



[2016] JMFC Full 1

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013HCV05313**

**Before: The Hon. Ms. Justice J. Straw
 The Hon. Mrs. Justice S. Thompson-James
 The Hon. Mr. Justice D. Fraser**

BETWEEN	BARRINGTON CIGARS (JAMAICA) LIMITED	CLAIMANT
AND	THE MINISTER OF FINANCE AND PLANNING	1ST DEFENDANT
AND	THE COMMISSIONER OF CUSTOMS	2ND DEFENDANT

Mrs. Georgia Gibson-Henlin and Mrs. Taniesha Rowe Coke instructed by Henlin Gibson Henlin, Attorneys-at-Law for the Claimant

Ms. Carlene Larmond, Director of Litigation instructed by the Director of State Proceedings for the Defendants

Application-Constitutional Redress-General Consumption Tax Act - Provisional Collection of Tax Act - General Consumption Tax (Validation and indemnity) Act - Special Consumption Tax-Whether Provisional Orders imposing Special Consumption Tax on unmanufactured tobacco pursuant to Provisional Collection of Tax Act invalid - Whether Minister acted *Ultra Vires* and improperly in amending General Consumption Tax Act Schedules-Whether imposition of tax breaches Claimant's Constitutional rights under Section 15 of Constitution

Heard: 22nd, 23rd September 2014 and 8th January 2016

Straw J

INTRODUCTION

[1] The claimant, Barrington Cigars (Jamaica) Limited is the sole cigar manufacturing company that produces premium Jamaican cigars for export. The Chief Executive Officer is Mr. Barrington Adams. He states that the claimant

purchases 90% of its tobacco from local farmers and imports the remaining amounts of unmanufactured tobacco. It is an increased assessment of tax on the unmanufactured tobacco that has brought the claimant to court.

[2] It is alleging that the 1st and 2nd defendants, The Minister of Finance and Planning and The Commissioner of Customs, respectively, have breached its constitutional rights and is asking this court to grant the following orders as contained in its Further Amended Fixed Date Claim Form filed on 6th May 2014:

1. A declaration that the Act to validate and confirm the imposition, variation and renewal of tax under the General Consumption Tax Act – Act 14 of 2013 is unlawful and/or invalid for the purpose of the imposition of the taxes and rates in the schedule of the *General Consumption Tax Act*.
2. A declaration that the Provisional Collection of Tax (*General Consumption Tax (No. 2) Order*, 2012 purportedly published in the Gazette on the 15th day of June 2012 has ceased to have effect and no tax or rate imposed by or extended from it is recoverable.
3. A declaration that the Provisional Collection Tax (*General Consumption Tax) (No. 3) Order*, 2012 purportedly published in the Gazette on the 13th day of December 2012 has ceased to have effect and no tax imposed by or extended from it is recoverable.
4. A declaration that the inclusion of the Special Consumption Tax rates made pursuant to the *Provisional Tax Orders No. 2 and No. 3* in the schedule to the General Consumption Tax schedules pursuant to section 60(1) of the General Consumption Tax Act breaches the Claimant's Constitutional Rights in so far as the "rates" are not tax and an improper exercise of lawmaking or taxing powers of the Minister and/or Parliament.
5. A declaration that the inclusion of the Special Consumption Tax rates made pursuant to the *Provisional Tax Orders No. 2 and No. 3* in the schedule to the General Consumption Tax schedules pursuant to section 60(1) of the General Consumption Tax Act is *ultra vires* the Minister's

powers and accordingly cannot be ratified and / or affirmed by Parliament and as such is invalid.

6. A declaration that the inclusion of the Special Consumption Tax rates made pursuant to the Provisional Tax Orders No. 2 and No. 3 in the schedule to the General Consumption Tax breaches the Claimant's Constitutional rights in so far as the "rates" amount to a compulsory acquisition of property in breach of s. 15 of the Constitution.
7. An order that the said rates be declared null and void and as being (sic) improperly imposed.
8. Damages for any loss or damage suffered by the Claimant as a consequence of the imposition of the tax.

BACKGROUND

[3] On the 15th day of June, 2012 and the 13th day of December 2012, the Minister of Finance imposed special consumption tax rates pursuant to the Provisional Collection of Tax (General Consumption Tax) Orders (No. 2) and (No.3) respectively that affected unmanufactured tobacco, to be implemented by the Commissioner of Customs. These two orders imposed a new tax rate of \$10.50 per 0.7 grams per stick on the said product.

[4] In March 2013, the claimant was advised by the Commissioner Of Customs, that pursuant to section 223 of the Customs Act, there had been a review for the period 1st January 2012 to 31st December 2012 and the claimant was liable for an additional \$5,439,239.00 of special consumption tax.

[5] In April 2013, the claimant filed a notice of application for judicial review seeking declarations and orders in relation to the above tax rate. On the 3rd June 2013, the Minister amended the General Consumption Tax Act by the General Consumption Tax (Amendment of Schedules) Order to include the rate of tax of unmanufactured tobacco imposed by the Provisional Orders. On the 5th June

2013, this order was affirmed by the House of Representatives by virtue of The General Consumption Tax (Amendment of Schedules) Order, 2013. On that date the House also passed the General Consumption Tax (Validation and Indemnity) Bill 2013 and on the 7th June, it was passed by the Senate. On the 12th June 2013 the Governor General gave the Royal Assent to The General Consumption Tax (Validation and Indemnity) Act, No. 14 of 2013. (The Validation Act)

[6] On 24th September 2013, the claimant commenced these present proceedings. In October 2013, the application for leave to proceed to judicial review was heard by Batts J who refused leave on 21st February 2014. The claimant subsequently filed notice to appeal this decision. On the 10th March 2014, The Minister issued a Tax Relief Advisory to the claimant waiving the reassessed sum of \$5,439,239.76. It is to be noted also that on the 31st March 2014, following inter - Ministry consultations (Ministry of Finance and Ministry of Industry and Commerce - through whom the claimant made certain representations) the tax measure was adjusted and the 1st Defendant published a Provisional Order amending Schedule 2 of the General Consumption Tax Act to adjust the tax measure from \$10.50 per 0.7 grams to \$1.05 per 0.7 grams. This adjusted tax rate contained in the above Provisional Order was tabled before Parliament on the 9th September 2014 to be affirmed.

[7] At the commencement of the present hearing, Ms Larmond who appeared as counsel for the Defendants, took a preliminary point that the proceedings before the Full Court should be stayed pending the outcome of the appeal as both the Appellate and Full Courts were being asked to determine the same questions. Mrs. Georgia Gibson Henlin, counsel for the claimant gave an undertaking to withdraw the notice of appeal and the hearing proceeded.

Summary of the Submissions of the Claimant

[8] The claimant contends that the said tax rates were not authorized or imposed by the proper procedure and/or authority and as such, their inclusion in the Schedule to the General Consumption Tax Act pursuant to s. 60 (1) of that Act and the enactment of the Validation Act is improper, illegal, *ultra vires* and/or unconstitutional. In particular, Mrs. Gibson Henlin submitted that the procedure for the implementation of both Provisional Orders was not carried out as required by The Provisional Collection of Tax Act.

[9] The claimant is contending further that its constitutional rights have been, are being and are likely to be infringed and in particular that section 15 of the Charter of Fundamental Rights of Freedom has been breached. The Charter is contained within Chapter III of the Jamaican Constitution and section 15 grants protection to the property rights of persons (natural or juristic). Section 15 is set out below:

Section 15.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –

- (a) prescribes the principles on which and the manner in which compensation thereof is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of-
 - (i) establishing such interest or right (if any);
 - (ii) determining the compensation (if any) to which he is entitled; and
 - (iii) enforcing his right to any such compensation.

[10] Section 15 (1) is qualified by section 15 (2) which provides that:

- (2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property –

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

Summary of the Submissions of the Defendants

- [11] The Defendants have admitted that certain procedural requirements as set out in The Provisional Collection Of Tax Act in relation to Provisional Order No. 2 were not followed. However, they contend that Provisional Order No. 3 continued the tax measure initially imposed by Order No. 2 and was properly confirmed by Parliament on the 5th of June, 2013.
- [12] They also contend that the Validation Act has dealt with this issue and cured any defects in relation to Order No. 2 and as such, the tax rate is properly imposed. Counsel for the respondent has submitted that the claimant's constitutional rights have not been breached and in any event, the claimant has put forward no evidence to sustain any submission that the tax, in particular the adjusted rate, is oppressive.

ISSUES

- [13] The four issues identified for the determination of the court are therefore:
1. The Legal Status and Effect of Provisional Orders Nos. 2 and 3
 2. The Legality of the Validation Act 14 of 2013
 3. Were the Claimant's rights breached under section 15 of the Constitution?
 4. Was there Executive interference with the Judiciary?

Issue 1 — The Legal Status and Effect of Provisional Orders Nos. 2 and 3

[14] The root of Mrs. Gibson Henlin's contention is centered around the invalidity of these two above-mentioned orders which originally imposed a special consumption tax rate on unmanufactured tobacco at \$10.50 per 0.7 grams/1 stick. This was subsequently adjusted as indicated previously. The Orders were made by the Minister by virtue of section 3 of The Provisional Collection of Tax Act. For the purposes of this judgment sections 3 (1), (3) and (4) are relevant and are set out below:

3.-(1) The Minister may make an order providing-

- (a) for the variation of any tax for the time being in force; or
- (b) for the renewal for a further period of any tax in force during the previous financial year or which was imposed for any limited period; or
- (c) for the imposition of any tax,

and notwithstanding anything to the contrary the provisions of such an order shall, for the period limited by this section and subject to the provisions of this Act, have effect as if contained in an Act of Parliament.

(2) Where an order under subsection (1) provides for the renewal of a tax, all enactments which were in force with reference to that tax as last imposed by an Act of Parliament shall, during the period for which the order remains in force and subject to the provisions of this Act, have full force and effect with respect to the tax as renewed by the order.

(3) An order under this section shall, subject to subsection (4), continue for a period of six months next following publication thereof in the Gazette:

Provided that the House of Representatives may by Resolution authorize the continuance in force of the order for an additional period of three months.

- (4) An order under this section shall cease to have effect-
 - (a) if it is not confirmed, with or without modification, by Resolution of the House of Representatives within the

next thirty days on which the House sits after the date of publication of the order in the Gazette; or

- (b) if Parliament is dissolved; or
- (c) if an enactment comes into operation varying, renewing or imposing the tax.

[15] Under the above Act, the Minister may vary an existing tax rate or renew a previously imposed tax. Any such order, however, would only remain in force for six months following publication in the Gazette. In addition, the House of Representatives could pass a resolution authorizing the continuance in force of the order for an additional three months.

[16] However, the order of the Minister would cease to have effect if it is not confirmed by the House of Representatives within the next 30 days on which the House sits after the date of publication in the Gazette. In essence, the Act places a limitation period on the legal validity of the order failing confirmation as described above.

[17] It is agreed by all the parties that Order No. 2, with the effective date of 15th June 2012, was never confirmed by the House as required by section 3 (4) (a). It would have ceased to have any effect after the ending of the limitation period. There is no evidence as to when this would have been. Order No. 3 was subsequently published in the Gazette on the 13th December 2012 and imposed the same tariff as Order No. 2 as of 15th June 2012. It is apparent therefore, as submitted by Ms Larmond, that Order No. 3 was implemented to extend or renew Order No. 2 which had not been confirmed.

[18] Mrs. Gibson Henlin submitted that both Provisional Orders are invalid as the resolution of the House as required was not obtained within the period designated. Ms Larmond contends however, that Order No. 3 was properly affirmed by Parliament. She referred the court to the documents exhibited which reflect that on the 3rd June 2013, the Minister amended the General Consumption Tax Act by virtue of The General Consumption Tax (Amendment

of Schedules) Order 2013 which included the rate of tax of unmanufactured tobacco imposed by the Provisional Orders. That document speaks to the effective date of the tax as 15th June, 2012.

[19] She also referred the court to the document containing the Order of Business of The Honourable Jamaica House Of Representatives dated 5th June 2013. This document contains the Resolution of the House affirming the amendment made by the Minister as described above.

[20] Ms Larmond submitted that when Order No. 3 is viewed in the context of section 3 (3) of the Provisional Collection of Tax Act and the General Consumption Tax Order affirmed by the House on 5th June 2013, there is support for the conclusion that Order No. 3 did not cease to have effect as it would have been affirmed by Parliament within the prescribed period. In her submissions, counsel stated that section 3(1) (b) of the Provisional Collection of Tax Act does permit the Minister to do a subsequent renewal.

[21] Counsel also exhibited Standing Orders of the House of Representatives which contains the description of the Sittings of The House as being on Tuesdays, Wednesdays and Thursdays. She stated that when one quantifies the 30 days as described in section 3 (4) of above Act, the time for confirmation of that Provisional Order would have extended to the month of July. She submitted that 30 actual sittings of Parliament would have commenced on 15th January, 2013 and ended on 18th June, 2013.

Further Submissions on Order No. 3 by Counsel for the Claimant

[22] Mrs. Gibson Henlin has not sought to challenge Ms Larmond's computation that speaks to the end of the limitation period for Order No. 3. However, she submitted further, that if Order No. 3 sought to extend Order No. 2 then it would still be invalid as the root of its validity sprang from a source which no longer had any legal existence.

- [23] She has submitted that tax rates can only be amended by virtue of Section 10(1) of the General Consumption Tax Act or pursuant to the Provisional Collection of Tax Act which has a limitation period unless confirmed. Counsel referred the court to section 60 (1) of the General Consumption Tax Act and submitted that the section does not empower the Minister or the House of Representatives to impose rates or taxes. She stated that the section simply empowers the Minister and thereafter the House of Representatives, by affirmative resolution, to amend the schedules of the General Consumption Tax Act to include otherwise validly imposed rates or taxes.
- [24] Counsel referred the court to the previously mentioned Amended Schedule of the General Consumption Tax Act and stated that it is clear that the tax was imposed by virtue of The Provisional Collection Of Tax Act as it refers to the effective date of the tax as 15th June 2012, the gazetted date of Order No. 2.
- [25] She has also submitted that the Minister has no authority or power under the last mentioned Act to use a provisional order to extend another as the provisional order must be affirmed by Parliament. Counsel stated further that it would not matter that Order No. 3 had not ceased to have effect when it was affirmed on 5th June 2013 as the Validation Act did not include Provisional Order No. 3. It is to be noted that The Validation Act only includes in its schedule the said Order No. 2.

Response of Counsel for the Defendants to Further Submissions

- [26] Ms Larmond has submitted that the claimant's argument that the General Consumption Tax amendment did not purport to affirm Order No. 3 is a misunderstanding and that the claimant is confusing the effective date with the date of the Order. She further submitted that the effective date need not be the date of the Provisional Order if the Provisional Order is renewing a tax that was previously in force.

Discussion

[27] On an examination of section 3 (1) (b) of the Provisional Collection of Tax Act, it is to be noted that the Minister would have the power to renew for a further period any tax which was imposed for a limited period. However, based on an examination of section 4 (2) of the said Act, that renewal could not be retroactive if the previous order had ceased to have effect as it had not been confirmed before the end of the limitation period. This was the case with Order No. 2. The situation would have been different if Order No. 3 was gazetted before the end of the limitation period for Order No. 2.

[28] Section 4 of the Provisional Collection of Tax Act is set out below:

4 (1) Where the provisions of an order made under subsection (1) of section 3 are modified by Resolution of the House of Representatives or by an Act of Parliament so as to affect the tax payable under that order, any money which has been paid in pursuance of the order and which would not have been payable under the modified provisions, shall be repaid or made good and any deduction made in pursuance of the order shall, so far as it would not have been authorized under the said modified provisions be deemed to be an unauthorized deduction.

(2) Where an order under subsection (1) of section 3 ceases to have effect before an enactment comes into operation confirming or modifying the provisions thereof, any money paid in pursuance of that order **shall be repaid or made good and any deduction made in pursuance of that order shall be deemed to be an unauthorized deduction. (emphasis added)**

[29] It is apparent therefore that Section 4 (2) provides for repayment of any money paid in pursuance of any order under section 3 (1) if the order ceases to have effect before an enactment comes into operation confirming or modifying its provisions. Mrs. Gibson Henlin is therefore correct in her assessment of the invalidity of Order No. 3 *per se*, as it would be proposing to renew an unconfirmed retroactive tax rate (June 2012) in December 2012.

[30] The issue would therefore be whether the Validation Act gave new life to Order No. 2 up to the 12th June 2013 and what effect this would have on Order No. 3 which had been confirmed by 5th June 2013. Before examining the Validation Act, it is important to consider the General Consumption Tax Act and the authority granted to the Minister under that Act.

The Relevance of the General Consumption Tax Act

[31] Sections 9, 10 and 60 of the above Act are relevant in regards to the power of the Minister in the levying of special consumption tax. The sections are set out below:

9 Subject to the provisions of this Act, there shall be imposed, from and after the 22nd day of October, 1991, a tax to be known as special consumption tax on the manufacture in or importation into Jamaica of prescribed goods.

10 (1) Special consumption tax shall be payable at the rates specified in the Second Schedule.

(2) The Minister may by order, subject to affirmative resolution of the House of Representatives, amend the rates of special consumption tax referred to in subsection (1)

60 (1) The Minister may by order published in the Gazette amend the Schedules.

(2) An order under subsection (1) shall be subject to affirmative resolution of the House of Representatives.

[32] Section 9 of the Act allows for the imposition of special consumption tax on prescribed goods. Section 10 (1) speaks to special consumption tax being payable at rates specified in the second schedule. Section 10 (2) empowers the Minister to amend the rates of that tax by Order, subject to affirmative resolution of the House of Representatives.

- [33] It is my opinion that Mrs. Gibson Henlin is correct in her submission that the amendment to the General Consumption Tax schedule was done by virtue of Provisional Order 2 and not by virtue of section 10 (2) of the General Consumption Tax Act. It is clear that this is so as the schedule refers to the effective date as 15th June 2012, the date of the said order.
- [34] It is Mrs. Gibson Henlin's further submission that the inclusion of the special consumption tax rate in the schedule to the General Consumption Tax Act pursuant to section 60 (1) of the General Consumption Tax Act on the 5th June 2013 is *ultra vires* the Minister's powers and cannot be ratified and/or affirmed by Parliament and as such is invalid. I am of the view that she would be correct in this assessment to the extent that Order No. 3 would not have been valid at the time it was made and it was this same order that was affirmed by Parliament on 5th June, 2013.
- [35] However, whether this amendment was and remained *ultra vires* the Minister's power will depend on the court's assessment of the legality of the Validation Act and whether it has cured any defects in relation to the relevant orders.

Issue 2 — The Legality of the Validation Act 14 of 2013

- [36] The Validation Act took effect as of 12th June 2013. The purpose of this Act is described in the recital:

AN ACT to Validate and confirm the imposition, variation and renewal of tax under the General Consumption Tax Act by several provisional orders pursuant to section 3 of the Provisional Collection of Tax Act, the collection of such tax, in good faith and inadvertent that the collection was invalid, improper or unlawful, during the period commencing on the 1st day of April, 2003 and ending on the day of coming into operation of this Act; to indemnify the Government and all persons acting on behalf of the Government from liability in relation thereto; and for connected matters.

The schedule of this Act lists the applicable provisional orders which were made between 23rd April 2003 and 28th February 2013 and includes Provisional Order No. 2.

Submissions by Counsel for the Claimant on the Validation Act

[37] Mrs. Gibson Henlin has launched a three pronged attack against the validity of the above Act. Firstly, she has submitted that the Act only has a curative effect and that it only validates and confirms the provisional orders up to 12th June 2013, and is therefore of limited application as it cannot affect future application of the tax rates. She has stated that there is no legislation which gives them future validity for inclusion in the schedule as has now been done.

[38] She has submitted also that this Act affirms the invalidity of the rates and taxes being challenged and can only deal with the issue of retrospectivity as its purpose is to cure or validate actions of the executive arm done in reliance on an erroneous view of the law. In addition, she stated that there is no evidence that the Minister or anyone acted in reliance on any erroneous view of the law.

[39] Secondly, Mrs. Gibson Henlin has submitted that there exists a more compelling basis for invalidity as at the time the new rate was included in the principal legislation (The General Consumption Tax Act), it would have not been properly imposed as the Provisional Orders had ceased to have effect. She stated that once the General Consumption Tax (Amendment of Schedules) Order of 5th June 2013 was passed and confirmed by Parliament, the Provisional Orders would no longer be in existence so the Validation Act could not confirm what did not exist. The rate in the principal act was therefore not valid and could not be levied on the claimant.

[40] It is counsel's opinion that, if Parliament had validated the rate prior to including it in the schedule, then she would concede that she would have no case

(presumably on this point). She referred the court to the paragraph in the Validation Act that speaks to “**no permanent amendment having been made**”, and submitted that the schedule had already been permanently amended at the time of the passing of the above Act. It is her contention also, that since Provisional Order No. 3 was never put into the schedule, it is still dead as it was never dealt with. It is her opinion the Minister should have prepared a new order to be confirmed by Parliament.

- [41] Thirdly, Mrs. Gibson Henlin has also submitted that the Validation Act is *ultra vires* and contravenes the claimant’s right to property protected under the Constitution. Counsel referred the court to **Inland Revenue Commissioner and Attorney General v Lilleyman and Others** (1964) 7 WIR, 495. In that case, a levy was passed by the legislature of British Guiana under the National Development Savings Levy Ordinance, which made provisions for employers to deduct from the salaries of the Defendants an amount of money which was to be paid to the Inland Revenue Commissioner.
- [42] The Court of Appeal held that the levy was in the nature of a forced loan and was not a tax protected by Article 12 of the Constitution and that the ordinance was therefore *ultra vires* the legislature.
- [43] The court also held that the power to legislate for the peace, order and good government of the country does not authorize the enactment of a law which contravenes the provision of the constitution which gives such power, even though such a law has been duly passed by the legislature. It is to be noted that Article 12 (1) is similar in substance to section 15 of the Jamaica Constitution in terms of the protection of property rights.
- [44] Mrs. Gibson Henlin submitted that by parity of reasoning, Parliament’s power to legislate for peace, order and good government of Jamaica does not authorize the enactment of The Validation Act.

Submissions by the Defendants on the Validation Act

[45] Counsel referred the court to section 2 of The Validation Act which states as follows:

(2)(1) Notwithstanding section 3 and 4(2) of the Provisional Collection of Tax Act and anything to the contrary in any other enactment.

(a) The variation renewal and imposition of tax under the General Consumption Tax Act by several provisional orders, including the provisional orders specified in the Schedule, made pursuant to section 3 of the Provisional Collection of Tax Act; and

(b) The collection of tax so varied renewed and imposed under the General Consumption Tax Act,

by the Government, and persons acting on behalf of the Government, in good faith and inadvertent that the variation, renewal, imposition and collection being invalid, improper or unlawful, during the period commencing on the 1st day of April, 2003 and ending on the day of the coming into operation of this Act, are hereby declared to have been validly, properly and lawfully done to all intents and purposes and with effect as if duly authorized by law.

[46] Based on the above, she has submitted that Parliament has spoken on the issue by passing validating legislation on the matter and that it is entirely within Parliament's remit to pass such legislation. She stated that The Validation Act declares that any acts done under it are presumed to be valid.

[47] She submitted further that the provisions contained in the two Provisional Orders became part of the principal legislation by virtue of The General Consumption Tax (Amendment of Schedules) Order 2013. She stated that the said Order made by the Minister on 3rd June 2013 expressly provides that it is to be read as part of the principal legislation.

[48] It is her contention that there has been compliance with sections 60 (1) and (2) of The General Consumption Tax Act, and it cannot be said that the Minister acted improperly, unlawfully or arbitrarily. The claimant's contention that its constitutional rights have been breached must therefore fail.

Relevant Authorities and Analysis

[49] Both parties referred the court to **Retrospectivity and The Rule of Law**, by Charles Sampford, chapter 4, which deals with retrospective legislation. Ms Larmond referred in particular to the author's description of the different categories of retrospective legislation at pages 103 to 115.

[50] The author categorizes retrospective legislation into seven main categories - curative legislation, beneficial legislation, subordinate legislation, procedural statutes, retrospective criminal law, retrospective taxation law (anti-avoidance statutes) and Laws retrospective to the date of announcement. Curative legislation is further broken down into the subcategories of routine revision; restorative legislation, validating legislation, and the overturning of judicial decisions.

[51] Mrs. Gibson Henlin is relying on the author's definition of validating legislation found at page 107 to ground her submissions as to its purpose:

Validating legislation is passed where someone, usually the executive arm of government, has acted in reliance on an erroneous view of the law, which action the retrospective statute is intended to validate...The legislation concerned is used to make the law retrospectively conform to that which the person acting in purported reliance on it believed it to be, and to thus validate any actions taken by that person. Although the validation of those actions may detrimentally affect an individual's actual legal rights, it is very seldom that it will defeat expectations as to rights and liberties.

[52] It is my opinion that Mrs. Gibson-Henlin may be taking too narrow a view of what could be termed an "*erroneous view of the law*". The Validation Act contains in its preamble the statement concerning doubt as to 'whether the statutory procedures' with respect to the orders were carried out. The inference is that agents of the government were levying assessing and collecting taxes in good faith that what was to be done to make their actions valid had been done.

[53] However, even if it could be argued that this reliance of the agents of the government cannot be termed as such a view, validating legislation does include other circumstances in its ambit. **Sampford** examines the issue of curative legislation in Australia and speaks to circumstances where a question mark may hang over the validity of a piece of legislation and gives the example of the Constitution (Supreme Court) Act 1989 (Vic). At page 109 it is stated as follows:

Section 18 of the Constitution Act 1975 (Vic) provides that an absolute majority of the Parliament is necessary for the enactment of Bills which, among other things, repeal, alter or vary provisions in the Constitution Act which deal with local government or the Supreme Court's jurisdiction. Because of this section, doubts arose as to the validity of certain legislation enacted between 1 December 1975 and 1 July 1989...The Constitution (Supreme Court) Act barred challenges to the validity of any legislation passed in the period in question, or of anything done under such legislation, on the ground that section 18 was not followed. On its face the Act was procedural; but because it prevented any challenge to the potentially unconstitutional Acts, it effectively validated them.

[54] **Sampford** refers also to a controversial example of Australian validating legislation, the Excise Tariff Amendment Act 1990 (Cth), which retrospectively validated the classification and rate of an excise duty which had been collected for nearly a decade and which was in the process of being challenged (pages 110-111). In those circumstances, the appropriate Minister acknowledged that the excise being paid, while in accordance with the legislative intention and the producers' understanding of their liability, in fact exceeded that payable under the law (**Australia, SSCSB (1990)**, p116). The legislation was actually passed when the case was part heard before the appropriate tribunal and closed off the argument being put by the party challenging the rate. This example could however be considered more typical of "*an erroneous view of the law.*"

[55] **Sampford** reports that the Minister claimed that the amendments could properly be characterized as curative, merely effecting a correction of a technical defect and that the failure to make the amendments would have resulted in a windfall gain to the two producers affected.

[56] The author also cites the US Supreme Court in **Graham & Foster v Goodcell** (1930) 282 US 409, 429-30 (pg 111, footnote 17) which has similarly drawn a distinction between actions of the legislature retroactively creating liabilities and those remedying mistakes as follows:

...a bare attempt of the legislature retroactively to create liabilities for transactions...and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government' holding that the power to pass the latter kind of statute 'is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration'.

In that judgment, the court also stated that the legislature is not prevented from curing the defect in administration simple because the effect may be to destroy causes of action which would otherwise exist (pg 282 US 429).

Is The Validation Act *Ultra Vires*?

[57] In considering the issue as to the legal status of the Validation Act, I must first consider its purpose. The preamble on pages 1 to 3, refers to sections 3 (1), 3 (2), 3 (3), 3 (4) and 4 (2) of the Provisional Collection Of Tax Act and continues as follows:

AND WHEREAS, as a result of successive revenue measures introduced by the Government, several provisional orders (including the provisional orders specified in the Schedule to this Act) varying, renewing and imposing tax under the General Consumption Tax Act were made during the period commencing the 1st day of April, 2003, and ending on the day of the coming into operation of this Act, respectively:

AND WHEREAS there is doubt as to whether the statutory procedures with respect to these orders were duly complied with:

AND WHEREAS no permanent amendment in relation to the matters comprised in those provisional orders was made to the General Consumption Tax Act: (emphasis added)

AND WHEREAS the Government, and persons acting for or on behalf of the Government, in good faith, have been levying, assessing and collecting various taxes on the basis of the provisions of those provisional orders:

AND WHEREAS it is desirable to validate and confirm as lawful the levy, assessment and collection of such tax in good faith, and inadvertent that the levy, assessment and collection was invalid, improper and unlawful during the period commencing on the 1st day of April, 2003 and ending on the day of the coming into operation of this Act:

[58] On an examination of the preamble, it is clear that Parliament appreciated that the necessary legal processes in relation to the continuing in force of various orders listed in the schedule were not followed. It is clear also that they intended to validate the levy, assessment and collection of revenue during the referenced period based on the tax rates. However, the curing of the defect goes deeper than the mere collection of the tax concerned. In the long title of the Act its purpose is described as being “...to Validate and confirm the imposition, variation and renewal of tax under the General Consumption Tax Act ...”

[59] Parliament clearly intended to validate the imposition of the tax rates included in the provisional orders as listed in the Schedule. The rate, in the instant case, had been varied based on Order No. 2. The claimant had been notified that there had been a reassessment of the tax owed based on the variation. Order No. 3 carried that assessment forward and the said rate was confirmed by Parliament. The Validation Act did not seek to create liabilities retroactively but

to cure the defects of the orders on which the Commissioner of Customs and his agents had acted.

[60] I would therefore agree with the submissions of Ms. Larmond that Parliament has spoken on the issue and it would be within their remit so to do. One of the meanings applied to the verb 'to validate' is 'to make valid, ratify, confirm. (per **The Concise Oxford Dictionary 8th edition**). The word 'valid' is therein defined also as having several meanings including 'executed with the proper formalities' and 'not having reached an expiry date'. It could be inferred therefore that the effect of the Validation Act is that Order No. 2 is to be treated as not having expired up to the 12th June 2013.

[61] In light of this understanding, it is not unreasonable to hold the view that the Act has therefore figuratively raised the provisional orders listed therein "from the dead" and brought them back to life for a limited period. In particular, Order No. 2 would have been revived between the 15th June 2012 and the 12th of June 2013.

[62] Does it make a difference as Mrs. Gibson Henlin has argued that Parliament amended the schedule to The General Consumption Tax Act to include the challenged tax rate before passing the validating legislation? The issue concerns the reference being made in the preamble to the Validation Act to, "**no permanent amendment**", in relation to the matters comprised in the provisional orders included in that Act. Her argument was to the effect that, since the schedule to the General Consumption Tax Act had been permanently amended to include the "dead" Provisional Order No. 2 before that order was validated or revived, at the time the Validation Act was passed there was no Provisional Order No. 2 in existence that could be validated.

[63] Mrs. Gibson Henlin referred the court to several cases to buttress and support her submissions. These included **The Attorney General of Trinidad & Tobago v Mootoo** (1976) 28 WIR 304; **The Attorney General and Minister of Home**

Affairs v Antigua times Limited (1976) 21 WIR 560; **Inland Revenue Commissioner v Lilleyman and Ors** (1964) 7 WIR 496; and **Societe United Docks v The Government of Mauritius** [1985] AC 585.

[64] The case of **Mootoo** is a decision emanating from the Court of Appeal of Trinidad and Tobago. The circumstances involved a challenge to an unemployment levy imposed by an Act of 1970 on chargeable incomes of individuals and profits of companies. The statute was enacted at a time when there was massive unemployment resulting in social unrest in 1969.

[65] The respondent had argued that the Act was *ultra vires* sections 1(a) and 2 of the Constitution regarding the right to property, authorized the 'naked confiscation of property', that it was arbitrary and oppressive and was not a bona fide taxing statute and was therefore invalid. Hyatali CJ who delivered the judgment of the court, stated that it was necessary and relevant to do the following (see pg. 309 e-f):

(1) to identify the evils which the Act sought to remedy; (2) to ascertain the reasons for its provisions;(3) to negative the suggestion of bad faith on the part of Parliament in enacting the Act; and (4) to refute the claim that Parliament in enacting the Act had employed a colourable device to evade the restrictions of the Constitution.

[66] Hyatali CJ considered authorities and learned opinions from various jurisdictions including India and the USA dealing with the issue of the constitutional validity of a statute and concluded that they clearly point in one direction:

They enunciate principles and establish canons of judicial review which are unimpeachable and I respectfully accept and adopt them for present purposes. I consider it essential therefore that the obligation which they impose on the court should be kept steadily in view and judicially discharged. (per pg 314 g).

[67] The Chief Justice also considered and sought guidance from learned and distinguished judges and authors from several jurisdictions concerning the

function and responsibilities of a court and the canons by which it should be guided in considering such a constitutional validity (pg 311 to 314). I have distilled and set out the major factors below:

1. A cardinal principle is that the court must first ascertain whether a construction of the statute is fairly possible by which the question of constitutional invalidity may be avoided. (**Cromwell v Benson** (4) (1931) 285 US 22 at p. 62 per Hughes CJ quoted in **Mootoo**, pg. 311g)
2. It is not on slight implication and vague conjecture that legislation should be pronounced *ultra vires* and its acts considered as void. The judge must feel a clear and strong conviction of the incompatibility between the Constitution and the law. (**Fletcher v Peck**, (1809) 6 Cranch 128 per Marshall CJ quoted in **Mootoo**, p. 311 i)
3. There is decent respect due to the wisdom, integrity and patriotism of the legislature by which any law is passed to presume in favour of its validity until its violation is presumed beyond all reasonable doubt) **Ogden v Saunders** 12 Wheat 213 quoted in **Mootoo**, pg 312 a-b.
4. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the constitution and avoid the consequence of unconstitutionality. **Black** on 'The Construction and Interpretation of Laws' (1911) p 110, para 41h quoted in **Mootoo**, p 312c.
5. The presumption is always in favour of constitutionality and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete and unmistakable (per Hyatali CJ in **Mootoo**, pg 312d).
6. If the court is convinced of the violation of the constitutional prohibition, it must give effect to the organic law regardless of the consequences. (**Osbourne v Commonwealth** (1911) 12 CLR 321) quoted in **Mootoo**, pg 312 i.
7. There is a presumption that a legislature understands and correctly appreciates the need of its people and that its laws

are directed to problems made manifest by experience and its discriminations are based on adequate grounds. (**Dr. Basu on Constitutional Law of India**, p 457 quoted in **Mootoo** p 312g).

- [68] This last mentioned principle was confirmed in the Privy Council decision of **Hinds v R and DPP v Jackson** (1976) 24 WIR per Lord Diplock at pgs 339-340. The issue raised involved a challenge made to the validity of an enactment providing for in camera hearings under the Gun Court Act 1974:

By s48(1) of the Constitution the power to make laws for the peace, order and good government of Jamaica is vested in the Parliament; and prima facie it is for Parliament to decide what is public safety or public order. Such a decision involves considerations of public policy which lie outside the field of the judicial power and may have to be made in the light of information available to Government of a kind that cannot effectively be adduced in evidence by means of the judicial process.

- [69] In **Attorney-General and Minister of Home Affairs v Antigua Times, Ltd**, (1975) 21 WIR, 560, another decision of the Privy Council, Lord Fraser of Tulleybelton, who delivered the judgment also reiterated the above principles. He stated as follows at pg 574a:

The proper approach...is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonable required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy, J," so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power."

- [70] Bearing in mind all the above factors, there is, in my view, an absence of "a clear, complete and unmistakable" violation of the Constitution in relation to the Validation Act. The Constitution allows Parliament to levy taxes as one of the exceptions to the protection of property rights (per section 15(2)). In relation to Mrs. Gibson Henlin's submission concerning the issue of 'no permanent

amendment' having been made at the time of the passing of the said Act, I am the view that this is at its highest "a slight implication" on which to hang the conclusion of invalidity. (per **Fletcher v Peck** as quoted in **Mootoo**). Counsel's submission is based on an extremely technical consideration of one aspect of the Validation Act. It is clear that the intention of Parliament was to validate the tax measures.

[71] I am not moved to conclude that there is evidence of a clear and strong incompatibility between the Constitution and the law. This is especially in light of the fact that counsel has admitted that she would have no case if the Validation Act had been passed before the schedule was amended.

[72] It is my opinion also, that there is at least one other valid interpretation that could be drawn from the use of the words "*no permanent amendment*". That phrase could be interpreted to mean that Parliament is acknowledging that no confirmation or modification was done in relation to Order No. 2 within the appropriate limitation period. It is that very failure that necessitated the passage of the Validation Act. I would therefore adopt the construction which would reconcile the statute with the Constitution and so avoid the consequences of unconstitutionality. (per **Mootoo**).

[73] I am fortified in this view also as I consider that the effect of the legislation is to cure the defects. Provisional Order No. 2 would therefore be sustainable up to the 12th of June 2013, so it could validly be renewed by Provisional Order No 3 in December of 2012 which was confirmed on the 5th June 2013. In all the circumstances, Mrs. Gibson Henlin's submissions in relation to the above issues lack merit in relation to the impropriety of the actions of the Minister and Parliament.

Issue 3 — Were the Claimant's rights breached under section 15 of the Constitution?

Submissions of Counsel for the Claimant

- [74] It is Mrs. Gibson Henlin's submission that The General Consumption Tax Act does not give the House of Representatives the power to enact legislation to validate what is strictly invalid especially as it impacts the rights and interests of citizens. She has sought to argue that the law is so arbitrary as to compel a conclusion that it does not involve the exercise of a taxing power as conferred by section 15 of the Jamaica Constitution, but constitutes "*in substance and in effect the exertion of a different and forbidden power.*" (per Lord Tullybelton in **Antigua Times**).
- [75] Counsel has asked the court to consider that section 15 of the Constitution prohibits the compulsory acquisition of any interest in or right over property of any description and provides that no such property shall be compulsory taken except under authority of the law. She submitted that the assessment of the tax would amount to a breach of the claimant's constitutional right to his property which includes money. (see **Inland Revenue Commissioner and Attorney General v Lilleyman and Others**, page 497).
- [76] Counsel contends also that the destructive results that the Provisional Orders, The General Consumption Tax (Amendment of Schedules) Order and the Validation Act would have on the claimant amounts to a deprivation of property without compensation. In his affidavit, Mr. Barrington Adams gave evidence that 0.7 grams is the average weight of a cigarette and the average weight of a premium cigar is 28 times more at 20 grams and that the offending Orders imposed the same rate on unmanufactured tobacco as on manufactured tobacco.

- [77] He stated further that there could be no proper justification for this extreme imposition of additional tax on unmanufactured tobacco which would result in the importer of cigarettes and manufactured tobacco and the importer of unmanufactured cigar tobacco leaves paying the same amount of special consumption tax. Mr. Adams states that this would make the claimant's business immediately and entirely unprofitable and at risk of closing down as the tax rate on unmanufactured tobacco used to create one cigar would exceed the retail cost of that cigar.
- [78] Mrs. Gibson Henlin has submitted that although the rate has been adjusted, it is still unreasonable as it is imposing the same rate on the finished and unfinished product. It is therefore still oppressive and shows the exercise of arbitrary power. She states that this is evident when one compares the rates as computed between the two products in the schedule as one is computed in grams and the other in kilograms. She argues that on the face of the statute there is discrimination between the retailer of cigars and cigarettes so even with the reduction, the harm is the difference between the unfinished goods and the finished cigars/cigarettes.
- [79] Counsel referred the court to **Kruse v Johnson** [1898] 2 QB 91 where the English Divisional court had to consider the validity of a by-law that prohibited persons from playing music or singing in any public place within 50 yards of a dwelling house. The court held that such a by-law ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust or made in bad faith or clearly involving the unjustifiable interference with the liberty of those subject to it.
- [80] Counsel has further submitted that the Minister did not act in good faith and in the national interest when he imposed the Provisional Orders and that Parliament exercised coercive actions by affirming the amendment and enacting the validating legislation as that will ultimately put businesses like the claimant out of operation with the attendant decrease in productivity and job losses.

Submissions of Counsel for the Defendants

- [81] In her reply to these points, Ms Larmond has submitted that two different tax rates applied to two different items does not render the rate unconstitutional. She recommended the approach of my brother, Batts J in his judgment in this matter **Barrington Cigars (Jamaica) Limited v The Minister of Finance & Planning and the Commissioner of Customs** [2014] JMSC Civ 21. Batts J observed that the imposition is generally applicable and that anyone who imports or purchase the items must pay the impost so it is not directed at the Claimant (Barrington Cigars) personally or peculiarly.
- [82] Counsel also referred the court to the Canadian case of **Stanley J. Tessmer Law Corporation v Her Majesty The Queen**, 2013 TCC27 (CanLII) and submitted that the claimant had put no evidence before the court to support the imminent destruction of its business. The circumstances of this case involved a challenge to the goods and services tax (GST) imposed by section 165 of The Excise Tax Act. The appellant was a law firm that sought to argue that the tax infringed the rights of their clients guaranteed by section 10 (b) of The Charter of Rights and Freedoms which guaranteed the right of everyone arrested or detained to retain and instruct counsel without delay. The appellant had sought to argue that the requirement to pay the GST tax on criminal defence counsel fees infringed its clients rights under the above mentioned section.
- [83] The court reviewed several charter cases and concluded that a party challenging legislation will be required to bring evidence of the effects of the legislation unless the unconstitutionality of the impugned legislation is apparent on its face. The court also noted that in certain circumstances, a party may rely only on hypotheticals to establish a factual foundation where actual facts are not available to that party. The court stated further that the use of hypotheticals in those cases would amount to the court taking judicial notice of facts or circumstances, which then form the evidentiary foundation for the Charter challenge. (per Paris J at paras. 54-56.)

[84] In **Tessmer**, the court rejected the submissions of constitutional invalidity as the appellant did not show that the purpose of the tax was specifically directed to criminal legal defence services and stated that it was a tax of general application. The court also found that there was absence of evidence that any of the appellant's clients were unable to retain counsel as a result of the GST payable on legal services. (para 66-67.)

Submissions of Counsel for the Claimant in Response

[85] In her submissions in reply, Mrs. Gibson Henlin stated that the Canadian Charter and the Jamaican Charter must be distinguished as the Jamaican Constitution grants a right of access to the Supreme Court for any applicant who is alleging that his constitutional rights, 'has been, is being or is likely to be contravened'. She urged the court to consider the calculations and stated that this would be sufficient evidence in all the circumstances.

[86] Section 19(1) of the Charter of Rights grounds this access to the court for any person alleging any such breach. It provides:

If any person alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

Analysis in relation to Section 15 of the Constitution

[87] In **Societe United Docks**, the Privy Council considered two consolidated appeals from the Supreme Court of Mauritius. The 2nd appeal which involved workers and unions (the appellants) employed to the ports authority, the M.M.A. In 1979, the unions and the M.M.A. agreed to submit to arbitration a dispute concerning salaries and allowances, the award to be binding on them. An award for a substantial increase in salaries between January 1980 to 30th June 1983

was made after arbitration. In December 1980, the appellants applied to the court for the award to be made executory and enforced. The government considered the increases to be undesirable and the minister with portfolio gave a direction under section 9 (1) of the Ports Act 1975 to the M.M.A. not to implement the award. The M.M.A. accordingly opposed the application. On 3rd April 1981, the trial judge reserved judgment and the Code of Civil Procedure (Amendment) Act 1981 was passed and came into force on 8th April.

- [88] On 9th April the Attorney-General under that Act, served a notice of objection to enforcement of the award on the ground that the award was contrary to the public interest. The appellants claimed that the new article of the Code and section 3 of the Act of 1981 deprived them of property without compensation contrary to section 8 of the constitution. The judge referred the matter to the Supreme Court which held that the award could not be made executory.
- [89] The Privy Council allowed the appeal and held that the right of the individual to protection from deprivation of property under section 8 of the constitution applied to corporate bodies and the protection was not confined to property compulsorily taken possession of or compulsorily acquired within section 8.
- [90] It was also held that the M.M.A. was contractually bound to accept the arbitration award and since it had no power to break its contracts, the Minister could not direct the M.M.A. not to implement the award. In relation to the provisions of the Code and the Attorney-General's objection, the court found that the effect deprived the workers of the benefit of the award without any compensation and of the right to bring an action for and recover damages for the breach contrary to section 3 of the constitution. Section 3 of the constitution established the fundamental rights and freedoms including the right to property and from deprivation of property without compensation subject to respect for others and for the public interest. Section 8 forbids compulsory possession or acquisition except where certain conditions were satisfied.

[91] Lord Templeman, who delivered the judgment of the court, considered loss caused by deprivation and destruction to be the same in quality and effect as loss caused by compulsory acquisition. (pg 600a) It is important to note that the Privy Council found that the Amendment Act was a coercive act of the government which alone deprived and was intended to deprive the appellants of property without compensation. (per Lord Templeman at pg. 609 b).

Conclusion

[92] In the present case, the court is being asked to draw inferences based on different tax rates that the adjusted rate on unmanufactured cigar is oppressive, discriminatory, arbitrary and will lead to the destruction of the claimant's business. The claimant however faces a formidable challenge in proving its case.

[93] Even if it could be argued, based on the calculations disclosed by Mr. Adams, that the original increased rate of 10.50 was manifestly excessive and of such a character that it was enacted for some other purpose than for raising revenue, that rate has subsequently been adjusted. The issue would be whether the adjusted tax rate included in the schedule of The General Consumption Tax Act is so arbitrary that it can be said to be imposed for another purpose apart from the exertion of the taxing power of Parliament. (per **Lilleyman** page 505).

[94] I have already held that the Validation Act is not *ultra vires*, therefore the burden would be on the claimant to put evidence before the court concerning the imminent destruction of its business. This is even more so against the backdrop of a waiver of the initial assessment and a reduced tax rate subsequent to inter-Ministry consultations that included representations made on behalf of the claimant.

[95] Even if the court were only considering the issue of the "*likely infringement*" of the claimant's rights, there are no hypotheticals existing to ground this

submission of which I could take judicial notice. There is also no evidence that could lead this court to any conclusion of the exercise of a coercive or arbitrary action by Parliament that would suggest that the implementation of the tax rate was merely a “colourable device to evade the restrictions of the constitution.” (per Hyatali CJ in **Mootoo**, pg 309f)

[96] Finally, I remind myself also of the principle enunciated in **Mootoo** that Parliament must be presumed to appreciate the needs of its people and that its discriminations are based on adequate grounds. Certainly, this is not the same issue as the bylaw in **Kruse**. A tax rate will more often than not, be based on levels of discrimination between different classes of goods.

Issue 4 — Was There Executive Interference With The Judiciary?

[97] There is yet one final point for consideration by this court. Mrs. Gibson Henlin has submitted that the actions of Parliament in the reduction of the tax rate during the court proceedings amount to executive interference with the judicial process. The issue was raised in **Societe United Docks** but the Privy Council did not pronounce on the submission as full arguments were not heard on the matter. Lord Templeman did however refer to the case of **Liyanage v The Queen** [1967] A.C. 259 where the Parliament of Ceylon passed Acts pursuant to a legislative plan ex post facto to secure the conviction and enhance the punishment of particular individuals, legalizing their imprisonment while they were awaiting trial, making admissible statements which had been inadmissibly obtained, altering the fundamental rules of evidence so as to facilitate their conviction and altering *ex post facto* the punishment to be imposed on them.

[98] Lord Templeman referred to the fact that the Board held that the Acts involved the usurpation and infringement by the legislature of judicial powers inconsistent with the written constitution of Ceylon (pg 608f-g). He also referred to the case of **Hinds v The Queen** [1977] A.C.195, 213 where the board affirmed the principle

of judicial freedom from political, legislative and executive control (pg 608h). In what sense then in this case, can it be said that Parliament attempted or did interfere with the judicial process?

[99] Parliament has the remit to prescribe tax rates for special consumption tax under the relevant acts. If it chose to reduce that rate while a matter challenging a higher rate was being considered by the court, how did this usurp judicial authority? The court would not be hindered in pronouncing judgment on the matter except if it held the view that the matter was now moot. This is certainly distinct from the circumstances that existed in **Liyanage**. It is also different from the actions of the legislature in **Societe Docks** where an Act was passed in the process of a court hearing that effectually sought to prevent the court from ruling on the matter to the detriment of the appellants. In the present case, the enabling legislation actually reduced the tariff that would be payable by the claimant, to the claimant's benefit. This argument therefore also fails.

DISPOSITION

[100] In all the circumstances therefore, I will not grant any of the declarations and orders sought by the claimant as set out in the Further Amended Fixed Date Claim Form.

Thompson-James J

[101] I have read in draft the judgement of my sister Straw J and agree with her reasons that the declarations and orders sought by the claimant ought not to be granted.

D. Fraser J

[102] I have read in draft the judgment of my learned sister Straw J. For the reasons she gives, I agree that the declarations and orders sought by the Claimant should be refused.