REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 229 of 2009

IN THE MATTER OF THE OCCUPATIONAL SAFETY AND HEALTH ACT NO. 1 OF 2004 (AS AMENDED)

BETWEEN

THE INSPECTOR OF FACTORIES

Appellant

AND

NH INTERNATIONAL (CARIBBEAN) LIMITED

First Respondent

AND

SAFEWAY ACCESS AND SUPPORT SYSTEMS LIMITED

Second Respondent

AND

TURNER ALPHA LIMITED

Third Respondent

Civil Appeal No: 218 of 2010

BETWEEN

SAFEWAY ACCESS AND SUPPORT SYSTEMS LIMITED

Appellant

AND

THE INSPECTOR OF FACTORIES

Respondent

PANEL: **A. Mendonça, J.A.**
A. York-Soo Hon, J.A.
G. Smith, J.A.

APPEARANCES: **Mr. D. Mendes, S.C. and Mr. S. Cazabon appeared on behalf of the Appellant**
Mrs. L. Lucky-Samaroo appeared on behalf of the First Respondent
Mr. D. Cowie and Mr V. Badrie-Maharaj appeared on behalf of the Second Respondent and
Mr. S. Jairam, S.C. and S. Jairam appeared on behalf of the Third Respondent

DATE DELIVERED: July 17th, 2013

We agree with the judgment of Mendonca J.A. and have nothing to add.

A. Yorke-Soo Hon,
Justice of Appeal

G. Smith
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. These appeals are from the Industrial Court and arise out of the dismissal of several complaints brought by Jeffrey Millington, Inspector of Factories, under the Occupational Safety and Health Act (the Act) with respect to safety and health offences on the ground that he did not have the locus standi to prosecute or conduct the complaints before the Industrial Court. One appeal, in which Mr. Millington is the Appellant, challenges the substantive holding of the Industrial Court that he did not have the necessary locus standi and in that appeal the material issue is he whether he had the necessary locus standi to initiate proceedings before the Industrial Court in respect of safety and health offences under the Act. The other appeal is an appeal by Safeway Access and Support Systems Ltd. (which is also a respondent in the substantive appeal) from the order as to costs made by the Court on the dismissal of the complaints. The outcome of that appeal may be determined by the decision on the substantive appeal.

2. The Act, as is set out in its long title, is an Act respecting the safety, health and welfare of persons at work. A number of the provisions of the Act impose duties on employers and occupiers of industrial establishments as defined in the Act. The Act creates a number of offences call safety and health offences. A safety and health offence as defined in section 83(1) of the Act refers to a contravention of a provision or the Act or the Regulations made thereunder, or the failure to comply with any duty, prohibition, restriction, instruction or directive issued under the Act or any Regulations made under it. The Industrial Court is given jurisdiction in respect of safety and health offences.

3. The Act provides for the establishment of The Occupational Safety and Health Authority (see section 64). The Authority may appoint a suitably qualified person as the Chief Inspector (see section 70(1)). The Minister to whom responsibility for the administration of occupational safety and health is assigned may, on the advice of the Chief Inspector, appoint inspectors who, for the purpose of enforcement of the Act, are given a wide range of powers. Among the powers given to inspectors appointed under the Act is the power under section 80 to prosecute or conduct before the Industrial Court any complaint or other proceedings arising under the Act or in the discharge of his duties as an inspector. This section provides as follows:

> *"An inspector may prosecute or conduct before the Court any complaint or other proceedings arising under this Act or in the discharge of his duties as an Inspector."*

4. On July 12th 2006 an incident occurred involving the collapse of scaffolding at the Customs and Excise Building, Government Campus Plaza on Richmond Street, Port of Spain. As a consequence of this incident, on January 11th 2007 Mr. Millington laid several complaints before the Industrial Court against the Respondents in the substantive appeal alleging the commission of safety and health offences. It was alleged that the Respondents had contravened certain provisions of the Act or failed to comply with certain duties set out in the Act. The sections of the Act which it is alleged were contravened are, in respect of the First Respondent, NH International (Caribbean) Limited, sections 6(1)(a) and (2)(a); in respect of the Second Respondent, Safeway Access and Support Systems Limited, sections 6(2)(d), 7(1) and 13(3) and in respect of the Third Respondent, Turner Alpha Limited, section 7(1). I do not think it necessary for the purposes of this appeal to set out the sections.

5. It is not in dispute that at the time of the complaints, Mr. Millington was not an inspector appointed under the Act. He was, however, an inspector duly appointed under the Factories Ordinance. The Act was intended to repeal the Factories Ordinance. Section 98 of the Act provides expressly for the repeal of the Ordinance. However that provision was not in force at the time Mr. Millington laid the complaints. By Legal Notice No. 48 of 2006 all provisions, save for section 98, were brought into force on February 17th, 2006. Section 98 however did not come into operation until August 17th, 2007 (see legal notice No. 150 of 2007). Therefore at the time the complaints were laid by Mr. Millington the provision in the Act expressly repealing the Factories Ordinance was not yet in force.

6. The complaints came before the Industrial Court. The Respondents took a number of preliminary points. Foremost among them was that Mr. Millington lacked the locus standi to prosecute or conduct the proceedings. By agreement between the parties, the Industrial Court proceeded to determine that objection.

7. Counsel for Mr. Millington argued before the Industrial Court that Mr. Millington had the necessary locus standi to initiate and prosecute the proceedings before the Industrial Court in relation to the alleged safety and health offences. He made two main submissions. First, he argued that by virtue of section 29(2)(a) of the Interpretation Act, Mr. Millington is to be treated as though he were appointed under the Act and so had the powers as an inspector under the Act, which included the power to prosecute and conduct the complaints before the Industrial Court. Secondly Counsel submitted that in any event, the Appellant was authorized by section 34(1) of the Summary Courts Act to lay the complaints.

8. The Industrial Court rejected both submissions. In its opinion both section 29(2)(a) and section 34(1) of the Summary Act were inapplicable. The Court held that as Mr. Millington was not an inspector duly appointed under the Act, he was not authorized to conduct or prosecute the complaints. The Court therefore dismissed the complaints. On hearing further argument on the question of costs, the Court made no order as to costs.

9. Mr. Millington now appeals from the decision of the Industrial Court dismissing the complaints and as I have mentioned there is also an appeal by the Safeway Access and Support Systems Ltd., the Second Respondent in the substantive appeal, from the order as to costs. I will first refer to the appeal from the order dismissing the complaints.

10. Before this Court, Counsel for Mr. Millington abandoned his argument with respect to section 34(1) of the Summary Courts Act. He, however, again relied on section 29(2)(a) of the Interpretation Act. In addition, he argued that even if section 29(2)(a) is not applicable the Appellant was entitled at common law to initiate proceedings before the Industrial Court to prosecute safety and health offences. This point was not argued before the Industrial Court.

11. I will now consider the section 29(2)(a) argument.

12. Section 29(2) of the Interpretation Act is as follows:

(2) Where a written law repeals or revokes a written law (in this subsection and subsection (3) called the "old law") and substitutes another written law therefor by way of amendments, revision or consolidation-

(a) all officers and persons acting under the old law shall continue to act, as if appointed under the written law so substituted;

(b) every bond and security given by a person appointed under the old law remains in force and all offices, books, papers and things used or made under the old law shall continue to be used as theretofore so far as consistent with the written law so substituted;

(c) all proceedings taken under the old law shall be prosecuted and continued under and in conformity with the written law so substituted, so far as consistently may be;

(d) in the recovery or enforcement of penalties incurred, and in the enforcement of rights existing or accruing, under the old law, the procedure established by the written law so substituted shall be followed so far as it can be adapted; and

(e) where any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions of the written law so substituted, the penalty, forfeiture or punishment, if imposed or adjudged after such repeal or revocation, shall be reduced or mitigated accordingly.

13. Counsel argued that section 29(2)(a) deems officers acting under the old law to have been appointed under the new law and to exercise powers granted to their counterparts under the new law. Mr. Millington, therefore, who is appointed as an inspector under the Factories Ordinance, should therefore be treated as or deemed to have been appointed, an inspector under the Act and entitled to execute the powers given to inspectors under the Act, including the power under section 80 to prosecute or conduct any complaint or other proceedings before the Industrial Court. Counsel was mindful that section 29(2) would be relevant only where the old law was repealed and revoked. In other words the section would have no application unless the Factories Ordinance was repealed or revoked and substituted by the Act. Counsel submitted that even though section 98 of the Act repealing the Factories Ordinance was not in force at the material time, the Act should be interpreted as impliedly repealing the Factories Ordinance. Therefore, although section 98, which expressly repealed the Factories Ordinance, was not in force at the material time, it was immaterial and made no difference.

14. These were essentially the same arguments advanced on behalf of Mr. Millington before the Industrial Court on section 29. The Court advanced two reasons for rejecting the argument. First the

Court stated that section 29 did not apply if a contrary intention appears in the Interpretation Act or in the Act. The Court was of the view that a contrary intention did appear in the Act. Secondly, the Court was of the view that section 29(2)(a) could not operate in isolation of the other subsections of section 29. Therefore before section 29(2)(a) could operate to clothe Mr. Millington with the powers of an inspector under the Act, 29(2)(b) to (e) inclusive had also to be applicable. In the Court's view the only subsections of section 29(2) which could have some relevance were (c) and (d). The Court, however, held that in any event they were not applicable. Consequently as section 29(2)(a) could not operate in isolation of the other subsections, it could not apply to this case.

15. I am in agreement with the Industrial Court's view that section 29(2)(c) and (d) are not relevant to this case, but I do not agree that for section 29(2)(a) to apply to this case any of the other subsections of section 29(2) must also be applicable. Section 29(2)(a) operates quite independently of the other subsections. There is nothing in section 29(2) that lays down, as a precondition for the application of subsection (a), that any of the other subsections must also apply. Its purpose is to permit officers appointed under the repealed law to continue to act as if appointed under the new law. For that to occur, no other subsection of section 29(2) need be satisfied. That notwithstanding, I, however, agree with the conclusion of the Court that section 29(2)(a) is not applicable to this case. I have come to this conclusion for essentially three reasons.

16. First, fundamental to the application of the section is that there must be a repeal of the written law under which Mr. Millington was appointed and a substitution in its place by way of amendment, revision or consolidation of another written law. Section 98 which expressly repealed the Factories Ordinance under which Mr. Millington was appointed was not proclaimed at the material time. On its face the Factories Ordinance was therefore not repealed and it continued to be in force. Counsel for Mr. Millington has argued that there was an implied repeal. A later statute may of course impliedly repeal an earlier one. To determine this, the Court must come to the conclusion that the more recently enacted statute was meant to completely displace or subsume the earlier statute so that the continued operation of both would be judged to be impossible or inappropriate (see **Sullivan on the Construction of Statutes** (5^{th} edition) at p. 347). It is therefore a matter of construction. The mere fact that section 98 was not in force is not a conclusive answer to whether there was an implied repeal of the Factories Ordinance. That however must be a consideration but once the only reasonable construction is that the later Act was meant to completely displace or

subsume the earlier one, then the later one should be regarded as having impliedly repealed the earlier Act.

17. I however do not think that the test for implied repeal is satisfied in this case. There are provisions in the Factories Ordinance which address certain matters that do not appear at all or with the specificity in the Act. For example, in the Factories Ordinance section 22 lays down certain requirements relating to hoists and lifts and section 23 deals with steam boilers. There are no provisions in the Act that deals with hoists, lifts and boilers or at any rate with the same specificity as in the Factories Ordinance. In those circumstances it is difficult to conclude that as a matter of construction the continued existence of both pieces of legislation is impossible and appropriate.

18. Secondly, the Industrial Court was, of course, correct to consider whether there was a contrary intention. Section 2(1) of the Interpretation Act provides that:

> *2. (1) Every provision of this Act extends and applies to every written law passed or made before or after the commencement of this Act, unless a contrary intention appears in this Act or the written law.*

Section 29(2) must therefore be interpreted as meaning that it would not apply if a contrary intention appears in the Interpretation Act or in the Act.

19. As section 98, which expressly repealed the Factories Ordinance, was not brought into force at the same time as the other provisions of the Act, the Act is to be construed as coming into force on February 17th, 2006 save for section 98. This is expressed in section 2 of the Act which takes into account the proclamations giving effect to the provisions of the Act and is as follows:

> "*2(i) With the exception of section 98 this Act came into operation on February 17th, 2006.*
>
> *(2) Section 98 came into operation on 17th August, 2007.*

20. By not bringing section 98, which expressly repealed the Factories Ordinance, into force the intention must have been that the Ordinance continues to exist as part of the corpus of written law. The intention, therefore, was that the appointment of inspectors under the Ordinance should continue unrevoked and so too their ability to act under the Ordinance. In those circumstances, there would therefore be no need to deem them able to continue to act under section 29 and to do so

would be impermissible. Therefore, even if it can be said that there was an implied repeal of the Ordinance, section 29 could not apply in the face of the contrary intention.

21. Thirdly section 29(2)(a) is in the nature of a deeming provision. It treats or deems officers acting under the old law as having been appointed under the new law. It was argued by Counsel for Mr. Millington that the effect of that would be to deem Mr. Millington as having been appointed under the Act and to have all the powers of an Inspector appointed under the Act.

22. I accept the view that section 29(2)(a) is to be treated as a deeming provision. In construing such a provision, as is the case with any provision, the Court should seek to avoid an interpretation that produces an absurd result. The Respondents referred to the decision of this Court in Civil Appeal 72 of 2005 **Gulf Petroleum Services Company Limited v Oilfield Workers Trade Union** where this point was emphasized. In that case it was stated:

> *"(18) Deeming provisions must be construed to have effect only for the purposes for which they were enacted. As* ***Benion on statutory Interpretation*** *(4th edition) (at page 815) puts it:*
>
> > *"The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further."*
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> *(19) The author further states (at p. 831) that:*
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> > *"The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept "absurdity", using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief".*
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> *(20) These opinions are based on sound judicial pronouncements. In* ***IRC v Metrolands (Property Finance) Limited*** *[1981] 1 W.L.R. 637, 646 Nourse J., after a review of the authorities, stated that:*
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> > *When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what person the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied.*

*(21) This statement was approved by Lord Lowry in **Marshall (Inspector of Taxes) v Kerr** [1995] 1 A.C. 148, 160. In that case also Lord Browne-Wilkinson approved the following similar statement of Peter Gibson J. in the leading judgment of the Court of Appeal in the same case:*

> *"For my part I take the correct approach in construing a deeming provision to be to give the words used an ordinary and natural meaning consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs unless prohibited from doing so".*

(22) It is therefore necessary to ascertain the purpose of the provision and determine whether the application of the provision leads to any injustice or absurdity and if so whether it is open to the court to limit the application of the provision."

23. The section clearly deems officers appointed under the old law, or the law that has been repealed, as continuing to act as if appointed under the new law replacing the old law. But how far is that to be taken? It cannot be that every officer appointed under the old law will continue to act under the new law. I think that appears to be clear in a case where the new law provides no role in which the officer is to act. It would be absurd to say that the officer in those circumstances continues to act. The position seems equally clear if the new law makes provision for different powers, functions, duties and responsibilities to be carried out by the officer. These may require different expertise and skills that the officer under the old law do not possess and would not be competent to carry out. If section 29(2)(a) had the effect as argued by the Appellant in those circumstances, it could produce a result that is unworkable and impracticable. It seems to me that section 29(2)(a) therefore cannot apply in every case with respect to the continuation of officers acting under the new law that replaces the old law. In my view for section 29(2)(a) to apply there must be a similarity of powers, functions, duties and responsibilities under the new law when compared to the old. I would therefore limit the application of section 29(2)(a) to those cases where the new law provides for materially the same powers, functions, duties and responsibilities as are ascribed to the officers under the old law. The section would therefore apply in this case if the powers, functions, duties and responsibilities of an inspector under the Act are materially the same as those under the Factories Ordinance. In this case, in my view, they are not. I think I need only make reference to the ambit of the Act as compared to the Factories Ordinance. The latter applies to

factories as defined in the Ordinance. The Act is much wider in its scope. It applies to an "industrial establishment". This term as defined in the Act includes not only a factory but a "shop, office and place of work" as well as other premises. In so far as the powers, functions, duties and responsibilities of an inspector under the Factories Ordinance relate only to factories they cannot reasonably be regarded as materially the same under the new law.

24. In view of the above, in my judgment section 29(2)(a) does not assist the Appellant. He is not by that section to be treated as an inspector appointed under the Act with the same powers as such an inspector. That section therefore does not clothe him with the necessary locus standi to prosecute and conduct the complaints before the Industrial Court.

25. I turn now to consider Counsel's second submission. Counsel for the Appellant submitted that Mr. Millington has the right at common law to initiate proceedings in the Industrial Court to prosecute a safety and health offence. The Respondents did not agree and raised a number of arguments, which I will refer to below. They first, however, argued that as the point was not raised before the Industrial Court the Appellant should not be allowed to raise the issue before this Court. They contended that they would suffer prejudice if the Appellant is allowed to pursue the point as all the facts are not before the court.

26. Whether an issue not raised in the Court below may be pursued before the Court of Appeal, is a matter of discretion for this Court. Certainly if the Respondents would suffer prejudice by the issue now being raised for the first time, this Court should not permit it to be argued. In my view the Respondents are not, prejudiced.

27. The preliminary hearing before the Industrial Court proceeded on the basis of certain agreed documents put before the Court. The agreed documents were intended to be relevant to the preliminary issue and not the substance of the complaints. If therefore the complaints are remitted to the Industrial Court, the Respondents are at liberty to lead evidence relating to the complaints. The agreed documents on the other hand had to do with the vires or powers of Mr. Millington to lay the complaints. If the question as to the common law right to private prosecutions were raised before the Industrial Court, I do not think that any further evidential light could have been thrown on the matter. It was clear from the documents who laid the complaints, the circumstances surrounding the laying of the complaints and Mr. Millington's status at the time. The issue is raised before this court on the same evidence that was before the Industrial Court; no new evidence is being led. The matter

is one of law to be decided on those facts. This Court, in my opinion, has a sufficient factual basis to entertain the issue and should do so in the interests of justice.

28. I do not think that there is any doubt that there is a common law right to prosecute for a criminal offence available to private citizens. In **Gouriet and others v H.M. Attorney-General** [1978] A.C. 435, Lord Diplock stated (at p. 497-498):

> *"The ordinary way of enforcing criminal law is by punishing the offender after he has acted in the breach of it. Commission of the crime precedes the invocation of the aid of a court of criminal jurisdiction by a prosecutor. The functions of the court whose aid is then invoked are restricted to (1) determining (by verdict of a jury in indictable cases) whether the accused is guilty of the offence that he is charged with having committed and, (2) if he is found guilty, decreeing what punishment may be inflicted on him by the executive authority. In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation) to invoke the aid of court's criminal jurisdiction for the enforcement of the criminal law by this procedure."*

29. In **Lund v Thompson** [1958] 3 ALL E.R. 356 the learned Law Lord, then Diplock J., referred to private prosecutions as one of the ultimate sanctions of the rule of law. In that case he said (at p 358):

> *"There is this also to be observed, that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions."*

30. In **R. (Hunt) v Criminal Cases Review Commission** [2001] Q.B. 1108 (at p. 1116 para. 20) Lord Woolf, C.J., in support of the common law power of the Inland Revenue to bring prosecutions stated:

> *"If an ordinary member of the public can bring proceedings for breaches of the criminal law, it would be surprising if the Inland Revenue were not in a similar position.*

31. It is not, however, a right that is unlimited. The position is succinctly set out in **Stone's Justices' Manual 2013** at (para. 1.380) as follows:

> *"Where the offence is not an individual grievance, any person has a general power to prosecute unless the statute creating the offence contains some restriction or regulation limiting that right to a particular person or party; the prosecutor does not have to demonstrate that it is in the public interest to prosecute an offence created by a public general Act since the public interest is established by the nature of the offence itself."*

The private right to prosecute is therefore limited in two respects, namely; (1) where the prosecution is intended by way of an individual grievance only and (2) where the statute limits the right to prosecute to a particular person or party.

32. Whether the prosecution is by way of an individual grievance or in the public interest is determined by the nature of the offence created by the statute. As was held in **R (on the application of Ewing) v Davis** [2007] EWHC 1730 (admin.) at para. 21:

> *"The public interest is established by the nature of the offence created by the statute not by the circumstances alleged or by the relation of the prosecutor to them."*

33. I have earlier in this judgment referred to the relevant sections of the Act establishing the safety and health offences which are the subject of the complaints against the Respondents. There was really no point taken that the offences created by the relevant provisions are not in the public interest. I think that this is the correct position as there can be no doubt that the provisions, which are aimed at ensuring the safety, health and welfare of persons at work, have been enacted for the public benefit and interest. The legislation in this case may be contrasted with **R. v Hicks** 119 E.R. 232 where the statute in question was framed solely and exclusively for the protection and benefit of a particular company; namely the Torquay Market Company.

34. The Respondents however argued that the Act limits the person who can bring proceedings. Reference was made to section 80, which was set out earlier in this judgment, and it was submitted that only an inspector appointed under the Act can prosecute for safety and health offences.

35. I however do not agree with that submission. Clear words are needed to displace the right in an individual to initiate a private prosecution. In **Giebler v Manning** [1906] 1 K.B. 709 Lord Alverstone C.J., said (at pp 714-5):

> "*Can a private person institute proceedings under s. 47, sub-s 2? Apart from express provisions limiting the right I should have thought the point was too clear for argument... It is contended that the only persons who can take proceedings under sub-s 2 of s. 47 are medical officers and sanitary inspectors. In support view reliance is placed on the words at the commencement of sub-s 1, but it seems to me that that argument goes a great deal too far. Having regard to the object of the statute, the protection of the public against the offering of diseased meat for sale, I think that if it had been intended to limit the right to take proceedings for the recovery of penalties to a limited class of persons, such as medical officers and sanitary inspectors, words would have been introduced into the section taking away from private persons right to lay informations under the section."*

Similarly in **Ewing v Davis**, supra, Mitting J. stated (at para. 23):

> *"If the right of private prosecution is to be taken away or subjected to limitation, it is for Parliament to enact and not for the courts by decision to achieve."*

36. In my judgment while section 80 empowers an inspector appointed under the Act to prosecute or conduct complaints and other proceedings, it does not seek to limit the right to private prosecutions. It cannot be construed as displacing or restricting that right. The section may usefully be compared to the following two sections where the right to private prosecutions was limited. One is section 253 of the **Public Health Act** which is considered in **Bowyer v Mather** [1919] 1 K.B. 419 which provided that:

> *"Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General.*

The other section is section 38 of the **Health and Safety at Work etc. Act 1974 [UK]** which is as follows:

> *"Proceedings for an offence under any of the relevant statutory provisions shall not, in England and Wales be instituted except by an Inspector or [the Environment Agency or] by or with the consent of the Director of Public Prosecutions."*

Section 80 is very different and does not limit or restrict the right to initiate proceedings in respect of safety and health offences to any particular individual.

37. The Respondents argued three other points. First it was contended that for there to be a right to a private prosecution there must first be some omission or failure on the part of the public authorities responsible for initiating the prosecutions. It was submitted that there was no such default or failure in this case and as such the right to initiate a private prosecution did not arise. Secondly, it was submitted that the offences in this matter are not criminal offences and therefore there could be no question of the common law right to private prosecutions being applicable. Thirdly, it was argued that Mr. Millington was acting in his public capacity as an inspector appointed under the Factories Ordinance and was not acting in his private capacity. The prosecution therefore cannot be said to be within the common law right to initiate private prosecutions.

38. With respect to the first submission that there must first be a failure or refusal of the public authority to prosecute, I have not seen any authority, and none has been referred to this Court, that lays down as a precondition of the right to initiate a private prosecution that there must first be refusal or failure to do so by the public authority. Indeed, none of the authorities support the proposition. In my judgment there is no such requirement. Even if there were such a requirement, I agree with Counsel for the Appellant that the refusal or failure may be viewed in terms of the failure or refusal to appoint inspectors under the Act in a timely fashion so that it is satisfied in this case.

39. With respect to the second submission that the offences are not criminal offences, a somewhat similar issue arose in the case of Civil Appeal 106 of 1986 **Caribbean Tyre Company Limited v Oilfield Workers Trade Union**. There, a question arose whether a company accused of an industrial relations offence, namely the taking of action otherwise than in conformity with the provisions of Part V of the Industrial Relations Act, was accused of a criminal offence. The Court applied the case of **Proprietary Articles Trade Association v Attorney General of Canada** [1931] A.C. where Lord Atkin said:

> *"Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an Act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one. Is the Act prohibited with penal consequences.?"*
>
> and
>
> *"the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the state to be crimes, and the only common nature they will be found to possess is that they are prohibited by the state and that those who commit them are punished."*

40. The Court therefore stated that the test whether an act is criminal or not is whether it is prohibited by the State and whether those who commit it are punished. The Court concluded that the industrial relations offence in the matter before it was a criminal offence. In the words of A. Warner, J.A., who delivered the leading judgment of the Court, the offence was "well within the domain of criminal jurisprudence".

41. Applying the test set out in the **Caribbean Tyre** case the question is whether the acts are prohibited by the State and whether those who commit them are punished. I do not think there can be any doubt that those two tests are satisfied in this case.

42. The sections of the Act under which the complaints are brought lay down duties or obligations owed by the employers and others to persons at work. The Act therefore prohibits certain Acts in relation to persons at work. For example section 6(1) provides that:

> *"It shall be the duty of every employer to ensure so far as is reasonably practicable, the safety, health and welfare at work of all his employees."*

The section in effect prohibits conduct by every employer that does not ensure so far as reasonably practicable the safety, health and welfare at work of all its employees. There can therefore be no issue that the section prohibits conduct and such prohibition is by the State. The same may be said for all the other sections under which the complaints were laid.

43. It also cannot be doubted that the conduct is prohibited with penal consequences. Section 83(1) makes the contravention of section 6(1) and the failure to comply with the section a safety and health offence which are punishable by a fine of twenty thousand dollars ($20,000) (see section 85(2)). The same is true for the other sections under which the complaints have been laid.

44. In my judgment, therefore, applying the test in the **Caribbean Tyre** case, the alleged offences are criminal offences and well within the domain of criminal jurisprudence. It follows therefore that when the Industrial Court sits to hear complaints in respect of safety and health offences as in this case, it is exercising a criminal jurisdiction. The common law right to initiate private prosecutions, therefore, cannot be excluded in this case on the basis that the complaints do not relate to criminal offences.

45. I now consider the third submission by the Respondents that Mr. Millington was not acting as a private prosecutor but as a public officer, namely as an Inspector of Factories appointed under the Factories Ordinance. The Respondents in arguing this point made reference to the complaints. In all of the complaints, the complainant is described as "Jeffrey Millington, Inspector of Factories." The complaints all begin with the words:

> *"The Complainant, JEFFERY MILLINGTON, Inspector of Factories of the Ministry of Labour and Small and Microenterprises Development, Riverside Plaza, Besson Street, Port of Spain, comes before a Judge of the Industrial Court Industrial Court and complains against the Defendant..."*

There then follows the name of the defendant and the particulars of the alleged offence. The complaint concludes with the following:

> *"and the Complainant, JEFFERY MILLINGTON, Inspector of Factories prays that the Defendant,... may be summoned to answer the said complaint."*

The complaint is then signed by Mr. Millington above the word "Complainant".

46. The complaints are therefore open to the interpretation that in laying the complaint Mr. Millington purported to do so as Inspector of Factories and not in his private capacity. It was also clear that prior to the laying of the complaints the Factory Inspectorate was very much involved in the investigation of the incident. There is in the record of appeal a letter to the Project Manager of the First Respondent, NH International (Caribbean) Limited, dated July 31st, 2006 which is signed by Mr. Millington. The letter informs the Project Manager that the Factory Inspectorate is empowered to take samples of materials from the site of the incident for forensic analysis and reminds him of a request to make "make the necessary arrangements for the cutting of samples" for CARIRI. He was also advised that "the samples were being taken under the authority of the Factory Inspector, Mr. Jeffrey Millington." The letter went on to give the Project Manager certain directions in relation to, inter alia, the recommencement of any activity on the accident site. To adopt the words of Mr. Cowie, Counsel for the Second Respondent, Mr. Millington assumed "a public officer's position throughout".

47. The question that therefore arises is whether in those circumstances this prosecution is within the common law rule.

48. There are three authorities that provide assistance on this point.

49. The first is **Allman v Hardcastle** [1903] J.P. 440. In that case, the appellant, who was an Inspector of Streets in the employment of a borough council, laid an information against the respondent for exposing articles for sale contrary to certain legislation. It was found that the appellant laid the information as a servant or agent of the borough acting by the council of the borough on the instruction and by the order of the said council. The prosecution was conducted by counsel instructed by the solicitor of the council of the borough. The magistrate dismissed the summons on the basis that the borough could not be an informant unless authorized by statute and it was not so authorized. On appeal it was held that the offence under the legislation in question being an offence against the

public any person might prosecute and therefore the appellant was entitled to prosecute. It was argued by the respondent that the prosecutor was in fact the borough council and as it had no authority to prosecute the prosecution could not be maintained. Lord Alverstone C.J., in giving the main judgment of the court said:

> *"I do not express an opinion as to whether in this case a prosecution could be brought by Allman on behalf of the Southwark Borough Council or not;... it seems to me that these words "on behalf of the Southwark Borough Council" are absolutely unnecessary... I think this prosecution, without deciding whether the corporation can or cannot initiate the proceedings is a proper one, and I see no reason why the information should not be laid by Allman, who says he laid it on behalf of the Southwark Borough Council."*

50. In the **Allman** case, therefore, even though the appellant was an Inspector of Streets in the employ of a borough council and purported to act pursuant to its instruction and on its behalf in laying the information, the prosecution was held to be within the common law rule. The court viewed the addition of the words in the information that indicated that the appellant was acting on behalf of the borough council as unnecessary surplusage which could be ignored. The complainant was the appellant who was entitled as any member of the public to initiate a prosecution.

51. The **Allman** case was followed in **Giebler v Manning**, supra. In that case the respondent was a sanitary inspector with a borough council. On information laid by him the appellant was charged with an offence under section 47(2) of the Public Health (London) Act 1891. Both the information and the summons issued on it stated that the respondent was acting on behalf of the borough council. The informant, however, had not been authorized by the council to take proceedings. The appellant was convicted. On appeal it was held that a private person can prosecute for an offence under the said statute and that the absence of authority on the part of the respondent did not invalidate the proceedings. The words indicating that the respondent was acting on behalf of the borough council in the information and the summons were mere surplusage and could be rejected. Lord Alverstone C.J., in his judgment stated (at p. 715):

> *"Then it is said that in the present case the information was not laid by the sanitary inspector as a private individual, because it is expressly stated to have been laid by him on behalf of the Fulham Borough Council. That point is covered by the decision of this court in **Allman** v **Hardcastle.** In that case information with regard to the obstruction of a street had been laid by the Appellant of the Southwark Borough Council. It was contended that the council had no authority to take the proceedings, which ought to have been taken by the police. It was held that the words "on behalf of the Southwark Borough Council" could be rejected as surplusage because the appellant was himself entitled to lay the information."*

52. Darling J. and Bray J., the other two judges, delivered concurring judgments. Darling, J., in his judgment said (at P.717):

> *"I quite agree with my Lord, and I have nothing to add to what he has said, that it is open to the respondent to take these proceedings as a private individual. But I do not think that he, in fact, did proceed as a private individual; he certainly did not affect to do so; he purported to act as an officer of the Fulham Borough Council, for he stated in his information and it appears on the face of the summons that he took the proceedings on behalf of the Fulham Borough Council. I might have come to the conclusion that the Appellant is entitled to succeed here if it had not been for the words used by my Lord in his judgment in the case of* ***Allman v Hardcastle****. He there decided, and my brother's Wills and Channell argreed with him, that you can give the go-by to these words "on behalf of" and treat the summons - which on its face professed to be a summons taken out by an officer of the public body on behalf of that public body, as well as it might be - as a summons taken out by him as a private individual. Having regard to that decision, I agree with the result of which this court arrives, viz., that the appeal must be dismissed."*

Bray J, stated: (at 718):

> *"Then the question arises as to whether, inasmuch as the respondent clearly purported to take these proceedings on behalf of the borough council, he can now contend that, for the purpose of these proceedings, he must be regarded as a private individual. In my opinion that point is concluded by* ***Allman v Hardcastle****..."*

53. In **Giebler** the prosecution was also held to be within the rule even though the respondent who laid the information was employed by the borough council in an official capacity and purported to act on behalf of the borough council in that official capacity. The statement that he was acting on behalf of the borough council in both the information and the summons was rejected as surplusage as the respondent himself was entitled to lay the information.

54. Lastly is the case of **Lake v Smith** [1912] J.P. 71. In this case an information was laid by the appellant as a surveyor for and on behalf of the Urban District Council of Sidmouth. It was held that the statement indicating that he was acting for and on behalf of the borough council could be rejected as surplusage. The appellant and not the council was the informer and the information would therefore lie.

55. These cases establish that even if the person laying the information acts or purports to act in an official capacity on behalf of a public body or pursuant to its instructions that would not be sufficient to take the case outside the common law rule. Any words or statements in the information

or the summons indicating the informer's official designation or that he is acting on behalf of the public body could be disregarded as surplusage. What mattered was that there was a person before the court who could have laid the information.

56. I can see no material distinction between those cases and this one. Applying the above authorities to the facts of this case it does not matter that Mr. Millington was in fact a Factory Inspector or that he was authorized by the Factory Inspectorate to conduct an investigation or perhaps even to initiate the prosecution. That is not sufficient to take the case outside of the common law rule and make the prosecution other than a private prosecution. Mr. Millington is the complainant and is capable of laying the complaint.

57. In view of the above I am unable therefore to agree with any of the objections raised by the Respondents. The Appellant in my judgment has a common law right to initiate these proceedings. The Appellant therefore succeeds on this point which, as I have mentioned, was not argued before the Industrial Court. The result however is that the appeal is allowed and the order of the Industrial Court is set aside. The complaints are therefore reinstated and remitted to the Industrial Court.

58. This leaves the appeal of the Second Respondent on the question of costs. The Industrial Court made no order as to costs. The Second Respondent has argued that that was a wrong exercise of the Court's discretion. It was submitted that costs should follow the event and accordingly the Industrial Court should have ordered that Mr. Millington pay its costs. The Second Respondent's appeal is therefore premised on the Court upholding the decision of the Industrial Court dismissing the complaints. In view of the conclusion I have reached on the substantive appeal it seems to me that the appeal on the question of costs goes by the wayside and must now be dismissed.

59. There being no exceptional circumstances in these appeals within the meaning of section 10(2) of the Industrial Relations Act I make no order as to costs on both appeals.

Allan Mendonça
Justice of Appeal