

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.29 OF 2004

IN THE MATTER of the Constitution of the Commonwealth of
Dominica sections 6(1), 6(2), 8(18), 16, 85, 103 and 117

AND

IN THE MATTER of the Constitution of the Commonwealth of
Dominica sections 42(2)

AND

IN THE MATTER of the Public Sector Salaries and Allowances
(Temporary) Reduction Act 2003

AND

IN THE MATTER of an Application by Sonia Williams, and by Conrad
Charles, Anita Joseph and Mervin Anthony on behalf of themselves
and as representing members of the Dominica Public Service Union
who are Public Officers for declaratory and other relief

BETWEEN:

SONIA WILLIAMS of Castle Comfort

and

CONRAD CHARLES of Bath Estate

ANITA JOSEPH of Canefield, and

MERVIN ANTHONY of Kings Hill

for and on behalf of themselves and on behalf of and
as representing members of the Dominica Public
Service Union who are Public Officers for
declaratory and other relief

Appellants

and

THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF DOMINICA

Respondent

Before:

The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Ramesh Lawrence Maharaj, SC, with him Mr. Julian Prevost for the Appellants
Mr. Anthony Astaphan, SC, with him Mrs. Heather Felix-Evans for the Respondent

2005: November 8;
2006: June 19.

JUDGMENT

[1] RAWLINS, J.A.: This is an appeal against a judgment in which the trial judge dismissed the appellants' representative claim, which they brought for themselves and on behalf of other members of the Dominica Public Service Union,¹ who are public officers. The appellant, Ms. Williams, a schoolteacher, is the President of the Union, which is the recognized bargaining body for the majority of the members of the public service of Dominica. The other appellants, Mr. Conrad Charles, Ms. Anita Joseph and Mr. Mervin Anthony are public servants.

[2] In their claim, the appellants state that the Public Sector Salaries and Allowances (Temporary) Reduction Act, 2003² is inconsistent with their right to property protected by section 6 of the Commonwealth of Dominica Constitution Order 1978.³ They assert that this Act was enacted in violation of their legitimate expectation that the government would have followed the process of negotiations toward the conclusion of a collective agreement, as the Public Service Act⁴ provides, as well as with their legitimate expectation to be consulted before the

¹ Hereinafter referred to as "the Union".

² No 10 of 2003. Hereinafter referred to as "the 2003 Act" or "the Act".

³ Hereinafter referred to as "the Constitution" or "the Constitution of Dominica".

⁴ Chapter 23:01 of the Laws of Dominica, Revised Edition, 1990.

legislature passed the 2003 Act, which deprived them of their salaries, allowances and increments.

- [3] The appellants also claim that the 2003 Act was inconsistent with section 11 of the said Constitution, which protects their right to freedom of association. They further claim that the Act violates the separation of powers doctrine and the rule of law, implicit in the Constitution, and section 8(8) of the Constitution. In this regard, they contend that the legislature usurped the functions of the Board of Arbitration or Tribunal constituted under the Public Service Act for the resolution of their disputes, and denied them the right of access to have their dispute with the government over their terms and conditions of employment adjudicated upon by the Board or Tribunal. They pray for related or consequential declarations. The appellants claim that by taking their financial benefits and not repaying or compensating them, and by denying them access to the Board or Tribunal, the Act infringed sections 6, 8(8) and 11 of the Constitution.
- [4] The appellants also sought to impugn the 2003 Act on the ground that the legislature gave it retroactive effect. They sought an order that the salaries, increments and other emoluments which public servants were not paid because of the provisions of the Act be paid with interest at the statutory rate of 5% per annum, and an order for damages, including aggravated and/or exemplary damages.
- [5] The appellants failed in the High Court on all of the issues which their claim raised. Their Notice of Appeal challenges the decision of the learned judge on each of the abovementioned issues, except the issue of legitimate expectation. With respect to the issue of retroactivity, the learned judge held, correctly, on the authority of *Ingle v Farrand*⁵ and *James v IRC*,⁶ that the 2003 Act cannot be impeached for retroactivity because the clear provisions of the Act, to which the court is obliged to

⁵ [1927] A.C. 417.

⁶ [1977] 2 All E.R. 897.

give effect, are that the Act is to be given retroactive effect. The appellants approached the issue of retroactivity on this appeal from the perspective that before the 2003 Act received assent on 1st August 2003, they were already entitled to the financial benefits or emoluments for July 2003 which the Act reduced. They therefore contend that the benefits for July 2003 clearly constituted property within the meaning of section 6(8) of the Constitution. I shall therefore subsume the issue of retroactivity under the issue whether the Act violated their right to the protection of their property under section 6 of the Constitution.

[6] At a glance then, the issues that arise on this appeal, and in the order in which they will be considered in this judgment are as follows:

- (1) Whether the 2003 Act or any provision of it is unconstitutional, void and of no effect because it violates the appellants' rights under section 11 of the Constitution which protects their freedom of association.
- (2) Whether the 2003 Act or any provision of it is unconstitutional, void and of no effect because it violates the appellants' rights under section 6 of the Constitution which protects their fundamental right to property.
- (3) Whether the 2003 Act or any provision of it is unconstitutional, void and of no effect because it violates the separation of powers doctrine, the rule of law or the appellants' right of access under section 8(8) of the Constitution.

It is common ground that the Act was not passed by the special procedures or majority which are required by sections 42 and 117 to alter the Constitution. If therefore the Act has violated any of the provisions or precepts of the Constitution, as the appellants allege, unless the impugned sections can be modified to bring them into conformity with the Constitution, they would be struck down.

[7] These issues will be considered against a brief background, which will highlight, in particular, the important provisions of the 2003 Act and the Public Service Act.

Background

[8] The Public Service Act provides for the establishment of a public service for Dominica. This Act provides for the tenure of office of public officers,⁷ as well as for the payment of allowances and increments to public officers.⁸ The Public Service Act further provides procedures for negotiation and consultation between the government and members of the public service, *inter alia*, in relation to wages and other terms and conditions of service, and for the settlement of disputes arising therefrom. In this regard, the Act provides a mechanism by which the government may, through the Establishment, Personnel and Training Department,⁹ treat with any public officer or their representative body and enter into collective agreements based on the result of the bargaining process.¹⁰ Any dispute which arises during that process may be referred to a Board of Arbitration¹¹ for resolution by a Tribunal.¹²

[9] The Union and the government entered into a signed collective agreement for wages and other terms and conditions of work for the periods 1997-2000 and 2000-2001. The parties conducted their affairs in accordance with some of the terms of a draft collective agreement for 2001-2003, which they were in the process of negotiating, but did not conclude an agreement for this period. While negotiations were ongoing, the legislature, as a part of the implementation of a Fiscal Stabilization and Economic Recovery Program, enacted the 2003 Act. This was done after extensive public consultations, which included the Union. The Union did not accept the Program or agree to the reduction of salaries and allowances, and the suspension of increments for public servants for any period.

⁷ See section 5 of the Act.

⁸ Section 7 of the Act.

⁹ Established under section 17 of the Act.

¹⁰ See sections 23, 28 and 30 of the Act.

¹¹ Established under Part V of the Act.

¹² See, in particular, sections 26 and 29 of the Act.

[10] The appellants' claim sought to impeach the 2003 Act in its entirety, but section 3(1), (2) and (3) of the 2003 Act, in particular. Section 3(1)(a) and (d) provide that during the period 1st July 2003 to 30th June 2005, the monthly salaries and allowances of the public officers who are specified in the First Schedule, were to be reduced by 5% as against the salaries and allowances that were payable to them for the month of June 2003. By section 3(2), the public officers lost any entitlement to their annual increments for the year between 1st July 2003 and 30th June 2004. While section 3(3) provided for the restoration of the payment of annual increments from 1st July 2004, the arrears of the increments which they lost for the year 1st July 2003 to 30th June 2004 were not to be recovered.¹³ Additionally, section 4 of the Act provides that in computing the salaries and allowances for the purpose of reduction of salaries and allowances, only salaries and allowances payable from 1st July 2003 to 30th June 2005 shall be taken into account.

[11] It is against this brief background that I shall first consider whether the 2003 Act violated the appellants' right to freedom of association guaranteed by section 11 of the Constitution.

¹³ Section 3 of the 2003 Act provided as follows:

"3(1) Notwithstanding anything in any written law, contract, order, award or agreement within the period July 2003 to June 30, 2005

(a) the monthly salary payable to a person who is a holder of an office set out in the First Schedule and to any person holding contracts of employment with the Government including a person engaged under section 70 of the Constitution (herein after referred to as "specified person" shall be five percent less than his salary payable for the month of June 2003.

(b) ...

(c) ...

(d) an allowance set out in the Third Schedule payable to a specified person shall be five percent less than the allowance payable for the month of June 2003.

(2) Notwithstanding anything in any written law, contract, order, award or agreement, within the period July 1, 2003 to June 30, 2004 annual increments payable to a specified person shall not be paid but the loss of increment in the hands of the specified person would be the amount of money the specified person would have been eligible but for this Act and shall not affect the specified person in any other way.

(3) The increments of specified persons not paid during the period specified in subsection (2) shall be restored after June 30, 2004 but no arrears shall be paid.

Freedom of Association

- [12] Section 11(1) of the Constitution of Dominica provides that except with his or her own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association. The provision further states that this means the right of the person to assemble freely and associate with other persons, and, in particular, to form or belong to trade unions or other associations to protect their interests.
- [13] The main thrust of the submissions of Mr. Maharaj, learned Senior Counsel for the appellants, on this issue may be stated as follows: the 2003 Act, in effect, denied the appellants their right of freedom of association guaranteed by section 11 of the Constitution because the Act curtailed or denied them their right to associate, by way of the collective bargaining process that the Public Service Act provides, to protect and promote their rights and interests which would have been evidenced in the resultant collective agreement. The Act therefore rendered their right to have the protection of their trade union nugatory and meaningless and subverted the protection of their interest. This was further exacerbated because the reduction in their salaries and allowances and the loss of entitlement to their increments would seriously affect their financial standing as members of the union.
- [14] Mr. Astaphan, learned Senior Counsel for the respondent, submitted that the question whether the Act violated the right to freedom of association is a non issue on the relevant legal principles stated in *Collymore and Abraham v The Attorney General*.¹⁴ In this case, Sir Hugh Wooding, CJ, stated that the right means no more than the freedom to enter into consensual arrangements to promote the common interests of the associating group. Mr. Astaphan insisted that in this context, the right is merely to form and belong to a union, rather than the right to protect the interests of any party through the association.

¹⁴ (1967) 12 WIR 5.

[15] The learned judge basically agreed with Mr. Astaphan's submissions, because, as she found, on the principles in *Collymore* and in *Attorney General v Alli & Others*,¹⁵ the freedom of association does not incorporate a right to collective bargaining or a right to compel employers to treat with the union with which a person is associated. I agree with the decision of the learned judge that the 2003 Act does not infringe the appellants' rights to freedom of association under section 11 of the Constitution. The Act does not preclude the appellants from membership of their union or of any other body, which is the essence and limit of the right. Freedom of association does not guarantee the pursuit of their interests or objectives as members of the union, which is essentially their claim. I would therefore dismiss the appeal on this ground.

Right to Property

[16] The appellants contend that by passing the 2003 Act, the State took or confiscated their property, to wit, salaries, allowances and increments,¹⁶ which they had already earned as well as that which they would have earned in the future. The learned judge held that the salaries and other financial benefits affected by the 2003 Act could not be regarded as property or a right or interest in property, and, therefore, the Act did not violate their rights under section 6 of the Constitution.¹⁷

[17] So far as it may be relevant in this case, section 6 of the Constitution states:

"6(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation.

(2) ...

(3) ...

(4) ...

(5) ...

¹⁵ [1989] LRC (Const.) 474.

¹⁶ Collectively referred to in this judgment as "financial benefits" or "emoluments".

¹⁷ See, compendiously, paragraphs 29, 30 and 31 of the judgment.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section -

- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right –
 - (i) in satisfaction of any tax, rate or due;
 - (ii) ; ... (vii)and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society...

(7) ...

(8) In this section –

“property” means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional;

“acquisition” in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right.

[18] Learned Senior Counsel for the appellants drew attention to the liberal interpretation which Sir Neville Peterkin, CJ, gave to the word “property” in *Attorney General v Lawrence*.¹⁸ The Chief Justice stated that “property” in the context of section 6 of the Constitution includes those well recognized types of interests which have the insignia or characteristics of proprietary rights, and may include money. He stated that the meaning includes concrete and abstract rights.

[19] Counsel for the appellants contended that, in the present case, the learned judge erred when she held that the financial benefits which the appellants lost as a result of the 2003 Act do not constitute “property” or interests therein. He said that the judge failed to appreciate that the appellants had contractual and statutory entitlements to receive those benefits pursuant to the terms and conditions of their employment and the offices which they held. He contended, additionally, that the economic interest which the appellants have in their contracts of employment with the State is a chose in action, which has property rights attached to it. He further submitted that the appellants’ economic interest in the emoluments that attach to

¹⁸ (1983) 31 WIR 176, at pages 184J-185b.

their offices and the statutory protection of their financial benefits from reduction constitute property. He said that since the appellants did not agree to the reduction of their benefits, and since there was no decision by the Arbitration Tribunal, the unilateral reduction of their financial benefits amounted to an acquisition of their property because it extinguished their property within the meaning of section 6(8) of the Constitution.

[20] To support the foregoing contentions, learned counsel for the appellants' relied on *Trinidad Island-Wide Cane Farmers' Association Inc. and Attorney General v Prakash Seereeram*¹⁹; *Rosemond John v Permanent Secretary, Ministry of Education*,²⁰ and *Bernadette Hood-Caesar v The Prime Minister and Minister of Finance and the Attorney General of Trinidad and Tobago*.²¹ On the other hand, Mr. Astaphan urged this Court to uphold the decision of the trial judge. He submitted that the appellants are only entitled to such financial benefits as attach to their offices.

[21] In her analysis, the learned judge stated that in order to find that the right to property is violated, there must be property in existence, which is capable of being identified and there must be a clear and defined title to that property. While, therefore, she agreed that the definition of "property" under section 6(8) of the Constitution is quite wide, she accepted that it is not without limit.

[22] It is noteworthy that, under section 6(8), among other qualifications, "property" must be "capable of being owned or held in possession", even if that property, interest therein or right thereto is held under a contract, trust or law or otherwise and whether present or future, absolute or conditional. The learned judge opined that financial benefits that attach to any of the public offices contained in Schedule 1 of the 2003 Act could have fallen within the ambit of these requirements if there was a collective agreement between the Union and the government when the Act

¹⁹ (1975) 27 WIR 329.

²⁰ Dominica Civil Appeal No. 7 of 1997.

²¹ Trinidad and Tobago High Court Action No. 3015 of 1987.

was passed, or if a minimum salary was set or was in existence at the time for the relevant period. Did the learned judge err as the appellants contend?

Did the 2003 Act violate section 6?

[23] The 2003 Act was passed on 23rd July 2003. It received the assent of the President on 1st August 2003, was published in the Gazette on 7th August 2003, but was deemed to have come into effect on 1st July 2003.²² It has been noted that it reduced salaries and allowances for the period 1st July 2003 to 30th June 2005 and forbade the payment of annual increments for the year 1st July 2003 to 30th June 2004. On this appeal, the question whether the 2003 Act violated section 6 of the Constitution arose in relation to 2 periods: the period after the month of July 2003 before the Act received the assent of the President, and month of July 2003. The appellants' attempt to impeach the 2003 Act on the ground of retroactivity is referable to the reduction of their benefits for the month of July 2003. They contend that even if it is found that they had no "property" in the financial benefits which would have accrued to them after assent, they had "property" in the benefits that accrued in July 2003 because they earned those benefits before the Act received assent. They insist that, for July 2003, they were entitled to receive the same level of remuneration that they received for the month of June 2003.

[24] I shall consider, first, whether the 2003 Act violated section 6 of the Constitution in relation to the reduction of financial benefits for the period from 1st August 2003.

Financial benefits for the period after publication

[25] It is accepted principle that where money to which a public officer is entitled is a debt owed to the officer, that money may be property, which section 6 of the Constitution protects from compulsory acquisition by the State. This, as the

²² See section 9 of the Act.

learned judge found, is exemplified in the recent decision of the Privy Council in *Robert Naidike and Others v The Attorney General of Trinidad and Tobago*.²³ In this case, Lord Brown stated that a clear contractual entitlement to a sum of money previously awarded by arbitration can be readily characterized as 'property', of which an owner cannot be deprived without due process of law. The same principle is borne out in *Bernadette Hood-Caesar v The Honourable Prime Minister and Minister of Finance and the Economy and the Attorney General of Trinidad and Tobago*.²⁴

[26] In *Bernadette Hood-Caesar*, the claimant's entitlement to her cost of living and incremental allowances was based on a prior Special Tribunal award. Ibrahim J. found that the prior award was a debt due to her and was therefore "property" within the meaning of section 4(a) of the Constitution of Trinidad and Tobago.²⁵ He declared that legislation, which sought to extinguish the claimant's²⁶ rights to those allowances violated her right not to be deprived of property without due process of law. *The Attorney General of the Gambia v Jobe*,²⁷ and *Inland Revenue Commissioner and The Attorney General v Lilleyman and others*,²⁸ also make it clear that "property" includes money that belongs to someone who has an immediate right to it.

[27] It is noteworthy, however, that the learned judge found that, in Dominica, in order for those benefits to attach to the appellants' offices for the relevant period, the Minister for Establishment and Personnel had to make an order and the legislature

²³ [2004] UKPC 49; Privy Council Appeal No. 10 of 2003 (12th October 2004).

²⁴ Trinidad High Court Action No. 3015 of 1987.

²⁵ See paragraphs 26-28 of the judgment.

²⁶ The claimant held the post of Nursing Assistant in the civil service.

²⁷ [1985] LRC (Const.) 556.

²⁸ (1964) 7 WIR 496. In this case, the British Caribbean Court of Appeal found that money constituted property for the purposes article 12 of the Constitution of British Guiana. It therefore held that the National Development Savings Levy Ordinance 1962, which imposed a compulsory levy on incomes with a provision for subsequent repayment together with interest, constituted an infringement to the right not to be deprived of property without due process of law and was therefore *ultra vires*. Mr. Astaphan stated that *Lilleyman* is clearly distinguishable from the facts and law in the present case because *Lilleyman* impugned a liability to tax on wages earned by the applicant. Taxes are only payable on income that is received or receivable in the sense that the wages have been earned, and its receipt inevitable as a matter of legal entitlement. There can be no tax on income that is not earned, received or receivable as a matter of legal right or entitlement.

had to pass the Appropriation Act to create the necessary charge upon the Consolidated Fund.²⁹ The reference to the Minister was premised on the judge's reliance on General Orders as a basis for the propositions that salaries,³⁰ and increments and allowances³¹ are to be determined by the Minister. She opined that when this Court found, in *Rosemond John*, that General Order 3.27 of Dominica was unconstitutional, but modified it to bring it into conformity with the Constitution, that decision did not mean that the General Orders on a whole are not applicable in Dominica.³² I think that it is important to note, however, that in *Rosemond John*, this Court held that the applicability of General Orders in Dominica is limited only to matters of conduct, procedure and discipline of public officers.³³ Accordingly, General Orders are not applicable to this case.

[28] I think, however, it is clear, that even outside of General Orders, financial benefits attach to a public office by an Act or Resolution of Parliament. The legislature may, generally, unilaterally reduce or increase the emoluments of public officers, so long as the emoluments are not a debt, and except where section 81 of the Constitution expressly prohibits the legislature from altering the benefits that are payable to the offices specified in section 81(5) of the Constitution.³⁴ *Gladwyn Ophelia King v Attorney General of Barbados*³⁵ supports these statements.³⁶

[29] The Constitution of Barbados came into effect in 1966. An Act of 1948 permitted the Minister, among other things, to vary the emoluments of public officers, by order. Such an order was to be provisional only and did not come into effect until

²⁹ See paragraph 25 of the judgment.

³⁰ General Order 4.1 which states that the salaries attached to public officers are such rates of pay in respect of a class and grade in the Civil Service as are determined by the Minister responsible for Establishment and Personnel.

³¹ See paragraph 21 of the judgment.

³² See paragraph 20 of the judgment.

³³ See pages 7 and 11 of the judgment.

³⁴ The benefits payable to the offices of the President, the Director of Public Prosecutions, the Director of Audit, the Parliamentary Commissioner, the Deputy Parliamentary Commissioner and the Chief Elections Officer.

³⁵ [1994] 1 WLR 1560.

³⁶ See also *Transkei Public Servants Association v Government of the Republic of South Africa and others* [1996] 1 L.R.C. 118, and *Chairman of the Public Service Commission and others v Zimbabwe Teachers Association and Others* [1997] 1 L.R.C. 479.

it was laid before the legislature and approved by a resolution of each House.³⁷ In Gladwyn King, the appellant, a public officer, challenged the Public Service Reduction Emoluments Act 1991 ("the 1991 Act"), which reduced her salary by 8% for the period 1st October 1991 to 31st March 1993. The remuneration for her post was fixed by the Civil Service Establishment (General) Order, 1990 ("the 1990 Order").³⁸ She contended that the 1991 Act deprived her of her right to be paid not less than the emoluments that the 1990 Order fixed. She therefore sought declarations that the 1991 Act contravened sections 11 and 16 of the Constitution of Barbados. The High Court dismissed her Constitutional Motion and the Court of Appeal of Barbados dismissed her appeal.

[30] The Privy Council dismissed Ms. King's Appeal from the judgment of the Court of Appeal. Their Lordships held that the appellant had no right to a minimum salary, and therefore no property protected by sections 11 and 16 of the Constitution. Their Lordships held, further, that 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. Accordingly, their Lordships held that her emoluments were lawfully reduced by the 1991 Act.³⁹

[31] Learned Counsel for the appellants sought to distinguish Gladwyn King from the present case. He submitted that while the Privy Council held that Ms. King, was not entitled to a minimum wage because the Minister and Parliament had the power to reduce her emoluments unilaterally under the 1948 Act, there is no similar legislation in Dominica that came into force prior to the Constitution, which permitted the legislature to unilaterally reduce the emoluments of the appellants in the present case. Rather, he said, the emoluments of the appellants are protected by law, to wit, by the provisions which the Public Service Act makes for them to benefit from the terms of collective agreements or Tribunal awards.

³⁷ See sections 2(1) and (4) of the Civil Establishment Act 1948 of Barbados; Chap 21 of the Laws of Barbados, 1971-1997.

³⁸ S.I. No. 45 of 1990, Barbados.

³⁹ See Page 1563F.

[32] Very respectfully, I disagree with learned Counsel for the appellants. The appellants could have been entitled to the financial benefits which they claim if there was in place a collective agreement, arbitration award or court order, which guaranteed their entitlement thereto when the 2003 Act came into force. Since they had none of these, the question whether the financial benefits that they claim constitute “property” protected under section 6 of the Constitution depends upon the interpretation of the relevant constitutional and legislative provisions.

[33] It is apparent that the constitutional and legislative schemes that were operative in *Gladwyn King* are fundamentally similar in effect to those that are operative in the present case. As in Barbados, the power conferred by the Constitution on the legislature to make laws for the peace, order and good government of Dominica⁴⁰ includes the power to make laws affecting the establishment of emoluments that attach to offices in the public service. All revenues received in Dominica must be paid into the Consolidated Fund, except revenues that by some law are payable into another specified fund.⁴¹ The financial benefits to which public officers are entitled are met from the Consolidated Fund because no specified fund has been established for the purpose.

[34] The basic principle that flows from *Gladwyn King* is that the legislature is the supreme authority over the allocation and expenditure of public funds from the Consolidated Fund.⁴² This is also the constitutional position in Dominica.⁴³ Section 37(2) of the Public Service Act recognizes this when it provides that any order which the High Court makes on an application to enforce an award by the Arbitration Tribunal under that Act must be subject to the powers of the legislature to authorize public expenditure. Section 78 of the Constitution provides that expenditure of money from the Consolidated Fund shall be authorized by means

⁴⁰ Section 41 and 48 of the Constitutions of Dominica and Barbados, respectively.

⁴¹ See section 76 of the Constitution.

⁴² This was a restatement of principle that the Privy Council earlier made *Hinds v The Queen* and *Thomas v The Attorney General of Trinidad and Tobago*.

⁴³ See section 77 of the Constitution.

of an Appropriation Act passed by the legislature. Section 79 permits the Minister of Finance to authorize the withdrawal of money from the Consolidated Fund to meet government's expenditure before an Appropriation Act is passed.

[35] Even if Dominica has no legislation similar to the 1948 Act of Barbados, which confers upon the Minister in Barbados the power to determine the emoluments that attach to a public office, this has no distinguishing significance. In the first place, by the 1948 Act, the Barbados legislature had simply delegated the power to the Minister to attach emoluments to public offices. The legislature retained the power to validate any order, which the Minister made, and, thereby, maintained its power to legislate for expenditure of money from the public purse. In *Gladwyn King*, the Privy Council stated that the legislature, in the plenitude of its sovereign legislative power, could have, at any time, repealed, withdrawn, or superseded the powers that it had delegated to the Minister in the 1948 Act.⁴⁴

[36] In the second place, section 81 of the Constitution of Dominica is similar to section 112 of the Constitution of Barbados. The Privy Council stated in *Gladwyn King* that while the legislature could, in its sovereign legislative power, reduce the financial benefits of public servants, it could not reduce the benefits of the officers specified in section 112(4) of the Constitution of Barbados,⁴⁵ because section 112 ensures the independence of the specified officers from financial pressures from the executive or the legislature.⁴⁶ According to their Lordships, since Ms. King was not one of the officers specified in section 112, her financial benefits were not protected from reduction by the legislature in its power to legislate financial benefits for public officers. Similarly, in the present case, the appellants do not fall within the protection of section 81 of the Constitution of Dominica.

⁴⁴ See per Lord Templeman at page 1562H. In Dominica, the only limitations on the sovereign law making powers of the legislature are those that are imposed by the provisions of the Constitution.

⁴⁵ The Governor-General, Judges, the Director of Public Prosecutions, the Auditor-General, members of the Judicial and Legal Services Commission and the Police Service Commission.

⁴⁶ See per Lord Templeman at page 1563B-E.

[37] It follows that the wages, salaries, and related allowances for the appellants could only be lawfully paid from the Consolidated Fund when approved by the Parliament of the Commonwealth of Dominica. There is no proof of such approval. There is no evidence that the government owed the appellants the sums that they claim from the date that the 2003 Act came into force. The appellants therefore had no property or interest in property under section 6 of the Constitution, which the legislature acquired under the 2003 Act. The learned trial judge was therefore correct when she held that the money which the appellants claimed was not property because they had not established any such entitlement to that money.

Financial benefits for July 2003

[38] It was seen⁴⁷ that the appellants contend that, for July 2003, they were already entitled to the same level of financial benefits which they received in June 2003. I have found that they had no binding agreement, Arbitration award or court order that had attached those benefits to their offices to render the benefits a debt which the government was obliged to repay. Outside of this, the benefits would have attached to their offices if the legislature had charged the Consolidated Fund for the payment of the July 2003 emoluments, which the appellants claim. By 1st August 2003, however, the legislature had not passed an Appropriation Act to cover the financial benefits for July 2003. The legal result is that although the appellants faithfully performed their duties during July 2003, with the expectation that they would have received the same financial benefits that they received for June 2003, unfortunately, that expectation did not amount to a legal right. The emoluments for July 2003 did not therefore constitute “property” under section 6 of the Constitution.

[39] In conclusion then, the appellants had no property in the financial benefits or emoluments which they claim either for the month of July 2003, or for the period

⁴⁷ In paragraph 23 of this judgment.

thereafter by which the 2003 Act reduced those emoluments. The 2003 Act could not have acquired property which they did not have, and, accordingly, did not violate section 6 of the Constitution. The appeal therefore fails on this ground.

- [40] I shall now consider the challenge to the appeal based on constitutional notions of the separation of powers and the rule of law, and, by extension, the right of access under section 8(8) of the Constitution.

Challenge on constitutional notions and right of access

- [41] The basic principles will be stated first. They will then be applied to the present case.

The basic principles

- [42] The rule of law and the separation of powers are constitutional concepts, notions or precepts, which are not specifically provided by enactment in the Constitution. The Constitution of Dominica has only a passing reference to the rule of law.⁴⁸ These two concepts are capable of differing interpretations in their jurisprudential contexts. The rule of law has its roots in the writings of Aristotle, who stated that where laws do not rule there is no constitution.⁴⁹ The concept crystallized into contemporary legal theory in the 19th Century work of Albert Venn Dicey.⁵⁰ He identified, as its basic tenets, the kindred principles that no person is above the law, in that every person must be equally subjected to the laws of the land,⁵¹ and that those who make laws and those who exercise discretion under the law must do so only in accordance with law.⁵² In its modern perspective, particularly after

⁴⁸ See (d) of the preamble to the Constitution, which states that the people of Dominica recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.

⁴⁹ See Aristotle's, *The Politics*, Sinclair, TA (trans) (Penguin, London, 1962), bk iv 1292a31.

⁵⁰ In *An Introduction to the Study of the Law and the Constitution* (10th Edition, MacMillan Press Ltd. London, 1982). See particularly Chapters 4 and 13.)

⁵¹ The idea of legal equality.

⁵² The idea that governments should not make laws that are secret or arbitrary or retrospective penal laws.

the Declaration of Delhi, the concept is regarded as requiring a legal system, which provides procedural fairness, and courts, which are presided over by impartial judicial officers and which are easily accessible to all persons.⁵³ From this perspective, the rule of law coincides, in a manner of speaking, with the right of access to judicial tribunals that section 8(8) of the Constitution guarantees.

[43] The jurisprudential basis of the separation of powers is also traceable to Aristotle.⁵⁴ In modern thought, it is a prominent aspect of the writings of John Locke,⁵⁵ Baron Montesquieu and Sir William Blackstone. Classically, this concept refers to the separation of the legislative, executive and judicial branches of government. Under the constitutional law of the Commonwealth Caribbean, it is usually exemplified in the separation of the exercise of government functions between these branches of government, even as our constitutions contemplate some overlapping and delegation of functions.⁵⁶ The concept is now regarded as the bedrock upon which the independence of the judiciary is hinged. It is applied by our courts to jealously safeguard their jurisdiction from usurpation by the legislature and the executive. This was exemplified, for example, in *Hinds v R*.⁵⁷ In this case, the Judicial Committee of the Privy Council struck down those aspects of the Gun Court Act, 1974, of Jamaica, on the ground that they violated the separation of powers doctrine, because the legislature, in setting up a Gun Court to try serious gun crimes, sought to constitute a Full Court Division, presided over by magistrates who were not appointed with the same security of tenure

⁵³ See "Declaration of Delhi" (1959-61) 2-3 Int'l C.J. at pages 2-3 and 19-42. See also, the Report of the International Congress of Jurists on The Rule of Law in a Free Society, (New Delhi, 1959, prepared by N.S. Marsh).

⁵⁴ See Aristotle's, *The Politics*, Sinclair, TA (trans) (Penguin, London, 1962), bk iv xiv 1297b35.

⁵⁵ In *Two Treatises of Government*, 1690. His central thesis was that a government authority should not execute and judge its own cause, because in all "well framed governments" legislation and execution of laws are in distinct hands.

⁵⁶ For example, the Constitution confers power upon the Chief Justice to make secondary legislation. See for an insightful analysis A. Ralph Carnegie, *Floreat the Westminster Model? A Commonwealth Caribbean Perspective* (1996) 6 Carib. L.R. 1.

⁵⁷ [1977] A.C. 195. The Privy Council was at the time of this decision and still is our apex court. The decision is binding on our court particularly as the constitutional provisions by which their Lordships implied the separation of powers into the Constitution of Jamaica are similar to provisions contained in the Constitution of Dominica. This Court has applied *Hinds v R*. in a number of cases, for example, in *J. Astaphan v The Comptroller of Customs and Another*, Dominica Civil Appeal No. 8 of 1994, 28th May 1996.

which the Constitution provided for judges. The Act purported to confer on the magistrates jurisdiction which was hitherto exercised by judges in serious cases.

[44] This Court has also applied the concept of the separation of powers to strike down an aspect of legislation, which purported to confer jurisdiction upon a public service official (who is therefore a member of the executive) to determine the amount of duties which an importer was to pay in certain circumstances. This was in the case *J. Astaphan and Co (1970) Ltd. v Comptroller of Customs of Dominica and Others*.⁵⁸

[45] In *J. Astaphan and Co.*, Sir Vincent Floissac CJ, held that the impugned legislation⁵⁹ violated the separation of powers because the legislature, which was constitutionally vested with the power to levy taxes, had transferred or delegated that legislative power to the executive, without retaining ultimate and effective control of the power, not *ex post facto*, but at the time of the exercise of the power. The Chief Justice was concerned that the legislature, in conferring its power to levy import duties upon the executive, did not circumscribe the power or prescribe guidelines or policy for the exercise of the power by the public service official.⁶⁰ The Chief Justice also stated that if the further sum which the impugned aspect of the legislation permitted customs officials to impose was a penalty, the legislation further violated the separation of powers because the power or discretion to impose a penalty is a judicial power which cannot be legislatively transferred to the executive. It is also noteworthy that the Court also held that section 27(4) the Customs Act also contravened the right to protection of property under section 6 of the Constitution of Dominica, because it permitted the Comptroller to deprive an

⁵⁸ (1996) 54 WIR 152; (Dominica Civil Appeal No. 8 of 1994, 28th May 1996).

⁵⁹ Section 27(4) of the Customs (Control and Management) Act, Cap. 69:01 of the Laws of Dominica, (Revised Edition, 1990), (hereinafter "the Customs Act"), which empowered a customs officer to require an importer who did not complete a perfect entry at the time when a consignment arrived to pay a sum which was not less than one half the amount of the estimated duties chargeable. Section 27(5) permitted such an importer to make a perfect entry within three months or in such longer period as the Comptroller of Customs gave. Section 27(6) deemed the estimated duty under section 27(4) to be the amount properly payable, if the perfect entry was not made within the period specified under section 27(5).

⁶⁰ See (1996) 54 WIR 152, at pages 157g–159b.

importer of property, to wit, sums paid over and above the duties actually payable on the customs officer's estimate, without lawful constitutional authority.⁶¹

Applying the principles

- [46] The appellants challenge to the judgment on the constitutional precept ground is succinctly captured in the submissions which they presented. Those submissions state that there was in existence law which protected the salaries, allowances and increments of the appellants who are public servants. Their rights in respect of their employment are protected from being unilaterally reduced by the government in that there is a statutory collective bargaining process to resolve disputes relating to their terms and conditions of employment. If such disputes cannot be resolved between them, the disputes are to be determined by a statutory judicial tribunal. The government, by using its majority in Parliament to enact the 2003 Act, acted in a manner that was inconsistent with the doctrine of the separation of powers and the rule of law in that both the government and the Parliament usurped or interfered with the exercise of judicial power by preventing the Board of Arbitration, constituted under Part V of the 2003 Act to determine the dispute that related to the salaries, allowances and increments of public officers.
- [47] On the other hand, Mr. Astaphan submitted that the Act did not violate the separation of powers doctrine or the rule of law, because the legislature did not usurp any "judicial power" that was vested in a judicial tribunal, as the Board of Arbitration is not such a tribunal. He submitted, additionally, that the fact that the members of the Board are not appointed by the Judicial and Legal Services Commission, takes this aspect of the appeal outside of the principles in *Hinds v R*.
- [48] In holding that the 2003 Act did not violate the separation of powers doctrine, the learned judge found that notwithstanding the provisions of the Public Service Act, which provided the mechanism for negotiations and the resolution of disputes by

⁶¹ See pages 159c-160e.

the Board, the power to make financial arrangements for public officers still lie primarily within the purview of the legislative. The legislature had merely delegated the negotiation and dispute resolution phase to the Board, which was an executive rather than a judicial body. The learned judge noted, further, that arbitration is a consensual process and its very nature distinguishes it from the judicial process.⁶² Therefore, even if negotiations and dispute resolution by the Board resulted in a Collective Agreement, they do not become final and binding terms and conditions until they are voted upon and passed as an Appropriation Act by Parliament.

[49] I think that these findings by the learned judge were generally correct. In my view, it is critical in this case that the Board is not a judicial body appointed by the Judicial and Legal Services Commission. Under section 32 of the Public Service Act, the Minister appoints members of the Board from persons nominated by the Public Service Board of Management,⁶³ and the representative body of public officers. The appointment of a member of the Arbitration Board is revocable either on the request of the Board of Management or of the representative body.⁶⁴ The legislature did not seek to confer judicial powers upon the Board of Arbitration. Rather, it conferred upon that Board the power to assist the parties to arrive at consensus on salaries and other terms and conditions for public officers.

[50] Additionally, the provisions of the Act do not prevent the legislature from exercising its power to legislate salaries and other terms and conditions for public officers. The Act does not therefore usurp judicial power from the Board, which the Board does not have. The result is that the Act does not violate the separation of powers doctrine by reducing the salaries and allowances of public officers, and by suspending their entitlement to increments for the period that it did. It also follows

⁶² See paragraph 67 of the judgment.

⁶³ Under section 19 of the Public Service Act, the Board of Management is constituted by a Chairperson, who is member of the Committee of Permanent Secretaries, designated by the Prime Minister; the Chief Personnel Officer; the Financial Secretary or his or her nominee; a Permanent Secretary designated by the Chairperson; and a legal officer nominated by the Prime Minister.

⁶⁴ See section 31(6) of the Public Service Act.

that the 2003 Act does not violate the rule of law because it does not deny the appellants access to an independent and impartial tribunal for the resolution of their case. By extension, the said Act does not violate the right of access to the court provided by section 8(8) of the Constitution of Dominica, which provides that any court or other authority prescribed by law to determine the existence or extent of any civil right or obligation shall be established by law; shall be independent and impartial, and shall give any matter brought before it a fair hearing within a reasonable time. The result is that the appeal fails on this ground, as it has on all other grounds.

Costs and order

- [51] The proceedings in this case fall under Part 56 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. Although rule 57.13(4) permits the Court to make any order as to costs as appears just, rule 56.13(6) states that no order as to costs may be made against an applicant unless the court thinks that the applicant has acted unreasonably in making the application or in the conduct of the proceedings. I do not think that the appellants acted unreasonably either in pursuing this case or in the conduct of the proceedings. I shall therefore dismiss this appeal, with no order as to costs.

Hugh A. Rawlins
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

- [52] GORDON, J.A.: I agree with my brother Rawlins JA in all of his conclusions, save one, and that is with respect to the entitlement of the appellants to their salary earned in July 2003. In my view, it may be a nice constitutional point as to what mechanism may be used to pay public servants absent the charging of their

salaries to the Consolidated Fund, but that in no way gainsays the entitlement of an employee to an accrued salary, that is to say one already worked for.

[53] I am fortified in my view by the authority of *Celliah Kodeeswaran v The Attorney General of Ceylon*⁶⁵. In that case the appellant, a public servant, sued the Crown for the balance of salary due to him as an increment which was denied to him because he did not pass a test in the Sinhala language as required by a Treasury Circular issued in the implementation of the Official Language Act 1956. Although the case raised issues of the constitutionality of the Act, a preliminary point was taken of whether a public servant had a right of action against the Crown in respect of salary due for services which he had rendered. On that preliminary issue the matter went to the Privy Council and the judgment of their Lordships was delivered by Lord Diplock. The respondent had relied in argument on the cases of *High Commissioner for India v Lall*⁶⁶ which was itself based on *Mulvenna v The Admiralty*⁶⁷, a Scottish case. Lord Diplock dealt with the issue in this way:

Lord Blackburn's reasoning in *Mulvenna's* case had not been concurred in by the other two members of the Court of Session, Lord Sands and Lord Ashmore, nor has it been subsequently treated in Scotland as correctly laying down the law: see *Cameron v. Lord Advocate*, 1952 S.C. 165. The conclusion which Lord Blackburn reached was that it

"must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in the terms of their contract, they have no right to their remuneration which can be enforced in a civil court of justice, and that their only remedy under their contract 'lies in an appeal of an official or political kind.'"

The only cases cited in support of this proposition were the well known cases which establish that the Crown has power to determine the employment of a public servant at will. He treated as an ineluctable consequence of this, too plain to call for further explanation, that a civil servant had no claim in law to arrears of salary accrued due before his dismissal.

In their Lordships' view this is a non sequitur. A right to terminate a contract of service at will coupled with a right to enter into a fresh contract

⁶⁵ [1970] AC 1111

⁶⁶ (1948) 75 I.A. 225

⁶⁷ 1926 S.C. 842

of service may in effect enable the Crown to change the terms of employment in futuro if the true inference to be drawn from the communication of the intended change to the servant and his continuing to serve thereafter is that his existing contract has been terminated by the Crown and a fresh contract entered into in the revised terms. But this cannot affect any right to salary already earned under the terms of his existing contract before its termination.

In the opinion of their Lordship, Lord Blackburn's reasoning in *Mulvenna's* case, 1926 S.C. 842 is defective and his conclusion is contrary to authority and is wrong. That portion of the judgment in *Lall's* case (1948) A.I.R. (P.C.) 121 which adopts it as a correct statement of the law must be regarded as given per incuriam since the relevant and prestigious authorities to the contrary appear not to have been cited to the Board."

- [54] In the circumstances, I would allow the appeal in respect of the trial judge's finding that there could be no challenge to the reduction of the appellant's salary for July 2003 which had already been earned at the time of the passage of the Public Sector Salaries and Allowances (Temporary) Reduction Act, 2003. I would hold that the respondent as representing the Commonwealth is indebted to the appellants for the difference between that which was paid to them by way of their July salaries and the amount which would have been paid if the Act had not been passed.

Michael Gordon, QC
Justice of Appeal