THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2018-01231

IN THE MATTER OF THE INTERPRETATION OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO INCLUDING SECTION 141 THEREOF

AND

IN THE MATTER OF THE INTERPRETATION AND DETERMINATION OF THE EFFECT AND STATUS OF THE CONTENTS OF THE 98th REPORT OF THE SALARIES REVIEW COMMISSION ON A GENERAL REVIEW OF THE SALARIES AND OTHER TERMS AND CONDITIONS OF SERVICE OF OFFICERS WITHIN THE PURVIEW OF THE COMMISSION, DATED 29 NOVEMBER 2013 WITH REGARD TO THE ISSUE OF SABBATICAL LEAVE TO MEMBERS OF THE HIGHER JUDICIARY

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Claimant

and

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Defendant

and

THE JUDGES OF THE SUPREME COURT

Interested parties

BEFORE: The Honourable Mr Justice James C. Aboud

DATE OF DELIVERY: 10 April 2019

APPEARANCES:
Rolston Nelson SC leading Zelica Haynes Soo-Hon, Kristal Madhosingh and Ria Mohammed-Davidson, instructed by Vincent Jardine of the Chief State Solicitor's Department for the Claimant

Douglas Mendes SC leading Darrell Allahar, instructed by Vahini Jainarine for the defendant

Russell Martineau SC leading Amirah Rahaman, instructed by Alana Bissessar of Pollonais, Blanc, de la Bastide & Jacelon for the Interested Parties

JUDGMENT

[1] The issue to be decided in this Fixed Date Claim ('the Claim) is whether members of the Higher Judiciary are entitled to sabbatical leave by virtue of the events surrounding the issuance of the 98th Report of the Salaries Review Commission ('the SRC Report') on 29 November 2013.

[2] Widespread national debate and controversy arose in November 2017 when the Hon Chief Justice, Mr Justice Ivor Archie JA applied for and was granted sabbatical leave by the former President, His Excellency Mr Anthony T. A. Carmona.

[3] In response to the uncertainty and uneasiness which arose, the Chief Justice opted instead to proceed on vacation leave. With a view, I think to quell the disquiet, the Attorney General filed this Claim on 12 April 2018 seeking clarity on the issue. The Claim mirrors a "construction summons" which was an originating process under the former Rules of the Supreme Court and is now provided for in CPR Part 56.1(1)(c). What has now come into question before the court is the interpretation of para 63(v) of the SRC's report. At first, the named defendant was the Judicial and Legal Service Commission. By consent, the Law Association of Trinidad and Tobago was substituted as defendant. After the Claim was filed and docketed to me the Judges of the Supreme Court (other than me) retained Senior Counsel and sought permission to join as interested parties.

Factual and Statutory background

[4] The SRC is an independent body established pursuant to sections 140 and 141 of the Constitution:

> 140. (1) There shall be a Salaries Review Commission which shall consist of a Chairman and four other members all of whom shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.

(2) The members of the Salaries Review Commission shall hold office in accordance with section 126.

141. (1) The Salaries Review Commission shall from time to time with the approval of the President review the salaries and other conditions of service of the President, the holders of offices referred to in section 136(12) to (15), members of Parliament, including. Ministers of Government and Parliamentary Secretaries, and the holders of such other offices as may be prescribed.

(2)The report of the Salaries Review Commission concerning any review of salaries or other conditions of service, or both, shall be submitted to the President who shall forward a copy thereof to the Prime Minister for presentation to the Cabinet and for laying, as soon as possible thereafter, on the table of each House.

[5] These sections authorize the SRC to review the salaries and other conditions of service of the President along with many other holders of public office. Currently, approximately 300 holders of public offices are under the purview of the SRC. These include the Chief Justice, Judges of Appeal and Puisne Judges. The members of the SRC hold office consistent with section 126 of the Constitution. According to the Oxford Dictionary Online edition (2019) the verb 'review' means "to examine or assess (something) formally with the possibility or intention of instituting change if necessary".

[6] By letter dated 3 February 2012 the President gave his approval for the SRC to undertake its 98th Report of all those office holders which fall under its remit. Written submissions were made to the SRC. In para 11 of its Report the SRC said that it extended an invitation to meet with all office holders to give them

an opportunity to make oral presentations on their written submissions. A large number of office holders accepted, including members of the Higher Judiciary. The Chief Justice, Justices of Appeal Mendonça, Bereaux, and Rajnauth-Lee (as she then was), as well as a consultant, Mr. Joseph Teixeira, attended on behalf of the Judiciary.

[7] Among their proposals was a submission that sabbatical leave should be granted to members of the Higher Judiciary. The proposals made by the Judiciary also included a paper on sabbatical leave. The paper, dated 27 February 2008, was written by Mr Justice Jamadar, at that time a High Court Judge.

[8] It is useful to examine this paper because Mr Nelson SC for the Attorney General suggested that certain useful definitions are found within it. The paper describes the work of the members of the Higher Judiciary, noting the length of the average terms of tenure (sometimes over 20 years) and the increased administrative and managerial responsibilities facing judges since the advent of the 'judge-driven' litigation modes encapsulated in the 2005 Civil Proceedings Rules. The paper also mentions the tensions, distrust, and suspicions that judges face while operating with in a small nation state. All of this creates "disturbingly high levels of chronic stress".

[9] The paper goes on to say this:

> "It may not be unrealistic to say that the judges and masters of the Judiciary of Trinidad and Tobago are at present and have been for several years stretched to the limit if not to their individual and collective breaking points…This then is the general context, at present, in which a judicial officer takes up an appointment and serves in Trinidad and Tobago.

> An informal survey of the current judges and masters reveals that a common experience, after a period of about 5-7 years, is a real feeling of burn-out and inertia. The consequence, recognized and accepted but not addressed institutionally, is that these judicial officers enter a phase of reduced enthusiasm and performance after about 5-7 years, which it seems may persist for several months and may never be completely resolved, or if resolved, re-occur cyclically".

[10] The paper recognized the need for judicial sabbaticals: ". . .if a judicial officer is to meet the high demands and expectations of [judicial] independence, impartiality, scholarship, expedience, and equanimity, as well as maintain public trust and confidence in the administration of justice, what is required is a well-rested, open, alert, incisive, rational and creative person (body, emotions, mind, psyche, and spirit)" (p. 15). The paper discussed "the need for sabbatical leave for judicial officers under three broad heads, (a) morale and incentive, (b) health and wellness, and (c) enhanced performance." In each case, the benefits of sabbatical leave were extolled. Justice Jamadar also listed the potential criticisms, in each case providing pre-emptive responses.

[11] The final two sections of the paper are titled "Questions to Consider" and "Implementation". The first posed a variety of scenarios, for example, frequency of sabbatical leave, duration, compensation, and procedure. Under the heading of "compensation" Justice Jamadar asked whether the leave should be with full, partial, or no salary. Under the "Implementation" section Justice Jamadar suggested that it was possible that, even in the absence of the external approval for sabbatical leave (which his paper plainly advocated) the Chief Justice already possessed the internal administrative power to de-roster a judge who was suffering from burnout or who had a backlog of judgments

(he cited the Privy Council judgment in *Rees v Crane* (1994) 43 WIR 444 at 452). In light of this, Justice Jamadar asked whether a "mini-sabbatical" could be considered as an alternative to "formal sabbatical leave" (as he termed it in this section). A mini-sabbatical involves leave for three months instead of six and would involve the pre-existing in-house administrative powers of the Chief Justice rather than by way of the SRC. In his concluding paragraph, Justice Jamadar said that the "need for implementation was urgent". It is worth noting that Justice Jamadar's paper was titled "SRC Submission-The Higher Judiciary—Appendix 6—Sabbatical Leave for Judicial Officers". According to the 10 July 2018 affidavit of the former SRC secretary, Stephanie Lewis, this paper constituted one of several proposals submitted by the Higher Judiciary to the SRC.

[12] It is also worth noting that Justice Jamadar's paper formed part of an earlier submission for sabbatical leave that was considered by the SRC in its 89th Report, issued in 2009. In that Report the SRC deliberated on the proposal and rejected it. The SRC stated that sabbatical leave for the Higher Judiciary should be "considered outside of the ambit of the general review in order to allow for a full appreciation of its implications" (see para 59 of the 89th Report).

[13] The SRC's 98th Report was presented to the former President on 29 November 2013. It made recommendations for revised salaries and allowances for those public officers under its purview for the period 2011 to 2014. The Report is divided into chapters, each dealing with specific office holders. The Higher Judiciary is dealt with in chapter 5.

[14] Like most of the other chapters, this chapter begins with a general overview of the functions and duties of the office holders. Their role in the democratic

process is described. Following this description is a summary of the Judiciary's proposals. The proposals are set out in para 62 as follows: an improved Housing Allowance, the discontinuation of the existing medical benefit and its replacement by an insurance plan, the improvement of the pension benefits of retired judges, the introduction of a Professional Allowance, a Duty Allowance and a Home Security Monitoring Allowance as new allowances, and the introduction of sabbatical leave.

[15] Each of these proposals is analysed in para 63 of the SRC report. The SRC accepted that an adjustment should be made to the Housing Allowance. It deferred acceptance of the proposals for an Insurance Plan and pension benefits for retired judges. It wholly rejected the proposals for Professional, Duty, or Home Security Monitoring Allowances (see para 63(i) to (iv)).

[16] Para 63(v) addressed the issue of sabbatical leave in this way:

> "(v) We agree in principle to the proposal for the introduction of Sabbatical leave for Judges. We recommend that office holders be eligible for a maximum of six (6) months such leave after a minimum of seven (7) continuous years of service. Thereafter, such leave should accrue to an eligible office holder at the rate of 6/7 of a month's leave for every additional year of service completed. Sabbatical leave should be provided with full pay.
>
> We consider that this leave should be provided for the following purposes: -
>
> (a) to participate in educational programmes that are related to the administration of justice, such as formal education

programmes and teaching at educational institutions or study programmes to improve the Judge's contribution; or
(b) to undertake a project that would contribute to improvements in the efficiency and effectiveness of the Court.

Approval for the grant of any such leave should be determined administratively by the Chief Justice taking account of the exigencies of the Court's operations. Additionally, appropriate administrative arrangements should be developed by the Judiciary to give effect to the facility".

[17] At the end of this chapter, like in all the other chapters, there is a section under the rubric "Recommendations". Nothing there mentions sabbatical leave. Instead, the SRC itemizes its recommendations for adjustments to a variety of benefits like salary, duty- and tax-free motor vehicle concessions and the housing allowance to name a few.

[18] The former President sent the SRC Report to the former Prime Minister, Mrs. Kamla Persad Bissessar. The date was not given but it must have been shortly after 29 November 2013 (the date that the SRC delivered the 98th Report to the President). Soon afterwards, by Cabinet Note PM (2013)109 of 5 December 2013 ('the Cabinet Note') the Hon Prime Minister advised the Cabinet in these terms, which I set out *verbatim*:

"1. The matter for the consideration of Cabinet is the Ninety-Eighth Report of the Salaries Review Commission (SRC) which deals with a general review of the salaries and other terms

and conditions of service of holders of offices which fall under the purview of the Commission.

2. By letter dated February 3, 2012, the President of the Republic of Trinidad and Tobago conveyed his approval for the SRC to undertake a general review of the salaries and other conditions of service of holders of officers within the purview of the Commission. The review was undertaken in two parts; one part pertaining to Members of Parliament, Local Government officials and members of the Tobago House of Assembly, and the other, pertaining to all other office holders who fall within the purview of the Commission.

3. The last review was undertaken in 2008 and recommendations thereon, contained in the Eighty-ninth Report of the SRC which was submitted in June 2009.

4. Consequent on its remit as indicated at paragraph 2 above, the SRC conducted its review and has submitted its recommendations in its 98th Report, a copy of which is attached. This Report dated November 2013 was received by the Prime Minister.

5. The size of the remit group falling under the SRC ranges from the President of the Republic to the most junior position in the Judicial and Legal Service and comprise some 300 categories of officers, representing an establishment of approximately 900 persons.

6. In the conduct of its review, the SRC examined information in respect of public sector officials in several countries,

including United Kingdom, Canada, Singapore, United States of America, Australia and New Zealand and considered the fundamental principles that guide the work of similar review bodies in those countries.

7. In making its recommendations, the SRC took into account the remuneration packages for the office holders within their purview. The current economic environment, globally and locally were examined. It should be noted that the salaries of the office holders under their purview have remained unchanged since 2005- a period of some eight (8) years with a resultant negative impact on their purchasing power. Also, account was taken of the fact that the country has experienced a measure of growth since the last review and despite the economic conditions at that time, other public sector officials received increases in salary, some of which were significant, over the period 2008-2010. In keeping with the principles advocated, it is recommended that the salaries and allowances for the office holders be revised for the period 2011-2014.

8. The Prime Minster considers that, in accordance with the provision of Section 141(2) of the Constitution of the Republic of Trinidad and Tobago, the 98th Report of the SRC should be laid on the Table on both Houses of Parliament.

9. In light of the foregoing, the Prime Minister recommends, and Cabinet is asked to agree to:

(1) accept:

I. The recommendations as contained in the attached 98th Report of the Salaries Review Commission on a general review of the salaries and other terms and conditions of service of holders of offices within the purview of the Commission; and

agree that:

I. In accordance with the provision of Section 141 (2) of the Constitution of the Republic of Trinidad and Tobago, the Report at (a) (1) above be laid on the Table of both Houses of Parliament."

[19] The Cabinet considered the Prime Minister's Cabinet Note on a day or days undisclosed to this court.

[20] By Cabinet Minute No. 495 of 13 February 2014, the Cabinet agreed to accept the recommendations in the SRC Report save and except the recommendation regarding the limit on tax/duty exemption on motor vehicles for certain office holders. It is useful to fully set out the decision of the Cabinet:

"Note PM (13)109 [the Cabinet Note], together with the comments/recommendations of the House Committee of the House of Representatives and an Addendum to the comments, and the recommendations of Finance and General Purposes Committee was considered.

Cabinet, having noted:

(1) The contents of the 98th Report of the Salaries Review Commission (SRC) on a general review of the salaries and other terms and conditions of service of holders of offices within the purview of the Commission, a copy of which was attached as an Appendix to the Note;

(2) That in its last general review (as contained in its Eighty-seventh Report), the SRC recommended that an evaluation of the jobs within its purview as well as a compensation survey be undertaken; in that regard the SRC advised that the services of a consultant were being sought to undertake the exercise and that work thereon would begin within the next few months; the Commission anticipates that the results will be available for consideration when next a general overview is undertaken; in the absence of an evaluation which would support changes in the existing relativities, the SRC maintained those relativities among the offices, except in the case of the offices of the President, the Higher Judiciary, the Chief Secretary, Tobago House of Assembly and specified offices in the Registrar General's Department;

(3) That in reviewing the benefits with respect to the Tax/Duty Exemptions on motor vehicles, the SRC recommended limits where provision exists currently for total exemption from Customs Duty, Motor Vehicles Tax (including Special Motor Vehicles Tax) and Value Added Tax as outlined in the relevant Chapters of the Report:

(4) The comments of the House Committee of the House of Representatives on the recommendations of the SRC as it pertains to Members of Parliament, a copy of which was attached as Appendix II to the Note (HUD (14)7); in particular, that the House Committee recommended inter alia:

(i) No adjustments in salary except for the offices of the Speaker of the House and the Leader of Opposition

(ii) Interim allowances (new and existing) for parliamentary offices as set out in Appendix II and Appendix II (A) of its Report, pending the completion of the job evaluation exercise

(iii) The outright rejection of the proposal to limit the facility for Tax/Duty exemptions on motor vehicles;

(5) The opinion of the Legal Unit of the Office of Parliament, attached as an Addendum to the comments of the House Committee, regarding the legal issues that may arise in the implementation of the recommendations of the SRC that propose limits on Tax/Duty Exemptions to the effect that:

I. The Constitution and other laws in very express terms have protected the remuneration arrangements of certain office holders; in the case of other officials, including Members, their remuneration arrangements can be altered to their disadvantage provided due process is followed.

II. The SRC has duly recommended, for many years, the entitlement of Members to tax/duty exemptions on motor vehicles for personal/official use without limitation; when the House of Representatives adopts the recommendations, this confers on Members an entitlement to the salaries and allowances and the terms and conditions as adopted; thus, any decision to implement current SRC recommendations that results in the removal or reduction in the salary and/or allowances of Members would violate section 4(a) of the Constitution unless such decision is made pursuant to section 13 of the Constitution.

III. Proximate to the above justifications, Members function as employees allowing for a generous interpretation of the term; they function as legislators as well as serve their

respective constituents and for this they receive a salary; while Members are not 'workers' for the purpose of the Industrial Relations Act, a unilateral variation of the terms of an employee's contract is always regarded as contrary to good industrial relations practice; the Industrial Court held in BIGWU v Chief Personnel Officer and Ministry of Science technology and Tertiary Education TD NO. 253 of 2009 that an attempt to reduce a worker's salary after he was offered and accepted a higher salary was a unilateral attempt to vary his salary where there was no such power reserved to the employer.

agreed:

(a) to accept the recommendations of the Salaries Review Commission (SRC) on a general review of salaries and other terms and conditions of service of holders of offices within the purview of the Commission contained in its 98th Report dated November 29, 2013 with the exception of the recommendations of the Commission with respect to transport facilities regarding the limit on Tax/Duty Exemption on motor vehicles for those offices under the SRC listed in the Attachment hereto, on the basis of the legal opinion to at (5) above;

(b) not to accept the recommendation of the House Committee of the House of Representatives on the 98th Report of the SRC in relation to the parliamentary offices, with the exception of the recommendation regarding the limit on Tax/Duty exemption on motor vehicles and referred to at (a) above;

(c) That the arrangements currently in place with respect to the full exemptions from Customs Duty, Motor Vehicle Tax (including Special Motor Vehicles Tax) and Value Added tax in respect of the offices listed in the Attachment continue to be applicable;

(d) That in the context of (a) and (b) above, in accordance with the provisions of section 141(1) of the Constitution of the Republic of Trinidad and Tobago, the approval of the President be granted for the SRC to review the salary and other conditions of service of the office of Lay-assessor, Equal Opportunity Tribunal;

(e) That the effective dates of implementation of the revised salaries and other conditions of service for holders of offices under the purview of the Commission be as set out at paragraph 241 of Chapter 22 of the 98th report of the SRC;

(f) That in accordance with the provisions of section (141) (2) of the Constitution of the Republic of Trinidad and Tobago, the 98th Report of SRC be laid on the Table of both Houses of Parliament."

[21] The Cabinet Minute reveals that the Cabinet carefully explained its disapproval of the SRC recommendation to limit or restrict the benefit of tax and duty exemptions for the purchase of new motor vehicles. It is important to point this out. Not only did Cabinet reject the recommendation but it gave a reasoned and cogent explanation for doing so.

[22] One day later, on 14 February 2014, and pursuant to section 141(2) of the Act, the SRC Report was laid in the House of Representatives. A motion for its approval was debated in the House of Representatives on 21 February 2014, 14 March 2014 and 15 March 2014. The Report was also laid in the Senate on 25 February 2014, but it was not debated there. On 15 March 2014, the House of Representatives approved a resolution in these terms:

"Be it Resolved: That the House approves the 98th Report of the Salaries Review Commission of the Republic of Trinidad and Tobago, with the exception of the recommendation to reduce the terms related to transport facilities".

[23] To be clear, there is no requirement in section 141 that a resolution of either House is needed to give legal effect to a tabled report of the SRC. According to the 12 April 2018 affidavit of Jacqueline Sampson, Clerk to the House, many documents are laid or tabled in Parliament pursuant to statute and they are collectively referred to as "Papers". Among these papers are the Reports of the SRC. The Papers are physically placed on the table in front of the Speaker's Chair, where the Clerk sits. Copies of the Papers are also available for scrutiny in the Parliamentary Library. According to Ms Sampson, the purpose of laying a Paper in the House is to provide information to the people's representatives and, by extension, to the world. Once laid they become a matter of public record. The SRC Report is not a statutory instrument and therefore does not require any further parliamentary action other than being tabled. However, as Ms Sampson helpfully explains, in the case of Papers such as the SRC Report, it is still open to any member of the House to elect to move a motion in these terms: "Be it resolved (a) that the House takes note of the paper, or (b) that the Paper be approved, or (c) that the paper be not approved ". As she testified, the vast majority of the SRC Reports have not been debated or approved. In the case of the 98th Report, the Lower House approved it after debate stretching over three days (I was not told how long on each day). The decision of the Members is a resolution and not an Order of the House. The former is an expression of opinion; the latter is an expression of will (see *May's Parliamentary Practice* 24th ed. p. 424).

[24] On 29 April 2014 the Minister of Finance and the Economy, Mr Larry Howai, issued Circular No. 2 of 2014 ('the MoF Circular'). It stated that the remuneration arrangements for holders of offices within its purview and revised arrangements had been approved by Cabinet. Attached to it was an

appendix that set out the arrangements for all the office holders in accordance with the Cabinet Minute. The MoF Circular is addressed to "all Permanent secretaries, Heads of Department, Chief Administrator, Tobago House of Assembly, and Heads of Statutory Bodies concerned". The subject of the circular is plainly stated at the top of the document: "Remuneration Arrangements for Holders of Public Offices within the purview of the Salaries Review Commission". The Minister itemized all the adjustments to allowances and emoluments of the relevant office holders in the appendix. Nowhere in the MoF Circular is any mention is made of sabbatical leave for the Higher Judiciary.

[25] Sometime in May 2014 the Chief Justice established an internal committee comprised of four Judges. The committee was chaired by Madam Justice Paula Mae Weekes JA (now Her Excellency the President) and was formed to consider appropriate administrative arrangements to give effect to sabbatical leave.

[26] According to the affidavit of the Attorney General, by letter dated 12 May 2014 a Court of Appeal Judge applied to the Chief Justice to proceed on sabbatical leave from 1 October 2014 to 31 March 2015. The Chief Justice orally deferred this application on the basis that the exigencies of the Judiciary did not allow that judge to proceed on it. In addition, the judge was told that a scheme was yet to be worked out to facilitate sabbatical leave. The Attorney General testified that this evidence, and what is set out in the paragraph below, is derived from correspondence passing between the Judge and the Chief Justice. The correspondence was not attached to his affidavit on the advice of his Senior Counsel. No one has suggested that it is inaccurate.

[27] The Judges met on 23 July 2014 and the members of the internal committee reported their opinion. The Judges of the Supreme Court did not file an affidavit in these proceedings but chose instead, through Mr Martineau SC, to assert facts from the bar table in the form of written and oral submissions. No party objected to this. Mr Martineau advised the court that, based upon his instructions, "the judges cannot say that there was an agreement in principle to the report of the internal committee". I take this to mean that the report of the internal committee was not adopted in principle or at all. On the evidence, it seems to have been mothballed since 2014.

[28] On 25 March 2016 Madam Justice Weekes JA formally advised the Chief Justice of her retirement effective 31 August 2016. On 18 April 2016 she wrote the Chief Justice seeking information as to how her entitlement to sabbatical could be effected. The letter acknowledges that her eligibility arises under the terms of the SRC Report. It is not said whether any reply was received to this letter.

[29] Beginning in November 2017 and continuing thereafter a series of newspaper articles were published alleging improper conduct by the Chief Justice in his personal and public life. It is fair to say that the nation became traumatized and divided.

[30] In that same month the Chief Justice applied in writing to the former President for six months sabbatical leave from March to August 2018. The public was not aware of this application. In February 2018 the Chief Justice wrote again to the former President identifying 11 March as the target date for his departure and again sought his approval. The then President formally approved the request on 6 March 2018. It was at this time that both of the Chief Justice's application letters to the then President became publicised.

[31] A national controversy erupted as soon as it became known that the former President had approved the Chief Justice's request for sabbatical leave. The controversy over the sabbatical leave was partly driven by the unresolved allegations of improper conduct that were circulating in the daily newspapers. It was publicly debated whether the Chief Justice was eligible or entitled to such leave. Newspaper columnists, editors, and senior and junior members of the bar joined in. Internal Judiciary emails leaked to the newspapers revealed disquiet among two judges. More than a dozen newspaper articles were published in all three daily newspapers on whether the Chief Justice was eligible for such leave. Copies of these newspaper articles were attached to Mr Jardine's affidavit.

[32] The Judiciary issued a media release on 9 March 2018 entitled "Sabbatical leave for Higher Judiciary". It sought to examine the issue of sabbatical leave. The release stated that administrative arrangements for the grant of sabbatical leave were already in place. I quote *verbatim*:

> "The issue of sabbatical leave for Justices and Judges of the Supreme Court received the attention of the SRC in its 98th Report, which was debated and adopted, save for a recommendation with respect to motor vehicles, by the Parliament of Trinidad and Tobago in March of 2014.
>
> Hansard report dated 2014.02.21 submission of Hon Dr. R. Moonilal which states as follows refers:
>
> 'Mr. Speaker, the Cabinet did agree to accept the recommendations of the Salaries Review Commission…contained in the 98th Report dated November 29, 2013. The Cabinet agreed to accept the

> recommendations with the exception of the recommendations of the Commission with respect to transport facilities regarding the limit on tax duty exemptions and motor vehicles…'."

[33] The press release went on to quote paragraph 63(v) and continued:

> "As the Report's recommendation as to Sabbatical leave required the administrative arrangements to be developed by the Judiciary, the Chief Justice in May 2014 appointed an internal committee of four judges chaired by then Appellate Judge, Mme Justice Paula Mae Weekes, to consider development of an appropriate administrative arrangement to give effect to the facility for sabbatical leave.
>
> The Report of the Committee was submitted to the Chief Justice and to a meeting of Judges and in July 2014 was agreed to in principle and thus comprises the administrative arrangement of the Judiciary. Since then, one judge sought to access the benefit, but that application was deferred owing to exigencies of the service at the time of the application".

[34] The public controversy over the Judiciary's eligibility for sabbatical leave continued to mount. A media release was issued by the Chief Justice on 14 March 2018. In it the Chief Justice indicated that he opted not to proceed on sabbatical leave. The release stated:

> "Conscious of the consternation which appears to have been caused by opting to access my sabbatical option and in a clear desire to ensure that the heads of all arms of the State

are not derailed from truly important national business by this issue, I have opted to not proceed on sabbatical.

However, as I have, since the middle of 2017 been engaged with the highly respected US Federal Judicial Centre on the issue of my study; and in November 2017 committed to this undertaking, I will proceed to utilize a portion of my vacation leave entitlement to address my study. . . "

[35] With a view to obtaining clarity and an end to the public uneasiness the Attorney General filed the Claim on 12 April 2018. The Claim seeks the court's determination of several questions germane to the controversy. By virtue of the doctrine of necessity, the High Court, being the only entity lawfully imbued with authority to make binding declarations, is now asked to answer the questions posed by the Attorney General in the Claim. The Attorney General has testified that these proceedings were initiated in order to protect the judiciary and to ensure that the boundaries of judicial independence and impartiality, as constitutionally mandated, are rendered clear. In doing this he says that he is acting in discharge of the Executive's functions. I well agree.

[36] This is what the Attorney General seeks in the Claim:

1. The determination and interpretation of the Honourable Court, by way of declaration or otherwise, as to whether, having particular regard to section 141 of the Constitution in conjunction with:

(a) the contents of the SRC Report and in particular paragraph 63 (v);

(b) the contents of the Cabinet Minute;

(c) the laying of the SRC Report before both House of Parliament on and Resolution of the Lower House to accept the SRC Report, subject to one exception

relating to the reduction of terms for transport facilities;

(d) the issuance of the Minister of Finance and the Economy Circular;

(e) the Judges Salaries and Pensions Act Chapter 6:02 and/or

(f) any other matter that the Court may deem relevant,

members of the Higher Judiciary, namely the Chief Justice, Justices of Appeal and Puisne Judges became eligible, as part of their terms of service, for the grant of sabbatical leave as delineated at paragraph 63(v) of the SRC Report.

2. If the answer to the issue set out at paragraph 1 above is in the affirmative, the determination of this Honourable Court by way of declaration or otherwise as to when, having particular regard to sections 140 and 141 of the Constitution, and/or any other matter that the Court may deem relevant, the eligibility of members of the Higher Judiciary to sabbatical leave would have arisen.

3. If the answer to the issue set out at paragraph 1 above is in the affirmative, the determination of this Honourable Court by way of declaration or otherwise, as to whether members of the Higher Judiciary, are currently entitled, in accordance with sections 4(a) and/ or 4(b) of the Constitution or otherwise, to be considered for and/or afforded the grant of sabbatical leave as delineated in paragraph 63 (v) of the SRC Report, or whether the consideration for and/or grant of such sabbatical leave would be further dependent on the development of administrative arrangements by the Judiciary.

4. Whether by virtue of any of the matters listed at paragraph 1 (i), (ii), (iii), (iv), (v) and (vi) members of the Higher Judiciary

would have a legitimate expectation to the grant of sabbatical leave as delineated at paragraph 63 (v) of the SRC Report.

The issues to be decided

[37] In a nutshell, these are the legal issues to be decided:

(1) Whether, having regard to the facts as they have arisen, Judges are eligible for the grant of sabbatical leave;

(2) If so, are they currently entitled to be considered for it?

(3) When did the eligibility of Judges for sabbatical leave arise?

(4) Whether Judges have a legitimate expectation to the grant of sabbatical leave?

Applicable law and governing legal principles

[38] Sections 140 and 141 of the Constitution (which create and empower the SRC) were set out earlier in this judgment. Except where otherwise stated the sections cited below refer to sections of the Constitution. The applicable law and governing legal principles are set out in discrete sections that are pertinent to answering the questions raised by the Attorney General.

(a) The terms and conditions of a judge's service

[39] Any analysis of the eligibility of members of the Higher Judiciary for sabbatical leave must begin with an understanding of the terms and conditions of a judge's service. Firstly, the terms and conditions of a judge's service cannot be altered to his or her detriment after appointment to the office (section 136(6)). The salaries and other allowances payable to judges are a charge on the Consolidated Fund (section 136(5)). This

ensures judicial independence and stabilizes the separation of powers doctrine that runs like a spine through the Constitution.

[40] Secondly, section 4 of the Judges Salaries and Pensions Act Chap 6:02 ('the JSP Act') provides that judges shall be paid the salaries specified in its attached Schedule. Sections 5 through 15 deal with judges' pensions. Section 16(1) of the JSP Act provides that:

> "The President may make Regulations generally for the carrying out of the provisions of this Act, and, without prejudice to the generality of the foregoing, may make Regulations relating to the conditions of service of, and the allowances payable to, a Judge."

[41] Regulations have not been made for 22 years. The last such Regulation was made in 1997. Nonetheless, members of the Higher Judiciary have enjoyed, as a matter of law it seems to me, terms and conditions of service today, which were improved after 1997 as a result of several SRC reviews. These post-1997 improvements have taken effect or been enjoyed without any Regulations having being made by the President under the JSP Act. This is an administrative or legislative lacuna that does not however disentitle the officeholders from the benefits conferred by successive SRC Reports. It may be that the executive and the legislative arms of government have—inadvertently or otherwise—turned a Nelsonian eye to the regulatory omission. To borrow Mr Mendes's expression this may be an instance of Homer nodding. The omission needs to be immediately corrected as a matter of good governance and the rule of law. That is the purist's view. It may also be, applying a more generous or liberal view, that substantive rights to the improved terms and conditions were created as a result of the section 141(2) procedural steps that precede the making of regulations or as a result of legitimate expectations that flowed from those procedural steps (both of which are considered below).

[42] Section 16 of the JSP Act does not specify the mechanism by which the President makes these regulations. The President is not empowered to act on his or her own of course. He or she acts in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet (section 80(1)). Nothing in section 141(2) mandates or directs the Cabinet or a Minister (even by oblique language) to advise the President to make Regulations after the SRC Report is tabled in both Houses of Parliament.

[43] How then, in the absence of any Regulations under the JSP Act, can the terms and conditions of a Judge's service be validly altered? Mr Mendes SC, for the defendant, submitted that a legislative intention can be gleaned from a conjoint reading of section 141(2) and section 16 of the JSP Act: once the Cabinet has agreed to accept the SRC Report it should or must also advise the President to make the requisite regulations under the JSP Act. Mr Nelson SC, for the Attorney General, seemed to suggest that a conjoint reading is farfetched as a matter of statutory interpretation. However, he offered nothing to validate any of the adjustments to the Judges' terms and conditions of service since 1997. If he is right, then all adjustments since 1997 are invalid.

[44] It seems to me that the lack of a textual connection between section 141(2) and section 16 of the JSP Act is immaterial to the questions posed in Claim. If the Cabinet accepts a recommendation from the SRC a lacuna in the language of section 141(2) cannot, in my view, disentitle the members of the Higher Judiciary to improvements in their terms and conditions of service. The Cabinet already knows that Regulations under the JSP Act must be made by the President and that the President can only make these

Regulations upon receiving the advice of itself or one of its members. Insofar as good governance is concerned the Cabinet ought to immediately advise the President of its acceptance of the recommendations of the SRC. This would cure the formal defects of the regulatory omission. Insofar as Judges have (from 1997 to the present) enjoyed benefits without any Regulations having been made it seems to me that the observance of, and reliance upon, successive SRC Reports by the Executive and the Judiciary, created *de facto* rights to the enjoyment of those benefits. The omission cannot operate like an agent of disentitlement. Later in this judgment I will deal with the question of legitimate expectation, a topic that is relevant to this issue.

(b) The role of the SRC in achieving the independence of the Judiciary

[45] The goal of judicial independence is to ensure that justice is done in individual cases and to ensure public confidence in the justice system. The three core characteristics of judicial independence are (a) security of tenure, (b) financial security, and (c) administrative independence (see *Valente v The Queen* [1985] S. C. R. 673 at p. 22 per Le Dain J and *The Commonwealth, Latimer House Guidelines*, Guideline II.1). So far as material, the preamble to the Constitution recognizes (at sub-para (d)) "that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law".

[46] Section 4(b) says this:

> "4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> . . .

(b) the right of the individual to equality before the law and the protection of the law;"

[47] Section 5(2)(f)(ii) says this:

"(2) Without prejudice to subsection (1), but subject to this chapter and to section 54, Parliament may not—

. . .

(f) deprive a person charged with a criminal offence of the right—

. . .

(ii) to a fair and public hearing by an independent and impartial tribunal;"

[48] To achieve these goals the Judiciary must be insulated from legislative and executive interference. This insulation occurs at several levels. Firstly, Judges are appointed by the President, acting in accordance with the advice of the independent Judicial and Legal Service Commission. They cannot be removed from office except for good and proper reasons. Secondly, they enjoy financial security by the Constitutional guarantee that their salaries and allowances are a charge on the Consolidated Fund. These protections eliminate the influence that the Legislature or the Executive might otherwise exert if they sought to hire judges who would do their bidding or threatened to fire judges who did not.

[49] The Constitution mandates the executive to find the funds to pay for an independent and impartial Judiciary that supervises, and is itself subject to, the rule of law. Among the many costs of providing this service is the payment of judges' salaries and allowances. These are not static in nature. Over time salary increases become necessary. Now, this is a nettlesome situation. The Executive is very often a party before the civil courts and it is always a party in the criminal courts. Every salary negotiation is an exercise in bargaining and, depending on the balance of power at the time,

the negotiators may not be on equal terms. There is no place for influence peddling or curry-favouring in fixing salaries and allowances in a sovereign and constitutional democratic state such as Trinidad and Tobago. It is for this reason that the SRC was created. It is designed as a buffer or sieve between the Executive and the Judiciary. It is free to haggle with an office holder or recommend or reject an office holder's proposal. When it does so it is not acting as an agent or an arm of the state. The SRC is itself independent. Its commissioners are appointed by the President after consultation with the Prime Minister and the Leader of the Opposition (section 141(1)).

[50] A sensible discussion of these principles is found in the judgment of the Supreme Court of Canada in *Ref Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Ref Re Independence in Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S. C. R. 3 at paras 186-7:

> 186. Negotiations over remuneration are a central feature of the landscape of public sector labour relations. The evidence before this Court (anecdotal and otherwise) suggests that salary negotiations have been occurring between provincial court judges and provincial governments in a number of provinces. However, from a constitutional standpoint, this is inappropriate, for two related reasons. First, as I have argued above, negotiations for remuneration from the public purse are indelibly political. For the judiciary to engage in salary negotiations would undermine public confidence in the impartiality and independence of the judiciary, and thereby frustrate a major purpose of s. 11(*d*). As the Manitoba Law Reform Commission has noted (in the *Report on the Independence of Provincial Judges* (1989), at p. 41):

> '. . . it forces them [i.e. judges] into the political arena and tarnishes the public perception that the courts can be relied upon to interpret and apply our laws without concern for the effect of their decisions on their personal careers or well-being (in this case, earnings).'

187. Second, negotiations are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence. The major expectation is of give and take between the parties. By analogy with *Généreux*, the reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive. As Professor Friedland has written in *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 57, "head-to-head bargaining between the government and the judiciary [creates] . . . the danger of subtle accommodations being made". This perception would be heightened if the salary negotiations, as is usually the case, were conducted behind closed doors, beyond the gaze of public scrutiny, and through it, public accountability. Conversely, there is the expectation that parties to a salary negotiation often engage in pressure tactics. As such, the reasonable person might expect that judges would adjudicate in such a manner so as to exert pressure on the Crown."

[51] This judgment involved three appeals from the Provinces of Prince Edward Island, Manitoba and Alberta. The majority decision was written by Lamer CJ. The statutory situation was different in *Provincial Court Judges'*

Association of New Brunswick; Ontario Judges' Association; Bodner v Alberta; Conférence des juges du Quebec; Minc v Quebec [2005] 2 SCR 286. That case arose after the Canadian government rejected the recommendations made by the Compensation Commissions of Ontario, New Brunswick, Alberta and Quebec. The Supreme Court endorsed Lamer CJ's principles of institutional financial security in the *Remuneration* case, namely that judicial salaries could only be changed by recourse to an independent commission, that salary negotiations are not permitted between the Judiciary and the Government and that judicial salaries should not fall below a minimum level. The unanimous decision of the panel was this:

> "Compensation commissions were expected to become the forum for discussions, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes. . .The commission process is an 'institutional sieve'—a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision-making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question."

According to Mr Nelson SC the Supreme Court of Canada left open the question of whether the report of the commission would be binding on the Canadian government. Mr Nelson is correct. This leads me to the next area of enquiry.

(c) The legal status of SRC recommendations

[52] It seems to me that the recommendations of the SRC cannot be binding on the Executive. The SRC is not a power unto itself and it does not rule by

fiat. It reviews and recommends. This does not mean that its recommendations should be regarded as having been "written out on air and running water", as the Roman poet Catullus put it in connection with something else. While its role is limited to an assessment of salaries and allowances with a view to instituting change, if necessary, the SRC does not itself effect any change.

[53] A court does not need to be mechanical or rigid in construing section 141(2). Its task is one of interpretation not divination (see *State v Zuma* [1995] ZACC 1, per Kentridge AJ). Jamadar JA summarised what is entailed in the process of generous interpretation in *Law Association of Trinidad and Tobago v Chief Justice Ivor Archie* (unreported) Civil Appeal No. P075 of 2018, dated 22 May 2018:

> "The cases show that the courts are to take a broad (non-rigid, non-formalistic—'tabulated legalisms'), purposive approach, looking contextually at the substance and reality of what is at stake, and doing so through the lens of the human rights provisions, core constitutional values—including unincorporated treaties (where these are relevant), but grounded at all times in the actual language, content, and context of the provisions under consideration, especially when these are specific and stated in the most concrete terms."

Whether the principle of generous interpretation applies only to Bill of Rights cases is debatable. Mr Nelson submitted that the law is not as clearly discernible as Jamadar JA has set it out. But it nonetheless seems challenging to this court to wholly detach sections 140 and 141 from the fundamental rights and freedoms sections of the Constitution. The independence of the Judiciary is structurally imbedded into the

Constitution, as the Attorney General himself says at para 8 of his affidavit. The fulfilment of the promise of human rights and freedoms depends upon an independent Judiciary. In that sense, the construction of sections 140 and 141 require the type of generous interpretation described by Jamadar JA. Of course, any form of interpretation begins with the plain, ordinary meaning of the words: *Attorney General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672, per Lord Fraser at 682.

[54] By the wording of section 141(2) it is clear that the SRC's role is one of review. Reviewing something includes making recommendations. Recommending is not dictating. The recommendation is made to the President. The President is mandated to forward a copy to the Prime Minister who presents it to the Cabinet. The presentation must be formal. The convention is by a Cabinet Note. The section requires the Cabinet to lay the Report on the table of both Houses "as soon as possible" after it has been presented to the Cabinet. These words import a sense of urgency. The decision as to whether to accept or reject the recommendation is one that is solely exercisable by the Cabinet. It does not seem plausible to me, on a reading of the section, that the acceptance or rejection is dependent on the will of the Legislature. To be clear, the offices under the purview of the SRC include the legislators. Unseemly debates might ensue if the final decision was left to the members of both Houses. In any event, if an enactment or resolution was required the section would have said so. The final decision must obviously rest with the Cabinet.

[55] Can the Cabinet whimsically reject the recommendations of the SRC? I agree with Mr Mendes SC and Mr Martineau SC: the Cabinet cannot do so. The independence of the Judiciary would be undermined if the Executive

were empowered in its absolute discretion to reject the SRC recommendations (see *Valente*, *supra*, para 51). It would make a farce of the whole exercise. It would destabilize public trust in the Judiciary, which would appear to the public as a servile or obsequious junior partner in the business of constitutional governance. In order to give meaning to the process, the Executive must consider the recommendations and, if any or all are to be rejected, it must give rational reasons for doing so. Legal authorities support this conclusion. They arise in the realm of public law.

[56] In *Easy-Jet Airline v The Civil Aviation Authority and Gatwick Airport Limited* [2009] EWHC 1422 Collins J discussed the effect of statutory provisions which required the Civil Aviation Authority to have regard to certain recommendations. He said that if the authority decided not to follow the recommendations it must give reasons for so doing:

> "A recommendation is stronger than guidance, but the same approach as set out in *R (Munjaz) v Mersey Care* [2006] 2 AC 148, is as it seems to me, appropriate. The adjective 'cogent' recognises that any reasons must be sufficient to show that proper consideration has been given to the recommendation and that reasons for not following it have demonstrated that the decision reached was sound".

[57] In the *Remuneration* case, the Supreme Court of Canada held that although the recommendations of the proposed Provincial commissions were non-binding, they should not be lightly set aside. If the Executive chose to depart from them, it had to justify its decision according to a standard of simple rationality—if need be in a court of law.

[58] This is what the Lamer CJ said (at paras 178 to 180):

"178. . . The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.

179. What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations. If the legislature is involved in the process, the report of the commission must be laid before the legislature, when it is in session, with due diligence. If the legislature is not in session, the government may wait until a new sitting commences. The legislature should deal with the report directly, with due diligence and reasonable dispatch.

180. Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's

> report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. The need for public justification, to my mind, emerges from one of the purposes of s. 11(*d*)'s guarantee of judicial independence — to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges' salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as being indifferent or hostile to judicial independence, if it is supported by reasons".

[59] I accept the logic of these pronouncements and I am fully satisfied of their usefulness in understanding the legal status of the SRC Report. It would be wrong to imagine that the SRC report, being non-binding, lacks constitutional significance.

Resolution of first question: Whether, having regard to the facts as they have arisen, Judges are eligible for the grant of sabbatical leave

[60] Having considered and approved the law set out above and also those authorities referred to by Senior Counsel for the three parties and also having regard to the undisputed facts, it is my opinion that the members of the Higher Judiciary are eligible for the grant of sabbatical leave.

[61] I think that the language in para 63(v) of the SRC Report is unambiguous. The first sentence expresses an agreement "in principle to the proposal" for sabbatical leave. This must refer to the submissions of the Judges and

their advisor and, in particular, to the paper written by Justice Jamadar. Alternatives were set out in the paper and I assume in the oral presentation as well. With respect to the proposal or proposals (there were more than one) the SRC says it agrees in principle. The next sentence is an impeccable and unequivocal statement of recommendation: "We recommend that office holders be eligible [for sabbatical leave] ". The SRC goes on in the remaining sentences of para 63(v) to carve out, from the body of the Judiciary's proposals, a specific recommendation. It identifies all the pertinent features of the type of sabbatical leave it recommends. Judges with seven years' service are to be eligible for a maximum of six months leave, with leave accruing thereafter at a rate of 6/7 of a month's leave per year of service. Leave is to be granted on full pay. Sabbatical leave is permissible only for the purposes specified and is to be approved by the Chief Justice taking account of the exigencies of court operations.

[62] Mr Nelson SC found that the use of the word "should" in para 63(v) cast doubt on a positive recommendation. Here are some examples: "Sabbatical leave should be provided with full pay", or ". . .leave should be provided for the following purposes. . . ", or "Approval for the grant. . . should be determined by the Chief Justice". I do not share that view. "Should" is not a polysemic word. Strictly speaking, it is the past tense of "shall". Both are auxiliary verbs. However, "should" has a present or future reference when it predicates a main clause. "Should" is specifically used to express advisability. In my view "should" does not mean "may". It is closer in meaning to "shall", especially when it predicates the main clause (for example "should be provided with full pay").

[63] I also respectfully differ with Mr Nelson's submission that "there is a lack of clarity about the term 'sabbatical leave'". In his reply submissions he

belatedly makes a distinction between "funded sabbatical leave" and "administrative leave". As Mr Martineau pointed out, Justice Jamadar's paper made no such distinction. In any event, para 63(v) speaks for itself. The definitions must be sourced there and not in Justice Jamadar's paper. In addition, if the argument is that the recommendation was for the grant of "administrative leave" instead of "funded sabbatical leave", then it seems to me, with all due respect, that this amounts to a concession that a recommendation was in fact made in para 63(v) and that its omission from the MoF circular does not constitute a bar to its existence (as argued in Mr Nelson's original submissions).

[64] I also have a problem with the argument that sabbatical leave involves access to the Consolidated Fund without passage of an Approbation Act or other statute. According to the SRC Report sabbatical leave is with full pay. This does not involve any additional access to the Consolidated Fund. It is to be assumed that the Chief Justice will have regard to the workload of the courts and the requesting (or 'burnt-out' judge) and will try to minimise or avoid a vacuum in the number of assigned judges when granting leave. It is speculative to posit that Acting Judges will have to be appointed as a result of the grant of sabbatical leave and thus be a drain on the Consolidated Fund: the complement of judges may be increased or systems to manage case-flow might improve, or the judge selected may be commanded to deliver all judgments and complete all part heard trials as a precursor to sabbatical leave. These are matters for the Chief Justice. Furthermore, the appointment of Acting Judges (if it becomes necessary) will not, I assume, be taken without prior consultation with the Attorney General and, through him, the Minister of Finance. In that case, if access to the Consolidated Fund is needed, it will not be without the force of law.

[65] The recommendation for sabbatical leave is not contained in the section that appears under the rubric "Recommendations" at the end of the chapter in the SRC Report. As a matter of construction, there is nothing in the "Recommendations" section that contradicts the recommendation in para 63(v). Something more than an omission is required to reverse the explicit language in para 63(v). There cannot reasonably be such a thing as an implicit negation by the omission of sabbatical leave in the "recommendations' section of the SRC Report.

[66] The Cabinet Note presented by the then Prime Minister is also unequivocal. It asks for the Cabinet to accept all the recommendations in the SRC Report. She also asked the Cabinet to lay the Report on the tables of both Houses in accordance with section 141(2). The Cabinet Minute is likewise unequivocal. It accepted the 98th Report of the SRC with the exception of the recommendations regarding the limitation of duty/tax exemptions on motor vehicles. The Cabinet also agreed to lay the SRC Report on the tables of both Houses.

[67] It seems to me that the then Prime Minister and the Cabinet were acting consciously and deliberately. The Minute shows us that the SRC Report was analysed in detail. The recommendations were accepted, save for one. Reasons were given for rejecting that recommendation. Those reasons seem plausible to me. There was no rejection of the recommendation for sabbatical leave. I assume that a record or a secretarial minute of the discussions between the Cabinet members was kept but, by convention perhaps, it was not produced in evidence. All we have is the Cabinet Minute. To be clear, Cabinet has never to date rejected the recommendation for sabbatical leave. Indeed, the Attorney General's Claim is not framed in a way that even obliquely betrays a rejection of

sabbatical leave. If it was the then Cabinet's intention to reject the recommendation in para 63(v) then it was duty-bound to give a reasonable explanation for the rejection. There is no explanation for rejecting the sabbatical leave recommendation because sabbatical leave was never rejected.

[68] As already mentioned in this judgment the tabling of the Report is for information purposes only. The resolution of the Lower House is not a requirement of law. If anything, the debate and the resolution show that, save for excepting the duty/tax exemption, a majority of legislators in the Lower House approved the SRC Report. I must assume that they had access to the SRC Report in the Parliamentary library and were familiar with its recommendations.

[69] It has been said that since sabbatical leave was not mentioned in the MoF Circular then Judges cannot be eligible for it. This is putting the cart before the horse. The Mof Circular is prepared by the Personnel Department on the basis of the Cabinet Minute (Ms Barton's affidavit said so). A failure to accurately capture the Executive's decision as stated in the Cabinet Minute cannot disentitle the Judges. What matters is the decision of the Executive, not the decision of the Legislature or a Minister under whose name a memorandum is issued. As previously noted, the MoF Circular is issued for information purposes only. It begins "I wish to inform you". It was addressed to Permanent Secretaries and other administrators regarding "remuneration arrangements" for office holders under the purview of the SRC. An informational circular with such a subject heading cannot reasonably be expected to contain information about sabbatical leave for Judges. The Minister of Finance cannot withhold a reference in his Circular to sabbatical leave (whether accidentally or otherwise) and

thus render ineffective a clear recommendation of the SRC, which the Cabinet has accepted, or to which it has not objected.

Resolution of the second question: Are the members of the Higher Judiciary currently entitled to be considered for sabbatical leave?

[70] Here is another way of phrasing this question: is the eligibility or grant of sabbatical leave dependent on the development of administrative arrangements within the Judiciary?

[71] The SRC recommendation included these words: "appropriate administrative arrangements should be developed by the Judiciary to give effect to the facility". It has been suggested that these words create a pre-condition so that if the arrangements have not been developed then the Higher Judiciary is ineligible for sabbatical leave. I do not accept that argument.

[72] The fact that approval for the grant of such leave should be determined administratively by the Chief Justice, as recommended by the SRC, does not mean that the Judges are ineligible or not entitled. They are entitled to apply for a grant, subject to the Chief Justice's approval. This is what the Cabinet decided. But there is another fly in the ointment, according to the Attorney General. At the time of filing his Claim he did not know whether "appropriate administrative arrangements" were "developed by the Judiciary to give effect to the facility." The Judiciary's Media Release suggested that an internal committee had been empanelled and that its report was agreed to "in principle". It has now been discovered, according to Mr Martineau's instructions that "the judges cannot say that there was an agreement in principle to the report of the internal committee". I take from this language that an agreement in principle was not reached. It

does not exclude the possibility that the report was rejected, but that might be stretching Mr Martineau's carefully chosen language. More than likely it means that a final agreement was not reached, in principle or at all, and perhaps the discussion was deferred. (I must disclose here that I have no recollection of this discussion, although, as far as I recall, I attended the meeting. Maybe I left the room at that time.)

[73] This is the underlying question to answer: is it apparent, on a close reading of the Executive's decision to accept the SRC's sabbatical leave recommendation, that members of the Higher Judiciary would be disentitled if the internal administrative arrangements were not agreed by the members of the Judiciary? I think not. The SRC did not say so. Administrative arrangements are dependent upon a consensus among members of the Higher Judiciary. These arrangements will, once developed, "give effect to the facility". This means that a Judge will be able to access the leave when the administrative arrangements are put in place. This is not to say that a Judge is ineligible, only that he or she cannot access it until the arrangements are agreed internally. It seems to me that the development of administrative arrangements cannot be treated as a litmus test for the existence or non-existence of the entitlement.

[74] Mr Mendes SC referred me to a number of cases that he described as analogous to the situation presented in this section of the judgment. These cases concern situations where, in the absence of rules or regulations that were prescribed by a statute to govern the exercise of a particular power, the court was deprived of its jurisdiction to exercise that power. In *Chaitan and Peters v Attorney General of Trinidad and Tobago* [2002] 3 LRC 32, de la Bastide CJ described the approach to be taken (at p. 67):

> "The failure of the relevant authority to fill in by rules or regulations, the interstices of a statutory provision which grants to a court a new jurisdiction or power, does not necessarily make it impermissible for the court to exercise that jurisdiction or power. That will be the result only if (a) the rules or regulations are needed in order to complete the definition of the power or jurisdiction in question and/or (b) an intention can be discerned from what Parliament has enacted that the making of the rules or regulations should be a condition precedent to the exercise of the power or jurisdiction."

[75] In *Jamaat al Muslemeen v Bernard* (No. 3) (1994) 46 WIR 429 the issue revolved around the power to order an interim payment in the absence of rules governing the making of such orders. It was held that "the specifying of the circumstances in which such orders were to be made was an essential pre-requisite to the ordering of any interim payment. Until those circumstances had been specified, the jurisdiction of the court to make an order for interim payments was still incomplete and could not be exercised." The same result obtained in *Sharma v Registrar of the Integrity Commission* [2007] 1 WLR 2840.

[76] One case traveling in the opposite direction, but for good reason, is *Port Contractors Ltd v Shipping Association of Trinidad and Tobago* (1972) 21 WIR 505. That case concerned the jurisdiction of the Industrial Court to join parties to its proceedings under a specific provision of the Industrial Stabilisation Act. Georges JA held that, in light of the wording of the statute, the power to join parties was not dependent of the making of rules of procedure: "It must be borne in mind that any rules prescribed would not limit the scope of the power. This must depend on the Act itself. They would merely regulate the procedure for the exercise of the power."

[77] In my view, Chief Justice de la Bastide's *dictum* in *Chaitan* is clear enough, and it is not inconsistent with what Georges JA said. The statute, by its language (which expresses the intention of Parliament), will say whether a new power is exercisable in the absence of any procedural rule that regulates its deployment. Applying de la Bastide CJ's *dictum* to this case, it seems to me, firstly, having regard to the wording of para 63(v), that internal administrative arrangements are not needed in order to define (or complete the definition) of the entitlement to sabbatical leave. The entitlement is already effectively defined in para 63(v), which was accepted by the Cabinet. Secondly, in order to have access to the entitlement, the Judiciary to "should develop appropriate administrative arrangements. . . to give effect to the facility". In the absence of these administrative arrangements the Judiciary will expose itself to valid criticism or a possible reversal of the grant of any sabbatical leave should a challenge be mounted to the grant in a court of law. I say this because the SRC used the auxiliary verb "should", which does not mean "may". Accordingly, the entitlement to sabbatical leave does not depend upon the development of administrative arrangements, but a Judge's access to the facility does depend upon it. It goes without saying that the development of these internal administrative arrangements does not involve any input from the Executive or the Legislature. Neither does it involve any input from this court. It is a matter for the Judiciary to work out on its own, according to its own understanding of good administration.

[78] The trigger that set this Claim in motion was the grant of sabbatical leave by the former President to the Chief Justice. None of the questions posed in the Claim specifically ask me to determine whether the grant of sabbatical leave to the Chief Justice was proper. According to the SRC the approval for the grant should be determined by the Chief Justice, but the SRC is silent on who

should approve the Chief Justice's application for his own sabbatical leave. It seems prudent to me, and in keeping with my understanding of the law, that administrative arrangements should be developed before any applications for sabbatical leave are made, considered or granted to any member of the Higher Judiciary.

Resolution of the third question: When did the eligibility of Judges for sabbatical leave arise?

[79] The SRC itself provides the answer to this question. At para 242 of the Report it stated that all allowances should take effect from 1 April 2011. This is one of the recommendations that the Cabinet accepted. The date of the resolution of the Lower House and the MoF Circular are irrelevant to this question. Now, it is not ideal to say that an office holder retroactively becomes eligible for a benefit, the grant of which depends on the future development of administrative arrangements. However, it is not the court's role to design something perfectly or to perfect a flawed design. The court's role is to declare what it sees when it looks at the design.

Resolution of the fourth question: whether Judges have a legitimate expectation to the grant of sabbatical leave?

[80] In light of my findings above this question loses importance. However, I would answer it in this way. It is not unreasonable to believe that an expectation that they were entitled to sabbatical leave arose when the Judiciary learnt that (a) the SRC Report was issued, (b) the Cabinet approved it (subject to one exception), and (c) It was laid on the Tables of both Houses. The expectation is legitimate because of the meaning and effect of the law as I have set it out above and also because each of the events listed above amount to representations that are "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd*

[1990] 1 WLR 1545 at p 1569 per Bingham LJ. Detrimental reliance is not a necessary constituent in a claim for legitimate expectation (see *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 per Lord Dyson, and *United Policyholders and Others v Attorney General of Trinidad and Tobago [2016] UKPC 17.*

[81] However, it is essential to such a claim that the State or public authority should give an *MFK* assurance and then resile from it without providing a proper explanation of an overriding public interest to justify its departure from the assurance or promise (see *Paponette*). Of course, as I have observed earlier, no one, including the Attorney General or any member of the Executive or the Legislature has said that the members of the Higher Judiciary are not entitled to sabbatical leave. The Attorney General has gone to pains to frame his Claim in the most neutral terms. Mr Nelson SC was not neutral of course. There are two sides to every story, otherwise why would anyone need a court? His was the duty to present one version and Mr Mendes SC and Mr Martineau SC presented another. I do not take Mr Nelson's submissions as a rejection by the Executive of the eligibility of the Judiciary to sabbatical leave.

[82] For the reasons stated above I hold and declare as follows:

(a) The members of the Higher Judiciary, namely the Chief Justice, Justices of Appeal, and Puisne Judges became eligible, as part of the terms and conditions of their service, for the grant of sabbatical leave as delineated in para 63(v) of the 98th Report of the Salaries Review Commission.

(b) The grant of sabbatical leave is dependent on the development of administrative arrangements within the Judiciary.

(c) The eligibility for sabbatical leave as a term and condition of service of members of the Higher Judiciary arose on 1 April 2011.

(d) The members of the Higher Judiciary have a legitimate expectation that sabbatical leave is part of their terms and conditions of service since 1 April 2011, but there can be no claim for it because the Executive has not resiled from its promise or assurance.

[83] In light of the mutual undertakings that were exchanged by senior counsel at the pre-trial review each party shall bear their own costs of the Claim.

James Christopher Aboud
Judge