BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 8 of 2017

BETWEEN:

RUPERT DELISLE WORRELL **Appellant**

AND

THE MINISTER OF FINANCE **Respondent**

Before: The Hon. Sandra P. Mason, Chief Justice (Ag.), The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2017: February 23
March 3

Appearances:

Mr. Gregory Nicholls in association with Mr. Bryan Weekes, Mr. Rene Butcher and Ms. Janice Brown for the Appellant

Ms. Jennifer Edwards QC in association with Ms. Donna Brathwaite QC for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] This is an appeal against the decision of **Worrell J**, delivered on 17 February 2017, in which he discharged the interim injunction granted by him on 12

February 2017, restraining the respondent, the Minister of Finance, ("the Minister"), Mr. Christopher P. Sinckler, from terminating the engagement of the appellant, Dr. Rupert Delisle Worrell ("Dr. Worrell"), as the Governor of the Central Bank of Barbados ("the Bank").

[2] As is contended by both parties, the outcome of this case could have significant fiscal and economic implications for this country. It is imperative, therefore, to approach this case with granular particularity. With this in mind, at the conclusion of oral arguments we delivered an oral decision dismissing the appeal, and promised to provide written reasons for our decision on 3 March 2017. We now do so.

[3] We consider it advantageous to begin by providing a detailed factual and procedural background to this matter.

FACTUAL BACKGROUND

[4] Dr. Worrell is the holder of an Economics degree with First Class Honours from the University of the West Indies (UWI), 1967 and a Ph.D. in the same discipline from McGill University, Montreal, Canada, 1976. He is an internationally recognised economist with fifty years of professional experience at the Mona Campus of the UWI, the International Monetary Fund and the Caribbean Centre for Money and Finance at the St. Augustine Campus

of the UWI. In 1996, Dr. Worrell was awarded the Barbados Gold Crown of Merit in recognition of contribution to the field of Economics.

[5] In addition to being Governor of the Bank, Dr. Worrell is, by virtue of his position of Governor, Chairman of the Board of Directors of the Bank under **section 11 (2) (a)** of the **Central Bank of Barbados Act, Cap. 323C ("Cap. 323C"** or **"the Act")**. As Governor, he is also, by virtue of **section 11 (2) (b)** of **Cap. 323C,** the Chief Executive Officer of the Bank.

[6] The respondent Minister is appointed under **section 65 (2)** of the **Constitution** and has been assigned responsibility for the administration of the Finance and Economic Affairs department of the Government. His responsibility includes giving oversight to, and approval of, financial and other matters relating to the governance of the Central Bank under **Cap. 323C**.

[7] **Section 5** of **Cap. 323C** provides that the purposes of the Central Bank shall be:

> (a) to regulate the issue, supply, availability and international exchange of money;
>
> (b) to promote monetary stability;
>
> (c) to promote a sound financial structure;
>
> (d) to foster the development of money and capital markets in Barbados; and
>
> (e) to foster credit and exchange conditions conducive to the orderly and sustained economic development of Barbados.

[8] **Section 11 (1)** of **Cap. 323C** confers power on the Minister to appoint the Governor of the Central Bank. That section provides:

> "The Governor shall be a person of recognised experience in financial matters and shall be appointed by the Minister by instrument in writing for a period not exceeding 5 years and shall be eligible for re-appointment; he shall be appointed on such terms and conditions as may be set out in his instrument of appointment, and such terms and conditions may not be altered to his disadvantage during his tenure of Office."

[9] In the exercise of his power under **section 11 (1)** of **Cap. 323C**, the then Minister of Finance, Investment, Telecommunications and Energy, by "Instrument of Appointment" ("the 2009 instrument") in writing dated 28 July 2009, first appointed Dr. Worrell to the office of Governor of the Central Bank for a term of five years commencing 1 November 2009. The relevant terms and conditions set out in that instrument read as follows:

> "In exercise of the powers vested in me by Section 11 (1) of the Central Bank of Barbados Act, Cap 323C, I do hereby appoint you the said DeLisle Worrell to be the Governor of the Central Bank of Barbados established by the said Act for a period of five years from November 1, 2009 on the following conditions:
> …
>
> Determination of Engagement:
>
> (i) The Minister of Finance may at anytime determine the engagement on giving six months [sic] notice in writing or on payment of six months' salary.
>
> (ii) The Governor may at anytime after the expiry of three months from the commencement of the engagement determine the engagement on giving three months' notice in writing."

[10] By "Instrument of Appointment" ("the 2014 instrument") in writing dated 28 October 2014, the current Minister appointed Dr. Worrell to a second term of five years in the office of Governor commencing 1 November 2014. The terms and conditions set out in the 2014 instrument are virtually identical to those in the 2009 instrument, save the date relative to the commencement of Dr. Worrell's second term of appointment.

[11] During the afternoon of Wednesday, 8 February 2017, Dr. Worrell received an SMS from the Minister to the effect that he, Dr. Worrell, was to meet with the Minister at Government Headquarters at 4pm on Thursday, 9 February 2017. Dr. Worrell replied by SMS enquiring as to the nature of the meeting. In the Minister's response, he declined to provide details but repeated his request for Dr. Worrell to meet with him "after the meeting of Cabinet" scheduled for that day.

[12] On 9 February 2017, Dr. Worrell attended at Government Headquarters as requested where he was informed by the Minister, without notice, that Dr. Worrell's relationship with him, the Minister, and with the Board of the Bank, had irretrievably broken down and that he, the Minister, was offering him, Dr. Worrell, the option of resigning by 13 February 2017, failing which Dr. Worrell's appointment as Governor of the Central Bank would be terminated.

[13] In his affidavit in support of his application for interim injunctive relief, Dr. Worrell deposed that a significant circumstance leading up to the 9 February 2017 meeting between himself and the Minister was the Board meeting of 26 January 2017 which discussed the Barbados economic outlook as a standing agenda item. At that meeting, the Board agreed that the Governor should write to the Minister to express the Board's concern regarding the current level of foreign reserves and the Bank's financing to Government. Dr. Worrell claimed that he was not originally persuaded that he should write because, as he explained to the Board, his position was already set out in a press release drafted by him which he had shared with the Minister, and also because he was in frequent communication with the Minister. However, the Board was firmly of the view that Dr. Worrell's position should be set out in writing to the Minister.

[14] Dr. Worrell averred that he reluctantly concurred and sent an email letter on 31 January 2017 to the Minister's private email address which reads as follows:

> "Dear Minister
>
> At the Board Meeting of the Board of Directors of the Central Bank of Barbados on January 26, 2017 the Board expressed deep concern about the current state of the International Reserves. They requested that I convey to you their view that the reserves

> have now fallen to a level which creates deep apprehension in the community and has the potential to undermine the exchange rate.
>
> The Board is of the view that decisive action is needed on project implementation and expenditure reduction to achieve announced fiscal targets, if the Government's credibility is to be restored. I am available to make a presentation to the Cabinet on this matter, if desired, and Board members are offering to assist in advancing these measures in whatever way might be most helpful to you and the Cabinet…"

[15] Dr. Worrell claimed also as significant the fact that on 5 February 2017, an article was published on the front page of the Sunday Sun Newspaper entitled "Bank Board fed up with Worrell". An excerpt of the article provided as follows:

> "…The SUNDAY SUN has been informed by highly placed officials that the board of directors of the Central Bank is seething with Governor and board chairman Dr. DeLisle Worrell over the way he was running the institution; and some of them have gone as far as to call for his head, or they are prepared to quit.
>
> And, in an unprecedented move, some members of the board, so incensed by Worrell's unyielding management style which they said is carried over into the boardroom, met in his absence with Minister of Finance Chris Sinckler last Friday and made a case for his removal as Governor…."

[16] In any event, after his 9 February 2017 meeting with the Minister, Dr. Worrell instituted an action in the High Court against the Minister's threatened course of action as set out hereafter.

THE ACTION BEFORE THE HIGH COURT

The Application and *Ex Parte* Hearing

[17] By an oral *ex parte* application certified as urgent, Dr. Worrell sought an order from the High Court for an interim injunction against the Minister to restrain him from terminating his appointment as Governor. This application was heard *ex parte* on Sunday 12 February 2017 before **Worrell J**.

[18] At this *ex parte* hearing, Dr. Worrell was represented by Mr. Gregory Nicholls, attorney-at-law, who had prepared a draft notice of application dated 12 February 2017, for **Worrell J's** perusal. In that application, the orders sought by Dr. Worrell were that:

> "1. The Defendant be restrained whether acting through agents and/or servants or otherwise howsoever from terminating, seeking to terminate, removing, suspending the appointment of or otherwise prohibiting the Claimant from performing the duties of Governor, Chairman of the Board of Directors and Chief Executive Officer of the Central Bank of Barbados until further order of this Honourable Court.
>
> 2. The Claimant be allowed to continue in the employment or the service of the Central Bank of Barbados until further Order of this Honourable Court."

[19] The grounds stated by Dr. Worrell in his draft application were that:

> "1. The stated intention of the Defendant to terminate the appointment of the Claimant as Governor of the Central Bank of Barbados on Monday February 13th 2017 unless he sooner resigns is prima facie unlawful insofar as the

Defendant is purporting to act in breach of section 13 of the Central Bank of Barbados Act Cap. 323C unless otherwise restrained by this Honourable Court.

2. The question of the legality of the administrative acts and/or omissions of the Defendant in respect of the manner in which the threatened decision to terminate and or revoke the Claimant's appointment as Governor of the Central Bank of Barbados was effected [sic] raises serious matters of public importance and of administrative law and as such as serious issues to be tried.

3. The Defendant has unlawfully determined that the Claimant's appointment should be revoked unless the Claimant resigns by Monday February 13th 2017, without affording the Claimant the benefit of due process, natural justice or procedural fairness before said determination was made and unless the urgent interim injunctive relief herein sought is granted by this Honourable Court in order to preserve the status quo, the Claimant's appointment as Governor of the Central Bank of Barbados will be terminated and as a consequence, the Claimant is likely to suffer irreparable harm.

4. The Defendants [sic] is unlikely to suffer any loss or prejudice in the event that the urgent interim injunctive relief is granted by this Honourable Court and the balance of justice lies in the grant of the injunction.

5. The purported threatened termination of the Claimant as aforesaid is likely to bring irreparable harm to the reputation of the Claimant as an internationally renown [sic] economist a National Independence Honours awardee as well as the integrity, independence and international reputation of the Central Bank of Barbados and will have at this time a deleterious impact on the economy of Barbados."

[20] A draft affidavit, in support of the draft notice of application, sworn on 12 February 2017, was also prepared by Mr. Nicholls and presented to **Worrell J** for his perusal. It is to be noted that no draft fixed date claim form was prepared and presented to **Worrell J** at this hearing.

[21] At the hearing, Dr. Worrell gave an undertaking in respect of damages and also an undertaking to file the notice of application and affidavit on Monday, 13 February 2017 and serve them on the Minister. Thereupon, **Worrell J** made the following orders:

> "1. The Defendant be restrained whether acting through agents and/or servants or otherwise howsoever from terminating, seeking to terminate, removing, revoking or suspending the appointment of or otherwise prohibiting the Claimant from performing the duties of Governor, Chairman of the Board of Directors and Chief Executive Officer of the Central Bank of Barbados until further Order of this Honourable Court.
>
> 2. The Claimant be allowed to continue in the employment or the service of the Central Bank of Barbados until further Order of this Honourable Court.
>
> 3. The Claimant undertakes to pay to the Defendant any damages which this Honorable [sic] Court so orders in the event that this interim order is discharged.
>
> 4. The Defendant be immediately served with a copy of this Order and shall have occasion to return to this Honourable Court on the 15th of February 2017 at 1:00 p.m. to give reasons why the injunctive relief given herein should not be sustained or why said relief should be varied or discharged.

5. The Claimant to file the Notice of Application with the Affidavit sworn on 12th of February 2017 no later than Monday 13th February 2017 and serve copies of the same immediately on the Defendant.

6. The Fixed Date Claim Form to be filed and served on the Defendant by Wednesday February 15th 2017."

[22] On 13 February 2017, Dr. Worrell duly filed his notice of application and affidavit in pursuance of the order of **Worrell J** made on 12 February 2017. However, Dr. Worrell did not file and serve the fixed date claim form on the Defendant at that time.

[23] By affidavit, filed 15 February 2017, the Minister outlined the role of the Governor of the Central Bank, the purposes of the Central Bank and his role as the Minister of Finance. The Minister deposed that Dr. Worrell's relationship with him, the Minister, and also with the Board, had irretrievably broken down, and expressed the opinion that if such a situation is allowed to continue, it would have a damaging and deleterious impact on the country's economy.

[24] The Minister stated that under the instrument dated 28 October 2014, appointing Dr. Worrell as Governor, the clause entitled "Determination of Engagement" provides that the Minister may at any time determine the engagement of Dr. Worrell on giving six months' notice in writing or on payment of six months' salary.

[25] The Minister maintained that in all the circumstances of the case the greater risk of injustice would lie in continuing the interim injunction ordered by **Worrell J**.

The *Inter Partes* Hearing

[26] The *inter partes* hearing was held before **Worrell J** on 15 February 2017 where counsel made oral submissions relating to the continuation or discharge of the interim injunction. Mr. Gregory Nicholls in association with Ms. Janice Brown and Mr. Rene Butcher represented Dr. Worrell, and Ms. Jennifer Edwards QC in association with Ms. Donna Brathwaite QC represented the Minister.

[27] On conclusion of counsel's submissions, **Worrell J** gave an oral decision discharging the interim injunction and reserving his written reasons for that decision. Mr. Nicholls straightway made an oral application for an injunction pending the determination of the appeal, and made submissions in support of that application. The Court adjourned its hearing to afford counsel for the Crown the opportunity to respond to the submissions made by Mr. Nicholls.

[28] We note that during this adjournment, Mr. Nicholls filed the fixed date claim form ordered by **Worrell J** at the *ex parte* hearing to be filed by 15 February 2017, in the High Court Registry and a notice of appeal and supporting affidavit in the Court of Appeal Registry.

[29] Following the resumption of the hearing, and after the submissions of Ms. Edwards QC, **Worrell J** delivered an oral decision granting a limited injunction against the Minister for six days pending the hearing of the already filed appeal to the Court of Appeal so as to preserve the status quo.

[30] We consider it crucially important to interject here that in the fixed date claim form, which was never before **Worrell J**, Dr. Worrell applied for judicial review pursuant to the provisions of the **Administrative Justice Act, Cap. 109B (Cap. 109B)** "as a result of being aggrieved by the unreasonable, unlawful and ultra vires administrative decisions and/or acts and/or omissions which led to the ultimatum given to him by the Defendant". Dr. Worrell's claim for relief under **section 5** of **Cap. 109B** included an alternative claim for "an Award of Damages equivalent to the pecuniary loss occasioned by the unlawful acts and/or omissions/decisions of the Defendant".

[30] On 17 February 2017, **Worrell J** delivered a written judgment setting out his reasons for discharging the interim injunction ordered by him on 12 February 2017. It is against this decision of **Worrell J** that Dr. Worrell filed his notice of appeal on 17 February 2017 titled Civil Appeal No. 8 of 2017. An affidavit was also filed in support of the notice of appeal.

THE APPEAL

The Notice of Appeal

[31] The order sought in the notice of appeal is for "the decision of the Learned Judge made on Friday, 17th February 2017 to discharge the prior interim injunction be set aside and that the said injunction be restored until the completion [sic] trial of the Action for judicial review". The details of findings of fact and or holdings of law appealed against are as follows:

> "(i) In consideration of the question of the balance of justice, the Learned Judge erred in holding that the **"adequacy of damages"** was an appropriate consideration in this matter and that the Claimant did not make out a case that the damage he may suffer in the case of a discharge of the injunction would be irreparable or further, that there were exceptional circumstances to disregard the notion of the adequacy of damages in this instance."

[32] The grounds of appeal stated in the notice of appeal are that:

> "(i) The Learned Judge erred in law by failing to rule or address his mind on the question as to the wider public interest element in considering the balance of justice and gave too much weight to the question as to the adequacy of damages in all the circumstances;
>
> (ii) The Learned Judge erred in law in not applying the appropriate test in determining the question of the balance of justice was [sic] whether the wider public interest was more in favour of the Defendant exercising his perceived contractual power to revoke or terminate my appointment in an arbitrary and procedurally unfair manner as against the application of a wider public policy interest to maintain good public administration and to restrain public authorities form [sic] abusing a statutory discretion on a

mere executive whim that would amount to an abuse of power; and

(iii) The Learned Trial Judge erred by assuming that a determination could be made on the merits in a matter of judicial review prior to the trial where a remedy of damages would be adequate."

COURT'S ANALYSIS AND CONCLUSIONS

The Issues in this Appeal

[33] Both parties to this appeal accept that the discharge of the injunction by **Worrell J** was done in pursuance of the discretionary power vested in him as a judge of the High Court. The logic of this acceptance leads to the conclusion that two principal issues are raised in determining this appeal against the discharge, and for the continuation, of the interim injunction by **Worrell J**.

[34] The first of these is whether this Court has jurisdiction to interfere with the exercise by the judge of his 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 **Worrell J's** exercise of his discretion to discharge the interim injunction in this case.

[35] These two issues are dealt with hereafter *seriatim*.

Appellate function in Exercise of Discretion to Discharge an Interim Injunction

[36] This Court rehearsed the principles applicable to the appellate court's jurisdiction to interfere with the exercise of the discretion by a trial court in

granting or discharging an interlocutory injunction, in its recent decision of **Ansa McAL (Barbados) Limited v Banks Holdings Limited and SLU Beverages Ltd. ("Ansa") Civil Appeal No. 21 of 2015**.

[37] In **Ansa**, this Court set out, *in extenso*, 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**, as follows:

> "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."

[38] This Court stated at para **[83]** in **Ansa**, that "In its numerous decisions, including **Locke v. Bellingdon Limited (Civil Appeals Nos. 31 and 34 of 2001 unreported), Toojays Limited v. Westhaven Limited [2012] 2 LRC 65 (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 appeal 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."

[39] Mr. Nicholls contended, in his written submissions to, and oral arguments before, this Court, that the exercise of **Worrell J's** discretion was based entirely on a misunderstanding or misapplication of the correct principles of

law relating to the grant or discharge of an interim injunction and/or a misunderstanding or misapplication of the evidence. As a consequence of these reasons, Mr. Nicholls argued that the decision of **Worrell J** should be set aside. Ms. Edwards QC, argued on the other hand, that the circumstances of this case do not justify this Court setting aside the decision of **Worrell J**, whose discretion was not based on a misunderstanding or misapplication of either the law or the evidence.

[40] In view of counsel's contentions, the issue which now arises before us, is whether **Worrell J** acted upon wrong principles of law and/or misunderstood or misapplied the evidence in exercising his discretion.

Did Worrell J act upon Wrong Principles?

[41] In determining whether **Worrell J** acted upon wrong principles in exercising his discretion to discharge the interim injunction, we deem it best to begin with a consideration of whether the governing principles applied by the judge were the correct principles applicable to an interim injunction of the kind sought by the applicant in this case.

The governing principles

[42] 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 English House of Lords decision in **American Cyanamid Co v Ethicon**

Ltd [1975] 1 All ER 504 ("**American Cyanamid")** test as interpreted by this Court in **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, that 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 relief sought.

[43] 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**. That origin notwithstanding, there is no doubt that the **American Cyanamid** test is equally applicable to cases initiated under **section 5** of **The Administrative Justice Act,** which are demonstrably cases with a public law element. This is plain from 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 paragraph 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."

[44] Supporting this same principle that the **American Cyanamid** test is also 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 (No. 2) [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).**

[45] In the case before **Worrell J**, at para [5] of his written decision, **Worrell J** invoked the general principles enunciated by this Court's decision in **Toojays,** which accepted the test established in the **American Cyanamid**, in exercising his discretion in favour of discharging the interim injunction. Given our conclusion in the preceding paragraph of this judgment, it is clear that **Worrell J** relied on the correct governing principles in exercising his discretion to discharge the interim injunction in this case. To be fair, we would add here that it is no part of neither the appellant's, nor the respondent's, case that **Worrell J** erred in this regard.

[46] Mr. Nicholls' quarrel was with **Worrell J's** application of the **American Cyanamid** test in the circumstances of this case. We therefore turn to considering **Worrell J's** application of the **American Cyanamid** test.

Serious Question

[47] No complaints have been raised before us with respect to **Worrell J's** conclusion of the first question of whether there was a serious question to be tried. Indeed, the judge correctly stated at para [4] of his decision, that:

> "It is clear to this court that these parties are at odds on the Affidavits placed before the court and the various contentions in the oral submissions of counsel both at the exparte [sic] hearing and the return date hearing indicate that there is a serious issue to be tried."

Accordingly, nothing more needs to be said on **Worrell J's** determination on this first question.

[48] The complaints are in respect of **Worrell J's** determination of the second question, namely, the balance of justice. We therefore turn to this determination.

The Balance of Justice

[49] Being satisfied that the appellant had crossed the serious issue to be tried threshold, **Worrell J** then turned to the question of whether the balance of justice lay in favour of discharging or continuing the interlocutory relief. In approaching that question, the judge commenced at para [8] of his judgment

by reminding of the function of an interlocutory injunction. Of this the judge said:

> "The granting or discharge of an interlocutory injunction is to keep the balance as justly as possible between the parties until trial and in doing this the principle of adequacy of damages is one of the factors which has to be considered by the court."

[50] At para [9] of his judgment, **Worrell J** noted the statement of Lord Diplock in the **American Cyanamid** that in considering the balance of justice/convenience, "the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of application and the time of trial" and that "[i]f 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". Extrapolating from that statement of the law, **Worrell J** concluded at para [10] of his judgment that:

> "The Balance (sic) of justice therefore must entail an assessment of whether damages would be an adequate remedy, so such an assessment must of necessity take place in the Court's mind."

[51] In approaching the question of adequacy of damages, **Worrell J**, at paras [17] and [18] of his judgment recalled this Court's decision in **Toojays** where it

was said that if the claimant can be adequately compensated in damages, in the sense of quantifiable damages which are legally recoverable in the action for anything he may wrongfully suffer between the date of the application and the trial, the Defendant should not be restrained save in exceptional circumstances. In light of this, at para [19], the judge reasoned:

> "This court therefore has to be sure that there are exceptional circumstances which render irreparable damage to the Claimant should this injunction be discharged. The balance of justice between the parties would not be served by the discharge of the Interim Injunction if it can be shown that the Claimant will suffer harm as to be irreparable, that is, that no amount of compensation in damages at trial could repair the damage caused should the Claimant be successful at trial as a result of the act of the Minister in removing the Claimant from his post of Governor of the Ventral (sic) Bank."

[52] Finally, in his determination of the matter **Worrell J** held as follows:

> "[21] In the circumstances this Court is not called upon to determine the substantive trial in the matter, neither is it called upon to harmonize (sic) the relations between the Governor of the Central Bank and The Minister of Finance and Economic Affairs.
>
> [22] I do not find that the case of irreparable harm has been made out on behalf of the Claimant and should he eventually succeed in the substantive Trial in this matter, it will be for the Trial Judge to determine whether indeed there have been and (sic) Breaches of the Central Bank Act or any other breaches of which the Claimant complains in his affidavit before the court.
>
> [23] All of these matters are such that can be determined by a trial judge who in my mind should be able to be in a

> position to determine the adequate level of damages in this case.
>
> [24] I do not find that this is an exceptional case in the words of Lord Buckley referred to above, in which the Claimant can successfully move this court to permit the injunction to remain in place.
>
> [25] In the circumstances, this court having had the opportunity of full submissions on this matter is of the opinion that the balance of justice dictates that the interim injunction be immediately discharged."

[53] Mr. Nicholls argues that "Worrell J fell into grave error in determining the question of the balance of justice by a narrowly focus on the adequacy of damages and not the wider public interest element in determining where the issue of the balance of justice rests". The nub of Mr. Nicholls' argument as to why this is so, is that the application for injunctive relief before **Worrell J** was in the context of a claim for judicial review made pursuant to the **Administrative Justice Act, Cap. 109B** and was therefore an application for relief in a public law matter. Such an application, argued Mr. Nicholls, "falls within those special factors, described in the *American Cyanamid* case, where adequacy of damages is not determinative of the remedies available to the parties". In such applications, insisted Mr. Nicholls, "the wider public interest" had to be taken into account and that **Worrell J** did not so take "the wider public interest" into account.

[54] It is manifest that the cogency of Mr. Nicholls' argument depends upon the answer to the primary question of what are the modifications to the **American Cyanamid** test appropriate to the public law element of a case, or in other words, what is the impact of public interest on the **American Cyanamid** test. In our view, the judgment of Lord Goff in **Factortame** goes a long way in elucidating the answer to that question. In that case, Lord Goff, without intending "to qualify the guidelines laid down in Lord Diplock's speech" in the **American Cyanamid**, explored at **p 869**, some "modifications appropriate to the public law element of the case". We explore these in the context of the case before us.

[55] To begin with, Lord Goff did not think there was any need for modification of the first limb of the **American Cyanamid** test in cases with a public law element. In his analysis, appropriate modifications were only warranted in respect of the second limb, the balance of justice limb. In this regard, Lord Goff proposed that the court's consideration of the balance of justice proceeds in two stages. The first is the consideration of adequacy of damages and undertakings in damages and the second is where the court considers all of 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 usually 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, at 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 relevant weight 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'."

[56] Lord Goff then turned to considering the impact of the public interest upon the **American Cyanamid** test. According to him at **p 870**, one important impact springs from the fact 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."

[57] It bears emphasising here that, as was pointed out by this Court in **Toojays** at para [58], the court is doing, at what Lord Goff calls the first stage, nothing more than adhering to the equitable maxim that equity follows the law. Because equity follows the law, the court must enquire at the first stage, as Lord Diplock said in the **American Cyanamid**, "whether if the plaintiff were to succeed at the trial…he would be adequately compensated by an award of damages for the loss he would have sustained…between the time of the application and the time of the trial". 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.

[58] That said, there can be no doubt that compensation by an award of damages for damage suffered through invalid administrative action may be available in a particular public law case. The Privy Council decision in **McLaughlin v Governor of the Cayman Islands [2007] UKPC 50 (McLaughlin)** was such a case. In that case, 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. In a case like **McLaughlin**, 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 in 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.

[59] At the second stage, the balance of convenience stage, according to Lord Goff, the appropriate modification to the **American Cyanamid** test in cases in which a party is a public authority performing public duties, is that the balance of convenience must be looked at more widely, and the interest of the public to whom these duties are owed taken into account. It is to be noted here that the court cannot move to the second stage unless it is found at the first stage that damages are not an available remedy for the damage suffered through invalid administrative action.

[60] Having regard to Lord Goff's explication of the impact of public interest on the **American Cyanamid** test, two aspects of the present case assume determinative importance. The first is that in his fixed date claim form Dr. Worrell sought by way of relief, *inter alia*, "an *Award of Damages* equivalent

to the pecuniary loss occasioned by the unlawful administration acts and/or omissions of the Defendant". This is, in our judgment, a clear admission by the appellant that compensation by an award of damages for damage suffered through the alleged invalid administrative action of the Minister were available in this case. In other words, this is a case like **McLaughlin** where damages were an available remedy and not one where, in the words of Lord Goff, there was "no general right to indemnity by reason of damage suffered through invalid administrative action".

[61] We would add here also that, while damages is a remedy traditionally granted between private persons, under **section 5** 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.

[62] The reason for the extension in **section 5** of **Cap. 109B** is explained by Professor Eddie Ventose in *Commonwealth Caribbean Administrative Law (Routledge Taylor & Francis Group London and New York 2013)* at page 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."

[63] Given the foregoing, we can find no legal or evidentiary basis to interfere with **Worrell J's** discretion in discharging the interim injunction based on his finding on the evidence before him that damages were an adequate remedy in so far as "the case of irreparable harm had not been made out on behalf of the Claimant". 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."

[64] That statement of the law by Lord Diplock leads us into the second aspect of this case which is of determinative importance, namely, Mr. Nicholls' argument that **Worrell J** should have taken "the wider public interest" into consideration in deciding the balance of justice. Here, it is self-evident that once **Worrell J** correctly decided at the first stage that damages would be an adequate remedy, and that the Minister would be in a financial position to pay them, that was the end of the matter. According to Lord Goff, it was not permissible for **Worrell J** to go to the second stage of the balance of justice.

[65] That notwithstanding, we take note here of the general rule that the court should not restrain the actions or decisions of a public authority by an interim injunction. This rule is based on the presumption that the decision was made

in the interest of the public: **Boddington v British Transport Police [1999] 2 AC 143.**

[66] In an effort to rebut that presumption, Mr. Nicholls has argued before us that not only would the decision of the Minister to terminate Dr. Worrell's appointment as Governor adversely affect his, Dr. Worrell's, rights in his private capacity, in that Dr. Worrell's reputation and international standing would be damaged, but he also argued that the public interest would be adversely affected.

[67] In judicial review proceedings, the wider interest of the public is implicated and this transcends the interest of private parties in civil proceedings. However, Mr. Nicholls has not persuaded us as to how the alleged purported decision of the Minister in terminating the appointment of the Governor would adversely affect the interest of the public in this country. He has not shown how the stability of this country or public administration would be adversely affected if Dr. Worrell's appointment is terminated by the Minister, and thus he has not displaced the presumption of the validity of the lawfulness of the actions of public authorities. On the contrary, Mr. Nicholls' contention that the wider public interest should be taken into account is more supportive of Ms. Edwards QC's contention that the trust and confidence between the Minister and Dr. Worrell had eroded, that the relationships between Dr.

Worrell and the Minister, as well as Dr. Worrell and the Board, had irretrievably broken down, making it difficult, if not impossible, for the Minister to perform his duties in executing good public administration.

[68] So that, even if **Worrell J** had gone to the second stage of the balance of justice, Mr. Nicholls did not make it clear to us how this would advance the appellant's case. In our judgment, the public interest would weigh more heavily in favour of the Minister not being restrained from performing the duties he has been empowered to carry out under **Cap. 323C** in the interest of the Barbadian public than in favour of the appellant.

DISPOSAL

[69] For all of the foregoing reasons we hold that the appeal against the discharge of the interim injunction is dismissed. As we said in our oral decision, the respondent shall have its costs in this appeal and in the court below, to be assessed if not agreed.

Chief Justice (Ag.)

Justice of Appeal

Justice of Appeal