

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

ANTIGUA AND BARBUDA

ANUHCVP2019/0011

BETWEEN:

CERISE JACOBS

Appellant

and

**[1] MINISTER OF TOURISM
[2] THE COMMISSIONER OF POLICE
[3] CHIEF MAGISTRATE**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant

Mrs. Carla Brookes-Harris, Solicitor General for the Respondents

2022: February 23;
May 24.

Civil Appeal – Constitutional law – Section 46 of the Constitution of Antigua and Barbuda – Delegation of legislative power – Delegation of legislative power by Parliament to Executive – Section 26(d) of The St. John’s Development Corporation Act - Penal offences - Whether learned judge erred in finding Minister had authority to create regulations which imposed penal offences – Discretion of Minister to fix penalties - Section 17 of the Interpretation Act of Antigua and Barbuda - Whether section 26(d) of The St. John’s Development Corporation Act violated section 46 of the Constitution of Antigua and Barbuda

At the heart of this appeal is a legal challenge to the Parliament of Antigua and Barbuda’s (“Parliament”) ability to delegate a specific aspect of its law-making power. Parliament delegated to the Minister of Tourism (“the Minister”) the power to make laws in relation to the prohibition of specific vending conduct and enables him to fix penalties for breaches of the law. The Minister, acting pursuant to that power, enacted subsidiary legislation in the

nature of regulation 3(1)(a) of The St. John's Development Corporation (Heritage Quay) Regulations, 2010 ("the St. John's Regulations") which prohibited vending without a permit in Heritage Quay.

Ms. Cerise Jacobs ("Ms. Jacobs") was charged by the Commissioner of Police with the commission of the offences of vending without a permit contrary to regulation 3(1)(a) of the St. John's Regulations. Having been charged, Ms. Jacobs appeared before the Chief Magistrate and applied for bail. The Chief Magistrate granted Ms. Jacobs bail in respect to the charges that were laid in relation to the St. John's Regulations, on condition that she did not attend Heritage Quay for any purpose.

Ms. Jacobs subsequently filed a Fixed Date Claim in the High Court and sought an administrative order. She prayed for reliefs including declarations of breaches of her constitutional rights and declarations that the Minister in creating regulation 3(1)(a) of the St. John's Regulations acted unlawfully and in contravention of section 46 of the Constitution of Antigua and Barbuda. She also sought to have regulation 3(1)(a) of the St. John's Regulations declared ultra vires section 26 of The St. John's Development Corporation Act.

The issue before the court of first instance was whether the Minister had the authority to make regulations 3(1) and (2) of the St. John's Regulations, which imposed penal consequences. The learned judge concluded that Parliament had the power to delegate some of its law-making power and that section 4 of The St. John's Development Corporation Act as amended which was facilitated by the Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000 and empowered the Minister to make the regulations in question. The learned judge therefore concluded that the Minister had authority and could make the regulation and accordingly struck out Ms. Jacobs' claim.

Being dissatisfied with the decision of the learned judge, Ms. Jacobs appealed. The four issues before the Court for resolution are: (i) Whether the judge erred in concluding that the Minister had the authority to make regulations which imposed penal consequences; (ii) Whether section 26(d) of the St. John's Development Corporation Act violated section 46 of the Constitution of Antigua and Barbuda; (iii) If so, whether the learned judge erred in law by failing to determine whether the actions of the Chief Magistrate and the Commissioner of Police were lawful; and (iv) Whether the judge ought to have concluded that Ms. Jacobs' fundamental rights were breached.

Held: dismissing the appeal against the decision of the learned judge, affirming the decision of the learned judge albeit on expanded bases and ordering that each party shall bear their own costs on the appeal, that:

1. Constitutions which are fashioned on the Westminster model, such as the Constitution of Antigua and Barbuda, recognise the existence of three arms of government namely, the Parliament, the Executive and the Judiciary. Further, the Constitution of Antigua and Barbuda is the supreme law of the state. This written Constitution accepts the doctrine of separation of powers and vests the legislative, executive and judicial powers in the respective institutions. These three arms of government must conform to the dictates of the Constitution of Antigua and

Barbuda. The doctrine of separation of powers is critical to the efficient functioning of any constitutionally democratic state, and laws which are inconsistent with the doctrine are void to the extent of that inconsistency.

Hinds and Others v The Queen [1976] 1 All ER 353 applied; **Bata Shoe Company Guyana v Commissioner of Inland Revenue and Others** (1976) 24 WIR 172 applied; **John v Director of Public Prosecution of Dominica** (1985) 32 WIR 230 applied.

2. Parliament is constitutionally vested with the power to make law as provided for by section 46 of the Constitution of Antigua and Barbuda and has the power or right to delegate some of its law-making power. There is no restriction on the types of persons or body to whom Parliament may delegate some of its legislative power. Similarly, there is no authority which suggests that it is impossible for Parliament to delegate some of its law-making power to create criminal offences to other bodies, including a Minister of State. Criminal penal statutes include every statute that creates an offence against the State. Whatever the character of the penalty, the charge is triable by way of prosecution and can be brought by a public officer. It is also established law that the general penal sanction for disobedience of a prohibition is a conviction. A close review of section 26(d) of The St. John's Development Corporation Act, when read together with regulation 3(1)(a), clearly indicates that the statute in question conferred upon the Minister the power to create a criminal offence. Nothing in section 26(d) of The St. John's Development Corporation Act speaks to civil liability. Accordingly, the learned judge did not err in concluding that the Minister had the authority to make regulations which imposed penal consequences.

Section 46 of **The Antigua and Barbuda Constitutional Order** 1981, Cap 23 of the Laws of Antigua and Barbuda applied; Section 26(d) of **The St. John's Development Corporation Act**, Cap. 392 of the Laws of Antigua and Barbuda applied; Regulation 3(1)(a) of **The St. John's Development Corporation (Heritage Quay) Regulations, 2010** No. 18 of 2010 applied; **The Queen v Hall** (1891) 1 QB 747 applied.

3. While Parliament may delegate some of its legislative power to the Executive, there must never be a total usurpation of Parliament's law-making role under the guise of delegated legislation neither should there be any appearance of Parliament abdicating its essential law-making function. Parliament is required to show fidelity to the doctrine of separation of powers and retain effective control over its delegated powers especially in relation to weighty matters such as the creation of a criminal offence. This effective control may be retained by the disjunctive means of circumscribing the delegated power, or by prescribing guidelines or a policy for the exercise of the power. In this appeal, Parliament evidently circumscribed the power granted to the Minister by virtue of section 26(d) of The St. John's Development Corporation Act and did not abdicate its legislative function. To the contrary, Parliament has provided a clear and intelligible rubric to be followed by the delegated authority, namely the Minister. Towards this end, Parliament described

the specific area, being Heritage Quay, for which the Minister is empowered to exercise authority and defined the scope of his power in respect of the specific area for which he may make regulations, being prohibiting the carrying on of business of a vendor. Consequently, Parliament adequately circumscribed the Minister's power in section 26(d) of The St. John's Development Corporation Act. Section 26(d) did not therefore violate the separation of powers doctrine. It is therefore not unconstitutional.

Section 2 of **The Antigua and Barbuda Constitutional Order** 1981, Cap 23 of the Laws of Antigua and Barbuda applied; Section 46 of **The Antigua and Barbuda Constitutional Order** 1981, Cap 23 of the Laws of Antigua and Barbuda applied; Section 26(d) of **The St. John's Development Corporation Act**, Cap. 392 of the Laws of Antigua and Barbuda applied; Regulation 3(1)(a) of the **The St. John's Development Corporation (Heritage Quay) Regulations, 2010** No. 18 of 2010 applied; **Carltona Ltd v Commissioners of Works and Others** [1943] 2 All ER 560 applied; **Abel v Lee** (1871) L R 6 CP 365 applied; **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others** (1996) 54 WIR 153 applied; **Re The Delhi Laws Act v The Part C States (Laws) Act** 1951 SCR 747 applied.

4. It is a settled principle of statutory interpretation that the chapeau guides the subsequent provisions. In this appeal, the chapeau of section 26 is not couched in mandatory terms. Instead, by the use of the word 'may', Parliament has given the Minister both the discretion to make the prohibition and the discretion to fix the penalty for contravening such provision or the discretion not to do so. In this appeal, where the Minister exercised his discretion to create a prohibition and exercised his discretion not to fix the penalty, there is no doubt that he acted within the confines of section 26(d) of The St. John's Development Corporation Act. The Minister's exercise of his discretion to create the offence and not to fix the penalty, was not ultra vires section 26(d) of The St. John's Development Corporation Act.
5. Parliament is also presumed to know its laws. Therefore, when Parliament conferred the discretion on the Minister to fix the penalties, it did so with the full knowledge that if the Minister exercised his discretion not to do so, then section 17 of the Interpretation Act would be effective. Accordingly, Parliament would have been aware that conferring the discretion on the Minister to create the prohibition and the discretion to fix the penalty, would not have posed any difficulty since section 17(1) of the Interpretation Act stipulates that if no penalty is fixed for an offence, the penalty is deemed to be a fine not exceeding \$5,000.00. There is nothing inconsistent with the separation of powers doctrine as recognised by the Constitution of Antigua and Barbuda by Parliament stipulating in section 17 of the Interpretation Act, the penalty to be imposed for the particular offence where there is no penalty expressly stated. Section 26(d) of The St. John's Development Corporation Act is not inconsistent with the basic principle of separation of powers and does not contravene section 46 of the Constitution of Antigua and Barbuda.

Section 26(d) of **The St. John's Development Corporation Act**, Cap. 392 of the Laws of Antigua and Barbuda applied; regulation 3(1)(a) of **The St. John's Development Corporation (Heritage Quay) Regulations Act** No. 18 of 2010 applied; Section 17 of the **Interpretation Act**, Cap. 224 of the Laws of Antigua and Barbuda applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** At the heart of this appeal is a legal challenge to the Parliament of Antigua and Barbuda's ("Parliament") ability to delegate a specific aspect of its law-making power. It arises in circumstances in which Parliament has delegated to the Minister of Tourism ("the Minister") the power to make laws in relation to the prohibition of specific vending conduct and enables him to fix penalties for breaches of the law. The Minister, acting pursuant to that power, enacted subsidiary legislation in the nature of regulation 3(1)(a) of **The St. John's Development Corporation (Heritage Quay) Regulations, 2010**¹ ("the St. John's Regulations") which prohibited vending without a permit in Heritage Quay.
- [2] Ms. Cerise Jacobs ("Ms. Jacobs"), who is the appellant, was charged by the Commissioner of Police with the commission of the offences of vending without a permit contrary to regulation 3(1)(a) of the St. John's Regulations.
- [3] Firstly, Ms. Jacobs was charged pursuant to section 4 of **The Vendors Act**² and for reasons that are irrelevant to this appeal that charge was withdrawn.
- [4] In substitution, three charges were laid against Ms. Jacobs, they are:
- (a) Vending without a permit contrary to regulation 3(1)(a) of the St. John's Regulations between 1st and 30th September 2015;

¹ No. 18 of 2010.

² Cap. 463 of the Laws of Antigua and Barbuda.

(b) Vending without a permit contrary to Regulations 3(1)(a) of the St. John's Regulations between 30th September and 20th October 2015; and

(c) Vending without a permit by committing an offence contrary to section 24 (2) of the Small Charge Act.

[5] Having been charged, Ms. Jacobs appeared before the Chief Magistrate and applied for bail. The Chief Magistrate, in relation to the two charges that were laid in accordance with the St. John's Regulations, granted Ms. Jacobs bail, on the condition that she did not attend Heritage Quay for any purpose.

[6] Ms. Jacobs filed a Fixed Date Claim in the High Court and sought an administrative order. She prayed for a number of reliefs, including declarations of breaches of several of her constitutional rights. She also sought a declaration that the Minister in creating regulation 3(1)(a) of the St. John's Regulations acted unlawfully and in contravention of section 46 of the **Constitution of Antigua and Barbuda**.³ She also prayed to have regulation 3(1)(a) of the St. John's Regulations declared ultra vires section 26 of **The St. John's Development Corporation Act**,⁴ an order for certiorari to quash the charges that were laid by the Commissioner of Police and a prohibition staying the criminal charges. Further, Ms. Jacobs sought special and general damages in the form of aggravated damages and vindictory damages for alleged breaches of her constitutional rights.

Issues in the Court Below

[7] Ms. Jacobs' Fixed Date Claim was strenuously resisted by the defendants who are the three respondents in the appeal namely: the Minister of Tourism; the Chief Magistrate and the Commissioner of Police.

³ The Antigua and Barbuda Constitutional Order 1981, Cap 23 of the Laws of Antigua and Barbuda.

⁴ Cap. 392 of the Laws of Antigua and Barbuda.

- [8] As the matter developed, a single issue seemed to have been agreed between the parties for the High Court to resolve. This was whether the Minister had the authority to make the regulations 3(1) and (2) of the St. John's Regulations which imposed penal consequences.

Judgment in Court Below

- [9] The learned judge having given consideration to the relevant constitutional provisions, when read together with section 26 of **The St. John's Development Corporation Act**, section 4 of the **Interpretation Act**,⁵ the **Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000**⁶ and the St. John's Regulations, concluded that Parliament clearly conferred on the Minister the power to make the regulation that he did. The learned judge was fortified in her conclusion having referred to the writings of authors of treatises such as **Maxwell on the Interpretation of Statutes**⁷ and **G.C Thornton in Legislative Drafting**.⁸ Consequently, the judge in a written judgment concluded that Parliament had the power to delegate some of its law-making power to the Minister. Further, that section 4 of **The St. John's Development Corporation Act** as amended which was facilitated by the **Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000**, empowered the Minister to make the regulations in question. In summary, the learned judge concluded that the Minister had authority and could make the regulation. Accordingly, the judge struck out Ms. Jacobs' claim.

Grounds of Appeal

- [10] Being dissatisfied with the decision of the learned judge, Ms. Jacobs has filed a Notice of Appeal which consists of three grounds, namely: "(i) the learned judge erred in law when she failed to find that Ms. Jacobs had been subject to criminal proceedings in circumstances where there was no statutory authority for the creation of criminal offences which could form the basis for criminal proceedings,

⁵ Cap. 224 of the Laws of Antigua and Barbuda.

⁶ No. 9 of 2000 of the Laws of Antigua and Barbuda.

⁷ Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (10th Edition, Sweet and Maxwell 1953) p. 303.

⁸ G.C. Thornton, *Legislative Drafting* (4th Edition, Bloomsbury Professional 1996) p. 329, 349.

which criminal proceedings result in the loss of Ms. Jacobs' liberty and in contravention of her constitutional rights;" "(ii) the learned judge erred in law in failing to find that the power of the Minister does not extend to creating criminal offences legitimising the initiation of criminal proceedings for alleged breaches of regulations issued by the Minister"; and "(iii) the learned judge erred in law in failing to consider whether the actions of the Commissioner of Police and the Chief Magistrate were lawful."

Issues on Appeal

[11] Upon hearing the refined oral arguments of counsel for the parties and taking into account the issues that were identified in Ms. Jacobs' written submissions and bearing in mind the two additional matters which this Court invited the parties to address at the conclusion of the hearing, I am of the view that the following four issues arise for this Court to resolve, namely:

- (i) Whether the judge erred in concluding that the Minister had the authority to make regulations which imposed penal consequences;
- (ii) Whether section 26(d) of **The St. John's Development Corporation Act** violated section 46 of the Constitution of Antigua and Barbuda;
- (iii) If so, whether the learned judge erred in law by failing to determine whether the actions of the Chief Magistrate and the Commissioner of Police were lawful; and
- (iv) Whether the judge ought to have concluded that Ms. Jacobs' fundamental rights were breached.

Submissions on behalf of Ms. Jacobs

[12] The main thrust of learned counsel Dr. Dorsett's argument was that regulation 3(1)(a) under which Ms. Jacobs was charged, is not criminal in nature. He further submitted that Parliament alone had the power and authority to create criminal

offences. He did not accept that regulation 3(1)(a) created a criminal offence but said that it was the Minister who purported to create a criminal offence as evidenced in regulation 3(1)(a) of the St. John's Regulations and he therefore acted unlawfully. His main point, however, is that regulation 3(1)(a) did not create a criminal offence. Further, Dr. Dorsett sought to rely on **R v Jones (Margaret) and ors**⁹ in support of his contention that Parliament alone has the power to create criminal offences. He stated that one would need very compelling reasons to depart from those principles and he posited that no such reason was evident in the appeal at bar.

[13] Dr. Dorsett maintained that Parliament did not delegate any power to the Minister to create a 'criminal offence but only a civil offence'. Dr. Dorsett was adamant that the making of a criminal law is a matter for Parliament, the legislative branch of government, not for a Minister, a member of the executive branch. Quite novel, and of note, is the fact that Dr. Dorsett argued that not every offence is criminal in nature. Dr. Dorsett advanced an interesting argument that even though regulations 3(1) and (2) refer to punishable on 'summary conviction', that 'summary conviction' merely speaks to a procedure as distinct from a criminal conviction.

[14] Accordingly, Dr. Dorsett argued that summary conviction does not mean conviction for a criminal offence. Therefore, in his view, in so far as a criminal offence had been created by virtue of the regulation, the Minister acted unlawfully. He posited that even though section 26(c) of **The St. John Development Corporation Act** gave the power to the Minister to make regulations, the Minister could not lawfully make regulations so as to create a criminal offence. He therefore argued that acting pursuant to regulation 3(1)(a), he could not lawfully do so and consequently his action was unlawful. Dr. Dorsett therefore argued that the Commissioner of Police, as a consequence, improperly charged Ms. Jacobs with the commission of the unlawfully created offence and that by extension the Chief Magistrate had no jurisdiction to hear and determine those unlawfully created charges which have as their bases regulation 3(1)(a).

⁹ (2007) 1 AC 136.

- [15] It is imperative to record that the main focus of Dr. Dorsett's argument was on section 26(c) of **The St. John Development Corporation Act** and not on section 26(d) which enabled the Minister to make the prohibition. It bears emphasising that in his oral and first written submissions, Dr. Dorsett was adamant that the creation of a criminal offence was for Parliament. He therefore posited that in so far as regulation 3(1)(a) does not create criminal offences then criminal prosecution cannot flow from it. He opined that 'legal proceedings relating to the St. John Regulations are civil proceedings arising from a civil matter involving a plaintiff (or claimant) and a defendant'.
- [16] Having heard extensive oral arguments from both sides at the close of hearing, this Court formulated two further issues and invited both sides to provide written submissions upon them:
- (i) Whether Parliament can delegate some of its law-making powers to create a criminal offence; and
 - (ii) Whether in the circumstances of this case the delegation was proper and appropriate.
- [17] After the close of the arguments and at the invitation of this Court, Dr. Dorsett in his post-hearing written further submissions accepted that 'Parliament can properly delegate some of its law-making powers to create a criminal offence'. He however opined that 'the delegation must be for very compelling reasons and in any event the delegate creating the criminal offence must always be acting expressly on Parliament's delegation'. He said that since the Minister purported to act pursuant to section 26 of **The St. John's Development Corporation Act**, he did so unlawfully. In effect, Dr. Dorsett resiled from his original position, namely that only Parliament can create criminal offences. Dr. Dorsett did not provide this Court with any specific authority in support of this contention that the delegation was unlawful;

if it was enabling the Minister to create criminal offences. Neither am I aware of any such authority.

- [18] Next, Dr. Dorsett relied on sections 2 and 46 of the **Constitution of Antigua and Barbuda** to strengthen his arguments on the unlawfulness of Parliament's delegation. Dr. Dorsett cited **McEwan and Others v Attorney General of Guyana**,¹⁰ and **Belize International Services Limited v Attorney General of Belize**¹¹ in support of his arguments. He was adamant that regulation 3(1)(a) violated section 46 of the **Constitution of Antigua and Barbuda** and is ultra vires.
- [19] Finally, in his post-hearing submissions as indicated earlier, Dr. Dorsett acknowledged that section 26(d) of **The St. John's Development Corporation Act** gives the Minister the power to issue regulations prohibiting vending and fixing penalties for their contravention. Nevertheless, he argued that 'the prohibition is not ipso facto a criminal offence'. He acknowledged that under section 26(d) of **The St. John's Development Corporation Act**, the Minister is empowered to fix the penalty for the prohibitions made under the regulation. However, Dr. Dorsett did not resile from his original position that there is no power to create a criminal offence in section 26 (d) of **The St. John's Development Corporation Act**. He emphasised his view that, in so far as the Minister purported to do so he acted unlawfully and consequently, that the learned judge erred in failing to conclude that the Minister acted unlawfully. Dr. Dorsett reiterated that section 26 (d) 'only enabled the Minister to create civil offences'.
- [20] In view of his arguments, Dr. Dorsett urged this Court to allow the appeal, set aside the decision of the learned judge and grant the reliefs that Ms. Jacobs had sought in the lower court and which were summarised earlier in this judgment.

¹⁰ [2018] CCJ 30 (AJ) (Nov. 13, 2018).

¹¹ [2020] CCJ 9 (AJ) BZ.

Submissions on behalf of the Minister, the Commissioner of Police and the Chief Magistrate

- [21] Learned Solicitor General Mrs. Brookes-Harris argued that the judge did not err by concluding that the Minister had the power to make regulation 3(1)(a) of the St. John's Regulations. She further maintained that Parliament could delegate some of its law-making power to create criminal offences.
- [22] Mrs. Brookes-Harris pointed out, in the appeal at bar, that Parliament conferred on the Minister the power to make 'regulations prohibiting the carrying on of business of a vendor within the designated area and fixing the penalty of contravening such prohibition'. She indicated that **The St. John's Development Corporation Act** was amended in 2000 by the **Law Revision (Miscellaneous) (Amendments) Act (No. 2) Act 2000** by section 8(a) which inserted a new paragraph 4(3)(g) and which when read together with the unamended subsection is in the following terms:
- "4 (3). In particular and without prejudice to the generality of the provisions of subsections (1) and (2) the Corporation may:-
- (g) provide and maintain places within a designated area for the purpose of carrying on the business of a vendor and to issue licenses to such business."
- [23] Mrs. Brookes-Harris also highlighted the fact that Parliament by virtue of section 8(b) of the **Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000** amended section 26 to include subsection (d) of **The St. John's Development Corporation Act** by conferring on the Minister the power to make regulations 'prohibiting the carrying on of business of a vendor within the designated area and fixing the **penalty for contravening such prohibition**' (emphasis added). Mrs. Brookes-Harris was adamant that Parliament conferred upon the Minister the power to make the regulations in question. She submitted further, that the clear reading of sections 16(3) and 16(7) of the **Interpretation Act** reinforces the position that the Minister acted lawfully and within the powers conferred upon him in making the regulations.

- [24] Mrs. Brookes-Harris explained that **The St. John's Development Corporation Act** empowers the St. John Development Corporation to provide and maintain places within a designated area for the purpose of carrying on the business of a vendor and to issue licenses to such businesses. In the appeal at bar, she stated that the designated area is Heritage Quay. She reinforced the fact that **The St. John's Development Corporation Act** empowers the Minister to make regulations to prohibit vending within the designated area and fix the penalty for such violation. In addition, Mrs. Brookes-Harris relied on section 17 of the **Interpretation Act** to further support her argument that Parliament conferred on the Minister the power to create the offences with which Ms. Jacobs was charged. Accordingly, she argued that the Minister acted lawfully and that the learned judge did not err in so holding.
- [25] Similarly, as with Dr. Dorsett, Mrs. Brookes-Harris, at the invitation of this Court, provided further post-hearing written submissions and authorities. She was adamant that Parliament can delegate part of its law-making powers to the Executive. In particular, she relied on the judicial pronouncements of Sir Vincent Floissac, Chief Justice, as he then was, in **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others**¹² in which the learned Chief Justice stated that 'the delegation or transfer of legislative power by the Parliament to the executive is not *per se* inconsistent with the principle of separation of powers'.¹³ Mrs. Brookes-Harris utilised these pronouncements to support her argument that in the appeal at bar, Parliament acted quite lawfully.
- [26] In fact, Mrs. Brookes-Harris stated that the case of **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others** is a complete answer to the first issue raised by the Court of Appeal. She pointed out that in that case, the Court struck down section 27(4) of the **Customs (Control and Management) Act**¹⁴ which purported to confer jurisdiction upon a public service official to exact a further sum

¹² (1996) 54 WIR 153.

¹³ *Ibid* at 157.

¹⁴ Chapter 69:01 of the Laws of Dominica.

from an importer and in addition to determine the amount of duties which an importer was to pay in certain circumstances.

[27] In relation to the critical issue of whether Parliament's delegation of powers, in the circumstances of the appeal at bar was unlawful, Mrs. Brookes-Harris correctly stated that in order to determine this issue, an assessment would have to be done as to whether Parliament has retained effective control over the Minister in his exercise of the power conferred upon him by the amended section 26 of **The St. John's Development Corporation Act**. She accepted that **J Astaphan & Co Ltd v The Comptroller of Customs Dominica and Others** provides guidance on this issue. In **J Astaphan & Co Ltd v The Comptroller of Customs of Dominica and Others** Sir Vincent Floissac stated that effective control might be retained by (i) circumscribing the power; or (ii) prescribing guidelines; or (iii) prescribing a policy for the exercise of the power.

[28] In **J Astaphan & Co. Ltd. v The Comptroller of Customs of Dominica and Others** Sir Vincent Floissac further stated that '[a]dmittedly, the power to prescribe a fixed or mandatory punishment or a range of discretionary punishments for a criminal offence is a legislative power constitutionally vested in the Parliament'. Mrs. Brookes-Harris argued that, in the appeal at bar, Parliament has retained effective control by circumscribing the power of the Minister to make regulations as set out in section 26 of **The St. John's Development Corporation Act** as amended by retaining control over the penalties. She said that there is no doubt that the provisions of the **Interpretation Act** prescribed the punishment which is in the form of a penalty of the fine of \$1,500.00 for contravening the said prohibition. The retention of power to prescribe the fine, Mrs. Brookes-Harris advocated, was a sufficient retention of power by Parliament.

[29] Mrs. Brookes-Harris admitted that section 26 of **The St. John's Development Corporation Act** as amended did not prescribe a fixed penalty or a range of penalty that the Minister can prescribe for the said contravention of the provision. However,

she advocated that the penalty in regulation 3 of the St. John's Regulations is a fine of \$5,000.00. This she said is made possible by virtue of section 17(1) of the **Interpretation Act** which stipulates that the penalty for a breach of a regulation is a fine not exceeding \$5,000.00. Further, she posited that section 17(2) of the **Interpretation Act** also provides that where an enactment confers power to make a statutory instrument, an offence under that statutory instrument is punishable on summary conviction. Mrs. Brookes-Harris stated that in those circumstances, there is no doubt that this regulation in question is in full compliance with the provisions of the **Interpretation Act** which ultimately demonstrates that there is parliamentary control over the power delegated to the Minister to make the said regulation.

[30] She undergirded her contention that Parliament had retained control over its delegation of power to the Minister merely on the conjoint reading of the relevant statutory provisions of the **Interpretation Act** and regulation 3(1)(a). Based on the foregoing, Mrs. Brookes-Harris submitted that section 26(d) of **The St. John's Development Cooperation Act** does not offend the **Constitution of Antigua and Barbuda** nor the separation of powers doctrine since there is sufficient parliamentary guidance and scrutiny as provided in the **Interpretation Act**. In summary, on the strength of the **Interpretation Act** and **The St. John's Development Corporation Act**, Mrs. Brookes-Harris submitted that Parliament has retained effective control over the Minister's exercise of power in making the regulation 3(1)(a) of the St. John Regulations pursuant to section 26(d) of **The St. John's Development Corporation Act**. Consequently, she said that the St. John's Regulations made thereunder are valid.

[31] Mrs. Brookes-Harris was adamant that it was Parliament that gave the power to the Minister by way of delegation and that there was nothing unlawful or inappropriate about this. Finally, she emphasised that section 26(d) of **The St. John's Development Corporation Act** does not offend the **Constitution of Antigua and Barbuda** nor the doctrine of separation of powers. Mrs. Brookes-Harris sought to illustrate through the ratio of **J Astaphan & Co. Ltd. v The Comptroller of**

Customs of Dominica and Others that there is nothing unlawful nor unconstitutional in the Minister exercising the power that Parliament delegated to him so to create the offence of vending without a licence. She was clear that, in her view, that neither section 26(d) of **The St. John's Development Corporation Act** as amended nor regulation 3(1)(a) offended the law nor the **Constitution of Antigua and Barbuda**. To the contrary, Mrs. Brookes-Harris asserted that they are in full compliance with the law including the **Constitution of Antigua and Barbuda**, and the **Interpretation Act**. By way of emphasis, Mrs. Brookes-Harris indicated that there is no doubt that the regulation 3(1)(a) is valid. She therefore urged this Court to dismiss Ms. Jacobs' appeal and affirm the judge's decision.

- [32] In addressing the various competing contentions, it is apparent that there are a number of statutory provisions and a few constitutional provisions that are relevant to this appeal at bar. I will now indicate them. Firstly, I will refer to the relevant constitutional provisions.

The Constitution of Antigua and Barbuda

- [33] Section 1 of the **Constitution of Antigua and Barbuda** recognises Antigua and Barbuda as a sovereign democratic State.
- [34] Section 2 of the **Constitution of Antigua and Barbuda** indicates that the Constitution is the supreme law of Antigua and Barbuda.
- [35] Section 46 of the **Constitution of Antigua and Barbuda** confers power on Parliament to make laws for the peace, order and government of Antigua and Barbuda, subject to the provisions of the Constitution.
- [36] I turn next to the relevant statutory provision of **The St. John's Development Corporation Act**.

The St. John's Development Corporation Act

[37] Section 5 of **The St. John's Development Corporation Act** empowers the Minister of Tourism to give directions as to policy to the Corporation.

[38] Section 26 of **The St. John's Development Corporation Act** enables the Minister to make regulations for the proper carrying out of the provisions and purposes of the Act.

[39] The **Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000** amended section 4 of **The St. John's Development Corporation Act**. Section 8(b) of the **Law Revision (Miscellaneous) (Amendments) (No. 2) Act 2000** amended section 26 of **The St. John's Development Corporation Act** to read as follows:

“26. The Minister may make regulations generally for the proper carrying out of the provisions and purposes of this Act and in particular but without prejudice to the generality of the foregoing may make regulations -

...

(c) prescribing the fees to be charged for licences issued to persons permitted to carry on the business of vendor within designated area;

(d) Prohibiting the carrying on of the business of a vendor within the designated area and fixing the penalty for contravening such prohibition.

Prescribing any other matter or anything which may be or is required by this Act to be prescribed.”

[40] Also, at the heart of this appeal, are several provisions of the **Interpretation Act**. I will now refer to the relevant provisions.

Interpretation Act

[41] Section 16(1) of the **Interpretation Act** states:

“Where an enactment confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time, as occasion requires.”

[42] Section 16(2) of the **Interpretation Act** provides:

“Where an enactment confers a power to make any statutory instrument the power shall be construed as including power exercisable in the like manner and subject to the like consent and conditions, if any, to amend,

alter, rescind or revoke, the instrument and to make other statutory instruments in lieu thereof; but this subsection does not apply to an order made otherwise than by a rule-making authority in the exercise of a statutory power that is of a legislative character.”

[43] Section 16(3) of the **Interpretation Act** stipulates:

“Where an enactment empowers any person or authority to do any act or thing, all powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or as are incidental to the doing thereof.”

[44] Section 16(6) of the **Interpretation Act** states:

“Where an Act confers any person or authority power to make a statutory instrument, the statutory instrument so made shall be read and construed subject to the Act under which it was made and so not to exceed the power of that person or authority, to the extent that where any such statutory instrument would, but for this sub-section, have been construed as being in excess of the power conferred upon that person or authority, the statutory instrument is nevertheless valid to the extent to which it is not in excess of that power.”

[45] Section 16(7) of the **Interpretation Act** states:

“Where an Act confers upon any person or authority power to make a statutory instrument, any act done under a statutory instrument so made shall be deemed to have been done under the Act that conferred the power to make the statutory instrument.”

[46] Section 17(1) of the **Interpretation Act** provides:

“Where an enactment confers a power to make any statutory instrument there may be annexed to a breach of that statutory instrument, in the absence from the enactment conferring the power of any specific provision to the contrary, a punishment by way of a fine not exceeding five thousand dollars.”

[47] Section 17 (2) of the **Interpretation Act** states:

“Where an enactment confers power to make a statutory instrument an offence under that statutory instrument is punishable on summary conviction.”

Discussion and Conclusion

- [48] Before specifically addressing the four main issues that have been identified above, it is essential that some observations be made about a substantial part of the arguments that were advanced on behalf of Ms. Jacobs and to briefly comment on the underlying claim. Indeed, it is noteworthy that in the Fixed Date Claim seeking the administrative order, Ms. Jacobs' main contention was that regulation 3(1)(a) of the St. John's Regulations was ultra vires section 26 of **The St. John's Development Corporation Act** and that accordingly any prosecution based on that regulation is unlawful. However, nowhere in the Fixed Date Claim nor in the Affidavit in Support did Ms. Jacobs indicate that Parliament had enlarged the Minister's power by way of an amendment in section 26(d) to **The St. John's Development Corporation Act** so as to enable him to create prohibitions. Also, in the original written submissions there was a marked absence of the amendment to section 26(d) of **The St. John's Development Corporation Act** which empowers the Minister to make prohibitions. It is noteworthy that Dr. Dorsett had initially focused exclusively on section 26(c) of **The St. John's Development Corporation Act** which allows the Minister to 'prescribe the fees to be charged for licences issued by persons permitted to carry on business of a vendor within designated areas'.
- [49] In fact, section 26(d) of **The St. John's Development Corporation Act** did not feature in Ms. Jacobs' claim. It was subsequent to the written submissions that were filed by Mrs. Brookes-Harris which had addressed the expanded power that Parliament had conferred on the Minister by section 26(d) of **The St. John's Development Corporation Act** together with analysis on the relevant regulatory provision when read together with the **Interpretation Act**, that Dr. Dorsett in his oral submissions before this Court addressed the pertinent issue of the expanded power that Parliament had given the Minister to make prohibitions by virtue of section 26(d) of **The St. John's Development Corporation Act**.
- [50] This situation is underscored by the fact that in his written submissions, Dr. Dorsett identified the three issues on this appeal as:-

- (1) Does the Minister, have the power to create criminal offences by way of regulations or otherwise?
- (2) Are the offences contrary to regulation of 3(1)(a) of the St. John's Regulations criminal offences?
- (3) If the offences contrary to regulation 3(1)(a) of the St. John's Regulations are not criminal offences, what consequence flow with respect to the actions of the Commissioner of Police and the Chief Magistrate?

[51] As I have indicated, it was only in his post-hearing written submissions, at the invitation of the Court that learned counsel Dr. Dorsett quite sensibly conceded that Parliament can delegate some of its law-making powers, including that to create a criminal offence, if it so desires. This is a very settled principle which does not need recitation of any authority. As I also previously expressed, Dr. Dorsett did not provide the Court with any authority for this proposition to the contrary and this Court is unaware of the existence of any such authority. In fact, there are several examples, which this Court need not cite, in the Anglophone Caribbean in which Parliament has delegated some of its powers to create criminal offences.

[52] It is a very strained interpretation for Dr. Dorsett to have asserted that where an offence under the St. John's Regulations is punishable on summary conviction, that 'summary conviction' speaks to the 'procedure in respect of the trial and punishment of the offence and the recovery of the penalty'. I do not for one moment accept his contention that this can refer to a civil claim. It is trite that summary conviction simply means 'being found guilty' of having committed an offence and it means what it says and can only mean that it is a criminal offence. It must also be emphasised that Dr. Dorsett initially argued that the Minister cannot create criminal offences and the offence created by section 3(1)(a) is not a criminal offence. The creation of a

criminal offence is a matter for Parliament. A Minister cannot create a criminal offence in the privacy of his office. This was the crux of his original argument.

[53] It is quite surprising that Dr. Dorsett asserted that the power that is granted by regulation 3(1)(a) when read together with section 17 of the **Interpretation Act**, is not a power to create a criminal offence. In fact, and to the contrary, that is precisely what regulation 3(1)(a) when read together with section 17 of the **Interpretation Act** facilitates – the power of subsidiary legislation to create a criminal offence. The ability to provide a penalty for a summary conviction speaks to criminal conviction. En passant, it is of significance that throughout the Anglophone Commonwealth Nations there are several delegated legislation through which criminal offences are created. It is trite that as a general rule criminal trials are either on indictment or summary trials. Of course, there are some criminal offences that statute can make triable either way. Summary convictions are obtained after there is trial of a summary nature for a criminal offence. It does not require any reference to any authority in order to support the well-established position that summary conviction relates only to criminal offences in contradistinction to civil procedures.

[54] In my view, it may well be that most of the weaknesses in Dr. Dorsett's arguments were occasioned by his failure to also address in a wholistic manner the effect of section 26(d) of **The St. John Development Corporation Act** which has widened the power of the Minister to make prohibitions and fix penalties. In fact, in my view he launched his argument from the incorrect basis of section 26(c) of **The St. John's Development Corporation Act** and did not address the relevant section 26(d) of **The St. John's Development Corporation Act**.

[55] It is important to state briefly that I am of the view that the **Interpretation Act** helps to simplify the law by providing basic rules as to how the courts should interpret the provision of an enactment. The **Interpretation Act** also defines words or expressions so that there is no unnecessary repetition of the definition of those words in other Acts. The making of a statutory instrument also known as subsidiary

legislation, is the exercise of a delegated power given by Parliament to a person other than Parliament to make law.

- [56] I now turn to specifically discuss issues 1 and 2 in fulsome, and I will address both of them together as they are inextricably linked.

Issue 1 – Whether the judge erred in concluding that the Minister had the authority to make regulations which imposed penal consequences

Issue 2 - Whether section 26(d) of The St. John's Development Corporation Act violated section 46 of the Constitution of Antigua and Barbuda

- [57] In resolving these issues, it is imperative to firstly examine the fundamental principles of constitutional law which are relevant to this appeal.

- [58] In this appeal, fundamental questions of parliamentary sovereignty and related issues of alleged breaches of fundamental rights and freedoms are brought into sharp focus. The Court must bear in mind the well settled parameters within which Parliament may function and those which can infringe the provisions of the **Constitution of Antigua and Barbuda**. Special regard must also be had to the sacrosanct principle of constitutional supremacy which is the bedrock of the democratic state of Antigua and Barbuda.

- [59] Indeed, constitutions that are fashioned on the Westminster model, such as the **Constitution of Antigua and Barbuda**, recognise the existence of three arms of government. These are the Parliament, the Executive, and the Judiciary. It has long been recognised that there is a strong relationship between the legislative and executive arm of government in the Anglophone Caribbean countries. The written constitutions such as the **Constitution of Antigua and Barbuda** by its structure accepts the separation of powers doctrine. The **Constitution of Antigua and Barbuda** vests legislative, executive and judicial powers in the respective

institutions. The seminal case of **Hinds and others v The Queen**¹⁵ has also established that the principle of separation of powers is applicable to written constitutions. In **Hinds and others v The Queen**, Lord Diplock delivering the majority judgment on behalf of the Board stated:

“Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. **All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.**” (emphasis added)

[60] I have clearly accepted above that there are three arms of government namely: the Judiciary, Parliament and Executive and that each arm must conform to the dictates of the **Constitution of Antigua and Barbuda**. This much was elucidated by the Board in **Hinds and others v The Queen** in which the written constitution of Jamaica was construed. Since then, the courts have consistently indicated that separation of powers is critical to the efficient functioning of any constitutionally democratic state. In **Hinds and others v The Queen**, the Privy Council held that laws that are inconsistent with the doctrine of separation of powers are void to the extent of that inconsistency and in **Bata Shoe Company Guyana v Commissioner of Inland Revenue and Others**¹⁶ learned Crane JA, as he then was, adumbrated as follows:

“The doctrine of the separation of powers merely concerns the integrity of judicial power, *ie*, protecting the judicial power from the encroachments of the other two organs of Government. The doctrine gives no assistance in determining whether any judicial function should be allocated to the executive, and insofar as the right of appeal is concerned, that being a question of policy, it may or may not lie. So, whether the right of appeal exists, is a matter relative to the allocation of functions between executive

¹⁵ [1976] 1 All ER 353.

¹⁶ (1976) 24 WIR 172.

and judiciary. It does not concern the integrity of judicial power and, for this reason, the doctrine cannot assist the appellants.”¹⁷

- [61] More recently, in **John v Director of Public Prosecution of Dominica**,¹⁸ the Board held that the Constitution of Dominica like other similar constitutions takes for granted the basic principle of separation of powers. These cases are illustrative of the principle of constitutional supremacy and there are several other cases like them.
- [62] There is no disputing that Parliament in this appeal, subject to the provisions of the **Constitution of Antigua and Barbuda**, is constitutionally vested with the power to make law as provided for by section 46 of the **Constitution of Antigua and Barbuda**. The province of the Parliament is to enact laws based in policy that are determined by the Executive. Nevertheless, substantial overlap exists between the legislative and executive branches both in relation to their composition and more importantly, in the independent relationship that exists between them.
- [63] In any democratic society, such as Antigua and Barbuda, Parliament has the power or right to delegate some of its law-making power. This power to delegate legislative authority is grounded in efficiency and constitutional efficacy. In any modern society, such as Antigua and Barbuda, the sheer volume of legislation to be undertaken requires Parliament to delegate some of its law-making powers and functions failing which Parliament will undoubtedly become overwhelmed and compromise its ability to function efficiently. This would ultimately undermine the effectiveness of any democratic society. As indicated, there is no authority provided by Ms. Jacobs which suggests that it is impossible for Parliament to delegate some of its law-making power to other bodies to create criminal offences and neither am I aware of any. Indeed, there is nothing remarkable about this and this will become apparent shortly.

¹⁷ Ibid at 181.

¹⁸ (1985) 32 WIR 230.

[64] I also add that the doctrine of separation of powers which is based on the written **Constitution of Antigua and Barbuda** facilitates the independence of the judiciary from the two other branches of government. Indeed, the text and the structure of written constitutions such as the **Constitution of Antigua and Barbuda**, recognise the strict separation of powers of the judiciary and give effect to it. Importantly, the separation of powers also works to prevent judges from arrogating to themselves powers vested in another branch of government. The judiciary is totally independent of the other branches of government and the High Court retains the power to strike down legislative or administrative executive actions that exceed the jurisdiction or undermines the authority of the Parliament. This much is settled since **Hinds and others v The Queen**.

[65] I turn now to address the creation of criminal offences.

[66] At common law, Acts that contain a prohibition usually contain the sanction or penalty for disobedience and where they are silent as to the sanction for disobedience to their prohibitions, the common law or received rules of construction import into them the appropriate sanction. This is evident for example by section 17(1) of the **Interpretation Act**.

[67] It is settled law that criminal penal statutes include every statute that creates an offence against the State. Whatever the character of the penalty, the charge is triable by way of prosecution and can be brought by a public officer. A close review of section 26(d) of **The St. John's Development Corporation Act**, when read together with regulation 3(1)(a) clearly indicates that the statute in question conferred upon the Minister the power to create a criminal offence. It is also established law that the general penal sanction for disobedience of a prohibition is a conviction.

[68] Usually in these circumstances, the offender is liable to conviction for a misdemeanor. In **The Queen v Hall**¹⁹ at page 753 it was held as follows:

"It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for this contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet, if the party offending have been fined to the king in the action brought by the party, as it is said that he may in every action for doing a thing prohibited by statute, it seems questionable whether he may be afterwards indicted, because that would be to make him liable to a second fine for the same offence F... Also where a statute makes a new offence which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment. Yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment. Also, where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. And if the indictment for such offence conclude contra formam statuti, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

[69] Turning to the role of the legislature, the Board in an opinion delivered by Lord Diplock in **Hinds and others v The Queen** at para 226 stated as follows:

"In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence, as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case."

[70] I am of the considered view that the above pronouncements accurately reflect the correct position in law. I am also fortified in the view that section 26(d) of **The St.**

¹⁹ (1891) 1 QB 747.

John's Development Corporation Act enabled the Minister to create criminal offences based on the plain reading of the subsection. In my considered view, nothing in section 26(d) of **The St. John's Development Corporation Act** speaks to civil liability.

[71] As I have stated, Dr. Dorsett initially based his submissions on section 26(c) which in my respectful view has very little to do with the present appeal and did not originally focus on section 26(d) of **The St. John's Development Corporation Act**. Had he focused on section 26(d), much of the errors he was led into would have been avoided. The essence of the appeal can be viewed also as a matter of the proper interpretation or construction that this Court should accord to section 26(d) of **The St. John's Development Corporation Act**.

[72] As a general rule, the interpretation of statutes is within the special province and under the exclusive control of the judiciary. Section 50 of **Bennion on Statutory Interpretation**²⁰ states that:

"Judicial control The courts have long maintained a right to superintend delegated legislation, though their powers are necessarily limited by the terms of enabling Acts."

[73] Thus, although Parliament often finds it necessary to delegate some of its legislative power, it is required to retain effective control. In the case of most delegated legislation, the appointed delegate is a Minister of the State. This is precisely what Parliament did in the relevant statutory provision by delegating some of its powers to the Minister. Section 56 of **Bennion on Statutory Interpretation** recognises that there is no restriction on the types of persons or body to whom Parliament may delegate legislative power. This comports with my view. The delegate need not be established by the Act, nor need the delegate be in the public domain, though this is usually the case.

²⁰ Diggory Bailey and Luke Norbury: *Bennion on Statutory Interpretation* (6th edition, LexisNexis Butterworths UK, 2017) at page 219.

[74] I hasten to add that it is no part of the function of the court to determine what is the appropriate policy of a law. Should any court attempt to do so that would be to impose upon the subject the political, moral, social or religious views of the judges, instead of construing and ascertaining the definite intention of the Parliament. It would amount to the court encroaching on the province of Parliament.

[75] The court's review of delegated legislation is not far reaching but is circumscribed. In **Carltona Ltd v Commissioners of Works and Others**²¹ at page 564 Lord Greene MR enunciated as follows:

“All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that the powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction.”

[76] Further, it is no part of the functions of this Court to modify the language of an Act of Parliament namely section 26 of **The St. John's Development Corporation Act**, in order to bring it into accordance with any view that the Court may have as to what is right or reasonable. As early as 1871, Wiles J in **Abel v Lee**²² expressed himself thusly:

“...I utterly repudiate the notion that it is competent for (sic) a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views of what is right or reasonable.”

[77] In this appeal, it is apposite to reiterate that I have approached the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency, as one must in order that this Court may not ourselves transgress the **Constitution of Antigua and Barbuda** or obscure the critical issue before us. The question is, has Parliament on the true construction of the enactment violated the hallowed constitutional principle of separation of powers.

²¹ [1943] 2 All ER 560.

²² (1871) L R 6 CP 365 at p. 371.

- [78] There is the full realisation that Parliament is obliged to act within its constitutional limitations and does not possess the supremacy that the English Parliament enjoys. Indeed, section 2 of the **Constitution of Antigua and Barbuda** clearly states that the Constitution is supreme. As a result, the validity of acts of parliamentary powers and by extension the delegation of Parliamentary powers to make laws can be questioned.
- [79] All of my own views accord with that of Sir Vincent Floissac, in citing **Hinds and Others v The Queen** in delivering his judgment in **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others**. He referenced the following;
- “It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of Government. Thus the Constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new State being exercisable exclusively by the legislature, by the executive and by the judicature respectively.”
- [80] From all that I have said, it is obvious that I am of the considered view that it is permissible for Ministers of Government to make inroads into the arena of Parliament once Parliament confers that power on them. Parliament has the power to delegate some of its law-making power and did delegate the power to the Minister to create a criminal offence. However, the matter does not end there. As I foreshadowed, Parliament is required to retain effective control over its delegated powers especially in relation to important matters such as the creation of a criminal offence. Anything less would amount to a most distinct deviation from the separation of powers principle.

[81] The learned author Frances Bennion in his treatise **Bennion on Statutory Interpretation** at section 51 states the following:

“Although Parliament often finds it necessary to delegate legislative power, it prefers to retain some measure of control over the exercise of power. This especially applies where the delegated legislation deals with weighty matters.”

[82] In my view, there can be no doubt that Parliament’s delegation of some of its powers to the Minister to make criminal offences is a matter that is very weighty. It is self-evident that this delegation requires Parliament to retain effective control over the exercise of this power. By way of emphasis, in Antigua and Barbuda, section 46 of the **Constitution of Antigua and Barbuda** vests the power to make laws in Parliament. This in no way negates the fact that Parliament can re-distribute some of its powers between the Parliament and the Executive. I have no doubt about this. Parliament can show fidelity to the doctrine of separation of powers even in circumstances where Parliament delegates some of its law-making power if it limits the power or establishes guidelines or policies for its exercise. As indicated earlier, it is settled law that Parliament’s power to delegate one of its core functions, namely law making, is not unfettered but is subject to certain constraints in order to ensure that the principle of separation of powers as guaranteed by the **Constitution of Antigua and Barbuda** is not infringed.

[83] As I had indicated earlier, the complexity and sheer volume of work mandate democratic States to permit Parliament to delegate some of its law-making powers if those States are to function efficiently. Indeed, both necessity and constitutional efficacy require this. However, there must never be a total usurpation of the law-making role of Parliament under the guise of delegated legislation neither should there be any appearance of Parliament abdicating its essential function.

[84] Parliament’s power to delegate legislation and the extent to which it may so do has been considered by the Courts of post-constitution Commonwealth States over the years. Indeed, in the landmark case of **Re The Delhi Laws Act v The Part C States**

(Laws) Act²³, a 1951 decision, the Supreme Court of India was asked to render an opinion on the constitutionality of three pieces of delegated legislation which spanned the pre-independence, post-independence and post-constitution periods of India's history. Ali J in his opinion provided a helpful summation on the delimits of delegated legislation. He opined:

“(1) The legislature must normally discharge its primary legislative function itself and not through others.

(2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.

(3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency, acts as a subordinate authority and does not become a parallel legislature.

...

[85] After emphasising the inevitability of delegated legislation in society, the learned judge opined:

“...one should not omit to refer to the dangers attendant upon the injudicious exercise of the power of delegation by the legislature. The dangers involved in defining the delegated power so loosely that the area it is intended to cover cannot be clearly ascertained, and in giving wide delegated powers to executive authorities and at the same time depriving a citizen of protection by the courts against harsh and unreasonable exercise of powers, are too obvious to require elaborate discussion.”

[86] Similar pronouncements were made by Mukherjea J in **Re The Delhi Laws Act** where he stated:

“The work of law-making should be done primarily by the authority to which that duty is entrusted, although such authority can employ an outside agency or machinery for the purpose of enabling it to discharge its duties properly and effectively; but it can on no account throw the responsibility which the Constitution imposes upon it on the shoulders of an agent or delegate and thereby practically abdicate its own powers.

...

²³ 1951 SCR 747.

Subordinate legislation, it is not disputed, must operate under the control of the legislature from which it derives its authority, and on the continuing operation of which, its capacity to function rests. As was said by Dixon J. 'a subordinate legislation cannot have the independent and unqualified authority which is an attribute of true legislative power.'

...

In my opinion, it is not enough that the legislature retains control over the subordinate agent and could recall him at any time it likes, to justify its arming the delegate with all the legislative powers in regard to a particular subject. Subordinate legislation not only connotes the subordinate or dependent character of the agency which is entrusted with the power to legislate, but also implies the subordinate or ancillary character of the legislation itself, the making of which such agent is entrusted with. If the legislature hands over its essential legislative powers to an outside authority, that would, in my opinion, amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.

...

The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. 'So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply.'²⁴

...

It is enough if the legislature lays down an intelligible principle which can be implemented by the subordinate authorities for specific cases or classes of cases.

...

Delegation of powers must be limited ones- limited either by legislative prescription of ends and means, or even of details or by limitations upon the area of the power delegated. The enabling legislation must, in other words, contain a framework within which the executive action must operate."

[87] Although the opinions of the learned judges are expressed differently, one main principle can be extrapolated: that is, when Parliament is exercising its power to

²⁴ Vide *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

delegate power or authority, in order to retain its effective control, one of the methods it can utilise is to circumscribe that delegated power or authority. The effect of this would prevent any encroachment on the doctrine of the separation of powers.

[88] In the appeal at bar, it is therefore necessary for Parliament to retain effective control since it has delegated to the Minister of Tourism, the power to create any criminal offence in relation to vending without a permit in Heritage Quay. To be meaningful, legislative control should have been put in place at the time of the exercise of the power. This has also been endorsed by Sir Vincent Floissac in **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others** and accords with my views.

[89] In **J Astaphan & Co (1970) v The Comptroller of Customs of Dominica and Others**, Sir Vincent Floissac, writing on behalf of the Court invalidated sections of customs legislation which permitted a customs officer to determine 'the further sum' that an importer had to pay as duty and held that it breached the separation of powers principle and did not attain the requisite threshold. Sir Vincent Floissac held that since 'the further sum' amounted to a tax, it was a delegated legislative power. Sir Vincent Floissac was clear that no effective form of control was put in place before the exercise of power by the delegate and therefore it could be potentially abused. His Lordship was clear that in so far as 'the further sum' lacked the guidelines for its determination, it violated the separation of powers principle. In fact, he enunciated that in so far as the 'further sum' amounted to the importation of a tax it would be unlawful and not within the purview of Parliament in the absence of any safeguards or guidelines for its determination, this amounted to '**a surrender of abdication by the legislature of Dominica of part of its legislative power**'. (emphasis added)

[90] It is helpful to adopt as I hereby do, the enunciations of Sir Vincent Floissac where he expressed similar pronouncements as the learned judges in **Re The Delhi Laws Act** and stated the following:

“It is now well established that the basic principle of the separation of powers is implicit in the Constitution of the Commonwealth of Dominica and that any law which is inconsistent with that basic principle is unconstitutional and invalid. The authority for that legal proposition is *John v Director of Public Prosecutions of Dominica* (1985) 32 WIR 230 where the Privy Council applied to the Constitution of Dominica what they had previously said in *Hinds, Hutchinson, Martin and Thomas v R* (1975) 24 WIR 326.

...

The power to impose taxes and duties is inherently a legislative power constitutionally vested in the legislature. If the ‘further sum’ which section 27 (4) of the Customs (Control and Management) Act has authorized the proper officer to demand a tax or a duty the legislature of Dominica has delegated or transferred its legislative power of taxation to the executive (i.e., the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers.

I conclude that the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers. There is no such inconsistency if the legislature retains effective control over the executive in the latter’s exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.

I also concede that the legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the executive. To that extent, the legislature retains ultimate control over the executive in relation to the exercise by the executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the executive.” (emphasis added)

- [91] Based on the above cited authorities, I am of the clear view that Parliament may retain effective control over delegated power by three methods. These are: (a) circumscribing the power (b) prescribing guidelines or (c) prescribing a policy for the exercise of the power. These three options are disjunctive and by all means mutually exclusive. In this appeal, Parliament has employed the option of circumscribing.

- [92] I am also of the considered view, consistent with Sir Vincent Floissac in the above quotation, that the ultimate control is not effective after the power has been exercised in an individual case or if and when the power has been abused by the Executive. If the basic principle of separation of the Legislative and Executive power is to be meaningful and effective, the basic principles should not be deemed to have been observed merely by reason of the existence of any control which operate ex post facto. There must be some parliamentary control at the time of the exercise of the power which usually finds its place in the delegating legislation.
- [93] By way of emphasis, Parliament can effectively maintain legislative control over delegated power by circumscribing the delegated power or authority. Indeed, it is settled law that this circumscribing can be done by sufficiently limiting the delegated power. Having regard to the cited authorities, I am fortified in my view that Parliament circumscribed the power granted to the Minister by virtue of section 26(d) of **The St. John's Development Corporation Act** and did not abdicate its legislative function. To the contrary, Parliament provided a clear and intelligible rubric to be followed by the delegated authority, namely the Minister. The Corporation is entrusted with authority to maintain places within the designated area, being Heritage Quay for the purpose of carrying on the business of a vendor and to issue licenses to such business. The Minister is granted authority to make regulations 'prohibiting the carrying on of business of a vendor within the designated area and fixing the penalty for contravening such prohibition'. Parliament described the specific area, being Heritage Quay, for which the Minister is empowered to exercise authority and defined the scope of his power in respect of the specific area for which he may make regulations, being prohibiting the carrying on of business of a vendor. Parliament adequately circumscribed the Minister's power in section 26(d) of **The St. John's Development Corporation Act**. Section 26(d) does not violate the principle of separation of power and is therefore not unconstitutional.

[94] Turning now to the question of the penalty which brings into sharp focus the interpretation and construction that should be accorded to section 26(d) of **The St. John's Development Corporation Act**. By way of emphasis, it reads as follows:

“26. The Minister may make regulations generally for the proper carrying out of the provisions and purposes of this Act and in particular but without prejudice to the generality of the foregoing **may** make regulations:-
d. Prohibiting the carrying on of the business of a vendor within the designated area and fixing the penalty for contravening such prohibition.”
(emphasis added)

[95] I have given deliberate consideration to the arguments advanced by Mrs. Brookes-Harris and the countervailing arguments advanced by Dr. Dorsett and I agree with Mrs. Brookes-Harris' submission that Parliament has given the Minister (a) the discretion to make the prohibition and (b) the discretion to fix the penalty for contravening such provision. My view is undergirded by the settled principle of statutory interpretation that the chapeau guides the subsequent provisions. In this appeal, the chapeau of section 26 is not couched in mandatory terms and does not impose an obligation on the Minister to fix a penalty. The word 'may' means what it says: the Minister has the discretion to fix the penalty or the discretion not to do so. If as the Minister did in the present case, he exercised his discretion not to fix the penalty, there is no doubt that he acted within the confines of section 26(d). In further support of my considered view is the fact that Parliament had, years before, in any event made provision for this eventuality by stipulating as it did in section 17 of the **Interpretation Act**. Parliament having done so, there is nothing remarkable about section 17 of the **Interpretation Act**. To the contrary, this provision is commonplace in many Interpretation Acts in the Caribbean.

[96] Butressing the above position, is the settled principle of statutory interpretation that Parliament is presumed to know its laws. Therefore, when Parliament conferred the discretion on the Minister to fix the penalties, it did so with the full knowledge that if the Minister exercised his discretion not to do so, then section 17 of the **Interpretation Act** would be effective. Accordingly, Parliament would have been aware that conferring the discretion on the Minister to create the prohibition and fix

the penalty, would not have posed any difficulty since section 17(1) of the **Interpretation Act** stipulates that if no penalty is fixed for an offence, the penalty is deemed to be a fine not exceeding \$5,000.00. In all the circumstances, the Minister clearly acted in accordance with section 26(d) of **The St. John's Development Corporation Act**. Consequently, the Minister's exercise of his discretion to create the offence and not to fix the penalty, was not ultra vires section 26(d). Additionally, there is nothing inconsistent with the separation of powers doctrine as recognized by the **Constitution of Antigua and Barbuda** by Parliament stipulating in by section 17 of the **Interpretation Act** the penalty to be imposed for the particular offence where there is no penalty expressly stated.

[97] In so far as I have already indicated that section 26(d) of **The St. John Development Corporation Act** does not infringe section 46 of the **Constitution of Antigua and Barbuda**, nor the separation of powers doctrine and that it is not unconstitutional, it therefore follows that regulation 3(1)(a) of the St. John's Regulations neither violates the separation of powers doctrine nor is it ultra vires section 46 of the **Constitution of Antigua and Barbuda**. Given the totality of circumstances and based on what I have foreshadowed, it is apparent that, I am of the clear view that the learned judge did not err in concluding that the Minister had the power to make regulation 3(1)(a) and that it was lawful; albeit by a less expansive route to that which I have indicated.

[98] In view of the totality of circumstances, I am also satisfied that section 26(d) of **The St. John's Development Corporation Act** is not inconsistent with the basic principle of separation of powers and does not contravene section 46 of the **Constitution of Antigua and Barbuda**. Consequently, I dismiss Ms. Jacobs' appeal in relation to the first two issues, and affirm the decision of the learned judge albeit on expanded bases.

Issues 3: If so whether the learned judge erred in law by failing to determine whether the actions of the Chief Magistrate and the Commissioner of Police were lawful

Issue 4: Whether the judge ought to have concluded that Ms. Jacobs' fundamental rights were breached

[99] In light of my conclusions on the first two issues that section 26(d) of **The St. John's Development Corporation Act** is not unconstitutional and does not violate the doctrine of separation of powers, it is evident that the subsequent acts that the public functionaries executed pursuant to regulation 3(1)(a) are similarly not unconstitutional. For completeness, I state that the last two issues in this appeal are rendered otiose and there is no need to further discuss them.

Costs

[100] In relation to the matter of costs and having regard to Rule 56.13 of the **Civil Procedure Rules 2000**, I am of the view that Ms. Jacobs did not act unreasonably in bringing this appeal. In the totality of circumstances, I am of the considered view that the appropriate cost order on this appeal is each party should bear their own costs. I so order.

Disposition

[101] For the above reasons, I dismiss Ms. Jacobs' appeal against the decision of the learned judge, affirm the decision of the learned judge, albeit on expanded bases. I also order that each party shall bear their own costs on the appeal.

[102] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar