[2020] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 97/2014

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**THE ATTORNEY GENERAL**	**APPELLANT**
AND	**THE JAMAICAN BAR ASSOCIATION**	**1st RESPONDENT**
AND	**THE GENERAL LEGAL COUNCIL**	**2nd RESPONDENT**

Mrs Nicole Foster-Pusey QC, Solicitor General, Miss Tamara Dickens and Mrs Donia Fuller-Barrett, instructed by the Director of State Proceedings for the appellant

Maurice Manning, Miss Catherine Minto and Lenroy Stewart instructed by Wilkinson Law for the 1st respondent

No appearance for the 2nd respondent

17, 19, 20 July 2017 and 10 July 2020

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of F Williams JA. He has adequately dealt with all critical issues raised for consideration in this appeal and I agree with his reasoning and conclusion in disposing of them. There is nothing that I could usefully add except to extend an apology for the delay in the delivery of the judgment.

F WILLIAMS JA

Background

[2] By notice and grounds of appeal filed on 11 December 2014, the Attorney General ("the appellant") appeals against a decision of Sykes J (as he then was - hereafter referred to as "the learned judge") made on 4 November 2014. By orders outlined when giving the said decision, the learned judge exempted attorneys-at-law from complying with certain legislative requirements and granted an interlocutory injunction, restraining the 2nd respondent ("the GLC") from carrying out certain functions. These orders were made pending the hearing of a constitutional motion. These were the terms of the said orders, so far as is material to this application:

> "**IT IS HEREBY ORDERED AS FOLLOWS**:
>
> 1. Attorneys-at-Law to whom the Proceeds of Crime Act was extended by reason of Proceeds of Crime (Designated Non-Financial Institution) Attorneys (Order), 2013 (DNFI Order) are exempted from and/or are otherwise not required to comply with the following Acts, Regulations, Orders or Guidance pending the outcome of the Constitutional Motion herein:
>
> 1.1 The Proceeds of Crime Act and the Proceeds of Crime (Money Laundering Prevention) Regulations 2007 as extended by the (DNFI Order);
>
> 1.2 The General Legal Council of Jamaica Anti-Money Laundering Guidance for the Legal Profession that was published in the Jamaica Gazette Extraordinary of Thursday May 22, 2014, No 2;
>
> 1.3 Chapter IV sections 94 and 95 of the Proceeds of Crime Act in so far as it requires Attorneys-at-Law to report suspicious transactions (STRs) directly to the Financial Investigations Division;

1.4 The amendment to the Legal Profession Act to insert in section 5(3C) any regulation(s) issued or made pursuant thereto including The Legal Profession (Annual Declaration of Annual Activities) Regulations, 2014, July 10, 2014;

1.5 The amendments to the Canons of the Legal Profession Act by the Legal Professions (Canons of Professional Ethics) (Amendment) Rules, 2014, 2nd July 2014 requiring the Attorney-at-Law to certify to the 2nd Defendant by the 31st January 2015 whether the Attorney-at-Law engaged in the matters set out in the Order of the 15th November 2013, and

1.6 The amendment to Canon IV of the Legal Profession Act (Canons of Professional Ethics) to remove the proviso that enjoined the Attorney's ethical obligation to protect client confidences and permit client confidences to be revealed in compliance with the Proceeds of Crime Act.

2. The 2nd Defendant is restrained from exercising the functions conferred on it under section 91A(2) of the Proceeds of Crime Act including the power to examine and take copies of information or documents in the possession or control of any of the businesses concerned, and relating to the operations of attorneys to whom the Proceeds of Crime Act was extended by the DNFI Order under section 91A (2) (c) of the Proceeds of Crime Act or to establish such measures including carrying out or directing third parties to carry out inspections or verifications in order to determine whether the Attorneys-at-Law are complying with the Proceeds of Crime Act under section 91A (2)(a).

3. This interlocutory injunction is granted on condition that the Registrar of the Supreme Court is able to convene a hearing commencing no later than February 2, 2015. The Attorneys-at-Law must be available for those days.

4. The Hearing of the Constitutional Motion as embodied in the Fixed Date Claim Form filed herein on October 13, 2014 is to take place on February 2, 3 and 4, 2015 for three days…"

[3] On a subsequent date (13 January 2015), the injunction was extended pending the determination of the constitutional motion in the Supreme Court.

[4] There were other aspects of the orders; but those dealt largely with such matters as the timetable for the hearing of the substantive matter and the filing of bundles.

The legislative amendments giving rise to the challenge below

[5] Two developments relating to the regulating of attorneys-at-law aroused the disquiet of the 1st respondent ("the Association") and led to the filing of the claim and the application for the injunction. One of these was the enactment of an amendment to the Proceeds of Crime Act ("the POCA") effective 31 October 2013. By that amendment, the GLC was empowered to issue to members of the legal profession what are described in the legislation as "guidance notes". These notes, issued by way of publication in the Jamaica Gazette Extraordinary, dated Thursday 22 May 2014, speak to the requirements of attorneys-at-law to be in compliance with the POCA, specifically as it relates to money laundering. This responsibility is given to the GLC in keeping with its mandate, pursuant to the Legal Profession Act ("the LPA"), of regulating the legal profession. The amendment also gives to the GLC other powers of ensuring compliance with the requirements of the amendment.

[6] The other development was the issuing by the Ministry of National Security ("the MNS") of the Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-law) Order 2013 ("the DNFI order"). That order was to have taken effect on 1 June 2014. Its purpose was to have denominated each attorney-at-law, who satisfied certain criteria, as a "Designated Non-Financial Institution" (or "DNFI"), with certain reporting duties and other requirements.

The challenge

[7] The Association, on behalf of attorneys-at-law, generally, mounted a challenge to the planned implementation of this regime. It challenged the regime's constitutionality and, in particular, claimed that the proposed regime undermines legal professional privilege. The challenge was brought by way of a fixed date claim form ("FDCF") filed on 13 October 2014 and a notice of application filed on the same date, supported by the affidavit of Donovan Jackson, attorney-at-law, sworn to on the said 13 October 2014. By its notice of application, the Association had sought the following orders:

> "1. A stay of the implementation of the Proceeds of Crime Act, Regulations and Guidance issued thereunder and, in particular, 5(3C) of The Legal Profession Act, insofar as they require attorneys-at-law to establish systems, programmes, policies, procedures and controls for the purpose of detecting money laundering and/or to consult with the 2nd Defendant for the purpose of carrying out its functions under the Proceeds of Crime Act (MLP) Regulations;
>
> 2. An injunction restraining the Defendants by themselves their servants and/or agents from requiring attorneys-at-law from [sic] implementing and/or enforcing the compliance and reporting obligations under the Proceeds of Crime Act (MLP) Regulations."

The appeal

[8] In its notice and grounds of appeal filed in this matter, the appellant has sought to challenge the grant of the injunction. Originally, 12 grounds of appeal were filed. However, amended notice and grounds of appeal were filed on 30 June 2017, and so, when the matter came on for hearing, grounds 5-12 were abandoned and only the following grounds were pursued:

> "1. The Learned Judge erred in finding that an interim or interlocutory injunction can lie against the Crown in constitutional claims;
>
> 2. The learned judge erred in finding that section 16 of the Crown Proceedings Act is not applicable where there is a constitutional claim or a constitutional challenge;
>
> 3. The learned judge erred in finding that section 16 of the Crown Proceedings Act is generally inapplicable in light of the fact that Jamaica has a written constitution which is the supreme law of the land;
>
> 4. The learned judge erred in finding that an injunction can be ordered to stay the implementation of an Act legitimately passed by Parliament, prior to the final hearing of the claim;"

[9] These are the orders sought in the amended notice and grounds of appeal:

> "1. The appeal is allowed and the injunction set aside; and
>
> 2. Costs to the Appellant."

The GLC's position

[10] The GLC did not participate in the hearing of this appeal. We were informed by counsel appearing that the GLC indicated that it would accept whatever the court's ruling was at the end of the day, as the issues joined did not affect it directly.

An important concession by the Crown

[11] Near to the end of her submissions, the learned Solicitor General conceded that the court does have the power to grant an injunction against the Crown; but contended that there was power to do so only at the bill stage and before a bill was enacted into law. The court, she submitted, does not have the power to grant an injunction against

the Crown once the bill has been enacted, because, once a bill becomes law, the presumption of constitutionality applies.

[12] This concession is an important and time-saving one, as it obviates the need for a deeper and more-detailed exploration of the court's power to grant injunctions generally; thus permitting a restriction of the analysis to within narrower confines.

[13] In written submissions filed 29 June 2015, the appellant argued grounds 1 to 4 together. As there is significant overlap among the grounds, I find that dealing with them together is the most convenient way to treat with them in this judgment.

Grounds 1-4

Summary of submissions

For the appellant

[14] On behalf of the appellant, the learned Solicitor General submitted that it was incorrect for the learned judge to have granted an injunction against the Crown, as the law had already come into force. She also submitted that the Judicature (Constitutional Redress) Rules of 2000 had expressly revoked those rules of 1963, on which the 1st respondent sought to rely. Further, she submitted that the Judicature (Constitutional Redress) Rules 2000 had been replaced by the provisions of the Civil Procedure Rules ("CPR").

[15] The learned Solicitor General argued that the CPR expressly provides for the process that governs applications for constitutional redress and also treats with applications for relief under the Constitution separately from applications for judicial

review. She additionally argued that this separation was evident in the CPR's consistent reference to judicial review applications distinctly from applications for constitutional relief (referring, for example, to rule 56.11). Reference was also made to rule 2.2(2) of the CPR which defines "civil proceedings" as including "…[j]udicial [r]eview and applications to the court under the Constitution under Part 56".

[16] After reviewing paragraphs [66] to [77] of the judgment, the learned Solicitor General again sought to stress that there is a difference in the approach to be taken (and that has been taken) by courts between: (a) when legislation is in draft form only; and (b) when the draft has been enacted. With the latter, she submitted, the presumption of constitutionality applies. She further submitted that, if the court has the power to grant an injunction restraining the operation of legislation, it could only properly do so after the legislation had been declared unconstitutional.

[17] The learned Solicitor General also referred to several cases in an effort to buttress her point that the burden of obtaining an injunction against the Crown, where any power to grant such an injunction exists, is an onerous one. She referred to the case of **Gairy and another v Attorney General of Grenada** [2001] UKPC 30, and submitted that, when the injunction was granted in that case, it had already been established that there had been a breach of the litigant's rights. To similar effect, she argued, was the case of **Neville Lewis, Patrick Taylor and Anthony McLeod, Christopher Brown, Desmond Taylor and Steve Shaw v The Attorney General of Jamaica and Another** (Jamaica) [2000] UKPC 35 in which, she submitted, a stay of execution was granted on the basis that the point in issue was a fairly-arguable point.

[18] She also asked the court to give a restrictive interpretation to the Crown Proceedings Act ("the CPA") to say that, when section 19(3) of the Charter speaks to "any remedy", it implies that the remedy must come at the end of any proceedings. She also sought to distinguish the case of **Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon Vernon J Symonette MP and others** [2000] UKPC 31 and **The Independent Jamaica Council for Human Rights (1988) Limited, Edward Seaga and others v The President of the Senate, Hon Syringa Marshall-Burnett and The Attorney General,** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 36, 37, 38 & 39/2004, judgment delivered 12 July 2004 (cases cited by the Association) on the basis that those cases relate to matters arising before each Act was passed. That circumstance (that is, challenge before enactment) was the important difference between those cases and this case, she argued, as, in this case, (she repeated for emphasis) the Act has already been passed, and so the presumption of constitutionality would apply.

[19] The learned Solicitor General also sought to distinguish the case of **Attorney-General of Canada v Law Society of British Columbia** [1982] 2 SCR 307, cited by the Association, from the instant case, on the basis that the Canadian regime relating to money-laundering regulation is completely different from Jamaica's.

Summary of submissions for the Association

[20] On behalf of the Association, Mr Manning began his submissions by seeking to remind the court of the doctrine of separation of powers and of the role of the court in a democratic society. It is important to remember, he argued, that, unlike in the United

Kingdom, where there is no written constitution and parliament is the supreme source of law, in Jamaica Parliament is not supreme. It is also important to note, he argued, that the judiciary is not the handmaiden of the legislature in Jamaica. In this country, he further argued, the judiciary has the constitutional duty to ensure that the rights and freedoms of every person in Jamaica are protected, so far as the constitution demands.

[21] Referring to section 19 of the Charter (in particular section 19(3)), he submitted that the court's discretion to grant relief in a matter such as this is unfettered and unlimited. The presumption of constitutionality must always give way, he argued, to the enforcement of constitutional rights where they are being contravened. To give redress and uphold the supremacy of the Constitution, he submitted, the court must have the power to grant interim relief whenever the facts of the case appear to warrant it.

[22] Mr Manning further submitted that it could not be that, in private-law actions, the court has its full arsenal of legal remedies; but, in the public-law arena, with matters involving the constitution (the supreme law of the land) the court is restricted from using all of its judicial arsenal. He referred to the case of **In re M [On appeal from M v Home Office]** [1994] 1 AC 377, as supporting his submission that no one is above the law, referring in particular to the dicta of Lord Templeman at page 395 of the judgment, where it was stated that:

> "My Lords, Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law. The expression 'the Crown' has two meanings: namely the monarch and the executive. In the 17th century Parliament established its supremacy over the Crown as monarch, over the executive and over the judiciary. Parliamentary

> supremacy over the Crown as Monarch stems from the fact that the Monarch must accept the advice of a Prime Minister who is supported by a majority of Parliament. Parliamentary supremacy over the Crown as executive stems from the fact that Parliament maintains in office the Prime Minister who appoints the ministers in charge of the executive. Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive. The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown… My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War. For the reasons given by my noble and learned friend, Lord Woolf, and on principle, I am satisfied that injunctions and contempt proceedings may be brought against the minister in his official capacity and that in the present case the Home Office for which the Secretary of State was responsible was in contempt."

[23] Mr Manning submitted that it should be regarded as clear that the 2000 rules and the CPR were meant to run together. Section 19(3) of the Constitution expressly contemplates the enactment and use of specific rules in matters relating to constitutional redress, which are not the rules of the CPR.

[24] He also submitted that it was impatient of debate that there is substance to the Association's contentions in this case and that this could be seen in the affidavit of Michael Hylton sworn to on 27 November 2014, which indicated that the GLC recognized that there would be conflict between the POCA regime and the canons of the profession: viz, the Legal Profession (Canons of Professional Ethics) Amendment Rules, 2004.

Issues

[25] The following are the issues that fall to be considered in this appeal:

(i) whether the court can grant an interim or interlocutory injunction against the Crown in constitutional claims, in respect of legislation that has already been enacted by Parliament.

(ii) whether section 16 of the CPA is applicable where there is a constitutional claim or a constitutional challenge and; in light of the fact that Jamaica has a written constitution which is the supreme law of the land.

The learned judge's findings

[26] The learned judge's decision was based on several factors. These can be seen especially in paragraphs [74], [76], [77] and [81] of his written judgment. In order to get a full appreciation of the learned judge's reasoning, it is necessary, despite the length of the paragraphs, to reproduce them in full; and they are set out below:

> "**[74]** The case of **Symonette** does not provide a clear answer but provides building blocks, along with the Canadian cases, from which an answer can be derived. Lord Nicholls said that exceptionally, there may be cases where intervention is needed earlier than after the passing of the statute because the consequences may be immediate and irreversible. Of course, this would be at the Bill stage of the legislative process. The basis of the judicial intervention would be the need to give full effect to the Constitution. The content of the cited passages from Lord Nicholls does suggest that intervention comes after a full hearing on the merits even if

the challenge is made at the Bill stage. However, his Lordship's dictum on intervention at the Bill stage was predicated on the premise that [the] offending provision may lead to immediate and irreversible damage. It seems to this court that [the] core idea is the immediacy and the risk of substantial irreversible damage that would justify the court taking intervening [sic] in the Parliamentary process. The question then is this: if it can be shown that the '*consequences of the offending provision [of an enacted law] may be immediate and irreversible and give rise to substantial damage or prejudice*' why should there not be interim relief. Intervention in Parliamentary process before the Bill is passed is an exceptional step. So too is either suspending an enacted law or exempting persons from compliance with an enacted law. The primary justification for intervention in both circumstances has to be that the consequences are immediate, irreversible and cause substantial damage or prejudice to persons.

….

[76] If the courts can intervene before the Bill is passed and becomes an Act, is there any compelling legal or policy arguments to deny the power to intervene pending resolution of constitutionality of the matter? This court cannot think of any. This court accepts the proposition that the courts can intervene after the Act [h]as come into force and before it is declared unconstitutional. The remaining question is what criteria would be used to determine whether the courts should intervene in the manner suggested by the Association.

….

Criteria for intervention after law passed and comes into force

[77] It would seem to this court that, at the very least, for the courts to intervene the consequences should be immediate, irreversible and cause substantial damage or prejudice to persons to such an extent that the countervailing public interest in upholding and obeying the law is overridden. This way of stating the matter would suggest that the claimant would need to make a compelling case for

> intervention which meets the three-stage test articulated below.
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> ….
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> **[81]** This court is unable to see why this provision along with subsections (2), (3) and (6) prevents an interim remedy where the damage, if unchecked, is immediate, irreversible, substantial and cause irremediable prejudice. Clearly, this power is exceptional but its existence cannot be denied and must necessarily exist if the courts are to fulfill its [sic] mandate as the upholder of the Constitution." (Emphasis as in original)

Discussion

[27] As previously indicated, it is now accepted by the appellant that the court is empowered to grant an injunction against the Crown. However, the terms of the concession made by the appellant would seek to limit the court's power, in this regard, to proposed legislation, in that the appellant maintains that the granting of an interlocutory injunction is not legally permissible once the bill has been passed into law.

[28] It is useful in beginning this discussion, to consider two cases, which, although not cited by either of the parties, have come to the court's attention and appear to have considerable bearing on this issue. We may start with the case of **Seepersad (a minor) v Ayers-Caesar and others** [2019] UKPC 7.

[29] That case originally started as a result of the first respondent's order, made in 2014, when the appellant was a minor of 16 years old, that the appellant be remanded in custody to an adult women's prison. The appellant and others had been charged with the offence of murder. An action was commenced based on the contention that the

appellant's detention as a minor in an adult correctional facility was in breach of the constitution as well as illegal on public law principles. A summary of the various court proceedings and further background to the matter may be seen in paragraphs 3, 4, 5 and 7 of the judgment, as follows:

> "3. However, on 18 May 2015, when the appellant was aged 17, section 54(1) of the Children Act 2012 was brought into force. This provided that a court remanding or committing for trial a child who is not released on bail must order that the child be placed in the custody of a Community Residence. Section 3 of the Act defines a 'child' as a person under the age of 18. Also on 18 May 2015, the Children's Community Residences, Foster Care and Nurseries Act 2000 was brought into force. Section 2 of that Act defined a 'community residence' as 'a children's home or rehabilitation centre ...'. A 'rehabilitation centre' was defined as 'a residence for the rehabilitation of youthful offenders, in which youthful offenders are lodged, clothed, and fed as well as taught ...' and a 'children's home' as 'a residence for the care and rehabilitation of children ...'. The Adult Women's Prison was not a Community Residence within the meaning of the Children Act. Furthermore, under section 60(1) of the Children Act, a court shall not order a child to be detained in an adult prison.
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> …
>
> 4. These mixed constitutional and judicial review proceedings were begun on 1 September 2015. The application included a claim for interim relief in the shape of a conservatory order either that (1) the Attorney General, the third respondent to the proceedings, undertake that the Commissioner of Prisons, the second respondent, do forthwith release the appellant into the custody of her mother; alternatively that (2) the Attorney General undertake that a suitable Community Residence approved by the Children's Authority be established immediately in order to provide a place of safety for the appellant. It was argued that her imprisonment in an adult prison was in breach of her constitutional rights, as well as illegal on conventional public law grounds.

> 5. The matter was dealt with promptly by the courts in Trinidad and Tobago. On 2 September 2015, Rampersad J granted leave to apply for judicial review and gave various directions for the grant of emergency legal aid and the production of evidence, including an order that the Children's Authority conduct an evaluation and report in respect of St Jude's School for Girls (then an industrial school) or such other facility which might qualify as a Community Residence with a view to identifying a suitable Community Residence. On 9 September evidence was filed from the Children's Authority reporting that the Authority was of the view that there was no suitable centre for accommodating the appellant in accordance with the Children Act. On 28 September, Rampersad J refused the applications for conservatory orders because (1) would put the court in breach of both the Bail Act and the Children Act; and (2) was not pursued by the appellant; furthermore both (1) and (2) were mandatory rather than conservatory in nature.
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> ….
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> 7. The Court of Appeal heard this appellant's appeal on 12 November 2015 and made an interim order to the effect (1) that the Attorney General provide a suitable Community Residence, as provided for in the Children Act and the Children's Community Residences, Foster Care and Nurseries Act, for the placement of the appellant on or before 8 December 2015 (that being the date on which it was contemplated that the main action would be heard); and (2) on the provision of such a Residence, the Commissioner of Prisons transfer the appellant into the custody of that residence. The Court made no order for costs. It also agreed to give full reasons in the event of an appeal to the Privy Council."

[30] The Court of Appeal of Trinidad and Tobago, in dismissing the appeal, had as its principal issue for consideration, whether a 'conservatory order' was the only kind of interim relief that a court could give in constitutional proceedings. The court unanimously held that it was not. A summary of the reasons on which that court's decision was based is set out at paragraph 8 of the Board's decision as follows:

"8. …Briefly, its reasoning was as follows:

(1) *Bansraj* was a case decided 30 years ago on its particular facts: the state was threatening to compulsorily acquire and bulldoze private land for the purpose of building a highway. The Court in *Bansraj* recognised that a court was entitled to be creative and innovative in finding a formula which would provide effective interim relief; but the consensus was that section 22 applied strictly to final orders.

(2) Because of this, the Court in *Bansraj* did not consider how the words 'in any proceedings against the state … as might in proceedings between subjects be granted' in section 22(2) should be interpreted in public law proceedings which are not akin to civil proceedings as customarily understood.

(3) The SLPA was designed to provide for civil actions in contract, tort and property against the state. As Lord Nicholls pointed out in *Durity v Attorney General of Trinidad and Tobago* [2002] UKPC 20; [2003] 1 AC 405, para 18, it was modelled closely on the United Kingdom's Crown Proceedings Act 1947 and designed to modernise the substantive law and procedure in ordinary civil actions against the State. It did not apply to 'proceedings analogous to proceedings on the Crown side of the Queen's Bench Division in England' (para 32). It was never intended to apply to public law matters, whether administrative law or constitutional law (which, as Lord Bingham remarked in *Gairy v Attorney General of Grenada* [2001] UKPC 30; [2002] 1 AC 167, para 21, are 'fairly [to] be regarded as sui generis').

(4) Section 8 of the Judicial Review Act of Trinidad and Tobago expressly provides for the granting of injunctive relief against public authorities in administrative law actions. It would be quite an anomaly if an injunction could be obtained in administrative law actions but not where there was an alleged breach of the rights under section 4(a) and 4(b) of the Constitution to due process and the protection of the law.

(5) Section 22 refers to 'any relief … as might in proceedings between subjects ...'. Constitutional proceedings cannot be brought between subjects. It was reasonable to infer that the limitation on granting injunctions was not intended to apply to public law proceedings.

> (6) Despite the pronouncements in *Bansraj* that final orders for injunctive relief could not be granted in constitutional proceedings, there was a 'plethora' of cases, including cases upheld in the Privy Council, in which orders akin to injunctions had been made (para 42). Reference was made to Lord Toulson in *Alleyne v Attorney General of Trinidad and Tobago* [2015] UKPC 3; 88 WIR 475, para 38; Lord Mance in *Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2006] UKPC 35; [2006] 1 WLR 2891, para 36; Lady Hale in *Surratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55; [2008] AC 655, para 59. In the last two cases, the Privy Council had made final orders akin to mandatory injunctive orders in constitutional proceedings. And in *Daniel v Attorney General of Trinidad and Tobago* [2011] UKPC 31; 80 WIR 456, the Court of Appeal and Privy Council upheld the mandatory order made by the trial judge. There were also many death penalty cases from Trinidad and Tobago where interim stays of execution and final orders had been made by the Privy Council in constitutional proceedings: an example was *Thomas v Baptiste* [2000] 2 AC 1.
>
> (7) Hence 'the weight of judicial precedent is aligned with Lord Toulson's matter-of-fact comment, that injunctive orders can be made in constitutional proceedings' (para 54). For policy reasons this should be so. An interpretation of section 14(3) of the Constitution and section 22 of the SLPA that least inhibits the grant of effective and appropriate relief to enforce the fundamental rights of citizens was more consistent with the underlying values of the Constitution and consistent with upholding the rule of law (para 57)."

[31] As the frequent references to "Bansraj" in the Privy Council's dicta indicate, the Court of Appeal of Trinidad and Tobago had for its consideration, in hearing **Seepersad v Ayers-Caesar and others**, its previous decision in the case of **Attorney General v Sumair Bansraj** (1985) 38 WIR 286. The facts of that case are not important for present purposes. Suffice it to say that it concerned the State's attempt to compulsorily acquire land belonging to the respondent for the purpose of bulldozing his home with a view to constructing a highway. The principal finding of the court was that a conservatory order

was the only interim remedy available to a litigant against the state in constitutional proceedings.

[32] In the same way that this court is (and the court below was) confronted with the clash between the constitutional provision dealing with the grant of redress, on the one hand, and the provision of the CPA imposing a restriction on the grant of remedies, on the other, so too in Trinidad and Tobago, the constitutional provision was seen as coming into conflict with the State Liability and Proceedings Act ("the SLPA").

[33] To facilitate a quick comparison, the two countries' constitutional and statutory provisions that are relevant to this appeal are set out in the following table:

Jamaican Constitution–section 19(1)& (3)	**T&T Constitution – section 14(1) - (3)**
"19. (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress. ….	"14. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.	to the High Court for redress by way of originating motion. (2) The High Court shall have original jurisdiction— (a) to hear and determine any application made by any person in pursuance of subsection (1); and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

	(3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.
Crown Proceedings Act, section 16(1)	**State Liability and Proceedings Act, section 22(2), chapter 8:02**
"16(1)(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;"	"(2) Where in any proceedings against the State any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties."

[34] It will be immediately apparent that, with one main exception, the relevant provisions in the constitutions of Jamaica and Trinidad and Tobago and the relevant statutory provisions concerning remedies that may be granted against the Crown, are identical. That exception lies in the fact that the Trinidad and Tobago Constitution, at section 19(3), refers to the SLPA; whereas the Jamaican constitution makes no such reference to the counterpart provision in the CPA. To my mind, however, there is no real significance to this difference, as, the CPA being a part of Jamaican law, due recognition

must be given to it. On the other hand, the fact that the SLPA is specifically mentioned in the Trinidad and Tobago Constitution does not give it any pre-eminence over its Jamaican counterpart. Each statutory provision must be considered vis-à-vis its constitutional provision. (This coincidence of words in the Constitutions and statutory provisions of the two countries is unsurprising, given their similar colonial history and the fact that they both gained independence from England in 1962, just days apart.)

[35] It is readily acknowledged that the case of **Seepersad v Ayers-Caesar and others** is not, by the rule of stare decisis, binding precedent in respect of Jamaica. It is, however, highly persuasive. Recently, this court briefly discussed the principle of stare decisis in the case of **Edward Gabbidon v Sagicor Bank Jamaica Limited (Formerly RBTT Jamaica Limited)** [2020] JMCA Civ 9, wherein Brooks JA, at paragraph [56] opined as follows:

> "[56] Before addressing the relevant law in this country, it would be helpful to consider another, centuries old, principle, which is relevant in this context, namely, stare decisis. That principle supplements the requirement that the law must be certain, and requires courts to consider the previous decisions, especially of superior courts, as authoritative and binding. The principle applies to this court in relation to the decisions of the highest court of this country, the Judicial Committee of the Privy Council. The decisions of the Privy Council, in appeals from this jurisdiction, bind the approach that this court may take in respect of any principle of law. The Privy Council's decisions, on appeals from other jurisdictions, on common law matters, and those involving legislation similar to those in this country, are, although not binding, highly persuasive. It is unnecessary, for these purposes to elaborate on that point."

[36] Apart from my regarding the decision in **Seepersad v Ayers-Caesar and others** as being highly persuasive, by virtue of the principle of stare decisis, it is, to me, highly persuasive in another sense or for another reason – that is, that the reasoning therein relates to a statutory provision and a constitutional provision in Trinidad and Tobago that are *in pari materia* with corresponding provisions in Jamaica. The reasoning of the Board and of the Trinidad and Tobago Court of Appeal also commend themselves to me. They are, in my view, similar to the approach taken by the learned judge in the court below in this appeal.

The Court of Appeal decision in the Seepersad case

[37] The Board's decision arose from a matter which came before the Trinidad and Tobago Court of Appeal as **SS (by her kin and Next Friend Karen Mohammed) v Her Worship Magistrate Marcia Ayers-Caesar and others**, Civil Appeal No S 244 of 2015; judgment delivered 28 April 2016. Apart from the summary of the decision in that case that was given by the Board and set out in paragraph [27] of this judgment, a quotation of a few paragraphs of the Court of Appeal judgment itself would also help to bring greater clarity to and understanding of the gravamen of that court's judgment. Although regrettably adding some length to this judgment, it is helpful that they be quoted. They are paragraphs 26, 27, 34, 39, 42, 51, 52, 57 and 65; and are set out below:

> "26. The approach to the interpretation of section 14 of the Constitution is well accepted to be imperative of a generous interpretation, that promotes the upholding of the fundamental rights provisions. Indeed, in seeking to interpret

and apply section 14(2) of the Constitution, Chief Justice Sharma commented as follows:

> 'Before dealing with the issues of whether exemplary damages can be awarded under the Constitution, I wish to repeat by way of introduction what I said obiter in *Ramnarine Jorsingh v Attorney* General (1997) 52 WIR 501 at 512:
>
> > 'The breadth of the language of subsection (2) is clear. The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. There is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies; it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender and guarantor of the constitutional rights would be guilty of the most serious betrayal.'
>
> By way of amplification, I should like to add that there is nothing in s 14 of the Constitution which limits remedies only to those known to law or equity, and nothing which limits the availability of existing remedies only to those circumstances in which they would currently be available.
>
> There is a need for a remedy under s 14 of the Constitution, in addition to or instead of common law remedies to vindicate constitutional rights. It cannot be that the constitutional courts' role is limited to an award for compensation and declarations. This approach would merely reflect the common law position.
>
> The role of the court in a constitutional motion is fundamentally different from its role in conventional (civil) litigation. This has been reflected in the development of the constitutional jurisprudence, thus far on the generous approach to be taken in interpreting the fundamental rights and freedoms, and it would be

something of a jurisprudential anomaly if the orders of the court should simply follow the common law.'

27. While it is clear that Chief Justice Sharma recognized, that the only limitations on what relief a constitutional court can grant 'can only derive from the Constitution itself' – hence the section 22 of the SLPA conundrum; it is also clear that he envisaged a breadth and depth of remedial power that of necessity must enable the effective 'enforcing, or securing the enforcement of' the fundamental rights provisions.

….

34. Again, what is apparent, consistent with what Lord Bingham observed in **Gairy v Attorney General**, is that the SLPA was simply never intended to apply to public law matters, whether administrative law or constitutional law matters (that are 'fairly to be regarded as sui generis' – Lord Bingham in **Gairy**).

….

42. Before exploring this policy issue, it is worth noting that despite **Bansraj v Attorney General** and the pronouncements there that injunctive relief cannot be granted as final orders in constitutional proceedings, there are a plethora of cases, including ones upheld by the Privy Council, in which final orders akin to injunctions have been made in constitutional proceedings.

43. Indeed, in **Alleyne v Attorney General**, a 2015 decision of the Privy Council, Lord Toulson had this to say in relation to the redress available under section 14 of the Constitution: 'The section does not state what form such redress may take, but it may include an injunction, a declaration, a monetary award or a combination of remedies'. It is recognized that the specific issue being addressed here was not before the Board when Lord Toulson made that comment, but nevertheless it is worth noting.

….

51. Clearly, the making of final orders akin to injunctive orders and of interim orders also, have been a feature of the post 1976 constitutional landscape of Trinidad and Tobago. Moreover, this has been so from the highest level of judicial

> authority, which no doubt in part explains the matter-of-fact statement of Lord Toulson in **Alleyne v Attorney General**, that constitutional redress includes the granting of injunctions.
>
> 52. In all of the above cases, orders could have been made declaratory of the rights of the parties…
>
> …
>
> 57. Given the primacy of the fundamental rights provisions in the Constitution, and the importance of the overarching constitutional values contained in the Preamble to the Constitution; an interpretation of section 14(3) of the Constitution and of the application of section 22 of the SLPA that least inhibits the power given by section 14(2) of the Constitution to grant effective and appropriate relief for the purpose of enforcing and/or securing the protection of the fundamental rights of citizens, is more consistent with the underlying values of the Constitution (as aforesaid) and more aligned with upholding the rule of law in constitutional proceedings where infringements of the human rights provisions are alleged.
>
> ….
>
> 65. Precedent and policy considerations aside, we are also of the opinion that section 22 of the SLPA is to be given no broader scope by reason of its incorporation (by virtue of section 14(3) of the Constitution), than it enjoyed standing on its own. And, in the specific context of section 14(3) of the Constitution, we can say that for all of the reasons above, this interpretation is rational, reasonable and consistent with a reading of the Constitution as a whole. Thus, its limitation on the granting of injunctions, is to be confined to constitutional proceedings in which the relevant circumstances are akin to civil proceedings between subjects, as discussed above. **Bansraj's** case was conceivably such a case…" (Emphasis added)

[38] If we consider the last-highlighted portion of the quotation from paragraph 65 of the judgment of the Trinidad and Tobago Court of Appeal, and liken it to our own factual circumstances, it becomes immediately apparent that the contest between the appellant

and the Association in the court below cannot be likened to "constitutional proceedings in which the relevant circumstances are akin to civil proceedings between subjects". In the instant case, the factual background sees a challenge by the Association to amendment to legislation introduced by the Government, that the Association contends runs afoul of the Constitution. No parallel situation between citizens can be discerned. Thus, the possibility of that being an impediment to the granting of an injunction in the instant case, by the court below, would not have been present.

The presumption of constitutionality

[39] In relation to the contention that the presumption of constitutionality is a reason why an injunction cannot lawfully be granted once a law has come into force, a brief consideration of a few matters is required. First, the presumption of constitutionality, simply put, is to the effect that laws enacted by Parliament are to be regarded as properly passed and not inconsistent with the Constitution. It is briefly discussed by the Honourable Dr Lloyd G Barnett in his book "The Constitutional Law of Jamaica", Oxford University Press, 1977 at page 350, where he observes as follows:

> "The Courts have almost uniformly applied a presumption that the measures of the legislature, at least where they have some rational relationship with a valid head of power, are constitutional. The onus of proving that the elected representatives of the people have acted in contravention of constitutional principles has therefore been cast on the person making the allegation."

[40] The question, of course, arises on the submissions of the learned Solicitor General: is this presumption conclusive, or rebuttable? To my mind, the answer must be: "rebuttable". There are numerous cases the world over in which statutory provisions have

ultimately been struck down as being in breach of constitutional provisions even though the presumption of constitutionality was applied. One such well-known case from this jurisdiction is that of **Hinds and others v The Queen** [1976] 1 All ER 353. It will be recalled that, in that case, the Board struck down certain provisions of the Gun Court Act of 1974 as being in conflict with the Jamaican Constitution. So any presumption as to the constitutionality of the particular sections in the Gun Court Act was clearly rebutted by the ruling of the Board.

[41] The decision of the Judicial Committee of the Privy Council in **de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others (Antigua and Barbuda)** [1998] UKPC 30, a case on appeal from Antigua and Barbuda, also demonstrates that the presumption is not conclusive. Although the presumption of constitutionality was accepted by the Privy Council to have been applicable, the impugned aspect of the statute in question (the Civil Service Act 1984), was nevertheless struck down as being incompatible with section 12 of the Constitution that provided for freedom of expression. The Court of Appeal of the Eastern Caribbean States had applied the presumption and secured the validity of the statute by reading words into it. The Privy Council held that that court erred in doing so.

[42] It is important to note as well that the introduction of the Charter has brought with it, by virtue of section 13(2), a shift in the approach of establishing the constitutionality of a section of an Act or an entire Act. The position now is that once a breach of a charter right is *prima facie* established, the party contending that there is no breach has the burden of proving that the purported breach is demonstrably justified in a free and

democratic society. This approach comes largely from the Canadian case of **R v Oakes** [1986] 1 SCR 103 in the judgment of Dickson CJ. This is what Dickson CJ observed at paragraph 66 of that judgment:

> "The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word 'demonstrably' which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, supra."

[43] Against this background, the question arises: If the presumption of constitutionality is rebuttable or is no longer applicable in so far as it relates to the burden of proof in Charter rights cases, on the authority of **R v Oakes**; and, if it can also be demonstrated to a court's satisfaction that consequences that might be immediate and irreversible and give rise to substantial damage, or prejudice, may be occasioned to an applicant or other party if the implementation of the particular statutory provision is not delayed, then what rational impediment can there be to grant immediate relief by way of an injunction? I can discern none.

[44] It seems to me that the learned judge adopted the correct approach in ascertaining whether such a threat existed, having regard to the principles laid down in several Canadian cases. At paragraph [78] of his judgment, the learned judge observed:

> "**[78]** Both sides have agreed that the test set out by the Canadian Supreme Court should be applied. Counsel referred to **RJR Macdonald Inc v The Attorney General of Canada and others** [(1994)]111 DLR (4th) 385. That case in turn reaffirmed its previous decision in **Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers** 38 DLR (4th) 321 where the test for interim relief was stated…"

[45] At paragraph [82] of his judgment, the learned judge quoted the following paragraph from **RJR MacDonald Inc v The Attorney General of Canada and others** [1994] 1 RCS 311 (page 334):

> "Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in this case."

[46] The learned judge then proceeded to apply this three-stage test to the facts before him; and came to the conclusion that the facts of the case warranted the grant of the orders that he ultimately made. I can discern no fault with or error in the procedure that he adopted. It cannot be said on this basis, therefore, that the learned judge was palpably wrong.

Other arguments

[47] Arguments were also advanced regarding the applicability or otherwise of Part 56 of the CPR and whether certain other rules still govern applications for constitutional

redress. A fairly-brief consideration of these rules and the relevant part of the CPR is, therefore, in order.

[48] The Judicature (Constitutional Redress) Rules, 1963 ("the 1963 rules") at rule 2, permitted the bringing of an action pursuant to section 25 of the Constitution (the predecessor to section 14) with a view to obtaining "…a declaration of rights and/or praying for an injunction or other appropriate order." It was on these rules that the Association sought to rely.

[49] That set of rules was expressly revoked by the Judicature (Constitutional Redress) Rules, 2000 ("the 2000 rules"). The 2000 rules, however, also mention (at rule 3) the possibility of praying for an injunction. Therefore, it is my view that, whichever rule is or might be in existence (and it appears to be the 2000 rules – since it revokes the 1963 rules), the rules would be subsidiary to the provisions of the Constitution – the supreme law. Additionally, the 2000 rules say, in essence, the same thing as the 1963 rules. The appellant has submitted however, that neither set of rules is in existence, as the 2000 rules would have been revoked by the CPR. Part 56 of the CPR now governs all applications brought for alleged breaches of the Constitution, it is argued. The appellant also makes the argument that, in relation to the provisions of the CPA and the Association's contention that it does not apply to judicial review proceedings, which are sui generis, rule 56.10(2) (c) is relevant and refutes the contention. That rule makes reference to "…a claim for Judicial Review or for relief under the constitution…". The use of the word "or" in that phrase, the argument continued, signifies that they are two different types of applications to which different considerations apply.

[50] It seems to me that there may very well be merit in Mr Manning's submission (previously mentioned at paragraph [23] of this judgment) that the constitutional redress rules and the CPR were meant to run together. One matter in favour of this view is the fact that, unlike the instance of the express revocation of the 1963 rules by the clear words of the 2000 rules, nothing has been produced to the court showing a revocation of the 2000 rules. It is also significant to note that the Rules Committee, as it stood at the time of the promulgation of the 2000 rules, was composed of largely the same members as at the time in September 2002, when the CPR was scheduled to come into force in January of 2003. The eight members of the committee whose names appeared in the Gazette in respect of the 2000 rules, also appear at page 454 of the CPR, with two additions and one change in the holder of the office of the Director of State Proceedings. In these circumstances, it would be difficult to accept that the CPR was enacted without an awareness of the existence of the 2000 rules, which have not been revoked.

[51] To my mind, however, even if we accept that it is solely the CPR that governs applications for constitutional redress, these arguments founder on a consideration of other provisions of Part 56. To this end, it is best to set out rule 56.1 in its entirety. It reads as follows:

> "**Scope of this part**
>
> 56.1 (1) This Part deals with applications –
>
> (a) for judicial review;
>
> (b) by way of originating motion or otherwise for relief under the Constitution;

(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and

(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

(2) In this part such applications are referred to generally as **'applications for an administrative order'**.

(3) **'Judicial Review'** includes the remedies (whether by way or [sic] writ or order) of -

(a) certiorari, for quashing unlawful acts;

(b) prohibition, for prohibiting unlawful acts; and

(c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.

(4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant -

(a) an injunction;

(b) restitution or damages; or

(c) an order for the return of any property, real or personal."

[52] Rule 56.1(1) and (2) seem to suggest that applications for relief under the Constitution would properly be regarded under the CPR as "applications for an administrative order". On the other hand, rule 56.1(3) seems to suggest that the term "judicial review" includes applications for orders of certiorari, prohibition and mandamus.

[53] Most significantly, rule 56.1(4) clearly and unmistakably provides that in constitutional matters, among others, an injunction might be granted. I readily acknowledge that the context of this rule does suggest that these would be final orders made after the substantive matter has been heard. However, it is to be noted that there is no provision prohibiting the grant of an interim injunction, where one is warranted.

[54] Further, there is, in my view, something to be said for the view expressed by Dr Barnett, when, he states at page 430 of his said book that the relevant section of the constitution is drafted in such a way that the remedy of an injunction cannot be excluded. Said he:

> "In order to have a proper locus standi the applicant must show that the constitutional provision 'has been, is being or is likely to be contravened in relation to him'. The phrase 'likely to be' seems to require only a reasonable probability that the apprehended action will be taken. **This formulation of the enforcement provision appears to facilitate the taking of preventive action where a violation is threatened and is probably more generous than the normal principles applied in relation to the prerogative and equitable jurisdictions of the Court**." (Emphasis added)

[55] It is important as well to carefully consider the language used in section 19(3) of the Constitution of Jamaica. It is to be remembered that that section gives to the Jamaican Supreme Court the following powers:

> "...make such orders, issue such writs and give such directions **as it may consider appropriate for the purpose of enforcing, or securing the enforcement of**, any of the provisions of this Chapter to the protection of which the person concerned is entitled." (Emphasis added)

[56] From any perspective, these are very broad terms. It seems to me that, where a provision of the supreme law is cast in such wide terms, it gives to our courts a very broad discretion in arriving at the appropriate remedy to ensure the protection of the rights that have been, are being or are likely to be infringed. This wide discretion, if it is to be limited or restricted, would have to be restricted in very clear terms; and I fail to see how the supreme law could, in the enforcement of the rights and freedoms it guarantees, be restricted by a provision of an act of Parliament. In that regard, the Jamaican constitutional provision is even stronger than its equivalent in Trinidad and Tobago, as there is no reference in the Jamaican Constitution to the CPA. In all the circumstances, I am therefore in full agreement with, and find to be entirely apposite, the words of Sharma JA in **Ramnarine Jorsingh v Attorney General**, at page 512, where he observed:

> "There is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies; it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached."

[57] This view is reinforced by a consideration of the amendment of the Jamaican Constitution in 2011 to repeal the then-existing Chapter III and replace it with the present Charter. The whole aim of that exercise was to strengthen the courts' power to make it more effective in the safeguarding of the rights and freedoms contained therein. To use the exact words set out used in the preamble of the Charter, it was introduced after much consultation, to provide: "...more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica".

[58] And, as we have already seen, the provisions of the CPA do not prevent the granting of an injunction against the Crown. At the time of the enactment of the CPA on 1 February 1959, Jamaica was still a Crown Colony, and was not to be subject to constitutional supremacy until it gained independence some three years later.

[59] A review of the cases cited by both sides produces the result that, whilst, understandably, each side cited them in support of its case, none of them, by itself, provides the answers to the issues and questions that arose in the court below or in the instant appeal. This, therefore, necessitated and resulted in the learned judge's taking a somewhat eclectic approach, using principles and approaches in one case, melding those with principles and approaches in another, treating them as "building blocks" (as he described them in paragraph [74]) and using a process of reasoning to arrive at the conclusion that he did. The case of **Symonette** was one such building block.

[60] Among the dicta on which he was entitled to rely from the cases cited in the court below were, for example, the dicta of the Board in **Gairy v Attorney-General of Grenada**, reflected in paragraphs 19(2), (3) and 21 as follows:

> "(2) By Chapter 1 and section 106 of their Constitution the people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose. Historic common law doctrines restricting the liability of the Crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution.

> (3) …. In interpreting and applying the constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield…
>
> [21] … Since the expression 'civil proceedings' probably excludes what would now be called applications for judicial review, it must be highly questionable whether it includes claims for constitutional redress which the draftsmen in the UK in 1947 and Grenada in 1959 could not have contemplated and which may fairly be regarded as *sui generis*. But even if it be accepted that the appellant's claim falls within the expression 'civil proceedings', that goes only to show that there was another procedural route which the appellant could have followed."

[61] Similarly, there were also dicta in the case of **RJR McDonald Inc v The Attorney General of Canada and others**, which would seem to lend support to the approach taken by the learned judge, as a matter of general principle, notwithstanding the facts of that case being somewhat different from those which emerged in the case from which this appeal arises. So that, for example, there is the dictum of the court as follows:

> "…We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment…"

[62] Again, having regard to the absence of authority directly addressing the specific issues in the court below, the learned judge cannot be faulted for this approach.

[63] I note in passing that the Association's constitutional motion was refused on the basis that the regime was found to be not unconstitutional; and that there is an appeal from that decision. However, given: (i) the particular way in which the issues have been

framed in this appeal; and (ii) the way in which the discussion herein was tailored, the scope of this appeal was limited primarily to a question of law as to the legal permissibility or otherwise of granting injunctions against the Crown in the face of enacted legislation. Consequently, an exploration of the wider issues surrounding the constitutionality of the regime does not arise here for consideration.

Conclusion

[64] It is abundantly clear from the learned judge's discourse, therefore, that, rather than considering irrelevant matters or approaching the matter incorrectly, as the appellant has suggested, he had, at the forefront of his thoughts and as his primary aim, the fulfilling of the court's mandate as the upholder of the Constitution (see, for example, his observations at paragraph [81] of the judgment). No error can be discerned in the approach that the learned judge took; or in the conclusion at which he ultimately arrived; or with the orders that he made.

[65] It seems to me, after a consideration of the law, the facts and all the circumstances of this case that the true position in regard to the granting of injunctions against the Crown is as follows:

(i) The Supreme Court of Judicature of Jamaica may grant an injunction against the Crown to restrain the coming into force or operation of legislation, either at the bill stage or after that bill has been enacted into law.

(ii) In either case, the grant of any such injunction is not a remedy that is to be ordered routinely; but ought to be ordered only in exceptional circumstances, moreso when the bill has already been passed into law. Additionally, it is to be expected that any application made after the bill has been enacted into law would be made very promptly thereafter.

(iii) In coming to a decision whether to grant any such injunction, the court should be guided by and apply the three-stage test enunciated in the case of **RJR Macdonald Inc v The Attorney General of Canada and others**, reaffirming the Canadian Supreme Court's position on the grant of interim or interlocutory relief in constitutional claims in the case of **Attorney General of Manitoba v Metropolitan Stores (MTS) Ltd** [1987] 1 SCR 110, to wit: (i) conduct a preliminary assessment as to whether there is a serious question to be tried; (ii) come to a determination as to whether the applicant would suffer irreparable harm if the application were refused; and (iii) assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

(iv) Section 16 of the Crown Proceedings Act does not prevent the grant of an injunction against the Crown in constitutional

> proceedings as that Act, being based on an English Act of 1947, and itself having been enacted in 1959 before the Charter, does not apply to public law proceedings; but only to ordinary civil actions against the State.

[66] In light of the foregoing discussion, I am of the view that the appeal should be dismissed. In light of the wide public-interest nature of this appeal, and the fact that, in bringing it, the appellant cannot be said to have acted unreasonably, I would also order that there be no order as to costs. If the parties take a different view, they may file written submissions on the question of costs within 14 days of the date of this judgment, the said question of costs to be considered by the court on paper.

STRAW JA

[67] I have read in draft the judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing useful to add.

McDONALD-BISHOP JA

ORDER

(1) The appeal against the order of Sykes J (as he then was), made on 4 November 2014, is dismissed.

(2) There shall be no order as to costs, unless within 14 days from the date of this order, written submissions are filed and served by the parties for the court to make an order as to costs after a consideration of the matter on paper.