BARBADOS.

[Unreported]

IN THE SUPREME COURT OFJUDICATURE

COURT OF APPEAL

Civil Appeal No. 24 of 2001

BETWEEN:

CHESTERFIELD MONTGOMERY THOMPSON

CHRISTOPHER ANTHONY AUDAIN

DOUGLAS PATRICK LUKE

(Appellants)

AND

RAWLE BRANCKER

MARINA MADELENE LEACOCK

HUTSON CECIL ALGERNON LEACOCK

ROBERT STEWART KIRBY

(The Executors of the will ofCECIL LEO LEACOCK,

substituted pursuant to orderdated 27 April 2004)

ERROL R. WALROND

(Respondents)

BEFORE: The Honourable Colin A. Williams, TheHonourable Frederick L. A. Waterman and The Honourable Peter D. H. Williams,Justices of Appeal.

2004: May 3, 6, 7 and October 5.

Mr. Leslie F. Haynes Q.C. and Mr. Hal McL.Gollop for the Appellants.

Mr. Maurice A. King Q.C., Mr. Edmund R. King,Mr. M. Adrian King and Mrs. Wendy Maraj for the First and Third Respondents andwith Mrs. Beverley Walrond Q.C. for the Third Respondent.

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JUDGMENT

I. INTRODUCTION

[1] The appellants are the Chairman and members of a Commission of Inquiryappointed under the ***Commissions of Inquiry Act, Cap.112 ("Inquiry Act")***to investigate and report upon the management and operations of the St. JosephHospital. The respondents were three of the members of the St Joseph HospitalBoard ("the Board"), who filed applications for judicial review of the noticesissued to them by the Commission of Inquiry under ***section 23*** ofthe ***Inquiry Act***. On 27 June 2001, ***Payne J*** quashedthe decision to issue the notices. This appeal is against hisjudgment.

II. BACKGROUND AND MINISTER'S POWERS

[2] The Board was established by ***section 3*** of the ***St. JosephHospital Act, Cap. 54B ("Hospital Act"),*** as follows:

> "3.(1) There isestablished a body to be known as the St. Joseph Hospital Board that shalladminister and manage the Hospital in the manner specified in this Act.
>
> (2) The Board is abody corporate to which, subject to this Act, section 21 of the *InterpretationAct* applies.
>
> (3) Part I ofthe *Schedule* has effect with respect to the constitution of theBoard and otherwise in relation thereto."

Underthe ***Hospital Act***, the Board members were given nopersonal status, but functioned only through the Board.

[3] The first respondent, Rawle Brancker ("Mr. Brancker"), is a prominentbusinessman. The second respondent, Cecil Leo Leacock ("Mr. Leacock"),who died on 26 September 2002, was Chairman of the Board and previously ownedand controlled a large business. The third respondent, Errol R. Walrond ("ProfessorWalrond"), an eminent surgeon, was a member of the Board *ex officio* asDean of the Faculty of Medical Science of the University of the West Indies(Cave Hill Campus). The respondents were appointed members of the Boardfrom 1 April 1990; the third respondent served until August 1992 and the firstand second respondents until September 1994.

[4] The Board comprised twelve members. The Hospital Administrator and the ChiefMedical Officer, in addition to the Dean of the Faculty of Medical Science,were *ex officio* members**.** The Minister of Health appointed theChief of Staff of the Hospital, another member of the medical staff and sevenother persons. He also appointed the Chairman and Deputy Chairman of the Board.

[5] The ***Hospital Act***, which came into force on 1 January 1990,provided for the administration and management of the Hospital and related matters.By a letter dated 4 May 1990, the Minister of Health, Mr. Branford Taitt,outlined to the Chairman, Mr. Leacock, the way in which the Board was expectedto function. The material parts of the letter were as follows:

> "I wish to give you some broad policyguidelines for the operation of St. Joseph. The Board will be responsiblefor the 105 bed hospital and the building known as Villa Maria, which was usedas a Convent for Sisters of the Order, who formerly ran the hospital. Ihave decided to sub-divide this building to provide in one part accommodationfor persons needing geriatric rehabilitative and convalescent care and toestablish in the other section a Drug Rehabilitation Unit.
>
> The Drug Rehabilitation Unit will bea separate entity administered by the Psychiatric Hospital and forming part ofthe mental health services. However, certain house-keeping and otherservices will be provided by your hospital. The Hospital Board will have totalresponsibility for the management of the remainder of the facility…
>
> The Board will have autonomy inconducting its affairs, subject only of course to any directions which may begiven under Section 4(2) of the Act. It is expected that at the outsetthe hospital will provide medical, surgical, obstetrical and gynaecological andemergency services. In time I hope that certain specialist services willbe attracted to the hospital…
>
> It is my intention that the hospitalwill have a very close working relationship with the Queen ElizabethHospital. It is also part of our policy that the University of the WestIndies Faculty of Medical Science will have full access to St. Joseph, forpurposes of training students and other matters relevant thereto…
>
> I am certain that the ex officiomembers of your Board will be of particular assistance in guiding yourdeliberations in this regard…
>
> For the time being, my Ministry willcontinue to finance the renovation work and procurement of equipment until yourBoard is fully established. Once the Board is fully functional then asubvention will be paid over which will have to be managed in full by theBoard.

I hope that this overview will giveyou a fairly clear idea of our plans for the St. Joseph Hospital and the taskwhich the Board will have over the next three years."

[6] The functions of the Board and the Minister's authority to give directions wereset out in ***section 4*** of the ***Hospital Act***:

"4. (1) The functions of the Board are

(a) to equip, furnish,maintain, manage, control and operate the Hospital;

(b) to manage, conductand supervise the activities of the Hospital;

(c) to have generalsupervision of the buildings, premises and grounds of the Hospital*;*

(d) to collectall fees payable to the Hospital under this Act;

(e) to enquire into andadjudicate upon disciplinary charges against members of the staff of theHospital;

(f) to makerecommendations to the Minister in respect of any matter directly or indirectlyaffecting the Hospital or the development of the medical or nursing servicetherein; and

(g) generally to carryout the provisions of this Act.

(2) TheMinister may give directions to the Board or any committee appointed by theBoard as to the exercise and performance of any of its functions under thisAct; and the Board or committee, as the case may be, shall giveeffect to any such directions." (Emphasis added.)

It should be noted thatthe ***Hospital Act*** gave the Minister the power to direct the Board,and the Board was required to give effect to any such directions. TheMinister in his letter to its Chairman emphasised that the Board's autonomy wassubject to any directions that he may give under the ***Hospital Act***.Mr. Maurice King QC, for the respondents, submitted that the Minister's powerto give directions to the Board was inconsistent with the Board's autonomy tomanage, control and operate the Hospital and that the allegations of misconducthad to be considered in that context.

III. THE COMMISSION OF INQUIRY

[7] On 10 April 1997, the Governor-General by warrant issued under the ***InquiryAct*** appointed an investigatory commission to investigate and report ona matter which the Governor-General deemed to be of special publicimportance. The appellants were appointed Commissioners to be aCommission of Inquiry with terms of reference to:

"(a) investigate and report upon

(i) the award andperformance of all contracts or sub-contracts and arrangements for work orservices carried out in connection with the refurbishment, renovation orrehabilitation of the St. Joseph Hospital during the period commencing onthe 1st day of April, 1989 and ending on the 31st day ofDecember, 1994;

(ii) any breaches ofapplicable rules, regulations, procedures or laws relating to theappointment of staff, the use of funds, equipment, supplies or materials at thesaid hospital during the period commencing on the 1st day of April,1989 and ending on the 31st day of December, 1994;

(iii) the management andoperations of the said hospital during the aforesaid period; and

(b) make such recommendations as theCommission may deem appropriate." (Emphasis added.)

It should be noted that theCommission's investigations related to a period both before the ***HospitalAct*** came into force and also after the respondents ceased to be membersof the Board.

[8] The first appellant, Chesterfield Montgomery Thompson, is a retired civilservant and was appointed Chairman of the Commission; the secondappellant, Christopher Anthony Audain, is an Attorney-at-Law in privatepractice and the third appellant, Douglas Patrick Luke, is an architect. It should be stated at the outset that the integrity of the Commissioners hasnot in any way been questioned in these proceedings. Every Commissioner wasrequired by ***section 16*** of the ***Inquiry Act*** to makeand subscribe an oath before the Governor-General that he would fully,faithfully, impartially and to the best of his ability discharge his duties asCommissioner. The submissions made on behalf of the respondents related mainlyto the propriety of the notices of allegations of misconduct in light of theprovisions of the ***Inquiry Act*** and in the context of the inquiryproceedings.

[9] The Commissioners filed an affidavit in which they stated that public hearingscommenced on 1 September 1998, 16 months after their appointment. Theyheard evidence from 94 witnesses over a period of 14 months until November1999. Thereafter they heard addresses of counsel until January2000. In May 2000, they issued notices of allegations of misconduct toall the Board members, but one member who was out of the island was not served.However, only the respondents challenged the notices, which are the subject ofthis appeal. The Commission gave an undertaking not to resume the hearingspending the final outcome of these proceedings.

IV. <u>THE SECTION 23NOTICES</u>

[10] This appeal invites a careful consideration of ***section 23*** of the ***InquiryAct,*** which provides that notice of allegations of misconduct likely to be made against any person must be given to that personprior to the commission making any finding of misconduct, as follows:

"23.(1) Where it appearsto a commission that allegations of misconduct have been or are likely to bemade against any person, group or organisation, the commission shall so far aspracticable give to that person, group or organisation reasonable notice of theallegations and a reasonable opportunity to contest them by calling evidence inrebuttal or by cross-examination or otherwise.

(2) Nofinding of misconduct on the part of any person, group or organisation shall bemade by a commission unless that person, group or organisation had reasonablenotice of the allegations of misconduct and reasonable opportunity to contestthem in the manner prescribed by subsection (1)."

[11] The section provides a statutory safeguard to protect any person, group ororganisation which is liable to be criticised in a report. There must be a fairbalance between the public interest in establishing the truth by a commissionof inquiry, which is not constrained by strict rules of evidence, and the rightof any person, group or organisation to protect its reputation.

[12] The Commission did not give notice under ***section 23*** to the bodycorporate, the Board, but instead addressed notices to each respondent. Thenotices to the first respondent were dated 4 and 12 May 2000, the notices tothe second respondent were dated 2 and 12 May 2000 and the notice to the thirdrespondent was dated 17 May 2000. All the notices were signed by the Chairmanof the Commission and headed:

> "Notice of Allegation on Findings ofMisconduct pursuant to section 23 of the Commissions of Inquiry Act, Cap. 112of the Laws of Barbados."

The heading of the notices was mostunfortunate in its mention of **"**findings of misconduct**".** Aperson could well be devastated by a notice carrying such a heading, especiallyone who had never been involved in the proceedings, since it conveyed theimpression that findings of misconduct had already been made. Itcontradicted the clear direction of the section that no such findings were tobe made until the parties receiving the notice had a reasonable opportunity tocontest the allegations against them. Each notice stated that:

> "The Commission is of the opinionthat on the evidence taken before it at the said inquiry conducted at theSherbourne Conference Centre between 1st September, 1998 and 19thJanuary 2000, it appears that the following allegations of misconduct arelikely to be made against you:" (Emphasis added.)

ere were eleven allegations ofmisconduct issued in identical terms

tothe respondents and these are summarised below:

(1) Approved thepayment of funds to the Minister to perform a function which could not bedelegated to him.

(2) Allowed theMinistry of Health officials to undertake functions which were legally vestedin the Board and which the Board did not delegate.

(3) Failed and/orrefused to implement adequate and effective financial control systems for theproper administration of the Hospital including the proper staffing of itsaccounts department.

(4) Mismanaged itsresources by permitting personnel appointed to the staff of the Hospital towork at other institutions whilst receiving salaries from the Hospital.

(5) Failed and/orrefused to submit its Annual Report to the Minister by June 30 in accordancewith Section 11 of the Hospital Act.

(6) Failed and/orrefused to keep proper accounts and records of transactions relating to theactivities of the Board.

(7) Failed to arrangeinsurance coverage of the St. Joseph Hospital building and other assets duringthe first three years of its operations.

(8) Failed to put inplace appropriate systems to ensure that the PriceWaterhouse Consultancyachieved its objectives.

(9) Failed to performthe Board's function to equip, furnish, maintain, manage, control and operatethe Hospital.

(10) Failed to takereasonable steps to ensure that the price paid was the most economical in allthe circumstances.

(11) Paid professionalfees of $50,000 to Mr. McAllister who at the time was employed as a publicofficer.

[13] The notices informed the respondents that they had a right to be heard beforethe Commission so that they could contest the allegations by calling evidencein rebuttal or by cross-examination or otherwise. It was suggested to therespondents that they should be legally advised how best they should proceedwith the matter. A resumé of the evidence in support of the allegations ofmisconduct was attached to the notices. It is neither necessary norappropriate for the purposes of this appeal to set out the supporting evidencein light of our view of the distinct roles of the Commission in relation to ***section23*** notices and of the Court on an application for judicial review ofnotices issued pursuant to that section.

[14] We should add that ***section 23*** has already been the subject ofsome analysis and comment in litigation arising from the Commission of Inquiryappointed on 2 November 1999 by the Governor-General to inquire into thecircumstances surrounding the escape of the prisoner Winston Leroy Hall fromGlendairy Prison on 23 September 1999 conducted by The Hon. Mr. Justice ElliottBelgrave, retired High Court Judge. However, in that litigation the issue inrelation to the ***section 23*** notices was whether the wording of thenotices issued to prison officers presupposed a finding of misconduct againstthem thereby precluding the Commissioner from making an impartial finding. Thecases in the litigation were all entitled ***Small v. Belgrave*** andwere: ***Civil Appeal No. 5 of 2000 (unreported decision of Sir DenysWilliams CJ, Chase and Williams JJA given on 27 April 2000); High Court CaseNo. 370 of 2000 (unreported decision of Blackman J (Ag.) given on31 July 2002)*** and ***Civil Appeal No. 23 of 2000 (unreporteddecision of Chase CJ (Ag.), Waterman JA and Frank King JA (Ag.) given on 16February 2001).***

V. THEPROCEEDINGS TO DATE

[15] The notices referred to in paragraph [12] prompted proceedings for judicialreview under the ***Administrative Justice Act, Cap.109B ("AdministrativeAct")***. The respondents filed separate originating motions on 25and 31 May and 10 October 2000 respectively, which were consolidated on 22November 2000. The motions were in similar terms and sought the followingremedies; an order of certiorari quashing "the decision" of the Commissiongiving the respondents notice under ***section 23***, an order ofprohibition forbidding the appellants from proceeding with the hearing of theallegations contained in the notices and a declaratory judgment declaring that the"decision" of the appellants to give the respondents notice was invalid. Therespondents also sought an injunction restraining the Commission fromconducting hearings on the allegations of misconduct contained in the notices,and claimed damages and costs.

[16] ***Section 3*** of the ***Administrative Act*** provides thatan application can be made to the Court for relief against an administrativeact by way of judicial review. An "act" is defined to include "any decision,determination, advice or recommendation made under a power or duty conferred orimposed by the Constitution or by any enactment".

Section 4 of the ***Administrative Act*** sets out thegrounds of relief as follows:

"4. The grounds upon which the Courtmay grant relief by way of the remedies mentioned in this Act include thefollowing:

(a) that an administrativeact or omission was in any way unauthorised or contrary to law;

(b) excess ofjurisdiction;

(c) failure to satisfyor observe conditions or procedures

required by law;

(d) breach of theprinciples of natural justice;

(e) unreasonable orirregular or improper exercise of discretion;

(f) abuse of power;

(g) fraud, bad faith,improper purposes or irrelevant considerations;

(h) acting oninstructions from an unauthorised person;

(i) conflict with thepolicy of an Act of Parliament;

(j) error of law,whether or not apparent on the face of the record;

(k) absence of evidenceon which a finding or assumption of fact could reasonably be based; and

(l) breach of oromission to perform a duty."

Mr. King reliedparticularly on sub-paragraphs *(b)*, *(c)*, *(f)* and *(k)* insupport of the applications for judicial review.

VI. THE HIGH COURT JUDGMENT AND ORDER

[17] The judge's findings of fact and reasons for decision were as follows:

"I find that there is no evidenceprovided on which the allegations could reasonably be brought.

I also find that the allegations areunreasonable in the *Wednesbury* sense and therefore in excess of the Commission'sjurisdiction.

There will therefore be an order ofcertiorari in each case to quash the decision or act of the Commissionissuing the Notice of Allegations." (Emphasisadded.)

[18] In view of the fact that Mr. Leslie Haynes QC, for the appellants, has raisedseveral concerns in relation to the terms of the order as filed on 10 February2003, we set out the same:

IT IS DECLARED that thedecision of the Respondents to give to the Applicants Notice of theAllegation on Findings of Misconduct pursuant to section 23 of the Commissionsof Inquiry Act Cap. 112 of the Laws of Barbados and to hear evidence inrespect of such allegations against them is invalid and isvitiated by being unreasonable and/or irregular or improper exercise ofdiscretion; and by the absence of evidence on which the said notices couldreasonably be based.

AND IT IS ORDERED thatCertiorari issue to remove into the Civil Division of the High Court of Justicefor the purpose of being quashed the decision of the Respondents toissue notices of Allegations on Findings of Misconduct Pursuantto Section 23 of the Commissions of Inquiry Act Cap. 112 of the Laws ofBarbados dated May 4, 2000 addressed to Rawle Brancker G.C.M and signed by C.M.Thompson Chairman St. Joseph Hospital Commission of Inquiry; and another datedMay 17, 2000 addressed to Prof. Errol R. Walrond and signed by C.M. ThompsonChairman St. Joseph Hospital Commission of Inquiry and another dated May 17,2000 addressed to Leo Leacock and signed by C.M. Thompson Chairman St. Joseph Hospital Commission of Inquiry.

AND IT IS FURTHERORDERED that thereupon the said decision be quashed.

AND IT IS FURTHERORDERED that the Respondents do pay to each Applicant the costs of andoccasioned by this motion certified fit for two counsel such costs to be agreedor taxed." (Emphasis added.)

In order to explain the discrepancyin the dates of the notices, we should state that the dates are correctlyrecorded in paragraph [12], but only partially so in the above order.

VII. THEGROUNDS OF APPEAL

[19] The grounds of appeal as amended are summarised below, as follows:

(i) The Learned Judge erredin law in

(a) entertaining theapplication for judicial review at a time when no findings of fact had beenmade by the Commission of Inquiry;

(b) holding that theapplication for judicial review was properly brought when there was a suitablealternative remedy available under ***Section 23*** of the ***InquiryAct*** which had not been exhausted;

(c) evaluating both theevidence contained in the resumés attached to the notices and the evidencecontained in the affidavits of the applicants and further erred in holding thatthere was no evidence on which findings of misconduct could reasonably be made;

(d) quashing the decisionof the Commission to issue notices to the respondents and further erred byquashing the Notices of Misconduct issued to the respondents.

(e) holding that theallegations in the Notices of Misconduct issued to the respondents wereunreasonable in the ***Wednesbury*** sense and therefore in excess ofjurisdiction.

(f) usurping thejurisdiction granted to the applicants under the ***Inquiry Act***.

VIII. RECOURSETO COMMISSION OR TO COURT?

[20] The main submission advanced on behalf of the appellants by Mr. Haynes was thatthe respondents' application for judicial review was premature: the Commissionhad not made any findings and in those circumstances the notices were notsubject to judicial review. The appellants' skeleton argument explainedthe submission, as follows:

> "The respondents launched theirapplications before the Commission's findings had been released. Thedecision which is under challenge is not an actual finding of misconduct butonly an indication that it may be possible to make such a finding. It istherefore impossible to say what findings will be made or how they will beframed. The notices as they stand are potential findings, they are notactual findings. The notices are intended to ensure that the Commissioncomplies with the requirements of natural justice and in this respect thechallenge is premature. Standing alone the notices have no adverseconsequences for the applicants, that is, there has been no finding ofmisconduct.
>
> The general principle is that anapplication for judicial review is a remedy of last resort. This means thatsave in … exceptional circumstances, it should not be used unless theRespondents had first exhausted available procedures for objecting to orappealing against the decisions sought to be judicially reviewed. In the instant matter, and because of the said Section 23, the Respondents areentitled as a matter of statutory right to make representations to theCommission. They have not exhausted available procedures and theapplication for judicial review is therefore unjustified. Instead theyhave come before the Court seeking judicial review based on the evidenceadduced by way of affidavits and are asking the Court to determine the verymatter which the Commission has been mandated to determine and which theCommission has not yet determined." (Emphasis added.)

This is a formidableargument, which we discuss at paragraphs [39] to [46].

[21] The appellants, of course, make other important submissions, on which we willcomment. However, at the core of the determination of this appeal iswhether the notices were properly subject to judicial review without referenceto the Commission.

[22] Mr. King in response to the appellants' main submission effectively repliedthat there was no obligation on the part of the respondents to contest thenotices before the Commission if the notices exceeded the jurisdiction of theCommission. The respondents' skeleton argument stated, "there is noremedy provided by law for the respondents to challenge the decision of theappellants other than by judicial review. Further the statute itself doesnot give to the respondents the right to ask the appellants to review theirdecision." The skeleton argument further stated that the allegations inthe notices raised substantial issues of law, which the appellants were notcompetent to decide, but were properly matters for the Court to adjudicate. Itwas submitted that "the appellants went very wrong procedurally in holding thatthe respondents were personally liable for the corporate acts of a bodycorporate. This error would result in serious injustice to the respondents andrequire the early intervention of the courts." The respondents also contendedthat "another major error of law occurs where the appellants issue notices ofmisconduct against the respondents where there is no evidence on which thefacts contained in the notices could reasonably be based. Absence of suchevidence is an issue of law…Absence of evidence is totally distinct from lackof sufficient evidence which is an issue of fact." With particular reference toProfessor Walrond, it was submitted that as he never gave evidence before theCommission, there was no basis for allegations of misconduct and that some ofthe allegations related to a period after he ceased to be a member of theBoard. The notices were therefore "in excess of jurisdiction and procedurallyunfair".

IX. BODY CORPORATE

[23] We agree with Mr. King that an important point of law for us to determine iswhether or not the notices of misconduct were properly issued to therespondents, and not to the Board. If the notices could properly be issued onlyto the Board, then they have to be considered in that context.

[24] A fundamental principle of company law is that an incorporated company has itsown legal existence quite separate and distinct from the individual members ofwhom it is constituted; so too with any other body corporate established bystatute. This is a principle which the Commissioners had a duty to keepconstantly before them in all aspects and at all stages of the performance oftheir mandate. This distinction is of critical importance in the presentproceedings.

[25] The Board was a body corporate to which ***section 21*** of the ***InterpretationAct, Cap. 1*** applied. That section sets out the effect of words ofincorporation: a body corporate when established is given stipulatedpowers. Such a body is vested with the power to sue and be sued in itscorporate name. Words of incorporation also vest in a majority of the membersof that body the power to bind other members thereof. Members are exemptfrom personal liability for the debts, obligations or acts of that body. Mr. King relied on ***section 21*** in support of his contention thatthe Board is a distinct legal person from its members and to highlight thecorporate nature of the responsibility of the Board.

[26] Mr. King also referred us to ***section 5*** of the ***Hospital Act***,which provided for the Board to delegate such of its functions as it thoughtfit to the Chairman, the Hospital Administrator, any committee appointed by theBoard or to any of its officers. There is no evidence to suggest that the Boarddelegated any of its functions or that the allegations of misconduct madeagainst the respondents relate to any functions delegated to them. There wastherefore no basis on which the allegations could properly be made against therespondents instead of against the Board.

[27] The judge dealt with the point in his judgment, as follows:

> "The applicants contend that sinceSt. Joseph Hospital Board is a body corporate to which Section 21 of theInterpretation Act applies it is distinct from its members, and that themembers are not personally liable or subject to these allegations.
>
> …
>
> It was also submitted that theapplicants had a legitimate expectation to be treated as members of a corporatebody, <u>but it is perhaps not now necessary for me to consider thissubmission.</u>" (Emphasis added.)

[28] In view of the above, it is not surprising that the respondents filed a respondents'notice to contend that the decision of the Court below should be affirmed ongrounds additional to those relied upon by the Court, as follows:

> "1. The allegations of misconduct made against the Respondents are the acts and/oromissions of the St. Joseph Hospital Board a statutory corporation. Thedecisions of the Board are the corporate acts and/or omissions of a bodycorporate. They are not the acts and/or omissions of the Respondents intheir personal capacity.
>
> 2. The decisionof the Appellants to give the Respondents Notice of Misconduct is contrary toand adversely affects the legitimate expectation of the Respondents not to beheld personally responsible for the corporate acts/omissions of a bodycorporate."

[29] Mr. King submitted that the notices should have been issued to the Board as thebody corporate and not to the respondents. The ***Hospital Act*** providedthat the decisions of the Board should be by a majority of votes and did notimpose on the members of the Board any personal responsibility for themanagement of the Hospital, which was purely the function of the Board, subjectto any directions that the Minister may have given the Board as to the exerciseand performance of any of its functions. Although the notices made reference tothe

respondents acting in their capacity as members of the Board, the noticeswere issued to the respondents personally. We agree with Mr. King'ssubmission and therefore hold that the allegations of misconduct should havebeen issued to the Board and not to its members.

X. FIRST RESPONDENT'S POSITION

[30] It follows that Mr. Brancker should not have been subjected to allegations ofmisconduct because these should have been directed to the Board.

XI. SECONDRESPONDENT'S POSITION

[31] On 27 April 2004, we gave a written decision ordering that the executors of Mr.Leacock's will be made parties to the appeal and that the appeal be carried onas if they had been substituted for the second respondent. We alsoordered that the award of costs of that hearing be reserved until the appealwas concluded. Although the executors were not represented at the hearing ofthe appeal, we have given consideration to the position of the secondrespondent. Except that he was Chairman of the Board, his position as aBoard member was in all material respects identical to that of the first andthird respondents. It therefore follows from our decision that any noticeissued should have been to the Board and not to Mr. Leacock.

XII. THIRDRESPONDENT'S POSITION

[32] Similarly, no notice should have been issued to Professor Walrond. Moreover, itwas submitted on his behalf that even if it was proper to issue a notice tohim, his position was different from that of the first and second respondentsin three respects: firstly, he was an *ex officio* member of the Board;secondly, he was a member only until August 1992, two years before the firstand second respondents ceased to be members and thirdly, he never gave evidencebefore the Commission. Mr. King submitted that *ex officio* membersof statutory boards had no choice as to whether or not to serve and if byvirtue of their office they were liable to be charged with allegations ofmisconduct, they would be reluctant to accept statutory positions. Secondly, the allegations of misconduct made against Professor Walrond were thesame as those made against the first and second respondents and no attempt wasmade to identify the allegations chronologically in order to show that ProfessorWalrond was a Board member at the relevant times. The allegations could nothave arisen from his testimony because he never gave evidence. In thecircumstances, Mr. King submitted that it was procedurally unfair to issue anotice of misconduct against him.

[33] It was conceded by the appellants that some of the allegations related toperiods when Professor Walrond had ceased to be a Board member, but it wasargued that he should nevertheless contest the allegations before theCommission. Mr. Haynes submitted that these were issues that should havebeen properly addressed to the Commission. We do not agree. Assuming that the notice was properly issued to Professor Walrond, it shouldhave been carefully prepared. Professor Walrond or anyone in a similar positionshould not be required to contest ill-conceived and loosely drafted noticesthat are in excess of jurisdiction of the Commission. It was right that heshould not appear before the Commission to contest such allegations but insteadapply to the Court to have the same declared invalid.

[34] It is helpful to quote what was said by ***Décary JA*** in the ***FederalCourt of Appeal*** decision of the ***Canadian Blood System Case*:*Canada (Attorney General) v. Canada (Commissioner of Inquiry on the BloodSystem) (1997) 142 D.L.R. (4th) 237.*** In that case Mr. CraigAnhorn was a former Operations Manager in the blood products section of the RedCross. He was not a party to the inquiry into the blood system and he didnot receive the memorandum sent to the parties by the Commission. He wastherefore extremely surprised to receive a notice of potential findings ofmisconduct against him. ***Décary JA*** had "to consider whether, inthe circumstances, procedural fairness" had been observed. He stated atpage 268 of his judgment:

> "In the circumstances, I find itunacceptable that Commission counsel did not inform Anhorn … of the possibilitythat he would be summoned as an important witness, that they did not cautionhim of the dangers lying in wait for him when he was examined, that they lefthim out of the process of the invitations sent to the parties … that theywaited until the very end of the hearings to give him a notice containingallegations that were so numerous, so important and so little identified withhis own conduct and that were, in certain cases, false on their face, and thatthey gave him so little time to react.
>
> *In these circumstances,* I cannot do otherwise than quashthe notice given to Anhorn. We have here the type of situation that I describedearlier, in which a Commissioner must, in all fairness to a person who istargeted, offer the person an opportunity to participate in the proceedings ofthe Commission and play fair with him."

The Supreme Court of Canada upheldthe Federal Court of Appeal in quashing the notice issued to Mr. Anhorn.

XIII. PROCEDURAL FAIRNESS

[35] Apart from the statutory protection afforded by ***section 23, section 19***of the ***Inquiry Act*** gives the Commission a discretion as to theprocedure it should adopt when conducting an inquiry:

> "19. Theconduct of and the procedure to be followed at an inquiry or investigationunder this Act is, subject to this Act, under the control and direction of thecommission conducting it."

The Commission properly outlined itsprocedures for the conduct of the inquiry in a statement issued on 1 September1998, a copy of which was attached to the first appellant's affidavit. Thestatement set out "briefly some rules of procedure determined by the Commissionfor the conduct of the Inquiry since there are not statutorily provided". TheCommission stated the procedure it proposed to adopt for the calling andexamination of witnesses. However, the statement did not elaborate on thestatutory provisions relating to ***section 23*** notices.

[36] The procedure adopted in other jurisdictions is instructive. In***Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)(1997) 151 D.L.R. (4th) 1,*** the ***Supreme Court of Canada,***held at ***page 2*** that:

> "A public inquiry does not applylegal standards or determine liability as does a criminal trial or a civilaction. Even if the public believes an inquiry has determinedresponsibility, it has not made findings with penal or civil consequences.Inquiries must make findings of fact which can damage reputations in order tomake recommendations that seek to prevent future tragedies.

…

> Procedural fairness is essentialwith respect to findings that may damage the reputation of a witness."

[37] ***Section 13*** of the ***Canada Inquiries Act*** is insimilar terms to ***section 23*** of the ***Inquiry Act***. In the ***Supreme Court of Canada*** decision in the ***Blood SystemCase***, it was stated at ***pages 6-7*** that:

> "Commission counsel delivered amemorandum to all parties inviting them to inform the Commission of thefindings of misconduct they felt should be made by the Commission. Thememorandum explained that under s.13 of the Act, the Commissioner is requiredto give notice to any person against whom he intends to make findings ofmisconduct. The parties' submissions would help ensure that the noticesgave warning of all the possible findings of misconduct which might be made bythe Commission. These confidential submissions would be read only by Commissioncounsel, and would be considered for inclusion in notices issued by theCommissioner. Only those possible findings which were supported byevidence adduced in the public hearings and which were anticipated to be withinthe scope of the Commissioner's final report were included in the notices."

[38] Finally, it is worth quoting the following passages from the ***FederalCourt of Appeal*** judgment of ***Décary JA*** in the ***BloodSystem Case: Canada (Attorney General) v. Canada(Commissioner of the Inquiry on the Blood System) (1997), 142 D.L.R. (4th) 237at 262 and 265:***

> "The concept of procedural fairnessis a shifting one; it changes depending on the type of inquiry and varieswith the mandate of the commissioner and the nature of the rights that theinquiry might affect. A public inquiry under the *Inquiries Act* isnot, I would point out, a trial, the report of a commissioner is not a judgmentand his recommendations may not be enforced. Thus a commissioner has broad latitudeand discretion, and the courts will question his procedural choices only inexceptional circumstances.
>
> … when the evidence presented at theinquiry establishes that a person who is not participating in it is at risk ofbeing put on the hot seat, or when the Commissioner's concerns take a differenttack and focus on new targets, the Commissioner, in all fairness to the personsconcerned, would perhaps be well advised to warn them as promptly aspossible. There is, I repeat, no general rule."

XIV. RESUMÉ OF EVIDENCE

[39] The judge resolved the case by a consideration of the evidence in support ofthe allegations of misconduct as follows:

> "It is further submitted that thereis no evidence to justify or support these allegations against the applicantspersonally or at all…
>
> The Court does not find in theresumé of the evidence provided to the applicants by the Commission anyevidence or suggestion of dishonesty or absence of good faith as regards thebest interests of the St. Joseph Hospital. The evidence does not indicateor suggest that any individual or particular role was delegated or assigned toor played by any of the applicants. A fortiori, there is no suggestionthat any of the applicants was the directing mind or will of the corporation,either generally or in relation to any particular allegation.
>
> Mr. Haynes emphasizes that civil orcriminal liability is not alleged. The allegations are perhaps more akin todisciplinary allegations. However, I agree with counsel for theapplicants that the consequences can in some respects be as serious as incriminal or civil proceedings. Therefore a standard of justice that fallsshort of what is required in civil proceedings would not seem to meappropriate.
>
> There are no legal consequencesattached to the findings per se of a Commission of Inquiry. But they havepublic attention. More so than most criminal or civil proceedings. The impactthat such findings may have on one's reputation must therefore be considered."

As stated in paragraph [17], thejudge's decision was based on his finding that there was no evidence providedon which the allegations could reasonably be brought.

[40] We disagree with the judge that the case should be resolved by a consideration ofthe evidence in support of the allegations. Whether or not there wassufficient evidence to support the allegations was a matter for the Commissionto determine and the Court should not usurp the Commission's function. Moreover, a resumé of the evidence is merely a short summary or account of theevidence that the Commission has at its disposal in considering theallegations. In our judgment, it was necessary for the judge to consider firstwhether the notices were properly issued to the respondents. If the noticescould properly be issued only to the Board, as we have held, the evidenceagainst the respondents had to be considered in light of that reservation.

[41] We appreciate that Mr. King drew a distinction between "where there is no evidenceon which the facts contained in the notices could

reasonably be based" and "lackof sufficient evidence". The former, he submitted, was a question of law forthe Court, while the latter was a matter of fact for the Commission. He gavethe history of the function of the Board. The operation of the Hospitalwas to be financed by the Ministry of Health prior to the Board assumingresponsibility. He also stated that many of the allegations made against therespondents were matters effectively under the control of the Minister, who hadpower to give directions to the Board. Alternatively, he submitted that theallegations of misconduct were matters of management. He furthersubmitted that the substance of the evidence could not possibly supportallegations of misconduct on the part of the respondents. However, as wehave already stated, the evidence was a matter properly to be determined not inrelation to the respondents, but in the context of their being Boardmembers. The assessment of that evidence and the findings of fact shouldproperly be made only by the Commission.

[42] We are supported in our view by the following passage from the judgment of ***DécaryJA*** in the ***Federal Court of Appeal*** in the ***BloodSystem Case*** at ***page 266:***

> **"**I should also…immediately reject theprocedural argument made by (one of the appellants), which was that there wasno evidence in the record on which the Commissioner could rely to make anallegation of possible misconduct against it. The commission's record isnot before us, and we are quite simply not in a position to evaluate the meritsof this argument. Had the record been before us, we would have beenextremely reluctant to allow ourselves to be persuaded by such an argument atthe stage of the delivery of the notice, which is where we now are. If,as (the appellant) contends, there is no sufficient evidence in its regard, theCommission will surely refrain from making a finding of misconduct against itin the final report."

[43] The judge applied the test of reasonableness in the ***Wednesbury***sense to the allegations of misconduct. The test is "that it must be provedto be unreasonable in the sense that the court considers it to be a decisionthat no reasonable body could have come to": ***Associated ProvincialPicture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 per Lord GreeneMR*** at ***230***. ***Lord Greene*** further statedat ***pages 228*** and ***234,*** "it must always be rememberedthat the court is not a court of appeal ... The power of the court to interferein each case is not as an appellate authority to override a decision of the(decision-making) authority, but as a judicial authority which is concerned,and concerned only, to see whether the (decision-making) authority (has)contravened the law by acting in excess of the powers which Parliament hasconfided in (it)."

[44] "Theprinciples of ***Wednesbury*** review … are that judicial review is notan appellate procedure; the court must not substitute its opinion for that ofthe decision-maker; the court must rule only upon the legality of a decisionand not upon its correctness; the court will concern itself with the manner inwhich a decision is reached rather than with the substantive merits of thedecision itself": ***Judges and Decision-Makers: The Theory andPractice of Wednesbury Review*** by ***Lord Irvine of Lairg, Q.C.[1996] P.L. 59.***

[45] The Privy Council in a recent decision of 7 July 2003, confirmed that on achallenge by way of judicial review to a ruling of a Commission of Inquiry thematter is to be determined on the traditional judicial review basis ofreasonableness. ***Mount Murray Country Club Ltd. v. Macleod [2003] STC 1525("Mount Murray Club case")*** was an appeal from the Isle of Mann in whichthe Privy Council dismissed the appeal, which had confirmed that a Commissionof Inquiry was entitled to have disclosure of tax return documents of theappellants that were relevant to the inquiry which the Commission wasconducting. ***Lord Walker of Gestingthorpe*** at ***paragraph 28*** stated:

> "[T]heir Lorships have derived muchassistance from the decision of the Board (on an appeal relating to the powersof a commission appointed under the Commissions of Inquiry Act of The Bahamas)in *Douglas v Pindling* [1996] AC 890. Lord Keith of Kinkel,delivering the judgment of the Board … summarised the position (at p 904):
>
> 'As regards the function of thecourt in the event that the commission's decision…is challenged, the matter isto be approached upon the traditional judicial review basis. The applicablecriteria are set out in the judgment of Lord Greene MR in *AssociatedProvincial Picture Houses Ltd v Wednesbury Corporation*…In particular, thedecision of the commission should not be set aside unless it is such as noreasonable commission, correctly directing itself in law, could properly arriveat'."

[46] The allegations of misconduct were not unreasonable in the ***Wednesbury***sense, except in relation possibly to the third respondent. The

noticeswere bad not because they failed the ***Wednesbury*** test, but becausethey should have been issued to the Board as the body corporate.

XV. CONSEQUENCES OF THE HIGH COURT ORDER

[47] Mr. Haynes opened his submissions by referring to (i)(d) of the grounds of appeal, where it is alleged that the judge erred in law "by quashingthe decision of the Commission to issue notices" and by drawing ourattention to the judgment which made "an order in each case to quash the decisionor act of the Commission issuing the Notices of Allegations". Healso referred to the order as drawn up, which declared that "the decisionof the respondents to give to the applicants Notices of the Allegations onFindings of Misconduct and to hear evidence in respect of suchallegations against them is invalid". Further, it was ordered thatcertiorari issue to quash "the decision" to issue notices. Mr.Haynes' contention was that the effect of the judgment and the order was notonly to quash the actual notices issued, but also to prevent the Commissionfrom making a decision to issue any further notices under ***section 23***and thereby preclude it from hearing evidence on the allegations ofmisconduct. The Commission would thereby be unable to make any adversefindings against the Board because the prerequisite notices could not beissued.

[48] The logical consequence of the judgment and order would have been to prejudicethe future conduct of the Commission in carrying out its inquiry. In our view,the Court should have ensured that the application for judicial review and theorder made thereon did not have the effect of aborting the Commission'sproceedings.

[49] We agree with Mr. Haynes' submission that the wording of the order had theeffect of depriving the Commission of its power under ***section 23***.The notices were bad only insofar as they were issued to the respondents andnot to the Board. However, "the decision" to issue notices could not have beenbad as the Commission had the power to do so under ***section 23*** and"the act" of hearing evidence could not be invalid as this is the procedureprescribed under ***section 23***. In view of the unfortunateresult of the order made by the judge we need to make clear the effect of ourdecision.

[52] ***Section 23*** gives the Commission the right to issue notices. The Commission can therefore issue notice of allegations of misconduct to theBoard. The form and manner of service of any such notice are entirely withinthe purview of the Commission.

[51] This judgment should not therefore be interpreted as preventing the Commissionersfrom issuing to the Board such notices as they see fit, provided that they arenot in excess of jurisdiction. The allegations themselves and thesufficiency of evidence to support the allegations are matters for theCommission under ***section 23*** and would not normally be subject tojudicial review prior to a hearing by the Commission.

XVI. GENERAL COMMENTS

[52] Mr. Haynes and Mr. King presented their respective submissions in this appealsuccinctly and have thereby enabled the Court, we trust, to add and contributeto an understanding of the ***Inquiry Act*** and its application tosome of the issues that arise following the appointment of Commissions ofInquiry.

[53] The primary function of Commissions of Inquiry is fact-finding. The factscannot and should not be found by the Courts. The position is well explained ina passage in the ***Supreme Court of Canada*** decision of the ***BloodSystem Case*** at ***page 14*** quoted from ***Phillips v. NovaScotia (Commission of Inquiry into Westray Mine Tragedy) (1995)124 D.L.R. (4th) 129 at 138***:

> "One of the primary functions ofpublic inquiries is fact-finding. They are often convened, in the wake ofpublic shock, horror, disillusionment, or scepticism, in order to uncover 'thetruth'. Inquiries are, like the judiciary, independent; unlike thejudiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free frompartisan loyalties and better able than Parliament or the legislatures to takea long-term view of the problem presented. Cynics decry public inquiriesas a means used by the government to postpone acting in circumstances whichoften call for speedy action. Yet, these inquiries can and do fulfil animportant function in Canadian society. In times of public questioning,stress and concern they provide the means for Canadians to be apprised of theconditions pertaining to a worrisome community problem and to be a part of therecommendations that are aimed at resolving the problem. Both the statusand high public respect for the commissioner and the open and public nature ofthe hearing help to restore public confidence not only in the institution orsituation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of thepublic."

[54] In exceptional circumstances, it will be appropriate for any dissatisfiedperson, group or organisation to make an application for judicial review duringthe course of the hearing of a Commission of Inquiry. Acourt application generally has the effect of delaying and sometimesdestabilising the work of a Commission and it is only in a limited numberof cases that such a course of action would be justified. It willgenerally be appropriate in relation to ***section 23*** notices tocontest the same before the Commission prior to any court application. Weadopt the words of ***Décary JA*** in the Federal Court of Appeal inthe ***Canada Blood System Case*** at ***page 250:***

> "In principle, therefore, I believethat it is possible to apply to quash a notice that a commissioner decides togive under section 13. In practice, however, I believe that the courts mustshow extreme restraint before intervening at this stage. The notices in no waystate the commissioner's opinion; they merely state the possibility that thecommissioner may state the opinion that there has been misconduct. Theallegations are not (or should not be) stated in legal language and must not beheld under a magnifying glass. When a commissioner decides to include a numberof allegations in a single notice, the notice may seem more overwhelming thanthe final report, in which the findings of misconduct, if such there be, willprobably be spread out. Since a notice, by definition, states possibleallegations of misconduct, it is inevitable that it will depict the conduct ofits recipient unfavourably, and that the recipient will believe that itsreputation is tarnished solely because a notice has been sent to it. Thus thereare many reasons why the Court should view the notice in context, and notdramatize its implications.
>
> The courts should intervene onlywhen the content of the notice implies an obvious excess of jurisdiction, ordiscloses a flagrant breach of the rules of natural justice. This needfor caution may be easily explained. Commissions of inquiry have becomean integral part of our democratic culture."

[55] Whereas judicial review is an appropriate remedy to control Commissions ofInquiry, challenges to their work are to be discouraged except in the clearestand most compelling cases. In the ***Mount Murray Club case,*** thePrivy Council stated at ***paragraph 27:***

> "[I]t would not havebeen right for the (judge or the appeal court), with much less knowledge of thefacts than the Commission, to intervene in order to impose on the scope of theinquiry restrictions which might prove arbitrary, or unworkable, or against thepublic interest."

Later in the judgmentthe Privy Council added at ***paragraph 36:***

> "the Commission is the guardian ofthe public interest…The Commission, having been granted extraordinary powers,must be relied on to exercise them responsibly in the public interest".

[56] It is an honour and privilege to be invited to serve on a statutoryboard. An *ex officio* member is appointed by virtue of theimportant position he or she holds in relation to the work of the board.Membership of most boards affords their members the opportunity for publicservice. As may be expected the work of many statutory bodies will be asuccess, but inevitably there will be some failures. In either event, themembers of such boards are accountable. When a Commission of Inquiry isappointed to investigate some aspect of the function of the board, it seems tous appropriate that all persons who can assist such a Commission with its workand especially board members should contribute to the investigation by theCommission. It was in this context that Mr. Haynes properly drew our attentionto ***section 10*** of the ***Inquiry Act,***which provides for the rights of persons interested as follows:

"10. An investigatory commission shall accord to any person, group or organisationthat satisfies the commission that he or it has a sufficient interest in thesubject-matter of its investigation a suitable opportunity to give evidenceduring its proceedings and, where appropriate, to call and examine andcross-examine witnesses either personally or by representative on evidence relevantto that interest."

It was Mr. Haynes' submission thatthe third respondent could have availed himself of the provisions under thissection.

XVII. DISPOSAL

[57] It would have been wrong for the High Court not to have provided relief to therespondents under the ***Administrative Act*** in the circumstances ofthis case. Misconduct is defined in the ***New Shorter Oxford EnglishDictionary, Fourth Edition***, as follows:

> **"Misconduct** *n.* ***1.*** Bad management,mismanagement, esp. culpable neglect of duties. ***2 .*** Improper orwrong behaviour."

An allegation ofmisconduct necessarily has a pejorative connotation. The very least,therefore, that responsible citizens who give public service on boards shouldexpect, is that any such allegation should be properly directed. Itcannot be right for an individual to be the subject of such an allegation whenhe or she operated within the context of a board and decisions made were thoseof the board. It cannot be right for a Board member whose appointment wasby virtue of the high position he held in the University to be personallysubjected to allegations of misconduct in circumstances in which he was nevercalled to give evidence and in which some of the allegations of misconductrelate to a period when he was not a Board member. Such notices were in excessof jurisdiction of the Commission and justified an application to the Court forjudicial review. We would therefore dismiss the appeal.

XVIII. COSTS

[58] As the first and third respondents, who were represented by counsel, have beensuccessful in the appeal, we exercise our discretion to award them their costsagainst the appellants.

[59] We should, however, sound a word of caution. Ill-conceived applicationsfor judicial review that are unsuccessful, which have the effect of disruptingthe work of Commissions of Inquiry, will doubtless in appropriate cases attractadverse cost orders against the applicants. Unmeritorious applicationsshould not be permitted to stall the work of important inquiries without anyliability for the payment of costs.

XIX. ORDERS

[60] Wetherefore make the following orders:

1. The appeal is dismissed.

2. The notices of misconduct issued to Mr. Brancker, Mr. Leacock and ProfessorWalrond under ***section 23*** of the ***Commissions of***

Inquiry Act,Cap. 112 are quashed.

3. The first and third respondents are awarded their costs here, including thecosts of the application and hearing by this Court on 25 March 2004, and thefirst, second and third respondents are awarded their costs in the Courtbelow. All costs are awarded against the appellants jointly andseverally, certified fit for two counsel for each respondent, the said costs tobe agreed or taxed.

Justice of Appeal

Justice ofAppeal. Justice of Appeal.