THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

Claim No. CV 2017-02038

IN THE MATTER OF AN APPLICATION IN THE PUBLIC INTEREST BY DEVANT MAHARAJ FOR THE CONSTRUCTION AND/OR INTERPRETATION OF SECTION 110(3)(b) OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO IN RELATION TO THE APPOINTMENTS OF RETIRED JUSTICES OF APPEAL AS MEMBERS OF THE JUDICIAL AND LEGAL SERVICES COMMISSION AS PERSONS WITH LEGAL QUALIFICATIONS NOT IN ACTIVE PRACTICE

Between

DEVANT MAHARAJ

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Anand Ramlogan SC leading Mr. G. Ramdeen, Ms. J. Lutchmedial and Mr. A. Pariagsingh instructed by Mr. R. Abdool-Mitchell for the Claimant.
2. Mrs. Deborah Peake SC, Mr. Heffes-Doon, Ms. Z. Haynes Soo Hon and Ms. T. Toolsie for the Defendant.
3. Mr. Roach and Mr. Ali for the Judicial and Legal Services Commission.
4. Mr. G. Delzin and Ms. S. Lall for the Office of the President of the Republic of Trinidad and Tobago.
5. Mr. Prescott and Ms. Hadad for the Law Association

Date of Delivery: June 5, 2017

DECISION

1. On Monday 5th June 2017, the Claimant filed a Fixed Date Claim Form and later that afternoon, filed a Notice of Application seeking the following interim relief:

   (i) An interim injunction restraining His Excellency the President of the Republic of Trinidad and Tobago from acting on the advice tendered by the Judicial and Legal Service Commission under Section 104 (1) for the appointment and swearing-in of two puisne Judges to the High Court on the 6th June 2017 until the hearing and determination of this claim or until further order;

   (ii) An interim injunction restraining and/or prohibiting the Judicial and Legal Service Commission from tendering any further advice to His Excellency the President of the Republic of Trinidad and Tobago pursuant to Section 104(1) and/or any other section(s) of the Constitution of the Republic of Trinidad and Tobago regarding the appointment of any new judicial officers until the hearing and determination of this claim or until further order;

   (iii) An order that this claim be deem fit for urgent and early hearing;

   (iv) The costs of this application be costs in the cause; and

   (v) Such further and/or other relief as the Court as may deem fir in the circumstances.

2. The court, at approximately 4:00 PM on June 5, 2017 was informed of the said application and instructed that same be e-mailed and on reading the said application together with the certificate of urgency filed, deemed the matter fit for urgent hearing and immediately issued directions that all the interested parties identifiable on the face of the application be given notice of same as well as the particulars of the hearing fixed by the court. In that regard, the office of the President as well as the Judicial and Legal Services Commission

(hereinafter referred to as the "JLSC") were notified and provided with e-mailed copies of the documents before the court.

3. The court had to first consider the nature of the application before it and formed the view that the application for interim relief is an application with notice but the relief is not confined to the relief prayed for at items 1 and 2 of the Notice of Application.

4. In determining the instant application, the court first addressed its mind as to the Constitutional provisions that operate with respect to the appointment of Puisne Judges.

5. The court also considered the response issued by the JLSC in response to the Claimant's pre-action protocol letter and noted that it was acknowledged that the JLSC was comprised, prior to the appointment of Mr. Koylass SC, of four members. In the said response, it was suggested that the JLSC is guided by Regulation 5(2) of the Public Service Commission Regulations as it relates to a quorum.

6. It is evident to the court that the JLSC has already advised His Excellency the President as to the two appointments which ought to be made and, in such a circumstance, the court would have to consider the provisions of s. 36 of the Interpretation Act Chap 3:01. The court noted s. 36 (1) (d) but noted that a guarded approach has to be undertaken since the said section should not be used and/or interpreted in a way so as to undermine the supremacy of the Constitution. Accordingly, at this stage, the court is of the view that the said section is predicated upon a circumstance where there operates a properly constituted JLSC whose members were appointed in a situation where there is no misapprehension as to the manner in which s. 110(3) of the Constitution of the Republic of Trinidad and Tobago Chap 1:01 (hereinafter referred to as "the Constitution") should be construed. The issue as to whether the JLSC is properly constituted is of paramount importance and directly impacts on the Rule of Law.
7. In its pre-action protocol response letter, the JLSC suggested that a purposive interpretation of the Constitution ought to be undertaken.

8. Having reviewed the relevant provisions of the Constitution, the court is of the view that there exists a circumstance which engenders in it a high degree of assurance that the Claimant has a strong arguable case which is likely to succeed at the trial and that there is merit in the contention that it was intended by the framers of the Constitution for the JLSC to have two persons who hold legal qualifications but who did not ever hold the office of Judge so as to be able to proffer a different non Judicial perspective to the JLSC's deliberation.

9. The court had regard to the procedure adopted and the directives of the board of the Privy Counsel in **The Attorney General v Dumas [2017] UKPC 12, P.C. App. No. 0069 of 2015**. The court noted that in the said matter, which involved the composition of a Commission, the Attorney General was the Defendant and it appears that no issue was taken with respect to the parties who were before the court. In addition, though two members were appointed and were serving on the said Commission, and their suitability, having regard to the relevant Constitutional provisions was in question, they were not made as parties to the action.

10. The JLSC is one of the Commissions provided for under the Constitution and therefore falls under the umbrella of the State and the State can be properly represented by the Attorney General. The court considered that there is no Constitutional motion before it and that the claim as outlined at this stage is for the interpretation of Constitutional provisions and, even in that context, the court has an obligation to ensure that the Rule of Law is not compromised. The appointment of Judges in a manner that is authorised under the Constitution has a direct impact on the Rule of Law and the court cannot have a myopic or restricted view as to the interim remedies available to it so as to preserve the status quo in a circumstance where there may be a serious issue to be determined in relation to the manner in which the JLSC ought to be comprised under the Constitution.

11. Given the timeline of events, the court cannot find that there operates any unusual or unjustifiable delay which should cause the court to decline a consideration of the Claimant's application at this stage.

12. The court also considered whether there is exists a nexus between the interim relief sought and the substantive relief claimed under the Fixed Date Claim Form. In this regard, the court noted that what is before it is an interpretation claim with respect to the provisions that govern the manner in which the JLSC ought to be comprised. That interpretation is of fundamental importance and the decisions of the JLSC should only be made if the composition of the body is consistent with the provisions outlined at s.110 (3) of the Constitution.

13. The appointment of Judges is a critical, and perhaps, the most important function that the JLSC has to discharge and so the nature of its composition cannot be dismissed and the court has an obligation to ensure that the spirit of the Constitution is followed to the letter of the law.

Who appoints Judges?

14. S.104 of the Constitution provides that:

"104 (1) The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.

(2) Where—

(a) the office of any such Judge is vacant;

(b) any such Judge isfor any reason unable to perform the functions of his office;

(c) any such Judge is acting as Chief Justice or a Puisne Judge is acting as a Justice of Appeal; or

(d) the Chief Justice advises the President that the state of business of the Court of Appeal or the High Court so requires, the President, acting in accordance with the advice of the Judicial and Legal Service Commission—

(i) may appoint a person to act in the office of Justice of Appeal or Puisne Judge, as the case may require;

(ii) may, notwithstanding section 136, appoint a person who has held office as a Judge and who has attained the age of sixty-five to be temporarily a Puisne Judge for fixed periods of not more than two years.

(3) The appointment of any person under subsection (2) to act in the office of Justice of Appeal or Puisne Judge shall continue to have effect until it is revoked by the President, acting in accordance with the advice of the Judicial and Legal Service Commission."

15. In a letter issued by the Administrative Secretary to the Chief Justice and sent last week to the Law Association of Trinidad and Tobago, the contents of which was made public and of which the court had notice, sought to indicate that the appointment of Judges is done by His Excellency the President and that all the formalities and arrangements attendant to such an appointment are within the exclusive remit of the President's House.

16. The Court sought clarification from the parties on this issue and the position advanced on behalf of His Excellency the President is that it was always understood that the JLSC advises His Excellency of the names of persons to be appointed and His Excellency exercises no discretion as it relates to the said appointments. In addition, with respect to the issue of the arrangements for the actual appointments, it appears that there is some level of consultation that emanates from the Chairman of the JLSC to the office of the President and based on the said communication a consultative approach is pursued for the fixing of the appointment date and time.

17. On a reading of s.104 of the Constitution, judicial appointments are made by the Office of the President, acting on the advice of the JLSC.

18. **Section 80 of the Constitution** states that:

"80(1) In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this

Constitution or such other law, and, without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act—
(a) in his discretion;
(b) after consultation with any person or authority other than the Cabinet; or
(c) in accordance with the advice of any person or authority other than the Cabinet.

(2) Where by this Constitution the President is required to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any case so acted shall not be enquired into in any Court."

19. Therefore, s. 80 of the Constitution creates three broad categories: (i) where the President is required to act in his discretion; (ii) where the President is required to act after consultation with; and (iii) where the President is required to act in accordance with the advice of.

20. The case of **Paul Lai v The Attorney General of Trinidad and Tobago Civ. App. No P129 of 2012** dealt with the interpretation of President's powers to appoint members of the Industrial Court of Trinidad and Tobago under the Industrial Relations Act Chap. 88:01.

21. Moosai JA referred to **Halsbury's Laws of England Volume 96 (2012) 5th Ed. [1081]** where it was stated that the *"object of construing an enactment is to ascertain the intention of the legislature as expressed in the enactment, considering it as a whole and in its context, and acting on behalf of the people."*

22. At paragraph 33 to 35 of **Paul Lai (supra**), Moosai JA stated,
"33. Section 4(3) of the IRA provides for the membership of the Industrial Court and the manner of their appointment. Firstly, ss 4(3)(a)(i) and (ii) of the IRA provides that "The Court shall consist of the following members: (a) A President of the Court who shall be a – (i) a judge…or (ii) a person who has the qualification (age excepted) to be appointed a Judge of the Supreme Court of Judicature", and the section goes on to specify that the President of the Industrial Court is to be appointed from those persons, by the "President

of Trinidad and Tobago after consultation with the Chief Justice." The obvious intention of the draftsmen was to prescribe the manner of appointment of the President of the Industrial Court, making it clear that the President of Trinidad and Tobago was to exercise his powers after consultation with the Chief Justice, as opposed to acting in his discretion or on the advice of any person or authority. In contradistinction s 4(3)(c) of the IRA provides that the Industrial Court shall consist also of "such number of members as may be determined by the President of Trinidad and Tobago from time to time…". In the latter section, the legislation is silent as to the manner of the exercise of the powers by the President of Trinidad and Tobago when appointing such members.

34. In the instant matter, we are concerned with the exercise of the functions of the President of Trinidad and Tobago, not under the Constitution, but under "any other law", namely the IRA. Section 80 (1) of the Constitution, provides both a general position and then exceptions to it. The general position is that which precedes the word "except", namely that in "the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet". In construing the conjoint effect of s 80 of the Constitution and s 4(3) of the IRA, it is noteworthy that where the President is required to act in his discretion under s 80(1)(a) of the Constitution, the draftsmen of our Constitution in the following instances have seen it fit to expressly provide for same. For example, s 40(2)(c) of the Constitution provides that nine Senators "shall be appointed by the President in his discretion". Further, s 126(4) of the Constitution provides that "A member of the Service Commission, other than the Judicial and Legal Service Commission, may be removed from office by the President acting in his discretion…

35. Similarly, apart from s 4(3)(a)(i) and (ii) of the IRA, the legislature has specifically prescribed instances under the IRA where the exercise of the functions of the President of Trinidad and Tobago is circumscribed. For example, s 4(9) of the IRA requires the President of Trinidad and Tobago to act in accordance with the advice of the President of the Industrial Court. Thus under s 4(9), where the term of office of a member of the Industrial Court has expired, that member may, "with the permission of the President of

Trinidad and Tobago acting in accordance with the advice of the President of the Court, continue in office for such period after the end of his term as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before the term of office expired." As is apparent, the legislature has seen it fit to specifically prescribe where the President of Trinidad and Tobago is required to act in accordance with the advice of the President of the Industrial Court. Significantly, the IRA does not vest similar power in the President of the Industrial Court to advise the President of Trinidad and Tobago to reappoint a member.

23. Similarly, with regard to Constitutional provisions, the legislature has seen it fit to specifically prescribe circumstances where His Excellency the President is required to act in accordance with the advice of or in consultation with certain persons or bodies, as per s. 104 of the Constitution.

24. In the present circumstances, the court has to determine whether s. 104 of the Constitution gives His Excellency the President a discretion in the appointment of Puisne Judges, or whether *"acting on the advice of"* the JLSC legally obligates the President to act in accordance with such advice.

25. In the circumstances, it appears to the court that in the discharge of the authority vested in him, by virtue of s 104 of the Constitution, His Excellency has no independent discretion and the issue as to proposed candidates for judicial appointments falls within the remit of the JLSC and it is the obligation of that body to select suitable candidates for appointment when vacancies arise and to inform His Excellency the President as to the particulars of those candidates as well as the time period within which it is hoped that the appointments would be made.

26. The court therefore next addressed its mind to the composition of the JLSC. Sections 110 and 111 of the Constitution provides as follows:

"110. (1) There shall be a Judicial and Legal Service Commission for Trinidad and Tobago.

(2) The members of the Judicial and Legal Service Commission shall be—

(a) the Chief Justice, who shall be Chairman;

(b) the Chairman of the Public Service Commission;

(c) such other members (hereinafter called "the appointed members") as may be appointed in accordance with subsection (3).

(3) The appointed members shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition as follows:

(a) one from among persons who hold or have held office as a judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeal from any such Court;

(b) two from among persons with legal qualifications at least one of whom is not in active practice as such, after the President has consulted with such organisations, if any, as he thinks fit.

(4) Subject to section 126(3)(a) an appointed member shall hold office in accordance with section 136.

111. (1) Subject to the provisions of this section, power to appoint persons to hold or act in the offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Judicial and Legal Service Commission.

(2) Before the Judicial and Legal Service Commission makes any appointment to the offices of Solicitor General, Chief Parliamentary Counsel, Director of Public

Prosecutions, Registrar General or Chief State Solicitor it shall consult with the Prime Minister.

(3) A person shall not be appointed to any such office if the Prime Minister signifies to the Judicial and Legal Service Commission his objection to the appointment of that person to that office.

(4) This section applies to such public offices as may be prescribed, for appointment to which persons are required to possess legal qualifications."

27. The thrust of the applicant's complaint is centered around the current composition of the JLSC insofar as there currently exists a circumstance where two retired Judges are members of the JLSC. In the substantive action before the court, the Claimant has invoked the court's jurisdiction to declare that the JLSC is improperly constituted and that the current composition does not accord with the provisions of s. 110 (3) of the Constitution. The court carefully considered the arguments advanced by all the parties who were before it and focused its attention to the express wording of the said s.110(3)(a) and (b) of the Constitution. It appears that the framers of the Constitution sought to distinguish between persons having a legal qualification and persons who, having such a qualification, held or holds the office of Judge of a Court having unlimited jurisdiction. Having noted that both ss.(a) and (b) deal with persons who are legally trained, unlike s. 110(2)(b), where the Chairman of the Public Service Commission is expressly named as a member without reference to that individual having a legal background, it appears that there is merit in the argument that the Constitution sought to differentiate between legally trained persons who hold or held the office of Judge as opposed persons holding legal qualifications who did not serve in such a capacity.

28. The JLSC is charged with the exercise of the appointments, not only of Judges, but of Magistrates, the Solicitor General, the Chief Parliamentary Counsel, the Director of Public Prosecutions, the Registrar General, and the Chief State Solicitor. The very formation of the Judiciary and all of the major players in the administration of justice are appointed by

the JLSC. Having regard to the tremendous power, influence, and impact that the JLSC can have on the legal landscape and, more importantly, on the citizens of this Republic, insofar as it is the JLSC's recommendations which translate into appointments of officers charged with the responsibility of upholding the Constitution and the law, the composition and the operations of the JLSC is critical to this Democracy.

29. Given the provisions of s. 110 of the Constitution, as hereinbefore outlined, there can be no doubt that the composition of the JLSC must be viewed as a serious issue and damages can never be considered as being an adequate remedy if it is established at trial that the composition of the current JLSC stands in violation of the provisions of s. 110 (3) of the Constitution.

30. The court therefore addressed its mind to the principles that ought to be considered when it has to determine whether or not it should grant interim injunctive relief and noted the law that it outlined in **Devant Maharaj v The Commissioner of Valuations and the AG CV 2017-01839** at paragraphs 16 to 20 and 23 to 31 where it was stated as follows:

*"16. The balance of convenience guidelines laid down in **American Cyanamid Co. v Ethicon Ltd. [1975] A.C. 396** should be read in conjunction with the subsequent decisions in **Smith & Others v Inner London Educational Authority [1978] 1 All E.R. 410** and **R v Secretary of State for Transport ex parte Factortame Ltd. and Others (No. 2) 3 WLR 818**.*

17. The decision of the House of Lords in American Cyanamid (supra) laid down the tests to be applied by courts when ruling on interim applications on notice by virtue of which prohibitory injunctions are sought. According to the case, when an application is made for an interlocutory injunction, in the exercise of its discretion, the initial questions that fall for the Court's consideration, are:

"Is there a serious issue to be tried?
If the answer to that question is, "yes", then two further related questions arise, they are:

Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?
If not, where does the balance of convenience lie?"

18. Whether there is a serious issue to be tried essentially means that the action must not be frivolous or vexatious and must have some prospect of succeeding. The Court when considering whether there is a serious issue to be tried, ought to consider what was said in American Cyanamid (supra) at page 407 where it was stated that:

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult question of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial"

19. The Court must also take into account the purpose of the interim relief sought and as Lord Diplock stated at page 406:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

*20. In **Factortame Ltd (supra) at 858 B-D**, Lord Bridge stated as follows:*
"A decision to grant or withhold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If at the end of the day the claimant succeeds in a case where interim relief has

been refused, he will suffer an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective that underlies the principles by which the discretion is to be guided must always be to ensure that the court shall chose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised."

23. In ***National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd [2009] I WLR 1405*** *at paragraph 13, Lord Hoffman stated as follows:*

"First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion for the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Pillar order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the later category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

24. In ***Factortame (supra)****, at page 870 G – page 871 A Lord Goff stated that where a party is a public authority performing duties to the public,*

"... particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land,

and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on the face of it the law, and so justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law."

25. Lord Goff further stated at page 871 E-H in ***Factortame (supra):***

"I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectively doubt that there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him or to obtain an interim injunction restraining the enforcement of the law- show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end it is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances that the challenge to validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

Adequacy of Damage and Balance of Convenience

26. Lord Diplock, when considering the adequacy of damages in ***American Cyanamid (supra)****, stated at page 408 the following:*

"...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 the application and the time of the trial. 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 plaintiffs claim appeared to be at that stage.

If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction."

27. A more recent exposition of the relevant principles to be applied in granting interim injunctive relief was undertaken in ***National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] 1 WLR 1405*** *where at paragraphs 16 to 18 Lord Hoffman said as follows:*

"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

In practice, however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict

whether the granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

"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 relative weight to be attached to them."

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

28. De la Bastide CJ in ***Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362*** *stated that focusing exclusively on whether damages were adequate and quantifiable is a far too narrow approach to be taken when considering the issue as to whether an interim injunction should be granted and His Lordship pointed out at page 368 that:*

"It is a truism that facts are infinitely variable, and it is dangerous to prescribe or apply a single formula for determining whether an interlocutory injunction should be granted in all cases, unless it is expressed in very broad terms."

29. In doubting whether the rule should be so narrowly stated His Lordship stated that the court must go further and ask itself the question "Where does the greater risk of injustice lie, in granting the injunction or in refusing it?"

30. In treating with the question "where does the greater risk of injustice lie, in granting the injunction or in refusing it?" His Lordship further stated at page 370 that:

"If the question is, 'Wherein lies the greater risk of injustice in granting or in refusing the injunction?', then it becomes apparent that it is not possible to treat…the strength of the plaintiff's case as irrelevant…

…[S]ome assessment of the merits more than merely that there was a serious issue to be tried, was required and the plaintiff must show a likelihood of success at the trial…

…He explained that the greater risk of injustice which was likely to be created by the grant of such an injunction meant that such an injunction would not be granted unless the court felt 'a high degree of assurance' that the plaintiff would be able to establish his right at a trial. He concluded therefore that essentially the same test should be applied in the case of both mandatory and prohibitory interlocutory injunctions, that is which carried the higher risk of injustice: granting or refusing it?

If the matter is approached in this way, it is pellucidly clear that it is necessary to make some assessment of the appellant's chances of succeeding at the trial."

31. The court also considered the judgment of Bereux JA in ***Chief Fire Officer & Anor v Elizabeth Felix-Phillip and 37 Others Civil Appeal No. S 49 of 2013*** *and in particular, paragraphs 30-39 thereof and the Court finds that the approach suggested by Bereaux JA as to the examination of the American Cyanamid guidelines and the application of same to the instant factual matrix is instructive."*

31. Having considered the law, the court ultimately had to determine where the balance of justice lies. In doing so the court noted that it is of paramount importance that the citizens of this Republic have confidence and trust in the administration of justice. In that regard, compliance with the law, as determined by the court, is predicated upon a symbiotic relationship that is characterised by mutual respect and a recognition of legitimacy. If there are serious questions as to the validity of the JLSC's composition and there is a likelihood that it can be established at the trial that the current composition violates the Constitution, irreparable damage can be occasioned to the Judiciary as an institution and the public's confidence in the administration of justice could be fundamentally shaken and undermined.

32. The court is entrusted with the responsibility to uphold the Constitution and to jealously guard and ensure that the provisions of same are not violated.

33. The issues that fall to be determined in this matter are of great public interest and importance and the court cannot restrict itself to a myopic consideration of the balance of convenience and must, at this stage, consider the interests of the public and the need to ensure that the public's confidence in the administration of justice is not irretrievably compromised and must consider third party interests and in particular those of the persons who stand to be appointed on June 6, 2017.

34. In the exercise of the weighing process, the court is acutely aware that an immeasurable sense of disappointment, frustration, and inconvenience would be occasioned upon the still unnamed candidates who expects to take the oath of Judicial Office this morning at 11:30 AM. The interest of these individuals, cannot outweigh the greater public interest in ensuring that the provisions of the Constitution are strictly complied with and there can be no right to hold public office if the body charged with the mandate of making recommendations to His Excellency pursuant to s. 104 of the Constitution lacks the Constitutional legitimacy and/or authorisation to make such a decision.

35. The court also noted that damage could very well be occasioned to the professional reputation of any individual who is appointed by the JLSC if it is established at trial that the JLSC is comprised in a manner that is inconsistent with s. 110 (3) of the Constitution.

36. The Judiciary and all its composite components stand as the last bastion in the democratic process and extreme care and caution has to be exercised so as to prevent a circumstance where the public forms the view that the institution has lost its legitimacy. History has demonstrated that revolutions of the past and the purging of the status quo have often been catalysed by situations where the confidence in, and the legitimacy of, lawful authority was lost. As societies evolve, the lessons of the past ought not to be dismissed but viewed and interpreted in such a way so as to ensure that the missteps, complacency, or advancement of insular concerns do not continue, thereby ensuring a stronger and more holistic democratic society.

37. At this stage, the court has no information before it to suggest that there is a dire need for more Judges or more importantly, that the administration of justice is severely compromised and that this current state of affairs is such that without the two proposed appointments severe prejudice would be occasioned to members of the public. In the absence of any such evidence, the court feels compelled to protect the status quo pending the hearing and determination of the substantive claim. However, before any such order is made on any final footing, all the interested parties and the intended appointees should be given an opportunity to fully place before the court all relevant information so as to assist the court in its determination as to whether the interim relief which the court now grants should be continued and if so, for what duration.

38. The court at this stage is of the view that the process in relation to the actual instrument of appointment being tendered to the successful applicants has not yet occurred, nor has the oath of Judicial Office as provided for under s. 107 of the Constitution been administered. Having regard to the fact that the court does feel that there is a serious question to be tried, that damages in the circumstances cannot be viewed as an adequate remedy and, more importantly, that the balance of justice results in a circumstance where it is just, convenient

and necessary for the court to intervene, as a greater risk of injustice can be occasioned to the public in general if persons are appointed to the office of Judge in a circumstance where the JLSC lacks the Constitutional authorisation to enable any such appointment. The court is also aware that the role and function of the JLSC is critical to the general processes involved with the administration of justice at all levels, but its obligation to ensure that the Constitution is not violated and that the provisions of same are strictly adhered to has to be of primary concern and a greater risk of injustice will therefore be occasioned if the court refuses to grant interim relief so as to protect the status quo.

39. The court is resolute in its view that as a superior court of record and as the ultimate guardian of Constitutional compliance, and in the unique and exceptional circumstances that now exist, it must intervene as the Rule of Law uncompromisingly mandates that the exercise of public power under the Constitution must be engaged in a way that is lawful and must operate in a circumstance where there is strict compliance with the Constitution and any other relevant law. Accordingly, the court hereby issues an order that the JLSC forthwith advise His Excellency the President to refrain from handing over to the two successful candidates any instrument of appointment to the office of Judge and to put on hold the administering of the oath provided for under s. 107 of the Constitution until the returnable date of this Notice of Application which said date shall be Friday 9th June, 2017 at 10:00 AM in SF05 at the High Court of Justice, San Fernando. On the said date, the court shall consider, based on the evidence before it, and in particular, the evidence of the affected third parties, whether or not the order made herein ought to continue.

_____

FRANK SEEPERSAD

JUDGE