

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCv2009/0394

**IN THE MATTER OF SECTION 119 OF THE CONSTITUTION
OF ANTIGUA AND BARBUDA CAP. 23 OF THE REVISED
LAWS OF ANTIGUA AND BARBUDA 1992 EDITION**

**IN THE MATTER OF SECTION 39 (1) (g) OF THE CONSTITUTION
OF ANTIGUA AND BARBUDA CAP. 23 OF THE REVISED
LAWS OF ANTIGUA AND BARBUDA 1992 EDITION**

BETWEEN:

GASTON BROWNE

Claimant

and

D. GISELLE ISAAC-ARRINDELL

Defendant

Appearances:

Mr. Ralph A. Francis and Ms. Deniscia Thomas for the Claimant
Mr. Justin Simon, Q.C. and Ms. Alicia Aska for the Defendant

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2010: June 1, 16
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JUDGMENT

- [1] **MICHEL, J.:** By Fixed Date Claim Form filed on 10th July 2009 the Claimant, Gaston Browne, claimed against the Defendant, D. Giselle Isaac-Arrindell, a declaration that the Defendant, being the substantive holder of the post of Executive Secretary to the Board of

Education (a body corporate established under **the Board of Education Act, 1994¹**) is not qualified to be the Speaker of the House of Representatives by virtue of the provision of section 39 (1) (g) of the Constitution of Antigua and Barbuda (hereinafter referred to as "the Constitution"). On the said 10th July the Claimant also filed an Affidavit in support of his application and exhibited therewith a copy of **the Board of Education Act, 1994** (hereinafter referred to as "the Act") and certain sections of the Constitution of Antigua and Barbuda.

- [2] On 6th August 2009 an Acknowledgement of Service of the Fixed Date Claim Form and Affidavit in support were filed on behalf of the Defendant by the Attorney General's Chambers and on 19th October 2009 that office filed an Affidavit in Response by the Defendant.
- [3] Case management directions were given in this matter on 5th February 2010 and the parties filed pre-trial memoranda on 19th March 2010 in accordance with the case management directions.
- [4] Pre-trial review of the matter took place on 16th April 2010, at which the Claimant was ordered to file the trial bundle by 23rd April 2010, the parties were ordered to file skeletal arguments with authorities by 17th May 2010 and the trial of the matter was set for 1st June 2010 on the basis of affidavit evidence only.
- [5] The Claimant did file the trial bundle by the date ordered and skeletal arguments in the form of a written submission (without authorities though) were filed on behalf of the Claimant on 18th May 2010. The skeletal arguments on behalf of the Defendant in the form of a written submission (with authorities) - as per the pre-trial review order - were not however filed until 31st May 2010.

¹ No. 11 of 1994

- [6] At the trial of the matter on 1st June 2010, lead Counsel for the Claimant, Mr. Ralph Francis, presented to the Court a bound copy of the authorities in support of his submission and then proceeded to make his submission on behalf of the Claimant.
- [7] The Court hereby accepts and deems to have been properly filed the submissions and authorities filed and presented to the Court on behalf of both parties.
- [8] The factual issues outlined in the written submission filed on behalf of the Claimant are as follows:
1. The Claimant is a member of the House of Representatives, having been elected as the Parliamentary Representative for the Constituency of St. John's City West at the March 2009 General Elections.
 2. The Defendant is not an elected member of the House of Representatives, but was elected by the elected members of the House to serve as Speaker of the House after the March 2009 General Elections.
 3. Prior to being elected Speaker and up to the present time, the Defendant is employed as the Executive Secretary of the Board of Education, which is a statutory corporation established by the Act.
 4. The Claimant is seeking a declaration that the Defendant, being the substantive holder of the position of Executive Secretary of the Board of Education, is not qualified to be the Speaker of the House of Representatives by virtue of the provision of section 39 (1) (g) of the Constitution.
- [9] None of these factual issues have been disputed by the Defendant and all are accepted by the Court as constituting the factual basis of this claim.

[10] In the written submission, the Claimant restated the issues which were enumerated in his pre-trial memorandum for determination by the Court as follows:

1. Does the Attorney General have a right of audience to represent the Defendant in this claim?
2. Is the Defendant a member of the House of Representatives?
3. Is the Defendant, as Executive Secretary of the Board of Education, a Public Officer under the Constitution?
4. Is the Defendant disqualified from serving as Speaker of the House of Representatives?

[11] The second issue was conceded by the Honourable Attorney General, as Counsel for the Defendant, and the averment in the Defendant's affidavit that she was not a member of the House was indicated by the Honourable Attorney General to be a mere typographical error.

[12] On the first issue for determination by the Court, Learned Counsel for the Claimant submitted that the appearance entered on behalf of the Defendant by the Attorney General is not in keeping with the law. That the challenge being made to the qualification of the Defendant is one which suggests that in her personal capacity she does not qualify to be a member of the House. That the Claimant is not therefore before the Court on any issue relative to the Defendant in the discharge of any function she may have discharged as the Speaker of the House, neither is any challenge being made to the Defendant in her capacity as Executive Secretary of the Board of Education. That the challenge is being made to the Defendant as a private citizen.

[13] Counsel submitted that there is no challenge being made by the Claimant to the Attorney General being involved in the case before the Court. That section 44 (1) of the

Constitution states that the High Court shall have jurisdiction to hear and determine any question whether any person who has been elected as Speaker from among persons who were not members of the House was qualified to be so elected and that section 44 (5) states that if any application is made by a person other than the Attorney General to the High Court for the determination of any question under this section, the Attorney General may intervene and may then appear or be represented in the proceedings.

[14] Learned Counsel submitted that the process of intervention permits the Attorney General to participate fully in the case as though he were a party thereto. That the Attorney General is the chief legal adviser to the Government and as such he initiates or defends claims on behalf of the Government.

[15] In addressing this issue in his oral submission at the trial, Learned Counsel for the Claimant cited the case of **Drew v Hall**² and referred to and read paragraph 4 on page 99 of the report of the judgment of the Supreme Court of Bermuda. Counsel also asked the question – “what is the intervention” and cited the case of **Adams v Adams**³, referring to and reading paragraph “g” on page 576 and paragraph “a” on page 577 of the report of the judgment of the High Court of Justice of England and Wales. Counsel also cited the case of **Othniel Sylvester v Satrohan Singh** referred to in the text “On the Benches of the Eastern Caribbean” by retired judge of the Eastern Caribbean Supreme Court, Mr. Albert N. J. Matthew.

[16] Learned Counsel concluded from the cases cited by him that the Attorney General clearly can intervene, but the right of intervention does not permit him to represent a party to the proceedings. He submitted, however, that the Court’s determination of this particular issue will not impact on the outcome of the case as a whole, or - to quote his own words - “whatever the Court may decide on this issue, there will be no violence done to the claim, because this matter in its entirety would be ventilated and justice would be done one way or the other.”

² (1983) 33 WIR 97

³ [1970] 3 All ER 572

- [17] On the third issue for determination – whether the Defendant is a public officer – Learned Counsel referred to and read out the definitions of public officer, public office and the public service in section 127 of the Constitution and then cited the case of **Walter v R**⁴ wherein the question of public office and public officer was examined by the Court of Appeal of the West Indies Associated States. He submitted that in that case section 115 of the 1967 Constitution of Antigua was addressed, which – except for some terminological changes (like Premier to Prime Minister) - is identical to section 127 of the 1981 Constitution. Counsel also cited the case of **Cyril Stewart v R**⁵ wherein the Jamaica Court of Appeal held that where a person has to discharge a duty in which the public is interested, he is performing a public duty and is therefore the holder of a public office and that it is not essential for a public officer to be appointed under some law or regulation or to be paid from public funds.
- [18] Counsel submitted that the Defendant is the Executive Secretary of the Board of Education, which is a statutory corporation established by the Act. That the preamble to the Act says that it is - "An Act to establish a Board of Education for the execution of certain educational policies of the Government provided in the Act; to raise money required for the execution of such policies and to make provisions for other matters connected therewith." That the Executive Secretary is appointed by the Cabinet of Antigua and Barbuda. That the sources of funds of the Board of Education are - (a) a levy raised and collected on incomes, (b) money appropriated by Parliament from time to time for the purposes provided by the Act, (c) donations and endowments given to the Board for the purposes of the Act and (d) such other moneys as the Board may raise from time to time through its activities.
- [19] Counsel submitted that the Board of Education is a vehicle through which the Government carries through certain policies relative to education and as such the Defendant, as Executive Secretary of the Board, is acting in the service of the Crown in a civil capacity in

⁴ (1980) 27 WIR 386

⁵ (1960) 2 WIR 450

respect of the Government of Antigua and Barbuda. That the Defendant is therefore a public officer.

[20] Counsel submitted that section 39 (1) of the Constitution disqualifies from election as a member of the House any person who holds or is acting in any public office. That section 42 (6) of the Constitution provides that a person shall vacate the office of Speaker, in the case of a Speaker elected from among persons who are not members of the House of Representatives, if any circumstances arise that would cause him to be disqualified for election as a member of the House by virtue of any of the provisions of section 39 of the Constitution. That on the day of her election as Speaker of the House of Representatives (on the 27th day of April 2009) the Defendant was not qualified to be elected as Speaker and the Court is asked to so declare.

[21] It is to be noted that Learned Counsel for the Claimant appeared to have dealt with the fourth issue - that is, whether the Defendant is disqualified from serving as Speaker of the House of Representatives – together with or alongside the third issue.

[22] In addressing the third and fourth issues in his oral submission at the trial, Learned Counsel for the Claimant submitted that the case of **Walter v R** dealt with the question as to whether the Premier of Antigua was a public officer and decided this question by reference to section 115 of the 1967 Antigua Constitution. Counsel then referred to and read out the following extract (taken from pages 388 and 389 of the report) of the judgment of the Court of Appeal of the West Indies Associated States:

“In deciding this issue we ...are more inclined to follow the ratio of *R v Whitaker* cited to us by Counsel. In this case the term ‘public officer’ was said to be one who discharges any duty in which the public are interested and more particularly if he receives payments from public money. The Constitution Order 1967, in our view defines the term ‘public officer’ for the purposes of the Constitution and we are fortified in this view by the provision made in section 32 which deals with the disqualifications for election as a member of the House of Representatives, and in

particular subsection 1 (g). Were it not for such a definition in section 115 the Premier among others, would be precluded from seeking re-election to the House of Representatives."

[23] Counsel referred to and read out section 127 (2) (d) of the Constitution and then referred to the definition of "public body" in section 2 of the **Prevention of Corruption Act, 2004**⁶. He then submitted that section 127 (2) (d) of the Constitution could be used to suggest that, because the Defendant is employed by the Board of Education, unless Parliament decrees otherwise, that office is not to be deemed to be an office in the public service, but he contends that there is a distinction being made in the cases of **Walter v R** and **Cyril Stewart v R** between public service and public officer.

[24] Learned Counsel stated that he got the impression that the submission being made on behalf of the Defendant was that unless one comes through the civil service one cannot be a public officer, but he submits that all of the authorities speak otherwise. Counsel then quoted the headnote of the case of **Cyril Stewart v R** which states:

"The appellant was convicted of the offence of bribery. He was an unpaid liaison officer to a District Committee whose duty it was to recommend to the Ministry of Labour agricultural workers for farm work in the United States of America. He received seven pounds for the purpose of showing favour to an applicant. It was submitted that he was wrongly charged with bribery as he was not a public officer. Held that where a person has to discharge a duty in which the public is interested, he is performing a public duty and is therefore the holder of a public office. It is not essential for a 'public officer' to be appointed under some law or regulation or to be paid from public funds."

⁶ No. 21 of 2004

[25] Learned Counsel noted that, just as in **Walter v R** the Court of Appeal of the West Indies Associated States held that they were impressed with **R v Whitaker**⁷, the Jamaica Court of Appeal in **Cyril Stewart v R** also referred to **R v Whitaker**.

[26] Learned Counsel submitted that the ratio of **Cyril Stewart v R** is to be found in the following extract from the judgment of the Jamaica Court of Appeal at page 452 of the report:

"The point we have to consider is whether the appellant when acting in his capacity as liaison officer for the Kellits District Committee was a 'public officer'.

"In the case of **R v Lancaster** ... Wills, J. is quoted as saying with regard to the crime of bribery that 'the nature of the office is immaterial as long as it is for the public good'.

"In the case of **R v Whitaker** it was held that it is a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept a bribe as an inducement to him to show favour or forbear to show disfavour to any person towards whom an impartial discharge of the officer's duty demands that he should show no favour or that he should show disfavour.

"In the judgment of the court delivered by Lawrence, J. in that case the following passages occur ([1914] 3 K.B. at p. 1296): 'Then it was argued that the appellant was not a public and ministerial officer. A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer.'

[27] Counsel also quoted the following extract from page 453 of the report:

⁷ [1914] 3 K.B. 1283

"It is true that in the judgment of the Court in *R v Whitaker* it is said that 'A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.' The judgment, however, does not purport to limit a 'public officer' to one paid from public funds and we can find no authority which does so."

- [28] Learned Counsel submitted that this leads to an examination of the position held by the Defendant as Executive Secretary of the Board of Education. Counsel referred to the long title of the Act, to sections 9, 11, 13, 22 and 23 of the Act and to section 90 of the Constitution. Counsel then submitted that it is clear that the bulk of the revenue of the Board of Education derives from parliamentary levies which, but for the Act, would have gone into the Consolidated Fund and be part of Government revenue; that the Board operates under the policies of the Cabinet through the responsible Minister; and that throughout the Act there is the imprint of the Cabinet or the Government.
- [29] Learned Counsel for the Claimant submitted that it has been asserted in the submission by the Attorney General that the Defendant had been the Speaker of the House prior to March 2009. Learned Counsel contends though that the fact that a challenge was not made prior to 2009 in no way absolves the Defendant from the provisions of the Constitution because the past cannot really be used to justify the future.
- [30] Learned Counsel submitted too that whilst it appears that section 127 of the Constitution makes an exception for the Prime Minister being considered a public officer, in the case of **Walter v R** the court did find that the Premier was a public officer notwithstanding an equivalent provision in the 1967 Constitution of Antigua and any similar argument which may be made as far as the Defendant as Executive Secretary of the Board of Education is concerned must produce the same result that the Executive Secretary is a public officer. In other words, Counsel submits, a member of a Board carrying out functions such as those of the Board of Education is in fact a public officer.

- [31] On the issue of costs, Learned Counsel for the Claimant submitted that this is not a trivial matter and, should the Court find for the Claimant, the Claimant is not asking for any costs to be paid by the Defendant, but any costs awarded should be paid by the State, because the Defendant must have relied on higher authority and should not therefore be burdened with costs. Learned Counsel concluded his oral submission with the statement that cost is not being sought against the Defendant and expressed the hope that, if the Defendant prevailed, no costs will be awarded against the Claimant.
- [32] In response to the submissions of Counsel for the Claimant, the Honourable Attorney General, who appeared for the Defendant in this matter, first addressed the issue of costs, and stated that this case is a matter of extreme public importance, it is not a frivolous matter and it is a matter worthy of judicial determination, and if the Defendant succeeds she will not be asking for costs.
- [33] The Honourable Attorney General next addressed the issue of the statement by the Defendant (in her affidavit) that she has been the Speaker of the House of Representatives since 2004, which he submitted was not intended to indicate that by virtue of the fact that there has been no objection until now that that makes her appointment and service as Speaker ipso facto in order. He submitted that what is wrong continues to be wrong and that the statement was simply made as a matter of fact.
- [34] The Honourable Attorney General next addressed the submission of Learned Counsel for the Claimant that the Attorney General cannot represent the Defendant in these proceedings based on Learned Counsel's interpretation of section 44 of the Constitution. The Honourable Attorney General submitted that section 44 (3) of the Constitution empowers the Attorney General to make application to the Court for the determination of a question under section 44 and that section 44 (5) permits the Attorney General to intervene if application is made by someone other than the Attorney General. The Honourable Attorney General submitted further that section 44 (5) creates the possibility of and gives the right to the Attorney General to intervene and that the various cases cited by Counsel for the Claimant do make the point that even in matters of private litigation, where

the sovereignty of the State is involved, the Attorney General has a general right to intervene.

[35] The Honourable Attorney General submitted that the issue which arises is whether the Attorney General is precluded from appearing on behalf of the Defendant, the answer to which he submits is that he is not. He submitted that section 44 does not preclude the Attorney General from appearing on behalf of the Speaker or indeed any Member of Parliament whose election is being questioned and that nowhere in the section does it state that the Attorney General can not or must not do so. That in giving the Attorney General a permissive power to intervene, section 44 (5) does not preclude or prevent the Attorney General from appearing on behalf of the Defendant. That the right to intervene is an option provided by the section to the Attorney General.

[36] The Honourable Attorney General submitted that in so far as the Defendant is in fact the Speaker of the House of Representatives, the Attorney General, in recognition of the public office of the Defendant as Speaker, can and does have the right to appear for the Defendant. That the Speaker is elected by Parliament, which is an institution of the State, and a vacancy in the office of Speaker would clearly affect the functioning of the institution and, in so far as the Defendant is clothed with the office and authority of the Speaker, the Defendant is part and parcel of one of these institutions of Government and to that extent the public office of the Attorney General can represent the Defendant.

[37] The Honourable Attorney General submitted that if this does not find favour with the Court then, as is conceded by Counsel for the Claimant, the Attorney General can intervene and the Court can consider the Attorney General's representation as an intervention in this matter. That this appears to be accepted by Counsel for the Claimant, so the issue is not whether the Attorney General can appear, but whether he can appear for the Defendant as distinct from intervening.

[38] The Honourable Attorney General then addressed the substantive issue of whether the Defendant, who holds the position of Executive Secretary of the Board of Education, is

qualified to hold the office of Speaker of the House of Representatives, to which she was elected on 27th April 2009. He submitted that this is a matter which arises out of the Constitution and a matter therefore that ought to be determined within the construct of the Constitution. That it is accepted that the Speaker of the House can be disqualified for election on the same grounds as can an elected member of the House. That this is the conjoint effect of sections 39 (1) (g) and 42 (6) (a) (iii) of the Constitution. That it is accepted that the Defendant was elected Speaker of the House from among persons who are not members of the House and that she is subject to disqualification, and that the issue is whether as Executive Secretary of the Board of Education she holds a public office.

[39] The Attorney General submitted that the Constitution, having mentioned the term “public office,” does not leave it to us to roam far and wide to determine what is a public office. That it defines the term for the purposes of the Constitution. That section 127 (1) of the Constitution reads: “In this Constitution, unless the context otherwise requires – ‘public office’ means any office of emolument in the public service and includes an office of emolument in the Police Force.” That the Constitution defines the term public service for the purposes of the Constitution; that it qualifies public service with a definitive article – “the public service,” meaning the public service to which the Constitution refers. That when the Constitution refers to “the public service” it means the public service as defined by it and not public service generally.

[40] The Honourable Attorney General next addressed the case of **Walter v R** referred to by Counsel for the Claimant. He submitted that in that case the Premier of Antigua had been charged on two counts of misbehaviour in public office and, on appeal from his conviction, it was argued on his behalf that he was not a person holding public office because the term public office in the criminal charge under the common law should be restricted to the definition of public office under the Constitution of Antigua at the time. That his lawyers argued that the 1967 Constitution of Antigua, in defining public office in section 115, excluded the Premier under subsection (2) and so, in the light of the fact that the Premier was excluded from the definition of public office in the interpretation section of the 1967 Constitution, that this should be applied in the interpretation of the term “public office” for

the purposes of the criminal law. The Attorney General submitted that the Court of Appeal of the West Indies Associated States did not uphold that argument and held that the Premier was a person in public office. That the reasoning of the Court of Appeal (at page 389 of the report) was that the 1967 Constitution defined the term “public officer” for the purposes of the Constitution, meaning, do not use the definition of the term “public officer” as defined in the Constitution and apply it to a criminal charge in your interpretation of the term “public officer” in your criminal charge; that these terms have two separate definitions or interpretations – the constitutional definition is one thing but the wider definition is another. That the Court of Appeal also stated (at page 389) that they were fortified in their view by the provision made in section 32 of the 1967 Constitution, which deals with the disqualifications for election as a member of the House of Representatives, and in particular subsection (1) (g), which subsection excludes the Premier. The Court of Appeal continued by stating (at page 389) that, were it not for the definition in section 115 of the 1967 Constitution, the Premier, among others, would be excluded from seeking re-election to the House of Representatives. So that in effect, the Attorney General submitted, the Court of Appeal gave a wider meaning to public office than the restrictive interpretation given by the Constitution.

[41] The Honourable Attorney General submitted that the cases of **Walter v R, Cyril Stewart v R and R v Whitaker** should not be used by the Court as guidance in respect of the interpretation of the term “public officer” as used in the Constitution for the purposes of the Constitution. That all three cases were criminal cases relating to charges under the common law and of necessity the interpretation of the term “public office” or “public service” is wider than the definition of the term in the Constitution and it is for that purpose that the Constitution places a more restrictive meaning.

[42] The Attorney General submitted that the authorities make it very clear that in interpreting the Constitution one has to give a purposive meaning to the Constitution – that you look at the words used, the context in which they are used, the mischief which is being avoided, and you interpret the Constitution accordingly.

[43] The Attorney General referred the Court to the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court in **Charles Savarin v John Williams**⁸. He pointed out that in that case the Appellant was elected at a general election in Dominica to represent a constituency; that he was at the time the General Manager of the National Development Corporation, which was a statutory corporation; that it was argued by the Respondent that as General Manager of that statutory corporation the Appellant held an office in the public service of Dominica and was therefore disqualified to be elected as a member of the House of Assembly; that the argument found favour with the trial judge but, on appeal, the decision was reversed, with the Court of Appeal holding that the Appellant did not hold or act in an office in the public service by reason of his being General Manager of the National Development Corporation. The reasoning of the Court of Appeal - as extracted from pages 8 and 9 of the judgment of the Court of Appeal delivered by Sir Vincent Floissac - is as follows:

"In its wisdom, Parliament elected to confine disqualification by reason of the holding of an office or appointment to offices or appointments in 'the Public service'. Accordingly, the crucial question in this appeal is the meaning of the phrase 'the Public Service'.

"Unlike the phrase 'public service' (which is a reference to a function), the phrase 'the public service' (with the definite article) is clearly a reference to an institution established legally or conventionally. In section 5 (1) (a) of the Disqualification Act, the phrase 'the Public Service' is capitalized. Having regard to the Constitutional background against which the Disqualification Act was enacted, the capitalisation is neither accidental nor meaningless. It signifies a legislative intention to use the phrase in the technical sense in which it was used in the 1967 Constitution which authorised the Disqualification Act.

"According to section 110 (1) of the 1967 Constitution and section 121 (1) of the existing 1978 Constitution of Dominica, the phrase 'the public service' means

⁸ Dominica Civil Appeal No.3 of 1995

'subject to the provisions of this section, the service (of the Crown) in a civil capacity in respect of the government of Dominica.' These Constitutional sections also define the phrases 'public office' and 'public officer'. According to those Constitutional definitions, 'public office' means 'any office of emolument in the public service' and 'public officer' means 'a person holding or acting in any public office.'

"By Constitutional definitions, the phrases 'public Office' 'public officers' and 'the public service' are correlative terms. The scope of the Constitutional meanings of those phrases is necessarily circumscribed by the Constitutional context of those phrases. An important ingredient of that context is Chapter VI (sections 76 to 87 inclusive) of the 1967 Constitution which deals specifically with the Public Service and which has been reproduced in Chapter VI (sections 84 to 96 inclusive) of the 1978 Constitution.

"I refrain from reciting the elaborate provisions of Chapter VI of the 1967 and 1978 Constitutions. Suffice it to say that Chapter VI provides for the appointment of persons to hold or act in offices in the Public Service and for the removal of such officers from their public offices. It provides for such appointment and removal by or in accordance with the advice of the appropriate Constitutional Commission (namely the Public Service Commission or the Judicial and Legal Services Commission as the case may be). It confers on such public officers a right of appeal to the Public Service Board of Appeal.

"The Constitutional definition of the phrase 'the public service' was clearly intended to be read and interpreted in the light and context of Chapter VI. So read and interpreted, the phrase must be confined to the institutional service governed and protected by Chapter VI."

- [44] The Honourable Attorney General pointed out that Chapter VI of the Dominica Constitution equates to Chapter VII of the Antigua and Barbuda Constitution headed "the Public

Service” and speaks to persons who would be appointed, disciplined or terminated by the Public Service Commission. He submitted that the term “the public service” referred to in the Constitution refers in particular to those persons who hold office by virtue of their appointment by the Public Service Commission and nothing else. That it is instructive that under Chapter VII of the Constitution reference is also made to persons who are appointed as police officers by the Police Service Commission. That the Board of Education Act is a stand alone piece of legislation which creates a statutory authority and while it is conceded that the Board was established for the execution of certain educational policies of the Government – as stated in the long title of the Act – neither the members of the Board nor the officers and staff of the Board are public officers for the purposes of the Constitution. That in the wider generic meaning of the terms public office or public officer these persons may well be included, so that if for example a charge is brought against the Executive Secretary for misbehaviour in public office she may not be able to argue that she is not in public office for the purposes of the wide generic definition of the term, but for the purposes of the restricted interpretation in the Constitution she is not a public officer. That in fact the issue begs the question, why would the Constitution have defined for its purposes the terms public office, public officer and the public service; why would there have been a need for the Constitution to define these terms. That the answer to this question is that the Constitution was seeking to give a restrictive definition to the terms for the purpose of the Constitution only.

- [45] The Honourable Attorney General contended that the case of **Savarin v Williams** supports his submission and that no attempt was made by Counsel for the Claimant to distinguish that case. That one is not dealing with the generic definition of the term or with any criminal charge, so the various English authorities do not assist. That one is addressing the interpretation of the Constitution and our own Court of Appeal has authoritatively pronounced on the interpretation of the terms. That the constitutional definition was being sought to be relied on by the Appellant in **Walter v R**, but the Court of Appeal threw that out, making it very clear that the constitutional definition is for use in interpreting the Constitution and not outside of it.

- [46] The Honourable Attorney General concluded his submission by stating that the Executive Secretary of the Board of Education does not fall within the constitutional definition of public officer since she is not part of the public service of Antigua and Barbuda.
- [47] In reply to the Attorney General, Learned Counsel for the Claimant referred to the definition of the public service in section 127 of the Constitution and submitted that the argument that unless one comes through the civil service one can not come within the definition of public service is rejected. He submitted too that there are three organs of the Constitution – the legislative, the executive and the judicial - which act as checks and balances of each other. That the legislature considers the actions of the executive and so how could a member of the legislature be expected to pass judgment on the actions of the executive if he is an employee of or paid by the same executive; that there is a conflict.
- [48] Learned Counsel for the Claimant submitted that the Attorney General has been making a distinction between the constitutional interpretation and the criminal interpretation of public officer, but that the Premier or Prime Minister is either a public officer or he is not.
- [49] Learned Counsel submitted that the Attorney General represents the Crown or officers of the Crown and that there has to be some connection with the Government for the Attorney General to represent. He contends that the Claimant is not challenging the Defendant as Speaker but is saying that before she became Speaker there was a factor disqualifying her. That the Attorney General having said that section 44 does not preclude him from representing the Defendant, has not said what entitles him to intervene.
- [50] Learned Counsel submitted that Parliament - through the introduction of **the Prevention of Corruption Act, 2004** – has in fact deemed that a public body would include “a corporation established by an Act of Parliament for public purposes or any subsidiary company thereof registered under the Companies Act, 1995” or “a board, commission, authority, committee or other body, whether paid or unpaid, and whether or not established by or under any law to perform public functions on behalf of the Government.” That the Court is asked to note the definitions of public office and public official in **the Prevention**

of Corruption Act, 2004 and that they are consistent with the provisions of the Constitution. That the terms public service and public officer are not the same thing and one can be a public officer without being part of the public service. That there are, for instance, non-established public workers who have not gone through the civil service.

- [51] The Honourable Attorney General responded by stating that **the Prevention of Corruption Act, 2004** defines “public body” but what the Constitution speaks of is an office in the public service, so legislation that refers to public body, etc. has no relevance to the Constitution. That the point too about **the Prevention of Corruption Act** is its use of the words “this Act” – one cannot go outside of “this Act.” That any other legislation, therefore, unless it refers to an office in the public service, its definitions are meaningless in the interpretation of the Constitution.
- [52] Against the background of this factual evidence and these legal submissions, the Court reserved its decision, which it not delivers.
- [53] Dealing first with the preliminary issue raised by Learned Counsel for the Claimant, the Court holds that the Attorney General is entitled to represent the Defendant in these proceedings.
- [54] If one takes the question as posed in the Claimant’s pre-trial memorandum and reproduced in the Claimant’s written submission, as to whether the Attorney General has a right of audience to represent the Defendant in this claim, the answer can only be in the affirmative, on the basis that for a person to be appointed Attorney General, in accordance with section 82 (2) of the Constitution, that person must be a citizen of Antigua and Barbuda entitled to practice as an attorney-at-law here and it is this which gives him a right of audience to represent anyone in Court. In other words, the Attorney General has a right of audience to represent the Defendant by virtue of him being a citizen of Antigua and Barbuda entitled to practice as an attorney-at-law, which he had to have been for him to be appointed as Attorney General.

- [55] Then there is the Claimant's argument (forming part of his written submission) that the appearance entered on behalf of the Defendant by the Attorney General is not in keeping with the law. The Claimant never indicated, however, which law – whether derived from statute, the common law or otherwise – that the Attorney General's appearance was not in keeping with. The provision in section 44 (5) of the Constitution authorising or empowering the Attorney General to intervene in an application made under section 44 of the Constitution is – as intimated by the Honourable Attorney General in his oral submission to the Court - one which empowers the Attorney General to intervene in an application if he wishes to, but not one which constrains him from representing a party to the proceedings if he so wishes.
- [56] If the Attorney General considers that the interest of the Government of Antigua and Barbuda, which he is authorized, indeed required, by the Constitution to represent, is affected by a matter before the Court, he can - in the discharge of his duty as Counsel to the Government - take over the defence of the matter. Support for this proposition can be found in the case of **Drew v Hall** - cited by Learned Counsel for the Claimant - where (at page 99 of the report) the Learned Chief Justice of Bermuda said:

“the Attorney General's position is constitutional and is defined in section 71 of the Constitution as the Principal Legal Adviser to the Government of Bermuda. This, in my opinion, gives the Attorney General all the powers of counsel in any matter in which the Government of this country, in its widest sense, is in any way concerned. Thus when representation petitions are brought before the court joining an officer of Government, such as the Parliamentary Registrar, or when certain statutory officers of the Government, such as an election officer, are attacked for performing statutory duties, the Attorney General can take over their defence as part of his duty as counsel to the Government. Moreover, in my opinion, since he is given power to intervene when a person elected to the House of Assembly is challenged as not having been validly elected, he may intervene to show that the proper procedure for challenging an election has not been followed, or he may intervene to represent the Parliamentary Registrar and the election

officers, if he is satisfied that they have not committed any impropriety. In my opinion, the Attorney General's powers under the Constitution are wide and, in the exercise of his powers, he is not under the supervision of this court. It is my view that the Attorney General has quite properly taken over the representation of the persons he appears for in these proceedings."

[57] It should be noted that section 82 of the Antigua and Barbuda Constitution is analogous to section 71 of the Bermuda Constitution.

[58] This Court accordingly holds that the Attorney General is fully competent and entitled to represent officers of the Crown in proceedings instituted by or against them in the High Court and that in representing the Speaker of the House of Representatives in proceedings instituted against her challenging her qualification to hold the public office that she holds, the Attorney General is certainly acting in accordance with the law or, stated differently, his actions are in keeping with the law.

[59] In terms of the second question posed, both in the Claimant's pre-trial memorandum and in his written submission, as to whether the Defendant is a member of the House of Representatives, the issue was conceded by the Honourable Attorney General and need not be further addressed – the Defendant is a member of the House of Representatives by virtue of being elected as Speaker of the House.

[60] The third question posed is whether the Defendant, as Executive Secretary of the Board of Education, is a public officer under the Constitution. Section 127 of the Constitution defines "public officer" as "a person holding or acting in any public office and includes an officer or member of the Police Force;" it defines "public office" as "any office of emolument in the public service and includes an office of emolument in the Police Force;" and it defines "the public service" as "subject to the provisions of this section, the service of the Crown in a civil capacity in respect of the government of Antigua and Barbuda."

- [61] Cases were cited by Counsel on behalf of both the Claimant and the Defendant to assist the Court in interpreting these provisions of the Constitution and applying them to the facts of the present case.
- [62] Learned Counsel for the Claimant referred the Court to the cases of **Walter v R** (decided by the Court of Appeal of the West Indies Associated States on appeal from the High Court in Antigua), **Cyril Stewart v R** (decided by the Jamaica Court of Appeal) and **R v Whitaker** (decided by the Court of Criminal Appeal of England and Wales). All three cases were criminal cases which dealt with common law offences relating to misbehaviour or misconduct in public office and defined public office sufficiently broadly to have captured the office of Executive Secretary of the Board of Education as a public office and its holder as a public officer for the purpose of a charge of misbehaviour or misconduct in public office.
- [63] The Honourable Attorney General, as Counsel for the Defendant, referred the Court to the case of **Charles Savarin v John Williams** (decided by the Court of Appeal of the Eastern Caribbean Supreme Court on appeal from the High Court in Dominica) and also to the cases of **Walter v R**, **Cyril Stewart v R** and **R v Whitaker** cited by Learned Counsel for the Claimant. Unlike the three latter cases, the case of **Charles Savaran v John Williams** was a civil case in which the Court of Appeal of the Eastern Caribbean Supreme Court had to determine whether the Appellant was holding or acting in an office in the public service of Dominica so as to disqualify him from being eligible for election as a member of the Dominica House of Assembly. The Court of Appeal ruled, in a judgment delivered by Sir Vincent Foissac, with characteristic erudition and distinction, that:

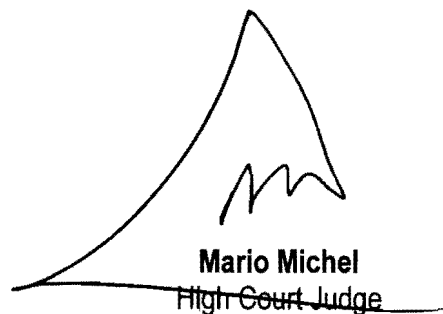
“The constitutional definition of the phrase ‘the public service’ was clearly intended to be read and interpreted in the light and context of Chapter VI. So read and interpreted, the phrase must be confined to the institutional service governed and protected by Chapter VI.”

- [64] Chapter VI of the Dominica Constitution is the equivalent of Chapter VII of the Constitution of Antigua and Barbuda, which deals with “the public service.”
- [65] Sir Vincent concluded in his judgment - with which the other members of the Court of Appeal concurred - that the Appellant did not hold or act in an office in the Public Service of Dominica by reason of the fact that he held the office of General Manager of the National Development Corporation and so he was not disqualified to be elected as a member of the House of Assembly.
- [66] This Court unreservedly accepts both the authority and applicability of the judgment of the Court of Appeal in Savaran in and to the present case, in terms of its interpretation and application of the relevant legislative and constitutional provisions to arrive at the conclusion that an employee of a statutory corporation under government control is not a public officer so as to disqualify him from election or selection as a member of Parliament.
- [67] The submission made to this Court by the Honourable Attorney General to the effect that the definitions of public office, public officer and the public service in the Constitution were intended precisely to restrict the meaning of these terms for the purposes of the Constitution to the definitions contained in the Constitution and that the wider meanings ascribed to these terms outside of the Constitution - whether at common law or in legislation like **the Prevention of Corruption Act, 2004** – have no bearing on their constitutional meanings, is wholly accepted by this Court.
- [68] The Court accordingly finds that, on the facts of the present case, the Defendant, being an employee of a statutory corporation under government control, but not holding or acting in any office of emolument in the public service as defined in the Constitution, is not a public officer. That this is further reinforced by the provision of section 127 (2) (d) of the Constitution, which expressly excludes persons holding office on a board established by statute from being categorised as public officers in construing the Constitution.

[69] This leads on to the fourth question posed in the Claimant's pre-trial memorandum and written submission, as to whether the Defendant is disqualified from serving as Speaker of the House of Representatives.

[70] Sections 39, 42 and 44 of the Constitution deal with the disqualifications of persons to be elected as members of the House of Representatives, the application of these disqualifications to the office of Speaker of the House, and the hearing and determination by the High Court of any challenge to the election of a member or the Speaker. The particular disqualification of the Defendant alleged by the Claimant in this case is a disqualification arising under section 39 (1) (g) of the Constitution on the basis that the Defendant holds or is acting in a public office. The Court, however, having found that the Defendant is not a public officer, which - according to section 127 (1) of the Constitution - means that she is not a person holding or acting in any public office, and no other ground of disqualification of the Defendant to be elected or to serve as Speaker of the House of Representatives having been alleged or established, the Court rules that the Defendant, Mrs. D. Giselle Isaac-Arrindell, is not disqualified from serving as Speaker of the House of Representatives of Antigua and Barbuda.

[71] In accordance with the sentiments expressed by Counsel for both parties that no order for costs should be made against the Claimant in the event of the Defendant prevailing, and in accordance with the Court's own view on the issue, no order will be made as to costs.



Mario Michel
High Court Judge