BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 14 of 2013

BETWEEN:

THE COMMISSIONER OF POLICE
DARWIN DOTTIN **Appellant**

AND

SIR ELLIOTT FITZROY BELGRAVE **First Respondent**

AND

THE POLICE SERVICE COMMISSION **Second Respondent**

Before: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2016: February 22; March 21
2017: March 31

Mr. Elliott D. Mottley QC, Mr. Leslie Haynes QC, Ms. Andrea Simon and Ms. Michelle Selman for the Appellant
Ms. Donna Brathwite QC for the First Respondent
Mr. Patterson K.H. Cheltenham QC, Mr. Hal McL. Gollop QC, Mr. Alrick Scott and Ms. Natasha Green for the Second Respondent

DECISION

BURGESS JA

Introduction

[1] The appellant, the claimant below, applied for judicial review of the decision of the first respondent, the first defendant below, to place him on "administrative leave" and the recommendation/decision of the second respondent, the second defendant below, to cause the appellant to be retired in the public interest. The appellant also sought interim relief against the first respondent by way of injunctions and declarations.

[2] The application for interim relief was heard in the High Court by **Reifer J** who refused the interim relief sought by the appellant. The appeal before us is an appeal by the appellant against the decision of **Reifer J**.

Factual and Procedural Background

[3] The appellant was at the relevant time the Commissioner of Police. In a 16-page letter dated 10 June 2013, addressed to the first respondent and signed by the members of the second respondent, the second respondent recommended to the first respondent that the appellant be retired from the public service pursuant to **section 11** of the **Pensions Act, Cap. 25 (Cap. 25)**. The letter set out, *inter alia*, the basis for the recommendation, considered the

process to be adopted to accord the appellant procedural fairness, and offered the opinion that the matter raised issues of national security.

[4] On 13 June 2013, an addendum to the 10 June 2013 letter signed by the Chairman of the second defendant was sent to the first defendant. The addendum read in the relevant part as follows:

> "Reference is made to our recommendation of 10 June, 2013…At a meeting of the members of the Commission held on 13 June, 2013, it was decided that this addendum to that correspondence should be forwarded for your consideration.
>
> We recommend that the Commissioner by (sic) informed that pursuant to section 11 (2) (b) of the Pensions Act, Cap 25 of the Laws of Barbados, the Police Service Commission has recommended that he be retired from the public service in accordance with your powers conferred by section 11 (1) (a) of the said Act.
>
> So as to facilitate your consideration of our recommendation, the Commissioner, in the public interest, should be asked to immediately proceed on administrative leave. All of his usual conditions and benefits should remain intact. Within twenty one (21) days of the date of the notice being given to the Commissioner, he should be provided with a copy of the relevant portion of that recommendation.
>
> The Commissioner should be given twenty eight (28) days after receipt of the relevant information to furnish Your Excellency with the reasons why the Commission's recommendation should not be accepted.
>
> Will His Excellency please accept and approve the recommendation of the Police Service Commission that
>
> (a) the Commissioner of Police be immediately sent on administrative leave,

> (b) within twenty one (21) days of notification of the Commission's recommendation, the Commissioner be served with a copy of the information under consideration by Your Excellency,
>
> (c) within twenty eight (28) days after he received a copy of the information being considered by Your Excellency, the Commissioner be invited to furnish Your Excellency with reasons why the Commission's recommendation should not be accepted,
>
> (d) after considering the representations of the Commissioner of Police, if those representations do not negative the recommendation of the Commission, that the Commissioner of Police be compulsorily retired from service of the Crown under section 11 (1) (a) of the Pensions Act, Cap 25 of the Laws of Barbados."

[5] Four days later, by a letter dated 17 June 2013 signed by the Chairman of the second respondent and addressed to the appellant, the appellant was advised as follows:

> "I write to inform you that His Excellency, Sir Elliott Fitzroy Belgrave, G.C.M.C., K.A., Governor General of Barbados, has been advised by the Police Service Commission to exercise the power conferred on him by section 11 (1) (a) of the Pensions Act, Cap. 25, and requested that you, in the public interest, be retired from the office of Commissioner of Police.
>
> His Excellency directed the Police Service Commission to provide you with copies of all statements and other evidence which was considered by the Police Service Commission in reaching its decision that you should be required to retire in the public interest, within twenty one (21) days of today's date, 17 June, 2013.

> His Excellency has further advised that within twenty eight (28) days thereafter, you may provide him with any statement or other evidence or document which, in your opinion, will cast doubt on, or completely rebut the case presented to his Excellency by the Police Service Commission and which is capable of showing that His Excellency should not act on the advice of the Police Service Commission, that you should be retired from the office of Commissioner of Police.
>
> His Excellency expressed the view that when he is fully satisfied that all the rules of natural justice as they apply to your case have been satisfied, he would be in a position to determine whether or not you should be required to retire.
>
> His Excellency is, however, of the view, that you should be placed on administrative leave with immediate effect, today 17 June, 2013, until further notice.
>
> I am further advised that on the advice of the Police Service Commission, after consultation with the Prime Minister, His Excellency has appointed Mr. Tyrone Griffith, Assistant Commissioner of Police, to act as Commissioner of Police with effect from today, 17 June, 2013, until further notice.
>
> You should conduct yourself accordingly."

[6] Thereupon, by fixed date claim form dated 20 June 2013, amended on 27 June 2013, the appellant applied under the **Administrative Justice Act, Cap. 109B (Cap. 109B)** for judicial review of the decision of the first respondent to place him on "administrative leave" and the recommendation/decision of the second respondent to cause the appellant to be retired "in the public interest". In its amended fixed date claim form, the appellant also sought interim relief as follows:

> "9. An Injunction to restrain the First Defendant, by himself, his servants and/or agents or otherwise howsoever, from taking any further steps or action to cause the Claimant to be retired from the Office of Commissioner of Police under the provisions 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 of these 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."

[7] The appellant filed two affidavits in support dated 20 June and 4 July 2013 respectively.

[8] The claim for interim relief came on for hearing before **Reifer J** in the High Court on 24 and 28 June 2013 and 5, 10 and 11 July 2013. On 10 July 2013, the second respondent entered a plea in bar to the application for interim relief that, on grounds of national security, the second respondent's recommendations/decisions were immune from judicial review. On that same date two affidavits were filed under seal of the Registrar by the second

respondent and on 12 July 2013, the appellant filed an affidavit in response to the second respondent's affidavits.

[9] A special order was made by the judge with respect to these three affidavits, consequent upon their contents, in a course of action agreed by all parties in an effort to avoid the unwarranted or unjustified disclosure of their contents as, in the submission of counsel for the second appellant, they raised grave issues of national security. The order was that those documents be filed with the Registrar of the Supreme Court personally, who would immediately thereafter seal them and return them to the judge.

[10] On 18 September 2013, **Reifer J** delivered her judgment. With respect to the second respondent's plea in bar, she held at para [55] of her judgment 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". As regards the appellant's claim for interim relief, she made the following order at para [71] of her judgment:

> "(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."

The Notice of Appeal

[11] On 9 October 2013, the appellant filed a notice of appeal against the second limb of **Reifer J's** order, namely, that "all other claims for relief are dismissed until further order". This limb of the order was in effect a refusal by **Reifer J** to grant the interim injunctive relief expressly sought by the appellant against the first respondent in paragraphs 9 and 10 of the amended fixed date claim form and any interim declaratory relief impliedly sought by the appellant in paragraphs 11 and 12 of the amended fixed date claim form.

[12] The appellant set out nine grounds of appeal in his notice of appeal. However, in his written submissions to and oral arguments before this Court, Mr. Mottley QC, counsel for the appellant, conceded that "…the substantive grounds are only two grounds No. 1 and 2. Grounds 3 through 9 will only be relevant if the second ground of appeal succeeds, or is answered in the affirmative". We therefore set out grounds 1 and 2 verbatim.

[13] These grounds read as follows:

> "1. The trial judge ERRED IN LAW in failing to appreciate that, by his Claim, the Appellant was seeking Judicial Review of two separate and distinct decisions of the Respondents, namely:
>
> a) the decision to send the Appellant on "Administrative Leave"; and

b) the decision to request the Governor-General to cause the Appellant to be retired in the public interest.

2. The trial judge ERRED IN LAW in failing adequately or at all to determine whether an Interim Declaration and or an Interim Injunction should be granted in respect of the decision (a) above BECAUSE:

(i) having regard to the manner in which the parties argued their respective cases at the trial, it was conceded by the Respondents that the concept of Administrative Leave was unknown to the law or police or public service procedure and practice of Barbados;

(ii) accordingly, the decision to send the Appellant on Administrative Leave was contrary to law and/or illegal and was null and void and of no effect;

(iii) as a consequence thereof, the trial judge was empowered to grant an interim declaration in terms of paragraph 1 to 4 of the Claim; and

(iv) the Appellant, in law, having been illegally removed from office, was still in office as Commissioner of Police."

[14] For completeness, it may be noted that, on 30 October 2013, the second respondent filed a notice of cross appeal challenging the finding of **Reifer J** that the evidence tendered by the respondent did not meet the threshold necessary to successfully ground a plea of National Security. This cross appeal was subsequently withdrawn and nothing more needs be said of it.

The Issues in this Appeal

[15] As already noted, this is an appeal against **Reifer J's** refusal to grant the appellant interim injunctive relief and interim declarations sought by him. In respect of the interim injunctive relief, it is accepted by all parties to this appeal that the refusal of the grant of the interim injunction by **Reifer J** was done in pursuance of the discretionary power vested in her as a judge of the High Court. That means that two principal issues are raised in determining the appeal in respect of the refusal of injunctive relief by **Reifer J**.

[16] The first of these is whether this Court has jurisdiction to interfere with the exercise by the judge of her discretion to discharge the injunction. The second relates to the determination of whether there is a basis for this Court to invoke any such jurisdiction which may reside in it and interfere with **Reifer J's** exercise of her discretion to discharge the interim injunction in this case.

[17] As regards the appeal against **Reifer J's** refusal to make the interim declarations sought by the appellant, a single issue arises. It is whether **Reifer J** had the power to make the interim declarations.

[18] These issues are dealt with hereafter *seriatim*.

Appellate Function in Exercise of Discretion to Discharge an Interim Injunction

[19] The principles applicable to this Court's jurisdiction to interfere with the exercise of the discretion by **Reifer J**, a judge of the High Court, in granting or discharging an interlocutory injunction was reaffirmed in the recent decision of **Ansa McAL (Barbados) Limited v Banks Holdings Limited and SLU Beverages Ltd. ("Ansa") Civil Appeal No. 21 of 2015**. In that case, this Court reiterated the principles enunciated by Lord Diplock in the English House of Lords in **Hadmor Productions Ltd. v Hamilton [1983] 1 AC 191 at 220-221**, where he said:

> "Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or upon the ground that there

> has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[20] At para [83] in **Ansa**, this Court recounted that:

> "In its numerous decisions, including **Locke v. Bellingdon Limited (Civil Appeals Nos. 31 and 34 of 2001 unreported), Toojays** and **Cellate Caribbean Ltd et al v Harlequin Property (SVG) Ltd**, **Civil Appeal No. 3 of 2011,** this Court accepted that statement of law by Lord Diplock as representing the law in Barbados. Other regional courts of appeals have also embraced this principle. Indeed, de la Bastide CJ in the Trinidad and Tobago Court of Appeal decision in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362** at **368** distilled these principles as follows:
>
> > "It is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own."

[21] It is clear from the authorities, then, that the appellate function of this Court in a case like the one before us which involves the exercise by a trial judge of her discretion in refusing to grant an interim injunction is severely

circumscribed. This Court is enjoined to show deference to the trial judge's exercise of her discretion and to resist interference with it merely upon the ground that the members of this Court would have exercised the discretion differently. Interference by us is warranted only if it is shown that the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence or is so aberrant that no reasonable judge regardful of his/her duty to act judicially could have so exercised it. It is only in these limited circumstances that this Court can set aside the judge's discretion and exercise an original discretion of its own.

[22] Mr. Mottley QC has accepted these limitations on us in this case. That notwithstanding, Mr. Mottley QC contended, in his written submissions to, and oral arguments before, this Court, that the exercise by **Reifer J** of her discretion was based completely on a misunderstanding or misapplication of the correct principles of law relating to the grant of an interim injunction and/or a misunderstanding or misapplication of the evidence. As a consequence of these, argued Mr. Mottley QC, the decision of **Reifer J** should be set aside and this Court's original discretion substituted therefor.

[23] Needless to say, in extremely helpful written submissions drafted by Mr. Cheltenham QC and the characteristically skilful oral arguments of Mr. Scott before this Court, the respondents disagreed with Mr. Mottley QC.

They argued that, contrary to Mr. Mottley QC's contentions, **Reifer J** properly understood and applied the law and evidence in this case. They maintained that, in those premises and having regard to the limited jurisdiction in this Court to interfere with the exercise by **Reifer J** of her discretion, this Court would not be justified in interfering with the decision of **Reifer J** to refuse the injunction sought by the appellant.

[24] In view of counsel's contentions, the second issue now arises before us, namely, whether **Reifer J** acted upon wrong principles of law and/or misunderstood or misapplied the evidence in exercising her discretion.

Did Reifer J Act upon Wrong Principles in Refusing the Interim Injunction

[25] In seeking to resolve this question, it appears to us advantageous to begin with a consideration of the governing principles which apply in this case.

The governing principles

[26] The general guidelines which are now firmly established as governing the grant or discharge of an interim or an interlocutory injunction in our courts is the test set out by Lord Diplock in the English House of Lords decision of **American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504** (**American Cyanamid)** as interpreted by this Court in **Toojays Limited v West Haven Limited [2012] 2 LRC 65 (Toojays)**. That test is a two limbed test. The first limb involves an enquiry as to whether the party seeking an interlocutory

injunction has shown that there is a serious issue, in the sense of not being frivolous or vexatious, to be tried. Once this is established, as it were, once the party has crossed this threshold, the court can then address the second limb which involves a question of whether the balance of justice lies in favour of granting or refusing the interlocutory injunctive relief sought.

[27] The **American Cyanamid** test was developed in a private law case and in the statutory context of an English provision in *pari materia* with **section 44 (b)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)**. However, in the very recent decision in **Worrell v The Minister of Finance, Civil Appeal No. 8 of 2017 (Worrell),** this Court held that, that origin notwithstanding, the **American Cyanamid** test is equally applicable to cases with a public law element initiated under the **Administrative Justice Act, Cap. 109B.** This Court found strong support for this view of the law in the Belizean Privy Council case of **Belize Alliance of Conservative Non-Governmental Organisations v Department of the Environment of Belize [2003] UKPC 63.** In that case, Lord Walker in delivering the advice of the Board accepted that the **American Cyanamid** test was applicable in interim injunctions in public law cases. He stated at **p. 2849A-B**, **para 35:**

> "Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House

> of Lords in American Cyanamid..., but with modifications appropriate to the public law element of the case."

Also supporting this same principle that the **American Cyanamid** test is applicable to cases with a public law element are the English House of Lords case of **Regina v Secretary of State for Transport, ex parte Factortame Ltd and others [1990] 3 WLR 818 (Factortame),** and the English Court of Appeal decision in **Smith and others v Inner London Authority [1978] 1 All ER 411 (Smith v Inner London Authority).**

[28] In this case, **Reifer J**, having explored the relevant factual background and the submissions of counsel on all sides, at para [37] of her judgment, turned to the law "as it relates to the source of the discretion vested in this Court and its exercise, be it to grant or discharge, an interlocutory injunction". She identified, and we would add correctly, **section 44 (b)** of **Cap. 117A** and **section 5 (2)** and **section 7** of **Cap. 109B** as the source of her discretion. In the same vein, she cited the English House of Lords decision in **American Cyanamid** as interpreted in this Court's decisions in **Williams v Canadian Bank of Commerce Trust Co. et al (1979) 36 WIR 111** and **Toojays** as establishing the general principles that govern the exercise of her discretion.

[29] Mr. Mottley QC has with, we dare say, admirable audacity and seasoned skill, attempted to craft a case that **Reifer J** erred in law in applying the **American Cyanamid** principles as the governing principles in refusing the interim

injunctive relief sought by the appellant in this case. In constructing this argument, Mr. Mottley QC premised that the **American Cyanamid** principles are nothing more than general guidelines governing the granting or refusal of interlocutory or interim injunctions. Mr. Mottley QC cited dicta from the English Chancery Division case of **Official Custodian for Charities and others v Mackey and others [1985] Ch 168 (Official Custodian for Charities),** the English Court of Appeal case of **Patel and others v WH Smith (Eziot) Ltd [1987] 2 All ER 569 (Patel)** and the English Queens Bench Division case of **R (on the application of GSTS Pathology LLP and others v Revenue and Customs Commissioners [2013] STC 2017 (GSTS Pathology)** as establishing an exception to the applicability of the **American Cyanamid** principles in cases where an applicant has a clear case in the right and the defendant does not present "an arguable defence" to it. In such a case, he argued, the court, in an exception to the **American Cyanamid** principles, only considers the relative strength of the parties case and does not go on to consider the balance of justice/convenience including whether damages would be an adequate remedy. According to Mr. Mottley QC, the present application is an application which falls within that exception.

[30] In furtherance of that argument, Mr. Mottley QC contended that the foundation of the appellant's claim is that he was sent on "administrative

leave" when the concept of such leave was not known to the law in Barbados. Mr. Mottley QC continued that a public officer, such as the appellant, could only be sent on leave provided for in the relevant statute laws of Barbados or in the *General Orders for the Public Service, 1996*. "Administrative leave", Mr. Mottley QC submitted, "is not a type of leave recognised in the *General Orders for the Public Service 1996* or in any statute and as such in the absence of any statutory power providing for this procedure, the First Respondent's action was illegal, invalid, void and of no effect". This, Mr. Mottley QC maintained, rendered the appellant's claim indefensible by the second defendant and so was a clear case to which the **American Cyanamid** principles were inapplicable.

[31] To the same effect is Mr. Mottley QC's submission that **section 11 (1) (a)** of **Cap 25**, the statutory provision on which the first respondent claimed to exercise the power to request that the appellant be retired, did not make any provision for the first respondent, acting on the advice and/or recommendation of the second respondent, to cause the appellant to be retired "in the public interest". The first respondent therefore acted "improperly and illegally" in acting on such recommendation. In consequence, Mr. Mottley QC concluded, the first respondent's letter of 17 June 2013 requiring the appellant "to retire in the public interest, was invalid, illegal, void and of no effect in so far as the

Pension Act did not empower him to do the same" and that, based on the Privy Council decision in **McLaughlin v Governor of the Cayman Islands [2007] UKPC 50 (McLaughlin)**, the appellant remained in office.

[32] In our view, the best way to approach Mr. Mottley QC's argument is against the backcloth of an elemental analysis of the applicability of the **American Cyanamid** test.

[33] Analytically, two fundamental assumptions are at the bottom of the applicability of the **American Cyanamid** test. The first assumption is that the hearing of an application for an interlocutory injunction is conducted upon incomplete and disputed evidence. In consequence, the judge hearing the application is not in a position to properly assess the relative strength of the parties' cases. This assumption explains the low threshold which the applicant has to meet in fulfilling the requirement of the first limb, namely, merely demonstrating that there is a serious question to be tried. The second assumption is that the *raison d'être* of the interlocutory injunction is the preservation of the rights of the parties in the most equitable fashion pending trial. Embedded in this second assumption therefore is the expectation that there will be a trial of the substantive claim. This premise underlies the second limb of the test, namely, finding where the balance of justice/convenience lies in granting or denying the injunction.

[34] Lord Diplock, writing the main reasons for the House of Lords in **American Cyanamid**, explained these bedrock planks of the test, at **pp**. **405-406**, as follows:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction…The object of the interlocutory is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial: but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience lies'."

[35] A critically important ratiocinative implication of the **American Cyanamid** test is that, at the interlocutory stage, the court's function is to decide whether the claimant has an arguable case and not whether the claimant's case is stronger than that of the defendant. Lord Diplock underlined this point in the **American Cyanamid** at **p. 406** where he said:

> "It is no part of the court's function at the interlocutory stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for mature considerations. These are matters to be dealt with at the trial."

[36] The full import of Lord Diplock's statement is best appreciated when it is remembered that, prior to the **American Cyanamid**, there was an overwhelming body of case authority that a court would not issue an interlocutory injunction against a defendant unless the court was satisfied that, as was said by Cotton LJ in the old English Court of Appeal case of **Preston v Luck (1884) 27 ChD 497** at **506** there was "a probability that the plaintiff is entitled to relief" or by Atkin LJ in the English Court of Appeal case of **Smith v Grigg Ltd [1924] I KB 655** at **659** "a strong prima facie case that the right which he seeks to protect in fact exists". Indeed, these authorities were treated as supporting a rule of law that a claimant had to show that he/she had a strong *prima facie* case on the evidence before the court at the interlocutory hearing that the claimant's rights had been infringed by the defendant, that his/her claim would succeed and that the defendant would ultimately fail: see, in particular, the English House of Lords decision in **JT Stratford & Son Ltd v Lindley [1965] AC 269.**

[37] Under the *prima facie* case approach, therefore, an appraisal by the court of the relative strength of each party's case was a crucial part of the court's

function in deciding how to exercise its interlocutory injunctive powers. The rationale of this approach was that it allowed the court to come to the preliminary view on the hearing of the application for interlocutory relief of the relative strength of each party's case and, as Lord Denning MR advocated in **Fellowes & Son v. Fisher [1976] Q.B. 122**:

> "If the plaintiff makes out a prima facie case, the court may grant an injunction. If it is a weak case, or is met by a strong defence, the court may refuse an injunction. Sometimes it means that the court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further."

[38] In **American Cyanamid**, however, Lord Diplock, at **p. 405**, deprecated the *prima facie* case approach as leading to "confusion as to the object sought to be achieved by this form of temporary relief". Lord Diplock explained, at **p. 406**, that given the fundamental nature and purpose of the hearing of an application for interlocutory injunction, a court should abstain from expressing any opinion upon the merits of the case until the hearing. A court should first decide whether a serious question to be tried has been made out. Once this has been demonstrated, the court should go on to consider whether the balance of justice/convenience lies in favour of granting or refusing the interlocutory relief that is sought. According to Lord Diplock, it is in considering the question wherein lies the balance of justice/convenience that an appraisal of the relative strength of each party's case may be made, but

such an appraisal should only be made "if the extent of the uncompensatable disadvantage to each party would not differ widely", and "only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute".

[39] In the later House of Lords decision in **N.W.L. Ltd. v. Woods [1979] 3 All ER 614 (H.L.) (Woods)**, Lord Diplock revisited the **American Cyanamid** and articulated what is called "the Woods exception" to the **American Cyanamid** test. Of this exception Lord Diplock said at **p. 625**:

> "My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co v Ethicon Ltd* to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co v Ethicon Ltd*, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."

[40] After repeating the thrust of the reasons for the **American Cyanamid**, Lord Diplock at **p. 626** enunciated a set of guiding principles for a court faced with the type of interlocutory injunction that would effectively bring an end to the action as follows:

> "Where…the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

[41] The Woods exception was considered by the Supreme Court of Canada in **RJR-MacDonald Inc. v Canada (Attorney General) [1994] 1 S.C.R 311 (RJR-MacDonald).** After mentioning that the **American Cyanamid** test was applicable in Canada "subject to the occasional reversion" to the strong *prima facie* case threshold, Sopinka and Cory JJ stated that one such occasion is when the result of the interlocutory application will in effect amount to a final determination of the action, or in other words, where the Woods exception was applicable. Sopinka and Cory JJ also speculated that, in the private law context, another exception to the **American Cyanamid** "serious question to be tried" standard may be recognised in cases where the factual record is largely settled prior to the application being made.

[42] In our view, the exceptions recognised in **RJR-MacDonald** are firmly tethered to the underlying logic of the **American Cyanamid** guidelines. First, as Lord Diplock pointed out in **Woods**, if the interlocutory application will in effect amount to a final determination of the action, then the basic purpose of

the interlocutory injunction would disappear as "there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial". Second, an underlying rationale of the **American Cyanamid** guidelines is that the court should not attempt to resolve disputes of fact without adequate evidence, nor to decide points of law without hearing sufficient argument. Where, therefore, the factual record is largely settled prior to the application being made, a court may consider the merit of the claim without offending the **American Cyanamid** guidelines.

[43] The foregoing analysis allows us to now address the cases cited by Mr. Mottley QC in support of his submission that, where a defendant in an application for an interlocutory injunction does not present an arguable defence, the **American Cyanamid** guidelines do not apply and the judge must move straight to a consideration of the merits of the case. We start with the **Official Custodian for Charities** case.

[44] The facts of that case are not important for present purposes. What is important is the passage from Scott J's judgment partially cited by Mr. Mottley QC in support of his argument. In our judgment, to fully understand the import of Scott J's statement of the law, it is necessary to read his full statement of the law as he understood it. Scott J said at **p. 16** of his judgment:

> "… I was invited by Mr. Nugee to apply the principles of *American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396*. He

> submitted that I should consider the balance of convenience and that that balance came down strongly in favour of maintaining the status quo under which the first and second defendants are collecting the rents of the property and managing it. I do not, however, think that this is a case to which the *Cyanamid* principles can be applied. Those principles are not, in my view, applicable to a case where there is no arguable defence to the plaintiffs' claim.
>
> In *Stocker v. Planet Building Society (1879) 27 W. R. 877* in the Court of Appeal, James L. J. said at p. 878:
>
> > "Balance of convenience has nothing to do with a case of this kind; it can only be considered where there is some question which must be decided at the hearing."
>
> See also *Manchester Corporation v. Connolly [1970] Ch. 420 per* Lord Diplock at 427D. In the present case, in the view I take of the section 146 (4) point, there is nothing to be decided at the hearing."

[45] It appears to us to be palpably clear that Scott J was not saying that the absence of an arguable defence in and of itself provided an exception to the applicability of the **American Cyanamid** guidelines. In the express words of Scott J, the practical realities of absence of an arguable defence in the case before him had the effect of there being "nothing to be decided at the hearing". Scott J's statement of the law is therefore wholly consistent with the Woods exception to the **American Cyanamid** guidelines that where "there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial", a court may consider the merits of each party's case. We would venture that this is happily so, as we can see no other principled reason why the

absence of a defence should operate as an exception to the **American Cyanamid** guidelines.

[46] In our view, it is of first importance that the discretion to grant or refuse interim injunctive relief in our courts be governed by conceptually coherent guidelines such as the **American Cyanamid** guidelines. Exception to those guidelines should not be serendipitous but should cohere with underlying principles of those guidelines. It is for this reason that the rider to the "no arguable defence" stated by Scott J in the **Official Custodian for Charities** case, namely, that the absence of an arguable defence in a case must have the effect of there being nothing to decide at the hearing of that case, must be stressed. In this regard, we also note that the learned authors of *Spry on The Principles of Equitable Remedies*, *Fifth Edition* (S*weet & Maxwell*) (*The Principles of Equitable Remedies)* at p.464 deny that the **Official Custodian for Charities** case represents an exception to the **American Cyanamid** as argued by Mr. Mottley QC. Rather, they opine that the **Official Custodian for Charities** case is authority for the proposition that "where no arguable defence exists to the plaintiff's claim an interlocutory injunction does not issue automatically but the court must exercise its discretion by reference to all the relevant circumstances".

[47] And so we turn next to the **Patel** case. A brief statement of the facts of this case goes a long way in understanding the relevance of **Patel** to the applicability of the **American Cyanamid** guidelines.

[48] The plaintiffs were the freehold owners of a yard over which the defendants had a right of way, which included a right to park vehicles for the purposes of loading and unloading. Since 1948, the defendants and their predecessors in title had parked vehicles along a wall of the yard adjoining the plaintiffs' premises. A licence which permitted the defendants to so park was revoked in 1986. Thereafter, the defendants continued to park along the wall, and the plaintiff sought an interlocutory injunction restraining the defendants from so doing and damages for trespass.

[49] It was held that the principle that a landowner whose title was not at issue was prima facie entitled to an injunction to restrain trespass whether or not the trespass harmed him, applied equally to the grant of an interlocutory injunction. A defendant was entitled to adduce evidence establishing that he had a right to do what would otherwise be a trespass, and, if he had sufficient evidence to establish that there was a serious issue to be tried, consideration of the balance of convenience was material. However, the evidence adduced by the defendants was woefully insufficient and in the circumstances, the plaintiffs were entitled to the interlocutory injunction sought by them.

[50] Balcombe LJ at **pp. 573-74**, after raising the question: "What, then, are the principles which a court should apply in a case of this type?" propounded as follows:

> "The two recent cases to which I have referred…are also authority that the same principle, namely prima facie a landowner whose title is not in issue is entitled to an injunction to restrain trespass, applies where the claim is for an interlocutory injunction. However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in *American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504, [1975] AC 396* in relation to the grant or refusal of an interlocutory injunction. I cite a short passage from the well-known speech of Lord Diplock in that case where he said ([1975] I All ER 504 at 510, [1975] AC 396 at 407):
>
> > 'The court no doubt must be satisfied that the claim is not frivolous or vexatious in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.'
>
> In considering that passage, one must bear in mind that in this type of case it is the defendant who is making the claim, because the plaintiff has established, without objection, that he has a title to the land in question.
>
> Again, for the purposes of this appeal, the plaintiffs have accepted that an easement to park cars in a defined area is a right known to the law, so the issue on this appeal is primarily whether the defendants have, by their evidence, shown an arguable case that their user (that is the parking of cars in the yard) was as of

> right, or, as it is sometimes put, not 'precario'. The burden is clearly on them to establish that."

[51] After outlining those principles, Balcombe LJ then said at **p 575**: "Those being the principles, what is the evidence in this case, bearing in mind that the burden on the defendants is to show evidence of 'user as of right' of the right which they claim to park cars in this yard?" Balcombe LJ then answered that question (in the passage cited by Mr. Mottley QC as establishing a principle of law that absence of an arguable defence render the **American Cyanamid** guidelines inapplicable as a general rule) as follows:

> "In my judgment the evidence shows no arguable case for the defendants having a general right to park cars in the yard beyond such right as they may be entitled to as part of their right of way. In my judgment, therefore, the judge below was wrong when he found that there was a defence to be reckoned with and that there was a serious issue to be tried. If there is no arguable case, as I believe there is not, then questions of balance of convenience, status quo and damages being an adequate remedy do not arise. Prima facie the plaintiffs are entitled to an injunction to restrain trespass on their land."

[52] Given the foregoing, it is not immediately clear to us how **Patel** supports "the no arguable defence" exception as argued by Mr. Mottley QC. In **Patel**, Balcombe LJ never purported to recognise any such exception. Balcombe LJ clearly stated that in the type of case before him, "it is the defendant who is making the claim, because the plaintiff has established…that he has title to the land in question". He then applied the **American Cyanamid "**serious

issue to be tried" guideline and found, in the passage cited by Mr. Mottley QC, that there was "no serious issue to be tried…no arguable case" and held that, in light of this finding, "questions of balance of convenience, status quo and damages being an adequate remedy", did not arise. Balcombe LJ's approach was wholly consistent with the application of the **American Cyanamid** principles and was not declarative of any exception to the applicability of those principles.

[53] We would add as a footnote to our analysis and conclusions on **Patel** that the authors of *The Principles of Equitable Remedies* at pp. 384-385 do not regard that case as supporting any "no arguable defence" exception to the **American Cyanamid.** Interestingly, as well, is that the learned authors of *Hanbury & Martin: Modern Equity, 16th Edition* (*Sweet & Maxwell*) at p 794 in discussing "cases where the **American Cyanamid** principles do not apply" under the subheading "Where No Arguable Defence" cite **Patel** for the proposition that "the claimant may obtain an interlocutory injunction to restrain a clear trespass even where it causes no damage". While we agree that **Patel** is authority for that proposition, we do not see how it supports the "no arguable defence" exception to the **American Cyanamid** test.

[54] Finally, we consider **GSTS Pathology**. In that case, Leggatt J at para [62] of his judgment accepted that "the general principles applicable to the grant of

interim relief are those established by the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504, [1975] AC 396*". He then noted that according to those principles, on an application for interim relief, the court should not consider the merits of claim beyond asking whether the claimant has shown a serious issue to be tried (what he called "a real prospect of success"). However, citing the English Court of Appeal case of **Cayne v. Global Natural Resources plc [1984] 1 All ER 225,** Leggatt J opined that that rule:

> "…is by no means inflexible. The fundamental requirement is that the court should do what appears just and convenient. There are cases in which the court has considered that justice requires it to examine the strength of each party's case before deciding whether to grant or refuse an injunction…"

[55] Leggatt J, at para [64], stated that two particular features of the case before him persuaded him that he ought to adopt the course of examining the relative strength of the parties' case. As to the first feature he said:

> "[65] The first one is that as counsel for HMRC rightly emphasised the 'interim' relief sought by the claimants, were it granted, would be equivalent in its effect to final relief. That is because the claimants are seeking an injunction to prevent HMRC from implementing its decision for a period which is likely - if the tribunal appeal is unsuccessful - to be around seven months.
>
> [66] It has been agreed by both parties that, save for this application, the claim for judicial review should not proceed until after the tax appeal has been determined if the claim then is relevant. That means that even if the hearing were then

> expedited, by the time any hearing for judicial review takes place, if it does, most of the period for which the claimants are seeking the injunction will have elapsed. If the injunction is granted and the claimants lose the tax appeal, they will therefore obtain most, if not all, of the substantial benefit which is the subject of their claim for judicial review. Nor do they propose that the benefit should be relinquished if the claim for judicial review proceeds to a hearing and is dismissed. The claimants do not offer any cross-undertaking in damages in this case. The explanation given is that to do so would be to expose them to the same financial risk which is the object of their application to the court to avoid. Granting the application sought by the claimants would amount to giving judgment against HMRC on the claim for judicial review. I do not think it would be just to follow that course unless I can be satisfied at this stage that the claim for judicial review has not just a real prospect of success but is likely to succeed."

[56] We would interject here a note that the question of whether or not there was an arguable defence was no part of the first "feature" which persuaded Leggatt J to depart from the **American Cyanamid** guidelines. On his express language, the determinative feature of the case before him was the fact that the result of the grant of the interim relief sought in the case before him would in effect amount to a final determination of the action. Put simply, Leggatt J, without stating it in so many words, invoked the Woods exception.

[57] Admittedly, Leggatt J made passing reference to the **Official Custodian for Charities** case at **para [111]** of his judgment in the passage cited by Mr. Mottley QC. There, Leggatt J was considering the merits of each party's case as an aspect of enquiry into the balance of convenience as an alternative

to his earlier consideration of the relative merits of the parties as a first step in deciding whether or not to grant an interim injunction. Leggatt J was considering this alternative approach because in **Woods**, Lord Diplock had stated that the relative merit of the parties' case was to be considered as an aspect of the balance of convenience.

[58] As regards the second feature, Leggatt J stated:

> "[67] The second reason why I think that I should consider the merits of the claim more closely on this application is because I can. The rationale of the *American Cyanamid* principle is that the court should not attempt to resolve disputes of fact without adequate evidence, nor to decide points of law without hearing sufficient argument; neither of which is generally practical or desirable on an interim application. That is not this case. In this case, pursuant to directions given by the court, a substantial body of evidence has been served and full trial bundles of documentation - most of it not relevant - have been placed before the court. There are however very few, if any, relevant disputed matters of fact. I have also had the benefit of argument from leading counsel over the day-and-a-half which was provided for the hearing…
>
> [68] The upshot is that I am in almost as good a position to form a view of the merits as I would be if this were the final hearing of the claim for judicial review. Moreover it would be wasteful and positively unhelpful to the parties in the circumstances if I were to limit myself to expressing a view only on whether the claimants have shown a real prospect of success, and put the parties to the trouble and expense of rehearsing their arguments again, no doubt over another hearing of similar length before another judge, if they wish to obtain a view on whether or not the claim is actually well founded."

[59] It appears to us very clear that this second reason given by Leggatt J falls squarely within the second exception to the applicability of the **American Cyanamid** guidelines adverted to by Sopinka and Cory JJ in **RJR-MacDonald**. So that, **GSTS Pathology** is no authority for the "no arguable defence" advanced before us by Mr. Mottley QC. In our judgment, **GSTS Pathology** is a case which applied the **Woods** exception and mentioned, without analysing, **Official Custodian for Charities** in that context.

[60] Thus, the burden of a proper analysis of the cases cited by Mr. Mottley QC is that there is no simple rule that where there is "no arguable defence" in an application for interim injunctive relief a court is free to consider the merits of the case and to ignore the **American Cyanamid** guidelines. The cases require more. The absence of an arguable defence must have the result that the grant of the interim injunction sought would in effect amount to a final determination of the action. In other words, to be applicable, the absence of an arguable defence must have the effect of bringing the case within the Woods exception.

[61] In the present case, the granting of the interim injunction sought by the appellant would not have the effect of amounting to a final determination of the action. For instance, in the claimant/appellant's amended fixed date claim form, a substantive remedy claimed is:

> "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 provisions of section 11 (1) (a) of the Pensions Act, Cap. 25 or at all."

Doubtlessly, if the interim injunction sought were granted, there would still be a question of the application to that substantive claim of the established principle that where the relationship between the claimant and the defendant involves mutual trust and confidence, the court rarely, if ever, grants injunctive relief irrespective of the relative strength of the claimant's case, preferring to leave the claimant to his remedy in damages. There would also be questions left to be tried as to the extent of the powers of the defendants under **section 11** of **Cap. 25**, and issues relating to the breach of the principles of natural justice, procedural fairness, excess of jurisdiction/illegality and improper exercise of discretion. So that, even assuming there was "no arguable defence" made out by the defendants in this case, **Reifer J** was correct in applying the **American Cyanamid** guidelines as the absence of such a defence would not, in effect, amount to a final determination of the action and so would not fall within the cases cited by Mr. Mottley QC.

[62] In any event, the case before **Reifer J** was not one in which there was the absence of an arguable defence. The second defendant, by way of defence,

raised a plea in bar of national security. Of this **Reifer J** held at para [55] of her judgment:

> "It is my finding…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 by the Court, namely, the "gag order", special filing arrangements and in camera hearings."

This is an unmistakable indication that **Reifer J** thought that, contrary to Mr. Mottley QC's contention, the second defendants had raised an "arguable defence". We are in full agreement with **Reifer J** and for this reason also, determine that **Reifer J** was correct in holding that the **American Cyanamid** guidelines applied.

[63] We note here that none of the grounds of appeal challenges **Reifer J's** understanding nor appreciation of the law or facts in her application of the **American Cyanamid** guidelines. That notwithstanding, we turn to a consideration of the judge's application of those principles to the case before her.

Serious Case to be Tried

[64] The judge determined that, in applying the **American Cyanamid** guidelines, the first issue for her to consider was whether there was a serious issue to be tried. On this, she opined at para [48] that the case involved "in the words of

Lord Diplock in **American Cyanamid** 'detailed questions of law which called for detailed argument and mature considerations'". Consequently, she held at para [49] that there was "a serious issue(s) to be tried". The judge expanded on this in para [50] as follows:

> "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)."

[65] We agree with this finding of the judge. Further, it is our judgment that the judge was correct in holding that the test of serious issue to be tried is met once the court is satisfied that the claimant's case is not frivolous or vexatious. It does not without more involve an enquiry into the relative strength of the claimant's case and the defendant's defence as contended by Mr. Haynes QC, counsel for the appellant, in his valiant attempt to reconcile the "no arguable defence" approach with the **American Cyanamid** guidelines. Accordingly, we hold that the judge properly concluded that the appellant's case met the threshold question of serious issue to be tried.

Balance of Justice

[66] Having answered the "serious issue" question in the affirmative, **Reifer J** addressed the issue of wherein lies the balance of "convenience/justice".

Recalling that the case before her involved an application for an interim injunction in judicial review proceedings, the judge cited "the learned authors of *De Smith, Woolf & Jowell*" where they opined 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] 1 AC 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".

[67] The judge also cited Brown LJ in the English Court of Appeal case of **Smith v Inner London Authority** where he stated on the relevance of public interest in an application for an interim injunction in judicial review proceedings:

> "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."

[68] **Reifer J** accepted these principles. However, she held by necessary inference that consideration of public interest as an aspect of the second limb of the **American Cyanamid** guidelines, balance of justice/convenience, only arises if damages is not an adequate remedy. In her view, in the case before her damages was an adequate remedy and she held so at para [67] of her judgment. Accordingly, she did not find it necessary to consider the interests of the public as an aspect of balance of justice.

[69] In our judgment, the approach taken by **Reifer J** is fully supported by our recent decision in **Worrell** which in turn is based on the judgment of Lord Goff in **Factortame.** In **Factortame**, Lord Goff proposed that the court's consideration of the balance of justice limb of the **American Cyanamid** guidelines proceeds in two stages. The first is the consideration of adequacy of damages and undertakings in damages and the second is consideration of all the circumstances of the case in deciding where the balance of justice lies. Of this Lord Goff stated at **pp 869-870**:

> "At this stage of the court's consideration of the case (which I will for convenience call the first stage) many applications for interim injunctions can well be decided. But if there is doubt as to the adequacy of either or both of the respective remedies in damages, then the court proceeds to what is called the balance of convenience, and for that purpose will consider all the circumstances of the case. I will call this the second stage. Again, I stress that I do not wish to place any gloss upon what Lord Diplock said about this stage. I wish only to record his statement, a p. 408, that
>
> > 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevance to be attached to them. These will vary from case to case.'
>
> And his further statement, at p. 409 (after referring to particular factors), that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases'."

[70] Lord Goff then turned to a further exploration of the place of adequacy of damages in cases with a public law element as it relates to the **American Cyanamid** test. According to him at **p 870**, an important feature is that "there is no general right to indemnity by reason of damage suffered through invalid administrative action", and conversely, "an authority acting in the public interest cannot normally be protected by a remedy in damages because it will not itself have suffered none". Accordingly, Lord Goff concluded at **p 870** that:

> "It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience."

[71] The sum and substance of Lord Goff's exposition is that, since compensation by an award of damages is not as a general rule available for damage suffered through invalid administrative action, an enquiry into adequacy of damages in such cases is generally unwarranted. It follows from this that, in a case in which compensation by an award of damages for damage suffered through invalid administrative action is available, a court cannot sidestep an enquiry into adequacy of damages at the first stage of the enquiry into the balance of justice limb. In principle, it must enquire into adequacy of damages in accordance with **American Cyanamid**. If, on such an enquiry damages are

found to be adequate the **American Cyanamid** rule that no injunction should be granted without going to the second stage applies.

[72] We would note here that, while damages is a remedy traditionally granted between private persons, under **section 5 (2) (f)** of **Cap. 109B**, the remedies granted on applications for judicial review, have been extended to include the remedy of "damages in money" as it is usually granted between private persons. The reason for the extension in **section 5 (2) (f)** of **Cap. 109B** is explained by Professor Eddie Ventose in *Commonwealth Caribbean Administrative Law (Routledge Taylor & Francis Group London and New York 2013)* at p.421 as follows:

> "[Traditional] public law remedies were insufficient to meet the demands of justice in particular cases, and most of the civil procedure rules made provision for the use of private law remedies. The courts too had already begun allowing applicants to claim private law remedies in claims for judicial review. There can be no quarrel with this development as it does not in any way compromise the rationale of judicial review which is to permit the citizen to obtain redress for the unlawful activities of public authorities".

[73] There can be no doubt that compensation by an award of damages for damage suffered through invalid administrative action may be available in a public law case involving the dismissal of a public officer. The Privy Council decision in **McLaughlin** affords an example of such a case. In it, the appellant was employed under a contract in a scientific post in the Cayman Government

service. His contract was terminated by the Governor in breach of the rules of natural justice. He sought relief for, inter alia, "damages for the [Governor's] illegal conduct and breach of duty…". There was no argument that damages was a remedy available to the appellant notwithstanding that the substantive claim in the case was judicial review.

[74] The case before **Reifer J** was a case like **McLaughlin**, in that compensation by an award of damages for damage suffered through any invalid administrative action of the respondents was available. **Reifer J** could not therefore sidestep an enquiry into adequacy of damages at the first stage of her enquiry into the balance of justice limb. In principle, she had to enquire into adequacy of damages in accordance with **American Cyanamid**. She did so and found damages to be adequate. She was therefore correct in applying the **American Cyanamid** rule that on such a finding no injunction should be granted and that there was no need for her to go on to a consideration of the second stage of the balance of justice limb.

[75] Given the foregoing, we can find no legal or evidentiary basis to interfere with the exercise by **Reifer J** of her discretion in refusing the interim injunction based on her finding on the evidence before her that damages were an adequate remedy. As was stated by Lord Diplock in **American Cyanamid** "if damages...would be an adequate remedy and the defendant would be in a

financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage". This is the law **Reifer J** applied.

Was Reifer J Right in Refusing the Interim Declaration Sought by the Appellant?

[76] Finally, we turn to the second ground of the appeal, namely, that the judge was wrong in law in refusing the interim declarations sought by the appellant.

[77] In approaching this ground, we note, first of all, that the appellant's amended fixed date claim form does not contain a claim for relief by way of an interim declaration. Nevertheless, the appellant has raised as a ground of appeal that the judge "ERRED IN LAW in failing to adequately or at all determine whether an Interim Declaration…should be granted". One particular interim declaration raised in those grounds was that "the Appellant, in law, having been illegally removed from office, was still in office as Commissioner of Police".

[78] **Section 5 (3)** of **Cap. 109B** provides that:

> "Any of the remedies mentioned in [the Act] may be applied for together or in the alternative in an application for judicial review; and the Court may grant any one or more of them as law and justice may require, and whether applied for in the original application or not."

This provision appears to grant the court the power to make an order whether applied for or not in the original application. So that, even though the

appellant did not claim interim declaratory relief in the original application, it behoves us, in light of **section 5 (3)**, to consider the appellant's claim for relief by way of interim declaration.

[79] Mr. Mottley QC was not very expansive in neither his written nor oral submissions to us on **Reifer J's** refusal to grant the interim declaratory relief sought. Here, Mr. Mottley QC's simple argument was that the respondents did not refute the appellant's contention that:

> "…the concept of Administrative Leave is not known to the Laws of Barbados or police or public service procedure and practice of Barbados. Further the Respondents did not provide any evidence in opposition to the appellant's contention that there was no provision in law to retire the Appellant in the public interest."

As the respondents did not refute these contentions, submitted Mr. Mottley QC, the appellant was entitled to the interim declaratory relief sought.

[80] Mr. Mottley QC's contention assumes, in the first place, that the judge had power to grant interim declaratory relief. But, does she have such power?

[81] The answer to this question is far from straightforward. Traditionally, based on English authorities, it has always been thought that interim declaratory relief is unknown to Barbadian law. The rationale for this view of the law is found in the judgment of Upjohn LJ in the English Court of Appeal case of

International General Electric Co of New York v Commissioner of Customs and Excise [1962] 2 All ER 398 at **p. 400** where he said:

> "…an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties forever, subject only, of course, to a right of appeal."

[82] In that same case, however, Diplock LJ observed as follows at **p. 401**:

> "In 1950 Romer J, in *Underhill v Ministry of Food (2),* was able to say that it was an unheard of suggestion that an interim declaration should be made, because it might be in the precisely opposite sense to the final declaration made at the trial. It is no longer possible to say it is an unheard of suggestion…"

Diplock LJ was here alluding to the fact that a statute may confer on the court power to make an interim injunction. Accordingly, where a statute vests the power in the court to make a declaration, it becomes a question of interpretation whether that declaratory power includes making an interim declaration.

[83] **Section 5 (2) (d)** of **Cap. 109B** confers on the court power to grant "a declaratory judgment". Additionally, **section 7** of that **Act** enacts that: "An interlocutory application may be made in any application for judicial review, and the Court or Judge may make any interlocutory order… and may grant any interim relief that the court or judge thinks fit".

[84] The real question is whether these statutory conferment can be interpreted as including a power to grant an interim declaratory judgment. In our view, they cannot be so interpreted. The reason for this is simple. Prior to the enactment of **sections 5 (2) (d)** and **7**, the law was clear that courts in Barbados could not grant interim declaratory relief. If Parliament intended to change this law it would have used express language to do so. Therefore, **sections 5 (2) (d)** and **7** cannot be read as encompassing a concept which was unknown to the existing law.

[85] We note *en passant* that the power to make interim declarations has been introduced into English law by *rule 25.1 (1) (b),* the Eastern Caribbean by *rule 17.1 (1) (a)* and Trinidad and Tobago by *rule 17.1 (1) (b)* counterparts to our **Supreme Court (Civil Procedure) Rules, 2008 (CPR)**. Strikingly, no such authority is conferred on the court or a judge under our **rule 17.1** of **CPR.**

[86] In our judgment, there is no power in a court or judge in Barbados to make an interim declaration. For this reason, we hold that **Reifer J** was correct in refusing the interim declarations sought by the appellant.

[87] We would only add, that even if **Reifer J** had the power to make an interim declaration, this is not a case in which she could have exercised that power since, as argued by the second respondent, the declarations sought in this case

involve substantive rights and the assessment of substantive rights. Declaratory relief is usually only given after full argument in such cases.

[88] We note as a postscript that the Governor-General has been named as a party to these proceedings in his personal capacity. In our view, this does not comport with the civility that should be accorded our Head of state. Accordingly, in future, any action brought against the Head of State should not specifically refer to that person by his or her name but by his or her office. A similar point of view was expressed by **Wooding CJ** in **Hochoy v N.U.G.E And Others (1964) 7 W.I.R 174**.

Disposal

[89] For all of the foregoing reasons, the appeal is dismissed with costs to the respondents, to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal