

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

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

Between

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Appellant

And

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

Respondent

**PANEL: A. Mendonça, Chief Justice (Ag.)
 P. Jamadar, J.A.
 N. Bereaux, J.A.**

**APPEARANCES: Mr. C. Hamel-Smith SC, Mr. J. Mootoo and Mr. R. Dass
 appeared on behalf of the Appellant.**

**Mr. J. Jeremie SC, Mr. I. Benjamin, Mr. K. Garcia and Mr. K.
Scotland appeared on behalf of the Respondent.**

Dated: May 22nd 2018.

JUDGMENT

Delivered by A. Mendonça, Chief Justice (Ag.)

1. The Appellant to this appeal is the Law Association of Trinidad and Tobago (the Law Association). The Law Association is a body corporate established by section 3(1) of the Legal Profession Act (LPA). The members of the Law Association are attorneys-at-law whose names are entered on the roll of attorneys maintained by the Registrar of the Supreme Court. The long title of the LPA is “to provide for the reorganisation and regulation of the legal profession for the qualification, enrolment and discipline of its members and for other matters relating thereto”. The affairs of the Law Association are managed and its functions performed by a council constituted in accordance with the provisions of the LPA.

2. The Respondent is the Chief Justice of Trinidad and Tobago. As Chief Justice he is the head of the judiciary, the President of the Court of Appeal and ex officio judge of the High Court, which two courts make up the Supreme Court of Trinidad and Tobago. He is also the chairman of the Judicial and Legal Service Commission, which has the responsibility, among others, to advise the President of the Republic of Trinidad and Tobago on the appointment of judges of the Supreme Court.

3. The issues before this court relate to (a) the lawfulness of an enquiry or investigation by a committee established by the council of the Law Association to ascertain and or

substantiate the facts upon which allegations made against the Chief Justice are alleged to be based; (b) whether the decision of the Law Association contained in its letter dated February 23rd, 2018 to continue to take further steps to further the enquiry or investigation to ascertain and or substantiate the allegations made against the Chief Justice has the appearance of bias; and (c) whether the investigation or enquiry is being conducted in bad faith and or in breach of the rules and or requirements of natural justice. The first issue at (a) is raised on the Law Association's appeal. The other two issues are raised on a counter notice of appeal filed by the Chief Justice.

4. With that brief introduction I turn to the relevant facts of this appeal over which I do not think that there is any real dispute.

5. Beginning in November, 2017 numerous articles have been published in the local press making very serious allegations concerning the conduct of the Chief Justice. In the words of the Chief Justice the articles suggest that he is corrupt and has corruptly and knowingly used his 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 he has corruptly and knowingly used his office in concert with convicted felons for their benefit by seeking and/or with the intention of defrauding innocent persons to obtain public housing.

6. In the light of the articles there have been calls from, inter alia, senior members of the local bar for the Chief Justice to answer the allegations with some of them suggesting that the Chief Justice should resign.

7. Two sitting judges of the High Court also wrote expressing their concerns. One of them called on the Chief Justice to convene an urgent meeting with the judges “for the sake of the” judiciary “and preservation of what is left of the public confidence in it” to “discuss the allegations and to urge him to provide such answers as might explain them for the benefit of the public” and members of the judiciary. The Chief Justice, however, declined to convene the meeting citing concerns that anything said at the meeting would not remain confidential but would wind up in the public domain.

8. The allegations were also of grave concern for the council of the Law Association. According to its President, Mr. Douglas Mendes SC, “even if the said allegations are untrue, a number of them are so serious that the fact that they have been published in the press would have the tendency to bring the Office of the Chief Justice into disrepute and undermine public confidence in the administration of justice if the Honorable Chief Justice did not address them”.

9. In a statement dated November, 15th 2017 and reported in the press, the Law Association referred to the allegations concerning the conduct of the Chief Justice that had appeared in the press up to that point and indicated that it considered one of the allegations made

in the articles to be “unsubstantiated”. However, with respect to another of the allegations the Law Association indicated that in the circumstances it would be “the prudent course for the Chief Justice to publicly address” that allegation. The allegation was identified in the press release.

10. Articles continued to appear in the media relating to the conduct of the Chief Justice and by November, 29th 2017 the Chief Justice had not offered any response to the allegations. On that date the council of the Law Association met and resolved to appoint a committee to “ascertain/substantiate the facts upon which the allegations against the Chief Justice were alleged to be based” and to report back to it. The secretary of the Law Association by email dated December, 2nd 2017 informed its membership of the resolution in these terms:

“This is to report that on Wednesday 29th November 2017, the Council of the Law Association met to consider recent newspaper reports in which certain allegations were made against the Honourable Chief Justice. After due deliberation, the Council decided as follows:

- (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.....”

11. Sometime following the resolution (the exact date does not appear on the evidence) the committee was established and began the task for which it was formed. Mr. Mendes is a member and chairman of the committee.

12. On November, 30th 2017 Mr. Mendes and Mr. Elton Prescott SC, a senior ordinary member of the council of the Law Association, met with the Chief Justice and informed him of the council's concern about the allegations appearing in the press and of council's decision to establish a committee to ascertain/substantiate the facts which formed the basis of the allegations. By email dated December, 18th 2017 the secretary of the Law Association informed its membership of the meeting with the Chief Justice. The contents of the email are as follows:

“Dear members

Further to a previous email informing you of decisions of Council in relation to certain allegations made against the Chief Justice in the Express newspapers, the Council of the Law Association advises the membership further of the following matters:

- 1 On November 30th 2017, as mandated by the Council, the President of the Law Association, Mr. Mendes SC, and Senior Ordinary Member, Mr. Elton Prescott SC met with the Chief Justice. Also present was Master Christie-Anne Morris-Alleyne. At that meeting, Mr. Mendes and Mr. Prescott informed the Chief Justice of the following:
 - a) That the Law Association considers that it has a dual role to play: on the one hand, to protect the Judiciary from unfounded allegations and, on the other, to hold the Judiciary accountable for its actions.

- b) That the Law Association had taken note of allegations made against him in the Express Newspapers, namely 1) that he had discussed the matter of personal security for judges with a named person (not a judge); and (2) that he had recommended/referred two or more individuals to the HDC for accelerated housing grants.
- c) That the allegations made against him are serious and are considered by the Law Association to be serious.
- d) That this is a view shared by many members of the Law Association and other members of civil society.
- e) That there have been calls for his resignation having regard to his failure to respond to the allegations.
- f) That his failure to respond has mostly likely led members of society to conclude that there is some truth to the allegations.
- g) That the gravity of the allegations and his failure to respond have brought the office of Chief Justice into disrepute and by extension the entire Judiciary.
- h) That the Council of the Law Association has resolved to investigate the allegations to determine whether they are true or not.

At the conclusion of the meeting, the Chief Justice said that he would think about the representations made to him.

2. The Committee established by the Council is mandated to report to the Council on or before 29th December 2017;
3. 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 the Chief Justice to the Prime Minister for his consideration pursuant to section 137 of the Constitution;
4. Upon receiving such advice, Council will convene a meeting of the general membership to consider such advice and obtain directions as to the way forward.

Regards,
ELENA ARAUJO
SECRETARY”

13. By December, 14th 2017 the Chief Justice had not responded to the allegations and on that date the council of the Law Association issued a further statement, the full text of which 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.”

14. On December, 15th 2017 the Chief Justice issued a press release in response to the allegations. In the view of Mr. Mendes, the Chief Justice’s press release “briefly” responded to “some of the allegations”. In these proceedings the Chief Justice has described his response as “restrained”. This he says is because of advice he has received and not otherwise. He has stated that he has not been restrained “because the allegations are true”. He says that they are untrue.

15. On December, 18th and 27th 2017 articles published in the press contained statements made by Mr. Mendes. He stated essentially that; (a.) it was part of the work of the committee to verify the allegations made against the Chief Justice; (b.) the committee will be speaking to those who it appears from the newspapers may know something; (c.) the committee will submit an interim report; and (d.) the Chief Justice will get a right to reply.

16. On January, 3rd 2018 it was reported in the press that on January 1st 2018 Mr. Mendes wrote to the managing director of the Housing Development Corporation (HDC) (the entity responsible for the provision of public housing) and asked about communications which may have taken place prior to 2015. He asked whether the managing director knew the identity of a senior HDC manager with whom the Chief Justice had allegedly

communicated and if she was aware of any recommendation the manager made in relation to the application for HDC housing.

17. On January, 3rd 2017 it was further reported in the press that, inter alia, Mr. Mendes said that (a) there was a plan to write to the Chief Justice to respond to the allegations in due course; (b). the council of the Law Association received an interim report from the committee but that it was not yet sent to the two Senior Counsel retained by the Law Association (see item 3 of the email of December, 18th 2017 sent out at para.12); and (c). the Law Association would not be rushed and would take as much time as needed to do a proper and fair report.

18. On January, 15th 2018 it was reported in the press that Mr. Mendes said the Law Association is still probing allegations against the Chief Justice.

19. On January, 20th 2018 Mr. Mendes wrote to the Chief Justice reminding him that the council of the Law Association had established a committee to attempt to “ascertain/establish” the basis of certain allegations made against him. The letter further stated that; (i) the Law Association embarked on that exercise against the backdrop of what appeared to be serious allegations and his “failure for quite some time and then only briefly to answer the allegations”; (ii) it considered it its duty to protect the Chief Justice against these allegations, if they are not substantiated and hold him accountable if they are; (iii) it was the Council’s intention to submit a report containing the committee’s work to two Queen’s Counsel for their advice and (iv) it intended to submit the report and Queen’s Counsel’s advice at a general meeting of the Law Association for a decision to be made on the way forward. The Chief Justice was further informed that the purpose

of the letter was to inform him of the matters which the committee considered to be of sufficient weight and sufficiently established at that stage and to give him the opportunity to provide any information or give any response which he may choose to give. It was stated:

“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. 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.”

The letter then set out several matters which the Chief Justice was asked to consider and respond to as he may deem fit.

20. By letter of January, 30th 2018 (wrongly dated 2017) the attorneys-at-law for the Chief Justice wrote to the Law Association in reply to its letter January 20th. The attorneys-at-law stated, inter alia, that:

“In your letter you acknowledge that the Law Association has no lawful role in nor constitutional power of discipline over Judges. That as you will appreciate is provided for under the Constitution.

In your letter you do not acknowledge that your enquiry is into the Express campaign of allegations. It is obvious to us that the Express is intent on continuing its campaign. You do not acknowledge the possibility or likelihood that this campaign will continue.

In your letter you do not specifically identify any basis for your enquiry. There is one in the Constitution.

In your letter you do not specifically identify any process or procedure designed to ensure impartiality and fairness and due process. There is one in the Constitution.

In your letter you mention the Law Association's statutory mandate. You did not elaborate but we will.

The Legal Profession Act expressly requires the Law Association to promote and advance the Administration of Justice and the Rule of Law.

In your letter you do not acknowledge that the Law Association ought not to endorse press campaign allegations by purporting to conduct an enquiry and so run the risk of impairing the Administration of Justice.

In your letter you do not acknowledge that the Law Association cannot responsibly support the Administration of Justice by disseminating publicly its opinions about these press campaign allegations without undermining the Administration of Justice.

In your letter you do not acknowledge that your so called enquiry and your proposed meeting will only prejudice public opinion against the Administration of Justice and the Rule of Law. This will add to the poison and vitriol of the Express campaign.

Respectfully, the Association has no duty "to protect" the Chief Justice and no duty to hold the Chief Justice "accountable" at all, let alone whether the allegations are substantiated or not. Rather the Association must support the application of due process and impartiality and uphold the Independence of the Judiciary, at every juncture which requires that no judge, whether Chief Justice or not, should be removed from office without good cause and with the question of removal being determined by an independent and impartial tribunal. This obviously excludes any press campaign, such as the one that the Express is bent upon conducting...."

21. On January, 31st 2018 the Chief Justice's attorneys-at-law wrote to the Law Association requesting copies of any documents, photographs and WhatsApp messages it may have in its possession in connection with the matter. The attorneys further stated that it was only when they received the requested information that a substantive response could be provided to the Law Association's letter of January, 20th 2018.

22. By letter dated February, 6th 2018 and signed by Mr. Mendes as the President of the Law Association and chairman of the committee, copies of the WhatsApp messages and documents which were obtained in the course of the investigation were sent to the attorneys-at-law for the Chief Justice. The letter also stated that it was the intention of the committee to complete the report and submit it to the Law Association's legal advisors by February, 9th 2018. The Chief Justice was urged to respond to the allegations contained in the Law Association's letter of January, 20th 2018.

23. By letter dated February, 14th 2017 the Chief Justice's attorneys at law responded to the Law Association by stating that the withholding of the "substantive package of documents, statements and annexures" until on or around February, 6th 2018, when in the interest of fairness of its investigation the Law Association could have provided the package on January, 20th 2018 was plainly wrong, unfair and unacceptable. The letter also stated that the Law Association's letter of February, 6th 2018 did not acknowledge the significant concerns about fairness which were raised in their previous letter nor did

it acknowledge the substantive responses set out in the annexures to the January, 30th 2018 letter.

24. By letter dated February, 15th 2018 the Law Association wrote to the Chief Justice's attorneys-at-law and advised, inter alia, that its position on its power to engage in the enquiry is as set out in detail in its letter of January, 20th 2018 and should be taken as a response to their letter of January, 30th 2018. Further, the Law Association repeated a paragraph of its letter of February 6th in which the Chief Justice was urged to respond to the allegations.

25. On February, 20th 2018 Mr. Mendes emailed Mr. Jeremie SC, one of the Chief Justice's attorneys-at-law, stating that the Law Association will be soon sending a brief to the two Queen's Counsel who are advising the Law Association and that if he wished them to consider the Chief Justice's response, he should provide that response by February, 22nd 2018.

26. By letter dated February, 21st 2018 the Chief Justice's attorneys-at-law wrote to the Law Association advising, inter alia, of the Chief Justice's intention to issue proceedings on or before February, 26th 2018 in respect of the Law Association's enquiry and/or investigation and asked that the Law Association take no steps to further its enquiry and or investigation until the court has pronounced upon the legal and constitutional propriety of the Law Association's proposed action.

27. By letter dated February, 23rd 2018 attorneys-at-law for the Law Association responded to the letter of February, 21st 2018 stating, inter alia, that “It should be uncontroversial that the Law Association is entitled, and indeed has the responsibility, to examine the allegations that have been made concerning the Chief Justice and, based upon the results of such examination, to take such steps as may be appropriate to promote, maintain and support the administration of justice and the rule of law.” The Law Association’s attorneys-at-law further stated that the Law Association intended to proceed in the manner previously indicated by sending the briefs to the Senior Counsel for their advice on the way forward. It was further stated that the Law Association remains desirous of receiving any response or information that the Chief Justice should choose to provide and due consideration would be given to it if and when received.

28. By notice dated February, 26th 2018 the Law Association advised its membership of a special meeting scheduled for March 15th 2018. The objects of the meeting which were identified in the notice were; (1) to consider the report of the committee of the Council appointed to ascertain/substantiate the allegations against the Chief Justice; (2) to consider the advice of the two Queen’s Counsel and (3) to direct the council as to the course of action to be taken, if any.

29. On February, 27th 2018 the Chief Justice filed a without notice of application for leave to make a claim for judicial review of the Law Association’s decision to continue to take further steps to further the enquiry or investigation to ascertain and or substantiate

allegations made against the Chief Justice and/or refuse to take no further steps in that regard. The parties however agreed that the application should be "rolled up" and heard together with the Chief Justice's claim for judicial review. In view of the application of the Chief Justice the Law Association did not proceed with the meeting scheduled for March 15, 2018.

30. The Chief Justice by his application sought the following relief:

- (1) a declaration that the decision is illegal and/or ultra-vires and/or unreasonable and/ or irrational and/or contrary to the provisions of the LPA and is null and void and of no effect
- (2) an order of certiorari to quash the said decision.

31. The grounds upon which relief was sort were essentially;

- (1) that the Law Association acted outwith its powers which are conferred on it by the LPA and contrary to the provisions of the Constitution;
- (2) that the decision has the appearance of bias; and
- (3) that the inquiry is being conducted in bad faith and or in breach of the rules and or requirements of natural justice.

32. The application was heard and determined by Kangaloo J. On the issue of whether the Law Association acted outwith its powers under the LPA and contrary to the Constitution, the Judge found that although "the Law Association like any other citizen of this country, may make a complaint about a Judge or the Chief Justice. What this Court says cannot be permitted on a conjoint reading of Section 5 (f) of the [LPA] and Rule 36 (1) (4) [of Part A of the Third Schedule to the LPA] or even these parts of the [LPA] separately does not empower in any way or authorise the Law Association to conduct an investigation into the misbehavior of the Chief Justice in any terms. The sole

procedure for doing so is to be found in the Constitution.” The Judge, therefore, held that the decision of the Law Association was ultra-vires its powers under the LPA and in contravention of the provisions of the Constitution. As to the issue of apparent bias the Judge found that there was no apparent bias. She however made no findings as to bad faith or breach of the rules and requirements of natural justice. In the circumstances the court granted a declaration that the decision of the Law Association is illegal and/or ultra vires and/or irrational and/or contrary to the provisions of the LPA and is null and void and to no effect. The Judge also made an order of certiorari quashing the said decision.

33. As I mentioned the Law Association has appealed and the Chief Justice has filed a counter notice of appeal. The Law Association contends that the Judge was wrong to find that it cannot conduct the investigation or enquiry and therefore erred in granting the relief she did. The Chief Justice in his counter notice of appeal contends that;

1. the Judge erred in failing to find the decision of the Law Association in its letter February, 23rd 2018 to continue to take further steps to further an enquiry on/or investigation to ascertain and/or substantiate allegations made against the Chief Justice and/or to refuse to take no further steps in that regard has the appearance of bias; and
2. the Judge erred in failing to find that the enquiry and/or investigation is being conducted in bad faith and/or in breach of the rules and/or requirements of natural justice.

I will first deal with the appeal of the Law Association.

34. The core issue in the Law Association’s appeal is whether the Law Association by conducting the enquiry and/or investigation to ascertain and/or substantiate the allegations made against the Chief Justice is acting ultra vires the LPA and or in

violation of the Constitution. It is common ground between the parties that if the LPA has not authorised the Law Association's conduct then that is a sufficient basis to dismiss the Law Association's appeal. If the LPA does authorise the conduct of the enquiry or investigation then the question arises whether it is proscribed by the Constitution.

35. Before discussing the relevant issues it is appropriate to set out the various provisions of the LPA and the Constitution that are of particular relevance in this appeal.

The Constitution

- 2** This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this constitution is void to the extent of the inconsistency
- 99** There shall be a Supreme Court of Judicature for Trinidad and Tobago consisting of a High Court of Justice (hereinafter referred to as "the High Court") and a Court of Appeal with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law.
- 100(1)** The Judges of the High Court shall be the Chief Justice, who shall be ex officio a Judge of that Court, and such number of Puisne Judges as may be prescribed.
- (2)** The High Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court, including all such powers as are vested in the Supreme Court of Trinidad and Tobago immediately before the commencement of this Constitution.
- 101(1)** The Judges of the Court of Appeal shall be the Chief Justice, who shall be the President of the Court of Appeal, and such number of Justices of Appeal as may be prescribed.
- (2)** The Court of Appeal shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

- 110(1)** There shall be a Judicial and Legal Service Commission for Trinidad and Tobago.
- (2)** The members of the Judicial and Legal Service Commission shall be— (a) the Chief Justice, who shall be Chairman; (b) the Chairman of the Public Service Commission; (c) such other members (hereinafter called “the appointed members”) as may be appointed in accordance with subsection (3).
- 111(1)** Subject to the provisions of this section, power to appoint persons to hold or act in the offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Judicial and Legal Service Commission.
- 136(1)** The holder of an office to which this subsection and subsections (3) to (11) apply (in this section referred to as “the officer”) shall vacate his office on attaining the age of sixty-five years or such other age as may be prescribed.
- (2)** Notwithstanding that he has attained the age at which he is required by or under subsection (1) to vacate his office, a Judge may, with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
- (3)** Nothing done by the officer shall be invalid by reason only that he has attained the age at which he is required under this section to vacate his office.
- (4)** The officer shall vacate his office if, with his consent, he is appointed a Senator or nominated for election to the House of Representatives.
- (5)** The salaries and allowances payable to the holders of the offices to which subsection (1) and subsections (3) to (11) apply or an office referred to in subsections (13) to (16) shall be a charge on the Consolidated Fund.
- (6)** The salary and allowances payable to the holder of any office to which subsection (1) and subsections (3) to (11) apply or an office referred to in subsections (13) to (16) and his other terms of service shall not be altered to his disadvantage after his appointment and for the purposes of this subsection, in so far as the terms of service of any person depend upon the option of that person, the terms for which he opts shall be taken to be more advantageous to him than any other terms for which he might have opted.
- (13)** Subsections (1) to (6) apply to the office of Judge.

- 137(1)** A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
- (2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.
- (3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a Judge other than the Chief Justice, represents to the President that the question of removing a Judge under this section ought to be investigated, then— (a) the President shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the President acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, from among persons who hold or have held office as a judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee; and (c) where the tribunal so recommends, the President shall refer the question accordingly.
- (4) Where the question of removing a Judge from office has been referred to a tribunal under subsection (3), the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, may suspend the Judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, and shall in any case cease to have effect— (a) where the tribunal recommends to the President that he should not refer the question of removal of the Judge from office to the Judicial Committee; or (b) where the Judicial Committee advises the President that the Judge ought not to be removed from office.

The LPA

Section 5. The purposes of the Association are—

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

Section 35

- (1) The rules contained in the Code of Ethics set out in the Third Schedule shall regulate the professional practice, etiquette, conduct and discipline of Attorneys-at-law.

Rule 36 (Third Schedule Part A Code of Ethics)

- 36(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.

36. I will first consider whether the conduct of the enquiry or investigation by the Law Association is ultra vires the Act and if not then consider whether it is in contravention of the provisions of the Constitution.

37. The purposes of the Law Association are set out in section 5 of the LPA. Mr. Hamel-Smith SC for the Law Association specifically relied on sections 5 (b), (f) and (g). He also placed reliance on rule 36 (4) of Part A of the Third Schedule to the LPA. He submitted that when read together they plainly empower the Law Association to take action where it reasonably considers that circumstances are such that the administration of justice and/or the rule of law are under threat or at risk of being undermined. He argued that section 5 (g) is sufficiently open and flexible to permit the Law Association to act in a variety of ways and that would include the investigation or enquiry it is conducting. I agree.

38. Section 5 (f) speaks specifically to the purpose of the Law Association being to promote, maintain and support the administration of justice and the rule of law. Where allegations are made in relation to the conduct of a judge or the Chief Justice that have the potential to negatively impact the administration of justice that must be of concern to the Law Association, particularly in the context of its purposes at 5 (b) and (f). Section 5 (g) of the LPA gives to the Law Association power to do such things as are “incidental or conducive to the achievement of its purposes” set out at section 5 (a) to (f).

39. The power contained in section 5 (g) must include a power to make representation which would include a power to make a complaint to the appropriate authorities in respect of the conduct of a judge or Chief Justice that has the potential to impair the administration of justice and the rule of law. Rule 36 (4) of part A of the Third Schedule to the LPA clearly recognizes that an attorney-at-law may make a complaint to the appropriate authorities and if an attorney-at-law may do so there is no justifiable reason why the Law Association cannot exercise a similar power in the light of its purpose at section 5 (b) “to represent and protect the interests of the legal profession” and at section 5 (f) “to protect, maintain and support the administration of justice and the rule of law.” This is consistent with what the trial Judge held. As she said the Law Association like any other citizen may make a complaint about a judge or the Chief Justice. There has been no appeal from this finding and indeed there has been no attempt to dispute that finding in this appeal.

40. *Meerabux v The Attorney General of Belize [2005] UKPC 12* was a case involving a judge of the Supreme Court of Belize against whom complaints were made by the Bar Association of Belize to the appropriate authority against the backdrop of legislative provisions similar to the LPA. The Privy Council made no adverse comment of the fact that the Bar Association had made complaints. Indeed to the contrary Lord Hope, speaking on behalf of the Privy Council, stated (at para. 28):

“Section 40 (3) of the Legal Profession Act provides that the objects of the Bar Association include representing the Bar in matters concerning the profession in relation to the courts and promoting the proper

administration of justice: paras (d) and (e). So it must also 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 that was convened to inquire into the matter...”

This supports the conclusion that the Law Association may complain to the appropriate authorities in respect of the conduct of a judge or Chief Justice.

41. If sections 5 (b), (f) and (g) when read together empower the Law Association to make a complaint to the relevant authorities why would the power to conduct an enquiry or investigation before making the complaint so as to inform itself whether it is appropriate so to do be excluded or not permitted. There is in my judgment no reasonable interpretation of the provisions of the LPA that would support a conclusion to exclude the power to conduct an enquiry or investigation into the conduct of a judge. As the Law Association argues section 5 (g) is sufficiently flexible so as to be permit the Law Association to act in a wide variety of ways to address an infinite number of situations which may arise and require action by the Law Association to achieve its purposes. Section 5 (g) is certainly wide enough to authorize an enquiry or investigation into allegations relating to the misconduct of a judge or Chief Justice. It is no proper objection to that conclusion that the Law Association does not have any disciplinary powers over the Chief Justice since the power to investigate or enquire can be seen as incidental or conducive to the achievement of its purposes clearly defined at 5 (b) and (f).

42. Further I agree with the Law Association that an interpretation of the LPA so as to exclude the power of the Law Association to conduct an enquiry or investigation is likely to confine it to a passive role in respect of complaints made of a judge or Chief Justice or to serve as a postbox for such complaints. That could not have been the

intention of Parliament. More is expected of the Law Association in the light of its purposes at 5 (b) and (f) and the specific power given to it by 5 (g). It seems to me that the Law Association would be expected to act responsibly and reasonably and inform itself whether there is any basis to the allegations of misbehaviour made against a judge or Chief Justice.

43. The power to support, promote and maintain the administration of justice and rule of law in my judgment must include the power to support a judge (which would include the Chief Justice) against unjust criticisms. This is specifically referred to at rule 36 (3) of Part A of the Third Schedule to the LPA in relation to an attorney at law and in my judgment is a power that the Law Association has as well. The rule may be viewed as signaling a specific power that the Law Association would have in order to achieve its purpose to promote, maintain and support the administration of justice and the rule of law. How can the Law Association be expected to properly fulfill that role if it cannot inform itself, if the criticisms made of the Judge are unjust. It seems to me that a perfectly reasonable interpretation of the Law Association's powers is that it would have the power to conduct an enquiry or investigation to do so.

44. In my opinion, in view of the breadth of its powers contained at 5 (g) for the achievement of its purposes, if it was intended by Parliament that the Law Association ought not to conduct an enquiry or investigation for the achievement of its purposes then that would have to have been specifically excluded.

45. In my judgment therefore the LPA empowers the Law Association to conduct an investigation or enquiry to achieve its purposes at 5 (b) and (f). In this case it is common ground that the allegations made against the Chief Justice are serious and can damage the judiciary and undermine public confidence in the administration of justice and the rule of law. The Law Association has appointed a committee to conduct an investigation or enquiry to ascertain/substantiate the facts upon which the allegations made against the Chief Justice are based. The intention of the Law Association is to obtain the advice of two Queens' Counsel on the report of the Committee and then determine the way forward at a meeting of its members convened for that purpose. As noted by the Judge, the potential end game of that may be to consider whether there is a sufficient basis to refer the question of misbehaviour of the Chief Justice to the Prime Minister for his consideration pursuant to section 137 of the Constitution. That, of course, is only one possible outcome. The Law Association in discharge of its purpose to promote, maintain and support the administration of justice and the rule of law may support the Chief Justice if there is no basis to the allegations. The Law Association sees it as its duty to do so in view of the purposes for which it was established. That is a possible outcome as well. In the circumstances it seems to me that the purpose of the investigation or enquiry clearly falls within section 5 (f) to support, promote and maintain the administration of justice and rule of law and 5 (b) to represent and protect the interests of the legal profession. In my judgment the Law Association is empowered by the provisions of the LPA to conduct the investigation and enquiry it is conducting.

46. I therefore do not agree with the Judge's conclusion that the Law Association in conducting the enquiry or investigation is acting ultra vires the Act.

47. Mr. Benjamin in submitting on behalf of the Chief Justice that the LPA does not give the Law Association the power to conduct the enquiry or investigation laid emphasis on the long title to the LPA to which I have referred earlier. He submitted in reference to the long title that the conduct of the investigation or enquiry is no part of the reorganization and regulation of the legal profession or the qualification, enrollment and discipline of its members or for other matters relating thereto. He argued that the words "for other matters relating thereto" are to be construed ejusdem generis the reorganization and regulation of the law profession and the qualification, enrolment and discipline of its members.

48. The effect of that submission seems to me to be that the long title should restrict the meaning of the provisions of the LPA. So that although the LPA may plainly authorise the Law Association to do something unless that is referable to the long title, the LPA is to be construed in such a way that the Law Association cannot do that act. Therefore if the power to conduct the enquiry or investigation is not captured by the words of the long title then the Law Association cannot conduct the enquiry or investigation. That however is to place too great a reliance upon and attach too great an importance to the long title.

49. The use of the long title in the interpretation of an enactment is put this way in *Bennion on Statutory Interpretation* (6thed.) (at pp 681-2):

We may summarise by saying that the long title is an unreliable guide in interpretation, but should not be ignored. It may arouse doubt where it appears to conflict with the operative parts of the Act; and this doubt should be resolved in the usual way. It is not right to say with Slade LJ that the court is not entitled to look at the long title unless the operative provisions are ambiguous. This strikes at the basis of the informed interpretation rule, for an inconsistency in the long title may impute an ambiguity. Lord Simon of Glaisdale said:

“In these days when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case an ambiguity - It is the plainness of all guides to the general objective of a statute that it will not always help as to particular provisions”

Nevertheless Judges still mistakenly say the long title may can be considered only in face of ambiguity.”

I accept that summary of the law as correct. The long title is therefore a guide to the general objectives of the act. It is, however, an unreliable guide to interpretation and will not always be helpful as to particular provisions. It may be of particular relevance where there is a conflict between it and the operative parts of the act in that it may arouse doubt.

50. This, however, is not a case where there is a conflict between the long title and the operative parts of the LPA. The operative parts of the LPA seem to me to cover ground that is not referred to in the long title but do not conflict with it. Like long titles generally the long title to be LPA describes the general objectives of the LPA, but I do

not understand the function of the long title to refer to everything contained in the act. Further the emphasis should be on the particular provisions of the act, in this case the LPA, which seem to me to bear the plain meaning referred to above. If the long title were to be used in a manner submitted by Mr. Benjamin it would not be possible to find authority in the LPA that would permit the Law Association to complain to the relevant authorities. But there is no dispute that the Law Association has that power. There is in my judgment no warrant to restrict the plain meaning of the sections of the LPA referred to above by reference to its long title.

51. It is also possible, as submitted by the Law Association, to arrive at the same conclusion that the Law Association has a power to conduct the investigation or enquiry by placing reliance on the duty of a decision maker to take reasonable steps to acquaint himself with information relevant to his decision. This is sometimes known the Tameside duty. The principle derives its name from Lord Diplock's speech in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. In that case the question arose whether the decision of the Secretary of State was reasonable. Lord Diplock put the question for the court's determination in these terms (1064-5):

“ It is not for any court of law to substitute its own opinion for [the Secretary of State]; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were relevant to what he had to consider:... Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right

question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

52. Applied to the Law Association in the context of this case, the Tameside duty may require an investigation of the facts before exercising its powers to, for example, promote, maintain and support the administration of justice and the rule of law. So for example in relation to its power to support judges against unjust criticisms as an example of its purpose to support, maintain and promote the administration of justice and the rule of law, it is not reasonable to expect the Law Association to properly perform that power before conducting sufficient enquiry or investigation into the relevant facts. The absence of such a duty as the Law Association submits is to sanction irrationality and caprice.

53. It may well be that because of the Tameside duty the question that usually engages the court is whether the decision maker has discharged his obligation to take reasonable or adequate steps to inform himself, not whether he has any duty to do so (**see for example *BZ 2001 SC 2 Meerabux v The Attorney General***).

54. In view of the above I must now consider whether the power of the Law Association to conduct an investigation or enquiry into the allegations concerning the conduct of the Chief Justice is proscribed as by the provisions of the Constitution.

55. Mr. Benjamin referred to several provisions of the Constitution sections, which I have set out above, namely, sections 2, 99, 101, 110(1) (2), 111 (1), 136 (1)-(6) (13), 137. He submitted that these provisions touch on and concern the independence of the judiciary and the security of tenure of Judges and are to be construed sensibly and literally. He argued that the Constitution at section 137 provides a mechanism for investigating the conduct of a judge including the Chief Justice. He submitted that that is the mechanism Parliament chose to establish to regulate the power to investigate a judge or Chief Justice. It is an exclusive procedure. It exists for the protection of the independence of the judiciary against not only the executive but from any source from which may come a threat to the independence of the judiciary. By embarking on the enquiry or investigation, the Law Association is doing the very thing that is required by the tribunal under section 137 (3) and it has trespassed into its territory and run afoul of the Constitution. It could not have been the intention of the framers of the Constitution, it was submitted, to allow for a parallel investigation since that can be detrimental to a judge or Chief Justice and by extension the administration of justice and infringe on the Judges' security of tenure and the independence of the Judiciary.

56. Mr. Benjamin is of course correct that the sections to which he refers touches on the independence of the judiciary. They deal, inter alia, with the method of appointment of Judges and their removal and are designed to ensure a degree of independence. The question in this appeal is, however, whether they proscribe the conduct of the Law Association, which by the LPA it is authorised to do. Mr. Benjamin's main focus was on section 137, which deals with the removal of a judge or Chief Justice from office.

57. Section 137 provides that a judge (which includes the Chief Justice (see section 3 of the Constitution) shall not be removed from office except in accordance with the provisions of the section (see section 137 (1)). It further provides that a judge may only be removed for inability to perform the functions of his office (whether arising from infirmity of mind or body or from any other cause) or for misbehaviour.

58. Section 137 (3) sets out the process for the removal of a judge. In the case of a Chief Justice, the process that may end with his removal is a multi-stage process. It begins with the Prime Minister representing to the President that the question of the removal of the Chief Justice from office ought to be investigated. That is stage 1. Stage 2: The President then appoints a tribunal. Stage 3: The tribunal enquires into the matter and reports to the President and recommends whether she should refer the question of removal of the Chief Justice from office to the Judicial Committee of the Privy Council (the Judicial Committee). Stage 4: Where the tribunal so recommends, the President shall refer the question accordingly for the determination of the Judicial Committee. And stage 5: The Chief Justice shall be removed from office by the President where the Judicial Committee has advised the President he ought to be removed.

59. The process outlined at section 137 as it relates to the removal of a Chief Justice, therefore, starts with the Prime Minister representing to the President that the question of his removal ought to be investigated. While the section provides for the exclusive

procedure for the removal of the Chief Justice from office, the section does not refer at all to a person who may complain to the Prime Minister and who may perhaps be the trigger that may cause the Prime Minister to make the representation to the President. The section on its face therefore does not refer to the conduct of a person who may wish to investigate allegations made against the Chief Justice for the purpose of determining whether or not to make a complaint to the Prime Minister. On a literal interpretation of the section, therefore, it does not speak to such conduct and does not prohibit it. On a literal construction the section does not prohibit what the Law Association is doing. The same is true of the other sections of the Constitution to which Mr. Benjamin referred. They do not on their face prohibit the Law Association from conducting the investigation or enquiry.

60. However as was said in *Ferguson v The AG [2016] UKPC 2* constitutional instruments fall to be interpreted in the light of a number of fundamental principles which are commonly left unstated but are inherent in a democracy and in conventions inherited from the period before they were adopted. The Constitution of Trinidad and Tobago follows what is referred to as the “Westminster Model”. One of the fundamental principles applicable to such constitutions, including the Constitution of Trinidad and Tobago, is the qualified separation of powers. In *Ferguson* that principle was explained in this way (at para 15):

“One of the fundamental principles of the Constitution is the qualified separation of powers. It is qualified because the “Westminster Model” has never required an absolute institutional separation between the three branches of the state. But the relations between them are subject to restrictions on the use of its constitutional powers by one branch in a

manner which interferes with the exercise of their own powers by the others. *In Hinds v The Queen* [1977] AC195, 212-213 Lord Diplock, speaking of the Constitution of Jamaica said:

“...a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new Constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the Constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to judicial instruments upon which this governmental structure is adopted that the absence of express words to that effect does not prevent that the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively....”

All Constitutions on the “Westminster Model” deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the Judiciary which are designed to assure to them a degree of independence from the other two branches of government.... What...is implicit in the very structure of a Constitution on the “Westminster Model” is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution:...”

The question then is whether one can derive from the Constitution when construed in the light of the principle of the separation of powers, a restriction on the power given to the Law Association by the LPA to conduct the investigation or enquiry.

61. To answer that question it is appropriate to determine the purpose that the principle of the separation of powers serves. There is little doubt that the aim of the principle is to protect against one branch of the state trespassing upon the province of the other. This is apparent from the extract of the judgement in *Hinds v The Queen* that is quoted in *Ferguson* as above referred to. The same point is made, perhaps more starkly, in *Ahnee v DPP [1999] 2AC 294*, a case in which the Privy Council considered the Constitution of Mauritius, which is also based on the “Westminster Model”. Lord Steyn, after considering the structure and provisions of the Constitution stated (at p303):

“From these provisions the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it....”

This applies with equal force to the Constitution of Trinidad and Tobago.

62. By seeking to protect against one branch of the state encroaching on the powers of the other, the principle of the separation of powers avoids the concentration of the power of the state in any one branch and the potential for the abuse of power by any one branch if it were otherwise and in so doing protects the liberty of the citizen. This point was made in very emphatic language in the Federalist papers (Federalist no. 47) referred to the Court by the Law Association in which it was said:

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.”

63. In the case of the judicature, by seeking to protect the exercise of judicial power from encroachment by the other branches of the state, which would otherwise have the power to do so, it serves the independence of the judiciary. As Lord Bingham noted extra judicially when discussing the principle of judicial independence:

“What does the principle mean? It means, broadly, that judges should not be liable to be removed or in any way penalized save for gross personal misbehaviour. This does not of course protect a judge who is shown to be corrupt, persistently drunk, incurably idle, or otherwise unfit to hold office. But it does protect a judge from being penalized on account of his judicial decisions, not only

by removal but by reduction of salary, banishment to a distant court far from his home and family, or any other detriment short of removal. Protect the judge against whom? The answer is clear: “Against the authority which would otherwise have power to remove him, dock his salary, or penalize him, which would almost always be, in one guise or another, the executive.” (see Tom Bingham: Lives of the Law: Selected Essays and Speeches 2000-2010 at p 145)

64. The principle of the separation of powers is therefore designed to achieve the separation of powers between the three branches of the state and to protect against one branch of the state exercising the powers of the others. In so doing the principle protects the independence of the judiciary. It also protects the citizen from the potential abuse of the power of the state if it were to reside in one arm. I, however, cannot see the relevance of that to the conduct of an enquiry or investigation by the Law Association to determine whether to make a complaint to the Prime Minister in respect of the conduct of the Chief justice which every citizen may do or to support the Chief Justice. In my judgment it is not relevant.

65. In the submissions filed on behalf of the Chief Justice, the point was made that the Law Association is a public authority in that it exercises public powers in relation to the regulation of the legal profession and the discipline of its members. While that is so, the Law Association for the purposes of the principle of separation of powers cannot be regarded as a part of the state. It certainly cannot encroach on the province of the judiciary. In the words of Lord Bingham, it cannot remove the judge, dock his salary or penalise him and by conducting the enquiry or investigation it is not doing so.

66. In my judgment it is not possible to arrive at a construction of the Constitution in the light of the principle of the separation of powers that would proscribe the investigation or enquiry of the Law Association.

67. Mr. Benjamin referred the court to *Rees v. Crane* [1994] 2 AC 173 to support his argument that the Law Association's enquiry or investigation offends against the Constitution but that case does not provide any such support.

68. This case concerned a former judge of the Supreme Court, namely Crane J. The Chief Justice at the time, Bernard CJ, after receiving complaints in relation to Crane J did not include him on the roster of judges who were to sit in court for the following term. Subsequently the Judicial and Legal Service Commission (the JLSC) pursuant to section 137 of the Constitution took a decision to make a representation to the President that the question of removing the Judge for inability to perform his functions due to bodily infirmity and or misbehaviour ought to be investigated. One of the issues in the case was whether the non-inclusion of the Judge on the roster was lawful.

69. The Privy Council noted that the Chief Justice had administrative functions that he could lawfully exercise. However the Privy Council stated (at pp 187-8):

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

other ways. The issue of the present case is thus whether what Bernard CJ did was merely within his competence as an administrative arrangement or whether it amounted to purported suspension.”

It was held that what Bernard CJ did went beyond mere administrative arrangements and amounted to a wrongful suspension.

70. *Rees v. Crane* is of course quite different from this case. What Bernard CJ did in that case exceeded his administrative powers and amounted to a de facto suspension of the Judge which he had no power to do. The Judge could only be removed or suspended in accordance with section 137. Bernard CJ sought to suspend him in other ways than provided by section 137. What the Law Association is doing amounts to neither the suspension nor the removal of the Chief Justice. The fact that the Constitution provides that a judge, including the Chief Justice, cannot be removed or suspended in other ways except as identified in section 137 has no relevance to what the Law Association is doing. It has not and cannot remove or suspend the Chief Justice. It is conducting an investigation or enquiry which may lead it supporting the Chief Justice or making a complaint to the Prime Minister, which like every other citizen it may make.

71. Mr. Benjamin also made reference to the role of the Judicial Legal Service Commission in the removal of a Judge as was explained in *Rees v. Crane*. In summarising the contentions of the appellants in *Rees v. Crane* it was noted in the judgement of the Privy Council that the JLSC merely initiates the process and it does no more than to represent to the President that the question of removal of a judge ought to be investigated. It makes no decision or determination; it finds no facts; it does not even state an opinion (see p 188). The same might have been said in relation to the role of the Prime Minister in the removal of a Chief Justice. It is however not clear from the judgment of the Privy

Council in *Rees v. Crane* whether those contentions, which were those of the appellants in that case, were cited with approval of the Board. However assuming that to be so, section 137 has no application, to what the Law Association is doing. As I mentioned above the section does not in any way refer to the conduct of anyone wishing to make a complaint either to the Prime Minister in the case of a Chief Justice, or to the Judicial and Legal Service Commission in a case of a Judge.

72. Mr. Benjamin's submission that Law Association has trespassed on the remit of the tribunal because the committee established by the Law Association is doing the same task as the tribunal appointed under section 137 will do, or as the trial Judge put it, the committee is seeking to shadow the procedure set out in section 137, in my judgment takes the matter no further. The committee appointed by the Law Association in pursuance of its powers under the LPA and the tribunal that can be appointed under section 137 of the Constitution are simply not the same. The tribunal is of constitutional relevance and its recommendation is of binding effect. If it recommends to the President whether the question of the removal of the Chief Justice should be referred to the Judicial Committee, the President is under an obligation to refer it. The committee is far removed from that. It is of no constitutional status and its report has no binding effect on the Chief Justice or anyone else for that matter.

73. Mr. Benjamin further submitted that the Court should adopt a consequential construction. Uppermost in this approach, it was submitted, should be the independence of the judiciary. He argued that by conducting what is in effect a shadow or parallel

investigation and the course the Law Association proposes to take on completion of the report by the committee may add to the vitriol of the articles appearing in the press in relation to the conduct of the Chief Justice. This can prejudice public opinion and undermine the independence of the judiciary and the administration of justice. It could not have been the intention of the framers of the Constitution to permit such an enquiry or investigation.

74. *Bennion on Statutory Interpretation* (6th edition) says this of the consequential construction of an enactment (at pp783-5):

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

.....

... Consequential construction requires the results of adopting each of the constructions to be assessed. The position was thus described by Romer LJ: “It seems to us that on the language of [the section] neither the view of [the defendant] nor that of the plaintiff can be said to obviously wrong. The court, then, when faced with two possible constructions of legislative language, is entitled to look at the *results* of adopting each of the alternatives respectively in its quest for the true intention of Parliament.

.....

.... the consequences of a particular construction may be regarded as ‘adverse’ if they are such that in the light of the interpretative

criteria the court views it with disquiet. Any other consequences (whether neutral or positively advantageous) may be called 'beneficent'..."

I think these observations on the consequential construction of an enactment provide a convenient way to consider the submissions of Mr. Benjamin in relation to the construction of the Constitution he proposes.

75. I may say at the outset that the adverse consequences of the construction proposed by Mr. Benjamin far outweigh any beneficent consequences with the result that the proposed construction cannot be adopted. I say so for the following reasons.

76. First, in the course of argument Mr. Benjamin conceded that the media is free to conduct an investigation into the Chief Justice's conduct. He, of course, also accepted that section 137 does not prevent a criminal investigation into the conduct of a Chief Justice. Mr. Benjamin's position however was that although a criminal investigation may be conducted and the media may also carry out the investigation, section 137 should be construed in such a way so as to prohibit an investigation by persons or bodies of a particular weight such as the Law Association since, as he put it, it comes with the imprimatur or the gravitas of the Law Association. It was submitted that ordinary members of the public believe such persons or bodies have the right to investigate and decide the truth or not of the allegations against the Chief Justice and that process alone does damage to the judiciary.

77. What is being suggested is that section 137 should be interpreted to proscribe an investigation or enquiry by only certain citizens of the country. That is highly discriminatory and has the taste of ad hominem legislation. That could have been the intention of the framers of the Constitution. This is clearly an adverse consequence.

78. Second, the proposed construction would impinge on the citizen's fundamental rights and freedoms guaranteed by the Constitution. I refer specifically to the right to freedom of thought and expression guaranteed by section 4 (i) of the Constitution. This right includes the right to form, hold and exchange opinions and to receive and impart information and ideas. It is of course not an unqualified right. The law of defamation and the offence of scandalising the court place limits on the right. But proscribing the enquiry or investigation would go beyond the limits established by those laws as that will suppress the ability of the Law association to receive any information of whatever quality whether it is defamatory of the Chief Justice or amounts to the offence of scandalising the court. No useful or constitutional purpose can be served in so doing. Indeed to do so would contradict the democratic notions of our society and the expectation that a judge's conduct can be the subject of public scrutiny and comment.

79. Third, I accept that an investigation or enquiry, if it concludes that the allegations are not baseless, can be harmful to the judiciary and the administration of justice. But an investigation or enquiry may also conclude that the allegations are baseless and that can support the judiciary and strengthen public confidence in it. An investigation or enquiry,

therefore, cannot be looked upon as necessarily having an adverse effect. In those circumstances the investigation or enquiry may be regarded as neutral and therefore as having a beneficent consequence.

80. Fourth, if there is no investigation or enquiry, as this case has shown, the allegations do not die or disappear. Indeed as this has shown they may grow louder in volume. As I noted earlier the allegations are serious and they call into question the integrity of the Chief Justice. In the Chief Justice's own description they suggest he is corrupt.

81. In the *Statements of Principle and Guidelines for Judicial Conduct* (published by the Judicial Education Institute of Trinidad and Tobago for the Judiciary of Trinidad and Tobago), which is intended to provide guidance to judges and judicial officers and to afford the judiciary a framework for regulating judicial conduct, it is there provided, inter alia,:

“1.6 A Judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence in our democratic society. (see p7).

1.7 Judges individually and collectively should protect, encourage and defend judicial independence (see p8)

“Commentary

(1) In order that the integrity and independence of the judiciary may be preserved, a Judge shall observe high standards of conduct. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour. (see p.7)

.....

- (7) Public confidence depends upon the rule of law and the independence of the judiciary. Lapses and questionable conduct by judges tend to erode that confidence. Public acceptance of and support for court decisions depend upon public confidence in the integrity and independence of the bench. Judges therefore, share collective responsibility to promote high standards of conduct.”(see p11).

From those extracts of the *Statements of Principles and Guidelines* it is clear that a judges’ conduct and integrity are considered as very material to public confidence in the judiciary and his failure to observe appropriate standards of conduct serve to impair and undermine public confidence in the judiciary.

82. Allegations in the public domain impacting negatively on the conduct of a judge particularly where they are unanswered and are not refuted are capable of damaging public confidence in the judiciary and of impairing and undermining the judiciary. The mere existence of the allegations can have that effect. In the context of the consequential argument advanced by Mr. Benjamin the choice seems to be between proscribing an investigation or enquiry to ascertain/substantiate the allegations (where even without it the existence of the allegations can be detrimental to the judiciary), or permitting an investigation or enquiry that can establish the allegations are baseless or to determine that they are not. If the result is that the allegations are baseless that can be a positive thing for public confidence in the Judiciary. If the investigation or enquiry determines that the allegations are not baseless then it has the potential to lead to a complaint that may result in the removal of the object of the allegations by the process outlined in section 137 of the Constitution. Either of these outcomes can strengthen or reinforce

public confidence in the judiciary. It would seem to be an obvious choice in those circumstances that the enquiry or investigation should not be proscribed.

83. In all the circumstances the adverse consequences of the proposed consequential construction of the Constitution point ineluctably to the conclusion that it cannot be accepted and must fail.

84. But there are other fundamental problems in the way of a construction of the Constitution that would proscribe the investigation or enquiry by the Law Association.

85. One is that given Mr. Benjamin's submission that some persons lacking sufficient weight or gravitas may conduct an enquiry or investigation, the construction to accommodate that would require that words be read into the Constitution. Mr. Benjamin has not suggested what those words may be, but it seems to me that to do so would involve the encroachment of the judiciary on the territory of the legislature.

86. Another is that it is well settled that guaranteed rights may not be overridden by general or ambiguous words. If I am right in saying that to prohibit an investigation or enquiry would infringe rights and freedoms guaranteed by section 4, then an interpretation of the Constitution that allows for that cannot be accomplished without clear words to that effect. Here there are not even general or ambiguous words that can have that effect. There are in fact no words that can have that effect. It is inconceivable that the framers

of the Constitution would have intended that result. Indeed to the contrary, it is expressly provided at section 5 (1) of the Constitution:

“Except as is otherwise especially provided in this Chapter and in section 54 no law may abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognized and declared.”

The “Chapter” referred to in section 5 (1) is a reference to Chapter 1. Section 137 is not contained in Chapter 1 and section 54 is not relevant to this appeal. In view of section 5 (1), it is not possible to derive a limitation on the rights guaranteed by section 4 of the Constitution from section 137.

87. In view of the above, it is my opinion that the LPA empowers the Law Association to conduct the enquiry or investigation and that conduct is not proscribed by the Constitution. In the circumstances, I would allow the Law Association’s appeal. The Chief Justice’s counter appeal to which I have earlier referred, however, if successful, can have the effect of the Court quashing the decision of the Law Association to continue with the investigation or enquiry. I therefore turn now to the Chief Justice’s counter appeal and I will first address the question of apparent bias.

88. In the Chief Justice’s application for judicial review, the ground upon which he sought relief in relation to apparent bias was expressed in these terms:

“Further, the said decision, has the appearance of bias because the [Law Association] has previously passed a Motion of No Confidence against the [Chief Justice] and the fair-minded and

informed observer, having considered the facts would conclude that there is a real possibility that the [Law Association's] insistence on conducting an unauthorized and ultra vires enquiry and/or investigation to ascertain and/or substantiate allegations made against the Chief Justice is motivated by the [Law Association's] bias against the [Chief Justice].”

89. The no confidence motion referred to above related to a controversy that arose in or about April, 2017 concerning the appointment of Marcia Ayers-Caesar, the then Chief Magistrate, to the office of judge of the High Court even while she had over fifty unfinished part heard matters.

90. On May, 5th 2017 the Council of the Law Association received a petition from sixty-two members of the Law Association requisitioning a special meeting of its members to consider a motion calling on its members to resolve, inter alia, that the Law Association do express its loss of confidence in the Chief Justice and members of the JLSC and to call upon them to resign forthwith. As it was required to do (see section 23 of the LPA First Schedule Part A) the Law Association convened a special meeting. At the special meeting, which was held on June, 1st 2017, it was resolved, inter alia, that the Law Association do express its loss of confidence in the Chief Justice and members of the JLSC and called upon them to resign forthwith.

91. Kangaloo J. dealt with the issue of apparent bias in a single paragraph of her judgment where she stated at para 37:

“On the issue of bias, if this Court puts itself in the shoes of the fair-minded and informed observer, and looks at all the Affidavits filed herein, it notes that the Motion of No Confidence in relation to the appointment of Marcia Ayers-Caesar took place in May last year and resolutions were passed in relation to the Chief Justice and to other members of the Judicial and Legal Service Commission...The Court can find no apparent bias in the instant case on the part of the Law Association which would stem from those resolutions nor from the conduct of the Law Association as a body to date. The Court therefore [finds] that the ordinary fair-minded observer being informed of all the facts and sitting in Woodford Square, Harris Promenade or in Shaw Park would not consider that in all of the circumstances of this case the body or the entity which is the Law Association of Trinidad and Tobago can be found wanting in terms of bias and is therefore not guilty of apparent bias on this issue and the Court so finds in that regard.”

92. In his submissions before this Court, the Chief Justice conceded that the single event of the passage of the no confidence motion might not have been sufficient to support a case of apparent bias. However references were made to other additional matters namely:

- (i) In the face of the Prime Minister’s statement that he would not get involved in relation to the allegations against the Chief Justice, the Law Association expended time, effort and perhaps costs in appointing the Committee (with the President of the Law Association as the chairman of the Committee) to investigate the allegations and provided information to the press by way of updates of the Committee’s work and in answer to specific questions put to the President and the Committee by the press;
- (ii) The Law Association’s statement of December, 14th 2017 referred to earlier in this judgement in which it (a) referred to the Chief Justice’s conduct as “unacceptable and incomprehensible”; (b) stated that the Chief Justice’s failure to challenge the allegations has the potential to “irreparably bring the office of the Chief Justice into disrepute and by extension tarnish the entire Judiciary”; and (c) stated the Chief Justice’s continued silence was “nothing short of reckless”.

It was submitted on behalf of the Chief Justice that in the light of those facts (including the no confidence motion), the Law Association damaged irretrievably the perception that it is acting or could act independently or fairly. The Law Association expressed its views during the course of the investigation and enquiry in terms which were extreme and unbalanced as to throw doubt for all time on its ability to investigate the allegations objectively. In those circumstances and applying the test of apparent bias as laid down in *Porter v Magill [2002] AC 357* and accepted and applied in the jurisdiction (namely that the fair-minded and informed observer having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased) the fair-minded and informed observer would conclude that there was a real possibility that the Law Association is biased.

93. In response the Law Association made three submissions. First, that the Chief Justice now raises different grounds alleging apparent bias from that contained in his application namely (a) the President of the Law Association is also a member of the Committee established to ascertain/substantiate the allegations against the Chief Justice and (b) the statements made by the Law Association, and he should not be allowed to rely on them before this Court. Second, the test of apparent bias as laid down in *Porter v Magill* is not applicable on the facts of this case. And third, even if the Chief Justice can rely on the new grounds and the *Porter v Magill Test* is applied the fair-minded and informed observer would conclude that there is no appearance of bias.

94. With respect to the first submission of the Law Association, it is, I think, clear from the ground in relation to apparent bias as set out in the application of the Chief Justice that reliance was placed only on the no confidence motion. This is further made clear from what appears in the application at paragraphs 'n' and 'o' under the rubric "The said

decision has the appearance of bias.” Those paragraphs provide more detail in relation to ground of apparent bias and are as follows:

“n. The [Law Association’s] investigation has the appearance of bias; the [Law Association] has previously passed a Motion of No Confidence against [Chief Justice]. In the light of the Prime Minister’s publicly stated position of non-involvement referred to by the [Law Association] in its letter to the applicant dated January 20th, 2018 aforesaid, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [Law Association’s] insistence on conducting an investigation is motivated by the [Law Association’s] bias against the “Chief Justice”.

“o. This is especially so in light of the fact that when the No Confidence Motion was passed there had been no investigation and no findings of fact made against the Chief Justice. The No Confidence Motion was also passed against the Chief Justice when the allegations made dealt with his role and function as the Chairman of the Judicial and Legal Service Commission. Further the resolution itself contained other errors and irregularities.”

95. It is quite clear therefore that in relation to apparent bias the Chief Justice in his application placed reliance only on the no confidence motion. The Law Association contends that is inappropriate and unfair for the Chief Justice to now seek to advance the new grounds for claiming apparent bias since it was deprived of the opportunity to consider what further evidence it may be able to submit to address them. The following was advanced as two examples in respect of which further evidence may have been led: (1) to provide the court with the full context and circumstances in which it was determined that the President of the Law Association should be a member of the Committee and/or (2) to provide the Court with the full context and circumstances in which the Law Association made the statements that are now relied upon by the Chief Justice.

96. I accept the Law Association's submissions. The case the Law Association came to meet on the question of apparent bias in the Court below was that by passing the motion of no confidence in the Chief Justice, the informed fair-minded observer having considered the facts would conclude that the Law Association's insistence to continue the investigation, against the backdrop of the Prime Minister's statement, was biased. The attorneys-at-law for the Law Association would no doubt have taken their client's instructions on that basis and prepared its affidavit to meet it.

97. Although there was evidence before the Court of the statements made by the Law Association and that Mr. Mendes was a member and chairman of the Committee, those facts were not relied on in relation to apparent bias. Accordingly the Law Association was deprived of the opportunity to consider their relevance to apparent bias and to consider whether any further evidence should be led in response. In the circumstances I agree that it would be unfair to the Law Association to permit reliance on the new facts in relation to the ground of apparent bias.

98. I may mention that if the grounds of apparent bias were contested on the newly raised facts in the Court below without objection by the Law Association then that would certainly be a consideration in relation to the Law Association's objection that it would be now unfair for the Chief Justice to rely on those facts even though not pleaded. However that was not the case and a similar objection was taken by the Law Association in the Court below to the one now raised before this Court (see p 311 of the Respondent's Supplemental Record of Appeal.)

99. The second submission of the Law Association raises the issue as to the applicability of the *Porter v Magill* test of apparent bias to the facts of this case. The test of apparent bias as laid down in *Porter v Magill*, as I mentioned earlier, is whether the fair-minded and informed observer having considered the relevant facts would conclude that there is a real possibility that the tribunal was biased. The test is based on the principle that a judge, in performing his judicial duty, must bring to it not only an unbiased or impartial mind but the appearance of impartiality as well. The test serves to support the right of a citizen to a fair hearing and establishes the judicial standard of impartiality. Of course the test applies not only to judges but to other decision makers.

100. In *Locabail (U.K.) Limited v Bayfield Properties Limited [2000] Q.B. 451* the focus of Lord Bingham was on tribunals determining the civil or criminal rights and liabilities of parties. He stated that “In the determination of the rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal”. I have not come across a case where the *Porter v Magill* test has been applied where the tribunal or decision maker would not fit that broad categorisation as one which or who is determining the civil or criminal rights and liabilities of parties.

101. What the Law Association is doing cannot fit that description. It is conducting an investigation or enquiry to ascertain/substantiate the facts in relation to the allegations, and then obtain Queen’s Counsel’s advice in relation to its findings before convening a meeting of its members to determine what course, if any, it should take. That decision has no binding effect on the Chief Justice and in my view cannot be described as a

determination of his civil rights and liabilities or for that matter a determination that is binding or would impose any liability on him.

102. It would seem that a more apt analogy is to view the Law Association as a potential complainant. As the Law Association pointed out, the complainant in a criminal context is not required to meet the *Porter v Magill* test or in other words is not required to satisfy the judicial standard of impartiality. Indeed a criminal complainant, even where his complaint does not result in a conviction, does not have any liability at common law to the person who was prosecuted as a consequence of his complaint, unless he acts with malice. A criminal prosecutor also is not required to satisfy the *Porter v Magill* test. What is required is that the tribunal who determines the guilt of the accused is impartial (*See R (Haase) v District Judge Nuttall [2009] 2 WLR 1004 para 19.*) Similarly a claimant in a civil matter need not satisfy the test of apparent bias.

103. In the circumstances, given that the committee of the Law Association is not determining any of the Chief Justice's rights or liabilities or coming to a determination that is binding on him, that a criminal prosecutor or complainant is not required to satisfy the *Porter v Magill* test, and so too a complainant on the civil side, in my judgment the Law Association would not be required to meet the test. I hold therefore that the *Porter v Magill* test is not applicable to Law Association on the facts of this case.

104. In the event that I am wrong in my conclusion regarding the new facts that the Chief Justice now seeks to rely on and applicability of the *Porter v Magill* to the facts of this case, I propose to consider the issue of apparent bias taking the new facts in account and applying the *Porter v Magill* test of apparent bias.

105. The *Porter v Magill* test is an objective one and requires the Court to ascertain from all the relevant circumstances whether the fair minded and informed observer having considered the relevant facts would conclude that there was a real possibility of bias. The contention of the Chief Justice is that the fair-minded and informed observer will conclude there is an appearance of bias having considered that (a) the no confidence motion; (b) the President of the Law Association is a member and chairman of the committee; (c) the statements made by the Law Association and (d) the Law Association's insistence on proceeding with the investigation notwithstanding the position of the Prime Minister that he would not get involved.

106. With respect to the President of Law Association being a member and chairman of the Committee it is however not apparent what is being made of this by the Chief Justice. This was raised as a consequence of a comment made by the trial Judge where she stated (at para. 30):

“The Court also asks itself, as was an issue in the *Meerabux* case, what was the necessity for the President of the Law Association to also be the President (sic) or indeed even a member of the Committee to ascertain/substantiate the allegations against the Honorable Chief Justice?”

107. In the *Meerabux* case an issue of apparent bias arose which related to a member of the Bar Association of Belize being the Chairman of the Belize Advisory Council (BAC) which is the body under the Constitution of Belize that recommends to the Governor General whether a judge of the Supreme Court should be removed for inability to perform his function or for misbehaviour. In short the BAC performs similar functions as the tribunal appointed under section 137 of our Constitution. Apparently the relevant

statutory provisions in Belize permitted a member of the Bar Association to be a Chairman of the BAC and required him to preside in the case of a removal of a judge. In *Meerabux*, complaints of the judge's misbehaviour were made by the Bar Association of Belize. So in essence a member of the Bar Association was sitting as a Chairman of the tribunal to hear complaints made by his Association against the judge. It is in that context that the issue of apparent bias arose.

108. However, in this jurisdiction the President of the Law Association is not required to sit on the tribunal established under 137 of the Constitution. In my view therefore the membership of the President on the committee (even as chairman of the Committee) cannot be a ground of objection and is not a factor in respect of which the fair-minded and informed observer would conclude there was any possibility of bias.

109. In relation to the statements of the Law Association of which the Chief Justice complains, the fair-minded and informed observer would be aware of the entire circumstances in which the statements complained of were made. He would be aware that what the Law Association is complaining of was the Chief Justice's 'steadfast refusal to refute' or challenge the allegations and to remain silent in the face of the allegations and that the Law Association in making the statements was not making any finding as to the truth of allegations or the suitability of the Chief Justice to hold office. In those circumstances he would not conclude that there was any real possibility of bias.

110. In relation to the position of non involvement attributed to the Prime Minister, The Law Association in its letter of January 20th 2018 referred to the "Prime Minister's publicly

stated position of non involvement”. The Judge does not appear to place reliance on this but instead referred to statements (at para. 10 of her judgment), which, although not in any of the affidavits in these proceedings, according to the Judge was in the public domain since they were made by the Prime Minister on December 6th 2017 during a nationally televised interview. The Judge concluded from those statements that the Prime Minister had made his position clear that he would not get involved in relation to the allegations against the Chief Justice and that the investigation or enquiry was being conducted with a view to change the Prime Minister’s mind. However I think that it is relevant to note that what appears in the judgment of the Prime Minister’s statements, amount to no more than the Prime Minister saying that he would not “wily nilly” decide that he is unhappy with the Chief Justice and “jump in and fix it” and that “the Constitution spells out how you can get rid of a Chief Justice”. The Prime Minister does not appear to be saying that he has taken a firm position that he will not involve himself in the allegations against the Chief Justice. In other words there is nothing from the statements attributed to the Prime Minister, or for that matter from the statement in the Law Association’s letter of January 30th that would suggest that the Prime Minister would not consider a complaint made to him by the Law Association in the context of section 137 of the Constitution. In those circumstances the informed and fair minded observer would not conclude that there was a real possibility of bias by the Law Association proceeding with the investigation or enquiry to determine whether or not it should make a complaint to the Prime Minister. .

111. Even if the statements of the Prime Minister are more definitive than I have made them out to be, the informed fair minded observer would not think that by conducting the

enquiry or investigation with a view to change the Prime Minister's mind, as the Judge has said, there is a real possibility of bias. He would know that Trinidad and Tobago is a free and democratic country and that such conduct is what can be expected in such a country.

112. The informed and fair-minded observer would also be aware of the following:

- (i) the Law Association's purpose is to promote, maintain and support the administration of justice and the rule of law;
- (ii) that the allegations have the potential to damage the Judiciary and impair confidence in the administration of justice;
- (iii) that when the first allegations appeared in the press, the council of the Law Association issued a statement that one of the allegations was not substantiated and indicated to the Chief Justice that he should respond to the other allegations;
- (iv) that when the allegations appeared in the press and the Chief Justice failed to respond, in view of its purpose to promote, maintain and support the administration of justice and in exercise of its power under the LPA, the council of the Law Association established a committee to ascertain/substantiate the facts on which the allegations are based;
- (v) the Law Association has called on the Chief Justice to provide his response to the allegations and that they will be considered while acknowledging that it has no power to compel the Chief Justice to respond;
- (vi) that the Law Association has indicated that it would not be rushed to complete the exercise that it has undertaken to ascertain/substantiate the facts;

- (vii) the council of the Law Association has retained two Queen's Counsel for the purpose of obtaining their advice, prior to convening a general meeting of its members to decide on the way forward;
- (viii) the Law Association has recognised that it has no disciplinary power over the Chief Justice;
- (ix) a possible outcome of the work of the committee is that it may result in the Law Association supporting the Chief Justice against what maybe unjust and unfounded allegations;
- (x) if a complaint is made to the Prime Minister by the Law Association arising out of the work of the Committee and the advice of the Queen's Counsel and the decision of the proposed meeting of the Law Association, that any decision that may impose any liability on the Chief Justice is not the decision of the Law Association; and
- (xi) the no confidence motion has nothing to do with the allegations that are now the subject of the decision of the Law Association to establish the committee and continue the enquiry or investigation

113. The fair minded and informed observer would know therefore, that the statements complained of by the Chief Justice were made in relation to Chief Justice's failure to take steps to respond to the allegations and that they were not findings as to the truth of the allegations or the suitability of the Chief Justice to hold office. He would not conclude that from the statements made that the Law Association would not be able to investigate the allegations impartially. He would know that the committee was established by the council of the Law Association in response to very serious allegations concerning the conduct of the Chief Justice after the Chief Justice failed to respond to them and in the exercise of the Law Association's power to promote, maintain and support the administration of justice. He would know that a possible outcome of the

work of the committee may be that the Law Association would support the Chief Justice. He would know that there could be no objection to the President of the Law Association being a member and chairman of the committee. He would know that although the Law Association has no power to compel the Chief Justice to respond and exercises no disciplinary power over him, it has sought the responses of the Chief Justice and has indicated that it would consider his responses in ascertaining/substantiating the facts on which the allegations are based. He would know that any decision that imposes any liability on the Chief Justice is not the decision of the Law Association. He would also know that the Law Association has indicated that it would not be rushed and that it has retained the services of two Queen's Counsel to render advice. He would not think anything adverse in the Law Association conducting the enquiry or investigation in view of the statements of the Prime Minister. In my judgment the fair-minded and informed observer having considered the relevant facts would not conclude that the Law Association would be unable to investigate the allegations impartially. He would not conclude that there was a real possibility that the Law Association was biased.

114. In the circumstances in my judgment the counter appeal in relation to the claim of apparent bias fails.

115. This leaves for consideration the second issue raised on the counter appeal of the Chief Justice, which is whether the enquiry or investigation is being conducted in bad faith and/or in breach of the rules and/or requirements of natural justice. The Chief Justice contends that the trial Judge ought to have concluded that the enquiry and/or

investigation is being conducted in bad faith and/or in breach of the rules and or requirements of natural justice.

116. In the grounds as set out in the application for judicial review, the Chief Justice claims the investigation or enquiry is being conducted in bad faith and or in breach of the rules and or requirements of natural justice because:

- (a.) the Law Association has not provided the Chief Justice except when demanded copies of the material which the committee has been or is considering; and
- (b.) the Law Association has not undertaken to provide the Chief Justice with a copy of the committee's report.

117. In the submissions before this Court, the Chief Justice relied on the following additional matters to support the claim of bad faith and/or breach of the rules and/or requirements of natural justice;

- (1). the Law Association has not disclosed the processes or procedures adopted by the Law Association in the conduct of the investigation or enquiry and
- (2). the Law Association has not disclosed the terms of reference of the committee.

The Chief Justice submitted that in the circumstances he was not afforded a reasonable opportunity to put forward his case. He should have been provided with processes and procedures adopted by the committee as well as the material which formed or is to form the basis of the committee's report and should have been afforded a reasonable opportunity to put forward his own case on the processes, procedures and materials

and/or answer the allegations that the Law Association is investigating. Further, it is contended that by failing to disclose the aforesaid information that the Law Association acted in bad faith. It has also acted in bad faith in disclosing to third parties, including its membership, details of the charges against the Chief Justice and updates of the investigation and failed to say whether the report of the committee is available and to provide the Chief Justice with a copy.

118. The primary submission of the Law Association is that the allegations of bad faith and/or in breach of the rules and/or requirements of natural justice have not been made out. As preliminary points however, but without prejudice to its primary submission, the Law Association contends that the Chief Justice cannot raise the alleged failure to disclose the processes and procedures of the Committee since that was not a ground included in the grounds set out in his application for judicial review and he cannot raise an argument of bad faith before this Court as Mr. Benjamin in the course of argument effectively conceded the point when he alleged in the Court below that the investigation is being conducted by 'well intentioned' but 'misinformed' people. Meaning no disrespect to the Law Association, I do not propose to consider the preliminary points as in my view, even if I were in agreement with it, they would make no difference to the final outcome of the counter appeal on these issues.

119. In relation to natural justice, it is well settled that what is fair depends on the context and particular circumstances of each case. This was stated very plainly by Lord Mustill

(with whom the other members of the House of Lords agreed) in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560, where he stated;

“...(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and that is to be taken into the account in all its aspects....”

(see also *R (on the application of Eisai Limited v The National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 at para 27).

120. In this case, as I mentioned above, the Law Association is conducting the investigation or enquiry to ascertain/substantiate the facts on which the allegations are based and thereafter obtain legal advice before taking a decision on the way forward at a meeting of its members called for that purpose. It is possible that this may result in a complaint to the Prime Minister in the context of section 137 or may result in the Law Association supporting the Chief Justice against what the investigation or enquiry may reveal are unjust or unsubstantiated allegations. The Law Association has no power to compel the Chief Justice to participate in the investigation or enquiry and exercises no disciplinary functions in relation to the Chief Justice. The purpose of the investigation or enquiry is therefore essentially for the Law Association to advise itself as to what action, if any, it should take in the light of the allegations made against the Chief Justice. That is the context in which requirements of fairness or natural justice are to be considered.

121. In *Rees v Crane*, supra, which involved a judge against whom section 137 proceedings were commenced, a question arose whether the JLSC acted unfairly in not notifying the judge, before it represented to the President that the question of removing him ought to be investigated pursuant to section 137(3) of the Constitution, that the question of removing him was being considered and not giving him notice of the complaints and an opportunity to reply. The Privy Council held that the JLSC did act unfairly. The JLSC ought to have told the judge of the allegations made to the Commission concerning him and ought to have given him a chance to deal with them “not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply.” (*see Rees v Crane p196*)

122. The JLSC in *Rees v Crane*, to discharge its duty to act fairly, was therefore required to inform the judge of the allegations in a way that was necessary for him to reasonably make his reply and give him an opportunity to deal with them. If that is the obligation of the JLSC before it acts in relation to a judge under section 137 of the Constitution then the obligation of the Prime Minister in relation to the Chief Justice should be the same. In other words, the Prime Minister before representing to the President that the question of removing the Chief Justice ought to be investigated, should inform the Chief Justice of the allegations against him in a way that is necessary for him to reasonably make his reply and give him an opportunity to do so. If that is the obligation of the Prime Minister in the context of section 137, then one should not reasonably expect there to be a similar obligation on the part of the Law Association, where what it is in essence doing is seeking to inform itself as to what action, if any, it should take in relation to the allegations against the Chief Justice. At most that may result in a complaint to the Prime

Minister. If in that context there is a duty on the part of the Law Association to act fairly, fairness cannot demand of the Law Association any greater standard than what would be expected of the Prime Minister in the context of section 137. In my view therefore, if the Law Association informed the Chief Justice of the allegations against him in a way that was necessary for him to reasonably make his reply and gave him an opportunity to do so there can be no complainant that the Law Association has not acted fairly. There would be no need for the Law Association to have provided the Chief Justice with the materials that the committee is considering or has considered, or the processes or procedures by which it is acting or has acted or to provide a copy of the committee's report. In my view on the evidence the Law Association has met this obligation.

123. As is apparent from the facts I have set out earlier in the judgment, on November 30th 2017 Mr. Mendes and Mr. Prescott met with the Chief Justice and informed him of the Council's decision to establish a committee to ascertain/substantiate the facts on which the allegations were made against him in the press. There can be no suggestion that the Chief Justice was unaware of what those allegations were.

124. On January 20th 2018 the Law Association wrote to the Chief Justice and reminded him that it had established a committee to ascertain/substantiate the basis of the allegations. The letter (which is referred to at para. 19 of this judgment) identified that its purpose was to inform the Chief Justice of the matters which the committee considered of sufficient weight and to give the Chief Justice an opportunity to provide any information or give any response he chose. The letter then set out specific questions, which the Chief Justice was asked to consider and to respond to as he may deem fit.

125. There were also the letters of February 6th, 15th and 23rd 2018 (see paragraphs 22, 24 and 27 of this judgment) and the email of February 20th (see para. 25 of this judgment) to which reference has been made earlier and in which the Chief Justice was asked to respond to the allegations.

126. With respect to the allegations of bad faith, much of the argument was premised on the failure of the Law Association to provide the processes and procedures the committee of the Law Association adopted, the materials it considered or is considering and a copy of the report if it has been prepared. I have found that the Law Association, to meet its obligation of fairness, is not required to supply these documents or information. I am of the view that a failure to do so it cannot sustain a claim in bad faith particularly as the Law Association provided whatever the Chief Justice specifically requested.

127. However in relation to the complaint that the processes and procedures were not provided, it was argued on behalf of the Chief Justice that he was not informed of the means by which the committee collected or obtained material and/or evidence, whether that included written statements from persons, whether under oath, whether the statements were oral and if so whether they were recorded. There is also an objection that the Chief Justice was not provided with the terms of reference of the Committee. While the Chief Justice was not provided with much of that detail, he was informed of the process being followed by the Law Association. He was informed that the committee was appointed to conduct an investigation to ascertain/substantiate the facts in which the allegations were made, that it was the duty of the committee to prepare a report, that the council of the Law Association had resolved to retain two Queen's

Counsel to consider the report and advise the Law Association in the light of it and to convene a meeting of the members of the Law Association to consider such advice and obtain directions as to the way forward. In my view it is not possible to sustain a ground of bad faith in view of what was provided to the Chief Justice. This is more so in the light of the fact as the evidence bears out, that what the Chief Justice specifically requested was provided.

128. The other complaint in relation to bad faith was that the Law Association disclosed to third parties, including its members, particulars of the charges and updates on the allegations. This complaint cannot be in relation to the allegations that were in the public domain. Those allegations were published in the press and carried in it for some time. If the complaint does relate to such allegations then it can have no possible merit. My understanding of the complaint, however, is that the Law Association disclosed to third parties information that it had obtained during the course of the enquiry or investigation. The Chief Justice has, however, not provided any evidence of any instance when this was done. It is a bald general allegation unsupported by any evidence. The evidence does show that the President of the Law Association did respond to certain specific questions posed by the press but the evidence does not show that he disclosed any information obtained by the Law Association in the course of its enquiry or investigation.

129. In the circumstances in my judgment the counter appeal in relation to bad faith on the part of the Law Association and non-compliance with the principles and or requirements of natural justice fails.

130. In the circumstances I would allow the appeal and dismiss the counter appeal. I would also set aside the orders of the Judge below and dismiss the application for leave to apply for judicial review and the application for judicial review. I would also hear the parties on the question of costs.

Allan Mendonça,
Chief Justice (Ag.)