THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 02775

In the matter of an application under Rule 42.10 of the Civil Procedure Rule 2002

BETWEEN	**ST. GEORGE JACKSON, ANDREW JACKSON (ON BEHALF OF ALL THEMSELVES AND ALL THE OTHER MEMBERS OF THE SPECIAL CONSTABULARY FORCE ASSOCIATION)**	**1ST CLAIMANT**
AND	**JOEL BETTY**	**2ND CLAIMANT**
AND	**ATTORNEY GENERAL**	**DEFENDANT**

Appearances: Mrs. Jacqueline Samuels-Brown Q.C, Mr. Christopher Townsend and Ms. Nicosie Dummett instructed by Townsend White and Porter for the Claimants; Mr. Lackston Robinson and Ms. Desrene Pearson instructed by the Director of State Proceedings for the Defendants.

Application for Declaratory Relief; Whether jurisdiction lies; Whether discretion should be exercised to grant declaration; Principles applicable to decision to grant declaration; CPR Rule 8.6. Doctrine of Executive Necessity – whether applicable.

Heard: June 21, 22 and 23, and August 4, 2010

ANDERSON J.

1). This was the hearing of a Fixed Date Claim Form (FDCF) dated and filed the 29th of May 2009. The claim was filed by the Island Special Constabulary Force Association (ISCFA) and the nominal claimants are Special Sergeant George Jackson, the General Secretary of the ISCFA, ("Jackson") and Cpl. Joel Betty a member of the said Association. The first claimant sues as representative of the ISCFA and the second on his own behalf as a member of the ISCFA.

2). The FDCF, as amended on June 22, 2009, seeks the following remedies:-

1. A declaration that the Heads of Agreement entered into between the Claimant and the 1st Defendant on the 3rd of October 2008 for the contract period April 1, 2008 to March 31, 2010 is binding on the parties thereto:
2. A declaration that all amounts due and payable and which remain unpaid to the members of the Claimant Association under the Heads of Agreement is (sic) properly owed and is to be paid pursuant to the terms of the said Heads of Agreement;
3. A declaration that the amounts due and owing to the members of the Claimant Association is a debt owed by the Government of Jamaica to the said members of Claimant Association and interest payable thereon is to be paid at the rate that is paid on Government of Jamaica bonds;
4. A declaration that the actions of the 1st Defendant, via its servants and or agents and or employees amounts to an unlawful deprivation of the property of the Claimant's members without adequate compensation there for;
5. A declaration that the actions of the 1st Defendant in breach of the Heads of Agreement is in contravention of Article 18 of the Constitution of Jamaica;
6. Costs;
7. Any other Order as this Honourable Court deems fit.

3). The claim is supported by affidavits of Jackson dated 29th May 2009 and 22nd June 2009, and an affidavit by the second claimant also dated 22nd June 2009.

4). The ISCFA is a statutory body, established pursuant to Section 26 (1) of the Constables (Special) Act, to deal with matters affecting the general

welfare and efficiency of Special Constable. The 1st Defendant, Government of Jamaica is the employers of the 2nd Claimant and the 3rd Defendant is the Minister responsible for making of all necessary regulations and orders and for promoting the organization, training and discipline and payment of wages for the Island Special Constabulary Force. This minister was a signatory of the agreement between the Association and the Government. The Ministry of National Security is the Ministry to which the members of the Association are employed and that Minister was also a signatory to the Heads of Agreement referred to above. The Attorney General is joined pursuant to the Crown Proceedings Act.

5). **The Evidence**

The evidence upon which the application is based is contained in the affidavits of George Jackson and Cpl. Joel Betty. The claimants allege that after the ISCFA had held talks with State Minister, Dwight Nelson, then State Minister in the Ministry of Finance and the Public Service, and the Minister then responsible for the Public Service, it accepted the terms of an offer with respect to wages and fringe benefits. The agreement by paragraph 1 of its terms covered the period April 1, 2008 to March 31, 2010. It was alleged that pursuant to the acceptance by the Association of the offer made by the Government of Jamaica, the Association entered into an agreement, characterized as a "Heads of Agreement", between the Association and the Government. The contract was signed for the ISCFA by then Special Corporal George Jackson and other members of the claimant association. For and on behalf of the Government of Jamaica, the signatories were the Honourable Audley Shaw, Minister of Finance and the Public Service, Minister Dwight Nelson, Minister of State in that Ministry; Honourable Trevor McMillan, then Minister of National Security, the Financial Secretary and Mr. Gilbert Scott, then Permanent Secretary in the Ministry of National Security. Those essential facts are not disputed. The evidence from the defendant is contained in the affidavits of Minister

Nelson referred to below, and does not deny the main averments of the claimants.

6) **Submissions for the Claimant**

Mrs. Samuels-Brown, who appeared as counsel for the Association, submitted that the claimants were entitled to seek the assistance of the court by way of the various declarations sought. The basis for seeking the declarations was the Heads of Agreement which had been signed between the parties. In essence, the Heads of Agreement provided the terms of employment and conditions of work which would be applicable to members of the Association during the contract period.

7.) According to the Heads of Agreement, the revised salary scale of the claimant's members was to be increased by fifteen percent (15%) from April 1, 2008 and thereafter by 7% on April 1, 2009. It is the evidence as contained in the first affidavit of George Jackson, that the agreement was faithfully adhered to during the period April 1, 2008 to March 31, 2009. It is averred that the members of the Association have relied upon the terms of the agreement, which they claim has given rise to a legitimate expectation of the fulfillment of its terms, and have acted to their detriment ion reliance on the terms of he Heads of Agreement, by contracting mortgagees or car loans, the repayment of which is now being jeopardized by the defendant's failure to fulfill their obligations under the Heads of Agreement. In his affidavit, the affiant depones that the members of the Association have been deprived of the increased salaries and that this in breach of their property rights under the Jamaica Constitution.

8). According to the Jackson affidavit, the Association received a letter from Minister Nelson dated April 3, 2009 which included a document from the Economic Management Division of the finance Ministry. This document

which is exhibited along with Minister Nelson's affidavit addressed the possible consequences of the government making all payments due as scheduled for fiscal year 2009/2010. The document is dated April 3, 2009 projected that if all the due sums were paid, wages would account for 53% of all tax revenue, and amount to about 11.3% of GDP, this compared to "international norm of about 8% to 9% of GDP." The document continued:

"The Government of Jamaica has to exercise fiscal prudence and contain the wage bill to sustainable levels. Within this context the agreed 7% increase and arrears/back pay are unaffordable and the Government of Jamaica is not in a position to make those payment. If the wage bill were to continue on the trend depicted above, the Government of Jamaica runs the risk of having its credit ratings downgraded with adverse consequential effect on interest and exchange rate, which would further feed into increasing the deficit thereby crowding out much needed spending on social and infrastructural projects."

9). In a letter in response, dated April 9, 2009, the claimant through its chairman wrote to Minister Nelson in the following terms:

Dear Sir,

On Wednesday April 8, 2009 an all Island Delegates' Meeting of the Special Constabulary Force Association was convened at Harman Barracks to consider a response to the document dated April 3, 2009, sent to us by you.

Of the eighty six delegates, fifty eight (58) were present thus establishing a quorum of two thirds majority.

The question of a waiver of payments due April 1, 2009 as per 2008 – 2010 Heads of Agreement was put to the delegates. After Lengthy deliberations the delegates unanimously mandated the Central Committee to:

1. **abide by the existing terms of the signed Agreement;**
2. **ensure that the value of the negotiated terms and conditions of the Heads of Agreement is maintained.**

3. **There can be no re-negotiation of the terms of the said Agreement**

4. **Any waiving of payment must be presented by the Ministry with suitable options for due consideration.**

The Central Committee awaits your response, so that meaningful dialogue may be engaged to ensure amicable solutions and speedy closure to this matter.

10). A further letter was sent by the Association on April 28, 2009 to the Minister of Finance, the Hon. Audley Shaw. I also set out the terms of that letter:

Dear Sir,

REQUEST FOR URGENT MEETING IN RESPECT TO NON PAYMENT OF INCREASES DUE ON DALARIES AND ALLOWANCES AS PER SIGNED HEADS OF AGREEMENT 2009 – 2010

The Association and our membership note that, notwithstanding the signed Heads of Agreement between the Ministry of Finance and the Public Service and the Association, there has been a non-payment of increases due on salaries and allowances with effect from April 1, 2009.

We believe that scant regard has been shown to us as, to date, we have not been officially invited to any meeting to discuss or to participate in any discussion relative to what is now appearing to be a breach of our agreement. In addition we are concerned about circulating reports, that previously non taxable allowances will now be taxed.

We are therefore requesting an urgent meeting, by Wednesday, April 29, 2009, to expeditiously deal with these critical matters.

We anticipate your prompt response.

By letter date May 8, 2009, the Finance Minister responded in the following terms:

Dear Mr. Jackson

Re: Request for urgent meeting in respect to non-payment of increase in salaries and allowances as per signed Heads of Agreement 2009-2010

This serves to acknowledge receipt of your correspondence dated April 28, 2009 regarding the above captioned and to apologise for the delay in responding.

Please note that the proposed tax on allowances does not violate the agreement signed between the Government and the Special Constabulary Force Association. On the matter of wages, the current economic crisis being experienced, coupled with the lack of resources will not allow the Government to pay salary adjustments other than regular annual increments in this fiscal year.

We ask for your understanding and cooperation in these trying times.

11). It was submitted on behalf of the Claimant Association that pursuant to Part 56 of the Civil Procedure Rules of 2002 (as amended), the Association was entitled to seek a declaration from the Court. That part of the rules deals with applications.

(a) for judicial review

(b) by way of originating motion or otherwise for relief under the Constitution;

(c) for a declaration in which a party is the state, a court, or a tribunal or any other public body;

Any such application dealing with the aforesaid is characterized as an "application for an administrative order".

CPR 56.9 mandates that an application for an administrative Order is to be made by way of a Fixed Date Claim Form as has been done in the case.

12). Mrs. Samuels-Brown submitted that a declaratory judgment is available to an applicant where what is sought is a pronouncement on the law with or without coercive orders such as damages or prerogative orders. She further submitted that such an application was particularly appropriate where the defendant is "vested with public responsibilities" as coercive remedies may not be available against such defendant.

It was submitted further that given the averments in the affidavit of Sergeant St. George Jackson as well as those in response to that affidavit, (See especially the affidavit of Hon. Dwight Nelson acknowledging the Heads of Agreement as binding), there is little in the way of dispute between the parties. In that regard, it was submitted that "the claim preceded an (largely) undisputed fact that:

(a) There is a valid and enforceable contract of employment
(b) The Heads of Agreement entered into between the ISCFA on the one hand and the representatives of the Government on the other hand, forms a part of the contract of employment.
(c) Pursuant to this agreement, payments due to the claimants were made up to March 31, 2009, in other words there has been part payment by the government.
(d) Subsequently the government has breached and/or failed to honour the terms of the agreement.

13). In addition, and in any event, counsel for the claimants submitted that they were entitled to, and the court had jurisdiction to give, relief under the Constitution of Jamaica. Counsel cited Article 18 of the Constitution which is in the following terms:

> "No property of any description shall be compulsorily taken possession of and no interest in or right over properly of any description shall be compulsorily acquired except by or under the provisions of a law.

14). It was submitted that there is "abundant" authority in support of the proposition that "property" in Article 18 includes money and in particular "salaries lawfully due". In the circumstances, the claimants are entitled to the declarations sought as well as an order for the damages arising from non-performance of the agreement to be assessed.

The claimant's submissions also sought to anticipate the response of the defendant that the issues in respect of which the declarations are sought are academic and theoretical, rather than real or substantial. Counsel pointed out that the Association which is established by Section 26 of the Constables (Special) Act, clearly has *locus standi* to bring the action. In addition, both the named claimants have a personal and real interest in the outcome of the litigation. There is, it was argued, a real dispute arising out of the non-payment of the entitlements provided for under the Heads of Agreement and the claimants had an interest in pursuing that, which the defendants had a real interest in opposing.

15). It was also submitted that declaratory relief is more readily available where one of the parties is a public authority and/or where the regular coercive remedies may be unavailable or of limited application against the Crown. The situation here is that the court had all the facts before it and the fact that at least one of the parties is a "public authority" makes it particularly apt to grant the remedy of a declaration.

16). Counsel for the claimants cited the English case of **GOURIET V THE UNION OF POST OFFICE WORKERS AND OTHERS** (1977) 3 All ER 70, in the House of Lords. There, Lord Diplock had suggested that it was not necessary in order to secure a declaration for there to be a subsisting cause of action. In that regard he suggested that the threat of a future breach of contract may be sufficient to ground an action for a declaration.

"The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future id threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future that the jurisdiction to make declarations of right can be most usefully invoked".

17). In that case, on the 13th January 1977, a news bulletin was carried on television that the Union of Post Office Workers had resolved not to handle any mail in the course of transition between England and Wales and South Africa during the following week. The plaintiff in that matter attempted by way of a private action to challenge this decision in relation to this public authority, after the Attorney General had refused to take action. It was held that that the plaintiff's only interest was as a member of the public and he was not entitled to a declaration that the act of the union workers would be unlawful.

18). **Submissions by the Defendant**

Mr. Robinson for the defendant strongly resisted the grant of any declaration to the claimants. He asserted that a declaration could not be granted in this case as any issue between the parties hereto was purely academic and accordingly, not justiciable. In particular, he said there was no dispute upon which the court could adjudicate between the parties as it was clear from various pronouncements that the government accepted the validity of the Heads of Agreement which had been signed between the parties. He referred in that regard, to the affidavit of Sgt. Jackson and at paragraph 25 where he had asserted that the position seemingly adopted by the 1st defendant was in breach of the terms of the Heads of Agreement. He also referred to the letter written by Sgt Jackson to Minister Nelson dated April 9, 2009, the text of which has been set out above.

19). He also made reference to the further affidavit of Sgt. St. George Jackson sworn to on the 22nd June 2009 in which he referred to a meeting between the Minister of Finance, the Honourable Audley Shaw, and the Association. It was alleged that at that meeting the Association's representatives were told that "not only was there a wage freeze in place but that amounts due under the Heads of Agreement which were not paid would not ever be paid but would have to be foregone by the members of the Association". In support of that assertion, Sgt. Jackson cited in his affidavit a letter written by the Hon. Minister of Finance dated May 8, 2009 and the text of that letter was set out above.

Dear Mr. Jackson,

20). It was Mr. Robinson's submission that this letter of the Minister of Finance did not bear the interpretation placed on it by Sgt. Jackson in his affidavit in that it did not speak to the increases due to the Association's members being "foregone" nor indicate that the decision in that regard was "non-negotiable". There was, in his view, as a matter of fact, no actual dispute in respect of which the claimants would be entitled to a declaration.

21). Mr. Robinson also doubted whether the claimants had any particular interest in seeking a declaration. In that regard he submitted that "interest" was wider than "*locus standi*". He did not doubt that they may have *locus standi* but felt that in order to bring an action they had to bring themselves within the principles enunciated by Buckley J in **Boyce v Paddington Borough Council**, (1903) 1 Ch 109.

> "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly,

where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

It was not clear that the claimants had any "interest" in these proceedings sufficient to allow them to seek a declaration.

22). Mr. Robinson cited the recent decision of Jones J. in the local case **Honourable Dorothy Lightbourne v Coke, Matalon and Portia Simpson-Miller**, HCV 1860 of 2010. There, the "sole" issue on the applications before the court was whether the leader of the Parliamentary Opposition, Hon. Portia Simpson-Miller, O.N. had a legal interest in the legitimacy and correctness of the decision by the Honourable Attorney General and Minister of Justice to decline to issue an authority to proceed under the Extradition Act for the extradition of the first defendant in that case. The Minister sought a declaration as to the propriety of her action in not issuing the authority and named the leader of the Opposition as a defendant in her claim. Mrs. Simpson-Miller sought to be dismissed from being a defendant in the claim, no relief being sought against her by the claimant Minister.

23). The learned judge in that case was considering whether the leader of the Opposition was a "proper defendant" as one having a "legal interest" in the outcome of the proceedings. He had quoted **Zamir & Woolf, The Declaratory Judgment** (1993) 2nd Edition, to the following effect:

"No person should be made a defendant unless he has a true interest to oppose the declaration sought, or unless there is some other good reason why he should be a party"

24). He expressed the view that an interest which is "speculative, political or ethical" was not sufficient, and that "declaratory proceedings require a party to confront the claimant on the issues raised". He accordingly concluded that the putative defendant in the case had no legal interest

and should cease to be a party to the proceedings. Based upon this case it was further submitted that the declarations sought should not be granted. While seemingly conceding that there was *locus standi* to bring the action, he submitted that the legal interest required was absent as the defendant was not denying the validity of the Heads of Agreement. I understand Mr. Robinson's submission to be that in this case *the claimants* have no legal interest to protect in seeking the declarations. I say this because it cannot be suggested, in light of the strong opposition being mounted to the grant of the declarations, that "the defendant has no true interest to oppose the declaration". In any event, as is clear from the citation from Zamir & Woolf above, the existence of some "other good reason" would be an appropriate basis for a person being made a defendant to an application for a declaration. The fact that the question before this court is directed, at its core, to the relationship between an executive organ of the state and the government, in my view, provides a sufficient basis for this court to consider the application. Without more, I would hold that this case (**Boyce**) is not relevant to the one before me.

25). Mr. Robinson also cited **London Passenger Transport Board v Moscrop** [1942] A.C. 332 as indicative of the court's historical view that the discretion to grant declaratory relief is one that should be exercised sparingly. Mr. Moscrop, an employee of the London Passenger Transport Board, sought a declaration that certain conditions of his employment were unlawful. Rejecting that claim, Viscount Maugham said, at pp. 344-345:

> "It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised 'with great care and jealousy'... What special interest has the respondent to enable him to bring this action? We are not here concerned with anything but his civil right, if any, under the section. I think it plain that there has been no interference with any private right of his, nor

has he suffered special damage peculiar to himself from the alleged breach ..."

26). The main burden of attack by the defendant on the claimant's application for the declarations was that the applications were based upon academic, hypothetical or theoretical considerations and the court, as a matter of law, did not exist to adjudicate upon such types of issues. It was conceded that the court has always had the power to make binding declarations of right without ordering consequential or coercive relief. However, counsel Mr. Robinson submitted that this was "most appropriate where there is a legal dispute but no wrongful act entitling either party to coercive relief". The clearly discretionary power to grant declaratory relief without coercive orders should be exercised sparingly. In support of this proposition Mr. Robinson cited **Tindall v Wright** The Times Law Reports May 5th 1922. There, it was held that a court would not decide a point of law which had become academic even though both parties were anxious to have it determined, and though it was a matter of public importance on which a Government Department required the guidance of the court with a view to amending legislation, if necessary. In **Tindall**, by the time the matter came on for trial, there had been a decision from the Divisional Court, binding on the lower court, which decision had been adverse to the contention of the appellant in the Tindall case. The issue had therefore become "academic" and the court refused to pronounce what would in effect be a futile judgment.

27). In another case, In **Re Barnato Dec'd: Joel v Sanges** 1949 1Ch 258, the Court of Appeal re-stated the proposition that the court had "no jurisdiction to adjudicate purely hypothetical questions that might never arise". In that case the issue was whether trustees of a trust may become liable in the future for any estate duty which may become payable if advancements were made from the trust to a beneficiary thereunder.

28). It was also submitted that no declaration should be made where the only purpose is to answer some academic questions on which the parties require some ruling. There must be an actual dispute between the parties. In **Mellstrom v Garner and Others** 1970 1W.L.R. page 603, the plaintiff sought a declaration as to whether he would breach a paragraph of an agreement with his then partners which prohibited him from soliciting clients of the partnership while he remained a "salaried partner", should he do this after ceasing to be a "salaried partner". It was held that since there had been no breach of the provision, nor any attempt to breach it, this was not a case where the court should exercise its discretion to grant a declaration. Similarly, in the case of **Operation Dismantle v the Queen**, it was held that no action for declaratory relief would be available to Appellants on the basis of a purely hypothetical view that allowing missiles belonging to the United States of America to be tested in Canada, would increase the risk of nuclear war and make Canada more likely to be a target of attack. In this case, Dickson J. said:

"The reluctance of the courts to provide remedies where the causal link between the action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to *Eager, The Declaratory Judgment Action (1971)* at page 5:

3. The remedy (of declaratory relief) is not generally available where the controversy is not presently existing, merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subject of declaratory relief".

29). Dickson J. continued:

Similarly, *Sarna* has said, "The Court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose

of remedying only possible conflicts". (*The Law of Declaratory Judgments* (1978), at p. 179).

In **Ainsbury v Millington** (1987) 1 W.L.R. 379, at page 381, it was held per Lord Bridge of Harwich:

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce upon abstract questions of law when there is no dispute to be resolved".

In that case Lord Bridge also quoted Viscount Simon, L.C. in **Sun Life Assurance of Canada v Jervis**, (1944) A.C. 111, 113-114, where he said:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in their favour without in any way affecting the position between the parties..... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue".

30). Counsel, Mr. Robinson also cited the English case of **Draper v British Optical Association** (1938) 1 Ch 115. The plaintiff claimed a declaration that action to remove the plaintiff's name from the register of members proposed to be taken against him by the defendant association consequent upon a meeting to be held and at which he could be heard, would be *ultra vires*. It was held that the action was premature. In **In Re Carnarvon Harbour Acts, 1793-1903, Thomas v The Attorney General** (1937) 1 Ch 72, the clerk to the Harbour Board took out a summons for a declaration to determine whether the Board had certain powers under the Acts. It was held that since no particular exercise of any power was being called into question, the court should not entertain such an application. If

a particular act was carried out, its legitimacy could then be the subject of appropriate action.

31). In **Howard v Pickford Tool Company Ltd.** (1951) 1 K.B. 417 the defendant company had agreed to employ the plaintiff in the capacity of managing director for a period of six (6) years. The plaintiff brought an action against the company seeking a declaration that the conduct of the chairman was such as to amount to a repudiation of the agreement so that he would be excused from further performance of his obligations under the contract. He however, continued to perform his functions. It was held that no declaration should lie as the issue here was wholly academic since the plaintiff was still performing his duties. The court was of the view that granting the declaration would not have meant that the plaintiff could then rely upon a declaration as a repudiation and treat it as such. On the other hand, if the plaintiff received the sought for declaration, it would inevitably give rise to further litigation. In other words it lacked *utility*, a concept to which I refer later in this judgment.

32). Mr. Robinson cited **Everett v Ryder**, K. B. Division, the Law Times, Volume 135, page 302. There, the plaintiff sought a declaration that an appointment had not been validly made, although to the knowledge of the plaintiff, the irregularity in the appointment had been corrected by the time of the plaintiff's action. It was held that no declaration could be granted as this would merely amount to an academic exercise, any irregularity having been corrected.

33). Counsel also submitted that the case of **Smeeton v The Attorney General**, (1920) 1 Ch 85, was further support for the proposition that this was not a proper case for the grant of a declaration. In that case, the plaintiff sought a declaration that he was exempt from excess profits duty as he fell within the exemption under section 39 of the Finance Act (No 2)

1915. He denied that he was liable to furnish a return or supply information to the Commissioners and sought a declaration to this effect. It was held that he was not entitled to such a declaration as he did not come within the principles of invalidity and public interest as enunciated in **Dyson v The Attorney General** (1912) 1 Ch 158 and **Burghes v The Attorney General** (1912) 1 Ch 173 (both dealing with the validity of forms). Further, it was not desirable to grant a declaration when there was a statutory right of appeal available to the plaintiff if he were dissatisfied with an assessment of his income. A declaration would necessarily have pre-empted any decision by the court constituted to hear Revenue matters. This case was cited as authority for the proposition that where there is an alternative remedy, declaratory relief ought not to be granted. In the instant case, it was submitted that the claimants have the alternative of arbitration. It should, however, be noted that that case involved the interpretation of taxing statutes which was the role of the Commissioners in raising assessments or requiring the filing of returns, and appeals against such were statutorily provided for.

34). Counsel also cited **Stockwell v Southgate Corporation** (1936) 2 All E.R. 1343. There, the court refused to grant a declaration as it formed the view that there was an alternative procedure available under the Private Street Works Act. This was particularly so where only two of the many persons who had an interest in the subject matter of the declaration were before the court and the others would have been at liberty to pursue an appeal to the justices under the aforementioned Act. It was also premature because it would make more sense to await the taking of appropriate steps to apportion expenses between the plaintiffs and others who were in a similar position as "frontagers" and who would not be bound by the terms of any declaration given here.

35). Submissions in opposition to Constitutional relief for deprivation of property.

Mr. Robinson also denied that the claimants were entitled to any constitutional redress for being deprived of their property, that is the money due under the Heads of Agreement for the period April 1, 2009 to March 31, 2010. He denied they had been deprived of a constitutional right to property by virtue of not being paid consistent with its terms. He cited the Barbadian case of **Gladwyn King v The Attorney General** (1993) 45 WIR 50, decided finally on appeal by the Judicial Committee of the Privy Council. In that case, the Barbadian Parliament passed legislation, the Public Service Reduction of Emoluments Act, reducing the emoluments of certain public servants of whom the plaintiff was one. The plaintiff brought an action challenging the validity of the Act claiming it contravened her constitutionally protected right under section 16 of the Constitution (no property to be compulsorily taken possession of except under the authority of a written law providing for compensation). Her action failed in the High Court and her appeal to the Privy Council was also dismissed.

36). It was held that the appellant did not have a constitutional right to a minimum salary and, not being among those public officers whose salary was expressly protected by section 112 of the Constitution of Barbados, there was no implied term that her emoluments would never be reduced. Indeed, section 112 was inconsistent with the claim that all public officers were entitled to the protection expressly conferred by that section on specified office holders. There was also no right to a minimum salary and accordingly no right protected by section 11 (no deprivation of property without compensation) or by section 16. The only right she could properly claim was to the payment of such emoluments as the Minister under the Civil Service Establishment Act or as Parliament in the exercise of its legislative powers, attached to her office.

37). In **King**, the Privy Council made it clear that the rights to emoluments enjoyed by public officers was in respect of emoluments as provided for under the Civil Establishment Act, and the fixing of which emoluments was delegated to the Minister under the terms of the Act. This is the same position under the equivalent Jamaican provisions. Accordingly, Mr. Robinson submitted, the claimant cannot sustain a claim for deprivation of property under Article 18 of the Constitution of Jamaica and any application for a declaration to this effect should be denied. It was also submitted that in any event, the position of public officers in their relationship with the Government as employers, was less one of contract than it was one of status. (See **Roshan Lal v Union of India** (1967) AIR SC 1889, India Supreme Court) In that case it was stated, (and adopted by the Court of Appeal in Barbados):

> "It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by the statute or statutory rules which may be framed or altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee".

38). In that regard, it was submitted that the claimants are public officers under the Constitution of Jamaica. The salaries for public officers in Jamaica, are determined under the provisions of the Civil Service Establishment and like in the case of Barbados, there is no entitlement of a minimum salary which could ground a claim for deprivation of property.

Nor is there any implied term that the emoluments of those officers would not be reduced. No declaration should therefore be granted to the claimants in respect of any claim grounded in the Constitution.

39). Mr. Robinson submitted that, based upon the authorities cited, this court should refuse to grant any declaration as to do so would seem to impose fetters on the Parliament in its legislative function and the Minister of Finance & the Public service in his executive function. He submitted in conclusion that there were certain facts which were not in dispute, which he said were as follows:

1. The members of the Island Special Constabulary Force Association are public offers
2. Their salaries are determined by negotiations with the Government.
3. A Heads of Agreement was signed by both parties
4. Salaries were paid consistent with the terms of the Heads of Agreement for the period 1st April 2008 to March 31st 2009.
5. There is a global economic crisis.
6. The Government has met with the Claimants to discuss alternative arrangements.
7. The Government has advised the Claimants that because of the Global Economic Crisis it could not pay increase due in fiscal year 2009 -2010 during that period;
8. It has stated *definitively* that it intended to honour the arrangements and it would not deny the obligations under the Heads of Agreement.
9. The Claimants have accepted the assurances of the Government.
10. The Claimants are willing to discuss alternative arrangements and methods of payment and are awaiting provision of a time table for the payment of the 2009 – 2010 benefits.

40). In light of what he called "undisputed facts", Mr. Robinson submitted as follows:

1. That there was no dispute relative to the unilateral decision of the part of the government not to fulfill its obligations under the Heads of Agreement for the payment of salaries and allowances for the period April 2009 – March 2010.
2. The issues raised in the claim (are) hypothetical or academic and the court ought not to exercise its discretion to grant the declaration sought.
3. Alternatively, declarations can not be granted as there is no live issue for determination.
4. There is no breach or intended breach which would entitle the claimants to orders sought.
5. Having regard the declarations sought, unless a time were stated by the Court for performance of the obligations, it would be useless.
6. Arbitration is a more practical and convenient alternative which should be pursued, and makes the grant of declarations, unnecessary.

41). In her response to the authorities cited by Mr. Robinson, counsel for the ISCFA submitted that most of them were distinguishable or had no application to the instant circumstances.

42). With respect to the Barbadian authority of **Gladwyn King**, it was her submission that the passage of a specific legislation by the Barbados parliament to implement the reduction of salaries made that case easily distinguishable. In the case of **Operation Dismantle**, she suggested that that case turned on the impossibility of proving the allegations upon which the declaration was sought. However the same case indicates that once there is "controversy" and "lack of clarity" this might provide the basis for the court to exercise its discretion and grant a declaration. She was also of the view that the recently decided case of **Lightbourne v Coke and**

Others had no application as it really turned on the application of Part 19.2(4) of the Civil Procedure Rules. The **Russian Commercial Bank** case, she said, should be read as enjoining the Court to ensure that it has all the relevant information before it, in order to grant a declaration.

43). With respect to **London Passenger Transport v Moscrop**, this case was distinguishable as there were no issues as to rights but rather only to privileges. The case of **Smeeton v The Attorney General** was another in which the court was of the view that it had insufficient information and she suggested that this feature was salutary in considering whether to grant the declaration.

44). She took issue with what Mr. Robinson had characterized as "undisputed facts". In particular, he had asserted that the government had definitively stated that they would honour the Heads of Agreement. However, there had been no affidavit evidence which contradicted the averment by Jackson that Minister Shaw had advised in a meeting that there was a "wage freeze" and that the increase due would have to be "foregone". There is also some difference between the respective averments of Minister Shaw and Minister Nelson. It is also disputed that the claimants "have accepted the assurances" of the government as to the sanctity of the terms of the Heads of Agreement. Further while the claimants are willing to discuss alternative arrangements there is no evidence that a clear and credible set of proposals to address the non-performance of the terms of the contract for 2009 – 2010 has been put forward. It was clear therefore, that a dispute existed and, at the very least, there is a clear lack of certainty and clarity as to the continued validity of the Heads of Agreement, on the basis of which the declarations should be granted.

45). **Court's Ruling**

I shall deal firstly and in short order, with the claim for a declaration that the claimants' property has been "acquired" without compensation

contrary to Article 18 of the Constitution of Jamaica. I do not accept that there has been a deprivation within the meaning of Article 18. I accordingly hold that the claimants are not entitled to the declaration sought in this regard. I do however feel that it is important for this court to make some observations in reference to the King case which was cited and heavily relied upon by the defendants and I will do so below.

46). I turn now to what is the central issue in this case: whether the circumstances exist in which this Court may exercise its discretion to grant a declaratory ruling to the claimants, (Is there jurisdiction to grant declaratory relief?) and if so, whether it should exercise its discretion to grant declarations.

47). It may be useful firstly, to define in simple terms how the authorities over many years have characterized a "declaration" or "declaratory relief" and also to consider whether any general criteria have emerged from the many cases in which declaratory relief has been sought as to the circumstances in which such relief would be appropriate. In so far as a definition is concerned, I would adopt the one used in **Zamir and Woolf**, (those authors cited elsewhere in this ruling) which stated:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive judgment which can be enforced by the courts".

48). It has also been defined as a judgment of a court in a civil case which declares the rights, duties, or obligations of one or more parties in a dispute, is legally binding, but does not order any action by a party. It seems clear on the authorities that a declaration is a discretionary judgment which must be 'granted with care and caution having regard to all the circumstances of the case', and ought not to be granted where the

relief claimed would be unlawful or inequitable or where an adequate alternative remedy which disposes of all the issues is available.

49). In so far as the question of jurisdiction of the court to grant declarations is concerned, I cite and adopt the views expressed by **Zamir and Woolf** (op cit) at paragraph 3.002 where it is stated:

> That jurisdiction is now so extensive that it can best be described in negative terms, i.e. by stating the cases in which the courts have no power to grant declaratory relief. Thus Lord Diplock {See **Rediffusion (Hong Kong) Ltd. v Att. Gen. of Hong Kong** (1970) A. C. 1136 at 1153} has identified four causes for a properly constituted court lacking jurisdiction:
>
> a) because of the non-fulfilment of a condition precedent to it entering on an enquiry;
> b) because of the status of the parties to the action;
> c) because of the subject-matter of the dispute; and
> d) because of the nature of the relief sought.

50). The authors continue:

> Thus, in *Barnard v National Dock Labour Board*, Denning L.J. said: "I know of no limit to the powers of the court to grant a declaration except such limit as it may in its discretion impose upon itself". A similar statement was made by Viscount Radcliffe in *Ibeneweka v Egbuna* {(1964) 1 W.L.R. 219 at 225}. Such dicta serve to emphasise the vast and as yet unexhausted, potential of declaratory relief. However, this does not mean that the courts can make declarations on any matter whatever as Lord Diplock made clear in *Gouriet v Union of Post Office Workers* (see above for cite):
>
> "Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years, it has become more and more extensively used, often as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is *ultra vires* and void. Nothing that I have said is intended to discourage the exercise of judicial discretion in favour of making

declarations of right in cases where the jurisdiction to do so exists. But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights".

51). In this jurisdiction, the right to seek declaratory relief is set out in **Rule 8.6** of the Civil Procedure Rules which provides as follows:

A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed.

52). I would hold that the provision in the CPR makes it plain that the court has a very wide jurisdiction in determining whether to exercise its discretion to grant declaratory relief. Should the court grant the orders in terms of the declarations sought by the claimant Association in this matter? Or to put it another way: are there circumstances in the instant proceedings which ought to make the court refuse to exercise its discretion in favour of the claimant?

53). With respect to the question of the circumstances or the conditions under which the court ought to exercise its power to grant declaratory relief, I am conscious that the defendant in opposing the grant and even denying the courts jurisdiction to grant the relief sought, has referred to a number of cases. Some of the cases raise public law issues as to the need for special interest to be shown by the claimant bringing the action. Together, the cases raise issues of whether the dispute is real or abstract or hypothetical; whether the question is moot because the circumstances have not arisen or may never arise; whether the person seeking the declaration has a real interest and the court's declaration will have foreseeable consequences and whether there is a proper "contradictor". But I am of the view that the principles to be deduced from the cases and upon which reliance has been placed by the defendant are adequately summed up with the following citation which is taken from the text,

"*Perspectives on Declaratory Relief*" by Anthony Papamatheos and Peter W. Young. There the learned authors state the following at page 148:

"As prescient a statement as any is that of Lockhart J in *Aussie Airlines Australia v Australian Airlines* (1996) 139 ALR 663 at 670-671.

> 'For a party to have sufficient standing to seek and obtain declaratory relief it must satisfy a number of tests which have been formulated by the Courts, some in the alternative and some cumulative. I shall formulate them in summary points as follows:
>
> - The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved and the declaratory relief must be directed to the determination of legal consequences: *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257. The answer to the question must produce some real consequences for the parties.
> - The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that (have) not occurred and might never happen'. *University of New South Wales v Moorhouse (1975) 133 CLR 1*, per Gibbs J at 10; or if the Court's declaration will produce no foreseeable consequences for the parties: *Gardner v Dairy Industry Authority* (NSW) (1977) 52 ALJR per Mason J at 180 and per Aickin J at 189.
> - The party seeking declaratory relief must have a real interest to raise it; *Forster v Jododex Australia Limited* (1972) 127 CLR 421 per Gibbs at 437 and *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* 1921 AC 438 per Lord Dunedin at 448.
> - Generally, there must be a proper contradictor: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* at 448 and *Ainsworth* per Brennan J at 596'.

The relevant principles are laid down by the High Court in *Ainsworth*, in particular in the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ at page 581-2. *Their Honours made the point that '(i)t is now accepted that superior courts have inherent power to grant declaratory relief'; and '(i)t is a discretionary power which "(i)t is neither possible nor desirable to fetter ....by laying down rules as to the manner of its*

exercise"' (a reference to the judgment of Gibbs J in Jododex at 437). See also Oil Basins Limited v Commonwealth (1998) 178 CLR per Dawson J at 649". (My emphasis)

The authors then state:

> These are rules that in general should be satisfied before the Court's discretion is exercised in favour of granting declaratory relief. To style what is happening here as the exercise of judicial discretion is simply erroneous.
>
> *The place where judicial discretion may arise is where a court has a power to order a declaration but contemplates not doing so. What are the circumstances in which this judicial power – that is to not order a declaration- will be exercised?*
>
> *I doubt there are many such circumstances. To the extent that there may be any it is difficult to state the circumstances with any greater clarity than by simple reference to the word - utility. It may be that if a declaration would serve no purpose, or be of no utility, a court could exercise a judicial discretion, within the scope of its judicial power, to decline to order it."* (Emphases all mine)

54). I adopt the views of the learned authors and while it may be possible to argue whether what the court does is the "exercise of a discretion" only when it decides NOT to grant the declaration, but rather the exercise of a "power", what is clear is that the jurisdiction to grant the declaratory relief is extremely wide.

55). A convenient starting point for the discussion of whether the declarations should lie, is the dictum of Lord Wilberforce in **Gouriet**, a case which has been referred to by both sides. His Lordship stated:

> I shall content myself with saying that, in my opinion, there is no support in authority for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities, *either asserts a legal right which is denied or threatened*, or claims immunity from some claim of the defendant against him or claims that the

> defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff. (My emphasis)

56). It will be recalled that the main plank of the defendant's opposition to the grant of the declaratory relief sought in this case was that there was "no dispute" upon which this court could adjudicate. It was said that the government had fully acknowledged its obligations under the Heads of Agreement and so no dispute existed. It was a theme repeated in several submissions and in different ways such as that the issue was "hypothetical" or "academic". I accept that there must be a "real dispute" a "lis" between the parties to give rise to a claim for a declaration. Indeed, in the **Russian Commercial and Industrial Bank** case, Lord Dunedin stated in relation to cases seeking declaratory judgments:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor; that is to say someone presently existing who has a true interest to oppose the declaration sought.

Also, in **Operation Dismantle** cited by the defendant above, Dickson J had said that the court would not adjudicate "unripe claims", which the defendant's counsel has said this was.

57). There is some important evidence contained in the last affidavit filed (on June 18, 2010) on behalf of the defendants by Lorna Phillips, the Director of Industrial Relations in the Ministry of Finance and the Public Service. She says that she participates in negotiations between the Government and its employees including the members of the ISCFA. There are three (3) things which are important about this affidavit. Firstly, she indicates that the "formal procedure for the conduct of wage negotiations between the Government of Jamaica and all the five police groups ....(is that)...any and all *disputes* that are not settled by Ministerial Intervention are referred to arbitration". She continues: "In the case of the present dispute

between the Government of Jamaica and the ISCFA, an attempt was made to settle the dispute through Ministerial intervention at *a meeting* between the parties held on May 8, 2009". That is the meeting at which, according to Jackson's affidavit, sworn and filed on June 16, 2010, in response to his direct enquiry of Minister Shaw as to what he should tell his members in the absence of any concrete proposals from the Government, he was advised: "Tell them the truth Mr. Jackson. Tell them that the wages are freezed (sic) and foregone".

58). Secondly, she clearly acknowledges that a *dispute* exists between the Government and the ISCFA. It seems to me that it cannot lie in the mouth of the defendant to urge this court to find that "no dispute exists" when the Government's own affiant says clearly that there is. It also should not go un-noticed that the affidavit of Ms. Phillips is the first time that the issue of an alternative remedy of arbitration is raised in any document from the GOJ.

59). Thirdly, she admits that she was in attendance for a "significant part of the meeting". She says "to the best of her information and belief" the representatives at the meeting were advised by Minister Shaw of "difficulties experienced by the Government in making the payments of increases in salaries and allowances". Ms. Phillips, accordingly cannot give evidence which contradicts the averment of Jackson about Minister Shaw's comments as at least for a part of the meeting she was not there. In fact, the assurances belatedly given by Minister Nelson in his affidavit sworn on May 4, 2010, (and from which the ISCFA draws some comfort) that the "GOJ intends to honour its obligations under the said agreement when the fiscal challenges now facing the country have been alleviated", comes almost one year after the meeting of May 8, 2009 and stands in contrast to the alleged statement by Minister Shaw.

60). Another submission which had been made for the defendants was that there was alternative relief available in that the claimants could pursue arbitration and that the Court should accordingly be hesitant to grant the declarations sought. However, it should be noted that it has been held that the existence of alternative remedies will generally not exclude the court's jurisdiction to grant declaratory relief, although its existence will be a factor which the court may take into account in deciding whether to grant the declaration. There is not a scintilla of evidence that the GOJ had decided or suggested to the ISCFA that the matter be referred to arbitration apart from the late affidavit of Ms. Phillips. The statement therein merely states that where there is a dispute, the dispute is referred to arbitration. In light of Mr. Robinson's submission that "there is no dispute", it must follow that it cannot be argued that arbitration is available. Certainly there is nothing in the affidavits from Minister Nelson that arbitration has been suggested as a way of resolving the impasse.

61). Further, given the role of the Civil Establishment Act and Orders which may be made thereunder by the Minister unilaterally to fix emoluments, subject to parliamentary approval, it is fair to infer that if the matter went to arbitration and the government was not satisfied with the result, it would still be open to the Minister, in the exercise of his executive responsibility to unilaterally determine the emoluments and have it ratified by appropriate resolution by parliament in the exercise of its legislative function. Indeed, **King v The Attorney General** is authority for the proposition that it is possible to legislate a reduction of emoluments without breaching the Constitution.

62). Given the conclusion arrived at by **Papamatheos and Young** in their text referred to above and which I respectfully adopt, that on a close analysis of the authorities the overarching principle governing the exercise of the court's power to grant declaratory relief is the principle of 'utility', it is

palpable that if the defendant was to refer this matter to arbitration, the fact that the claimant ISCFA had a declaration as to the validity of the contract Heads of Agreement, would certainly be a factor of great utility to advance before the arbitrator. In this regard, I am of the view that 'utility' is to be accorded a broad meaning extending to more than mere legal correctness. It will also be recalled that lack of 'utility' of such a declaration, was one of the reasons submitted by the defendant's counsel why it should not be granted.

63). Also of relevance is the view expressed by Dickson J in **Operation Dismantle**, right after denying the availability of declaratory relief to "unripe claims". Thereafter, the judge did go on to say:

> "None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points in her judgments, *Borchard, Declaratory Judgments* (2nd ed. 1941), at p. 27, stated that,
> ... "*no injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the process; he need merely show that some legal interest or right of his has been placed in jeopardy or uncertainly*". (My emphasis)

64). I accept the proposition, implicit in the claimant's asking for a declaration as to the validity of the Heads of Agreement, that the legal interest or rights conferred by virtue of the Heads of Agreement had "been *placed in jeopardy or uncertainty*" by the failure to comply with the terms of the Heads of Agreement or to provide the alternative basis of resolution by way of accord and satisfaction. I also consider it manifest that if a declaration is granted it will have legal "consequences" for the parties, one of the conditions in favour of the exercise of the power, suggested Lockhart J in **Aussie Airlines Australia**.

65). There is in my view, and I so hold, a dispute which exists between the parties which is susceptible to the court making a binding declaratory

ruling. The dispute lies in the fact that there has been a breach, or at least non-performance of the terms of the Heads of Agreement for over one (1) year. The issue is neither hypothetical nor academic. There is also the possibility although this is not necessary for my decision herein, that based upon a declaration in terms of that asked for in paragraph 1 of the FDCF, it may no longer be open to the Government to avoid its obligations to the ISCFA without breaching the provisions of Article 18 of the Constitution of Jamaica.

66). In addition, there is a 'contradictor' in the defendant which has a real interest in opposing the grant of the declaration. (See **Lightbourne v Coke and Others** cited above) Having looked at the arguments in this way, I am of the view that the claimant ISCFA is at least entitled to the declaration sought at paragraph 1 of its Fixed Date Claim Form and I so hold.

67). In further support of this view, I cite and adopt the views expressed by the learned authors of Zamir and Woolf to the following effect at paragraph 3:007 of their text:

> The jurisdiction of the court to grant declaratory relief appears now to be wider when the court is exercising its supervisory jurisdiction in proceedings involving government departments or other public bodies than where it is exercising its original jurisdiction in proceedings between private individuals.

68). This case clearly falls within the category of those involving government departments. Having found in favour of the claimant in respect of the first relief claimed, I do not consider that it is necessary or advisable to grant a declaration in relation to paragraph 2 of the FDCF. The validity of the Heads of Agreement having been affirmed by the declaration to this effect in my view provides a sufficient basis on which to move forward.

69). I do believe that to make declarations in respect of paragraphs 2 and 3 would go further than is necessary in the instant case. In relation to the second declaration sought, there would still remain too many issues which would need to be determined including the specific amounts, the logistics and time of payment, etc, are matters which ought not to be the subject of a bald declaration, but should properly be determined after evidence has been led or after further negotiation. In my view to say that amounts are due without any evidence which would allow for quantification is undesirable. I also believe that to grant this declaration in the terms in which it is asked for would amount to making an award in relation to liability for a breach of contract and "for damages to be assessed". This was not a remedy for which the Court was asked. Moreover, since it is accepted that declarations are generally to be sparingly given, it seems to me that it is unnecessary to go further than to grant the declaration sought at paragraph 1 of the FDCF.

70). The declaration at paragraph 3 is specifically denied as it asks for interest at 15% but there was no evidence led as to why it should be awarded at that rate.

71). I have, I believe, said enough above to indicate that I am not satisfied that declarations can be made in relation to paragraph 4 (deprivation of property) and paragraph 5, breach of the Constitution Article 18. I take the view that the taking of the property under Article 18 must be taking with a view to permanently depriving the claimant of any right to the property; that is an attempt to exercise a proprietary right thereto, and I do not have any evidence which would support such a finding.

72). Having said that, I would wish to make (as I said above I would) some general observations which arise out of the submissions of defence counsel in relation to the procedures under the Civil Establishment Act and the

extensive references to the Barbadian case of **Gladwyn King**, cited by the defendant.

73). I do not disagree with counsel for the Government with respect to his submissions on the unique role of the Act and the duty of the Minister thereunder in unilaterally determining the emoluments of certain public servants, not including those whose emoluments are constitutionally protected. It is not at all clear to me however, that, having entered into negotiations and signed a binding contract with the ISCFA, this could be varied without either legislative intervention as in **King**, or the making of an appropriate order under the Civil Establishment Act. There is no evidence that either of these approaches has been pursued.

74). In **King**, when one looks at the report, one cannot help but be impressed by the efforts of the government in that case to engage and share with the public officers affected, the nature of the threat to the national interest and the basis and the reasoning underlying the decision to implement the cuts in salaries. From the report in the Barbados Court of Appeal, we learn that in September 1991, the Government of that country was experiencing difficulties with fiscal matters. The government issued a circular to officers in the public service dated September 5, 1991 which set out in considerable detail for the benefit of those officers, the reasons and the context in which it had become necessary to reduce the fiscal deficit to 1% of GDP over the second half of the fiscal year 1991/1992. It explained that this could only be achieved by reducing current expenditure and that a reduction in the wage bill was the only viable option to generate the level of savings required. It further explained that the research had pointed to the need to trim emoluments by a particular percentage and the length of time that the reduction would last, being eighteen months. All of this was shown to have a connection with the need to enter into the standby facility with the International Monetary Fund. The circular also outlined the

nature of the extensive discussions which had taken place between the government and the representatives of the employees on the possibility of developing a "deferred payment scheme", but explained why that option had been found to be impossible. It appealed to public servants to remember the traditions of public service and advised that the temporary reduction would not affect pension entitlements. Finally, it was directed that the circular be sent to *each public officer* with the request that each person exercise an option to accept the reduction of eight per cent (8%) per annum in his emoluments. The proposed reductions were eventually implemented by the passage of legislation, "The Public Service Reduction of Emoluments Act" of 1991.

75). That extensive sharing of information in King is to be contrasted with the letter from Minister Nelson dated April 3, 2009 which enclosed what appears to be a page from a larger document, (the page headed "specific wage trends"). This document (which is un-sworn and the author unknown) makes no reference to the "global economic crisis" called in aid by counsel for the defence in his submissions. The "global economic situation" is referred to in Minister Nelson's affidavit of May 4, 2010. Certainly the rather perfunctory letter from the Minister of Finance dated May 8, 2009 cannot be said to be anything other than a clear advice that the Government would not be able to pay salary adjustments "in this fiscal year". There is no evidence of any communication of how long the situation was likely to remain. Nor is there any mention of a relationship between the inability to pay and the Standby Agreement made with the IMF. Moreover, as noted in the Jackson affidavit sworn on June 16, 2010, there have been "no concrete proposals from the Government" made in meetings held between the parties after the filing of the FDCF.

76). In **King**, the appellant sought declarations, inter alia, that the Public Service Reduction of Emoluments Act contravened the provisions of section 16 of the Barbados Constitution (Guaranteeing freedom from

deprivation of property), and that she was entitled to her emoluments as if the Act had not been passed. Her action failed. It was held that her action could not succeed as by virtue of the Civil Establishment Act, a variation of her emoluments was a "condition appertaining to the officer's contract of service". The emoluments could be varied under the Civil Establishment Act and as there was no guarantee of minimum emoluments, the Minister acting under the provisions of that Act, could vary, and indeed reduce, the emoluments of the appellant. It stood to reason that legislation which did what was clearly contemplated under the Civil Establishment Act would not be *ultra vires* the Constitution of Barbados.

77). There is little question that the Civil Establishment Act in Jamaica gives the Minister and Parliament the power to fix and vary emoluments of public officers in the same way as the Barbados Act did. The reasoning in the **King** case is thus equally applicable to the claim for the declaration in this case with respect to deprivation of property and, as I have noted above, the claimant is not entitled to that declaration applied for here.

78). The point to be re-emphasized here is that the narrow issue upon which this court is really required to adjudicate is the validity of the Heads of Agreement. Counsel for the Government says that the defendant does not deny its validity, but opposes the grant on the basis that it may have the consequence of subjecting the government to other demands from other sections of the public service who may have similar grievances. Apart from the fact that it is not for this court to make rulings on the basis of the potential impact on the behaviour of persons not involved in the litigation, no evidence has been led in this regard by way of affidavits or otherwise. The affidavits for the Government have been devoid of anything which showed that the defendant has sought to provide a clear and credible basis

for the non-implementation of the 2009/2010 terms or how this may be addressed.

79). Counsel for the Government in the course of his submissions mentioned several times the "global economic crisis" and the fact that the Government had had to enter into an IMF Agreement as bases for justifying the non-performance of the agreed terms of the Heads of Agreement. Indeed, counsel had included among his list of "undisputed facts" that there was such a crisis, and that the Government had "advised the claimant that because of this crisis it would not be able to make the payments due in 2009/2010 in that year". There is, however, as I have noted, but one brief reference in the evidence to the "global financial situation", that contained in the affidavit of Minister Nelson, filed June 8, 2010. Even that affidavit does not say that *the claimant ISCFA* was advised that the inability to make the payments was the result of that situation. Rather it said that there were meetings with "public sector unions".

80). It seems to me from the evidence, that the level of engagement and provision of information of the kind provided in **King**, was the least that should have been accorded the claimant if the Government was seeking the cooperation of the claimant in overcoming its fiscal difficulties facing the country. It may be that a more serious and consistent level of engagement on the part of the defendant may have had the effect of alleviating the concerns of the claimant and rendered this application unnecessary. Rather the evidence seems to suggest that little hard effort was made in communicating to the claimant, not only the real nature of the government's difficulties but to proffer alternatives for discussion. This failure to urgently engage the claimant in a meaningful way showed at best an indifference, and at worst a disrespect, not only of the claimant ISCFA, but of the process by which the Heads of Agreement had been

arrived at. It also seems to ignore the possible negative consequences for the credibility of the Government if the impression is given, that the State can, without compelling and transparent explanations, renege on its commitments.

In those circumstances, I am satisfied that claimant must succeed in its application at least as stated above.

81). **The Doctrine of Executive Necessity**

I think I ought to make a few other observations with respect to the submissions of counsel for the Government. Mr. Robinson in resisting the grant of the declarations sought, submitted that to grant such a declaration would be to impose a fetter upon the Minister's executive function and parliament's legislative function. While he did not specifically articulate these concerns within the context of a specific submission on the so-called "Doctrine of Executive Necessity", it is often in that context that those alleged fetters are raised and so I believe that it should be considered. The doctrine has been held to be alive and well in this jurisdiction in **Revere Jamaica Alumina Limited v The Attorney General** (1977) 15 JLR 114; (1977) 26 W.I.R.486

82). The doctrine of executive necessity is the principle which states that although government may, through the actions of its duly authorized agents, bind itself in contract for the breach of which it may be liable in damages, government is not competent to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises. The essence of the doctrine therefore is that government cannot hamper the freedom of future actions of the government or the parliament in matters which concern the welfare of the state. In a paper entitled "**Executive Necessity: Upholding Contracts of**

a previous Government" delivered by **Mark Robinson** at a Conference in Canberra on November 1, 1996, the learned author stated:

> The origin of the doctrine of executive necessity is generally attributed to the decision of Rowlatt J in **Rederiaktiebolaget Amphitrite v The King** [1921] 3 KB 500 [[1921] All ER Rep 542]. ("The Amphitrite") In that case, during a time of war, a neutral shipowner, a Swedish steamship company, obtained from the British government an undertaking that their ship would not be detained in a British port if it made its way to Britain with a particular stated cargo. After the ship arrived, the government withdrew the undertaking and the port facilities. The ship, the *Amphitrite*, was detained by the British contractee and the Swedish company to avoid further loss, sold the ship. They sued in the High Court, seeking a petition of right for damages. It was held that the government's contract was not enforceable in a court as it was not within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. Rowlatt J at (1921) 3 KB 500, at p 503 acknowledged that the government can bind itself through its officers by commercial contract but went on to say:
>
> > "it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State"

83). In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 [52 ALJR 254, 17 ALR 513], Mason J (as he was then) at 74 said this statement was too wide ..... and stated the policy considerations in the following terms (at 74-75)

> "Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities. And it would be detrimental to the public interest to deny to the government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by

binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future."

84). It is clear that a claim to the benefits of this doctrine is not to be lightly made especially in a situation where the government is seeking to have various stakeholders share the view that all must cooperate for the general public good. I have in my researches come across a "Report of the Auditor General for South Australia" for the period 1997 to 1998 which contains a useful section with some consideration of the question of "Fetters on future exercise of Statutory and Prerogative Powers" and which may help in the approach to this subject as it relates to this case. In considering the doctrine's application to government's capacity to enter into contracts it says:

> There is, in all government contractual relationships, an inherent fetter or constraint imposed not only upon the Government, but also upon those parties with whom it contracts. Any such 'constraint' is in terms of the achievement of the intended objective of the contract, e.g. the construction of a hospital, supply of goods and services, etc. A fetter in this sense of governmental contracting is accepted as appropriate and is uncontroversial.

85). The report also refers to a South Australia case of **Northern Territory of Australia v Sky West Pty Ltd** [1987] 48 NTR 20 at page 46 where Kearney J made the following observation which I adopt:

> In general and for good reasons, a government rightly regards itself as bound to carry out a contract it has lawfully and properly entered into, when the other party is not in breach. These reasons are rooted in common sense and good government - in general, in a proper concern to protect the public revenue against unnecessary and unwarranted loss, to preserve the Government's reputation for integrity and to retain its credibility, particularly with the business community. But a government is not only a party to a contract; through its control of Parliament it is a law-maker. In that capacity it has an interest in ensuring that the people respect and observe the law, and to do so it must display by its actions some minimum respect for its own rules. Further it is in the public interest that

> when a government contracts with an ordinary person, it deals fairly with that person, and is seen to do so. Accordingly it would be a serious matter for the rule of law if a government were perceived as refusing without proper cause to perform a contract for services to the public entered into in accordance with all the legal safeguards designed to protect the public interest.

86). The Report of the South Australia Auditor General cited with approval as a helpful summary concerning the approach to the operation of this doctrine, comments from a text "Liability of the Crown" by Professor P W Hogg. There the learned author stated:

> "The vice of The Amphitrite rule is that it subjects the contractor to a risk which is not among the provisions of his contract, and which is actually inconsistent with any provisions providing for variation or discharge which will invariably be accompanied by provisions compensating the contractor. Where, as in The Amphitrite, the government decides to act inconsistently with obligations which it has deliberately undertaken, the application of the ordinary law will safeguard the contractor's profit by compelling the government to pay damages (or renegotiate)..... In those rare cases where the government cannot countenance either the payment of damages or renegotiation, it can secure the passage of Parliamentary legislation, retrospective if necessary to override the private rights.

87). It seems to me that this is an appropriate characterization of the application of this doctrine for the purposes of this case. In the circumstances, it would be for the Government to make a compelling case and, if it deems it necessary, pass relevant legislation. It can always seek to override the contract by legislation as long as the legislation is constitutionally valid. Accordingly, I do not accept that the grant of a declaration would in any way materially fetter the executive power of the Minister nor parliament's legislative powers.

88). In light of all that has been set out above, I reiterate my decision and accordingly make an order in terms of Paragraph 1 of the Fixed Date

Claim Form filed by the claimant on May 29, 2009 and amended June 22, 2009.

89) I also award costs of this application to the claimant Island Special Constabulary Force Association, to be agreed or taxed.

ROY K. ANDERSON
AUGUST 4, 2010