[2015] JMFC FC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2012 HCV 06428

BEFORE: THE HON. MR. JUSTICE DAYE
THE HON. MRS. JUSTICE McDONALD-BISHOP
THE HON. MR. JUSTICE BATTS

IN THE MATTER of The Constitution of Jamaica

AND

IN THE MATTER of an Application by ARTHUR WILLIAMS, alleging a breach of his rights under sections 13(3) (b) (c) and (e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by ARTHUR WILLIAMS for Constitutional redress pursuant to section 19 of the said Charter

BETWEEN	**ARTHUR WILLIAMS**	**CLAIMANT**
AND	**ANDREW HOLNESS**	**DEFENDANT**

Dr. Lloyd Barnett and Wentworth Charles instructed by Wentworth Charles & Co. for the Claimant

Mrs. Georgia Gibson-Henlin and Miss Taneshia Rowe instructed by Henlin Gibson Henlin for the Defendant

Miss Carlene Larmond, Miss Symone Pearson and Miss Monique Harrison for the Attorney General instructed by the Director of State Proceedings

Heard: 21 & 22 July 2014 and 6 February 2015

CONSTITUTIONAL LAW – PARLIAMENT – THE SENATE – APPOINTMENT OF SENATOR – RESIGNATION OF SENATOR – REMOVAL OF SENATOR – PRE-SIGNED AND UNDATED LETTERS OF RESIGNATION AND AUTHORIZATION GIVEN TO LEADER OF OPPOSITION BY SENATOR AT TIME OF APPOINTMENT – TO USE LETTERS AT HIS SOLE DISCRETION TO EFFECT RESIGNATION OF SENATOR – SENATOR REFUSING TO RESIGN – USE OF THE LETTERS BY THE LEADER OF THE OPPOSITION TO EFFECT RESIGNATION OF THE SENATOR – WHETHER AUTHORITY TO USE LETTERS REVOKED – WHETHER LETTERS UNCONSTITUTIONAL – WHETHER THE REQUEST FOR AND USE OF THE LETTERS BY THE LEADER OF OPPOSITION UNCONSTITUTIONAL – WHETHER FUNDAMENTAL HUMAN RIGHTS OF SENATOR INFRINGED BY LEADER OF THE OPPOSITION – THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962, SS. 13, 19, 35, 41, 44 (1) & 137 – THE CIVIL PROCEDURE RULES 2002 (“THE CPR”), RULE 56.9(1), (2), (3).

DAYE J

[1] The claimant**,** Arthur Williams, was duly appointed a Member of the Senate of Jamaica by the Governor General on the advice of the defendant as the Leader of Opposition on the 16 January 2012.

[2] On 14 November 2013 the defendant again as Leader of Opposition, but in his second term of office, tendered to the Governor General a purported letter of resignation on behalf of the claimant.

[3] This purported letter of resignation was in standard form and originally undated. It was drafted and authorized by the claimant. There were two other letters accompanying it.

[4] These three letters are exhibited in the affidavit of the claimant. They are set fully in the judgments of McDonald-Bishop J and Batts J. The purported letter of resignation was addressed to the Governor General. Also addressed to the Governor General, was a letter which explained that the person signing the letter of resignation authorized the Leader of Opposition to deliver it to the Governor

General when the Leader of Opposition considered it necessary. The third letter was addressed to the Leader of Opposition authorizing him to date and deliver the letter of resignation to the Governor General.

[5] The claimant said that the Leader of Opposition used and relied on these letters in respect of Senator Christopher Tufton and him.

[6] The other Opposition Senators on or around 12 November 2013, headed by Senator Tavares - Finson, resigned their membership from the Senate independently of these letters. They all signed similar worded letters as a condition, and before they were nominated by the Leader of Opposition to the Senate.

[7] These are the basic facts. The background to these decisions and the events leading up to them, are more fully described in the judgments of my learned colleagues.

[8] There is one area of disputed facts. The claimant who was Chief of Staff, at the Office of the Opposition party contended that the letters were prepared and agreed to for the specific purpose to ensure party unity among Opposition Senators on any future debate of a Bill to amend the Constitution to abolish appeals to the Judicial Committee of the Privy Council (JCPC) as the final Appellate Court of Jamaica and to replace it by the Caribbean Court of Justice (CCJ), (para. 8-11 of Affidavit of Arthur Williams dated 19 November 2013). It was not the intention, he deponed, for the purported letter of resignation to be used by the Leader of Opposition against Senators who did not support the Leader of Opposition in the internal election for the Leader of Opposition's party (Jamaica Labour Party).

[9] In order for a Bill to amend the Constitution relating to the final appellate court, a two thirds majority vote of members of each House is required. This

includes the Senate. So the role of the Senate is very important in respect of Constitutional amendments.

[10] In 2005, three Bills were tabled before the Senate to remove the JCPC and to establish the CCJ as Jamaica's Final Appellate Court. There was a successful constitutional challenge to the Bills (**Independent Jamaica Council for Human Rights [1998] Ltd. and Other v Hon. Syringa Marshall-Burnett and the Attorney General** [2007] UKPC3 (3 February 2005).

[11] The Privy Council held that for a Bill or any law to amend or alter the provisions of the Constitution to remove the JCPC and replace it with the CCJ as the final Appellate Court, it must adhere to the procedure that is mandated for special entrenched provisions of the Constitution. The procedure adopted by the Senate to introduce these Bills was that applicable to change or amend a provision of the Constitution that only required a simple majority. The Court reasoned that the constitutional framers intended that there should be special entrenched provisions in the Constitution to protect and safeguard the people's rights relating to important institutions of Government.

[12] The defendant refuted this claim that the standard form letters of resignation were created for the specific purpose to ensure compliance with the Opposition party's official position on the CCJ. He contended that the letters were drafted for a general purpose. It was to give him a wide discretion as Leader of the Opposition to choose or nominate candidates for appointment which the Constitution obliged him to make. (See Affidavit of Andrew Holness dated 21 November 2013, paras. 6 and 12).

[13] It is quite likely that the party leaders and administration would agree what position their Senators ought to take on such an important Bill. It is also quite likely that the standard form letter of resignation would include and was drafted with one of the purpose of ensuring party unity on the issue of the CCJ.

[14] As far as Dr. Barnett is concerned, the purpose for which the letter of resignation was signed is immaterial. His reason is that such a letter seeks to give a power of removal to the Leader of Opposition which is contrary to the Constitution. Dr. Barnett conceded in his submissions that the claimant was wrong in law to prepare these letters.

Commencement of Proceedings

[15] It is against this background that the claimant applied to the Supreme Court for constitutional relief and the Orders and Declarations set out and enumerated in his Fix Date Claim Form (See judgment of McDonald-Bishop J).

[16] The Civil Procedure Rules (CPR) 2002, as amended, sets out how a person should apply to the Court in such a claim as this. R 56.9 (1) provides as follows:

> *"An application for an Administrative Order must be made by a Fix Date Claim Form 2 identifying whether the application is for:*
> *(a) Judicial Review*
> *(b) A relief under the Constitution*
> *(c) A declaration; or*
> (d) *Some other Administrative Order*"

Further R 56.9 (3) (b) provides:

> *(3) The affidavit must state-*
> *(a) …*
> *(b) …*
> *(c) "in the case of a claim under the Constitution, setting out the provisions of the Constitution which the claimant allege has been, is being or is likely to be breached."*

The R 56.11 (3) provides:

> *"A claim form relating to an application for relief under the Constitution must be served on the Attorney General."*

Nature of Jurisdiction

[17] The Constitution expressly confers original jurisdiction on the Supreme Court to determine any question whether any member of either House of Parliament has vacated his seat (Sec. 44 of the Constitution). The question as to whether a person has vacated his or her seat is related to the question as to whether the person has resigned his membership of the House to which he or she is appointed (Sec.41 (1) (b) of the Constitution).

[18] The Constitution provides that any person, including the Attorney General, may institute proceedings in the Supreme Court to determine the matter of whether a member of the House has vacated his or her seat. (Sec. 41(2). Locus standi to move the Supreme Court is thus extensive and not restricted to a specific individual member or general members of the House.

[19] This provision contemplates that the issue of the status of seats in either House is a matter that affects the public. The provision also confers standing on the Attorney General to appear and this would seem to indicate that the issue of the seat of a member of the House is an important matter of public interest. A public interest element is introduced along with the individual and private interest.

[20] The nature of the jurisdiction of the Court in these proceedings is a factor which must be borne in mind in any consideration of issues arising under the provision.

[21] Not only is the issue of whether a member of either House has a vacated his or her seat to be determined by the Supreme Court, but the Supreme Court is also expected to determine the validity of the election and appointment of a member of either House (Sec. 41 (a)).

[22] There is no dispute in these proceedings in relation to the election or appointment of any member of the House and, in particular, the Senate. The

dispute is whether a member has vacated his seat in the Senate. Notwithstanding this, it is necessary to regard the method and or process of appointment to the Senate to ascertain the true meaning of when a member of the Senate has vacated his seat.

[23] Mrs. Gibson-Henlin submitted that this jurisdiction is limited and that the court's duty is limited to determining only the issue whether the claimant resigned his seat. While I accept that the provision conferring jurisdiction on the court is specific, I do not find that this means that the court is excluded from applying a generous and liberal interpretation to the provisions of Sections 34-44 which fall under chapter 5.

Composition of Parliament

[24] The Senate or Second Chamber, as it is sometimes described, is created as one of the organs of Parliament by virtue of Section 34 of the Constitution. Sections 34-47 deal with the organs of Parliament. So, issues arising under these sections touch and concern issues of governance. The public has vested interest in such matters.

Appointment

[25] Section 35 provides that the number of persons composing the Senate is 21. Thirteen (13) of these Senators are appointed by the Governor General on the advice of the Prime Minister. The Governor General appoints the other eight (8) Senators on the advice of the Leader of the Opposition. (See 35 (2) and (3).

Termination of Appointment

[26] The Senator holds office until he or she resigns subject to specific disqualifications. There is no express power conferred on the person who appoints the Senator (the Governor General) nor the person nominating the Senator (the Leader of Opposition in this case) to determine or terminate the term of office of the Senator.

[27] The immediate predecessor to the Senate was the Legislative Council established under the Jamaica (Constitution) Order in Council 1959. Dr. Lloyd Barnett for the claimant referred to the provisions relating to Senators in the 1959 Constitution as an historical antecedent to the current 1962 Constitution. He sought to demonstrate that there was express provision in the 1959 Constitution to determine the tenure of office of a Senator in the Legislative Council by the Premier. However, he said, there is no such express power given to any person, body or authority in the 1962 Constitution. Dr. Barnett compared other provisions of the Constitution which confer express powers to remove an appointee (Sections 80 (5), 71, 71 (4), 78 (4), 121 (3), 128 (1)). Dr. Barnett argued further that there is no implied power to terminate the tenure of office of a Senator. There is no such power by necessary implication by the very nature of the structure and provisions relating to the Senate.

[28] The problem of the removal of a Senator was highlighted in the **Constitutional Law of Jamaica** by Lloyd G. Barnett (1977, Oxford University Press) p. 211 para. 3. Furthermore, he pointed out that the role of the Senator appointed on the advice of the Leader of Opposition is important to Constitutional amendments, that is, those requiring special majority in both Houses of Parliament (entrenched and specially entrenched provisions). There could be no change to these important Constitutional provisions unless the Senate agreed. The party in Government could not get a 2/3 majority unless they had the support of one or more Opposition Senator (ibid. p.267). The Constitution framers intended this role of the Senate even though problems may arise. Dr. Barnett, therefore, argued that any act or scheme that indirectly affects or infringes on the voluntary right of a Senator to resign is unlawful and is inconsistent with the Constitution.

[29] Mrs. Gibson-Henlin did not really seek to counter the premise on which these submissions rest. Her main submission was that the letter of resignation was lawful because it was voluntary and free from any pressure. She further

contended that the language of the letter of resignation was clear and unambiguous and that the clear meaning should be given to the letter. She argued that the letter of resignation satisfied all the requirements of Sec. 137 (1) of the Constitution, i.e. it was in writing, signed by the maker and address to the person who appointed the Senator. In addition, she contended that the defendant lawfully used these letters as he was authorized and the registration of the claimant was effective.

Issues

[30] Pursuant to case management orders of 10 January 2014 the parties filed their statement of facts and issues on 8 April 2014 (pp. 93-94 and 99 of Volume to Index to Judges Bundle).

[31] The claimant's stated eight (8) issues for the determination of the Court. I highlight three (3) of these which I believe are at the heart of the dispute. They are as follows:

> "3. *Whether the scheme of procuring undated letters of resignation and a letter of authorization from all persons to be appointed Senators under the nomination of the Leader of Opposition is contrary to Jamaica's constitutional scheme and is inconsistent with the Constitution.*
>
> *4. Whether the undated letter of resignation and the manner of their use are void as being inconsistent with the Constitution by seeking to give to the defendant the right on power to effect the resignation of the claimant at the defendant's volition and timing.*
>
> *8. Whether the use of the undated letters of resignation on the basis that the claimant did not support the defendant in the election of leadership in the Jamaica Labour Party contravenes the claimant's constitutional rights to the freedom of thought, conscience, belief,*

expression, and association provided by Sec 13 (3), (b) (c) and (e) of the Charter of Rights".

On the other hand, the defendant cited the issues as follows:

"(a) *Whether the letters duly created and signed by the claimant were effective to secure his resignation in accordance with Sec. 41 (1) (b) of the Constitution upon being duly executed by the defendant as authorised.*

(b) Whether there is anything in Sec. 41 (1) (b) that prevents a Senator from authorizing his resignation as was done in the instant case."

[32] The issues the parties have presented raise considerations as to the validity of these letters as well as their constitutionality and status.

[33] Dr. Barnett formulated the issues in a broader manner than Mrs. Gibson-Henlin. Her formulation of the issues is much narrower. However, the statements of issues of both parties recognize that there is a claim that requires the interpretation of the meaning of the provisions of the Constitution relating to the tenure of office of a member of the Senate of Jamaica (Sec. 41 (1) (b)).

Interpretation of the Constitution

[34] Dr. Barnett submitted that the principle of construction of the Constitution to be applied is that expressed by Lord Wilberforce in **Minister of Home Affairs v Fisher (P.C.)** [1980] AC. 319 to 328 [1979] 2. W.L.R. 889, 895, para E-F. He said:

> *"This is in no way to say that they are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the tradition and usage which have given meaning to that language. It is quite consistent with this and with the recognition that rules of*

> *interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."*

[35] Dr. Barnett's view is that the historical antecedent of the Constitution is necessary to interpret its provisions and, particularly, the provision relating to the tenure of office of a Senator.

[36] In **Hinds v The Queen (P.C.)** [1977] A.C. 195 at 211 para. D, Lord Diplock said when considering Chapter VII of the Jamaican Constitution:

> *"A written Constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made."*

He went on to explain that a written Constitution is fundamentally different in nature from an ordinary legislation passed by a Parliament. Therefore, one cannot strictly apply the cannons or rules of interpretation of legislation to a Constitution instrument. The Constitution may imply, by necessary implication, certain fundamental principles without using express words incorporating such principles as the separation of powers of the three organs of Government: legislative, executive and judiciary.

[37] The Privy Council confirmed the proper approach by the Court to the task of constitutional interpretation in **Reyes v The Queen** (2002) 60 WIR 42 [26]. Lord Bingham of Cornhill said:

> *"As in the case of any other instrument, the Court must begin its task of Constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the*

> *Constitution as if it were found in a will or deed or a charter party. A generous and purposive interpretation is to be given to the Constitutional provision* protecting human rights. The Court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental rights at issue and ensure contemporary protection of that right in light of evolving standards of decency that mark the progress of a maturing society".

[38] Lord Bingham of Cornhill specifically referred to Sir Dennis Bryon CJ's approach to constitutional interpretation in the consolidated appeals from the Eastern Caribbean Court of Appeal of **Spencer** v **The Queen and Hughes v The Queen** (reported April 2, 2000). There Byron CJ stated that it was the duty of the court to:

> *"give life and meaning to the high ideals and principles entrenched within the Constitution".*

[39] Both Counsel for the defendant and the Attorney General have accepted and agreed that a generous and purposive interpretation should be given to the Constitution. This interpretation is not only confined to the interpretation of the fundamental rights and freedom provisions of the Constitution.

[40] The Attorney General relied on the Full Court's adoption of the generous and purposive rule of the Constitution in **Maurice Tomlinson v CVM, TVJ Ltd. and PBCJ** (the 'Tomlinson case'), [2013] JMFC Full 5, at paras. 144-154, per Sykes, J.

[41] Mrs. Gibson-Henlin in her oral submissions, although agreeing with the principle of interpretation of the Constitution, applied it in a different way regarding the power of the Leader of Opposition to appoint Senators. Her position was that the Constitution framers intended the Leader of Opposition to have the power to appoint Senators and impliedly to request the removal of Senators to ensure that the people's representative fulfill their duty to govern.

Counsel relied on a passage by Peter W. Hogg in **Constitutional Law of Canada** (5th ed.) Vol. 1 Section 9.5 (c) to support her view. This extract deals with the problems or hindrance a Senate in a parliamentary system can cause to a responsible government. It is not helpful on the point of the right of a principal to revoke or terminate his authority under an agency. Further, the extract addresses the role of a Senate under a Federal Constitution system. **Hind's** case (supra. p211 para D-H and p 212 para A-G) shows that reliance should not be placed on decision that governs the role of a Senate under a Federal Constitution. It is the decisions based on a unitary Constitution that is applicable.

[42] Mrs. Gibson-Henlin's interpretation leans to the view that the intention of the Constitution framers was that it was the political representative that had the power to terminate the membership of a Senator. The corollary of that would be that the nominated Senator would have little or no power to decide his or tenure in the Senate.

[43] It appears in my view, applying the principle of generous and purposive interpretation to the provision of Chapter V of the Constitution and, particularly Sec. 41 (1) (b), that the high ideals, principles and values that the framers of the Constitution intended for the Senate are:

(a) A measure of security of tenure
(b) Independence of deliberation i.e. freedom to debate
(c) Separation of powers in the legislature
(d) Check and balance of powers within the legislature

[44] The values were intended to be used, applied and exercised for the benefit of the people and interest of the people of the country.

[45] Any act or decision by the Constitutional holder of an office that nominates Senators that conflicts or appears to run contrary to these fundamental ideals and principles would on the purposive interpretation of the Constitution be

inconsistent and /or in contravention of the Constitution and accordingly would be void.

Resignation

[46] Dr. Barnett submitted that the purported resignation of the claimant was not voluntary. He relied on **Tamukunde v Attorney General and Others** [2009] 4LRC 154, of the Supreme Court of Uganda, to illustrate the circumstances and results of a letter of resignation from a Member of Parliament that was found to be involuntary (para. 12 of claimant's submission).

The facts of this case are as follows; Brigadier Tamukunde who was a Member of Parliament and the army representative was directed by the army High Command to write a letter of resignation to the speaker of the House. He complied. Then he complained afterward that his resignation was forced by the army high command. He claimed that his resignation was contrary to the Constitution of Uganda and that the declaration by the Speaker that his seat was vacant was void. The applicant voiced comments about a Bill debated in Parliament during proceedings there and on a radio talk program without the permission of the army command.

Kenyehambra JSC held the following:

> *"A genuine voluntary resignation by a honourable Member of Parliament need not say more than the simple communication that he or she is resigning his parliamentary seat."*

The learned judge commented that the appellant's letter did not say that he was resigning but that he was directed to resign. He stated further:

> *"A Member of Parliament, the supreme legislative organ of the land should never have to resign under the threat of directive of anyone but only in accordance with the provisions of the country's*

> *constitution and laws made by Parliament and voluntarily."*

The learned judge found that the language of the letter of resignation was a soldier's obedience to superior orders under protest.

[47] Mrs. Gibson-Henlin distinguished that case from the dispute before this court. She said that there was no duress or fraud by the defendant in this case.

[48] I accept and agree with Dr. Barnett's submissions that although, the case is concerned with the resignation of a Member of Parliament and not a Senator, it contains principles that are equally applicable to the resignation of the latter.

[49] Also, although the Constitution of Uganda is not identical to the Constitution of Jamaica there is sufficient similarity in the terms regarding the absence of a power of removal of an appointed parliamentarian, which allows for the application of the principle that restricts the appointer or nominator of the Senator to remove him or her from office. I also bear in mind that the Ugandan Constitution was not a Federal Constitution.

[50] It is true on the facts of **Tamukunde** that some element of force or coercion was applied to the applicant by his superiors to resign. There is no such force as between the claimant and defendant. The letter of resignation was drafted by the claimant and signed by him and witnessed. It was made at a time and in an atmosphere of consensus. However, there was an element of pressure and undue influence exercised by the defendant at the time the letter of resignation was used. This affected the voluntariness of the letter and also its lawfulness and validity. This case in my view is, therefore, a persuasive authority to apply to this hearing.

[51] Counsel, Miss Carlene Larmond, drew the court's attention to the Malaysian case of **Datukong Ong Kee Hui v. Siniyium Awak Mutit** [1983] MIJ

36. Her submissions on this case were helpful and I find the case to also be of persuasive value.

[52] The issue in this case was whether the contract between a member of the House of Representative or State Legislative Assembly that his resignation from the party would entitle the defendant, as chairman of the party, and the party to submit a letter of resignation that was previously signed by the plaintiff to the speaker.

[53] The facts were that the plaintiff was a member of a political party. The defendant was chairman and Secretary General of the party. The plaintiff signed a letter of declaration as a condition to be a candidate on the party ticket. This declaration was addressed to the secretary general of the party and a letter of resignation was attach to it. The plaintiff agreed that upon being elected to be a member of the House of Representatives, he would donate the allowance paid to him and the secretary general would submit a letter of resignation to the speaker of the House if he committed any act against the party's interest.

The letter the plaintiff signed was without any date, the plaintiff was elected to the House of Representatives. Differences developed between himself and the party and resigned from the party. The secretary general then delivered the letter of resignation from the House to the Speaker. The court decided that such a contract was against public policy and the liberty of the Member. It also held that it was a wrongful act for the Secretary General to date and tender this letter to the Speaker.

[54] Mrs. Gibson-Henlin also distinguished this case from the instant one on the ground that there was nothing done by the defendant that was contrary to public policy. She argued also that the arrangement between the claimant and the defendant did not amount to a contract as in the Malaysian case. She submitted that there is no public element interest in that case. She appeared to

be implying that this claim was a matter of private interest only. Dr. Barnett had pointed out earlier in his submissions that even in private law and in ecclesiastical law, resignation bonds were found to be contrary to public policy and void. [**Stephenson v London Joint Stock Bank 19. TLR 138 and Fletcher v Lord Sondes** [1827] 4 ER826].

[55] This case too was not a case involving the Senate but the principle, I hold, is equally applicable to issues relating to the Senate under the Jamaican Constitution.

Agency

[56] Dr. Barnett submitted, in the alternative, that if the purported letter of resignation was valid, it only created a principal and agent relationship. The defendant was a mere agent to deliver the letter to the Governor General and has no other authority. Counsel for the claimant contended that even if the claimant could resign his office by this undated letter he would be:

> *"Equally entitled to withdraw his consent to the use of the document and repudiate its premature execution or unauthorized use". (Skeleton Submission of claimant para. 11, dated 11 June, 2014).*

He repeated this argument in his oral submissions and supported it by reference to Vol. (1) (2) Halsbury's Laws of England (4th ed.) para. 182 and **East Sussex County Council v Walker** [1972] 11TR 280. The first reference deals with the principle that a principal may terminate an agency by revocation and the agent may terminate it by renunciation. **The East Sussex** case deals with the issue that an employer who asked the employee to resign or to be dismissed by the employer is actually dismissing the employee who complies with that request.

[57] Counsel for the Attorney General, Miss Carlene Larmond, submitted that a principal may terminate his agency orally. A deed may be revoked by word of

mouth. She pointed out that it is only if the agency is revoked that one would go to the issue of revocation of the resignation.

[58] Mrs. Gibson-Henlin, for the defendant, takes a different position on whether the authority given to the defendant to submit the purported letter of resignation was revoked. She submitted that a resignation letter cannot be revoked without the consent of the person to whom it is communicated. It was not the defendant's understanding that the claimant had revoked his authority. There is no evidence that suggests that the defendant requested anyone to resign. The defendant would have had to get written instructions that the claimant withdraws his authority to submit the letter of resignation. The authority to tender the letter of resignation cannot be revoked.

[59] Mrs. Gibson-Henlin, in responding to the Attorney General's authority, accepted that revocation need not be by formal instrument. She submitted that there was no disavowance of the authority given to the defendant not to deliver that letter. I find that it is a settled principle of law that a principal can terminate, revoke or withdraw authority to an agent. The method of termination may be by word of mouth and does not necessarily have to be in writing.

[60] Based on the affidavit evidence of the discussions held and the differences of opinion about the resignation between the defendant and the claimant on Tuesday 12 November 2013 at the party's office, I hold that a reasonable person can imply that the claimant revoked, terminated or withdrew his authority to tender his resignation. Up to 12 November, the letter was not signed and dated by the defendant. There was an interval for the right to terminate, revoke or withdraw the letter of resignation. The wide discretion which appears on the face of the letter for the defendant to use it as he deemed necessary would not have amounted to an irrevocable authority to submit this letter to the Governor General. The individual's right to resign under the Constitution is personal and non-delegable. In my view the pre-dated letters of

resignation and authority to the defendant to date and use them are contrary to public policy, void and inconsistent with the Constitution.

Conventions

[61] Repeatedly and frequently, various writers who writes about the Constitutions of the Commonwealth Caribbean refer to the role of constitutional conventions as a mean of possibly resolving issues relating to the power and duties of office holders under the Constitution. Such discussions arose in respect to the powers to appoint Senators and the practice of individual Senators of resigning their seats (**Constitutional Law of Jamaica** by Lloyd G. Barnett, p. 210 para. 3 p. 211 para.1, p. 212 para. 1 p. 213 para. 1).

[62] Rose-Marie Bell Antoine in **Commonwealth Caribbean Law and Legal System** (2nd Edition Chapter 17) discusses the expected role of judges in a Caribbean Court of Justice. She draws attention to the view that there was a call for Caribbean judges to be more independent and indigenous in their thinking and to "strike out and mould the common law in their own likeness". This call may be re-directed to the political leaders and parliamentarians to mould the constitutional conventions in their likeness to assist the problem of when a Senator nominated by his or her party leader should resign. Dr. Barnett in his book suggests that this should be left to each individual case.

[63] New conventions can be created. This was Sir Fred Phillips' opinion in **Commonwealth Caribbean Constitutional Law** (1998). He said the following:

> *"Experience has shown that the categories of conventions are not closed. Further, as the Constitution in the Caribbean undergo change ... so new conventions - written and unwritten – will emerge and become respected as obligatory form of political behaviour". (Chapter 5 p.35)*

[64] Senator Tom Tavares - Finson appeared to have signalled a convention to the claimant that the way forward to the issue of resignation of a Senator should be by caucus of the Senators. It is not beyond political leaders and parliamentarians to create a constitutional convention regarding resignation of Senators to ensure effective administration of Government for the people.

Breach of the Charter of Fundamental Rights and Freedoms

[65] The claimant claims that the purported act of terminating his membership of the Senate by the defendant breached Section 13 (3), (b) (c) and (e) of his Charter rights (para. 6 of Declaration of Fix Date Claim Forms). Sec. 13 (2) (a) guarantees the rights of freedom set out in subsection (3). These are:

> "(a) …
>
> (b) the right to freedom of thought, conscience, belief and observance of political doctrines
>
> (c) the right to freedom of expression
>
> (d) ...
>
> (e) the right to freedom of peaceful assembly and association"

[66] The duties of the Senator are to deliberate by debating and voting on any Bill, law or policy that affects the welfare of the citizens of the country and the good order of the society. The nature of this duty necessarily involves the need for a Senator to be free to share his or her views, beliefs and opinions and to seek to persuade other members about human life, the state and government. By virtue of this responsibility and duty, any act or decision which interferes with these duties could implicate the rights and freedoms of thought, conscience, belief and observance of political doctrine as well as freedom of expression under Sec. 13 (3)(e) of the Constitution. It does not mean, automatically, that a claimant who alleges these breaches has established them. **Banton and Others v Alcoa Mineral of Jamaica** [1974], 12 J.L.R. 417, [1971] 17 W.I.R. 275). I apply **Banton's** case subject to the qualifications made by Dr. Barnett that it was a

decision based on the Fundamental Rights and Freedoms in Chap. 3 of the Constitution the predecessor of the Charter of Rights. I understand the submission that it is the state that must justify any infringement of a citizen's right and the burden is not on the citizen to show the state's action was unjustified.

[67] Ms. Larmond for the Attorney General has considerably assisted the Court by her written submission on these provisions. Counsel reviewed comprehensively a number of cases dealing with the scope of these rights. In addition, she supplied copies of each case cited in the Attorney General's Bundle of Authorities. I will summarise and highlight the main principles that I understand underline the cases and determine if any of them are applicable to the claimant.

Right to Freedom of Conscience

[68] This right is expressed together with the freedom of thought, belief and observance of political doctrine. They are related but, nevertheless, different.
Freedom of conscience is described as embracing not only religious beliefs but all types of philosophies or doctrines. It involves the right to carry out the external practice of one's belief to persuade others and to organize and manage its activities (Barnett, The Constitution Law of Jamaica, p 105). The right to freedom of conscience is wider than the right to hold a religion. It covers conscientiously held beliefs, whether grounded in religion or in secular morality (**R v Morgentaler** [1988] 1 SCR 30.

[69] Freedom of conscience relates only to serious belief in respect of a weighty and substantial aspect of human life. (**Council of European Human Rights, Handbook p. 16 Interpreting Article 9 of the Convention: General Consideration**).

[70] Freedom of conscience can involve a sincerely held belief (**Re Eric Darien, A Juror** [1974] 22 W. I.R. 323. It does not embrace something that

merely bothers the mind (**Charles v AG of Trinidad and Tobago** (TT 1983 HC 94).

[71] The letter of resignation drafted by the claimant for the specific purpose to ensure Senators abide by the official view of the party on the CCJ has the potential to hinder or interfere with a Senator's freedom of thought, conscience, belief and observance of political doctrine. A letter of resignation for this purpose is inconsistent with the scheme of the Constitution.

[72] The use of the letter of resignation for a wider purpose such as securing party allegiance or loyalty to a party leader could also breach these freedoms except though these hindrances to the Senator would be specific to his duty as a Senator and not generally at large. A Senator would remain free to express his political beliefs and thoughts with others. I also agree that the claimant have not sufficiently particularise these breaches in his claim to move the court to grant him relief on either of these grounds

Freedom of Expression

[73] Like the right to freedom of thought, conscience and belief, the right to freedom of expression could be implicated by a letter of resignation to the Senate requiring a Senator to take a party stance on a matter of public interest. A person is entitled to express views, belief and opinions that may be unpopular, distasteful or contrary to the mainstream. Diversity of ideas is inherently valuable both to the community and individual. This was how the Canadian Court explained the right to freedom of expression (**Irwin Toy Ltd. v Quebec (Attorney General)** [1989] [SCR 92].

[74] The European Court of Human Rights in **Lingers v Austria** [1986] 8 EHRR 407 at 418 para. 38 explains the right to freedom of expression thus:

> *"..... one of the essential foundation of a democratic society and one of the basic condition for its progress*

> *and for such individual self fulfillment .... . It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"..."*

The case demonstrates that the right to freedom of expression is valuable both to the individual and the society. The use of a letter of resignation for the express purpose alleged by the claimant or generally as alleged by the defendant could restrict the freedom to fully and openly discuss a matter of public importance. This was likely to offend their protection of the rights for a Senator and the community. Once again, the restriction is more in the context of the Senator within Parliament. He or she is free otherwise to express views and opinions privately. It is more the public or community interest that is affected when a nominated person or body make use of a letter of resignation as the one in question. Therefore, I do not find that that right was breached in relation to the claimant. The parliamentary privilege, rules and regulations, which are a part of our common law and statutes, can be relied on by the Senator to enforce any breach of his right to freedom of speech in Parliament.

Freedom of Association

[75] The Privy Council in **Collymore v A.G.** [1969] 1 W.I.R. p 229 to 234 accepted Wooding CJ's definition of freedom of association below:

> *"In my judgment, the freedom of association means no more than the freedom to enter into consensual arrangements to promote the common interest objects of the associating groups. The objects may be many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right not licence for a course of conduct or the commission of acts which in the view of Parliament are limited to the peace, order and good governance of the country."*

[76] The use of the letter of resignation by the defendant does not affect the claimant's ability to enter into association with or to continue to consensually associate with other members of his party to pursue the main objectives of his party as set out in the Party's Constitution. He does have a right to support or not to support a contestant in an internal party leadership election. He should not be penalized by a party leader for his choice. But if there is any such act, it is not the same as, and does not amount to, a breach of his right to enter and pursue consensually acts with other members of his party to promote the objective of seeking state power.

[77] The main thrust of the claimant's argument here is that the right to freedom of association includes the right to disassociate. His choice, he says, not to support either candidate in the party's leadership election was an exercise of the right to freedom of association. The claimant says the party's (JLP) constitution permits the election of officers at its annual conference and any member is free to support whoever they wish to support. To do an act which affects this is a breach of his constitutional rights, he contends.

[78] Dr. Barnett relied on the authority of Halsbury's Laws of England/Rights and Freedom (Vol. 88A (2013) 5th Edition\para. 465), that any compulsion placed on a person in the exercise of this right is a breach of his or her right to association. He said, "the notion of freedom imply some measure of freedom of choice as to its exercise" (**Sonensor v Denmark** [2006] 46 EHRR 577). There may be some force in this argument except that **Collymore's** decision (supra.) seems to suggest that the right to freedom of association does not include the means to associate, e.g. the right to strike. So, in my view the right under the party's Constitution to participate in pre-election activities is a means related to the freedom of association. It is not one and the same as the fundamental right of association.

[79] In the final analysis, I do not find that there is a breach of any of the rights and freedoms alleged by the claimant.

Conclusion

[80] In the result, I do concur with my learned colleagues, McDonald - Bishop J and Batts J, that the declarations that should be granted by this court on the basis of our reasoning and conclusions should be as follows:

(1) That the request for and procurement of pre-signed and undated letters of resignation and letters of authorization by the Leader of the Opposition from persons to be appointed or appointed as Senators to the Senate of Jamaica, upon his nomination, is inconsistent with the Constitution, contrary to public policy, unlawful, and is, accordingly, null and void.

(2) That the pre-signed and undated letters of resignation and letters of authorization, as well as the manner of their use to effect the resignation of Senators (the claimant in particular) from the Senate of Jamaica, are inconsistent with the Constitution, contrary to public policy and are, accordingly, null and void.

Costs

[81] I concur that there should be no order as to costs in this hearing and I adopt the reasons of McDonald-Bishop J in relation to this order.

MCDONALD-BISHOP J

[82] This matter raises as a broad issue the constitutionality of a scheme in which pre-signed and undated letters of resignation and letters of authority were executed by Opposition Senators, either prior to or on the date of their appointment, authorizing the Leader of the Opposition to effect their resignation

from the Senate whenever, he, in his absolute discretion, should consider it necessary to do so.

[83] The central questions that have been presented for consideration are whether (a) the letters themselves, (b) the request for them and (c) the use of them by the Leader of the Opposition to effect the resignation of an Opposition Senator who had refused to resign when requested to do so are in conflict with Jamaica's constitutional scheme and, therefore, unconstitutional and void.

[84] A related but collateral issue that also arises for consideration is whether the Leader of the Opposition, in using those letters in the circumstances he did to render the Senator's seat in the Senate vacant, had infringed the Senator's right to freedom of conscience, association and expression guaranteed to him by section 13 (3), (b), (c), and (e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter of Rights").

The parties

[85] Mr. Arthur Williams, the claimant, is a member of the Jamaica Labour Party ("the JLP") and, at the time of filing his claim, was a member of the JLP Central Executive and Standing Committee. He had been a member of those bodies since 1989. Between November 2002 and January 2012, he was appointed a member of the Senate of Jamaica by the Governor General upon the recommendations of the three successive leaders of the JLP over the period. Mr Andrew Holness, the defendant, was the last to nominate him for appointment.

[86] The defendant is a former Prime Minister of Jamaica and, currently, Leader of the JLP and the Parliamentary Opposition.

[87] The Attorney–General was served with the claim pursuant to rule 56. 11 (3) of the Civil Procedure Rules, 2002 ("the CPR") and has joined in the proceedings as a neutral party.

The undisputed factual background – an overview

[88] In the December 2011 general elections, the JLP was defeated at the polls by its major rival, the People's National Party ("the PNP"). The JLP became the Parliamentary Opposition. The defendant was replaced as Prime Minister and was selected as Leader of the Parliamentary Opposition. The claimant, within that new dispensation, was, in January 2012, appointed a member of the Senate by the Governor General upon the advice of the defendant. He was appointed Leader of Opposition Business in the Senate and was also assigned, then, to the Office of the Leader of Opposition as Chief of Staff.

[89] Following discussions with the defendant concerning persons to be appointed as Opposition Senators following the general elections, the claimant, in agreement with the defendant, prepared undated letters of resignation and letters of authority to be signed by each Opposition Senator to be nominated by the defendant for appointment to the Senate.

[90] The undated letters were signed by the seven Opposition Senators who were appointed on 16 January 2012. Two such Senators, who are of immediate relevance to these proceedings, were the claimant and Dr. Christopher Tufton. The claimant is relying on the affidavit evidence of Dr. Tufton, filed in these proceedings, in support of his claim.

[91] The letters of all the Senators were identical in terms except for the names of the Senators and the names of the witnesses. The letters were all signed and shown to have been witnessed on the same date of their appointment to the Senate, being 16 January 2012. The claimant, apart from being the deviser of the scheme, also authored the letters and witnessed the signatures of other Senators. The Senators were duly appointed by the Governor General upon the nomination of the defendant with the undated letters of resignation secured by him.

[92] Following the appointments, there was (what one may call) a divisive leadership race within the JLP between the defendant and Mr. Audley Shaw, a then Deputy Leader of the party. The defendant emerged the victorious candidate in the aftermath of the 'leadership elections' held on 10 November 2013.

[93] Upon the reinstatement of the defendant as party leader, there were discussions among the Senators as to whether they should resign to give the defendant a 'free hand' to re-organize the internal party machinery. Some Senators expressed their willingness to resign and eventually did so by submitting 'fresh' letters of resignation. The claimant and Dr. Tufton saw no reason to resign. Accordingly, the claimant refused to write a 'fresh' letter of resignation and he did not authorize the defendant to sign and date the pre-signed and undated resignation letters he had submitted to him.

[94] In the face of the claimant's refusal to resign, the defendant dated and affixed his signature to the letters given to him by the claimant and submitted them to the Governor General. Dr. Tufton's letters were also treated in the same manner. The Governor General, upon receipt of the pre-signed letters of resignation, accepted them as the resignation of the claimant, as they were purported on the face of them to be. The acceptance by the Governor General of the purported resignation rendered the seat of the claimant in the Senate vacant.

[95] In the light of the action of the defendant in 'effecting the claimant's resignation' and thereby causing his seat to become vacant in the Senate, the claimant initiated these proceedings against the defendant by Fixed Date Claim Form filed 19 November 2013.

The claim

[96] The claimant seeks the following reliefs as set out in his claim:

> *"1. A Declaration that an undated letter of resignation and a letter authorizing the Defendant to date and use the same which had been signed by the Claimant were used by the Defendant other than for the purpose for which they had been given and therefore were unlawfully used and accordingly are void and of no effect.*
>
> *2. A Declaration that based upon the Claimant's stated position that he would not resign as requested, he had effectively revoked the said letters.*
>
> *3. A Declaration that the very fact of requesting these undated letters of resignation from all persons to be appointed as Senators under nomination of Leader of Opposition is contrary to Jamaica's constitutional scheme and is inconsistent with the Constitution.*
>
> *4. A Declaration that the undated letters of resignation and the manner of their use are void as being inconsistent with the Constitution by seeking to give to the Defendant the right to power to effect the resignation of the Claimant at the Defendant's volition and timing.*
>
> *5. A Declaration that by using the undated letters of resignation for the reason that the Claimant did not support the Defendant in the election for leadership of the Jamaica Labour Party is inconsistent with the Constitution of the Jamaica Labour Party and the Constitution of Jamaica.*
>
> 6. *A Declaration that the use of the undated letters of resignation on the basis that the Claimant did not support the Defendant in the election for leadership of the Jamaica Labour Party contravenes the Claimant's constitutional rights to the freedoms of conscience, association and expression protected by*

section 13 (3), (b), (c), and (e) of the Charter of Rights.

7. *An Injunction restraining the Defendant from making any nomination for the appointment of a new member of the Senate of Jamaica which would purport to fill alleged vacancies created by his use of undated resignation letters of two Senators including the Applicant, pending a final determination of this matter by the Court or agreement between the parties.*

8. *An Order for any further or other relief to which the Claimant is entitled or which the Court considers to be just."*

[97] The claimant was unsuccessful in his application for the injunction sought in paragraph (7) of his Fixed Date Claim Form. With the injunction denied, the defendant obtained the freedom he desired to nominate a new candidate for appointment to the vacant seat, which he eventually did.

The impugned letters

[98] In an effort to promote a fuller appreciation of the import of the letters at the centre of this dispute, it is considered fitting to disclose their terms at this juncture before the case advanced by each party is examined.

Letter # 1

[99] The letter addressed to the defendant reads thus:

> *"Arthur Williams*
>
> *The Leader of the Opposition*
> *1 West King's House Road*
> *Kingston 10.*
>
> *Dear Opposition Leader*
>
> ***<u>Re: The Senate of Jamaica</u>***
> *Upon your advising the Governor General of Jamaica to appoint me a Senator, I have signed and delivered to you an undated letter of resignation as a Senator.*

You are hereby authorized at your sole discretion to date this letter and deliver to the Governor General of Jamaica at any time you deem necessary.

Yours faithfully

SGD: <u>[Arthur H. W. Williams]</u>

Arthur Williams

Witnessed by: *<u>SGD: [Tom Tavares-Finson]</u>*

Tom Tavares-Finson J.P.
January 16, 2012"

This letter shows and endorsement (in pen) of the date, 14/11/2013, above the signature "*Andrew Holness*". This signifies the signing of the letter by the defendant on that date. The letter also bears a date stamp with the words, "*Received 14 Nov 2013 Kings House*" which signifies the receipt of the letter by the Governor General on the said date.

Letter # 2

[100] The second letter was addressed to the Governor General, which reads:

"Arthur Williams

His Excellency
The Governor General of Jamaica
Kings House

Dear Governor General

<u>Re: The Senate of Jamaica</u>

I hereby tender my resignation as a Member of the Senate of Jamaica, with immediate effect.

This letter was signed by me and delivered to the Leader of the Opposition at the time of my appointment to the Senate, on the clear understanding that he is authorized to date this letter

and deliver to Your Excellency at any time he deems necessary.

Yours faithfully

SGD: [Arthur H. W. Williams]
Arthur Williams

Witnessed by: SGD: [*Tom Tavares-Finson]*

Tom Tavares-Finson J.P.
January 16, 2012"

This letter, like the one addressed to the defendant, bears the signature of the defendant with the date, "14/11/2013", and the date stamp of Kings House imprinted thereon showing "*Received 14 Nov 2013 Kings House*". That signifies receipt by the Governor-General on the said date.

Letter # 3

[101] The third letter was also addressed to the Governor General and it reads:

"*Arthur Williams*

His Excellency
The Governor General of Jamaica
Kings House

Dear Governor General

Re: The Senate of Jamaica

I hereby tender my resignation as a Member of the Senate of Jamaica, with immediate effect.

Yours faithfully

SGD: [Arthur H.W. Williams]
Arthur Williams

Witnessed by: SGD: [Tom Tavares-Finson]

Tom Tavares-Finson J.P.
January 16, 2012"

This letter was, similarly, signed and dated by the defendant on 14 November 2013 and, like in the case of the other two letters, it was received at Kings House on the same date as evidenced by the date stamp.

[102] The defendant has admitted that he had received those letters, that he dated them and delivered them to the Governor General on the dates reflected on the letters, which would be 14 November 2013. It is accepted, therefore, that this action precipitated the termination of the claimant's tenure in the Senate as of that date.

The claimant's case

[103] The case advanced by the claimant may be summarized thus: He was actively involved with the defendant in his consideration for persons to be chosen for recommendation to the Governor General for appointment as Opposition Senators. The defendant was deeply concerned that no one should be appointed who was not likely to be, during the term of office, committed to the position of the JLP with respect to the Caribbean Court of Justice ("the CCJ") and who could, therefore, be likely to vote other than in accordance with the official position of the JLP on that issue. Accordingly, sets of three letters were prepared by him, (the claimant) for each person to sign.

[104] He acted and signed the letters in the belief and on the basis that they would be used only for the stated purpose and for no other purpose. He had never been asked by any previous Leader of Opposition, under whose aegis he was appointed a Senator, to sign undated letters of resignation. The defendant was, therefore, the first to make such a request.

[105] After the leadership election was completed, he met with the defendant on 12 November 2013 and explained to him his reasons for staying out of the leadership race. The reason he gave to the defendant was that he had worked closely with both the defendant and Mr. Audley Shaw. The defendant responded

by saying that at the time, those who did not support him would have to make way for those who supported, that those who did not support could be considered in the future, and that some have to get back to work in their constituencies. He then advised the defendant of his position that he would not resign and also that Dr. Tufton had advised him that he, too, was not resigning.

[106] The defendant told him to bear in mind that he had a document that he could use and that he should have discussions with Dr. Tufton again and then to advise him (the defendant) of the decision made by Dr. Tufton and him. Later that evening, he saw a television clip of the defendant saying that he was not interested in individual resignation of Senators but an *en bloc* resignation of all Opposition Senators, as a matter of principle.

[107] He had publicly indicated his intention to attend the Senate meeting on 15 November 2013 for the matter to be discussed. However, at 9:14 a.m. that morning, he received a telephone call from the defendant advising him that he had utilized the letters by dating and giving them to the Governor General and that the Governor General had accepted them as his resignation.

[108] He was in no agreement with any desire or request for all Opposition Senators to resign on the basis of internal party leadership elections and he did not offer his resignation or publicly indicate any intention to the defendant that he would resign nor did he tender any resignation to the Governor General.

[109] The main planks of the claimant's allegation of unconstitutionality in respect of the letters and the defendant's use of them are broadly outlined as follows:

(i) Section 41(1)(b) of the Constitution states, *inter alia*, that the seat of a member of either house shall become vacant if he resigns his seat. There is no provision giving the Leader of the Opposition the power or anything to terminate the appointment of the Senator and the demand of

the undated letter of resignation is inconsistent with the Constitution as seeking to obtain indirectly what cannot be obtained directly.

(ii) The procurement and use of the letter, other than for the purpose for which it was intended or agreed, renders its use unlawful, unauthorized and void.

(iii) The letters were inconsistent with the constitutional scheme provided by section 137 of the Constitution, which provides that a person appointed to any constitutional office may resign from that office by writing under his hand addressed to the person by whom he or she was appointed and the resignation takes effect when it is received by the appointing person. The resignation was not in accordance with this constitutional scheme. The letters were also, otherwise, inconsistent with the Constitution, in that, they made the appointment of the Senator continuously conditional, which is a situation not authorized or countenanced by the Constitution.

(iv) The letters were used by the defendant for a purpose other than for which they were given as no issue had arisen with respect to the CCJ but were used because of the claimant's refusal to resign or to tender his resignation and/or did not support the defendant in the election for party leader.

(v) Based upon his stated position of not resigning or wishing to resign, the claimant had effectively revoked the said letters.

(vi) Further or alternatively, the defendant has contravened his fundamental rights to freedom of conscience, association and expression guaranteed by the Charter of Rights by seeking to revoke his appointment as a Senator on the basis that he had not supported him in the party leadership election.

The defendant's response

[110] The main components of the defendant's response to the claim will now be summarized. He contends as follows:

(i) Upon becoming Leader of the Opposition, he entrusted the claimant with the important position of Chief of Staff in the Office of the Leader of the Opposition and agreed to appoint him Leader of Opposition

Business in the Senate. This position has responsibility for ensuring the unity and stability of the Opposition members of the Senate. At the time, concerns were expressed by members of the party, including the claimant, about the unity and stability of the Opposition Senators having regard to its history whilst in opposition.

(ii) Accordingly, the claimant, in his capacity as an attorney-at-law and Leader of Opposition Business in the Senate, devised a scheme, which he advised would preserve the stability and unity of the Opposition in the Senate. The claimant further advised that the scheme was constitutional and that he would present it to the Opposition Senators. The scheme was devised and executed by the claimant and he received the pre-signed letters that were created and drafted by the claimant. The claimant devised and authored the words of the letters and so wrote the letters of his own free will.

(iii) The defendant was authorized by the claimant to date and deliver the letters of resignation freely given by him at the time of his appointment to the Senate. So accordingly, he dated and delivered them to the Governor-General on 14 November 2013.

(iv) The words of the letters are clear and unambiguous on the face of them and there is no question as to the authority that was granted to him that he could use the letters of resignation as he saw fit. The claimant cannot say that he did not choose willingly to grant permission for his resignation to be tendered as he, the defendant, deemed it necessary. Any dispute in this area ought to be resolved in his favour in so far as the claimant was a major player in this co-opting of other Senators to the scheme.

(v) is use of the letter is neither in contravention of convention, the JLP's Constitution nor the claimant's constitutional rights to freedoms of expression, conscience and association under the Charter of Rights. It is not clear how the right to freedom of expression is violated.

(vi) There is no evidence that the claimant revoked the letters before he had acted upon them or if he had revoked the letters, such notice had come to his attention.

(vii) His use of the resignation letter was, therefore, valid. He acted on the authority given to him by the claimant to use the letters as he deemed necessary. The letters, duly created and signed by the claimant, were effective to secure his resignation in accordance with section 41(1)(b) of the Constitution upon being duly executed by him (the defendant) as authorized. There is nothing in the section that prevents the claimant authorizing his resignation as was done in the instant case.

(viii) There is thus no reasonable basis for the claimant bringing the claim and the claimant ought to be refused the reliefs sought.

Discussion and findings

A. The purpose of the letters

[111] While there is not much divergence in the parties' account as to the circumstances giving rise to this claim, it is evident that one area of significant dispute between them relates to the purpose for which the letters in question were devised and to be used. This issue as to the purpose for which the letters were devised and to be used would turn for resolution on the credibility of the parties. There was, however, no effort made to cross-examine by either of the parties and so the court was not placed in a proper position to make any assessment or determination as to whom to believe on the issue.

[112] Furthermore, although Dr. Tufton had deposed on behalf of the claimant, he only managed to state what he was told by the claimant on the issue as to the reasoning behind the intended purpose of the letters. He is, therefore, not able to speak to what the defendant had said, in truth and in fact. So, it is really the claimant's words against the defendant's. I would, therefore, refrain from positing any view on the credibility of the parties on this matter as to the purpose of the letters having not seen or heard any of them in the witness box.

[113] The court, therefore, would have to take the letters as they are on the face of them and construe them accordingly. What is clear on the face of them is that no reason was stated as a condition-precedent for their use. It does seem from a

literal interpretation of their unambiguous terms that they were given to the defendant for use, in his absolute discretion, as he saw necessary and without any reference to any specific occurrence or event.

[114] More importantly, however, and in any event, it is my view that the resolution of this area of factual dispute is not critical, or I dare say, relevant, to the core question for determination by this court. This is so because whatever the purpose for which the letters were devised and intended to be used, the question for resolution is, simply, one of law and that is what is the legal nature and effect of those letters within the constitutional framework. The core question is whether the letters should have been devised, in all the circumstances, and used as they were by the defendant to render seats in the Senate vacant.

[115] In the end, the resolution of the factual area of dispute as to whether the letters were geared at engendering unanimity on the CCJ vote or aimed at a broader issue of securing party unity and stability has no bearing on the fundamental question of their constitutionality. The purpose is immaterial, as it were, in the scheme of things.

B. Issues relating to the validity and constitutionality of the letters and their use

[116] Having concluded that the purpose for which the letters were devised is irrelevant, I have identified, with the invaluable assistance of counsel, the pertinent issues relating to those letters and their use that now arise for resolution. They are as follows:

(1) Whether the questioned letters of resignation are valid and effectual to effect the resignation of the claimant from the Senate within the Constitution.

(2) Whether the procurement and use of the letters by the defendant to effect the resignation of the claimant from the Senate was valid and constitutional, having regard to the circumstances in which they were requested, prepared and used.

[117] These are, of course, seen as inter-related issues that have been conveniently examined together during the process of my evaluation of the evidence and the applicable law.

Issue #1: Whether the questioned letters of resignation are valid and effectual to effect the resignation of the claimant from the Senate within the Constitution.

The legislative framework

[118] It is considered pertinent to set out from the outset the legislative framework created by the Constitution within which these issues have been examined.

[119] Section 35 of the Constitution makes provision for the appointment of Senators, twenty-one of them, to be by the Governor General (s. 35(1)). It provides, however, that the appointment of thirteen should be on the advice of the Prime Minister (s. 35 (2)) and the appointment of eight upon the advice of the Leader of the Opposition (s. 35(3)).

[120] Section 41 makes provisions for the tenure of offices of Senators and Members of the House of Representatives. The section enumerates, in its various subsections, nine ways in which the seat of a Senator may become vacant: See sections 41(1) (a-g), (3)(a) and (4)(a).

[121] One of the relevant methods for our purposes is the resignation of the Senator as provided in section 41(1)(b). That subsection states, in so far as is relevant for immediate purposes, that the seat of a member shall become vacant "if he resigns his seat."

[122] It is duly noted that there is no express provision under section 41 that the seat of a Senator shall become vacant upon the advice of the Prime Minister or the Leader of the Opposition who may have nominated them for appointment.

[123] Section 137 makes further provisions with regards to resignation by a person from any office established by the Constitution, which would include the Senate. Section 137(1) reads, in so far as is relevant:

> *"(1) Any person who is appointed, elected or otherwise selected to any office established by this Constitution (including the office of Prime Minister or other Minister or Parliamentary Secretary) may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed, elected or selected:"*

[124] Section 137 (2), then, continues:

> *"(2) The resignation of any person from any such office as aforesaid shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or any person authorized by that person or authority to whom it is addressed or by this Constitution to receive it."*

[125] Section 44 (1) confers on this court the power to determine the question that has arisen concerning the claimant's seat in the Senate that was rendered vacant on the basis that 'he had resigned his seat'. There is thus no question that the questions for resolution do fall within the jurisdiction of this court.

Whether the claimant 'resigned' within the meaning of the Constitution

[126] The defendant's contention is that the claimant had validly resigned by virtue of the prior authorization given to him by the claimant to use the pre-signed letters of resignation as, he, the defendant would deem it necessary. He, therefore, contends that there was nothing unconstitutional about the circumstances in which the claimant's seat had become vacant in the Senate because the claimant had validly resigned. This now arises for contemplation.

[127] The resolution of this question as to whether the claimant had resigned, in fact and in law, is one that requires an objective analysis of all the circumstances within the framework of the applicable law. It becomes necessary at this juncture to examine the provisions of section 137 of the Constitution (paragraphs [123] and [124] above), which provides part of the legislative framework within which the circumstances have to be examined. Therefore, the relevant question to be asked and answered is whether the claimant, on 14 November 2013, resigned by "*writing under his hand addressed to the person or authority by whom he was appointed, elected or selected."*

[128] In an effort to bring greater clarity to the issue as to whether the claimant had resigned his seat in the circumstances, counsel for the claimant went as far as to put before the court the definition of the word '*resign'*. The definition in the ***Shorter Oxford English Dictionary on Historical Principles***, third edition, was relied on. It provides several different connotations of the word, but one of immediate relevance for our purposes is the one that relates to an office, which is: *"To relinquish, surrender, give up, or hand over (something): esp., an office, position, right, claim, etc."*

[129] On the basis of my acceptance of that meaning of the word 'resign', the crucial question, therefore, is whether it can properly be concluded that the claimant, on 14 November 2013, or at any other time, had *relinquished, surrendered, given up or handed over* his position as Senator by writing under his hand addressed to the Governor General who had appointed him.

[130] Dr. Barnett maintained that the Constitution is to be interpreted in the light of its historical antecedents. He pointed out, within that context, that historically the system of government that Jamaica adopted from England did not countenance even voluntary resignation from or voluntary termination of parliamentary membership. Accordingly, he said, any provision in the Constitution relating to resignation from Parliament has to be strictly construed.

[131] Upon examining the facts in an effort to ascertain whether the claimant had resigned, the first thing I have noted is that the actual letter of resignation, albeit said to be undated, was, in fact, prepared and signed by the claimant on the 16 January 2012, the date of his appointment to the Senate (letter # 3 above). This conclusion is based on the fact that the letter bears the signature of the claimant and was signed as being witnessed by Tom Tavares–Finson JP, on that date. That letter states that the claimant was resigning "with immediate effect". If that letter were read alone, it would mean that the claimant would have been resigning on the same date of his appointment.

[132] That resignation letter, however, was not intended to stand alone but was intended by the maker to be read and construed with the other letters that were simultaneously prepared and dated, one addressed to the defendant and the other to the Governor General (Letters # 1 and #2 above). The letter from the claimant to the defendant authorized the defendant, at his sole discretion, to date the letter of resignation and to deliver it to the Governor General at any time he deemed it necessary. The Governor General was advised by the claimant in the letter addressed to him of that authority he had given to the defendant. The letters were, however, not presented to the Governor General on the date they were signed and witnessed.

[133] After that date, the claimant served as a Senator with there being no resignation 'of immediate effect' as stipulated in the letters of resignation. So, at the time the claimant handed the letters to the defendant, he had no intention to resign. While the claimant occupied the seat in the Senate, with no intention to resign and with nothing conveyed by him to the defendant that he would resign at any time, the letter was submitted to the Governor General by the defendant as he saw it necessary to do on 14 November 2013. That was, therefore, the effective date of the purported resignation. The question now is: Did the claimant, in the light of these circumstances, *resign by writing under his hand* on 14 November 2013?

[134] The facts do show that on 14 November 2013, the claimant did not indicate to the defendant that he was resigning. In fact, there is clear and undisputed evidence that the claimant had indicated to the defendant, on 12 November 2013 (two days before), his objection to the suggestion that he resigned his position and had conveyed his intention to discuss the matter further with the defendant.

[135] An examination of the terms of the letters reveals that there was no simple fact of resignation by the claimant, without more. The contents of the letters show, above anything else, the authority given to the defendant on the date of the claimant's appointment to have the claimant's seat rendered vacant whenever the defendant should consider it necessary, in his **sole** discretion, to do so by submitting the pre-signed letters to the Governor General. This would mean, that the resignation letters could have been submitted without any further consultation with or reference to the claimant as to whether he was ready to resign at any time. This was what eventually occurred, when, the defendant, without the claimant's knowledge and concurrence, delivered the letters to the Governor General.

[136] The mere fact that the letters were signed and dated by the defendant in the context of the situation where the claimant had expressly stated to him that he had no desire to resign means that the defendant submitted them to the Governor General to effect the resignation of the claimant at a time he deemed necessary as opposed to when the claimant deemed it necessary to do so.

[137] It is clear that the submission of the letter to the Governor-General that precipitated the claimant's 'resignation' was not the act of the claimant and it certainly was not done with his concurrence and this was known to the defendant. It was all the act of the defendant done with his sole and clear intention that the time had come for the claimant to leave the Senate. There was thus no coincidence of the act resulting in the claimant's 'resignation' with the

requisite intention on the part of the claimant to resign at the time the letters were delivered to the Governor General.

[138] It follows, therefore, that the claimant did not, himself, submit or, at any rate, voluntarily submit, his resignation on 14 November 2013 when the letters were received by the Governor General. Even more importantly, he did not authorize the defendant to submit them on that date, having refused to tender his resignation to the certain knowledge of the defendant.

[139] Mrs. Gibson-Henlin has submitted, on behalf of the defendant, that the resignation letters were written instructions from the claimant to the defendant and that there was nothing in the claimant's affidavit evidence to say that he had indicated to the defendant that he had withdrawn the authority given. The inference to be drawn, she said, was that the defendant did not understand that the authority was withdrawn. What would have given effect to the revocation of the authority, she said, would have been a written document in those terms. A written revocation would have been required to go to the defendant and copied to the Governor General so that the defendant would have known that the agency given to the defendant was withdrawn, she argued.

[140] With all due respect to learned counsel, I cannot accept those submissions in the context of the circumstances of this case. I find that the express indication to the defendant of the claimant's disagreement to resign at that time, was a clear and unequivocal communication to the defendant that the claimant was not agreeing to the use of the pre-signed letters to effect his resignation at that time. Whether one calls it revocation of the authority, suspension of it or withdrawal of it, the fact is that the defendant knew, at that point in time when he signed and dated the letters of resignation and delivered them to the Governor General, that the claimant was not agreeing to him using the letters. Communication of the revocation of the authority in writing was, in my view, unnecessary.

[141] In any event, I find that this issue as to revocation of authority and whether it should have been done in writing or not is one that is totally irrelevant to the issue at hand concerning the validity and constitutionality of the purported resignation. I, therefore, do not see the need to embark on any further or more mature consideration of the point. I say this because I find that I am in agreement with the meritorious submissions made on behalf of the claimant that for a resignation to be valid, it must be voluntarily made by the person resigning. I accept, as argued by counsel for the claimant, that a valid resignation requires the intention as well as the act of resignation on the part of the person resigning.

[142] I am persuaded to the view advanced on behalf of the claimant through the authority of **Sandhu v Jan De Rijk Transport Ltd** [2007] EWCA Civ 430, that "resignation predicates a result which is a ***genuine choice*** on the part of the [person resigning]." There was no choice, whatsoever, on the part of the claimant, genuine or otherwise. In actuality, the person desiring the claimant's resignation was the defendant. He was the one with the intention that the claimant should resign and he brought about that intended result when he submitted the letters to the Governor General on 14 November 2013.

[143] In actuality, then, the letter of resignation, delivered to the Governor-General, was not issued under the hand of the claimant or by the defendant with the concurrence of the claimant and on his authority but by the defendant in the exercise of his sole and absolute discretion against the wishes of the claimant. This, therefore, brings into sharp focus, the validity of the letters issued under such circumstances and the defendant's use of them within the constitutional scheme provided by sections 41 and 137.

[144] I find as rather instructive and of high persuasive worth on this issue of the validity of the letters and the use of them by the defendant, the reasoning and conclusion of the Supreme Court of Uganda in **Tumukunde v Attorney General and Another** [2009] 4 LRC 154, a case relied on by the claimant. In that case,

the appellant, Tumukunde, was a soldier and a Member of Parliament as an elected representative of the Uganda People's Defence Forces ("the UPDF"). He made remarks in Parliament and in the media about a certain bill, which was tabled for debate. The Army's standing orders forbade speaking to the press without permission. Tumukunde was directed to resign his seat within 12 hours, which he did. His letter to the Speaker, the person to whom the resignation should have been addressed, indicated: *"I was directed to write to you Mr Speaker"*. Then it went on: *"The purpose of this letter is to draw your attention to the above directive and to write to you. I accordingly comply."*

[145] The Speaker, upon receipt of the letter, instructed the Clerk of Parliament to notify the electoral Commission of the vacant seat arising from Tumukunde's resignation. Tumukunde petitioned the Constitutional Court for a declaration that he remained a Member of Parliament. Article 83 of the Constitution of Uganda dealing with the tenure of a Member of Parliament was similar to our section 41.

[146] The Constitutional Court dismissed Tumukunde's petition, holding that he had lawfully resigned. He appealed and his appeal was allowed by the Supreme Court. The court found unanimously that Tumukunde did not lawfully resign on the basis that a resignation requires a voluntary act on the part of the person resigning and that was absent in his case.

[147] In that case, the Attorney General had, reportedly, argued, *inter alia,* that the three ingredients of an effective resignation are that the resignation be in writing, be signed by the person resigning and be addressed to the Speaker of Parliament. Tumukunde's resignation, according to those submissions, fulfilled the three ingredients. The same could be said, *prima facie*, of the claimant's letters as argued by counsel on his behalf. The Supreme Court of Uganda, however, rejected that argument.

[148] I have had the distinct privilege to read all the judgments of their Lordships of the Supreme Court and have found them quite instructive, in particular, the comprehensive lead judgment of Kanyeihamba JSC. A portion of his reasoning, which I would adopt, reads thus:

> *"Whereas it is clear that the constituencies of members of Parliament are different when they join Parliament and are sworn in, they all, without exception, become honourable members of Parliament with common tasks, rights, obligations, immunities, and privileges and can only be removed before the expiry of their respective terms of tenure in accordance the provisions of the Constitution."*

[149] After re-stating the provisions of Article 83 of the Constitution of Uganda and the sections he found applicable, his Lordship continued:

> *"An analysis of the appellant's resignation letter reveals more than the resignation prescribed by the Constitution. The letter is a speaking instrument which means that it contains and reveals much more than what the Constitutional Court deemed it to be and, therefore, is subject to judicial review.*
>
> *A genuine voluntary letter of resignation by an honourable member of Parliament need not say more than the simple communication that he or she is resigning the parliamentary seat immediately or with effect from a certain date. He or she may simply state that 'I hereby resign' without further ado. Consequently, the Speaker and anyone else reading the appellant's letter which I reproduce hereafter in this judgement for clarity and understanding is bound to ask whether it is a resignation or a cry for help. The letter written in the appellant's long hand speaks volumes..."*

[150] After examining the features of the letter, the learned judge, then, concluded, in so far as is relevant:

> *"In my opinion, by the manner and style in which it is frame, the appellant's letter addressed to the Speaker is not a true communication of his resignation of his seat in Parliament. A member of Parliament, the*

supreme legislative organ of the land, should never have to resign under the threat or directive of anyone but only in accordance with the provisions of the country's Constitution and laws made by Parliament and voluntarily. I see the letter as constituting a soldier's obedience to superior orders under protest..."

In my opinion, the only legitimate method available to anyone wishing to unseat a member of Parliament is to resort to one of the devices spelt out in arts 83 and 252 of the Constitution. The appellant's seat could only have become vacant if the applicant voluntarily resigned. In this judgment, I have endeavoured to show that this is not what happened. Therefore, the appellant did not resign."

[151] Tsekooko JSC, in expressing his view, also, that a resignation to be valid must be voluntary, stated, which I would also adopt:

"I think that a member of Parliament must vacate Parliament according to the legal procedures established by the Constitution and other laws as stated in the petition. If, in a constitutional democracy, members of Parliament are to be forced to resign their seats outside the law, this will be setting a dangerous precedent amounting to violation of the independence of the members of Parliament whatever may be the whims of their constituents."

He then went on:

"Article 83(1) of the Constitution and s 84 of the Parliamentary Elections Act ('the PEA') enumerate nine ways in which a member of Parliament shall vacate his or her seat in Parliament. The first is if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker. Article 84 of the Constitution and s 85 of Act 17 of 2005 elaborate on one of the ways, namely the recall by his electorate in his or her constituency in accordance with the Constitution. Reading the above laws, it is very clear to me that the resignation from Parliament by a seating member must certainly be voluntary."

[152] While I do appreciate that Tumukunde was a member of the elected house in the Ugandian Parliament and having noted the points of distinction drawn to the court's attention by counsel for the defendant, I find, nonetheless, that the principles enunciated in the case are of general application to members of the Houses of Parliament, in general, and so would be applicable to the Senate. The Constitution has made no distinction in providing for the tenure of members of both Houses in so far as their seats may be vacated by their resignation. So what is applicable to those in the House of Representatives is taken as being applicable to the members of the Senate in so far as section 41 (1) (b) is concerned.

[153] This court must look at the three letters signed by the claimant and given to the defendant as a composite whole in order for some sense to be made of the purported letter of resignation which was worded to have immediate effect on the date it was signed but which did not have such effect in actuality. It is the letters to the defendant and the Governor General that shed light on the intended date of the resignation. That date would have been whenever the defendant in his absolute discretion deemed it necessary. Resignation of the claimant was, therefore, on the terms of the letters, not left as a matter for the claimant's sole and absolute discretion whenever he considered it necessary but for the defendant's. It was, indeed, a resignation letter that gave the defendant the power to 'resign' the claimant whenever he, the defendant, should have seen it fit to do so. This cannot be taken as a genuine resignation letter. It is clear, beyond dispute, that there was no simple resignation letter by the claimant, without more, as would have been within the contemplation and expectations of the framers of the Constitution.

[154] On top of all that, I have found in the circumstances that obtained that there was no voluntary resignation or, indeed, any resignation at all by the claimant on 14 November 2013. He was simply 'resigned' by the defendant on

what can only be described as the ill-conceived and nonsensical terms of the letters that he, the claimant, designed, signed and delivered to the defendant.

[155] In my view, the letters were contrary to the letter, intent and spirit of the Constitution as it relates to the manner in which a Senate seat may be rendered vacant by resignation. It follows, then, that the authority in writing to the defendant to use the letters to effect the claimant's resignation has no place in that scheme. In the final analysis, I would hold that the letters were not the kind required by the Constitution to effect the resignation of a Senator, and are, therefore, inconsistent with the constitutional scheme and are, accordingly, unconstitutional, null and void.

[156] Therefore, the fact that the claimant had issued no revocation of the authority, in writing, is immaterial since the grant of the authority, in the first place, was itself, unconstitutional and, therefore, void.

[157] My view of the impropriety and unconstitutionality of the letters of resignation in this case is invigorated by the reasoning and conclusions of the court in the Malaysian case of **Datuk Ong kee Hui v Siniyium Anak Mutit** [1983] 1 MLJ, that was brought to our attention by Miss Larmond, to whom we are grateful. The facts of this case have proved quite useful in looking at the propriety of the request for and the use of pre-signed and undated letters of resignation by members of Parliament and so are worth noting.

[158] The primary facts of the case, in outline, are as follows: The plaintiff was a member of a political party in Sarawak. The defendant was the president of the party. Upon request of the party, the plaintiff signed some undertakings and an undated resignation letter as a condition precedent for him being nominated a candidate on the party ticket. The letter that was signed by the plaintiff and addressed to the Chairman and Secretary - General stated, in part*:*

> *"I, the undersigned, do solemnly declare that upon my election to be a Member of Dewan Rakyat, I will sincerely and faithfully:-*
> *1…*
> *2…*
> *3…*
> *4. Donate to the Party the allowance paid me by the Dewan Rakyat.*
> *5…*
>
> *I further declare that in the event of my doing any act which to the Central Working Committee may seem to be against the interest of the Party, I will forfeit my seat in the Dewan Rakyat [the House of Representatives] and you may submit the letter of resignation which I append hereto to the Speaker."*

[159] The letter was signed by the plaintiff without any date written on it. The parties knew the date was purposely left out and that the letter would be dated when it was going to be submitted to the Speaker. The plaintiff resigned from the party. The main issue before the court was the resignation of the plaintiff from the party, which was followed by the action of the defendant and the Party Secretary-General in forwarding the letter of resignation to the Speaker of Dewat Rakyat resulting in the termination of the plaintiff as Member of Dewat Rakyat. The plaintiff argued that he did not authorise anyone to date the letter and that he signed as a joke. The court rejected that argument.

[160] Although the court found that the plaintiff was a party to the scheme (or conspiracy with other members of his party), it held that that it was against public policy for a Member of Parliament or the State Legislative Assembly to be made obliged by any political party or any other body of which he is a member to resign from either the Dewan Rakyat or the State Legislative Assembly when the member resigns from the party. The learned judge declared, that "to recognise *such an* arrangement *would amount to a degradation of the Honourable House, which is the foundation of democracy in our country."*

[161] The court also concluded that the letter of resignation, earlier signed by the plaintiff to the Speaker, Dewan Rakyat, was a wrongful act on the part of the defendant. The contract between the plaintiff and the party was found to be illegal as being in breach of public policy.

[162] It is quite evident that there are areas of distinction between that case and the case at bar, in that, the plaintiff in that case was a member of the Malaysian House of Representatives while in this case, the claimant was a member of the Senate. There was also no payment of any money on the part of the claimant in this case to the defendant or the JLP as a pre-condition for his appointment or for anything. Those differences and more, notwithstanding, I find that, at core, the circumstances are not so different so as to render the findings of that court totally unhelpful.

[163] In the instant case, the claimant, through his own doing, and, of course, with his consent, gave to the defendant the power to determine, in the defendant's absolute discretion, when he (the claimant) should leave the Senate. In effect, the claimant would have been left to the 'whim and fancy' of the defendant to effect his 'resignation' and not to his own exclusive discretion to determine when he does so. He compromised his independence of thought and action on the matter, which was manifested in the conduct of the defendant in delivering the letter of resignation to the Governor General, against his expressed wishes. To the extent that the letters did rob the claimant of his right and liberty to voluntarily resign at a time when he, in his absolute discretion (as distinct from the defendant's) saw it necessary, they were repugnant and contrary to public policy in keeping with the line of thinking of the court in **Datuk Ong Kee Hui.**

[164] It would, indeed, be a danger to the public interest and would amount to a degradation of the supreme legislative organ of the state to hold that such pre-authorized and pre-signed letters of resignation are permissible within our

constitutional democracy. I would, therefore, hold that they are not only unconstitutional but are contrary to public policy and as such are null and void.

Issue #2: Whether it was lawful for the defendant to have caused the removal of the claimant from the Senate by use of the letters

[165] Indeed, on the face of the terms of the letters executed by the claimant, it was, in actuality, unconditional authority given to the defendant to remove him from the Senate in the future whenever the defendant so desired and for whatever reason he would have seen fit. The letters, therefore, served to endow the defendant with power to remove a Senator whom he had nominated for appointment. The remaining question that has arisen for disposal in the light of all this is the constitutionality of the defendant's action in removing the claimant from the Senate.

[166] Dr. Barnett argued that no authority is given under the Constitution to the appointer to terminate parliamentary membership and so this cannot be readily inferred. Within this context, he drew attention to a text from his book, "***The Constitutional Law of Jamaica*** (Oxford University Press (1971) at page 211, under the heading, "*Removal of Senators".* There, it is usefully stated that:

> *"Although the Prime Minister and the Leader of the Opposition have been given full powers and complete discretion in the making of senatorial nominations they have been given no express power of removal. Since a certain measure of security of tenure is consonant with the role which the Senate was generally contemplated as performing there is no necessary implication that such a power was intended."*

[167] In arriving at this conclusion above, Dr. Barnett drew on several experiences in Jamaica's political history that serve to illustrate that there is no power of removal of a Senator given to the Prime Minister or Opposition Leader. After noting several instances of the resignation of Senators from the Jamaican

Parliament since 1963 (and up to the time he was writing), and the circumstances under which they resigned, he observed at p. 213:

> *"It seems that the Senators have taken different views of the principles which should govern their tenure of office and that the official view is that there is no legal power to remove a Senator. In the absence of the development of a convention it appears that each case will be determined in accordance with the attitude of the individual Senator concerned "*

[168] To reinforce this point that there is no power of removal that inheres in the Leader of the Opposition to remove a Senator whom he had nominated for appointment, Dr. Barnett placed strong reliance on the Jamaica (Constitution) Order in Council 1959, the predecessor of the 1962 Constitution. Section 19 (1) of the 1959 Constitution was roughly equivalent to section 41 (1) of the present Constitution. That Constitution had one provision in the form of section 19(3), which is missing, however, from the 1962 Constitution. That subsection reads:

> *"The seat of a member of the Legislative Council who was appointed as such in pursuance of subsection (2) of section 15 of this Order shall become vacant if the Governor, acting in accordance with the advice of the Premier, so declares by instrument under the Broad Seal."*

[169] It is, indeed, accepted that there is no similar provision in the 1962 Constitution that gives the Governor General the power to declare a parliamentary seat vacant on the advice of the Leader of the Opposition (or the Prime Minister).

[170] I am also moved to agree with the illuminating submissions of Dr. Barnett that with respect to public offices where the framers of the Constitution had intended that there should be power to remove the holder therefrom, they had made express provisions for that within the Constitution. He supported this argument by reference to several provisions which, when duly noted, do reveal

that there are no such similar provisions in relation to the tenure of members of the Senate.

[171] When all these matters are considered, it seems safe to opine that there is no express power given in the Constitution for removal of a Senator on the advice of the person who had nominated him for appointment because none was intended. So, the absence of a provision along the lines of section 19 (3) of the 1959 Constitution does convey the notion that the framers of the Constitution did not intend for the seats to become vacant other than by the means expressly enumerated in that section. There is, thus, no scope for the inference of such a power in the defendant to remove a Senator he had nominated for appointment to the Senate. In the light of all this, I am not swayed to accept the submissions of Mrs. Gibson-Henlin that, in the absence of express provisions, the Constitution should be given a broad and purposive interpretation so that the power to appoint or to recommend for appointment should be taken as, implicitly, conferring the power on the same person to revoke or to advice revocation.

[172] It would follow, then, that the defendant, as Leader of the Opposition, had no power under the Constitution to remove or to recommend the removal of an Opposition Senator from the Senate. Therefore, the Governor General would not have had the power, express or implied, to remove the claimant on the advice of the defendant or at his behest, which in effect, was what transpired in the circumstances of this case.

[173] The fact that the Constitution has given no such power to the defendant to effect the removal of any Senator from his seat, for whatever reason, means that the action of the defendant in submitting the letters of resignation to effect the ‘resignation of the claimant from the Senate was inconsistent with the Constitution. This was so whether the claimant had agreed to the use of the letter in such circumstances or not. The claimant could not validly agree to give the defendant a power he does not possess under the Constitution so that he could

act inconsistent with it. The supremacy of the Constitution must prevail and the duty of the court is to ensure that that obtains at all times.

[174] Dr. Barnett, in seeking to fully drive home the point that the procurement and use of such pre-signed letters of resignation are void as being not only unconstitutional but contrary to public policy also sought to draw a parallel between those letters and resignation bonds used in ecclesiastical cases. It had been held in those cases that the giving of a bond by the presentee upon presentation that he would resign the benefice at the request of the patron was tainted and void. See **Fletcher v Lord Sondes** [1827] 7 East 600; **Hawkins v Turner** [1719] 24 ER 232 and Halsbury's Laws of England (4th edition), Volume 14 at paragraph 833.

[175] Again, while the facts and circumstances of those ecclesiastical cases may not be on all fours with the case at bar, the fundamental principles emanating from them are applicable to cases such as this. It follows, then, that such pre-signed resignation letters, would be void, particularly so, when given for a purpose which is contrary to the Constitution.

Summary of findings

[176] I have paid due regard to the robust submissions of Mrs Gibson-Henlin, made on behalf of the defendant, and the authorities on which she has relied in seeking to defend the letters in issue and the resignation that flowed from the use of them. I conclude, however, with all due respect to counsel's courageous effort that there is nothing in the case advanced by the defendant, and in law, that can neutralize the reality that the scheme had the undesirable effect of sapping the claimant of his own free will and robbing him of the absolute right in deciding when he would resign from the Senate. Instead, it gave power to the defendant as the person who had nominated him for appointment to the Senate to make that decision in his sole discretion. I find that the manner in which the claimant's

purported resignation was effected, and the circumstances attendant on it, cannot, at all, be sanctioned by this court.

[177] No liberal and generous interpretation, which this court has been invited by Mrs. Gibson-Henlin to give to the Constitution, could serve to validate those letters and the action of the defendant in using them to remove the claimant from the Senate. To uphold the validity of such a scheme and what emanated from it would be to place our revered constitutional democracy on a very slippery slope. It would mean that a resignation could be extracted from any office holder, against his will, by force, fear or fraud, and still be held valid on the mere basis that the letter of resignation was signed by him. This could not have been the intention of the framers of the Constitution who sought to establish a political structure based on democracy and respect for the fundamental rights, freedoms and dignities of every individual.

[178] I find that the questioned pre-signed resignation letters and, by extension, the request for them and the procurement of them by the defendant, are invalid and ineffectual within the meaning of the Constitution and are inconsistent with the Constitution. They are also contrary to public policy. Accordingly, they are null and void.

[179] I find too that the use of the said letters by the defendant to remove the claimant from the Senate is inconsistent with the Constitution and, as such, is unlawful, unconstitutional and invalid.

C. Whether the fact that the claimant was author of the letters should affect his claim for declaratory relief in relation to the validity of the letters and their use - “the clean hand principle”

[180] It is my humble view that the response of the defendant and the circumstances within which these letters were drafted and devised do raise for some consideration the significance and effect of the claimant’s participation in

the impugned scheme. I find it necessary to draw specific attention to the involvement of the claimant in the scheme because it is a central theme in the case. Furthermore, the defendant has used the fact of the claimant's involvement to contend that any dispute in this area ought to be resolved in his favour in so far as the claimant was a major player in the co-opting of other Senators to the scheme.

[181] I would venture to say that had this been a matter in which the claimant was seeking to invoke equity to come to his aid, the circumstances would, no doubt, have evoked the response that 'he who comes to equity must come with clean hands'. The question is: Should the claimant be barred from obtaining the declaratory reliefs he seeks in relation to the validity and the use of the letters?

[182] A consideration of this 'clean hands' principle, as it is dubbed, has raised its head in administrative law cases in other jurisdictions. Ms Larmond, quite helpfully, directed attention to two cases in which the issue was considered. They are the Canadian case of **Luzolo Sabastia Monteiro and Minister of Citizenship and Immigration** 2006 FC 1322 (Ottawa) and from the European Court of Human Rights, the case of **Van Der Tang v. Spain,** Application no. 19382/92, Strasbourg, delivered 13 July 1995. In those cases, it was argued that the applicants should be denied judicial review because they did not have "clean hands". The fact that they did not have "clean hands" however, did not operate as a bar to the consideration of their applications.

[183] In the interest of time, a brief look at the case of **Monteiro** could prove useful for immediate purposes. Briefly stated, the facts are as follows: The applicant made an application for judicial review under the Immigration and Refugee Protection Act against the decision of the Minister of Citizens and Immigration rejecting his application to be exempted from the requirements to obtain a permanent resident visa before entering Canada based on humanitarian and compassionate considerations. The applicant did not report for his removal

from Canada and a warrant for his arrest was issued. It was argued by the respondent that he did not have " clean hands" and that where an application for judicial review is brought by a person who does not have "clean hands" it must be dismissed. The court, in examining the issue stated:

> *"[8] In **Thanabalasingham v. Canada (Minister of Citizenship and Immigration), 2006 FCA 14 at paragraphs 9 to 10**, the Federal Court of Appeal recently determined that an application for judicial review brought by a person who does not have clean hands should not necessarily be dismissed. In such a situation, the Court has discretion to determine whether judicial review should be allowed or dismissed."*

[184] The court then cited the dictum of Evans J.A. in **Thanabalasingham** that relates, in part, to the exercise of the court's discretion. The material portion of that dictum, I will now replicate:

> *"In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other hand, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the* individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

The court, exercised its discretion to hear the application.

[185] In looking at the circumstances of the case at bar, it is noted that the issues raised by the claimant relate to the constitutionality of an action that would have far – reaching implications for the system of governance in Jamaica within

the constitutional framework. The court's ever-present duty to guard its judicial and administrative processes from abuse must be balanced against the public interest in ensuring the lawful conduct of government, the protection of fundamental human rights and freedoms and the preservation of the supremacy of the Constitution.

[186] The unconstitutionality of the scheme the claimant had devised and participated in; the conduct of the defendant it had influenced; the potential adverse impact of that scheme on constitutional democracy; and the need to deter others from engineering similar devices to circumvent the Constitution, are significant and considerations that must be weighed in the balance in considering the effect of the claimant's "unclean hands" on his claim that the letters are invalid.

[187] **In R v Secretary of State for the Home Department, ex p Nahreed Ejaz** [1994] QB 496, 507, Peter Gibson LJ stated:

> *"It is an important principle of administrative law that estoppel cannot be invoked to give a minister or authority powers which he or it does not in law possess'.*

[188] In my view, there is no way in which the "clean hands" doctrine, estoppel or any other analogous principle could be invoked to legitimize the impugned scheme and the defendant's removal of the claimant from the Senate, which, in themselves, are inconsistent with the Constitution. These limiting principles, or any other, cannot be invoked to give the defendant powers that he does not possess under the Constitution although he was empowered by the claimant to do so. The court must uphold the supremacy of the Constitution at all times.

[189] Having found that the impugned scheme, the letters themselves, and the use of them by the defendant to effect the removal of the claimant from the Senate are unlawful, unconstitutional and, therefore, null and void, I am impelled

to the conclusion that the claimant is entitled to succeed on this aspect of his claim, despite his unfortunate complicity.

[190] The foregoing finding is so pivotal as to be sufficient to dispose of the claim in favour of the claimant. However, out of deference to the industry of counsel and given the fact that there is, on record, an added component to the claim, I have seen it fit to consider the final aspect of the claim that alleges the defendant's contravention of the claimant's right to freedom of conscience, expression and association. In the light of my findings, however, that the claimant should succeed on the claim in relation to his removal from the Senate, I do not propose to detail, in any elaborate fashion, the reasons in coming to my conclusions on this aspect. I believe that in the circumstances, a summary of my observations and conclusions should suffice.

D. Whether the claimant's fundamental rights contravened

Discussion and Findings

[191] The claimant, in his Fixed Date Claim Form, avers that he is seeking a declaration that the defendant's use of the undated letters, on the basis that he did not support him in the JLP leadership race, had contravened his constitutional rights to freedom of conscience, expression and association guaranteed under section 13 (3) (b), (c) and (e) of the Charter of Rights.

[192] It is seen from the Fixed Date Claim Form and the supporting affidavit of the claimant that he has failed to identify, in substance and with particularity, the matters of conscience, expression and association in which he has been affected or how he has been affected. He has indicated no ground for saying that his rights to conscience, expression and association have been breached and the specific facts on which he has based such a claim in relation to each right. This is, particularly, important in this case because removal from the Senate, even though contrary to the Constitution, does not necessarily, translate into breach of

the claimant's human rights protected under the rubric of the right to freedom of conscience, expression or association set out in section 13 of the Charter of Rights.

[193] Rule 56.9 of the CPR, provides that where relief is sought under the Constitution, the claimant must file with the claim form evidence on affidavit [r. 56.9(2)]. In that affidavit, the claimant must state, *inter alia,* the provision of the Constitution which he alleges, has been, is being, or is likely to be breached [r. 56.9.3(c)]; the grounds on which such relief is sought [56.9(3)(d)]; and the facts on which the claim is based [r.56.9(3)(e)]. In my humble view, the claimant's statement of case in relation to this aspect of the claim was not set out in accordance with the rules and as such has not assisted the court sufficiently in identifying the substance of his claim of breach of the rights alleged.

[194] Be that as it may, in assessing whether he has established this aspect of his claim, I have gained much guidance from the principles extracted from the authorities provided to this court as to what the freedoms of conscience, expression and association would entail, as a matter of law.

[195] Again, I must, at this point, express appreciation, in particular, to counsel for the Attorney General for the invaluable assistance given to the court in its consideration of this aspect of the matter through the provision of comprehensive submissions and useful authorities.

[196] The following authorities are some of those that have been duly considered and the principles extracted from them applied in coming to my finding as to whether there has been a breach of the claimant's constitutional rights of conscience, expression and association:

Freedom of Conscience: (1) Murdoch, Jim: ***Protecting the Right to Freedom of Conscience, Thought and Religion under the European Convention of Human Rights,*** Council of Europe Human Rights Handbooks in its interpretation

of Article 9 of the European Convention of Human Rights*;* (2) Lloyd Barnett, *The Constitutional Law of Jamaica,* pp. 379 & 405; (3) **R v Morgentaler** [1988] 1 SCR 30; (4) **Re Eric Darien, A Juror** (1974) 22 WIR 323; (5) **Charles v AG of Trinidad and Tobago,** TT 1983 HC94.

Freedom of Expression: (6) **Benjamin and Others v Minister of Information and Broadcasting and Another** [2000] 58 WIR 171; (7) **Tomlinson v Television Jamaica Limited and Others** [2013] JMFC Full 5.

Freedom of Association: (8) Halsbury's Laws of England**,** *Rights and Freedoms,* Volume 88A (2013), 5th Edition; (9) Lloyd G. Barnett, *The Constitutional Law of Jamaica*, page 412; (10) **Collymore and Another v The Attorney General** [2000] 58 WIR 171; (11) **Reyes and others v Zabeneh and Another** [2009] 79 WIR 165; (12) **Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner) Case** (1990) 2 SCR 367**;** (13) **Compte, Van Leuven and De Meyer v Belgium** [1981] ECHR 3 (23 June, 1981); and (14) **Royal Society for the Prevention of Cruelty to Animals v Attorney General** [2002] 1 WLR 448.

[197] Having considered the evidence within the legal framework provided by the authorities, I must commence by stating that I do endorse the views expressed by Parnell J in **Banton and Others v Alcoa Minerals of Jamaica Incorporated and Others** [1971] 17 WIR, 275 that "*the mere allegation that a fundamental right or freedom has been or is likely to be contravened is not enough. There must be facts to support it.*'

[198] The overriding question that arises for resolution in all the circumstances is whether the evidential threshold has been reached for this court to properly declare that the defendant has breached the claimant's fundamental rights to freedom of conscience, expression and/or association so as to warrant the grant of declaratory relief in his favour. Having considered this aspect of the claimant's

case against the background of the law as derived from the authorities, the evidence presented, and all the circumstances, I am hard pressed to find the facts that support the claimant's complaint that the defendant had breached his rights to freedom of conscience, expression and association, as a matter of law, thereby entitling him to relief under the Constitution.

[199] Accordingly, I would refuse to grant the declarations sought on this aspect of the claim that the defendant has breached the claimant's fundamental rights to freedom of conscience, expression and association.

E. The effect of the claimant's participation in the impugned scheme

[200] Before disposing of the claim, I am compelled, by the peculiar circumstances of this case, to state my views on the conduct of the claimant and to say whether it should be used against him in any way in these proceedings. This is considered necessary because the claimant has succeeded on the claim and there are costs orders that have been made during the course of the proceedings that costs in respect of those matters are to be costs in the claim. See orders of Glen Brown, J made on pre-trial Review dated 24 June 2014 (p. 115 Judge's bundle, Vol #1) and of Marsh J dated 16 July 2014 made on Notice of Application to Strike Out Portions of Affidavit. The general rule is that the successful party is entitled to costs.

[201] It is observed that while the defendant was wrong to effect the removal of the claimant from the Senate in contravention of the Constitution, which is, in itself, unlawful, it cannot be overlooked that it was the claimant who had empowered him to do so, albeit wrongly, as I have found it to be. The undisputed evidence is that he also advised the defendant that the scheme to procure and use the letters was constitutional.

[202] Further, it is also borne in mind that the claimant had framed the letters himself in his dual capacity as an attorney-at-law and Leader of Opposition Business in the Senate. Interestingly, he did so in such a manner that, on the face of their contents, he gave the defendant the absolute right to remove him from the Senate, whenever the defendant deemed it necessary to do so. That would also have meant for whatever reason the defendant would have seen fit. So, if the defendant had found it necessary to submit the letters in the aftermath of the leadership race for whatever reason he saw fit, he would have been acting within the terms of the letters drafted by the claimant. The claimant, being an attorney-at-law and an experienced Senator, should have considered and appreciated the legal and constitutional implications of the scheme he devised and the ramifications of the letters he framed.

[203] He should, therefore, take responsibility for the letters giving the defendant unlimited power over his destiny in the Senate, despite the fact that he said he had given it for one purpose and that was in relation to the CCJ. It is my humble view, however, that even if the purpose was in relation to the CCJ, such a purpose would have had the same effect, which would have been his removal from the Senate for holding a contrary view, that is, one not supporting the defendant's and/or the party's position on the CCJ. So, whether it was the CCJ issue or the leadership race, the position, essentially, would not have been different. In other words, he would have been removed from the Senate (or penalised as he would want to put it) for holding or expressing his own view and for taking a particular position as he saw fit. Indeed, he was the one that created the perfect setting and granted authority to the defendant to do what he did, that being, to remove him from the Senate.

[204] In my view, when all things are considered, the significant complicity of the claimant in the scheme that has given rise to the claim (indeed, he being the 'deviser' and 'implementer' of it) must be brought to bear in some way on these

proceedings. I believe that it should affect his entitlement to costs as the successful party.

[205] Accordingly, I would not be minded to award costs in his favour.

Disposal

[206] I propose that declarations be granted, albeit not in the exact terms as set out in the claim, to convey the conclusions I have arrived at that (a) the questioned pre-signed and undated letters of resignation and letters of authority, (b) the request for and procurement of them, and (c) the defendant's use of them to effect the resignation or removal of the claimant from the Senate are unconstitutional, contrary to public policy, unlawful and, therefore, null and void.

[207] In the premises, I do concur with the terms of the declarations that should constitute the orders of this court as stated by my learned brother Daye, J.

BATTS, J

[208] At the commencement of this matter, the parties agreed to number the bundles filed as follows:

#1 - Index to Judges Bundle filed 16 July 2014

#2 - Claimant's List of Authorities

#3 - Index to Bundle and Authorities filed 18 July 2014

#4 - Defendant's Bundle of Authorities filed 21 July 2014

#5 - Defendant's Skeleton Submissions

[209] Having perused the several Affidavits filed, it is apparent, as submitted by Dr. Barnett, that there are not many material issues of fact. In this regard the factual matrix may be summarized thus:

a) The Claimant, an attorney-at-law, is a member of the Jamaica Labour Party (JLP) and a member of its Central Executive and Standing Committees. [*Bundle 1 page 7 and 61]*

b) In November 2002 the Claimant was appointed a member of the Senate by the Governor General on the recommendation of the then Leader of the Opposition. [*Bundle 1 page 7]*

c) In September 2007 he was re-appointed to the Senate on the recommendation of another Leader of the Opposition. [*Bundle 1 page 7]*

d) On neither occasion was he asked to sign a letter of resignation as a precondition to being so appointed. [*Bundle 1 page 7]*

e) In January 2012 the Claimant was reappointed to the Senate by the Governor General of Jamaica at the recommendation of the Defendant who was now the leader of the Opposition. [*Bundle 1 page 7]*

f) The Claimant was in January 2012 engaged as Chief of Staff to the said Leader of the Opposition. [*Bundle 1 page 7 and 61]*

g) It was agreed between the Defendant and the Claimant that the Claimant should prepare letters to be signed by each person who was recommended for appointment to the Senate. The Claimant prepared sets of 3 such letters for execution by the appointees. [*Bundle 1 page 8 and 61]*

h) The Claimant states that the sole purpose of the letters of resignation was to enable the removal of any Opposition Senator who was not likely to be committed to the position of the Opposition Party on the issue of the Caribbean Court of Justice. The Claimant says the letter was only to be used if an appointee took or was likely to take a position on that issue which was not in accordance with the position of the Opposition Party. [*Bundle 1 page 8]*

i) The Defendant states that the letters were prepared and appointees required to sign them, because of concerns expressed by party members including the Claimant, about "the unity and stability of the opposition senators having regard to its history whilst in opposition". It was, says the Defendant, the Claimant as an Attorney-at-law and Leader of Opposition Business who devised the scheme and also advised that it was constitutional. [*Bundle 1 page 61]*

j) The letters were signed by each person prior to the Defendant notifying the Governor General of his recommendations for appointment to the Senate. [*Bundle 1 page 8]*

k) On Sunday 10 November 2013, an internal party election was held as Mr. Audley Shaw challenged the Defendant for the leadership of the Jamaica Labour Party. [*Bundle 1 page 8]*

l) On the 11 November 2013 the Claimant was asked by Mr. Tom Tavares Finson, a fellow Opposition Senator, to convene a meeting of Opposition Senators .At that meeting a decision was to be taken whether they would all resign. Mr. Finson indicated his intent to resign. [*Bundle 1 page 9]*

m) The Claimant convened the caucus and the only Opposition Senator not in attendance was Senator Christopher Tufton. [*Bundle 1 page 9]*

n) In that meeting (which was not attended by the Defendant) the Claimant stated that he saw no basis for resigning. This was so because Mr. Christopher Tufton, the only senator who had made public his support for Mr. Shaw in the recent internal party election, was not present to state his position. The meeting agreed that the Claimant should speak to Mr. Tufton and find out his position. [*Bundle 1 page 9]*

o) It was reported to the Claimant that the Standing Committee of the JLP in a meeting on the Monday following the meeting of Senators, was given a report as to what had transpired at the meeting of the Opposition Senators. [*Bundle 1 page 9]*

p) The Claimant was further advised that the Standing Committee discussed the matter of all Senators being required to tender their resignations *en bloc* so as to give the Defendant a free hand going forward. [*Bundle 1 page 9]*

q) The Claimant received a call from the Defendant on the 12 November 2013 in consequence of which the Claimant met with the Defendant. The Claimant told the Defendant he had not participated in the recent leadership contest and the Defendant responded by saying those who had not supported him had to make way for those who had. Some had to return to work in their constituencies. [*Bundle 1 page 10]*

r) The Claimant advised the Defendant of the decisions taken at the recent meeting of Opposition Senators as well as the fact that he had spoken to Mr. Christopher Tufton who had said he was not resigning. [*Bundle 1 page 10]*

s) The Defendant reminded the Claimant that he had a document which he could use. [*Bundle 1 page 10]*

t) Speaking on public television the Defendant said he was not interested in individual resignations of Senators but wanted an *en bloc* resignation. The Claimant says he did not agree with that position, did not offer his resignation, and publicly stated his intention to attend the meeting of the Senate on 15 November 2013. [*Bundle 1 page 10]*

u) The Defendant has not responded to the allegations in paragraphs (p),(q),(r) and (s) above save to say that he was not aware of any public statement made by the Claimant. The Defendant states:

> "I was authorized by the Claimant to date and deliver the letters of resignation freely given by him to me at the time of his appointment to the Senate and exhibited at A.W.3 of his Affidavit. I accordingly dated and delivered those letters as well as simultaneous letter of instructions to me to the Governor General on 14th November 2013." [Bundle 1 page 62]

v) The Claimant received a telephone call from the Defendant on the 15 November 2013 advising him that he had utilized the resignation letters by dating same and giving them to the Governor General who had accepted them. [*Bundle 1 page 10]*

[210] There is also filed an Affidavit of Mr. Christopher Tufton [*Bundle 1 page 69]* in which he supports the assertions made by the Claimant and also alleges that he met with the Defendant on Tuesday 12 November 2013, and advised him that he would not be resigning as requested. He later received a voice message from the Defendant informing him that the resignation letters had been dated and sent to the Governor General. The Defendant has not responded to these allegations. He was content to deny the alleged purpose for which the letters of resignation were created and to state that he was authorized to and did sign and deliver the letters. [*Bundle 1 page 62]*

[211] The letters in question are identical save for the names. It is only necessary to quote those issued in respect of the Claimant: [*Bundle 1 page 56,54 and 55]*

a. The Leader of the Opposition
1 West Kings House Rd
Kingston 10

Dear Opposition leader

Re: The Senate of Jamaica

Upon your advising the Governor General of Jamaica to appoint me a Senator, I have signed and delivered to you an undated letter of resignation as a Senator. You are hereby authorized at your sole discretion to date this letter and deliver to the Governor General of Jamaica at any time you deem necessary.

Yours faithfully,
Arthur Williams

(This letter was date-stamped as received at Kings House on the 14 November 2013). (It is witnessed and dated by Tom Tavares-Finson 16 January 2012. It is signed by the Defendant on the 14 November 2013.)

b. His Excellency
The Governor General of Jamaica
Kings House

Dear Governor General

Re: The Senate of Jamaica

I hereby tender my resignation as a member of the Senate of Jamaica with immediate effect.

This letter was signed by me and delivered to the Leader of the Opposition at the time of my appointment to the Senate on the clear understanding that he is authorized to date this letter and deliver to Your Excellency at any time he deems necessary.

Yours faithfully
Arthur Williams

(This letter was similarly witnessed by Tom Tavares-Finson on the 16 January 2012; signed by the Defendant on the 14 November 2013 and received at Kings House on the 14 November 2013).

c) His Excellency
The Governor General of Jamaica
Kings House

Dear Governor General

Re: The Senate of Jamaica

I hereby tender my resignation as a member of the Senate of Jamaica with immediate effect.

Yours faithfully
Arthur Williams

(This letter was witnessed by Tom Tavares-Finson on the 16 January 2012; signed by the Defendant on the 14 November 2013 and received at Kings House on the 14 November 2013).

[212] The Claimant in his Fixed Date Claim Form seeks Declarations and Orders all seeking to impugn the said letters. Written submissions have been filed by all parties and by the Attorney General and extensive oral submissions made. I do not propose to repeat these submissions. The parties must rest assured that all have been carefully reviewed and considered. I will only make such reference to them as I consider necessary to explain my decision.

[213] There has been much evidence and some amount of time spent submitting on the reason for the letters of resignation; as well as on the question whether the authority to present them was or could be revoked. This latter being, it was said, dependent on whether the mode of the revocation was oral or in

writing. In my view the resolution of those factual and/or legal issues is unnecessary for a decision in this matter.

[214] This is because it is manifest that pre-prepared letters of resignation and pre-prepared letters of authorization to use them which are executed at the time of an appointment serve only one purpose. That being to facilitate removal of the appointee even if he is reluctant or unwilling to go voluntarily. This must be so because if someone wishes to resign they will do so. The pre-prepared letter will only be necessary in the event the person does not wish to put pen to paper. Of course a pre-prepared letter will save time if the person intends to resign and then says "go ahead use it". This rationale, saving in time, cannot explain the pre-prepared letter of authorization to use the pre-prepared letter of resignation. One would have thought the authority to use must always be contemporaneous with its use.

[215] In summary therefore a pre-prepared letter of resignation and letter of authority can only be intended to allow for the revocation of the appointment, or the removal of the appointee from the post, in circumstances where that appointee is reluctant to or refuses to voluntarily remove himself from the position at the time one wishes him removed. Even if some other conceivable purpose for these documents can be suggested, the fact that they enable the appointer to use them in that way will give rise to the Constitutional issue I consider central to the determination of this matter.

[216] That issue is whether or not the Constitution of Jamaica contemplates that appointees to the Senate may be removed by pre-signed letters of resignation and pre-signed authorities to use such letters of resignation. Dr. Barnett has phrased the issue perhaps more elegantly i.e.:

> "Is the questioned instrument of resignation valid and effective within the meaning of the Constitution."

[217] The Constitution of Jamaica in Chapter V treats with appointments to the Senate.

Section 35 (3)

> "The remaining eight Senators shall be appointed by the Governor General, acting in accordance with the advice of the Leader of the Opposition by instrument under the Broad Seal."

[218] Section 41 (1) treats with the circumstances in which the seat of a Senator and Member of the House of Representatives may become vacant. I will quote the section in its entirety:

> "41. (1) The seat of a member of either House shall become vacant –
>
> (a) upon the next dissolution of Parliament after he has been appointed or elected;
>
> (b) if he resigns his seat;
>
> (c) if he is absent from sittings of the House for such period and in such circumstances as may be prescribed in the Standing Orders of the House;
>
> (d) if he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall become a subject or citizen of any foreign Power or State;
>
> (e) if any circumstances arise that, if he were not a member of the House, would cause him to be disqualified for appointment or election as such by virtue of paragraph **(b)** or **(g)** of subsection (2) of section 40 of this Constitution;
>
> (f) if he becomes a party to any contract with the Government of Jamaica for or on account of the public service :

Provided that-

(i) if in the circumstances it appears to the Senate (in the case of a Senator) or to the House of Representatives (in the case of a member of that House) to be just so to do, the Senate, or in the House of Representatives (as the case may be) may exempt any member from vacating his seat under the provisions of this paragraph, if that member, before becoming a party to such contract as aforesaid, discloses to the Senate or to the House of Representatives (as the case may be) the nature of such contract and his interest therein;

(ii) if proceedings are taken under section 44 of this Constitution to determine whether a Senator or a member of the House of Representatives has vacated his seat under the provisions of this paragraph he shall be declared by the Court not to have vacated his seat if he establishes to the satisfaction of the Court that he, acting reasonably, was not aware that he was or had become a party to such contract;

(g) if any firm in which he is a partner, or any company of which he is a director or manager, becomes a party to any contract with the Government of Jamaica for or on account of the public service or if he becomes a partner in a firm, or a director or manager of a company which is a party to any such contract:

Provided that-

(i) if in the circumstances it appears to the Senate (in the case of a Senator) or to the House of Representatives (in the case of a member of that House) to be just so to do, the Senate or the House of Representatives **(as** the case maybe)

may exempt any Senator or member from vacating his seat under the provisions of this paragraph if that Senator or member, before or as soon as practicable after becoming interested in such contract (whether as a partner in a firm or as director or manager of a company), discloses to the senate or to the House of Representatives (as the case may be) the nature of such contract and the interest of such firm or company therein,

(ii) if proceedings are taken under section 44 of this Constitution to determine whether a Senator or a member of the House of Representatives has vacated his seat under the provisions of this paragraph, he shall be declared by the Court not to have vacated his seat if he establishes to the satisfaction of the Court that he, acting reasonably, was not aware that the firm or company was or had become a party to such contract.

(2) The seat of a member of the House of Representatives shall become vacant if-

(a) he is appointed as a Senator; or

(b) any circumstances arise that, if he were not a member of the House of Representatives, would cause him to be disqualified for election as such by virtue of paragraph (b) of subsection (1) of section 40 of this Constitution.

(3) (a) Subject to the provisions of paragraph (b) of this subsection, if any member of either House is sentenced by a court in any part of the Commonwealth to death or to imprisonment (by whatever name called) for the term of or exceeding six months, he shall forthwith cease to

exercise any of his functions as a member and his seat in the House shall become vacant at the expiration of a period of thirty days thereafter: Provided that the President or the Speaker, as the case may be, may at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of his conviction or sentence, so, however, that extensions of time exceeding in the aggregate three hundred and thirty days shall not be given without the approval, signified by resolution, of the House concerned.

(b) If at any time before the member vacates his seat he is granted a free pardon or his conviction is set aside or his sentence is reduced to a term of imprisonment of less than six months or a punishment other than imprisonment is substituted, his seat shall not become vacant under paragraph (a) of this subsection and he may resume the exercise of his functions as a member.

(c) For the purposes of this subsection-

(i) where a person is sentenced to two or more terms of imprisonment that are required to be served consecutively, account shall be taken only of any of those terms that amounts to or exceeds six months; and

(ii) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

(4) (a) Subject to the provisions of paragraph (6) of this subsection, if any member of either House is adjudged or declared

bankrupt, certified to be insane, adjudged to be of unsound mind or detained as a criminal lunatic, he shall forthwith cease to exercise any of his functions as a member and his seat in the House shall become vacant at the expiration of a period of thirty days thereafter:

Provided that the President or the Speaker, as the case may be, may at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of any such adjudication, certification or detention, so, however, that extensions of time exceeding in the aggregate one hundred and eighty days shall not be given without the approval, signified by resolution, of the House concerned.

(b) If at any time before the member vacates his seat any such adjudication or certification is set aside or the detention of the member as a criminal lunatic is terminated, his seat shall not become vacant under paragraph (a) of this subsection and he may resume the exercise of his functions as a member.

[219] I have quoted Section 41 in its entirety to demonstrate that the Constitution provides what must be regarded as a comprehensive set of circumstances in which an appointment to the Senate can become vacant. There is no provision for the appointee's removal by either the appointer or the official who recommended his appointment. These sections of the Constitution are entrenched provisions (see section 49).

[220] Dr. Barnett submits further that the 1959 Constitution of pre-independent Jamaica contained a provision which allowed for replacement of members of the

Upper Chamber (then called the Legislative Council) at the instance of his appointer. That provision reads as follows:

> "19(3) The seat of a member of the Legislative Council who was appointed as such in pursuance of subsection (2) of section 15 of this Order shall become vacant if the Governor, acting in accordance with the advice of the Premier, so declares by instrument under the Broad Seal."

[221] Dr. Barnett demonstrates that although the provisions of the 1962 Independence Constitution are otherwise closely modeled on the 1959 Constitution, the provision quoted above was omitted. This submitted counsel, and I agree, is confirmation, if such is necessary, that the framers of the Constitution of 1962 did not intend for the appointer or the person making the recommendation, to have the power to remove persons from the Senate once validly appointed.

[222] If that is so, and I so hold, then any step by a person or persons to give themselves the power to remove a Senator who has been validly appointed will be unconstitutional.

[223] Given that a pre-signed letter of resignation with a pre-signed letter of authority to use it, gives a power of removal to the addressee, such documents must violate the Constitutional imperative. What is that imperative? It appears to me that the Constitution intended that once appointed to the Senate each of the eight such appointees (in the case of the Opposition) would operate with a free will. Their decisions should be arrived at because it is their decision, and not because of fear for example, of being removed from office. A decision by a Senator to follow or obey the instruction of the Leader of the Opposition should be arrived at because that is the wish or desire of the Senator. It must not be the result of coercion.

[224] This is the reason for the Constitutional protection afforded Senators and the absence of a power of removal either by the appointer or by those who recommended the appointment. The questioned documents are therefore null, void and of no effect. It matters not whether they were revoked as in my view, and I so find and declare, the pre-signed letters of resignation and authority to use them, were at all material times null and void and of no legal effect.

[225] I find some support for my decision in a case cited by the Attorney General's Department, ***Sinyium Anak Mutit v Datuk Ong Kee Hui*** *[1982] 1MLJ 36 (14 Sept 1981)*. In that case the Plaintiff was a member of a political party. The Defendant was President of the party. The claim was for money had and received and for malicious falsehood, fraudulent misrepresentation and conspiracy. The circumstances being that the Plaintiff prior to becoming a candidate for elections had entered into an agreement with the party to the effect that if he did any act which may seem to be against the interest of the party he would forfeit his seat in the House (Dewan Rakyat). He authorized them in such an instance to submit his letter of resignation "which I append hereto". The agreement also provided that his salary would go to the party. The Court decided that such an agreement was against public policy and was a degradation of the House. The submission of the letter of resignation earlier signed by the Plaintiff was therefore a wrongful act. It is important to note that the Malaysian Court found as a fact that the Plaintiff had a full knowledge of all the contents of the documents he signed. There was no fraud or conspiracy found. If there was a conspiracy the Plaintiff was a party to it. The Court stated its reason for finding the agreement to be against public policy in the following way:

> "The trial court is of opinion that such a contract is against public policy and liberty of a member of the Dewan Rakyat. It is against public policy for a Member of Parliament or State Legislative Assembly to be made obliged by any political party or any other body of which he is a member to resign from either the Dewan Rekyat or Council Negri (State Legislative Assembly) when the Member resigns from the party. To recognize such an arrangement would amount to a

> degradation of the Honourable House which is the fountain of democracy in our country."

[226] I respectfully agree. Similarly, it seems to me, an arrangement whereby the Leader of the Opposition holds pre-signed letters of resignation and authority to use them, is against public policy and I might add would serve only to degrade the institution of the Senate. It matters not (as in this case) that the Claimant was the author of the scheme and knew exactly what he was doing. Public Policy and the Constitutional imperative outlined above will not allow a Senator (or Member of Parliament) to so fetter his own free will. This court ought not to raise any form of estoppel against the Claimant as to do so will frustrate the Constitutional intent in circumstances where the Claimant now seeks to have it upheld and protected.

[227] A decision on this point is sufficient to resolve this matter. Out of deference to the submissions made however I will make brief remarks on some other aspects of this claim. The Defendant's Counsel urged the Court to imply a term in the Constitution enabling removal by the appointer. This she submitted would be consistent with the tradition as it relates to appointments in the public sphere i.e. he who appoints can also remove. With respect however, the Constitution of 1962 reflected an intention to protect the Members of Parliament from such a situation. Indeed as Dr. Barnett in his submission carefully articulated whenever the Constitution intended to grant such a power it was expressly stated, see sections 80(5); 31(3); 71 ;71(4) ;78(4); 128(1); 83; 121(3).

[228] It was also urged upon us that the letter authorizing the use of the letter of resignation had not been expressly revoked by the Claimant. Until such a revocation was communicated to the Defendant in person and in writing he was entitled lawfully to use the letter. As I have held the letter is itself unlawful having been pre-signed and given to the Defendant. However even if it were not, the Defendant on the evidence could hardly think himself authorized to make use of it given the clear statement by the Claimant , that he had no intention to resign. That assertion of fact was not denied by the Defendant. The Defendant as Party

Leader must in any event be taken to know the facts communicated to the Standing Committee. It is manifest that the Defendant only resorted to the use of the pre-signed letters in the case of the Claimant and Mr. Christopher Tufton because they did not voluntarily tender resignations when asked to do so. Such being the case if necessary I would have found that at the time he tendered the letters of resignation the Defendant had no authority so to do and was well aware that the Claimant had no wish to resign.

[229] It was also submitted that the Section 41 resignation must be the act of the Senator and no one else. This must involve an act of resignation coupled with an intention to resign. I agree with Dr. Barnett that tender by the Defendant in circumstances where the Claimant had no intent or desire to resign is not a resignation within the meaning of Section 41.

[230] Finally Dr. Barnett submitted that the removal or attempt to remove the Claimant from the Senate because of a position he may or may not have taken as a member of the party amounted to a breach of his client's constitutional right to Freedom of Conscience, Freedom of Association and Freedom of Expression. The use of the letters of resignation and authority constituted an effort to punish the Claimant for exercising democratic rights which the Constitution of the political party also recognizes. In the case before us there is a dearth of evidence to support this assertion. The Defendant has not stated that the use of the letters was connected to a particular internal party matter. The Claimant has not said that the defendant so stated.

[231] Indeed, the evidence suggests that the Defendant was motivated by a desire to have a "free hand" to appoint new Senators; he having just won the party election and been reelected Party Leader. His desire to have only loyalists in the Senate and, therefore, to remove those who did not support him in the internal election can be considered a legitimate political motivation. If therefore the Constitution gave the leader of the Opposition an unqualified power to

remove Senate appointees, I cannot see how removal, because he wanted party loyalists in the Senate, could be a basis for a constitutional challenge. On the other hand where, as in this case, the Constitution has given no express power to remove a Senator, other considerations arise. It seems to me that if the pre-signed letters were used to remove an appointed senator in order to penalize him for statements made or positions adopted in the Senate or elsewhere, then it certainly is arguable that his freedom of conscience, freedom of association and freedom to express himself would be infringed. That this was the reason for having the letters may be gleaned from the reason advanced by the Defendant for their creation i.e. to ensure party unity in the Senate. Clearly the intention was to be able to fetter expressions of opinion not to the suit of the party. Therefore had the letters been otherwise lawful, I would have found the use of them by the Defendant in this case and for the reasons advanced to be in breach of the Claimants right to express himself or to associate or to freedom of conscience.

[232] In the final analysis and for the reasons stated above I agree with the Declarations as stated in the Judgment of my brother Daye J.

[233] Costs would ordinarily go to the Claimant, however as he, an attorney-at-Law, was the author of this unlawful scheme I agree that there should be no Order as to costs.

DAYE J

ORDER

[234] The Court hereby declares and orders as follows:

(1) That the request for and procurement of pre-signed and undated letters of resignation and letters of authorization by the Leader of the Opposition from persons to be appointed or appointed as Senators to the Senate of Jamaica upon his nomination is

inconsistent with the Constitution, contrary to public policy, unlawful, and is, accordingly, null and void.

(2) That the pre-signed and undated letters of resignation and letters of authorization, as well as the manner of their use to effect the resignation of Senators (the claimant, in particular) from the Senate of Jamaica, are inconsistent with the Constitution, contrary to public policy and are, accordingly, null and void.

(3) No order as to costs.

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Daye J

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McDonald-Bishop J

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Batts J