

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2020/0002

BETWEEN:

ELIZABETH DARIUS-CLARKE

Appellant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Horace Fraser for the Appellant
Mr. Seryozha Cenac and Mrs. Rochelle John-Charles for the Respondent

2021: July 1;
2022: March 10.

Civil appeal – Termination of an ambassador without cause – Dismissal at pleasure - Section 87(2)(c) of the Constitution of Saint Lucia – Court’s reluctance to interfere with political decision - Whether the termination of Mrs. Clarke as ambassador without cause breached section 87 of the Constitution – Definition of public office – Whether position of ambassador is a public office within the meaning of the Constitution – Principle of fairness – When duty to act fairly arises - Whether Mrs. Clarke’s termination was unfair as she was not given an opportunity to be heard – Non-justiciability of Governor General’s actions – Section 121(3) of the Constitution

The appellant (“Mrs. Clarke”) was an ambassador of Saint Lucia to the United States appointed by the Governor General on the advice of the then Prime Minister. As ambassador, her employment contract was to last 2 years from 1st May 2015. In June 2016,

general elections were held resulting in a change of government. After the elections, Mrs. Clarke was asked to tender her resignation by no later than 31st August 2016. She refused to comply and demanded the reason for asking for her resignation. By an instrument dated 30th September 2016, the Deputy Governor General terminated her appointment as ambassador effective 15th October 2016 acting under section 87(2)(c) of the Constitution of Saint Lucia ("Constitution"). Being aggrieved with the termination of her employment, she filed a claim in the high court seeking various declarations and reliefs as to the constitutionality of the termination of her employment.

In dismissing her claim, the trial judge found, inter alia, that as an ambassador she served at the pleasure of the Government of Saint Lucia and so her dismissal without cause did not violate section 87(2) of the Constitution. Further, the principle of fairness did not apply to her dismissal and her dismissal pursuant to section 87(2) was non-justiciable under section 121 of the Constitution. Aggrieved by this decision, Mrs. Clarke appealed.

The main issue on appeal was whether the termination of Mrs. Clarke's employment as ambassador violated section 87 of the Constitution. Counsel for Mrs. Clarke argued that the trial judge erred in finding that Mrs. Clarke was dismissible at pleasure and that her termination under section 87(2) was non-justiciable. Counsel further contended that Mrs. Clarke was a public officer entitled to fairness and that the trial judge erred in holding otherwise.

Held: Dismissing the appeal and making no order as to costs, that:

1. Where a decision that is influenced by political considerations is challenged, the courts should be reluctant to interfere with the political judgment. Ambassadors represent the state in a foreign country and are responsible for carrying out government's policies. They are expected to command the Prime Minister's trust and confidence and the Prime Minister should be given a free hand in appointing and removing such persons. The appointment and removal of an ambassador under section 87(2) of the Constitution is a decision influenced by the Prime Minister's political considerations and a court of law would be reluctant to challenge what is essentially a political judgment.

Permanent Secretary Ministry of Foreign Affairs & Prime Minister Patrick Manning v Feroza Ramjohn and Ganga Persad Kissoon [2011] UKPC 20 applied; **R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs** [2008] UKHL 61 applied.

2. Under the Constitution, a public officer is a person who holds a public office. A public office is one that (i) is established with a sufficient degree of permanence and which exists apart from the office holder, (ii) has an appointment effected by the relevant public service commission, (iii) is an office of emolument and (iv) involves service to the government in a civil capacity. All four conditions must exist for an office to be considered a public office. As an ambassador, Mrs. Clarke was not appointed by or on behalf of the Public Service Commission or any other commission or body. As

such she did not meet the second condition and she was not a public officer or a person holding a public office.

Yaw v Correia (1975) 65 WIR 144 applied.

3. Section 87(2)(c) of the Constitution distinguishes between ambassadors who held public office before their appointment as ambassador, and ambassadors who were not public officers before their appointment. In the case of ambassadors who were public officers and who were appointed to public office on the recommendation of the Public Service Commission, the Prime Minister must consult the Public Service Commission before tendering advice to the Governor General to terminate the appointment of such ambassadors. In the case of ambassadors who did not hold public office before being appointed, such consultation would not be necessary. They are appointed at the Prime Minister's pleasure and in that respect their appointments are political. Therefore, they can be dismissed at pleasure since they do not enjoy the same security of tenure as their counterparts who were appointed from public office. Mrs. Clarke did not hold public office before her appointment as ambassador and she was dismissible at pleasure. Consequently, the termination of her appointment as ambassador without cause, and without her having an opportunity to be heard, did not breach section 87 of the Constitution, nor any of her natural justice rights.

Section 87(2)(c) of the **Constitution of Saint Lucia** Chap. 1.01, Revised laws of Saint Lucia 2019 applied; **Endell Thomas v The Attorney General** [1981] UKPC 28 distinguished; **Fraser v Judicial and Legal Services Commission and another** [2008] UKPC 25 distinguished; **Inniss v Attorney General of Saint Christopher and Nevis** (2008) 73 WIR 187 distinguished; **Bain-Thomas v Attorney General and another** (2017) 91 WIR 324 distinguished.

4. The duty to act fairly would have arisen if the decision to terminate Mrs. Clarke's appointment was based on a specific allegation made against her. In that situation, she would have been entitled to respond to the allegation. On the facts, there was no evidence of the advice given by the Prime Minister to the Deputy Governor General. In the absence of evidence of allegations against Mrs. Clarke in the termination process the principle of fairness did not apply to her and there was no requirement that she be heard before her termination.

Ministry of Foreign Affairs & Prime Minister Patrick Manning v Feroza Ramjohn and Ganga Persad Kissoon [2011] UKPC 20 applied.

5. Section 121(3) of the Constitution is an ouster clause which creates a presumption of regularity as to the Governor General's decisions. This presumption can be rebutted if there is a manifest, glaring or capricious exercise of discretion. On the facts, having found that Mrs. Clarke was dismissible at pleasure, and that her termination was not unfair, there was no room for finding that the termination was glaring or capricious as to take it out of section 121(3). Consequently, section 121(3)

applied and the Court would not enquire into the Deputy Governor General's decision.

Section 121(3) of the **Constitution of Saint Lucia** Chap. 1.01, Revised laws of Saint Lucia 2019 applied.

JUDGMENT

- [1] **WEBSTER JA [Ag.]**: This appeal raises the novel point of whether the Governor General, acting on the advice of the Prime Minister, can terminate the appointment of an ambassador without cause. Learned counsel for the parties advised the Court that this issue has never been settled by the courts and invited this Court to resolve the issue from first principles.
- [2] The appellant, Mrs. Elizabeth Darius-Clarke ("Mrs. Clarke"), was Saint Lucia's ambassador extraordinary and plenipotentiary to the United States of America and Saint Lucia's permanent representative to the Organisation of American States ("OAS"). In October 2016, Mrs. Clarke's appointment was terminated by the Deputy Governor General acting on the advice of the Prime Minister. Mrs. Clarke was aggrieved by the termination of her employment and brought a claim against the Government of Saint Lucia ("the Government") for constitutional and administrative law reliefs. The learned trial judge, Cenac-Phulgence J ("the Judge"), dismissed the claim. This is an appeal against the Judge's decision.

Background

- [3] Mrs. Clarke's 2-year contract of employment dated 25th September 2015 stated that she was appointed as Saint Lucia's ambassador to the United States effective 1st May 2015. On 6th June 2016, general elections were held in Saint Lucia resulting in a change of Government. The Government of the ruling Saint Lucia Labour Party was replaced by the Government of the United Workers Party. Mrs. Clarke is the wife of Mr. Leo Clarke, the general secretary of the Saint Lucia Labour Party.

- [4] Shortly after the elections, the permanent secretary in the Ministry of External Affairs, acting on instructions of the incoming Prime Minister, advised Mrs. Clarke by telephone that she would not be representing Saint Lucia at the OAS general meeting due to be held on the 13th-15th June 2016. She received a second call to the same effect from the cabinet secretary.
- [5] By letter dated 17th August 2016, the permanent secretary in the Ministry of External Affairs formally asked Mrs. Clarke to tender her resignation by no later than 31st August 2016. Mrs. Clarke refused to comply with the request asserting that it was a fundamental breach of her contract of employment and that she could only be terminated for cause. She also asked for the reasons why her resignation was being requested.
- [6] By an instrument dated 30th September 2016, the Deputy Governor General terminated Mrs. Clarke's appointment as ambassador effective 15th October 2016 acting under his power to do so under section 87(2)(c) of the Constitution of Saint Lucia¹ ("Constitution"). She was paid a prorated gratuity from the start of her contract on 1st May 2015 to 15th October 2016, but her other contractual benefits, such as payment of school fees for her daughter were not paid and were not addressed. Mrs. Clarke continued to deny the validity of her termination noting, in particular, the failure to address the terms of her contract. She also asserted that the Prime Minister had criticised her publicly and had dealt with her differently to how he treated other ambassadors. She also complained that she was not afforded an opportunity to make representations to the Deputy Governor General, and that if she had been given such an opportunity it might have caused the Deputy Governor General not to carry out the Prime Minister's recommendation.

The High Court claim

- [7] Mrs. Clarke filed a claim in the high court seeking declarations that the termination of her appointment as ambassador breached her constitutional rights, her rights

¹ Chap. 1.01, Revised laws of Saint Lucia 2019.

under her contract of employment with the state, and her legitimate expectation to complete the term of the contract of employment. She also sought the full balance of her emoluments due under the contract up to the scheduled date of the completion of the term of her employment.

[8] The core of her complaints was that she was neither given a reason for the termination of her employment nor an opportunity to defend herself. Further, the termination breached her constitutional right to have the matter considered by the Deputy Governor General and she was denied the right to advise the Deputy Governor General in accordance with section 87(2) of the Constitution. Had the termination been considered by the Deputy Governor General, she would have had the opportunity to address the reasons for the termination of her employment. Instead, the Deputy Governor General, on the advice of the Prime Minister, terminated her appointment with no opportunity for her to address the issues relating to her termination.

[9] The Judge noted that the claim raised six issues to be determined by the high court, namely:

- (i) Whether the actions of the Deputy Governor General under section 87 of the Constitution is non-justiciable under section 121 of the Constitution;
- (ii) Whether the termination of Mrs. Clarke's appointment as ambassador was in breach of section 87 of the Constitution;
- (iii) Whether there exists a duty to act fairly on the part of the Prime Minister when advising the Governor General under section 87 of the Constitution and whether the termination of Mrs. Clarke as ambassador was in breach of the principles of fairness;

- (iv) Whether Mrs. Clarke's constitutional right under not to be discriminated against was violated contrary to section 13 of the Constitution in her termination as ambassador;
- (v) Whether Mrs. Clarke had a legitimate expectation that she would be entitled, whether by her contract or by customary practice, to fulfil the term of her contract or be paid in lieu thereof; and
- (vi) Whether Mrs. Clarke is entitled to any of the heads of damages claimed and to the full balance of emoluments and benefits to the end of her contract period.

