[2015] JMFC FC 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2009HCV00660

BEFORE: THE HON MR JUSTICE KING J
THE HON MRS JUSTICE MCDONALD-BISHOP J
THE HON MR JUSTICE WILLIAMS J

BETWEEN	**LEGAL OFFICERS' STAFF ASSOCIATION**	**1ST CLAIMANT**
AND	**TASHA MANLEY**	**2ND CLAIMANT**
AND	**MELLISA SIMMS**	**3RD CLAIMANT**
AND	**THALIA FRANCIS**	**4TH CLAIMANT**
AND	**MAURICE BAILEY**	**5TH CLAIMANT**
AND	**KHANDREA FOLKES**	**6TH CLAIMANT**
AND	**TRUDY-ANN DIXON-FRITH**	**7TH CLAIMANT**
AND	**SUSAN WATSON BONNER**	**8TH CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**1STDEFENDANT**
AND	**THE MINISTER OF FINANCE AND PLANNING**	**2NDDEFENDANT**

Patrick Foster QC and Mrs Simone M Mayhew instructed by Simone M. Mayhew for the claimants

Allan Wood QC, Mrs Daniella Gentles-Silvera and Miguel Williams instructed by Livingston, Alexander & Levy for the defendants

30, 31 October & 1 November 2012 and 17 July 2015

JUDICIAL REVIEW - LEGITIMATE EXPECTATION - GOVERNMENT'S POLICY FOR COMPUTATION OF SALARIES OF LEGAL OFFICERS - POLICY LINKING LEGAL OFFICERS' SALARIES TO JUDGES' SALARIES - CHANGE OF POLICY BY GOVERNMENT - LEGISLATION EFFECTING CHANGE IN POLICY - NO NOTIFICATION TO LEGAL OFFICERS - NO CONSULTATION BEFORE CHANGE EFFECTED - BREACH OF LEGAL OFFICERS' LEGITIMATE EXPECTATION - WHETHER BREACH OF LEGITIMATE EXPECTATION JUSTIFIED - WHETHER LEGITIMATE EXPECTATION OVERRIDDEN BY LEGISLATION - APPROPRIATENESS OF CASE FOR JUDICIAL REVIEW - WHETHER ALTERNATIVE REMEDY EXISTS - WHETHER DECLARATORY RELIEF APPROPRIATE

KING J

[1] The delay in the delivery of this judgment, for which I must take personal responsibility, is deeply regretted.

[2] The Administrative Orders sought in these proceedings and the relevant background have been thoroughly described in the judgments of my learned brother and sister.

Judicial Review

[3] Orders 1, 2, and 3 being the Orders of Certiorari, Mandamus and Prohibition are sought by way of judicial review.

[4] The eventual deciding issue in this application for judicial review was not whether the claimants enjoyed the legitimate expectations which they claim, nor even whether those expectations, both procedural and substantive were frustrated, but rather whether there existed a public interest of sufficient weight to properly override those legitimate expectations.

[5] As unfair as a breach of legitimate expectation might be, that unfairness can be outweighed and overridden by a sufficient compelling reason for the change in the policy or practice in question.

[6] I find as I understood my learned brother and sister to have found, that the reason put forward by the defendants to justify the change in policy are sufficiently cogent to have properly overridden the legitimate expectations of the claimants.

[7] On that basis, I find that the applicants are not entitled to the Orders sought at 1, 2 and 3.

Declarations

[8] Under part 56.1 of the Civil Procedure Rules apart from judicial review or relief under the Constitution, an administrative order may be sought in the form of a declaration where a party is the state, a court, a tribunal, or any other public body. It is the by virtue of this provision that the declarations are sought in orders 4, 5 and 6.

[9] Under Part 8.6 of the CPR

> "a party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed."

The court has a general power to make declarations although a claim to consequential relief has not been made, or has been abandoned or refused see Halsbury para. 1610 The fact that the applicant is no longer entitled to other relief is also no bar to the grant of a declaration see **De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th Edition, para 18-023.** As would be apparent from what I had said earlier I

am of the view that there was no real contest in relation to the existence or breach of legitimate expectations set out in the application for these declarations. As such the claimants are entitled to the declarations sought.

[10] However, having regard to the refusal of the Orders sought at 1, 2 and 3, I would make no order for the reversal of policy changes which entitled the claimants to those declarations.

[11] I too do not think that an order for costs is warranted.

MCDONALD-BISHOP J

Introduction

[12] This claim concerns the remuneration of legal officers employed to the public service. The Legal Officer's Staff Association ("LOSA"), the1st claimant, has joined forces with the seven other claimants, its executive members, acting in their personal capacity, to bring a claim for administrative orders (by way of judicial review and declarations) against the Minister of Finance and Planning (now the Minister of Finance and the Public Service), the 2nd defendant.

[13] LOSA is an unincorporated body that was formed prior to 1992 to represent the interests of legal officers that fall at certain levels within the various departments of the public service, including clerks of courts and deputy clerks of courts in the Resident Magistrates' Courts. LOSA, over the years, has undertaken collective bargaining with the government on behalf of these public officers with respect to remuneration, benefits and conditions of work. LOSA, however, had been dormant for some time.

[14] All the other claimants at the time of commencement of these proceedings held positions of responsibility as executive members of LOSA following its revival in or around July 2008. Tasha Manley, the 2nd claimant, was elected as president of the Association and gave evidence for and on behalf of LOSA and herself in these proceedings.

[15] The 2nd defendant, pursuant to section 77 of the Constitution of Jamaica, is, among other things, charged with responsibilities for the public service relative to collective bargaining/industrial relations, compensation policy, pay planning, employment benefits, staff orders and conditions of service.

[16] The Attorney General, named as 1st defendant, is joined by virtue of the Crown Proceedings Act.

The background

[17] The claimants' grouse with the defendants has its roots in a decision taken by Cabinet in or around 1994 that the salaries of legal officers would be linked to those of the judges of the Court of Appeal and the Supreme Court (the higher judiciary). This decision was arrived at consequent on negotiations between LOSA executives and representatives of the government for the period 1991-1993. The decision to link the salaries gained formal expression in what was called the Heads of Agreement with the Government of Jamaica executed on 24 December 1992.

[18] Clause 2 (f) of that Agreement stipulated a mechanism for the upward adjustment of salaries payable to the legal officers, which was proportionately linked to the salaries payable to the higher judiciary. It provided with respect to the basic salaries of legal officers as follows:

> "In the event any upward adjustment is made to the basic salary and allowances of Legal Officers at Level VII in keeping with the understanding between the Heads of Departments and the Ministry of Public Service regarding parity with Judges of the Court of Appeal adjustments will be made as appropriate to the basic salary and allowances of other levels of the group."

[19] Following on that Agreement, Cabinet, by its decision dated 14 March 1994, instructed that the policy whereby the salary increases due to legal officers were linked to that of the higher judiciary was to be formalised. That decision resulted in the scheme whereby the basic salaries of the legal officers were calculated by reference to the salaries of the higher judiciary without the need for any further negotiations.

[20] Several pieces of correspondence were exchanged between the government and LOSA over the years that serve to reflect the linkage policy. In fact, the existence and application of this policy that formed the basis of the remuneration of the legal officers was again re-affirmed by the government through a letter dated 4 June 2002 issued under the hand of the then Financial Secretary. This letter was in response to the written request of LOSA for clarification in relation to the policy applicable to the determination of the salaries of its members.

[21] After 2002, there was no salary negotiation by LOSA with the government as the body went into dormancy for some time. As a result, there was no duly elected executive to act on its behalf. It was not until between July and September 2008 that steps were taken to revive LOSA commencing with its re-launch and the appointment of an interim executive. An executive was subsequently put in place with the 2nd - 8th claimants elected as its members.

[22] By the time LOSA was revived, a new Cabinet had already been formed in or around September 2007, following the general elections of that year. It was then that the Ministry of Finance and Planning was renamed the Ministry of Finance and the Public Service (the Ministry) with the then Minister being the Honourable Audley Shaw. The formulation of policies pertinent to the increase of salaries for public sector workers fell within the purview of the Public Service Establishment Division in the Ministry. At the time, the Honourable Senator Dwight Nelson, Minister without Portfolio in the Ministry, assumed responsibility for that Division. Senator Nelson was charged with the responsibility to formulate the government's policy relating to salary increases for the judiciary and other public sector workers, including the legal officers.

[23] In or around late 2007, the 6th Independent Commission for the Judiciary (the Independent Commission) was appointed pursuant to the Judiciary Act to consider issues pertaining to the salaries, benefits and conditions of service of the judiciary and to make recommendations for, *inter alia*, increases in the judges' salaries. Section 4 of the Judiciary Act delegates power to the 2nd defendant to issue orders to increase the salaries of judges and provides that in making such orders, the 2nd defendant may take into account any report or recommendation of the Independent Commission.

[24] By report dated 31 January 2008, the Independent Commission recommended increases of 50% over a two - year period for judges to take effect on 1 April 2007 and 1 April 2008. In making its recommendations, the Independent Commission found that in most countries of the world, the higher judiciary is compensated on bases that "clearly distinguished the members from other public sector workers to protect their independence, maintain their dignity and to attract the most suitable candidates for judicial appointments". The report indicated that urgent steps were required to be taken "to address the woefully inadequate packages and poor working conditions" of the higher judiciary and that such steps, as recommended in the report, ought to be taken immediately.

[25] Even more importantly for current purposes, the report reads further:

> "This Commission is aware of the financial and budgetary constraints of the government. Nevertheless we believe that it is important to initiate measures that clearly establish the status and role of the judiciary in our constitutional democracy and recognise that in doing so a clear signal must be sent that the Higher Judiciary is not a part of the Civil Service or any other part of the executive arm of government."

The recommendation of the Independent Commission that the government should treat with the higher judiciary differently from other public sector workers received endorsement from the then Attorney General and Minister of Justice, the Honourable Dorothy Lightbourne. She forwarded her comments indicating her endorsement of that position to the 2nd defendant. She proposed*, inter alia,* a severance of the legal officers from the Judicial Legal Group which according to her "…provides the necessary context for separating the determination of benefits for the Judges from the other groups in the legal profession".

[26] By Cabinet decision No. 23/08, dated 7 July 2008, salary increases were approved at a rate of 5% for legal officers and the higher judiciary in keeping with the Memorandum of Understanding (the MOU) made by the government with the trade unions representing the civil service. The new scales of revised salaries that were to

take effect from 1 April 2007 and 1 April 2008 under the MOU also included those payable to the legal officers.

[27] The decision to discontinue the link between the increases in the salaries payable to legal officers and the higher judiciary was communicated to members of the civil service by a Departmental Circular dated 21 July 2008. This communication was directed to all Permanent Secretaries and Heads of Departments.

[28] In September 2008, it was decided that further increases should be granted to the judges. This was communicated by Senator Dwight Nelson in a letter to the Honourable Chief Justice. Subsequently, on or around 7 October 2008, the 2nd defendant promulgated the Judiciary (Salaries) Order, 2008 pursuant to section 4 (2) of the Judiciary Act. This gave effect to the decision to increase the salaries payable to the judges.

[29] In or around 2008, it was brought to the attention of the legal officers that the decision had been made to increase the salary of the judiciary by 50%. Upon enquiry conducted by the then revived LOSA as to the position of the legal officers, they were advised in a letter of 21 November, 2008, which reads in part:

> "The Ministry of Finance and the Public Service wishes to acknowledge receipt of your correspondence dated November 10, 2008…
>
> I am to advise that the previous dispensation where LO 7 salary was linked to that of the Senior Puisne Judge was based on Cabinet decision. In recent time and based on the recommendations of the independent Commission for the Judiciary and by a further Cabinet Decision the LO 7 position has been de-linked from that of the Senior Puisne Judge."
>
> It is recommended that the Legal Officers submit a salary claim to the Industrial Relations Unit for the next round of salary negotiations 2010/2012. Notwithstanding, we are however willing to meet with you and to have further discussion regarding your concerns…"

This letter unequivocally indicated to the legal officers an end to the system that was in place for about 15 years. After a failed effort to have dialogue with Senator Dwight Nelson concerning the cessation of the policy, the claimants were spurred into taking legal action.

The proceedings

[30] In 2009, the claimants applied for leave to apply for judicial review of the Cabinet's decision to de-link their salaries from that of the higher judiciary. Leave was granted in 2011 whereupon the claimants commenced these proceedings by seeking the following reliefs:

> "1. An order of certiorari quashing the decision of the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica to "de-link" the calculation of the basic salaries of Legal Officers from that of the members of the Judiciary;
>
> 2. An order of mandamus directing the Minister of Finance and the Public Service/Cabinet of Jamaica/ Government of Jamaica to calculate the salaries of the Legal Officers for the period 2007-2009 in accordance with its cabinet decision of 1993;
>
> 3. An order of Prohibition prohibiting the Minister of Finance and the Public Service/Cabinet of Jamaica/ Government of Jamaica from changing the basis on which the salaries of the Legal Officers are calculated without having proper consultation with the Legal Officers and/or representatives on their behalf;
>
> 4. A Declaration that the Legal Officers have a legitimate expectation that their salaries will be calculated in accordance with the Cabinet Decision of 1993;
>
> 5. A Declaration that the Legal Officers have a legitimate expectation that before the manner in which their salaries are calculated is changed, there will be prior effective consultation and negotiation;
> 6. A Declaration that the decision to "de-link" the calculation of the basic salaries of Legal Officers from those of the members of the Judiciary was made in

breach of the substantive and procedural legitimate expectations of the Legal Officers;

7. Costs to the Claimants;

8. Such further and/or other relief as the Court deems fit."

The claimants' case

[31] The claimants' application for judicial review and the declarations sought is rooted in the claimants' contention that the 2nd defendant has breached their substantive and procedural legitimate expectation. The common thread that runs through the evidence of all the claimants is that as of 1993 (which in actuality should be 1994), the salaries of legal officers were calculated by reference to the formula that bore a link to the salaries of members of the higher judiciary. They were never consulted at any time prior to the making of the decision to de-link the salaries of legal officers from those of the higher judiciary and they have all been personally affected by that decision.

[32] The gravamen of the contention of the claimants is that the 2nd defendant had changed this long - standing policy affecting legally officers represented by LOSA and each of them personally without prior consultation or notification. They view the failure to notify them of the change and the absence of consultation prior to the change being effected as constituting a breach of their legitimate expectation.

[33] The claimants, in relying on several authorities (which will be examined in due course) made vigorous submissions through Mr Foster QC in seeking to establish that there has been a breach of their legitimate expectation. I will now undertake to provide a synopsis of some relevant aspects of those submissions as follows:

(1) There was a clear and unequivocal policy relating to the calculation of salaries of legal officers. The undisputed facts clearly demonstrate that the claimants had a procedural and substantive legitimate expectation that the calculation of their salaries would be linked with that of the judiciary and that in the event any change

was to be made to the manner in which the salaries were calculated, they would first be consulted on the change. There has been no consultation with them to date.

(2) There is thus a clear breach of their legitimate expectation in the manner in which their salaries were to be determined. If the government felt it necessary to change the long - standing policy for legal officers, which it is entitled to do, the authorities are clear that this must be done in a procedurally fair manner. The government's usual approach to salary changes for public sector workers is usually done through negotiation and consultation. The government ought not to have made any change in the pay policy until it had negotiated or consulted with LOSA or the affected persons and this it clearly failed to do.

(3) When the court weighs the reasons advanced by the defendants for frustrating the claimants' legitimate expectation against the interests of the claimants, the reasons given do not justify the frustration of the claimants' legitimate expectation.

(4) There is no cogent evidence of any overriding public interest justification before the court, which would weigh in the defendants' favour to justify the breach of the claimants' legitimate expectation and so the court should find that the government acted unfairly and abused its power in changing the policy.

(5) Notwithstanding the implementation of the decision to de-link the salaries of the legal officers from that of the higher judiciary, the decision in question should be quashed and the 2nd defendant be ordered to carry out his duty to determine the salaries of the legal officers according to law and well known principles such as legitimate expectation. With the quashing order, the salaries of the higher judiciary would stand but the situation would revert to the

previous pay policy that was in effect prior to November 2008. The government, if it wishes, could then commence the consultation required by law and to change the policy if it so desires. They are, therefore, entitled to the discretionary remedies of certiorari, mandamus and prohibition as well as the declarations sought in the Fixed Date Claim Form, being all the reliefs they seek.

The defendants' case

[34] The defendants responded to the claim through their deponents, Mrs Millicent Hinds-Brown, the Director of Compensation and Classification Standards in the 2nd defendant's Ministry, and Mrs. Lorna Phillips, Acting Deputy Financial Secretary, in the same Ministry. That evidence was augmented by the equally vociferous submissions of Mr Wood QC that were advanced on the defendants' behalf.

[35] Mrs. Hinds-Brown, for her part, usefully chronicled, inter alia, the history of the government's policy concerning the salaries of the legal officers and the background to the decision to de-link those salaries from those of the higher judiciary. Her evidence has informed the facts constituting the background to these proceedings.

[36] Mrs. Hinds-Brown contended that when the decision was made to de-link the salaries of the legal officers from those of the higher judiciary, LOSA was dormant and there was no executive in place with which to communicate. That is the defendants' explanation for the absence of specific notification and consultation with LOSA and its members before the impugned decision was taken. In the defendants' view, the communication to the Permanent Secretaries and Heads of Departments was enough to bring notice of the change to all public officers, including the claimants.

[37] The defendants maintained that any frustration of the claimants' legitimate expectation is justifiable on the basis of an overriding public interest. The case for the defendants, as to this overriding public interest, is presented under the following headings, which represent the main planks on which their case of justification is being advanced:

(i) The recommendations of the Sixth Independent Commission for the Judiciary made in 2007;

(ii) The legislative schemes under which salaries for legal officers are fixed and which effected the change of policy;

(iii) Legislative changes imposing statutory duty on the Minister of Finance to take appropriate measures to introduce fiscal changes to ameliorate the countries macro-economic problems;

(iv) The right of government to change governmental policies;

(v) Applicability of the doctrine of executive necessity.

[38] In summary, it was the submissions of the defendants that for all the reasons advanced under the foregoing headings, the 2nd defendant had the discretion to alter the previous policy made in 1994 and he had proceeded under the statutory scheme to implement that change of policy. The 2nd defendant's power to do so cannot reasonably be fettered and the decision was a just exercise of power. As difficult as the matter is, when it is looked at on a whole, there was, and is, made out a public interest that overrides the claimants' legitimate expectation.

[39] For those reasons, among others not detailed at this time but which will be examined in due course, the defendants maintained that the remedy of judicial review is not available to the claimants and the reliefs sought should not be granted. Accordingly, the claim should be dismissed.

[40] The defendants too are relying on various authorities in support of their case that have all been examined during the course of my deliberations. They will be addressed at the relevant points in the analysis of the case.

The issues

[41] What is clear from the foregoing distillation of the salient facts and the competing arguments of the parties is that there was in place a policy of remuneration of legal officers that was connected to the salaries payable to the higher judiciary. That policy existed for more or less 15 years. The change in policy occurred without any prior notification to and/ or consultation with the legal officers. The letter of Mrs. Lorna Phillips has done much to show an inevitable concession of those facts by the defendants.

[42] In the light of those pertinent primary facts, and the consequent dispute that has arisen between the parties, the key issues that have arisen for consideration and resolution are identified to be as follows:

(1) Whether the claimants had a legitimate expectation to be advised and consulted about the change in policy before the decision was made to change it.

(2) If there was such a legitimate expectation, whether it was breached or frustrated by the 2nd defendant/the Cabinet/ the government.

(3) Whether, if the claimants' legitimate expectation was breached or frustrated, there was an overriding public interest justifying such breach or frustration.

(4) Whether the claimants are entitled to judicial review remedies.

(5) Whether the claimants are entitled to declaratory relief.

Legitimate expectation: the relevant law

[43] In treating with the issues raised for consideration, I have found it necessary to first establish the legal framework within which my analysis has been conducted by a reminder of some basic tenets of the law pertaining to the doctrine of legitimate expectation. In looking at the doctrine within the context of an application for judicial review, I have chosen as my starting point an extract from the oft-cited dictum of Lord

Diplock in **Council of Civil Service Unions v Minister for the Civil Service** ("**CCSU**") [1985] A.C. 374 at 408 – 409 that reads:

> "Judicial review, now regulated by R.S.C. Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom we will call the "decision - maker" or else a refusal by him to make a decision.
>
> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision in class (b) a "legitimate expectation," rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences..."

[44] In **R v Devon CC ex p Baker** [1995] 1 All ER 73 88-89, Lord Simon Brown LJ, for his part, commented on the doctrine by stating:

> "Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness-the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

His Lordship went further to state that whether or not the claimant can legitimately expect procedural fairness, and if so, to what extent, will depend upon the court's view of what fairness demands in all the circumstances of the case.

[45] The claimants, in their effort to establish their claim of breach of legitimate expectation, relied on the U.K. Court of Appeal case, **Bhatt Murphy (a firm), R v(on the application of) the Independent Assessor** [2008] EWCA Civ 755 (9 July 2008). In that case, Laws LJ, quite helpfully, sought to bring further clarity to the relevant law concerning this doctrine of legitimate expectation after his review of some earlier authorities on the subject (including **CCSU** and **Exp. Baker**). He maintained that broadly speaking, the doctrine of legitimate expectation encompasses two kinds: procedural legitimate expectation and substantive legitimate expectation. He, then set out, in a broad summary, the place of the doctrine in public law, which for convenience (and not out of disrespect to his lordship's formulation), is set out in point form as follows:

(i) The power of public authorities to change a policy is constrained by the legal duty to be fair and other constraints, which the law imposes.

(ii) A change of policy which would otherwise be unexceptionable may be held to be unfair by reason of prior action, or inaction, by the authority.

(iii) If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult. This is the paradigm case of procedural expectation.

(iv) If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise. This is substantive expectation.

(v) If, without any promise, it has established a policy, distinctly and substantially, affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change. This is the secondary case of procedural expectation.

(vi) To do otherwise, in any of these instances, would be to act unfairly so as to perpetrate an abuse of power.

[46] This court was also reminded by the claimants of the useful guidance on the subject provided by Lord Woolf MR in one of the leading cases on the subject, **R. v. North and East Devon Health Authorities ex p Coughlan** [2001] Q.B. 213. There, his Lordship considered the court's role in situations where what is in issue is a promise made by a public authority as to how it would behave in the future when exercising a statutory function. At page 241 [paragraphs 55-59], his Lordship provides useful guidance on the subject, which, I also chose to paraphrase, simply, for the sake of ease of reference and not out of any disregard for his Lordship's formulation. The following points have been extracted from the dictum:

(i) Where a member of the public has a legitimate expectation that he will be treated in a way and the public authority wishes to treat him or her in a different way, the starting point is to ask what in the circumstances the member of the public could legitimately expect. The question is: "But what was their legitimate expectation?" (**re Findlay** [1985] AC 318,338, per Lord Scarman).

(ii) Where there is a dispute as to this, this has to be determined by the court and this will involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which it was made, and the nature of the statutory or other discretion. There are three possible outcomes of such enquiry by the court.

(iii) In the first category, the court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here, the court is confined to reviewing the decision on *Wednesbury* grounds (**Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223). In the case of this first category, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body had given proper weight to the implications of not fulfilling the promise.

(iv) In the second category, the court may decide that the promise or practice has induced a legitimate expectation, for example, of being consulted before a particular decision is taken. Here the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see **Attorney General of Hong Kong v Ng Yuen Shiu** [1983] 2 AC 629). In such a case, the court will itself judge the adequacy of the reason advanced for the

change of policy taking into account what fairness requires. In the case of this second category, the court's task is the conventional one of determining whether the decision was procedurally fair.

(v) In relation to the third category, where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will, in a proper case, determine whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. In the case of this third category, the court has to determine, when necessary, whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

(vi) The court having decided which of the categories is appropriate, its role in the case of the second and third categories is, demonstrably, different from that in the first category. In many cases the difficult task will be to decide into which category the decision is to be allotted. There are cases that demonstrate the difficulty in segregating the second category (procedural) from the third category (substantive) and so in such cases, no attempt is made, and rightly so, to draw the distinction.

The burden of proof

[47] In so far as the burden of proof in such cases alleging breach of legitimate expectation is concerned, it was pointed out by their Lordships of the Judicial Committee of the Privy Council in **Francis Paponette and Others v The Attorney General of Trinidad and Tobago** [2011] 3 WLR 219, that the initial burden lies on the applicant (member of the public) to prove the legitimacy of his expectation. However,

once the elements constituting legitimate expectation and the breach of it have been established, the onus then shifts to the public authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

[48] Their Lordships went on to further state:

> "If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws, LJ in **R (Nadarajah) v Secretary of State for the Home Department** [2005] EWCA Civ 1363 at [68]:
>
> > 'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances'.
>
> It is for the authority to prove its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified."

[49] It follows from all this that in this case, the burden of proof is initially on the claimants to establish the existence of a legitimate expectation on their part and the breach of it by the defendants. Once that is established, then, the burden would shift to the defendants to prove that the breach of the legitimate expectation was justified in the public interest or justified by the presence of a sufficient overriding interest.

Whether claimants had a legitimate expectation

[50] It was contended on behalf of the defendants at the outset that there was no breach of the claimants' legitimate expectation because LOSA had not been placed in a position for consultation to take place prior to the change in policy. Later, It was practically conceded, albeit belatedly, and only in oral submissions made on the

defendants' behalf, that the claimants would have had a legitimate expectation to be consulted and/or notified of the change in policy. Further, it was also accepted in submissions that this legitimate expectation would have been breached by the revocation of the policy without consultation.

[51] There was no formal admission of these facts by the defendants in their statement of case. Given the absence of that admission in the defendants' statement of case, I found it necessary to seek to establish whether, in law and in fact, there was, indeed, a breach of the claimants' legitimate expectation as contended by them. This enquiry was considered necessary given the reliefs the claimants are seeking, which include declarations relating to the existence and breach of the legitimate expectation that they claim to have had. Indeed, I must say that even if there had been formal admissions made, this enquiry would still have been necessary in the light of the law relating to the granting of declaratory relief.

[52] It has always been said to be an established rule of practice of very long standing that a declaration is a judicial act and ought not to be made on default of pleading, or on admissions of counsel, or by consent, but only if the court is satisfied by evidence. This rule of practice has been justified on various grounds, including the ground that declarations of legal rights may affect third parties who are not bound by the declaration. This is a consideration, it is said, that may have particular relevance in judicial review proceedings: see the Civil Procedure, White Book 2010, volume 1 para. 40.20.3 and the cases cited therein.

[53] Therefore, in the light of the nature of the claim brought by the claimants and the discretionary reliefs they seek, it seems prudent for the court, in keeping with the established rule of practice, to conduct its independent assessment to see whether the claim to a legitimate expectation and the alleged breach of it have been made out as a matter of law on the evidence. I have undertaken that analysis and do find that the claimants have managed to establish on the evidence the existence on their part of a legitimate expectation recognised by public law. I have arrived at this position based on the following reasoning and analysis.

[54] It is observed that following a history of dialogue and negotiations between LOSA and the government prior to 1994, the policy was arrived at and was given expression in writing in the Heads of Agreement. The government had made a promise, on which the legal officers relied, that their salaries would be determined by reference to the stipulated formula linked to the salaries of the higher judiciary. For the time the policy existed, it did, in fact, confer a benefit or advantage on the legal officers in so far as the computation of the increases in their basic salaries was concerned. There is nothing in the Agreement and the circular bearing the Cabinet decision that stipulated the time when the policy should have been in force. There was thus no time limit set for its operation.

[55] Also, there is no evidence of any distinct promise that was made to the legal officers that there would have been consultation with them before any change was effected to the policy. Indeed, there is no statutory provision that the claimants have relied on, or could rely on, that points to a legal right vested in them to be consulted before their salaries were determined. I find, however, that based on the established practice of dialogue and consultation between the legal officers and the government that had characterized their dealings prior to the policy, and which resulted in the policy, any change to the policy should have been subjected to a similar process of notification, consultation and dialogue. The legal officers would be persons who, in the circumstances, would have been entitled to rely on the continuance of the policy and did, in fact, do so. In employing Lord Diplock's formulation in **CCSU**, it could be argued that the legal officers would have had a natural, reasonable and legitimate expectation that they would have been permitted to enjoy the benefit the policy conferred on them until a rational reason for its discontinuance had been communicated to them and they were afforded an opportunity to comment.

[56] The government had clearly induced in the claimants a procedural as well as a substantive legitimate expectation. It could also arguably fit within the third classification described by Laws, LJ in **Bhatt Murphy** as the secondary case of procedural legitimate expectation. Whatever label is ascribed to the doctrine, however, I find that at the time the decision to de-link the salaries was taken by the 2nd defendant, the claimants did

have a legitimate expectation that the policy in question would have continued until a rational reason was given to them for its discontinuance and that they would have been consulted before any change to it was effected.

Whether the claimants' legitimate expectation was breached/frustrated

[57] The claimants' contention is that their legitimate expectation was breached or frustrated. The defendants have maintained that the inability to communicate with LOSA during its period of dormancy is the justification for the failure to consult. I agree with the arguments of the claimants that this is a rather weak attempt at an excuse or justification. The functionality or otherwise of LOSA could not have prevented communication with the legal officers about the intended change in policy. As so rightly pointed out on the claimants' behalf, governmental communication with government departments is predominantly done through the issuance of circulars. In fact, the evidence in this case is that the change in policy was eventually communicated through a circular issued to Permanent Secretaries and Heads of Department. There is no explanation advanced by the defendants as to the reason that would have prevented communication through this medium.

[58] I accept the claimants' case that no effort was made to notify the legal officers and to invite comments or submissions on the matter from them. There was, simply, no consultation and no rational reason communicated to the legal officers beforehand for the discontinuance of the benefit of the policy that they have enjoyed for almost a decade and a half. Accordingly, I find that there was a breach or frustration of the claimants' legitimate expectation. I am duly satisfied that the concession made by Mr Wood QC that there was a legitimate expectation on the part of the claimants and that it was breached or frustrated was apt in all the circumstances.

Whether frustration of the claimants' legitimate expectation justified

[59] The central and more contentious issue that now arises for consideration is whether the defendants can justify the breach or frustration of the claimants' legitimate

expectation. In using Lord Woolf MR's formulation in **Coughlan** as my guide in resolving this question, I regard the first category as being irrelevant to my deliberation since no issue is taken with the rationality or reasonableness (in the *Wednesbury* sense) of the decision itself. It does appear, though, that the decision to de-link straddles both the second and third categories, in that, procedurally, there was, in fact, a breach of the legitimate expectation of the claimants to be consulted on the change and, at the same time, there was also a breach of their substantive legitimate expectation to continue to enjoy the benefits of the policy until a rational reason was communicated to them for the discontinuance of it. I find that there is a fusion of the two categories and so the principles applicable to both will be discussed.

[60] In applying 'the **Couglan** formula', there are two material but inter-related questions that would arise for resolution at this point and they are encapsulated thus:(a) whether procedurally the decision taken to effect the change without consultation was fair, that is to say, whether there was an overriding reason for the 2nd defendant to have resiled from consultation with the claimants concerning the established policy; and (b) whether the frustration of the claimants' substantive legitimate expectation in having the policy continued until a rational reason was given to them for its discontinuance was justified and fair by virtue of some overriding public interest.

[61] The claimants' contention is that the defendants have put forward no evidence of an overriding public interest. According to Mr Foster QC, there is no cogent evidence of any overriding public interest before the court and there is no overriding interest that can be gleaned from the decision itself that would weigh in the defendants' favour to justify breach of the claimants' legitimate expectation. The defendants' argument of justification should be rejected, he submitted. He argued further, and quite strongly too, that the court should find that the government acted unfairly and has abused its power in changing the policy. He submitted that good administration and fairness required that the government consulted and negotiated with LOSA before implementing the decision to de-link the salaries of legal officers from the judiciary, especially given that the change resulted in a change of a substantive benefit.

[62] The defendants, for their part, have posited several grounds (already identified in paragraph 37 above) as justification for the breach or frustration of the expectation. An examination of the main components of the defendants' case on each ground has been undertaken in order to resolve this major point of dispute between the parties.

A. Recommendations of the Independent Commission

[63] The defendants have relied, fundamentally, on the report of the Independent Commission, in combination with the economic crises prevailing in the country, as the primary basis for the change in the policy. The defendants, speaking through Mrs. Hinds-Brown in her affidavit, stated at paragraph [11]:

> "There is every justification for the change of policy to de-link the salaries of the higher judiciary from that of the legal officers in the public service given the recommendations of the 6th Independent Commission as to the need to accord special and independent treatment of the Judiciary recognizing their independent constitutional role from that of other arms of Government and the further fact that increases of salary to members of the public service on the scale granted to the Judiciary was not sustainable given the economic downturn and not within the financial and budgetary constraints imposed on the Government."

[64] Mr Wood QC, in taking off from this evidential platform, submitted that the 2nd defendant had gone ahead and fixed the salaries of legal officers based on the report he had before him. He noted that the fiscal constraints were appreciated by the Independent Commission and in the circumstances, the government was faced with two issues, that is, whether it should keep judges underpaid or that they be given an increase but that the increase could not be granted across the board. According to learned Queen's Counsel, even with the de-linking, fiscal constraints impacted levels of increase for the judiciary and those levels of increase could not extend to legal officers in the public service.

[65] Mr Wood QC maintained that the report found that judges' salaries had reached the point of being woefully inadequate, almost embarrassing, and given that judicial

independence is the main plank that guarantees the impartiality of the judiciary, the independence of the judiciary could be impaired, if something was not done. He pointed out that the report spoke to the urgency to act. There was thus an urgency to de-link and in all the circumstances, there was no Association with which to consult. He maintained that the necessity to increase the judges' salaries drove the necessity to de-link because of the lack of financial resources to give similar increases to the legal officers.

[66] Learned Queen's Counsel further argued that given the urgent need to deal with the judges' salaries, and given that there was an inactive Association, had the Minister held his hands and allowed a process of consultation and negotiations, that course would have taken the form of protracted meetings and negotiations. The Minister acted reasonably in proceeding without consultation given the urgency dictated to de-link, he argued.

[67] The claimants have not accepted this argument and responded through Mr Foster QC that while they do not disagree with the recommendation of the Independent Commission, as it relates to treating the judiciary separately from the public service, on a clear reading of the report, however, the defendants' reliance on the report of the Independent Commission is one of convenience and cannot be a true overriding interest. This, Mr Foster QC contended, is because the issue as to how to treat with salaries of legal officers is an interpretation that the defendants have read into the report. He argued that there is, in fact, no recommendation made by the Independent Commission for the salaries of legal officers to be de-linked from those of the judiciary and it "is a fundamental factual misstatement" made by the defendants.

[68] Furthermore, the claimants contended, the government's desire to treat the judges differently did not necessarily require the de-linking of the salaries of the legal officers. According to them, this could have been achieved by any other effective way. They submitted further that even if the government had felt that this was the only, most expeditious or prudent way to treat with the issue, the change could have been achieved after a proper process of consultation with the affected parties.

Discussion and findings

[69] I find after a consideration of all the evidence and the arguments advanced on both sides that the defendants have given cogent evidence of the facts and circumstances underlying the decision to change the policy. They cited at the centre of the decision, the Independent Commission's report concerning the judiciary and the recommendations made for separate treatment of the judiciary from other public officers. The fact that the Independent Commission's had recommended different and separate treatment of the judiciary from other public sector workers cannot be challenged. Therefore, I find it difficult to agree with the assertions of the claimants that reliance on the report is a matter of convenience. I also find it difficult to appreciate the point made by them that the government could have found a different way to foster separation of the judiciary from legal officers other than by de-linking the salaries.

[70] The evidence has disclosed that the Independent Commission was sent relevant material prepared by the then Solicitor-General, Mr Michael Hylton QC to provide additional information to it during the course of its deliberations. This, no doubt, would have informed the Commission that its recommendations, relating to salary increases for judges, would have had implications for legal officers and other persons whose salaries were linked to those of the judges. Therefore, this connection between the judges and the legal officers, with respect to salaries, would have been within the knowledge and contemplation of the Independent Commission when it made its recommendation for separate treatment of the judiciary from other groups within the public service.

[71] Therefore, it is fair to argue that when the Independent Commission made its recommendation about separation of the judiciary from other public servants and gave its reasons for that recommendation, it was open to the 2nd defendant to take it to mean that wherever such links existed between the higher judiciary and other groups, in whatever shape or form, consideration should be given to removing them. This means, in effect, that the Independent Commission need not have directly recommended abolition of the policy but its recommendations could, indirectly and reasonably, give rise to such a meaning. In fact, there can be no dispute that the 2nd defendant was

entitled, by law, to act on the recommendations of the Independent Commission in determining judges' remuneration as he thought fit. It was, therefore, legitimately open to him, in dealing with the issue of separation of the judiciary from the general civil service as recommended, to treat with this obvious connection that existed through the linking of salaries.

[72] To go even further, the Independent Commission in its report had prefaced its recommendation to deal with judges' salaries, conditions of work and the separation of them from other groups in the civil service by stating that it was cognizant of the financial and budgetary constraints facing the country. It, nevertheless, went on to recommend salary increases for the judges, despite those known constraints. In doing so, this was what it stated:

> "The evaluation among other things, also factored the challenges of the threats to society posed by a grossly under paid Higher Judiciary with unfavourable work conditions ***balanced with the urgent need for our country to maintain strict fiscal discipline especially where emoluments are concerned."*** (Emphasis added)

The recommendation was, therefore, not only made within the context of known prevailing fiscal constraints but the Independent Commission clearly disclosed that it had taken those constraints into account in making its recommendation that increases in salaries be given to the judges. The Commission also noted that while it accepted that the recommendations were not binding on the government, it would, however, recommend that, in the event that the government rejected the recommendations, that an explanation be given to the public by the government for its reason for doing so. There was thus a recognised public interest component to the recommendations.

[73] The existing salary policy that obtained at the time of the recommendation and which affected the higher judiciary was, therefore, a live one for the consideration of the 2nd defendant following on the recommendations of the Independent Commission. It cannot be said, therefore, that it was not proper or reasonable for the 2nd defendant, in

the light of the report, to consider the existing policy concerning salaries for the judiciary that was connected to the salary policy regarding legal officers.

[74] The defendants have also proffered, as a further explanation for de-linking, the inability of the government to afford increases across the board for other groups whose salaries were linked to those of the higher judiciary. The Deputy Financial Secretary gave evidence of this. It is not disputed that at the time the change in policy was made, the government had entered into the MOU with some public sector groups with regards to a wage freeze. The government was, undeniably, exercising restraint in fiscal matters to include the containment of the public sector wage bill. As already stated, the Independent Commission's report would have come against that background.

[75] It is a given fact that increases in judges' salaries would have impacted the government's wage bill and overall expenditure. An increase in the salaries of legal officers along with the judiciary would have inflated the wage bill and the government's overall expenditure even more. The defendants said that increases across the board would have been with deleterious effect. That does not appear to be an unreasonable and unsubstantiated assertion in light of the unchallenged evidence of the Deputy Financial Secretary. The fact that the government's balance sheet and financial statements have not been presented to the court would not, in my view, preclude the court from accepting as true that increases in salaries based on the existing policy would have resulted in financial strain on the government at a time when it faced serious macro-economic problems. I do not think it necessary for this court to ask that the problems of the government be further demonstrated in light of the evidence placed before us by the defendants.

[76] In any event, the 2nd defendant has the statutory right and responsibility to determine the salaries payable to all public sector workers, subject of course to parliamentary approval. It is not for the court to overstep its bounds to examine the balance sheet of the government to say whether or not increases in salaries can be afforded. That, I think, would be rather intrusive on the functions and power of the executive and legislative arm of government.

[77] In the end, I cannot agree with the claimants that the defendants have put forward no material on which they could properly rely to show justification as required by the Privy Council in **Paponette**. Their Lordships have instructed that the defendants must give details of the public interest so that the court can decide how to strike a balance of fairness between the interest of the claimants, as applicants, and the overriding interest relied on by the defendants. I believe in this regard, the defendants have managed to put sufficient evidence before the court of something they consider to be an overriding public interest prevailing at the time the decision was made to change the policy. There is enough material placed before us on the basis of the Independent Commission's report that would warrant consideration within this context.

[78] The decision, however, as to whether, in fact, the Independent Commission's report and recommendation would constitute an overriding public interest, sufficient in law to justify the breach or frustration of the claimants' legitimate expectation, is ultimately one for this court. In the end, the court must do a balancing act of the need and the right of government to alter its policy, on the one hand, and the right of the claimants, on the other, to continue to benefit from the policy and to be advised of any adverse change to be effected in relation to it. The authorities have shown that the pivotal question of fairness is one for the court to determine in all the circumstances of the case.

[79] In treating with the defendants' contention that there is justification for the breach or frustration of the claimants' legitimate expectation, I am guided by the illuminating reasoning of Laws LJ in **Bhatt Murphy** when he stated, in part, at paragraphs 41 and 42 of the judgment:

> "41. …Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest.

They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement- in truth, a duty - is ordinarily repugnant to any requirement to bow to another' will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.

42. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that '[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage'."

[80] The question now is whether the recommendation of the Independent Commission stands as justification for the frustration of the claimants' legitimate expectation. The defendants, while accepting that there would have been such an expectation of consultation on the part of the legal officers, have put forward an explanation that they contend would justify them resiling from such a process. The explanation was the dormancy of LOSA with no elected executive to act on its behalf at the material time. This, they said, was further compounded by the need to attend to the judges' salaries with urgency in the light of the Independent Commission's report. Their argument is that time would not have permitted consultation which would have led to meetings and protracted negotiations.

[81] Having considered the reasons advanced by the defendants against the background of all the circumstances, as revealed on the evidence, I would reject the defendants' excuse proffered for failing to consult with the claimants. In the same way the change was notified by circular through the Heads of Departments, the intention or proposal to change could have been communicated in the same way. While it could be accepted that the judges' emoluments and conditions of service might have required urgent attention, the need for urgency was not the same as an emergency of such gravity that all other legitimate interests should have been overridden. The judges had managed under the old dispensation for more than a decade. The need to address their situation, while pressing, was not so overwhelming as to override any need on the part of the 2nd defendant to notify the claimants of the intended change in policy and to welcome comments. Consultation was required when the decision was in the formative stages. There was, simply, no effort made at all to consult with them.

[82] Lord Lloyd, in delivering the advice of the majority of the Board in **Fisher v Minister of Public Safety and Immigration** (No.2) [2000] 1 AC 434, 447, noted:

> "…But legitimate expectations do not create binding rules of law. As Mason CJ made clear at page 291, a decision-maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that."

Following on the path of Lord Lloyd's reasoning in considering the case at bar, I would say that procedural fairness required no more from the 2nd respondent/ Cabinet/government than to notify the legal officers of the intended change and to give them an opportunity to state their case. They failed to do so.

[83] There is thus no acceptable reason advanced on the basis of the Independent Commission's recommendation for the failure of the 2nd defendant to have afforded an opportunity to the legal officers to be consulted. I have looked at the context within which the power was being exercised, and in my view, the standard of procedural fairness was not met by the 2nd defendant. As such, the defendants did not act fairly when the decision was made to change the policy without notification and consultation. I have discerned no overriding public interest on the basis of the report of the Independent Commission to justify the breach of the claimants' procedural legitimate expectation.

[84] I will now turn to consider whether the substantive legitimate expectation of the claimants was justifiably frustrated on the basis of the recommendations. I have selected some pertinent principles for special note on this question. As already established, the authorities are all agreed that the court will interfere if the decision to dishonour the expectation is unfair in the sense that there is no overriding public interest which justifies it. As Sedley J opined in **R v Ministry for Agriculture Fisheries and Food ex p Hamble Fisheries (Offshore) Ltd** [1995] 2 All E.R. 714, 731 (Fordham, 4th edn. para. 54.2.4):

> "While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy). To postulate this is not to place the judge in the seat of the Minister. As the foregoing citations explain, it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a

> legitimacy which in fairness out tops the policy choice which threatens to frustrate it."

Having considered this aspect of the claimants' case as to breach of substantive legitimate expectation against the background of the relevant principles of law and all the evidence, I believe the reliance of the defendants on the report of the Independent Commission, as a justification for the change, is not misplaced. I hardly think anyone can deny that that there is a significant public interest component in having an independent and impartial judiciary. Given the constitutional role of the judiciary, it could not honestly be said that there is no justification in treating the higher judiciary separately from the legal officers or other groups within the public service in so far as their emoluments are concerned. The separate treatment of the emoluments of the judiciary from other public sector employees is not a foreign notion in our system of governance. The Constitution, itself, has done so by prohibiting the alteration of certain portions of the emoluments of members of the higher judiciary to their detriment (see sections 101 and 107). The claimants' salaries are not given such constitutional or statutory protection.

[85] The report of the Independent Commission, concerning the status of the judges and the recommendation of the need to accord to them better treatment within the context of the harsh economic realities that faced the country at the time of the recommendation, were, in my view, of sufficient gravity to have reasonably influenced the decision of the defendants to de-link the salaries. The concerns expressed by the Independent Commission concerning the treatment of the higher judiciary were, in my humble estimation, a sufficient public interest matter that would override the substantive legitimate expectation of the legal officers to continue to have their salaries linked to the salaries of the judiciary. The 2nd defendant had the statutory authority to act upon the recommendation and he chose to do so; that was his right and it is not subject to the authority of the court.

[86] I find, therefore, that the action of the defendants in changing the policy and frustrating the claimants' substantive legitimate expectation (as distinct from their procedural expectation) is justified on the ground of that overriding public interest

derived from the recommendation of the Independent Commission and the known economic realities that confronted the government at the time. There is enough for one to conclude that there is justification for the breach of the claimants' substantive legitimate expectation in the light of the Independent Commission's recommendation and the 2nd defendant's acceptance of it.

B. Legislative schemes effecting change of policy

[87] The defendants have also contended that any legitimate expectation on the part of the claimants must yield to legislation that had effected the change in policy. Their case on this limb rests on several planks each of which has been examined in turn.

[88] The defendants have argued that by virtue of the Civil Service Establishment Act, section 3(2), the 2nd defendant has the authority to determine the emoluments for officers attached to the public service. As such, the right of the claimants and other legal officers to emoluments is a legal right to receive such emoluments as the 2nd defendant may fix under this statute and which is subject to affirmative resolution of the House of Representatives. They contended that this is what gives legal effect to any agreement or arrangement governing wages.

[89] The defendants also drew attention to the fact that on 19 June 2009, the Civil Service Establishment (General) Order 2008 was amended by the Civil Service Establishment (Amended) (No. 2) Order 2009 to implement the change of policy which had de-linked the increases to legal officers from those granted to the judiciary. They argued that the Order is an effective exercise of statutory power delegated to the 2nd defendant by Parliament to determine the emoluments attached to offices in the public service, including that of legal officers. The Order, they pointed out, was duly gazetted and so the change in policy, having been duly endorsed by the House of Representatives, became law. They argued further that in these proceedings, no attempt has been made by the claimants to challenge the Order made under the Act giving effect to the change.

[90] The defendants pointed out too, in advancing this argument, that it is trite law that subordinate legislation made in pursuance of an Act of Parliament has the full force and effect of the Act under which it has been made (see Halsbury's Laws of England, 4th edition, Volume 44, paras 1499, 1500 and 1510). According to them, legitimate expectation cannot override an Act of Parliament or subordinate legislation made under an Act of Parliament. Any legitimate expectation must give way and be regarded as overridden where it conflicts with the exercise of legislative power, whether by an enactment of Parliament or by the exercise of power delegated by Parliament. See Michael Fordham, Judicial Review Handbook (Fordham) 5th edition, paras 41.1.1.2& 41.1.42.1.3); **R v Department for Education and Employment Ex p Begbie** [2000] 1 WLR 1115); and **R v Staffordshire Moorland District Council Ex p Bartlam** (1999) 77 P& CR 210.

[91] The defendants' position is that once the 2nd defendant had complied with the statutory procedure in making the Order and Parliament had affirmed the Order, that would have overridden any defect that was attendant on the 2nd defendant's underlying decision. It is their contention that until the Order is challenged and set aside, any legitimate expectation must give way and cannot override it. In their words: "The court cannot now, by a side wind, disregard or nullify the Order made under the Act in the absence of any claim challenging its validity". The defendants' contention is that the claimants should fail on this basis, if on no other.

Discussion and findings

[92] I have noted with deep interest these submissions and the claimants' response to them against the background of the authorities cited. While I do accept that the 2nd defendant has the statutory power to determine the salaries of public sector workers that he sought to exercise in this case, he (the Cabinet and the government) would have already induced a legitimate expectation in the legal officers as to how their salaries would have been calculated and determined. The actual decision to de-link the salaries predated the Order and was communicated to the claimants before the Order was

promulgated. So, the Order was to give formal expression to the decision to change the policy and to implement it.

[93] The Order, in my view, would have stood as the formal frustration of the legitimate expectation or as a crystallization of the frustration. The Order constituted the breach or an extension of the breach of the legitimate expectation. As such, the Order cannot be used as justification since it did not exist prior to the making of the decision so that what the claimants would have wanted the 2nddefendant to do (that being to consult with them) would have conflicted with his powers under the existing Order. The claimants had, indeed, taken legal action before the Order was promulgated. It means that the demand of the claimants for consultation came before the formalisation or implementation of the decision by the Order. This renders the circumstances distinguishable from the situations in the cases of **R v Department for Education and Employment Ex p Begbie** and **R v Staffordshire Moorland District Council Ex p Bartlam**, relied on by the defendants. The facts of these cases are sufficiently detailed in paragraphs [205], [206] and [207] by my learned brother, Williams, J, and so for the sake of expediency I will not repeat them here.

[94] It is sufficient for me to just indicate for present purposes that in **ex p Begbie**, for instance, the passing of the statute under which the Secretary of State was acting had predated his breach of the applicant's legitimate expectation and so in breaching the legitimate expectation, he was exercising a discretion granted under that existing statute. I readily accept, as pointed out by the claimants, that the facts of **ex p Begbie** are not 'on all fours' with the instant case. In this case, at the time the claimants had started to complain about the absence of consultation, the Order had not yet been passed and so no issue of the 2nd defendant operating inconsistently with the Order could have arisen if he were to have consulted with them. The passing of the Order, therefore, does not justify the breach of the claimants' legitimate expectation.

[95] I must say, however, that while the Order cannot be taken as justification, it being a part of the frustration itself, this court cannot ignore the fact that it is a statutory instrument which had formalised and effected the change in policy. By the time of the hearing for leave for judicial review and, even more so, by the time of the filing of the

fixed date claim form initiating these proceedings, the Order had already been passed into law with retrospective effect. Its effect was to terminate the 'linkage policy' as at the start of the contract period for 2007-2009. This means, in effect, that the 2nd defendant, through the delegated authority given to him by Parliament, had effected a change in the policy from 2007, which received parliamentary approval.

[96] It is settled law that there is a strong presumption that delegated legislation is valid unless and until it is declared invalid. So once an Act is passed (including subordinate legislation) there is, indeed, a presumption of validity and constitutionality until the contrary is proved. It is not contended by the claimants in these proceedings that this enactment was not a proper exercise of the 2nd defendant's statutory power. I agree with the contention of the defendants that with there being no challenge to the validity, constitutionality or legality of this statutory instrument, it stands as law effecting the legislative change in policy until or unless it is set aside or repealed.

[97] The standing of this Order as being valid and effectual in law in implementing the change in the policy cannot at all be overlooked in determining whether the claimants' procedural legitimate expectation, which has been found to have been unjustifiably breached, can be enforced by this court. The authorities relied on by the defendants have proved instructive on this point, including those extracted from Fordham, 5th edition, paragraphs 41.1.1.2; 41.1.1.3; and 42.1.3. Therein, the learned authors noted that one of the limitations to the doctrine of legitimate expectation is that it cannot override primary or secondary legislation. This position was reflected in the words of Neill LJ in **R v Secretary of State for the Environment ex p National and Local Government Officers Association** [1993] 5 Admin LR 785, 804E, when he noted:

> "I am very doubtful whether, save perhaps in exceptional cases, the principle of legitimate expectation can be invoked to invalidate either primary or secondary legislation which is put before Parliament."

[98] In **Regina v Secretary of State for Health, ex p United States Tobacco International Inc.** [1991] 3 W.L.R. 529 (cited in Fordham at para. 41.1.12 in the extract relied on by the respondents), judicial review was permitted in relation to Regulations

passed by the Secretary of State which was tabled before Parliament and passed without prior consultation with the applicants on certain matters. Although those Regulations had parliamentary approval, the court found that the Secretary of State had a duty or an obligation under the principal statute, pursuant to which the Regulations were made, to consult with the applicants. The statute under which he acted expressly provided that before safety Regulations were passed by him, he should consult with persons who could be affected by it. The Court found that having regard to the history of the government's dealing with the applicants and the very serious effects the legislation had on the applicants' commercial undertaking, fairness required that the applicants be given an opportunity to make representations before the Regulations were enacted. The Regulations were quashed as being unlawful. The outcome of that case had prompted the learned authors to make the point that the case would suggest that legitimate expectation (at least, in a procedural sense) could be available to that end in an appropriate case.

[99] It is readily evident that the circumstances of the case at bar are totally different from what obtained in the **United States Tobacco International** case. There is no statutory duty or obligation imposed on the 2nd defendant to consult with the claimants or legal officers before their salaries are determined. Also, there is no alleged or proven breach of any of their constitutional or fundamental rights. So, there is no basis on which it could be argued (and it has not been so argued) that the 2nd defendant acted *ultra vires* or unlawfully in having the Order passed. This would, therefore, not be an appropriate case in which this court could interfere with the Order, itself, when there is no application made in relation to its constitutionality, legality or validity.

[100] On the strength of the authorities, it does appear that in the face of the constitutionality and validity of the Order giving effect to the change in policy, any legitimate expectation that existed on the part of the claimants must give way. The legitimate expectation would have to yield in the face of the passage of the Order.

[101] I have arrived at this conclusion because it is clear to me on the authorities that legitimate expectation is limited by law and I find nothing exceptional in the circumstances to depart from what is established as a clear principle that legitimate

expectation must give way to legislation, be it primary or secondary. I find it even more compelling for it to yield in circumstances such as these where there is no challenge to the validity of the statutory instrument. This line of reasoning has led me to conclude that the argument of the defendants that the claimants' legitimate expectation is overridden by the Order effecting the change in policy is not without merit.

Whether the court should interfere with the exercise of legislative power

[102] My view that the enforcement of the claimants' legitimate expectation is adversely affected by the Order effecting the change in policy is fortified by yet another argument advanced by the defendants. That argument calls into question the propriety of the court to interfere with matters that fall within the purview of Parliament. The argument of the defendants is that the court ought not to interfere with matters, such as the Order and the fixing of public sector salaries, that fall within the purview of Parliament. They contended that the court has always exercised restraint when the matters come within the purview of Parliament. In support of this contention, the defendants placed reliance on the opinion of the Privy Council in the consolidated appeals of **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J Symonette M.P. Speaker of the House of Assembly and 7 Others and Ormond Hilton Poiter and 14 Others v The Methodist Church of the Bahamas and Others** Privy Council Appeal nos. 70 of 1998 and 6 of 1999 delivered 26 July 2000 (which will be conveniently referred to as the '**Bahamas District of the Methodist Church case'**).

[103] In the instant case, with the 2nd defendant exercising his statutory power leading to the Order being properly approved by the House of Representatives, the question must arise as to how far this court can now go to interfere with the action of the legislature in order to give effect to the legitimate expectation of the claimants. The doctrine of the separation of power does hover in the background and stands as a constant reminder of the limitation on the court in interfering with the actions of the other two arms of government.

[104] In **The Bahamas District of the Methodist Church** case, the Privy Council had to consider whether the court of the Bahamas had the right to intervene in the action of Parliament before legislation was passed into law on the grounds that if enacted, it would have breached the claimants' fundamental rights and freedoms guaranteed by the Bahamian Constitution. The Board, in considering the question, looked at the relationship between the courts and Parliament. Their Lordships noted that in common law countries, like the Bahamas (and by extension Jamaica, I would say) where the written Constitutions are supreme, they contain the supreme law clause providing that if any law that is passed is inconsistent with the Constitution, then the Constitution shall prevail and the law, to the extent of the inconsistency, shall be void. The same Constitutions, as their Lordships noted in the case of the Bahamas (and I would add, in the case of Jamaica) provide that subject to the Constitution, Parliament shall make laws for the peace, order and good government of the country. Their Lordships then said at page 13 of the opinion:

> "…The courts have the right and duty to interpret and apply the Constitution as the supreme law of the Bahamas. In discharging that function the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. **That function apart, the duty of the court is to administer Acts of Parliament, not to question them**." (Emphasis added.)

[105] The second general principle of constitutional importance, according to their Lordships in the same case, is that the courts have recognised that Parliament has exclusive control over the conduct of its own affairs, subject of course to the Constitution. This principle, their Lordships said, "is essential to the smooth working of a democratic society which espouses the separation of power between executive government and an independent judiciary". According to them, "**the courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators**."(My emphasis)

[106] It is, indeed, the province of the legislature that has delegated authority to the relevant Minister, to determine the emoluments to be paid to judges, legal officers as

well as to other public sector groups. The judiciary has no control over the financial matters of government to say what should or should not be expended or on whom or for whose benefit. That is the exclusive remit of the executive and the legislature. The remuneration of legal officers falls squarely within that remit. There is no allegation in the case at bar that the Order effecting the change is in conflict with the Constitution. Therefore, I can discern no rational basis for the court to interfere with the treatment of those matters by those arms of the State in the absence of any infringement by them of the Constitution or any law.

[107] In **ex p Begbie,** Laws LJ made certain utterances on the exercise of statutory power by the executive, which prove rather useful for present purposes. The learned judge opined at page 1130:

> "The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court; here the judges may well be in no position to adjudicate save at most on a bare Wednesbury basis) without themselves donning the garb of policy maker which they cannot wear.
>
> The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found since within it changes of policy fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interest of groups which enjoyed expectations generated by an earlier policy."

[108] My reluctance to support any intrusive supervision by the court is fuelled by my belief that to do so would mean that the judiciary would be dictating to the defendants what to do in an area that totally falls within their purview. That would mean that the judiciary would be 'donning the garb of policy-makers' which we are not entitled to wear.

[109] The opinion of their Lordships in the Barbadian case of **Ophelia King v the Attorney-General of Barbados** [1994] 1 WLR 1560, relied on by the defendants, has even more strengthened my resolve not to uphold any argument that the court should interfere with the decision of the 2nd defendant in changing the policy on which the determination of the remuneration of legal officers is based. In **Ophelia King**, the constitutional and statutory regime that was under consideration is similar to that under which the 2nd defendant acts in fixing the emoluments payable to public officers. The case is, therefore, of some assistance in considering the question before us. A reminder of the facts may prove helpful.

[110] In that case, the relevant Minister was permitted by the Civil Service Establishment Act of 1948 to, among other things, determine the emoluments payable to public officers by Order subject to Parliamentary approval. Ms. King's emolument was fixed in accordance with the Civil Service Establishment (General) Order 1990. In 1991, the Public Service Reduction Emoluments Act was passed. It reduced the salary of Ms. King for a period. Ms. King brought legal proceedings against the Barbadian Government contending that she had a right to be paid what was fixed by the 1990 Order and that by reducing her salary, the 1991 Act had breached her constitutional rights not to be deprived of her property. She failed in her bid to have the court intervene with the decision of the Minister, as approved by Parliament, to reduce her salary.

[111] Several instructive points emerged from their Lordships reasoning which lend themselves to the resolution of the legal issues in this case and which have influenced my decision. These are distilled and outlined as follows: (i) Ms. King had no right to a minimum salary; (ii) her only right was to such emoluments as attached to her office as the Minister provided under the 1948 Act, or as Parliament provided by legislation; (iii) the Minister and Parliament had the power to reduce her emoluments unilaterally under the 1948 Act; and (iv) her emoluments were lawfully reduced by the 1991 Act.

[112] Under our statutory regime, the legal officers enjoy no protection in relation to the fixing of their emoluments. It is the 2nd defendant who determines what is to be paid to them, subject to parliamentary approval. Their salary can be adjusted in whatever way

the 2nd defendant and Parliament consider fit. As such, there is no implied right that emoluments that attach to such offices, or the policy that is used in their determination or calculation, cannot be changed. It is clear, as in the case of **Ophelia King**, that the legal officers would be entitled to what the 2nd defendant and, ultimately, Parliament say they are entitled to.

[113] In all the circumstances, I would heed the admonition of the authorities that the court must refrain from trespassing, or appearing to trespass, upon the province of the legislature and the executive. I would hold that there is no room for the intervention of this court with the decision of the 2nd defendant that had received executive and legislative approval and which has been made law by an unchallenged legislative process.

[114] In summary, having looked at the instant case in its totality, against the background of the authorities and the submissions made on both sides, it is my considered view that the claimants' legitimate expectation has been overridden by the promulgation of the Order made pursuant to the Civil Service Establishment Act. The principal statute, itself, has bestowed no legal right on the claimants to be consulted with respect to the determination and fixing of their salaries. The Order is not shown to be unconstitutional or illegal to warrant the intervention of the court. It, therefore, stands as a valid exercise of legislative power in respect of which the court would have no right in law to intervene. In the end, I find that there is no basis in law on which this court could intervene with the decision and action of the 2nd defendant without violating the doctrine of the separation of powers. This is so because to intervene in such matters would be to don the policy-making garb of the government which is not the function of the court.

[115] In my respectful view, the response of the defendants to the claim on this limb that relates to the legislative measures that have effected the change in policy does seem to be a valid and complete answer to the claimants' claim that could well be determinative of the matter in the defendants' favour. Although this may seem to be so, however, I have refused to stop my consideration of the case on this point alone in the light of the full case advanced by each party and out of deference to the industry of

counsel on both sides. Accordingly, I have also examined the other grounds advanced by the defendants as justification for frustrating the claimants' legitimate expectation.

C. Legislative scheme for fiscal policies of the Government

[116] The defendants have also contended that further legislative changes by way of the Financial Administration and Audit Amendment (No. 2) Act 2010 ('the Financial Administration Act') have occurred since the passing of the Order putting the change in policy into effect. According to them, by that Act, a statutory duty has been imposed on the 2nd defendant to meet certain fiscal targets by 31 March 2016. Therefore, the level of increases claimed by the claimants cannot be maintained and would contribute to the 2nd defendant failing to achieve the statutory targets without contravening those statutory provisions.

Discussion and findings

[117] It is my view that the Financial Administration Act cannot be used as justification for frustrating the claimants' legitimate expectation, as it would have been passed after the decision had been made and after the 2nd defendant had failed to consult with the claimants. In other words, by the time of the passing of this Act, the frustration of the claimants' legitimate expectation had already been consummated by the Order formally giving effect to the de-linking. The Act, therefore, cannot stand as being part of the overriding public interest that could justify the frustration of the claimants' legitimate expectation.

[118] The Financial Administration Act is more relevant to the issue to be discussed later as to whether the court should or could enforce the claimants' legitimate expectation by way of the reliefs they are now seeking. The effect of this statute, therefore, is discussed within the context of whether the court should intervene to give effect to the claimants' legitimate expectation in the light of the statutory provisions now affecting the fiscal policies of the government. Reference will, therefore, be made to it at that point in my analysis (see paragraphs [152] and [153]).

D. The right of the government to change its policy

[119] The defendants have also relied on the principle that there is a right inherent in every government to change its policies and, as such, government cannot be fettered by its previous decisions. Their contention is that the policy that had given rise to the legitimate expectation on the part of the claimants was effected in 1994 and would constitute an unreasonable fetter on the exercise of the discretion of future governments, which would not be lawful. They argued that such a fetter is unlawful, particularly, when it interferes with the constitutional power of the 2nd defendant and of the government with respect to proper fiscal administration. They rely on **Dennis Meadows et al v Jamaica Public Service et al**, Claim no. 2011HCV05613, delivered on 30 July 2012, in support of this contention.

[120] The defendants also maintained that if the orders sought by the claimants, by way of judicial review, are granted, then, that would fetter the government in changing a policy made in 1994 by compelling it to carry out a previous executive decision notwithstanding the changes that have occurred in the intervening 16 years including the deterioration in the fiscal resources available to the government. According to them, no government or Cabinet can take decisions that fetter or preclude future governments from adopting new policies. They argued that the right of the government to change policy relating to the terms of service of public officers was clearly accepted in the case of **Hughes v Department of Health and Social Security** (1985) AC 776 at 778.

Discussion and findings

[121] I do accept as valid this argument that the 2nd defendant (Cabinet and government) had a right to change the policy in question. The claimants have recognised and accepted that too. The issue, however, is not so much the decision to change itself or the right to change *per se* but the manner in which the change was effected. The right to change the policy would still be subject to the requirement to be fair in the light of all the prevailing circumstances, including the existence of the claimants' legitimate expectation. The mere right to change government policy does not, in my view, override the claimants' procedural legitimate expectation, that is, to be

notified and consulted before the change was effected, even if the 2nd defendant had a good reason for changing the policy. I conclude, then, that the right to change government policy, by itself, and without more, cannot serve as justification for failure to consult even if it could go in justification of the breach of the substantive legitimate expectation.

E. Executive necessity

[122] Connected to this argument concerning the right of government to change its policy is the defendants' reliance on the doctrine of executive necessity as justification for the change in policy. It was submitted on behalf of the defendants that the 2nd defendant, in making the decision to de-link the salaries, was entitled to alter the previous policy on the basis of the doctrine of executive necessity. They contended that he was entitled to do so having properly taken into account the recommendations of the Independent Commission and the fact that salary increases to legal officers in the public service on the scale granted to the judiciary was not sustainable given the macro-economic deterioration of the country with consequent reduction of the financial resources available to government to pay such increases.

Discussion and findings

[123] As the defendants have noted, this doctrine of executive necessity was recognised as still being valid and was applied in the case of **Revere Jamaica Alumina Ltd. v Attorney General** (1977) 15 JLR 114 by Smith CJ. This principle called the "Amphitrite principle" was enunciated by Rowlatt, J in **Rederiaktiebolaget Amphitrite v. R** [1921] All ER 542; [1921] 3 K.B. at 503 and reiterated in part by Smith CJ thus:

> "No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby Government purported to give an assurance as to what its executive action would be in the future... And this is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law... My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be

> determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the state."

[124] I have accepted the submissions made by both sides that while the doctrine of executive necessity is still valid and applicable today, it must be reconciled with the approach in **Paponette** and **Coughlan** for the court to weigh the fairness of the need of the government to act in changing its policies against the fairness of the government to keep its promises to its citizens and to hold true to the assurances it has given to them that had induced in them a legitimate expectation. It is accepted that the government cannot fetter itself from changing its policies but its right to change them is subject to the requirement to do so fairly in circumstances where it has induced a legitimate expectation in persons relying on the continuance of a particular policy.

[125] In assessing this argument of executive necessity, I do see where it is more relevant as justification for the decision made to change the policy, in substance, but I can find in it no justification for failure to notify the claimants and other legal officers of the proposed change and to allow reasonable time for comments. Even if consultation might not have made a difference, the 2nd defendant was required to do nothing more than to notify the legal officers and to afford them an opportunity for consultation. The doctrine of executive necessity, even if it is such as to override the claimants' substantive legitimate expectation, or to justify frustrating it, is not sufficient a justification for frustrating their procedural legitimate expectation. Executive necessity, therefore, cannot, in my view, stand as a valid answer to the claim of breach of the claimants' procedural legitimate expectation.

Summary of findings on the defendants' case of justification

[126] In summing up my findings, I must state that I have found no justification for the breach of the claimants' procedural legitimate expectation on any of the bases advanced by the defendant. The grounds put forward by the defendants do not dilute the procedural unfairness by which the change was effected. There was, therefore, an unjustifiable breach of the claimants' legitimate expectation in the procedural sense

when the 2nd defendant failed to consult with them pertaining to the proposed change in policy.

[127] Whilst the breach or frustration of the claimants' procedural legitimate expectation is not justified on any ground advanced, it has, however, been overridden and its enforceability adversely affected by the promulgation of the Order pursuant to the Civil Service Establishment Act that effected the change retrospectively. There has been no challenge to the legality or constitutionality of that Order. There is no application to set it aside. Therefore, it stands as valid and effectual in changing the policy by legislative means. It is Parliament that has the responsibility under the Constitution to make laws for the peace, good order and government of the country and it has delegated authority to the 2nd defendant to determine emoluments for public sector workers by Order subject to affirmative resolution of the House of Representatives. This is not a matter for the judiciary.

[128] I have accepted with even greater force the argument advanced on behalf of the defendants that once Parliament had passed the law effecting the change in policy, and in the absence of any challenge to the validity or constitutionality of it, then the court ought to be slow in encroaching on the province of the executive and the legislature by giving effect to the doctrine of legitimate expectation, even if there was procedural unfairness in the process leading up to the impugned decision. It would follow, then that the procedural expectation would have been overridden by the legislative measure.

[129] I, find that there is justification for the frustration of the claimants' substantive legitimate expectation on the combined bases of the recommendation of the Independent Commission; the fiscal and macro-economic context within which the decision to change the policy was taken; the statutory context within which the 2nd defendant operates to determine the salaries payable to legal officers; freedom of the government to change its policies; and the related doctrine of executive necessity. I find in these grounds, collectively weighed, an overriding public interest that outweighs the claimants' substantive legitimate expectation in having the policy continued. Therefore, I cannot conclude that the frustration of the claimants' substantive legitimate expectation

was unfair, unreasonable or would have amounted to an abuse of power necessitating the intervention of the court on that limb.

[130] It is my humble view, then, that if the court were to uphold the claimants' procedural legitimate expectation (which is found to have been breached) and interfere with the decision, it would, in effect, be interfering with the 2nd defendant's statutory authority to determine the salaries of public sector workers as well as with Parliament's role to enact laws for the good of the country. This could stand as an infringement of the separation of powers doctrine with the court donning the garb of policy- maker, which it ought not to do. In such circumstances, and in the light of the authorities, I accept the defendants' arguments that the claimants' legitimate expectation must yield to the legislative instrument that had effected the change in policy.

[131] Indeed, my finding that legitimate expectation must yield to the Order and that this court, in any event, should not trespass on the province of the executive and the legislature in the circumstances, could be determinative of the matter in the defendants' favour, despite the conclusion that there was breach of the claimants' procedural legitimate expectation.

Enforceability of legitimate expectation

[132] Although I have found that the case could be determined on the foregoing findings that the claimants' procedural legitimate expectation had been overridden and the substantive legitimate expectation justifiably breached, frustrated or overridden, I have, nevertheless, considered the case presented by both sides in its totality. Having done so, I have arrived at the same conclusion that this court ought not to interfere to enforce the claimants' legitimate expectation that would have been breached. The further reasoning that has led to this conclusion will now be detailed within the context of the case advanced by the parties.

Whether alternative remedy available

[133] The defendants have raised several points of objection on which they rely in submitting that the remedies sought by the claimants ought to be denied, even if the court were to find that the legitimate expectation had not been overridden or justified.

They raised as one such basis the argument that alternative remedy in private law exists and is available to the claimants. The basic contention of the defendants is that what is being sought by way of judicial review is the enforcement of a right to salary increases and that the court, in exercising its discretion to permit the application for judicial review, would give effect to wage increases for the legal officers employed in the public service. According to the submission, the matter should properly have been dealt with as an industrial dispute under the Labour Relations and Industrial Disputes Act.

[134] The defendants cited the cases of **Sykes v the Ministry of National Security & Justice and the Attorney General** (1993) 30 JLR 76 and **Swann v Attorney General of the Turks & Caicos Islands** [2009] UKPC 22 as authorities that have confirmed the principle that the court will not entertain applications for judicial review which are in effect industrial disputes and grievances as to wages. Of course, the claimants have resisted such an argument contending that, to the contrary, this is a claim that sounds wholly in public law.

Discussion and findings

[135] In considering the argument as to the availability of an alternative remedy, I do accept that the alternative remedy bar operates both at the permission stage as well as at the substantive hearing stage. In determining whether the application should be dismissed on the ground of the availability of an alternative remedy, I have found it useful to carefully examine the facts of the cases cited by the defendants.

[136] In **Sykes**, legal officers represented by LOSA, of which Sykes was the President, took industrial action by absenteeism from work for a few days. Cabinet directed that the necessary deductions due to absenteeism should be made from the salaries of those officers involved. Sykes, acting on behalf of LOSA and its members, brought an action for judicial review seeking the remedies of certiorari and prohibition. It was held by the Court of Appeal that the remedies by way of prerogative orders are inapplicable to a claim for salaries for services rendered pursuant to a contract of employment. The Court of Appeal declared that the claim for salary withheld by a public authority seeks to enforce a private right and the appropriate proceedings were by writ. Therefore, to seek

a remedy by way of prerogative order was inappropriate and an abuse of the process of the court. The claim failed.

[137] In **Swann**, the complaint of the appellant was that he suffered an unlawful reduction in his remuneration by a decision taken by Cabinet upon his appointment as Chairman of the Public Service Commission. He made an application for leave to apply for judicial review. The application was denied by the leaned Chief justice who found that the essential claim was for damages as a result of an alleged breach of an agreement as it related to his salary, which would have been enforceable by an ordinary action. The learned Chief Justice concluded that the judicial review procedure was neither necessary nor appropriate and that that was so even if it was arguable that there was a collateral public law issue and the appellant had sufficient interest to pursue it.

[138] Upon appeal, the Court of Appeal, and later the Privy Council, affirmed this decision. The Board, speaking through Lord Neuberger, found that the Chief Justice's decision was unassailable in that "the appellant's complaint amounted to a straightforward private law claim" which was "almost certainly in contract (although it is conceivable that it could be founded on an estoppel)". In finding that the appellant should not have brought his claim by way of judicial review but instead by a writ, their Lordships noted that that was "primarily because his claim is on analysis a classic private law claim based on breach of contract (or conceivably, estoppel)."

[139] At paragraph 15, Their Lordships further opined (which I consider rather instructive for present purposes):

> "The Board accepts that the appellant may conceivably be able to mount an argument on the public law ground of legitimate expectation, but this would be very much a fall back contention. In any event, it is a contention which would be based on the same evidence, and indeed much of the same argument, as his possible estoppel ground, which itself would be an alternative to his primary argument, namely the claim in contract. Consequently, the possibility of such a contention being advanced can scarcely justify the claim being brought by way of judicial review."

[140] I recognise that in the case at bar, the remedies the claimants are seeking by way of judicial review, if granted, would be to compel the government to go back to the original policy whereby legal officers would receive increases in their salaries that are linked to those of the higher judiciary. I do appreciate, therefore, that the claim is in relation to the salaries payable to legal officers and, in particular, how increases in their salaries should be determined. I find, however, that the mere fact that a successful application for judicial review could have the effect of granting legal officers increases in salaries linked to the salaries payable to the higher judiciary, does not, in my view, render their claim one a "classic breach of contract case" or "a straightforward private law case".

[141] They are not seeking to enforce a private right emanating from classic contract law as in **Sykes** and **Swann**. Their claim is based wholly on the public law ground of legitimate expectation. They have invoked the doctrine of legitimate expectation as the kernel of their claim and not as the Board said in **Swann** as, “very much a fall back contention”. I dare say that it is clear, even from the nature and substance of the arguments advanced from both sides, that the grouse of the claimants is a matter that falls squarely within the public law sphere.

[142] I must point out too that in **Swann** a point was made by their Lordships, which weighs heavily in favour of a conclusion that the claimants should not be barred on the basis that an alternative remedy exists in private law. Lord Neuberger in paragraph 16 noted:

> “…There are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private law claim, but they are relatively exceptional. Those occasions would normally be where the public law issues are of particular importance to the applicant or where they should be aired in the public interest. However, there is no suggestion of either of those exceptional factors applying in this case.”

[143] On the strength of this view expressed by their Lordships, I would say that even if it could be said that this is, essentially, a private law claim, it is such that the public law

issues concerning legitimate expectation are not only important to the claimants but they are such that they should be aired in the public interest. Even if it could be said, then, that the claim is essentially a private law claim, I do believe that the exceptional factors noted by their Lordships would exist thereby rendering it an exceptional case in which the public law issues could be raised and ventilated in a claim for judicial review.

[144] In the result, I am not attracted to the viewpoint of the defendants that a vehicle for ventilation and resolution of the issues raised in this claim exists in the regime created by the Labour Relations and Industrial Disputes Act. I, for my part, would not decline to exercise jurisdiction on the basis that an alternative remedy exists in private law.

Availability of judicial review remedies

[145] As it stands, the only challenge I find that the claimants would legitimately have had to the defendants' action, as being an unjustifiable frustration of their legitimate expectation, would have been in relation to their procedural legitimate expectation. There is no doubt that they were treated unfairly when they were not consulted. But is the unfairness enough to grant relief for breach of the expectation in this regard?

[146] The authorities have established that unfairness, by and of itself, is not sufficient to ground enforceability of legitimate expectation. In Fordham, 4th edition at paragraph 54.1.13, this principle extracted from the dictum of McKay J in **Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd** [1994] 2 NZLR 641, 654 is noted and proves quite instructive:

> "The authorities… amply demonstrate that unfairness can be a ground for judicial review, but it does not follow that anything that can be described as 'unfair' will suffice…What is required is unfairness of the kind illustrated by the cases, or of a similar nature based on a proper application of the same principles.
>
> **In each case the particular facts must be examined, including the nature of the unfairness relied upon, and whether it is such as to justify the intervention of the court**." (Emphasis added.)

[147] It is said too that the court will only intervene by way of judicial review to direct the public authority to abstain from performing its statutory duty or from exercising its statutory power if the court is satisfied that the unfairness of which the applicant complains renders the insistence by the public authority in performing its power an abuse of power. In **R v Commissioners of Customs Excise ex p British Sky Broadcasting Group** [2001] EWHC Admin 127, Elias J pointed out (as cited in Fordham (supra) para. 54.1.13):

> "The threshold of unfairness amounting to an abuse of power is a high one and the court must be careful not to interfere simply because a decision can be justifiably subject to some criticism."

[148] My starting point is to declare my acceptance of the principles that the discretion to grant judicial review is a wide one. It is also recognised, as demonstrated by the authorities, that the fact that the remedy is discretionary means that a claimant could win on every point and still find that the court refuses a remedy in the exercise of its discretion. In granting the remedy, there are several key factors that fall for determination by a court. For instance, delay (or even where there is no delay), the questions of hardship, prejudice, and what is in the interest of good administration are relevant considerations when one is considering whether judicial review should be granted. A court may still refuse relief if it considers that granting relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

[149] The claimants, themselves, have recognised that their claim has been plagued by significant delay, which is a relevant consideration in determination of the question whether judicial review should be granted. They have made it clear, and I do accept that the delay in the proceedings is not at all attributable to them. However, even if we take out the delay factor, which ought fairly not to be used against the claimants in any way, and say that there has been no delay, judicial review may still be refused as an appropriate remedy.

[150] **Haringey London Borough Council** [2003] EWHC 2591, a case cited by the claimants, reinforces the principle that hardship or prejudice to the relevant parties is a relevant factor in deciding whether or not to grant relief. It is said that that the court has a wide discretion, which includes balancing the requirements of good administration, even where the applicant has acted promptly: **R. v. Gateshead Metropolitan Borough Council**, **ex p J.L. Nichol** (1988) 87 L.G.R. 435. Therefore, the effect on the administration of granting relief may be relevant to the exercise of the discretion even if there has been no delay in applying for review. I have treated with the claimants' application without any consideration as to delay adversely affecting their case.

[151] The claimants' contention is that there is no evidence that the government would suffer hardship or prejudice if the reliefs were granted. They maintained that any hardship to the government would not outweigh the prejudice to them who have been victims of abuse of power. Of course, the defendants have argued to the contrary pointing to prevailing circumstances at the time the decision was made, after it was made, and up to the date of the hearing as evidence that the hardship and prejudice to the government would outweigh any prejudice to the claimants that would have been brought about by the change in policy. The defendants maintained that it would be inimical to good administration if the claimants were to be granted the orders they seek by way of judicial review. In advancing this argument, the defendants relied on the affidavit of Ms. Lorna Phillips, then Acting Deputy Financial Secretary in the Ministry, sworn to on 29 October 2012. In that affidavit, the responsibilities placed on the 2nd defendant to steer the country on a path to economic recovery were made clear.

[152] It is, indeed, within this context that the Financial Administration Act, on which the defendants earlier relied as justification for the change in policy, now assumes greater and material significance. This Act was passed shortly after action was taken by the claimants to obtain leave for judicial review. In relation to it, Ms. Phillips deposed, inter alia, that the government in its Fiscal Policy Paper tabled in the House on 24 May 2012, had outlined a strategy to deliver on the legislated target set out in the Act. According to her:

> "This target does not include making retroactive pay increases to the legal officers based on a link to the judicial salary increases. Thus, deviation from this strategy could result in the Government of Jamaica missing the legislated target thereby breaching the Financial Administration and Audit (Amendment) No.2.) Act, 2010 and, increasing the budget deficit and public debt stock."

She deposed further that the government, in order not to breach the fiscal targets, would be forced to implement fiscal measures which could involve further wage restraint within the public sector and that this could have serious adverse results, as detailed, including reduction of government expenditure on critical services and imposition of taxes which would put a further burden on the population, in particular, the most vulnerable.

[153] Then, there has been the involvement of the International Monetary Fund (the IMF) in the fiscal planning and economic administration of the country. Ms. Phillips deposed that the making of retroactive pay increases linked to the increases that are given to the judiciary would have significant adverse effect on the fiscal accounts and would jeopardise a successful conclusion of the IMF negotiations in which the government has been involved. The defendants' position, put forward through Ms. Phillips' evidence, is that any of the adverse outcomes that are likely to arise, if salary increases were allowed as desired by the legal officers, would serve to de-rail the successful negotiation of a new IMF agreement with deleterious effects for the socio-economic state of the country.

[154] Having considered the evidence adduced by the defendants, I would start by saying that the law is clear that circumstances prevailing not only at the time the challenged decision was taken, but also up to and at the point of the court's consideration of relief, are relevant considerations. Therefore, Ms. Phillips' evidence cannot be ignored or be dismissed as being irrelevant. It is starkly clear that if the claimants were to succeed and be granted the judicial review orders they seek, the court would, in effect, be compelling the 2nd defendant not to implement the Independent Commission's recommendations as he sees fit. The Independent Commission did not

overlook the dilemma facing the government when it made its recommendations for improvement in judges' remuneration.

[155] At the time the decision was made to de-link, the economic woes of the country and the role of the 2nd defendant, in seeking to contain the public sector wage bill, were well known. The struggle over better salaries for public sector workers pre-dated the decision to de-link and at the heart of such disputes has always been the government's declared inability to meet the various and varied demands of public sector workers for salary increases due to financial constraints. This state of affairs has continued. The defendants' assertion that the government could not or cannot afford similar increases to be given across the board as those given to the judges in 2007-2009 is an undisputed fact that the court is bound to accept given that the executive and the legislature are best positioned to make such a determination. It is not the duty of the court to intrude on such matters.

[156] The issue is not about the legal officers not getting any increase in salary. Indeed, there is nothing to say that the legal officers might never get increases above, or the same as, the level of increases offered to the judiciary; that possibility does exist. It is simply that with the decision to de-link, any level of increase in their salaries they are to receive would not necessarily bear any direct correlation to the salaries payable to judges. The key issue is the separate treatment of the judiciary as recommended by the Independent Commission. The legal officers are just casualties of the implementation of that accepted recommendation due to the link they enjoyed with the judiciary through salaries. They are, therefore, not shown to be affected, in any intrinsic and fundamental right, by the change in policy.

[157] As hard as it may seem and as unfair as the decision may be, at bottom line, the claimants are entitled to such salaries as the 2nd defendant determines by virtue of his statutory power under the Civil Service Establishment Act. In making his determination, he has the right to take into account not only the interests of the claimants but also the interests of others and what is in the best interest of the nation, as a whole. The interest of the government, in trying to maintain judicial independence and, at the same time, to

achieve economic and social stability through appropriate fiscal measures and legislated fiscal targets, cannot be said to be baseless and unjustifiable.

[158] I am moved to accept on the defendants' case, after weighing all the various considerations, including fairness to the claimants, that the quashing of the decision to de-link and ordering the 2nd defendant to revert to the earlier policy could cause serious administrative inconvenience with undesirable consequences for the government and the nation. Clive Lewis in **Judicial Remedies in Public Law** (1992) at page 294, by citing some relevant authorities, made the relevant point under the sub-heading '**IMPACT ON ADMINISTRATION**' that:

> "The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and not be in the wider public interest. The effect on the administrative process is relevant to the courts' remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decision were quashed. Judges may differ in the importance they attach to the disruption that quashing a decision will cause…."

[159] I conclude that there is ample evidence upon which this court may legitimately find that to grant the claimants the reliefs they seek by way of judicial review would be inimical to good administration and would prove more prejudicial to the government in carrying out its policies in the public's interest than it would be to the claimants. If this court were to hold otherwise, then, it would be donning the garb of the policy-makers and, by so doing, would be intruding on the field of the executive and the legislature, which it ought not to do. In **R (Bibi) v. Newham London Borough Council** [2002] 1

W.L.R. 237 at [41] (cited in Fordham (supra) at para. 54.1.13), Schiemann LJ made the point, with which I find favour, that:

> "The court even where it finds that the claimant has a legitimate expectation of some benefit, will not order the authority to honour its promise where to do so would be to assume the powers of the executive."

Having considered all the circumstances of this case, I am driven to the conclusion that, regrettably, there is a countervailing public interest that outweighs the right of the claimants to have their procedural legitimate expectation that is found to have been breached, enforced through judicial review. I find that even though the unfairness in the government's handling of the matter might be such as to evoke strong criticism and, perhaps, condemnation from the court, it is not such as to warrant or justify the court's intervention. There is a line demarcated by the separation of powers doctrine that the court cannot properly cross.

[160] For all the foregoing reasons, coupled with the conclusion already arrived at that the legitimate expectation of the claimants must yield to the subsequent Order giving effect to the decision to de-link, I would hold that the orders sought by the claimants by way of judicial review (certiorari, prohibition and mandamus) should, unfortunately, be refused.

Whether the claimants are entitled to declarations

[161] The claimants have also combined in the claim for judicial review, a claim for declaratory relief, which is permissible under part 56 of the CPR. The remedy is also available against the Crown by virtue of the Crown Proceedings Act, sections 2 (2) and 16 (1). I have taken time out to traverse the various principles of law pertinent to the grant of declaratory relief in an effort to be properly informed on the question whether the court should grant the claimants the declarations they seek in the circumstances of the case. I have paid due regard to the applicable law because I have arrived at a position that even though the claimants might have had a legitimate expectation concerning the policy in question, it had been defeated or frustrated with justification and/or had been overridden by a countervailing public interest and by legislative

measures that this court does not have the authority to legitimately interfere with. The defendants would have justified the breach or frustration. This state of affairs, in my view, would have served to strip the claimants of any enforceable rights in law that they would have had based on the doctrine of legitimate expectation.

[162] A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position ***is*** and what ***are*** the rights of the parties. A declaratory judgment pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant (see Smith, Woolf & Jowell, ***Judicial Review of Administrative Action***, paragraphs 18-001 pg. 735). The declaratory decree cannot be obtained as of right. It is well established that the grant of declaratory relief is discretionary. The discretion is, however, wide. The court has a general power to make declarations although a claim to consequential relief has not been made, or has been abandoned or refused. However, it is essential that some relief should be sought or a right to some substantive relief established. The declaration being claimed must relate to some legal right(s) and must confer some tangible benefit on the claimant: (Halsbury's (supra), *para.* 1610). The court, however, will not make a declaratory judgment where the question raised is purely academic, the declaration would be useless or embarrassing or where an alternative remedy is available. The authorities have explained that it is of the greatest importance in deciding whether or not discretion should be exercised in favour of granting declaratory relief that the relief should serve some useful purpose. If it does not, it is difficult to see what reason there can be for granting relief. Usefulness does not have to take a material or tangible form; all that is required is that the declaration should resolve a real difficulty with which the claimant or applicant ***is*** faced (See de Smith, Woolf & Jowell, Judicial Review of Administrative Action, para. 18-022 and Halsbury's (supra) para.1611).

[163] in the light of the relevant law, I conclude that to grant the declarations in the terms proposed by the claimants in the fixed date claim form (or even close thereto) could be misleading in that they would have the effect of giving the impression that the defendants have not justified the breach or frustration of the claimants' legitimate

expectation or that the legitimate expectation has not been overridden. The declarations would not reflect what **is** the true legal position between the parties and what ***are their legal rights*** at the end of the hearing of the instant proceedings, which is the purpose of a declaration.

[164] There is no right to any substantive relief on the part of the claimant that is established on the evidence, in the final analysis. Their rights have been superseded, overtaken, and/or overriden by matters of sufficient public interest that have served to justify the breach of their legitimate expectation or to which the legitimate expectation must yield. As far as I see it, the grant of declarations within the terms sought by the claimants, or even as close thereto as possible, would serve no useful purpose. Above all, they would do nothing to resolve any present difficulty with which the claimants are faced. In the circumstances, I can discern no clear and compelling basis, in law or in fact, upon which this court should exercise its discretion and grant the declarations sought. I would refuse to grant the declarations sought.

Conclusion

[165] Having given the case advanced by the claimants the serious thought I think it deserves within the context of the law and all the circumstances, I do arrive at the conclusion that no proper basis is shown to exist in law that would justify the court's intervention with the decision of the defendants to de-link the salaries of the claimants from those of the higher judiciary. I think we can only express our strong displeasure with the manner in which the decision to change was taken and eventually communicated to the legal officers and hope that in the future, there is no repetition of what could be regarded as government's high-handed approach towards its employees.

[166] I would hold that the claimants' application for judicial review for certiorari, mandamus and prohibition and for the declarations as contained in the fixed date claim form as filed should be denied and the claim, accordingly, dismissed.

[167] I would make no order as to costs in keeping with the CPR, rule 56.15 (5) as I cannot say that it was unreasonable for the claimants to have brought the claim, even though they have not succeeded in obtaining the reliefs sought.

F. WILLIAMS J

Nature of Application

[168] This matter arises from a Government decision to cease a long-standing practice. That practice entailed the granting to Government-employed legal officers, of an automatic salary increase whenever an increase was granted to members of the higher judiciary, the increase in the former having been calculated as a percentage of the latter.

[169] The claimants are individual members (past and present) of the unincorporated association (that is the Legal Officers' Staff Association – or LOSA), formed to represent their interests; and, as might be expected, the Association itself.

[170] The 1st defendant is joined pursuant to the provisions of the Crown Proceedings Act. The 2nd defendant is the person from whom the decision to delink the two sets of salaries emanated and at whose instance it was implemented.

The remedies sought

[171] By way of fixed-date claim form filed on March 15, 2011, the claimants seek the following orders and declarations:

> "1. An order of certiorari quashing the decision of the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica to "delink" the calculation of the basic salaries of Legal Officers from that of the members of the Judiciary;
>
> 2. An order of mandamus directing the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica to calculate the salaries of the Legal Officers for the period 2007-2009 in accordance with its Cabinet Decision of 1993;

3. An order of Prohibition prohibiting the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica from changing the basis on which the salaries of Legal Officers are calculated without having proper consultation with the Legal Officers and/or representatives on their behalf;

4. A Declaration that the Legal Officers have a legitimate expectation that their salaries will be calculated in accordance with the Cabinet Decision of 1993;

5. A Declaration that the Legal Officers have a legitimate expectation that before the manner in which their salaries is calculated is changed, there will be prior effective consultation and negotiation;

6. A Declaration that the decision to "delink" the calculation of the basic salaries of Legal Officers from those of the members of the Judiciary was made in breach of the substantive and procedural legitimate expectations of the Legal Officers;

7. Costs to the Claimants;

8. Such further and/or other relief as this Court deems fit."

The grounds of the application

[172] Among the more important grounds on which the application is founded, are the following:

"c. The Minister of Finance and Cabinet decided in or about 1993 that the salaries of Legal Officers would be linked to those of the members of the Judiciary;

d. Since 1993 the salaries of Legal Officers were calculated in accordance with the Cabinet Decision and the Legal Officers have relied on the link;

e. The decision to "delink" the salaries of the Legal Officers from those of the members of the Judiciary was made in breach of the legitimate expectation of the Legal Officers that they would continue to receive salary calculated in accordance with the Cabinet Decision of 1993;

f. The decision to "delink" the salaries of the Legal Officers from those of the members of the Judiciary was made in breach of the legitimate expectation of the Legal Officers that they would be consulted before any change was made to the manner of calculation of their salaries as there was no consultation nor even information provided to Legal Officers at the time the decision was to be made or was made;

g. The Minister/Ministers have failed to meet with the Claimants and/or their representatives with a view to resolving the issues in question;

h. The failure of the Minister of Finance/Ministers to carry out the required step of consultation and negotiation with the Legal Officers before making a decision to their detriment is irrational;

i. The failure of the Minister/Ministers of Finance to ensure the calculation and payment of the Legal Officers' salaries in accordance with the 1993 Cabinet Decision has caused and will continue to cause financial harm to the members of the Claimant, and all Legal Officers within the public service."

Further background

[173] The just-stated grounds provide in large part a concise over-view of the background to the matter and what the claimants regard as the origins of their claim to legitimate expectation. To supplement this, however, it is useful to indicate a few additional matters. The first is that, some time in or prior to 1992 or thereabouts, the Heads of the Government Legal Departments (that is, the respective heads of the Office of the Director of Public Prosecutions, the Attorney-General's Department; the Legal

Reform Department and the Office of the Parliamentary Counsel) arrived at an agreement with the Ministry of Finance and the Public Service that increases to their salaries would be linked to increases in the salaries of Judges of Appeal. These heads of department occupy Level VII – the highest of the seven groups into which the various legal officers are placed for purposes of remuneration. Second, by way of a Heads of Agreement signed December 24, 1992 between LOSA and the Ministry of Finance, the parties agreed that, in respect of the wage-negotiation period April 1, 1991 to March 31, 1993, there was to have been a linking of increases of basic salaries paid to legal officers with increases granted to the higher judiciary. That document is exhibited to the affidavit of Tasha Manley sworn on February 19, 2009 as Exhibit TM4. Its paragraph, (Clause 2F), that is of most significance to this matter reads as follows:

> "In the event any upward adjustment is made to the basic salary and allowances of Legal Officers at Level VII in keeping with the understanding between Heads of Department and the Ministry of Public Service regarding parity with Judges of the Court of Appeal adjustments will be made as appropriate to the basic salary and allowances of other levels of the group".

[174] It should be noted as well that Cabinet on March 14, 1994 (and not 1993, as appears in the claimants' pleadings and affidavit evidence), gave express approval for a formalization of the policy whereby increases in the salaries of the higher judiciary would automatically trigger increases in the salaries of legal officers.

[175] Additionally, thereafter, there was a course of dealing between the parties, reflected in numerous pieces of correspondence that passed between them, that shows an adherence to this policy from 1992 to 2008. An example of such correspondence can be seen in the very letter which gives expression to the government's or minister's decision to delink the two sets of salaries, that is, the letter from the Ministry of Finance and the Public Service dated November 21, 2008, under the signature of Mrs. Lorna A. Phillips, for the Financial Secretary. It is exhibit TM9, exhibited to the affidavit of Tasha Manley filed February 19, 2009. The parts of that letter that are relevant to this aspect of the discussion, read as follows:-

> "I am to advise that the previous dispensation where LO 7 salary was linked to that of the Senior Puisne Judge was based on a Cabinet Decision. In recent times and based on the recommendation of the Independent Commission for the Judiciary and by a further Cabinet Decision the LO 7 position has been delinked from that of the Senior Puisne Judge."

The utility of this letter for the purposes of this analysis lies in the fact that in this one document we are able to see both an acknowledgement from the 2nd respondent, of the existence of a "previous dispensation" wherein there was a linking of the two sets of salaries; as well as a disclosure of the fact of their delinking.

[176] It is against this background that the claimants are asserting their claim to what they say is their legitimate expectation that these long-standing arrangements would not have been altered without prior consultation with them.

[177] In light of this, it may be useful at this point to explore what is involved in the legal concept of "legitimate expectation".

Legitimate expectation

[178] The nature of the concept of legitimate expectation has been considered and defined in a number of cases and by numerous courts.

[179] A good starting point for a consideration of the subject is the case of **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935. In that case, Lord Fraser of Tullybelton, at pages 943 to 944 of the judgment, said of the subject of legitimate expectation:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in ***O'Reilly v Mackman*** [1982] 3 All ER 1124, [1983] 2 AC 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Examples of the former type of expectation are ***Re***

> ***Liverpool Taxi Owners' Association*** [1972] 2 All ER 589, [1972] 2 QB 299 and ***A-G of Hong Kong v Ng Yuen Shiu*** [1983] 2 All ER 346, [1983] 2 AC 629. (I agree with Lord Diplock's view, expressed in the speech in this appeal, that 'legitimate' is to be preferred to 'reasonable' in this context. I was responsible for using the word 'reasonable' for the reason explained in ***Ng Yuen Shiu***, but it was intended only to be exegetical of 'legitimate'.)"

Also, at page 954 of the said judgment, Lord Scarman opined on the subject of legitimate expectation and its susceptibility to judicial review as follows:

> "The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled. The introduction of the phrase 'reasonable expectation' into this branch of our administrative law appears to owe its origin to Lord Denning MR in **Schmidt v Secretary of State for Home Affairs** [1969] 1 All ER 904 at 909, [1969] 2 Ch 149 at 170 (when he used the phrase 'legitimate expectation'). Its judicial evolution is traced in the opinion of the Judicial Committee delivered by Lord Fraser in **A-G of Hong Kong v Ng Yuen Shiu** [1983] 2 All ER 346 at 350-351, [1983] 2 AC 629 at 636–638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective 'legitimate' in this context and use it in this speech even though in argument it was the adjective 'reasonable' which was generally used. The principle may now said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

[180] The authorities also show that legitimate expectation may be either procedural or substantive in nature or may take the form of a combination of both. In the case of **The Queen, On the Application of Bhatt Murphy (a firm) and Ors v The Independent Assessor** [2008] EWCA Civ 755, Lord Justice Laws, in delivering the judgment of the English Court of Appeal, observed (at paragraph 50) as follows:-

> "A very broad summary of the place of legitimate expectation in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

[181] So far as substantive legitimate expectation is concerned, Lord Woolf MR made the following observations in the case of **R v North and East Devon Health Authority, Ex p Coughlan** [2001] QB 213, at paragraph 213:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy is established, the court will have the task of weighing the requirements of fairness against any

overriding interest relied upon for the change of policy." (Emphasis added).

The underscored portion of the above quotation also gives an indication of the court's function, once the existence of a legitimate expectation has been established in any given case.

The burden of establishing the existence of legitimate expectation

[182] In the relatively-recent Privy Council decision of **Francis Paponette and others v The Attorney-General of Trinidad and Tobago** [2010] UKPC, 32 (delivered December 13, 2010), the speech of Lord Dyson JSC, delivered on behalf of the majority of the Board, reveals the following instructive discourse in relation to where the burden of proof lies:

> "37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.
>
> 38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in **R (Nadarajah) v Secretary of State for the Home Department**[2005] EWCA Civ 1363 at [68]:

> ‘The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances’.
>
> It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.” (Emphasis added).

Again, the underlined portions of this passage are the parts that are of greatest importance to this discussion, indicating, as they do, (i) where the burden lies initially; (ii) to whom it shifts once the existence of the legitimate expectation has been established; (iii) what the authority then has to prove; and (iv) the exercise in which the court has to engage in coming to its decision as to whether the frustration of the expectation is fair or not in all the circumstances.

[183] We are assisted by these dicta in identifying the main issues in this case which may be briefly and broadly stated to be: (i) whether the claimants had a legitimate expectation to consultation in this case before any change to the long-standing policy and practice was effected; (ii) whether that expectation was frustrated by the respondents or either of them; (iii) whether the authority has placed before this court sufficient evidence of an overriding interest which might be held to justify its frustration of the claimants’ legitimate expectation. Also – arising from other arguments presented - (iv) whether the orders (as opposed to the declarations) being sought in this case and the subject matter of the case itself, make the matter in essence one relating to a claim for compensation for the claimants, thus making it a private-law matter and so not one amenable to or appropriate for judicial review proceedings.

We may now proceed to examine each issue in turn.

Discussion

First Issue:

Whether the Claimants Had a Legitimate Expectation

[184] The need for a detailed exploration of this issue has been obviated by the acceptance by learned counsel for the respondents (during the course of the response to the submissions of the claimants), that the claimants did in fact have the legitimate expectation for which they contend.

[185] Of course, this acceptance helped to give greater focus to the arguments presented thereafter and has assisted tremendously in narrowing the issues that are to be decided by the court. It is, therefore, most welcome, although belatedly being made.

[186] Had the court been aware of this stance on the part of the respondents before, however, this would likely have influenced the court's approach to the hearing of the submissions in this matter. This is so having regard to the recently-recounted dicta of Lord Dyson in the **Paponette** case [see paragraph [182] of this judgment], as to where the burden of proof lies initially and the shifting of that burden once the existence of a legitimate expectation has been established. Following these dicta, it would seem that such an acceptance shifts the burden immediately to the respondents. Earlier knowledge of the acceptance, therefore, would, in all likelihood, have resulted in the proceedings starting with submissions being made by the respondents, instead of by the claimants, as was done in this case.

[187] These circumstances give poignancy and weight to the suggestion of King, J, made in the course of these proceedings, that in judicial review proceedings it would be helpful (as is oftentimes, if not routinely, done in most other actions) for a statement of agreed facts and issues to be prepared and filed. It should be noted, however, that these comments are not meant to be a criticism of the respondents or (more specifically), counsel for the respondents in the instant case, as there was a very early indication of a challenge in obtaining instructions. Rather, they are meant simply as an observation and suggestion that might redound to the benefit of good administration and advance the overriding objective.

[188] It therefore can be accepted that, what has been established in this case is that the claimants did in fact enjoy the following: (using the words of Lord Justice Laws in the **Bhatt Murphy** case) that the Government:

> "…without any promise … has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation).

[189] It is also clear that the facts of this case reflect the circumstances described by Lord Woolf MR in the **ex parte Coughlan**, which he described as:

> "… [a] practice [which] has induced a legitimate expectation of a benefit which is substantive, not simply procedural..."

It may, therefore, be accepted that what the claimants have claimed and that has been accepted as having been established are: (i) a substantive legitimate expectation (enshrined in the practice of linking); and (ii) a case of secondary procedural expectation (reflected in the practice of consultation).

Second Issue:

Whether the Legitimate Expectation has been Frustrated

[190] The need for a detailed examination of this issue has also been rendered unnecessary by (i) the acceptance of the existence of the legitimate expectation; and (ii) the facts of this case and the way in which the matter has been argued, which make it clear that there is no dispute between the two sides to this claim that the expectation has in fact been frustrated.

[191] Where the contest is joined between the parties is mainly in relation to the third issue: that is, whether the respondents have successfully discharged the burden which has shifted to them of providing the court with sufficient material to establish the existence of an overriding interest which justifies the frustration of the claimants' expectation. It is to an exploration of this third issue that we now turn.

Third Issue

Whether Overriding Interest is Established

[192] The respondents have attempted to establish the overriding interest for which they contend through two affidavits filed in this matter. The first is that of Millicent Hinds-Brown filed on July 2, 2009; and the second is that of Lorna Phillips, filed on October 29, 2012 shortly before the start of this hearing; after the application for an adjournment made by the respondents had been refused.

Summary of the Contents of the Hinds-Brown Affidavit

[193] In her affidavit, Ms. Hinds-Brown, the Director of Compensation and Classification Standards in the Ministry of Finance and the Public Service, sets out the background to the matter and to the decision to delink the salaries of legal officers from those of the higher judiciary. Paragraphs 19 and 21 to 23 of her affidavit provide a summary of the respondents' position in relation to this issue. So far as material, these paragraphs read as follows:

> "19. In delinking salary increases to legal officers from the increases to the Judiciary relevant considerations as set out in the Commission's Report included taking into account the status of the members of the higher Judiciary and the need to treat them as a distinct group given their constitutional role to ensure that the rule of law is upheld. Further the financial and budgetary constraints imposed on the Government necessitated that the higher Judiciary be treated as a distinct group from legal officers in the public service if such level of increases were to be granted. Such special consideration to the Judiciary is not a policy that is unique to Jamaica as observed in the Report of the 6th Independent Commission that "in most countries the higher Judiciary is compensated on the basis that clearly distinguishes its members from other public sector workers to protect their independence, maintain their dignity and to attract the most suitable candidates for Judicial appointment…"
>
> "21. The Civil Service Amendment (General) Order 2008 made by the Minister of Finance and the Public Service, dated 4thJuly 2008 was tabled in the House

of Representatives on28th October 2008 setting out the salary scale for members of the public service… [C]onsequent on the Government's change of policy that has delinked increases in the salary scale for legal officers from that granted to the Judiciary, the aforesaid Order has been amended by the Minister of Finance and the Public Service by the Civil Service Establishment (Amendment) (No. 2) Order 2009 to thereby implement the Government's change of policy. The aforesaid Order has been duly affirmed by resolution of the House of Representatives…"

"22. Accordingly, the Civil Service Order 2008 as amended by the Civil Service Establishment (Amendment) (No. 2) Order, 2009 has confirmed the salary scale applicable for the legal officers in the public service consequent on the new policy that has delinked such increases to the salary scale to the Judiciary. The Order is an effective exercise of statutory power delegated to the Minister of Finance and the Public Service by Parliament to determine the emoluments attaching to offices in the public service, including legal officers."

"23. Further there is every justification for the change of policy to delink the salaries of the higher Judiciary from that of legal officers in the public service given the recommendations of the 6th Independent Commission as to the need to accord special and independent treatment of the Judiciary recognizing their independent constitutional role from that of other arms of Government and the further fact that increases of salary to members of the public service on the scale granted to the Judiciary was not sustainable given the economic downturn and not within the financial and budgetary constraints imposed on the Government."

Summary of the Contents of the Phillips Affidavit

[194] In her affidavit, Ms. Lorna Phillips, Acting Deputy Financial Secretary in the Ministry of Finance and Planning, deposes about matters, the substance of which might be seen in paragraphs 5-9, which read as follows:

"5. The Government of Jamaica has been involved in negotiations with the International Monetary Fund (hereinafter referred to as 'the IMF') for the past several months and the focus of those negotiations are (sic) on the need for a clear demonstration that Jamaica is placed on an irrevocable path to establishing fiscal sustainability…The making of retroactive pay increases linked to the increases that are given to the judiciary would have significant adverse effects on the fiscal accounts and jeopardize a successful conclusion of the IMF negotiations. Further, pursuant to section 48C of the Financial Administration and Audit (Amendment) (No. 2) Act, 2010 it is provided "the Minister shall take appropriate measures…to reduce the ratio of wages paid by the Government as a proportion of the gross domestic product to nine percent or less by the end of the financial year ending on March 31, 2016". This position is also supported by the Minister of Finance's statement to the House of Representatives on July 17, 2012…"

"6. … [D]eviation from this strategy could result in the Government of Jamaica missing the legislated target, thereby breaching the Financial Administration and Audit (Amendment) (No. 2) Act, 2010, and, increasing the budget deficit and public debt stock."

"7. In order not to breach the fiscal targets the Government of Jamaica would be forced to implement alternative fiscal measures, which could include, further wage restraint within the public sector and this could adversely affect the Government's ability to recruit and maintain quality staff; reduce necessary social services and infrastructural maintenance and development, in particular, health, education, security and justice; and increase taxes which would put a further burden on the population, including investors/businesses, workers, pensioners and other vulnerable members of the society…".

"8. The public sector wage bill is of utmost concern to the Government of Jamaica…"

"9. Since the filing of the Fixed Date Claim Form on March 15, 2011 the legal officers have received a

> wage increase of 7% which was implemented with effect from April 1, 2011. This was consistent with levels of increases granted to all Public Sector Workers for the period 2009-2010…"

The Submissions

For the respondents

[195] Against this evidential background, the respondents made a number of submissions which may be summarized as follows:-

a. Legitimate expectation cannot override the statutory scheme under which salaries for legal officers are fixed.

b. The salaries have been fixed pursuant to the Civil Service Establishment Act 2008 as amended by the Civil Service Establishment (Amendment) (No. 2) Order 2009 and no attempt has been made to challenge these orders.

c. Section 48C of the Financial Administration and Audit Amendment (No. 2) Act 2010 has imposed on the Minister the obligation of, *inter alia*, taking steps to reduce the fiscal balance to nil by March 31, 2016. There is also a prohibition on the Minister from exceeding the targets that have been set, except on exceptional grounds.

d. Any legitimate expectation must give way to and be regarded as overridden where it conflicts with the exercise of legislative power – whether by an enactment of Parliament or the exercise of legislative power delegated to the Parliament (citing **R v Department for Education and Employment, ex parte Begbie** [2000] 1 WLR 1115; and **R v Staffordshire Moorland District Council, ex parte Bartlam** (1999) 77 P & CR 210).

e. This court ought not to interfere with matters that fall within the purview of Parliament (citing **The Bahamas District of the Methodist Church v Symonette** [2000] UKPC 31).

f. A Minister or Cabinet cannot lawfully make a policy which fetters future governments (citing **Dennis Meadows et al v Jamaica Public Service Company Limited et al** – Supreme Court Claim No. HCV 05613 of 2011, delivered on July 30, 2012).

g. LOSA could not have been consulted prior to November 2008 as it had been inactive; and it was not until November 10, 2008 that it wrote the responsible Minister about the matter.

h. The Minister properly took into account the recommendations of the Commission in taking the decision to delink.

h. The Minister was entitled to alter the previous policy on the basis of the doctrine of executive necessity, the increase in the salaries being sought by the claimants being unsustainable, given the macro-economic deterioration of the country with consequent reduction of the financial resources available to Government to pay such increases (citing **Revere Jamaica Alumina v The Attorney-General** (1977) 15 JLR, 114).

i. Judicial review is neither a necessary nor appropriate procedure for the claimants to have adopted, to, in effect, seek to enforce a right to a particular salary increase – in other words, an industrial dispute. Additionally, legitimate expectation can be relied on in an ordinary civil claim or proceedings under the Labour Relations and Industrial Disputes Act (LRIDA), (citing **Sykes v The Ministry of National Security & Justice and the Attorney-General** (1993) 30 JLR, 76; and **Swann v Attorney-General of the Turks & Caicos Islands** [2009] UKPC, 22).

For the claimants

[196] For their part, the claimants submitted on this broad issue in terms that might be summarized as follows:-

a. The reasons advanced by the respondents that are based on the views of the Independent Commission do not justify the frustration of the claimants' expectation.

b. On a proper reading of the recommendations of the Commission, it is clear that the Government's reliance on the recommendations is one of convenience and cannot be the true overriding interest for the frustration of the claimants' expectation. This is because the issue of how to treat with the salaries of legal officers is clearly an interpretation that the Government has read into the report. The mandate of the Commission did not include a consideration of the salaries of legal officers. There is no recommendation made by the Commission for the salaries of legal officers to be delinked from those of the judiciary.

c. The Government's desire to treat the judges as distinct did not necessarily require the delinking of the salaries of the legal officers from those of the Judiciary as this could have been achieved in many other and more effective ways.

d. While the doctrine of executive necessity still prevails, it must be exercised with discretion and has to be considered and applied in the light of significant developments in public law since the **Revere** case as to how the state should exercise power.

e. The significant delay that has characterized the resolution of this matter is not the fault of the claimants. In any event (as seen in the case of **R v Haringey London Borough Council** [2003] EWHC 2491), hardship or prejudice to the parties (and not delay) is the

relevant factor for deciding whether or not to grant remedies, in particular the discretionary ones.

The doctrine of executive necessity

[197] In the **Revere** case cited by the respondents, Smith, CJ discussed the doctrine of executive necessity, relying heavily on the case of **Rederiaktiebolaget Amphitrite v R** [1921] 3 KB, 500. In that case, Rowlatt, J (at page 503), observed, inter alia:

> "…it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.
>
> There is no doubt that this principle, called the doctrine of executive necessity, is still valid today…"

[198] In the **Revere** case, the plaintiff and the Government had, in 1967, entered into an agreement by which the Government undertook not to impose any further taxes on the production of bauxite or on bauxite reserves. In 1974, however, the then government, by means of an Act, imposed the bauxite production levy on all bauxite won in Jamaica. The plaintiff sued, claiming, *inter alia*, that the Act was *ultra vires* and unconstitutional. It was held, however, applying the doctrine of executive necessity, that any previous undertaking by government in relation to future taxation was invalid.

[199] In this case, the claimants do not deny the validity of the doctrine. However, they contend that, the validity of the doctrine notwithstanding, consultation was necessary as this is what is required by the modern approach to public law, which is informed by considerations of openness and transparency. They further contend that, at the end of the day, the court is required to conduct an exercise of weighing the competing interests set out in the **Paponette** case – that is, to consider the substantive issues in the case. With this submission (that is, taking the **Paponette** approach), I agree. In light of the concession made by the respondents, it may be accepted as a given that consultation was, in fact, necessary. What remains is for the court to weigh the requirements of fairness against that interest.

The fiscal dilemma

[200] There can be no denying that Jamaica finds itself in the throes of straitened economic circumstances, the end to which is nowhere in immediate view. Apart from the seemingly-insoluble fiscal dilemma in which the country finds itself, it struggles for survival in a global economy in which formerly-prosperous nations now find themselves on the verge of bankruptcy.

[201] The nation is acutely aware of the country's protracted negotiations (at the time the matter was being argued), with the International Monetary Fund (IMF). Economic "belt-tightening" and wage restraint are the order of the day. Since the arguing of this matter, it is notorious that there has been a National Debt Exchange (NDX), with a view to restructuring some $860 billion of debt; failing which a more drastic "haircut", said to have been preferred by the IMF, would have been necessary. There is a seemingly unending slide of the Jamaican dollar vis-à-vis all the major foreign currencies on a daily basis; and several negotiating groups have already agreed to wage freezes up to the year 2015, hoping to stave off job cuts and play their part in the national effort to help pull the country out its economic doldrums. Debate continues and, at the time this judgment was written, litigation was both pending and promised to challenge the constitutionality or otherwise of Government's decision to withdraw some $45.6 billion ($11.4 billion over 4 years), from the coffers of the National Housing Trust (NHT) for "fiscal consolidation" or "budgetary support". And, as pointed out in the affidavit of Mrs. Phillips, there are even legislated economic targets that the Government is mandated to meet, barring emergencies and exceptional circumstances. There is, therefore, no doubt that these are, for Jamaica, parlous economic times.

[202] For the avoidance of doubt, however, it should be pointed out that not all of these just-mentioned factors would have been in operation at the time of the frustration of the legitimate expectation. However, the fact that other factors of the same kind have come into existence since the frustration, shows that the trend of matters mentioned as considerations that influenced the frustration, has continued.

[203] Therefore, although consultation would have been desirable and could even be said to have been required, the fact that none was held, although regrettable, cannot,

when all the circumstances are weighed in the balance, be viewed as negating the economic imperative that led to the change in policy.

Legitimate expectation conflicting with the exercise of legislative power

[204] In relation to the respondents' contention that any legitimate expectation must give way and be regarded as overridden where it conflicts with the exercise of legislative power, an examination of the cases of **ex parte Begbie** and **ex parte Bartlam** is instructive.

[205] In **ex parte Begbie**, the appellant had appealed a judge's decision dismissing her application for an order of certiorari to quash a Secretary of State's decision not to permit her to be funded at an independent school beyond the age of 11. Her claim was founded on her contention that she had a legitimate expectation that she would have been allowed the benefit of an assisted place at the school, based on undertakings given by the then government whilst it was in opposition. Its undertaking then was that although it would, when in government, abolish the state-funded, assisted-places scheme, it would have allowed children already holding places under the scheme to continue to receive funding. On being elected, the party passed an act to abolish the scheme; allowing primary-school children to be funded only until the completion of their primary education – except where the Secretary of State, exercising his discretion, decided to permit them to continue to receive funding for a longer period. It was held, *inter alia*, dismissing the appeal that the courts would not give effect to a legitimate expectation if it would call for a public authority to act contrary to the terms of a statute.

[206] Of interest to the instant case are the dicta of Laws, LJ at pages 1130G and 1131C of the judgment. First he observed:

> "The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare

> Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear."
>
> He also observed:
>
> "The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.*"*

If we ascribe to the word "macro-political" the meaning attributed to it by Laws, LJ - that is as involving "…questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court)"; then, it will be seen that the reasons being put forward by the respondents in the instant case might not unreasonably be characterized as being macro-political. This, therefore, calls for some weight to be placed on the dicta of Laws, LJ in this court's approach to the resolution of this matter, requiring the court to be less intrusive than it would, perhaps, normally be.

[207] In **ex parte Bartlam**, the court of appeal refused to grant the appellant leave to apply for judicial review. There the appellant had originally applied for and was granted leave to apply for judicial review *ex parte*; but that leave was set aside at an *inter partes* hearing. The application related to the construction of a radio base station tower near to a footpath that the appellant used. In that case, the policy of the council granting planning permission ran counter to the legislation, in that the policy called for an application to be published and for a period of 28 days to run before any such application was to have been regarded as having been granted. The statute, (the General Permitted Development Order, 1995 [the GPDO]), on the other hand, had no requirement for publication or consultation. One plank of the appellant's application was that she had a legitimate expectation that she would have been allowed to have made representations in the 28-day period after the application had been publicized by the council. In delivering the judgment of the court, Nourse, LJ observed:

> "In my view, however regrettable or even deplorable it may be that the Council did not observe their declared policy, their failure to do so cannot prejudice or affect the working of the statutory provisions contained in the GPDO. Once the 28-day period had expired without, regrettably, anything happening, the planning permission granted by the GPDO became effective."

[208] It appears however, that, unlike the instant case in which the statutory provisions were put into effect some time after the delinking that is complained of – in a sense, formalizing the consequences of that delinking – in the **Bartlam** case, there was an existing statutory framework (rather than one implemented *ex post facto*), with which the council's policy conflicted. In my view, the most that might be said about the application of the **Bartlam** case to the instant case is that there is this difference in the facts. However, I am of the view that the principle expressed therein, is still a valid and useful one.

[209] Similarly, we are faced with an existing legislative framework (albeit one enacted subsequent to the frustration) in the form of, the Civil Service Order 2008 as amended by the Civil Service Establishment (Amendment) (No. 2) Order, 2009. This, in my view, requires the court to be less intrusive in its approach; and so to refuse the orders that are being sought.

A matter for Parliament?

[210] Is this a matter in which the court should be slow to interfere, on the basis that it is a matter for Parliament, as the respondents contend (citing the **Symonette** case)? In that case the issue that fell to be decided was whether the Methodist Church in the Bahamas should be established independently of the Methodist Church in the Caribbean and the Americas (based overseas), rather than continue as a district of that said church. In the course of the ensuing dispute, a bill was enacted, the constitutional validity of which was challenged.

[211] The main reason for which this case was cited was for its discussion of one of two principles of the common law. One of these principles is that the courts have the right and duty to interpret and apply the Constitution as the supreme law of The

Bahamas (or any other country which has a written constitution - such as Jamaica). The other (and the more important for these purposes, which is set out at page 12 of the judgment), is that, subject to the supremacy of the written constitution**:**

> "…the courts recognise that Parliament has exclusive control over the conduct of its own affairs. The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions: see **Prebble v. Television New Zealand Ltd** [1995] 1 A.C. 321, 332, where some of the earlier authorities are mentioned by Lord Browne-Wilkinson. The law-makers must be free to deliberate upon such matters as they wish. Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone. This constitutional principle, going back to the 17th century, is encapsulated in the United Kingdom in article 9 of the Bill of Rights 1689: "that … proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The principle is essential to the smooth working of a democratic society which espouses the separation of power between a legislative Parliament, an executive government and an independent judiciary. The courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators: see **Reg. v. Her Majesty's Treasury, Ex parte Smedley** [1985] 1 Q.B. 657, 666, per Sir John Donaldson M.R." (Emphasis added).

So far as these dicta are concerned, the court is indeed sensitive to the need to refrain from even the appearance of trespassing upon the province of legislators. So that, even though the central focus of the claimant's submissions is on the fact that the policy was changed without consultation - that is, on what transpired before the legislation was enacted and ultimately resulted in the legislation being passed; the fact remains that there is now legislation enacted by Parliament which confirms the results of the shift in policy made by Government. It is my view that the court should be most reluctant to

interfere with this legislation. Based on the authorities, it should decline to do so in this case.

[212] In relation to the **Dennis Meadows** case, I accept the respondents' submission based on this authority. In summary, this is to the effect that a cabinet or one of its ministers cannot by it/his/her actions fetter the actions of a future government. However, as I understand it, the claimants are not contending to the contrary. They are not, in other words, saying that government cannot change its policy. The substance of their contention is that, before such a change in policy is arrived at or implemented, there should first be consultation; and, there was none in this case. As has previously been discussed, however, even though there ought to have been consultation, I find that the material put before the court by the respondents is sufficient to override the claimants' right to the said consultation.

Whether judicial review is a necessary or the appropriate application

[213] It is the respondents' contention that the claimants have fallen into error in seeking a remedy by way of judicial review, when what is being sought in effect is to enforce a claimed right to a salary increase; or to settle what is really an industrial dispute. In support of this submission, the respondents rely on the **Sykes** case and the **Swann** case.

[214] In the **Sykes** case, the appellant had sought the remedies of certiorari and prohibition in relation to the decision that deductions be made from the salaries of the appellant and other legal officers who had absented themselves from work as a form of industrial action. The full court refused the application and this refusal was upheld by the court of appeal on the basis that the application was aimed at enforcing a private

right which was properly enforceable by ordinary action. Indeed, it was felt that, in the circumstances, having regard to what was the true nature of the result that was being sought, to make the application by way of an application for one of the prerogative orders (as they were then called), amounted to an abuse of the process of the court.

[215] Similarly, in the **Swann** case, the Privy Council dismissed the appeal of the appellant from the decision of the Chief Justice of the Turks and Caicos Islands refusing to grant leave to apply for judicial review. The application arose from the decision taken by that country's cabinet to reduce the appellant's salary as chairman of the public service commission. The chief justice, in the exercise of his discretion (such applications being discretionary in nature), held that judicial review was not the appropriate means by which to seek to challenge such a claim and that an ordinary claim seemed to be the more appropriate means by which to seek the desired remedy. Lord Neuberger, in delivering the opinion of the Board, opined that the same legitimate expectation on which the appellant sought to rely in his application for leave could be relied on and advanced in an ordinary action.

[216] The claimants, on the other hand, take the view that this claim is not truly one seeking to enforce a right to salary or a salary increase; but sounds properly in public law.

[217] In order to ascertain which contention is accurate, it is necessary to try to ascertain what cause of action the claimants could possibly have used to frame their claim in an ordinary action, if they were to have proceeded otherwise than by way of judicial review. It has not been possible for the court to identify any such cause of

action. The issues raised in this claim, for example, do not seem to admit of formulation into a claim for breach of contract. In my view, therefore, the claimants could not have sought their remedies by way of an ordinary action; and so judicial review appears to me to be the appropriate remedy.

Other way(s) in which the commission's recommendations could be given effect?

[218] Another interesting point that arose in the course of the hearing came in the form of the claimants' contention that there are many ways (other than delinking), in which the government could have given effect to the Commission's recommendation that the salaries of the higher judiciary should be such as to distinguish it from the civil service.

[219] These were the words of the Commission in that regard:

> "…This Commission is aware of the financial and budgetary constraints of the Government. Nevertheless we believe that it is important to initiate measures that clearly establish the status and role of the judiciary in our constitutional democracy and recognise that in doing so a clear signal must be sent that the higher Judiciary is not a part of the Civil Service or any other part of the executive arm of Government…"

Now, it cannot be gainsaid that the legal officers at every level, but especially at the level of heads of department and other senior levels (one of which [the DPP] has constitutional recognition; and others of which have statutory recognition), perform indispensable functions that call for considerable learning, experience and skill. Without a doubt, they deserve to be properly remunerated. While, however, linking of their salaries to those of the judiciary is a convenient way of granting them increases; is it not possible for them to receive proper remuneration without employing the method of linking?

[220] It should be remembered that legal officers are employed at different levels in numerous courts offices and government departments throughout the length and breadth of the island. In this regard, see, for example, Exhibit TM1 to the affidavit of Tasha Manley, filed February 19, 2009 – the Rules of the Legal Officers' Staff Association (L.O.S.A.); clause 3 – dealing with membership. The relevant part of the Rule reads:

> "3. Membership
>
> (1) membership of the Association shall be open,
>
> (i) to any person entitled to practise as an Attorney-at-Law in Jamaica and is employed in Central Government in the capacity of Legal Officers.
>
> (ii) and any person performing the functions of Clerk of the Courts; Deputy Clerk of the Courts, and Assistant Clerk of the Courts and the Registrar of the Revenue Court."

[221] In addition to this, it should be remembered that there are a number of statutory and other positions, remuneration for which is also pegged to the salary of members of the judiciary. For example (and this list is by no means exhaustive), there is: (i) the Contractor-General (see section 11 of the Contractor-General Act); (ii) certain members of the Electoral Commission of Jamaica (see the First Schedule - clause 7 of the Electoral Commission (Interim) Act; (iii) the Children's Advocate (see the First Schedule, clause 6 of the Child Care and Protection Act); (iv) the Public Defender (see s. 9 of the Public Defender (Interim) Act; and (v) the Commissioner of the Independent Commission of Investigations (INDECOM). Indeed, the following section, taken from section 6 of the First Schedule, Part 1 of the INDECOM Act, generally typifies similar provisions in the other Acts. This is how it reads:

> "6. (1) Subject to sub-paragraph (2), the Commissioner shall receive emoluments and be subject to the terms and conditions of service as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives,the emoluments being not less than the emoluments which may, from time to time, be payable to a Judge of the Supreme Court". (Emphasis added).

[222] It will clearly be seen, therefore, that, once linking of these various salaries is in place, increasing the salaries of members of the higher judiciary would of necessity automatically bring about increases to a fairly wide cross section of legal officers and other persons holding important public offices. If the recommendation of the Commission (that a clear separation needs to be made of the judiciary from other categories of workers), is to be given real meaning and effect, how could this be achieved without delinking? It is impossible, as at present advised, to see how true separation could ever be achieved without the delinking that the Minister thought necessary to give effect to the Commission's recommendation. So that, yes, the concept of delinking to give effect to the recommendation arises from an interpretation placed on the Commission's recommendation by the Minister; but in all the circumstances (and in the absence of feasible, or any, alternative approaches put forward by the claimants), the interpretation cannot be said to have been an unreasonable one.

[223] Also, it is interesting to note that although the claimants have submitted that many means of giving effect to the Commission's recommendations, other than delinking exist, they have not identified any of these for the court's consideration.

Was LOSA inactive?

[224] The respondents, as a reason for the absence of consultation in this case, have proffered the explanation that consultation was impossible on account of the inactivity of LOSA at the material time. In support of this, they point to the fact that an initial increase was granted to the legal officers, which was in keeping with the increases granted to all public sector workers, without any communication having been received from LOSA. They point also to the publication of a newspaper article dated September 29, 2008

indicating the re-launch of LOSA. They point as well to the fact that no communication was received from LOSA until (a) its letter to the Minister of Justice and Attorney-General dated August 26, 2009, indicating the re-launch of the association on July 8, 2008; and(b) its letter to the Ministry of Finance and the Public Service dated November 10, 2008, introducing the newly-elected executive of LOSA (see ExhibitsTM2; and TM 8 to the affidavit of Tasha Manley, sworn to on February 19, 2009).

[225] The claimants say that LOSA was in fact re-launched from July, 2008 (specifically July 8); with an interim steering committee being mandated to act on behalf of the association. (See paragraph 8 of the affidavit of Tasha Manley, sworn to on February 19, 2009).

[226] It is worthwhile to observe that confirmation of LOSA's inactivity comes from LOSA itself in paragraph 2, exhibit TM 2 of the said affidavit of Tasha Manley, where it says:

> "The Association has not been active for over five years and as such there has been no representation in a number of areas affecting Legal Officers, including the issue of remuneration."

So, if we accept what is said in the affidavit of Ms. Manley, LOSA was re-launched a few days before circular No. 21, dated July 21, 2008 (exhibit SC 3 to the affidavit of Mrs. Hinds-Brown) indicating the increased salaries to legal officers for the period 2007/2009. This re-launching, however, was not communicated to the Government until August, 2008 – after the circular was issued.

[227] If we are to accept the existence of the long-standing policy and practice; and go by the contents of one of the documents forming exhibit TM 4 (a letter to the Permanent Secretary, Ministry of Justice dated April 23, 2002 from Mrs. Michelle Daley-Tomlinson), LOSA's dormancy might be understandable (see page 56 of Bundle 1):

> "As you may recall, the Legal Officers' Staff Association in recent times has not been submitting formal claims as our salary packages are automatically calculated based on the Cabinet approved judicial scale JLG/JD."

In these circumstances, therefore, where there was no direct interaction and, apparently, no need for such interaction over the course of several years, is there any evidence that, with a significant shift in policy about to be implemented, any effort was made to make contact with LOSA? And even if LOSA itself was dormant, would discussions with the heads of department or other legal officers not be better to have been attempted than (as happened) for no discussion or consultation to have been held at all?

[228] In the absence of any evidence of such efforts to initiate consultation, this position taken by the respondents appears, with respect, to be a convenient one taken with the benefit of now knowing that the Association was dormant. However, at the end of the day, one is forced to have regard to the previous finding that the respondents have sufficiently justified the frustration of the claimants' legitimate expectation. So that, even though the respondents' arguments on this point cannot be accepted, they have succeeded on the point that ultimately matters most.

Discretionary nature of the orders being sought

[229] As is well known, the grant or refusal by the court of the orders of certiorari, mandamus and prohibition is discretionary. And the category of matters that it is open to the court to consider in the exercise of its discretion is wide and by no means closed.

[230] The cases suggest that the question of what will conduce to good administration is one consideration for the court to bear in mind in the exercise of its discretion.

Perhaps most *apropos* to the aspect of the matter under discussion are the words of Lord Walker in **Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers** [2011] UKPC 4, at [40]:

> "All relief granted by way of judicial review is discretionary, and the principles on which the Court's discretion must be exercised take account of the needs of good public administration."

[231] Similarly, in **Credit Suisse v Allerdale Borough Council** [1997] QB 306, 355D, it was stated (per Hobhouse LJ) that:

> "The discretion of the Court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, and the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially to quash the relevant administrative decision or act…"

Alternative remedy

[232] The existence of an alternative remedy is one additional matter that, it appears, is now open for the court to consider at the stage of the substantive hearing (such as this), and not only at the stage where leave to apply for the orders is being sought. So that on the one hand we have the dicta in **R v Essex County Council, ex p EB** [1997] ELR 327, 329C, of McCullogh, J to the effect that:

> "…questions about the availability of an alternative procedure will normally arise on the application for [permission] and not at the hearing on the merits;"

On the other hand, we also have the decision of **R v Chief Constable of West Yorkshire, ex p Wilkinson** [2002] EWHC 2353 (Admin) at [43] which contains dicta to the effect that:

> "…even where permission has been granted in an alternative remedy case, the alternative remedy argument may possibly…be available to be deployed at a substantive hearing on any discussion as to the appropriateness of relief, if any, to be granted."

Additionally, in **R (M) v London Borough of Bromley** [2002] EWCA Civ 1113, Buckley, LJ observed:

> "…the jurisprudence relating to alternative remedies [is] only one aspect of a more general discretionary power of the court to refuse relief in an appropriate case."

And this is how it is put in that most useful text – **Judicial Review Handbook**, 6th Edition, by Michael Fordham, QC, at paragraph 36.1:

> "36.1 **General effect of other safeguards**. Judicial review is not the sole or immediate protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question whether these have been or can be pursued, stands to affect whether judicial review will be available, and, if so, how it will operate."

[233] For the avoidance of doubt, it is to be noted that, in this case, the question of the existence of an alternative remedy was raised at the stage of the application for leave; and so it would undoubtedly be within the respondents' rights to advance it again (as they have) at this stage of the proceedings.

Good administration

[234] In this case, in the wake of the government's shift in policy and the implementation of the delinking of the salaries, several pieces of legislation were enacted to give effect to and formalise the said policy. In addition to these pieces of legislation which deal with the issue of remuneration directly, it is to be remembered that there is also section 48C of the Financial Administration and Audit Amendment (No. 2) Act, 2010, which sets certain targets for the Minister of Finance to attain. Would the grant of the orders and the declarations being sought not entail the passing of other pieces of legislation and put the attainment of these targets at risk? On a reasonable view, they would; and that would not be conducive to good administration – another reason disinclining one from granting the orders that are being sought.

Conclusion

[235] There can be no doubt that the claimants in this case held a legitimate expectation (and rightly so), that they would have been consulted before any change to the long-standing policy and practice of linking their salaries to those of the members of the higher judiciary was changed. Similarly, there can be no doubt that the government, by effecting the change that it did (by delinking the two sets of salaries), committed a breach of or frustrated the legitimate expectation of the claimants (both procedurally and substantively) in this regard. There is also no denying that the breach is most regrettable and not something to be condoned. However, as, it is hoped, has been

previously demonstrated, that does not mean that the claimants are thereby automatically entitled to all or any of the relief that they seek.

[236] Although the existence of the legitimate expectation is undeniable; and although its existence is accepted by the respondents, it is my considered opinion that it would not be appropriate to grant any of the remedies sought, given my other findings in this matter.

[237] Included in the reasons for this position are that: given the dire economic straits in which the country found itself at the time of the breach, the respondents have sufficiently and satisfactorily established the existence of an over-riding interest that negates the breach complained of. Additionally, the fact of the existence of the previously-discussed legislative framework confirming the effect of government's decision to delink, and the cases concerning this area, require the court not to intervene. Intervention at this stage also would not be conducive to good administration.

Costs

[238] The claimants have included in the orders that they have prayed for, an order for costs. However, they have not succeeded in having the decision to delink quashed, or in obtaining the orders for prohibition and mandamus that were also prayed for; or any orders at all. Even if they had, however; or even if the respondent had succeeded on all aspects of this claim, I can see no reason for departing from the general rule as to costs in matters relating to administrative applications, that is set out in rule 56.15 (5), and which reads as follows:

> "(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

It cannot be said that the applicants have acted unreasonably in making this application or otherwise in the conduct of this application.

[239] In the result, I would dismiss the application, with no order as to costs.

KING J

Order

1. The application for judicial review (for orders of certiorari, mandamus and prohibition) as set out in paragraphs 1, 2 and 3 of the Fixed Date Claim Form is refused.

2. By majority (King J dissenting) the application for declarations as set out in paragraphs 4, 5 and 6 of the said Fixed Date Claim Form is refused.

3. There shall be no order as to costs.