[2015] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 22/2015

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ANDREW HOLNESS**	**APPELLANT**
AND	**ARTHUR WILLIAMS**	**RESPONDENT**

Ransford Braham QC, Mrs Georgia Gibson-Henlin and Mrs Taniesha Rowe-Coke instructed by Henlin Gibson Henlin for the appellant

Dr Lloyd Barnett and Wentworth Charles instructed by Wentworth Charles & Co for the respondent

Miss Carlene Larmond, Miss Simone Pearson and Miss Monique Harrison instructed by the Director of State Proceedings for the Attorney-General of Jamaica

Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell observing proceedings for the Clerk to the Houses of Parliament

16, 17 and 25 March 2015

PANTON P

[1] In my opinion this appeal ought to be dismissed, and my reasons are set out hereunder. I am also of the view that the counter-notice of appeal should be dismissed for the reasons stated by my learned brother Brooks JA.

[2] The circumstances of this case are unusual, to say the least. The appellant is the Leader of the Opposition in the House of Representatives. He is seeking a reversal of the order of the Full Court (Daye, McDonald-Bishop and Batts JJJ) made on 6 February 2015. By that order, it was declared that:

> "1 … the request for and procurement of pre-signed and undated letters of resignation and letters of authorization by the Leader of the Opposition from persons to be appointed or appointed as Senators to the Senate of Jamaica, upon his nomination, is inconsistent with the Constitution, contrary to public policy, unlawful, and is, accordingly null and void.
>
> 2. …the pre-signed and undated letters of resignation and letters of authorization, as well as the manner of their use to effect the resignation of Senators (the claimant in particular) from the Senate of Jamaica, are inconsistent with the Constitution, contrary to public policy and are, accordingly, null and void".

The facts

[3] The declarations resulted from a suit filed by the respondent Williams on 19 November 2013 against the appellant. In his affidavit in support of the fixed date claim form, Mr Williams said that he is a member of the Jamaica Labour Party (JLP) and had been since 1989 a member of its Central Executive and Standing Committee. He has

been a member of the Senate since 2002 having been recommended for appointment by successive leaders of the JLP. The last recommendation was made in January 2012 by the appellant, and His Excellency the Governor-General appointed the respondent.

[4] The appointment of the respondent and six other Senators was gazetted on 26 January 2012 and stated to be from 16 January 2012, and as having been made by the Governor-General in accordance with the advice of the Leader of the Opposition. The power of appointment was exercised under the authority conferred by section 35 (3) of the Constitution of Jamaica.

[5] There was an unusual feature of the recommendations on this occasion. According to the respondent Williams, following discussions between him and the Leader of the Opposition, they agreed that Mr Williams "would prepare letters to be signed by each person who was to be recommended for appointment to be used by him [the Leader of the Opposition] in the event of any member appearing to take a view or position on the issue of the Caribbean Court of Justice other than in accordance with the position of the Jamaica Labour Party on that issue". In keeping with that decision, Mr Williams prepared three letters for each individual to sign.

[6] The Leader of the Opposition gave a different account of how these letters came about. He said that the respondent, as Leader of Opposition Business in the Senate and in his capacity as an attorney-at-law, devised a scheme which he (Mr Williams) had advised "would preserve the stability and unity in the Opposition Senate".

That scheme, he said, was in the form of the three letters set out in the next paragraph.

[7] Letter number 1:

> "Arthur Williams
>
> His Excellency
> The Governor General of Jamaica
> King's House
>
> Dear Governor General
>
> **Re: The Senate of Jamaica**
>
> I hereby tender my resignation as a Member of the Senate of Jamaica, with immediate effect.
>
> This letter was signed by me and delivered to the Leader of the Opposition at the time of my appointment to the Senate, on the clear understanding that he is authorized to date this letter and deliver to Your Excellency at any time he deems necessary.
>
> Yours faithfully
>
> [Sgd] Arthur Williams
>
> Witnessed by: [Sgd] Tom Tavares-Finson J.P.
> January 16, 2012
>
> 14/11/2013
>
> [Sgd] Andrew Holness"

Letter number 2:

"Arthur Williams

His Excellency
The Governor General of Jamaica
King's House

Dear Governor General

Re: The Senate of Jamaica

I hereby tender my resignation as a Member of the Senate of Jamaica, with immediate effect.

Yours faithfully

[Sgd] Arthur Williams

Witnessed by: [Sgd] Tom Tavares-Finson J.P.
January 16, 2012

14/11/2013

[Sgd] Andrew Holness"

Letter number 3:

"Arthur Williams

The Leader of the Opposition
1 West King's House Road
Kingston 10

Dear Opposition Leader

Re: The Senate of Jamaica

> Upon your advising the Governor General of Jamaica to appoint me a Senator, I have signed and delivered to you an undated letter of resignation as a Senator. You are hereby authorized at your sole discretion to date this letter and deliver to the Governor General of Jamaica at any time you deem necessary.
>
> Yours faithfully
>
> [Sgd] Arthur Williams
>
> Witnessed by [Sgd] Tom Tavares-Finson J.P.
> January 16, 2012.
>
> 14/11/13
> [Sgd] Andrew Holness"

[8] In my view, it does not matter whether the letters came about as a result of the JLP's stance on the Caribbean Court of Justice, or because of the need to generally preserve stability in the ranks of the Opposition in the Senate. I agree with McDonald-Bishop J that "resolution of this area of factual dispute is not critical, or I daresay, relevant to the core question for determination". Whatever was the motivation for generating those letters, the important fact is that they were crafted by the respondent and given to the Leader of the Opposition.

[9] On 10 November 2013, there was a contest between the Leader of the Opposition and Mr Audley Shaw, Member of Parliament, for the leadership of the JLP. This was a contest permitted by the constitution of the JLP. Mr Holness was successful. The following morning Senator Tom Tavares-Finson (apparently acting as an emissary of the Leader of the Opposition) told Mr Williams that he would be tendering his

resignation as a Senator to the Leader of the Opposition and requested Mr Williams to convene a caucus of Senators to determine whether there were others who would wish to resign also. Incidentally, in his affidavit dated 21 November 2013, the Leader of the Opposition described Mr Williams as "Chief of Staff in the Office of the Leader of the Opposition" as well as being Leader of Opposition Business in the Senate. Mr Williams duly convened the caucus. Dr Christopher Tufton was the only Senator who was absent. They all indicated their willingness to resign, if required so to do, but some queried the basis for resigning.

[10] Mr Williams said he saw no reason to resign, and thought it inappropriate to even consider resignation without knowing the position of Dr Tufton who was the only Senator who openly supported Mr Holness' opponent in the leadership race. There was consensus among the Opposition Senators that Mr Williams should ascertain the stance of Dr Tufton and then reconvene the caucus. It was agreed that the Leader of the Opposition should be advised of the position by Thursday 14 November 2013.

[11] On Tuesday 12 November 2013, Mr Williams met with the Leader of the Opposition who advised him that those who had not supported him in the leadership election ought to make way for those who had done so, and that some persons in any event needed to "get back to work in their constituencies". Mr Williams informed him that he and Senator Tufton had decided not to resign. The Leader of the Opposition then reminded Mr Williams that he had the letters of resignation and authorization which he could bring into operation. They parted with an understanding that Mr Williams was to have further discussions with Dr Tufton and then revert to him. Dr

Tufton himself met with the Leader of the Opposition on the said 12 November 2013 and advised him that he would not be resigning.

[12] That evening, the Leader of the Opposition said on television that he was not interested in individual resignation of Senators; rather, he wished them to resign *en bloc.* Mr Williams intended to attend the meeting of the Senate on Friday 15 November 2013. That did not happen, because at 9:14 am on that very day the Leader of the Opposition telephoned him to say that he had dated and given the letters to the Governor-General who had accepted them as his (Mr Williams') resignation.

The issues as stated to the Full Court

[13] The appellant Holness stated the issues as follows:

> i. "Whether the letters duly created and signed by the claimant were effective to secure his resignation in accordance with Sec 41 (1) (b) of the Constitution upon being executed by the defendant as authorized"; and
>
> ii. "whether there is anything in Sec 41(1)(b) that prevents a Senator from authorizing his resignation as was done in the instant case".

The respondent Williams saw the issues thus:

> i. "Whether the scheme of procuring undated letters of resignation and a letter of authorization from all persons to be appointed Senators under the nomination of the Leader of Opposition is contrary to Jamaica's constitutional scheme and is inconsistent with the Constitution;
>
> ii. whether the undated letter of resignation and the manner of their use are void as being inconsistent with the Constitution by seeking to give to the defendant the right [or] power to

effect the resignation of the claimant at the defendant's volition and timing; and

iii. whether the use of the undated letter of resignation on the basis that the claimant did not support the defendant in the election of leadership in the Jamaica Labour Party contravenes the claimant's constitutional rights to the freedom of thought, conscience, belief, expression, and association provided by Sec 13(3), (b)(c) and (e) of the Charter of Rights".

