REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 075 of 2018
Claim No. CV 2018-00680

BETWEEN

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Appellant

And

THE HONOURABLE THE CHIEF JUSTICE OF TRINIDAD AND TOBAGO MR. JUSTICE IVOR ARCHIE O.R.T.T.

Respondent

PANEL: **A. MENDONÇA, C.J. (acting)**
P. JAMADAR, J.A.
N. BEREAUX, J.A.

APPEARANCES: **C. Hamel-Smith SC, J. Mootoo and R. Dass instructed by R. Otway for the appellant**
J. Jeremie SC, I. Benjamin, K. Scotland and K. Garcia instructed by R. Ramsingh for the respondent

DATE DELIVERED: 22nd May 2018

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] The main issue in this appeal is whether the Law Association of Trinidad and Tobago (the LATT) can enquire into allegations which were made against the Chief Justice in a series of articles published in the Sunday Express newspapers. The LATT alleges that out of concern for the administration of justice and in light of the measured response of the Chief Justice to the allegations, it appointed a committee to enquire into and to ascertain whether there is substance to the allegations. The President of the LATT was named as President of the committee. The LATT proposed to send the committee's report to two Caribbean Queen's Counsel/Senior Counsel for advice which would then be considered in a general meeting of members on 15th March 2018. The Chief Justice of Trinidad and Tobago (the Chief Justice, the respondent or Archie) has brought these judicial review proceedings contending that the enquiry is unlawful:

(i) because the procedure set up by section 137 of the Constitution is the sole basis upon which any enquiry into the conduct of the Chief Justice can be undertaken.

(ii) because in any event it is ultra vires the LATT's powers under the Legal Profession Act Chap 90:03 (LPA).

[2] The respondent successfully obtained an order by way of judicial review from Kangaloo J, that the LATT acted outside its authority in commencing and continuing the enquiry into the allegations.

[3] The Chief Justice also alleged that the enquiry is tainted by apparent bias given that the LATT had passed a no confidence motion against him and other members of the Judicial and Legal Service Commission.

[4] The no confidence motion stemmed from a controversy, which arose in April 2017, concerning the appointment of the Chief Magistrate, Marcia Ayers-

Caesar, to the office of Puisne Judge while she still had fifty or more unfinished criminal matters. The controversy was the source of much public discussion. Sixty-two members of the LATT petitioned the LATT Council for the holding of a special general meeting of the members of the LATT. On 1st June 2017, during that meeting, a motion was passed by members expressing their loss of confidence in the Chief Justice of Trinidad and Tobago. Two hundred and eighty five (285) members voted in favour of the motion while one hundred and fifty members voted against.

[5] The Chief Justice also alleges that the enquiry is being conducted in bad faith or in breach of the rules of natural justice because the LATT has not provided, except upon demand from his attorneys, copies to him of the material which the LATT has been considering and the LATT has not undertaken to provide him with a copy of the committee's report.

Rolled up hearing

[6] The matter proceeded expeditiously before Kangaloo J with the parties agreeing to a "rolled up" hearing in which the question of the grant of permission to file for judicial review and the substantive hearing were heard at the same time. But as Holman J noted in **R (on the application of Milner) v South Central Strategic Health Authority [2011] All ER (D) 137 (Feb)**, "*it is … very important that a practice, on occasions, of ordering a so-called rolled up hearing does not blur the important step of the grant of permission, or the distinction between consideration of permission and substantive consideration…"*

[7] In this case some blurring may have occurred in that the judge simply granted the substantive relief to the respondent without considering whether the threshold for the grant of permission had been attained and whether permission to file for judicial review should be granted. It is implicit in her decision to grant relief to the respondent that such permission was granted. The appellant has not appealed the grant of permission. It is therefore the substantive issues which are the subject of the appeal. However, there was a proper basis for the grant of

formal permission to apply for judicial review and I too would have granted it. It is now for us to consider whether the substantive orders granted by the judge were correctly made.

The judge's decision

[8] The decision is not altogether clear-cut. I have summarised it, in the following terms:

(i) The LATT by the appointment of the committee with the President of the LATT in the role of president of that committee and in liaising with the press and in corresponding with the HDC and in all other matters (including the issue of a press release) sought to shadow the procedure which is set out under section 137 of the Constitution and continues to do so. The final opportunity for its members to participate in this mirror of the section 137 procedure would have been given at the 15th March 2018 meeting at which it would have been considered whether the committee's report and the advice from Senior Counsel/Queen's Counsel ought to be sent to the Prime Minister for him to consider instituting section 137 proceedings.

(ii) Therefore, the LATT's enquiry was being conducted with a view to changing the Prime Minister's mind, the Prime Minister having indicated on 6th December 2017, that he would not get involved.

(iii) As a matter of law, the removal of judges and the removal of the Chief Justice is enshrined, dictated and provided for solely under the Constitution for the very reason of ensuring procedural fairness to judges and the Chief Justice, who enjoy security of tenure.

(iv) On a joint reading of section 5(f) and rule 36(4) of the Code of Ethics, Part A, they do not empower or authorize the LATT to conduct an investigation of the Chief Justice in any terms. The sole procedure for doing so is to be found in the Constitution.

(v) There was no apparent bias on the part of the LATT which could have stemmed from the no confidence motion passed against the Chief Justice and other members of the JLSC. The ordinary fair minded observer being informed of all the facts would not consider that in all the circumstances of

this case the LATT can be said to be biased.

[9] Kangaloo J then held that the LATT acted outwith its authority under the LPA in commencing and continuing its enquiry into the allegations against the Chief Justice and granted a declaration that the decision was illegal and *ultra vires* the LPA as well as unreasonable and irrational. She then ordered certiorari quashing the decision. The LATT has appealed the judge's decision and her failure to address whether the LATT had acted in bad faith. By a counter notice of appeal, the Chief Justice has challenged the judge's finding of no apparent bias by a counter notice of appeal.

[10] The broad question is whether the judge was correct in the decision to which she came and turns on whether the LATT has the power to enquire into the allegations. There are the subsidiary questions of whether the LATT was biased and was guilty of bad faith in the manner in which it was conducting the enquiry. As to the main issue i.e. whether the LATT has power to conduct the enquiry, two questions arise:

(i) Does section 137 of the Constitution provide the sole procedure by which an enquiry into the conduct of the Chief Justice can be conducted?

(ii) If it does not, does the LATT have the power under the LPA to enquire into/establish the facts as they relate to the allegations levelled against the Chief Justice?

These were questions of construction, that is to say, they are issues of law as opposed to fact. Thus, the Court of Appeal can fully review the judge's decision and reverse it without limitation. The normal limitations as to reversal by a Court of Appeal of fact findings by a trial judge do not apply.

The newspaper articles

[11] The answers to both questions require an examination of the nature of the allegations made against the Chief Justice. It is necessary to look at the newspaper articles. The Chief Justice at paragraph 6 of his principal affidavit

speaks of a *"relentless and concerted"* series of publications in the press:

> ***"principally by one leading daily newspaper, containing … allegations against me which publications have been and are highly defamatory of me personally and in my office in that they falsely, improperly and maliciously suggest that I am corrupt and that I have corruptly and knowingly used my office in concert with convicted felons for their benefit by seeking to persuade the Judiciary and/or otherwise obtain a private security contract for judges' personal safety and that I have corruptly and knowingly used my office in concert with convicted felons for their benefit by seeking and/or with the intention of defrauding innocent persons to obtain HDC housing."***

He continues at paragraphs 7 and 8:

> ***"7. The … allegations, which are wholly false, appear to be part of a concerted effort unlawfully to damage the Judiciary and impair confidence in the administration of justice and/or to drive me from my office, other than in accordance with the procedures set out for securing my removal therefrom under the Constitution. The publications have included the publication of electronically doctored and manipulated material as confirmed by independent forensic subject-matter technical experts in the United States.***
>
> ***8. Acting in accordance with legal advice I have received, and not otherwise, my public responses to the said allegations have been restrained. I have not been restrained because these allegations are true. I say that these matters are untrue."***

[12] The Chief Justice, though he refers to the publications, has not exhibited them. Rather, he expresses an opinion (without any factual foundation) that they are part of a concerted effort to damage the judiciary. It is a matter of public record that the publications were by the Sunday Express newspaper. We have not

heard from the Sunday Express newspaper but the Chief Justice suggests that at some stage the publications will be the subject of litigation in defamation in which case, the issue of the Reynolds qualified privilege defence and questions of responsible journalism, will arise. Mr. Mendes, Senior Counsel and President of the LATT, has responded by affidavit filed on 5th March 2018. He has exhibited some of the articles but not all of them. From those that I have seen it is clear that the Reynolds defence will be raised *inter alia*. According to the publications, some effort to contact the Chief Justice was allegedly made before the articles were published in order to give him the opportunity to respond. The reporter alleged that no response had been forthcoming. I note that the denials at paragraph 7, however general, are the first outright rejection by the Chief Justice of the veracity of the allegations and come some three months after the first allegations were made.

[13] A report of 19th November 2017, exhibited to the Mendes affidavit was featured on page 4 of the Sunday Express with the headline *"CJ gets house for felon"*. It refers to a previous report of 12th November 2017. It can be gleaned from the article of 19th November, that the previous article published on 12th November 2017 had reported that the Chief Justice communicated with his close friend Dillian Johnson shortly after the Chief Justice had discussed with judges at a judges' meeting, a change from the state provided security for judges to security provided by a private company. Both of these articles resulted in a number of calls for the Chief Justice to respond to the allegations as well as for him to resign. From what can also be gleaned from the second report, the first report of 12th November 2017 was clear that no specific company had been put to the judges. But it noted that Johnson worked as a consultant for a security company known as Fortress Security Services Ltd.

[14] As to the report of 19th November 2017, I have summarised the report as follows:

(i) Dillian Johnson, the Chief Justice's close friend was among twelve people recommended for Housing Development Corporation (HDC) units by the Chief Justice.

(ii) All twelve were successful in obtaining housing after the Chief Justice personally called and communicated via social media with a senior HDC official to fast track the applications.

(iii) One piece of correspondence between Archie and the senior HDC manager dated 5th August 2015 revealed that Archie requested that homes be given to ten individuals. Following the request the individuals' applications were prioritised and they were allocated homes.

(iv) The Chief Justice contacted the senior manager on at least two occasions by phone asking for status updates on his personal requests.

(v) While his name appeared on HDC documents as recommending two people, the other ten names were documented as " *'recommended' by then-housing minister.*"

The article adds that questions about these allegations were sent to the Chief Justice on 2nd, 5th, 9th and 10th November but he was yet to respond.

[15] Another report exhibited to the Mendes affidavit was published on 26th November 2017. It is headlined on the front page of the Sunday Express as *"Confession"* and states that the Chief Justice's friend, Dillian Johnson, admitted to seeking his help to secure the judges' security contract. In summary the article stated:

(i) That Dillian Johnson admitted to having a discussion regarding judges' security in a brief interview with the Sunday Express on Tuesday 21st November.

(ii) It referred to correspondence between Johnson and Archie.

(iii) The Sunday Express had repeatedly sought to get a response from the Chief Justice *"but none has been forthcoming".*

(iv) That Johnson was on suspension from his job at the Water and Sewerage Authority (WASA) for instructing junior officers to conduct private work outside the confines of WASA resulting in the company being billed for works not sanctioned.

(v) That Johnson was a person of interest in a murder investigation.

[16] Another article exhibited to the Mendes affidavit was published in the Sunday Express on 17th December 2017. The report is at pages 4 and 5 but is introduced by the banner front page headline *"How fraudsters used Archie"*. Readers are then referred to page 4 and are greeted by a second larger headline *"Conned by a friend of Archie"*. The article repeats previous allegations. It is also clear that it was a follow up on a previous Sunday Express article of 10th December but that article is not exhibited in these proceedings. In summary, the 17th December article stated:

(i) More people have come forward relating how they were conned by one Kern Romero, a friend of Chief Justice Archie (a clear indication that the previous article had referred to people being conned by Romero and that he was a friend of the Chief Justice).

(ii) Romero had conned several individuals using personal pictures and correspondence between himself and Archie to legitimise his transactions.

(iii) Several of the victims telephoned Archie himself via Archie's cell phone requesting their money. Some even threatened to make the scam public.

(iv) One alleged victim told the Sunday Express that he was sceptical of Romero's claims that he could deliver an HDC house in two months but was persuaded when Romero showed him WhatsApp exchanges and pictures of himself and the Chief Justice and even carried on a conversation with the Chief Justice in the victim's presence.

(v) When his house was not delivered, the victim contacted the Chief Justice directly, demanding his house be delivered. He later received a call from Keith Scotland, Attorney-at-law, who opted to settle the matter.

(vi) Dillian Johnson in the 22nd November 2017 interview with the Sunday Express also admitted to taking pictures of Archie and sharing WhatsApp conversations with a friend who is affiliated with the opposition UNC political party.

(vii) The pictures were taken while both Johnson and Archie were together in Guyana in 2015 while Archie was on an official trip. The Sunday Express had seen the pictures and questions were posed to Archie on 2nd November 2017 regarding the contents of the images. The Chief Justice was yet to

respond.

(viii) In the 22nd November 2017 interview Johnson claimed he was offered a six figure amount to swear a false statutory declaration stating that, while in Archie's company, he had overhead conversations and utterances about ongoing cases before the Magistrates' Court and the High Court involving financiers and members of the opposition United National Congress (UNC) political party. Two UNC politicians, a former Attorney General and a serving Senator, were identified by Johnson as making the offer. Both have denied the allegation.

(ix) He spoke with Archie about the six figure offer. Archie directed him to attorney-at-law Keith Scotland's office which he visited. Scotland however is quoted as denying that Johnson ever contacted him or that any statutory declaration was signed.

The LATT's reaction

[17] In regard to these and other articles published by the Sunday Express newspapers, Mr. Mendes deposed:

> ***"The fact that such serious allegations had been, and were continuing to be made, in the media concerning the conduct of the Honourable Chief Justice was, and remains, a source of grave concern for the Council of the Law Association. Even if the … allegations are untrue, a number of them are so serious that the fact that they have been published in the press would have the tendency to bring the Office of the Chief Justice into disrepute and undermine public confidence in the administration of justice if the Honourable Chief Justice did not address them."***

Mr. Mendes added that the council of the LATT was concerned that the Chief Justice had not addressed the serious allegations concerning his conduct and was of the view that it would be prudent for him to do so. The council thus issued a press release on 15th November 2017 stating that it would be *"the prudent course"* for the Chief Justice to publicly address the allegations. The reports of

19th and 26th November then followed. By 29th November 2017 there was still no response from the Chief Justice. The council of the LATT met and resolved to appoint the committee.

[18] On 30th November 2017, Mr. Mendes along with Mr. Elton Prescott, senior ordinary member of the council, met with the Chief Justice. Mr. Mendes deposed that *"we ... informed the Honourable Chief Justice of the Council's concerns about the allegations made against him in the press and his failure to respond to those allegations and of our decision to establish the committee ..."* Mr. Mendes deposed that by 14th December 2017 the Chief Justice still had not responded to any of the allegations and they consequently issued a statement stating, inter alia, *"that the Chief Justice's continued failure to challenge the allegations has the potential to irreparably bring the Office of Chief Justice into disrepute, and by extension tarnish the entire Judiciary. His continued silence is nothing short of reckless".*

[19] According to Mr. Mendes, on 15th December 2017 the Chief Justice issued a press release briefly responding to some of the allegations made against him. Strangely enough, the press release was not exhibited by the Chief Justice, even though he refers to it, but it is exhibited to the Mendes affidavit. It stated:

> ***"The Honourable the Chief Justice Mr. Justice Ivor Archie wishes to make the following specific statements with regard to particular matters already ventilated publicly:***
>
> ***(i) Specialized Units of the Trinidad and Tobago Protective Services and the Judiciary Security Unit are the only entities responsible for assessing and implementing arrangements for the personal security of Judges and Magistrates. It is therefore false, and indeed irresponsible, to suggest that at any Judges' meeting, the Chief or any other Judge discussed the retention of any private security firm for the purpose of providing the said personal security.***
>
> ***(ii) In 2015 the Honourable Chief Justice did forward the names***

of some needy and deserving persons to the Trinidad and Tobago Housing Development Corporation (HDC) for such consideration as might be appropriate. At no time has Chief Justice Archie ever recommended Mr. Dillian Johnson for HDC housing. It is patently untrue and appears to be purposeful mischief making for one to suggest otherwise.

(iii) More recently there has been discussion in the public domain about an attack on Dillian Johnson. The Office of the Chief Justice expects the relevant authorities will urgently conduct a necessary and thorough investigation into this incident.

This is all that the Chief Justice is at liberty to say at this time."

[20] The brief statement provoked a variety of responses some of which are exhibited by Mr. Mendes' affidavit. It did nothing to quell the public expressions of concern. Worse, it was followed by the publication of the article on 17th December 2017 to which I have referred at paragraph 16. The response was clearly inadequate. It is more notable for what it doesn't say:

(i) There is no categorical denial that he knew Dillian Johnson, as a close friend or otherwise or if he did know him, that he was aware of his criminal record.

(ii) There is no denial that he discussed what transpired at the judges' meeting with Mr. Johnson. Further, the newspaper article never suggested that the Chief Justice, or any other judge, discussed the retention of any private security firm to provide personal security for judges. Indeed the article was clear that the Chief Justice in breach of confidentiality had discussed with Mr. Johnson the contents of a confidential meeting of judges.

(iii) While he denies ever recommending Mr. Johnson for housing there is no categorical denial that, as Chief Justice, he actively lobbied the HDC for housing for the other individuals referred to in the article. Indeed his admission that he did *"forward names of some needy and deserving persons"* to the HDC raises more questions. To whom were these *"forwarded",* were they accompanied by his recommendation, what

yardstick was used to determine whether these persons were *"needy"* or *"deserving"*?

There followed a number of newspaper reports about the manner in which the LATT would be probing the allegations including the comments of Mr. Mendes. There was also an exchange of correspondence between the Chief Justice and the LATT the most significant of which, for present purposes, was a letter of the LATT to the Chief Justice dated 20th January 2018, in which the LATT spelled out the basis of its decision to appoint the committee. It added that it had expanded the scope of the allegations based on a particular news report. It posed certain questions to the Chief Justice based on the newspaper articles and asked for a response by 26th January 2018. Eventually, these proceedings were filed.

The section 137 argument

[21] The allegations have serious implications for the Chief Justice which, if true, may have implications for the section 137 procedure. The question is whether the section 137 procedure is the only basis on which any enquiry into the allegations can be pursued. The submission on behalf of the Chief Justice is that section 137 provides the sole basis of enquiry into the conduct of a judge or Chief Justice. If correct, it means that even if the LATT has the power under the LPA to investigate, section 137 acts as a complete bar to any enquiry. It is therefore necessary to deal first with the section 137 argument.

[22] Section 137 provides:

> ***"(1) A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.***
> ***(2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the***

President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.

(3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a Judge other than the Chief Justice, represents to the President that the question of removing a Judge under this section ought to be investigated, then—

(a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the President acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, 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 appeals from any such Court;

(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee; and

(c) where the tribunal so recommends, the President shall refer the question accordingly.

(4) Where the question of removing a Judge from office has been referred to a tribunal under subsection (3), the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, may suspend the Judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, and

shall in any case cease to have effect—

(a) where the tribunal recommends to the President that he should not refer the question of removal of the Judge from office to the Judicial Committee; or

(b) where the Judicial Committee advises the President that the Judge ought not to be removed from office."

The Chief Justice alleges that section 137 of the Constitution prohibits any enquiry being undertaken by the LATT for the purpose of deciding whether to make representations to the Prime Minister with respect to the exercise of his powers under section 137. He contends that he enjoys security of tenure and protection from investigation into the question of his removal from office, save in accordance with section 137. Mr. Benjamin in his address developed the argument as follows:

(i) The investigation into the conduct of the Chief Justice runs the risk of impairing and making vulnerable the office of judge. This is because it is not a section 137 process. A section 137 process subserves the public interest. The enquiry in this case is an illegitimate process of investigation which impairs the office. Secondly, the investigation comes with the imprimatur of the LATT. The LATT is a public authority. The prestige and authority of the LATT means that its investigation will have a certain authority and impact on the administration of justice and public confidence in the administration of justice.

(ii) Such an investigation which negatively impacts on the administration of justice is not what the framers of the Constitution expressly contemplated when they drafted section 137.

(iii) It is a parallel or shadow process which usurps the section 137 proceedings. The evidence demonstrates that the LATT is re-creating on an ad hoc basis a process which mimics the section 137 process.

(iv) The fact of the investigation and its intrusion into the section 137 process, permits the court to conclude that the LATT has trespassed into section 137 constitutional territory.

(v) Further, the manner in which the LATT engaged with the public media did

not detract from the campaign (against the Chief Justice) nor did it act as a form of restraint. Rather, it added to the campaign and supports the submission that it ought not to be doing the enquiry because it has already had a negative impact on the administration of justice.

[23] Mr. Hamel-Smith submitted as follows:

(i) The LATT is not part of the state. If section 137 has the effect claimed by the respondent and as found by Kangaloo J, this will necessarily have a restrictive impact upon all members of the public including the press.

(ii) Such an interpretation would mean that any conduct of a judge is immunised from investigation and enquiry by members of the public including the LATT and its members on any view. This imposes damaging and unjustifiable restrictions on the public.

(iii) Such an interpretation is repressive of the democratic rights of the individual to freedom of expression including the right to criticise public officials – **Hector v Attorney-General of Antigua and Barbuda and Others [1990] 2 AC 312**.

(iv) It is inconsistent with the modern approach of the courts which, in recognition of the importance of free speech (and no doubt freedom of expression), have substantially narrowed the type of conduct that is engaged in established areas such as defamation and scandalising the court.

(v) It is inconsistent with the doctrine of separation of powers for restrictions to be placed on public rights outside of the triumvirate of the legislative, executive and judiciary. The purpose of the separation of powers is to protect public rights, not to restrict them.

(vi) The Constitution was not designed to impose restriction upon the rights of

the public at large. On the contrary it was designed to ensure the liberty of the public and the free scrutiny of the limbs of government by:

a. specifically guaranteeing fundamental rights and freedoms under Section 4, including the rights of freedom of thought and expression, and association and assembly;
b. ensuring that only the legislature could override such rights and, even so, only where it obtained a special parliamentary majority; and
c. by providing a Judiciary which was suitably insulated from control from the other limbs of government so as to be an effective protector and safeguard of the fundamental rights of the citizen.

There is no constitutional purpose served by insulating the judiciary from the good faith scrutiny, comment or enquiry of citizens or groups of citizens whether by invoking the separation of powers or otherwise and this would be plainly inconsistent with the essential constitutional purpose of demarcating the political rights of the various limbs of the State in order to protect the rights of the citizen.

Analysis

[24] At the end of the day it is a matter of construction of section 137. There is no necessity to refer to any decided case. In my judgment, section 137 cannot be interpreted in the manner contended for by Mr. Benjamin. The scope of section 137 was considered by Lord Slynn in **Rees v Crane [1994] 2 AC 173 PC**, 187 – 188. The issue in that case was whether the de-rostering of a High Court judge by the Chief Justice was effectively a suspension from duty such as to offend the provisions of section 137, by depriving the judge of the procedure and protections afforded him under section 137. Lord Slynn stated at pages 187-188:

> ***"Their Lordships accept that … the Chief Justice must have the power to organise the procedures and sitting of the courts in such way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of***

the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. …

The exercise of these powers, however, must be seen against the specific provisions of the Constitution relating to the suspension of a judge's activities or the termination of his appointment. It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways."

[25] But exclusivity of that procedure does not mean that members of the public are excluded from doing their own enquiries or investigation into the conduct of the judge. As **Sharma v Brown-Antoine [2007] 1 WLR 780 PC** makes clear section 137 does not prohibit a criminal enquiry into a judge's conduct. In my judgment, it equally does not prohibit an enquiry into a judge's conduct by a private citizen or organisation. The effect of section 137 is simply that any such enquiry cannot result in the judge's removal from office. But there is no prohibition by section 137 of any such material obtained by that enquiry being used in any section 137 enquiry. There is also no prohibition against any information obtained by that enquiry being used by the Prime Minister in deciding whether to invoke the section 137 procedure. No doubt the Prime Minister will be legally advised.

[26] A non-section 137 enquiry of the kind contemplated by the LATT is non-binding on the Chief Justice. He is not bound to engage the Law Association by responding. Similarly the Law Association is not bound to inform him of anything or to call upon him to respond to questions posed. Mr. Benjamin submitted that the procedure adopted by the LATT mimics the section 137 procedure and for that reason is illegitimate. The fact of imitation of the procedure cannot render the enquiry wrong. But more importantly the apparent mimicking of the procedure is

simply an attempt by the LATT to be fair. Indeed the Chief Justice himself has sought fairness from the LATT by demanding to know and obtaining the material in its possession. There is no consequence to the Chief Justice's tenure if an adverse finding is made. Of course Mr. Benjamin's submission is that an adverse finding undermines and impairs the office. But even if true, unanswered allegations in newspaper reports do precisely the same thing.

[27] But Mr. Benjamin raises valid concerns. A non-section 137 enquiry which reaches adverse conclusions against a judge or Chief Justice can be damaging to the reputation of the judiciary. But that cannot be a basis for ascribing to section 137 a meaning which the framers did not intend. Indeed it is precisely because they anticipated that judges would be open to unfounded and damaging allegations and reports that section 137 was framed. But at the end of the day, as Mr. Hamel-Smith submitted, public officials including judges must be able to withstand public scrutiny in both their professional and personal conduct. In agreement with Mr. Hamel-Smith I consider the interpretation suggested by Mr. Benjamin unjustifiably restrictive of public rights. Indeed I find myself in full agreement with the submissions put forward by Mr. Hamel-Smith at paragraph 23.

[28] A judge must be constitutionally protected from intrusive interventions by the executive and by members of the public but he cannot be expected to be immunised from public scrutiny. No doubt complaints will arise from time to time, most of which may be unmeritorious. The Judicial and Legal Service Commission however is not bound to act on frivolous complaints. Neither would the Prime Minister. See Lord Slynn in **Rees v. Crane [1994] 2 A.C. 173, 193:**

> ***"It is also in their Lordships' view clear that the commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. The commission may receive isolated complaints of a purely administrative nature which they consider can be dealt with adequately through administrative action by the Chief Justice. Then they would no doubt not make a***

representation that the question of removal be considered. Indeed it may well in the public interest be desirable that such matters be dealt with quickly by the Chief Justice rather than that the full panoply of representation, tribunal and the Judicial Committee be set in motion. The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President…"

[29] The interpretation sought to be put on section 137 by the Chief Justice simply cannot be accommodated. Any such interpretation requires clear and express language to that effect and there is no such language in Section 137. Its language is clear enough however that a Chief Justice (or judge) cannot be removed otherwise than by the process established by section 137.

[30] As to Mr. Benjamin's submission that, given the prestige and authority of the LATT, the process of an enquiry will negatively impact on the office of the Chief Justice, I do not agree. Any enquiry process and decision arrived at after such enquiry will serve ultimately to uphold the character of the office holder and the dignity of the offices if it results in an exoneration. An exoneration will also vindicate not just the Chief Justice personally but preservation of the office as well. Secondly if there is no exoneration then it is necessary for the upholding of the integrity of the office that the section 137 process takes it course.

[31] Section 137 is intended to protect the Chief Justice and judges from unwarranted attempts to remove them from office by the Executive. It is recognised that in the course of his duties, a judge's decision may offend the Executive. It may also offend private citizens adversely affected by his decisions who may seek to impugn his conduct. But section 137 was not meant to immunise him from public scrutiny. It is for this reason that judicial officers are expected to conduct themselves, publicly and privately, in a manner befitting of their office. They must be prepared to accept and ignore what may be unjust and unwarranted criticism from persons who simply may not know better and from even those who do.

[32] Mr. Hamel-Smith submitted that the judge also has available to him a cause of action in defamation, as well as the judicial remedy of scandalising the court. However correct that submission may be, it may not always be seen as appropriate for the judge to venture into the arena by pursuing an action in damages (and what if he loses?). Secondly, as Mr. Hamel-Smith himself admitted, the remedy of scandalising the court has been considerably narrowed in recent times and may not always be clear cut enough to be worth pursuing.

[33] In my judgment the judge placed far too restrictive an interpretation on section 137 and fell into error. She appeared to have been heavily persuaded by what she perceived to be the intention of the LATT in appointing the committee, headed by its President, to investigate the allegations. She seemed to have gleaned that the LATT's intention was to shadow the procedure set out in section 137 of the Constitution. But even if that were the intention, the judge misdirected herself by asking the wrong question and providing the wrong answer. It was never a question of the intention nor the adoption of a shadow procedure. The right question was whether the procedure provided by section 137 was the sole basis upon which the Chief Justice could be investigated. Put another way the question is whether section 137 prohibited the LATT from conducting an investigation into the allegations. Having asked herself those questions she should then have examined the language of section 137 which plainly does not prohibit any such enquiry.

Whether ultra vires the LPA

[34] Section 137 being no bar to any enquiry I turn then to the second question, whether the LATT does in fact have the power under the LPA to undertake the investigation. The Chief Justice contends that the LATT has no power of investigation under the LPA and that the enquiry is outwith its powers under the LPA. As a body created by statute, the LATT's powers are circumscribed by the LPA. The LATT's powers are powers granted by Parliament in relation to the regulation of the legal profession. They do not extend to regulation or

investigation into the conduct of a judge. The LATT relies on sections 5 and 35 of the LPA together with Rule 36(4) contained in Part A, Code of Ethics, Third Schedule to the Act. Section 5 of the LPA provides as follows:

> ***5. The purposes of the Association are—***
>
> > ***(a) to maintain and improve the standards of conduct and proficiency of the legal profession in Trinidad and Tobago;***
> >
> > ***(b) to represent and protect the interests of the legal profession in Trinidad and Tobago;***
> >
> > ***(c) to protect and assist the public in Trinidad and Tobago in all matters relating to the law;***
> >
> > ***(d) to promote good relations within the profession, between the profession and persons concerned in the administration of justice in Trinidad and Tobago and between the profession and the public generally;***
> >
> > ***(e) to promote good relations between the profession and professional bodies of the legal profession in other countries and to participate in the activities of any international association of lawyers and to become a member thereof;***
> >
> > ***(f) to promote, maintain and support the administration of justice and the rule of law;***
> >
> > ***(g) to do such other things as are incidental or conducive to the achievement of the purposes set out at (a) to (f).***

[35] The LATT relies on section 35 (1) of the Act which provides that the rules contained in the code of ethics set out in the Third Schedule to the Act "s*hall*

regulate the professional practice, etiquette, conduct and discipline of Attorneys-at-law". It adds that included in Part A of the Code of Ethics is Rule 36(4) which states that:

> **"*Where there is ground for complaint against a Judge or Magistrate an Attorney-at-law may make representation to the proper authorities and in such cases, the Attorney-at-law shall be protected.*"**

Firstly, Mr. Hamel-Smith submitted that sub-sections 5 (b), (f) and (g) of the Act, when read together, plainly empower the LATT to take action where it reasonably considers that circumstances are such that the administration of justice and/or the rule of law are under threat or at risk of being undermined.

[36] Secondly, the type of action which the LATT may take in furtherance of its purposes is not limited by the Act, but instead, is by sub-clause 5(g) quite sensibly left both open and flexible so as to permit the LATT to act in a wide variety of ways to address an infinite number of situations which may arise and require action on the part of the LATT. Thirdly, Rule 36 (4), on its face, plainly envisaged that members of the Judiciary are not immune from complaint by members of the legal profession and, quite significantly, recognises that it is the complaining party who is to be afforded protection and not the Judge in question. He submitted that, implicit in this protective measure, is a recognition that Judges, being public officials holding positions of trust and confidence, are open to scrutiny.

[37] Mr. Hamel-Smith added that given the factual matrix applicable to the instant case it must be accepted that the allegations that have been made concerning the conduct of the Chief Justice go directly to the heart of the administration of justice and the rule of law, including maintaining public confidence in the administration of justice and the rule of law. These allegations also plainly impact upon the interests of the legal profession in Trinidad and Tobago. In the circumstances, the LATT acted in furtherance of the very purposes

for which it was established. Further, to achieve its stated objective the LATT could not have been expected to simply adopt a passive role or to serve as a mere post-box for complaints made of and concerning the conduct of the Respondent. Much more was required in the light of its statutory purpose. It had to act responsibly and needed to try to inform itself as to the facts that were relevant to the allegations made against the Honourable Chief Justice and to seek legal advice thereon before making any decisions about whether it should do anything further. This is precisely what the LATT did. It is well settled that a statutory body has a duty to carry out a sufficient enquiry prior to taking any decision. This is well known in public law as the '*Tameside'* duty imposed on a decision maker requiring them to ask the right question and to take reasonable steps to acquaint themselves with the relevant material to enable a correct answer.

[38] He also relied on the decisions of the Privy Council in **Re Chief Justice of Gibraltar [2010] 2 LRC 450** and **Meerabux v Attorney General of Belize [2005] 2 AC 513** to show that questions as to whether a Chief Justice should be removed would invariably involve some measure of input by the legal profession.

Analysis

[39] In my judgment, section 5 of the LPA stands on its own. There is no necessity to resort to section 35 and rule 36 whether by way of illustration or otherwise, to assist in its interpretation. Section 35 and rule 36(4) deal with the rules which regulate the professional practice, conduct and discipline of attorneys-at-law. To the extent that in the course of practice, there may be conflict with a judge such as may warrant a complaint against the judge, rule 36(4) arises as a natural consequence. But it cannot be used to justify an investigation into the conduct of a judge which has nothing whatsoever to do with any conflict or interaction with attorneys at law in the course of court proceedings.

[40] The provisions of section 5(a) to (f) give specific powers to the LATT which all stand on their own, totally independent of each other. Section 5(g) on the other hand supplements each of those independent powers and is broadly

drafted to permit the LATT the latitude to achieve the purposes set out in section 5(a) to (f). In my judgment section 5(f) empowers the LATT to pursue the enquiry/investigation in this case. It permits the LATT to seek to maintain and support the administration of justice and the rule of law. Maintenance and support of the administration of justice and the rule of law must entail seeking to protect the standing of the offices of Chief Justice and Justice of Appeal more so where questions arise about the conduct of the office holders. Where allegations are made which, if true, can result in a loss of respect for the office holder, faith in the administration of justice and ultimately the rule of law are undermined.

[41] One only has to examine the newspaper reports to conclude that the appellant's enquiry falls within section 5(f) and is wholly justified.

[42] The decision to appoint a committee to ascertain/substantiate the facts in respect of the allegations made against the Chief Justice was made on 29th November 2017. At the time the decision was made the three reports (with banner headlines) of the 12th, 19th and 26th November had been published and there had been no response from the Chief Justice. The contents of the reports are set out at paragraphs 13, 14 and 15 above. They were followed, at least, by the reports of 10th and 17th December 2017 (see paragraph 16). These allegations in all of these reports if true suggested that:

(i) The Chief Justice was enjoying the consortium of Dillian Johnson, a felon and person of doubtful character.

(ii) The Chief Justice was guilty of a serious error of judgment in his choice of friends such as to have brought the office of the Chief Justice into disrepute.

(iii) The Chief Justice was using the prestige of his office to secure housing benefits for his friends including his close friend Dillian Johnson.

(iv) The Chief Justice because of his friendship with Johnson sought to favour Johnson's company with the opportunity to bid for a security contract with the judiciary.

(v) The Chief Justice had breached the confidentiality of judicial discussion at a judges' meeting by revealing to his close friend the

subject of those discussions. There would also have been a conflict of interest in that it was obvious that a change to a private security provider presented Johnson's company with an opportunity to bid for the contract. This is so even though the Chief Justice never mentioned the name of the company to the judges. At the heart of the allegations was that the Chief Justice, in a betrayal of the integrity of his office, was seeking to manipulate the judges for his own purposes.

(vi) The Chief Justice was being manipulated by Johnson.

(vii) Sean Romero, a friend of the Chief Justice, peddled his friendship with the Chief Justice, including using personal conversations and access to the Chief Justice's cell phone number, to persuade persons to give him money in order to secure HDC housing.

(viii) The office of Chief Justice was being used as a means of conning members of the public out of their money. This had brought the office into disrepute.

(ix) The Chief Justice's association with Mr. Romero had resulted in the office of the Chief Justice being brought into odium and disrepute.

(x) Worse still, his friendship with Romero exposed him to direct contact with members of public who were able to obtain his private cell phone and speak directly with him, offering threats if they were not placated. If true the very independence of the office was compromised and his ability properly to carry out his duties was called into question.

(xi) His relationships with both Johnson and Romero may have exposed him to blackmail and thus may have compromised his ability to perform his functions. In the case of Johnson the blackmail may be founded on Johnson's possession of photographs taken of him (of which he was unaware) as well as WhatsApp conversations saved on Johnson's mobile phone. I am aware that the Chief Justice has disputed the authenticity of these photographs and conversations as being photoshopped and fake. But this was not an immediate response. At the time of the reports there was no response from the Chief Justice.

(xii) It also includes the possibility that unscrupulous politicians may have sought to compromise his ability to sit in cases involving party

financiers in which his association with Johnson, a felon and a man of doubtful character, may have compromised his ability to perform functions. This strikes at the heart of judicial independence.

I must emphasise however that I have in no way accepted the contents of these newspaper reports as true. I am simply addressing what are the implications from these allegations of facts.

[43] These allegations, as Mr. Hamel-Smith submitted, go to the heart of the administration of justice. They affect the credibility of the holder of the office of Chief Justice and the office itself. In my judgment the seriousness of the allegations required an enquiry by the LATT. Such an enquiry is consistent with its mandate under sections 5(f) and (g). It was made all the more necessary by the failure of the Chief Justice to respond speedily and became even more justified by his clearly inadequate response on 15th December 2017.

[44] The Chief Justice in his principal affidavit contends that his restrained responses were pursuant to legal advice rather than a reflection of truth in the allegations. Certainly in responding in accordance with his legal advisors' advice he was acting in his own best interests and the Chief Justice is very much entitled to do so. But the best interests of the office holder and the best interest of the office itself may not always coincide.

[45] I daresay that in this case they do not. A restrained approach to the very serious allegations in this case does not reflect well on the office. Very serious allegations and factual issues remain unanswered which, on the face of it, reflect adversely on the office. The office and the officeholder are not synonymous or coterminous. The office goes on and on. The officeholder does not. But his conduct may tarnish not only his reputation but the office itself leading to a loss of respect for the office and a loss of confidence in the administration of justice. In my judgment the nature of these allegations cast serious slurs on the office of Chief Justice. They required strong and authoritative responses. Nothing of the kind has been forthcoming. When a response was in fact given it was tepid and inadequate in the extreme. The longer the allegations went undenied the greater

the damage to the office and the greater the negative impact on the administration of justice, however much it may have been in the best interests of the office holder to say little or nothing. The non-denials have been rendered all the more telling by the fact that it was being trumpeted repeatedly by the Sunday Express that questions about these issues had been put directly to the Chief Justice, before publication, and he was not responding. In such circumstances, the LATT, pursuant to section 5(f) and (g), was duty-bound to intervene and undertake the enquiry. In my judgment the LATT does have the power under section 5(f) and 5(g) to investigate and establish the facts in relation to the allegations against the Chief Justice. These allegations so negatively impact on the office of the Chief Justice, and by extension the judiciary, that they threaten to undermine the administration of justice and the rule of law such so as to justify such an enquiry by the LATT.

[46] Mr. Hamel-Smith submitted in effect that concomitant with the LATT having the power to complain about a judge was its duty to carry out a sufficient enquiry prior to making any decision to complain. This he submitted is well known as the *"Tameside"* duty imposed on a decision maker requiring him or her to ask the right question and to take reasonable steps to acquaint themselves with the relevant material to enable a correct answer. Certainly there are good administrative reasons for the imposition of such a duty but I do not consider that it arises in this case. The LATT's entitlement to proceed with its enquiry arises not so much from the existence of a duty, but from the sanctity and constitutional importance of the office of Chief Justice, the reticence of the Chief Justice (however well-advised) to respond in any meaningful way and the resulting threat to the administration of justice and the rule of law.

[47] Finally on this question, I do not derive much assistance from **Meerabux and Re Chief Justice of Gibraltar**. In my judgment, both cases turned on their own facts, as does this case. Certainly, in those cases the input of the legal profession was required to assist the foundation of the complaints. This case however requires deeper inquiry and turns on whether the LATT has the specific statutory mandate to proceed to do so.

The submissions of the respondent are unduly restrictive of the rights of the public. They bear all the hallmarks of an attempt to suppress the facts. If the allegations are false, as the respondent contends, then why stop the enquiry? Let the true facts emerge. Section 137 is not designed to restrict public rights. It is designed to protect judges.

The bias arguments

[48] By his counter notice of appeal, the Chief Justice seeks to reverse Kangaloo J's finding that there was no apparent bias on the part of the LATT which would stem from the no confidence resolution or the conduct of the LATT as a body.

The judge applied the test in **Porter v. Magill [2002] 2 AC 357** and found that *"the ordinary fair-minded observer being informed of all of the facts ... would not consider that in all the circumstances of this case the body or the entity which is the Law Association of Trinidad and Tobago can be found wanting in terms of bias …"*

[49] Counsel for the Chief Justice accepted that while the judge applied the right test, she failed to take into account that the threshold of bias was 'possibility' and that the fair minded observer being a member of the Trinidad and Tobago community and possessing an awareness of the allegations surrounding the Chief Justice, could consider that in all the circumstances there was a real possibility that the LATT's decision to pursue an enquiry into the allegations was biased.

[50] He submitted that the facts available to the fair minded observer included:

(a) that a petition to file a Motion of No Confidence against the Respondent and other members of the Judicial and Legal Service Commission ("JLSC") was circulated among members of the Appellant on May 4, 2017; and

(b) that on June 1, 2017 the Appellant held a special general meeting in which there was a vote of no confidence in the Respondent and the JLSC arising out of the appointment of Marcia Ayer-Caesar and her selection as a High Court Judge. The Motion of No Confidence was passed.

He submitted that in addition to those facts, and against the backdrop of, inter alia - (a) the LATT having openly declared to the public its belief in the inability of the Chief Justice to hold the office and (b) of the LATT having, in the face of the Executive's stance of non-involvement in the allegations as reported on in the press, doggedly expended time and effort in looking into those allegations – came the LATT's statement on December 14, 2017, in which it:

(i) referred to the Respondent's conduct as "unacceptable and incomprehensible";

(ii) stated that the Chief Justice's failure to challenge the allegations has the potential to "irreparably bring the office of the Chief Justice into disrepute and by extension, tarnish the entire Judiciary"; and

(iii) stated that the Chief Justice's continued silence was "nothing short of reckless".

[51] He submitted that taken together, the facts were more than sufficient to establish that the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the LATT was biased. By its declaring that it had no confidence in the Chief Justice and its statements thereafter in and to the press, the LATT damaged, irretrievably, the perception that it is acting, or could act, independently or fairly. The LATT has expressed its views during the course of its investigation in terms so extreme and unbalanced as to throw doubt for all time on its ability to investigate the allegations objectively.

[52] Mr. Hamel-Smith on the other hand submitted that this case *"involves a decision by the Law Association to enquire into facts relating to allegations concerning the conduct of the Honourable Chief Justice that have been made in the public domain, with a view to placing those facts before the Law Association's*

legal advisers and then making a further decision as to what, if anything should be done by the Law Association." He added that depending on the outcome and the nature of the advice it receives and any future decisions it may make, the LATT might potentially become a complainant to the Prime Minister. As such, the LATT cannot be made subject to strictures which would exceed those that may be imposed on the actual prosecution or be treated as though it was the actual arbiter of the rights of the Chief Justice.

Analysis

[53] I do not accept that the enquiry by the LATT necessarily required any hearing be given to the Chief Justice. Neither did it bind him. He was not bound to respond to anything the LATT sought or asked of him. There are no immediate consequences to the Chief Justice of any findings from the enquiry. Indeed the enquiry may yet exonerate him. The LATT was not acting in any disciplinary capacity nor could it. It is not the kind of enquiry into which natural justice concerns could be imported.

[54] Second, even if natural justice principles were to be imported into the enquiry the judge came to the correct finding. As stated by Lord Hope in **Gillies v. Secretary of State for Work and Pensions [2006] 1 WLR 781** at 787, paragraph 17:

> ***"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in Johnson v Johnson (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able***

when exercising his judgment to decide what weight should be given to the facts that are relevant."

Mr. Benjamin sought to contend the judge applied her mind to the wrong question by considering what was in her mind rather than in the mind of the fair minded observer. I do not agree. It is quite clear from paragraph 37 that the test applied by the judge was that of the *"ordinary fair minded observer being informed of all the facts and sitting in Woodford Square, Harris Promenade or Shaw Park."*

[55] Further, even if I accept the facts as stated by Mr. Benjamin at paragraph 50 above, the fair minded observer would not find apparent bias. Rather, he or she, being neither *"complacent unduly sensitive or suspicious"*, would have discerned that the comments of Mr. Mendes in respect of the Chief Justice's continued silence had to be taken into context and were not a judgment of the Chief Justice's guilt or innocence in relation to the substance of the allegations.

[56] Further, as Mr. Hamel-Smith submitted, the no confidence motion did not concern the allegations which are the subject of the present enquiry but related to the manner of appointment of the former Chief Magistrate to the post of High Court judge in the light of her many outstanding part-heard matters, a completely different issue. More importantly, the enquiry is being conducted by a committee and not by the entire body of members who voted in the no-confidence motion.

President of the LATT as a chairman of the committee

[57] At paragraph 30 of the judgment, the judge seemed to question the appointment of Mr. Mendes as chairman of the committee. She did not make clear the basis of that query, whether it was a question of bias or not. Rather, at paragraph 31, she seems to suggest that it was all part of the unconstitutionality of the enquiry being part of the shadow procedure adopted by the LATT. Mr. Benjamin in his written submissions found her questioning of the President's appointment to the committee to be reasonable but it is unclear whether he himself has raised it as an element of bias.

[58] Mr. Hamel-Smith submitted that the submission cannot now be raised as an element of bias because it formed no part of the pleaded case before Kangaloo J. As a result the LATT never had the opportunity to address it in its affidavit evidence and in written submissions before the judge. I agree. Certainly the Chief Justice in his affidavit made no complaint about Mr. Mendes' membership on the committee. In my judgment it would be unfair to the LATT for the submission to be considered at this stage. In any event the judge's decision is rather unclear as to the basis of her query. If it is that it forms part of the shadow procedure, I have already considered that issue.

Bad faith

[59] At paragraph 15 of the grounds upon which he sought relief, the Chief Justice alleged that the LATT was conducting its investigation in bad faith or in breach of the requirements of natural justice because:

(i) The LATT has not provided, except upon demand by his attorneys, copies of the material which the LATT or its committee has been considering.

(ii) The LATT has not undertaken to provide him with a copy of the committee's report which it is threatening to submit or has unlawfully submitted to the Caribbean Queen's Counsel/ Senior Counsel for their respective advice for the purpose of convening a general meeting of the LATT for a decision to be made on the way forward.

Those are the only two grounds on which the respondent founded his case on bad faith.

[60] Before us now the respondent submitted that the LATT had a duty to act in good faith and provide the material to the respondent. He submitted that the LATT has acted in bad faith as per grounds set out in the paragraph immediately preceding. Additionally he alleges that the LATT has acted in bad faith on the following basis:

(iii) The LATT failed and refused to disclose the process or procedures adopted

by the committee or the advice received or any reports compiled to the Respondent. Further the LATT has failed and/or refused to disclose any interim report.

(iv) The LATT has failed to tell the Respondent if the committee's report has been forwarded to the two (2) Caribbean silks. It has failed to disclose to the respondent the terms of reference of its committee; the means by which the committee has collected material and/or evidence; whether the collection of material or the taking of evidence has included taking written statements from persons; whether such statements as might have been made to its committee were made or given under oath, or via oral interviews not under oath; or whether these statements were recorded and, if so, to provide the respondent with copies of the recordings.

(v) Further the LATT has acted and has been acting in bad faith in disclosing to third parties (including to its membership and to the public – including by means of press releases) details of the charges against the respondent and updates on the LATT's investigation into the allegations against the respondent, as opposed to the respondent or his attorneys.

[61] None of these three additional grounds has been pleaded by the respondent. Mr. Hamel-Smith has objected only to the first of these additional grounds as not having been pleaded. In my judgment, this however does not bind the court or prevent it from striking out the other two claims. The respondent pleads fairness but these three additional grounds provide no fairness to the appellant in forewarning it as to the case the respondent had brought against it. On that basis alone the claims should be disallowed.

[62] The judge made no ruling on the issue of bad faith. Mr. Hamel-Smith as a second ground of objection, submitted that the entire issue of bad faith had been withdrawn by Mr. Benjamin in his address. He pointed to certain parts of the transcript of the 3rd February 2018 in which Mr. Benjamin spoke of *"well intentioned but misinformed enthusiasm."* Certainly this may explain why the judge did not give a specific decision on the point. But there is no express concession by Mr. Benjamin before the judge and he certainly did not concede the

point before us.

[63] I am satisfied the claim at paragraph 60(iii) above cannot succeed because of the lack of pleading but I shall proceed to address the claims (iv) and (v) at paragraph 60 in the event that I am wrong in disallowing them.

I have struggled to come to terms with the nature of the duty of fairness the respondent has sought to place on the LATT in this case. The LATT has sought to allow the respondent the opportunity to be heard even though it was not bound to and even though the respondent is not bound to respond. This is not a disciplinary hearing. Given the clear meaning of section 137 it cannot be. Indeed the respondent has jealously sought to exclude any right of the LATT to hold any hearing at all. Yet he demands and is given copies of the material the LATT has been considering and then withdraws completely from the process saying that the material was supplied to him in too short a time to allow him to properly respond. In my judgment the claim to the materials sought at paragraph 60(iv) is excessive. I agree with Mr. Hamel-Smith that the LATT in engaging in the exercise of informing itself of the facts, is not to be held to a duty of fairness akin to that of any of the decision makers under section 137. Indeed the respondent complains about shadow section 137 proceedings being undertaken by the LATT but the material he now complains he did not get may very well be what is required under a section 137 proceeding.

[64] In my judgment the LATT, given the scope of its enquiry, was not required to provide the respondent with the material he now alleges he was deprived of. Its failure to do so cannot render it guilty of bad faith. Further, it was open to the respondent to write to the LATT requesting the material he claims he has been deprived of. But no such request was made despite correspondence between the parties. Indeed, the LATT wrote to the respondent on 20th February setting out its intention to proceed with the enquiry and asking certain questions of the respondent. There appears to have been no response whatever to this e-mail by the respondent. But even if there were a response, it would have been appropriate then to request these materials.

[65] As to the claim at paragraph 60 (v) that the LATT has acted in bad faith in disclosing to third parties details of the "charges" against the respondent and updates on the LATT's enquiry into the allegation but failing to disclose the same to his attorneys, I consider that that contention must also fail. I continued to struggle with the basis of the claim of bad faith. The ground is unclear. There are no *"charges"* against the respondent. There cannot be. The nature of the enquiry does not oblige the LATT to disclose any updates on the enquiry. Finally, I do not see the necessity for such a disclosure or the prejudice he would suffer by the non-disclosure. The claim in bad faith is simply not made out. The evidence does not disclose any.

Order

[66] I shall order as follows:

(i) That Kangaloo J was entitled to grant permission to file for judicial review because the threshold for the grant of permission was attained.

(ii) That on the substantive claim, she fell into error for the reasons I have given and the LATT's appeal is allowed.

(iii) That the judge was right to dismiss the respondent's claim that the LATT was guilty of apparent bias, for the reasons I have given. Further, the LATT is not guilty of acting in bad faith. The respondent's counter notice of appeal must therefore be dismissed.

We shall hear the parties on costs.

Nolan P.G. Bereaux
Justice of Appeal