Re Shankar Alan s/o Anant Kulkarni
[2006] SGHC 194

Case Number : OS 668/2006

Decision Date : 27 October 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Jimmy Yim SC, Adeline Wong (Drew & Napier LLC) and Daniel Koh (Rajah & Tann) for the Law Society of Singapore; R S Bajwa (Bajwa & Co), Mahmood Gaznavi (Mahmood Gaznavi & Partners) and Alan Shankar (Alan Shankar & Lim) for the applicant

Parties : —

Administrative Law – Disciplinary proceedings – Applicant seeking order to quash findings of disciplinary committee – Whether disciplinary committee apparently biased – Whether tests of "reasonable suspicion of bias" and "real likelihood of bias" identical – Whether excessive intervention by disciplinary committee constituting separate ground for complaint – Whether disciplinary committee descending into arena and failing to observe proper role

27 October 2006 *Judgment reserved.*

Sundaresh Menon JC:

1 The applicant, Shankar Alan s/o Anant Kulkarni is a solicitor of some 17 years' standing. He stands convicted by a disciplinary tribunal of what, for a professional man, can only be described as heinous conduct. He contends however, that he has been the victim of a miscarriage of justice; that the process by which the conviction was reached was not a fair one. The applicant reaches out to that hallowed principle: justice must not only be done but it must manifestly be seen to be done. He contends that this principle has been violated in his case. What do these words really mean? Are they simply a nice-sounding tagline expressing a pious aspiration? Or do these words in fact express an uncompromising standard which serves to guarantee that those having business before judicial and quasi-judicial bodies in this country will not go away harbouring any reasonably held apprehensions that they have not been fairly dealt with? Those are the questions raised in this case.

The factual background

2 The complainants are Mislia bte Yusof ("Mdm Mislia") and her husband Abdul Malik bin Sukor ("Mr Abdul Malik").

3 According to the complainants, they were introduced to the applicant some time in 1999 by one Rudolph Khoo ("Khoo") who was a real estate agent. Khoo was assisting them with the sale of their Housing and Development Board ("HDB") flat at Block 325 Woodlands Street 32, #12-137, Singapore 730325. At that time, Mr Abdul Malik was an undischarged bankrupt. Khoo had advised the complainants that in order to sell their flat, Mr Abdul Malik first needed to obtain a discharge from his bankruptcy. To enable this, Khoo offered to procure for the complainants a loan of $25,000 which could be repaid once the flat was sold. To facilitate these arrangements, Khoo introduced the complainants to the applicant to act for the complainants in a number of related matters. These were:

(a) to apply on behalf of Mr Abdul Malik for a discharge from bankruptcy;

(b) to act for the complainants in the sale of their HDB flat; and

(c) to document some loans that the complainants obtained from one Chiang Bin Kwang ("Chiang").

4 The loans that the complainants obtained from Chiang were to be discharged by them from the proceeds of sale of their flat.

5 Some time in June 1999, the complainants attended at the applicant's office. They were accompanied by Khoo. The applicant subsequently prepared a loan agreement which stated that Chiang was to extend an interest-free loan of $45,000 to Mdm Mislia. The applicant also prepared a warrant to act which irrevocably authorised the applicant's firm to act for the complainants in the sale of their HDB flat and to make payment of the sum of $45,000 to Chiang from the proceeds of sale of the flat. Mdm Mislia did sign these documents. She subsequently approached Khoo on two occasions for further loans from Chiang. These were in July 1999 and September 1999. On each occasion, the applicant prepared a loan agreement and a letter of authority which authorised his firm to make payment to Chiang.

6 In total, Mdm Mislia signed three agreements purportedly to borrow from Chiang the total sum of $88,500 made up of:

(a) $45,000 on the first occasion;

(b) $30,000 on the second occasion; and

(c) $13,500 on the third occasion.

7 However, according to Mdm Mislia, she in fact only received from Chiang the sum of $40,000 made up of the sum of $25,000, $10,000 and $5,000 respectively on each of the three occasions.

8 Some four years later in October 2003, the complainants made a complaint to the Law Society of Singapore ("the Law Society"). The complaint was initially considered by an Inquiry Committee. That committee reported on 30 July 2004 that it was of the opinion that a *prima facie* case had been disclosed which warranted investigation by a Disciplinary Committee ("DC").

9 The DC was duly constituted and it heard evidence in respect of three charges brought against the applicant over two hearing days on 19 and 20 July 2005. Directions were given for closing submissions to be made in writing.

10 On 24 January 2006, the DC reported its findings that all three charges had been made out against the applicant: see [2006] SGDSC 1. The applicant then sought leave to make an application for a quashing order in respect of the DC's findings and determinations as set out in its report of 24 January 2006. Having heard the submissions, I gave leave. The application for a quashing order then came before me and was argued on 20 June 2006.

11 The applicant was represented by Mr R S Bajwa. The Law Society was represented by Mr Jimmy Yim SC, Ms Adeline Wong and Mr Daniel Koh.

12 There is no doubt that the function of a court dealing with an application for judicial review is a limited one. The key concern is to scrutinise the process and ensure that the rules of natural justice have been fairly applied. The issue in an application for judicial review is not whether the tribunal, the findings of which are the subject of the challenge, has reached a decision that the court considers is

correct. Rather, it is whether it has proceeded correctly, observing the applicable "due process" requirements.

13 The central issue that was raised before me arose out of the conduct of the DC in initiating a certain line of inquiry, prosecuting it with some vigour when examining the witnesses, and then reaching a conclusion on that issue. The issue in question related to a specific aspect of the dealings between the various persons involved. It will be noted that the complaint alleged that although Mdm Mislia signed documents evidencing loans amounting in total to $88,500, she and her husband never received this amount from Chiang who was the lender. Instead, they maintained that they had received much less. However, the amount of $88,500 was later debited by the applicant's firm from the proceeds of the sale of the complainant's flat and then paid over to Chiang.

14 The applicant was charged with three counts of grossly improper conduct contrary to s 83(2)(*b*) of the Legal Profession Act (Cap 161, 2001 Rev Ed).

15 The charges related to various specific aspects of the applicant's dealings with Mdm Mislia and Mr Abdul Malik including allegations that:

(a) the applicant had acted both for the complainants as well as for Chiang in the loans without advising the complainants of the implications of the conflict of interest in which he was placed;

(b) the applicant had failed to take the complainants' full instructions in preparing the various documents;

(c) the applicant had the complainants sign these documents without fully advising them on the terms or their implications; and

(d) the applicant had failed to ascertain whether the actual amounts that had in fact been received by Mdm Mislia from Chiang was in accordance with what was reflected in the loan agreements.

16 The DC heard evidence from the complainants and the applicant. It also heard evidence from two witnesses from Citibank Singapore Ltd ("Citibank"), whom I refer to collectively as "the Citibank witnesses". The Citibank witnesses had been called on behalf of the applicant. In the case of the first two loans to Mdm Mislia, the payments had been made by way of cheques drawn in her favour. Nonetheless, her evidence was that the cheques had been encashed by Chiang at Citibank and he then handed her a portion of the sum encashed. The applicant challenged this and called the Citibank witnesses to deal with this aspect of the case.

17 The nub of the applicant's case before me centred on the manner in which the DC dealt with this part of the evidence and the case. In summary, it came down to the following:

(a) The Citibank witnesses were "independent" witnesses in that they were the only ones before the DC not interested in the outcome of the case. The only other witnesses were the complainants and the applicant.

(b) The DC had not questioned the complainants when they were giving evidence to the same extent or in the same manner as it had the Citibank witnesses (in particular, the first witness) or the applicant for that matter.

(c) As against this, the DC had interrupted the applicant's counsel when he had been adducing the evidence of the first of the Citibank witnesses who had testified that it was unlikely that the money could have been handed over to anyone other than Mdm Mislia. The DC, it was submitted, in effect cross-examined the witness in an effort to establish otherwise.

(d) The DC's line of cross-examination appeared to have been directed initially at showing that the cheques could have been encashed at the priority banking counter and if presented by Chiang himself, who was a priority banking customer, he instead of Mdm Mislia might have been able to collect the cash.

(e) The DC's chairman's questioning took the form of suggesting at one point that he himself had seen certain practices being done in relation to banking at priority banking counters thus challenging the witness's evidence to the contrary. In the same vein, the chairman at one point asserted that he had personal experience in banking for 26 years and again this appeared to be directed at extracting a concession from the witness.

(f) By way of comparison, the applicant noted that the counsel for the Law Society had asked a total of seven questions (including just two principal questions) whereas the chairman and members of the DC asked some 60 or so questions of the first Citibank witness.

(g) The second of the Citibank witnesses was subsequently called. The chairman again explored the possibility that Chiang, as a priority banking customer, instead of Mdm Mislia, could have received the money from the teller even though the cheques were drawn in favour of Mdm Mislia. The witness, who was one of the tellers who actually attended to Mdm Mislia, rejected this possibility. However, the DC did not make any evaluation of her testimony.

18 In its conclusion on this issue, the DC said as follows in its report at [44]:

> In relation to the payments made to Mislia, despite the testimony of Mr Daniel Ang on Citibank's best practices on the encashment of cheques and Ms Jolene Tok's testimony on her practices as a bank teller, we are nonetheless inclined to believe Mislia's evidence in relation to the cashing of cheques drawn in her favour at the Citibank counters by Chiang. *It was clearly not in Citibank's interests to acknowledge that it might be possible in some circumstances for a drawer of a cheque to cash it over the counter although it was drawn in favour of someone else. However, as the cheques had already been signed at the counter by Mislia, and Chiang was a Citibank Priority Customer in possession of Mislia's IC, we find it highly likely that on both occasions Chiang would have been able to cash the cheques on Mislia's behalf*. With regard to the second cheque, the fact that the words 'or bearer' were not crossed out made it all the more likely that Chiang would be able to cash Mislia's cheque over the counter. [emphasis added]

19 There are some points that bear noting in this. First, throughout the questioning of both the Citibank witnesses the line taken by counsel for the Law Society and indeed by the DC itself was that it was *possible* that Citibank's practices had not been followed in these instances and that it was *possible* that the money had been paid to Chiang rather than to Mdm Mislia.

20 Yet in its decision, the DC found "it was highly likely that on both occasions Chiang would have been able to cash the cheques on Mislia's behalf" in spite of the evidence to the contrary on the practices of the bank. This is noteworthy because the evidence of the Citibank witnesses was that this was unlikely if not impossible. That which is unlikely (even if possible) to have taken place once, becomes so much more unlikely to have occurred on both of two occasions. The DC does not appear to have considered this at all and based its conclusion on the fact that Mdm Mislia had already signed

the cheque at the counter and Chiang was a priority banking customer of Citibank. This brings me to the next point.

21 In relation to both the Citibank witnesses, counsel for the Law Society was content to rest his cross-examination on establishing the *possibility* that in certain circumstances the bank's general practices might be breached without regard to whether or not Mdm Mislia was accompanied by a priority banking customer. The notion that because Chiang was a priority banking customer of Citibank and he could have skirted around or even breached some of the procedures was something first suggested and then pursued by the DC. It is of interest that this whole issue did not even feature in the closing arguments for the Law Society. The applicant therefore described this aspect of the DC's findings as "a product of the Chairman's mind".

22 Thirdly, at no time did counsel for the Law Society or any member of the DC suggest to either of the Citibank witnesses that they were likely to be anything less than totally frank in their answers because "it was not in Citibank's interests to acknowledge that it might be possible in some circumstances for a drawer of a cheque to cash it over the counter although it was drawn in favour of someone else". Yet this appears to have been the other principal basis upon which the DC chose not to accept their evidence.

23 It is unfortunate that the Citibank witnesses were not given the opportunity to comment on the DC's view that their evidence might be suspect because it would not have been in the bank's interest to admit of such possibility.

24 It is not surprising that counsel for the Law Society did not make any such suggestion to the Citibank witnesses, since he did not even mention their evidence in his closing arguments. However, their evidence on this issue was a significant part of the arguments raised on behalf of the applicant in attacking the credibility of the complainants' evidence.

25 It also appears that this did bear upon the DC's evaluation of the evidence as a whole. This is what the DC said in its report at [46]:

> *The Respondent has gone to great lengths to attempt to show in his defence that Mislia actually received the full sums mentioned in the Loan Agreements and that he somehow correctly assumed the loans to be interest free. In our opinion, this was an imprudent approach as it left the Respondent with little or no credibility.* The Respondent would have us believe that no interest was in fact payable on the three loans at all and that the lender, who was completely unknown to the Complainants at the time of the first loan, was seemingly lending them money out of sheer benevolence. [emphasis added]

26 Finally, there is one further point that should be highlighted. At [49] and [50] of its report, the DC stated as follows:

> The Committee is further of the opinion that the assumptions made by the Respondent about the interest payable were neither innocuous nor inadvertent. We also think that in all likelihood the Respondent knew that Chiang was in the business of lending money (presumably, illegally) and that this was to be an illegal moneylending transaction.
>
> The Committee therefore concludes that the Respondent prepared the Loan Agreements as interest-free for the sole purpose of making the loans appear like friendly loans and thereby hiding the true amounts of interest owed to Chiang under them. By omitting to ask the Complainants the proper questions and by attempting to narrow the scope of his retainer, the Respondent was

deliberately turning a blind eye to the true nature of these illegal and extortionate loans. He did not ask about the interest payable because he did not want to know. He also abused his position as the Complainants' solicitor by leading them to believe that all was above board and that he would protect their interests when in fact he was much more concerned with protecting Chiang's and Rudolph's interests. As such we find that the acts and omissions of the Respondent were not merely negligent or even grossly negligent but were clearly calculated to keep the Complainants in the dark, to make sure Chiang was paid excessive amounts of interest, and to keep himself out of trouble.

27 I mention these paragraphs because they have some bearing on the conclusion I have reached in this case. I would only make the point here that these paragraphs reflect a position that formed no part of the case mounted by the Law Society in its prosecution of the applicant. Indeed, the very first paragraph of the Law Society's closing submissions to the DC stated:

> The [applicant] is correct that the Law Society's position is <u>not</u> that he has been engaged in fraudulent conduct.

28 Against this background, I return to the application before me. The applicant rested his claim to relief on the following grounds:

(a) that the DC had conducted itself in such a manner as to give rise to apparent bias or a reasonable suspicion of bias;

(b) that the DC by virtue of its excessive questioning had descended into the arena and so lost that degree of detachment which it needed to maintain in order to ensure that the applicant had a fair trial; and

(c) that the DC applied the wrong standard of proof. Whereas it was accepted on both sides that the appropriate standard was proof beyond a reasonable doubt there was nothing in the DC's report to indicate that it was applying this standard in evaluating the evidence.

The preliminary point

2 9 In response to the third of the arguments above, Mr Yim first raised a preliminary point. He noted that this was an application for judicial review and not an appeal or an application for other recourse under the law.

30 He submitted first that where there are alternative remedies, a court would be very slow to exercise its supervisory jurisdiction over inferior tribunals. He relied in this regard on the decision of the English Court of Appeal in *R v London Borough of Bromley* [2002] 2 EWCA Civ 1113 ("*Bromley*"). He further submitted that in an application for judicial review, the court's concern was not with the outcome but rather with the process and with the legality of the decision on its face. He relied upon the decisions of the House of Lords in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 and of our Court of Appeal in *Singapore Amateur Athletics Associations v Haron bin Mundir* [1994] 1 SLR 47 ("*Haron bin Mundir*"). He submitted that the issue of whether the DC had applied the wrong standard of proof would in this case necessarily require me to make an evaluation of whether I thought the decision of the DC was unsupportable on the basis of the evidence adduced.

31 Dealing with the first point, in my view, Mr Yim's reliance upon *Bromley* does not advance his position. *Bromley* was a case where the appellant, "M", was a care worker employed by a local health authority. A complaint was made that M had sexually assaulted some residents at a centre for

children with learning disabilities. The complaint was investigated and the local authority accepted the investigator's report which concluded that M had sexually assaulted the victims. M's name was then placed by the Secretary of State on a list of individuals considered unsuitable to work with children and M sought judicial review of this.

32 The English Court of Appeal upheld the decision at first instance which disallowed the application for judicial review. However, certain aspects of the decision bear close analysis because they distinguish that case from the one before me now. In particular:

(a) In *Bromley*, the quashing of the local authority's decision on procedural grounds would have prevented a decision on the merits being reached by a tribunal to whom the applicant could have brought an appeal;

(b) That expert tribunal was far better placed than a court to decide on the issues of substance.

See *per* Judge LJ at [43]–[45] and *per* Burton LJ at [26].

33 Mr Yim submitted that in the present context, the applicant would have the opportunity in show cause proceedings, before the court of three judges to make good his contention that the DC had made an error of law in applying the wrong standard of proof. Accordingly, he submitted, an alternative remedy was available.

34 I do not think it is correct to view the court of three judges as an alternative remedy to the seeking of judicial review. The point has previously been considered by Chan Sek Keong J (as he then was) in *Re Singh Kalpanath* [1992] 2 SLR 639. In that case, Chan J noted that show cause proceedings before a court of three judges were different from judicial review proceedings "both with respect to the law as well as the procedure": see at 650, [27]. He noted in particular that in show cause proceedings the court of three judges could go into the merits of the findings and determinations of the DC on the basis of the evidence led. However in judicial review proceedings, the court is concerned not with the merits of the decision but rather with its legality on administrative law grounds.

35 In my judgment, the foregoing analysis of the difference between these two types of proceedings remains valid and is in no way displaced by *Bromley.* In fairness to Mr Yim, it must be said that he measured his submissions carefully and was content to leave this on the basis that the availability of show cause proceedings was a factor to be considered by the court in deciding whether to exercise its supervisory jurisdiction.

36 I turn to Mr Yim's second preliminary argument. He did not take issue with the proposition that the relevant standard of proof was to a degree beyond reasonable doubt – see *Wong Kok Chin v Singapore Society of Accountants* [1989] SLR 1129 ("*Wong Kok Chin*") at 1140–1141, [19] as well as *Law Society of Singapore v Yahya Syed* [1997] SGDSC 4 at [8]–[11] and the cases cited there, in particular *Re an Advocate and Solicitor* [1978–1979] SLR 240. However, Mr Yim submitted that nowhere on the face of the report of the DC was it apparent that it had applied any other standard of proof. He accepted that if the DC had expressly stated that it had considered the evidence on a balance of probabilities, that might have amounted to an error of law on the face of the decision and might have attracted the intervention of the court at this stage. While it was true that the DC had applied a variety of phrases in evaluating the evidence, including "highly likely", "not fully convinced", "inclined to believe" among others, Mr Yim submitted that I would have to actually examine the evidence and consider the merits in order to assess whether the DC had indeed applied the wrong

standard of proof. That, he argued, was not a permissible venture in an application for judicial review.

37 In my judgment, Mr Yim has overstated the principle although I accept the conclusion he urges upon me on this point. I think it is helpful to begin with the decision of F A Chua J in *Leong Kum Fatt v AG* [1984–1985] SLR 367. That was a case arising out of the dismissal of a police officer for misconduct. The police officer brought judicial review proceedings to challenge his dismissal.

38 Chua J considered the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and of Kulasekaram J in *Wong Kim Sang v AG* [1982–1983] SLR 219 before articulating the following principle at 372, [13]:

> The scope of judicial review is limited only to review of the decision-making process, that is the hearing, and not the decision itself. *So long as the Board directs itself to the right inquiry and asks the right questions within its permitted area and not outside that area and acts according to natural justice the court would not intervene*. The court is concerned only with the hearing not the conduct of the investigations, the findings of the Board or the reasons given by the Board for its findings. [emphasis added]

39 It is apparent from this extract that the first question for the supervising court is whether the tribunal in question has directed itself to the right inquiry. The inquiry before the DC was whether on the evidence presented the charges against the applicant had been made out beyond a reasonable doubt. If the DC had directed itself to that question and concluded that the charges had been made out then it would be outside the purview of a supervising court to sift through the evidence and evaluate whether or not the DC was correct to arrive at that conclusion. That would clearly be a case of the supervising court straying beyond its proper remit and venturing improperly into the merits: see for example *Mohan Singh v AG* [1987] SLR 398 at 405–406, [30]–[34] and cases cited there in particular *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175; see also *Haron Bin Mundir* at 59–60,[58].

40 However, the question before me is whether the DC in the present case directed itself to the right inquiry. In my view, that is a matter falling within the ambit of the supervising court's jurisdiction. However, in the present case, I do not think that helps the applicant. There is of course much to commend any tribunal expressing itself clearly especially in relation to such a vital issue as the standard of proof it has applied. Unfortunately the DC in this case has not done that. The report does manifest some laxity in expression but that without more is insufficient to enable me to reach a conclusion that the DC has in fact directed itself to the wrong inquiry. I would therefore decline to intervene on this ground.

Apparent bias

41 I return to the main ground on which the decision was challenged, namely apparent bias. Although the first and second arguments I have listed above at [28] are closely related, nonetheless I deal with each separately because they raise distinct issues.

42 There was no dispute that the DC was bound to observe the rules of natural justice. The courts have developed numerous principles that govern the application of these rules but at their irreducible core it comes down to two essential requirements:

(a) every party to a dispute shall be entitled to a fair hearing; and

(b) the tribunal tasked with determining the dispute shall be disinterested and independent.

43 One of the specific applications of the second of these rules is the requirement that the decision be reached without the taint of any bias on the part of the tribunal. Such bias may be actual bias. Much more frequently, it is apparent bias, and Mr Yim accepted as settled law the proposition that a decision of a tribunal may be quashed by a supervising court if it is tainted by apparent bias.

44 What then is the meaning of apparent bias and how is a court to determine if it has been made out? The jurisprudence throws up a number of formulations of the appropriate test of which the two most common are a "reasonable suspicion of bias" and a "real likelihood of bias".

Are the tests really different?

45 In *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 ("*Tang Kin Hwa*"), Andrew Phang Boon Leong JC (as he then was) examined the authorities from several jurisdictions with characteristic thoroughness and attention to their underlying rationale and concluded as follows at [39]:

> The key question is whether or not there was a perception on the part of a reasonable person that there would be a real likelihood of bias … At this point, there appears to me to be no difference in substance between the "reasonable suspicion of bias" and "real likelihood of bias" tests … one must also guard against gratuitous semantic confusion. What matters, in the final analysis, is a practical approach that takes into account not only the possible meanings of the word and phrases in question but also the context in which they appear.

46 The learned judge was careful to note that this was a tentative view and invited clarification from the Court of Appeal on an appropriate occasion: see *Tang Kin Hwa* at [45].

47 At one level, this seems an eminently sensible and practical approach. However, the observance of the rules of natural justice are at the very core of our system of justice and in my view, it bears reconsideration as to whether or not there is an appreciable distinction between the various formulations of the appropriate test.

48 I begin by noting that the imaginary scales of justice which symbolise the judicial process can connote a quantitive element. Such a perception would be misplaced. The judge evaluating the evidence in a given case arrives at an impression of the quality of the case that has been presented and a variety of expressions have emerged to capture the range of these impressions. At one end of the spectrum, one speaks in terms of a doubt which suggests a state of uncertainty. The term is best seen in the context of the expression "beyond reasonable doubt" which has been the subject of detailed explication by V K Rajah J in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45 ("*Jagatheesan*") at [46]–[61]. In essence, that expression requires not that the case be proved to a degree beyond all conceivable doubts but that it be proved to a degree that excludes doubts "for which there is a reason that is, in turn, relatable to and supported by the evidence presented": see *Jagatheesan* at [61].

49 Next to "doubt", there is "suspicion" which suggests a belief that something might be possible without yet being able to prove it. The addition of the adjective "reasonable" suggests that the belief cannot be fanciful and perhaps as suggested by Rajah J in *Jagatheesan*, that the reasons for the suspicion be capable of articulation by reference to the evidence presented. It might be noted that an inquiry into whether one may entertain a "reasonable suspicion" is directed in the first instance at the person harbouring the suspicion albeit with consideration to the circumstances of the person who is allegedly acting suspiciously. I mean this in the sense that the issue is whether it is reasonable for the former to harbour the suspicions in the circumstances even if by virtue of some fact or

explanation, the suspicious behaviour of the latter is in fact entirely innocent.

50 Then there is "likelihood" which points towards a state of being likely or probable or, for that matter, possible. Again, the addition of the adjective "real" suggests that this must be substantial rather than imagined. The focus of this inquiry is directed more to the actor than to the observer. The issue is the degree to which a particular event is or is not likely or possible.

51 Finally, there is the expression "proof on a balance of probabilities". This connotes a degree of satisfaction upon the evidence that a particular fact is more likely so than not (or the converse).

52 I think there is some value in considering the relevant standards in this light. I turn then to the decision of the House of Lords in *Regina v Gough* [1993] AC 646 ("*Gough*"). That was a case where the appellant had been convicted on a single count of conspiracy to commit robbery. His brother was the alleged co-conspirator but he had been discharged on the application of the prosecution. After the appellant had been convicted and sentenced, the brother started shouting to the court and one of the jurors then recognised him as a neighbour. The appellant appealed contending that the presence of the brother's neighbour on the jury was a serious irregularity. The appeal was dismissed. In arriving at his conclusion, Lord Goff of Chieveley who delivered the leading judgment of the House had this to say at 670:

> Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. *Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias*. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those 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 by him …
>
> It follows from what I have said that the Court of Appeal applied the correct test in the present case. *On that test, it was accepted by Mr. Hytner that there was no ground for disturbing the jury's verdict*. I would therefore dismiss the appeal.
>
> [emphasis added]

53 *Gough* is not the law in Singapore, as I shall shortly illustrate, but the passage I have referred to is useful in highlighting certain points:

> (a) The key issue in that case was which of the two principal tests were to be preferred. The appellant contended it should be the "reasonable suspicion" test. The House of Lords held that the correct test was the "real likelihood" test with the explanation that the focus should be on the question of possibility rather than of probability;
>
> (b) The appeal failed because of the test applied by the House of Lords. In short the choice of the test had a dispositive effect on the outcome of the case.

54 In arriving at this conclusion, Lord Goff considered a line of cases which had applied the "reasonable suspicion" test beginning with the celebrated *dictum* of Lord Hewart CJ in *The King v*

Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 ("*Sussex Justices*") where he said at 259:

> [A] long line of cases shows that it 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 … Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

55 Lord Goff's conclusion was that this hallowed principle would be quite adequately served by a test that directed the inquiry at whether there was a *real possibility* of bias. He noted as follows in *Gough* at 668:

> Furthermore the test so stated gives 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.

56 It seems to me therefore that it may be over simplifying matters somewhat to conclude that the tests are for all practical purposes identical. It is true that in very many cases, there may be no difference to the outcome of the case which test one applies, but that merely means that in those cases, the degree of evidence in fact presented leaves a sufficient impression that whichever test was applied the result would have been the same. It does not follow just from this, that there is no difference between the tests.

57 In *Tang Kin Hwa* (at [45] above), Phang JC made the following points in analysing whether there was a conceptual difference between the two tests:

(a) Both tests are premised on an objective basis (at [36]).

(b) On one view at least, the difference between the two tests was between a reasonable suspicion of bias and the appearance of a likelihood of bias and seen thus, there was little of substance between the two tests (at [37]).

(c) If "likelihood" is seen in terms of "possibility" rather than "probability" a point already made by Lord Goff in *Gough*, then there is no difference of substance between the two formulations (at [39]).

(d) In so far as it has been suggested that the inquiry is to be undertaken from the perspective of the public rather than of the courts, it is not desirable to maintain a sharp distinction between the two. The court indeed personifies the reasonable man and the court should approach the matter with broad common sense without relying on special knowledge or details of court procedure [at [40]–[41]).

58 In assessing these points, I think it is well first to recall the basis upon which the principle rests that a decision may be attacked for apparent as opposed to actual bias. As noted by Lord Goff in *Gough*, bias is an insidious thing so that a person may well believe with all sincerity and good faith that he is acting impartially and yet his mind may unconsciously be affected by bias: see *Gough* at 659 citing Devlin LJ in *Regina v Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 ("*Barnsley*").

59 This coupled with the public interest in ensuring that justice is administered in a manner that is beyond reproach and that it is manifestly seen to be so, gives rise to a need to consider each case with two separate and distinct interests in mind:

(a) the direct interests of the parties to the dispute in securing a process that in fact accords with their legitimate expectations; and

(b) the overriding public interest that no issue can be raised with respect even to the way in which justice *appears* to have been administered.

60 This gives rise to a significant point. It is helpful here to refer to what was said by Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599:

> I n *Reg. v Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association*, Devlin J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit … 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. The court will not inquire whether he did, in fact, favour one side unfairly. *Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."*
>
> [emphasis added]

61 Although Lord Denning was speaking in terms of a "real likelihood of bias" the passage does serve to highlight the fact that the inquiry should not be limited to whether the court thinks that there was in fact a sufficient possibility that the tribunal was biased but rather should be directed at whether a reasonable man might think it so. Lord Goff in *Gough* thought this was a distinction without a difference because the court personifies the reasonable man (see *Gough* at 667–668), a view shared by Phang JC in *Tang Kin Hwa*. However, in my view Lord Goff glossed over what appears to me to be a point of some importance when he expressed his conclusion as follows at 668:

> 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 … justice requires that the decision should not be allowed to stand.

62 What is significant in this is that the inquiry has been shifted from one directed at how it might all appear to a reasonable man to whether the judge thinks there is in fact a sufficient possibility of bias. This in my view is a very significant point of departure and it is well summarised in the following short extract from the judgment of Simon Brown LJ in *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139 ("*Dallaglio*") at 152:

> It will be seen, therefore, that by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias.
>
> …
>
> It is not necessary for the applicants to demonstrate a real possibility that the coroner's decision

would have been different but for bias; what must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decided the merits, unfairly.

63 The High Court of Australia in *Johnson v Johnson* (2000) 201 CLR 488 took a different view from Lord Goff on this issue. The judgment of Kirby J articulates the point with customary eloquence at 506–508 as follows:

> Nevertheless, the interposition of the fictitious bystander and the adoption of a criterion of disqualification expressed in terms of possibilities rather than "high probability" are both intended to serve an important social interest which must be restated in disposing of this appeal. Each of these considerations lays emphasis on the need to consider the complaint made ultimately, not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public ... It is also why it would be a mistake for a court simply to impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself.
>
> …
>
> As is usually the case when a fiction is adopted, the law endeavours to avoid precision … Obviously, all that is involved in these formulae is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias.

64 The point simply is this: there is a vital public interest in subjecting the decisions of those engaged in any aspect of judicial or quasi-judicial work to the most exacting scrutiny in order to ensure that their decisions are not only beyond reproach in fact and indeed from the perspective of a lawyer or a judge but also beyond reproach from the perspective of a reasonable member of the public. The inquiry should be directed from that perspective at whether the events complained of provide a reasonable basis for such a person apprehending that the tribunal might have been biased.

65 In my view this is the key to understanding the difference between the two tests and this was canvassed in *Webb v The Queen* (1993–1994) 181 CLR 41 ("*Webb*") which also was a decision of the High Court of Australia. It is helpful here to make reference to some passages from that decision. Mason CJ and McHugh J noted as follows at 50–51:

> In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of "reasonable likelihood" or "real danger" of bias tends to emphasize the court's view of the facts. In that context, the trial judge's acceptance of explanations becomes of primary importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident.

66 This passage highlights the problem of comparing the perspective of the public with that of the reviewing court. The emphasis of the "real likelihood" or "real danger" test is that it directs the

inquiry at whether the court thinks there is a real likelihood, or in Lord Goff's preferred terms, a real possibility or danger or risk that the tribunal is biased. This is borne out by the fact that Lord Goff himself explicitly stated in *Gough* that he viewed the essence of the inquiry in a case of apparent bias as follows at 661:

> But it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question of *whether there was such a degree of possibility of bias on the part of the tribunal* that the court will not allow the decision to stand [see also at 659–660]. [emphasis added]

67 There is no doubt that Lord Goff himself saw the two tests as different because of this. Thus at 665, he quoted the following passage from the decision of Devlin LJ in *Barnsley*:

> 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

68 He followed this immediately with the following comment:

> It is plain from this passage that Devlin L.J. was concerned to get away from any test founded simply upon suspicion – "the sort of impression that might reasonably get abroad" – and to focus upon the actual circumstances of the case in order to decide whether there was in those circumstances a real likelihood of bias. His question – do the circumstances give rise to a real, likelihood that the justices might be biased? – suggests that he was thinking of a likelihood as meaning not probability, but possibility; the noun probability is not aptly qualified by the adjective "real," and the verb "might" connotes possibility rather than probability. Such a reading makes the real likelihood test very similar to a test requiring a real danger of bias. [emphasis added]

69 Even with the rider that "likelihood" is to be equated with "possibility" there is a significant difference between the court inquiring whether on the one hand it thinks there is a sufficient (real) possibility that the tribunal was biased on the one hand, and on the other, whether a lay person might reasonably entertain such an apprehension, even if the court was satisfied that there was in fact no such danger.

70 This point comes out most clearly in the portion of Lord Goff's judgment where he sought to deal with the hallowed case of *Sussex Justices*. The facts and the holding in *Sussex Justices* presented a real obstacle in the way of adopting a test for apparent bias that was founded on a sufficient degree of possibility of bias rather than on the mere suspicion of it. In *Sussex Justices* the essential facts were that the acting clerk to the magistrates was a member of the firm of solicitors representing a party that had an interest in the outcome of the litigation. At the conclusion of the evidence the magistrates retired to consider their decision and the clerk accompanied them so as to be available should they desire to be advised on any point of law. As it transpired, the magistrates arrived at their decision without consulting the clerk at all. On the facts stated, there was no danger or risk at all of the decision in fact having been tainted by bias because the clerk had not in fact been involved in the deliberations. But the decision of the magistrates was set aside because of the importance of ensuring that justice must not only be done but also be seen to be done (see at [54] above). Faced with this, Lord Goff dealt with this authority by comparing it with the decision in *Regina*

v Camborne Justices, Ex parte Pearce [1955] 1 QB 41 where the opposite conclusion was reached and in effect treated *Sussex Justices* as being confined to its facts, noting as follows at 664:

> In the *Sussex Justices* case it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the court went on to hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the *Camborne Justices* case, in which it was held that, since there was no real likelihood of bias on the part of the justices' clerk, there was no ground for quashing the justices' decision. *The cases can therefore be distinguished on the facts.* [emphasis added]

71 I don't find that at all convincing. In my view *Gough* cannot be reconciled with *Sussex Justices* and I can do no better here than to refer to what was said by Sir Thomas Bingham MR (as he then was) in *Dallaglio* (see [62] above) at 162 on the effect of *Gough* upon the continuing vitality of Lord Hewart's *dictum* in the *Sussex Justices* case:

> The third class comprises cases in which there is no actual bias and no direct pecuniary interest giving rise to a presumption of bias. It was the bounds of this third class which were in issue in *Gough*. The House of Lords was there called upon to choose between two tests for inclusion in this class, both of the rival tests finding support in authority. One test was whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible because of bias on the part of the decision-maker. The second was whether there was a real likelihood, or danger, of bias. The House of Lords unanimously upheld the second of these tests, expressed in terms of real danger, to make clear that it is possibilities, not probabilities, which matter. *This decision shows, as it seems to me, that the description 'apparent bias' traditionally given to this head of bias is not entirely apt, for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand. The famous aphorism of Lord Hewart CJ in R v Sussex Justices, ex p McCarthy that 'justice … should manifestly and undoubtedly be seen to be done' is no longer, it seems, good law,* save of course in the case where the appearance of bias is such as to show a real danger of bias. [emphasis added]

72 In any case, leaving that to one side, the facts in *Sussex Justices* do serve to highlight the real difference that does exist between the two tests for bias. The case rests upon the application of a principle that safeguards not only the *fact* but also the *appearance* of justice being done; it is simply not relevant when applying such a principle to consider the degree of the risk or possibility of the tribunal in fact being biased. In this light, I return to the decision of *Webb*, this time to draw from the judgment of Deane J at 70–71 where speaking of *Gough* he stated as follows:

> The House of Lords test differs from that accepted in recent cases in this Court as regards both its substance and its reference point. The substance of the House of Lords test is "a real danger of bias". The substance of this Court's test is "a reasonable apprehension of bias". The reference point of the House of Lords test is the appellate court itself or, where the question arises at first instance, the trial judge. The reference point of this Court's test is the fair-minded informed lay observer.

…

The adoption of a "real likelihood" or "real danger" test, with the appellate court (or the trial judge) itself as the reference point, would, in my view, go a long way towards substituting, for the doctrine of disqualification by reason of an appearance of bias, a doctrine of disqualification for actual bias modified by the adoption of a new standard of proof (i.e. a real likelihood or possibility rather than probability in the sense of more likely than not). It is true that, as Lord Goff made clear in *Reg. v. Gough*, the inquiry which is involved in the application of the real danger test is not directed to an exploration of the actual state of mind of the particular judge or juror. It is directed to the court's assessment of the possibilities in the context of the objective facts disclosed by the material in evidence. Nonetheless, the ultimate question which a court is required to address in an application of that test is whether there *was* a real danger, in the sense of possibility, of actual bias. The adoption of a test requiring the determination of that ultimate question for the resolution of cases involving no more than an allegation of an appearance of bias would, in my view, be undesirable

[emphasis in bold italics added]

73 In my view, this is a correct and admirably lucid articulation of the differences between the tests and of their significance.

74 I would therefore, with some reluctance, differ from the view taken by Phang JC in *Tang Kin Hwa* that there is no practical difference between the two tests. In my judgment, there are indeed some important differences between them the most important of which are the reference point of the inquiry or the perspective or view point from which it is undertaken, namely whether it is from the view point of the court or that of a reasonable member of the public; and the substance of the inquiry, namely, whether it is concerned with the degree of possibility that there was bias even if it was unconscious, or whether it is concerned with how it appears to the relevant observer and whether that observer could reasonably entertain a suspicion or apprehension of bias even if the court was satisfied that there was no possibility of bias in fact. These two aspects are closely related and go towards addressing different concerns. The "real danger" or "real likelihood" test is met as long as a court is satisfied that there is a sufficient degree of possibility of bias. As noted by Deane J in *Webb* this is plainly a lower standard of proof than that on a balance of probabilities. But that lower test is in truth directed at mitigating the sheer difficulty of proving actual bias especially given its insidious and often subconscious nature.

75 The "reasonable suspicion" test however is met if the court is satisfied that a reasonable number of the public could harbour a reasonable suspicion of bias even though the court itself thought there was no real danger of this on the facts. The driver behind this test is the strong public interest in ensuring public confidence in the administration of justice.

Which test applies in Singapore?

76 This is a much more straightforward inquiry. It is settled law in Singapore having regard to several prouncements of the Court of Appeal that the "reasonable suspicion" test is the law in Singapore. Thus in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, the Court of Appeal held as follows at 338, [80]–[83]:

80 Before us, Mr Gray addressed the same arguments and submitted that Lai Kew Chai J should have disqualified himself. He relied on *R v Liverpool City Justices, ex p Topping* [1983] 1 All ER 490, at p 494, where Ackner LJ said:

> In our view, therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.
>
> In the past there has also been a conflict of view as to the way in which that test should be applied. Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias? ….
>
> We conclude that the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery CJ in a test which he laid down in *R v Uxbridge Justices, ex p Burbridge* (1972) *Times,* 21 June and referred to by him in *R v Mclean, ex p Aikens* (1974) 139 JP 261 at 266: would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible.

81 This test was approved in the subsequent case of *R v Weston-super-Mare Justices, ex p Shaw* [1987] 1 All ER 255.

82 Mr Eady did not challenge these authorities; he accepted that they laid down the correct test. But he submitted that the learned judge applied that test and was entitled to conclude on that basis that no reasonable or right-thinking person would consider the learned judge to be biased.

83 We respectfully accept the objective test as laid down in these cases and now turn to consider whether, on the grounds as contended by Mr Gray, a reasonable and right-thinking person sitting in court and knowing the relevant facts would have any reasonable suspicion that a fair trial for the appellant was not possible.

77 The Court of Appeal followed the decision of the Divisional Court in England in *Regina v Liverpool City Justices, Ex parte Topping* [1983] 1 WLR 119. However, that decision of the Court of Appeal came before *Gough* and the same court had the occasion to reconsider the position in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97. There, the court said as follows at [46]:

> There is really no dispute on the law which is well settled. A judge may be disqualified from hearing or determining a case or matter by reason of actual bias or apparent bias: see 8 *Halsbury's Laws of Australia*, 1996, para 125-290 at 236,159. We are concerned with only apparent bias. The test to be applied in determining whether there is any apparent bias on the part of the tribunal hearing the case or matter in question has been settled by this court in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 at p 338, and it is this: would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the litigant concerned is not possible.

78 The court did then go on at [47] to refer to the position after *Gough* but found at [48] there was no material difference on the facts of the case whichever test was applied. However, the fact remains that even post-*Gough* the applicable test was seen as the "reasonable suspicion" test. I would note in passing that the same test has also been applied by the High Court in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd (No 2)* [1988] SLR 532, *De Souza Lionel Jerome v AG* [1993] 1 SLR 882 and in *Re Singh Kalpanath* (see [34] above). In the latter decision, Chan Sek Keong J in fact emphasised that the concern was not whether there is in fact a real likelihood or possibility of bias, but simply whether a reasonable man without any inside knowledge might conclude that there was an appearance of it: see *Re Singh Kalpanath* at 666, [82].

79 Chan J however suggested a further refinement in the application of the relevant test, namely that it should take due regard of the context in which it is being applied. He noted as follows at 666–667, [84]–[86]:

> 84 … In *Steeples v Derbyshire County Council*, the court suggested that the 'real likelihood' test should be applied to administrative decisions and the 'reasonable suspicion' test to judicial decisions. This suggestion implicitly recognizes that a higher standard of conduct is required of judges …
>
> 85 The editor of *Halsbury's Law of England* also express the view that the stringency with which the principle is applied may also depend on the importance of the right at stake or the decision to be taken: see 1(1) *Halsbury's Laws of England* (4th Ed) at para 86.
>
> 86 The test of bias should be referable to the contents of the rule. Context is all important. In judicial proceedings, the rule is most demanding. A judge is expected to maintain the highest standard of conduct in the exercise of his functions. He must bring an open and impartial mind to the determination of the dispute before him and must not act in any way which compromises the integrity of the judicial process. The standard required of the chairman of the disciplinary committee under the Legal Profession Act is just as high, and is commensurate with the standing of that office, having regard to the statutory qualifications for holding that office and the powers of the committee. Further, the committee is vested with powers to make findings and determinations which may affect the reputation or livelihood of an advocate and solicitor.

80 It is not necessary for present purposes for me to express a concluded view on whether a different standard should apply to administrative as opposed to judicial decisions though I do think there is much to commend this. I would also note that the same view seems to have been expressed by the High Court of Australia in *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [70]. In any event, it is plainly correct that the highest standards must be applied in the context of judicial proceedings.

81 Having noted that "the reasonable suspicion" test is the law in this country, I would also make the point that in my view, it is so for very good reasons. This has been encapsulated succinctly in the passage from the judgment of Chan J in *Re Singh Kalpanath* which I have just referred to. I would also draw, once again, from the decision of the High Court of Australia in *Webb.* Deane J in coming to the view that "the reasonable suspicion" test should be retained post-*Gough* made the following key points at 70–72:

> (a) The position had been considered and established by the High Court of Australia in *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 and had subsequently been applied in a number of cases.
>
> (b) The adoption of the "real likelihood" or "real danger" test would go towards substituting for a doctrine of disqualification by reason of an appearance of bias, disqualification for actual bias albeit modified by *Gough* in the adoption of a lower standard of proof founded on a sufficient degree of possibility (see the passage I have quoted at [72] above).
>
> (c) The test of reasonable apprehension (or suspicion) on the part of a fair-minded observer makes it clear that the court is making no adverse finding on the question whether it is possible or likely that the tribunal in question was affected by bias.
>
> (d) The real likelihood test could well have the effect of creating public disquiet in the administration of justice which was the very end designed to be avoided by the formulation of a

test founded on appearance.

(e) The knowledge of the adverse consequences of "the real likelihood" test upon the particular tribunal and of the administration of justice as a whole as noted in (c) and (d) could well cause a reviewing court to pay insufficient attention to the rationale of the doctrine of disqualification by reason of an appearance of bias, namely, that justice must undoubtedly be seen by members of the public to be done.

82 In my judgment, these reasons individually and collectively offer a compelling case for the retention of "the reasonable suspicion" test with the substitution of the decision of our Court of Appeal in *Tang Liang Hong v Lee Kuan Yew* for *The Queen v Watson, Ex parte Armstrong* at [81](a) above.

83 I would add two further observations. In my view, in relation to the point noted at [81](e) above, this is also an argument for avoiding the conclusion that the two tests are in substance the same. As I have already stated, I do not consider that they are. By adopting the correct (and in my view preferable) test the reviewing court will maintain its focus on the real mischief and inquiry: whether on the facts presented a fair-minded member of the public could reasonably entertain a suspicion or apprehension of bias regardless of whether the court thought it likely or possible or not.

84 Secondly, there is an inherent difficulty with the real likelihood test in that it is utterly imprecise. The court is not looking for proof of bias on a balance of probabilities. What then is the court looking for? A sufficient degree of possibility or bias is how Lord Goff put it in *Gough*. But that becomes inherently, indeed impossibly, subjective. The "reasonable suspicion" test in my view avoids this because it directs the mind not towards the degree of possibility of bias which the court thinks there may be; but toward the suspicions or apprehensions the court thinks a fair-minded member of the public could reasonably entertain on the facts presented.

85 Before leaving this issue, I would also observe that the trend in the jurisprudence of a number of countries appears to be in harmony with this view. In *Johnson v Johnson* (at [63] above), Kirby J reviewed the authorities and made the following observation at 500 as one among a number of reasons for keeping with the "reasonable suspicion" test:

> [I]n so far as one looks outside Australia, to South Africa, to some expositions of the law in Canada, and to the principles applied in the United States of America, all appear harmonious with that accepted by this Court. Although the New Zealand Court of Appeal has preferred to follow English authority, this was only because that Court was convinced that the outcome would have been the same if either test had been applied.

86 The authorities from the various jurisdictions mentioned are cited in the judgment of Kirby J. What is of interest is that even in the United Kingdom, there appears to be at least hints of a possible retreat from *Gough*.

87 In *Bradford v McLeod* [1986] SLT 244, the Lord Justice-Clerk Ross sitting in the High Court of Justiciary in Scotland noted as follows at 247:

> What the sheriff failed to note, however, when the motion was made that he should decline jurisdiction, was that the interests of justice required not merely that he should not display bias but that the circumstances should not be such as to create in the mind of a reasonable man a suspicion of the sheriff's impartiality.

88 In *Regina v Bow Street Metropolitan Stipendiary Magistrates, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, Lord Browne-Wilkinson declined to address the continuing applicability of *Gough* but he did state as follows:

> For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in *Reg. v. Gough* ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg. v. Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in *Webb v. The Queen*. It has also been suggested that the test in *Reg. v. Gough* in some way impinges on the requirement of Lord Hewart's dictum that justice should appear to be done: see *Reg. v. Inner West London Coroner, Ex Parte Dallaglio* [1994] 4 All ER 139, 152A-B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

89 It is interesting to note that Kirby J in *Johnson v Johnson* did think this case might signal a gradual return to "their Lordships' earlier position, more in harmony with the approach adopted by this and other courts" (see *Johnson v Johnson* at 499)

90 Finally, in a judgment of the Privy Council sitting on appeal from the High Court of Scotland in *Millar v Dickson* [2002] SLT 988, Lord Hope of Craighead with the concurrence of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead and Lord Scott of Foscote, made the following observations:

> 63 … the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done … It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings.
>
> 64 There is ample authority in our domestic law to support these propositions … The same result followed in *Doherty v McGlennan*, where there was a suspicion about the sheriff's impartiality. These decisions were based on the rule which Eve J described in *Law v Chartered Institute of Patent Agents* at [1919] 2 Ch, p 289 that, if circumstances exist which give rise to a suspicion about the judge's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists. It is also worth noting that the same rule was applied in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* where, as Lord Browne-Wilkinson made clear at [2001] 1 AC, pp 129E–F and 135H, the result was in no way dependent on the judge personally holding any view or having any objective regarding the question whether Senator Pinochet should be extradited …
>
> 65 The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice: see *Dimes v Proprietors of Grand Junction Canal; R v Gough* at [1993] AC, p 661, per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. *The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand.*

[emphasis added]

91 It follows that in my judgment the law in this land is that a decision of a judicial or quasi-judicial body will be set aside if there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased. The test set out in *Gough* is not a part of our law and that is so for good reasons.

Should the decision of the DC in this case be quashed?

92 I turn then to the facts of the present case. In my judgment, the relevant facts are reasonably simple and they are the following:

(a) The issue that is the principal subject of the challenge related to one aspect of the overall factual matrix.

(b) That aspect of the overall factual matrix was to some degree relevant to the second and third charges against the applicant, both of which included the assertion that he had failed to ascertain the actual amounts received by Mdm Mislia from Chiang. More importantly by the applicant's submission to the DC, it was made relevant to the general issue of the credibility of the complainants.

(c) The treatment meted out by the DC to the complainants on the one hand and to the Citibank witnesses on the other generally, and in particular on this issue was unequal.

(d) The questions asked by the DC went beyond clarifying aspects of the evidence of the Citibank witnesses and in some instances appeared rather to be directed at extracting concessions from the witnesses. I set out some extracts from the evidence although I should state that one gets an even better sense of this by listening to the recording of the proceedings which I did:

(i) Transcript p 145 lines 10–31 (during evidence-in-chief)

> Bajwa (applicant's counsel) : Now, if you were told that the position was that actually she presented the cheque and the IC, and the cashier instead of giving her the money gave it to two other persons who were there, male persons, how would you react to that? Is that possible, impossible or outrageous, what would you say?
>
> Witness : It is unlikely because when we are paying back or giving the cash, we look at the IC and then call for the person, the person may come forward then the cash will be given to the person.
>
> Chairman : So if I went with my mother to the Citibank, my mother is illiterate, we both stand at the counter, my mother sign at the back of the cheque. She presents her IC, the teller has checked that its' my mother, she had confirmed with the IC when it comes to paying, I am standing there with her IC, the teller will still call for my mother.

Witness : But they will not give back the IC as yet until the cash is to be given.

Chairman : So who will they give back the IC to?

Witness : To the person that they can identify earlier that presented this cheque and the IC.

Chairman : So if I was the one who gave my mother's IC and the teller knows my face, you're telling me that the cash will not be given to me.

Witness : No.

(ii) Transcript p 149 line 16 to p 151 line 10 (during re-examination)

Chairman : It's at the priority banking counter. Would you agree with me that there will be no reason for Madam Mislia to cash this cheque at the priority banking counter if she is not a priority banking customer?

Witness : Because this belongs to the priority banking customer.

Chairman : So the priority banking customer would be accompanying Madam Mislia to the priority banking counter. I bank, so please –

Witness : I wouldn't know. It's not required for the customer to accompany ---

Chairman : Mr Ang, I am asking you a very, very simple question.

Witness : Yes.

Chairman : I've done banking for 26 years, all right. So it's a very simple question. If Madam Mislia is not a priority banking customer, is there any reason for her to join the priority banking queue to cash a cheque?

Witness : You are right, not necessary.

Chairman : Not necessary, she will not be entertained because she's not a priority banking customer.

Witness : Yes.

Chairman : So for her to have been entertained at the priority banking counter, she must have been accompanied by a priority banking customer?

Witness : Likely to be.

…

Bajwa : Why do you say this was cashed at the priority banking counter? Why do you say that? It may be a priority banking cheque but it doesn't mean that it was cashed only at the priority banking counter?

Witness : You are correct. It's not a priority banking counter.

Chairman : I asked you whether you checked---whether it was cashed at the priority banking counter, and you said yes, it was cashed at the priority banking counter.

Witness : I apologise for the error, it's not. It's at the Cap Square branch, normal counter.

Chairman : Do you know that for a fact or are you guessing?

Witness : No, its for a fact because of the "6", it's a normal counter.

…

Chairman : Is it possible that the priority banking counter girl will take the cheque to your normal counters to, you know, cash? No?

Witness : No.

Chairman : Because I have seen some people at priority banking counters, when all the counters at the priority banking are occupied in some banks, someone will come from behind the counter and take the cheque and try and do it at one of the normal counters.

Witness : Even then, the full verification will be in place.

(iii) Transcript p 151 line 17 to p 152 line 24 (during re-examination)

DC : Mr Ang, if you look at the cheque on page 65, you see that "bearer" is not cancelled.

Witness : Yes.

DC : Are you saying that Citibank would still insist on paying only the name payee for such a cheque?

Witness : Yes, Sir.

DC : It would not treat this as a bearer cheque which anybody could just present over the counter for cash?

Witness : No.

Chairman : Why?

Witness : Because from what is noted behind, it's the same name that is presented this.

DC : Now, you are saying that if I got someone to give me a bearer cheque which is not in my name and I brought it to a Citibank branch, I could not get cash for that cheque.

Witness : Yah, we need to check with the drawer first.

DC : Okay, and if the drawer was there---drawer is the person whose name is on the cheque, right?

Witness : Drawer meaning the account holder.

DC : Yes, if the account holder is there with me, and he says "This is my cheque, I would like it to be paid to this person as bearer", would Citibank proceed to make payment?-

Witness : Then the branch manager have to.

DC : Is it possible that if the drawer was there on both occasions and the drawer is a Citigold priority banking customer, that your teller might be more willing to give him the money because he has the IC of the name payee and he has the name payee with him although not at the counter, it is after all his own cheque?

Witness : I am not able to answer that.

(iv) Transcript p 152 line 25 to p 154 line 7 (during re-examination)

DC : Earlier, you stated it is the procedure of Citibank to have the person present their IC, the cheque and the teller pays the money to the person, that is the procedure of the bank?

Witness : Yes.

DC : You stated earlier that it is absolutely not possible for the teller to hand the money to another party.

Witness : Yes.

DC : Why are you so certain that procedures may be violated and everyone is able to conform 100% to it?

Witness : Okay, what we have, we have a quality control department. They check, they perform so-called ad hoc checks. The test is every quarter. They will view videotape, they will view the process, make sure that all these are in place.

DC : Right, but in any of this kind of quality checks, they are sample basis. Sampling can never guarantee 100%. Why are you so certain that that never can happen that a violation of a procedure can happen?

Witness : The sampling is an accepted procedure that's adopted in the US.

DC : So, by the same token, it is also the bank's procedure to note, to record the name of the person at the back of the cheque before handing over?

Witness : Say again.

DC : It is also the procedure that you stated that the name of the payee is written at the back of the cheque before handing over?

Witness : Before the encashment is processed.

DC : Right, so he will write the name of the person and then hand over the money?

Witness : After all the checks, yes.

DC : Then, can I bring you to the evidence---can you take a look at page 64.

Witness : Okay.

DC : Why is the payee's name not written?

Witness : IC number is noted.

DC : Yes, but in the other cheque, 66, the teller's name is written as well as the IC number, everything is in accordance with the procedure. In this case here, this cheque is not in complete conformance with the procedure, so why are you so certain in the other case that violation of procedure can never happen?

Witness : We only catch any violation through sampling.

DC : It is likely, it is possible that that can happen, right, that the teller may hand over the money to someone other than the payee?

Witness : It's hard to answer that because so far, there is none.

Chairman : You wouldn't know whether there were, right?

Witness : I won't know.

(v) Transcript p 154 lines 8–28 (during re-examination)

Chairman : Yes. Can I---now, as a priority banking customer, if there are people at the priority banking counter, can I not flash my card, priority banking card or whatever I have and cut queue and go to any of the other counters?

Witness : No.

Chairman : No? Can't I just flash my card at the teller and when the person she's serving moves away, she will beckon me to step forward?

Witness : Not likely.

Chairman : You are sure of that?

Witness : Yes.

Chairman : What's your procedure in relation to priority banking?

Witness : Because normally, if someone or customer who insists on being served fast will normally call the supervisor or manager to attend to him separately. Because if you allow one like that, the others in the queue will also say, "I will also want to do that".

Chairman : But they don't have a priority banking card to flash?

Witness : To the other customers, they won't be able to see whether you are priority customer or not, so normally we will get the supervisor or manager to attend to him separately, to deal with him separately.

(e) This had interrupted the applicant's counsel in the midst of his examination of the first Citibank witness.

(f) The DC asked far more questions on this issue than did counsel for the Law Society.

(g) The idea that the bank's rules or procedures could have been bypassed because Chiang was a priority banking customer was initiated and prosecuted by the DC and finally found its way into the DC's report.

(h) In the course of her evidence Mdm Mislia herself did not say Chiang had used his priority banking card (assuming he had one) or that he had in any way used his influence at the bank.

(i) Even though the examination of the Citibank witnesses by counsel for the Law Society and indeed by the DC was directed at showing that it was *possible* that the bank's practices may have been breached, the conclusion stated in the DC's report was that it was *highly likely* this had happened on both occasions.

(j) This was a conclusion that was contrary to the thrust of the evidence given by the Citibank witnesses. The DC's basis for choosing to disregard their evidence was that it would not have been in their interest to acknowledge that the bank may have paid out on a cheque to someone other than the drawee. This is significant because in effect the DC appears to have concluded that the Citibank witnesses were consciously choosing not to be truthful in order to save Citibank from embarrassment and/or liability. Yet this was never put to them in order to afford them the opportunity to address this. Nor was it even suggested by counsel for the Law Society. Hence, it was also never open to counsel for the applicant to address the DC on this issue. It also appeared to give little or no credence to the bank's own interest in abiding by its procedures in order to avoid claims being brought against it, which after all is a primary reason for the existence of such procedures.

93 In my judgment, I have no doubt at all that the facts set out at (c) to (j) above could have left the fair-minded reasonable observer with a reasonable suspicion that the DC was infected by disqualifying bias. Moreover, at a wider level two other points may be noted by way of background. The cross-examination of the applicant by counsel for the Law Society is recorded in some 20 pages of transcript, several pages of which were taken up by questions from the DC. This was followed by another eight pages of examination by the DC. Secondly, the cross-examination of Mdm Mislia by the applicant's counsel was interrupted by the DC on a few occasions and it culminated in this exchange between the chairman and counsel for the applicant.

Bajwa : ---because the Tribunal wants you---wants to understand what you understood. What do you understand by the meaning "costs in the preparation of loan payment"? Did you understand by that that he meant loan documentation?

Witness : That means the letter that I signed for the loan agreement.

Bajwa : All right.

Chairman : Did you scrutinise this bill when it was received by you at that point of time?

Witness : No.

Bajwa : Mr Chairman, I think at this point, I should be given some leeway to cross-examine her and let her explain and I would appreciate actually if this sort of questions which are actually more the scope of the prosecutor to bring in to clarify what she's saying in re-examination. But for the moment, I think you should give me some leeway to carry on with my point and perhaps ask her later.

Chairman : I think we are giving you the fullest of leeway. It's just that at certain junctures, where I feel that the witness may not be comprehending things properly. I think it is definitely within our right to, you know.

Bajwa : You see, I've already asked her whether she had notice it. I started this questioning very carefully. I asked her, "Did you notice it?" She said "I noticed it". Now you have asked "Did you notice it?" which a lot of attention and scrutiny. That is something for her to say. She could have always said "I noticed it but I didn't examine it". But when u ask her in that fashion, then basically she's going to give that answer,---

Chairman : Never mind, carry on.

Bajwa : ---so I think that's the point. The point is that I will appreciate if I'm just allow to carry on. We are all trying to come down to the truth.

Chairman : Carry on, carry on.

Bajwa : We are here to try to establish what happened. My cross-examination is not unduly aggressive, I'm being very kind to the witness. I just want her to tell the truth.

Chairman : Yes, carry on.

94 I reiterate that the issue is not whether the DC was in fact infected by such bias or even whether the court considers that there was a sufficient degree of possibility that they were so infected as to render their findings unsafe. Rather, the issue is whether a fair-minded reasonable person who observed the DC:

(a) initiating a line of inquiry;

(b) prosecuting that line and indeed other related lines of inquiry vigorously;

(c) interrupting the examination of the witness by the applicant's counsel;

(d) treating the witnesses on either side in an unequal or inconsistent manner;

(e) asking questions that seemed directed at obtaining concessions from the witnesses rather than at clarifying points;

(f) reaching a conclusion (*ie* "highly likely") on these issues which was far removed from whatever concessions (*ie* "possible") had been obtained and which was not even submitted by the Law Society; and

(g) discarding the evidence of the Citibank witnesses on the basis that they were likely to have been untruthful without putting this to them or to the applicant,

might reasonably apprehend that the DC was infected by disqualifying bias. In my view, the answer to that is plainly yes.

95 There is just one further point I should touch on before leaving this issue. Mr Yim submitted that I should not look at the facts in isolation but should make a holistic appraisal of the whole of the evidence. He then submitted that this all concerned a minor issue discrete from the rest of the case.

I have no difficulty with the broad proposition that one should not look at the facts in isolation but I don't consider that it changes the position in any way for several reasons.

96 First, it is helpful to address the narrower submission Mr Yim made which is that this was an issue discrete from the rest of the case. In fact, I don't think that contention is correct.

97 The case turned very much on whose evidence (as between the complainants and the applicant) the DC believed on the central issues. Here, one of the major planks of the closing submissions filed on behalf of the applicant was that Mdm Mislia's credibility was compromised by the evidence of the Citibank witnesses. It was therefore not possible to treat the evidence on this issue as isolated and incapable of tainting the DC's evaluation of the case as a whole.

98 This is borne out by [45] and [46] of the DC's report and in particular [46] which I have already referred to at [25] above where this was mentioned as one of the issues which left the applicant with little or no credibility in the DC's view.

99 Further, I return here to what I have said above at [26] quoting from [49] and [50] of the report. The DC in those paragraphs came to the conclusion that the applicant:

(a) in all likelihood knew that Chiang was in the business of lending money (presumably illegally) and that this was to be an illegal moneylending transaction;

(b) the applicant prepared the documents "for the sole purpose of making the loans appear like friendly loans and thereby hiding the true amounts of interest owed to Chiang under them";

(c) the applicant "was deliberately turning a blind eye to the true nature of these illegal and extortionate loans"; and

(d) the acts and omissions of the applicant "were not merely negligent or even grossly negligent, but were clearly calculated to keep the complainants in the dark, to make sure Chiang was paid excessive amounts of interest and to keep himself out of trouble".

100 It is not before me whether the DC was correct in arriving at these conclusions but Mr Yim was good enough to accept that this had formed no part of the Law Society's case before the DC. The case in fact advanced for the Law Society was much more circumspect and it is encapsulated in the final paragraph of the closing submissions filed on its behalf before the DC:

> The present Loan Agreements between the complainant and the individual Chiang is not akin to a standard banking transaction with a mortgage bank. It is unfortunate that the Respondent, by his failure to have diligently performed his duties and/or advancing his client's interest, has unwittingly lent himself to be of service in a transaction, which has evidently been an illegal money-lending transaction.

101 When this is read together with [27] above where I have referred to the first paragraph of the Law Society's submissions, it becomes apparent that the DC went well beyond the highest case put forward by the Law Society. In that light, it is simply not appropriate to analyse the situation in the manner suggested by Mr Yim and to conclude that the alacrity with which the DC appeared to pursue the inquiry as to whether the money was paid by the bank tellers to Mdm Mislia directly or to Chiang is a limited issue that had no connection with or effect upon the DC's evaluation of the case as a whole. It is neither possible nor safe to make such an assumption.

102 In the final analysis, the fact is that it is often impossible to quantify the effects in any meaningful way, in an attempt to save the decision that is being challenged. I return here to draw once again from the judgment of Chan Sek Keong J in *Re Singh Kalpanath* (see [34] above) at 671–672, [100]–[101] following a *dictum* of Devlin LJ in *Barnsley* (see [58] above):

> 100 The other members of the DC have filed affidavits stating that CS had not influenced or attempted to influence their decision. It would be quite impossible for the applicant to challenge these affidavits. But that is not a relevant consideration. In *R v Barnsley Licensing Justices*, Devlin LJ said (at p 186):
>
> > I agree with what the Master of the Rolls had said about the effect of the decision in *R v Hertfordshire Justice* [6 QB 753]. I do not think in this sort of case that if one or more members of the bench were found to have a real likelihood of bias, it would be right or proper to count heads and say there was a majority of unbiased members. One cannot tell, as the judgment in that case points out, to what extent the bias of even one magistrate, *especially if he be the chairman,* may influence the decision of the rest. Once has to look at the whole picture. (Emphasis added.)
>
> 101 For the above reasons, there is a firm basis for quashing the findings and determination of the DC and I order accordingly.

103 Albeit raised in a different context, the principle is the same. Once a court has found that matters have been established which could give rise to a reasonable suspicion of bias, it would not be appropriate then to examine if it is to be isolated and treated as immaterial. This is all the more so when one approaches the inquiry from the perspective of the "reasonable suspicion of bias" test which seeks to uphold the importance of ensuring that justice is manifestly seen to be done, as opposed to from the perspective of the "real likelihood or danger of bias" test where one is concerned with the degree of risk that the process has been infected with. Applying the "reasonable suspicion" test from the view point of a fair-minded reasonable person, it simply is no answer to the complaint to say that in fact, because the subject matter of the complaint can be isolated (which in any case I do not find to be so here) there is no real danger of harm. This again highlights the difference between the two tests and the danger of obscuring the distinction between them.

104 Accordingly, the applicant succeeds on this ground and I grant the application for the quashing order.

The prohibition against assuming an inquisitorial role

105 My conclusion on the first principal ground of challenge is sufficient to dispose of the matter. However, a further ground was raised by Mr Bajwa and it was fully argued. In my view it affords a separate basis for my conclusion and I therefore address this now.

106 Mr Bajwa submitted that quite apart from the issue of apparent bias, the decision of the DC should also be set aside on the basis that the degree and manner of the DC's interventions in particular in the evidence of the Citibank witnesses reveal that the DC had so descended into the arena as to impair its judgment and its ability to properly evaluate and weigh the evidence and that this rendered the trial unfair.

107 The factual basis for this submission largely overlaps with that for the submissions as to apparent bias. This is not unexpected and perhaps for that reason, the cases do not always distinguish the two issues. However, in my judgment there is a separate and distinct principle that

arises in this context and it is borne out of the fact that our system of justice is founded on an adversarial model rather than an inquisitorial model.

108 This has been expressed in a number of authorities the starting point of which is one containing perhaps the most eloquent articulation of the principle. That is found in the judgment of Denning LJ (as he then was) in *Jones v National Coal Board* [1957] 2 QB 55 ("*Jones*"). Developing a point articulated by Lord Green MR in *Yuill v Yuill* [1945] P 15, Denning LJ noted as follows at 63:

> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not … Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict" : see *Yuill v. Yuill*.
>
> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly … The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

109 That passage states both the principle as well as the rationale for it. Excessive and unwarranted interruptions by the tribunal may give rise to different grounds for complaint. In *Haron bin Mundir* (at [30] above), the Court of Appeal formed the view that the manner in which the respondent had been questioned was humiliating and unfair so that the right to be heard "was realised more in form than in substance" see at 63, [73]. In *Roseli bin Amat v PP* [1989] SLR 55 ("*Roseli bin Amat*") the Court of Appeal concluded from the nature of at least some of the excessive interruptions of the trial judge that the judge had not kept an open mind and had determined the issues adversely against the appellants before their case had been presented: see at 63–64, [23].

110 The complaint in the present case is distinct from the issue of prejudgment and it has to do with the risk of a fair trial being compromised because of the failure of the tribunal to observe its proper role and its duty not to descend into the arena. The validity of this principle and its applicability in Singapore was recognised by the Court of Appeal in *Yap Chwee Khim v American Home Assurance Co* [2001] 2 SLR 421 ("*Yap Chwee Khim*") where in giving the judgment of the Court, L P Thean JA said as follows at [25]:

> [W]e should mention that a trial judge has very wide power under s 167 of the Evidence Act (Cap 97, 1997 Ed) to ask questions of any witness who is before him. Section 167 provides as

follows:

> (1) The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.
>
> …

However, such wide power must be exercised with caution and within well-recognised limits with judicial calm and detachment and without usurping or assuming the functions of counsel. Case law has shown that, while a trial judge has the power to ask questions of witnesses at any stage of the hearing, an excessive exercise of such power may, and indeed would, operate unfairly against the witnesses and litigants. A general statement on the role a judge should play in this regard is to be found in the judgment of Denning LJ in the case of *Jones v National Coal Board* [1957] 2 QB 55 at 63; [1957] 2 All ER 155 at 159.

111 The Court then cited the passage from *Jones* that I have already referred to.

112 Similarly, in *Wong Kok Chin* (at [36] above), the following observations of Yong Pung How CJ at 1151–1152, [54]–[55] reflect an approach that similarly endorses this as a distinct basis for relief in such cases:

> 54 … In our system of justice the process is adversarial and not inquisitorial. This necessarily means in the case of a disciplinary committee of a professional body, that it must approach the issues before it with an open mind, it must also listen to the evidence for and against the offender, and to what he may have to say in his defence; and it must then make up its mind whether, on all the evidence before it, the offender has been proved to be guilty of the offence. In hearing evidence, a disciplinary committee may seek clarification on points in the evidence which are not clear, but in doing so it must at all times avoid descending into the arena, and joining in the fray. In the last instance, it is there to judge as best it can; it is not there to supplement the prosecution …
>
> 55 … [A]n inescapable impression is formed from perusing the transcript that, in trying to discharge its responsibilities effectively, the committee went well beyond its authority to carry out a 'due inquiry' under the Act, until the inquiry became an inquisition of its own, aimed at securing evidence to justify a finding of guilt.

113 In *Galea v Galea* (1990) 19 NSWLR 263, the Court of Appeal of the Supreme Court of New South Wales also considered the point and Kirby A-CJ (as he then was) listed a set of guidelines at 281–282 which a court could apply in evaluating whether excessive intervention by the judge had risen to such a level that the prospect of a fair trial had been compromised. In my judgment, it is neither necessary nor especially helpful to apply such a set of guidelines especially in our context where, unlike the position that Kirby A-CJ was faced with, we do not have jury trials.

114 I agree that the principle recognised in *Jones* and upheld in *Yap Chwee Khim* must be applied with due consideration for the fact that in the modern era of complex and often document-intensive litigation, it is not uncommon for judges to take an active part in case management or to intervene as often as they feel they need to in order to understand the issues and the evidence. Equally, I accept

(and indeed my personal approach to conducting hearings reflects this view) that counsel are often assisted by the court revealing its concerns, its provisional views and its reservations so that the parties have every opportunity to seek to correct or modify them or to persuade the court to come to a different view. In my view, giving counsel the opportunity to peek within the judicial mind considering the case can be a great advantage to counsel and the parties.

115 However, this is not the mischief. The real problem arises when the judge takes up a position and then pursues it with the passion of the advocate and in the process slips "into the perils of self-persuasion" (*per* Sir Robert Meggary "*Temptations of the Bench*" (1978) 16 Alta L Rev 406 at 409 cited in *Galea* at 281). When that happens, he has entered the arena and it is a position ill-suited to the dispensation of dispassionate justice.

116 This was most recently considered by the English Court of Appeal in *Mayor and Burgesses of the London Borough of Southwark v Kofi-Adu* [2006] EWCA (Civ) 281, a case which I drew to counsel's attention. Mr Yim submitted that the case was distinguishable on its facts but I think that the real issue is whether the principle articulated there has any relevance to the case before me. I think it is helpful here to review the following extracts from the judgment of Parker LJ at [146] to [148]:

> *It is, we think, important to appreciate that the risk identified by Lord Greene MR in Yuill v Yuill does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair.*
>
> In the instant case we are left in no doubt that the judge's constant (and frequently contentious) interventions during the oral evidence, examples of which we have given earlier in this judgment, served to cloud his vision and his judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation. This conclusion is confirmed by his irrational findings in relation to housing benefit and by his complete failure to address the credibility of Ms Kofi-Adu's evidence in his judgment or to explain why he rejected the evidence of Mrs Aitcheson's diary sheets. …
>
> In our judgment, therefore, the manner in which the judge conducted the trial led to a failure on his part to discharge his judicial function. That is not to say, of course, that the decisions which he reached on the issues of nuisance and annoyance (including the issue of reasonableness in that context) might not have been reached following a proper evaluation and scrutiny of the evidence. Plainly, they might. The flaw in the instant case lies not so much in the decisions themselves as in the way in which the judge reached them, in that he allowed himself not merely to descend into the arena but, once there, to play a substantial part in the interrogation of the witnesses. In effect, he arrogated to himself a quasi-inquistorial role which (as Lord Denning MR explained in *Jones*) …. is entirely at odds with the adversarial system.
>
> [emphasis added]

117 There are three points from that passage which I think are of assistance:

(a) Although cases of this nature may frequently also give rise to a complaint of apparent bias, the basis upon which Parker LJ was proceeding was the quite distinct principle that because of the adversarial system of justice that avails in England, as indeed it does here, a tribunal that assumes a quasi-inquisitorial role is acting at odds with one of the essential underpinnings of that

system and that is objectionable.

(b) Accordingly, the resolution of such a complaint depends not on appearances or what impressions a fair-minded observer might be left with, but rather on whether the reviewing court is satisfied that the manner in which the challenged tribunal acted was such as to impair its ability to evaluate and weigh the case presented by each side. In effect, was there a failure on the part of the tribunal to discharge its judicial function?

(c) The resolution of the complaint does not depend upon showing that the decision reached was wrong. The flaw in question is not in the decisions reached but in the *manner* in which they were reached.

118 In my judgment, these principles are wholly consistent with our own jurisprudence as articulated in cases such as *Yap Chwee Khim* and *Wong Kok Chin*. At the same time, there are extremely good reasons not to limit or chill unduly the wide latitude given to judicial tribunals in the conduct of hearings. For this reason, it will be necessary to show that the tribunal *has acted* in a manner that does constitute a failure of the judicial function. This will exceptionally be so as it was in the case in *Yap Chwee Khim*. It was also the case in *Haron bin Mundir* and *Roseli bin Amat* where a different aspect of the same overarching principle of ensuring a proper discharge of the judicial function was involved.

119 Here, I touch on Mr Yim's submission that I could find guidance in the decision of the English Court of Appeal in *Cairnstores Ltd v Aktiebolaget Hessle* [2003] FSR 413 ("*Cairnstores*").

120 I make a few observations on the case to put it in its proper context:

(a) In *Cairnstores,* the appellant took issue with the decision of the court at first instance principally because of the interventions of the judge during the trial. Although the case was, at least in part, mounted on the basis of apparent bias, the Court of Appeal did not see its resolution on this basis. Rather, as noted at [34] and [35], the real complaint was that because of the nature and extent of the interventions, the appellant had not had a fair trial.

(b) The court assessed the complaint primarily from that perspective and applied a decision of the European Court of Human Rights in *CG v United Kingdom* (2002) EHRR 31. Reference was also made to the judgment of Lord Greene MR in *Yuill v Yuill* (see at [108] above).

(c) The court then assessed the evidence and the nature of the questions complained of, which had been asked of an expert witness in a patent case.

(d) Having done that, the court formed the impression having considered the nature and extent of the questions in the context of the case and the type of witness being questioned that this did not render the trial unfair.

121 I would accept that the question in every case of this nature is what is the impression the court is left with after considering all the evidence and the circumstances. There can be no inflexible rules and every case will depend on its facts. A tribunal that questions an expert at some length in an effort to come to grips with a difficult technical issue might leave a quite different impression than one that questions a witness of fact on a vital but simple point in an effort to secure a concession.

122 Turning to the case at hand, I reiterate the relevant factual matrix as I have outlined it at [92] to [101]. Upon that matrix, it seems to me there was sufficient basis for me to draw the

necessary inferences and conclude that there was a failure of the judicial function on the part of the DC in the present case in:

(a) the initiation, prosecution and conclusions reached in respect of the case that the money had been handed to Chiang rather than to Mdm Mislia with the significance attached to Chiang's status as a priority banker;

(b) the manner in which the questioning on this issue was conducted (see [92] at (d) and (e) above);

(c) the failure to put to the Citibank witnesses the DC's views on their credibility especially since the Law Society was not making any such submission and so the applicant had no reason at all to think this evidence would be rejected and no opportunity to address the point; and

(d) the lack of care taken in the evaluation of the evidence such that the DC felt able to conclude that:

(i) it was *highly likely* Chiang had obtained the money from the bank teller on both occasions when the entire examination on this issue was directed solely at showing that this was a *possibility*;

(ii) the Citibank witnesses were consciously being untruthful without this being put to them and when there was no apparent basis for such a conclusion; and

(iii) the applicant had knowingly engaged in a scheme to facilitate and conceal some illegal money-lending transactions when this was never even suggested by the Law Society and when no evidence towards this end appears to have been adduced.

123 This is a conclusion I arrive at given the exceptional concatenation of events. It is not the result of one or some particular facts. It is upon the totality of the circumstances that I find that the case at hand is distinguishable on the facts from *Cairnstores*. Accordingly, I would find for the applicant on this basis also.

Conclusion

124 It may well be true that the complainants have a genuine grievance concerning the applicant and the way in which he conducted himself as their solicitor. But that is not the issue before me. The applicant is entitled to the benefit of the presumption that he is innocent of the charges until he has been found guilty beyond reasonable doubt by a DC that has acted in accordance with the rules of natural justice. On the facts presented, I am satisfied that the DC:

(a) conducted itself in such a manner as to give rise to a reasonable suspicion of bias on its part; and

(b) failed to discharge its judicial function because it assumed an inquisitorial role at a certain point by descending into the arena in such a manner that impaired its judgment and its ability to fairly evaluate and weigh the evidence and the case as a whole.

125 Either of these grounds affords a sufficient basis to quash the DC's findings and determination and I so order.

126 I will hear the parties on costs.