[10] In a careful and well-reasoned judgment, the Judge found, in summary, that Mrs. Clarke, as an ambassador, served at the pleasure of the state and could be recalled at any time without reason; the termination of her employment by the Deputy Governor General, acting on the advice of the Prime Minister, did not breach the provisions of section 87(2) of the Constitution; the principle of fairness did not apply to her dismissal and the dismissal did not violate her rights under section 13 of the Constitution not to be discriminated against; Mrs. Clarke did not have a legitimate expectation to be allowed to work out the balance of her contract or be paid in lieu thereof; and finally, Mrs. Clarke's termination pursuant to section 87(2) of the Constitution is non-justiciable under section 121. The Judge therefore dismissed the claim with no order as to costs. Further details of the Judge's reasoning and conclusions are dealt with below.

The appeal

[11] Mrs. Clarke appealed against the Judge's decision. The amended notice of appeal lists four grounds, namely:

- (i) The Judge misdirected herself and therefore erred in law by holding that Mrs. Clarke was dismissible at pleasure. By so ruling the Judge failed to consider that the provisions of section 87 of the Constitution were intended to ensure some protection to ambassadors.

- (ii) The Judge's ruling that the termination of Mrs. Clarke's appointment by the Deputy Governor General pursuant to section 87(2) of the Constitution is non-justiciable in accordance with section 121 of the Constitution.
- (iii) The Judge's findings that Mrs. Clarke was not entitled to fairness is wrong in law.
- (iv) The Judge failed to consider and/or hold that Mrs. Clarke was, in any event, entitled to compensation in accordance with the contract between her and the Government. This failure in the trial process led to the trial being unfair.

[12] I will now summarise the submissions of both learned counsels and then deal with the grounds of appeal.

Brief summary of counsels' submissions

[13] Mr. Horace Fraser, who appeared for Mrs. Clarke, did not dispute that she was appointed by an instrument of appointment issued by the Governor General and that her removal did not breach the provisions of section 87(2) of the Constitution. However, he contended that the dismissal breached Mrs. Clarke's constitutional right not to be dismissed at pleasure and there is no express provision in the Constitution that gives the Governor General the power to dismiss an ambassador at pleasure, and such a power cannot be implied. Further, he argued that the doctrine of dismissal of public servants at pleasure was effectively abolished in the Eastern Caribbean by the Privy Council in **Endell Thomas v The Attorney General**² and later cases, and that the Court was entitled to enquire into the circumstances of Mrs. Clarke's appointment.

² [1981] UKPC 28.

- [14] Mr. Seryozha Cenac, who appeared for the respondent, submitted that the Constitution contemplates those certain offices were held at pleasure because they were not based on merit but on the political judgment and advice of the Prime Minister conveyed to the appointing agent, the Governor General. Such persons do not have the security of tenure enjoyed by public officers who are appointed by the Governor General on the advice of the Public Service Commission. The doctrine of dismissal at pleasure applies to these persons because they were not appointed through the intake system of the Public Service Commission with the attendant safeguards and protections provided by section 87(2) of the Constitution. As such, the principles extracted from cases like **Endell Thomas** do not apply to the termination of Mrs. Clarke's employment as an ambassador. Further, her dismissal was not unfair.

Ground 1 – The constitutionality of the termination – section 87 of the Constitution

- [15] The central issue in this appeal is whether the termination of Mrs. Clarke's appointment as ambassador was wrong and in breach of section 87 of the Constitution. The preceding section 86 states that the power to appoint persons to hold or act in offices in the public service, and the power to discipline or remove such persons, shall vest in the Public Service Commission. This section does not apply to ambassadors because subsection (3) says that the section does not apply to, among other persons, any office to which section 87 applies. The office of ambassador is mentioned in section 87. The section provides that appointments and removals of the persons mentioned in that section are made by the Governor General acting on the advice of the Public Service Commission or the Prime Minister as the case may be.
- [16] Section 87 plays a central role in this case and it is helpful to set out the relevant portions of the section:
- “87. Appointment etc., of permanent secretaries and certain other officers
(1) This section applies to the offices of Secretary to the Cabinet, permanent secretary, head of a department of government, deputy head of a

department of government, any office designated by the Public Service Commission as an office of a chief professional adviser to a department of government and any office designated by the Commission, after consultation with the Prime Minister, as an office the holders of which are required to reside outside Saint Lucia for the proper discharge of their functions or as an office in Saint Lucia whose functions relate to external affairs.

(2) The power to appoint persons to hold or to act in offices to which this section applies (including the power to confirm appointments) and, subject to the provisions of section 96, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Governor General, acting in accordance with the advice of the Public Service Commission.

However—

- (a) the power to appoint a person to hold or act in an office of permanent secretary on transfer from another such office carrying the same salary shall vest in the Governor General, acting in accordance with the advice of the Prime Minister;
- (b) before the Public Service Commission tenders advice to the Governor General with respect to the appointment of any person to hold an office to which this section applies (other than an appointment to an office of permanent secretary on transfer from another such office carrying the same salary) it shall consult with the Prime Minister and if the Prime Minister signifies his or her objection to the appointment of any person to the office, the Commission shall not advise the Governor General to appoint that person
- (c) in relation to any office of Ambassador, High Commissioner or other principal representative of Saint Lucia in any other country or accredited to any international organization the Governor General shall act in accordance with the advice of the Prime Minister, who shall, before tendering any such advice in respect of any person who holds any public office to which appointments are made by the Governor General on the advice of or after consultation with some other person or authority, consult that person or authority.”

[17] Sub-section (1) of section 87 mentions certain offices such as secretary of the cabinet, permanent secretary and others, and sub-section (2) states that the persons who hold these offices must be appointed, disciplined and removed from office by the Governor General “...acting in accordance with the advice of the Public Service Commission.” The Prime Minister does not have a role in the appointment or removal of persons holding these offices. They are public servants and are

effectively shielded from the political process by the insulation provided by the Public Service Commission which must advise the Governor General on their appointment and removal.

- [18] Paragraph (c) of sub-section (2) is the only section in the Constitution that makes reference to the position of ambassadors. There are no provisions in the Constitution that deal with the creation or role of ambassadors. The paragraph is directly relevant to the termination of Mrs. Clarke's tour of duty as ambassador. It creates an exception to the procedure for appointing and removing persons holding the offices mentioned in sub-section (1). The paragraph can be divided into two parts. The first part deals with the procedure for appointing, disciplining and removing ambassadors, high commissioners or other principal representatives of Saint Lucia in a foreign country. The Governor General acts in accordance with the advice of the Prime Minister and there is no requirement for the Prime Minister to consult any person, commission or body before tendering his advice to the Governor General.
- [19] The second part of paragraph (c) beginning with the words "who shall, before tendering such advice..." caters to the situation where the affected person holds any public office to which appointments are made by the Governor General on the advice of or after consultation with some other person or authority. In this situation, the Prime Minister must consult with the person or authority before tendering his advice to the Governor General. In practice, this means, that if, say a permanent secretary, who holds public office following an appointment by the Public Service Commission, is later appointed as an ambassador, the Prime Minister must consult the Public Service Commission before tendering his advice to the Governor General to terminate his appointment as ambassador. The permanent secretary does not lose the insulation provided by section 87(2) by his appointment as ambassador. On the other hand, where a person who was not a public officer is appointed as an ambassador, he does not get the insulation provided by section 87(2), the Prime Minister can advise the Governor General to appoint or remove such a person in

his deliberate judgment without consulting the Public Service Commission or any other body or person.

[20] There is no evidence that Mrs. Clarke held a position to which she was appointed by the Governor General on the advice of the Prime Minister after consultation with any person or authority. She was a lecturer at Monroe College in Saint Lucia before her first appointment as ambassador in 2012³ and she was re-appointed in 2014 and 2015 by the instruments of appointment issued by the Governor General acting on the advice of the then Prime Minister, Dr. Kenny Anthony.

[21] It is not surprising that paragraph (c) of section 87(2) created this carve out for ambassadors. An ambassador is a high-ranking diplomat who represents the state of Saint Lucia on behalf of the Head of State in a designated foreign country and is responsible for carrying out the state's policy and programmes and maintaining the state's image in that country. As such, they are expected to command the confidence of the Prime Minister. This accounts for the fact that Prime Ministers are given a free hand in appointing ambassadors without going through the usual procedures such as the Public Service Commission. By the same token, they are dismissible by the Governor General acting on the advice of the Prime Minister who does not have to consult the Public Service Commission or any other body. Put another way, their appointment is political in the sense that they are selected by the Prime Minister in his discretion, exercising his personal judgment. The insulation from political influence only arises when an ambassador is appointed through the rigorous process of the Public Service Commission and that situation is catered for in the second part of paragraph (c).

[22] The political nature of the appointment of ambassadors also accounts for the fact that there is a standard diplomatic practice that they are expected to tender their resignations whenever there is a change of government. This is confirmed by

³ Paragraph 8 of the affidavit of Dr. Kenny Anthony filed on 28th February 2018.

Elizabeth Bailey, deputy permanent secretary in the Ministry of External Affairs in her affidavit filed on 15th February 2018 opposing the claim.

[23] For the foregoing reasons, I am satisfied that the Prime Minister is not required to consult any person or other body before advising the Governor General to appoint an ambassador unless, the ambassador was appointed by the Prime Minister from a position in the public service where the person's appointment was made on the advice of or in consultation with the Public Service Commission or some other person or body. The evidence is that the Prime Minister did not consult any person or other body (such as the Public Service Commission) before advising the Governor General to appoint Mrs. Clarke as an ambassador. It was only if the Prime Minister was required to or had consulted some other person or body before appointing Mrs. Clarke as ambassador, that he would be required by paragraph (c) to consult that person or body before advising the Governor General to terminate her appointment. That, in my opinion, is the meaning and intent of paragraph (c).

[24] In this case there is no suggestion by Mrs. Clarke that the procedures in section 87 were not followed. She was appointed by the Governor General on the advice of the then Prime Minister and she was removed by the Deputy Governor General on the advice of the serving Prime Minister. The instrument terminating her appointment specifically stated that it was made under section 87(2)(c) of the Constitution and that the Deputy Governor General was acting on the advice of the Prime Minister. Her complaint is that she was removed without cause and without an opportunity to state her case. This brings into play the issue of whether the state can dismiss an ambassador at pleasure. If it cannot, the termination of her appointment would be in breach of her natural justice rights under the Constitution.

[25] The research of counsel did not produce any decided cases dealing with the procedure for appointing and removing ambassadors, including the fact that there is a political element in such appointments and removals. By way of analogy, we were referred to the decision of the Privy Council in the consolidated appeals of

Permanent Secretary Ministry of Foreign Affairs & Prime Minister Patrick Manning v Feroza Ramjohn and Ganga Persad Kissoon.⁴ The appeal of Mr. Kissoon involved a consideration of section 121(4) of the Constitution of the Republic of Trinidad and Tobago⁵ (“the T&T Constitution”) which provides that “A person shall not be appointed to an office to which subsection (3) applies if the Prime Minister signifies to the Public Service Commission his objection to the appointment of that person to that office.” The Prime Minister objected to Mr. Kissoon’s appointment, proposed by the Public Service Commission, as Commissioner of state lands in the Ministry of Agriculture. Mr. Kissoon challenged the Prime Minister’s decision on the ground that he had not been given an opportunity to be heard and to answer the allegations against him. The Court of Appeal of Trinidad and Tobago upheld his challenge. On appeal to the Privy Council, the Board noted that section 121(4) gave the Prime Minister veto power that was subject only to very narrow limitations. In dealing with the limitations to the Prime Minister’s powers, Lord Brown, who delivered the advice of the Board, referred to the 1974 report of the Constitution Committee and cited the following passage from the report:

“These officials are so directly concerned with the formulation of the [government] policy and supervision of its implementation that they must be accepted to the political chiefs with whom they must have a close working relationship. This does permit some measure of political influence in purely public service appointments but is necessary on purely practical grounds. We would mention that this recommendation of ours is in keeping with the views of the Public Service Associations as expressed to us.”

- [26] The Board found that the veto power allowed the Prime Minister to object to an appointment on general grounds without advance notice to the affected person, but where there is an allegation against the affected person that is considered in the decision making process the person should, as a matter of fairness, be given an opportunity to be heard.⁶ The evidence in the case was that the Prime Minister considered a letter from the Minister of Agriculture about Mr. Kissoon. Mr. Kissoon was not given an opportunity to respond to the contents of the letter and the Board

⁴ [2011] UKPC 20.

⁵ Act. No. 4 of 1976, Laws of Trinidad and Tobago.

⁶ Supra n.4 at paragraphs 45 and 46.

found in his favour on the facts applying the fairness principle. I deal with the principle of fairness in ground 3 below.

[27] The reasoning of the Board on the issue of the Prime Minister's power to exercise the veto power without consultation underscores the importance of allowing the appointing officer (the Prime Minister) a free hand in choosing the persons who are closely connected with formulating and implementing the government's policies. Nowhere is this more true than in the appointment and dismissal of ambassadors. As stated above, they represent the Head of State in foreign countries and are responsible for implementing the government's policies and programmes and maintaining the state's image in that country. As such, the Prime Minister must be free to choose persons in whom he has full trust and confidence.

[28] The decision to appoint or remove an ambassador is essentially a political decision that is formulated in this way for practical reasons. In the words of Dr. Kenny Anthony in discussing whether the doctrine of dismissal at pleasure survives:

“At the outset, it must be made clear that the answers to these questions involve considerations which appropriately belong to the political and administrative sphere. Considerations of law are, therefore marginal.”⁷

[29] Similarly, in the decision of the House of Lords in **R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs**⁸ that was relied on by learned counsel Mr. Cenac, the House was considering the validity of a section of the Constitution of British Indian Ocean Territory. Their Lordships had to review the advice of the secretary of state to Her Majesty as to what can properly be said to conduce to the peace, order and good government of British Indian Ocean Territory. At paragraph 130 of the decision Lord Carswell said:

“A court might understandably be strongly attracted to the view that a law which removes the Chagossians from their homeland cannot be said to be for the peace, order and good government of the colony. But it is not for the courts to declare the law invalid on that ground. Once they enter upon such

⁷ Anthony, Kenny D. “Dismissal at pleasure: the history and consequences of its abolition.” *West Indian Law Journal* 7 (1983): 56–86.

⁸ [2008] UKHL 61.

territory they could very easily get into the area of challenging what is essentially a political judgment, which is not for the courts of law.”

- [30] I rely on these cases, and I am sure there are others, to illustrate the point that where a decision that is influenced by political considerations is challenged, the courts should be very reluctant to interfere with the political judgment. In my opinion, the appointment and removal of an ambassador under section 87(2)(c) of the Constitution falls into this category.

Mrs. Clarke as a public officer

- [31] Learned counsel for both parties and the Judge dealt with the issue of whether Mrs. Clarke was a public officer. Mr. Fraser submitted that Mrs. Clarke was a public officer and therefore could not be dismissed at pleasure. Mr. Cenac submitted and the Judge found that Mrs. Clarke was not a public officer.
- [32] The issue here is whether the position of ambassador is a public office within the meaning of the Constitution. Public office is defined in section 124 of the Constitution as “any office of emolument in the public service” and “public service” is defined as “subject to provisions of this section, service in a civil capacity of the Government.” “Public officer” means “a person holding or acting in any public office.” The Judge relied on the Court of Appeal of Guyana’s decision in **Yaw v Correia**⁹ which analysed the equivalent provision to section 124 in the Constitution of the Co-operative Republic of Guyana¹⁰ (“the Guyana Constitution”) which formulated the following test for determining whether a person holds a public office:

“In order to determine, therefore, whether a ‘public office’ has been constituted under arts 125(1) and 96(1) of the Constitution a useful method of ascertainment might be to examine the question in this way. (1) Is there an ‘office’ established in this sense afore described with a sufficient degree of permanence and continuity, and which exists apart from the holder? If so, (2) has an appointment made to that office in accordance with art 96(1)? If so, (3) is it an office of emolument? If so, (4) is an office which involves service with the Government of Guyana in a civil capacity?”¹¹

⁹ (1975) 65 WIR 144.

¹⁰ Chap. 1:01, Revised laws of Guyana 2012.

¹¹ Supra n. 9 at page 152 per E.V. Luckhoo C.

[33] Section 96(1) of the Guyana Constitution which is referred to in the third limb of the test states that the power to make the appointments "...shall vest in the Public Service Commission". The Court of Appeal of Guyana also made it clear that all four limbs of the test must be satisfied for an office to be considered a public office.

[34] Applied to the facts of this case, it is common ground that Mrs. Clarke was not appointed by or on behalf of the Public Service Commission. Therefore, the third limb of the test is not satisfied and, in her position of ambassador, she was not a public officer as defined and contemplated by the Constitution and **Yaw**. Mr. Fraser's submission to the contrary, that Mrs. Clarke was a public servant within the meaning of the test in **Yaw** is therefore not accepted. Mrs. Clarke was employed in the service of the Government but not as a public officer and her appointment and removal were governed by section 87(2)(c) of the Constitution which I dealt with above.

Conclusion on section 87(2)

[35] I would conclude this part of the judgment by finding that Mrs. Clarke was not a public officer in the sense contemplated by the Constitution and that she could be dismissed by the Governor General acting on the advice of the Prime Minister pursuant to section 87(2)(c). I will now deal with whether it was necessary for the respondent to show that the dismissal had to be for cause or whether the doctrine of dismissal at pleasure survives in Saint Lucia and applies to the facts of this case.

Dismissal at pleasure

[36] At the heart of the doctrine of dismissal at pleasure is that civil servants hold office at the pleasure of the Crown or the state and can be dismissed without giving any reasons. The doctrine is firmly rooted in the English common law and can be traced as far back as **Slingsby's Case**¹² in 1680. The doctrine was described by Chuks Okpaluba, former lecturer in Law at the Faculty of Law, University of the West Indies, Trinidad and Tobago, as:

¹² (1680) 3 Swan 178.

"It is common knowledge that the concept of dismissal at pleasure was established by the common-law judges in order to frustrate actions by public servants against the Crown for wrongful dismissal. It was established when the Crown could not be sued in its courts on any account and at the time when the entire common law of dismissal from employment was heavily weighed in favour of the employer."¹³

In the landmark decision on dismissal at pleasure of **Endell Thomas** Lord Diplock described the doctrine this way:

"To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. "At pleasure" means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so."¹⁴

[37] The rationale for the doctrine has been expressed in different ways and it comes down to the fact that the Crown or the state must be free to carry on the business of government without having to retain servants who are inimical to the public good of running the country.

[38] The facts of **Endell Thomas** are that the plaintiff was a police officer in the Trinidad and Tobago Police Service. He was charged and disciplined by the Police Service Commission purporting to act under the Police Service Commission Regulations 1966 ("the Regulations"). Mr. Thomas challenged the validity of the Regulations. During the proceedings, the Board considered the issue of whether the plaintiff, as a Crown servant, was dismissible at pleasure. Their Lordships reviewed the relevant provisions of the 1962 Trinidad and Tobago Constitution ("the 1962 Constitution") dealing with the establishment of the Public Service Commission and the Police Service Commission, and in particular, section 99 dealing with the latter's power to appoint and exercise disciplinary control over and to remove persons acting or holding offices in the police service. The advice of the Board was delivered by Lord Diplock. His lordship noted at page 124 that:

"The whole purpose of chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching

¹³ Okpaluba, Chuks. "Dismissal at Pleasure: The Persistence of an Anachronism." *Anglo-American Law Review* 6 (1977) 284.

¹⁴ *Supra* n. 2 at page 123.

service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service.”

The Board rejected the Attorney General’s contention that the exercise of the right of the Crown to dismiss its servants at pleasure had been transferred by section 99(1) of the 1962 Constitution from the Governor General to the Police Service Commission, and that the Police Service Commission did not have to have reasonable cause to dismiss an officer. The Board’s finding on this point is clear. At page 126, Lord Diplock stated:

“In their Lordships’ view there are overwhelming reasons why “remove” in the context of “to remove and exercise disciplinary control over” police officers in section 99 (1) and in the corresponding sections relating to the other public services must be understood as meaning “remove for reasonable cause” of which the commission is constituted the sole judge, and not as embracing any power to remove at the commission’s whim. To construe it otherwise would frustrate the whole constitutional purpose of chapter VIII of the Constitution which their Lordships have described. It would also conflict with one of the human rights recognised and entrenched by section 1 (d) of the Constitution, viz. “the right of the individual to equality of treatment from any public authority in the exercise of any functions.” Dismissal of individual members of a public service at whim is the negation of equality of treatment.”

- [39] The ratio decidendi of **Endell Thomas**, that a public officer cannot be dismissed at pleasure, has been applied by subsequent cases in the Privy Council and the Courts of the Eastern Caribbean. In **Fraser v Judicial and Legal Services Commission and another**¹⁵ the permanent secretary of the public service purported to terminate the employment of a magistrate based on an allegation of wrongdoing. The Privy Council decided that the office of magistrate had security of tenure and therefore was subject to the principles of natural justice and the appellant should have been afforded an opportunity to make representations before his dismissal. His dismissal

¹⁵ [2008] UKPC 25.

was held to be unconstitutional, and he was awarded damages. The case is distinguishable on the ground that the magistrate had security of tenure by virtue of his appointment by the Judicial and Legal Services Commission and he could only be dismissed by the Commission for cause.

[40] In **Inniss v Attorney General of Saint Christopher and Nevis**,¹⁶ an attorney at law was appointed to the office of registrar of the high court and additionally to the office of magistrate of the high court of the Federation of St. Christopher and Nevis. She was employed on a two-year contract terminable by the government on three months' notice. The permanent secretary of the Establishment Division of the government wrote to the appellant purporting to terminate her contract in accordance with clause 8(1). No mention was made in the termination letter that the Judicial and Legal Services Commission had been consulted about the termination. The appellant was not given an opportunity to show cause why she should not be dismissed. The Privy Council decided that the termination without cause breached the provisions of section 83 of the Constitution of Saint Christopher and Nevis¹⁷ and awarded damages.

[41] The Judge referred to both of these cases and found, correctly at paragraph 41 of her judgment, that "What is clear is that both cases involved offices where a service commission was a part of the appointment process and therefore are not entirely applicable to the case at bar." I agree with this distinction. Both Mr. Fraser and Ms. Inniss, and Mr. Endell Thomas, held positions that had security of tenure by virtue of their appointment by the commissions, and they could only be dismissed on the advice of or by the relevant commission and with cause.

[42] In **Bain-Thomas v Attorney General and another**¹⁸ the appellant held the position of secretary to the cabinet and head of the public service of Grenada. Appointments to the position were made by the Governor General on the advice of the Public

¹⁶ (2008) 73 WIR 187.

¹⁷ Schedule 1 of the Saint Christopher and Nevis Constitution Order, 1983.

¹⁸ (2017) 91 WIR 324.

Service Commission. The Governor General, acting on the advice of the Public Service Commission, transferred the appellant to the post of Executive Director of the Anti-Money Laundering and Counter Terrorism and Finance Commission without consulting her. The Court of Appeal confirmed that the appellant held a position that was protected from improper actions and unfairness by the Public Service Commission by adding another layer of insulation, namely, the Governor General, who was required to be independent and to act fairly and objectively. He was not a mere “rubber stamp”. The Court of Appeal held that the transfer was unconstitutional and awarded damages to the appellant.

- [43] This case is also distinguishable. Ambassadors are not appointed by the Governor General on the advice of or in consultation with any commission. The Prime Minister is the sole judge of who is appointed to and removed from the position. For the reasons set out in paragraphs 17-18 above the Governor General is bound to act on the advice tendered by the Prime Minister. Blenman JA referred to this aspect of the matter in paragraph 72 of **Bain-Thomas** when she stated:

“Similarly, where the Head of State is clothed with the power to appoint or remove public officers, on the advice of the PSC, this is expected to be done lawfully and removal could only be for cause. The Head of State is not expected to act whimsically or capriciously in removing or appointing public officers.” [Emphasis added]

I agree with this statement. When the Head of State is acting on the advice of a commission or other body, he must consider the advice that has been tendered before making a decision. However, when the Head of State is acting on the advice of the Prime Minister regarding an ambassador, he is not required to consult with any commission or other body before tendering his advice, and the Head of State must act on the advice. The Constitution provides in section 87(2)(c) in clear and mandatory terms that the Governor General shall act on the advice of the Prime Minister. This clear provision leaves no room for implying into the language of section 87(2)(c) an independent discretion to be exercised by the Governor General once he is advised by the Prime Minister. The decision in **Bain-Thomas** does not assist Mrs. Clarke.

Survival of the doctrine of dismissal at pleasure

- [44] The effect of the decision in **Endell Thomas** on the doctrine of dismissal at pleasure is clear, police officers and other public servants cannot be dismissed at pleasure and the state must show reasonable cause for the dismissal. Academic writers in the Caribbean undoubtedly agree with this position but have not gone as far as to say that **Endell Thomas** has completely abolished the doctrine of dismissal at pleasure. Dr. Anthony left the issue open and opined that issues relating to the retention of the doctrine are for public policy and appropriately belong in the political or administrative sphere.¹⁹
- [45] The doctrine was applied by the Court of Appeal of Trinidad and Tobago in 1976 in **Attorney General of Trinidad and Tobago v Richard Toby**²⁰ and by the Court of Appeal of Guyana in 1974 in **Yaw**. These decisions have not been overruled although Dr. Anthony has expressed doubt whether **Toby** was correctly decided. The Court's attention was not drawn to any recent cases where the doctrine was applied.
- [46] What is clear is that the cases that were cited to this Court in support of Mrs. Clarke's position involve public servants who were appointed on the recommendation of a commission and enjoyed security of tenure and insulation from the political influence. Ambassadors do not enjoy such tenure and insulation for the reasons set out above and I am satisfied that the doctrine of dismissal at pleasure still obtains for such persons and they can be dismissed at pleasure.
- [47] To sum up on ground 1, I find that section 87(2)(c) applies to Mrs. Clarke's employment. She was appointed by the Governor General acting on the advice of the Prime Minister and dismissible without cause by the same process. **Endell Thomas** made great strides in abolishing the doctrine of dismissal at pleasure but the case did not go as far as to abolish the doctrine in the case of ambassadors who

¹⁹ Supra n.7 at page 84.

