

BARBADOS
[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 1280/2012
1281/2012
1316/2012

BETWEEN:

**RICHARD BOYCE
ANTONIO FORTE
ELPHENE MOORE
JOHN MAXWELL
VERNELLA WILTSHIRE
BARRY HUNTE
ELLIOTT BOVELL
TREVOR BLACKMAN
RODERICK WALCOTT
WINSTON HOLDER
VERNON MOORE
WAYNE ARCHER
SONIA BOYCE
ANDREW MOORE**

APPLICANTS/CLAIMANTS

AND

**COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL**

**FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT
THIRD RESPONDENT**

BETWEEN:

JEDDAR FERNEAUX ROBINSON

APPLICANT/CLAIMANT

AND

**COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL**

**FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT
THIRD RESPONDENT**

BETWEEN:

ERROL ELLIS

CLAIMANT

AND

**POLICE SERVICE COMMISSION
COMMISSIONER OF POLICE
ATTORNEY GENERAL
GOVERNOR GENERAL**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

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

2013: October 23

2014: March 4

Mr. Alair Shepherd QC in association with Ms Jennivieve Maynard and
Mr. Kevin Miller for the Claimant Errol Ellis (#1316/2012)

Mr. Tariq Khan, Attorney-at-Law, for the Police Service Commission

Ms. Donna Brathwaite QC for the First, Third and Fourth Respondents

Mr. Ralph Thorne QC in association with Ms. Mechelle Forde for the Claimants (1280 and 1281/2012)

DECISION

Introduction

- [1] This is a matter involving three separately filed (July 2012) applications for judicial review, which on the 1st November, 2012 were consolidated by Order of Chandler J. on an application of counsel in suit #1316/2012 filed 27th September, 2012.
- [2] The Respondents to the claims are largely the same, with the exception in the last filed claim (1316/2012) of a Fourth Respondent, being the Governor General of Barbados.
- [3] The First Respondent is the Commissioner of Police of the Royal Barbados Police Force, the functionary or public official charged with the "responsibility for the command and superintendence of the Royal Barbados Police Force under the Police Act, Cap.167 of the laws of Barbados".
- [4] The Second Respondent, the Police Service Commission, is "an authority of the Government of Barbados established by virtue of section 91 of the Constitution of Barbados charged with the power and duty conferred by the Constitution to determine, inter alia, the appointment of police officers."
- [5] The Third Respondent, the Attorney General "is being sued as the Representative of the Crown in right of its government of Barbados pursuant to the provisions of the Crown Proceedings Act, Cap. 197."
- [6] The Fourth Defendant in the third claim, the Governor General, "is joined as his Office is the office ultimately responsible for making all promotions within the Barbados Police Force acting on the representation of the Police Service Commission."
- [7] Chandler J further granted leave to counsel in that matter to amend his Statement of Case in terms that will be outlined later in this judgment as that amendment is the genesis of the current matter for determination, namely, a preliminary submission on a point of Constitutional importance.

Background to the Current Application

- [8] At this stage, it is relevant to briefly outline the nature of the substantive application which is generally (but not entirely) the same in all three actions. They have however been precipitated by the same event and for reasons which will become evident have been titled locally as "The Police Promotions Case(s)".
- [9] It was a matter of public knowledge within the Royal Barbados Police Force in and about 2012, that there were a number of senior positions currently or, soon to be, vacant as a result of senior officers retiring or nearing retirement. In fact, it is deposed by several of the Claimants that in May 2012 the First Respondent (Commissioner of Police) actually met with a general assembly of police officers to inform them of the existence of a high number of vacancies among the higher ranks of the Royal Barbados Police Force.
- [10] The listed Claimants were generally aware that they had been recommended for promotion and/or fell within the "zone of promotion" pursuant to the rules governing promotion within the Royal Barbados Police Force (presumably by the Promotions Advisory Board and/or the Commissioner of Police.)
- [11] Sometime in mid-July 2012 (immediately prior to the commencement of these legal proceedings) it was made known (as deposed by the Claimants) that police officers who had **not** been recommended by the Promotions Advisory Board and by the Commissioner's Office were to be promoted to the vacant senior positions with effect from 1st August, 2012 (some in fact purported to take effect from 15th July, 2012) and these said police officers were purportedly about to be handed their instruments of promotion instead of the Claimants.
- [12] This fact was allegedly made known by the delivery to the First Respondent/Commissioner of Police by the Second Respondent/Police Service Commission of letters of appointment.
- [13] Generally, all Claimants (being those officers who had been informed of their recommendation for promotion and not included in the list of persons to receive instruments of promotion) are aggrieved that their respective expectation of promotion within the ranks of the Force has been defeated by certain alleged unlawful acts (in breach of the Administrative Justice Act, Cap. 109B and the rules relating to promotions) deemed by them to be unreasonable, irregular, arbitrary, improper, an abuse of power and in bad faith.
- [14] In the first claim (1280/2012) fourteen (14) police officers sought Judicial Review of the decision of the Second Respondent (the Police Service Commission) in failing to promote them to certain specified ranks in the Royal Barbados Police Force (at the rank of Sergeant and above) and to certain attendant declarations. In essence, they allege that the Police Service Commission has failed to follow the correct procedure in relation to the recommendations made by the Police Service Commission to the Governor General.
- [15] In the second claim, one police officer seeks relief in identical terms to the first claim (1280/2012). It is of course relevant that the same counsel acts in claims 1 and 2.
- [16] In the third claim filed by a second/different attorney-at-law, a single police officer seeks judicial review, inter alia, of the decision of the Police Service Commission (the First named Respondent in that action) to promote certain officers to various ranks in the Royal Barbados Police Force with effect from the 1st day of August 2012. He has requested that the Police Service Commission provide him with reasons as to why he has not been promoted in view of the fact that he is within the "zone of promotion". The Police Service Commission while responding to the effect that he was considered, has declined to say 'why' he has not received a promotion.
- [17] As stated above, this is similar but different relief as that being sought in claims 1 and 2. The difference between these three consolidated claims will not be explored in this preliminary application but may be of real significance in the determination of the substantive action.
- [18] Pursuant to an Application for Interim Relief (Application for Court Orders During or After the Course of Court Proceedings) filed under claims 1280 and 1281, Kentish J on the 13th August, 2012 ordered, inter alia, the following:
"That the Respondents/Defendants be and are hereby restrained either by themselves, their servants and/or agents or howsoever otherwise from delivering or publishing in the Official Gazette or in any manner whatsoever or otherwise confirming to anyone the recent letter of appointment delivered to the Respondent/Defendant (Commissioner of Police) to implement the said appointments until the hearing and determination of the substantive application for review."
- [19] A perusal of the file by this Court suggests that this current application is as a result of the content of an Affidavit in Response to claim 1316/2012 filed 2nd August, 2012 by the then Chairman of the Police Service Commission, Dr. Trevor Austin Carmichael Q.C. (as he then was), because it was shortly thereafter (on 27th September, 2012) that counsel for the third claim filed the Application presently before the Court. At the heart of the response by the Chairman of the Police Service Commission was a reference to and reliance on the requirements of sections 9 and 10 of the Service Commissions Act Cap 34 the provisions of which said sections apply to all the individuals connected with these proceedings.
- [20] Section 9 and 10 of the Service Commissions Act state as follows:
"9. A person shall not in any legal proceedings be permitted or compelled to produce or disclose any communication, whether written or oral, which has taken place between the Commission or any member of the Commission and the Government or the Governor-General or any member of the Governor General's personal staff, or the head of a department of Government, or any communication between any member of the Commission and the Chairman or between the members in exercise of, or in connection with the exercise of,

the functions of the Commission, unless the Governor-General, after consultation with the Chairman, consents in writing to such production and disclosure.

10. (1) No member of the Commission or any other person shall, without the written permission of the Governor-General, publish or disclose to any unauthorized person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties in respect of any matters relating to the functions of the Commission."

[21] Significantly, subsection (2) ascribes criminal status and sanctions to a contravention of this provision.

[22] The Application presently before this Court appears to flow from a continuation of the proceedings before Kentish J. (after the Order made by Chandler J on 1st November, 2012 consolidating all the actions and granting leave to amend claim #1316/2012), and pursuant to the Order made by her on 9th January, 2013 similar in terms to the Application of 27th September, 2012 in which it was ordered, inter alia, that the constitutional issues raised in paragraphs 9 and 10 of the amended Fixed Date Claim Form in this consolidated action be adjudicated prior to any further Case Management Conference.

The Present Application

[23] This brings us to the matter to be presently determined by this Court more clearly outlined in Chandler J's Order of 1st November, 2012 as follows:

1. A Declaration that sections 9 and 10 of the Service Commissions Act Cap.34 of the Laws of Barbados are unconstitutional null and void as contravening the applicant's Fundamental Right to a Fair Hearing as protected by section 18 and enshrined in section 11 of the Constitution of Barbados;
2. A declaration that sections 9 and 10 of the Service Commissions Act Cap. 34 of the Laws of Barbados are unconstitutional null and void as contravening the doctrine of the separation of powers as enshrined and/or implied and/or the basis of the Constitution of Barbados.

[24] While it appears that the record does not show any formal application for Discovery by the Applicant in suit 1316/2012, it is evident from that Applicant's response to the Affidavit in Response of Chairman Carmichael that the invocation of the protection of sections 9 and 10 stands in the path of that Claimant proving his case.

[25] This is made clear by his counsel at paragraph 3 of his Written Submissions in this matter where he states as follows:

"For the purpose of fairly adjudicating the substantive claims and affording the Claimants their Constitutional Right to a fair trial (hearing) guaranteed by section 18(8) of the Constitution the Claimants require the PSC and the Commissioner of Police to disclose to the Court all communication whether written or oral which has taken place between the PSC and (a) the Commissioner of Police and (b) other officers of the Royal Barbados Police Force and which are material to these actions. In addition, the Claimants seek discovery of:

- (i) Any and all Memoranda, letters, notes or communications, whether oral or written from passing between the Commissioner of Police and the Chief Personnel Officer ("the CPO") any officer in the RBPF and/or the PSC;
- (ii) Any and all Reports of the PSC;
- (iii) Minutes of the meeting of the PSC.

However the PSC and the Commissioner of Police rely on sections 9 and 10(1) of the Service Commission Act Cap. 34 of the Laws of Barbados ("the Act") which they maintain prohibit them from disclosing and producing to the Court any such communication".

[26] It is the expressed view of this Claimant/Applicant that the adjudication of this application will answer the question as to whether these documents are subject to disclosure.

[27] It is to be noted here that counsel for the other Claimants indicated his solidarity with counsel Mr. Shepherd's submissions, but made the point that the outcome of this application will not affect his claims.

The Case for the Applicant Errol Ellis [#1316/2012]

[28] In his written and oral submissions to the Court, counsel for this Claimant/Applicant made two major points as follows:

The Constitutional Modification Argument

[29] Counsel for the Claimant concedes that sections 9 and 10(1) of the Service Commission Act Cap. 34 quite simply disentitle the Claimant to the discovery outlined above and/or place the right to that discovery in the hands of or at the discretion of the Executive. In consequence, he submits that these sections of the Act breach his client's rights to a fair hearing and he seeks a declaration that the Claimant has been discriminated against contrary to his constitutional rights as enshrined in section 11 and protected by section 18(8) of the Constitution."

[30] The most critical aspect of his submission is that while he concedes that sections 9 and 10 of the Service Commission Act predates the Constitution and is thus protected by the savings clause (section 26 of the Constitution), the matter does not end there; he argues further that this Court has a power to make modifications, given to it by section 4(1) of the Barbados Independence Order, which said provision "is wide enough to justify and/or allow for a modification of sections 9 and 10 of the Service Commission Act Cap. 34."

[31] Sections 4(1) and (6) of the Barbados Independence Order relied on by counsel for the Applicant read as follows:

"4(1) Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order.

(6) In this section "existing law" means any law having effect as part of the law of Barbados immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

[32] The Court must, in his submission, consider the basis on which sections 9 and 10 continued to have effect on the coming into operation of the Constitution assuming that these sections precluded the Claimants from obtaining any form of disclosure of the relevant evidence without the consent of the Governor General.

[33] Counsel argues that modification of sections 9 and 10 can be achieved by simply reading in the words, "such permission (or consent)

not to be unreasonably withheld.” The effect of this he says is to remove any inconsistency between sections 9 and 10 and section 26 of the Constitution. He submits that section 26 does not come into operation for reasons outlined in **Roodal v The State Cr. A No. 64 of 1999 of the Court of Appeal of Trinidad and Tobago**.

- [34] Modification is necessary, he argues, because these sections remove from the jurisdiction of the Court the power it requires over discovery so as to fairly adjudicate the rights of the parties. It violates the right to a fair trial as it allows a party the right to withhold relevant documents. The principle of “equality of arms” (fair balance between the parties), an essential element of a fair trial requires that the parties herein have access to relevant records and documents; see **McMichael v United Kingdom (1995) 20 EHRR 205 at paragraph 80; Dombo Beheer B.V. v The Netherlands (1994) 18 EHRR 213; McGinley and Egan v The United Kingdom (1999) 27 EHRR 1 (the human rights cases decided by the Commonwealth on Human Rights and the European Court)**.
- [35] Counsel speaks to the correct approach to interpretation of a Constitution such as that of Barbados and cites in support thereof the following authorities: **Edwards v Attorney General for Canada [1930] AC 124, 136; Minister of Home Affairs v Fisher [1980] AC 319, at 328-329; Hunter v Southam Inc. [1984] 2 SCR 145, 155; Attorney General of Trinidad and Tobago v Whiteman [1991] 2 AC 240, 247**.
- [36] These cases all speak generally, and more specifically, in the words of Lord Keith of Kinkel in **Attorney-General of Trinidad and Tobago v Whiteman**, of adopting the Purposive Approach to Constitutional interpretation, as opposed to a narrow and legalistic approach.
- [37] In counsel’s submission, the Court must therefore adopt a broad and generous approach in its assessment of the scope of the section 4 (1) power to modify. Counsel draws the Court’s attention to the words of De La Bastide CJ (as he then was) in **Roodal**, a bold call for **judicial activism** when he states as follows:

“Having made this review of the authorities, we are now in a position to assess the purport and effect of section 5 (1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being “construed”, the type of ‘construing’ which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. **In fact, the function which the court is mandated to carry out in relation to existing laws under this section goes far beyond what is normally meant by ‘construing’.** It may involve the substantial amendments of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law (emphasis mine). **Mr. Daly’s submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn the clock back.**”

- [38] Counsel also referenced **DPP v Mollison (No. 2) [2003] UKPC 6** where the Privy Council concluded that section 4(1) of the Jamaica Constitution) Order 1962 gave the court power to modify section 29 of the Juveniles Act 1951 so as to bring it into conformity with the Constitution after consideration of the following five cases: **Kanda v Government of Malaya [1962] AC 322; San Jose Farmer’s Co-operative Society Ltd. v AG (1991) 43 WIR 63; Vasquez v R [1994] 1 WLR 1304; Browne v R [2000] 1 AC 45; Roodal** (supra). In **Mollison** the Privy Council held that legislation that provided for a juvenile to be detained “during the Governor General’s pleasure (i.e. the executive) was incompatible with the separation of powers and was therefore unconstitutional: see also **Hinds v The Queen [1977] AC 195**.
- [39] The modification suggested under the authority of section 4(1) of the Barbados Independence Order is the substitution of “may” where sections 9 and 10 read “shall” and, as already mentioned above reading in the words “such permission (or consent) not to be unreasonably withheld”.

Separation of Powers Argument

- [40] In his submission, counsel argues that sections 9 and 10 of the Service Commission Act violate the constitutional separation of powers inherent in the Constitution in that it allows the executive to assume a judicial power. He relies in this submission on the case of **State v Khoiratty [2006] UKPC 13 (22nd March 2006); Ahnee v Director of Public Prosecutions [1999] 2 AC 294; DPP v Mollison** (supra).
- [41] He argues further that section 26 of the Constitution only prevents a challenge to existing legislation on the grounds that the provisions offend the fundamental rights and freedoms as enshrined in the Constitution, it does not immunize existing legislation if that legislation offends against the principle of separation of powers.
- [42] In so far as questions of discovery are matters that are under judicial control, then sections 9 and 10 by removing that control from the judiciary and giving it to the executive are in breach of the Separation of Powers and so unconstitutional.

The Case for the First Respondent 1316/2012 [Police Service Commission]

- [43] Counsel for the First Defendant’s primary submission in response is to raise the protection of a constitutional and a statutory ouster clause to be found at section 106 of the Barbados Constitution and section 13 of the Administrative Justice Act Cap. 109B respectively. They read as follows:

“106.

The question whether –

- (a) any Commission established by this Chapter has validly performed any function vested in it by or under this Chapter;
- (b) any person has validly performed any function delegated to him in pursuance of the provisions of section 95 or 97, as the case may be; or
- (c) any member of such a Commission or any other person or Authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as referred to in paragraph (b)

shall not be enquired into by any court.

- [44] Section 13 reads as follows:

- (1) It is the duty of any person or body making a decision to which this section applies, if requested in accordance with section 14 by any persons adversely affected thereby, to supply to that person a statement of the reasons for the decision.
- (2) This section applies to any decision that is required by law (including any enactment) or by contract to be made in accordance with the principles of natural justice or in a fair manner with the exception of
 - (a) any decision for which by express provision of any enactment reasons are not to be required;
 - (b) any such decision as is specified in the First Schedule.

FIRST SCHEDULE

- (a) Any decision other than a decision relating to a disciplinary matter made by
 - (i) the Judicial and Legal Service Commission;
 - (ii) the Public Service Commission;
 - (iii) the Police Service Commission;
 - (iv) the Statutory Boards Service Commission;
 - (v) the Defence Board or other authority under the Defence Act.

- [45] In consequence, counsel submits in response to the Modification Argument that a modification of the wording of the Service Commission Act Cap. 34 is debarred by virtue of these constitutional and statutory ousters in addition to the fact that the Act is "saved" by section 26 (Savings Clause) of the Constitution.
- [46] Counsel distinguishes these circumstances from those of **Roodal v State of Trinidad and Tobago [2003] UKPC 78**, the case most heavily relied on in support of his submissions by counsel for the Claimant, on three main grounds as follows:
- "(a) This authority is concerned with the operation of a mandatory death sentence;
 - (b) it disavows the reasoned judgement of the Court of Appeal by de la Bastide that the extent of the power of modification remained unchanged upon the advent of the 1976 Constitution;
 - (c) Given the subject matter, fundamental rights and freedoms, a generous interpretation of the constitutional power to modify is promoted in such matters."
- [47] Counsel commends to this Court the dissenting opinion of Lord Millett and Lord Rodger of Earlsferry that such an interpretation 'is not only untenable but liable to subvert the operation of the Constitution.'
- [48] Counsel for the First and Second Defendant largely responded by way of distinguishing the major cases relied on by the Claimant, his major criticism being, inter alia, that these subject cases were mainly fact/context specific: see references to **Roodal (supra)**; **State v Khoyratty (supra)**; **McMichael v United Kingdom (supra)**; **Edwards v Attorney-General of Canada (supra)**; **Minister of Home Affairs v Fisher (supra)**; **Hunter v Southam Inc. (supra)**; **Attorney-General of Trinidad and Tobago v Whiteman (supra)**; **DPP v Mollison (No. 2)**; **Kanda v Government of Malaya (supra)**; **San Jose Farmer's Cooperative Society Ltd v Attorney-General; (supra)**; **Vasquez v R (supra)**; **Browne v R [2000] 1 AC 45**.
-] He further distinguished several of the cases in view of the fact (as stated above) that several of them concerned the application of human rights provisions found in various conventions. He argues that the alleged failure to be recommended for promotion is not a constitutional provision relating to human rights and freedoms which would invariably invoke the protection of the Constitution. Further, the language found in the Constitution and Administrative Justice Act is plain and unambiguous so that there is no need for interpretation, let alone a generous and purposive interpretation.
-] Counsel submits generally as an overview, that the legislative and constitutional framework (sec. 106 of the Constitution and section 13 of the Administrative Justice Act) is capable of only one construction, one that ousts the ordinary jurisdiction of this Court in as much as sections 9 and 10 are not unconstitutional and the Applicants' proposed modification is without merit. Since there is no unconstitutionality, there is no need for modification.
- [51] It may be observed here that these submissions are far wider than the issue raised by the Claimant. These submissions appear to be fashioned more substantially around the statutory and constitutional ouster provisions, in other words, on the reviewability of the actions of the Police Service Commission whereas, as noted above, the issues for determination raised by this 'in limine' application, relate to the Court's powers of modification and a determination of whether the relevant sections contravene the constitutionally protected Separation of Powers.
- [52] I must inevitably agree with counsel for the Claimant/Applicant, that these arguments are best suited for the substantive action and not to the 'in limine' application.

The Case for the Third and Fourth Respondent [The Attorney General and The Governor General]

- [53] The main limb of these Respondents' answering submissions is a reliance on the savings clause, that is, section 26 of the Constitution, and the further submission that its language is clear, unambiguous and more significantly, 'impregnable' as it "effectively immunizes all pre-independence laws from challenge on the grounds that they were inconsistent with the fundamental rights and freedoms guaranteed under sections 12 to 23 of the Constitution.
- [54] Stated differently, counsel submits that this general savings clause forms part of the Constitution which is the supreme law of Barbados and sections 9 and 10 of Cap 34 are provisions in a piece of legislation that was in existence prior to the Constitution. Against this background, there can be no merit in the Claimants' argument that these sections are unconstitutional.
- [55] Counsel strongly rejects the call to judicial activism when she states at paragraph 20 of her Written Submissions that "Courts ought not to usurp the right of an informed electorate to shape a system of laws which is best suited to it". The Claimant's counsel modification argument is soundly rejected by her as she argues that the modification clause is no part of the Constitution and must therefore be subservient to the general savings clause at section 26.
- [56] She argues that since sections 9 and 10 are existing law the power under the modification clause (section 4(1) of the Barbados Independence Order) to adapt or modify the offending provision so as to bring it "into conformity" with the fundamental rights guarantees therefore never comes into play.

- [57] In examining and distinguishing the cases cited by counsel for the Claimant, this counsel submitted that the Privy Council's application of the modification argument in **Roodal v The State (supra)** (the case most relied on by counsel for the Claimant) was overruled/reversed by the later case of **Matthew (Charles) v The State [2004] UKPC 33**. It is counsel's argument that the 'correct' approach is to be found in the dissenting judgments of Lord Millett and Lord Rodger in **Roodal** who felt that the position advanced by the majority was untenable and liable to subvert the operation of the Constitution ("These two Law Lords endorsed the views of Lord Bingham of Cornhill in **Reyes v The Queen [2002] 2 AC 235 at 246** that "The court has no licence to read its own predilections and moral values into the constitution"). The decision in **Roodal (supra)** was also, she submitted, inconsistent with the Privy Council's approach to the relationship between modifications and savings law clauses in the earlier cases of **R v Hughes [2002] UKPC 12** and **Fox v The Queen [2002] UKPC 13**.
- [58] Counsel also observes and submits that the 'ruling in the **Roodal** case if taken to its logical conclusion, opens **all** existing laws to constitutional scrutiny and potential modification in order to render them in conformity with the fundamental rights guarantees.' [see paragraph 30 of her Written Submissions].
- [59] Counsel further observes that in the **Mathew (Charles)** case, the Court (Privy Council) made reference to the fact that the reasoning of the majority in **Roodal** was also rejected that same day by the Privy Council in the Barbadian case of **Boyce and Joseph v R [2004] UKPC 32, (2004) 64 WIR 37**.
- [60] In closing counsel made four (4) points as follows: "that (1) even if the enforcement of sections 9 and 10 of Cap 34 may result in their being inconsistent with section 18 of the Constitution as being alleged by the Claimant, (2) the fact that these sections form part of an existing law and (3) section 26 of the Constitution clearly provides that nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provisions of sections 12 to 23 of the Constitution to the extent that the law in question is an existing law, (4) the validity of sections 9 and 10 is preserved. If a change is to be effected, it ought to be done by Parliament and not the Courts".
- [61] In response to Counsel's separation of powers argument, she submits that the right to make an order for discovery vests in the Judiciary by virtue of the Supreme Court Rules which is subsidiary legislation. Since this is subsidiary legislation it cannot overrule an Act of Parliament that is saved by the Constitution.

The Issues Arising Therefrom

- [62] This application raises two issues, namely; the constitutionality of sections 9 and 10 and whether these sections contravene the separation of powers doctrine. To my mind, these issues exclude two very closely related but different topics: (1) the reviewability of the actions of the Police Service Commission; and (2) whether certain documents are subject to disclosure.
- These latter topics are more relevant to the substantive application and call for related, but different, submissions. Consequently, this decision will reference but not determine these much wider issues.

Discussion

- [63] This case raises profoundly difficult issues of law, issues that have spawned some of the most well-known cases in local, regional and Commonwealth jurisprudence: **see Thomas v Attorney-General [1982] AC 113; Kemraj Harrikissoon v Attorney-General (1979) 31 WIR 348; Anisimic Ltd v Foreign Compensation Commission [1969] 2 AC 147; Attorney General et al v Jeffrey Joseph and Lennox Boyce CCJ Appeal No. CV 2 of 2005** among others.
- [64] The issues arising from this application for the determination of this Court are best described by the words of the Rt. Honourable Mr. Justice de la Bastide in a joint judgment with the Honourable Mr. Justice Saunders in **The Attorney General et al v Joseph and Boyce (supra)** where in determining the status of unincorporated international human rights treaties on domestic law, it was stated thus at paragraph [103] when their Lordships sought to analyse and apply the case law:
- "...The frequency and force of the dissents and the high incidence of reversals by the JCPC of its own recent decisions demonstrate very forcefully the fact that this branch of the law is in an unsettled state and is still evolving. **Novel and difficult questions of law are involved here.** Judges all over the world are struggling to give form and coherence to ideas that only began to engage their attention in fairly recent times." (emphasis mine).
- [65] This statement is as relevant to the issue at hand as it was in that case to the determination of the status of unincorporated human rights treaties on domestic law.
- [66] These so called 'difficult questions of law' in this particular instance have an ancient beginning that has been subjected to a modern challenge. It is best exemplified in that oft-quoted statement of Francis Bacon (later spoken of as the 'Noble Lie') which has become a staple in the exposition and discussion of this issue. It is found in his writings "Of Judicature in Essays, Civil and Moral". He wrote:
- "Judges ought to remember that their office is 'jus dicere' and not 'jus dare'; to interpret law, and not to make law or give law. Else will it be like the authority claimed by the Church of Rome..."
- [67] This is a classic statement of strict and complete legalism.
- [68] There are many classic statements of this so called 'noble lie' some of which attempt to deal with the inherent flaw in this concept. This familiar quote from Lord Esher MR in **Willis v Baddeley [1892] 2 QB 324**, speaks to this issue as follows:
- "This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make law **though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.**" (emphasis mine).
- [69] In 1921 B Cardozo in his writings titled "The Nature of the Judicial Process" in a statement recognizing this fundamental challenge made this very carefully worded admission:
- "The power to declare the law contains the power, and within limits, the duty, to make the law."**
- [70] The two statements above-mentioned are a clear recognition of the profound challenge or flaw in the argument of accepted political legalism (or judicial orthodoxy).
- [71] This (old school) approach of strict legalism has given way in the 20th and 21st centuries to what the Hon. Justice Michael Kirby (AC CMG) Justice of the High Court of Australia in his published Hamlyn lecture titled "Judicial Activism", calls a period of legal Reformation, "a period of enlightenment, candour and transparency". Whether it is described flatteringly or positively as Judicial Creativity (where judges seek to avoid the absurd outcomes of strict logic and high technique) or the more negative, pejorative or threatening, Judicial Activism (where judges have been deemed to have exceeded limits of judicial authority and usurped the power of the executive), is usually dependant on the philosophy of the speaker or writer. Judicial Restraint appears to be the middle ground.
- [72] At page 18 of this publication Justice Kirby states:
- "As judges of the legal Reformation in the late twentieth century felt themselves released from the straight-jacket of "excessive legalism", they became more willing to expose, and to discuss frankly, the considerations of principle and policy that were affecting their minds as they worked towards their decisions. Once encouraged to explain their reasoning in this transparent way, it became difficult to return the judicial dialogue to the sterile pretence that solutions for all legal problems

are to be found in the language or logic of a past decision, or the unambiguous text of a statute or a written constitution, with nothing else required. When the genie of full and truthful reasons escaped, it became hard to persuade the law's practitioners to return to the old deceit of formalism".

- [73] At page 54 of his publication he grapples with this difficult area of law, exploring the boundaries but unable to coherently draw the line. Stated differently, he identifies the circumstances for action and the occasions for restraint, without drawing the line between the two, merely addressing the awareness that it exists.
- [74] He states as follows:
"It is not a breach of the separation of powers doctrine for a court, in expounding the common law, interpreting a statute or construing a written constitution, to discharge this traditional but limited role of lawmaking. Nevertheless, the separation of powers principle reminds, judges that there is a necessary boundary. Judges must not cross it if they are to adhere to their proper function. If they go too far they risk damaging the source of their independence and authority. To those of us brought up with the doctrine of parliamentary supremacy, as lawyers in the United Kingdom have been, it is not perhaps so necessary to be reminded of the need for deference as it is for those who enjoy the constitutional power of invalidation of statutes. **That great power has such large ramifications that it necessarily contains within itself the pressure to limit its use.**" (emphasis mine).
- [75] This conflict is no more evident than in the subject debate where in principle the divide is over whether the courts have gone too far or not far enough (Judicial Activism vs Judicial Restraint).
- [76] In **Roodal**, the Privy Council ruling in which said case is strongly commended to this Court by counsel for the Claimant, the Court of Appeal of Trinidad and Tobago in a unanimous decision, exercised "Judicial Restraint" when in spite of the fact that the learned Chief Justice de la Bastide (as he then was) declared the statute that made the death penalty mandatory to be unconstitutional and in contravention of the Trinidad and Tobago government's treaty obligations, it was nonetheless 'saved' by that country's Savings Clause (section 6(1)). (A ruling that appears ostensibly to conflict with the elementary principle that laws enacted subject to a Constitution must conform to it or be struck down.) The Trinidad and Tobago Court of Appeal in their reasoning distinguished their Savings Clause from the 'weaker' savings law clauses to be found in the Constitutions of Belize and in several of the OECS States: see **Reyes v The Queen (supra)**; **R v Hughes (supra)**; **Fox v The Queen (supra)**. The Court of Appeal expressed the view therein that "... if the death penalty is no longer to be mandatory in Trinidad and Tobago, this change must be effected by Parliament".
- [77] In a decision delivered by the Privy Council, **[2003] UKPC 78**, by a bare 3/2 majority of the 5 member board (Lord Millett and Lord Rodger of Earlsferry strongly dissenting), the Privy Council overruled the Court of Appeal of Trinidad and Tobago.
- [78] Interestingly, the law lords appeared to have been dissatisfied with this result and less than a year later specially convened a (9) nine member (enlarged) board to address the same issue in **Charles Mathew v The State (supra)** and **Boyce and Joseph (supra)**.
- [79] The result was that the Privy Council reversed itself in that it overruled **Roodal** (giving credence and support to the dissenting opinion of Lord Millett and Lord Rodger of Earlsferry in **Roodal**) and validated the death penalty in Trinidad and Tobago and Barbados. The death penalty in Trinidad and Tobago was validated by virtue of a clause in the Constitution (section 6(1)) preserving the effect of an existing law. The effect remains that the law imposing the mandatory death penalty was deemed to be valid even though found to be a cruel and unusual punishment and therefore inconsistent with the Constitution and in contravention of the country's treaty obligations.
- [80] However this reversal was achieved once again by a bare majority (five to four, with Lord Bingham, Lord Nicholls, Lord Steyn and Lord Walker dissenting). The inevitable conclusion appears to be that this matter may not yet be over for those States which still retain the Privy Council as their final Court of Appeal or at all, as the Caribbean Court of Justice may be called on to address this matter in the not too distant future.
- [81] The Privy Council decision of **Boyce and Joseph** reveals that in the opinion of the law lords Barbados has a "strong" Savings Law clause similar or the same as that of Trinidad and Tobago. That Savings Law Clause has been found to be a particularly robust form of "Savings Law Clause". The decision in **Boyce and Joseph** remains the law in Barbados unless and until ruled on by our final apex court, the Caribbean Court of Justice. The decision in **Boyce and Joseph** was delivered by the Privy Council on the same day as it delivered the **Mathew** decision and decided on the same basis.
- [82] The Caribbean Court of Justice's approach to JCPC rulings can be found at paragraph 18 of their **Joseph and Boyce** decision and reads as follows:

"[18] The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgements of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly we reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados..."

Disposal

- [83] I reject the Modification Argument of counsel Mr. Shepherd QC for the same reasons expressed by de la Bastide CJ (as he then was) in the Trinidad Court of Appeal in **Roodal**, for the reasons expressed in the dissenting decision of **Lord Millett and Lord Rodger** in the Privy Council in **Roodal**, for the reasons expressed in **Boyce and Joseph** and the reasons expressed in **Mathew v The Queen**. While giving a generous and purposive interpretation to those constitutional protections affecting human rights, "the court has no licence to read its own predilections and moral values into the Constitution..." (**Lord Bingham** in **Reyes v The Queen [2002] AC 235**).
- [84] **Lord Millett** in **Pinder v R [2002] UKPC 46** stated as follows:
"A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn; not to substitute the judges' views where it should be drawn".
- [85] In so doing, I adopt the words of Lord Millett in **Roodal** "that parliament should not be taken to have changed an important legal rule by a sidewind." (see paragraph 40 letter B and de la Bastide CJ).
- [86] To do so begs the question: If constitutional provisions are not vulnerable to the encroachment of legislative enactments, why should they be so vulnerable to encroachment by the Judiciary?

- [87] De la Bastide, former President of the CCJ in his presentation “Judicial Supervision of Executive Action in the Commonwealth Caribbean”, the Inaugural Telford Georges Memorial Lecture (Barbados, 31st March, 2006) issued an admonition against “unbridled judicial activism” in these terms:
- “Judges are not well equipped to make policy decisions which are better left to those whose business it is to make them.
- Judges too must obey the law and therefore must respect the right of public officials and authorities to exercise the decision-making powers which the law has vested in them.
- It is wrong for judges to breach the social contract embodied in the Constitution by disregarding the allocation of responsibilities and functions which that contract makes as between the Judiciary and the other arms of government.
- As a practical matter, excessive interference by the judges in the business of administration will create a loss of efficiency and effectiveness in administration, not to mention frustration and tension.”
- [88] It is to be noted that constitutional interpretation is inescapably political. It is the juxtaposition of legal principle and (the dreaded) legal policy.
- [89] This court also follows and adopts the approach of de la Bastide in **Roodal** which to this court’s interpretation clearly details circumstances such as these as representative of the court arrogating to itself “a law-making function that should properly be left to the legislature.” This analysis (below) of the boundaries of the modification argument follows the seemingly ‘activist’ statements of de la Bastide (above):
- “...When may the court fill the gap and when should it refrain from doing so? We suggest that it depends on whether there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution. In such a case the court may fill the gap by modification. Where however the solution is not so simple, and filling the gap involves the making of a choice or the establishment of a policy, these are matters which the court should leave to the legislature. It appears to us that these are the considerations which limit the power of the court to modify under section 5 (1), rather than the starkness of the conflict.”
- [90] De La Bastide goes on to submit that the power to modify only arises where invalidity has been established and states further:
- “Viewed from a slightly different angle, the purpose of modification is to achieve conformity with the Constitution as a whole, not with a particular part of it. Therefore, since there is a provision in the Constitution which preserves the validity of an existing law which conflicts with the human rights provisions, such a law is not required to be brought ‘into conformity with’ the Constitution.”
- [91] In other words, there is no invalidity as this law has been saved by section 26, and consequently, there is no power to modify: see **Boyce and Joseph v R; Roodal v State of Trinidad and Tobago; DPP of Jamaica v Mollison; Browne v The Queen**.
- [92] In any event, were this Court to have accepted the Claimant’s argument, it nonetheless cannot agree that the addition of the words “such permission or consent not to be unreasonably withheld” has the effect of bringing those alleged inconsistent sections into conformity with the Constitution.
- [93] Like the Privy Council in **Roodal**, I conclude that given the conclusions on the modification argument, it is unnecessary to consider the separation of powers argument. Nonetheless, it is my view that sections 9 and 10 do not constitute the exercise of a judicial function by the executive, nor for that matter does it represent an ouster of the judicial function in discovery.
- [94] Further, I disagree with counsel Mr. Shepherd in his submission that ‘the adjudication of his application will answer the question as to whether these documents are subject to disclosure. Discovery in Judicial Review proceedings is a matter for the court and will be subject to considerations of public interest immunity/national security/privilege etc. In practice, unless a claimant can show a prima facie breach of public duty, disclosure will not usually be granted. In other words, the courts will not allow a claimant to go on a ‘fishing expedition’ where an applicant claims that a decision is so unreasonable that it must be flawed and seeks a disclosure in the hope that it might turn up evidence to support that or another allegation: see **Judicial Remedies in Public Law, 2nd Ed. Clive Lewis under the heading Circumstances when disclosure may be ordered: De Smith’s Judicial Review, 6th Ed.: Re Glor Na Ngael’s Application [1991] NI 117; Air Canada v Secretary of State for Trade (No. 2) [1983] 2 AC 394; Burmah Oil Co Ltd v Bank of England [1980] AC 1090; Science Research Council v Nasse [1980] AC 1028**.
- [95] I do not reject the argument of counsel for the Second Defendant [Police Service Commission] except in so far as he appears to be suggesting, in the opinion of this Court erroneously, that this Court is precluded from enquiring into the constitutionality of sections 9 and 10 by virtue of the constitutional and statutory ouster clauses referenced above. The modern view is expressed by Byron J (as he then was) in **Public Service Commission v Shillingford Civil Appeal No. 10 of 1988 (Dominica, unreported decision)** as follows:
- “The modern view is that courts today will review a prerogative power once the nature of its subject matter renders it justiciable. What is now pivotal to a determination of the reviewability of a prerogative power is not so much the source of the power, but rather its subject matter.”
- [96] However, I merely wish to observe that he has based his submissions on the issue of **reviewability** as opposed to **constitutionality** which is the basis of this application, and in that regard, I agree with counsel Mr. Shepherd QC, that his arguments would be better placed if directed at the substantive application.
- [97] In the premises, the Claimant’s application is dismissed.
- [98] The issue of costs is reserved for later in these proceedings.