**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. S. 161 of 2017**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**
**APPELLANT**

**AND**

**DEVANT MAHARAJ**
**RESPONDENT**

**PANEL:** **Mendonça JA**
**Bereaux JA**
**Rajkumar, JA**

**APPEARANCES:** **Mrs D. Peake SC, Mr R. Heffes-Doon, Mrs Z. Haynes-Soo Hon, Ms T. Toolsie, Instructed by Mr B. James appeared on behalf of the Appellant.**

**Mr A. Ramlogan SC, Mr G. Ramdeen, Ms J. Lutchmedial, Mr A. Pariagsingh, Instructed by Mr A. Mitchel appeared on behalf of the Respondent.**

**Mr I. Roach, Instructed by Mr I. Ali appeared on behalf of The Judicial and Legal Service Commission**

**Mr G. Delzin, Instructed by Ms S. Lall appeared on behalf of The Office of the President**

**Ms T. Hadad-Maharaj, Instructed by Mr D. Allahar appeared on behalf of the Law Association of Trinidad and Tobago**

**DATE OF DELIVERY:** **August 2nd, 2017**

**REASONS**

**Delivered by A. Mendonça, J.A.**

1. On June 06 2017, we allowed this appeal, set aside the orders of the judge below and dismissed the respondent's claim and application for interim relief. We also made the following orders as to costs:

   (a) the respondent shall pay the appellant's costs both here and below certified fit for senior counsel; and
   (b) the respondent shall pay to the Judicial and Legal Service Commission its costs of the appeal;
   such costs to be assessed by the registrar.

We made no order as to costs as between the respondent and the Law Association of Trinidad and Tobago and the office of the President of the Republic of Trinidad and Tobago. We also made no order as to costs as between the respondent and the Judicial and Legal Service Commission in the Court below.

We indicated at that time that we would give our written reasons for our decision. I now give my reasons for the orders made.

2. On June 05th 2017, the respondent, Mr Devant Maharaj, (hereinafter referred to interchangeably as the respondent or Mr Maharaj), filed a fixed date claim form (the claim form) seeking the interpretation of S 110 of the Constitution to determine whether the appointment of a retired judge to the Judicial and Legal Service Commission (hereinafter referred to as the JLSC) under S 110(3)(b) is valid and proper. Mr Maharaj sought the following relief:

   (1) A declaration that retired judges cannot be appointed as members of the JLSC under and/or pursuant to S 110(3)(b) of the Constitution;
   (2) A declaration that the "persons with legal qualifications …not in active practice as such" referred to in S 110(3)(b) of the Constitution do not include retired judges;

   (3) Costs;

(4) Such further relief orders and directions or writs as the Court might consider just and/or appropriate as the circumstances of the case warrant.

3. The JLSC has important responsibilities under the Constitution in respect of offices within its purview. It has the power to appoint persons to hold or to act in those offices including the 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 those offices. The offices within the purview of the JLSC are public offices for appointment to which persons are required to possess legal qualifications and include Judges of the Supreme Court.

4. S 110(2) and (3) of the Constitution provide for the membership of the JLSC. It, however, is convenient to set out the entirety of S 110:

> 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.

5. The respondent is of the view that on a proper construction of S 110(3)(b) a retired judge cannot be appointed to the JLSC. By pre-action letter dated May 8th 2017, attorneys-at-law for Mr Maharaj wrote to the Chief Justice in his capacity as Chairman of the JLSC. They raised several queries relating to the JLSC. In relation to the composition of the JLSC, they noted that there were two retired judges, namely Mr Roger Hamel-Smith and Mr Humphrey Stollmeyer (hereinafter referred to as Justice Hamel-Smith and Justice Stollmeyer respectively), who are both retired Justices of Appeal, and queried whether their presence on the JLSC satisfied the requirements that "two persons with legal qualifications, at least one of whom is not in active practice as such" in S 110(3)(b). They contended that S 110(3) only authorises the appointment of one judge, sitting or retired, and two retired judges could not be appointed.

6. Mr Roach, attorney-at-law for the JLSC, by letter dated May 18th 2017, replied to the pre-action letter written by Mr Maharaj's attorneys-at-law. In relation to the composition of the JLSC, he noted that:

> "It is now left to be determined whether or not Justice Stollmeyer, according to S 110(3)(b) falls within the requirement of being one of two persons with legal qualifications, at least one of whom is not in active practice. Since the JLSC is short of one such member, this brings into focus whether an ex-judge who is not in active practice can be considered as being qualified under this particular category.
>
> I submit that a purposive interpretation of S 110(3)(b) seems to require the appointment of members of the legal profession to provide a different non-judicial perspective to the JLSC. Nevertheless, there is no discernible prohibition placed by the Constitution on a former judge filling this category per se, since the pellucid requirement of S 110(3)(b) is for one of the two to not be in active practice, but both must possess legal qualifications. My instructions are that Justice Stollmeyer is a person with legal qualifications who is not in active

> practice and is therefore the appointed member who fills this category, which would have left vacant the post for the person with legal qualifications who is in active practice, since filled by Ernest Koylass SC."

7. It is relevant to note that apart from the attorney-at-law for the JLSC offering his interpretation of S 110(3)(b) he also regarded Justice Stollmeyer as one of the two persons appointed under S 110(3)(b). Justice Hamel-Smith, it seems, was appointed under S 110(3)(a).

8. Mr Maharaj was not persuaded by the position as stated in Mr Roach's letter and proceeded to commence these proceedings by filing the claim form.

9. The claim form sets out the grounds upon which the relief Mr Maharaj seeks is based and is accompanied by an affidavit sworn by him. Mr Maharaj, in his affidavit, states that he has "filed several important cases" on his own behalf and in the public interest. Having considered the provisions of the Constitution he became concerned about the composition of the JLSC and in particular whether it was properly constituted. He was of the view that if it were not constituted in a manner consistent with the Constitution that that is a matter of grave public concern given the constitutional responsibilities of the JLSC and is a matter that can negatively affect public confidence in the administration of justice.

10. Mr Maharaj's concerns were informed by his view of the proper construction of S 110(3)(b). The crux of that construction may be found in the following grounds set out in the claim form:

"10. Although a retired judge can be described as a former Attorney-at-Law who is not in active practice, it is obvious that great care was taken in drafting S.110(3) to identify two distinct categories of persons, those with judicial experience under S.110(3)(a) and those selected from the legal profession under S.110(3)(b). It is therefore a breach of S.110(3) to appoint one person on the basis that he satisfies both S.110(3)(a) and S.110(3)(b).

11. Rule 54 of the Code of Ethics in Part A of the Third Schedule to the Legal Profession Act, Chap. 90.03 states that *"A person who previously held a substantive appointment as a Judge of the Supreme Court shall not appear as an Attorney-at-law in any of the Courts of Trinidad and Tobago for a period of ten years commencing on the date of his retirement, resignation or other termination of such appointment."* Justice Stollmeyer cannot truly be described as a person with legal qualifications who is not in active practice.

12. A purposive interpretation of S.110(3)(b) suggests that the pool of potential candidates comprising *"persons with legal qualifications at least one of whom was not in active practice"* refers to members of the bar and not judges (whether retired or otherwise).

16. The Honourable retired Justice of Appeal Mr Humphrey Stollmeyer is not qualified to be appointed and/or serve as a member of the JLSC because he does not fall within the category of persons identified in S.110(3)(b) of the Constitution, that is – a person "with legal qualifications … not in active practice as such…"

19. It is clear from a proper reading of S.110 that retired Justice Stollmeyer is not in fact a person with legal qualifications who is not in active practice within the meaning and contemplation of S.110(3)(b) of the Constitution. A former Judge cannot therefore properly and lawfully be appointed to serve as a member of the JLSC pursuant to S.110(3)(b)."

11. It is therefore plain that the contention of Mr Maharaj is that a person who once held the office of a judge does not qualify for appointment under S 110(3)(b) as he cannot fall within the category of persons identified in that subsection as "persons with legal qualifications at least one of whom is not in active practice as such"

12. On June 05th 2017, the same day as the filing of the claim form, Mr Maharaj learnt of the intention of the President to swear in two persons as puisne judges (or in other words, as judges of the High Court). He tried to obtain an undertaking from the President to defer the

judicial appointments. He was unsuccessful. Accordingly on that day, by notice of application the respondent applied for an injunction pending the hearing and determination of the claim restraining (a) the President from acting on the advice tendered by the JLSC for the appointment and swearing in of the two puisne judges on June 06th 2017, and (b) the JLSC from tendering any further advice to the President pursuant to S 104(1) of the Constitution regarding the appointment of any new judicial officers.

13. Section 104(1) of the Constitution provides as follows:

> "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."

14. The respondent's application came before Seepersad J, and was treated by him as an urgent application for hearing on June 05th 2017 as the swearing in of the two puisne judges was set for the following day. The judge directed all interested parties identified on the face of the application to be given notice on the application as well as the hearing of the application. As a consequence of such notice given pursuant to the judge's direction, attorneys-at-law representing the Office of the President, the JLSC, and the Law Association of Trinidad and Tobago appeared before the judge.

15. In the early hours of June 06th 2017, the judge made the following orders:

    (1) 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.

    (2) The costs of this application are reserved.

    (3) The Inter-Parties injunction is adjourned to Friday 9th June 2017 at 10:00am…

16. The judge did not come to a determination of the proper construction of S 110(3)(b) of the Constitution. He, however, saw merit in the argument that S 110(3) only permitted one judge (sitting or retired) to be appointed to the JLSC and Justice Hamel-Smith, having been appointed under S 110(3)(a), Justice Stollmeyer, could not, therefore, be appointed under S 110(3)(b). He stated:

> "27 The thrust of the applicant's complaint is centred 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 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 (*sic*) the office of a judge 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."

The judge was, therefore, of the view that there was a serious issue to be tried as to the proper construction of S 110(3)(b). He then proceeded to consider the principles governing the grant of an injunction and granted the injunctive relief referred to earlier at paragraph 15.

17. Before this Court it was of course recognised by the parties that the crux of the case is whether on the true construction of S 110(3)(b) a retired judge can be appointed to the JLSC. Both parties were of the view that this Court could come to a final determination of that question on the material before it. If the Court concluded that retired judges were not excluded by S 110(3)(b) then that would be the end of the matter as there would be no basis

on which to grant any injunctive relief as ordered by the Court. In those circumstances this Court should allow the appeal and dismiss the respondent's claim. If, on the other hand, the composition of the JLSC contravenes S 110(3)(b) in that Justice Stollmeyer could not have been appointed a member under that section, then the JLSC could not continue to act as constituted and the question then would be whether the advice tendered to the President pursuant to S 104(1) of the Constitution with respect to the appointment of the two puisne judges, and in respect of which the judge granted the injunctive relief, is saved by S 36 of the Interpretation Act as was argued by the appellant (S 36 of the Interpretation Act is set out at paragraph 55 of this judgment).

18. Mrs Peake SC, appearing for the appellant, saw no ambiguity in S 110. She submitted that nothing in S 110(3)(b) disqualified a person who is a retired judge from being appointed to the JLSC. The section required the two persons to both possess legal qualifications and further required that at least one of them must not be in active practice as such. A retired judge certainly met the requirement relating to legal qualifications and like Justice Stollmeyer could meet the other criterion of not being in active practice as such. There is indeed no dispute that Justice Stollmeyer was not in active practice. Ms Peake therefore submitted that S 110(3)(b) did not disqualify retired judges from being appointed to the JLSC.

19. Mr Ramlogan, counsel for the respondent, submitted to the contrary. He contended that on a simple literal reading of S 110(3)(b) what is required was the appointment of members of the legal profession and not the Judiciary, past or present. He argued that read in its context, the

words "persons with legal qualifications" are distinct from persons who hold or have held office as a judge referred to in S 110(3)(a). Persons with legal qualifications in 110(3)(b) referred to members of the bar. S 110(3) created therefore two distinct categories of persons, namely, judges and persons with legal qualifications and imposed a quota on the number of judges, past or present, who could be appointed under S 110(3). That quota was one. Mr Ramlogan also submitted that the words "at least one of whom is not in active practice as such" pointed to an attorney-at-law and not a judge. Further, Mr Ramlogan argued that on a purposive construction, S 110(3)(b) did not permit the appointment of more than one judge.

20. Counsel appearing for the JLSC and the Office of the President supported the submissions of Mrs Peake. Ms Hadad, who appeared for the Law Association, indicated that she was adopting "a neutral position" and was of the view that S 110(3)(b) could be interpreted in either of the ways contended by the parties. She, however, offered for the Court's consideration that S 110(3)(a) might be considered a special provision and S 110(3)(b) a general provision. On the principle *generalibus specialia derogant,* the general provision would not extend to the matters dealt with in the special provision. The effect of that would be that S 110(3)(b) did not apply to retired judges since they fell within S 110(3)(a).

21. The question therefore that arises on the submissions is whether a retired judge may be appointed to the JLSC under S 110(3)(b). This of course, raises a question on the proper interpretation of the Constitution. In **Bennion on Statutory Interpretation** ($6^{th}$ ed.) it is noted that the sole object of statutory interpretation is to arrive at the legislative intention.

The legislative intention corresponds to the legal meaning of an enactment. In searching for the legal meaning, it was said (at p.504) that the Court:

> "*Identifies* the general guidelines to legislative intention (otherwise known as interpretative criteria) that are relevant in the instant case, of which there may be many. It *determines* by reference to these relevant criteria the specific interpretative factors that, on the wording of the enactment and the facts of the instant case, are decisive. It *weighs* the factors that tell for or against each of the opposing constructions put forward by the parties and then gives its decision."

I believe this is of assistance with the interpretation of provisions of the Constitution. The object is to determine the intention of the framers of the Constitution and the approach of the Court in determining the legislative intention of an enactment is of relevance to the interpretation of provisions of the Constitution.

22. In view of the submissions in this matter, it is necessary to consider the interpretive criteria informing the literal construction of an enactment, and the purposive construction. It is also necessary to consider whether the maxim *generalibus specialia derogant* (special provisions override general ones) is of relevance to the construction of S 110(3)(b).

23. As I mentioned, both parties relied on what they saw as the literal construction of S 110(3)(b). As well as they might because the *prima face* intention of a statute is that which corresponds to its literal meaning (see S 85 of **Bennion on Statutory Interpretation** (6th ed.)(at p 275). Considerable weight is therefore to be attached to the literal meaning. It is put this way at p 781 of **Bennion**:

> "The literal meaning, at least of a modern Act, is to be treated as pre-eminent when considering the enactments contained in the Act. In general, the weight to be attached to the literal meaning is far greater than applies to any other interpretative criterion. The literal meaning may occasionally be overborne by other factors but they must be powerful indeed to achieve this."

24. The literal meaning is that which corresponds to the grammatical meaning of the text of the enactment in its setting. That meaning may be straightforward or may be ambiguous or obscure. In relation to that the authors of **Bennion** (6th ed) noted (at pp 780-81):

> "The term "literal meaning" corresponds to the grammatical meaning where this is straightforward. If, however, the grammatical meaning, when applied to the facts of the instant case, is *ambiguous,* then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is *semantically obscure,* then the grammatical meaning likely to have been intended (or anyone of them in the case of ambiguity) is taken as the literal meaning. The point here is that the literal meaning is one arrived at from the wording of the enactment alone, without consideration of other interpretative criterion."

25. What then is the literal meaning of S 110(3)(b)? Before considering this subsection, it is necessary to notice S 110(2), which provides for the members of the JLSC, as well as S 110(3)(a). S 110(2) provides that the members of the JLSC shall be the Chief Justice, the Chairman of the Public Service Commission and such other members (referred to as appointed members) as may be appointed in accordance with subsection (3). Subsection (3) therefore concerns the appointed members as they are referred to in subsection (2). S 110(3)(a) provides that of the appointed members, one shall be appointed 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. That section is straightforward enough and requires the appointment of one sitting or retired judge of the High Court or Court of Appeal in this jurisdiction or one sitting or retired judge of similar Courts in some other part of the Commonwealth. Justice Hamel-Smith, a retired Judge of the Court of Appeal of this jurisdiction, was appointed under S 110(3)(a) and there is no issue that the section permitted his appointment.

26. S 110(3)(b) permits the appointment of two persons from among persons with legal qualifications. At least one of them must not be in active practice as such. Mr Ramlogan submitted that judges are not to be included among persons with legal qualifications. But I can see no basis for excluding judges from persons with legal qualifications. That would be to give "legal qualifications" a meaning quite inconsistent with the usual meaning of the words. And if judges do not possess legal qualifications, as the term is usually understood, then neither would attorneys-at-law, as it is from them that judges are appointed. If it were the intention to exclude judges from persons with legal qualifications it could have been easily so provided by, for example, adding after the words "legal qualifications" the words "excluding judges". But that was not done. The reference to "person with legal qualifications", in my view would not exclude judges.

27. Apart from having legal qualifications, the subsection requires that at least one of the two persons appointed under S 110(3)(b) must not be in active practice as such. I believe that the words "as such" refer to "active practice" and mean in the exact sense of those words. In other words the section refers to persons not in "active practice' in the exact sense of that expression and refer to the practice of someone with legal qualifications such as an attorney-at –law. The section permits the appointment of one person who is in active practice as such but does not mandate it. It also permits the appointment of two persons who need not be in active practice as such. A retired judge, being a person with legal qualifications, is not excluded from falling within the description of not being in active practice as such and is therefore not excluded by the section on that basis. On the facts of this case Justice

Stollmeyer who is appointed under S 110(3)(b) is not in active practice as such and is therefore not excluded by the subsection.

28. Indeed even if Justice Stollmeyer were in active practice as an attorney-at-law, he would not be excluded as the section permits the appointment of one person in active practice and a retired judge can return to active practice as an attorney-at-law after he leaves the bench. What he is prevented from doing for 10 years after leaving the bench is appearing as an attorney-at-law in any of the Courts in this jurisdiction. This is provided for at rule 54 of the Third Schedule of the Legal Profession Act which provides:

> "54(1) A person who previously held a substantive appointment as a Judge of the Supreme Court, shall not appear as an Attorney-at-law in any of the Courts of Trinidad and Tobago for a period of 10 years commencing on the date of his retirement, resignation or other termination of such appointment.
>
> (2) This rule shall not apply to a person who is appointed to act as a Judge in a temporary capacity."

29. After the expiration of 10 years, a retired judge is free to appear as an attorney-at-law in the Courts of this jurisdiction. But before that, he may practice as an attorney-at-law doing one or more of the many things for which appearing in Court is not necessary. A retired judge can therefore be in active practice as such. Therefore, whether in active practice or not, being a person with legal qualifications, a retired judge is not precluded by S 110(3)(b) from being appointed to the JLSC.

30. In my opinion on a literal interpretation of S 110(3)(b) retired judges may be appointed to the JLSC. Further, I see nothing on a plain reading of S 110(3)(a) that would prevent a retired

judge from also being appointed under S 110(3)(b). In my view, therefore, on a literal construction of S 110(3) more than one judge, past or present, may be appointed. One may be appointed under S 110(3)(a) and a retired judge may also be appointed under S 110(3)(b) as he is a person with legal qualifications who may or may not be in active practice.

31. Despite the clear literal meaning of an enactment, Courts have, on occasion, attached a meaning to the words which the literal meaning is not capable of bearing. **Bennion on Statutory Interpretation** (6th ed) refers to this as a strained construction which essentially means giving to the words of an enactment a meaning other than its grammatical meaning. The authors outline broadly four reasons which may justify or require a strained construction of an enactment and these are (at S 158):

    (a) "repugnance between the words of the enactment and those of some other enactment;
    (b) consequences of a literal construction so undesirable that parliament cannot have intended them;
    (c) an error in the text which plainly falsifies Parliament's intentions; or
    (d) the passage of time since the enactment was originally drafted."

    These reasons seem to be apart from the case where a strained construction is adopted to give effect to the purpose of an enactment. I will refer shortly to the issue of the purposive construction, but it is sufficient for me at this stage to say that none of those four reasons outlined for the adoption of a strained construction is applicable in this case.

32. Mr Ramlogan also rested his case on what he considered to be the purposive construction of S 110(3)(b). **Bennion on Statutory Interpretation** (6th ed) describes a purposive construction as (at p 846):

    "…one which gives effect to the legislative purpose by -:

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive literal construction), or
(b) applying a strained meaning where the literal meaning is not according with the legislative purpose" (in the Code called a purposive and strained construction)"

I have above referred to the literal meaning of the subsection as not excluding the appointment of retired judges. If the provision is to exclude judges on a purposive construction, it will therefore require this Court to adopt a strained construction to give effect to the purpose.

33. Mr Ramlogan argues that the clear purpose of the subsection is to have the input of the members of the bar in the exercise of its functions. He however, provided no material that could identify that as the purpose of the section. But it does not appear from the section that it supports such a purpose.

34. It is common ground that the quorum for the proper conduct by the JLSC of its business is three of its members. That being so, the JLSC can properly conduct its business without the presence of any of the appointed members under subsection (3)(b) provided of course, the members identified in S 110(2)(a) and (b) and 110(3)(a) are present. If the clear purpose of S 110(3)(b) were to secure the input of attorneys-at-law in the exercise of the JLSC's functions, it would be logical to expect that provision would be made so that one of those persons appointed under 110 (3) (b) must comprise the quorum, but there is no such provision.

35. In ascertaining the purpose of an enactment it is necessary to identify the mischief with which it is intended to deal. The Court was provided with no material to assist in this regard. However, reference to the earlier 1962 Constitution might be of some assistance in this case. In that Constitution, S 76 provided for the members of the JLSC. The section required, *inter alia*, that the Governor appoint as a member a person who "holds or has held high judicial office" (see S 76(3)(a)). This was in addition to the Chief Justice as well as the senior puisne judge (see S 76(2)(a) and (b)). Under the 1962 Constitution, therefore three judges (including the Chief Justice) were members of the JLSC.

36. The Report of the Constitution Commission (dated January 22nd 1974) which has informed much of the current Constitution, recommended changes to the composition of the JLSC. It recommended that the JLSC should consist of the Chief Justice and four members appointed by the President. Of the four members, "at least" one should be a former judge of the Supreme Court. Of the others, there was no recommendation that they should not include judges, but the Commission did not think that a sitting judge should as a matter "of course" be a member (see para 341). While the recommendation that there should be at least one retired judge on the JLSC did not, in those terms, find its way into the current Constitution, I believe that like the recommendation, the intention of S 110(3) is not to limit the appointment to only one judge, whether sitting or retired. The appointment of a retired judge is permitted under S 110(3)(b) but not mandated.

37. Even if having regard to the Report of the Constitution Commission, the purpose of S 110(3) is not evident, I am convinced that the purpose as argued for by Mr Ramlogan is not

supportable. What would then follow, it seems to me, is that the purpose of the subsection cannot be identified or is doubtful and in such a case the Court is unlikely to depart from the literal meaning (see S 308 of Benion (6th ed.). I have discussed the literal meaning above.

38. As I mentioned above, it was suggested by counsel for the Law Association that the maxim *generalibus specialia derogant* might be of assistance with the interpretation of S 110(3)(b). The effect of this maxim is expressed in this way in **Bennion on Statutory Interpretation** (6th ed) (pg. 1038):

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or Instrument, it is presumed that the situation is intended to be dealt with by the specific provision."

39. For the maxim to be applied therefore, there must be a general provision which covers a situation for which specific provision is made by some other provision in the Act. The maxim therefore does not apply where instead of a specific provision and a general provision there are simply different provisions concerned with overlapping aims and applications (see ***Cusack v Harrow London Borrow Council [2013] UKSC 40***(at para 61)). In my view that is the position here.

40. Section 110(3)(a) and (b) in my opinion should not be treated as specific and general provisions but different provisions concerned with overlapping aims and applications. Both sections are concerned with the appointment of members of the JLSC. To that extent their aims overlap. But they are different. S 110(3)(a) requires the appointee to be a current or former judge. S 110(3)(b) requires that both appointees possess legal qualifications and at

least one must not be in active practice as such. The former section makes it a qualification for appointment that the person must be a retried or siting judge. The latter provides for different qualifications but which do not exclude the possibility that the person may be a retired judge. I cannot regard one as more specific or less general than the other. There are both specific as to the required qualifications but different.

41. Further, the maxim is a guide or cannon of construction that may assist in cases of contradiction within the same instrument (see **Bennion** at p 1038). There is however no contradiction between S 110(3)(a) and (b).

42. When the different factors are weighed, they overwhelmingly support a construction that allows for the appointment of retired judges under S 110(3)(b). The language of the subsection does not exclude the appointment of retired judges, nor does the language of S 110(3) as a whole permit the appointment of only one judge. S 110(3)(b) permits the appointment of two persons with legal qualifications, at least one of whom must not be in active practice. Both criteria can be satisfied by a retired judge. There is nothing to displace the literal meaning of the provision. There is no basis to adopt a strained literal interpretation. The argument that on a purposive construction the section requires the appointment of members of the bar is not supportable. And the maxim *generalibus specialia derogant,* while a useful guide or cannon of construction, is not applicable in this case. In my judgment therefore on the proper construction of S 110(3)(b) retired judges may be appointed to the JLSC.

43. In the course of his submissions to this Court, Mr Ramlogan, counsel for the respondent, strayed from his pleadings and the case as argued in the Court below, and made submissions relating to the number of the members that the JLSC should comprise. According to Mr Ramlogan, the JLSC must comprise five members. It is not disputed that at some point prior to the commencement of these proceedings there was a vacancy on the JLSC. There were therefore four members at some point in time. By the time these proceedings were commenced, a fifth member was appointed in the person of Mr Ernest Koylass SC, an attorney-at-law in practice at the bar in this jurisdiction. Mr Ramlogan however submitted that notwithstanding there are now five members, the required number of members was still relevant and this was in relation to the injunctive relief sought by Mr Maharaj with respect to the swearing in of the two puisne judges.

44. Mr Ramlogan submitted that as there must be five members of the JLSC, anytime the membership fell below that number, the JLSC was constitutionally defective as it did not have the number of members to be constitutionally competent. Mr Ramlogan's submission is that at some point during the process of the selection of the two persons for appointment to the office of puisne judge, it was clear on the evidence that there would have been a four member commission and therefore the JLSC was at some point not competent to advise the President of the appointment of the two puisne judges pursuant to S 104(1) of the Constitution. It followed that the appointment of those judges should not be proceeded with and the judge was therefore correct to grant the relief that he did, albeit for different reasons, i.e., reasons that turned on the numerical composition of the JLSC and not whether a retired judge can be appointed under S 110(3)(b).

45. Ms Peake for the appellant reminded the Court that the respondent's case as pleaded and argued in the Court below had nothing to do with the numerical composition of the JLSC. She however, submitted that S 110 of the Constitution did not require the appointment of five persons. She argued that S 110(2)(c) allowed for the appointment of up to three persons but did not require the appointment of three persons.

46. Ms Hadad for the Law Association supported the construction that the Constitution required that there be five members of the JLSC and five members must be appointed.

47. Mr Roach was also of that view. As he mentioned in the letter written in behalf of the JLSC in response to the respondent's pre-action letter, "four members fell short by one as intended by S 110" of the Constitution. He, however, also expressed the view in that letter that any act of the JLSC while it carried on with four members was saved by S 36 of the Interpretation Act. This is a point which was supported by Mr Delzin for the Office of the President and is one I will come to later.

48. There are therefore two issues that arise on the basis of these submissions, namely (1) that whether the Constitution requires the appointment of five members of the JLSC; and (2) if so, what is the consequence of that on the facts of this case in relation to the two puisne judges.

49. It is clear that by S 110(2)(a) and (b) the Chief Justice and the Chairman of the Public Service Commission are made members of the JLSC. S 110(2)(c) refers to such other members as may be appointed under subsection (3). Such "other members" are in subsection (2)(c) referred to as "the appointed members". If for "such other members" in S 110(2)(c) one were to substitute the words "appointed members" the section would read: "The members of the Judicial and Legal Service Commission shall be the appointed members as may be appointed in accordance with subsection (3)". This does not suggest to me that the section offers an option or discretion to appoint any number of the appointed members. If that were so then it would be possible to argue that the section means that none of the appointed members need be appointed. It is difficult to accept that that can be the intention of the section.

50. Then there is subsection (3) that uses quite imperative language in relation to the appointed members and provides that the appointed members shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. In other words, the appointed members shall be appointed as provided for in subsection (3) and this seems to me to require the appointment of the three persons who together are called the appointed members.

51. What seems to have contributed to the difference between the parties in the construction of the section is the use of the words "may be appointed" in S 110(2)(c). That subsection by the use of those words recognises that there is a power to appoint the appointed members but it is a power to be exercised in accordance with subsection (3). That subsection, however, requires that the power be exercised. It provides that the appointed members shall be

appointed by the President in the manner provided therein. It does not allow for a discretion to appoint any number of the members and requires that all the appointed members be appointed.

52. I therefore agree with the submission that the JLSC should comprise of five members. The issue that now arises is what is the consequence of that, or in other words, what flows from that in this case.

53. In relation to the appointment of judges, S 104(1) of the Constitution provides that they shall be appointed by the President acting in accordance with the advice of the JLSC. I think Mr Ramlogan was correct when he submitted that it is a fair inference that at some point a four member JLSC would have been involved in the selection process of the successful applicants for the office of puisne judge. But this does not mean that the advice of the JLSC to the President in accordance with S 104(1) was given by a four member JLSC.

54. Mr Koylass SC was appointed on May 17th 2017. On his appointment the JLSC was at full strength numerically. At about the same time as the commencement of these proceedings on June 05th 2017, there was a notification that persons were to be sworn in as puisne judges on June 06th. It is therefore appropriate to infer that some time prior to that announcement, the President was advised by the JLSC in accordance with S 104(1). But there is no evidence when the JLSC acted in accordance with S 104(1). There is accordingly no evidence that the advice was given to the President by a four member JLSC. The fact that the four member JLSC might have been involved in the selection process does not mean that the advice as

finally tendered to the President was not properly given in accordance with S 104(1) and there is no basis to draw such an inference. It is of course the respondent's obligation to raise a prima facie case with a serious issue to be tried. In so far as counsel for the respondent seeks to justify the injunction granted by the Judge on the basis of the numerical composition of the JLSC, the failure to provide the relevant evidence to raise even a prima facie is fatal to the respondent's case.

55. But what if there were such evidence before the Court. Here it is necessary to give consideration to S 36 of the Interpretation Act. This section provides as follows:

> 36. (1) Where a board is established under a written law, then, subject to any requirements with respect to a quorum, the validity of any act done in pursuance of any power of the board shall not be affected by—
>
> (a) the presence at or participation in the proceedings at which the act was done or authorised of any person not entitled to be present at or to participate in the proceedings; but a Court may declare an act invalid if such presence or participation is not bona fide and the objection is taken promptly having regard to all the circumstances;
>
> (b) any defect in the appointment or qualifications of a person purporting to be a member;
>
> (c) any minor irregularity (not calculated to cause any prejudice, injustice or hardship to any person) in the convening or conduct of any meeting; or
>
> (d) any vacancy in the membership of the board.
>
> (2) In this section, "board" has the meaning assigned to it by section 34(3).
> (By virtue of S 34 (3) "board" includes, *inter alia*, a Commission)

56. Mr Ramlogan submitted that the section could not assist the JLSC. He argued that the four member JLSC could act validly in the sense that their acts could be saved by S 36. On the other hand, the four member JLSC could act invalidly in such a way that their acts could not be saved by S 36. What made the difference is where there is a properly constituted JLSC to

start with and a casual vacancy arose. S 36(1)(d) could be invoked to save the acts of the JLSC during the period of time there is that casual vacancy in its membership. Where, however the JLSC proceeded under a misunderstanding of the Constitution that four members were sufficient and that a four member JLSC was one that was required by the Constitution, then S 36 could not be prayed in aid. In other words where the JLSC was acting under the misapprehension that four members were sufficient then reliance could not be placed on S 36. Mr Ramlogan made it clear that he was not alleging any bad faith on the part of the JLSC. Alternatively, he argued that even if there is no misapprehension, the imperative is to act with alacrity and have the fifth appointment made within a reasonable time. If that was not done then the acts of the JLSC could not come within S 36.

57. As to the first submission, Mr Ramlogan contended that the JLSC in this case was acting under a misapprehension as to the requirements of the Constitution. To support his submission, he relied on the following passage contained in the letter from Mr Roach on behalf of the JLSC in response to the respondent's pre-action letter:

> "It is conceded that the JLSC as a constituted with four (4) members fell short by one member as intended by section 110. Given the recent appointment of Mr Ernest Koylass SC, however, this point is now moot. Notwithstanding this, I hasten to point out that the functions of the JLSC can be lawfully conducted with a quorum of three (3) members present at any time, by virtue of its adoption of the Public Service Commission Regulations, Chapter 1:01, *mutatis mutandis*. [See Notice No. 258 published in the Trinidad and Tobago Gazette Volume 23, No. 51 dated 23rd February 1984.] Regulations 5(2) thereof provided that, *"At any meeting of the Commission three members shall constitute a quorum"*. In the unlikely event that the JLSC was found to be improperly constituted and/or without the required quorum, section 36 of the Interpretation Act, Chapter 3:01 of the Laws of Trinidad and Tobago preserves as valid any of its past decisions."

58. I do not, however, interpret this to mean that the JLSC is acting under a misapprehension as to the requirements of the Constitution. In fact the JLSC stated quite clearly its view, correctly in my opinion, that a four member JLSC fell short by one member as intended by the Constitution. The letter then refers to the fact that the business of the JLSC can be lawfully conducted with three members, which is the required quorum to which I have made reference earlier and which has not been disputed. This does not suggest that a fifth member need not be appointed but simply states until that member is appointed the JLSC can lawfully conduct its business once it is quorate.

59. In the course of argument, Mr Roach, for the JLSC, reminded the Court that the appointing authority is the President. The JLSC does not appoint itself. And in a small society as ours, it is often times difficult to find suitable persons willing to fill the positions. In the meantime it cannot be expected that the JLSC would cease to function. The suggestion was that efforts were being made for some time for someone to fill the position. This is entirely consistent with what is stated in the letter and does not support the submission that the JLSC was operating under a misunderstanding of the constitutional requirements.

60. With respect to the alternative submission, Mr Ramlogan did not suggest what is a reasonable period of time by which the appointment to fill the vacancy should have been made so as to take the matter outside of section 36 of the Interpretation Act. In any event there was no evidence as to how long the JLSC operated with four members. Further there is no evidence that would suggest that the appointing authority was not moving with alacrity to

find a suitable person willing to become a member of the JLSC. Accordingly there is no evidence on which this argument could be mounted.

61. In my judgment Mr Ramlogan has not advanced anything that would render section 36 of the Interpretation Act inapplicable on the facts of this case. That section in effect provides that subject to any requirements with respect to a quorum, the validity of any acts of the JLSC would not be affected by any vacancy in its membership. In my judgment it would provide a complete answer to any complaint as to the validity of the advice of the JLSC on the basis that there was a vacancy in its membership. So that even if there were evidence before the Court that at the time the JLSC tendered its advice to the President in relation to the appointment of the two puisne judges there were only four members, the validity of the advice would be protected by S 36(1)(d) of the Interpretation Act.

62. The above are my reasons for making the orders referred to at the outset of this judgment.

**A. Mendonça,**
**Justice of Appeal**

**Delivered by Bereaux, J.A.**

**Introduction**

63. On 6th June 2017, we allowed the Attorney General's interlocutory appeal against the decision of Seepersad J who had granted, inter alia, an interim 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."***

The order of Seepersad J was in aid of a fixed date claim by which the respondent, Devant Maharaj (Maharaj) had sought an interpretation of section 110 of the Constitution of Trinidad and Tobago to determine whether the appointment of two retired judges to the Judicial and Legal Service Commission (the Commission) under section 110(3)(b) was valid and proper. The broad question which arose on appeal was whether Seepersad J was correct in making such an order. The Court of Appeal was unanimous in its conclusion that he was not.

64. In allowing the appeal we also dismissed the substantive claim and awarded the Attorney General his costs both in the Court of Appeal and in the Court below. We were satisfied that the members of the Judicial and Legal Service Commission were properly appointed. We promised to give our reasons at a later date. That date is now at hand and I set out the bases of my conclusion in the rest of this judgment.

65. At the heart of the appeal was whether the Commission was properly constituted, pursuant to section 110(3) of the Constitution, when it purported to recommend to His Excellency the President the appointment of two judges to the High Court. The two judges were part of a total of five persons selected by the Commission for appointment to the High Court and were the final two appointments to be made by His Excellency. Also at the heart of the appeal

were the provisions of section 36(1) of the Interpretation Act Chap 3:01 and in particular section 36(1)(d), by which it is provided that a vacancy in membership in the Commission would not affect the validity of any act done in pursuance of its powers.

66. By section 104(1) judges are appointed by His Excellency the President, acting in accordance with the advice of the Commission. The Commission is established under section 110 of the Constitution of Trinidad and Tobago. In addition to its functions under section 104(1) of the Constitution, the Commission is empowered by section 111 of the Constitution to appoint persons to hold or act in such public offices as may be prescribed "*for appointment to which persons are required to possess legal qualifications*." These include the offices of State Counsel in the Chambers of the Solicitor General, Chief Parliamentary Counsel and Director of Public Prosecutions. Additionally, the Commission is empowered to make appointments to the important offices of Solicitor General, Chief Parliamentary Counsel and the Director of Public Prosecutions.

**<u>Facts</u>**

67. By his fixed date claim Maharaj sought, inter alia:

    i. A declaration that retired judges cannot be appointed as members of the Commission under or pursuant to section 110(3)(b) of the Constitution.

    ii. A declaration that the *"persons with legal qualifications… not in active practice as such"* referred to in section 110(3)(b) of the Constitution do not include retired judges.

    He sought no permanent injunctive relief.

    Maharaj describes himself as a "*civic-minded*" citizen and *"leader in the community who is concerned about recent controversial events regarding the appointment of High Court judges*

*and wishes to ensure that the procedure complies with the constitutional requirements."* As a matter of public record he is also a former minister of government and member of the now opposition party which previously formed the government of Trinidad and Tobago. He is known to be a social activist. He cited recent controversies about the process by which judges are appointed as having *"caused"* him to examine the legal procedure by which judicial appointments are made. Prior to the controversies he had no interest and never examined them. He is now *"concerned about the composition of the JLSC and in particular, whether it was properly constituted."* His research of the history of the Commission's composition has determined that there were many occasions in the past when the President appointed persons to serve on the Commission and it was comprised of two retired judges and one attorney-at-law. In fact, since 2005 this has been the case, save and except the period 2011-2012. No objection was taken by the Commission to Maharaj's locus standi to bring this action.

68. The two judges (the Honourable Jacqueline Wilson and the Honourable Kathy Ann Waterman) were scheduled to be sworn in by His Excellency the President of Trinidad and Tobago on 6th June 2017 at 11:30 a.m. On 5th June 2017 Maharaj filed an application for interim injunctions restraining His Excellency the President from acting on the advice tendered by the Commission (under section 104(1)) for the appointment and swearing in of the two judges as well as an injunction restraining the Commission from tendering any further advice to His Excellency regarding the appointment of any new judicial officers until the claim was heard and determined.

69. In support of the application for the interim stay Maharaj deposed in a supplemental affidavit that after he filed his claim on 5th June, 2017, he was informed by a member of the media of the swearing in of the two Puisne Judges by His Excellency the President on 6th June 2017 at 11:30 a.m. pursuant to the advice of the JLSC. He sought from the President a deferral of *"these proposed judicial appointments"* until his claim was determined. There was no response to the request from His Excellency the President or from counsel for the Commission, Ian Roach to whom a copy of the written request was sent. He was thus forced to seek interim injunctive relief to prevent what he considered to be a "*gross and flagrant violation of the Rule of Law and the Constitution whereby an improperly constituted JLSC [was] tendering advice to His Excellency regarding the [appointment] of new judges in the face of"* a challenge to its legitimacy. Such appointments by His Excellency had the potential to cause irreparable damage to the status of the judiciary and could undermine public confidence in the administration of justice.

The interim application was heard at about 8:00 pm on 5th June, 2017 by Seepersad J who made the order recited at paragraph (63) above after an urgent hearing to which the Office of the President and the Law Association of Trinidad and Tobago were invited, to attend and participate.

**<u>The judge's decision</u>**

70. Seepersad J, in making the order, considered the principles applicable to the grant of interim relief. His decision can best be summarised as follows:

i. The composition of the Commission must be viewed as a serious issue. Damages can never be considered an adequate remedy if it is established at trial that the composition of the Commission stands in violation of the provisions of section 110(3) of the Constitution.

ii. There was a high degree of assurance that Maharaj had a strong arguable case which was likely to succeed at the trial. There was merit in the contention that the framers of the Constitution intended the Commission to have as members, two persons holding legal qualifications but who had never held the office of a judge, so as to be able to proffer a different non-judicial perspective to the Commission's deliberations.

iii. The court had to consider section 36 of the Interpretation Act. While the provisions of section 36(1)(d) were noted, the court was of the view that section 36 is predicated upon a circumstance where there operates a properly constituted Commission whose members were appointed in a situation in which there was no misapprehension as to the manner in which section 110(3) of the Constitution was construed.

**Grounds of the substantive claim**

71. The relevant grounds of the substantive claim are as follows:

(i) Having regard to the critical constitutional role and function of the Commission, it is imperative that its membership be properly appointed in accordance with the Constitution.

(ii) As of May 17, 2017 there were four members of the Commission:
(a) The Honourable Chief Justice, Mr. Justice Ivor Archie (ex officio) – Chairman
(b) Ms. Maureen Manchouck, Chairman, Public Service Commission (ex officio) – Member
(c) Mr. Roger Hamel-Smith – Member
(d) Justice Humphrey Stollmeyer – Member.
The Honourable Messrs. Roger Hamel-Smith and Humphrey Stollmeyer are both retired Justices of Appeal. On May 17th 2017 a fifth member Ernest Koylass SC (a practising member of the Bar) was appointed.

(iii) Although a retired judge can be described as a former attorney-at-law who is not in active practice, section 110(3) was drafted to identify two distinct categories of persons; those with judicial experience under section 110(3)(a) and those selected from the legal profession under section 110(3)(b). Retired Justice of Appeal Stollmeyer does not fall within the category of persons identified under section 110(3)(b). It is therefore a breach of section 110(3) to appoint one person on the

basis that he satisfies both section 110(3)(a) and section 110(3)(b).

(iv) Rule 54(1) of the Code of Ethics in Part A of the Third Schedule to the Legal Profession Act, Chap. 90:03 states that *"A person who previously held a substantive appointment as a Judge of the Supreme Court shall not appear as an Attorney-at-law in any of the Courts of Trinidad and Tobago for a period of ten years commencing on the date of his retirement, resignation or other termination of such appointment."* Justice Stollmeyer cannot truly be described as a person with legal qualifications who is not in active practice. A purposive interpretation of section 110(3)(b) suggests that the group of potential candidates comprising *"persons with legal qualifications at least one of whom is not in active practice"* refers to members of the bar and not judges (whether retired or otherwise). In the circumstances his appointment is invalid.

**Other relevant facts**

72. Maharaj gave notice of his intention to file this claim by a pre-action letter of 8th May 2017, addressed to the Chief Justice as chairman of the Commission, raising, inter alia**:**

i. Whether the Commission could only be properly constituted with a minimum of five members

ii. Whether section 110(3) required the appointment of persons with legal qualifications other than retired judges whose eligibility to serve as a member of the Commission was catered for by section 110(3)(a); and

iii. Whether the Constitution intended that there should be representation from the bar on the Commission under section 110(3)(b).

73. By letter of 18th May 2017 Mr. Ian Roach, of counsel responded to that letter on behalf of the Commission. I have summarised the relevant parts of his response as follows:

(i) He conceded that the Commission as then constituted *"fell short by one member as intended by section 110"* but stated that the appointment of Mr. Koylass rendered that point as moot.

(ii) The functions of the Commission can lawfully be conducted with a quorum of three members present, by virtue of its adoption of the Public Service Commission Regulations.

(iii) In any event, if the Commission were found to be improperly constituted or without the required quorum, section 36 of the Interpretation Act Chap 3:01

preserves as valid any of its past decisions.

(iv) While a purposive interpretation of section 110(3)(b) seems to require the appointment of members of the legal profession to provide a different, non-judicial perspective to the Commission, there is also no discernible prohibition placed by the Constitution on a retired judge's appointment in this category.

**Submissions of Counsel**

74. Mrs. Peake submitted that the trial judge was plainly wrong in granting the injunction. She submitted that in the first place the trial judge granted an order that was not sought and that order was made after the shortcomings of the respondent's application had been highlighted. In any event the appointment of the judges was already a *fait accompli* and the *status quo* was maintained by allowing the swearing in to proceed. She submitted in effect that there was no urgency in the application because Maharaj had delayed in filing his action although he had known since late April, early May, from the contents of an undated press release from the Commission that additional judges were to be appointed.

She added that there was no serious issue to be tried in relation to the interpretation of section 110(3)(b) of the Constitution because its meaning is quite plain. There was nothing in section 110 which excluded a retired judge from being appointed under section 110(3)(b). The retired judge satisfied both criteria in section 110(3)(b) by having legal qualifications and being either in active practice or not. There was no ambiguity. A retired judge having regard to the language of 110(3)(b) was not disqualified from serving on the Commission. The respondent's case was not just weak but unarguable.

75. As to section 110(2) of the Constitution, its meaning was plain. Section 110(2)(a) in conjunction with sub section (3) gave the President a clear discretion to appoint *"up to"* three members. Section 110(2)(c) provides for *"such other members ... as <u>may</u> be appointed"* (emphasis added). There was no requirement that three members had to be appointed. She submitted that in any event if the court were to find that a retired judge did not qualify under section 110(3)(b), it was at best a defect which was cured by section 36 of the Interpretation Act. Section 36(1)(a),(b) or (d) of the Interpretation Act applied and provided a complete answer to the submissions of Mr. Ramlogan.

76. Mr. Ramlogan in reply submitted that having regard to the context of the provisions in section 110 it was intended that the two members appointed to serve under 110(3)(b) should be ordinary members of the legal profession and not former judges. He submitted the phrase 'persons with legal qualifications' *"bears its ordinary English contextual meaning*". He added that the context in which the section is drafted strongly suggests that persons with legal qualifications are distinct from persons who hold or who have held office as a judge and that is precisely why they had two separate categories. He added that judges are not to be read as having legal qualifications for the purpose of section110(3)(b).

**77.** His second submission was that section 110 provides for the appointment of five members of the Commission. The Commission is not properly constituted unless there are five appointed members barring temporary vacancies which arise through resignations, retirements or death. Barring such temporary vacancies the Commission cannot function with four members for a

prolonged period of time. This was illegal and contrary to the provisions of section 110. His alternative submission was that a four member commission was illegal *simpliciter*.

78. As to the applicability of section 36 of the Interpretation Act, Mr. Ramlogan submitted, in agreement with the trial judge, that section 36 only applied to a properly appointed commission. So that, for example, a vacancy under section 36(1)(d) would only apply to a properly appointed commission.

**Analysis and Conclusions**

79. The decision of the judge is summarised at paragraph 70 above. The question which arose is whether he was so plainly wrong that the only legitimate conclusion to which we could have come was that he erred in the exercise of his discretion. See **G v G [1985] 1 WLR 647** and **The Attorney General of Trinidad and Tobago v Miguel Regis, Civil Appeal No. 79 of 2011** at para 10.

80. The principles applicable to the grant of interim injunctive relief are now accepted to be the **American Cyanamid** guidelines *"but with modifications appropriate to the public law element of the case"*. See **The Chief Fire Officer & Anor. v. Felix-Phillip & Ors., Civil Appeal No. S 49 of 2013** at paragraph 32. In **Felix-Phillip** the Court of Appeal at paragraph 36 of the judgment (Mendonça, Jamadar and Bereaux, JJA) summarised into four paragraphs, the **American Cyanamid** guidelines, in so far as they relate to public law actions. Only three of the four guidelines were relevant to this appeal:

    (i) It is sufficient if an applicant for interim injunctive relief can show that there is a serious case to be tried. If he can establish that, he has *"crossed the threshold"*

and the Court can then address itself to the question whether it is just or convenient to grant an injunction.

(ii) As a general rule, in cases involving the public interest it will be necessary to proceed directly to the balance of justice. This is because questions arise as to whether it may be appropriate to impose upon the State the usual undertaking in damages as a condition for the grant of an injunction. A public authority acting in the public interest cannot normally be protected by a remedy in damages because it will itself have suffered none.

(iii) In cases in which a party is a public authority performing duties to the public, the balance of justice must be looked at more widely and must take into account the interests of the public in general to whom these duties are owed.

81. The judge was right that the interpretation of section 110(2) and (3) was a serious issue to be tried. Given that this was a matter which ultimately affected the public interest and that damages were not an option, it was necessary to proceed directly to consider the balance of justice and in particular the strengths of the respective cases. In this case the short legal question was whether the Commission was properly constituted in terms of the number of members appointed and the qualification of one member to be a member of the Commission. It was a pure question of law which turned on the interpretation of section 110(2)(c) and section 110(3) of the Constitution. There were two contending positions. A proper construction of section 110 revealed that the Attorney General's interpretation was correct and that Maharaj's claim was without foundation. The Court of Appeal was of the unanimous opinion that the appointments of Justice Hamel-Smith and Justice Stollmeyer (in particular) were valid and that the judge was plainly wrong to have granted interim injunctive relief. The issue being a question of pure law, the appeal was therefore allowed and the judge's order reversed. The substantive action was also dismissed.

82. There were two issues for consideration under section 110 of the Constitution:

(i) whether section 110(2) and (3) required that the Commission be comprised of three appointed members;

(ii) whether a judge falls within the definition of *"a person with legal qualifications"* per section 110(3)(b).

Section 110 of the Constitution establishes the Commission as follows:

> ***(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) …***

Subsection 4 was not relevant to the discussion.

83. Section 110(2)(c) provides that the appointed members shall be *"such other members ... as may be appointed in accordance with subsection (3)"*. Subsection 3 then provides that those members *"shall be appointed by the President ... as follows."* Section 110(2)(c) and 110(3) must be read together. It then becomes apparent that use of the word *"may"* in section 110(2)(c) is enabling, allowing the President merely to make appointments of such persons

as he considers appropriate. But the mandatory provision is in section 110(3) which ordains that three appointments are to be made from two categories of persons.

84. There is no discretion under section 110(2)(c) to appoint or not to. If there were, then it would be open to the President to make no appointment at all under 110(2)(c) and leave the Commission to comprise only the ex-officio members per section 110 (2)(a) and (b). That would be an absurd result. A decision to appoint must accord with section 110(3). In my judgment therefore the conjoint effect of section 110(2)(c) and 110(3) is to require that the Commission must comprise of five members. The evidence before us appeared to be that at the time of the making of the recommendations for the appointment of the two judges, the Commission was comprised of only four members. The question therefore was whether the Commission was validly constituted. In my judgment it was by virtue of section 36(1)(d) and 36(2) of the Interpretation Act. Mrs. Peake was right that any invalidity is cured by section 36 of the Interpretation Act which provides as follows:

> ***"36. (1) Where a board is established under a written law, then, subject to any requirements with respect to a quorum, the validity of any act done in pursuance of any power of the board shall not be affected by -***
>
> > ***(a) the presence at or participation in the proceedings at which the act was done or authorised of any person not entitled to be present at or to participate in the proceedings; but a Court may declare an act invalid if such presence or participation is not bona fide and the objection is taken promptly having regard to all the circumstances;***
> >
> > ***(b) any defect in the appointment or qualifications of a person purporting to be a member;***
> >
> > ***(c) any minor irregularity (not calculated to cause any prejudice, injustice or hardship to any person) in the convening or conduct of any meeting; or***
> >
> > ***(d) any vacancy in the membership of the board.***

> ***(2) In this section, "board" has the meaning assigned to it by section 34(3)."***

Section 34(3) defines *"board"* to include a *"corporation, tribunal, commission, committee or other similar body"* (emphasis added). The Commission is caught by the definition.

85. In this case, section 36(1)(d) was plainly applicable. Consequently any vacancy which existed in the membership of the Commission at the time of the recommendation of the judges was covered by section 36(1)(d). Mr. Ramlogan submitted that section 36 only applied to a situation in which there is a fully and validly constituted Commission. The submission appeared to mirror a similar opinion voiced by the judge. But in agreement with Mr. Delzin it seems to me that section 36 was drafted to address the very mischief which arises in this case, whereas, a decision of a properly constituted Commission requires no application of section 36(1)(d).

86. Seepersad J at paragraph 6 of his judgment *"noted"* section 36(1)(d) but stated "*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*." I can see no basis for such an approach. The Interpretation Act has been promulgated by Parliament as an aid to the construction of legislation including the Constitution. It has been deployed in many cases to aid in the construction of an immeasurable number of statutes by many judges including judges of the Privy Council (see for example **Cooper and another v Director of Personnel Administration and another [2006] UKPC 37** per Lord Hope at paragraph 9). I am well aware of Lord Diplock's counsel that it could be misleading "*…to apply to*

*constitutional instruments the canons of construction applicable to ordinary legislation…*" See **Hinds v R [1977] AC 195** at 212. But Lord Diplock in **Hinds** was dealing with the important doctrine of separation of powers which required a special approach to the construction of the constitutional instrument. It is not the same here. In my judgment a proper construction of the Constitution by the application of the Interpretation Act in no way undermines its supremacy. The judge fell into fundamental error in the approach he took to section 36. Further the application of section 36 allows the Commission to continue to function even though not at full capacity (subject to quorum) especially when membership is depleted by sudden resignation or even death. Ours is a small country; finding suitable candidates to sit on the Commission is not always quick or easy. The catchment of candidates is small.

**Whether a judge is *"a person with legal qualifications"* – section 110(3)(b)**

87. The next question was the meaning of the phrase *"persons with legal qualifications at least one of whom is not in active practice as such."* That phrase itself can be broken into two:

    (a) persons with legal qualifications

    (b) at least one of whom is not in active practice.

*Persons with legal qualifications*

88. In my judgment the phrase has been intentionally drafted to include as wide a catchment of persons as possible. A similar phrase has been used in section 111(4). A judge of a court of unlimited jurisdiction in civil and criminal matters would certainly qualify as having legal qualifications. I struggle to see the controversy.

*Not in active practice*

89. This is the more interesting phrase. Mr. Ramlogan submitted that the intention is to have at least one member of the bar, who is in active practice, serve on the Commission. I can discern no such intention. The submission turns on the words "*active practice*". The conventional interpretation seems to be that such a person must be a member of the bar who is actively practising as an attorney-at-law including appearing in courts of law. The rationale seems to be that such an attorney-at-law, because he appears in court, will be familiar with persons with court practices who are suitable enough to be appointed judges. Such an interpretation would certainly accord with a proper interpretation of what "*active practice*" is. But it is not the only interpretation. A person in "*active practice*" could also include a sitting member of the judiciary. He too is practising his profession albeit from a judicial perspective. He too will have a fair idea of the persons appearing in court who are suitable enough to be appointed judges. "*Active practice*" can also include a retired judge who, while not appearing in court (because of the ten-year prohibition) actively practises in other areas of the law. Another view may be that a non-court practice is not active practice. There was no controversy that, in this case, Justice Stollmeyer had retired from the bench and was no longer in active practice in Trinidad and Tobago.

90. Mr. Ramlogan's argument is founded on the basis that an attorney-at-law who appears in court would bring a sound perspective to the Commission. Whether or not that is true I am not persuaded that such an appointment is in the best interest of the judiciary or the legal profession. Indeed I daresay that I think it highly undesirable. Such an attorney-at-law is appearing in Court before judges whom he seeks to persuade, while having the right to

participate in any decision to promote him to the Court of Appeal or in any decision to discipline him under section 110 of the Constitution. Given the cut and thrust of courtroom exchanges between lawyer and judge during trials, it is arguable, if not likely, that such an attorney-at-law may have an advantage or pose an intimidating presence to the presiding judge. Indeed if Maharaj's evidence is accurate (and it was not challenged) this may well have been the unwritten rationale behind the recent practice of appointing two retired judges as members of the Commission. A retired judge sitting on the Commission on the other hand is open to no such criticism. Indeed, a retired justice of appeal would also be quite familiar with the quality of work of all High Court judges having presided over appeals from their judgments. He would also be familiar with the performances of attorneys-at-law who would have appeared before him in both the High Court and Court of Appeal. The argument has nothing to commend it.

91. In my judgment there is no discernable intention to exclude judges from 110(3)(b). I agree with Mrs. Peake that any such intention would have been expressed by Parliament by an express disqualification written into the section. Any such interpretation by a court would be tantamount to judicial legislation.

92. On the other hand there is a clear intention that the Commission will not be properly constituted if no judge or former judge is appointed to the Commission or if a person who has legal qualifications and is not actively practising, is not appointed (or both). But there is no corresponding mandatory requirement in section 110(3)(b) that one of the two appointees must be an active member of the legal profession or a practising member of the bar. The

subsection effectively prohibits two practising members of the profession from sitting on the Commission. But it does not prohibit an additional judge. As such, the other two members may be persons with legal qualifications but who are not in active practice. The phrase is wide enough to include two additional retired judges who are not in active practice.

93. But even if Mr. Ramlogan is right that an appointment of a retired judge under section 110(3)(b) is wrong, then section 36 of the Interpretation Act would again apply to cure any defect in a decision of the Commission. In my judgment section 36(1)(a) or (b) is the complete answer to any contention that the appointments to be made by the President would have been invalid. Maharaj's case was therefore without any foundation in law. Ms Hadad submitted that section 110(3)(a) is a special provision and that section 110(3)(b) is a general provision; as such, section 110(3)(b) cannot extend to things previously dealt with by section 110(3)(a). I do not think that section 110(3)(a) can be described as a special provision. In any event, the meaning is clear.

For all of the reasons above I dismissed the appeal and the substantive action.

**Nolan P.G. Bereaux**
**Justice of Appeal**

**<u>Delivered by P. Rajkumar JA</u>**

**Background**

94. By fixed date claim form dated June 5th 2017 the respondent/claimant applied for an interpretation of the Constitution to determine whether the appointment of a retired judge to the Judicial and Legal Service Commission (JLSC) under s. 110 (3) (b) of the Constitution

was valid. This section deals with the composition of the Judicial and Legal Service Commission (JLSC), the body entrusted, with inter alia, the selection and advice to the President on appointment, of judges.

95. He specifically sought i. *a declaration that* ***retired judges*** *cannot be appointed as members of the JLSC under or pursuant to 110 (3) (b) of the Constitution*, and ii. *A declaration that "person with legal qualifications… not in active practice as such" referred to in s. 110 (3) (b) of the Constitution does not include* ***retired judges***.

96. By application for interim relief also filed on the 5th June, 2017 the respondent/claimant also sought to restrain the appointment and swearing in of two Judges to the High Court (the proposed appointments), as well as any appointment of new judicial officers, until the hearing and determination of the claim or further order.

97. On June 6th 2017 the High Court ordered 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 the notice of application*", which was set for June 9th 2017.

98. On appeal the respondent/claimant queried whether the Judicial and Legal Service Commission was properly constituted at the time of its decision to advise His Excellency the President of the proposed appointments:

a. **if** constituted comprising more than one retired judge and,

b. (despite not specifically seeking a declaration to this effect), **if** constituted comprising four persons (and not five). (It was contended that this was also relevant to whether s. 36(1) of the Interpretation Act applied at all to validate acts of the JLSC so constituted, as s. 36(1) could have no application to acts of a constitutionally defective JLSC).

99. The appeal from that order was heard before this court on the same day and decision was delivered orally with written reasons to follow.

**Issues**

100.

i. Whether s. 110 of the Constitution requires the JLSC to be constituted with 5 members.

ii. Whether, in any event, section 36 (1) of the Interpretation Act could apply to validate acts of the JLSC when constituted with four members.

iii. Whether s. 110 (3) (b) of the Constitution does not permit more than one retired judge to be appointed to the Judicial and Legal Service Commission.

**Conclusion**

101. On a proper construction of the Constitution, and in particular s. 110:

i. The Judicial and Legal Service Commission (JLSC) would be properly constituted notwithstanding that it comprised four (and not five) members, because (a) s. 110 of the Constitution itself **permits** the appointment of five members but does not **mandate** the appointment of all five members, and, (b) a quorum consists of 3 members.

ii. Even if s.110 (2)(c) of the Constitution did require the appointment of all five members, s. 36 of the Interpretation Act would apply in this case to regularise past actions by a JLSC comprising four members, provided that they had been taken by a quorum.

iii. Although section 110 (3) (a) of the Constitution expressly requires that one appointed member of the JLSC must be a judge (current or retired) it does **not provide, nor does it require** that **only one** such person can be appointed.

iv. Neither does s. 110 (3) (b) of the Constitution provide that persons to be appointed under that subsection cannot be persons also qualified under s.110 (3) (a).

v. To construe the phrase "*persons with **legal qualifications** ... not in active practice as such*" in s. 110 (3)(b) of the Constitution as **not including** retired judges would be to strain the language of that provision to its breaking point, as it would require, inter alia, a conclusion that retired judges do not have legal qualifications.

vi. Provided that a retired judge can satisfy the requirements of s. 110 (3) (b) there is no reason in principle why a member appointed under s. 110 (3) (b) cannot also be a retired judge, as neither the language of s. 110 (3) (b), nor the context of s. 110, supports a construction to the contrary.

vii. There is no merit therefore in the contention that s. 110 (3) (b) of the Constitution permits **only** one retired Judge to be appointed to the Judicial and Legal Service Commission, or precludes the appointment of more than one retired Judge.

viii. In any event even if s. 110 permitted only one retired judge (which it does not) s. 36 of the Interpretation Act would validate past acts of a JLSC comprising more than one retired judge.

**Disposition**

102. In the circumstances the appeal is allowed. Further, as the issue of constitutional interpretation, (at the heart of both the substantive application and the application for interim relief before the High Court), has been fully ventilated on the hearing of this appeal, the substantive application filed on June 5th 2017 will also be dismissed.

**Analysis**

103. The respondent/claimant by fixed date claim form dated June 5th 2017 sought the following substantive relief:

   i. A declaration that retired judges cannot be appointed as members of the JLSC under or pursuant to 110 (3)(b) of the Constitution, and

   ii. A declaration that "*persons with legal qualifications…not in active practice as such*" referred to in s. 110 (3) (b) of the Constitution does not include retired judges.

104. By application for interim relief, (also filed on the 5th June, 2017), the respondent/claimant sought to restrain the appointment and swearing in of two Judges to the High Court (the proposed appointments), as well as any appointment of new judicial officers, until the hearing and determination of the claim or further order.

105. The application was founded on the applicant's assertion that s. 110 of the Constitution did not permit more than one retired judge to be appointed to the Judicial and Legal Service Commission (the Commission or the JLSC).

106. The applicant also took issue with the Commission being comprised of 4 members.

107. The High Court judge grounded his order on a finding at paragraphs 8 and 27 of his judgment (all emphasis added). The reasoning at paragraph 8 is as follows: *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.__*

108. Whether that is so requires a construction of s. 110 of the Constitution.

**Issues**

*Whether s. 110 of the Constitution requires the JLSC to be constituted with 5 members*

*Whether in any event section 36(1) of the Interpretation Act could apply to validate acts of the JLSC when constituted with four members.*

109. It is not in dispute:-

i. That the JLSC has adopted Regulation 5(2) of the Public Service Regulations and that, as a result, a quorum of the JLSC is 3 members. (See letter from the JLSC's attorney dated May 18th 2017).

ii. That the JLSC operated with a quorum at the material time.

iii. That even if the JLSC were only constituted when it comprises 5 members s. 36 of the **Interpretation Act** provides for the validation of past acts where the Commission's membership fell below that, once a quorum existed.

110. It is in dispute however whether s. 36 of the Interpretation Act would apply to validate acts of a JLSC which was persistently operating with less than 5 members, as it is contended that i. s. 36 applies only to a properly constituted body, but ii. such a JLSC would not be properly constituted under the Constitution.

111. It is necessary therefore to examine s. 110 of the Constitution and determine whether it actually prohibits the operation of the JLSC with four members. In particular s. 110 (2) provides as follows (all emphasis added):

> *(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).*

112. While it is arguable that the section refers to the manner and method of appointment of members it is significant that s. 110 in its entirety does not expressly provide that the JLSC **must** comprise 5 members, or that if **all** the appointments provided for by the Constitution are not made that the JLSC is constitutionally defective.

113. While it provides for the categories of persons who may comprise the JLSC, (and by implication those who may not sit on the JLSC),

a. it does not mandate that the JLSC is only properly constituted when it consists of 5 persons, or

b. that all the members who **may** be appointed **must** be appointed.

114. In the absence of an unambiguous express or implied prohibition in the Constitution against the number of members of the JLSC being less than 5, there would be no justification for considering a JLSC with four members to be constitutionally defective.

115. Despite that being so it was contended that while the Interpretation Act applied to regularise a temporary situation where the JLSC's membership fell below 5, its continued operation with a membership reduced below 5 carried the risk of it operating in breach of the Constitution.

116. In fact the claimant/respondent did not contend that **every time** that the membership of the JLSC fell below five it would be constitutionally defective. However the method of distinguishing between a constitutionally permitted operation of the JLSC with 4 members and a constitutionally prohibited operation with 4 members on his analysis was unclear.

117. That inability to differentiate between the two situations illustrates the uncertainty that would be occasioned if the claimant / respondent's argument were accepted. It also suggests that the reason that the Constitution did not specifically provide that the JLSC **must** comprise five persons is that it did not in fact so require, in recognition of the practical reality that occasions may arise when the number of members might be fewer than five.

118. The JLSC is responsible for appointments on promotion, transfer, confirmation of appointments, removal and exercise of disciplinary control over several hundred offices. The practical consequence of having to bring its work to a standstill every time its membership fell to four for an undefined period, due to resignations, illness or death, would be to render the JLSC potentially and unpredictably unworkable.

119. In this case the evidence is that the JLSC comprised 4 members from some unspecified date after October 27th 2015. However, as a practical matter it cannot be the case that every time that a vacancy arises in the membership of the JLSC that cannot be, or is not, filled within an undefined or uncertain time frame, by one of the limited number of persons, in a relatively small society who satisfies the criteria, that the constitutionality of the composition of the JLSC comes into question. This is reinforced by the recognition that the JLSC can in fact act with fewer than 5 members, given that a quorum is 3 members. Therefore the justification for declaring unconstitutional a JLSC with 4 members that is capable of constituting a quorum has not been established.

120. While s. 110 may require a JLSC of no more than five members, nothing in the language of s. 110 of the Constitution compels the conclusion that the JLSC, operating with 4 members, would be constitutionally defective.

121. The issue of whether s. 36 of the Interpretation Act could apply to a constitutionally defective JLSC therefore does not arise, as a four member JLSC would not automatically be constitutionally defective. In fact it is precisely the situation, inter alia, of a vacancy in membership of a board, (including the JLSC) that is addressed by the Interpretation Act at s. 36 (1) (d). Section 36 is set out hereunder (all emphasis added):-

> ***36.*** *(1) Where a board is established under a written law, then,* ***subject to any requirements with respect to a quorum****, the* ***validity of any act*** *done in pursuance of any power of the board* ***shall not be affected*** *by —*
>
> > *(a) the presence at or* ***participation in the proceedings*** *at which the act was done or authorised* ***of any person not entitled to be present*** *at or to participate in the proceedings; but a Court may declare an act invalid if such presence or participation is not bona fide and the objection is taken promptly having regard to all the circumstances;*

*(b) any **defect** in the appointment or **qualifications** of a person purporting to be a member;*

*(c) any minor irregularity (not calculated to cause any prejudice, injustice or hardship to any person) in the convening or conduct of any meeting; or*

*(d) **any vacancy in the membership of the board**.*

122. Section 36 of the Interpretation Act would apply to validate the acts of a JLSC which would otherwise be affected by participation in the proceedings of any person not entitled to be present, a defect in the qualifications of a person purporting to be a member, or any **vacancy** in its membership. Although Section 36 of the Interpretation Act was enacted by Act No. 45 of 1979, the predecessor provision to section 36 of the Interpretation Act was s. 37 of the 1962 Interpretation Act. (This was assented to on July 19th 1962 – before the enactment of the 1962 and 1976 Constitutions).

123. It is set out as follows: - *Where by or under any enactment passed or made after the commencement of this Act a statutory board is established, then, subject to any requirements of that enactment with respect to a quorum, the **functions** of the statutory board are **not affected** by any **vacancy in the membership** thereof*). That provision in the 1962 Interpretation Act was to the same effect as Section 36 of the current Interpretation Act in relation to the validity of the functions of a statutory board, (like the JLSC), with a vacancy in its membership. Therefore since at least 1962 a vacancy in the membership of a statutory board, (provided that it sat with a quorum), has not been a reason to challenge the validity of its functions.

124. That being so the basis for an application for interim relief would not be established, unless the claimant / respondent's further contention is accepted, namely, that a JLSC with more than one retired judge is constitutionally defective and that the Interpretation Act does not apply for this reason.

**Whether s. 110 (3) (b) of the Constitution does not permit more than one retired judge to be appointed to the Judicial and Legal Service Commission (the Commission or the JLSC)**

125. Central to the issue raised by the claimant / respondent is whether anything precludes a retired judge from being appointed under s. 110 (3) (b), it being common ground that one retired judge can be appointed under s.110 (3) (a), and that any further appointment of a retired judge needs to have been made under s. 110 (3) (b).

126. The answer must depend on the construction of the language of the provision, and in particular whether the language of s.110 (3) (b) **precludes** a retired judge from being appointed under s. 110 (3) (b).

**Law**

127. Section 110 of the Constitution is set out hereunder (all emphasis added).

> ***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;*

(**Note** - (for convenience a person appointed under s. 110 (3) (a) will be referred to as the appointed third member)

*(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.*

(**Note** - for convenience these will be referred to the appointed fourth and fifth members)

**Principles of statutory construction**

128. Counsel for the Law Association cited Bennion on Statutory Interpretation 6th ed. at page 1039. This was in support of the proposition that one, of the several approaches to construction of s.110 (3) (a) and (b), was to consider subsection (a) as a special provision. In that case, subsection (b), (a general provision), was to be read as not extending to, or excluding, the situation that subsection (a) already specifically provided for. This is reflected in the maxim *Generalis clausula non porigitur ad ea quae antea specialiter sunt comprehensa* or variations thereon.

129. In fact however the learning on the maxim to which reference was made commenced at page 1038. For completeness therefore it is better set out in its entirety hereinafter. As the

extract from Bennion itself reveals, while those principles of construction may be applicable in the case of **contradictions**;

i. The provision must be examined **in context** as Bennion also sets out what he considers the basic rule of statutory construction, as discussed below,

ii. Further for that maxim, or variations thereof, to apply it must be demonstrated that s. 110 (3) (a) is actually a special provision and s. 110 (3) (b) is a general provision.

iii. It must also be demonstrated that there is in fact such contradiction between s. 110 (3) (a) and s. 110 (3) (b) or within s. 110 as a whole.

**The basic rule**

130. See Bennion on Statutory Interpretation 6th edition at page 504 (all emphasis added)

> *The **basic rule** of statutory interpretation is that the legislator's intention is taken to be that in any case of doubtful meaning the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by **weighing and balancing the interpretative factors** concerned*[1].

**Balancing exercise – weighing of the interpretative criteria**

131. It is therefore not appropriate to single out any single supposed canon of construction and apply it without conducting the necessary balancing exercise. It would be necessary for this purpose to consider:

i. The **literal construction** of s. 110 (3) (a) and (b),

---

[1] As Bennion recognises at page 9 – Introduction – **5th ed**ition

"*Instead there are a **thousand and one interpretative criteria**. Fortunately, not all of these present themselves in any one case; but those that do yield factors that the interpreter must figuratively weigh and balance.*"

ii. The **context**,

iii. The effect of a **consequential** construction,

iv. The applicability of a **purposive** construction, and

v. Whether any **canon** of **statutory construction**, including the maxim - cited by counsel *Generalis clausula non porrigitur ad ea quae antea specialiter sunt comprehensa - A general clause does not extend to things previously dealt with by special provision* -apply to **displace the literal meaning** of the language used in s. 110 (3) (a) and (b).

vi. (It must also be borne in mind that for those maxims to apply it must be demonstrated that:

(a) s. 110 (3) (a) is a specific provision and s. 110 (3) (b) is a general provision, and;

(b) it must also be demonstrated that there is in fact such contradiction between s. 110 (3) (a) and s. 110 (3) (b) or within s. 110 as a whole).

132. Therefore before considering whether this maxim above all others could apply it is necessary to consider the approach to statutory construction suggested by Bennion as follows (all emphasis added):-

**Text and Literal meaning**

**At Page 507 6th edition**

*The so-called literal rule dissolves into a presumption that the **text is the primary indication of intention** and that the enactment is to be given a **literal** meaning **where this is not outweighed by other factors**. The so-called golden rule dissolves into one of the criteria that may outweigh the literal meaning, namely the **presumption that an 'absurd' result is not intended**. The so-called mischief rule dissolves into the presumption that Parliament intended to provide a remedy for a **particular mischief** and that a **purposive** construction is desirable.*

*The enactment **must** be accorded the meaning the court considers **the interpretative criteria** lead to **unless there** is **some inbuilt indication to the contrary**. The presumption that this is Parliament's intention is conclusive, or juris et de jure (of law and from law). The **contrary indication** need not assume any particular form however, and **may be** express or **implied**.* (Page 507 6th edition)

***Section 284. Presumption that text is primary indication of legal meaning***

*In construing an enactment, **the text of the enactment**, in its setting within the Act or other instrument containing it, is to be regarded for the legislator's intention.* (at page 780 6th edition).

***Section 285. Presumption that literal meaning to be followed***
*Prima facie, the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the **literal meaning**.* (at page 780 6th edition)

*COMMENT ON CODE S 285*
*Primacy of text While this section states the importance of literal construction, it is explained elsewhere that the prime text is that of the **enactment** in its **immediate setting**.*

*Literal meaning - The term 'literal meaning' corresponds to the grammatical meaning where this is straightforward.[5] If however the grammatical meaning, when applied to the facts of the instant case, is **ambiguous** then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is semantically obscure, then the grammatical meaning likely to have been intended (or any one of them in the case of ambiguity) is taken as the literal meaning. The point here is that the **literal meaning is one arrived at from the wording of the enactment alone**, without consideration of other **interpretative criteria**. When account is taken of such other criteria (for the purpose of arriving at the legal meaning of the enactment), **it may be found necessary to depart from the literal meaning** and adopt a strained construction.*

**Literal construction**

133. Section 110 (2) provides for the inclusion on the JLSC, ex officio, of the Chairman of the Public Service Commission, and the Chief Justice.

134. Section 110 (3) specifically provides for the composition of **appointed** members of the JLSC. Section 110 (3)(a) specifically requires the inclusion of a judge or former judge (who has held office as a judge of a court of unlimited jurisdiction in civil and criminal matters or as a judge of a court of appellate jurisdiction from such a court, in some part of the Commonwealth).

135. It was contended that provision having been made for appointment of a retired judge by s.110 (3) (a) of the Constitution, s. 110 (3) (b) precluded the additional appointment to the JLSC of any additional retired judge. However nothing in the language used in section 110 (3) (b) so provides. Section 110 (3) (b) is as follows (all emphasis added):

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

136. In fact however s.110 (3) (a) provides for a variety of categories of person from whom appointments may be made, of whom retired judges are just one. "*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*" can include, for example:

i. A current High Court judge from this jurisdiction;

ii. A current appellate judge from this jurisdiction;

iii. A retired High Court judge from this jurisdiction;

iv. A retired appellate judge from this jurisdiction;

v. A current High Court judge from some other part of the Commonwealth;

vi. A current appellate judge from some other part of the Commonwealth;

vii. A retired High Court judge from some other part of the Commonwealth;

viii. A retired appellate judge from some other part of the Commonwealth.

137. Retired judges from this jurisdiction would comprise only two of the above categories. If it were the case that s. 110 (3) (b) were meant to exclude persons already specified in s. 110 (3) (a), (the appointment of such persons having already been specifically provided for), this would necessarily mean that the other categories of persons provided for in s. 110 (3) (a) would **also be ineligible** for appointment to the JLSC, if even one person in the categories identified above had already been appointed.

138. That argument carried to its logical conclusion would mean that if a retired appellate judge from this jurisdiction had already been appointed as the appointed third member, then no appointments can be made to the JLSC of persons falling into any of the following categories:

i. a current High Court judge from this jurisdiction;
ii. a current appellate judge from this jurisdiction;
iii. a retired High Court judge from this jurisdiction;
iv. a current High Court judge from some part of the Commonwealth;
v. a current appellate judge from some part of the Commonwealth;
vi. a retired High Court judge from some part of the Commonwealth;
vii. a retired appellate judge from some part of the Commonwealth.

139. This would be because a. the quota of such persons specifically provided for by s. 110(3) (a) would have already been filled by the appointment of the retired judge, and therefore, (b) such persons would be **deemed** to be excluded from consideration for appointment under s. 110 (3) (b). This construction could potentially deprive the JLSC of access to a significant body of expertise, for example, if a retired High court judge with extensive experience in

civil law and judicial practice were to be appointed under 110 (3) (a), then a retired appellate judge with extensive experience in criminal law and judicial practice would be precluded from appointment. The overriding necessity for interpreting the provision as requiring the inclusion of two persons on the JLSC with non-judicial experience, at the expense of limiting the membership of the JLSC to only one retired judge, has not been established.

**The natural meaning of the section**

140. **On its face** the language of s. 110 (3) (b) could permit appointees under both s. 110 (3) (b) and s.110 (3) (a) to be from among retired judges from this jurisdiction, as discussed below, (putting aside for the time being the argument that appointment of retired judges was already specifically provided for by s. 110 (3) (a) and therefore could not equally be contemplated by s. 110 (3) (b)).

141. (Assuming that there is a **requirement** to appoint two further members, as distinct from a power to do so), it may be useful to consider the types of person who may be appointed under s. 110 (3) (b) as the appointed fourth and fifth members.

i. Such persons must both have **legal qualifications**.

ii. **At least** one of the two must not be in active practice as such.

***"With legal qualifications"***

142. Section 110 (3) (b) provides that the appointed fourth and fifth members of the JLSC must have legal qualifications. The respondent disputes that a retired judge can be included in the category of persons having **legal qualifications**, given the contention that provision for membership of retired judges has already been made in s.110 (3)(a).

143. On the face of the provision there is no reason for concluding that *"with legal qualifications*" does not mean exactly what it says. If it were that the provision was not meant to include retired judges as persons **with legal qualifications** it could have simply provided an exception in their case (i) by language in **s. 110 (3) (b)** itself similar to or with the effect of "*except for retired judges"* or "*not including such persons as specified in s. 110 (3) (a)"*, or ii. by language in s. 110 (3) (a), such as for example, the word "*only*" in **s. 110 (3) (a)** after the word *one*.

***"At least one of whom not in active practice as such*"**

144. Further, nothing in the express language of s.110 precludes a retired judge from falling into the category of persons contemplated by the words "*At least one of whom is not in active practice as such*". On analysis those words are neutral to the outcome of this issue.

***"At least"***

145. These words on their face mean that **one** of the two remaining members to be appointed to the JLSC must not be **in active practice as such**. However these words do not preclude **both** such members being "*not in active practice as such*". Two logical situations are contemplated by the language:-

a. **Situation one – both members** under s. 110 (3) (b) being **not in active practice as such; and**

b. **Situation two – one member** under s. 110 (3) (b) being **not in active practice as such** and **one member** being in **active practice as such**.

146. While the provision permits, by implication, that one member **may** be in active practice, it would be a stretch of language to contend that one member **must** be in active practice. The language of section 110 (3) (b) of the Constitution therefore permits, though it does not require, **one** member of the JLSC to be in active practice. It also permits, though it does not require, **both** members appointed under section 110 (3) (b) to **not be** in active practice.

**Retired judges and active practice**

147. The fact that a judge has retired does not automatically mean that he may not be in active practice as: (a) A retired judge if fully retired **may** fall within the category of person considered to be a person not in active practice;

(b) Equally however he may return to active practice but not appear before the **courts** for a period of 10 years being prohibited from so doing by rule 54 of the Third Schedule Part A of the Legal Profession Act. Ch. 90.03.

> *54. (1) A person who previously held a substantive appointment as a Judge of the Supreme Court shall not* ***appear*** *as an Attorney-at-law* ***in any of the Courts*** *of Trinidad and Tobago for a period of ten years commencing on the date of his retirement, resignation or other termination of such appointment.*

148. He may yet qualify as a person in active practice as such if, for example, he practices law as an in house legal advisor, a conveyancer, or a commercial lawyer who does not attend court.

149. A retired judge is therefore capable of being:-

a. **either** <u>not</u> in active practice, and therefore qualified under **110 (3) (b)** as being one of the persons falling within the category *at least one of whom is not in active practice as such*,

b. **or** in active practice, and still qualified therefore as being a member under **110 (3) (b)** – who could be in active practice).

150. Unless judges are **deemed** not to have legal qualifications, nothing in the **language** of s. 110 (3) b would preclude **both** such appointees being retired judges.[2]. (It does not preclude the appointed members being judges either a. one fully retired and one in active practice or b. both fully retired).

151. Therefore even if one retired judge has already been appointed under s. **110 (3) (a)** the **language** used in s. **110 (3) (b)** does not preclude further appointments of retired judges, either whether a. fully retired or b. still in active practice as such, but not appearing before courts.

## Consequential construction

152. ***Section 286. Presumption that consequential construction to be given***

*It is presumed to be the legislator's intention that the court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should assess the **likely consequences** of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the **consequences** of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.* (Page 783 6th edition Bennion) (all emphasis added)

[2] Further there is no basis for construing active practice to mean only practice before the courts. Yet even in this case a retired judge may practise before the courts after 10 years has elapsed and unequivocally would be capable of being encompassed by the language of s. 110(3)(b) under the limb " a person in active practice as such"

153. If the plain and literal meaning of the language of the provisions is applied the composition of the JLSC would be as follows:-

a. The Chief Justice

b. The Chairman of the Public Service Commission

c. A retired judge under 110 (3) (a) in the category of persons specified above[3].

154. The language of s. 110 (3) (b) does not on its face exclude the appointment of an additional retired judge or even two. It would not have been difficult if it had been so intended, to insert language to that effect in s. 110 (3) (b) such as "*not being a person of the type described in 110 (3) (a)* "after the word "*such* "or words to similar effect. This could also have been accomplished by inserting words in s. 110(3) *(a)* such as "*only*" after the word "*one"*. That would have made clear that persons under s.110 (3) (a), such as retired judges, were excluded from consideration for appointment under s. 110(3) (b).

155. If nothing in the language of section 110 (3) (b) precludes the appointment of a retired judge, it must be considered whether there is any other matter or canon of construction that can displace the meaning derived from the language of the provision. The respondent has to rely upon an **implication** that this is so from the fact that, as specific provision is made for appointment of, inter alia, retired judges in s. 110 (3) (a), once such an appointment has been

[3] i. A current High Court judge from this jurisdiction;
ii. A current appellate judge from this jurisdiction;
iii. A retired appellate judge from this jurisdiction
iv. A retired High Court judge from this jurisdiction;
v. A current High Court judge from some part of the Commonwealth;
vi. A current appellate judge from some part of the Commonwealth;
vii. A retired High Court judge from some part of the Commonwealth;
viii. A retired appellate judge from some part of the Commonwealth

made, remaining appointments under s.110 (3) (b) must be made from a class of persons other than those under s. 110(3) (a)[4].

156. The contention is that it must therefore be implied as a necessary consequence that retired judges, (and all other persons specified under s. 110 (3) (a)), cannot equally or additionally qualify for appointment to the JLSC under s. 110 (3) (b) of the Constitution.

157. Given that s. **110 (3) (b)** does not on its face require exclusion from consideration of persons who could have been appointed under s. 110(3) (a) the issue becomes whether any canon of statutory construction applies to displace the plain meaning of the language of s. 110 (3) (b).

**Whether any canon of statutory construction applies to displace the plain meaning of the language of s. 110 (3) (b)**

**Purposive construction**

158. ***Section 304. Nature of purposive construction***

> *A purposive construction of an enactment is one which gives effect to the legislative purpose by-*
>
> *(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a* ***purposive-and-literal*** *construction), or*

[4] who **also** satisfy the criteria of a. having legal qualifications, and b. (in the case of one or both such appointees) are not in active practice

*(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a* ***purposive-and-strained*** *construction.* ( See Bennion on Statutory Interpretation 6th edition at page 846)

*...Most often a purposive construction, in the true sense, will be a literal construction.* (at page 847)

***Section 308. Where purpose unknown or doubtful***

*Where the court is unable to find out the purpose of an enactment, or is doubtful as to its purpose, the court is unlikely to depart from the literal meaning.*

159. It is contended that a **purposive** approach to construction of the provision (see page 73 transcript of proceedings Court of Appeal) would exclude retired judges from also being considered under s. 110 (3) (b) for inclusion as persons eligible for appointment to the JLSC. That argument however contains within it the fallacy of **assuming** that the purpose of including retired judges under sub section 110 (3) (a) is to specifically exclude retired judges under, s. 110 (3) (b).

160. If it is contended that a purposive construction is required it needs to be demonstrated that the **purpose** of s 110 (3) (b) was to exclude from appointment additional retired judges, provision having already been made for the appointment of one under s. 110 (3) (a).

161. Given however that the JLSC sits with 3 as a quorum it would even be possible for it to sit without any of the persons appointed under s. 110 (3) (b). In that case it could sit with a retired judge, the Chief Justice, and the Chairman of the PSC.

162. It is unlikely to be the case therefore that the purpose or mischief at which s. 110 (3) (b) was directed was to ensure either:-

i. that decisions of the JLSC did not take place without the input of someone in active practice, as Section 110 permits this, even without recourse to s. 110 (3) (b) or;

ii. that s. 110 (3) (b) required the input of two non-judicial members, (as contemplated by the trial judge at paragraph 8 of the judgment), as s. 110 as a whole read in context permits the JLSC to sit without such input.

**Applicability of maxims**

**Whether this is a case for adoption of the interpretive maxims relating to the impact of specific provisions on general provisions**

**Maxims/presumptions**

163. *There are certain maxims, now to be discussed, which may afford assistance in cases of contradiction.* Bennion 6th edition Page 1038 *(*all emphasis added*).*

> *Generalibus specialia derogant: Where the literal meaning of a **general** enactment covers a situation for which **specific** provision is made by some other enactment within the Act or instrument, it is **presumed** that the situation was intended to be dealt with by the **specific** provision. [1]This is expressed in the maxim generalibus specialia derogant (special provisions override general ones).*
> *Acts very often contain **general** provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation: it is **presumed that the general words are intended to give way to the particular**. This is because the more detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it.( Page 1038 6th edition)*
>
> *Page 1039 6th edition*
> *Other versions of the same concept are the following.*
> *Generalia specialibus non derogant The converse principle: general provisions do not override special ones.[7]Lord Cooke of Thorndon said:[8]*
> *[This maxim] as its traditional expression in Latin indeed suggests, is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage.*
> *Clausula generalis non referta ad expressa General words are taken not to be intended to disturb express stipulation.*

> The passage at page 1039 6th ed. Bennion cited by counsel commences as follows:- ***Generalis clausula non porigitur ad ea quae antea specialiter sunt comprehensa - A general clause does not extend to things previously dealt with by special provision***.
> *Effect of specific on general provision A specific provision within an Act is not usually of much relevance in construing one of the Act's general provisions on* ***other*** *aspects.*
> *Drafters who wish to make clear that a specific provision is not intended to modify the meaning of a wider general provision often preface the former with the formula 'without prejudice to the generality of [the general provision] …'Sometimes the words 'the generality of' are omitted, but the intended effect is the same. This formula has its dangers, since often courts find themselves mentally unable to disregard the special provision when construing the wider one.*[3]
> *As will appear from the foregoing treatment, there are a number of guides which may assist* ***in cases of contradiction*** *within the same instrument.*[4]

**Whether contradictory**

164. Maxims and presumptions of statutory construction are relevant in cases of contradiction. The analysis of s. 110 (3) (a) and s. 110 (3) (b) above does not reveal any such contradiction. The necessity of invoking maxims and presumptions of statutory construction to displace the literal construction has therefore not been demonstrated.

**Whether s. 110 (3) (b) is in fact a general provision**

165. Further, the difficulty with applying any of these maxims is that it requires the assumption that subsection (b) is in fact a general provision. However subsection (b) is not so easily categorized. It provides for a potentially different category of appointee from that in subsection (a). Unlike that provision it permits appointment to the JLSC of two persons who **need not** have judicial experience, although they must have legal qualifications. This does not make it a general provision in the way that term is usually understood. Like subsection (a), it is in fact quite specific. For example, it permits a person with legal qualifications who

comes from active practice to be appointed as a member. It is unclear therefore how it can be contended that subsection (b) is in fact a general provision.

166. Therefore if the contention is that, *provision having already been made by subsection (a) for appointment of a retired Judge, no further appointment of a retired Judge can be made under s. 110 (3)(b*), that must be elicited from the language actually used, and not from inference by the application of one of several competing principles of statutory interpretation.

167. The proposition that the specific inclusion of a retired judge at s. 110 (3) (a) **means that a retired judge may not be appointed under 110(3) (b)** is not supported. In fact s.110 (3) (a) may equally be construed as requiring at **least** one retired judge, while not excluding additional retired judges from also being appointed under s. 110 (3) ( b).

168. In fact this is recognized in the same extract from Bennion, 6th ed. At page1039 cited by counsel as follows: "*Effect of specific on general provision - A specific provision within an Act is not usually of much relevance in construing one of the Act's general provisions **on other aspects**. This is because specific provisions may be inserted ex abundanti cautela",* (out of an abundance of caution). The specific inclusion of retired judge inter alia actually ensures ex abundante cautela that at least one retired judge would be appointed. This does not necessarily mean however that no additional retired judge could be appointed under s. 110 (3) (b).

169. The language of the statutory provisions and the applicability thereto of the competing canons of construction were not analysed in the judgment of the court below in arriving at the conclusion 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***," which was the basis of the grant of interim relief.

**Alleged Concession**

170. Finally the respondent points to the letter from attorney at law for the JLSC as supporting his construction of 110 (3) (b).

> "*I submit that a* ***purposive*** *interpretation of s. 110(3) (b) seems to* ***require*** *the appointment of members of the legal profession to provide a* ***different, non-judicial*** *perspective to the JLSC" (*all emphasis added)

171. However that does not amount to a concession that the JLSC can **only** be properly constituted when a member with legal qualifications and in active practice is appointed. Neither can it amount to accepting a prohibition on more than one retired judge. The language of the letter though conciliatory does not support such a construction. It continues "*Nevertheless, there is also* <u>*no discernible prohibition*</u> *placed by the Constitution on a former judge filling this category per se…"*.More importantly however, even if it could be construed as a concession, (which is not the case), the language of the Constitution itself does not support such a construction. This is because the words, thereof including- "***at least*** *one of whom is not in active practice as such*" cannot be construed as **requiring** one member to be in active practice, and/ or prohibiting appointment of more than one retired judge.

172. The alleged concession by the JLSC's attorney at law needs to be read in this context. At most it can be interpreted as accepting the **desirability** of an appointee from active practice. However it cannot be construed as acceptance of the **necessity** for such an appointment as a precondition to the constitutional validity of the composition of the JLSC.

173. The letter also appears to contain another concession as follows: "It is **conceded** that the JLSC as was constituted with four (4) members fell short by one member as **intended** by section 110." As indicated previously however, the language of the Constitutional provision does not support this. In any event, as contended therein, even if it did, (which it does not), the Interpretation Act would apply.

174. Balancing the above, given:

(a) that the language of s. 110 (3) (b) **does not specifically exclude** retired judges from appointment;

(b) that the language of s. 110 (3) (b) in fact **permits** the appointment of at least **one person not in active practice** and may permit **both** to be **not in active practice**, provided that they have **legal qualifications – both criteria which prima facie are capable of also being satisfied by retired judges**,

(c) that the application of the interpretive criteria referred to above does not support a departure from the literal construction of s. 110 (3) (b),

(d) the inability to discern any **legislative purpose requiring exclusion** of more than one retired judge from appointment to the JLSC,

the contention by the claimant/respondent, that the JLSC would not be properly constituted under the Constitution if it were to comprise more than one retired judge, would not be justified.

175. It is that construction which must prevail before the claimant / respondent can be entitled to challenge any appointments by the JLSC, as the basis of such challenge is the unconstitutionality of its composition. That is the matter that was raised on the interpretation

application. It is also the issue that had to be addressed on the application for urgent interim relief, and it is the issue which was raised and argued on this appeal. Given that:

a. the conclusion at paragraph 8 of the judgment of the High Court is unsupported by any analysis; and;

b. having had the benefit of the very arguments that would have to be raised at the hearing of the substantive claim, we can discern no merit in them;

this would be an appropriate case to not only refuse the interim relief claimed but to dismiss the substantive claim as it raises, in detail, the identical issues.

**Conclusion**

176. On a proper construction of the Constitution, and in particular s. 110:

i. The Judicial and Legal Service Commission (JLSC) would be properly constituted notwithstanding that it comprised four (and not five) members, because:

(a) Section 110 of the Constitution itself **permits** the appointment of five members but does not **mandate** the appointment of all five members, and,

(b) a quorum consists of 3 members.

ii. Even if s.110 (2)(c) of the Constitution did require the appointment of all five members, s. 36 of the Interpretation Act would apply in this case to regularise past acts by a JLSC comprising less than the required number of members, provided that they had been taken by a quorum.

iii. Although s. 110 (3) (a) of the Constitution expressly requires that one appointed member of the JLSC must be a judge (current or retired),

a. It does **not provide, nor does it require** that **only one** such person can be appointed.

b. Neither does s. 110 (3) (b) of the Constitution provide that persons to be appointed under that subsection cannot be persons qualified under subsection a.

c. To construe the phrase "*persons with **legal qualifications** ... not in active practice as such*" in s. 110 (3)(b) of the Constitution as **not including** retired judges would be to strain the language of that provision to its breaking point, as it would require, inter alia, a conclusion that retired judges do not have legal qualifications.

d. Provided that a retired judge can satisfy the requirements of s. 110 (3) (b) there is no reason in principle why a member appointed under s. 110 (3) (b) cannot also be a retired judge, as neither the language of s. 110 (3) (b), nor the context of s. 110, supports a construction to the contrary.

177. There is no merit therefore in the contention that s. 110 (3)(b) of the Constitution permits **only** one retired Judge to be appointed to the Judicial and Legal Service Commission, or **precludes** the appointment of more than one retired Judge.

178. In any event even if s. 110 permitted only one retired judge (which it does not) s. 36 of the Interpretation Act would validate past acts of a JLSC comprising more than one retired judge

**Disposition**

179. In the circumstances the appeal is allowed. Further, as the issue of constitutional interpretation, (at the heart of both the substantive application and the application for interim relief before the High Court), has been fully ventilated on the hearing of this appeal, the substantive application filed on June 5th 2017 will also be dismissed.

**Peter A. Rajkumar**
**Justice of Appeal**