²⁰ TT 1976 CA 19.

are not appointed or dismissed in consultation with any body or person, and the Governor General must act on the advice tendered to him by the Prime Minister. Mrs. Clarke's dismissal did not breach the provisions of 87(2) of the Constitution nor any of her natural justice rights. I would dismiss ground 1 of the appeal.

Ground 3 - The Judge erred in finding that Mrs. Clarke was not entitled to fairness

- [48] One of the consequences of the finding that Mrs. Clarke was dismissible at pleasure is that the Prime Minister was not required to consult her before advising the Deputy Governor General to terminate her appointment. The duty to act fairly would have arisen if the decision to terminate her appointment was on the basis of a specific allegation made against her. In that situation, Mrs. Clarke would be entitled to an opportunity to respond to the allegation. However, there is no evidence of the advice that the Prime Minister gave to the Deputy Governor General. The Judge took note of the complaints by Mrs. Clarke about statements made by the Prime Minister about her lack of qualifications for the position of ambassador but noted that there was no evidence that this formed a part of the advice tendered to the Deputy Governor General.
- [49] The decision in **Manning v Feroza** supports the position taken by the Judge. I referred to this case above for the proposition that the veto power vested in the Prime Minister under section 121(4) of the T&T Constitution is subject only to very narrow limitations. Mr. Kissoon was not given a reason for the Prime Minister's objection to his appointment by the Public Service Commission as Commissioner of state lands in the Ministry of Agriculture. The Board found that the Prime Minister could exercise his veto power without consulting Mr. Kissoon, but because an allegation about Mr. Kissoon was considered in the Prime Minister's decision a duty to act fairly arose.

[50] In Mrs. Clarke's case there is no evidence of any specific allegation made against her in the Prime Minister's advice to the Deputy Governor General and, therefore, she was not entitled to fairness in the sense of not being allowed to reply to a non-existent allegation or to the fact that the Deputy Governor General did not deal with her claimed contractual entitlements.

[51] Learned counsel Mr. Fraser raised the issue of fairness in a different way in his written and oral submissions in this Court. He relied on the case of **Bain-Thomas** and submitted that the Deputy Governor General was not a rubber stamp and was required to consider that Mrs. Clarke's contract had been terminated prematurely, of which he must have been aware, and that she was entitled to benefits under her contract. Nonetheless, he followed the advice of the Prime Minister blindly and terminated her appointment. I have already expressed the view that **Bain-Thomas** does not apply to this case because Mrs. Clarke did not enjoy the security of tenure that Mrs. Bain-Thomas enjoyed, having been appointed on the advice of the Public Service Commission. Mrs. Clarke was dismissible at pleasure and the Deputy Governor General was not required to consider the background to her termination before acting on the Prime Minister's advice.

Ground 2 - The judge's ruling that the termination of Mrs. Clarke's appointment by the Deputy Governor General pursuant to section 87(2) of the Constitution is non-justiciable in accordance with section 121 of the Constitution

[52] Section 121(3) states that-

"Where by this Constitution the Governor General is required to perform any function in accordance with the advice of, or after consultation with, any person or authority, the question whether the Governor General has so exercised that function shall not be enquired into in any court of law."

This is an ouster clause which, as the Judge said at paragraph 22 of her judgment, creates a presumption of regularity which can be rebutted if there is a manifest, glaring or capricious exercise of discretion. In this case, Mrs. Clarke claims that the Court can and should enquire into the action of the Deputy Governor General in terminating her appointment because she could not be terminated without cause

and the Deputy Governor General was required to exercise independent judgment and enquire into the fairness of the termination. Having found that the Deputy Governor General was entitled to terminate Mrs. Clarke's appointment without cause and that the termination was not unfair, there is no room for finding that the termination was glaring or capricious so as to take it out of section 121(3). The section applies and the Court should not enquire into the Deputy Governor General's decision.

Ground 4 – Contractual compensation

- [53] This ground of appeal claims that the Judge failed to consider and/or hold that Mrs. Clarke was in any event entitled to compensation in accordance with the contract between her and the Government. This ground was abandoned by counsel during his oral submissions accepting that the claim was not one in private contract law and nothing further needs to be said.

Conclusion

- [54] In summary, I find that Mrs. Clarke was not a public officer and she could have been dismissed by the Deputy Governor General without cause acting on the advice of the Prime Minister pursuant to section 87(2)(c). The doctrine of dismissal at pleasure survives in a limited form in Saint Lucia and applies to the dismissal of Mrs. Clarke. Her dismissal was not unfair within the meaning of the Constitution and the actions of the Deputy Governor General are non-justiciable. The Judge's overarching finding that Mrs. Clarke had failed to prove a breach of the Constitution is upheld and she is not entitled to damages for breach of the Constitution.

Disposal

[55] I would dismiss the appeal with no order as to costs.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar