THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT KITTS AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

A.D. 2014

In the matter of Section 49 and 50 of the Constitution of St. Christopher and Nevis

And in the matter of an Application for Declaratory, injunctive and Other Relief by the Hon Shawn Richards, the Hon Timothy Harris, the Hon Eugene Hamilton and the Hon Mark Brantley, pursuant to Section 96 of the Constitution of St. Christopher and Nevis

Claim No. SKBHCV2013/0241

BETWEEN:

[1] HON. SHAWN RICHARDS
[2] HON. TIMOTHY HARRIS
[3] HON. EUGENE A. HAMILTON
[4] HON. MARK BRANTLEY

Claimants

AND

[1] THE CONSTITUENCY BOUNDARIES COMMISSION
(Being Mr. R.A. Peter Jenkins, Hon. Asim Martin, Hon. Marcella Liburd Hon. Vance Amory, and Hon. Vincent Byron)
[2] THE PRIME MINISTER OF ST. CHRISTOPHER AND NEVIS
[3] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS (in his capacity as Representative of His Excellency The Governor General)

Defendants

Appearances:-

Mr. Douglas Mendes S.C. leading Mr. Michael Quamina instructed by Mr. Delara MacClure Taylor and Ms. Talibah Byron for the Claimants

Mr. Anthony W. Astaphan S.C. leading Mr. Sylvester Anthony instructed by Ms. Angelina Gracy Sookoo for the 1st Defendant.

Dr. Henry Browne Q.C.leading Mr. Sylvester Anthony instructed by Ms. Angelina Gracy Sookoo for the 2nd Defendant.

Mr. Roger Forde Q.C. leading Mrs. Simone Bullen-Thompson Solicitor General instructed by Ms. Nisharma Rattan-Mack for the 3rd Defendant.

2014: May 15

July 31

Judicial Review – Constitutional Boundary Commission – Challenge to the Decision of the Boundary Commission Contained in Final Report – Relevant and Irrelevant Considerations – Whether the Commission took irrelevant Matters into Consideration - Bias – Whether the Appointment of the Chairman Tainted with Appearance of Bias – Consultation – No Expressed Constitutional, Statutory or Common duty Consult – Commission Embarking on Consultations - Whether Giving Rise to Legal Obligation to Consult – Whether Consultation Fair and Proper.

The Constituency Boundaries Commission of St. Kitts and Nevis being duly constituted in accordance with section 49 of the St. Kitts and Nevis Constitution began work on the 6th August 2012, to carry out its mandate under section 50 of the Constitution to review and possibly present recommendations to the Governor General to change the number and or the boundaries of the constituencies in the Federation. Despite having no statutory or constitutional duty to consult, the Commission decided very early into their task to consult with all of the known political parties in the Federation. On the 5th June 2013, the Commission sent letters to each of the political parties attaching the relevant provisions of the Constitution, a preliminary census data report, the decision of the High Court in the last boundary case which ended in a failed attempt to change certain boundaries, and invited each party to make presentations on whether the number and or boundaries of the existing constituencies should be changed and how such changes should be made. A deadline of the 17th June 2013 for responses was given to the consultees. Several political parties responded and generally stated that no changes should be made to any constituency boundaries in the Federation. The first claimant in his response stated that the time given to respond was too short, and that in any event the Commission should not have any regard to the preliminary census data report as it was 'unreliable'. Further, he stated that the boundaries should not be changed. The second claimant also asked for more time to respond and raised a number of other issues including a complaint that the Chairman of the Commission was affected by bias having been *inter alia* a former activist of the ruling St. Kitts Nevis Labour Party. The other two claimants were not personally contacted but their parties were. On the receipt of these responses from the consultees the Commission extended the deadline for presentations to the 2nd July 2013. There was no other presentation from the first claimant, but the second claimant gave a further presentation on the 1st July 2013 again stating *inter alia* that no changes should be made to any of the boundaries. Political Parties in Nevis responded and actually engaged the Commission in discussions which led to a site visit in Nevis to 'better appreciate how certain changes could be made to Nevis. Three members of the Commission also prepared and submitted their individual presentations to the Commission. These members were the Hon. Marcella Liburd and the Hon. Asim Martin who each suggested some variation to change certain boundaries, and the Hon. Vincent Bryon who expressed the view that no boundaries should be changed.

On the 9th July 2013, at a meeting of the Commission, the Chairman of the Commission prepared and shared with the other members of the Commission a document entitled a 'Review of Proposals' which was not only a review of the presentations received from those consultees who had responded, but also contained the Chairman's own recommendations for changes to a number

of boundaries in St. Kitts. This 'Review of Proposals' document was shared with the members of the Commission for them to do as they saw fit, and it was agreed that the Commission would meet again on the 18th July 2013 to discuss these proposals. Mr. Byron acting on his own shared the document with the claimants. Mr. Richards then held a number of public meetings in which he relied on the several proposals presented to the Commission by those members, including the Chairman who had been appointed on the advice of the Prime Minister, to criticize the Government for attempting to change the boundaries to 'gerrymander' the elections. In these public meetings he made clear reference to the 'Review of Proposals' document that had been prepared by the Chairman. These meetings were held over a period of at least several weeks.

On the 18th July 2013, the Commission met again and agreed to prepare a draft report for circulation to all members for their input, approval or disapproval and then for signatures by members. It was agreed by a majority at that meeting that the recommendations of the Chairman contained in the 'Review of Proposals' document to change certain boundaries would be included in that report. At this very meeting, Mr. Vincent Byron requested that the Commission hold further consultations, including public consultations on the proposals that were now being considered by the Commission. The Commission did not agree to conduct any further consultations and in fact made a decision not to hold any public consultations. At this meeting, the Chairman advised that within a week he would have the draft report ready, and the meeting ended on that note; the members of the Commission then awaiting the draft report to be prepared by the Chairman. This draft report was not ready until the 3rd September 2013, when the Chairman shared it at a meeting of the Commission. Mr. Byron advised the other members of the Commission that he wished to study this draft report before he could agree to its contents. He asked to be allowed to take it away from the Commission but by a majority the Commission refused to allow this draft report to leave the Commission. The majority did agree that Mr. Byron would have a further opportunity to consider the report on the 5th September 2013 when the Commission next expected to meet to consider this report. On the 5th September 2013 the Commission, again by a majority agreed that the report would be the final report of the Commission to be presented to the Governor General for onwards transmission to the National Assembly. Mr. Byron did not sign the report, and made it clear that he was not agreeing to any of the alterations to boundaries in St. Kitts being recommended by the Commission. Mr. Amory did sign the report but did not agree to any changes to be made in St. Kitts.

A few days later the claimants sought and obtained an ex parte conservatory order on the basis that there good grounds to believe that a draft proclamation prepared by the Governor General, was being presented to the National Assembly on Monday the 9th September 2013, for the Assembly to approve and give effect to this final report of the Commission, and that the Governor General was then likely to act in an expeditious manner to make a proclamation to alter certain constituency boundaries. The underlying claim by the claimants was one for judicial review of the Commission decision contained in its final report. At an *inter partes* hearing, leave was granted to the claimants to proceed on three grounds to seek to quash the report of the Commission, and the conservatory order was also continued to last until the final hearing and determination of the matter.

On this judicial review application, the claimants have argued first that the Commission failed to consider relevant matters and have taken irrelevant matters into consideration when it took into account a preliminary census report when it was clear that the final census report was likely to

have marginal shifts which could have significant impact on the ground. As their second ground, they argued that the Chairman of the Commission was tainted with an appearance of bias on the basis that he was, *inter alia,* a former executive member of the governing St. Kitts Nevis Labour Party, a political activist in the past, and had a number of commercial contracts with the government for various projects. As their third ground, the claimants primarily argued that the Commission, having embarked on a process of consultations, had failed to consult fairly and properly when it failed to provide its provisional views to the consultees and to ask for their responses.

The respondents have resisted this claim vigorously, arguing that the Commission had properly considered the factors set out in Schedule 2 of the Constitution, and further was entitled to have regard to the preliminary census data report once it appreciated the possible effect of the marginal shifts which might become obvious on the final report. On the allegation of apparent bias the respondents contended that the Chairman had been appointed in accordance with the provisions of the Constitution without objection from anyone including the Leader of the Opposition who had been consulted during the appointment process. They further contended that on the evidence presented to the court, there could be no reasonable basis to find that the Chairman was tainted with any appearance of bias. On the allegation of the Commission's failure to consult fairly and properly, the respondent generally argued *inter alia,* that having regard to the political composition of this Commission, there was really no duty on the Commission to even consult and that in any event in the circumstances of this case if there had arisen such an obligation it was a limited obligation. The Commission argued that having regard primarily to the conduct of the claimants, the Commission had done all it could be required to do consult fairly and properly; the fault, if any in this process of consultation was to be laid at the feet of the claimants who did not avail themselves of the reasonable opportunity to consult created by the Commission.

Held:

1. A court is entitled to intervene if a decision making body has failed to consider relevant matters which they were bound to consider or have taken into consideration matters which they should not have considered. A court however, is not entitled to intervene 'merely because it considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on grounds of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations in the court.'

   Approving and applying the dicta of Lord Greene MR in Associated Provincial Picture Ltd v Wednesbury Corp [1947] 2 All ER 680 at 683; Applied R v Boundary Commission for England ex parte Foot [1983] 1 QB 600.

2. In carrying out its mandate under the Constitution, the Commission, like every other decision making body is entitled as a preliminary matter to consider and determine precisely what are the limits of its powers and what are the precise parameters delimiting matters which are and which are not relevant for its consideration. It is therefore proper for the Commission to approach its task with an open mind in deciding what matters are or are not relevant. In this regard, the Commission was entitled to treat with the Preliminary

Census Data Report as a relevant matter. In so doing it was important that the Commission was aware that it was not completed. The Commission sought specific guidance from the Attorney General, and was advised that it would not be appropriate to act on the Report without more, having regard to the possible consequences of marginal shifts following the verification process. With this in mind the Commission called upon the Ministry responsible for the Preliminary Census Data Report and other technical persons and discussed these shifts. Here the Commission was approaching the decision making process from different angles; they were meeting with experts, they were looking at guidance from some of the relevant case law, they were looking at their constitutional powers. The Commission was fully cognizant that it was possible that there could be marginal changes in the final data, and it sought technical guidance to better understand what effects those possible marginal changes could have on the ground. It would have been improper in the circumstances of this case, if this Commission had failed to give any consideration to this Preliminary Census Data Report in its decision-making process. Had the Commission done so it would have been open to a challenge that it failed to take relevant matters into consideration. Once the Commission had sought to make itself aware of the possible shortcomings of the Preliminary Census Data Report by putting itself in a position to better understand what marginal shifts could mean, it could hardly be said that the Commission blindly followed the Preliminary Census Data Report. In the circumstances of this case, the Commission acted properly in having regard to this Preliminary Census Data Report.

Approving dicta of Sir John Donaldson MR in R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd. [1987] 2 All ER 1025 at p 1032; Considered R (on the Application of Beresford) v Sunderland City Council [2001] 4 All ER 565

3. Where there is an allegation that the Chairman of the Commission is tainted with an appearance of bias, the question for the Court is whether the fair minded and informed Kittitian or Nevisian in Independence Square in Basseterre would conclude that there was a real possibility of bias." In answering this question the Court must first ascertain all of the circumstances that ground and relate to this suggestion of bias, and the Court is entitled to look at all the information before the court and not only what might have been known to the hypothetical observer when the decision was being made. In this regard the fair-minded observer must be taken to be informed of all the relevant facts that are capable of being known by members of the public generally. The fair minded and informed observer is to be taken to know of section 49 of the St. Kitts and Nevis Constitution providing for the creation of the Commission and the appointment of its members including this Chairman. The fair minded and informed observer would also know that this Chairman would have been appointed in accordance with those provisions and that there were no objections taken regarding his appointment until recently. Thus in the mind of the fair minded and informed observer and in the mind of this Court, there would have arisen a presumption of impartiality in his favour that could only be rebutted by the claimants showing that there was 'something more' which could give rise to this perception of apparent bias.

Applied: The Hon. Gaston Browne and Others v The Constituencies Boundaries Commission Civil Appeal No. 26 of 2013 (Antigua and Barbuda); Vance Armory v Thomas Sharpe Civil Appeal No. 13 of 2009 (SKN); Constituency Boundaries

Commission and Another v Urban Baron (1999) 58 WIR 153. Considered Gillies (AP) v Secretary of State for Work and Pensions [2006] 1 W.L.R. 781; R v Bow Street Magistrates Ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119 (HL); Dr. Vaughan Lewis v Attorney General & Monica Joseph; Director General of Fair Trading v The Proprietary Association of Great Britain & Anor [2000] All ER (D) 2425; Derry City Council v Brickkiln Ltd 2012 WL 4888681 Queen's Bench Division (Northern Ireland)

4. Apart from anything else, Mr. Jenkins' qualifications and professional experience made him eminently suitable for the appointment as Chairman. He was appointed by the Governor General in accordance with section 49 of the Constitution which required consultation with the Leader of the Opposition who at the time made no objection to his appointment. This allegation of bias came for the first time almost one year after this appointment by a Member of Parliament who knew of his appointment and the work being done by the Commission. It was undisputed in this case that the Chairman of the Commission was a past executive member of the St Kitts Nevis Labour Party and that he has a financial interest in Jenkins Limited which owns a department called the Jenkins Funeral Home that provides services to the Government, and that he was employed as an engineering consultant by the Social Security Board, and that further he is engaged as project manager for a road development project by the Public Works Department. None of this however, or anything else raised in the case, provided the basis to find or even suspect that the contracts which Mr. Jenkins has had and have with the government are anything other than bona fide commercial transactions conducted at arms length without any form of impropriety. It is not proper to assume that where a decision maker, properly appointed, has a commercial contract with a government, that should without more, be seen as that 'something more' in cases such as the present, giving rise to the possibility of bias. Accordingly, none of these factual matters amount to the 'something more' that could rebut the presumption of impartiality in favour of the Chairman.

5. An allegation by the claimants which do no more than state that the Chairman is a political activist of the ruling party without providing any details of such activism and which is disputed does not provide the basis upon which the claimants may seek leave to cross examine the Chairman to provide grounds of such an allegation. It is not sufficient for a claimant for judicial review pursuing a case of bias, that the decision maker is, as in this case, a political activist, and then seek to extract from the decision maker possible details that could support this conclusion. This is a fishing expedition. If the claimants knew he is an activist, they should have presented this court with the details of this activism. It is not appropriate that they seek to cross-examine with a hope of finding some information showing such activism. This reason equally applies to all the other disputed allegations relating to this issue of bias. The claimants have contended that Mr. Jenkins is the chairman of the Board of Directors of the ZIZ Radio Station, which has denied Mr. Richards any 'airtime' to broadcast political matters. More would have been needed by way of evidence from the claimants on this. Assuming that the Radio Station did in fact deny Mr. Richards 'airtime', they would have needed to show or at the very least allege that the Board of Directors on which Mr. Jenkins sat had been actively involved in the decision or decisions to refuse Mr. Richards the requested 'airtime'. Mr. Jenkins has denied any knowledge of this, and has further denied that the Board is involved in such decisions. The allegations that Mr. Jenkins has many contracts with government and the

veiled suggestion that he has acquired these contracts improperly falls for the same reasons. They have not met the evidential threshold of raising a viable allegation of fact that Mr. Jenkins has improperly obtained any of the contractual work he has received from the government. It is not appropriate to allow on a judicial review application any opportunity to the claimants to cross examine Mr. Jenkins on this point when they had not reached the threshold in their pleadings of raising and providing the details of a viable allegation in the first place. The claimants have wholly failed to plead or establish any improper acquisition of work or business, or a direct connection between Mr. Jenkins professional and commercial activities and the work of the Commission.

6. The constitutional construct of the Commission brings to this body a certain political identity, characterized by four of its members required to be chosen from the National Assembly – two selected by the Prime Minister and two others by the Leader of the Opposition. There is therefore a clearly stated intention in the Constitution that there should be some balance brought to the Commission as regards its general membership. It is significant the Chairman is not to be chosen from the National Assembly. The Prime Minister's choice of a Chairman, if not done in good faith, may obviously run foul of allegations of bias, actual or apparent. There can really be no doubt that when the membership of the Commission has been constituted in accordance with the provisions of the Constitution, there arises, as a matter of law and constitutional propriety, a presumption of impartiality. The Commission is thereafter expected to act as an independent body carrying out its mandate in a bona fide manner in accordance with the provisions of the Constitution without regard to any improper pressure. It is within this scheme that the political will of the individual members, representing the wishes of the political party that sponsors them, is expected to operate. For the members of the Commission to act properly, their primary aim must be to fulfill their mandate under the Constitution. Neither the Commission nor its individual members may act to manipulate boundaries so as to affect the outcome of the political fortunes of the candidates at an election. The results of previous elections should never be considered when it is embarking in reviewing boundaries, nor should it ever 'consider the effects of its recommendations on future voting patterns'. So even though this body is largely made up of politicians, and effectively weighed by persons from the Government side, this body ought to act in the most impartial way so that its constitutional purpose would be fulfilled. The fact that the membership is largely political does not mean that the Commission may act without regard to transparency and fairness.

7. Where an allegation is being made that the Commission has failed to consult properly, it is for claimants to show first, that there was this obligation to consult and second, that there was clear unfairness in this process of consultation to the point where it cannot be said that there was any proper consultation.

   Considered: R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213; R (on the application of Medway Council and others) v Secretary of State for Transport [2002] EWHC 2516(Admin).

8. Whilst the Commission has no expressed constitutional, statutory or common law duty to consult, once the Commission had decided to consult, consultation then became a part of

its remit in carrying out its mandate under section 50 and Schedule 2 of the Constitution. It would therefore be improper to assume that the political composition of the Commission should mean that once it decides to consult, such consultation could be conducted at a standard that falls short of what could be considered meaningful, reasonable and fair. This Constitutional Commission, whilst it simply makes recommendations on boundary changes which recommendations must be brought before the National Assembly for approval or disapproval, nonetheless performs a task of immense constitutional and public importance, one which is likely, *inter alia,* to have an impact not only on political careers and social ties in the community, but also on future voting rights. From a jurisprudential standpoint, any consultative approach engaged in brings to the work of the Commission a degree of transparency and public participation that indicates a healthy democratic environment. For another thing, no doubt there would be a number of parties who would have an interest in ensuring that this process is done fairly; persons who can express views of breaking established local ties, present alternatives and generally participate in a process which is ultimately tied to their right to vote. This latter jurisprudential justification for fairness in the consultation process really is to '*ensure high standards of decision-making by public bodies, to enable responses that will best facilitate a sound decision and to avoid the sense of injustice which a person affected by a decision may otherwise feel.'*

Considered: R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213; R (on the application of Medway Council and others) v Secretary of State for Transport [2002] EWHC 2516(Admin); Approving dicta of Lord Reid in R (Osborn) v Parole Board [2013] 3 WLR 1020 at page 1045

9. In the absence of a statutory scheme, a court is not bound by any inflexible rules in determining whether the consultation process was fair; a mechanistic approach to consultation must be avoided. '*There is no general rule as to what will be required in order to ensure that a consultation process is lawful: what is required will vary from case to case and will relate to the particular circumstances. Accordingly a mechanistic approach to the requirements of consultation should be avoided, particularly where extended or complex consultation exercises are concerned. The courts take a holistic approach, assessing whether the consultation exercise, viewed in its totality, satisfied the decision-maker's obligation to consult.' Among the factors which are relevant for the court's consideration are the constitutional, legislative and administrative context within which the process is conducted.'*

   Considered: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168; Jonathan Auburn, Jonathan Moffett and Andrew Sharland, (Consultant Editor Richard MaManus QC,) "Judicial Review, Principle and Procedure," Oxford University Press at paragraphs 7-20 to 7-21.

10. Even in applying a flexible and non-mechanistic approach, minimum standards of fairness will require that firstly, in a case such as this 'consultation must be undertaken at a time when proposals are still at a formative stage. Secondly, sufficient reasons must be provided for particular proposals so as to permit those consulted to give intelligent consideration and make an intelligent response. Thirdly, adequate time must be given to

allow responses to be made. Finally, the response to consultation must be conscientiously taken into account when the ultimate decision is taken."

Considered: The Hon. Gaston Browne and Others v The Constituencies Boundaries Commission Civil Appeal No. 26 of 2013 (Antigua and Barbuda); R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213

11. In the context of the Constitutional framework and the political composition of the Commission and the fact that none of the consultees are 'political novices' but 'seasoned politicians and parliamentarians', the initial approach of the Commission in sending out the letter inviting 'presentations', was a proper one and was merely a start of the consultation process. There is nothing to suggest that the Commission did not send out this invitation in good faith. It showed that this Commission was trying to get it right, as it was obvious that the manifest purpose of this invitation was to solicit information and proposals to assist the Commission in the review and the formulation of proposals. This is one way in which consultations may be commenced. This is what flexibility is about. There was nothing to suggest that at this stage the Commission did not have an open mind.

12. The evidence in this case does not show that the first and second claimants failed and or refused to participate unless and until they received the final census data. These two claimants were responding to the invitation from the Commission to which the preliminary census data was attached. There was no express statement on their part that they would not take part in the consultation exercise, and no reasonable inference can be drawn that their request for final census data could mean that they would not participate otherwise. A 'submission that there should be no changes to the existing boundaries cannot constitute a failure or refusal to participate in the consultation process. By section 50(1)(b) of the Constitution, one of the options available to the Commission is to report to the Governor General that, 'in its opinion, no alteration is required to the existing number or boundaries of constituencies.' Submitting that there should be no changes is a constitutionally recognized legitimate response.' This could not therefore mean that any consultee who made such a submission well in advance of seeing any proposals from the Commission was saying without more that he would take no further part in the consultations exercise in the sense that he would not wish to respond to specific proposals of the Commission with regard to certain boundary changes. Further the fact that there were no complaints from the first and second claimants that they were unable to make a presentation because they did not have any proposals from the Commission could not in any sense release the Commission from the obligation in law to share its proposals with the consultees. In sending the initial letter inviting presentations the Commission was entitled to act as it did. At this stage there was no need for the Commission to give anyone its proposals. In reality, at this stage the Commission had not formulated any proposals of its own; the Commission was acting as Commissions of its kind is expected to act – that is to have an open mind and to seek input from consultees towards formulating proposals of its own.

13. The fact that the first claimant did not submit any presentation or proposal by the 2nd July 2013 deadline set by the Commission cannot conclusively mean that the first claimant's party would not have participated by way of responding to any proposals that may have been proposed subsequently by the Commission. Quite the contrary, from the evidence a

reasonable inference can be drawn that they were very interested in this process, responding in the manner and within the time they did, and a further inference can reasonably be drawn that if asked they would have provided comments on any proposals the Commission was considering. At the highest, if the Commission by 2nd July 2013, could be properly taken to have believed that the first and second claimants were refusing to participate in the consultation process, it would still not relieve it of the obligation to share its proposals generally with the parties (including the first and second claimants) they had decided to consult, and to seek comments on them.

Considered: R v Leicester City Council ex parte Capenhurst [2004] EWHC 2124 (Admin)

14. Up to the deadline of 2nd July 2013, none of the consultees had had a reasonable opportunity to state their views. At this stage, no proposals being yet formulated by the Commission. As a matter of law and principle a reasonable opportunity can only come into existence if and when the consulting body shared those proposals it is considering in circumstances when it is clear that it is soliciting a response; in this case this would at the very least mean that this Commission should have presented its proposed boundary changes to the consultees for comment. By the 2nd July 2013 deadline, the Commission had not presented the first and second claimants or anyone for that matter with any proposals for the alterations of the boundaries. Mr. Byron's sharing with the claimants the Chairman's 'Review of Proposals' document which included his own personal recommendations for alterations to certain boundaries subsequent to 9th July 2013, cannot be viewed as part of any flexible consultation process which the Commission had engaged in. This is so, as firstly, he could not be seen acting on behalf of the Commission, and secondly, when this document was prepared and shared it was not the 'provisional proposals' of the Commission but the individual recommendations of Mr. Jenkins, the Chairman. There is no doubt that the 'Review of Proposals' document became the Commission's proposals on the 18th July 2013, when at a meeting held that day, the Commission by a majority agreed that the recommendations contained in that document would be included in the draft report of the Commission. On this date the Commission did not agree to hold any further consultations and in fact affirmatively agreed not to hold any public consultations on their proposals. The work of the Commission had essentially ended with its members now awaiting the draft final report of the Commission for agreement which was expected to be completed within a week of the meeting of the 18th July 2013, but which was presented at the meeting of the 3rd September 2013 with apologies from the Chairman for the delay. None of the consultees were given this document by the Commission as a document of the Commission, and even if it could be considered that an environment conducive to the process of consultation had been created by the Commission, it was clear from the evidence including the minutes of meetings held by the Commission from the 18th July 2013 onwards, the Commission had not contemplated the consideration of any feedback or comments from any of the consultees. By the time the final report had been agreed to and signed by a majority of the members of the Commission, there had still not been any reasonable opportunity given to the consultees to state their views. In the circumstances therefore the consultation embarked upon by the Commission was less than fair; there was no proper consultations.

Considered: Port Louis Corporation v Attorney General of Mauritius [1965] AC 111; Cinnamond v British Airport Authority [1980] 1 WLR 582; and R v Devon County Council ex parte Baker [1995] 1 All ER 73

15. It is not automatic that a court will grant relief where a decision-maker has acted improperly by failing to consult fairly and properly. It is always within the discretion of the court whether or not relief should be granted, and this task is to be approached by having regard to all the circumstances of the case. Factors which are relevant to whether relief should be granted would include: (i) whether any prejudice was caused to the consultees and or any third parties as a result of the failure; (ii) in a rare case whether consultations would have made a difference to the final decision. Where a body such as the Boundary Commission has failed to consult fairly and properly, this without more would give rise to prejudice to the consultees; 'the denial of the right to be treated fairly and to influence the outcome of the process is prejudice enough". Further, third parties have a vested interest in the work of the Boundary Commission, and if consideration were to be given to them in the context of whether relief should be granted, it would be in their interest that the process leading to any recommendations of the Commission be fair. The fact that the last attempt to change boundaries failed cannot be used as a basis to approve present recommendations of the Commission regardless of the fairness of the process. There is a greater utility in ensuring that this process leading up to the change of boundaries is fair and proper rather than to place emphasis on expediency. Where a respondent submits that consultations would not have affected the final outcome, it is for that person to present the court with cogent evidence to ground such a finding. There was no such evidence in this case. Law and experience has shown that consultations are important to the review and possible changes to boundaries of constituencies. This therefore, would be a proper case to grant relief.

    Considered: Cinnamond v British Airport Authority (1980) 1 WLR 582; Malloch v Aberdeen Corporation [1971] 1 WLR 1578; R v Chief Constable of Thames Valley ex parte Cotton [1990] IRLR 344; ex parte Capenhurst; R (ASmith) v North Derbyshire Primary Care Trust [2006] 1 WLR 3315; Simplex G.E. (Holdings) and anr v Secretary of State for the Environment (1989) 57 P&CR 36; R. v. Broadcasting Complaints Commission, ex p. Owen [1985] Q.B. 1153; The Hon. Gaston Browne and Others v The Constituencies Boundaries Commission Civil Appeal No. 26 of 2013 (Antigua and Barbuda)

16. In the circumstances the following orders are hereby granted:

    (1) A declaration that the decision of the Constituency Boundaries Commission contained in its Report dated the 5th September 2013 is *ultra vires,* null and void and of no effect.

    (2) An Order of Certiorari moving into this Court, and quashing the decision of the Constituency Boundaries Commission contained in its Report dated the 5th September 2013.

(3) An Order of Prohibition against the Constituency Boundaries Commission from submitting to the Governor General, or making use of the Report of the Commission dated the 5th September 2013 pursuant to section 50(1)(1) or otherwise.

(4) An Order of Prohibition against the second defendant prohibiting him from submitting to the Governor General the draft proclamation approved by resolution of the National Assembly on the 9th September 2013 for giving effect to the recommendations contained in the Report of the Constituency Boundaries Commission of the 5th September 2013, pursuant to section 50(6) of the Constitution of St. Kitts and Nevis.

(5) An Order of Prohibition directed to the third defendant in his capacity as Representative of the Governor General prohibiting the Governor General howsoever from making a proclamation in terms of any draft proclamation submitted under section 50(6) of the Constitution.

17. The court has a discretion whether to award costs in this matter and in this regard have applied the guidance in the Court of Appeal in the Gaston Browne case where it was said that: *"In judicial review proceedings the general rule is that no costs award may be made against an applicant unless the court considers that the applicant has acted unreasonably."* In this case, the claimants did not succeed on two of the three grounds on which they proceeded. It was also clear that this Commission had set out to act in good faith and that it was hoping to get this process right. It simply fell into error. In these circumstances it is ordered that each side will bear their own costs. This order shall extend to the earlier order made in the interlocutory proceedings.

JUDGMENT

[1] RAMDHANI J. (Ag.) This is the second time in recent history that the Constituency Boundaries Commission has attempted to alter constituency boundaries in St. Kitts and Nevis and has been met with a challenge in the High Court. On this occasion, it is the decision of the Commission contained in a report dated the 5th September 2013 recommending that certain constituency boundaries in St. Kitts be altered that has been brought under the judicial microscope by way of this application for judicial review.

THE PARTIES

[2] The claimants all distinguished members of society and are all members of the National Assembly. The first named claimant is Hon. Shawn K Richards of Crab Hill, Sandy Point,

St. Kitts, is the current Parliamentary Representative of Constituency No. 5 and the Leader of the People's Action Movement. The second is Hon. Dr. Timothy Harris, of Tabernacle, the Parliamentary Representative of Constituency No. 7 and Leader of Team Unity Party. The third named claimant is Hon. Eugene Hamilton of Cunningham Heights, Cayon, Parliamentary Representative of Constituency No. 8 and a Deputy Leader of the People's Action Movement. The fourth named claimant is the Hon. Mark Brantley of Montpelier, in the island of Nevis is the Parliamentary Representative for the Nevis Constituency No. 9, the Leader of the Opposition in Parliament and the Deputy Leader of the Concerned Citizenship Movement Party.

[3] The first named defendant is the Constituency Boundaries Commission (the Commission) that was established pursuant to section 49 of the Constitution of St. Kitts and Nevis (the Constitution) on the 1st August 2012. The Commission is comprised of a Chairman and four ordinary members. The Chairman, Mr. R. A. Peter Jenkins was appointed by the Governor General, acting in accordance with the advice of the Prime Minister given after the Governor General has consulted with the Leader of the Opposition. The four ordinary members of the Commission are all members of the National Assembly, two of these, the Hon. Marcella Liburd and the Hon. Asim Martin, being appointed by the Governor General acting in accordance with the advice of the Prime Minister, and the other two, the Hon. Vance Armory and the Hon. Vincent Byron appointed by the Governor General acting in accordance with the advice of the Leader of the Opposition.

[4] The second named defendant is the Honourable Prime Minister, Dr. Denzil Douglas who is also the leader of the ruling St. Kitts Nevis Labour Party. The third named defendant is the Honourable Attorney General of St. Christopher and Nevis, who is joined in these proceedings in his capacity as representative of His Excellency the Governor General.

THE APPLICATION FOR JUDICIAL REVIEW

[5] I have set out quite a bit of the legal and factual background of this matter in my earlier judgment on the 'Application for Leave to Apply for Judicial Review', and for the discharge

of the interim conservatory order which I had granted on the 9th September 2013. I do not propose to repeat these here.

[6] In their Fixed Date Claim for judicial review of the decision of the Constituency Boundaries Commission contained in its report dated the 5th September 2013, the claimants seek the following reliefs:

> *(i) An Order of Certiorari to move into the High Court and quash the decision of the Constituency Boundaries Commission contained in its report dated the 5th September 2013;*
>
> *(ii) An Order of prohibition against the Constituency Boundaries Commission from submitting to the Governor General, or making use of, any report purportedly pursuant to Section 50(1)(1) of the Constitution or otherwise;*
>
> *(iii) A declaration that the decision of the Constituency Boundaries Commission contained in its report dated the 5th September 2013 is ultra vires, null and void and of no effect;*
>
> *(iv) An Order of Prohibition against the 3rd Defendant prohibiting him from submitting to the Governor General the draft proclamation approved by resolution of the Assembly on the 9th September 2013 for giving effect to the recommendations contained in the said Report, pursuant to Section 50(6) of the Constitution of St. Kitts and Nevis;*
>
> *(v) An Order of Prohibition against the 2nd Defendant prohibiting him from acting or relying on the Report of the Constituency Boundaries Commission contained in its report dated the 5th September 2013, whether directly or indirectly, and/or from making a proclamation, under section 50(6) of the Constitution of St. Kitts and Nevis for giving effect to the recommendations contained in the said Report;*
>
> *(vi) Such Further and or other relief as this Court may think fit;*
>
> *(vii) Costs*

[7] The claimants seek these orders on three primary grounds, namely: (1) that the Commission have taken irrelevant matters into consideration and have failed to consider relevant matters, (2) that the Commission's Chairman is affected by an appearance of bias, and (3) that the Commission failed to consult properly and fairly.

THE LEGAL ISSUES

[8] The first issue being raised by the pleaded case is whether the Commission, in arriving at its Report, took into consideration irrelevant matters and failed to have regard to relevant matters? Here the claimants have contended that in the performance of its functions, the Commission relied on a document termed the 'Preliminary Census Report 2011', which is incomplete. In the circumstances, the Commission did not have regard to the matters set out in subparagraph (b) of Schedule 2 of the Constitution of the Federation of St. Kitts and Nevis. As a result the Commission based its decision on irrelevant information.

[9] The second issue being raised is whether the Commission is tainted with apparent bias? Here the claimants have relied on the allegation that the chairman has an ongoing political affiliation and financial connections with the sitting government.

[10] The third issue being raised is whether the Commission failed to consult fairly and properly? Here the claimants have contended in essence that the Commission have a common law duty to consult, and in any event having embarked on consultation thereafter had an obligation to consult fairly and properly which the Commission failed so to do because it did not (a) provide the claimants with any proposed changes being considered by it, (b) provide the claimants with adequate time to formulate their own proposals, in the absence of any proposals from the Commission to guide them, (c) give conscientious consideration to the response by the claimants; (d) seek the views of the third and fourth claimants in their individual capacities or members of the public.

THE FIRST GROUND/ISSUE – RELEVANT AND IRRELEVANT CONSIDERATIONS – ANALYSIS AND FINDINGS

[11] The claimants contend that the Commission in relying on a document termed the 'Preliminary Census Data 2011' took into consideration unreliable information in coming to its recommendations and in the circumstances failed to have regard to the matters set out in subparagraph (b) of Schedule 2 of the Constitution.

[12] There is no doubt that the Commission did consider this Preliminary Census Data 2011 (PCD 2011) which it was seized of from its very first meeting. When the political parties were written to and invited to make recommendations relating to the boundaries, they were provided with a copy of the PCD 2011. Mr. Byron himself raised concerns about the use of the PCD 2011, contending that the data was not final.

[13] By June 2013, the Commission acted on these concerns and sought the advice of the Attorney General. The legal opinion rendered by the Attorney General cautioned the Commission on the use of the PCD 2011 without more, opining that 'to use the preliminary census as is without more, when it is clearly stated that the information is not final and likely to experience change is not recommended because this can lead to questions about the accuracy of the information, the accuracy of the work carried out by the Commission and the very question that is now the subject of this opinion, that is whether the Commission ought to rely on the report.' The Attorney General did go on to say that this information was relevant to the work of the Commission and it could be used if its preliminary nature could be explained by suitable persons from the Statistical Department.

[14] The Commission then invited the Permanent Secretary in the Ministry of Sustainable Development, Ms. Beverley Harris who was responsible for the census exercise to attend a meeting of the Commission. She attended on the 2nd July 2013 and addressed the preliminary nature of the PCD 2011. She indicated that although there could be a slight change of between 0.5% and 1% in the figures reflected in the PCD 2011 and the Final Census Report, the count was accurate as far as she was aware.

[15] In July 2013, the Commission took the decision to consider the Preliminary Census Data 2011.

[16] When I granted leave to challenge the report on this ground, I had made the point then that I did not consider that the claimants had made out an arguable case on this point. I did grant leave, however, having regard to the exceptional nature of this case, and the fact

that the claimants appeared to have placed considerable emphasis on this ground, and further much being said about this in the public domain.

[17] No new evidence really was presented on this matter, and both sides continued to rely on the affidavits earlier filed. There was an application by the applicants to be allowed to cross examine the Chairman and the Commission members on this issue, but this was withdrawn at the date of the trial, and the parties simply relied on their earlier arguments on this point.

[18] The claimants have essentially relied on their submissions made at the leave stage premised on the position that 'elections in St. Kitts and Nevis are determined by slim majorities.' They argue that in 'attempting to equalize constituencies…it is important to act upon complete and accurate information. In this case it was made clear that the census data was not yet complete and the completed data would be available within a month. Yet still, inexplicably, the Commission proceeded to make adjustments to the boundaries without awaiting the final census data and even against the advice of the Honourable Attorney General. In doing so the Commission erred in acting on incomplete data and acted irrationally in failing to await the completed data.'

[19] The respondents have approached this in several ways. First they argue that 'to discharge its functions under section 50 of the Constitution, the Commission was required to obtain the best information available on the number of inhabitants of St. Kitts and Nevis. They say that the laws of the Federation have provided a means of ascertaining the population data and figures in the Federation. Section 4 of the Statistics Act Cap 23.31 provides for the conduct of a census. By Order dated the 21st April 2011 the Governor General ordered that a census be undertaken. The Order required that a count be taken of all households with St. Kitts and Nevis. The census was in fact conducted.

[20] I have examined this matter in some detail in my earlier judgment relating to the leave application, and I am convinced that my provisional views expressed then continue to be relevant.

[21] I have noted again the affidavit evidence in this matter on this point and have again turned to the Report of the Commission which makes note of the objection taken by Mr. Byron to the use of the Preliminary Census Report. It was this that led to the Commission seeking advice from the Attorney General's Office. The Commission then decided to have technical input on the Preliminary Report. In this regard, they had meetings with Ms Beverley Harris, the Permanent Secretary in the Ministry of Sustainable Development, the person responsible for conduct of the Population Housing Census 2011, and Mrs. Angela Walters-Delpeche, the Head of the Statistics Department (Nevis Island Administration) who 'looked at the Census data, and assisted with interpreting the data. This included discussions in 'the differences in Density of the population in the respective islands of St. Kitts and Nevis and the respective parishes' of both islands.

[22] Quite apart from specifically examining the Preliminary Report, there was also technical input from Mr. Randolph Edmeade, Director of Physical Planning and the Environment, who 'assisted in identifying the movements and shifts in the population within the country'. The Commission also met with Mr. James Buchanan, a private land surveyor for technical input. He 'shared his expertise on matters to be considered in locating of boundaries as they relate to Schedule 2, including geographical features; existing administrative boundaries; the means of communications; and the need to ensure adequate representation of sparsely populated rural areas.'

[23] Mr. Vincent Byron, on behalf of the claimants, (and answering an affidavit on behalf of the respondents sworn to by the Chairman of the Commission, Mr. Jenkins on 13th September 2013), treats with these matters in his affidavit sworn to on 18th September 2013. He states, beginning at paragraph 12:

> *"12. With respect to the attendance of Beverley Harris at the meeting of July 2nd 2012, I note that Ms Harris informed the Commission that the verification process had been completed in St. Kitts except in relation to one parish and that she was not certain how much of St. Kitts had to be verified. She said also that the verification process in relation to St. Kitts would be completed at the end of July. As far as Nevis was concerned she said that the verification process in Nevis started late but given the small size of Nevis, they should be able to catch up. I personally asked Ms Harris if she would be satisfied at the end of the verification,*

which was not yet complete, that it provides a reliable basis upon which she could get a count or would she want to complete the computer editing to get the final number. Ms Harris indicated that the computer verification and edits would be needed. I therefore maintain that in the absence of computer verification and edits bearing in mind the possibility of change in data, even if marginal, the preliminary census data should not be used… my position is hardened when I question why there is a rush to adjust the boundaries, elections not being constitutionally due until 2015, when Ms Harris had said that the verification process, including computer edits, would be completed shortly. Finally on the use of the Preliminary Census Data 2011, I have no recollection of the Commission making the decision to use the Preliminary Census Data 2011, although I know that it, and not the final work product of the census authorities was used. I know that the chairman used such a decision based on unseen advice as is reflected in his Review of Proposals document…. For my part I have always maintained my objection to use of this incomplete data…"

13. I agree that in May 2013, I was present at a meeting in which oral presentations were made by Randolph Edmeade, Director of Planning and Mr. James Buchanan Licensed Land Surveyor, on the review of boundaries in St. Kitts, as alleged in paragraph 14 of Jenkins affidavit. Mr. Buchanan did give a general presentation of Boundaries in Nevis, but Mr. Edmeade declined to do so, as there was according to him, a Director of Planning in Nevis. While these gentlemen did raise certain elements of subparagraph b(i) to (v) of schedule 2, it was done briefly, and there was no discussion of same amongst the members. Further my concern is that respect to the proposals before the commission, there was absolutely no discussion amongst the members with respect to the matters set out in subparagraphs b (i) to (v) of schedule 2."

[24] How does this evidence of Mr. Byron compare to what is contained in the Commission's Final Report? I am confirmed in the view that Mr. Byron does not contradict the Commission's Final Report when it states that Ms Harris was called to discuss the data. Mr. Byron does say that he was not satisfied that the Commission should use the data having regard to her responses. It is to be noted that he does not make any reference to Ms. Delpeche, the statistical officer who the Report states 'assisted in interpreting the data. The Court notes that while he says that Mr. Edmeade declined to make a presentation, he along with Mr. Buchanan did raise certain elements of subparagraph b(i) to (v) albeit briefly. I am firm in my earlier expressed view that it is difficult to see how Mr. Byron is contradicting the Report in material matters. It might have been material for him to say that the Commission failed to seek any guidance on what impact the minor changes might have. But he actually gives evidence that the Commission did in fact do so. He does say that there were no discussions between members, but this is not a matter which the Court

should intervene in as if to say to the Commission which is constitutionally entitled to regulate its own procedure, that the members should have discussions or more discussions. What the Court considers relevant is that the Commission actively addressed the concerns that were constantly being raised by Mr. Byron.

[25] So really the question is whether in acting on the preliminary report without it being verified, the Commission has acted improperly and in breach of their mandate? Put another way, I am being asked to consider whether as a legal question, the Commission could have used this preliminary data in its deliberations?

[26] The claimants cannot be complaining that the boundaries cannot be changed. The essential complaint here and the only complaint that the claimants can be making is that in acting on the preliminary census report the Commission acted on data or information that is unreliable. In this regard it is noted that the first named claimant exhibited as 'SR1' to his affidavit of the 9th September 2013, letters which he wrote to the Commission during the consultation process requesting more information including detailed Enumeration Data and that the Commission pointed him to the preliminary census data published in the Gazette. There may be an implication here that the Commission really did not rely on any other source of information. The claimants say that in acting on the Preliminary Census Report, the Commission has acted on irrelevant considerations and therefore acted as no reasonable Commission would.

[27] How does a reasonable Commission act? Should a reasonable Commission have acted on this Preliminary Report? An important passage is found in Professor H W R Wade text on Administrative Law (5th edn, 1982) p 362 quoted with approval in R v Boundary Commission for England Ex Parte Foot at :

> *"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which*

leaves to the deciding authority the full range of choices which legislature is presumed to have intended.

[28] The question then is what is the objective standard. This was the approach of the Court in R v Boundary Commission for England ex parte Foot[1] in which the role of the Boundaries Commission in the UK was being examined. In this case, having quoted this passage Sir John Donaldson MR proceeded to answer it by saying:

> *"The locus classicus on the subject is a passage from the judgment of Lord Greene MR in Associated Provincial Picture Ltd v Wednesbury Corp [1947] 2 All ER 680 at 683…in which he stated what has become known as the 'Wednesbury principle' Counsel for the appellants expressly accepted that this principle applies so as to govern and limit the powers of the court to intervene in regard to the activities of the Commission…. The Wednesbury principle would or might on our opinion entitle the court to intervene if it was satisfied that the Commission had misdirected themselves in law, or had failed to consider matters which they were bound to consider or had taken into consideration matters which they should not have considered. It would not, however, entitle it to intervene merely because it considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on grounds of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations in the court."*

[29] Discussing these principles in the context of consideration of irrelevant considerations, Sir John Donaldson MR in the case of R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd.[2], stated:

> *"…it is said to follow that the first stage in every decision-making process involves the decision-maker considering and determining precisely what are the limits of his discretion and what are the precise parameters delimiting matters which are and which are not relevant to his consideration."*
>
> He continued later on:
>
> *"Good policy making, administration and decision making involve studying problems from all angles. It is a practical process and must never be allowed, and still less induced, to become a theoretical or legalistic exercise. For my part I can see nothing whatsoever to criticize in the approach of a decision maker which involves him in saying to himself. 'I do not know whether, as a matter of law,*

[1] [1983] 1 QB 600
[2] [1987] 2 All ER 1025 at p 1032

Factor A is or is not a relevant consideration. This is or may be difficult, but I do not need to consider it further, because I am quite satisfied that other factors, which are admittedly relevant, are of such comparative weight that my decision will be the same whether or not I take account of factor A.'

[30] In this case, from the evidence on both sides, the Commission had considered the Preliminary Census Report. The Commission was aware that it was not completed. It sought specific advice on how it should treat with it. The Commission got advice from the Attorney General, that it would not be appropriate to act on it, without more, having regard to the possible consequences of marginal shifts following the verification process. With this in mind it called upon the Ministry responsible for the Report and other technical persons and discussed these shifts. In this Court's view the Commission was doing essentially what was recommended by Sir John Donaldson MR in the ex parte Welcome Foundations case. It could not be said that it should not consider this Report at all. In fact if this Commission had failed to give any consideration to this Report in its decision-making process, it would have been open to a challenge that it had failed to take relevant matters into considerations. Once the Commission was aware of the possible shortcomings of the Report and it understood what marginal shifts could mean, it could hardly be said that it blindly followed the Report. Here the Commission was approaching the decision making process from different angles. It was meeting with experts. It was looking at guidance from some of the relevant case law. It was looking at its constitutional powers. Surely in this process, the Commission was entitled to look to the available census report. In looking at this document, the Commission had put itself in a position to appreciate that it was possible that there could be marginal changes in the final data. It had also positioned itself to better understand what effect those possible marginal changes could have on the ground. The Commission had also proceeded to seek technical guidance and discuss these possible changes. With all of this I do not believe that it can be argued that any reliance on the Report could not be reasonable in the circumstances?[3] Should they have done as the claimants are contending, that is wait for the Census Report to be finalized? Is that the only reasonable stance that the Commission can take? I do not agree.

[3] R (on the Application of Beresford) v Sunderland City Council [2001] 4 All ER 565

[31] From the standpoint of the claimants, they are satisfied that the opinion of the Learned Attorney General makes the point quite clearly. Marginal changes may likely make significant impact. The claimants have presented some evidence that the margin of votes separating candidates at the last two elections were, in certain districts, within a hundred of votes. They opine that any small change can have a devastating impact on the outcome of the elections one way or the other. But this is not a matter that the Commission could properly have regard to in its deliberations. If a Commission were to begin to consider which candidate would likely win or lose his seat in the Assembly if changes are to be made to Boundaries, that would consciously or unconsciously have the effect of influencing its decisions and could by itself 'gerrymander' the elections. Nothing in Schedule 2 informs the Commission that it must have regard to any contention that it should be concerned about whose stronghold it would be splitting, or whether any changes would dismember any member's constituency and affect his chances at the next elections, or whether having regard to the voting patterns, any minor change might have the effect of removing a member's support base in a constituency. This Court would go as far as say that these are matters that the Commission must not have any regard to. The Commission hears about these things during consultations, but it must not let these things affect its decisions on changing boundaries. In fact, if it needs to be stated again, if those are the effects of boundary changes, so be it. It cannot be reasoned that because the effect of proposed changes is to adversely affect a person's chances at being returned as a member of the Assembly, it therefore means the process is flawed. If question are being raised, the process can surely be examined, but it must be examined without regard to those matters.

[32] Thus for all the reasons set out above, nothing that the claimant has presented indicates that, in this regard, the Commission approached their decision making in an unreasonable manner, especially having regard to the final report they presented.

[33] I had granted leave to challenge the report on this basis, but making the point at the time that this should again be explored by the court at the hearing. Nothing new has been presented. In the circumstances I do not find that the Commission, in considering the

preliminary Census Report, had regard to an irrelevant consideration or gave such undue weight to that aspect of it which was still open to changes. In short I find that the Commission acted as a reasonable Commission would on this matter.

THE SECOND GROUND/ISSUE - COMPLAINT OF APPARENT BIAS

[34] The claimants have again relied on submissions made on the leave application and argue that the Chairman with his ongoing political affiliations with the current government is tainted with a perception of bias, and that the fair-minded and informed observer would consider that there was a real possibility of bias.[4] They say the need for a completely neutral person is even more crucial in this case, as 'four of the members of the Commission are taken from the Assembly, two each being appointed on the advice of the Prime Minister and the Leader of the Opposition. There will accordingly be a constitutionally built-in and sanctioned perception on the part of the fair-minded and informed observer that four members of the Commission would be predisposed in favour of solutions that would advance the fortunes of their own political parties. In those circumstances, the position of the Chairman becomes pivotal.

[35] They say that in this case on the evidence, the Chairman has ongoing political affiliations and financial connections with the sitting government, in that:

1. *He is a member and activist of the St. Kitts/Nevis Labour Party and was a member of its executive;*
2. *He has financial interests in two enterprises, Jenkins Funeral Home and Jenkins Construction, which have contracts with the Government. He is also personally employed by the Social Security Board as the project manager for two government projects;*
3. *He is also the Chairman of ZBC Corporation, a government owned radio and television station;*
4. *He has a financial interest in a commercial entity which is set to develop a 144 condominium project on land that was acquired or is to be acquired from the government. The financing for this project is being sought from the state owned bank.*

[4] Meerabux v AG of Belize [2005] 2 A.C. 513.

[36] In addition, the claimants say there 'was obvious communication between the Chairman and the Government concerning the delivery of the Commission's report given that the Order Paper for the sitting of the Assembly on the 9th September 2013 was issued listing as an item for debate 'Reports of Committees' almost simultaneously with the execution of the Commission's Report and its delivery to the Governor General.'

[37] The claimants say that the evidence as well as the changes which have been 'made have affected the political fortunes of those in opposition to the Prime Minister, which would create in the fair-minded and informed observer the perception that the majority in the Commission has manipulated the boundaries so as to benefit the ruling party and to disadvantage those in opposition. It is particularly curious that Dr. Harries constituency already contained the number of inhabitants needed to achieve equality among all constituencies. Yet still, a large number of constituents were removed from his constituency and an almost equal number added to bring it back to its original number. The fact that the report was signed by one of the members of the opposition is of no moment in this case since this member made it clear that he did not agree to the changes made in St. Kitts.'

[38] They argued, relying on Constituency Boundaries Commission v Urban Baron, that the presence of factors that raised a perception of gerrymandering was sufficient to cause the well informed and fair-minded observer to conclude that there was a real possibility of bias.

[39] The respondents contend that the allegation of bias is 'an afterthought' on the part of the claimants. They say that the 'Leader of the Opposition is a party to the Application for leave for judicial review, so too is Dr. Timothy Harris. There was not the slightest mention of any allegation of bias in that Application or in the Application for interim relief. Bearing in mind Counsel's statement that the claimants were working on this matter since June 2013, the failure to plead or mention ought not to be considered an oversight.'

[40] The defendants also submitted that:

> 1. *there is no constitutional restriction placed on the appointment of the Chairman other than he must not be a member of the Assembly or the Nevis Island Assembly;*
> 2. *Mr. Jenkins was appointed Chairman to the Commission on August 1, 2012. Section 49(1)(a) of the Constitution required the Governor-General to act in accordance with the advice of the Prime Minister only after he has consulted with the Leader of the Opposition or such other persons as the Governor General, acting in his own deliberate judgment, has seen fit to consult.*
> 3. *there is no pleading or allegation that the Leader of the Opposition was not consulted by His Excellency the Governor General;*
> 4. *at the time of Mr. Jenkins's appointment Dr. Timothy Harris was a member of the Cabinet. It is therefore fair to say that Dr. Harris would have known of the intention to appoint and of the appointment of Mr. Jenkins and;*
> 5. *save for the bold allegation that Mr. Jenkins is an activist, there is no evidence or particulars of this alleged activism. In fact this allegation has been denied although Mr. Jenkins does admit he was a member of the Executive of the St. Kitts and Nevis Labour Party.*

[41] It was submitted that there is no proper basis for leave to be granted in relation to any allegation of bias. Further and in the alternative, it is submitted that the claimants 'have waived any right to object to Mr. Jenkins' appointment. At the very least Mr. Harris knew him as they both would have been members of the same political party and the Leader of the Opposition was consulted.

[42] Also it is inconceivable the third defendant argues, that Mr. Vincent Byron and Mr. Vance Amory, the two members appointed by the Leader of the Opposition to the Commission were unaware of Mr. Jenkins' affiliation to the Labour Party. Yet they sat with Mr. Jenkins' at several meetings without objections and Mr. Amory signed the Report.

[43] In these circumstance they contend, it is now too late for this allegation to be taken.

[44] The third defendant also argues that the claimants raising 'another spectra of bias with their allegation 'obvious communication between the Chairman and the Government', is nakedly a fishing expedition premised absolutely on speculation. There is absolutely no evidence to justify this allegation.'

The defendants relied on a number of cases including: Dr. Vaughan Lewis v Attorney General & Monica Joseph Civil Appeal No. 12 of 1997 St. Lucia; Sir James FA Mitchell v Ephraim Georges Civil Appeal No.14 of 2011 SVG; Soyna Young v Vynette Frederick Civil Appeal No. 22 of 2011 SVG

Discussions and Finding

[45] The claimants are arguing that this is a case of apparent bias. Our Court of Appeal in The Hon. Gaston Browne and Others v The Constituencies Boundaries Commission[5] in the context of the appointment members of the Constituency Boundaries Commission under the Antigua and Barbuda Constitution addressed the applicable principles for the court's consideration. The head note of this case states that:

> *"The test for establishing apparent bias is whether a fair minded and informed observer would consider that there was a real possibility of bias. An allegation of apparent bias is to be considered having regard to all the relevant facts and circumstances of the particular based on the material before it and within the context of the issue to be decided. Therefore, a fair minded and informed observer having regard to all of the facts would be aware of the constitutional provisions establishing the Commission. Where the Constitution itself provides for the appointment of members to a council, commission or other constitutional body in a certain manner and there is compliance with those provisions in making the appointment, the composition of the commission or such body so appointed cannot in and of itself ground a charge of apparent bias. The fact that the Commission was appointed in accordance with specified provisions of the Constitution would trigger the presumption of impartiality in favour of the members regardless of the personal affiliations. That means that the onus would then be placed on the appellants to rebut that presumption by cogent evidence on a balance of probabilities."*

[46] In the context of this case, applying Gaston Browne and the Court of Appeal decision in Vance Armory v Thomas Sharpe[6], the court is tasked with constructing and wearing the mantle of that fictitious character called the 'fair-minded and informed observer' within the St. Kitts and Nevis context in which this issue arises. I am reminded by Lord Hope when he said in Gillies (AP) v Secretary of State for Work and Pensions[7] that:

[5] Civil Appeal No. 26 of 2013 (Antigua and Barbuda)
[6] Civil Appeal No. 13 of 2009 (SKN)
[7] [2006] 1 W.L.R. 781

> *"The fair minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of a particular judge or tribunal member who is under scrutiny. It is to be assumed … that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."*

[47] The recommended approach of the cases is that when faced with an allegation of bias the Court must ascertain all of the circumstances which ground and relate to the suggestion of bias. In seeking to discover what facts and inference the fair minded and informed observer would be entitled to arrive at, the Court is entitled to look at all the information before the court and not only what might have been known to the hypothetical observer when the decision was being made. In this regard the fair-minded observer must be taken to be informed of all the relevant facts that are capable of being known by members of the public generally.

[48] With this in mind, I too will pose the question in similar terms as our Court of Appeal has done: "The question then is whether the fair minded and informed Kittitian or Nevisian in Independence Square in Basseterre would conclude that there was a real possibility of bias."

[49] The fair minded and informed observer is to be taken to know of section 49 of the St. Kitts and Nevis Constitution providing for the creation of the Commission and the appointment of its members including this Chairman. The fair minded and informed observer would also know that this chairman would have been appointed in accordance with those provisions and that there was no objections taken regarding his appointment until recently. This being the case, the burden would be on the claimants to show that there was 'something more' which could give rise to this perception of apparent bias.

[50] In this Constitutional context, as the fair minded and informed observer, I have examined the evidence in this case and have considered those facts as I have found them to make

this determination as to whether there is this 'something more' which would lead me to conclude that there is a real possibility of bias.

[51] There is no dispute that Mr. Jenkins was a past executive member of the St Kitts Nevis Labour Party and that he has a financial interest in Jenkins Limited, which owns a department called the Jenkins Funeral Home that provides services to the Government. There is also no dispute that he was employed as an engineering consultant by the Social Security Board, and that further he is engaged as project manager for a road development project by the Public Works Department. Beyond this, the claimants have not brought any cogent evidence sufficient to meet the threshold of satisfying the fair minded and informed observer of any other material fact relevant to this discussion.

[52] In seeking to prove their case on apparent bias, the claimants have made other allegations which have been disputed. They have said that Mr. Jenkins is an activist of the ruling party. This has been denied on the affidavits. There has been no evidence of the details of such activism. The claimants did seek the leave of this court to cross-examine Mr. Jenkins on this issue. I denied this application, as I have concluded that it is not sufficient for a claimant for judicial review pursuing a case of bias, that the decision maker is, as in this case, a political activist, and then seek to extract from the decision maker any details which could support this conclusion. This is a fishing expedition. If the claimants knew he is an activist, they should have presented this court with the details of this activism – this is essentially a conclusion. It is not appropriate that they seek to cross-examine with a hope of finding some information showing such activism.

[53] I have reasoned similarly in relation to all the other disputed allegations relating to this issue of bias. The claimants have contended that Mr. Jenkins is the chairman of the Board of Directors of the ZIZ Radio Station, which had denied Mr. Richards any 'airtime' to broadcast political matters. To my mind, there needs to be more by way of evidence from the claimants on this. Assuming that the Radio Station did in fact deny Mr. Richards 'airtime', they would have needed to show or at the very least allege that the Board of Directors on which Mr. Jenkins sat had been actively involved in the decision or decisions

or policy to refuse Mr. Richards the requested 'airtime'. Mr. Jenkins has denied any knowledge of this, and has further denied that the Board is involved in such decisions. This, to my mind, is the end of this. It would not be appropriate to allow on a judicial review application any opportunity to the claimants to cross examine Mr. Jenkins on this point when they had not reached the threshold of raising and providing the details of a viable allegation in the first place.

[54] The allegations that Mr. Jenkins has many contracts with government and the veiled suggestion that he has acquired these contracts improperly falls for the same reasons. They have not met the evidential threshold of raising a viable allegation of fact that Mr. Jenkins has improperly obtained any of the contractual work he has received from the government. On this basis, I also refused permission to cross-examine.

[55] I therefore agree with the defendant that the claimants have wholly failed to plead or establish any improper acquisition of work or business, or a direct connection between Mr. Jenkins professional and commercial activities on the one hand, and the work of the Commission on the other hand.

[56] Significantly, the claimants have argued that even apart from the disputed matters, the mere fact that Mr. Jenkins accepted that he has contracts with the government is the 'something more' sufficient to give rise to a real possibility of bias. Learned Senior Counsel Mr. Mendes has argued that these are all financial connections,[8] so that even unconsciously it would be in his interest that he should take steps to ensure that the government remains in power.[9] This is the '*something more'* which should affect the mind of this court, he argues.

[8] R v Bow Street Magistrates Ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119 (HL); see also Dr. Vaughan Lewis v Attorney General & Monica Joseph

[9] Director General of Fair Trading v The Proprietary Association of Great Britain & Anor [2000] All ER(D) 2425 . It is unnecessary for me to relate the facts of that case. Its relevance in this context is that at paragraphs 96-99 the court indicated that the test was that of a fair-minded observer who might apprehend that the decision-maker would be unable whether consciously or subconsciously to come to an impartial appraisal. Quoted with approval in Derry City Council v Brickkiln Ltd 2012 WL 4888681 Queen's Bench Division (Northern Ireland

[57] I am unable to agree that the contractual work which Mr. Jenkins is involved in with the government can be viewed in the same manner of those cases where the decision makers had a financial interest in the outcome of the decision. In fact those are cases of actual bias. Here there is no evidence to find or even suspect that the contracts which Mr. Jenkins has had and have with the government are anything other than bona fide commercial transactions conducted at arms length without any form of impropriety. In these circumstances I see no analogy with those cases of direct financial connections. I have noted the un-contradicted evidence that Mr. Jenkins has on many occasions applied for and tendered for commercial contracts from the government and has failed. With all of this I am not able to find that these are 'financial connections' that the fair minded and informed observer can rely on to conclude that Mr. Jenkins consciously or unconsciously will act in a biased manner. I am not prepared to find as a principle that where a decision maker, properly appointed, has a commercial contract with a government, that should without more, be seen as that 'something more' in cases such as the present, giving rise to the possibility of bias.

[58] I understand the comment of the Court of Appeal in the Urban Baron case and in Gaston Browne when criticisms were made in relation to the appointment of party supporters to commissions of this nature, and the court's view that many of these types of allegations can be prevented if only the powers that be could see fit to seek out persons who did not ever have any public connection with the ruling party. I also bear in mind, however, that our societies are small and the choices of qualified persons are limited so that sometimes these selections and appointments will often be burdened with such questions. This is an even more important reason why the fair minded and informed observer is to be 'fair minded' and 'informed'.

[59] In arriving at my conclusion I found relevant, that in this case, Mr. Jenkins' qualifications and professional experience made him eminently suitable for the appointment, and that this is an allegation of apparent bias which was first raised by Dr. Timothy Harris in June 2013. This was nearly one year after the Chairman had been appointed to the

Commission, and this was further in context when no-one else had ever made any objections to the suitability of Mr. Jenkins to sit as Chairman.

THE THIRD GROUND/ISSUE – THE DUTY TO CONSULT FAIRLY AND PROPERLY

[60] The claimants argue that the Commission has failed in their duty to consult fairly and properly. Reserving their position on the court's earlier expressed view that there is no common law duty to consult imposed on the Commission, they have argued now that even in the absence of a statutory or common law duty to consult, 'the duty to consult properly is imposed whenever a public authority voluntarily initiates a process of consultation.'

In making this submission the claimants have relied on a number of cases including: R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213; R v Secretary of State for Transport, ex parte Medway Council [2002] EWHU 2516, para. 7; R v Leicester City Council ex parte Capenhurst [2004] EWHC 2124, para 40, 44; R v Secretary of State ex parte British Waterways Board [2006] EWHC 1019, para. 23; R v National Institute for Health and Clinical Excellence ex parte Eisai Ltd. [2008] EWCA Civ. 438, para. 24; R v Secretary of State of Defence ex parte Harrow Community Support Ltd [2012] EWHC 1921, para. 28; Gaston Browne et al v Constituencies Boundaries Commission et al CA 26 of 2013 April 28 of 2014)

[61] The claimants argue that the authorities show that where the decision maker has embarked on the process of consultations, it must make candid disclosure of the reasons for what is proposed in order to allow those consulted to give intelligent consideration and an intelligent response, being the elements of a proper consultation. The Commission therefore should have communicated to those it had chosen to consult, those proposals for the alterations of boundaries which it had under consideration at the formative stage in order that they could have something to sink their teeth into. Having decided to consult, fairness also required that the Commission should include among those it chose to consult, those persons on whom its proposals would have a substantial impact. This would necessarily include any incumbent representative whose constituency was being altered.'

[62] The claimants go on to argue that in this case 'the Commission consulted before they had developed any proposals for the alterations of boundaries. It simply required its chosen consultees to provide it with recommendations. Having considered the recommendations which it did receive, it then developed its own draft proposals and engaged in a process of internal discussions.' The claimants argue that, 'having decided to consult, the Commission's obligation to conduct a proper consultation required that they communicate their preliminary proposals, once developed, to the consultees and those substantially affected thereby, and ask for their comments. This they never did before they produced their final report. The consultation was substantially flawed' they argue.

[63] All of the defendants[10] continue to argue that there is no common law duty to consult. Learned Senior Counsel Mr. Astaphan has argued that if the Court were to find that having embarked on a process of consultation, the Commission was bound to consult properly, it should bear in mind that 'there are no inflexible rules, and that a mechanistic approach to consultation must be avoided. Learned Senior Counsel relying on R v Boundaries Commission ex parte Foot[11], submitted that there are fundamental differences with a boundaries commission and other authorities. He submits that the court 'ought not to mechanically apply general principles or propositions from cases where the constitution of the relevant authority or legislative framework is very different. The extent of the duty clearly depends on the legislative framework or facts. In this case… in the absence of prescribed legislative conditions, the Commission had a wide margin of discretion in deciding on consultations. Also, any consultation is subject to the condition or assumption that the invitee will be ready and willing to avail of a reasonable opportunity to express its views.

[64] Learned Senior Counsel submits that the 'peculiar status of the Commission in St. Kitts and Nevis is illustrated in the fact that its Members, save for the Chairman, are required by

[10] The respondents have adopted the arguments of each other on all the legal issues at the hearing. Mr. Forde Q.C. submitted contrary to the Commission that the court should find as a fact that the Commission had not agreed to include the Chairman's 'Review of Proposals' on the 18th July 2013, and that it was still open to the claimants to make representations after this date up until the 5th September 2013. This is discussed below.
[11] [1983] 1 QB 600

the Constitution to be elected Members of the National Assembly; a very different situation from what exists in Antigua and Barbuda and Dominica. Significantly, the Constitution did not prescribe any specific disqualifying criteria for the selection or appointment of the Chairman. The irresistible inference therefore is that the Constitution intended the matter of recommendations to boundary changes to be a political issue to be dealt with by elected Members of the National Assembly on the Commission and thereafter in the National Assembly.'

[65] Mr. Astaphan S.C. asks that this court have regard to all the facts and circumstances of this case and to pay attention to the 'special nature of the composition of the Commission. The Opposition parties had two members on the Commission representing their political interests; one of them signed the Boundaries Report.' He submits that 'it ought to be manifestly clear that these claimants are not political novices. They are seasoned politicians and parliamentarians who understand what was, and is, required of them. The Commission therefore provided them with sufficient time and data to review and make recommendations, or at least start the process. This invitation and information were sent out at an early stage of the process. The manifest purpose was to solicit information and proposals to assist the Commission in its review and the formulation of proposals. There is nothing to suggest that this invitation was not sent out in good faith. The invitations were sent to the political leaders of the respective parties, and Members of the Assembly who were, at the time, unaffiliated with any political parties.'

[66] Learned Senior Counsel for the Commission further submits that the 'responses by the claimants are important matters for the consideration of the Court. It ought not to be seriously disputed that the claimants failed or refused to participate unless and until they received the final census data or Enumeration Data. This was the complaint. There was no request for additional time except by Mr. Richards, which he received, and no other complaint about the absence of or request for specific proposals from the Commission.'

[67] Learned Senior Counsel submits in the alternative that by their conduct the claimants have waived whatever rights they may have had, if any, to complain about any failure of the

Commission to provide any further data or proposals to them. They knew well in advance of the Commission's decision to use the Preliminary Census Data and failed to act until the report was prepared and submitted to the Assembly.

[68] Learned Senior Counsel further submits that the court ought to refuse relief on three additional grounds. The first is that the claimants have not pleaded or shown that the recommendations would have been different had the claimants been consulted notwithstanding their objections or alleged failures of the Defendant Commission. Second, that the quashing of the Boundaries Report will have a significant detrimental impact on third parties. These parties include not only the political parties who participated, but the people who they represent. This is especially the case where the other political parties co-operated; three members of the Commission made recommendations; and the Commission held a joint meeting with the representatives of the two political parties in Nevis. Third, relief should be refused on the ground of delay.

[69] In his written submissions Mr. Forde Q.C. contended that there could be no common law duty imposed on the Commission as it was not making any decision which affected the rights of anyone. He submits that all the Commission did was to make recommendations which may or may not have been accepted by the National Assembly. He appeared prepared to accept that where there was no duty to consult but the decision maker commences consultation, it must be done properly. He submits, 'the duty for this consultation is created by the decision maker giving a legitimate expectation to the aggrieved party that there will be consultation and it would be done properly'. He argues that 'in determining the extent of such proper consultation the following matters are relevant (a) whether the aggrieved party knew that there was no legal duty to be consulted and (b) what did the decision maker intend as proper consultation – did he intend the same extent as consultation where there was a legal duty to consultation or some less extent.' He contends that the Commission did not intend to extend to the claimants the same degree of consultation as if there was a legal duty to consult.

[70] Learned Queen's Counsel goes on to argue that in this case there was proper consultation as the Commission did provide the claimants with copies of the Constitution and a document which provided the best information on the existing number of inhabitants and that they knew the existing number and boundaries of the Constituencies and that they knew that Schedule 2 of the Constitution provided for nearly an equal number of inhabitants and not nearly an equal number of electors. He submits that from the evidence the claimants had adequate time to respond and some responded. He states that these claimants made no proposals for the distribution of inhabitants in the Constituencies and further the claimants failed to participate in the consultation which was offered by the Commission. He submits that 'a decision maker need not advise the consultees of his prior decision but is entitled to obtain their views in arriving at that decision.

[71] Before I turn to my analysis and findings on this issue, I consider that it is appropriate that I now set out my factual findings on the consultations process embarked on by the Commission.

Factual Matters Relating to Consultation

[72] The Commission was constituted on the 1st August 2012. The Chairman, Mr. Peter Jenkins, was appointed by His Excellency the Governor General on the advice of the Prime Minister, after consultation with the fourth claimant, Hon. Mark Brantley. Two of the ordinary members of the Commission, the Hon. Vance Amory and the Hon. Vincent Byron were appointed to the Commission by His Excellency the Governor General acting in accordance with the advice of the Leader of the Opposition. The other two, the Hon. Marcella Liburd and the Hon. Asim Martin were appointed by the Governor General acting in accordance with the advice of the Prime Minister.

[73] The Commission began its work on the 6th August 2012 when it had its first working session when it agreed to the procedure that it would adopt to execute its mandate. At this first sitting, the Commission members were provided with section 49 and 50 of the Constitution, a judgment of the High Court in Civil Suits No. SKBHCV2009/0159 and 0179,

the Preliminary Census Report 2011 and the Report of the previous Boundaries Commission to assist them in the discharge if their duties.

[74] From the inception, the Commission also decided that the experts would be consulted and that all political parties would be invited to present written proposals. It was also decided that individual members of the Commission would submit their own proposals. A draft report would then be prepared by the Chairman for consideration by the members.

[75] Sometime in May of 2013, Mr. Randolph Edmeade, Director of Planning, Mrs. Angela Walters-Delpheche, the Head of Statistics Department in Nevis, and Mr. James Buchanan, Licensed Land Surveyor, appeared before the Commission and discussed the impact of factors stated in paragraph b (i) to (v) of Schedule 2 of the Constitution on the boundaries and the Preliminary Census Report.

[76] As a member of the Commission, Mr. Byron presented an individual submission to the Commission. This submission contained as an attachment, an expert report prepared on behalf of PAM by one Mr. Patrick Williams. This was circulated and discussed by the members of the Commission.

[77] As regards its decision to consult, by a letter dated the 5th June 2013, the Chairman of the Commission wrote to all political parties[12] and the Hon. Sam Condor and the Hon. Timothy Harris, inviting them to make written presentations to the Commission and to indicate any recommendations they wished to make in relation to the changes to be made to the existing constituencies or number of constituencies in accordance with section 50 of the Constitution. Attached to this letter was the Official Gazette of the 11th April 2013, containing the Preliminary Report of the Population and Housing Census 2011, extracts of sections 49, 50 and Schedule 2 of the Constitution and a report presented by the Statistics Department (this was a report of Beverley Harris). I will now set out the body of this letter in full:

[12] St. Kitts and Nevis Labour Party (SKNLP), The People's Action Movement (PAM), The Concerned Citizens Movement (CCM), The Nevis Reformation Party (NRP) and The National Integrity Party (NIP)

"Re: Constituency Boundaries Commission

The Constituency Boundaries Commission was appointed by his Excellency The Governor General on the 1st August 2012.

The Commission invites your organization to make a written presentation to it by Monday, 17 June 2013.

The presentation must be subject to section 49 and 50 of the Constitution of St. Christopher and Nevis.

If you wish to recommend changes to the existing Constituencies, or number of Constituencies as per Section (50.1), kindly refer to Schedule 2, page 90 of the said Constitution.

To assist you, we have enclosed the following information:

(a) The Official Gazette of April 11, 2013 in which is published the Preliminary Report Population and Housing 2011 Census
(b) Extracts of the Constitution:
- *Section 49 and 50*
- *Schedule 2*

(c) A report presented by the Statistics Department which describes the eleven Constituencies in the Federation, and the number of inhabitants therein.

We look forward to receiving your report.

[signed] Peter Jenkins
Chairman
Constituency Boundaries Commission
of St. Christopher and Nevis"

[78] It is to be emphasized that the letter from the Commission required the invitees to submit any presentations they may wish to make by the 17th June 2013.

[79] By a letter dated the 17th June 2013, the Hon. Shawn Richards replied on behalf of PAM. He expressed concern that after being at work for about ten months, the Commission was inviting the submission of 'presentations' within a 'mere 12 (twelve) days'. In his letter, Mr. Richards stated in part:

"As you are aware, my Party is the largest Opposition Party in the Federation, and its membership expects its Leaders to exhibit a reasonable level of competence and responsibility when dealing with such matters. We are therefore expected to

examine the ramifications of any boundary changes to several electoral seats. Since we do not have all the required expertise among our leadership. We have taken the prudent step to appoint at least two experts to advise us, as I am sure you have done. This we believe would assist us greatly in making a credible response to your request."

[80] He insisted that the Preliminary Census Data should not be used and requested that his experts be provided with the final census data. In this letter he expressed the view that the boundaries should remain the same.

[81] By a letter dated the 17th June 2013, the Hon. Dr. Timothy Harris expressed concern about the Chairman's alleged bias, the legality of the Commission, and he pointed out that he had received the Commission's invitation on the 10th June 2013, and that there was 'not sufficient time for [him] to prepare a studied response by June 17, 2013'. He then requested additional time to respond and suggested a period of 60 to 90 days. Further, he requested the enumeration district data and description of the enumeration district and the final report.

[82] Having received the letters sent in by Mr. Richards and Dr. Harris, the Commission wrote to each of them, a letter dated the 18th June 2013 by which it extended the 'deadline' for the submission of the written proposals to the 2nd July 2013. This letter in full reads:

"Dear Sir:

Re: Constituency Boundaries Commission

Further to letter dated June 5, 2013, the Constituency Boundaries Commission (the Commission) hereby acknowledges receipt of your letter of response dated June 17, 2013.

The Commission in a meeting took the decision to extend the deadline until July 2, 2013 for submission of any written proposal you may wish to make regarding changes to the existing constituency boundaries.

As indicated in our prior correspondence, any suggestion must be guided by Schedule 2 of the Constitution of St. Christopher and Nevis, Schedule 4 of the West Indies Act, Cap. 1.01.

We look forward to receiving your proposal.

[signed] Peter Jenkins
Chairman [etc.]"

[83] He (Dr. Harris) later indicated by letter dated the 1st July 2013, that he was not in favour of any changes at this time. This letter reads as follows:

Dear Sir

I have for reference your letter to me dated June 18, 2013, in reply to mine to you dated June 17, 2013, which was itself a reply to yours to me dated June 05, 2013.

Please note that there is nothing contained in your said letter of June 18, 2013, that addresses the nine (9) points of concern raised in my said letter of June 17, 2013.

Further, it is impossible to achieve outcomes that would please the Constitution and the law and justice generally from a process which is being treated in the cavalier, dismissive, irresponsible and hasty manner as this is.

And I accordingly do not and cannot accept that the Constituency Boundaries Commission is presently positioned to move forward on this matter. And I do not agree with any changes in the constituency boundaries at this time.

Yours truly
Dr. Timothy Harris

[84] At the end of the deadline established by the Commission, there were no presentations submitted by three of the invitees, namely The People's Action movement, Dr. Harris and the Hon. Sam Condor. Four political parties, The National Integrity Party, The Concerned Citizens Movement, The Nevis Reformation Party, and The St. Kitts-Nevis Labour Party submitted proposals to the Commission.

[85] Within the membership of the Commission, prior to the 9th July 2013 three members submitted proposals for the review of boundaries. These were Mr. Vincent Byron, Ms. Liburd and Dr. Martin.

[86] On the 9th July 2013, at a meeting of the Commission, a document entitled a 'Review of Proposals' prepared by the Chairman was circulated among the members of the Commission. This document represented his review of the proposals but also contained

the Chairman's own recommendations for changes to certain boundaries. This 'review of proposals' document was circulated on the 9th July 2013, to all members of the Commission. It was agreed at the Commission's meeting of the 9th July 2013, that the document was for their 'review, consideration and use individually and collectively'. This review consisted of proposals for considerations and or agreement by the Commission. Whilst there was no embargo on the use of the review of proposals or any other document before the Commission at that time, there was no decision taken by the Commission that the 'review of proposals' would be sent out to any of the invited consultees as a document of the Commission.

[87] No one has disputed that '[b]ased on the representations made by the Concerned Citizens Movement and the Nevis Reformation Party, there was a joint meeting with both Parties in Nevis and site visit to better appreciate the implications of the … [certain] changes to the boundaries in Nevis.' (It is to be noted that this fact was disclosed in the Final Report of the Commission at page 7.) It would seem that this visit took place on the 12th July 2013.[13] In Nevis a consultation was held at the Red Cross Building with representatives from the Concerned Citizens Movement and the Nevis Reformation Party. Some recommendations were made at this meeting.

[88] The next meeting of the Commission was on the 18th July 2013, when the Commission met to report on the Nevis Visit and to discuss the 'review of proposals' document and to decide on the recommendations for its report.

[89] At this meeting the issue of consultations were discussed at some length. According to the minutes of the meeting:

> *'Mr. Byron who 'recommended that consultations be held in St. Kitts especially in the areas that would experience drastic changes. This was recommended in light of the report presented on the visit to Nevis. Hon Vance Armory sought clarity as to whether Mr. Byron is suggesting that the consultations be held with the parties as was done in Nevis. Mr. Byron indicated that that is an example of the consultation that can be held.*

[13] Minutes of the Commission's Meeting of the 9 July 2013 – Exhibit 'PJ6'

Hon. Asim Martin indicated that the Commission would have to first discuss the matters internally and see the grounds on which they have difficulty or may not have difficulty and see where the Commission goes from there as he doesn't think that the first thing to do is to go out and have consultation.

Chairman indicated that he has been urging members on both sides to have dialogue. Hon. Vincent Byron queried whether the Commission had responded to a letter received from the Hon. Eugene Hamilton. The Chairman indicated that a letter of response had been sent and explained that the Hon. Eugene Hamilton wrote as an individual and the Commission took a position that they would invite parties to make their representation. The party to which the Hon. Eugene Hamilton belongs was written to and asked to make its representation. That party has not submitted a proposal.

Chairman added that perhaps a press conference could be held with all five (5) members so that the public could be aware of what was done.

[later on in the minutes on the issue of consultations…]

A vote was taken on whether or not the consultations should be held with the public as proposed by Mr. Byron

Hon. Asim Martin – no
Hon. Marcella Liburd – no
Hon. Vance Armory – abstained
Hon. Vincent Byron – yes

The decision of the Commission was that there would be no consultation with the public.

[90] At this meeting of the 18th July 2013, the Commission discussed the review of proposals and the recommendations made by the Chairman. The Chairman has accepted that the contents of the 'review of proposals' document were used to inform the draft report which was eventually prepared by the Chairman. Whilst the minutes of the meetings of the 18th July 2013, read that an indication was given by the Chairman that his draft report would be 'circulated to all members for their input, approval, disapproval and then for signature by members' within a week, the Chairman himself has deposed that on the 18th July 2013, a majority of the members agreed to include the 'proposals in the report of the Commission.' He states:

"11. I prepared the draft proposals which I circulated to all members on the 9th July, 2013 after proposals were submitted to the Commission by some of the

consultees. These draft proposals, which included proposals received by the Commission was to be discussed, and if possible agreed, for inclusion in the report of the Commission on the 18th July, 2013."

"12. The Commission met on the 18th July and the majority of the members agreed to include the draft proposals in the report of the Commission."

[91] Mr. Byron himself has deposed that 'it was decided at the meeting, by a majority, that the recommendations made by Mr. Jenkins, with certain changes, would be the Commission's recommendations to the National Assembly. Both Hon. Marcella Liburd and Hon. Asim Martin supported the recommendations of the Chairman and abandoned their own.'

[92] The draft report was not ready within the week as was indicated by the Chairman, and in the meantime, there is no evidence that the Commission held any press conference to sensitize the public as what was being proposed. The review document, though given to individual members for use as they saw fit, was not sent out on behalf of the Commission, to any of the invitees for their response.

[93] Mr. Byron acting on his own, did send to the person who could be described as part of the opposition including Mr. Richards, Mr. Hamilton and Dr. Harris, copies of the recommendations which had been submitted to the Commission from the invited parties and from its own members including the review of proposals document submitted by the Chairman ('SR6'). He did not represent any of the submissions including 'SR6' as being the proposals of the Commission.

[94] The claimants, Mr. Richards, Mr. Hamilton and Dr. Harris accepted that they had been presented with copies of the recommendations including 'SR6'. Mr. Richards in his affidavit sworn to on the 15th May 2014, he deposes that:

"2. By the 14th July 2013, I had been provided with copies of recommendations that had been made to the Commission for changes to boundaries of the constituencies. These included recommendations made by the St. Kitts Labour Party, Patrick Williams and the Members of the Commission themselves, namely Peter Jenkins, Marcella Liburd and Asim Martin…"

3. I understood all of these documents to be merely recommendations made to the Commission which the Commission was to take into consideration. I understood that the recommendations made by Mr. Jenkins was his own personal recommendations and not that of the Commission. I understood the same in relation to the recommendations made by Marcella Liburd and Asim Martin…."

[95] Both Dr. Harris and Mr. Hamilton also stated that they did not see the recommendations sent by Mr. Byron as being the recommendations of the Commission but only being recommendations of individual members and others.

[96] On or about mid July 2013, Mr. Richards embarked on a series of public meetings at which he discussed the recommendations that were before the Commission including 'SR6'. He explained that:

"…because these three persons were all appointees of the Government, and because they were similar to the proposals made by the St. Kitts Labour Party, in the discussions I held with members of the public and the public meetings thereafter, I treated their proposals of the Government."

[97] The Commission did not hold any consultations thereafter. They never called on anyone for any feedback on 'SR6'. At the public meetings, Mr. Richards publicly criticized the Government for attempting to change the boundaries. He made many allegations of gerrymandering. Mr. Richards did not communicate any of the views or criticisms to the Commission. At this stage the Commission itself did not have any regard to anything that Mr. Richards was saying in the public domain. The Commission did not call on any of the consultees to provide any feedback on the review of proposals which had been agreed by a majority on 18th July 2013, would be included in the draft report to be prepared.

[98] The Commission did not meet again until the 3rd September 2013, when the Chairman presented a draft report to the members. Mr. Jenkins states at paragraph 22 in his affidavit of the 18th September 2013, that:

"…on September 3, 2013, at a meeting of the Commission a draft report was presented to all the members. The other members agreed with the contents, however Mr. Byron indicated he wanted more time to review the report, and asked to take the report with him. Hon Member Liburd indicated that due to the sensitivity of the matter and the likelihood of exposure of the contents of the report, and the fact that other documents circulated within the meetings have made it to the airways, that it was recommended that the report should not 'leave the room' until

it had been submitted to the Governor General and was a matter of public record. Hon. Member Martin and I agreed with this recommendation. Mr. Byron himself suggested returning on Thursday September 5, 2013 at 10:00 a.m. to review the report due to the fact that the Hon. member Armory was scheduled to leave the Federation on Friday September 6. Mr. Byron even stated he would bring the necessary documentation on Thursday to be able to make his review and stated he would stay as long as needed to which all other members assented to facilitate Mr. Byron. On September 5, 2013 Mr. Byron turned up after the meeting was completed and delivered a letter … and indicated that he would not sign the report. The report was signed by the remaining members of the Commission and submitted to the Governor General."

[99] Having regard to the evidence on affidavit and the minutes of the meetings, it is clear that when the Commission met on the 3rd September 2013, they were meeting to either formally agree or disagree on the draft report prepared by the Chairman. The decision to approve or disapprove of this draft was deferred to the 5th September 2013, when by a majority (including the Chairman and the two members appointed in accordance with the advice of the Prime Minister) approved it as the final report of the Commission.

Discussion and Findings

[100] In approaching this issue I have kept in mind that where an allegation is being made by the claimants that the Commission has failed to consult properly, it is for them to show first that there was this obligation to consult and second that there was clear unfairness in this process of consultation to the point where it cannot be said that there was any proper consultation.[14]

[101] Both sides have agreed that there is no statutory or constitutional right to consult. There is therefore no need for me to treat with this. With regard to a common law duty to consult, I have stated my view on this in my earlier decision in this case. I continue to hold the view that the Commission is not under a common law duty to consult.

[14] However, if it is alleged that a consultation process is unfair, clear unfairness must be shown: it must be shown that the error is such that something has gone clearly and radically wrong, such that it cannot be said that there was any proper consultation (R (Greenpeace Limited) v Secretary of State for Industry [2007] EWHC 311 (Admin) at [63] per Sullivan J as he then was).

[102] The question for me is what then is the effect of the decision of the Commission to consult? Did this then mean that, having embarked on a process of consultation was the Commission under a duty to conduct this process fairly and properly? And if the answer to this last question is in the affirmative, was this consultation process that was engaged in by the Commission, one that was fair and proper?

[103] In assessing the effect of the Commission's decision to consult I have found it necessary to examine the nature of this body. I have started from the constitutional construct of the Commission which no doubt brings to this body a certain political identity, characterized by four of its members required to be chosen from the National Assembly – two selected by the Prime Minister and two others by the Leader of the Opposition. Even so, however, it is significant that there is clearly stated intention in the Constitution that there should be some balance brought to the Commission as regards its general membership. It is also significant the Chairman is not to be chosen from the National Assembly. The Prime Minister's choice of a Chairman, if not done in good faith, may obviously run foul of allegations of bias, actual or apparent. There can really be no doubt that when the membership of the Commission has been constituted in accordance with the provisions of the Constitution, there arises, as a matter of law and constitutional propriety, a presumption of impartiality. The Commission is thereafter expected to act as an independent body carrying out its mandate in a bona fide manner in accordance with the provisions of the Constitution without regard to any improper pressure. It is within this scheme that the political will of the individual members is expected to operate. For the members of the Commission to act properly, their primary aim must be to fulfill their mandate under the Constitution. Neither the Commission nor its individual members may act to manipulate boundaries so as to affect the outcome of the political fortunes of the candidates at an election. The results of previous elections should never be considered when it is embarking in reviewing boundaries, nor should it ever 'consider the effects of its recommendations on future voting patterns'. So even though this body is largely made of politicians, and effectively weighed by persons from the Government side, this body ought to act in the most impartial way so that its constitutional purpose would be fulfilled. For these reasons I do not understand any of the defendants to be saying that if the

membership is largely political, then let them carry out the political will of their respective parties without regard to transparency and fairness. What the defendants are all saying that public opinion or feedback is not essential to the work of this Commission having regard to its obvious political composition and character. Is this true?

[104] The importance of public opinion or feedback to the work of this body is really one of the underlying themes in the arguments before the court on this matter. I therefore consider that it is relevant to examine issue of the importance of public opinion or feedback to the work of the Commission.

[105] It is useful at this stage to set out the Constitutional rules that the Commission must have regard to in fulfilling its mandate. Schedule 2 states:

"Rules for the delimitation of Constituencies

1. *There shall be not less than eight constituencies in the island of Saint Christopher and not less than three constituencies in the island of Nevis and if the number of constituencies is increased beyond eleven, not less than one third of their number shall be in the island of Nevis."*

2. *All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient to take account of the following factors, that is to say -*
   (a) the requirement of rule 1 and the differences in the density of the population in the respective islands of Saint Christopher and Nevis;
   (b) the need to ensure adequate representation of sparsely populated rural areas;
   (c) the means of communication;
   (d) geographical features; and
   (e) existing administrative boundaries."

[106] St. Kitts and Nevis has eleven constituencies, eight in St. Kitts and three in Nevis. From an unavoidable and practical standpoint any attempt to change the boundary of any constituency would have to start with reference to preexisting boundaries. There has to be a recognition that boundary changes therefore will be likely to break established local ties, disrupt political party organizations, pose some challenges for electoral registrations, and may possibly cause confusion to the electorate. I can hardly see, therefore that simply because the Commission is largely comprised of political appointees, it would mean that

public opinion or feedback should not play a role in the work of this Commission. It becomes even more important when the political appointees on the Commission do not represent all the known political parties in the Federation. In fact, I do believe that the fact that it is largely political underscores the importance of seeking out public views and feedback on this important constitutional task.

[107] The fixing of the boundaries of the electoral constituencies is an important part of a nation's democratic tapestry if the elections of parliamentary representatives are ever to be free, fair and transparent. Other jurisdictions around the world have recognized the importance of public consultations and hearings on proposals for boundary changes. In fact, if only by way of an example, in the United Kingdom where the courts have expressed views that this type of Body does not affect 'rights' but merely makes recommendations,[15] parliament itself have laid down comprehensive rules for consultations when boundary changes are being considered. In the UK there are four permanent Boundary Commissions – one each for England, Scotland, Wales and Northern Ireland. The Parliamentary Constituencies Act 1986 provides that there should be publicity and consultation whenever any of these Commissions are reviewing and recommending changes to boundaries. The proposals themselves must be made known to the inhabitants of each of the constituency for which changes are being proposed. These proposals must be open for inspection at a specified place within the relevant constituency and the Commission must be ready to receive written representations during a 12 weeks period. This period is called the initial consultation period. After these representations are received they must be considered by each of the Commissions. There is also a period of public hearings on the proposed changes which last for about five weeks. After the public hearings the Commissions must publish the representations received and the records of the public hearings held. There is then a secondary consultation period of four weeks in which representations are again invited on all that went before.

[108] This court is not to be understood as saying the Commission in St. Kitts and Nevis has a statutory or common law duty to consult, but the point is to be made that there is

[15] Ex parte Foot

considerable utility in embarking on a process of consultations on boundary changes, which obviously is what this Commission decided to engage in. Having regard *inter* alia to the Commission right to regulate its own procedure, I am of the view that once this Commission decided to consult, consultation then became a part of its remit in carrying out its mandate under section 50 and Schedule 2 of the Constitution.[16] I do not believe therefore that the political composition of this Commission should mean that once it decides to consult, such consultation might be conducted at a standard that falls short of what could be considered meaningful, reasonable and fair. This Constitutional Commission, whilst it simply makes recommendations on boundary changes which recommendations must be brought before the National Assembly for approval or disapproval, nonetheless performs a task of immense constitutional and public importance, one which will inter alia, have an impact on future voting rights and political careers. For one thing, any consultative approach engaged in brings to the work of the Commission a degree transparency and participation that indicates a healthy democratic environment. For another thing, no doubt there would be a number of parties who would have an interest in ensuring that this process is done fairly; persons who can express views of breaking established local ties, present alternatives and generally participate in a process which is ultimately tied to their right to vote. This latter jurisprudential justification for fairness in the consultation process really is to '*ensure high standards of decision-making by public bodies, to enable responses that will best facilitate a sound decision and to avoid the sense of injustice which a person affected by a decision may otherwise feel.'*[17]

[109] Where therefore the Commission in St. Kitts and Nevis chooses to embark on a process of consultation with interested parties there arises an obligation to conduct such consultations fairly and properly. As has been noted in R (on the application of Medway Council and others) v Secretary of State for Transport[18]: *"…it is axiomatic that consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness."* Here Mr. Maurice Kay was applying the guidance given in R. v North and East Devon HA Ex p.

[16] Section 49(3) of the Constitution states inter alia: *"The Commission may regulate its own procedure…"*
[17] (Osborn at [67]-[70]) per Lord Reed).
[18] [2002] EWHC 2516(Admin)

Coughlan[19] where it has been stated: *"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out **properly**."* [emphasis supplied] This guidance applies with equal force to the decision of the Constituency Boundaries Commission of St. Kitts and Nevis to embark on consultations.

[110] What is to be considered fair and proper consultations is a matter for the court to decide.[20] In this regard the court's 'function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required'.[21] Whilst the duty to consult in the United Kingdom and other countries including Antigua is one which is statutorily prescribed, and that those provisions establish for their individual jurisdictions a certain standard of fairness, there is no doubt some guidance to be found in the statutory schemes in those other jurisdictions as to what may be considered fair and proper consultations. Boundary review and changes, whether in St. Kitts and Nevis, or Antigua or in the United Kingdom inevitably triggers an inter play between (a) the constitutional mandate to ensure an almost equal number of inhabitants residing in each constituency and (b) a number of standard factors, such as present geographical features (this would include considerations of whether or not to break existing local ties), means of communication, existing administrative boundaries.[22]

[111] That being said, in the absence of a statutory scheme, a court is not bound by any inflexible rules in determining whether the consultation process was fair. In this regard I agree with the defendants that the learned authors of Judicial Review, Principles and Practice[23] are correct when they say that a mechanistic approach to consultation must be

[19] [2001] Q.B. 213 Court of Appeal (Civil Division)
[20] (R (Osborn) v Parole Board [2013] UKSC 61 at [65] per Lord Reed); see also Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781 , para 6, per Lord Hope of Craighead; see also R. (on the application of Flatley) v Hywel Dda University Local Health Board 2014 WL 3002721
[21] (R (Osborn) v Parole Board [2013] UKSC 61 at [65] per Lord Reed);
[22] Schedule 2 of the Constitution of St. Kitts and Nevis
[23] Jonathan Auburn, Jonathan Moffett and Andrew Sharland, (Consultant Editor Richard MaManus QC,) "Judicial Review, Principle and Procedure," Oxford University Press at para. 7-20 to 7-21.

avoided. It is appropriate that I now set out the Gunning[24] requirements and the general approach to be taken to consultations:

> *"The most commonly cited statement of the key features of a lawful consultation process is that laid down in R v Brent LBC, ex p Gunning. The so-called Gunnning requirements are that:*
>
> > *(1) consultation is undertaken at a time when the relevant proposal is still at a formative stage;*
> > *(2) adequate information is provided to consultees to enable them properly to respond to the consultation exercise;*
> > *(3) consultees are afforded adequate time in which to respond; and*
> > *(4) the decision-maker gives conscientious consideration to consultees' responses.*
>
> *However, whilst the Gunning requirements are often cited as the leading statement of the content of the duty to consult, they are neither the only possible formulation nor an inflexible list. There is no general rule as to what will be required in order to ensure that a consultation process is lawful: what is required will vary from case to case and will relate to the particular circumstances. Accordingly a mechanistic approach to the requirements of consultation should be avoided, particularly where extended or complex consultation exercises are concerned. The courts take a holistic approach, assessing whether the consultation exercise, viewed in its totality, satisfied the decision-maker's obligation to consult.*
>
> *When considering what is required in a particular case, the courts are likely to have regard to a number of factors including the legislative and administrative context;…"*

[112] The defendants are relying on the above learning to contend that the Commission in approaching the consultations as they did, acted in a fair manner and that the consultations were proper. I agree with the defendants in the context of the constitutional and administrative context of the Commission's work, it was not improper for the Commission to have decided to consult only the known political parties in the Federation.[25]

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[24] R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168

[25] See R v Devon County Council ex parte Baker [1995] 1 All ER 73 which was commended to this court by Learned Queen's Counsel for the Commission. Reference was made in particular to dicta by Dillon LJ at page 83 where he said: "I do not believe that each individual resident had an individual right to be consulted face to face by the permanent officers or groups of councilors. Consultations can perfectly well be achieved by meetings held by council officers with residents generally at a particular home or by views expressed through the support group." [emphasis supplied]; see also HMB Holdings Ltd. v Cabinet of Antigua and Barbuda PC Appeal No, 18 of 2006

[113] Learned Queen's Counsel Mr. Forde has also argued that since there was no statutory or common law duty to consult and since no rights were being affected such as to give rise to a legitimate expectation, this has to be viewed as a case, as he terms it, of 'assumed consultation'. He states that the requirement for fairness in *assumed consultation* cannot be same as in the other types of consultation. He argues that in *assumed consultation* the question really is whether in the totality of the circumstances the decision-maker acted fairly. He says that it would not be right to attempt to 'pigeon hole' the decision-maker. Learned Queen's Counsel effectively argues that in providing the 'Review of Proposals' document to Mr. Byron on or about the 9th July 2013, when the final report of the Commission was only agreed upon on the 5th September 2013, the claimants were actually given the provisional proposals of the Commission well in advance and should have taken the proactive step of communicating with the Commission their responses. This was the threshold of fairness, and it was the claimants who failed to avail themselves of the opportunity provided; the consultation process was therefore fair and proper.

[114] I have considered all the arguments, and looking at this case in a holistic manner, I do not agree with the defendants on the issue of whether or not there was fair and proper consultations. I will now set out my reasons.

[115] First, the court should look to certain minimums standards of fairness regarding the Commission's decision to consult. Second, in approaching the matter flexibly and avoiding a mechanistic approach, the court should examine the facts of the case against these minimum standards and assess the conduct of the Commission and the consultees to determine whether the Commission did all that they could to be fair and to consult properly.

[116] I am of the view that it is useful to have regard to the English Court of Appeal in Coughlan when they said:

> *To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation*

must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168.

[117] It is also useful to have regard to the OECS Court of Appeal decision in Gaston Browne et al v Constituencies Boundaries Commission et al.[26] In that case, the Boundaries Commission of Antigua had a statutory duty to consult, but in defining the extent of the duty, the Court of Appeal drew upon the general law relating to consultations and stated:

> *"The law imposes an obligation of fairness on any public consultation exercise and such consultation must be carried out properly. The requirements for a fair consultation are now well established. Firstly, consultation must be undertaken at a time when proposals are still at a formative stage. Secondly, sufficient reasons must be provided for particular proposals so as to permit those consulted to give intelligent consideration and make an intelligent response. Thirdly, adequate time must be given to allow responses to be made. Finally, the response to consultation must be conscientiously taken into account when the ultimate decision is taken."*

[118] There is no doubt in my mind that our Court of Appeal in Gaston Browne has declared the law on the minimum standards of consultations as regards the work of a Constituency Boundary Commission, and this is so regardless of whether or not there is a statutory duty to consult, or even this concept of *assumed consultations* as Mr. Forde Q.C. argues. One of the underlying themes is that consultations must be performed by the decision-maker with an open mind and at a formative stage.[27] It is also important to note that the decision-maker cannot have a predetermined option, such that the consultation is a sham. He may have a preferred option; but he must disclose that to the potential consultees as such 'so as to better focus their responses'.[28] '*However, the decision-maker is entitled to formulate the options upon which he wishes to consult, without consultation: fairness does not require there to be "pre-consultation consultation" (R (Forest Heath District Council) v Electoral Commission Boundary Committee for England [2009] EWCA Civ 1296 at [33] per Sir Anthony May P, albeit in a somewhat different statutory context; see also [11] and [51]), or a "first round of consultation" on the options to be consulted upon (R (Tinn) v Secretary of State for Transport [2006] EWHC 193 (Admin) at [32] per Bean J). To have an open mind does not mean to have an empty mind (R (Royal Brompton and Harefield NHS*

[26] CA 26 of 2013 April 28 of 2014)

[27] (R v Brent London Borough Council ex parte Gunning (1985) LGR 168 , and R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at [108])

[28] (R (Sardar) v Watford Borough Council [2006] EWHC 1590 (Admin) at [29] per Wilkie J)

Foundation Trust) v Joint Committee of Primary Care Trusts [2011] EWHC 2986 (Admin) at [16] per Owen J). The consultation documents must be clear to the general body of interested persons, and present the issues fairly and in a way that facilitates an effective response (R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [8]-[14]).'

[119] I also note the caution of the English Court of Appeal in Coughlan when the court stated that:

> *"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicize every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligations is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."*

[120] These are the principles that guide me in my examination of the circumstances of this case.

[121] I have noted, as the defendants have asked, the Constitutional framework and the political composition of the Commission and the fact that none of the consultees are 'political novices' but 'seasoned politicians and parliamentarians'. I am on the view however, that when the Commission sent out their initial letter of the 5th June 2013, inviting 'presentations', this was merely a start of the consultation process. I agree that there is nothing to suggest that the Commission did not send out this invitation in good faith. I actually believe that this Commission was trying to get it right. I also agree with the defendants that the manifest purpose of this invitation was to solicit information and proposals to assist the Commission in the review and the formulation of proposals. This is one way in which consultations may be commenced. This is what flexibility is about. There was nothing to suggest that at this stage the Commission did not have an open mind.

[122] The Commission, through Learned Senior Counsel, Mr. Astaphan argued that the claimants, having been given the documents attached to the letter of invitation would have known or made aware of the criteria being considered by the Commission, or which was

going to be considered by the Commission and the factors to take into account which is the equality of inhabitants. He pointed this court to R v Leicester City Council ex parte Capenhurst[29] and drew attention to what Silber J. stated at paragraph 47, namely:

> *"I do not think that a consultee would not have been properly consulted if he ought reasonably to have known the criterion, which the decision-maker would adopt or the factors, which would be considered decisive by the decision-maker but that was the only reason why the consultee did not know these matters was because, for example he had turned a blind eye to something of which he ought reasonably have been aware. Thus consultation will only be regarded as unfair if the consultee either did not know the criterion to be adopted by the decision-maker or ought not reasonably to have known of this criterion."*

[123] I have examined this case and I am of the view that Capenhurst did not only decide that the consultee should be given the criterion upon which the decision-maker was proceeding to act, (in this case that would be the factors contained in Schedule 2 of the Constitution and the other documents sent to the consultees), but it also accepted that for the consultations to be proper, the consultee should also be informed of the proposed decision which was informed by those criteria, which the decision-maker was proposing to make. The invitation of the 5th June 2013 by itself therefore, did not satisfy the Commission's obligation to consult properly.

[124] The defendants have asked me to find that the claimants' responses to this invitation are crucial on the consultation issue. The defendants have argued that these responses show that the claimants failed and or refused to participate unless and until they received the final census data. Mr. Byron also asked for the Enumeration Data. Dr. Harris expressed concerns about the Chairman's alleged bias and the motion of no-confidence which was yet to be heard by National Assembly. Mr. Richards also asked for additional time, which he received, and 'there was no other complaint about the absence of or request for specific proposals from the Commission'.

[125] The defendant Commission argued that 'by taking the position which the claimants did, they manifestly failed to take advantage of the opportunity to participate in the consultation process, and they did so substantially, if not totally, on the erroneous ground that the

[29] [2004] EWHC 2124 (Admin)

Preliminary Census Data could not be lawfully or properly used by the… Commission. They therefore cannot be heard to complain if the Commission proceeded without their further input." In making these submissions the Commission relied on Port Louis Corporation v Attorney General of Mauritius [1965] AC 111; Cinnamond v British Airport Authority [1980] 1 WLR 582; and R v Devon County Council ex parte Baker [1995] 1 All ER 73. In particular the defendants pointed this court to dictum of Lord Morris in the Port Louis case where he stated that: "the requirement of consultation must be subject to a condition or assumption that the local authority [the consultee] will be ready and willing to avail itself of a reasonable opportunity to state its views."

[126] An examination of the first claimant's response – In his letter dated the 17th June 2013[30] Mr. Richards: (i) complained about the shortness of time permitted for responses; (ii) informed the Commission that they had appointed two experts to assist his party; (iii) noted that their experts were concerned that they only had preliminary census data and it might be a waste of time to perform any exercise on incomplete data; (iv) asked to be provided with the final census data as soon as possible, and (v) expressed the hope that the Commission was not acting in cahoots with the Government to gerrymander the constituency boundaries on incomplete data. The first claimant ended his response by noting that he looked forward to the completed census data to assist his party's technicians.

[127] An Examination of the second claimant's response – In his letter dated the 17th June 2013[31], the second claimant: (i) raised concerns about the Chairman's impartiality; (ii) expressed the view that the delay in debating the no-confidence motion made the existing government illegitimate which in turn compromised 'the composition and functions' of the Commission and made a mockery of this present effort'; (iii) complained about the short period permitted for responses (iv) asked about the existence of professional reports other than those mentioned in the invitation letter; (v) asked for enumeration data and the description of enumeration districts; (vi) asked when the final census report would be ready

[30] "SR5"
[31] "SR4"

and when it would be made available to him; (vii) submitted that continuity of communities and representation needed to be pursued; (ix) submitted that there should be no effort, or the perception of such effort to prejudice the efforts of the six parliamentarians who indicated a lack of confidence in the government and (x) enquired whether meetings had been held with stakeholders and if so when. He asked for a reply to his queries.

[128] Mr. Jenkins on behalf of the Commission replied by separate letters dated the 18th June 2013 to the first and second claimants. He simply extended the deadline for the submissions of presentations to the 2nd July 2013. He did not answer any of the other requests or queries raised by either of these claimants.

[129] The second claimant did submit a presentation dated the 1st July 2013 in which he stated that he was not satisfied with the way the Commission was performing its functions and he submitted that changes should not be made to the boundaries.

[130] From this analysis of the responses I cannot agree with the defendants that the first and second claimants failed and or refused to participate unless and until they received the final census data. These two claimants were responding to the invitation from the Commission to which the preliminary census data was attached. I can hardly see if each of them asks for final census data that could mean that they would not participate otherwise. They did not say so. Further the fact that there were no complaints from the first and second claimants that they were unable to make a presentation because they did not have any proposals from the Commission could not in any sense release the Commission from the obligation in law to share their proposals with the consultees. At this stage, the Commission was entitled to act as it did and ask for presentations and or proposals. At this stage there was no need for the Commission to give to anyone proposals. In reality, at this stage the Commission had not formulated any proposals of its own; the Commission was acting as Commissions of its kind would and could act – that is to have an open mind and to seek input from consultees towards formulating proposals of its own. Therefore the deadline given for submissions and the responses of the consultees must be viewed in this context.

[131] I also agree with Mr. Mendes S.C. that a 'submission that there should be no changes to the existing boundaries cannot constitute a failure or refusal to participate in the consultation process. By section 50(1)(b) of the Constitution, one of the options available to the Commission is to report to the Governor General that, 'in its opinion, no alteration is required to the existing number or boundaries of constituencies.' Submitting that there should be no changes is a constitutionally recognized legitimate response.' This could not therefore mean that any consultee who made such a submission well in advance of seeing any proposals from the Commission was saying without more that he would take no further part in the consultations exercise in the sense that he would not wish to respond to specific proposals of the Commission with regard to certain boundary changes.

[132] The fact that the first claimant did not submit any presentation or proposal by the 2nd July 2013 deadline set by the Commission cannot conclusively mean that the first claimant's party would not have participated by way of responding to any proposals that may have been proposed subsequently by the Commission. I agree that the first claimant's response regarding the use of the preliminary census data, and the Commission's decision to seek advice on the use of this preliminary data was indeed a valuable contribution to the process as it led the Commission to have a greater appreciation of the use it could put this data to.

[133] From all of the evidence regarding the attitude of the first and second claimant in this case towards the review process, I am unable to conclude that any reasonable inference could be drawn that they would have refused to respond to any proposals put forward by the Commission. Quite the contrary, the evidence does indeed leads me to conclude that they were very interested in this process, responding in the manner and within the time they did, and an inference can reasonably be drawn that if asked they would have provided comments on any proposals the Commission was considering. At the highest, if the Commission by the 2nd July 2013, could be properly taken to have believed that the first and second claimants were refusing to participate in the consultation process, in my view it would still not relieve them of the obligation to share its proposals generally to the parties

(including the first and second claimants) they had decided to consult, and to seek comments on them. It hardly needs to be re-stated at this stage that by the 2nd July 2013, the Commission itself did not formulate any proposals and matters were still in an embryonic state.

[134] From all of the above, I am of the view that at this stage, up to the deadline of the 2nd July 2013, none of the consultees had had a reasonable opportunity to state their views. First having regard to my findings, none of them had failed or refused to continue consultations. The Port Louis case does not assist the defendants in this matter. In that case the Government in proposing alterations to certain boundaries, had presented from the onset, those proposals in detail to the local authority and had asked for their views. It was the local authority, the consultee, which had instead of stating its views had sought additional information from the government and had complained about a lack of proper consultation when the government refused to provide the additional information and the deadline for submission passed. In this matter, by the 2nd July 2013, no proposals being yet formulated by the Commission, therefore at this stage, the consultees had not been given a '*reasonable opportunity*' to state their views. All of the authorities show that such a reasonable opportunity can only come into existence if and when the Commission presents its proposed boundary changes for comment. By the 2nd July 2013 deadline the Commission had not presented the first and second claimants or anyone for that matter with any proposals for the alterations of the boundaries.

[135] The actual proposals considered by the Commission were formulated on the 9th July 2013. These proposals were contained in the document known as the 'Review of Proposals' (exhibit 'SR6') which was created by Mr. Jenkins, the Chairman and shared with the other Commission members at the Commission's meeting of the 9th July 2013. The Commission argued that 'SR6' was circulated by the Chairman for review and discussions, and Mr. Byron thereafter shared and discussed 'SR6' with the claimants.

[136] At the hearing, the defendants effectively argued that when Mr. Byron shared 'SR6' with the claimants, this was part of the flexible consultation process which the Commission had

engaged in. It was then open to the claimants or the entities consulted to have availed themselves of the opportunity to comment on the proposals contained in 'SR6'. They never did this. In fact it was point out to the court that instead of making representations to the Commission, Mr. Richards embarked on a series of public meetings to criticize the government's proposals.

[137] In fact the un-contradicted evidence of Mr. Jenkins contained in paragraph 12 in his eight affidavit of the 22nd April 2014, states that at the Commission's meeting of the 18th July 2013, the Commission had by a majority accepted the proposals contained in the Review of Proposals document – 'SR6'.[32] Learned Senior Counsel Mr. Astaphan in his oral arguments also accepted that a majority decision had been taken by the Commission on the 18th July 2013 to accept the recommendations being made by the Chairman.[33]

[138] I do not agree that Mr. Byron's sharing of 'SR6' with the claimants could be viewed in any way of satisfying any minimum standards of fairness in the consultation exercise embarked upon by the Commission. It was presented to the Commission at its meeting on the 9th July 2013, as a review of all the proposals received so far by the Commission from the consultees and as containing recommendations from Mr. Jenkins personally. At this meeting it was not presented as the Commission provisional views.

[139] All of the claimants deposed in separate affidavits on the 15th May 2014 in which they similarly deposed that when they got the document 'SR6' they had no idea it was the Commission's proposals which they were expected to respond to. As Mr. Richards deposed in his affidavit:

> 2. *By July 14th 2013, I had been provided with copies of recommendations that had been made to the Commission for changes to the boundaries of the constituencies. These included recommendations made by the St. Kitts Labour Party, Patrick Williams and the Members of the Commission themselves, namely Peter Jenkins, Marcella Liburd, and Asim Martin…..*

[32] See also the Minutes of the Meeting of the Commission on 18 July 2013

[33] Learned Senior Counsel actually argued at the hearing that: "I am also saying that they had the opportunity after the 18th to go to Court because they would have realized that the proposals that were being recommended by the Chairman, this is the legal approach to the Court. Rather than wait until the last minute by the 21st when they were so adamant about the adverse consequences of these proposals after the meeting of the 18th. They had the opportunity of going to the High Court to stop it then."

3. *I understood all these documents to be merely recommendations made to the Commission which the Commission was to take into consideration. I understood that the recommendation made by Mr. Jenkins was his own personal recommendation and not that of the Commission. I understood the same in relation to the recommendations by Marcella Liburd and Asim Martin. But because these persons were all appointees of government, and because they were also similar to the proposals made by the St. Kitts Labour Party, in the discussion I held with the members of the public and at the public meetings thereafter, I treated their proposals as the proposals of the Government.*
4. *I accept that I held a meeting in the Bronx on the 14th July 2013, and that I said the things attributed to me in paragraph 9 of Mr. Jenkins' 7th affidavit. However, the references that I made in that speech to changes in the boundaries were primarily proposals made by Marcella Liburd. My reference to the proposal to split Sandy Point in two was a reference to the proposal made by Peter Jenkins in his recommendation entitled 'Review of Proposals' ("SR6").*
5. *Thereafter, in the various public meetings that I held, that I attended and that I spoke at, I was referring to proposals made by the Labour Party, and the Government Members on the Commission collectively as the proposals being made by the Government and I criticized them as constituting an attempt to gerrymandering the boundaries.*
6. *At no time was I aware that the Commission had made a decision to adopt only the recommendations made by Mr. Jenkins or his recommendations along with some of Ms. Liburd's, or his recommendations along with changes in Nevis, until I became aware of the contents of the Report in September 2013. I was at no time aware that on July the 18th 2013 the Commission by a majority had accepted Mr. Jenkins proposals, as Mr. Jenkins deposes in his 8th affidavit at paragraph 12."*

[140] The other claimants also made the point that they did receive 'SR6' from Mr. Byron [obviously on or after the 9th July 2013] but that they understood this to be the individual recommendations from Mr. Jenkins, and not the provisional proposals of the Commission.

[141] I am unable to find that when Mr. Byron shared this document with the claimants he was acting as the Commission or on its behalf. The Commission itself did not expressly direct him to share with anyone as an act of the Commission.

[142] I have also considered whether the Commission's obligation to share 'SR6' with the political parties to which Mr. Byron and Mr. Amory belonged were satisfied by the presence of these two gentlemen on the Commission. There has been the suggestion that those

political parties would have had the opportunity, through Mr. Byron and Mr. Armory to comment on 'SR6' and even the draft report which followed, and in taking the non-mechanistic and flexible approach this would have fulfilled the Commission's obligation to consult properly in relation to these parties. I am of the view however, and I agree with the claimants, that these two gentlemen even though appointed on the Commission on the recommendation of the Leader of the Opposition, cannot be regarded as the spokesmen or mouthpiece of their sponsors. I have made the point earlier, when the members to a Commission such as this were appointed, it is expected as a matter of law and constitutional propriety that they would act independently.[34] This Commission is not its individual members. So that if individual members acted on their own and shared 'SR6' with the claimants who were not thereupon invited to submit comments to the Commission on the proposals contained therein, the acts of the individual members could not be treated as the acts of the Commission.

[143] What is also significant to me is that even if the sharing of 'SR6' with the claimants could have been seen either as a flexible and informal act of consultation (and that the claimants could have availed themselves of the opportunity to submit comments to the Commission) the period within which the claimants would have had to respond was a mere nine days – between the 9th July and the 18th July 2013, when the Commission agreed by a majority that the 'SR6' proposals would form part of the draft final report. This was surely an unreasonably short period within which to receive feedback.[35]

[144] It is important to see all of this in the context that by the 18th July 2013, the Commission had made up its mind that it would not hold any further public consultations on the proposed changes to constituency boundaries. This must also be viewed in context that the Commission had earlier set a deadline of the 2nd July 2013 for presentations from the consultees, and nothing more was ever said either to the political parties which were consulted or to the individual members on the Commission who were appointed on the

[34] See the dicta of Singh JA in Constituency Boundaries Commission v Urban Baron Court of Appeal No. 12 of 1998 when he said: "The fact that the Commission was appointed in accordance with s. 56 of the Constitution triggered the presumption of impartiality in favour of the members regardless of their personal affiliations."
[35] See Gaston Browne when our Court of Appeal held that 7 days was not a sufficient period to allow for response in a consultation exercise relating to the alterations of boundaries.

recommendations of the Leader of the Opposition, that further comments or responses were being sought from the consultees. To my mind, it must be a minimum facet of proper consultation that the Body seeking consultation must be prepared to receive feedback and to give conscientious consideration to such communication. Having regard to the minutes of the meetings of the 9th July 2013 and the 18th July 2013, there is no doubt in my mind that the Commission was done with consulting. Even Mr. Jenkins 7th affidavit points affirmatively to this conclusion, as he himself states that he 'remembers' Mr. Richards criticizing his proposals in the public domain. Having stated this observation, there is no evidence coming from him that the Commission was prepared to consider any of those comments in the public domain, or to call on any of the consultees to ask them to make a formal response on the proposals. Where was the flexibility? Who was supposed to be flexible? The claimants? Should they have been required to go to the Commission on 'SR6' and ask to be heard? If so, when were they supposed to do this? Between the 9th July and the 18th July 2013, by which latter date the Commission had agreed by a majority to include the 'SR6' proposals in the draft report?

[145] In arguing that the claimants should have been more proactive in participating in the consultation exercise, the defendants have pointed to the fact that the political parties in Nevis had engaged the Commission and that this had resulted in a site visit to Nevis to better appreciate the nature of proposed changes in Nevis. They say that the claimants in St. Kitts failed to avail themselves of any similar opportunity.

[146] In my view, if this Commission had met with the consultees on the ground in St. Kitts and discussed the proposed changes and then give reasonable time for responses, there would have been no issue on whether the consultations were proper. That said, I hardly could see how any of the consultees could have imagined that the Commission was considering certain specific changes in St. Kitts. It is difficult for me to see the fact that the political parties in Nevis were proactive and the claimants were not, that this was a failure on the part of the claimants. I also note in this regard that the Commission did not ever share with the political parties in Nevis of any the proposals contained in 'SR6' and ask for their comments. Acting as they did as regards the Nevis site visit could not in my

view relieve the Commission from sharing their provisional proposals with the consultees. In my view, the fact that the Nevis Political parties did not complain could not taken be taken to mean that the claimants had no valid complaint.

[147] In fact even if I am wrong about the minimum standard of what was required for fair and proper consultations and that all that was required of the Commission was to create an environment conducive to consultations, as Learned Queen's Counsel Mr. Forde has argued on his theory of *assumed consultations*, I do not agree that the Commission did in fact create such an environment which provided a reasonable opportunity for the consultees to state their views. Whatever opportunity the consultees may have had to state their views could only have arisen when 'SR6' was shared with them, which, on a finding most favourable to the Commission, was on the 9th July 2013. The evidence shows that by the 18th July 2013, the Commission had for the first time agreed that 'SR6' was not only to be treated as the provisional proposals of the Commission, but more significantly it was agreed by a majority on that very day, that it would be included in the draft final report of the Commission. The evidence shows that the work of the Commission had essentially ended except to await the draft final report that was to be completed by the Chairman within a week. The Commission had done its consultations, and in fact on the 18th July 2013, had actually agreed that it would not hold any public consultations, obviously on the proposals that, at that stage, it had agreed to adopt. Where was the reasonable opportunity for the consultees to state their views? Mr. Forde's argument is based on the claimants having until the 5th September 2013 to state their view, but this is obviously at odds with the facts. All the claimants had, beginning the 9th July 2013, even if they could predict that 'SR6' would become the Commission provisional proposals, was a period of nine days at the end of which the Commission had essentially made its decision. In my view, even if I approach this matter as Learned Queen's Counsel, Mr. Forde urges, there would still have been no reasonable opportunity given; there was no fairness.

[148] Arguments in the alternative were also made by Learned Senior Counsel Mr. Astaphan that the fact that the Commission proceeded without the further participation of Mr. Richards and his party, and Dr. Harris did not preclude them from the process entirely.

They had the opportunity as members of the National Assembly to speak and vote on the recommendations laid before the National Assembly by the Prime Minister.' Even though the claimants knew that the recommendations were being placed before the National Assembly, 'they absented themselves from the National Assembly and deprived themselves and their constituents of a debate or vote on the draft proclamation laid before the National Assembly.' Learned Senior Counsel argues that in these circumstances the first and second named claimants cannot be heard to complain that they were treated unfairly, if at all.

[149] This is a matter resting on factual matters which had been previously employed by the defendants to make an argument at the leave stage, that the claimants had an alternative remedy and should not be allowed to proceed with judicial review. Here the argument has evolved somewhat to a contention that the claimants have by their conduct waived their right to complain and or should be estopped from complaining. Notwithstanding, I am of the view that my earlier conclusions on the claimants' decision not to attend the National Assembly to debate and vote on the draft proclamation are correct. What is being challenged in this case is the lawfulness of the decision contained in the recommendations of the Commission in its final report. The debates in the Assembly cannot be viewed as a valid avenue to cure any possible irregularity in the Commission's work. I cannot see that the claimants acted improperly by mounting a challenge as they did in this matter even though they did not participate in any debates and vote in the Assembly.[36]

WHETHER RELIEF SHOULD BE GRANTED

[150] Arguments have also been made by the defendants to the effect that even if the court were to find that the process was less than fair, no relief should be granted to the claimants as firstly, they have not shown that they were prejudiced in any way, and secondly, that the recommendations would have been different had they been given the 'Review of

[36] See R (on the Application of Sinn Fein) v Secretary of State for Northern Ireland 2007 WL 2864 Divisional Court; See also ex parte Capenhurst per Silber J at para. 52 where he offered the view that he did not think that discussions after the decision had been made 'constituted an adequate substitute for proper consultations before the decision under challenge were made."

Proposals' directly by the Commission. In this regard they have relied on the Cinnamond v British Airport Authority[37] and Malloch v Aberdeen Corporation[38] in which latter case Lord Diplock stated:

> *"A breach of procedure whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the court, unless behind it there is something of substance which has been lost by the failure."*

[151] The defendants have thirdly argued that, relief should not be granted as the 'quashing of the Commission's Report will have a significant detrimental impact on third parties. These parties include not only the political parties who participated in the process, but the people they represent. Fourthly, the defendants have also argued that the finalization of boundaries, which have been long outstanding, ought not to be further delayed because one political party refused to cooperate and one individual declared his position that he is not in favour of any change at this time.'

[152] On the first point, the claimants have in turn urged this court to find that the claimants have suffered prejudice as a consequence of the decision made by the Commission to the extent that the changes in the boundaries have affected their electoral chances. They also say that in any event they do not need to go that far. They say that 'the denial of the right to be treated fairly and to influence the outcome of the process is prejudice enough.

[153] I have considered the case of Cinnamond in which the English Court of Appeal was called upon to treat with a decision of the British Airport Authority to ban six cab drivers as a result of their improper conduct from entering the airport except as a bona fide airline passenger. The court considered the issue as to whether the principles of natural justice had been breached when the decision had been made without affording the cab drivers to opportunity to make representations. Brandon L.J dealt with the issue in the following manner:

> *The third question which was argued before us was that of natural justice. So far as that is concerned, I agree with what has been said by Lord Denning M.R. and Shaw L.J. I do not think that in the circumstances of this case there was any need to give these minicab drivers an opportunity to make representations to the*

[37] (1980) 1 WLR 582
[38] [1971] 1 WLR 1578 at 1595

> *authority before they issued the ban. The reason for the ban must have been well known when the letters were received. Any representations which were desired to be made could have been made immediately by letter. None were. The truth is that no representations other than representations which included satisfactory undertakings about future behaviour would have been of the slightest use.*
>
> *If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the minicab drivers as a result of not being given that opportunity. It is quite evident that they were not prepared then, and are not even prepared now, to give any satisfactory undertakings about their future conduct. Only if they were would representations be of any use. I would rely on what was said in Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578, first per Lord Reid at p. 1582 and secondly per Lord Wilberforce at p. 1595. The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing.*

[154] It is clear to me that in Cinnamond the English Court of Appeal was convinced that giving the cab drivers an opportunity to make representations would not have mattered at all, so that they could hardly argue that the failure to provide such an opportunity had caused them prejudice.[39] This cannot be argued in this case, as law and experience have shown that consultations in matters relating to boundary changes may actually affect the final decision to effect changes. It is unnecessary that I go as far as finding that the decision of the Commission did in fact affect the claimant's electoral chances. What is relevant is that I agree that the loss of the right to consult fairly is prejudice enough in matters such as this. It cannot be said that a right to make representations in matters such as boundary changes would not avail the political parties consulted anything. In this regard, I agree with the claimants that the Court of Appeal decision in Gaston Browne is instructive. In Gaston Browne, the court held that it had not been established by any cogent evidence that the changes in the boundaries would have affected the Appellants' electoral chances. Nor had any other distinct prejudice been established. Yet still the Court of Appeal intervened and set aside the Commission's Report because not enough time had been given for consultations.' It does not matter that in Gaston Browne the obligation was statutory as no distinction can really be made in cases where the Commission itself chose to embark on consultations.

[39] It is to be noted that the court actually reasoned that if the cab driver were prepared to give satisfactory undertakings, the representations would have been of some use.

[155] On the second point, the claimants have primarily argued that 'the onus is not on the claimants to show that if the Commission had consulted on its proposals it would have made a difference to the result. Rather if the Commission wishes to have the court deny relief, even though a proper consultation was not held, it must establish that it would have inevitably come to the same conclusion even if it did the right thing.' They rely on ex parte Capenhurst in which Silber J quoted with approval Bingham LJ in R v Chief Constable of Thames Valley ex parte Cotton[40] when he said:

> *"While cases may no doubt arise in which it can properly be held that denying the subject of a decision as adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:*
>
> 1. *Unless the subject of the decision has had the opportunity to put his case it may not be easy to know what case he could or would have put if he had the chance.*
> 2. *As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at page 402, experience shows that what is confidently expected is by no means always which happens.*
> 3. *It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if a complainant's position became weaker as the decision-maker's mind became more closed.*
> 4. *In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.*
> 5. *This is a field in which appearance are generally thought to matter.*
> 6. *Where the decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."*

[156] I consider the above learning to very instructive on this issue. I cannot in any sense conceive what representations would have been made by any of the political parties except for the one to which Mr. Richards belonged as he had made known in the public domain what his views were. What is even more significant in this case, having regard to the fact that the Commission had not demonstrated an inclination to be receptive to representations subsequent to the 18th July 2013 (by which time it was already too late), it

[40] [1990] IRLR 344 at page 352

is difficult for this court to determine whether any representations made would have made any difference to the eventual Report of the Commission. In R (Smith) v North Derbyshire Primary Care Trust[41] May LJ stated:

> *"I have already noted that neither Mr. Pittaway nor Mr. Post contended that the judge's second reason, that is that the decision would have probably been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process in the forbidden territory of evaluating the substantial merits of the decision."*[42]

[157] I am unable to find any evidence in this case which could properly lead me to find that the Commission would have inevitably come to the same recommendations if it had heard representations on its proposals. I would prefer to think that if a Commission of this sort embarks on consultations and those consultations are required in law to be fair and proper, the Commission which has failed to consult fairly, cannot be heard to say that nothing would have come of such consultations unless they present some evidence to ground this conclusion.

[158] On the third point, the claimants have argued that 'the fact that the quashing of a report of a Boundaries Commission, such as the first [defendant's] in this case, will always impact upon the third parties which the Commission has identified, but only to the extent that they will for the time being be uncertain as whether changes in boundaries will occur in the future. For the time being the boundaries will remain the same and they will continue to canvass and to vote where they did before. They will have suffered no prejudice and there will therefore be no cause to deny relief.'

[159] The claimants also argued on this point that 'in any event, these third parties also have a vested interest in ensuring that boundaries are altered only after a consultation process which is proper is engaged in and they can't complain if the court so orders. Moreover, if

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[41] [2006] 1 WLR 3315 at para. 10

[42] In Cinnamond the Court of Appeal as satisfied that the British Airport Authority actually made out its case that it had had the lawful power to impose the ban on the six cab drivers without having to give them any opportunity to make representations

the fact that third parties would be impacted would be a basis for denying relief in a case such as this, relief would never have been granted where a Boundaries Commission failed to consult properly and the Court of Appeal in Gaston Browne would not have granted the relief they did.'

[160] I am not prepared to find that relief should always be granted where a Boundaries Commission failed to consult properly. This should always be left to the court's discretion.[43] I cannot therefore find that Gaston Browne really makes the point that in every case where consultations were not done fairly, relief would be granted automatically; this would depend on the circumstances of the case. I agree that third parties have a vested interest in the work of the Boundary Commission.[44] To my mind, in light of the importance of the Commission's work, it would be in the third parties' interest that the process leading to such recommendations be conducted properly. The fact that the last attempt to change boundaries failed cannot be used as a basis to approve present recommendations of the Commission regardless of the fairness of the process. There is a greater utility in ensuring that this process leading up to the change of boundaries is fair and proper rather than to place emphasis on expediency.

[161] On the fourth point, the claimants have argued that it is not true to suggest that the first claimant's political party refused to cooperate and the second claimant was not in favour of any changes. This being the case, there is then no basis for the defendants to contend that finalization of the boundaries should not be delayed.

[162] I have dealt with these factual matter above, and I have made it clear that there is no reasonable basis to suggest or find that the first claimant had refused to cooperate in the consultation exercise and that the second claimant statements that there should be no changes could not be reasonably taken to mean that he too had refused to consult any further, or that it would be meaningless to consult with him.

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[43] See Simplex G.E. (Holdings) and anr v Secretary of State for the Environment (1989) 57 P&CR 36; see also R. v. Broadcasting Complaints Commission, ex p. Owen [1985] Q.B. 1153

[44] Here the respondents have actually argued that the public have a vested interest in the Commission's work.

[163] This then is a fitting case for relief to be granted. On this point the defendants have argued that if the court were to quash the report of the Commission, this would have no legal effect on the duties of the Governor General. Mr. Forde Q.C. in written submissions states that the, 'Constitution sets out the bases upon which the Governor General must act which are (a) the existence of a draft resolution approved by Parliament; (b) submission of the draft resolution to the Governor General by Prime Minister. He further submitted that 'as soon as the National Assembly exercised its discretion to approve the draft proclamation, the Commission's report ceased to have any legal effect in relation to the draft resolution approved by Parliament. The Commission's report by itself had no capacity to affect boundaries of the constituencies or the number of constituencies. The constituencies are affected when the Governor General issues a proclamation based on the draft proclamation approved by Parliament. He went on to submit that 'persons who act pursuant to administrative decisions which proved to be invalid, may have nonetheless acted lawfully although they had based themselves on an invalid decision. The validity of the act of the second actor depends upon his legal powers.' Learned Queen's Counsel relies on Boddington v British Transport Police [1999] 2 AC 144 and in particular the following dicta of Lord Steyn when he said:

> *"It has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends on the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."*

[164] Learned Queen's Counsel invited the court to note that 'there is no evidence that the Governor General knew that the Commission had acted unlawfully (for there was no such finding) and there is no evidence that the Governor General knew that the draft Resolution was not properly passed by the National Assembly.'

[165] I have restated the argument in such detail only for completeness, as the claimants in their response have correctly pointed out that this point was taken in the leave stage and it was

decided by this very Court in the earlier judgment in this matter at pages 57 to 72. I will now briefly set out some of my reasons. Then I had made the point that respect must be paid to the provisions of the Constitution and in particular to Schedule 2. I stated then at page 67: "No one could be in any doubt that the interpretation and application of constitutional provisions including those found in Schedule 2 of the St. Kitts and Nevis Constitution, must be broad, generous and purposive so as to 'reflect the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded.[45]' These provisions, I pointed out in my earlier judgment, affected the right to vote. Once the proper respect is given to these provisions, 'it can hardly be said that any part of section 50 of the Constitution could have permitted the Assembly to debate a draft proclamation, which debate would validate a Report of the Commission which was formulated in violation of the provisions of Schedule 2; it would render Schedule 2 meaningless.' I also considered the case of The Prime Minister and Juno Samuel v Sir Gerald Watt KCN Q.C.[46] which made the point that the actions of the second actor can be declared void of the acts of the first actor are illegal or otherwise void. In any event in this case, the Governor General is yet to act and by this judgment His Excellency will now be aware that the Report of the Commission is quashed as being null and void. In any event, this court is not being called upon to quash the act of the Governor General but to prevent him from acting on a Resolution which was founded on an unlawful Report of the Commission. Further, there is no doubt that the court has a power to restrain even the final legislative act of the Governor General in assenting to a Bill passed by the Assembly.[47]

CONCLUSION AND ORDERS

[166] The claimants have failed to show that the Commission has failed to consider relevant matters and have taken irrelevant matters into consideration. They have also failed to show that the Chairman of the Commission has been affected by an appearance of bias. They have however been able to satisfy this court that the Commission, having embarked

[45] Lord Wilberforce in Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] A.C. 319 at 328
[46] Civil Appeal no. 5 of 2012
[47] Bahamas District of the Methodist Church v Symonette [2000] UKPC 31 at paragraphs 25 to 37.

on a process of consultation, has failed to conduct those consultations fairly and properly. This Court is further satisfied that this is a proper case to exercise a discretion to grant relief. In the circumstances I make the following orders:

(6) A declaration that the decision of the Constituency Boundaries Commission contained in its Report dated the 5th September 2013 is *ultra vires,* null and void and of no effect.

(7) An Order of Certiorari moving into this Court, and quashing the decision of the Constituency Boundaries Commission contained in its Report dated the 5th September 2013.

(8) An Order of Prohibition against the Constituency Boundaries Commission from submitting to the Governor General, or making use of the Report of the Commission dated the 5th September 2013 pursuant to section 50(1)(1) or otherwise.

(9) An Order of Prohibition against the second defendant prohibiting him from submitting to the Governor General the draft proclamation approved by resolution of the National Assembly on the 9th September 2013 for giving effect to the recommendations contained in the Report of the Constituency Boundaries Commission of the 5th September 2013, pursuant to section 50(6) of the Constitution of St. Kitts and Nevis.

(10) An Order of Prohibition directed to the third defendant in his capacity as Representative of the Governor General prohibiting the Governor General howsoever from making a proclamation in terms of any draft proclamation submitted under section 50(6) of the Constitution.

[167] The court has a discretion whether to award costs in this matter. I am guided by the Court of Appeal in the Gaston Browne case where it was said that: *"In judicial review proceedings the general rule is that no costs award may be made against an applicant*

unless the court considers that the applicant has acted unreasonably." In this case I have considered that the claimants did not succeed on two of the three grounds on which they proceeded. I have also noted my earlier finding that this Commission had set out to act in good faith and that it was hoping to get this process right. It simply fell into error. In these circumstances I will order that each side will bear their own costs, and this order shall extend to the earlier order made in the interlocutory proceedings.

[168] All I left to do now is to thank each side for their helpful submissions and guidance through this very complex and important matter.

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Darshan Ramdhani
Resident Judge (Ag.)