REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

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

IN THE MATTER OF AN APPLICATION FOR LEAVE TO MAKE A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES, 1998 AS AMENDED AND PURSUANT TO SECTION 6 OF THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE CONSTITUTION AND THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE DECISION OF THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO CONTAINED IN ITS LETTER DATED FEBRUARY 22, 2018 TO CONTINUE TO TAKE FURTHER STEPS TO FURTHER AN ENQUIRY

AND/OR

IN THE MATTER OF INVESTIGATION INTO THE HONOURABLE THE CHIEF JUSTICE OF TRINIDAD AND TOBAGO MR. JUSTICE IVOR ARCHIE O.R.T.T.

AND/OR REFUSE TO TAKE NO FURTHER STEPS IN THAT REGARD

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. MENDONCA, C.J. (Ag)

P. JAMADAR, J.A.

N. BEREAUX, J.A.

APPEARANCES:

Mr. C. Hamel-Smith, S.C., Mr. J. Mootoo, Mr. R. Dass, Mr. R. Otway for the Appellant.

Mr. J. Jeremie, S.C., Mr. I. Benjamin, Mr. K. Garcia, Mr. K. Scotland and Ms. Raisa Caesar for the Respondent.

DATE OF DELIVERY: 22nd May, 2018.

DELIVERED BY P. JAMADAR, J.A.

JUDGMENT

"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."
- Ambard v AG of Trinidad and Tobago, [1936] AC 322

" 'Justice' is understood as meaning accountability and fairness in the protection and vindication of rights, and in the prevention and redress of wrongs."
- Nuremberg Declaration on Peace and Justice, 19th June 2008

"In a modern, democratic society founded on the ideology of participatory democracy, such as Trinidad and Tobago, every citizen has a legitimate interest in the upholding of the Constitution and the rule of law."
- Dumas v AG of TT, Civ. App. P218 of 2014, para 103, 22nd December 2014

"So it must have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal ..."
- Meerabux v. AG of Belize, [2005] UKPC 12

INTRODUCTION

1. Can the Law Association of Trinidad and Tobago (LATT) investigate[1] alleged misconduct on the part of the Chief Justice of Trinidad and Tobago (CJ)? This is the primary issue to be determined in this appeal. As argued by the CJ, it is an entirely theoretical issue that is relevant to all judges and to the due administration of justice, though grounded in factual circumstances that have been currently unfolding in Trinidad and Tobago and which directly concern and affect the CJ. There is a second issue, but it only arises if this first one is determined against the CJ. This second issue arises if the LATT can investigate alleged misconduct on the part of the CJ. It is whether the LATT is biased, acted contrary to the principles of natural justice and/or in bad faith, in relation to its actual investigation of the CJ.

2. The CJ concedes (only after discussion with this court) and rightly so, that the Media, the Police/DPP, an ordinary citizen, a single attorney and/or an *ad hoc* group of attorneys can investigate alleged misconduct on his part, but insists that the LATT cannot. The argument advanced is straightforward. First, the LATT is a creature of statute, the Legal Profession Act (LPA), and there is no basis in the statute that can confer either the jurisdiction, or the power, to investigate a Judge or a Chief Justice. Second, in Trinidad and Tobago, section 137 of the Constitution provides the only lawful basis and mechanism for the investigation of a Judge, or a Chief Justice. Therefore the investigation of the CJ by the LATT is ultra vires the LPA and outwit the jurisdiction and powers of the LATT; in addition, it is in direct conflict with section 137 of the Constitution, and so it is illegal, unlawful and unconstitutional, and thus null and void. The trial judge agreed. I do not.

3. On the second issue, the CJ argues that the prior conduct of the LATT, in passing a no-confidence motion against him on an unrelated matter, and its ongoing conduct and process in relation to its current investigation of his alleged misconduct, have the

[1] The Standing Orders of the Trinidad and Tobago Police Service, issued on the 1st July, 2001, pursuant to section 57 (1) (a) of the Police Service Regulations (S.O. No. 28), defines 'investigation' in that context as "the process whereby information is systematically collected, collated and analysed to determine whether a prima facie case can be made out against a perpetrator(s)" (clause 10).

appearance of being biased, and are being conducted unfairly and in bad faith. The trial judge disagreed. I concur.

Some General Statements on Relevant Statutory Interpretation Principles

4. The general purpose of statutory interpretation is to discover the purpose and meaning of a statute. This is self-evident. This interpretative undertaking is in service of the application of the provisions of a statute, to particular circumstances that arise for consideration and resolution by the courts, for the benefit of both individuals and the society. In pursuit of these objectives - interpretation and application - the courts deploy several forms of legal argumentation. Resolving the issues in this case requires the interpretation and application of both the LPA and the Constitution.

5. **First,** there is textual analysis. One looks to the actual language and structure used in the statute in order to ascertain meaning. If the language is plain and unambiguous, then the literal meaning of the words used is considered. One also looks at the statute as a whole, considering structure, context and the impact of different parts of the statute on the provisions that fall to be interpreted and applied. This intratextual approach can deepen understanding, and so assists in the task of statutory interpretation. Finally, one considers the hallowed 'canons of construction' that have evolved over time as guides to the discovery of meaning. **Second,** the intention of the makers of the statute is also an aid to interpretation and application. Textual analysis may fully reveal intent, but at times it is necessary to look elsewhere, such as to prior versions of the statute/provision, the historical background, supporting green/white papers, relevant and jurisprudentially permissible parliamentary debates, and even contemporary commentaries.

6. **Third,** judicial precedents which have considered, interpreted and applied the same or similar provisions, may be relevant. Here relevance is influenced by similar fact patterns, principles, values, and language/intent - what are described as analogous situations. Extrapolation that is logical and consistent with the principles/values/reasoning in the precedents considered is permissible. **Fourth,** policy considerations may at times be deployed and determinative. This is when one first determines the likely

outcomes/consequences that flow from one interpretation/application or another - a predictive assessment; one then determines which outcome is preferable and aligned with the underlying values, purposes and intent of the law - an evaluative judgment.[2]

7. Each of these four forms of legal argumentation has been relied on by the parties to different degrees and will be considered. In this matter, no obvious arguments on the basis of tradition or culture were advanced; however an amelioration of a historical, cultural deficit (social context) will be alluded to.

8. **Finally,** the Constitution is described as being *sui generis,* thus its interpretation calls for more nuanced approaches than are normative for regular statutes. The classic exposition of this interpretative approach is explained by Lord Wilberforce in the Bermudian fundamental rights and freedoms case of **Minister of Home Affairs v. Fisher**:[3] "The second (interpretative approach) would be more radical: it would be to treat a constitutional instrument ... as *sui generis,* calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law." For Lord Wilberforce, this meant that the fundamental rights provisions "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of the fundamental rights and freedoms".[4]

9. In **Suratt v AG**,[5] Baroness Hale, citing with approval **Minister of Home Affairs v Fisher**, stated the nature of this interpretative principle in general terms, as follows: "... the Constitution itself must be given a broad and purposive construction." Thus the Privy Council has broadened the principle of generous interpretation from provisions relating solely to fundamental rights and freedoms, to all provisions in the Constitution. Indeed, as early as 1983, in **AG of Fiji v DPP**, a case concerning the powers of the DPP and not fundamental rights and freedoms, Lord Fraser had stated: "Their Lordships fully accept

[2] See **The AG v Ayers-Caesar**, Civ. App. No. S 304 of 2017, at paragraphs 28, 29 and 30.
[3] [1979] 3 All ER 21, at page 26.
[4] [1979] 3 All ER 21, at page 25.
[5] [2007] UKPC 55, at para 45.

that a constitution should be dealt with in a way that should receive a generous interpretation."[6] And in 1984, Lord Diplock in **AG of The Gambia v Jobe** had also stated:[7] "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms ... is to be given a generous and purposive construction."

10. What does such a generous, interpretative approach entail? The cases show that the courts are to take a broad (non-rigid, non-formalistic - 'tabulated legalisms'), purposive approach, looking contextually at the substance and reality of what is at stake,[8] and doing so through the lenses of the human rights provisions, core constitutional values (including unwritten constitutional principles),[9] and international treaty values - including unincorporated treaties (where these are relevant),[10] but grounded at all times in the actual language, content and context of the provisions under consideration, especially when these are specific and stated in the most concrete terms.[11]

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[6] See, **AG of Fiji v DPP** [1983] 2 AC 672, at page 682. Lord Fraser also pointed out that such a 'generous' interpretation "does not require the courts, when construing a constitution, to reject the plain ordinary meaning of words" (at page 682).

[7] [1984] AC 689, at 700.

[8] See for example, Baroness Hale in **Suratt**, at paragraphs 43 and 44.

[9] Such as the separation of powers - see, **Hinds v R** [1977] AC 195 (PC).

[10] See **Boyce v R** [2004] UKPC 32, at para 59: constitutions, and all others laws, should so far as is possible be interpreted consistently with State Treaty obligations. And see also, **AG v Joseph** (2006) CCJ 3: in which de la Bastide P and Saunders J countenanced resort to treaty values where there was either ambiguity or uncertainty; and Baroness Hale in **Naidike v AG** [2004] UKPC 49, where she had resort to the unincorporated Convention on the Rights of the Child.

[11] See Fundamentals of Caribbean Constitutional Law; T. Robinson, A. Bulkan, A. Saunders; Chapter 3, Interpretation; pages 156-158; Thomson Reuters, 2015: "Generous interpretation is a concrete methodology that starts with language used in the Constitution in the context of the constitution as a whole, examining the constitution's ethos and its underlying values and norms" (at page 156). And see, Lord Hoffman in **Boyce v R, [2004] 4 LRC 749**, at paras 28-29:

> **"[28] Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions.** The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts—what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment—had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, **the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time.** In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up

11. In addition, in Trinidad and Tobago there is a written constitution that proclaims that it is 'the supreme law' and that, in effect, all other laws are to be read and interpreted consistent with its constitutional values (section 2 of the Constitution). The Constitution therefore also functions as an interpretative lens in relation to all other laws.[12] In this context the Preamble to the Constitution is also a legitimate aid to interpretation.[13]

> to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. **The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.** Section 15(1) is a provision which asks to be construed in this way. The best interpretation of the section is that the framers would not have intended the judges to sanction punishments which were widely regarded as cruel and inhuman in their own time merely because they had not been so regarded in the past.
>
> **[29] All this is trite constitutional doctrine. But equally trite is the proposition that not all parts of a constitution allow themselves to be judicially adapted to changes in attitudes and society in the same way. Some provisions of the Constitution are not expressed in general or abstract terms which invite judicial participation in giving them practical content. They are concrete and specific.** For example, section 63 of the Constitution says that the executive authority of Barbados shall be vested in Her Majesty the Queen. It would not be an admissible interpretation for a court to say that this meant that it should be vested in a head of state who was appointed or chosen in whatever way best suited the spirit of the times; that the choice of Her Majesty in 1966 reflected the society of the immediate post-colonial era and that having an hereditary head of state who lived in another country was out of keeping with a modern Caribbean democracy. All these things might be true and yet it would not be for the judges to give effect to them by purporting to give an updated interpretation to the Constitution. The Constitution does not confer upon the judges a vague and general power to modernise it. The specific terms of the designation of Her Majesty as the executive authority make it clear that the power to make a change is reserved to the people of Barbados, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a constitution up to date."

And also at paras 53-56, 59; as well the commentary on this by Archie CJ and Jamadar JA in **Francis v State** [2015] 2 LRC 244, at paras 127-145, "In our opinion, the minority view in **Roodal** which prevailed as the majority view in **Boyce/Matthew** did not disavow the 'always speaking' principle in relation to the interpretation and application of the substantive human rights provisions themselves (at para 145)".

[12] See **The Minister of Planning and Sustainable Development v The Joint Consultative Council**, Civ. App. No. P 200 of 2014, at paragraph 37.

[13] See Lords Bingham, Nichols, Steyn, and Walker in **Matthew v State of Trinidad and Tobago** [2004] 4 LRC 777, at para 46: "We attach significance to the principles upon which, as declared in the preamble to the 1976 (as to the 1962) Constitution, the people of Trinidad and Tobago resolved that their state should be founded. This declaration, solemnly made, is not to be disregarded as meaningless verbiage or empty rhetoric. Of course, the preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when seeking to interpret those provisions (see *Bennion, Statutory Interpretation*, 4th ed. (2002), Section 246) and any interpretation which conflicts with the preamble must be suspect."; and **The Minister of Planning and Sustainable Development v The Joint Consultative Council**, Civ. App. No. P 200 of 2014, at paragraphs 32-38.

THE FIRST ISSUE

12. **The LATT has the jurisdiction, power and duty, statutorily and constitutionally, to investigate serious allegations of misconduct against a Chief Justice or a Judge in Trinidad and Tobago, which, if substantiated, can undermine the due administration of justice and/or the rule of law and which may lead to suspension and/or removal pursuant to section 137 of the Constitution.**

A. The LPA: Jurisdiction and Power to Investigate the CJ

13. Does the LPA give the LATT any statutory jurisdiction and power to investigate the CJ where there are serious allegations of misconduct regarding his behaviour, which, if substantiated, can undermine the due administration of justice and/or the rule of law and which may potentially lead to suspension and/or removal pursuant to section 137 of the Constitution? It does.

14. It is agreed that the allegations of misconduct against the CJ that are being investigated by the LATT are all extremely serious.[14] It is also agreed that the nature of the allegations are such, that they have the potential to undermine (and may have already undermined) the judicial integrity of the CJ, damage irreparably public trust in the administration of Justice, and erode confidence in the rule of law.[15] Yet there has been no clear resolution as to truth or falsity, credibility or otherwise, in relation to any of these allegations. The CJ has at best partially answered aspects of the allegations. He did so in a short press release issued by a protocol and communications officer of the Judiciary of

[14] In summary, they assert that the CJ corruptly and knowingly used his power and influence as Chief Justice, in concert with convicted felons, to influence judges to make use of private security and to secure State sponsored HDC housing, for their benefit and as a favour for persons known to him.

[15] The CJ described the situation as follows (in his affidavit filed in these proceedings on the 27th February, 2018 at paragraph 6): "Over the period November 2017 to January 2018 (and continuing) there has been a relentless and concerted series of publications in the press, principally by one leading daily newspaper, containing and/or reporting on 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 intention of defrauding innocent persons to obtain HDC housing."

the Republic of Trinidad and Tobago (JRTT).[16] The issues still swirl around in the public domain and continue to remain, unabated, the subject of adverse public comment.

15. Furthermore, these allegations did not arise out of the LATT, or from any one of its members. They have been the product of a rigorous and sustained series of investigative articles - investigative journalism - led principally by one presumptively mainstream and reputable daily newspaper. As is to be expected in a small society such as exists in Trinidad and Tobago, other local mainstream media such as newspapers and television, have also covered the unfolding and at times, unseemly saga. Social media, virtually unregulated in Trinidad and Tobago, is alive with every conceivable comment. Even international media have reported on the issues.

To live in Trinidad and Tobago, is to know the full extent to which these issues that adversely implicate the CJ, are widespread and tenacious. It is impossible to be unaware, as the mass of evidence revealed in the proceedings, is but a small portion of what is and continues to be the lived reality in Trinidad and Tobago. Local Judges are a part of this society, and necessarily so. They read the newspapers, listen to the radio stations, look at local television, and chat with ordinary members of the community - they live in Trinidad

[16] December 15th, 2017. Media Release, The Honourable Chief Justice Responds.
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. Specialised 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

-end-

and Tobago. In part, this is how they remain aware of local conditions and relevant to the adjudicative task of interpreting and applying the law for the benefit of Trinbagonians.

16. The unchallenged evidence suggests, that it was because the issues were in the public domain and remained unanswered by the CJ for an extended period of time, and then when responded to by the CJ were responded to only partially and only in terms of 'bare denials', that the LATT determined that it should undertake the investigation that is challenged in these proceedings. This appeal interrogates whether the LATT was right in this decision and undertaking.

What did the LATT Decide to Investigate and How Did it Propose To Do So?

17. On the 29th November, 2017 the Council of the LATT met to consider the newspaper reports of the allegations against the CJ. At that meeting it decided:[17]

> "i) That the allegations made were sufficiently grave to warrant further consideration by the Council as to what appropriate action it should take; and
>
> ii) That a Committee be established to attempt to ascertain/substantiate the facts upon which the allegations made against the Chief Justice were alleged to be based and to report back to Council for further consideration."

18. In so far as this is an accurate description of what was decided by the LATT, it is clear that the Council of the LATT made no (pre-)determinations about the allegations against the CJ and only intended an open-ended investigation to attempt to "ascertain/substantiate the facts".

19. It appears that the Council at that meeting also mandated that the President and a Senior Ordinary Member of the LATT meet with the CJ to explain the following:[18]

[17] As reported in an email notification to all LATT members, dated 2nd December, 2017.
[18] As reported in an email notification to all LATT members, dated 18th December, 2017.

i) That the LATT considered that it has a dual role to play: to protect the Judiciary from unfounded allegations, and to hold the Judiciary accountable for its actions.

ii) That the LATT had noted the allegations against the CJ,[19] that it considered them to be serious, and that this was a view widely shared among the members of the profession and civil society in Trinidad and Tobago.

iii) That his failure to respond at all to the allegations has led to calls for his resignation and to conclusions that there is some truth to the allegations.

iv) That the gravity of the allegations and his failure to respond have brought both the office of the Chief Justice and the entire Judiciary into disrepute.

v) That the Council of the LATT has resolved to investigate the allegations and to determine whether they were true or not.

20. On the 30th November, 2017, as mandated by the Council of the LATT, the President and one of its most Senior Ordinary members met formally with the CJ and the Court Executive Administrator. They informed the CJ directly about the five points above and the CJ indicated that "he would think about the representations made to him".[20] Again, what is clear is that the LATT's intention, as formally communicated to the CJ on the 30th November, 2017 (and undenied on the evidence), was to conduct an open-ended investigation into the factual underpinnings of the allegations made against him, in order to ascertain whether they were "true or not"; and to do so in furtherance of its assumed role "to protect" and/or "to hold the Judiciary accountable for its actions".

The evidence shows that there was no objection taken (formally or otherwise) by the CJ to the LATT's proposed course of action, either at that meeting, or anytime shortly thereafter, and certainly not before the CJ issued his press release in response to the allegations - the 15th December, 2017. Indeed, it appears that it was really only after the LATT forwarded to the CJ, by letter of the 6th February, 2018, the documents in its possession, that a formal written challenge was made about the LATT's course of conduct in relation to its

[19] The CJ's discussion of personal security for judges with questionable third parties and his recommendations for accelerated HDC housing for individuals.
[20] As reported in an email notification to all LATT members, dated 18th December 2017.

investigation of the CJ (though complaints about process were somewhat alluded to in earlier correspondence dated the 30th January, 2018 and the 31st January, 2018).[21]

21. What this action by the CJ challenges frontally, is this primary assumed role undertaken by the LATT, "to protect" and/or "to hold the Judiciary accountable for its actions"; and to do so by conducting an investigation into allegations of serious misconduct made against the CJ, that were in the public domain as a result of a series of investigative articles published in a presumptively mainstream and reputable daily newspaper.

22. In terms of the LATT's proposed process for investigating the allegations against the CJ, this was broadly as follows.[22] First, for the Investigating Committee to conduct its investigation, which included giving the CJ an opportunity to respond to the allegations.[23] Second, for the Investigating Committee to report its findings to Council. Third, for Council to retain two Senior Counsel to advise on the question, whether there is any sufficient basis to refer a question of misbehaviour by the CJ to the Prime Minister for his consideration, pursuant to section 137 of the Constitution.[24] And fourth, upon receiving such advice, to convene a meeting of the LATT's general membership for it to consider the advice and determine the way forward for the LATT. For the purposes of this aspect of the analysis, the procedure adopted by the LATT is irrelevant, as the challenge is to the *vires* and constitutionality of the decision to investigate and the undertaking of an (any) investigation *per se*.

Interpreting and Applying the LPA

23. The LPA intends to provide for the organisation and regulation of the legal profession (qualification, enrolment and discipline of its members) and for other matters relating to it.[25] Section 3 establishes the LATT as a body corporate and section 4 provides

[21] See letters from the CJ's attorneys to the LATT dated 30th January, 2018; 31st January, 2018; and 14th February, 2018.
[22] As reported in an email notification to all LATT members, dated 18th December, 2017.
[23] See the LATT's letter dated the 20th January, 2018 addressed to the Chief Justice. (Appendix A to this Judgment).
[24] Section 137 creates the only constitutional framework for the suspension and/or removal of a Chief Justice: see **Rees v Crane** [1994] 2 AC 173 PC.
[25] See the Long Title to the LPA.

that its affairs are to be managed by a Council constituted as provided for by the LPA. Section 5 states the purposes of the LATT and identifies six specific objectives. Three are directly relevant – section 5 (b), (c) and (f). As well, section 5 (g) is facilitative.

24. Section 5 of the LPA states:

> The purposes of the Association are -
>
> (a) …
>
> (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) …
>
> (e) …
>
> (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).

25. Representing and protecting the interests of the legal profession is one specific purpose. Protecting and assisting the public in all matters relating to law, is another. Promoting, maintaining and supporting the administration of justice and the rule of law is a third. And doing all things necessary to achieve these three purposes is authorised. What does this mean for this case?

26. The plain English of the sections mean that the LATT has been created and exists as a legal, autonomous entity in order, among other things, to fulfil these purposes. So what does it mean, to do all things that are incidental and conducive to achieving the promotion, maintenance and support of the administration of justice and the rule of law, in the circumstances of this case? If there are serious allegations that a Chief Justice or any Judge has misconducted him/her self in office, does determining whether this is, or is not, so promote, maintain and support the administration of justice and the rule of law? And

does determining whether this is so or not, further the best interests of the legal profession? As well, is there a public interest element[26] involved in this determination? The questions once framed reveal the obvious answer - of course determination does further these purposes! How could it not? After all, it is a well-established rule of law principle, "that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[27] Appearances matter.

27. Appearances matter not just in the actual conduct of court matters,[28] but in relation to all aspects of a judge's life.[29] This is because upholding principles of judicial ethics is recognised as essential to ensuring the six core judicial values of independence, integrity, propriety, impartiality, equality, and competence and diligence;[30] core values which are internationally accepted as vital to public trust and confidence in the administration of justice and the rule of law.[31] These values, and their adoption by the JRTT (see below), presuppose that judges are accountable for their conduct to the relevant authorities. Indeed, these core ethical values incarnate the constitutional and lawful obligations of judges, as well as describe with some particularity, how they are to be realized. Determining whether these serious allegations against the CJ are true or not, is therefore important to the best

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[26] In **London Artists Ltd v Littler** [1969] 2 QB 375, at 391, Lord Denning explained his understanding of 'public interest', as follows: **"Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest …".**

[27] **R v Sussex Justices, ex parte Mc Cathy** [1924] 1 KB 256.

[28] See**, Delcourt v Belgium**, European Court of Human Rights (ECHR) (Jan. 17, 1970), for an international perspective.

[29] See Exploring the Role of the CPR Judge, JEITT 2017, Paria Publishers, at page 11: "The basis of this assertion is in the Constitution, the law and in subscribed to ethical principles, that go to the very heart of the role of the ... Judge. ... Judges have both the duty and the responsibility to uphold these high ideals at all times and everywhere." The JRTT's Statements of Principle and Guidelines for Judicial Conduct, Guideline 2.2, in the chapter on Integrity states: "The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done." In the Commentary on the Bangalore Principles of Judicial Conduct, paragraph 101 explains the 'Concept of "Integrity"', as follows: "… A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office … Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity."

[30] See, the JRTT Statements of Principle and Guidelines for Judicial Conduct, 2017.

[31] See, Bangalore Principles of Judicial Conduct (2002); and Commentary on the Bangalore Principles of Judicial Conduct (2007). See also, Judicial Ethics Report of the European network of Councils for the Judiciary (2009 – 2010), which affirmed that declaring and upholding principles of judicial conduct strengthen public confidence.

interests of the legal profession, the integrity of the administration of justice, and to safeguarding the rule of law; and it is also in the public interest to do so.

28. Indeed, in 2017 the JRTT published in written form its Statements of Principle and Guidelines for Judicial Conduct (SPGJC). Fashioned after the United Nations Bangalore Principles of Judicial Conduct[32] and the Canadian Judicial Council's Ethical Principles for Judges, the CJ noted in the Preface, the constitutional importance of respect for the rule of law. He then pointed out that: "These Guidelines ... are pivotal in the Judiciary's continuous efforts to strengthen public trust and confidence in (the) judicial system. ... essential to the facilitation of the nation's judicial system. ... (and) will serve both as a foundation for excellence and as an instrument for achieving judicial compliance with the demands of the rule of law." It is therefore difficult to imagine how in Trinidad and Tobago, highly publicised serious issues concerning alleged misconduct by a Chief Justice, or a Judge, do not implicate public trust and confidence in the rule of law,[33] or how resolving them in a timely and transparent manner, is not in the public and the legal profession's interest.

29. In Fundamentals of Caribbean Constitutional Law,[34] at paragraph 6-012, the core principles associated with the rule of law are examined in a Caribbean context. Of relevance to this matter is the identification of the institutional role the courts, and therefore *a fortiori* judges, play in ensuring the rule of law. The authors express it this way: "Courts play a critical role in ensuring the rule of law ... and must embody the values of independence and impartiality in carrying out that function."

30. In my opinion, courts and judges in Trinidad and Tobago ensure the rule of law by conforming to all of the standards and values set out in the SPGJC. Dicey's second

[32] In April 2003 the United Nations Human Rights Commission (UNHRC) endorsed the Bangalore Principles of Judicial Conduct, and considered them the authoritative statement on the values that should inform judicial conduct.
[33] In fact, based on the published SPGJC, particularly the statements and commentaries on the first three - Judicial Independence, Integrity, and Propriety, it is evident that the allegations of misconduct levelled against the CJ raise questions that could be of serious concern if established as true.
[34] T. Robinson, A. Bulkan, A. Saunders; Chapter 6, The Rule of Law; Thomson Reuters, 2015.

principle of the rule of law is that "no man is above the law".[35] This fundamental idea that every person is subject to the law and responsible for their actions under the law, is often used in the context of accountability, and rightly so.[36] A Chief Justice and a Judge are no exception. Embedded in this principle of accountability however, is the assumption of responsibility. That is to say, it is only because a person is responsible, that they can be accountable. Therefore, it is because a Chief Justice or a Judge is assumed to be responsible for conducting themselves according to certain minimum standards and upholding certain non-negotiable values, that they can be held accountable if they fall short to such a degree that it is inimical to the due administration of justice.

31. The JRTT's published SPGJC creates a legitimate expectation that a Chief Justice would embody "the core judicial values" that constitute "an instrument for achieving judicial compliance with the demands of the rule of law" - Preface to the SPGJC. Clearly, in Trinidad and Tobago, the JRTT has acknowledged that this is one aspect of how the rule of law is maintained. [37]

32. When one adds to this the express constitutional recognition of the rule of law as one of the core values that underpin democracy in Trinidad and Tobago,[38] it is absolutely clear to me that it is within the statutory jurisdiction and power of the LATT (as per its articulated purposes) to investigate these allegations against the CJ. Such an investigation is one of the things incidental and/or conducive to promoting, maintaining and supporting

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[35] A.V. Dicey; An Introduction to the Study of the Law of the Constitution; 10th ed.; page 193; MacMillan, 1959.

[36] Fundamentals of Caribbean Constitutional Law; at paragraph 6-021; citing **Gairy v AG** (1999) 59 WIR 174, at para 9; **AG v Joseph** (2006) 69 WIR 104, at para 20; and **Hochoy v NUGE** (1964) 7 WIR 174.

[37] See Aharon Barack; The Judge in a Democracy; pages 51-56 - The Nature of the Rule of Law; The Formal Aspect of the Rule of Law ('rule by law'), The Jurisprudential Concept of the Rule of Law ('the inner morality of the law'), The Substantive Concept of the Rule of Law ('the rule of proper law - guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of society'); Princeton University Press, 2006. And, John Rawls; A Theory of Justice; The Rule of Law; pages 206-207 - "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When the rules are just they establish a basis for legitimate expectations. They constitute the grounds on which persons can rely on one another and rightly object when their expectations are not fulfilled."; Oxford University Press, 1999. Also, Prof. R. B. Antoine; The Rule of Law v Ruling by Laws: Promoting Development in Caribbean Societies; JEITT 2017 Distinguished Jurist Lecture; Paria Publishing Company, 2018.

[38] See the Preamble to the Constitution, clause (d).

the rule of law in this regard. In so far as the general public also has an interest in the rule of law, and the LATT is empowered to protect and assist the public in this cause, the LATT also has the jurisdiction and power to investigate these allegations against the CJ in the public interest.

LPA: Rule 36, Part A, Code of Ethics

33. Rule 36 deals with ethical imperatives in relation to the courts and the administration of justice. It states:

(1) An Attorney-at-Law shall maintain a respectful attitude towards the Court and shall not engage in undignified or discourteous conduct which is degrading to the Court.

(2) An Attorney-at-Law shall encourage respect for the Courts and the Judges.

(3) An Attorney-at-Law shall support Judges and Magistrates against unjust criticisms.

(4) 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.

34. In addition to what is stated above in relation to section 5 of the LPA, and pursuant to the conjoint effects of section 35 of the LPA and Rule 36 of Part A of the Code of Ethics (Third Schedule), on an intratextual reading of the LPA, the LATT is also statutorily empowered in furtherance of its and its members' relationship to the courts and the administration of justice, to "encourage respect for" the CJ (Rule 36(2)), to support the CJ "against unjust criticisms" (Rule 36 (3)), or "where there is ground for complaint ... (to) make representation to the proper authorities ..." (Rule 36 (4)). A literal reading and interpretation of the unambiguous language used in the text makes it plain that this is so.

Once again, an investigation is one of the things incidental and/or conducive to encouraging respect for the CJ, or protecting the CJ from unfounded allegations, or holding

him accountable for his actions. How else can the LATT determine whether it is to encourage respect, or support against criticism, or lodge a complaint? These powers to investigate, respect, support, or complain are aligned intratextually with the section 5 purposes and therefore *intra vires* the LPA. The clarity and unambiguity of the broad-based language used in the text, also suggests that this interpretation and application of the LPA are consistent with the intentions of the Legislature, as they fall within the range of meanings that are reasonable.

35. In my opinion, no authority is needed to support the proposition that the LATT is entitled, and I would think duty bound, to conduct a careful and fair investigation before either supporting the CJ, or taking steps to hold him accountable, in relation to the serious allegations of misconduct that have been made against him. Any responsible person or public body would be expected to do so. Fundamental fairness and plain common sense dictate that this must be so. How does one responsibly support or accuse another, without first ascertaining and substantiating, or refuting, the underlying facts? Indeed, to do otherwise would be for the LATT to fail in the performance of its statutorily prescribed purposes to protect the interests of the profession (section 5 (c)), to promote good relations between the profession and the Judiciary, and between the profession and the public (section 5 (d)), and to promote, maintain and support the administration of justice and the rule of law (section 5 (f)). There are therefore statutory underpinnings for the carrying out of a fair and proper investigation into the allegations against the CJ.

36. Furthermore, case law establishes this duty of sufficient inquiry in relation to public bodies, as well as the duty to adequately and fairly consider and assess relevant materials before making decisions. In fact, with a body such as the LATT where the Council has chosen to seek the views of its general membership before any final decisions on the way forward are taken, there is also a duty on the Council to ensure that all relevant materials, including opinions from any consultants, are fairly and adequately presented to the general membership. All of this is facilitated by a fair and proper investigation. See Lord Diplock in **Secretary of State for Education and Science v Tameside Metropolitan Borough Council** (1977) AC 1014, at 1065: a public body has a general and basic duty to sufficiently

acquaint itself with relevant information before making a decision (the '**Tameside**' duty).[39] The case law therefore also supports the LATT undertaking a fair and proper investigation into the allegations against the CJ.

Participatory Democracy: An Entitlement to Vindicate the Rule of Law

37. Finally on this point, Trinidad and Tobago has a written constitution which is the supreme law, in relation to which all other laws are to be construed consistently so far as that is possible.[40] Therefore the LPA is to be read and interpreted through the lenses of values that are properly considered constitutional. This approach may be described as the constitutionalism of the rule of law.[41]

38. In two recent court of appeal decisions, **Dumas v AG**[42] and **The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry**,[43] the Preamble to the Trinidad and Tobago Constitution was used as a general aid to interpreting both the Constitution and all other statutes, in so far as achieving alignment with core constitutional values was attainable.[44] In both cases, the

[39] And see also, Michael Fordham; Judicial Review Handbook, 4th Ed.; pages 871-875; Duty of Sufficient Inquiry (para 51.1), Duty to Fairly Present and Address Relevant Materials (para 51.2).
[40] See section 2 of the Constitution; and **The Minister of Planning and Sustainable Development v The Joint Consultative Council**, Civ. App. No. P 200 of 2014.
[41] See, Constitutional Law of Canada (3rd ed.); P. W. Hogg; page 1257, Thomson Canada, 1992; and see also, Fundamentals of Caribbean Constitutional Law; T. Robinson, A. Bulkan, A. Saunders; Chapter 6, The Rule of Law; pages 265-266; Thomson Reuters, 2015.
[42] Civ. App. No. P 218 of 2014 (delivered December 2014).
[43] Civ. App. No. P 200 of 2014 (delivered October 2016).
[44] **Dumas v AG**, Civ. App. No. P 218 of 2014, paragraphs 103, 116 and 117 state:

> "103. In a modern, democratic society founded on the ideology of participatory democracy, such as Trinidad and Tobago, every citizen has a legitimate interest in the upholding of the Constitution and the rule of law. The courts as guardians of the Constitution, have the duty and responsibility to ensure that the Constitution and the rule of law are upheld.
>
> 116. The Preamble to the 1976 Republican Constitution indicates that the type of democracy that the Constitution creates, includes clear elements of civic republicanism, in which there is both an encouragement and expectation of citizens' participation in the democratic process. In this sense, the encouragement of citizens' participation in the democratic process, is a part of the Trinidad and Tobago constitutional ethic and value system that must inform a court's approach to issues of standing in non-Bill of Rights constitutional review actions. Such a constitutional ethic does not rely entirely on public interest litigation being pursued by the State and its organs – usually through the Attorney General. Rather, it recognizes, both for theoretical and pragmatic reasons, that it is the right and even the duty of citizens to get involved in appropriate cases in such public interest litigation.

constitutional value applied was that of active participation in upholding the Constitution and the rule of law, in furtherance of participatory democracy as mandated by clause (c) of the Preamble to the Constitution.[45]

39. Applying this principle of constitutionalism and this policy approach of active participation in public affairs, to the interpretation and application of section 5 of the LPA and to Rule 36, Part A, of the Code of Ethics, the consequence is as follows. It is more consistent with the core constitutional value of participation in public affairs, to interpret section 5 and Rule 36, to permit the LATT to investigate the allegations of serious misconduct against the CJ. This is because such permissiveness can facilitate the development and maintenance of "due respect for lawfully constituted authority"[46] - in

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117. Indeed, the 1976 Republican Constitution of Trinidad and Tobago has as an underpinning ethic, a participatory political ethos, in which the upholding and vindication of the rule of law form an integral part of the model of democratic governance."

And **The Minister of Planning and Sustainable Development v The Joint Consultative Council**, Civ. App. No. P 200 of 2014, paragraphs 36 and 37 states:

36. As this court has also already explained: "By virtue of section 11(1) of the Interpretation Act, the Preamble is to be construed as a part of the Constitution and as an aid to explaining its meanings and purposes." Thus the Preamble of the Trinidad and Tobago Constitution is by way of specific statutory provision at the very least an 'interpretative preamble'. As such, the Preamble is a 'good means to find out the meaning of the statute' and 'the key to open understanding thereof.' In Trinidad and Tobago therefore, given the detail and content of the 1976 Republican Constitution's Preamble and its clear and specific statements of the core principles and values upon which the Constitution and the State of Trinidad and Tobago are based, it embodies a guiding and authoritative framework for constitutional interpretation.

37. However, beyond the interpretation of the Constitution itself, as the supreme law and where multiple interpretations and applications may exist in relation to all other legislation, a preference is to be exercised in favour of the options that accord best with the constitutional values and principles enshrined in both the Preamble and the formal text of the Constitution itself. Indeed, one may venture to say that the Constitution being the supreme law, courts may have a positive duty to promote the values and principles that are contained in the Preamble, which have been declared by 'the People' as underpinning both the Constitution and the establishment of the State of Trinidad and Tobago as a society governed by the rule of law (which is not necessarily to say that the Preamble constitutes an independent source of rights).[44] It is this ideological and values-laden consensual character of the Preamble, that confers its authoritative and interpretative function.

[45] See also, **Rangarajan v Jagjivan Ram** (1990) LRC 412, at page 424 - "Democracy is a government by the people via open discussion. The democratic form of government itself demands of its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational part of democracy which distinguishes it from all other forms of government" (per Shetty J; approved in **Benjamin v Minister of Information** [2001] UKPC 8, per Lord Slynn).

[46] See clause (c) of the Preamble to the Constitution.

these circumstances, the administration of justice and the rule of law (embodied in the conduct of the CJ).[47]

B. The Section 137 Shield

40. Does section 137 of the Constitution provide the only lawful means by which a Chief Justice or a Judge can be investigated in Trinidad and Tobago? No it does not.[48]

41. Does section 137 of the Constitution provide the only permissible, contemplated, and lawful opportunity for and form of investigation into the conduct of a Chief Justice or a Judge, where what is being explored is whether a potential complaint (to the Prime Minister in the case of a Chief Justice, or the Judicial and Legal Service Commission in the case of a Judge) in relation to the suspension or removal of either arises on available information, and if so, so as to make representations to have the proper authority consider triggering a formal section 137 inquiry? No it does not.

42. Does the Constitution permit a LATT investigation specifically into the allegations of serious misconduct against the CJ, at a potential pre-complaint exploratory stage, to attempt to ascertain/substantiate the facts upon which the allegations made against the Chief Justice were alleged to be based, and to report back to the Council and/or the general LATT membership for further consideration? Yes it does.

43. Section 137 states:

> **(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 offices by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial**

[47] See clauses (c) and (d) of the Preamble to the Constitution

[48] It was conceded, during the course of discussions on the hearing of the appeal, that in relation to the Media, the Police/DPP, an ordinary citizen, a single attorney and/or an *ad hoc* group of attorneys, pre-complaint investigations into the conduct (or alleged mis-conduct) of judicial officers could be undertaken.

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 advices the President that the Judge ought not to be removed from office.

44. Clearly a Chief Justice or a Judge can only be suspended or removed pursuant to the formal process prescribed by section 137 of the Constitution. The section is clear and speaks for itself. That this is so, is also supported by the case law. In **Rees v Crane**,[49] an

[49] [1994] 2 AC 173 PC

attempt by the then Chief Justice and JLSC to effectively suspend a Judge by de-rostering him indefinitely, was found to be unconstitutional because the only power to suspend had to be founded in section 137 proceedings.[50] No one has argued otherwise, and the LATT has always proceeded on this assumption and basis. Indeed, in a letter from the LATT to the CJ dated the 20th January, 2018, by which it sought the CJ's responses to and input (information) on the allegations it was investigating at that time, the LATT stated unequivocally: "The Council of the Law Association fully appreciates that it has no power to compel you to respond and that it has no disciplinary or other power in relation to you."

45. Nowhere in section 137 is an antecedent investigation, conducted in order to consider whether the section 137 process should be invoked, prohibited. Further, nowhere in section 137 is an antecedent investigation, conducted in order to consider whether a complaint should be made to the proper authority to invite it to in turn consider invoking the section 137 process, prohibited. No authority has been produced by the CJ that supports any such propositions. Yet this is exactly what the CJ is advocating as the constitutional effect of section 137. In order to achieve such a prohibition which is not expressly stated and which obviously curtails several fundamental rights and core constitutional values, the court is being invited to, in effect, read into the Constitution and into section 137 such a prohibition. The consequences are frankly quite astounding.

46. The CJ's argument runs as follows. Section 137 is the only lawful means by which the CJ can be investigated, at all. That investigative process is provided for specifically and exclusively at sub-sections 137 (3) (a) and (b). It is therefore the Presidential Tribunal alone, and none other, that can carry out any investigation whatsoever of any allegations of misconduct about the CJ. Thus, any other investigations of the CJ are unlawful, unconstitutional, and null and void; ergo, the LATT's investigation of the CJ is illegal.

[50] **Rees v Crane** [1994] 2 AC 173 PC; per Lord Slynn (at pages 187-188): "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."

47. On what basis therefore, can a Prime Minister or the JLSC represent to the President that the question of removing a Chief Justice or a Judge ought to be investigated, if the Prime Minister or the JLSC are prohibited from conducting any kind of inquiry or investigation to satisfy themselves that there is a bona fide question that ought to be investigated? This Prime Ministerial or JLSC representation[51] occurs prior to the appointment of a Presidential Tribunal to investigate and report on the matter represented.[52] Thus, if the CJ is correct, neither the Prime Minister nor the JLSC can undertake any kind of inquiry or investigation; they are mere conduits, mindlessly and irresponsibly representing that a Chief Justice should be investigated with a possible view to suspension and/or removal. The CJ's argument implies that neither has any public law '**Tameside**' duty, to fairly and adequately consider and assess relevant materials, before making the decision to represent to the President that there is a question of removal.

48. In fact, the case law suggests otherwise. In **Rees v Crane**, at the pre-section 137 (3) (b) and (c) inquiry stage, the Privy Council suggested in the case of a Judge, that: (i) the JLSC has a responsibility to evaluate the merits of a complaint before making any representation to the President, and (ii) the Judge ought also to be given notice of the allegations against him/her and a fair opportunity to respond at that stage of the process (i.e. prior to any representation to the President). What is being contemplated here is an inquiry, even an investigation. Indeed, the evidence in **Rees v Crane** demonstrates that this is exactly what took place, albeit belatedly.[53]

49. Lord Slynn explained the thinking of the Board as follows:[54]

> "**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.

[51] Sub-section 137 (3) of the Constitution.
[52] Sub-section 137 (3) (a) and (b) of the Constitution.
[53] **Rees v Crane** [1994] 2 AC 173 PC, at page 193 E.
[54] **Rees v Crane** [1994] 2 AC 173 PC, at page 193 B – D; emphasis added.

> 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 facile sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the commission must act fairly.**"

50. Complaints received by the Prime Minister (in the case of a Chief Justice), or by the JLSC (in the case of a Judge) must be duly considered and assessed. The **'Tameside'** duty exists; and it includes an inquiry into, an investigation of, the facts, so as "to be satisfied that the complaint ... must be sufficiently serious to warrant representation to the President". Further, consideration must be given to "what materials it needs in order to make such a decision" - thus an investigation. The duty of fairness also places further investigative imperatives on the Prime Minister or the JLSC at this stage, including giving the Judge under inquiry a fair and reasonable opportunity to consider and respond to the allegations being investigated.[55]

51. What then of someone who wishes to make a complaint to either the Prime Minister or the JLSC? Can that person undertake an inquiry, an investigation, to ascertain and/or substantiate relevant facts before deciding to make the complaint? The CJ says absolutely not; as before, there can be no investigation of a Chief Justice at all except pursuant to sub-section 137 (3) (a) and (b) - by the Presidential Tribunal. This suggestion is subject to the same faulty reasoning as before in relation to the Prime Minister's or the JLSC's duty to inquire and consider, to discover and investigate, relevant and material evidence. Though

[55] See, **Rees v Crane** [1994] 2 AC 173 PC, pages 194 F-195B, 196D.

in this instance there may be no strict legally imposed duty, that does not translate into an implied prohibition.

52. In **Rees v Crane,** the Board explained "that section 137 envisages three stages, before the commission, the tribunal and the Judicial Committee of the Privy Council."[56] The Board also recognised that "section 137 which sets up the three-tier process is silent as to the procedure to be followed at each stage and as a matter of interpretation is not to be construed as necessarily excluding a right to be informed and heard at the first stage. On the contrary its silence on procedures ... at least leaves open the possibility ... which fairness requires that the party whose case is to be referred should be told and given a chance to comment."[57] Such a "chance to comment" in the circumstances of **Rees v Crane** was found to exist. However the Board also recognised that in relation to these three stages, "there may be a prior stage since it is likely that the complaints will have originated with or been channelled through the Chief Justice."[58] Indeed, there may be several prior stages depending on the circumstances and context surrounding the origins of a formal complaint. For example, before a formal complaint to a Chief Justice, or a Prime Minister, or the JLSC is even made, aggrieved parties may meet, discuss, investigate, take advice, and then consider and decide to proceed (or not to do so). In fact, it is reasonable to assume that similar occurrences must have taken place in **Meerabux v AG of Belize**[59] and in **Re Chief Justice of Gibraltar**,[60] cases in which complaints were made against a Judge and a Chief Justice respectively.

53. As with section 137, so also with these pre-complaint stages, there is constitutional silence on the processes and procedures to be followed at any of these prior stages. However, the specific question for determination on this appeal, is whether the pre-complaint stages can include an investigation by the LATT?

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[56] At page 189 E. In between the JLSC and the Tribunal stages, the President plays a role - the appointment of the Tribunal; and between the Tribunal and the Judicial Committee stages, the President also plays another role - the referral of the question to the Judicial Committee.
[57] At page 192 F-G.
[58] See page 189 E.
[59] [2005] 2 AC 513. See for example para 8.
[60] [2010] 2 LRC 450. See for example para 4.

54. Plain and ordinary common sense suggests the flaw in the proposition that there can never be any investigative process before a formal complaint is made. How is someone acting responsibly and fairly to determine whether a legitimate complaint should be made? What if there are multiple issues, spread over time, and involving several actors and agencies? And what if that 'someone' is the LATT, a public body whose public utterances and actions can significantly influence public feelings and opinions, and whose actions may be subject to certain normative public body standards?

55. The reasoning in **Rees v Crane**, that the potential adverse impact of a decision by a JLSC to make a representation to the President demanded an *a priori* careful and thorough investigation with an opportunity to be heard,[61] is also applicable to the LATT given its status, even if arguably to a lesser degree. The reasoning of the Board is analogous: the LATT cannot simply be a conduit pipe by which complaints that come to its attention are passed on to a Prime Minister or the JLSC for their consideration. The consequence is that the LATT, like the JLSC in **Rees v Crane**, would I think be duty bound to conduct a fair, careful and thorough investigation of the allegations of misconduct against the CJ before deciding whether to make a formal complaint to the Prime Minister. Anything less could, in my opinion, likely constitute a dereliction of public duty, or be reckless, or careless, or irresponsible. The '**Tameside**' duty also applies to the LATT.

56. Adapting Lord Slynn's comments in **Rees v Crane** to the situation at hand[62] - it might indeed be thought to be in the best interests of the due administration of justice and the rule of law, that the LATT undertake a fair, careful and thorough investigation of the facts and circumstances giving rise to the allegations against the CJ, so as to avoid any unjustified complaints being considered or made against the CJ, not just for the benefit of the CJ, but also for the court system as a whole. Bearing in mind that the LATT has adopted a neutral position (it also not being the originator of the allegations) and has undertaken to defend the CJ if this is warranted, there is every good reason in the public interest for the

[61] See page 194 A-C.
[62] See page 195 B.

LATT to investigate these allegations and 'clear' the CJ if that be the case - the CJ having already attempted publicly to deny any wrongdoing on his part.[63]

Applying Constitutional Principles of Interpretation

57. Why does section 137 exist? And why was it placed in the Constitution? What does a textual and intra-textual analysis reveal?

58. Section 137 was not placed in Chapter 7 of the Constitution, which deals with 'The Judicature'. It was placed in Chapter 9, Part 11, which deals with 'Appointments to, and Tenure of, Offices', under the sub-head 'Special Offices' (Sections 135 -137 of the Constitution). The link between Chapter 7 and Chapter 9 in relation to the Judiciary, lies in section 106 (in Chapter 7).

59. Section 106(1) states:

> "Subject to section 104(3), a Judge shall hold office in accordance with sections 136 and 137."[64]

60. Thus, section 137 is incorporated into Chapter 7, which deals exclusively with the Judiciary. And Chapter 7, taken in the context of the structure of the Constitution, is indicative of the unwritten constitutional principle of the separation of powers.[65]

61. Section 137 exists in the Constitution as an integral aspect of the separation of powers, securing the independence of the Judges from undue influence and/or control by the Executive or Legislature. To reinforce this, sections 136 and 137 are entrenched pursuant to section 54(2) (a) of the Constitution.[66] Sections 136 and 137 protect the

[63] See CJ's Press Release dated the 15th December, 2017.
[64] Section 104(3) deals with the revocation of acting appointments in relation to Judges.
[65] See **Hinds v R** [1977] AC 195 PC, at page 225G: **"the principle of separation of legislative, executive and judicial powers is implicit in a constitution on the Westminster model".**
[66] A two-thirds majority "of all members of each house" is required to alter its terms.

independence of Judges (and therefore of the Judiciary) by providing security of tenure and prescribing the only bases and procedures for their suspension and/or removal.[67]

62. The primary aim of the entrenchment of section 137 is therefore to be considered in the context of the constitutional principle of the separation of powers. Section 137 is not intended to place Judges outside of the rule of law, or to exempt them from accountability, or to immunize them from being disciplined. On the contrary, the Constitution by way of section 137 recognises that Judges, even though they may hold a 'Special Office', are to be held accountable for and disciplined ('removed from office') for 'inability to perform the functions of office' or 'for misbehaviour'. However, Judges "shall not be so removed except in accordance with the provisions of" section 137.

63. It is therefore difficult to see how, given this purpose and intent, section 137 of the Constitution can be read, interpreted and/or applied purposively so as to exclude any and all pre-complaint investigations of alleged misconduct by a Chief Justice or by Judges. Or to exclude such an investigation by the LATT, which has as one of its statutory purposes the upholding and vindication of the rule of law (section 5 (f), LPA). This is certainly not inherent in section 137, given the relatively concrete and specific nature of its language, context and purpose.

64. In any event, to curtail constitutional values and rights generally requires very extraordinary circumstances and express language. I have already demonstrated how the LATT's statutory purposes permit this investigation of the CJ. In this context the LATT as a legal person is entitled to the protection of the fullness of its rights and entitlements under the Constitution. This would include the entitlement to actively participate in developing and maintaining due respect for the administration of justice, the Judiciary, the office of the Chief Justice, and the rule of law (see above).[68] It would also include the fundamental rights to freedom of conscience, and to freedom of thought and expression.[69]

[67] The legislative history explored by the trial judge and examined below, supports this interpretation – see paragraphs 23 – 24 of the trial judge's judgment.
[68] See clauses (c) and (d) of the Preamble to the Constitution.
[69] See section 4 (h) and (i) of the Constitution.

As Lord Hoffman has so crisply put it: "Fundamental rights cannot be overridden by general or ambiguous words. ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[70]

65. The Constitution itself is subject to this interpretative approach.[71] Thus unless the express language of the Constitution itself prohibits the pre-complaint investigation undertaken by the LATT, such a prohibition cannot readily be implied or read into section 137. The language of section 137 does not prohibit any such pre-complaint investigation by anyone, and certainly not by the LATT; such a prohibition can undermine the constitutional entitlement to actively participate in responsible action taken for the purpose of upholding the rule of law; such a prohibition can also stifle freedom of conscience, freedom of thought, and freedom of expression;[72] therefore presumptively no such prohibition should be read into section 137 or the Constitution.

66. Should such a prohibition be read in as a 'necessary implication'? The position is the same as above - no prohibition should be read into section 137 as contended by the CJ. The protection of the independence of the Judiciary and of Judges and of a Chief Justice that section 137 intended to guarantee,[73] is not realistically threatened or undermined by

[70] See **R v Secretary of State for the Home Department, ex p. Simms**, [2000] 2 AC 115, at page 131 E. And also, Lord Stein at page 130 E: where he asserts the constitutional principle of the presumption of general application of fundamental rights in the interpretation and application of statutes.

[71] See **Hinds v The State**, [2015] LRC 244, at pages 291 para 90, and 297 para 102. And see also the following sections of the Constitution: section 1 (1) - Trinidad and Tobago is a Sovereign State, section 2 - the Constitution is the supreme law, and section 5 (1) - except as expressly provided for by the Constitution, no law may curtail any of the fundamental rights.

[72] See, **Hector v AG of Antigua** [1990] 2 AC 312, at page 318 - " In a free democratic society it is almost too obvious to need stating that those who hold (public) office ... must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind" (per Lord Bridge); **R v Secretary of State for the Home Department, ex p Simms** [2000] 2 AC 115, at page 127 - "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. ... It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in governance and the administration of justice of the country" (per Lord Steyn); and **Rangarajan v Jagjivan Ram** [1990] LRC 412, at page 424 - "Democracy is a government by the people via open discussion. The democratic form of government itself demands of its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational part of democracy which distinguishes it from all other forms of government" (per Shetty J; approved in **Benjamin v. Minister of Information** [2001] UKPC 8, per Lord Slynn).

[73] See **Rees v Crane** at pages 187H-188A.

pre-complaint investigations of alleged misconduct. Judicial independence is preserved exactly because it is only by virtue of the formal section 137 process that a Chief Justice or a Judge can be suspended or removed. Thus, however many 'investigations' are conducted by however many persons, until a formal complaint is made and the Prime Minister or the JLSC invokes the section 137 process, there is absolutely no realisable threat to judicial independence in this context. Yes there may be unsavoury publicity, and yes there may even be condemnation in the court of public opinion, but none of these threaten judicial independence as protected by section 137.

Judges, and especially Chief Justices, cannot be overly thin skinned. They hold public office and decide cases, including cases involving the State. The stakes are sometimes high; lives, jobs, compensation, property, investments, reputation, family, freedom, causes, values and rights - can all be taken away by the actions of judicial officers. Parties win, and parties lose. Popularity is not an expectation that should be aspired to. But, accountability is.

67. Indeed, there are well established ways to uphold and protect the dignity of the court and the professional reputations of judicial officers, without having to stymie or curtail legitimate pre-complaint investigations into potential misconduct. For example, action can be taken for defamation to vindicate damage to personal reputation - as the CJ has initiated in relation to these circumstances;[74] or action can be taken for the offence of scandalising the court - for contempt of court, to uphold the institutional reputation of and respect for the courts/judges and of the administration of justice.[75]

[74] Formal CPR 1998 pre-action protocol letters, dated the 5th January, 2018 and the 8th January, 2018, were issued on behalf of the CJ to the Express Newspapers and the TT Guardian Newspapers (and CNC3 media house) respectively.

[75] See **Dhooharika v DPP** [2014] UKPC 11; at paras 32 and 42 - "... the offence of scandalising the court exists to protect the administration of justice"; "... the offence exists solely to protect the administration of justice ... There must be a real risk of undermining public confidence in the administration of justice." And see also, **Ahnee v DPP**, [1999] 2 AC 294, but note Lord Steyn's limitations: "Given that freedom of expression is the lifeblood of democracy ... there is a tension between freedom of expression and the offence of scandalising the court. ... Moreover it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and of the right of

68. Yet even in relation to contempt of court, the following advice of the Privy Council is well known: "The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public ... are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. ... Justice is not a cloistered virtue ...".[76] Though stated in the context of contempt of court, this 1936 advice is no less apt in the more modern context of allegations of misconduct by judicial officers.[77]

69. The more recent Nuremberg Declaration on Peace and Justice makes the point that justice includes accountability. Indeed, the Bangalore Principles of Judicial Conduct arose out of the United Nations Judiciary Integrity Group initiative (2002-2008) to bolster public trust and confidence in judicial systems globally; and recognised that accountability that is measurable according to specified values is essential for realising this goal. In 2007, the Preface to the United Nations Human Rights Commission publication on the Bangalore Principles stated: "A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law." The Trinidad and Tobago SPGJC was developed, agreed to by Judges, and published in furtherance of these internationally recognised and acclaimed objectives. It is an endorsement of the idea that in Trinidad and Tobago judicial officers will be held accountable according to these internationally recognised standards, adapted as they have been for local conditions. Therefore, far from threatening or undermining judicial independence, the administration of justice, or the rule of law, legitimate pre-complaint investigations into alleged judicial misconduct serve to strengthen them all, because potentially, they further the goals of accountability, integrity, and public trust and confidence.

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citizens to comment on matters of public concern. There is available to a defendant a defense based on the 'right of criticizing, in good faith, in private or public, the public act done in the seat of justice. ... The exposure and criticism of such judicial misconduct would be in the public interest" (at pages 305G-306E).

[76] **Ambard v AG**, [1936] AC 322 PC, per Lord Atkin, at page 225.

[77] See also the footnoted quotation from **Ahnee v DPP** above.

70. There is no evidence or suggestion that the LATT is motivated by malice, or that it intends and/or seeks to undermine public trust and confidence in the administration of justice. On the contrary, as it stated in its memorandum (of the 18th December, 2017) to its general membership, "the LATT considered that it has a dual role to play: to protect the Judiciary from unfounded allegations, and to hold the Judiciary accountable for its actions." An investigation to determine whether the allegations against the CJ are true or not, in the context in which these allegations have entered and remained in the public sphere, is in my opinion responsible professional and public interest action on the part of the LATT. Action which once pursued in good faith and impartially, can only bolster public trust and confidence in the administration of justice and the rule of law in Trinidad and Tobago. There is therefore no 'necessary implication' basis to support the general prohibition argued for by the CJ. In my opinion, the circumstances of this matter do not disclose that any such prohibition should be read into section 137. Instead, there is every good reason why it should not.

71. Taking a broad (non-rigid, non-formalistic) purposive approach, looking contextually at the substance and reality of what is at stake, and doing so through the lenses of the fundamental rights provisions, core constitutional values, and international jurisprudential values as discussed above, and doing so contextually mindful of the language used in the section and its purpose, I can find no constitutional warrant to justify an interpretation and application of section 137 of the Constitution, that prohibits the LATT from carrying out the investigation into allegations of misconduct by the CJ that it has undertaken, and in continuing to carry it out as proposed.

72. The LATT's appeal on this issue is therefore allowed.

THE SECOND ISSUE

73. **There is no real possibility that the LATT, judged from the perspective of the fair-minded and informed observer who is a member of this society and who is aware of the relevant and material issues and realities, can appear to be biased in its**

investigation of the serious allegations of misconduct that have been publicly levelled against the CJ.

74. **The LATT has not acted in bad faith, or contrary to the principles of natural justice, in its investigation of, or dealings with, the CJ in relation to the serious allegations of misconduct that have been publicly levelled against the CJ.**

75. This second issue only arises because the LATT can investigate alleged misconduct on the part of the CJ. It questions whether the LATT is biased, and acted contrary to the principles of natural justice and/or in bad faith, in relation to its actual investigations of the CJ.

A. Bias

76. The CJ's allegation of bias against the LATT (as contended) turns on whether there is evidence to demonstrate that "the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility" of bias - Smith JA, in **Roy v Singh**.[78] The test is an objective one, that is, whether on the available factual evidence, there is a real possibility that the LATT's decision to investigate the CJ (and to continue to do so) was biased. What is to be considered "is the appearance that these facts give rise to" from the perspective of "the fair-minded and informed observer"; and the facts to be considered are all those that are available, relevant and capable of being known to the general public.[79]

77. To support this contention of bias, the CJ places special reliance on particular facts:

(i) A prior (June 2017), unrelated motion of no-confidence passed by the General Membership of the LATT against the CJ and the then members of the JLSC, pursuant to a members Special Petition, and in relation to a national furore over the appointment and subsequent untimely resignation

[78] Civ. App. No. P 294 of 2013. And see generally, **Porter v Magill** [2002] 2 AC 357 HL; and **Panday v Virgil**, Mag. App. No. 75 of 2006 (per Archie JA).
[79] See **Gillies v Secretary of State for Work and Persons**, [2006] 1 WLR 781, at page 789; and **Panday v Virgil** [supra].

of the Chief Magistrate as a Judge. The issue that stirred widespread public and professional disquiet, was the fact that when the Chief Magistrate was appointed she had 'left behind' over 50 unfinished part-heard matters, some of which involved accused persons on remand and in detention for years.

Assertions of mis-management by the CJ and the JLSC were rampant. In fact the Chief Magistrate has sued the JLSC and in that suit accused the CJ and the JLSC of, inter alia, using undue pressure, coercion and threats to bring about her resignation.[80] There is also litigation pending by accused persons, that arise out of this event, challenging the continuing prosecution of some of these actions; and the Attorney General has also initiated proceedings to ascertain the legality of the process in relation to these accused persons.[81]

(ii) A statement allegedly made by the Prime Minister on the 6th December, 2017 that he would not get involved in this matter involving the CJ.

(iii) The LATT's actions in providing periodic updates to its membership about the nature and progress of its investigation of the CJ.

(iv) The fact that the President of the LATT is also a member of the Investigating Committee.

(v) Statements made by the LATT (on the 14th December, 2017), characterised by the CJ as "extreme and unbalanced", such as referring to the CJ's conduct (of silence) in not responding to the widespread and sustained

[80] See, **AG v Ayers-Caesar**, Civ. App. No. S 304 of 2017.
[81] See **Akili Charles v Her Worship Maria Busby Earle-Caddle etal**, CV 2017 – 03707 (Judicial Review of the decision of the Defendants to restart the Preliminary Inquiry into the charge of murder bought against the Claimant de novo). See also **Attorney General v Judicial and Legal Service Commission etal**, CV 2017 – 03190 (The AG's action to interpret the legality inter alia of the manner in which matters commenced but not completed before Chief Magistrate Marcia Ayers-Caesar, are now to be determined and/or concluded). These matters are currently before the Court.

> public allegations of several instances of misconduct on his part, as "unacceptable and incomprehensible", as having the potential to "irreparably bring the Office of the Chief Justice into disrepute and by extension, tarnish the entire Judiciary", and as "nothing short of reckless".

78. The CJ's submission on this point was as follows: "We submit, 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 Appellant (LATT) was biased. By declaring that it had no confidence in the Respondent (CJ) and by the statements made by the Appellant (LATT) thereafter in and to the press, the Appellant (LATT) damaged, irretrievably, the perception that the Appellant (LATT) is acting, or could act, independently or fairly. The Appellant (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."[82]

79. The one thing that the fair-minded and informed observer does not do, is to 'cherry pick' facts out of context. The second thing that the fair-minded and informed observer in Trinidad and Tobago also does not do, is to be "unduly sensitive or suspicious ... (especially) ... in a society such as ours that is deeply polarised and where conspiracy theories abound".[83]

80. The public allegations of misconduct levelled against the CJ began in about November 2017. They continued unabated into January 2018, and have not ceased. They were numerous, continuous and highly publicised - often being the subject of front page, full colour, banner headline articles accompanied by photographs and other images. In addition, they spawned equally widespread public comments and commentaries, many of which were adverse to the CJ and many of which called on him, even urging him, to respond and 'clear the air' (including comments and calls from former chief justices, from sitting judges, and from senior members of the legal profession). What the record of appeal

[82] Paragraphs 78 and 79 of the written submissions filed on the 27th March, 2018.
[83] See, **Panday v Virgil**, per Archie JA (supra)

does not fully disclose, but about which one can take notice by virtue of living in Trinidad and Tobago, is the fact that this swirling, never ending, whirlwind of accusations pervaded all forms of public communication - radio, television, social media, as well as virtually every street corner and every workplace and home. In fact, these allegations consumed the public spheres and infected the public spaces. The fair-minded and informed observer, living in these small twin islands of Trinidad and Tobago, would have been very well aware of this.

81. The CJ, in his principal affidavit filed in these proceedings on the 27th February, 2018, describes and comments on the situation as follows:[84]

> **"6. Over the period November 2017 to January 2018 (and continuing) there has been a relentless and concerted series of publications in the press, principally by one leading daily newspaper, containing and/or reporting on 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 intention of defrauding innocent persons to obtain HDC housing.**
>
> **7. The said 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.**

[84] At paragraphs 6, 7, 8 and 9.

9. The LATT, apparently dissatisfied with the extent and the manner of my public responses to these allegations, advised its membership by an email circulated to its membership on December 18, 2017, inter alia, that my alleged failure to respond to the said allegations has brought the office of Chief Justice into disrepute and by extension the entire judiciary, as a result of which the LATT has resolved to investigate the allegations to determine whether they are true or not; and that the LATT's Council has resolved to retain two Senior Counsel to advise on the question whether there is sufficient basis to refer a question of misbehaviour by me to the Prime Minister for his consideration pursuant to section 137 of the Constitution."

82. What did the LATT do? First its Council met and discussed what was happening. As a consequence, on the 15th November, 2017 it issued a one page statement in relation to the allegations and issues concerning private security contracts for judges - which was the issue in the public domain at the time. That statement noted that "the charge levelled at the Chief Justice is as yet unsubstantiated." However, it also opined that the allegation "call(ed) out for an explanation." The statement ended as follows: "The Law Association therefore considers that, in the circumstances, it would be the prudent course for the Chief Justice to publicly address the allegations surrounding the discussions he allegedly had with the person identified in the article."

83. Subsequently, a second series of allegations arose, this time concerning HDC housing. The Council of the LATT met again on the 29th November, 2017. At this meeting the Council resolved to appoint the Investigating Committee to, among other things, "ascertain/substantiate the facts" in relation to these issues and to then report back to it, it having determined that the allegations "were sufficiently grave to warrant further consideration ... on what appropriate action it should take". On the 2nd December, 2017 the Council informed its membership by email accordingly.

84. Then on the 30th November, 2017, the President and a Senior Ordinary member of the Council met formally with the CJ as mandated by the Council. At that meeting the CJ was informed about what the Council had decided on the 29th November and was also told about its concerns in relation to his continuing silence on the issues. Following this meeting, the allegations of misconduct against the CJ continued to be publicly ventilated.

On the 14th December 2017, two weeks after meeting with the CJ and with the CJ having made no public statement on any of the issues, the Council issued a second statement. It is this statement which contains the supposedly "extreme and unbalanced" comments by the LATT that are relied on as evidencing bias.[85]

85. On the 15th December, 2017 the CJ issued his first public statement on any of the issues. It was in the following terms:

> **"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. Specialised 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**

[85] The text of the LATT's statement of the 14th December, 2017, is as follows:

> "The Council of the Law Association has read with increasing alarm the allegations of improper conduct levelled directly and by implication against the Head of the Judiciary. Of particular concern is the allegation that he has intervened to obtain preferential treatment in the distribution of public housing to his acquaintances. The Council is even more troubled at the failure of the Chief Justice to respond to these damaging allegations despite calls from various quarters, including the Law Association, publicly and privately, that he do so with alacrity. The Chief Justice's steadfast refusal to refute these and other accusations levelled against him is unacceptable and incomprehensible.
>
> The Council is of the view 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.
>
> As already stated publicly, the Council of the Law Association had resolved to ascertain/substantiate the facts upon which the allegations made against the Chief Justice were alleged to be based with a view to determining what, if any, further action might be appropriate. In this regard, attention is drawn to section 5 of the Legal Profession Act which mandates that the purposes of the Law Association include representing and protecting the interests of the legal profession and promoting, maintaining and supporting the administration of justice and the rule of law.
>
> In relation to similar provisions governing the Belizean Bar Association, the Privy Council commented that "complaints alleging inability and misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would likely be involved in the presentation of such complaints to any tribunal that was commenced to inquire into the matter."
>
> The Council of the Law Association will continue to discharge its statutory mandate to the best of its ability."

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."

86. On the 18th December, 2017, the Council issued another update to its members by email, reporting on its meeting with the CJ, explaining that the Investigating Committee was mandated to report to Council on or before the 29th December, 2017, that Council had decided to retain two senior counsel to advise on whether there was any sufficient basis to refer a question of misbehaviour by the CJ to the Prime Minister for his consideration, and advising that upon receiving such advice a meeting of the membership of the LATT would be convened to obtain directions on the way forward.

87. This is a more contextually balanced, accurate and complete picture of the core information that a fair-minded and informed observer would have to consider, on this issue of bias raised by the CJ. From this, as the trial judge found, it would be clear that there can be no conceivable bias arising from the no-confidence resolutions related to the Chief Magistrate's appointment and removal as a Judge. This event occurred several months prior in time and is completely unrelated to the issues of alleged misconduct against the CJ now being investigated. This would be an irrelevant and inappropriate consideration.

88. As to the statement of the Prime Minister allegedly made on the 6th December, 2017, there is no evidence as to the status of this utterance, whether it was an official statement or an off-the-cuff comment. In any event, such a position taken by the Prime

Minister is not some sort of authoritative silencing event, after which 'let no dog bark' - as we say in local parlance. Democratic governance facilitates and actually thrives on the freedom to think and express one's thoughts, and encourages the hope, even the expectation, that independent thought, and rational and intelligent dialogue can influence change. If the LATT wanted to discover whether there were grounds to influence the Prime Minister and to change his mind on the issue, doing so does not show bias in a democracy; rather it is symptomatic of freedom. Democracy frowns upon authoritarianism, and especially dictatorial forms of it - these are all considered anathema. Like the no-confidence motion, any statement made by the Prime Minister on these issues on the 6th December, 2017 would be considered irrelevant by a fair-minded and informed observer.

89. With respect to the facts relied on by the CJ in relation to the LATT's updating of its membership, the fact that the President was on the Investigating Committee, and the statements made by the LATT that were critical of the CJ for failing to publicly respond to the allegations, there is absolutely nothing in these that in the context of what was unfolding could, be reasonably considered as disclosing a real possibility of bias. As a Council accountable to its membership it had a duty to report. The President was entitled to be on the Investigating Committee; there are no disclosed disqualifying considerations. Indeed there is every good reason why as President of the LATT he should be on it. These are very serious issues, with potentially serious consequences, and leaders are expected to lead in exactly these situations - not withdraw, or as we say locally 'duck and run'.

90. Finally, the statements critical of the CJ. Taken in their proper context, the fair-minded and informed Trinbagonian would recognise that all the Council was doing was expressing its opinions on the CJ's failure to publicly respond to the allegations of misconduct against him. By the very nature of the allegations, it was only the CJ who could deny, admit, explain, or clarify the facts underpinning these allegations. Moreover, the calls for him to respond were not solely from the Council - independent attorneys, judges, former Chief Justices, newspaper columnists and writers, letter writers, commentators and editors were making the same or similar requests.

Thus the fair-minded and informed observer would recognise that in Trinidad and Tobago, what the Council was demanding at the time was nothing extraordinary or remarkable. It was simply what many others were also demanding, even if done by the LATT in strident and condemnatory tones and terms. Indeed, the fair-minded and informed observer may very well, and reasonably so, consider that the LATT's demands for a response from the CJ were justified in the circumstances. After all, this is a matter of great public importance - whether the Chief Justice of Trinidad and Tobago has misconducted himself as alleged. It has generated great public interest. The LATT has made no finding one way or the other. All it has done is to robustly demand that the CJ respond. And the CJ is the only one who can answer these allegations. How could calls for a response therefore, be evidence of a real possibility of bias? In Trinidad and Tobago, it quite simply would not have been objectively thought, seen or experienced to be so by any one of our fair-minded, informed, independent, and impartial observers.

91. Accumulating these incidents to make something more, arithmetically, fails, because qualitatively no single one nor all taken together can create the result contended for by the CJ. The trial Judge summed up her position as follows: "The Court can find no apparent bias in the instant case on the part of the Law Association which would stem from those resolutions or from the conduct of the Law Association as a body to date." I agree.

92. This aspect of the CJ's Cross-Appeal fails. The evidence does not cross the threshold to establish a real possibility of bias in the LATT, in either the decision to investigate, or in continuing to investigate the CJ.

93. **However, and in any event, there is a more fundamental answer to this contention of bias. The LATT is not in the conduct of its investigation at this time, either a 'prosecutor' of any issue(s), or a 'decision maker' in relation to any rights, liabilities, or responsibilities of the CJ. Therefore the LATT is not in the conduct of its investigation subject to the same standards of impartiality that is demanded of judges, decision makers, or even prosecutors. Simply put, this ground is**

misconceived; the 'fair-minded and informed observer' test of bias as developed and applied jurisprudentially, is of <u>no direct and decisively determinative relevance</u> to the propriety of the LATT's investigation of the CJ at this stage.

B. <u>Breach of Natural Justice</u>

94. As with the argument on bias, the CJ's argument on natural justice falls short of the mark. Fairness depends on context.[86] Generally and in relation to decision makers, fairness requires that a person who may be adversely affected by a decision should have an opportunity to make representations before a decision is taken with a view to producing a favourable result. And since a person cannot usually make worthwhile representations without knowing what may weigh against her/his interests, fairness often requires that s/he is at least informed of the gist of the allegations against her/his interests.[87]

95. In **Rees v Crane**, the Privy Council thought that the requirements of fairness would be met if the Judge had been properly informed at an early stage in the section 137 process, of the allegations being made against him and had been given a reasonable opportunity to respond to them.[88] In **Rees v Crane** that 'early stage' was the 'commission stage', the first of the three stages that section 137 contemplated:[89] "It thus falls to be decided whether in this case the right to be informed and to reply at a later stage dispenses with the obligation or duty to inform at the commission stage."[90] It is important to note for the purposes of this appeal, that the Board recognised that there could be "a prior stage" in the section 137 process, "since it is likely that complaints will have originated with or been challenged through the Chief Justice."[91] However**,** the Board only considered it apt to impose a duty to inform and a right to be heard at the commission stage (and before any representation to the President was made) because, "The composition of the commission and the nature of the process made what happened here more akin to a quasi-judicial decision."[92] Thus: "He

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[86] **R v Secretary of State for the Home Department, ex p Doody**; (1994) 1 AC 531 HL, at page 560D-G.
[87] **R v Secretary of State for the Home Department, ex p Doody**; (1994) 1 AC 531 HL, at page 560D-G, per Lord Mustill.
[88] **Rees v Crane**, at pages 192E-193F (supra).
[89] **Rees v Crane**, at pages 189E and 192G (supra).
[90] **Rees v Crane**, at page 189F, and see also page 192G (supra).
[91] **Rees v Crane**, at page 189E (supra).
[92] **Rees v Crane**, at page 193F, and see also pages 194F-195B (supra).

(the judge) ought to have been told of the allegations made to the commission and given a chance to deal with them - not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply."[93]

96. Does the LATT have the same, or a similar duty as the JLSC at the 'commission stage' of section 137 proceedings?[94] The Investigating Committee of the LATT is not a quasi-judicial committee in relation to any supervisory, or disciplinary function or capacity over the CJ. It has absolutely no legal power to compel the CJ to do anything, or to hold him legally accountable for anything, or to legally discipline him in any way. Yet, the Council and the LATT extended to the CJ the very fullness of natural justice opportunities that **Rees v Crane** mandates for the first stage of the formal section 137 constitutional process for the suspension or removal of a Chief Justice or a Judge.

97. How can the LATT be faulted, when it did arguably more than it was required to do? That is in effect what this aspect of the CJ's challenge amounts to. The complaint is that the LATT did not provide the CJ with enough of an opportunity to be heard. The undisputed evidence is to the contrary. For example, by letter dated the 20th January, 2018, the CJ was informed in writing and in detail of the allegations being investigated and he was invited to respond (this letter is attached to this judgment as '**Appendix A**'). In fact, the evidence reveals that the LATT has supplied the CJ with virtually all the information it has in relation to the allegations against him, over and beyond what the Privy Council envisaged for even the first stage of the formal section 137 process. Also, when the CJ had asked for more information, this too had been supplied in a timely fashion (for example, the CJ's written request of Wednesday the 31st January, 2018 for "copies of any documents, photographs and What's App messages that you have in your possession", was responded

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[93] **Rees v Crane**, at page 196D (supra).

[94] See **Rees v Crane**, at page 191G – H: **"It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage."**

to in writing on Tuesday the 6th February with the LATT supplying ten sets of information so as to facilitate, inter alia, "your (the CJ's) intended forensic examination" (this LATT response is attached to this judgment as '**Appendix B**'). Whither the complaint?

98. This aspect of the CJ's Cross-Appeal also fails. The evidence does not cross the threshold to establish that the CJ was not duly and amply informed of the allegations against him that were being investigated by the LATT, or that he was not given a reasonable and adequate opportunity to respond to them in whatever fashion he chose. Indeed, the evidence shows that the CJ was given far more information and opportunity than the law may have required; and he was treated by the LATT with due regard and respect, and with appropriate courtesy and care.

C. <u>Bad Faith</u>

99. This accusation is the most tenuous of all. It is presented 'rolled up' with comments about natural justice and fairness. As can be discerned, it is contended by the CJ that because the LATT has been 'disclosing to third parties' details of the allegations against the CJ and 'updates' of its investigations into these allegations, it has acted in bad faith, with the consequence of rendering the investigative process 'manifestly unfair' and so illegal.[95]

100. The undisputed evidence reveals the following. The LATT simply did not initiate or propagate these allegations against the CJ. All the details were initially placed in the public domain via the media, and actively kept alive in national circulation by the media - not the LATT. The LATT did interact with the media about these issues, responding to questions asked and issuing its public statements. However, the LATT's public statements were descriptive of its process and reporting in nature - not accusatory or judgmental of the CJ in relation to the substance of the allegations (though they were critical of the CJ's non-responsiveness).

[95] See paragraphs 98 and 101 of the CJ's written submissions filed on the 27th March, 2018.

101. In relation to the disclosure of the LATT's investigative process to the CJ, the evidence reveals that from its very first formal meeting with the CJ on the 20th November, 2017 (when the President and a Senior Ordinary member met with him), the LATT has been open and transparent about its intentions and process. Indeed, the written correspondence including email exchanges passing between the parties and their legal representatives reveal a cooperative and facilitative, even if firm, approach by the LATT towards the CJ and his legal advisors.

102. This aspect of the CJ's Cross-Appeal therefore also fails. There is just no evidence of deceit, deception, misinformation, or *mala fides* on the part of the LATT. There is rather evidence of openness, transparency, disclosure and invitation. In my opinion, there is simply no demonstrated evidence of bad faith sufficient to render the LATT's investigation manifestly unfair to such a degree that it is unlawful.

SOCIAL CONTEXT

103. **The trial judge was not wrong to discover and consider the legislative history of section 137 of the Constitution, but misunderstood its significance in relation to this case.**

104. **The LATT's fundamental rights to freedom of thought and freedom of expression, entitle it to responsibly investigate and if necessary respectfully expose, the serious allegations of misconduct against the CJ that the LATT is at present investigating.**

Legislative History

105. Interpreting and applying the law must at times be undertaken in the socio-political context in which it exists. In **Dumas v AG** (supra) I used this socio-political context as an aid to discovering the approach to be taken in relation to public interest standing in constitutional review.[96] My colleagues were uncomfortable with this approach and

[96] **Dumas v AG**, at paragraphs 120-127 (supra).

specifically disassociated themselves from the comments in those paragraphs, while agreeing otherwise with my "approach ... analysis and reasons."[97] Stubbornly I remain of the view that socio-political context, which includes historical, cultural, anthropological, economic and other social science analyses, is a necessary and important aid to the interpretation and application of the law if one is to genuinely develop a Caribbean jurisprudence. In my opinion, cases like **Dumas v AG** (supra), **Sankar v AG**,[98] **Khan v Mc Nichols**,[99] **Roodal v State**,[100] **HV Holdings Ltd v Incorporated Trustee of the Presbyterian Church of Trinidad and Tobago**,[101] **Francis v Hinds**,[102] and **Sanatan Dharma Maha Sabha etal v AG**,[103] all demonstrate the use and usefulness of this approach in apt cases.

106. In this case, the trial judge researched and applied the legislative, historical context of section 137 as an aid to interpretation.[104] She has been criticised by the LATT for doing this.[105] While I agree that ideally the parties should be invited to comment on such matters if a court intends to place reliance on them, I can find no fault otherwise in the trial judge's use of these materials. What is at stake in this appeal, is the reach of section 137 of the Constitution to render unlawful and sanctionable, any investigations of a Chief Justice or a Judge outside of the scheme provided for by section 137. In a case such as this one, the historical underpinnings of the section should ideally have been researched and brought to the attention of the court by the attorneys for the contesting parties, as relevant background material. This was not done, so the judge did it for our benefit.

107. The research is useful. It helps one understand the historical, legislative context. In particular, it explains the intent of securing the independence of the Judges, and the

[97] **Dumas v AG**, at paragraph 148 (supra).
[98] Civ. App. No. 58 of 2007, at paragraph 34.
[99] Civ. App. No. 153 of 2006.
[100] [2004] 1 LRC 213, at para 93, per Lords Millett and Rodger.
[101] [2012] UKPC 1; PCA No. 92 of 2011.
[102] [2015] 2 LRC 244, at pages 266-276, paras 28-58.
[103] (Trinity Cross Case) H.C.A. No. 2065 of 2004.
[104] See paragraphs 23 and 24 of the judgment.
[105] LATT's written submissions filed on the 26th March 2018: "The learned Judge also erred in considering and taking into account the Report of the Constitution Commission ... and the reported comments of Sir Ellis Clarke at the Queens Hall Conference in April 1962 ... for the purpose of construing section 137 ...".

mechanism for doing so - the separation of powers between the Executive, Legislature and Judicature. It also explains why this mechanism was used in relation to the suspension and removal of Judges (i.e. to ensure security of tenure in this context). What is unclear, is the use that the judge made of this information. Paragraph 342 of the Report of the Constitution Commission (22nd January, 1974) was cited. It is from the report leading up to the 1976 Republican Constitution. It recommended a change from the 1962 constitutional provisions, that change being that the Report of the Investigating Tribunal (into the question whether a Chief Justice or a Judge should be suspended or removed) should no longer be sent to the Privy Council, but to the President who would take action based on it. The judge then highlighted the following words in the report that came after the said recommendation: "there would ... be no need for a further review of the matter by another tribunal outside the country", and the judge then commented as follows: "Indeed, this statement appears to underscore the need for a sole review into the removal of judges and that review being provided for in the Constitution." In so far as the judge was influenced by this information, and from her comment on it and her decision it appears that she was, she failed to appreciate that the 1976 Constitution did not incorporate the stated recommendation and in fact, retained the role of the Privy Council as the final arbiter on the matter of the suspension or removal of a Judge or of a Chief Justice.

108. In so far as the trial judge also made reference to the 1962 Queen's Hall Constitutional Conference and the comments of Sir Ellis Clarke, and then to **Rees v Crane** (supra) and the following comment of Lord Slynn, "if judicial independence means anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways" (emphasising the words underlined), as a consistent train of thought related to the constitutional safeguards to the independence of the judiciary that section 137 provided, no criticism is justified. However, a careful reading of **Rees v Crane**, as explained above, reveals that Lord Slynn's comment was made in the context of the then Chief Justice unilaterally de-rostering a sitting judge for an indefinite period, which the Board considered a constructive suspension and therefore ultra vires section 137. Hence the comment.

109. In this matter, the LATT's investigation is not any part of a formal disciplinary proceeding against the CJ. It cannot directly lead to his suspension or removal. It is not, and does not purport to be, a part of the formal section 137 process and it is not intended to substitute itself for that process. It is simply a fact finding investigation that is intended to inform and to assist the membership of the LATT, with the additional guidance of independent legal advice, in deciding whether the LATT is to defend the CJ or hold him accountable in relation to the serious allegations of misconduct that have been publicly levelled against him.

Competing Fundamental Rights

"The starting point is the right to freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right."

- R v Secretary of State, Ex parte Simms [2002] AC 115, 125

110. Though I have already considered how the fundamental rights to freedom of thought and freedom of expression impact the issues raised in this appeal, the LATT has asked for a more robust application of these rights in this matter.[106] Essentially the argument is twofold. Positively, there is no warrant to curtain the LATT's right to investigate this alleged misconduct by the CJ, because such an investigation is inherent in and fundamental to its constitutional rights to think and to express its views freely. Negatively, to construe section 137 as contended by the CJ reads into the Constitution a curtailment of these rights which the Constitution does not permit to be done in this fashion. In his counter arguments, the CJ denies these assertions and contends that the investigation by the LATT in fact undermines his rights to due process, the protection of the law, and to equality of treatment by a public authority.[107] For the CJ, these rights are linked to "the constitutional question (of) ... the independence of the Judiciary and the security of tenure of judges."[108]

[106] See paras 54-72 of its written submissions filed on the 28th March, 2018.
[107] See paras 32-38 of the CJ's written submissions filed on the 27th March, 2018.
[108] See para 29-30 of the CJ's written submissions filed on the 27th March, 2018.

111. The CJ did not develop substantively his contentions beyond bare assertion. This is regrettable. In any event, and for the reasons given above, the constitutional protection of the independence of the Judiciary and of the CJ (and his constitutionally entrenched security of tenure), are not in any way directly engaged or threatened by the LATT's investigation. In the context of this matter, the protection of the independence of the Judiciary and the CJ and CJ's security of tenure as Chief Justice, exist in relation only to those who have the actual legal jurisdiction and power to formally censure, or suspend, or remove him. And it is only by reason of formal section 137 proceedings that the CJ can be suspended or removed from office - as is constitutionally guaranteed. It is this guarantee that affords the CJ his due process rights, the protection of the law, and if ever such proceedings are invoked, the entitlement to equality of treatment.

112. In my opinion, these constitutional entitlements may not apply in the strict sense to the 'informal' investigation of the LATT; and no authority has been brought to the court's attention to show how or why they should. **Rees v Crane** is not such an authority, as explained above. Indeed, how could due process rights, the protection of the law, or equality of treatment be engaged in relation to the LATT which has no public law jurisdiction or authority over the CJ? How are these rights being contravened in relation to the CJ in the circumstances of the LATT's investigation? These questions have all been left unanswered before this court by the CJ.

113. In any event, the CJ has the benefit of the protection of the law in his personal capacity, in so far as he can vindicate his reputation by private law action in defamation (which formal process he has already initiated). As well, if the circumstances justify it, he can vindicate the office of Chief Justice and the administration of justice via contempt proceedings. All of this has already been explored above, and will be developed further below.

114. The Trinidad and Tobago Constitution, unlike several other Caribbean Constitutions, frames the core fundamental rights provisions (section 4 of the Constitution)

in "broad and unfettered terms ... (with) ... no textual limitation or abridgement stated. ... Trinidad and Tobago is both unique and distinct in that it does not append any limitations or restrictions to the recognised and declared fundamental rights and freedoms." (Archie CJ and Jamadar JA in **Francis v. State**).[109] It is against this background that the fundamental rights provisions in Trinidad and Tobago are to be interpreted and applied - given the now proverbial 'generous interpretation' (see above). As was also explained in **Francis v State**, the human rights provisions in Trinidad and Tobago are therefore to be interpreted according to the 'always speaking' constitutional principle and canon of construction.[110] The generous and purposive interpretation is therefore to be employed with this in mind.

115. In **Boyce v R**, Lord Hoffman in delivering the majority opinion made the following pertinent observations, which demonstrate the relevance and nature of the 'always speaking' principle:[111]

> "Parts of the Constitution, and in particular the fundamental rights provisions ... are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. ... The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In doing so ... they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the

[109] [2015] 2 LRC 244, at para 49; and see also paras 28-45 (for the legislative history), and paras 52 and 88; and note Lord Steyn in **Roodal v State**: "The Bill of Rights under the 1976 Constitution was cast in absolute terms." [2004] 1 LRC 213, at para 20.
[110] [2004] 2 LRC 244, per Archie CJ and Jamadar JA, at paras 129-145.
[111] [2004] 4 LRC 749, at paras 28-29. And note the limitations of the principle, at paras 29, 55-59; it is limited generally to provisions that are "expressed in general or abstract terms" (para 29) and does not generally apply to provisions that are "completely specific" or "stated in the most concrete terms" (para 55). It is therefore neither a "supra-constitutional principle" (para 56), nor "a magic ingredient which can be stirred into a jurisprudential pot ... and brewed up into a potion which will make the Constitution mean something which it obviously does not" (para 59).

terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life."

116. Is there any special value to freedom of thought and freedom of expression in Trinidad and Tobago? Is there anything about our unique social context that will assist in putting flesh on these bare bones, general and abstract terms, that are declared in section 4(i) of the Constitution: "freedom of thought and expression"? How are they to be interpreted and applied in the concrete circumstances of this case and to contemporary life in Trinidad and Tobago, here and now? No real assistance has been given by the advocates for either party. Regrettably the court has been left, once again, to do this co-constructive, indigenous, interpretative work on its own. Pronouncements by courts are not the same as evidence, helpful as they may be.

117. There is no doubt that courts have always recognised, long before there were written constitutions in the Caribbean with human rights provisions, that freedom to think and freedom to express what one thinks and feels are "the lifeblood of a democracy."[112] Little wonder that the Constitution expressly links the democratic way of life (as something that the People of Trinidad and Tobago believe in), to active participation in public affairs (clause (c) of the Preamble to the Constitution). In fact the Constitution recognises that

[112] See for example, **Abrams v United States** [1919] 250 US 616, at 628 and 630, per Holmes J: "But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. … Persecution for the expression of opinion seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. … **But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.** … I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." And see also, the relatively recent pronouncements of Lord Steyn in **R v Secretary of State for the Home Department, Ex parte Simms and Another** [2002] 2 A.C. 115 at page 126: "… **freedom of speech is the lifeblood of democracy**. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. **It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country**: see Stone, Seidman, Sunstein and Tushnet, Constitutional Law, 3rd ed. (1996), pp.1078 – 1086."

such active participation is vital to "develop and maintain due respect for lawfully constituted authority" (clause (c) of the Preamble to the Constitution).

118. Lord Steyn, in **Ex parte Simms** (supra) has boldly declared in relation to the right of freedom of expression: "In a democracy it is the primary right: without it an effective rule of law is not possible". Lord Steyn recognises that freedom of expression is not an absolute right; as he explains, "sometimes it must yield to other cogent interests". What is necessary to curtail the right? "A pressing social need" and even then "the restrictions should be no more than is proportionate to the legitimate aim pursued". [113]/[114]

119. Even in the context of Judiciaries, the independence of Judges, and the administration of justice, these particular fundamental rights and freedoms are so highly valued, that criticism of the court systems and of judicial officers has always also been recognised as conducive to a vibrant democracy, and allowed, even encouraged, within limits.[115]

120. In **Ahnee v. DPP**,[116] Lord Steyn in upholding the constitutionality (in relation specifically to the fundamental right to freedom of expression) of the offence of scandalising the court and in justifying its usefulness for protecting the administration of justice from being undermined, at the same time explained its limitations, as follows:

> "Given that freedom of expression is the lifeblood of democracy ... there is a tension between freedom of expression and the offence of scandalising the court. ... Moreover it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a

[113] **Ex parte Simms**, pages 125 – 126 (see footnote 112 above).
[114] See also **Panday v Gordon** [2006] 2 WLR 39, at paragraphs 17 – 23.
[115] See **Ambard v AG** [1936] AC 322.
[116] [1999] 2 AC 294.

> democratic society for public scrutiny of the conduct of judges, and of the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the 'right of criticising, in good faith, in private or public, the public act done in the seat of justice'. ... The exposure and criticism of such judicial misconduct would be in the public interest."[117]

121. Accountability by public officers, including judges, is of paramount value in a democracy. Discourse in the public sphere is both necessary and needed in order to sustain the democratic values of freedom and the rule of law - values which the Constitution expressly affirms and aligns,[118] "... men and institutions remain free only when freedom is founded upon respect ... for the rule of law." Freedom and the rule of law depend significantly on accountability for their survival. This is because true freedom is grounded in responsibility.[119] Freedom to think and freedom to express one's views, in so far as they "facilitate the exposure of errors in the governance and administration of justice"[120] are thus "the lifeblood of democracy." The legitimate exposure and criticism of judicial misconduct is therefore undoubtedly in the public interest.

122. How is judicial misconduct to be exposed? What precedes exposure? In my opinion exposure presupposes investigation, or at least anticipates it. This is a matter of pure common sense and experience. Investigation therefore reasonably and rationally precedes exposure; whether it is by the media, the police, a citizen, an attorney, a group of attorneys, or the LATT. Exposure implies publicity, expression, in all of its legitimate forms and fashions. This too is self-evident. So unless what the LATT has undertaken constitutes the offence of scandalising the court, in this case scandalising the CJ or his office, or is personally defamatory of the CJ, or must yield to some other pressing social

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[117] At pages 305G-306E.
[118] See clause (d) of the Preamble to the Constitution.
[119] See Democracy and Constitution Reform in Trinidad and Tobago, Peter Jamadar and Kirk Meighoo, Ian Randle Publishers, 2008, at pages 77 – 83: "Responsible or unresponsible freedom" - "It is understood that every freedom comes with its obligations, duties, and responsibilities, and that more than anything else, these obligations, duties, and responsibilities are what protect and preserve these freedoms in the end" (page 80).
[120] See **Ex parte Simms**, footnote 112 above.

need, the Constitution declares that the LATT's fundamental right to express itself and to actively participate in upholding the rule of law, permits its investigation and exposure of any judicial misconduct; in this case, the alleged misconduct by the CJ. In my opinion, for all of the reasons given above, there is no justification for curtailing the LATT's fundamental rights to freedom of thought and expression, manifesting in its investigation of the CJ.

123. In so far as it is arguable that the CJ is entitled to due process rights and the protection of the law in the LATT's investigation, this has already been explored and disposed of above under the substantive heads of bias, natural justice, and bad faith (fundamental fairness). The CJ's entitlement to the protection of the law (as access to justice *per se*) is therefore available in so far as he has access to the courts, already via these proceedings, to challenge the vires, constitutionality, and procedural propriety of the substance and process of what the LATT has undertaken.[121] The CJ's potential actions for defamation and/or contempt of court are also alternative ways that he can avail himself of the protection of the law.

124. Therefore in the balancing of competing rights, I remain of the opinion that there is a positive right (founded in the rights to freedom of thought and of expression), that permits the LATT to investigate the CJ for these allegations of misconduct. I am satisfied that this entitlement of the LATT does not disproportionately or prejudicially hinder the CJ's fundamental rights to due process, the protection of the law, or to equality of treatment, should they exist in these circumstances for his benefit.

Inclusion, Voice, and Empowerment – Responsible Freedom

125. One final word on freedom of thought and of expression in Trinidad and Tobago. It is linked to the Preamble's assertion of active and meaningful participation in service of respect for lawfully constituted authority. This clause has historical antecedents that are grounded in the lived memories and experiences of former colonised peoples, especially

[121] See **AG v McLeod**, [1984] 1 WLR 522, at page 534 (per Lord Diplock).

Caribbean peoples where slavery and indentureship were the common experience for large majorities and for very long periods of time.

126. In the text 'Speaking Freely: Expression and the Law in the Commonwealth',[122] the essays compiled include one by Professor Rex Nettleford O.M., entitled 'Freedom of Expression and the Caribbean Media'.[123] He begins the essay as follows:

> "To these one-time chattels who came to form the mass of the population, freedom of expression meant more than a right to utter unfettered political opinion, as their lack of legal citizenship precluded a claim to this right. Rather, the retreat to psychic landscapes beyond the oppressor's reach was the sustaining alternative to the failure of armed resistance. With the emancipation of the slaves and the abolition of slavery in 1834, former slaves entered legal processes as "free" men and women, thus enlarging their expectations in claiming the right to free expression. In this sense they joined the Free Coloured class, which enjoyed legal freedom but suffered civil disabilities that they fought with freedom of expression.
>
> The advent of indentured Asian labourers to replace the emancipated Africans was occasion for the reinforcement of freedom. Freedom of expression was central to the British government's assurance that no legal excuse for the perpetuation of chatteldom could be made by planters in pursuit of profit from the cultivation of sugar. Asians could pursue their own religion, maintain their family patterns, and return to ancestral hearths voluntarily at the end of their indenture. The preservation of a cultural memory – the bedrock of freedom of expression formerly denied to the enslaved African labourers – was to shape Caribbean social processes and patterns of governance thereafter."[124]

He ends it with a conclusion that asserts:

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[122] Editor Robert Martin, Faculty of Law The University of Western Ontario; Irwin Law, 1999.
[123] At pages 41-58. Professor Nettleford is a widely known and well respected Caribbean scholar and political analyst. He was a former Vice Chancellor of the University of the West Indies, Jamaica.
[124] See pages 41 – 42.

> "The importance of freedom of expression to the Commonwealth Caribbean's view of itself as a society committed to democratic governance and its civil society is rooted in a long history of conscious resistance to institutional and psychological marginalization of the people."[125]
>
> "If this right is the cornerstone of the democratic edifice, it is also the heartbeat of a living body politic as reflected in the history and culture of the Commonwealth Caribbean."[126]

127. The social context of the rights to be free to think and to express oneself in the Caribbean, especially in relation and response to formal authority, and even more so in relation to holding such authority accountable, is absolutely vital to ameliorating deep historical mass experiences of disenfranchisement, alienation, voicelessness, and powerlessness.[127] The flesh to be put on these particular constitutional bones, must therefore enable inclusion, voice and empowerment – responsible freedom.

Arif Bulkan and Tracy Robinson, leading constitutional scholars in the Caribbean, note: "One reason why equality matters in the Caribbean is our history and the foundational role of inequality and exclusion, and the struggle against it, in the formation of the modern Caribbean, as well as persistent legacies of those inequalities evidenced in the challenges the Caribbean faces today".[128] The same can also be said in relation to why freedom of thought and expression matters in the Caribbean.

128. In my opinion therefore, applying a generous and purposive interpretation to section 4 (i) of the Constitution, that is grounded in local realities and relevant to local needs at this time, demands upholding the LATT's fundamental rights to freedom of

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[125] See page 55.
[126] See page 58.
[127] See also, Democracy and Constitution Reform in Trinidad and Tobago (supra), at page 83: "Slave and colonial society is perhaps the most antipathetic environment for the development of a tradition and ethos of responsible decision-making, or responsible freedom. This truth about ourselves must at least be recognised and accepted …". Hence, the imperative to not lightly inhibit freedom of thought and expression in the context of accountability.
[128] See, Equality and Social Inclusion, Caribbean Judicial Dialogue, Paper No. 5, November, 2017, Trinidad.

thought and expression, and therefore to responsibly investigate, and if necessary respectfully expose, serious allegations of misconduct by Judges and Chief Justices, including the allegations against the CJ that are currently being investigated by the LATT at this time.

CONCLUSION

129. For all of the reasons given above, the LATT's appeal is allowed and the CJ's cross appeal is dismissed. Both the CJ's application for leave and his substantive application are therefore dismissed. The parties will be heard on the issue of costs.

130. It is worth noting as a postscript to this judgment, that the unchallengeable evidence placed before this court demonstrates that suspension and/or removal of the CJ pursuant to section 137 of the Constitution or at all, are not and have never been the motivating objectives of the LATT in its pursuit of this investigation. Rather, on the preponderance of the evidence, truth, transparency, accountability, the public interest, the protection of the administration of justice, and the preservation of the rule of law in Trinidad and Tobago, have always been the driving forces behind its actions in this cause. In my opinion the LATT cannot be faulted in this regard in the circumstances of this case.

131. For me this has been a most difficult matter to adjudicate - to sit in judgment of one's own Chief Justice. It reveals how challenging the work of judging can be. Yet it brings to the fore how necessary the independence, integrity, and impartiality of judicial officers (together with all of the other SPGJC) are for the sustainability of the democratic way of life, which considers as fundamental to its character and nature, the rule of law.

Peter Jamadar
Justice of Appeal

APPENDIX A

000073

20 January 2018

The Honourable Chief Justice Ivor Archie T.C.,
Hall of Justice
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Dear Chief Justice,

As you are aware, the Council of the Law Association has established a Committee to attempt to ascertain/establish the basis of certain allegations made against you in the Express Newspapers. Our enquiry was later expanded to cover allegations made in a report in the Caribbean News Online.

The Law Association has embarked upon this exercise against the back-drop of what appeared to be serious allegations, your failure for quite some time, and then only briefly, to answer the allegations, and the Prime Minister's publicly stated position of non-involvement. The Law Association considers it its duty to protect you against these allegations, if they are not substantiated, or to hold you accountable, if they are. It is the Council's intention to submit a report containing the Committee's work to Dr. Francis Alexis Q.C. and Mr. Eamon Courtenay Q.C. for their respective advices and then to convene a general meeting of the Law Association for a decision to be made on the way forward. At that meeting, the Committee's report and Queen's Counsel's advice will be presented and debated.

The purpose of this letter is to inform you of the matters which the Committee considers to be of sufficient weight and sufficiently established at this stage, and to give you the opportunity to provide any information or give any response which you may choose to give.

The Council of the Law Association fully appreciates that it has no power to compel to you to respond and that it has no disciplinary or other power in relation to you. We do consider however that, as with any other citizen, we have the power to refer a complaint to the Prime Minister for him to treat with as he deems fit and we are satisfied that the power to refer such a complaint falls within our statutory mandate.

We therefore ask you to consider and to respond to the following, as you may deem fit.

1. You developed and maintained a close personal relationship with Dillian Johnson and Kern Romano, the first of whom was convicted of an offence involving the forgery of a judicial officer's signature, and the second of whom was convicted of an offence of fraud which was committed by using his relationship with you as proof of his ability to carry out his fraudulent scheme. With regard to the latter, more particularly, he promised his victims that he could secure a favourable result in their applications for HDC housing because he could call upon your assistance in so doing. The concern is that you showed extremely poor judgment as Chief Justice in entering into and maintaining close personal relationships with persons who had the potential to bring the office of Chief Justice into disrepute.

2. You invited Mr. Dillian Johnson to meet with you in Guyana when you travelled there on official business. Mr. Johnson did meet you there and he shared your hotel room.

3. Mr. Johnson is associated with a private security agency named Fortress Security Services. After a meeting with judges concerning their security arrangements, you exchanged the following whatsapp message with Mr. Johnson:

"Archie: Have an update with what you asked me to look into for you.

Johnson: What that? Which one?

Archie: The security thing. Spoke with some judges to change their personal security.

Johnson: GrB"

There is to be inferred from this exchange the following:

i) There was some ongoing conversation between you and Johnson about security arrangements for judges on which you were now updating Johnson.

ii) You had spoken to "some" judges about changing their security arrangements because Johnson had asked you to "look into" it for him.

You also had discussions with Mr. Johnson about the security needs of the judiciary as reported in the Sunday Express of 26th November 2017, p. 3.

4. With regard to the allegations concerning HDC housing:

i) You recommended two persons for HDC housing in 2013, namely Calvin Asgarali and Sherwin Rawlins.

ii) You asked for favourable consideration for ten applicants for HDC housing in 2015, namely, Augustina Alexis, Kathy-Anne Alexis, Nicole St Clair, Agnes St Clair, John Allan, Eboni Fletcher, Hanna Guevara, Jermaine Ferguson, Kern Trotman and Natalie John.

iii) There is no letter from you in the HDC records concerning any of these recommendations, and the inference is that you made these recommendations orally or by some other social medium.

iv) You followed up your recommendations with whatsapp messages and personal calls to a senior HDC manager, whose identity has not been disclosed to us.

v) You called the Managing Director of the HDC concerning outstanding applicants.

vi) In your whatsapp message to and calls with the senior HDC manager, whose identity we have not been able to ascertain, you sought to encourage the HDC manager to fast track the applications.

vii) Mr Dillian Johnson was one of the persons whose names were mentioned in your whatsapp messages.

viii) You caused your friend or acquaintance, Mr. Colin Edwards, to contact an HDC manager to make representations on behalf of two applicants for HDC housing, providing Mr Edwards for that purpose with the applicants' names and their application numbers. We have not been given the names of the two applicants.

ix) You communicated with the Prime Minister, Dr. Keith Rowley, sometime after the election in 2015, recommending the following applicants for HDC housing: Dylan Huggins, Carol Williams and Felicia Pierre.

x) Dylan Huggins and Carol Williams were both persons who Mr. Kern Romano had approached and from whom he obtained money on the promise that you would intercede with the HDC on their behalf.

xi) There were other persons, whose names were not given to us, who you recommended and were approached on similar terms by Mr. Romano.

xii) You recommended the persons referred to in (x) and (xi) above at the request of Mr Romano, your personal friend, and as a favour to him.

5. In May 2017, Mr. Justice Frank Seepersad was assigned personal security by the police service in response to certain perceived threats to his safety. You discontinued the security detail without first discussing same with him and you thereafter declined his request to meet to discuss his security concerns.

We would very much appreciate if we could have your response by 26th January 2018 so that we may include it in the brief to be sent to Queens Counsel.

Yours faithfully,

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Douglas L. Mendes S.C.
President of the Law Association and Chairman of the Committee

APPENDIX B

Law Association of Trinidad and Tobago
established by the Legal Profession Act 1986

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6th February, 2018

Ms. Raisa Caesar
Messrs. Alexander Jeremie & Co.
81 St. Vincent Street
Port of Spain

Dear Madam,

Your letters of the 30th and 31st January, 2018 (erroneously dated the 31st January, 2017) are noted together with a copy of the Pre Action Letter which your firm issued to Ms. Omatie Lyder of the Trinidad Express which will form part of the bundle of documents which are dispatched to our legal advisors for their consideration.

As regards your request for "any documents, photographs and WhatsApp messages" that we have in our possession we have attached for your client's review and consideration the following copies of Whatsapp messages and documents which we have obtained in the course of our investigation:

a. A Whatsapp message exchange purportedly made between your client and Dillian Johnson relating to personal security for the Judges. - **A**
b. A Whatsapp message exchange purportedly made between your client and Dillian Johnson relating to the latter's receipt of Armani underwear inclusive of images. – **B**
c. A photograph of your client's Driver's permit and Dillian Johnson's Driver's permit - **C**
d. A photograph of an HDC spreadsheet which records that houses were provided to Sherwin Rawlins and Calvin Asgarali on the recommendation of your client in 2013 – **D**
e. Photographs of Sherwin Rawlins and Calvin Asgarali – **E**
f. A Whatsapp message exchange purportedly made between your client and Dillian Johnson inviting the latter to Guyana. – **F**
g. An email between employees of HDC providing an update on names forwarded by your client – **G**
h. Dylan Huggins' Statement to the Police in the Kern Romero investigation dated the 1st December, 2015 – **H**
i. A composite statement of pages of two statements allegedly given by Dillian Johnson to the Police. Same was provided to us in a series of images which we have compiled. - **I**
j. A bundle of correspondence provided to us by Seepersad J. in relation to the directive by your client to cancel his police escort – **J**.

It is our intention to complete our report in time to submit it to our advisors by this Friday 9th February 2018. We would therefore urge that even while you subject the above documents to your intended forensic examination you respond to the factual allegations contained in my letter dated 20th January 2018. We feel confident that even in the absence of such forensic analysis

your client would be in a position to say whether any of the statements are true or not.

Yours faithfully,

Douglas L. Mendes S.C.
President of the Law Association and Chairman of the Committee