The judgment of the Full Court

[14] Daye J formed the view that the issues raised "considerations as to the validity of these letters as well as their constitutionality and status". According to the learned judge, both parties to the suit recognized that an interpretation was required of "the meaning of the provisions of the Constitution relating to the tenure of office of a member of the Senate of Jamaica (Sec 41(1) (b))".

[15] In interpreting section 41(1)(b), Daye J said it appeared to him that the high ideals, principles and values that the framers of the Constitution intended for the Senate are:

"(a) A measure of security of tenure
(b) Independence of deliberation i.e. freedom to debate
(c) Separation of powers in the legislature
(d) Check and balance of powers within the legislature."

He concluded that any act or decision by the Constitutional holder of an office that nominates Senators that conflicts or appears to run contrary to these fundamental ideals and principles would on the purposive interpretation of the Constitution be inconsistent and/or in contravention of the Constitution and accordingly would be void.

He held that "a reasonable person can imply that the [respondent] revoked terminated or withdrew his [the appellant's] authority to tender his [the respondent's] resignation". He said that the letters did not amount to an irrevocable authority to submit same to the Governor-General.

[16] Daye J said that the individual's right to resign under the Constitution is personal and non-delegable. He held that "the pre-dated letters of resignation and authority to the [appellant] to date and use them are contrary to public policy, void and inconsistent with the Constitution". As regards the various other breaches that the respondent had complained of, Daye J did not find that such rights and freedoms had been breached.

[17] McDonald-Bishop J was of the opinion that the central questions for consideration were whether "(a) the letters themselves, (b) the request for them and (c) the use of them by the Leader of the Opposition to effect the resignation of an Opposition Senator who had refused to resign when requested to do so are in conflict with Jamaica's constitutional scheme and, therefore, unconstitutional and void" (para 83). She saw as a collateral issue the question as to whether the use of the letters in the circumstances rendered the Senator's seat in the Senate vacant.

[18] Having examined the letters and considered the undisputed facts as well as the submissions, McDonald-Bishop J concluded that the submission of the letter of resignation to the Governor-General was not the respondent's act, and it was not done with his concurrence. There was no intention, she said, on the part of the respondent to resign. The letter cannot be taken as a genuine resignation letter and it was not

voluntarily submitted by the respondent, she said. In the opinion of the learned judge, Mr Williams "was simply 'resigned' by the [appellant] on what can only be described as the ill-conceived and nonsensical terms of the letters that he, the [respondent] designed, signed and delivered to the [appellant]".

[19] McDonald-Bishop J noted that the Constitution did not give the Leader of the Opposition the power to effect the removal of any Senator from his seat. She interpreted that fact to mean that the action of the Leader of the Opposition in this case in submitting the letters of resignation to effect the resignation of Mr Williams was inconsistent with the Constitution. The scheme, she said, had the undesirable effect of sapping Mr Williams of his own free will, and robbing him of the absolute right in deciding when he would resign from the Senate.

[20] Batts J considered that "pre-prepared letters of resignation and pre-prepared letters of authorization to use them … serve only one purpose. That being to facilitate removal of the appointee even if he is reluctant or unwilling to go voluntarily". He expressed the view that "… any step by a person or persons to give themselves the power to remove a Senator who has been validly appointed will be unconstitutional." Given the facts and the submissions, he concluded that the questioned documents are null, void and of no effect.

The grounds of appeal

[21] As many as 16 grounds of appeal were filed. They are as follows:

> "a. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in that in granting

the declarations and orders as sought under section 41 of the Constitution they failed to consider effect [sic] of the refusal of the injunction sought by the Claimant and also the subsequent acceptance by the Governor General of the resignations rendering the seats vacant and therefore the fact of appointment of new Senators.

b. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion such that the issue is whether in all the circumstances including the fact that the Governor General had performed his duty in treating the seat as vacant and appointing new Senators as requested the declarations sought should have been granted in the terms sought or at all.

c. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion insofar far as they found that the facts in question engaged in any way the supremacy of the Constitution and in so doing wrongly expanded the Court's consideration of the issue beyond the specific jurisdiction conferred by section 44(1) thereof.

d. The learned judges had no jurisdiction to entertain the claim having regard to section 44 of the Constitution.

e. The Court failed to appreciate that as constituted it lacked jurisdiction to hear any question as to whether the Claimant vacated his seat or whether any member was validly appointed particularly since the Claim for the determination of such questions was not properly before it as a result of which the Honourable Court fell into error.

f. The learned judges erred as a matter of fact and/or law in finding that the letters were unconstitutional.

g. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in finding that the Appellant gave himself power to remove Senators.

h. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion granting the declarations on public policy considerations insofar as the facts of the present case are distinguishable from **Tumukunde v Attorney General** [**2009] 4 L.R.C. 154** and **Datuk Ong Kee Hui v. Siniyium Anak Mutit [1983] 1 MLJ 36** particularly having regard to the Claimant's complicity.

i. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in failing to accept the submissions of on [sic] behalf of the Appellant that the Appellant [sic] that the Respondent had validly resigned and thereby at the material time vacated his seat.

j. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in failing to accept submissions on behalf of the Appellant that the framers of the Jamaican Constitution intended that leaders of the political parties appoint and remove Senators.

k. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in placing emphasis on whether the Appellant was appointed as the Respondent's agent to effect his resignation as distinct from whether by his own act as well as the contents of the letters the Respondent by preparing affixing [sic] his signature to the letters he properly resigned and vacated his seat as a Senator.

l. The Honourable Mr Justice Day [sic] erred as a matter of fact and/or law and/or wrongly exercised his discretion in rejecting submissions on the Appellant's behalf by reference to the passages cited from **Hinds v. R 1977 A.C. 195** at 211 D-H and 212 A-G:

i. Those extracts do not deal with the role of the Senate. The extracts also support the submissions made on behalf of the Appellant relating to the interpretation of the Constitution and sources from which that interpretation

can be drawn including federal Constitutions derived from Westminster.

m. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in finding that the Appellant requested and procured the pre-signed and undated letters of resignation and letters of authorization from persons appointed as Senators to the Senate of Jamaica upon [their] appointment notwithstanding the independent evidence of Dr. Christopher Tufton that at all material times he dealt only with the Respondent. There was no challenge to the Appellant's evidence that he was not a party to these discussions.

n. The learned judges erred as a matter of fact and/or law and/or wrongly exercised their discretion in accepting submissions that the principles relating the law of agency were relevant to the instant case and/or if it was that the said agency was revoked by implication or at all at the relevant time of its exercise:

i. In any event the Respondent was not concerned with the withdrawal of the authority. He was concerned with whether it was exercised for the purpose for which he says it was given.

o. The learned judges erred in failing to recognize that:

i. That the resignation was the voluntary act of the Respondent and that no or no proper withdrawal was communicated to the appointing authority or the Appellant.

p. The Honourable Mrs Justice McDonald Bishop and the Honourable Mr Justice Batts erred as a matter of fact and/or law and/or wrongly exercised their discretion in accepting the submissions on the Respondent's behalf with respect to express provisions being made in relation to appointments and removal from public offices in the Constitution such that where no such power is stated it meant that none was intended in particular they failed to have due regard to the provisions of the

Interpretation Act which are incorporated in the Constitution." (emphasis as in the original)

Was the correct procedure followed?

[22] When the matter went before the Full Court, there was no challenge to that court's jurisdiction. Indeed, the issues stated by the appellant mentioned nary a word about jurisdiction. The main point was the question of the validity of the letters in the light of the Constitution. However, it was the jurisdiction of the court that our attention was first drawn to at the commencement of the hearing of the appeal. Mr Ransford Braham QC, for the appellant, grouped grounds c, d and e together and submitted that the appeal ought to be allowed as the issue was canvassed before the Full Court in a manner that was contrary to the Constitution.

[23] Mr Braham referred to sections 34, 35, 41(1)(b), 44(1) and (2) of the Constitution and submitted that on the face of the Constitution itself, in relation to the composition of the Senate, any question concerning whether a Senator has been appointed or has vacated his seat has to be dealt with in accordance with a law passed by Parliament for that purpose.

[24] The sections, apart from section 44, referred to by Mr Braham may be summarized thus:

i. Section 34 states that there shall be a Parliament consisting of Her Majesty, a Senate and a House of Representatives.

ii. Section 35 provides that the Senate shall consist of 21 persons – 13 appointed by the Governor-General acting in accordance with the advice of the Prime Minister, and eight appointed by the Governor-General in accordance with the advice of the Leader of the Opposition; and

iii. Section 41(1)(b) provides that the seat of a member of either House shall become vacant if he resigns his seat.

[25] It is however necessary to quote section 44 in full as it is the main platform on which Mr Braham stood in launching his attack on the procedure adopted before the Full Court. The section reads thus:

1) "Any question whether –

(a) Any person has been validly elected or appointed as a member of either House; or

(b) Any member of either House has vacated his seat therein or is required, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, to cease to exercise any of his functions as a member,

shall be determined by the Supreme Court or, on appeal, by the Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.

2) Proceedings for the determination of any question referred to in subsection (1) of this section may be instituted by any person (including the Attorney-General) and, where such

> proceedings are instituted by a person other than the Attorney-General, the Attorney-General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein."

[26] Mr Braham submitted that the Parliament (Membership Questions) Act ("the Act") is the relevant law contemplated by section 44(1) of the Constitution. Mr Braham described the Act as "a fairly comprehensive one which has a comprehensive set of rules". Those rules are the Parliament (Membership Questions) Rules, 1964. So far as the Act is concerned, he placed emphasis on section 3 which states that where there is a question as to whether a member of either House has vacated his seat, it shall be referred to and determined by the Supreme Court in accordance with the provisions of the Act. Every such reference shall be:

> "by petition presented to the Court –
>
> (a) in relation to the Senate, by the Clerk by authority of a resolution of the senate;
>
> (b) in relation to the House of Representatives …
>
> (c) in relation to either House by the Attorney-General or by any other person."

[27] On the basis of those combined provisions, Mr Braham submitted that the claim should have been brought by petition which would have given other persons affected by the situation an opportunity to be heard. In this regard, he was referring to the fact that the Leader of the Opposition had submitted two sets of resignation letters to the Governor-General and this had resulted in the replacement of not only the respondent

Williams but also Senator Dr Christopher Tufton by Mr Ruel Reid, CD, JP, and Dr Nigel Clarke, respectively. If the proceedings had been brought in keeping with the Act, he said, the court would have had to consider that Messrs Reid and Clarke "ought to have been made respondents". Moreover, he said, even if this Act was not in force, both gentlemen ought to have been served.

[28] I would not be surprised if either Mr Reid or Dr Clarke were to regard this suit as unwelcome litigation for them. In any event, I have not been pointed to any provision that would have prevented them from seeking to join in the proceedings, if they had wished.

[29] Mr Braham was quite impressive in putting forward this procedural point as being fatal to the respondent's cause. He said that "the pleader for the respondent understood that they were dealing with whether or not a member had resigned and had vacated his seat". The court, he said, also understood it so the Constitution and the law passed pursuant to the Constitution should have been followed. There are several reasons why a Senator may vacate his seat, and one is by resigning, he said. If it is, he continued, that it is being claimed that the Senator has resigned, "and the Senator is saying that the document appearing to be a resignation is not to be treated as such, it does not prevent the question from being whether he has vacated his seat". Similarly, he said, if the Senator is saying that the document that appears to be a resignation is not a resignation, due to its unconstitutionality, it is still a question touching and concerning whether a member has vacated his seat.

[30] Miss Carlene Larmond, representing the Attorney-General, submitted that although the Full Court may have accepted that section 44 of the Constitution conferred jurisdiction in respect of the matter, that court did not embark on a section 44 hearing. In justifying her position, she pointed out that section 17(1) of Act required the court to take certain actions at the conclusion of the hearing of a petition. None of those acts was performed. Such acts include a determination as to whether the member has or has not vacated his seat, and a certification of same to the President of the Senate.

[31] Dr Lloyd Barnett for the respondent submitted that the fact that the issue relating to the use of the letter of resignation is a discrete issue that falls within the Supreme Court's jurisdiction, and the fact that genuine breaches of human rights are involved, it was appropriate to commence the matter by fixed date claim form.

Decision on jurisdiction

[32] Several cases were cited with reference to this point. No discourtesy is meant in saying that I do not find it necessary to refer to any except **Hayles v Hamilton** [2010] JMCA Civ 27 in which I pointed out that **Dabdoub v Vaz** SCCA Nos 45 and 47/2008, delivered 13 March 2009 which clearly involved questions akin to those posed in section 44 of the Constitution was commenced and maintained throughout by fixed date claim form. In any event, the learned judges in the Full Court demonstrated (in the passages of their judgments that I quoted earlier) that they were fully aware that what they were dealing with was the validity of the letters. I would venture to suggest that the Act would definitely come into play in relation to the Senate if the Clerk, or the President of

the Senate, or indeed the Attorney-General wishes to have the status of a member clarified. So, in the circumstances, there is no merit in this jurisdictional point.

The real issue – the letters: are they consistent with the Constitution?

[33] Subsequent to the submissions made by Mr Braham as regards the jurisdiction of the Full Court, the lot fell on Mrs Georgia Gibson-Henlin to confront the real issue in the case – the status of the three letters submitted by the Leader of the Opposition to His Excellency the Governor-General. Mrs Gibson-Henlin had a difficult task. She submitted that the Governor-General was obliged to act on the advice of the Leader of the Opposition once he had received the "letter of advice", because the letter created a duty or obligation to act: **Re Maharaj and the Constitution of Trinidad and Tobago** [1966] 10 WIR 149. The power to appoint, she said, includes the power to revoke unless the contrary intention appears. She relied on the case of **Robinson v Coke** [2010] UKPC 14 at paragraphs 5-7 to say that the Privy Council has affirmed the application of section 35 of the Interpretation Act to the interpretation of the Constitution. That section provides that where an Act gives a power to make an appointment, the authority making the appointment also has the power to remove, suspend, reappoint or reinstate any person who has been appointed in exercise of the power.

[34] Mrs Gibson-Henlin's submissions so far may well be regarded as unobjectionable. However, they have to be viewed in the light of reality. She went off base when she submitted that the Leader of the Opposition "is the appointer". It is

sheer fallacy to say that the Leader of the Opposition appoints members of the Senate. He does not. He has the power to advise the Governor-General on an appointment – nothing more, nothing less.

[35] Mrs Gibson-Henlin contended that appointments to the Senate are based on partisan representation. In this context, she said, it is artificial to speak of the independence of the Senate in a vacuum. She said that was so because a strong cohesive opposition is required in the Senate for veto purposes. In my judgment, that may be, in the minds of some persons, a good political argument, but it does not help in determining the validity of the letters in question.

[36] Mrs Gibson-Henlin submitted that "the letters came about from the respondent" who was competent to sign a valid letter of resignation. However, according to her, the respondent having signed the letters, it was not open to him to withdraw them unilaterally. Further, once the letters were delivered in accordance with the Constitution and received by the Governor-General, they became effective. Mrs Gibson-Henlin further said that there was no evidence of the revocation of the letters coming to the attention of the appointing authority prior to the resignation. The Governor-General having received the letters, she said that the Court was then embarking on a futile exercise.

[37] According to Mrs Gibson-Henlin, the judges of the Full Court erred in finding that the scheme was unconstitutional given the fact that the respondent had the ability to resign in keeping with the Constitution and he himself had crafted the letters.

[38] Dr Barnett said that there was no case in public or private law in which the courts have approved an appointer or employer taking a letter of resignation at the time of appointment or employment to be used at will at any time. In the instant case, said Dr Barnett, the action was taken in respect of a constitutional office so the method of imposing a so-called resignation had to be expressly or impliedly authorized by the Constitution. The use of the letter of resignation, he continued, contrary to the will of the office holder is equivalent to a revocation of an appointment, and there is no legal basis for that action. No rational ground has been advanced for its use, he said.

[39] Dr Barnett submitted that where there is a scheme for appointment or resignation, the authority to resign is to be found in that scheme and a method to depart from that scheme is not effective. In the instant case, Dr Barnett said, the life of a Senator's membership is coterminous with the life of the Parliament itself. The Constitution specifies the method by which membership of Parliament may be terminated. Section 41(1) of the Constitution, he said, makes it clear that it is the member who must make the determination. He reminded the court that the letters of resignation in the instant case were required prior to the rendering of advice by the Leader of the Opposition for the appointment.

Reasoning and conclusions in respect of the letters

[40] The Constitution provides that the seat of a member of either House becomes vacant "if he resigns his seat". On 16 January 2012, prior to becoming a member of the House, the respondent Williams signed a letter tendering his resignation as a

member of the Senate with immediate effect. That letter cannot be regarded as a resignation letter as he was not yet a member of the Senate. However, assuming that it was, in order to have penned such a letter at that time, and further to have given it to the Leader of the Opposition to present to the Governor-General, the authority to so present it would be dependent on Mr Williams' continued wish to resign.

[41] The facts indicate quite clearly that there was regular dialogue between the appellant and the Leader of the Opposition throughout that week which commenced on 10 November 2013. They discussed the question of resignation on more than one occasion. The respondent indicated that he had no wish to resign. So too did Dr Tufton. In that situation, the Leader of the Opposition ought to have realized that, even if he had the authority to submit the resignation of a Senator to His Excellency, these two Senators had no intention or wish to resign. Any authority that he may have had to submit the letters had been terminated. I do not think it would have been necessary for either Senator to write to the Leader of the Opposition on the point. However, that might have been useful, given the subsequent legal tussle. At that stage of the proceedings, where there was clear refusal to agree to resign, the Leader of the Opposition needed mature legal advice. That seemed to have been lacking.

[42] The Senate is a very important part of the machinery of government in this country. The Constitution makes it so. Good governance requires mature deliberation on legislative measures. Each Senator is expected to give conscientious thought to every topic that comes before the Senate for discussion and vote. Every member of the Senate takes an oath to be faithful and bear true allegiance to Jamaica, to uphold and

defend the Constitution and the laws of Jamaica, and to conscientiously and impartially discharge his or her responsibilities to the people of Jamaica. The responsibilities are "to the people of Jamaica", not to an individual, not to a club, group or section of Jamaica. In view of that oath, it would be against the spirit of the Constitution if one were to bind one's conscience otherwise.

[43] In my opinion, in the instant case, the respondent did not resign. The letter of resignation, having been crafted before he became a Senator, was invalid. The Constitution does not contemplate the drafting of a letter of resignation prior to being appointed a Senator. Nor does it contemplate the delivery of pre-signed and pre-dated letters of resignation to the Leader of the Opposition for him to present, at a time of his choosing, to His Excellency the Governor-General. The choice of resignation is the Senator's – no one else's. If it were meant to be otherwise, the Constitution would have so stated.

[44] It is my view, therefore, that the Full Court was correct in ruling that the letters of resignation were inconsistent with the Constitution, and so null and void. The legal and constitutional position is that the respondent and Dr Tufton did not resign. They are therefore entitled to retake their positions in the Senate.

[45] This is the first time in our history as a sovereign nation that there has been a legal challenge as regards the resignation of a Senator. It seems that, in future, a Senator who wishes to resign should submit his or her letter of resignation directly to the appointing authority, so that there can be no doubt that a resignation has occurred.

The matter of resignation is personal to the Senator although it is a matter in which the public has an interest. The Governor-General is not expected to go behind a letter of resignation submitted by the holder of a constitutional office. That is why the letter is to be submitted by the holder of the office. The Leader of the Opposition is not authorized to submit a letter of resignation for a Senator. Had the Constitution been followed in this instance, the purported appointments of Senators Reid and Clarke would not have occurred. They would have been spared any inconvenience they may have suffered as a result of their appointments. They may however view the situation as one that provided an unexpected moment of honour in their lives in service to the nation.

The terms of my agreement with the Full Court's Order

[46] The Full Court declared that the request for the letters of resignation and authorization was "inconsistent with the Constitution, contrary to public policy, unlawful, and is, accordingly null and void", and that the letters themselves and the manner of their use were "inconsistent with the Constitution, contrary to public policy and are, accordingly, null and void". It should be noted that the issues as framed by the respondent concentrated on whether the scheme that he had devised was "inconsistent with the Constitution" and whether their use was "void as being inconsistent with the Constitution". There is no reference to the terms "unlawful" or "public policy". The conduct of the proceedings in the Full Court concentrated on the question of the inconsistency with the Constitution. Accordingly, I limit my endorsement of the judgment of the Full Court to saying that I agree that the activities leading to the

ousting of the holders of seats in the Senate were inconsistent with the Constitution and so null and void - those activities being the crafting of the letters, their delivery to the Leader of the Opposition and their subsequent submission to the Governor-General.

DUKHARAN JA

[47] I have read in draft the judgments of the learned President and my brother Brooks JA and agree with their reasoning and conclusions. I have nothing to add.

BROOKS JA

[48] On 15 November 2013, the Governor-General received letters from the Leader of the Opposition, Mr Andrew Holness, which indicated that two of the senators, whom Mr Holness had previously recommended for appointment as senators, had resigned. The senators involved were Mr Arthur Williams and Dr Christopher Tufton. Acting on those letters, and on further recommendations by Mr Holness, the Governor-General appointed other persons to those positions in the Senate.

[49] Mr Williams and Dr Tufton promptly indicated that they had not resigned. They stated that Mr Holness had issued the letters of resignation without their consent. In his claim against Mr Holness in the Supreme Court, Mr Williams accepted that he had previously signed the letters and given them to Mr Holness for use by him at his sole discretion. Mr Williams contended that he had impliedly withdrawn that mandate during a conversation with Mr Holness, held two days before the latter dispatched the letters to the Governor-General.

[50] The main issues raised in this appeal are firstly, the constitutionality of the letters and their use and secondly, whether any of Mr Williams' fundamental rights, assured him by the Jamaican Constitution, were breached.

[51] In approaching this judgment the factual background will be first set out. It will be followed by an outline of the findings and decision of the Full Court. Thereafter, the grounds of appeal will be grouped and assessed according to the issues which they raise.

The factual background

[52] The evidence is that seven of the eight persons, who were appointed as senators by the Governor-General in January 2012, on Mr Holness' recommendation, signed letters identical to those signed by Mr Williams. The letters had been crafted just days before the appointments were made. There were three letters for each person. The first letter was a terse letter of resignation with immediate effect. The second, was a letter of resignation with an explanation of the manner in which it was to be used, that is, at Mr Holness' sole discretion. Those two letters were addressed to the Governor-General. The third letter was addressed to Mr Holness. It authorised him to use the other two letters as and when he deemed necessary. The letters have been set out in full in the learned President's judgment.

[53] Mr Williams, an attorney-at-law, had drafted the letters, advised Mr Holness as to their validity, and secured the signatures of the other six persons who signed

letters at that time. Mr Williams signed witnessing the respective signatures. On his documents, his signature was witnessed by one of the six. He delivered all the letters to Mr Holness. All the letters, including those signed by Mr Williams and Dr Tufton, bore the date 16 January 2012, as being the date on which they were witnessed. That was the same day that the seven senators were appointed by the Governor-General on the recommendation of Mr Holness. The seven, and a subsequently appointed eighth, all performed their respective duties as senators until November 2013 when the next relevant development occurred.

[54] In that month, following Mr Holness having been re-elected as the leader of his political party, seven of the eight Opposition senators met. Dr Tufton was not among them. There was general agreement at the meeting that they would resign in order to allow Mr Holness a free hand in determining whom he wished to represent the Opposition in the Senate. Mr Williams did not agree. He decided not to resign. He later spoke to Dr Tufton who took a similar view.

[55] On 12 November 2013, the two met separately with Mr Holness. He required that they resign. They each indicated to him their refusal to do so. He reminded them that he had the pre-signed letters in his possession. Apparently, they parted holding different views as to what would next occur. Both Mr Williams and Dr Tufton said in their affidavit evidence that they were surprised to learn that Mr Holness had, on 14 November 2013, issued the letters to the Governor-General.

[56] The Governor-General, acting on Mr Holness' advice, appointed Mr Ruel Reid as a senator. That was on 15 November. Mr Reid's appointment was, ostensibly, to replace either Mr Williams or Dr Tufton. On 26 November, Dr Nigel Clarke was appointed to the remaining Senate seat.

[57] Mr Williams filed a fixed date claim on 19 November 2013 in the Supreme Court. In his claim he asked for declarations that the letters and their use were unlawful, unconstitutional and therefore void. He also asked for declarations that certain of his fundamental rights afforded by the Constitution had been breached. Mr Holness was the named defendant but, because there were constitutional issues involved, the Attorney General was also served with the claim. Mr Holness resisted the claim. It was heard by the Full Court of the Supreme Court on 21 and 22 July 2014. All parties made submissions.

[58] The Full Court ruled in favour of Mr Williams. On 6 February 2015, it made declarations along the lines requested by him in respect of the letters and their use. The court, however, declined to declare that his fundamental rights had been breached. It also severely chided Mr Williams for his active part in the creation of the scheme whereby the letters were crafted and signed.

The findings and decision by the Full Court

[59] The learned judges comprising the Full Court, Daye, McDonald-Bishop and Batts JJ, all wrote fully reasoned judgments in respect of the issues raised before

them. They considered the question of the validity of the letters and found that the request for the letters and the letters themselves were not consistent with the independence that a democratic society expects of its legislators. The request was therefore found to be unconstitutional and invalid. The learned judges found that Mr Williams had not resigned and that the use of the letters that he had signed was also invalid.

[60] The learned judges of the Full Court also considered the claims by Mr Williams that his constitutional rights to freedom of conscience and the right to association were breached. The majority, however, found that there was insufficient evidence to support those claims and they were denied.

[61] As a result of their findings the Full Court made the following declarations:

> "(1) That the request for the procurement of pre-signed and undated letters of resignation and letters of authorization by the Leader of the Opposition from the persons to be appointed or appointed as Senators to the Senate of Jamaica, upon his nomination, is inconsistent with the Constitution, contrary to public policy, unlawful, and is, accordingly, null and void.
>
> (2) That the pre-signed and undated letters of resignation and letters of authorization, as well as the manner of their use to effect the resignation of Senators (the claimant in particular) from the Senate of Jamaica, are inconsistent with the Constitution, contrary to public policy and are, accordingly, null and void."

Despite making the declarations in his favour, the Full Court, in light of their view of Mr Williams' participation in the scheme by which the letters came into being, made no order as to costs.

The appeal

[62] Mr Holness has appealed against the decision of the Full Court. He filed 16 grounds of appeal. They have been set out in the judgment of the learned President and need not be repeated here. The several grounds on which Mr Holness has appealed raise issues of jurisdiction and also contend that the Full Court erred in its findings concerning the validity of the letters and their use. Mr Williams also appealed, by way of a counter-notice of appeal, against the Full Court's findings concerning his fundamental rights and freedoms. The preparation for and hearing of the appeal were fast-tracked because of their national importance.

[63] In this judgment the issues raised by the appeal and the counter-notice will be broadly grouped and assessed as follows:

a. The jurisdictional issue.

b. The validity of the request for the letters.

c. The use of the letters by Mr Holness and their effect.

d. The fundamental rights issue.

e. The appointment by the Governor-General of other persons to the seats previously occupied by Mr Williams and Dr Tufton.

The jurisdictional issue

[64] The essence of Mr Holness' complaint in respect of the issue of jurisdiction is that Mr Williams proceeded by an incorrect method and the Full Court had no jurisdiction to deal with the matters that he had raised in his claim. Mr Braham QC, on Mr Holness' behalf, submitted that Mr Williams' complaint raised the question of whether he had validly resigned his seat. Learned Queen's Counsel pointed to section 44(1) of the Constitution, The Parliament (Membership Questions) Act (hereinafter referred to as the PQMA) and the rules in respect of that Act. He submitted that the method by which Mr Williams should have proceeded is comprehensively set out by those provisions.

[65] Learned Queen's Counsel pointed out that Mr Williams did not proceed by way of a petition, as is required by the PQMA. Nor did Mr Williams serve parties who, by the PQMA, were required to be served. These included the persons who had been appointed to the Senate as a sequel to the resignations that were submitted. Such service, Mr Braham pointed out, is also required by the PQMA.

[66] Mr Braham submitted that neither the Rules Committee of the Supreme Court nor the court itself has the power to allow any procedure other than that which has been specified by Parliament. In failing to observe the specified procedure, Mr Braham argued, Mr Williams had sought to invoke a jurisdiction that the Full Court did not have. The learned judges ought therefore, he argued, to have so directed Mr

Williams and should have declined to hear his claim. In failing to do so, Mr Braham submitted, the Full Court erred. He submitted that the appeal should be allowed on the basis of that error.

[67] Apart from referring to the provisions mentioned above, Mr Braham relied on, among others, **Winston Peters v Attorney General and Another** and **William Chaitan v Attorney General and Another** (2001) 63 WIR 244, **Patterson v Solomon** [1960] AC 579; [1960] 2 All ER 20, **Absolam v Gillett** [1995] 2 All ER 661 and **Henriques v Tyndall and Others** [2012] JMCA Civ 18. He sought to distinguish **Hayles v Hamilton** [2010] JMCA Civ 27.

[68] Dr Barnett, for Mr Williams, as did Ms Larmond, for the Attorney General, submitted that, despite a reference by at least one of the judges of the Full Court, to the jurisdiction granted by section 44 of the Constitution, the issues that the Full Court wrestled with, and in fact decided upon, were the specific issues of the validity of the letters and the use of those letters by Mr Holness. These, learned counsel pointed out, were separate from the questions raised by section 44. Ms Larmond pointed out that the case had been argued before the Full Court along the lines that the Full Court did have the power to assess the questions dealing with the letters and their use. There was, she admitted, a contention that section 44 did not allow the court to consider whether constitutional rights had been breached. That was, she argued, the only context in which a jurisdictional issue relating to section 44 was

raised. She submitted that Mr Holness' complaint in this court concerning the jurisdiction of the Full Court is based on a factual misconception.

[69] Ms Larmond submitted that the Full Court did not decide any issue of whether any seat in the Senate had been vacated or as to the validity of the membership of any member of the Senate. Learned counsel did, however, accept that the Full Court's conclusions lead to certain inferences touching on those issues.

[70] Although agreeing that the Full Court had jurisdiction other than by virtue of section 44 of the Constitution, Dr Barnett went further than Ms Larmond did on that point. Dr Barnett submitted that the Full Court was also entitled to assess, in Mr Williams' claim, questions raised pursuant to section 44. Ms Larmond seemed to accept that section 44, by way of the PMQA, did prescribe its own method of procedure, which did not include the Full Court, as it was activated. Ms Larmond did not, however, say so specifically.

[71] Mr Hylton QC, for the Clerk to the Houses of Parliament, sought to assist this court by bringing to its attention sections 3 and 4 of the Judicature (Rules of Court) Act, and rule 8.1 of the Judicature (Civil Procedure Rules) 2002 (the CPR). These, he submitted adjusted the procedure stipulated by the PMQA. He submitted that those provisions allowed Mr Williams to have proceeded as he did and allowed the Full Court to have assessed issues under the purview of section 44.

[72] In answering Dr Barnett and Mr Hylton, on these specific points, Mr Braham cited the preamble of the PMQA which, he submitted, specifically speaks to dealing with issues raised by section 44. Mr Braham also cited rule 2.2(3)(c) of the CPR which, he said, specifically excluded from the operation of the CPR, proceedings that are regulated by certain enactments. The PMQA, he submitted, was one such enactment. Learned counsel submitted that the Rules Committee that created the CPR has no authority to substitute its own rules for those which had been promulgated by Parliament.

[73] The submissions by learned counsel raise two distinct aspects to the issue of jurisdiction. The first is whether the procedure which was used to invoke the jurisdiction of the Full Court concerned a question under the purview of section 44. The second is whether the procedure followed permitted an analysis approved by section 44 and the PMQA.

[74] In respect of the first aspect, it would be correct to say that although the questions raised by Mr Williams for resolution by the Full Court, and which it in fact considered, are very closely related to the question raised by section 44(1)(b), they are, indeed, very different questions. Whereas the Full Court decided on the questions of whether the letters were valid and whether they were validly used, section 44(1)(b) deals with the question of whether a member has vacated his seat in one of the houses of parliament. The relevant portion of section 44 states as follows:

> "44. (1) Any question whether-

(a) any person has been validly elected or appointed as a member of either House; or

(b) **any member of either House has vacated his seat therein**…

shall be determined by the Supreme Court or, on appeal, by the Court of Appeal whose decision shall be final, **in accordance with the provisions of any law for the time being in force in Jamaica** and, **subject to any such law**, **in accordance with any directions given in that behalf by the Chief Justice**." (Emphasis supplied)

[75] Ms Larmond and Dr Barnett are correct in their interpretation that the questions raised by Mr Williams could have been, and were dealt with, without impinging on the provisions of section 44. The issues involved in the analysis by the Full Court dealt with the constitutionality of the letters and of their use. Those issues will be more closely examined in considering other grounds of appeal. They are, however, separate issues from the question of whether Mr Williams had vacated his seat.

[76] The aspect of whether the Full Court could have proceeded with Mr Williams' claim by virtue of the jurisdiction allowed by section 44 of the Constitution, is however, less straightforward. It entails an examination of the interplay between statutory law and rules of court established by the Rules Committee of the Supreme Court in accordance with the Judicature (Rules of Court) Act.

[77] Before conducting that examination, it is necessary to quote the relevant portion of section 41(1) of the Constitution. It deals with the methods by which the seat of a member of either house of parliament may become vacant. The relevant portion states:

> "41 – (1) The seat of a member of either House shall become vacant-
>
> (a) ...
>
> (b) if he resigns his seat;
>
> (c) – (g) ..."

[78] It is also appropriate at this stage to state that there is no alternative legislation concerning the assessment of questions raised by section 44 of the Constitution. The PMQA is the law established by Parliament by which questions raised under the provisions of section 44 are to be assessed and given effect. The preamble to and section 3 of, the PMQA make that clear. The former states:

> "**Whereas by section 44 of the Constitution of Jamaica it is provided** amongst other things that any question whether any person has been validly appointed as a member of the Senate or **whether any member of either House of Parliament has vacated his seat** or is required under the provisions of subsection (3) [dealing with a member being sentenced for a crime] or subsection (4) [dealing with a member being declared bankrupt] of section 41 of that Constitution, to cease to exercise any of his functions as a member, **is to be determined by the Supreme Court or, on appeal, by the Court of Appeal** whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica:
>
> BE IT THEREFORE ENACTED...as follows:-" (Emphasis supplied)

Section 3 of the PMQA states, in part:

> "3 – (1) Any question whether-
>
> (a) a person has been validly appointed as a member of the Senate; or
>
> (b) a member of either House-
>
> (i) **has vacated his seat therein**, or
>
> (ii) is required under subsection (3) or (4) of section 41 of the Constitution of Jamaica to cease to exercise any of his functions as such member,
>
> **shall be referred to and determined by the Court in accordance with the provisions of this Act**." (Emphasis supplied)

[79] The PMQA thereafter stipulates the procedure by which the relevant questions dealt with therein should be brought before the Supreme Court. Section 3(2) requires that the reference to the Supreme Court "shall be by petition". Section 5 requires other interested persons to be made parties. Section 6 requires the payment of security for costs within three days of the lodging of the petition. It states:

> "6.-(1) A person (other than the Clerk [of a House of Parliament] or the Attorney General) presenting a petition shall at the time of or within three days after the lodgment in Court of the petition give security for all costs that may become payable by him to any witness summoned on his behalf or to any party to the petition.
>
> (2) Security for costs shall be an amount of six hundred dollars and shall be given by recognizance entered into by the prescribed number of sureties, or given otherwise in the prescribed manner."

[80] In its next several sections, the PMQA stipulates, among other things, the procedure to be observed with respect to the service, presentation and trial of the petition. Three of those sections deserve special mention. The first is section 14(3). It deals with the issue of costs and gives precedence to the ordinary rules of the Supreme Court. It states, in part:

> "(3) The rules and regulations of the Court with respect to costs to be allowed in actions, causes and matters in the Court shall in principle and so far as practicable apply to the costs of petitions and other proceedings under this Act..."

[81] The next, is section 15. It speaks to the jurisdiction of the court in matters under the PMQA being similar to the ordinary jurisdiction of the court. The section states:

> "15.-(1) **Subject to the provisions of this Act** the Court shall in relation to any proceedings brought under this Act have the same power, jurisdiction and authority as if those proceedings were an ordinary action within the jurisdiction of the Court.
>
> (2) Subject to sections 40 and 42 of the Judicature (Supreme Court) Act, any power conferred on the Court by or under this Act may be exercised by a single Judge." (Emphasis supplied)

It is to be noted from the emphasised portion of that extract, that the PMQA does not totally cede jurisdiction to the court's procedure. That which has been stipulated in the PMQA is not subject to the court's procedure.

[82] Finally, section 19. It permits the rules of court to apply to proceedings under the PMQA. It states:

> "19. Subject to any direction given by the Chief Justice **rules of court shall apply to proceedings under this Act**, as they apply to actions, causes or matters within the jurisdiction of the Court or of the Court of Appeal, as the case may be." (Emphasis supplied)

There has been no indication that any Chief Justice has given any directions concerning proceedings under the PMQA. All the sections quoted above may be said, to some extent, to cede jurisdiction to the Rules Committee or the Court for determining procedure.

[83] The PMQA was passed in 1963. It was, however, not brought into force until 1966. In the interim, the Parliament (Membership Questions) Rules, 1964 (hereafter, "the PMQ rules"), said to have been made pursuant to the PMQA, were created and brought into force by the Rules Committee. The first provisions of the PMQ rules set out their intent:

> "In exercise of the powers conferred on the Rules Committee of the Supreme Court by the Parliament (Membership Questions) Act, 1963 and by the Judicature (Rules of Court) [Act], the following Rules are hereby made:-
>
> 1. These Rules may be cited as the Parliament (Membership Questions) Rules, 1964 and shall come into effect on the date of publication in the Gazette."

The Gazette publishing the PMQ rules was dated 13 August 1964. The fact that the PMQ rules pre-dated the PMQA being brought into force is of no moment, as section 5(c) of the Judicature (Rules of Court) Act allows the Rules Committee to make rules "in anticipation of any law or enactment providing for an appeal, a reference or an application to the Supreme Court or any Court or Judge thereof".

[84] The statutory provisions, having been set out, it must next be determined how they are viewed by the courts in their interaction with the rules of court and the jurisdiction of the court.

[85] In **Eldemire v Eldemire** [1990] UKPC 36; (1990) 38 WIR 234, the Privy Council ruled that the court has a discretion, where a party had proceeded by means of an incorrect originating process, to permit the claim to proceed despite the defect. Substance was preferred over form. That decision was made in the context of the alternative processes being both subject to the rules of court. Where, however, a particular process has been stipulated by statute, neither rules of court nor the court itself may authorise an alternative process. This has been decided by numerous decisions of this court.

[86] In **Smith v McField** (1968) 10 JLR 555, it was held that this court was not empowered to extend the time prescribed by an Order in Council for providing security for the prosecution of an appeal to the Privy Council. The Order in Council stipulated that an applicant seeking permission to appeal should provide security for costs within 90 days of being given conditional leave to do so. No provision was made for the result of failure to comply. It was held that default resulted in the conditional leave was determined by effluxion of time. The decision in **Smith v McField** was approved by the Privy Council in **Roulstone v Panton** [1979] UKPC 36; (1979) 1 WLR 1465.

[87] The same principle applies for locally passed legislation. **Hugh Richards v R** [2014] JMCA Crim 48 dealt with that point. It was decided in that case that time periods stipulated by the Judicature (Resident Magistrates) Act could not be extended without a statutory provision permitting the court to do so.

[88] In civil cases, similar principles apply. Phillips JA ruled in **Attorney General of Jamaica v John McKay** [2011] JMCA App 26, that despite rule 1.8(5) of the Court of Appeal Rules, 2002 (CAR), purporting to authorise a single judge of this court to consider applications for permission to appeal in interlocutory matters, that authorisation ran afoul of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act. As a result the learned judge of appeal ruled that the single judge did not have the power that the rule purported to endow. She said, at paragraph [8]:

> "…I am of the view, that the single judge of appeal does not have the power to either extend the time for the filing of a civil appeal nor to give permission to appeal to this court, in respect of an interlocutory order in civil proceedings, not being exempt from section 11(1)(f) of the Act."

A five-member panel of this court, at paragraph [41] of **Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9, took the same position. The court held that although the CAR purported to give a single judge of this court the power to decide procedural appeals, that power ran afoul of the Constitution. The offending rule was therefore held to be invalid.

[89] It is to be noted that the CAR were created by the Rules Committee pursuant to the Judicature (Rules of Court) Act. The CPR governing the procedure of the

Supreme Court can fare no differently from the CAR in a case of conflict with legislation. Even if it may be said that, by virtue of section 15(1) of the PMQA, or the fact that the PMQ rules were created by the Rules Committee, that a fixed date claim may be substituted for a petition, there would still be a breach of the provisions of the PMQA if the other provisions were not followed. The PMQA stipulated for the payment of security for costs. A failure to make the payment within the three days of filing the claim meant that the claim would be determined by effluxion of time. This is despite the fact that the amount involved is a modest $600.00. The result would be the same as in **Smith v McField**.

[90] The principle must apply to the present case. Even if it may be said that the Rules Committee, having created the PMQ rules, is entitled to revoke, amend or replace those rules, it may not exercise that power in respect of the PMQA itself. The requirements of the PMQA must be satisfied. There is no evidence that Mr Williams sought to abide by those requirements. There is no evidence that he paid any security for costs. The result would be that, if he were seeking to invoke the jurisdiction authorised by section 44 of the Constitution his claim would have faltered and the Full Court would not have had jurisdiction to either extend the time for payment or to hear his claim. Mr Braham is correct in his submissions in this regard. That scenario does not, however, arise. It was not section 44 which governed Mr Williams' claim.

[91] Mr Williams, therefore, succeeds on the first aspect of the issue. Jurisdiction being found to have been vested in the Full Court, the substantive issues may now be addressed.

The validity of the request for the letters

[92] Mrs Gibson Henlin advanced the submissions on behalf of Mr Holness in respect of the validity of the letters and their use. Learned counsel supported the scheme by which the letters were created and signed. The term "scheme" is used here in the sense of "a plan" or "an arrangement". No negative connotation is implied.

[93] Learned counsel submitted that the Leader of the Opposition was entitled to request the resignation of any person whose appointment he had secured. Her submissions in respect of the power of the Leader of the Opposition to have senators removed may be summarised as follows:

a. Although it is the Governor-General who appoints the persons to occupy the 21 seats in the Senate, the Governor-General is obliged to accept the recommendations made to him by the Prime Minister in respect of 13 of those seats and by the Leader of Opposition in respect of the other eight.

b. Effectively, therefore, it is the person who makes the recommendation who makes the appointment.

c. The person who makes an appointment has the authority to revoke that appointment.

d. Applying those premises to the facts of this case meant that Mr Holness, having recommended Mr Williams for appointment to a seat in the Senate, had the power to ask for Mr Williams' resignation and to advise the Governor-General to remove Mr Williams.

[94] The argument is untenable. Section 35 of the Constitution states that it is the Governor-General, acting in accordance with the Prime Minister and the Leader of the Opposition, who appoints the respective senators. Section 137(1) applies to resignations from the Senate. By that section, a senator "may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed". The section does not speak to "effective appointments" or to persons who "effectively appoint". It is the Governor-General who appoints senators. It is the Governor-General to whom senators must address any letters of resignation.

[95] Despite Mrs Gibson Henlin's strong assertion to the contrary, the Leader of the Opposition has no authority to receive a letter of resignation from any senator. There is no provision in the Constitution or elsewhere which supports her stance. Any letter of resignation, which the Leader of the Opposition receives, has no effect until it is received by the Governor-General or by a person designated by the Governor-General to receive it.

[96] Mrs Gibson Henlin also submitted in the court below that the tender of the resignation letters was voluntary. It is in the context of the validity of the scheme that the Full Court set out a significant portion of its reasoning. The reasoning of the judges was consensual. Daye J ruled at paragraph [60] of the judgment:

> "...The individual's right to resign under the Constitution is personal and non-delegable. In my view the pre-dated letters of resignation and authority to the defendant to date and use them are contrary to public policy, void and inconsistent with the Constitution."

[97] McDonald-Bishop J expressed similar views at paragraph [155]:

> "In my view, the letters were contrary to the letter, intent and spirit of the Constitution as it relates to the manner in which a Senate seat may be rendered vacant by resignation. It follows, then, that the authority in writing to the defendant to use the letters to effect the claimant's resignation has no place in that scheme. In the final analysis, **I would hold that the letters were not the kind required by the Constitution to effect the resignation of a Senator, and are, therefore, inconsistent with the constitutional scheme and are, accordingly, unconstitutional, null and void.**" (Emphasis supplied)

[98] Batts J, as did the other judges, pointed to the fact that although the Constitution closely followed the format of the 1959 Constitution which it replaced, the power given to the Premier in the 1959 instrument to advise the Governor to declare a seat vacant, was omitted from the 1962 promulgation. The learned judge held "that the framers of the Constitution of 1962 did not intend for the appointer or the person making the recommendation, to have the power to remove persons from

the Senate once validly appointed" (paragraph [221] of the judgment). He continued at paragraphs [222] and [223]:

> "[222] If that is so, and I so hold, then **any step by a person or persons to give themselves the power to remove a Senator who has been validly appointed will be unconstitutional**.
>
> [223] Given that a pre-signed letter of resignation with a pre-signed letter of authority to use it, gives a power of removal to the addressee, such documents must violate the Constitutional imperative. What is that imperative? It appears to me that the Constitution intended that once appointed to the Senate each of the eight such appointees (in the case of the Opposition) would operate with a free will. Their decisions should be arrived at because it is their decision, and not because of fear for example, of being removed from office. A decision by a Senator to follow or obey the instruction of the Leader of the Opposition should be arrived at because that is the wish or desire of the Senator. It must not be the result of coercion." (Emphasis supplied)

[99] Mrs Gibson Henlin criticised the holding of the learned judges. She submitted that appointment to the Senate is based on partisan representation. In this context, she argued, it is artificial to speak of the independence of the Senate in a vacuum. This, she said, is because a strong cohesive opposition is required to preserve its veto in the cases where a two-thirds majority is required to pass certain types of legislation.

[100] Learned counsel argued that there is "nothing within the scheme of the Constitution that suggests that the tenure of a Senator is on equal footing with that of the Members of Parliament, who are elected representatives" (paragraph 68 of her

written submissions). She drew the conclusion from the practice that senators traditionally vote along party lines in order to maintain "party discipline", that "it could not have been the intention or the spirit of the Constitution for the office of the Senator to be granted the same measure of security of tenure as that of the House of Representatives" (paragraph 69 of her written submissions).

[101] The reasoning of the learned judges of the Full Court is to be preferred. As pointed out above, in reference to sections 35 and 137 of the Constitution, the framework of the supreme law does not contemplate the removal of senators by either the Governor-General or the person who had advised the Governor-General to appoint those senators. The comparison with the provisions of the 1959 Constitution, which contained that contemplation, is telling. It is also telling that the Constitution does not recognise political parties. Mrs Gibson Henlin's submissions, and the grounds of appeal, in this regard must fail.

The use of the letters by Mr Holness and their effect

[102] Mrs Gibson Henlin, however, had other strings to her bow. Learned counsel submitted that once the letters of resignation were received by the Governor-General they were effective. She submitted that even if Mr Williams had revoked Mr Holness' authority to use the letters as he deemed fit, there is no evidence that Mr Williams communicated that revocation to the Governor-General or the Governor-General's representative prior to their receipt of the letters. The essence of learned counsel's submission is that, in the absence of notice, the resignation set out in the letters was

effective. She submitted that a resignation takes effect when the writing signifying it is received by the authorised recipient. Once delivered, the resignation could not be revoked. For these submissions, Mrs Gibson Henlin relied on, among others, **Re Maharaj and the Constitution of Trinidad and Tobago** (1966) 10 WIR 149, **Riordan v The War Office** [1959] 3 All ER 552, **Birrell v Australian National Airlines Commission** (1984) 5 FCR 447 and **Finch v Oake** [1896] 1 Ch 409.

[103] **Re Maharaj** does not assist learned counsel. At best, the case supports the principle that the Governor-General is obliged to act on the advice of the stipulated constitutional authorities. In the case of section 35 of the Constitution, those authorities are the Prime Minister and the Leader of the Opposition. The principle established by **Re Maharaj** is that a complaint against the Governor-General for failing to act in accordance with the relevant advice is not justiciable until a formal demand has been made for the Governor-General to so act.

[104] The principle to be extracted from **Riordan**, **Birrell** and **Finch** is that a letter of resignation, once delivered to the appropriate authority, cannot be withdrawn. It is effective once it is delivered and does not require an acceptance by that authority.

[105] If, however, the letter was delivered contrary to the wishes of the signer of the letter, it cannot be said that he has resigned. True, he did sign it, but as Lindley LJ stated at page 415 of **Finch**, "[i]f this letter had never reached the secretary [the appropriate authority] it might have been treated as non-existent". The signing and

handing to another, on conditions, is not delivery to the appropriate authority. The question that remains is whether the letters in the present case were delivered to the Governor-General against Mr Williams' wishes.

[106] The Full Court found that in indicating his refusal to resign, Mr Williams had revoked his authority for the letters to be used. Daye J, at paragraph [60] of the judgment, said:

> "Based on the affidavit evidence of the discussions held and the differences of opinion about the resignation between the defendant [Mr Holness] and the claimant [Mr Williams] on Tuesday 12 November 2013 at the party's office, I hold that a reasonable person can imply that the claimant revoked, terminated or withdrew his authority to tender his resignation. Up to 12 November, the letter was not signed and dated by the defendant. There was an interval for the right to terminate, revoke or withdraw the letter of resignation. **The wide discretion which appears on the face of the letter for the defendant to use it as he deemed necessary would not have amounted to an irrevocable authority to submit this letter to the Governor-General**…." (Emphasis supplied)

[107] McDonald-Bishop J, at paragraph [140], expressed a similar view. She said:

> "…I find that the express indication to the defendant [Mr Holness] of the claimant's [Mr Williams'] disagreement to resign at that time, was a clear and unequivocal communication to the defendant that the claimant was not agreeing to the use of the pre-signed letters to effect his resignation at that time. Whether one calls it revocation of the authority, suspension of it or withdrawal of it, **the fact is that the defendant knew, at that point in time when he signed and dated the letters of resignation and delivered them to the Governor-General, that the**

> **claimant was not agreeing to him using the letters.** Communication of the revocation of the authority in writing was, in my view, unnecessary." (Emphasis supplied)

The opinions of the learned judges are supported by authority.

[108] **Tumukunde v Attorney General and Another** [2009] 4 LRC and **Sinyium Anak Mutit v Datukong Ong Kee Hui** [1982] 1 MLJ 36 assist the analysis of this issue. The cases were cited to the Full Court by Dr Barnett and Ms Larmond respectively. The facts of the cases are not on all fours with the present case. They, however, demonstrate the principle that the holders of positions in the legislature should not be subject to coercion or any undue pressure to make decisions against their will.

[109] In **Tumukunde**, a brigadier in the Ugandan army was the army's elected representative in that country's parliament. He made certain comments outside of parliament that the army's high command found offensive and in breach of protocol. His superiors directed him to write a letter of resignation to the speaker of the house within 12 hours. He did so. The letter stated, in part, that he had been directed to resign. He thereafter complained that the resignation had been coerced. He then petitioned the Constitutional Court for a declaration that he remained a Member of Parliament. The court found that it was not a genuine letter of resignation. Kanyeihamba, JSC stated at page 164:

> "A genuine voluntary letter of resignation by an honourable member of Parliament need not say more than the simple communication that he or she is resigning the parliamentary seat immediately or with effect from a certain date. He or

> she may simply state that 'I hereby resign' without further ado. Consequently, the Speaker and anyone else reading the appellant's letter…is bound to ask whether it is a resignation or a cry for help….

He continued at page 165:

> "…A Member of Parliament, the supreme legislative organ of the land, should never have to resign under the threat or directive of anyone but only in accordance with the provisions of the country's Constitution and laws made by Parliament and voluntarily."

And at page 166:

> "In my opinion, the only legitimate method available to anyone wishing to unseat a Member of Parliament is to resort to one of the devices spelt out in arts 83 and 252 of the Constitution. The appellant's seat could only have become vacant if the appellant voluntarily resigned. In this judgment, I have endeavoured to show that this is not what happened. Therefore, the appellant did not resign."

[110] In **Sinyium Anak Mutit v Datuk Ong Kee Hui**, a member of a political party in Malaysia sought to be nominated by the party to contest an election to the House of Representatives in that country, the Dewan Raayat. The party and he agreed that in exchange for its financing of the expenses of his election bid, he would turn over his allowance, as a member of the Dewan Raayat, to the party. He also agreed that if he did anything which may be seen to be against the interests of the party, he would forfeit his seat in the Dewan Raayat. He signed an undated letter of resignation and

authorised the party to submit it to the speaker of the Dewan Raayat in the event of his forfeiture according to the agreement. He fell out with the party over the earnings he was turning over to it, and he resigned from it. The party in turn submitted the resignation letter and he lost his seat in the Dewan Raayat. He then sued the party claiming a refund of the money that he had turned over to it.

[111] Wan Mohamed J, in the court at first instance, held, in respect of the delivery of the pre-signed letter of resignation, that it was:

> "…against public policy for a Member of Parliament or a State Legislative Assembly to be made obliged by any political party or other body of which he is a member to resign from [his position] when the Member resigns from the Party. **To recognise such an arrangement would amount to a degradation of the Honourable House which is the fountain of democracy in our country**." (Emphasis supplied)

It is important to note that the validity of the resignation was not in question. Despite that strong statement by the learned judge, he awarded judgment for the member and made orders to ensure that the party was reimbursed its expenses.

[112] On appeal by the party, the Federal Court overturned the judge's orders (**Datuk Ong Kee Hui v Sinyium Anak Mutit** [1983] 1 MLJ 36). It ruled that the contract was an illegal one and that the member had no entitlement to remedy by the court. Like Mohamed J, however, the Federal Court made strong comments about the arrangement that led to the dispute. In his judgment in that court, Tun Salleh Abas FJ said, in part at page 39 of the report:

> "The system of representative government is based upon freedom of choice. The electors must be free to choose a candidate to represent them in the legislature, whilst the candidate who is successfully returned must in turn be free to act in accordance with his independent judgment. **Any arrangement depriving him of this independence is frowned upon by the law as violating public policy.**" (Emphasis supplied)

[113] The learned judge's reasoning on the point makes very interesting reading, but three excerpts will suffice. The first is his extraction of a principle from **Amalgamated Society of Railway Servant v Osborne** [1909] 1 CH 163; [1910] AC 87. He expressed it at page 40:

> "...The electors who elect a Member of Parliament must be free to choose which of the candidates they prefer. **Similarly, the candidate so chosen must also be free to act according to the best of his ability and his judgment and should not be subject to the dictates of others. Therefore, any rule or contract with or without consideration which contravenes this freedom strikes at the very root of representative government and is therefore void and also against public policy**." (Emphasis supplied)

That freedom should, it seems, also extend to members of the Senate.

[114] The second is relevant to Mrs Gibson Henlin's mention of maintaining party discipline. It is also at page 40:

> "…No party can rely upon an external sanction to enforce discipline if the very disciplinary matter to be enforced, i.e. the payment of remuneration to the party, and the form of sanction itself, i.e. the forfeiture of the seat, are illegal."

[115] Salleh Abas FJ made it clear that the court was not dealing with the member having forfeited his seat. He, however, seemed to suggest at page 41 that it had not been properly forfeited. After quoting the provision of the Federal Constitution dealing with resignations from the House of Representatives, the learned judge said at page 41:

> "Thus tenure of office of a member of Parliament is at [the member's] own pleasure except of course when he commits any acts disqualifying him from being a member. Apart from disqualification it is up to him whether he wishes to resign or not. **There is no question of his seat being forfeited at the instance of any person or party on the ground that he has committed a breach of contract or arrangement with this person or party nor is there any question of him being removed from the House at such instance**. However, this statement is as far as we can go...for the time being in the context of this case. We cannot go any further because the Speaker is not a party to this suit nor did the respondent challenge his ruling in accepting his resignation...." (Emphasis supplied)

[116] Based on that reasoning, including the guidance from **Tumukunde** and **Datuk Ong Kee Hui**, the grounds in respect of this issue should also fail.

The fundamental rights issue

[117] I agree with the careful reasoning of Daye and McDonald Bishop JJ on this issue, in his judgment in the Full Court. There is no evidence that Mr Williams has been prevented from exercising any of his fundamental rights of conscience, association or expression.

[118] Dr Barnett submitted, in support of the counter notice of appeal, that the freedom of association also included a freedom not to associate. The point is also supported by authority. It, however, does not assist Mr Williams. He has not shown that he has been forced, against his will, to associate with anyone.

[119] Perhaps he hopes to extrapolate a theory from his evidence on the point. The essence of that unchallenged evidence is that Mr Holness required him to resign because he did not expressly support Mr Holness in a leadership race in their political party. The theory, therefore, is that the requirement was an act of reprisal. Even if that were so, that reprisal does not convert into compelling Mr Williams to do anything or associate with anyone against his will. Certainly, also, the freedom not to associate is not restricted to Mr Williams. Mr Holness also has that right. No one person's rights have precedence over the other's.

[120] The ruling of the Federal Court in **Datuk Ong Kee Hui v Sinyium Anak Mutit** also assists in the question of Mr Williams' counter-claim. As mentioned above, the court ruled that parties had participated in an illegal contract and were, therefore, not entitled to any relief from the court. Salleh Abas FJ said, in part at page 41:

> "**As the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore *void ab initio* and the parties are outside the pale of the law.** The respondent being a party thereto cannot claim any remedy under this arrangement. He is not entitled to the refund of the balance of his remuneration kept by the party, nor could he claim any damages, special or general, in connection with his

> forced resignation; *ex turpi causa non oritur actio* [an action does not arise from a base cause]." (Emphasis supplied)

[121] Based on that reasoning, and because Mr Williams was a willing and active participant in the scheme that created the letters, he would not be entitled to any relief from any breach of his rights that flowed from that arrangement.

[122] The counter-notice of appeal should also be dismissed.

The actions of the Governor-General subsequent to receiving the letters

[123] The issue of the result of the Governor-General appointing two other persons to the seats from which Mr Williams and Dr Tufton were said to have resigned is not one which the Full Court was asked to adjudicate upon, and it did not do so. The issue spoke to whether the method of removing Mr Williams from his seat was valid.

[124] As the subsequent appointments were not an issue in the court below, this court is not entitled to adjudicate upon it. It would seem, however, that if a letter of resignation is ineffective, then there was no vacancy for the Governor-General to fill, despite any advice by the relevant constitutional authority that he do so.

Conclusion

[125] The Full Court was correct in finding that the demand for pre-signed letters of resignation was unconstitutional and invalid. Similarly the use of those letters without the consent of the persons who had signed them was also invalid. Consequently, the letters of resignation that were delivered to the Governor-General by Mr Holness in

respect of Mr Williams were invalid and ineffective. The appeal by Mr Holness should be dismissed.

[126] The counter-notice of appeal by Mr Williams should also be dismissed as there was no evidence to support his claim that there were breaches of his fundamental rights in the circumstances of this case.

[127] The issue of costs remains. It should be noted that despite the strong comments in **Datuk Ong Kee Hui** about the litigants being "outside the pale of the law", the court, nonetheless, awarded costs to the appellant. It is not an inconsistent position. The parties to the litigation were involved in a legitimate exercise before the court.

[128] In considering the costs of the litigation in this case, it may be said that whereas the Full Court was entitled to hold, because of Mr Williams' participation in the scheme that created the letters, that there should be no order as to costs, different considerations apply here. Mr Holness, having received a judgment of the Full Court, decided to appeal from it. That is his right. He should not be denied it. He cannot, however, say that there is any basis to depart from the usual rule that costs must follow the event. Were it not for the counter-notice of appeal, his appeal having failed, costs would have been awarded to Mr Williams to be taxed if not agreed.

[129] There was, however, the counter-notice. Mr Williams failed in respect of that. The issues raised in respect of the counter-notice were far less demanding than those raised on the appeal. Mr Williams would have been put to greater expense in respect of the appeal than Mr Holness would have been in respect of the counter-notice. Mr Williams should be paid a portion of his costs. Two-thirds would be reflective of the difference in the demand between the appeal and the counter-notice.

PANTON P

ORDER

It is ordered as follows:

a. The appeal is dismissed.

b. The counter-notice of appeal is dismissed.

c. The respondent should have two thirds of his costs on the appeal. Such costs are to be taxed if not agreed.

d. Each party should bear his own costs in respect of the counter-notice of appeal.