BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1077 of 2013

BETWEEN

COMMISSIONER OF POLICE DARWIN DOTTIN CLAIMANT

AND

SIR ELLIOTT FITZROY BELGRAVE FIRST RESPONDENT

THE POLICE SERVICE COMMISSION SECOND RESPONDENT

Before The Hon. Madam Justice Margaret Reifer, Judge of the High Court

2013: June 24, 28;
July 5, 10, 11;
September 18;

Mr. Elliott Mottley QC, Mr. Leslie Haynes QC, Mr. Stewart Mottley and Ms. Andrea Simon for the Claimant

Ms. Jennifer Edwards, Solicitor General, and Ms. Donna Brathwaite for the First Defendant

Mr. Patterson Cheltenham QC, Mr. Hal Gollop QC, Ms. Marsha Loughheed Paige, and Ms. Nathasha Greene for the Second Defendant.

DECISION

INTRODUCTION

[1] In a move eerily reminiscent of the 1993 compulsory retirement of **Jules Barnard,** Commissioner of Police of the Republic of Trinidad and Tobago, Barbados' current Commissioner of Police, **Darwin Dottin**, on the 17th day of June 2013 received a letter of similar import.

[2] On that said date, a letter was issued under the hand of a newly/recently appointed Chairman of the **Police Service Commission** to the Commissioner of Police. There exists some initial ambiguity as to whether the Chairman was acting on the advice of **His Excellency, the Governor General** or whether the Public Service Commission was advising His Excellency. This was easily addressed by counsel for the First Defendant who referred the Court to section 32 of the ***Constitution*** in the context of her submission that the Governor General pursuant to the provisions of the ***Constitution*** acts on recommendations, he does not take decisions, and prayed in support of this, Exhibit "GM 2", a letter of 13th June 2013 from the Public Service Commission to His Excellency. (See a discussion of this issue in ***Hochoy* v *NUGE et al* [1964] 7 WIR 174** and ***Keith Sandiford et al v Public Service Commission & the Attorney General*** (**decided 14th May 1998, Barbados High Court per Waterman J).**

[3] Nonetheless, two things are made pellucidly clear by this document:

(1) That the Governor General is considering the compulsory retirement of the Commissioner of Police purportedly "in the public interest" under the power conferred upon him by section 11(1) (a) of the ***Pension Act*** **Cap. 25**; and

(2) That the Commissioner is, with immediate effect, placed on what is described as "administrative leave" until further notice.

THE STATEMENT OF CASE

[4] The above stated events gave rise to the filing of this action by way of Fixed Date Claim Form on 20th June 2013.

[5] The First defendant to this action is **His Excellency, The Governor General, Sir Elliot Fitzroy Belgrave**.

[6] The Second Defendant is **The Police Service Commission** (hereinafter referred to as the PSC), an authority of the Government of Barbados established pursuant to the provision of section 91 of the ***Constitution*** of Barbados.

[7] This document was amended by the document titled Amended Fixed Date Claim Form filed on 27th June 2013. The Claimant therein, the **Commissioner of Police Darwin Dottin** (hereafter referred to as the COP) applied for Judicial Review of:

(1) The decision and/or advice and/or recommendation of the First Defendant made on or about 17th June 2013 to cause the Claimant to be placed on administrative leave from the said date;

(2) The decision and/or advice and/or recommendation of the Second Defendant requesting the First Defendant to cause the Claimant to be retired in the public interest from the office of Commissioner of Police of the Royal Barbados Police Force".

THE APPLICATION FOR INTERIM RELIEF

[8] Of more immediate relevance, is the Interim Relief sought in the Amended Fixed Date Claim which states as follows:

"9. An Injunction to restrain the First Defendant, by himself, his servants and/or agents or otherwise howsoever, from taking any steps or action to cause the Claimant to be retired from the office of Commissioner of Police under the provision of section 11(1)(a) of the ***Pensions Act***, **Cap. 25** or at all.

10. An injunction to restrain the First Defendant by himself, his servants and/or agents or otherwise howsoever, from taking any step or doing any act to cause the office of Commissioner of Police to be filled by a permanent appointment until after the trial proceedings or other order.

11. An Order that all proceedings relating to the removal of the Claimant from the office of Commissioner of Police by the First Defendant be stayed pending the determination of the trial of these proceedings;

12. An Order that pending the determination of the trial of these proceedings the status quo be maintained so that the Claimant is permitted to return to work/resume the office of Commissioner of Police."

[9] The Claimant filed two Affidavits in Support dated 20th June and 4th July 2013 respectively. Three further Affidavits were filed, two on behalf of the Second Defendant, which prompted the third, filed on behalf of the Claimant. A special order was made with respect to these three Affidavits, consequent on their content, in a course of action agreed to by all in an effort to contain the unwarranted or unjustified disclosure of their contents as, in the submission of counsel for the Second Defendant, they raised grave issues of National Security. It was ordered that these documents be filed with the Registrar of the Supreme Court personally, who would immediately thereafter seal these documents and return them to the judge.

THE CASE FOR THE CLAIMANT

[10] It is necessary to here note that the Claimant made two major submissions in this case, firstly by Mr. Mottley QC lead counsel, and by Mr. Haynes QC in Reply to Second Defendant's submissions.

[11] Counsel Mr. Mottley's submissions on why the court should grant the interim relief sought were succinct and made two major points. (It is here noted that the course taken in the Written Submissions handed to the Court on the date of hearing vary somewhat from the approach taken in the oral submissions. The points referenced above, relate to the oral submissions made to the Court at the hearing).

[12] His first and substantive point was that there was a fundamental breach of Natural Justice. He avers that it is significant that nowhere in the Affidavit in Response of the Second Defendant and in the Written Submissions of counsel for the First Defendant is there any reference to legislative justification for the decisions taken by the Defendants, particularly, the decision to send the Claimant on "administrative leave". He submits that such a decision was in breach of Natural Justice. He argues that this decision and the process followed in implementing it, is **NULL AND VOID**. In consequence, the Claimant remains the Commissioner of Police.

[13] **Lord Bingham**, in the Privy Council decision of ***McLaughlin v Governor of the Cayman Islands*** **[2007] UKPC 50** at para. 14 of that decision, is cited in support of this submission as follows:

> "It is settled law that if a public authority purported to dismiss the holder of a public office in excess of its power, or in breach of natural justice, or unlawfully (categories which overlapped), the dismissal was, as between the public authority and the office-holder, null, void and without legal effect, **at any rate once a court of competent jurisdiction so declared or ordered** (emphasis mine). Thus the office-holder remained in office, entitled to the remuneration attaching to such office; so long as he remained ready, willing and able to render the service required of him, until his tenure of office was lawfully brought to an end by resignation or lawful dismissal".

[14] His second substantive argument is that there is no issue to be tried and this is revealed by the Defendant's Affidavit in Response. As stated above, there is no justification in law for the "administrative leave" placed before the Court. It follows, therefore, that the Court cannot apply the other tests of ***American Cyanamid*** *(infra).* In other words, if there is no serious issued to be tried, the Court cannot go on to look at the balance of convenience (or for that matter the adequacy of damages), it simply does not arise as an issue.

[15] In further support of the above submission he referenced the following authorities: ***National Commercial Bank of Jamaica v Olint Corporation;*** *(infra);* ***Official Custodian for Charities and Others v Mackie and Others*** **[1985] Ch. 168; Civil Court Practice 2013** (on circumstances where balance of convenience may not be relevant); ***Mclaughlin v Governor of Cayman Islands*** *(op cit);* ***Patel and Others v W H Smith (Eziot) Ltd and Another*** **[1987] 2 All E.R. 569.**

[16] Counsel went further, in effect submitting that this court has **NO** discretion but to grant the relief sought when he states in his Written Submissions as follows:

> "It is submitted that if as a matter of law on an application for an interim injunction the only evidence before the court is that of the person seeking injunctive relief, **the court must necessarily grant the injunctive** relief

sought (my emphasis). Lord Diplock's guidelines in ***American Cyanamid v Ethicon*** **[1975] AC 396** do not come into play."

Is this a suggestion, that in this event, the Court has **NO DISCRETION** and **MUST** grant the relief sought?

[17] In anticipation of the submission of the Second Defendant on the issue of Public Interest Immunity, counsel further submitted that he is not asking for the discovery of any document and that Public Interest Immunity goes to the issue of evidence, it cannot stop the court from hearing this case, the court is concerned solely with the process.

THE CASE FOR THE FIRST DEFENDANT

[18] The approach of the First Defendant to the application for Interim Relief was to the effect that there was no objection in principle to the terms of paragraphs 9, 10 and 11 of the demand for Interim Relief with the exception of some stated minor amendments to paragraph 9. In addition, in view of the submission made above (re: section 32 of the ***Constitution*** which establishes that the Governor General acts on recommendations), it was her further submission that if the court is minded to make orders in this matter, such orders should only be made against the PSC.

[19] Counsel adopted the guidelines of **Lord Diplock** in ***American Cyanamid Co. v Ethicon*** **[1975] A.C. 396** in determining whether an interim injunction ought to be granted. She submits that these guidelines are as follows:

(a) Is there a serious question to be tried;

(b) Whether damages would be an adequate remedy;

(c) The balance of convenience (In this regard she made reference to the observations of **Keer L.J. in *Cambridge Nutrition Ltd v BBC*** **[1990] 3 All E.R. 523** at **534** that the Cyanamid case must never be used as a rule of thumb, but rather an authoritative and helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

(d) Special cases.

[20] It was her submission that the Court ought not to permit the Claimant to return to work or resume the office of COP. She argued that there was a serious question to be tried, but it was her view "that damages would be an adequate remedy and as such the balance of convenience does not come into play." She submitted that the test is whether damages would be an adequate remedy and not whether they would be a perfect remedy. She argued that where there is a question of which of the two, (private interest vs. public interest arises), the public interest is always given priority over private interests.

[21] Further, it was her view that the case of ***National Commercial Bank of Jamaica,*** referenced by counsel for the Claimant in his submissions, was supportive of her submission that where damages are an adequate remedy there is no reason to interfere with the substantive issue until trial. Her further argument was that the status quo is that the Commissioner of Police is on leave, as opposed to the Claimant's counsel's submission that the Commissioner of Police is still in fact the Commissioner of Police since there is no power under the Pension Act 'to retire in the public interest' and any such purported action is null and void.

THE CASE FOR THE SECOND DEFENDANT

[22] Unlike counsel for the Claimant he sees a serious issue to be tried, which will not evaporate on the granting of the injunctive relief sought by the Claimant. He submitted that there is a significant public element in this matter and it has significant public implications.

[23] In other words, he submits that the Court should follow the footprint espoused by **Burgess JA** in the ***Toojay* case**, it having been accepted that there is a serious issue to be tried. It is his submission on the assessment of the "balance of convenience" test that the balance must lie in the direction of a non-return to office. In his view, the allegations made against the Commissioner of Police are grave and they raise severe concerns. The Claimant is not a low level functionary, and should the Court return him to this position, his ability to function would be severely compromised. The Affidavits and exhibits reveal a loss of confidence in the Claimant and taking into account the nature of his job, a court should be loath to return him to office.

[24] The second and most important point addressed by counsel for the Second Defendant raised the defence of National Security, a plea which counsel suggests, if accepted, would

'trump' all other submissions made and bring this proceeding to an immediate finish. Stated otherwise, he argues that both applications for interim and substantive relief by way of judicial review should be excluded on the ground of National Security. In other words, counsel argues that such a plea/ defence would render this matter non-justiciable. (This also speaks, he says, to the issue of whether there is serious issue to be tried/an arguable defence as this without more shows conclusively that there is an arguable defence).

[25] He submitted that the case of ***Council of Civil Service Unions v Minister for the Civil Service*** **[1985] A.C. 374** (hereinafter referred to as the ***GCHQ*** Case) is the 'locus classicus.' The judgments of the four laws lords, **Lord Fraser, Lord Scarman, Lord Diplock** and **Lord Roskill**, provide a helpful analysis of the governing considerations in a matter where the defence of National Security is raised.

[26] From these judgements counsel submits that three important observations can be made:

(1) That one cannot simply assert national security, it must be supported by evidence;

(2) Evidence must point to the fact that the decision-maker had national security in his mind when coming to the decision;

(3) That the defence of National Security can be raised at any stage of the proceedings, but once raised, a court ought to determine whether there is a sufficient evidentiary base to support it, and if so satisfied, it acts as a bar to the proceedings.

[27] The case of ***GCHQ*** was one where National Security was successfully argued. This extract from **Wade and Forsyth** at pages 469 and 470 of their text '***Administrative Law',*** and referenced by counsel in his submissions speaks eloquently to the rationalization of the plea:

> "The right to a fair hearing have to yield to overriding considerations of National Security. The House of Lords recognized this necessity where civil servants at the government communications headquarters, who had to handle secret information vital to national security, were abruptly put under new conditions to service which prohibited membership of national trade unions. Neither they nor their unions were consulted, in disregard of

> an established practice, and their complaint to the courts would have been upheld on grounds of natural justice, had there not been a threat to national security. The factor which ultimately prevailed was the danger that the process of consultation would have precipitated further strikes, walk-outs, overtime bans and disruption generally of a kind which had plagued the communications headquarters shortly beforehand and which were a threat to National Security. Since national security must be paramount, natural justice must then give way".

[28] Significantly, this proviso or qualification follows:

> "The Crown must however, satisfy the court that national security is at risk. Despite the constantly repeated dictum that "those who are responsible for the national security must be the sole judges of what national security requires,' the court will insist upon evidence that an issue of national security arises, and only then will it accept the opinion of the Crown that it should prevail over some legal right. There is also the proviso that the opinion of the Crown should not be one which no reasonable minister could reasonably have held. "There is no abdication of the judicial function, but there is a common sense limitation recognized by judges as to what is justiciable."

[29] Counsel also relied on the following cases in support of his submission: ***R v Secretary of State for the Home Department, ex parte Hosenball*** **[1977] 3 All ER 452;** ***R v Secretary of State, ex parte Cheblak*** **[1991] 2 All E R 319.** He explained that while the facts of all these cases are different, in all of them the plea of National Security was raised in circumstances where there were egregious breaches of due process and were successfully held to be non-justiciable after the court satisfied itself that there was an evidentiary basis for the plea.

[30] Counsel argues that the Minister of National Security is the ultimate (and proper) arbiter in determining whether issues of national security arise. The Minister considered the information before him, and "there was enough material for a reasonable minister to make an informed decision to ground the plea of national security." In other words, the

Affidavits filed by the Second Defendant shows that there is a sufficient evidentiary basis to raise the plea National Security and that the decision maker had considerations of national security in mind when making its decision.

CLAIMANT'S REPLY

[31] Counsel Mr. Haynes argued strongly that the matter is justiciable despite the plea of National Security; the issue is one of illegality (whether there is such a creature known to the law as "Administrative Leave") and he submits that where there is an issue of illegality as opposed to a review of an exercise of discretion, the plea of National Security does not play a part. He argues that by sending the COP on" Administrative Leave" the Governor General, acting on the advice of the PSC exceeded their statutory authority. Had the matter simply been one of a right to be heard (Natural Justice) then the issue could arise as to whether National Security could trump Natural Justice.

[32] He references in support of this proposition extracts from **Professor Eddie Ventose, De Smith, Woolf and Jowells's *'Judicial Review'***, and **Forsyth and Wade's** '***Administrative Law'***. Professor Ventose in the extract provided, while acknowledging the existence of this defence, went on to say most significantly:

> "….Such is the nature of the power that the courts usually avoid addressing such issues and they have accepted that national security consideration would trump considerations of natural justice. However, the threshold is a high one and the courts are not willing to let the Executive simply claim a national security interest that could trump natural justice or deny a person his liberty".

See also ***Oliveira v Attorney General of Antigua and Barbuda AG*** **2009 HC 15** (decided 26th May 2009, Antigua and Barbuda High Court per **Blenman** J) discussed by Professor Ventose.

[33] He further distinguished the three cases referred to by counsel for the Second Defendant. Firstly, the issue in the ***GCHQ*** case was one of an attempted review of executive discretionary power and not an illegality. Similarly, in ***Hosenball*** the Secretary of State, in failing to supply a deportee with particulars of the allegations made against him, was not acting contrary to law. Again in ***ex parte Cheblak*** the Home Secretary was acting in

accordance with the law and critical considerations were that there was an absence of bad faith and that the Home Secretary did not exceed his authority.

[34] It is his submission (relevant to the substantive issues not yet addressed) that by sending the COP on "Administrative Leave", the Governor General acting on the advice of the PSC exceeded the statutory limitations imposed upon them. His cited case authorities ***Secretary for the Home Department v Rehman [2001] UKHL 47; [2001] All ER (D) 155 R v Secretary of State for the Home Department ex parte Ruddock [1987] 2 All ER 518; A v Secretary of State for the Home Department [2005]*** **2 AC 68.**

[35] His second substantive argument is that before considering the plea of National Security the Court must first define National Security (see discussion of **Lord Slynn** in ***Secretary of State for the Home Department v Rehman***) and secondly, determine whether the evidence is cogent enough to prevent the Court from enquiring into the decision as challenged: see ***Belmarsh Detaubees case; X v Secretary of State for Home Department*** **[2004] UKHL 56.**

[36] Counsel concedes that section 11 of the ***Pension Act*** authorizes the PSC to recommend to the Governor General the retirement of the COP once he has reached the appropriate age, but such a decision is subject to challenge if it is not made in 'good faith'. The most recent Affidavit of the COP lays the basis for the challenge to that decision on the basis of '*mala fides'*: see ***Anderson Bowen*** case where **Kentish J** ruled that there is a serious issue to be tried.

[37] The factual matrix of this case raises other issues which were addressed by counsel, but not discussed at this time but generally related to the jurisdiction of the PSC and the COP and what constitutes the 'status quo' amongst other things.

THE LAW

[38] It is unnecessary to restate that law as if relates to the source of the discretion vested in this Court and its exercise, be it to grant or discharge, an interlocutory injunction: see ***American Cyanamid; Williams v Canadian Bank of Commerce Trust Co. et al*** **decided 29th November 1979 Barbados High Court per Chase J (Ag);** ***Toojays Ltd v Westhaven Ltd*** **decided 19th September 2011, Barbados Court of Appeal per Burgess JA**(hereinafter referred to as **Toojays**).

[39] In ***Toojays,*** **Burgess JA** thoroughly reviewed and analysed the law on this issue, concluding that the proper approach as espoused by **Lord Diplock** in ***American Cyanamid***, and the only logical approach distilled from the statutory provisions (section 44(b) of the ***Supreme Court of Judicature Act***. **Cap. 117A** and section 5(2) and 7 of the ***Administrative Justice Act*** **Cap. 109B**) is a two-step (as opposed to a three-step) approach which he elucidates at paragraph 42 of his judgement as follows:

> "In sum, taken in its statutory context, the ***American Cyanamid*** guidelines must be taken to have established a two-stage enquiry. The first stage involves a consideration of whether there is a serious case to be tried and at the second stage the balance of justice (convenience) is the governing consideration.

[40] At paragraph 57 and 59 he speaks further of the General Approach and Exceptional Circumstances making, in my opinion two very critical points.

At paragraph 57 he states as follows about the General Approach:

> "This approach views "damages" as referring to those damages which are legally recoverable in the action; and "adequate" as synonymous with quantifiable. It proposes that as a general rule the object of best enabling the trial judge to do justice between the parties, whichever way the decision goes at trial, requires that, in the words of Buckley LJ in the English Court of Appeal decision in ***Polaroid Corporation v Eastman Kodak Co Ltd*** **[1997] RPC 379 at 395-**
>
> > "If the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained save in exceptional circumstances".

[41] At paragraph 59 **Burgess JA** sought to define "Exceptional Circumstances" as follows:

> "In this regard, it appears from the cases that what constitutes "exceptional circumstances" are those circumstances where the interest of justice renders the general approach inapplicable"

[42] See also **Mustill LJ** in ***Locabail International v Agroexport*** **[1986] 1 All ER 901;** ***Zockoll Group Ltd v Mercury Communications Ltd*** **[1998] FSR 354;** ***Nottingham Building Society v Eurodynamics Systems Plc.*** **[1993] F.S.R. 468;** ***NCC International AB v Alliance Concreete Singapore Pte Ltd*** **[2008] 5 LRC 187;** ***Cayne v Global Natural Resources plc*** **[1984] 1 All ER 225**

[43] It is important here to note in contrast to the above the seemingly conflicting statements made by the Privy Council in ***National Commercial Bank v Olint*** **[2009] 5 LRC 370.**

[44] There is significant dicta in the above caselaw and others to the effect that the rules applicable to the granting of an interlocutory prohibitory injunction and an interlocutory mandatory injunction (as in this case) differ (discussed by counsel for the Second Defendant at paragraphs 34 to 59 of his written submission where he argues that it is widely accepted that the test is more stringent than that when considering the grant of a prohibitory injunction).

[45] In ***National Commercial Ban***k the Privy Council chided the trial judge and Court of Appeal of Jamaica for delving into a discussion as to whether the injunction sought was prohibitory or mandatory. They termed these arguments barren and stated:

> "21. Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant and interlocutory injunction".

[46] The text advocated was a determination as to "whichever course seems likely to cause the least irremediable prejudice to one party or the other".

[47] In my opinion just another expression of the truism that "every case has to be determined on its own facts".

THE ISSUES ARISING

[48] Consequent on the above, the issues arising for determination are as follows:

(i) Is there a serious issue to be tried;

(ii) If yes, where does the balance of convenience (justice) lie; taking into consideration the general approach to the adequacy of damages and a consideration of whether these are Exceptional Circumstances;

(iii) The plea of National Security (whether both the interim and substantive relief sought by way of judicial review by the Claimant ought to be excluded on the grounds of National Security).

(iv) Assuming that the plea of National Security is not accepted by the Court, whether the Claimant should be returned to office pending the hearing of the substantive matter.

IS THERE A SERIOUS ISSUE TO BE TRIED?

[49] Notwithstanding the admission of counsel for the Second Defendant that there is (to the best of her knowledge) no such animal as "Administrative Leave", there are nonetheless, in the words of **Lord Diplock** in ***American Cyanamid*"** detailed questions of law which call for detailed argument and mature considerations".

[50] I accept the submissions of counsel for the Defendants that there is a serious issue(s) to be tried and consequentially, reject that of the Claimant that there is not.

[51] I see issues of Procedural Fairness, Natural Justice, Excess of Jurisdiction/Illegality, Improper exercise of discretion, among others, arising from the factual matrix of this matter. At all times counsel for the Claimant have maintained that there are two issues, firstly, that there is no known creature called "administrative leave", and secondly, that the Commissioner of Police should have been given an opportunity to be heard (Natural Justice). I shall deal with the issue of balance of convenience (justice) together with the issue of re-instatement later in this judgement.

THE PLEA OF NATIONAL SECURITY

[52] Counsel for the parties have more than adequately outlined the principles of law and relevant case law to be applied where the defence of National Security is raised, and it is unnecessary at this stage to examine it further. See ***GCHQ*** case**; *The Zamora* [1916]2 AC77' *R v Secretary of State for the Home Department ex parte Hosenball*; *Chandler v***

Director of Public Prosecution **[1964] AC 763;** ***Boddington v British Transport Police*** **[1998] 2 All ER 203.**

[53] However, I do find most apposite the following statement made by **Taylor J** in ***ex parte Ruddock*** and repeat it hereunder:

> "..Conceivably (although I would reserve the point) in an extreme case the court might have to decline to try the issues. But in all such cases, cogent evidence of potential damage to national security flowing from the trial of the issues would have to be adduced, whether in open court or in camera, to justify any modification of the court's normal procedure. **Totally to oust the court's supervisory jurisdiction in a field where ex hypothesi the citizen can have no right to be consulted is a draconian and dangerous step indeed. Evidence to justify the court's declining to decide a case (if such a course is ever justified) would need to be strong and specific. (emphasis added).**

[54] I accept the submission of counsel for the Second Defendant in response to the counsel for the Claimant when he says that a consideration of the cases relied on by the Second Defendant reveals no such distinction or limitation as canvassed by the counsel for the Claimant. He cites in support the judgement of **Lord Scarman** in the ***GCHQ*** case where he states as follows:

> "The point of principle in the appeal is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The question may arise in ordinary litigation between private persons as to their private rights and obligations: and it can arise, as in this case, in proceedings for judicial review of a decision by a public authority. The question can take one of several forms. It may be a question of fact which Parliament has left to the court to determine: see for example section 10 of the Contempt of Court Act 1981. It may arise for consideration as a factor in the exercise of an executive discretionary power. **But, however it arises, it is a matter to be considered by the Court in the circumstances and context of the case**. (emphasis mine). Though there are limits dictated by law and

> common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of power."

[55] The more powerful and persuasive argument, in this court's opinion, is the erudite discussion of **Hilaire Bennett** in her text '***Constitutional and Administrative Law',*** in which she points out the difficulties inherent in resorting to traditional terminology and classifications. Counsel for the Second Defendant adopted this learning to be found in her text, as do I:

> "Actions for improper motives, failing to take account of relevant considerations, failing to respect the requirements of natural justice and fettering discretion by adopting a rigid policy will all amount to unreasonableness – and hence – illegality as understood by the courts".

See also **Lord Bingham** in ***McLaughlin v Governor of the Cayman Islands*** (supra) where he speaks to the overlapping of the categories.

[56] It is my finding nonetheless, that the evidence provided by way of Affidavit evidence in this matter does not, at this stage of the proceedings, meet the threshold necessary to successfully ground a plea of National Security. They reveal a sensitive matter, the confidentiality of which can be addressed by the special measures already put in place of the court, namely, the "gag order", special filing arrangements and in camera hearings. Stated differently, there is no *"cogent evidence of potential damage to national security flowing from the trial of the issues…whether in open court or in camera, to justify any modification of the court or in camera, to justify* any *modification of the court's normal procedure."* (**Taylor J**. in ***Ex Parte Ruddock***). It brings into focus a sensitive issue crying out for statutory intervention and clarification.

SHOULD THE CLAIMANT BE RETURNED TO OFFICE PENDING THE HEARING OF THE SUBSTANTIVE ISSUE (THE BALANCE OF CONVENIENCE/JUSTICE).

[57] The determination of whether to return the Claimant to office until the hearing of the substantive hearing caused me great pause or to use the language of **Lord Diplock** "mature consideration".

[58] This court is of the opinion that in the final analysis the issue to be determined here is more about the balance of convenience and less about the adequacy of damages. (Note: it was the argument of counsel for the First Defendant that damages would be an adequate remedy and as such the balance of convenience does not come into play).

[59] This point of view of supported by the learned authors **De Smith, Woolf & Jowells** where in a discussion of the Interlocutory Injunction in Judicial Review proceedings this opinion is advanced as follows:

> :..It follows that in cases involving the public interest, for example, where a party is a public body performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of the adequacy of damages but on the balance of convenience test: see ***R v Secretary of State for Transport, ex p. Factortame Ltd.*** **(No.2) (1991) 1AC 603 at 672-673.** In such cases, the balance of convenience must be looked at widely, taking into account the interests of the general public to whom the duties are owed".

[60] It is interesting to note the approach taken by the Court of Appeal of the Organisation of Eastern Caribbean States in the unreported case of ***The Attorney General of the Commonwealth of Dominica v Williams et al*** **, Civil Appeal No. 13 of 2003,** judgement delivered on 18th February 2005 under the presidency of **Alleyne JA** (as he then was). On the issue of re-instatement argued by counsel for the Respondents, the Learned Judges declined to interfere with the declaration of the Learned Trial Judge, but outlined the arguments of the parties at Paragraph 24 of the decision as follows:

> "[24] Learned Queen's Counsel for the appellant contended, following submissions of learned counsel for the respondents, that even if the appeal were not successful on the substantive issues, the declaration of the learned trial judge that the appellants are still members of the police force should not be upheld. Counsel submitted that the police force is a disciplined force among whose principal functions is ensuring the security

of the State. On this basis, and to avoid the risk of undermining morale within the force, the court should avoid an order which would have an effect or reinstating these officers, and should instead make an order of compensation. In his oral submissions learned counsel for the respondents contended that to fail to sustain the learned trial judge's declaration in this respect would render the Constitution protection virtually worthless, or at the least, would severely diminish the value of the protection given to public officers by the Constitution".

[61] These arguments are similar in import to those made by counsel for the Defendants and counsel, Mr. Haynes for the Claimant.

[62] In ***Smith v Inner London Education Authority*** **[1978] 1 All ER 411, Browne LJ** had this to say on the relevance of the Public Interest in applications of this nature:

> "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed"

[63] Although, public employment is more often described as one of status rather than contractual, because of the constitutional powers vested in the various Service Commissions, there are, nonetheless, several similarities with contracts of employment in civil law.

[64] Civil Law (private contract law) is generally not responsive to claims of re-instatement of a contract of employment. A discussion of the principles governing enforcement or specific performance of a contract of employment is enunciated in **Halsbury's *Laws of England*, 4th Ed. Vol. 16** at paragraph 303 where it states:

> "Although the theoretical basis of it remains unclear, there is a normal rule of practice that a Court will not enforce a contract of employment, either by way of specific performance or by granting of an injunction that would have a similar effect. An employee who has been wrongfully dismissed will therefore normally have to accept the repudiation and use the employer for damages. **As an exception to this rule, there may be cases where a Court will grant an injunction to a wrongfully, dismissed**

employee to restrain the employer from acting on that dismissal where there remains a strong element of continuing confidence between the parties". (emphasis mine).

[65] A review of the case law will indicate that Courts of law rarely grant such relief.

[66] I wish here to distinguish the case of ***McLaughlin*** which was heavily relied on by counsel for the Claimant. A reading of this case does not provide support for the issue of re-instatement. The real issue addressed by the Privy Council in that appeal is stated succinctly by **Lord Bingham** as follows:

> "The real issue in this appeal concerns the compensation payable to Dr. McLaughlin following his dismissal or purported dismissal from the government service".

[67] In point of fact, the issue concerned the distinction between damages for wrongful dismissal in breach of contract as opposed to an award of salary (monetarily the more advantageous ruling). It was in consequence not so much a question of whether the act was VOID but whether it was unlawful and more simply, whether it was effective in bringing the tenure of a public office to an end. This fundamentally affected the computation of damages, a calculation of arrears of salary until resignation as opposed to damages computed from when the claimant's tenure of office lawfully ended.

[68] In my view, on an application of the General Approach referred to by **Burgess JA**, I am not persuaded that I should exercise my discretion to grant this relief.

[69] I next addressed the question of whether these are Exceptional Circumstances demanding the granting of the interlocutory relief sought. A consideration of this point carried more weight, especially the argument of counsel for the Claimant that this is a matter dealing with a civil servant at the highest level and that the ***Constitution*** provided certain safeguards by way of the establishment of Service Commissions meant to be a buffer between the politician and the civil servants. He argued forcefully that for the PSC to act in the way it did and then argue that damages is an adequate remedy is setting a dangerous precedent. In effect, they would be acting illegally and then enjoying the benefit of their actions. I have however expressed the view (above) that I see this as more an issue of the balance of convenience/ justice.

[70] In the final analysis, however, I find no Special or Exceptional Circumstances which demand the departure from the norm (arguments with respect to maintenance of status quo notwithstanding) to justify the granting of this relief.

[71] On a consideration of all aspects and points of view, I am still of the view expressed to counsel at the case management period of this matter, that the best approach and the only way to hold the balance of justice equally between all parties, would be to proceed swiftly to an expedited hearing of this matter.

[72] In view of the forgoing, and in consideration of the import of section 32 of the ***Constitution,*** namely, that the Governor General exercises his functions in accordance with recommendations made, this court declines to issue an injunction against him, but to do so more appropriately against the authority that issues the recommendation. Accordingly, it orders as follows:

(1) All action taken in this matter to date by the Second Defendant is stayed and the Second Defendant is restrained from making any further recommendations to the First Defendant to effect the compulsory retirement of the Claimant from the Office of Commissioner of Police under the provisions of section 11 (1) (a) of the ***Pensions Act*** **Cap 25** until the trial of these proceedings or other order:

(2) All other claims for relief are dismissed until further order.

[73] In closing, I wish to clarify my apparent disregard of certain applications and written submissions made by counsel for the Claimant in their Written Submissions (of which they are two). To do so I will of necessity have to address the chronology of events. The first Written Submission was handed to the Court and the other parties while Counsel Mr. Mottley was making his submission. It is evident that counsel for both Defendants noted the oral submissions and dutifully responded to same. Learned counsel Mr. Haynes QC replied for the Claimant and made submissions noted by the parties and thereafter submitted Written Submissions, expected by the Court and no doubt counsel for the other parties to reflect oral submission made. This second document also went significantly

further that the oral submissions, in other words, further submissions were made that counsel for the Defendants did not hear or respond to. In both cases relief was sought under the substantive claim (specifically paras. 1 to 3 of the Amended Claim) in addition to the claim for injunctive relief. Consideration of these submissions is accordingly deferred to the hearing of the substantive matters at the earliest possible date.

[74] The issue of costs is to be deferred.

Margaret Reifer
Judge of the High Court