

DECISION ON A QUESTION OF BIAS

On 19 July, 1988 the applicant formally submitted that Ms. Richards should not sit as a member of the Authority in these proceedings. It was the applicant's submission that there is an appearance of bias arising out of Ms. Richards associations with one of the objectors to its application, namely the Consumer Credit Legal Service Co-operative Limited (the Legal Service). It has been stressed by the applicant that there is no allegation of actual bias on Ms. Richards part.

The applicant claimed to have first become aware of Ms. Richards associations as a result of a discussion between its solicitor and one of the solicitors for the Legal Service which had taken place on the previous day, ie. on the 18th July, 1988. In its submission of the 19th July it relied on certain documents which showed Ms. Richards to have been a director of the Legal Service for particular periods. Throughout this matter the terms director and member of the Committee of Management have been used apparently interchangeably and we do not consider there to be any difference of significance between them in the context of this matter.

Immediately after the applicant's submission had been made the Authority adjourned for a brief period. It then reconvened and informed the parties that Ms. Richards proposed to prepare and make available to the parties a detailed statement of her past associations with the Legal Service. Such a statement was delivered later on the same day and certain discussions ensued as a result of which Ms.

Richards agreed to prepare a supplementary statement after she had had the benefit of perusing certain annual reports of the Legal Service. The proceedings were then adjourned in order that the applicant could supplement its submission after considering the statements of Ms. Richards and in order that the objectors could respond in full to the applicant's submissions.

The Authority reconvened on 27 July, 1988. Mr. Meagher, who appeared for both objectors on this issue, tendered an Affidavit by Mr. Bingham and certain Minutes of the Committee of Management of the Legal Service. The Authority was also provided with copies of the annual reports of the Legal Service for the years 1984-87 inclusive.

Certain facts are clear. Ms. Richards association with the Legal Service commenced in mid 1984 when she became a volunteer worker for the service, which capacity lasted until April 1985. In December 1984 she was elected to the Committee of Management of the Legal Service for a period which ended in April 1985. She was re-elected to the Committee of Management in June 1985 and continued as such until August 1986 when she resigned.

The Minutes of the Legal Service disclose that Ms. Richards attended meetings of the Committee of Management on 3 December 1984, 16 January 1985, 12 March 1985, 30 April 1985, 27 August 1985, 8 October 1985, 19 November 1985, 4 February 1986, 26 March 1986, 22 April 1986 and 26 August 1986. The Minutes of the Annual General Meetings of the Legal Service held on 30 April 1985 and 26 March 1986 both record Ms. Richards attendance.

In Mr. Bingham's Affidavit it is stated that the Legal Service decided to object to HFC's application on or after 29 July, 1987, that being the date on which notice of HFC's application for a licence was published pursuant to section 42 of the Credit (Administration) Act. It is further said that that decision was made by the Co-ordinator who was an employee of the Legal Service and not by the Board of Directors. Be that as it may, the objection is, as its very terms stipulate, that of the Legal Service.

For the objectors it is argued that unless it appears that Ms. Richards had an active part in the formulation of the decision to object to the application made by the applicant or was otherwise directly concerned with the objection, her association with the Legal Service as a member of the Committee of Management does not create an appearance of bias which would disqualify her from sitting as a member of the Authority. In furtherance of that argument, the objectors say that nowhere in the Minutes of the meetings of the Committee of Management attended by Ms. Richards is there any specific reference to HFC or to these proceedings.

Paragraphs, 4, 6 and 7 of Mr. Bingham's Affidavit assert that (i) Ms. Richards was not involved in the preparation of any matters put or to be put before the Authority in these proceedings; (ii) prior to 26 March 1986 the sole control of objections to credit providers licences was one of the ordinary functions of the employee Co-ordinator (then Mr. Gross); (iii) thereafter until March 1987 there was a licensing sub-committee of the Board of Directors that did not include Ms. Richards; (iv) in March 1987 that sub-committee disbanded and the sole

control of objections was exercised by the then Co-ordinator, Mr. Nelthorpe; and (v) that Ms. Richards was not informed or consulted about matters relating to objections to any credit provider, including HFC.

It appears to us that there is nothing in the Minutes which is contradictory of any of the assertions in Mr. Bingham's Affidavit although we do observe that the Minutes do not confirm the existence of these arrangements and that looked at in that light there may be some support for the comments of Mr. Charles on behalf of the applicant that the Minutes are unlikely to show the full range of matters discussed at meetings of the Committee of Management, including those attended by Ms. Richards.

The Annual Reports for the relevant years of the Legal Service do not assist very much in establishing the extent to which individual members of the Committee of Management were involved in or even consulted upon the preparation and work generally carried out by the Legal Service in furtherance of their present objection. They show clearly enough that the Legal Service has adopted a policy of taking an active role in the objection processes provided for by the Credit (Administration) Act but that is hardly news to this Authority.

Of importance to the present issue is the question of the activities of the Legal Service in connection with this particular objection during the period that Ms. Richards was a member of the Committee of Management. Clearly enough the formal decision to object was made about the end of July 1987, almost 12 months after Ms. Richards ceased to have any direct association with the Legal Service.

However, it is evident to the Authority that the Legal Service had these proceedings in contemplation at a much earlier point in time. During the course of the hearing, questions arose concerning claims for privilege made by the Legal Service in respect of certain documents which were not made available to the applicant during the discovery process. One such document was a note made by a Mr. Campbell in mid February 1985 of certain telephone conversations. Mr. Bingham said that the document was prepared "for the express purpose of these proceedings". (Transcript p. 1298).

At a later stage of the proceedings, Mr. Nelthorpe , in relation to the same document, said "it is difficult to imagine what other purpose there could be in Mr. Campbell writing to the Legal Service if it was not for the purpose of these proceedings. He was asked quite specifically to write and give us information relating to these proceedings". (Transcript p. 2522).

At no subsequent stage has it been indicated that there was any error or mistake in the explanation given to the Authority as to the circumstances of the creation of the Campbell document. We, therefore, must take it that the Legal Service had this present objection in mind as early as mid February, 1985.

The evidence as to Ms. Richards' actual involvement with the preparation of the present objection is less conclusive. No doubt has been cast on the accuracy of either of her statements in so far as they relate to her activities as a volunteer worker for or member of the Committee of Management of the Legal Service but it must be said that

Ms. Richards is there saying that she has no recollection of any discussion or involvement with this specific objection.

As previously indicated, the Minutes do not show that at any meeting of the Committee of Management attended by Ms. Richards any decision or formal motion was taken or put which related to this objection.

However, it does not appear to us for reasons indicated earlier that that entitles us to conclude as a matter of certainty that the question of the proposed objection by the Legal Service to the applicant's licence did not arise for consideration or discussion at any meeting of the Committee of Management attended by Ms. Richards. All that we believe we can conclude from the facts before us is that during at least some of the time when Ms. Richards was a member of the Committee of Management, the Legal Service was seriously contemplating the objection and undertaking work in preparation therefor.

The objection to Ms. Richards is based on apparent bias, not actual bias. Counsel have referred the Authority to a very considerable number of cases to assist it in determining the present issue. It seems to us that the principle of law to be applied is that set out in the joint judgement of Barwick, C.J., Gibbs, Stephen, & Mason, J.J in *The Queen v Watson* (1976) 136 C.L.R. 248. The test to be applied is whether a fair minded person with the knowledge of the facts known to the Authority might reasonably suspect that the member of the Authority concerned might not resolve the question with a fair and unprejudiced mind.

It is also clear from the authorities that there must be a reasonable as distinct from fanciful apprehension or suspicion that the member

might not bring a fair and unprejudiced mind to the determination of the matter. It seems to us that our duty is to apply those principles to the facts of this present case.

We do not consider that the facts of any particular case cited to us by Counsel are sufficiently similar to the facts before us to enable us to merely adopt the decision in that case by the reasoning that the facts are indistinguishable.

As previously stated Ms. Richards was a member of the governing body of the Legal Service during the period when these proceedings were in contemplation and preparation for them was under way. The role of the Committee of Management is to manage, direct and control the affairs of the Legal Service. In our view, that Ms. Richards served on the Committee of Management during the period referred to is sufficient to create a reasonable as distinct from fanciful suspicion in the minds of an informed bystander that Ms. Richards might not resolve the questions in these proceedings with a fair and unprejudiced mind.

Mr. Meagher, for the Objectors, referred to the provisions of section 17(2)(c) of the Credit (Administration) Act which require that the member therein referred to must have knowledge of the interests of persons who obtain or seek to obtain credit from credit providers and further must not have had experience in the provision of goods or services or the provision of credit. He went so far as to assert that it may be assumed that unless a person has been associated with the Legal Service in the past, such a person would not have the requisite knowledge of the interests of persons seeking to obtain credit. With respect, we cannot agree.

We do not think that it can be seriously maintained that it is only through association with the Legal Service that one can ever acquire a knowledge of the interests of borrowers sufficient to satisfy the requirements of section 17(2)(c) of the Act.

However, it is not our view that every association or involvement with the Legal Service will lead to a disqualification from membership of the Authority dealing with an objection brought by the Legal Service. Each instance has to be examined on its own merits and in this case it is clear that what has principally influenced us in our decision is the fact that Ms. Richards was a member of the governing body at a time when the objection was under contemplation and being prepared for.

It seems to us, however, that other associations with the Legal Service may not have similar consequences; for example, a volunteer worker who has handled individual cases which involved advising consumers in disputes with lenders seems to us to be in a position very much analogous to a solicitor who has acted for various clients.

It is the unanimous decision of the Authority that it must uphold the applicant's submission and that the Authority as presently comprised shall cease hearing this matter.

R. T. VINEY
Chairman

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J. L. TREVENEN
Member

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C. H. RICHARDS
Member

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29 July, 1988