLICATION

28. At the onset of the hearing on 8.4.2004, Learned Counsel before submitting on his application for the recusal of the Chairman, made the 2nd application, a preliminary objection, which in substance, as gleamed from this verbal submission, is that the Chairman should disqualify himself even before hearing and deciding on the merits of the application for recusal which under the circumstances takes the position of 3rd application. Learned Counsel's submission was recorded verbatim which I now narrate:

> " I humbly submit that Yang Arif's direction at the last date for me to submit on the point of recusal before Yang Arif amount to a breach on natural justice i.e. no man should be a judge in his own cause. That being the case Yang Arif it would cause a disability on the part of Yang Arif to hear further submission on recusal. On this point I respectfully

invoke s.23(6) of the IRA, 1967 (submits copy and refers to ss.(6). Reads sec.). The part I would like to concentrate is the first 2 lines "during the absence of .... or any other cause by the Chairman". I have an authority on the point (submits Anwar Siraj case) (Refers to the case). This case concerned: (Reads out the facts as in the preamble). (Reads first para of judgement). s5(5) of the Jurong Town Corporation Act came to be interpreted by his Lordship. And I am submitting that s.5(5) of the Act bears a striking resemblance in its content to s.23 of the IRA, 1967. If I may read out s.5(5) (reads as stated in judgment). The resemble (sic) is again in the first two lines. This word "unable" is similar to the phrase "inability to act by illness or any other cause by the Chairman" which is found under s.23(6) of the IRA.

Having said that, I refer to page 311 of the judgement where I have highlighted the decision. (Reads highlighted para D, E and F). Therefore Yang Arif in light of this decision on the interpretation of s.5(5) of the Jurong Town Corporation Act, I humbly submit that since there will arise a breach of natural justice if Yang Arif were to hear my submission on recusal which in turn will cause Yang Arif's inability to act for "any other cause" as found in s.23(6) of the IRA that the way forward would be for this matter to be heard before another Chairman or another Division of this Honourable Court.

And to fortify this view Yang Arif I invoke s.29(g) of the IRA, 1967 (reads out the section). Having said that I pray for a ruling on my submission on this point before I proceed to my submission on the point of recusal. "

29. I overruled the objection thus dismissing the 2nd application and informed the parties that my reasons will follow and I now provide the same.

Memo Judex In Causa Sua

30. Learned Counsel's argument was based on the principle of *memo judex in causa sua* or that no man may be a judge in his own cause. In support thereof Learned Counsel limited himself to s.23(6) of the Act and the authority of the Singapore decision of Rajah J in ***Anwar Siraj v. Tang I Fang (1982) 1 MLJ 308.*** With respect, I do not find s.23(6) of the Act to be supportive of Learned Counsel's preliminary objection and consequently ***Anwar Siraj (supra)*** as canvessed by Learned Counsel becomes irrelevant.

31. The material part of ***section 23(6) of the Act*** reads:

> *"(6) During the absence of or inability to act from illness or any other cause by the Chairman, the Yang di-Pertuan Agong may appoint another person to exercise the powers or perform the functions of the Chairman......."*

32. The Court's reading is that section 23(6) *ibid* is an enabling provision that allows H.R.M. Yang di-Pertuan Agong to appoint a Chairman in the event of the absence or inability of the substantive Chairman.

33. In the instant case there is no evidence whatsoever to show that the Chairman is absent or suffering from any inability to act. In addition I fail to comprehend how an enabling section can translate itself into a provision for disabling the Chairman from carrying out his duties. I

therefore find nothing in this section to assist the Learned Counsel in his submission.

34. In as far as the case of ***Anwar Siraj (supra)*** referred to by Learned Counsel is concerned, suffice it for me to distinguish the case by referring to that part of the judgment at page 311 para E which reads:

> *" In my view, the instant case is one where the Chairman is not able to act as the law has cast a disability to act ...."*

In that case the chairman had already disabled himself. Not so here yet.

35. I now examine the law on *memo judex in causa sua* and its application to the instant case. In so doing I caution myself that this principle is firmly established in our jurisprudence. ***Halsbury's Law of Malaysia, 2001 Edn., Vol. 9 paragraph 160.093*** states:

> *" It is a fundamental principle (often expressed in the maxim memo judex in causa sua) that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man may be a judge in his cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the court will grant an order of prohibition to prevent it from adjudicating,...."*

36. Lord Bingham, Lord Chief Justice, in ***Locabail (UK) Ltd v. Bayfield Properties Ltd (2000) IRLR 96***, sitting in the Court of Appeal, deciding on 5 applications for permission to appeal against various

judicial decisions concerning disqualification of judges on grounds of bias, in his speech said:

> "*The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting in his own cause.*"

37. Augustine Paul J (as his Lordship then was) in deciding on an application, for himself to recuse at the commencement of the trial, said in ***Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police (2001) 2 MLJ 481***:

> "*A judge in deciding a case, is merely carrying out a constitutional function entrusted upon him by the Yang di-Pertuan Agong. The decision made is on admissible evidence and the arguments advanced by the parties. A judge has no interest in the outcome of his judgement.*"

38. No evidence whatsoever had been tendered or argument made out to the Court, up to the time that the Court arrived at a decision on the 2nd application, that the Chairman has any direct interest in the subject matter or the outcome of this case.

39. In England it has been held that it is for the inferior tribunal itself to exercise a discretion as to whether it can hear the case in the event of an application for an adjudicator to disqualify on the grounds of bias [see ***R v. Frankland Prison Board of Visitors, ex p Lewis (1986) 1 All ER 272; R. Weston-super-Mare Justices, ex p Shaw (1987) 1 All ER 255***].

40. Closer at home too, it is common place for the adjudicator against whom bias is alleged to decide on the application to disqualify. In ***Mohamad Ezam Mohd Nor & Ors. (supra)*** Augustine Paul J (as his Lordship then was) had to decide for himself on an application in the High Court for his Lordship to recuse. In ***Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors. v. Sey Hoe Sdn. Bhd. & Ors.,*** Dennis Ong JCA sitting in the Court of Appeal gave judgement on an application for himself to recuse from hearing that appeal.

41. The foregoing constituted my reasons for having then overruled the 2nd application to disqualify myself from hearing the 3rd application for the Chairman to recuse.

3RD APPLICATION

42. This 3rd application is for the Chairman to recuse.

Grounds of Application

43. Learned Counsel's 3rd application was supported by a written submission, containing 15 paragraphs, an exhibit and two authorities *viz* ***Metropolitan Properties Co. (F.C.G.) Ltd. v. Lannon and Others (1969) 1 Q.B. 577*** and ***David Anthony v. Public Prosecutor (1985) 1 MLJ 453.*** ('the Written Submission').

44. The objection against the Chairman is founded on two grounds as stated in paragraph 10 of the Written Submission as follows:

> " i. real likelihood of bias, and
> ii. the pending High Court mater ....."

I will deal with both grounds.

BIAS

Legal Principles

45. ***B.R. Ghaiye,*** in his text entitled ***'Law and Procedure of Departmental Enquiries (In private and Public Sector)' 3rd Edn., Vol. 1, at page 620, describes:***

> *" (b) **What is bias –** 'bias' is one-sided inclination of mind, for example, prejudice. A biased man does not hold his opinion as his opinion holds him and therefore, he cannot have an impartial mind. "*

46. NH Chan JCA in ***Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors. (1995) 2 MLJ 213 at page 223 para (G)*** details further the description of bias by saying :

> *" Bias with regard to anyone acting in a judicial capacity means anything which tends or may be regarded as tending to cause such person to decide a case otherwise than on the evidence [**R v East Kerrier Justices [1952] 2 QB 719; [1952] 2 All ER 144**]; **1 Jowitt's Dictionary English Law (2nd Ed), under 'Bias' at p 210.** "*

47. Having framed my mind on what constitute 'bias' I next take caution on the seriousness and undesirability of bias. For in the words of Mohtar Abdullah FCJ in ***Allied Capital Sdn. Bhd. v. Mohamed Latiff bin Shah Mohd (2001) 2 MLJ 305,*** when his Lordship sat in judgement in the Federal Court on an allegation of bias against a Court of Appeal Judge :

> *" We agree that the issues raised affect a very fundamental aspect of the administration of justice and public confidence in the system of justice. The principles of law on bias and disqualification of judges from hearing a case are so basic and entrenched in our judicial psyche that any aberration from the norms of ethical behaviour would be frowned upon. "*

Automatic Disqualification

48. ***Dimes v. The Properties of the Grand Junction Canal (1852) 3 HL Cas 759 HL*** and ***Pinochet Ugarte (No. 2) (1999) 2 WLR 2272 HL*** are the authorities on the rule of automatic disqualification on account of bias. Lord Bingham LCJ in ***Locabail (UK) Ltd. (supra)*** spoke on the application of this rule thus:

> *" In the content of automatic disqualification, the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest. "*

49. It is settled by binding authority that absent of the essential ingredient of a pecuniary or propriety interest by the judge in the subject of the proceedings, automatic disqualification does not arise.

50. Not even a hint of pecuniary or propriety interest by the Chairman in the subject matter of this case has even been suggested by Learned Counsel. On the contrary Learned Counsel in elaborating on his Written Submission said : "We are not suggesting Yang Arif is biased".

51. In the circumstances automatic disqualification of the Chairman cannot arise and I so rule.

Likelihood of bias

52. Should automatic exclusion under the rule in ***Dimes*** and ***Pinochet (No.2)*** not arise, authorities abound for an adjudicator to be disqualified on the principle of likelihood of bias or ostensible bias or apparent bias.

53. And what, I ask myself, is the correct test for the application of this principle?

54. In his leading speech, Lord Goff in the House of Lord's decision of ***R v. Gough (1993) AL 646 HL at page 668,*** said :

> *" In my opinion, if, in the circumstances of the case (as ascertained by the Court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more vigorous criterion should be applied. Furthermore the test as so stated give sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. "*

His Lordship continued at page 670:

> *" In conclusion, I wish to express my understanding of the law as follows. I think it possible and desirable, that the same test should be applicable in all cases of apparent bias,*

whether concerned with justices or members of other inferior tribunals, ...”

55. This test, known as the ‘real danger of bias’ test is now settled law in England and Wales after ***R v Gough*** [see ***Locabail (UK) Ltd. (supra); Facey v (1) Midas Retail Security and (2) Whitgift Centre Management (2000) IRLR 812: Scanfuture UK Ltd v. Secretary of State for Trade*** **and** ***Industry (2001) IRLR 416; Zaiwalla & Co. v. Walia (2002) IRLR 697; Bennett v. London Borough of Southwark (2002) IRLR 407 CA***].

56. Closer at home, in ***Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan Bhd. (1999) 3 MLJ at pp 69-70,*** Edgar Joseph Jr. FCJ, delivering judgement on behalf of the Federal Court summed up the stand of the Federal Court:

> *“ Having given careful consideration to the matter, we prefer the test of apparent bias given in* ***R v. Gough (‘the real danger of bias’ test)*** *as this will avoid setting aside of judgement upon some insubstantial grounds and the flimsiest pretexts of bias. ”*

57. This same ‘real danger of bias’ test was applied by Mohtar Abdullah FCJ in delivering judgement of the Federal Court in ***Allied Capital Sdn. Bhd. v. Mohamed Latiff bin Shah Mohd (2001) 2 MLJ 305.***

58. And the Federal Court reiterated the application of the real danger of bias test as applied in ***R v. Gough*** in the speech of Mohamed Dzaiddin Chief Justice delivering judgement in ***Mohamed Ezam bin Mohd. Nor &***

Ors v. Ketua Polis Negara (2002) 1 MLJ 321, where his Lordship said at p. 325 :

> *" Having considered the authorities cited and their reasoning, we would follow* ***Gough*** *which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned judge when he heard the habeas corpus application involving the appellants? "*

59. Having determined that the correct test is that of the 'real danger of bias' test as propounded in ***R v. Gough***, I next examine authority on the correct application of this test.

60. Lord Goff, in ***R v. Gough (supra)***, after examining authorities in detail spoke at p. 670:

> *" [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to the circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration. "*

61. Lord Hope of Craighead speaking in the House of Lords case of ***Porter v . Magill (2001) UKHL 67*** said:

> *" The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased.*

> *It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.* ”

62. NH Chan JCA adding to the judgement of Gopal Sri Ram JCA in ***Hock Hua Bank (Sabah) Bhd. (supra)*** observed that "*The proper test on the appearance of bias is whether a reasonable and fair minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible.*"

63. The two authorities of ***Metropolitan Properties Co. (F.C.G.) Ltd (supra)*** and ***David Anthony v. P.P. (supra)*** quoted by Learned Counsel do not deviate from the principles stated in the authorities hereinbefore in connection with the mode of application of the proper test.

64. Having determined that the real likelihood of bias should be evaluated not from the mind of the Chairman but from that of a reasonable and fair minded person, I also take heed of both persuasive and binding authority on the need for cogent circumstances with relevant evidence which is to be applied to the mind of that reasonable and fair minded person.

65. Per Lord Denning in the case of ***Metropolitan Properties Co. (F.C.G.) Ltd (supra),*** quoted by Learned Counsel:

> " *Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see* ***Reg. v. Camborne Justices, Ex parte Pearce*** and ***Reg. v. Nailsworth Licencing Justices, Ex parte Bird.*** *There must be circumstances from which a reasonable man would*

think it likely or probable that the justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. "

66. Per Edgar Joseph Jr. JFC in ***Majlis Perbandaran Pulau Pinang (supra)*** at pp 69-70:

> *" It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hyphothetical reasonable man (**R v. Gough,** per Lord Golf, at p. 670 D-E*). "

67. And NH Chan JCA in ***Hock Hua Bank (Sabah)(supra)*** at p. 228 spake:

> *" To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence. "*

68. Save quoting the two authorities on the application of the likelihood of bias test and stating that the Chairman is biased for the reason that the firm PKC is representing a party (AMESU) in an action in the High Court against the Chairman, Learned Counsel has not shown any real circumstances in the form of conduct, communication or any other relevant action by the Chairman in support of the alleged bias of the Chairman against the Claimant or for that matter against the firm PKC.

69. Paying due deference to the guidance of the numerous authorities referred to hereinbefore, I now ask myself: What will be the response of the proverbial man on an omnibus, in this case more appropriately a Malaysian on one of the Company's Intrakota bus, when I appraise him of the circumstances of the instant case as known to the Court, in lay-language as follows:

> *" On 5.12.2001 the Claimant completed Form B and employed the firm PKC as his lawyer. Subsequently several years later, the All Malayan Estate Staff Union (AMESU) retained and employed the firm PKC for a case in the High Court. The case in the High Court involved an objection by AMESU against the Chairman's appointment. The firm PKC is not a party to the case in the High Court. They happen to be employed as a lawyer by AMESU. There is no evidence that the Chairman has any interest whatsoever in the Claimant, the Company or the subject matter of the case before the Court. Neither is there any evidence that the Chairman has any interest nor bears any animosity against the firm PKC. Would you say that because of this, the Chairman will be prejudiced against the Claimant? "*

70. It is my considered opinion that the response of the Malaysian in the Intrakota bus to the aforesaid question will be in the negative.

71. Of concern to me in deciding the various issues pertaining to this application is the time-honoured speech of Lord Hewart CJ in ***R v. Sussex Justices, ex p Mc Carthy (1924) 1 KB 256 at p 259*** where his Lordship recalled how fundamentally important it was that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."

72. Of relevance equally to me in this connection, are the words of Slade J in ***R v Camborne Justice, ex p Pearce (1954) 2 All ER 850***:

> *"Whilst endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than it should in fact be done."*

73. In crystallising my decision I hearken to the words of Lord Bingham LCJ in ***Locabail (UK) Ltd (supra) at pp 98 –99***:

> *" All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case. "*

74. So too of guidance to me here in this respect are the writing at ***pg 191 in Halsbury's Laws of Malaysia, 2001 Edn., Vol. 9,*** which read:

> *" On the other hand, a finding of real danger of bias may be justified in the following circumstances: ...., or if for any other reason, there is real ground for doubting the judge's ability to ignore entraneous considerations, prejudices and predilections, and his ability to bring an objective judgement to bear the issues. "*

75. The instant case is no different from any other to me. I do not profess to know the Claimant nor the Company. I have no interest in the subject matter of the case which is the termination of employment of the Claimant by the Company. I am incurious of the outcome of this litigation. I have no doubts that I am able to bring an impartial and unprejudiced mind to bear on the substantive issues in connection with this case. Nor will I be affected by any extraneous considerations, prejudices nor predilections.

76. Though directly not relevant I categorically state that I have no interest whatsoever in the firm PKC and know of no animosity or any other emotion for that matter in connection with that firm. They are not a protagonist in either the instant case nor the AMESU case in the High Court. In as far as I am concerned they are but servants doing the biddings of their respective master in the two relevant litigations.

77. Having come thus far, applying the relevant principles of law to the various issues tied up with this 3rd application and arriving at the irresistible conclusion that there can exist no real danger of actual bias or ostensible bias on the part of the Chairman, what then is incumbent upon the Chairman?

78. In ***Locabail (UK) Ltd (supra)***, Lord Bingham LCJ cautions at page 101:

> *" If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgement upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. "*

And his Lordship went on to find support of his dicta in the South African case of ***President of Republic of South Africa and others v. South African Rugby Football Union and others (1999) (7) BCLR (cc) 725 at 753*** and in the Australian Federal Court case of ***Re Ebner (1999) FCA 110.***

79. Augustine Paul J (as his Lordship then was) in ***Mohamad Ezam Mohd Nor & Ors. (supra) at p. 501*** said:

> *" Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application. "*

80. And I pay particularly heed to the admonishment of Gopal Sri Ram JCA in ***Hock Hua Bank (Sabah) Bhd. (supra)*** where commenting upon a judge who after declaring his lack of prejudice recussed himself, said:

> *" In his carefully reasoned judgement, the learned judge was at pains to point out his lack of prejudice. Yet he was not prepared to hear the case. That to my mind is wrong. "*

81. In the above circumstances, with respect, the Court finds the first ground canvessed by Learned Counsel in his application for the recusal of the Chairman, to be devoid of merit.

PENDING HIGH COURT MATTER

82. And now for the second limb of Learned Counsel's attack, launched on the basis of a pending High Court matter against the Chairman ('the High Court application').

83. Details of the High Court application is given at paragraph 4 of the Written Submission which reads as follows:

> " 4. On the instruction of All Malayan Estate Staff Union (hereinafter referred to as "AMESU"), our firm, Messrs P. Kuppusamy & Co. filed an application (Application For Judicial Review No:R2-25-05-04) on 12.1.2004 to the High Court of Malaya at Kuala Lumpur for the following reliefs:
>
> (i) that leave be granted to the Applicant to issue a writ of quo warranto to remove in the High Court for the purpose of disqualifying Rajasegaran a/l V.N. Rajah for appointment as a Chairman of the Industrial Court;
>
> (ii) that leave be granted to the Applicant to apply for a declaration that the appointment of the said Rajasegaran a/l V.N. Rajah as a Chairman of the Industrial Court by the Second and Third Respondents is null and void and of no legal effect;
>
> (iii) that leave be granted to the Applicant to apply for an Order of Mandamus directed to the Second and Third Respondent to rescind/revoke the appointment of the said Rajasegaran a/l V.N. Rajah as Chairman of the Industrial Court;
>
> (iv) an Order directed to the Second and Third Respondents to stay the appointment of Rajasegaran

a/l V. N Rajah as a Chairman of the Industrial Court until the disposal of this action; and

(v) that an injunction be granted to restrain the First Respondent from exercising the powers, duties and functions of a Chairman of the Industrial Court and from claiming any rights, privileges or emoluments attached to that office.

A copy of the Application is annexed herewith and marked as Exhibit 1. [please see pages 8 to 15 annexed herewith]. "

Evidence

84. I first address my mind to the issue of evidence. On the first day's hearing when Learned Counsel sought an adjournment at the close of his initial submission, the Court in granting the adjournment gave as one of its reasons, the fact that there was no evidence as yet before the Court on a central issue. In this connection the Court reminded Learned Counsel that the Chairman is prevented from importing his personal knowledge into the case.

85. Paragraph 5 of the Written Submission reads as follows:

> *" The High Court had granted leave to the Applicant to file the application on 10.1.2004 and the matter is now fixed for mention on 28.4.2004. "*

No evidence in support thereof was tendered by Learned Counsel.

86. 16. In ***Loh Moh & Anor v. Public Prosecutor (1954) 20 MLJ 14***, Bellamy J said:

> *" It is an elementary proposition of law, too frequently overlooked with resulting confusion and possible injustice, that cases must be decided on the evidence and that the evidence must be such as is relevant and admissible under the Evidence Ordinance, that is, it must be either from admitted documents or the statements of witnesses or be something of which the Court can take judicial notice. "*

His Lordship then continued:

> *" In **Harpushad v. Shoe Dyal,** their Lordships of the Privy Council said:*
>
> > *" A Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts. "*
>
> *The learned President clearly, in my view, misdirected himself in importing into the case his own knowledge of matters of which there was not a shred of evidence before him. "*

See also ***Chong Khee Sang v. Pang Ah Chee (1984) 1 MLJ 377; Public Prosecutor v. Sharma Kumari (2000) 6 MLJ 254*** for similar decisions.

87. Where, there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at *[See **Edwards v. Bairstow (1956) AC 14; Din (Taj) v. Wandsworth LBC at p664 H, per Lord Wilberface; R V Hillingon LBC, Exp Islam (Tafazzul) (1983) 1 AC 688 at p708D, per Lord Wilbeforce and at p717G, per Lord Lowry**].*

88. In the above circumstances I am required to and therefore do disregard paragraph 5 of the Written Submission.

Exhibit 1

89. Exhibit 1 to the Written Submission is a copy of a writ filed by the firm of KPC dated 12.1.2004 in which the parties are:

" ANTARA

ALL MALAYAN ESTATE STAFF UNION ... PEMOHON

DAN

1. RAJASEGARAN A/L V. N. RAJAH
2. SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA
3. KERAJAAN MALAYSIA ... RESPONDEN-RESPONDEN "

The body of the writ contains 5 separate applications as stated at paragraph 4 of the Written Submission. The exhibit bears the signature of the Assistant Registrar, High Court, Kuala Lumpur.

The exhibit shows that the reference number of the application is "2" which is inconsistent with the reference number of "R2-25-05-04" stated in paragraph 4 of the Written Submission.

Nowhere from the exhibit can it be discerned that the hearing of the application for leave in the High Court did proceed on 21.1.2004 as scheduled. Nor was any other evidence tendered to show the same.

The exhibit further does not reveal whether all of the 5 prayers contained therein were pursued by the applicant on the date of hearing. For had the prayer for the stay order (iv) and the prayer for the injunction to restrain (v) been pursued and granted, the Chairman would not now be sitting in the Court.

In short the exhibit and the availability of evidence left much to be desired.

Be that as it may, the Court will give weight to this exhibit in as far as to show that an application had been filed in the High Court relating to the validity of the appointment of the Chairman and that the applicant is the AMESU whose solicitors in the action are the firm PKC.

Remoteness

90. This court had cause to address and analyse the issue of a pending High Court application against the Chairman's appoinment as a reason expounded for the Chairman's recusal in an earlier case. This is the case of ***Capetronic (Malaysia) Corporation Sdn. Bhd. v. Alan Ng Li Hong, Award No. 400 of 2004.***

91. I repeat that part of the Award below:

> *" **High Court Application***
>
> *32. For purposes of completion of all issues raised, I ask myself: In the event counsel had satisfied their evidential burden regarding a pending application in the High Court challenging the appointment of the Chairman, would this fact by itself demand the Chairman to recuse and abdicate his duty? My considered response to this poser is firmly in the negative. My reasons follow.*
>
> *33. In **Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang Di Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (1986) 2 MLJ 391**, one of the grounds canvassed by the applicant in support of his application was that the Speaker of the Legislative Assembly would be dismissed at an impending*

future meeting of the State Assembly. Abu Mansor J (as his Lordship then was) in rejecting the ground said:

> *"The decision that the Court is invited to take cognisance of is the decision of a meeting of the State Assembly due to meet on Monday, November 4, 1985 (hearing Thursday, October 31, 1985). Such an event is remote and may or may not take place and it borders even on it being hypothetical when as such no order should be given (See* ***Glasgow Navigation Co. v. Iron Ore Co****.). The case of* ***Attorney-General v. Scott*** *may also be in point which decided that the Court cannot decide on something which depends on uncertainties or "in the air"."*
>
> *As there, so here. The Court cannot deliberate on remote events or on surmise or on conjecture of outcome of events.*

34. The administration of justice and public confidence in the same would be greatly hampered if serving judicial arbitrators are prevented from carrying out their duties for the reason that a challenge has been mounted and is pending against their appointment. To allow so would make the courts atrophy and disabled from carrying out their business."

92. An article which I did not then have benefit of sight is in point with this same issue. Lord Woolf, Lord Chief Justice of England and Wales in an article entitled ***Current Challenges In Judging, (2004) 2 MLJ pg i*** opines:

> *" On the other hand, prior to the beginning of the Iraqi war, the Divisional Court, presided over by Lord Justice Simon Brown, in my view properly refused to grant a declaration as to the legality of what might or might not happen in the future in that conflict. "*

Court's Awards

93. In his Written Submission, Learned Counsel expressed concern that ***if*** the High Court were to declare the appointment of the Chairman "in law null and void" then the Court's awards "are open to be challenged as being void."

94. With respect, Learned Counsel again enjoins the Court to journey into speculation on the outcome of the High Court application. The Court is unable to and will not embark on a pursuit of hypothesis.

95. Meaning no disrespect to Learned Counsel, the fact that the Court's award will be made possible of challenge per se, for whatever cause, being advanced as a reason to prevent the Court from inquiring into and deciding on the instant reference, is over-simplistic and devoid of any merit in that it overlooks the fundamental principles that operate in the environment of adjective law. That a discontended party may proceed further in search of satisfaction is the jewel in the crown of our legal system. Such discontentment can arise from a variety of reasons including that arising from a jurisdictional error. That such a recourse is probable and may be pursued to the benefit of any party cannot constitute a reason to rob the Court of its jurisdiction.

96. In the circumstances, the Court finds the second limb of Learned Counsel's reasoning of the impending High Court application as a cause promoting the Chairman's recusal, untenable.

97. For the reasons stated above I dismiss the Claimant's 3rd application for the Chairman to recuse. Any decision otherwise would tantamount to enabling parties to a litigation to choose their own judges, the undesirability of which is remarked by NH Chan JCA in ***Hock Hua Bank (Sabah) Bhd. (supra)***:

> " *To use the words of Darling J in **R v. Sharman (1930) 9 Cr App. Rep 130;** 'if the appellants' and I may add, or parties, ' are to be allowed to select the judges who shall hear their appeals,' and I may also add, or cases 'the business of the court could not be carried out'.* "

EPILOGUE

98. In passing I cannot help but comment on three aspects concerning this case. I hasten to emphasize that what I am about to comment had not in any way affected my deliberations on the various issues connected with the 3 applications. The subject of these comments did not form part of my decision making process.

Void or Voidable

99. At paragraph 14 of the Written Submission, Learned Counsel submitted that ***if*** the High Court were to declare the appointment of the Chairman "in law null and void, and if in the meantime Yang Arif has heard cases in the Industrial Court, such as the instant matter before this Honourable Court, concluded such cases and written Awards, then

such Awards are open to be challenged as being void." This statement by Learned Counsel stood bald with no further elaborations nor authority in support thereof.

100. Notwithstanding the Court's inability to deliberate on surmise or conjecture of outcome of events, I took upon myself to examine the effect on an award made by an improperly constituted court, for this is what would befall the Court upon the disqualification of the Chairman for any reason whatsoever.

101. ***Halsbury's Laws of Malaysia, 2001 Edn. Vol. 9, paragraph 160.99 entitled 'Whether proceedings void or voidable':***

> " *There is authority for the proposition that prima facie the participation of a disqualified person renders proceedings voidable but not void;* [see ***Dimes v. Grand Junction Canal Proprietors (1952) 3 HL Cos 759 at 786; Wildes v. Russel (1866) IR 1 CP 722; Phillips v. Eyre (1970) LR 6 QB1 at 22; R (Hastings) v. Galway Justices (1906) 2 IR 499***] *and this has been take to mean that the proceedings are to be treated as valid until set aside by a competent tribunal, and until then are not open to collateral attack* [see ***Wildes v. Russell (1866) LR I CP 722 at 741-744; R V Kent Justices (1880) 44 JP 298***]. "

102. In the text entitled ***Judicial Review of Administrative Action by de Smith, Woolf & Jowell, 5th Edn., p. 256,*** the author writes:

> " *The problems arose from the premise that if an act, order of decision is ultra vires in the sense of outside jurisdiction, it was said to be invalid, or null and void. If it is intra vires it*

was, of course valid. If it is flawed by an error perpetrated within the area of authority of jurisdiction, it was usually said to be voidable; that is valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record [see ***Punton v. Ministry of Pensions and National Insurance (No. 2)(1964) 1 W.L.R. 226; D.P.P. v. Head (1959) A.C. 83, 109.112)*** *]. "*

103. Learned Counsel quoted ***Metropolitan Properties Co. (F.G.C.) Ltd (supra)*** on the issue pertaining to the likelihood of bias. Had Learned Counsel gone further into L. Denning's judgement he would have come to that part at p.600 where his Lordship after holding that the chairman of the rent assessment committee should not have sat, confirmed that the decision under the circumstances would be voidable:

> *" I hold, therefore, that Mr. John Lannon (the chairman) ought not to have sat on this rent assessment committee. The decision is voidable on that account and should be avoided. "*

104. Learned Counsel's averment at paragraph 14 of the Written Submission on the possibility of the Court's awards being void is therefore against the weight of authority.

The Firm PKC

105. It was most disquieting for the Court to note the response by Learned Counsel to a clarification sought by the Court at the close of the hearing on 8.4.2004. It went like this:

" Court: Does it make it difficult for your firm to appear before me?

K.V. Raj: Yes Yang Arif for the very same reasons as submitted to day my answer will be in the affirmative. For all matters that are fixed for hearing before Yang Arif pending the outcome of the judicial review of the outcome (of) Yang Arif's appointment in the Industrial Court. ”

106. ***Halsbury's Laws of England, 4th Edn. Reissue, Vol. 3(1), paragraph 464 entitled 'Conflict of interest generally'*** reads:

> “ *There are certain occasions when a barrister should decline to accept instructions or may be obliged to withdraw from a case because of circumstances which would render it difficult for him to maintain his professional independence or would otherwise make his representation of the client incompatible with the best interest of justice.* ”

107. And ***rule 5(a), Legal Profession (Practice and Etiquette) Rules, 1978*** reads:

> “ *(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.* ”

108. In the circumstances it may be prudent for the firm PKC, for as long as they are unable to dispel their difficulty in appearing before the Chairman, to withdraw and discharge themselves from this and other cases in Court No. 15. To so not do may not be in the best interest of the administration of justice.

Delay

109. The Claimant was dismissed on 5.8.1998. Todate hearing of the case has yet to commence. Justice delayed is justice denied. Be it for the Claimant or the Company.

110. Perhaps Gopal Sri Ram JCA's words in ***Co-Operative Central Bank Ltd (in receivership) v. Rashid Cruz bin Abdullah (2004) 1 MLJ 626*** is timely. There his Lordship commented :

> " *All litigation including industrial litigation involves some delay. That is inevitable. But it is a tragic circumstances upon the justice system that 116 people had to wait for 11 years before they are made aware whether their case can take off before the Industrial Court. We are vexed as to how such a problem can be overcome. We offer no solution. All we suggest is the speedy disposal of the cases and the refusal of the Industrial Court to entertain any further preliminary objections.* "

SUMMARY OF DECISIONS

111. The 1st application to transfer the case to another Division of the Industrial Court is dismissed.

112. The 2nd application to disqualify the Chairman from hearing the 3rd application is dismissed.

113. The 3rd application seeking the recusal of the Chairman is dismissed.

HANDED DOWN AND DATED THIS 6TH MAY, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT