

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.24 OF 2005

BETWEEN:

JUDICIAL AND LEGAL SERVICES COMMISSION

Appellant

and

[1] HORACE FRASER
[2] ATTORNEY GENERAL OF SAINT LUCIA

Respondents

Before:

The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh Rawlins

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Sydney Bennett, QC with Ms. Patricia Augustin for the Appellant
Mr. Leonard Ogilvy for the First Respondent
Mr. Anthony Astaphan, SC with Ms. Georgis Taylor-Alexander and Mr. Rene Williams for the Second Respondent

2005: October 26;
November 28.

JUDGMENT

- [1] **BARROW, J.A.:** The central issue raised by this appeal is whether the termination of the employment of a magistrate by the Government of St. Lucia (the Government) in reliance on a provision in a contract of employment, rather than by the Judicial and Legal Services Commission (the Commission) in the exercise of its constitutional power, is in breach of the Constitution.
- [2] The Government, the second named respondent, first employed Mr. Horace Fraser (the Magistrate), the first named respondent, as a magistrate on 6th September 2000 on a contract for one year. The contracting parties were the Government and the magistrate.

The last renewal was on 6th September 2003. Among the terms of the contract was a provision in clause 6 that the Government could at any time determine the engagement on three months' notice or on paying one month's salary in lieu of notice.

[3] During the magistrate's tenure allegations of corruption were made against him and the Commission, the appellant, decided to investigate the allegations. The appellant appointed a retired High Court judge to conduct an investigation. He recommended that the magistrate's employment be terminated pursuant to the termination clause in the contract of employment.

[4] The Commission decided to act on the recommendation and by letter dated 5th January 2005 "recommended" to the permanent secretary in the Ministry of the Public Service "that clause 6 of Mr. Fraser's contract be invoked and that his contract be determined with immediate effect upon paying him one month's salary in lieu of notice." In response to this letter from the Commission the permanent secretary wrote the magistrate a letter in which he referred to the report into the charges of misconduct and stated that "we have found the said charges" of misconduct substantiated, that the acts were in breach of clause 5 of the contract of employment¹ and that in accordance with clause 6 of the contract the magistrate would be paid a month's salary in lieu of notice. The Permanent Secretary wrote a second letter the following day stating that it superseded the first letter. The second letter stated that the Commission had advised the Ministry that due to improper conduct on the magistrate's part his contract should be determined with immediate effect and on the basis of that advice his contract was being determined, effective four days later.²

[5] The magistrate succeeded in the High Court on the claim that he brought pursuant to section 105 of the Constitution for a declaration that he had been removed from his post by

¹ Clause 5 gave the Government a right to terminate the engagement if the person engaged should in any manner misconduct himself.

² He was not paid salary in lieu of notice. The Commission and the Government do not dispute that the magistrate is entitled to one month's salary in lieu of notice.

the Government and/or the Commission³ in contravention of s 91 of the Constitution.⁴ Shanks J ruled that the Commission had contravened section 91 of the Constitution when it induced the Government to remove the magistrate without reasonable cause. The learned judge also found that the Government had contravened section 91 by removing the magistrate from office when it had no power to do so. The learned judge ordered the Commission⁵ to pay damages to the magistrate equivalent to the net loss of salary and other benefits, including gratuity, for the approximately eight months that the contract had to run before its term would have expired, and damages of \$10,000 for distress and inconvenience.

[6] It is unfortunate that counsel did not draw to the attention of Shanks J that this court had considered the very issue of termination of the engagement of a magistrate in reliance on a contractual provision in the case of **The Attorney General of St. Christopher and Nevis v Angela Jasmine Inniss**.⁶ In that case the respondent had entered into a contract with the Government to serve as Registrar of the High Court and Additional Magistrate for a period of two years. A clause in that contract provided that the Government could at any time determine the engagement on giving three months' notice or on paying one months' salary. The Government invoked the clause and terminated the employment. Ms. Inniss claimed that the termination was null and void in that the Government purported to usurp the power to exercise disciplinary control over the applicant in her office of Registrar, in contravention of s 83(3) of the Constitution.⁷ Counsel for Ms. Inniss argued that she had

³ In the originating motion the magistrate sought declarations against the Commission and not against the Government but in the judgment the trial judge referred to the claim as being for a declaration against the Government and/or the Commission; see paragraph 1 of the judgment in Claim No. SLUHCV 2004/0256 dated 10th June 2005.

⁴ Section 91 (3) provides that "... the power to exercise disciplinary control over persons holding or acting in offices to which this section applies and the power to remove such persons from office shall vest in the Judicial and Legal Services Commission." The section applies to the offices of magistrate, registrar and assistant registrar of the High Court, to any public office in the department of the Attorney-General (other than the public office of Attorney General) or in the department of the Parliamentary Commissioner, the department of the Chief elections Officer (other than the office of Officer) or the department of the Director of Public Prosecutions (other than the office of Director) for appointment to which persons are required to hold ... specified qualifications and such other offices connected with the courts as Parliament may prescribe."

⁵ The judge specifically considered which of the Government or the Commission should be ordered to pay the damages that he decided should be awarded to the magistrate.

⁶ St. Christopher and Nevis Civil Appeal No 6 of 2000, decided November 19, 2001 (unreported).

⁷ Section 83 is in terms identical to section 91 of the St. Lucia Constitution except that the power to exercise disciplinary control and the power to remove the relevant office holders vests not in the Commission but in the

security of tenure in her employment, that she was protected by the Constitution and that her employment could not be terminated in the manner in which the Government purported so to do. At first instance the court held that the termination clause in the contract was null and void and of no effect.

[7] On appeal the Court of Appeal analysed whether there had been a breach of s 83(3) of the Constitution or whether there had been only a breach of contract.⁸ Redhead JA focused on the finding of the trial judge that the holders of the offices specified in s 83 of the St. Christopher and Nevis Constitution⁹ provided a service of such importance to the public that s 83(3) provides a mechanism for their removal which lies outside the control of the Executive and such an officer could not “bargain away” by contract the protection afforded to an office holder under s 83. Redhead JA described the trial judge’s language as bearing a striking similarity to that used by Byron CJ in **Attorney General of Grenada v The Grenada Bar Association**¹⁰ (often referred to as the **Holdip** case, after the name of the Director of Public Prosecutions whose employment on a fixed term contract was the subject of that litigation) and found that in relying on that decision the trial judge had erroneously elevated registrars, magistrates and crown counsel to a constitutional status equivalent to that of the Director of Public Prosecutions and of judges.

[8] In the **Holdip** case the Attorney General had argued that the Director of Public Prosecutions, by entering into a contract for a period of two years, had waived his right to remain in office until he reached the constitutionally specified retirement age or was estopped from insisting on his right to so remain by having agreed to a fixed term appointment. The Court of Appeal concluded in the **Holdip** case that the office of Director of Public Prosecutions was endowed by the Constitution with the same qualities of independence as members of the judiciary and the holder of that office could not be removed from office on the basis of the effluxion of time.

Governor General acting on the recommendation of the Commission which must first consult the Public Service Commission.

⁸ The Government accepted at the outset that they had not paid the respondent the sum to which she was entitled under the termination clause in the contract.

⁹ As in s 91 of the St. Lucia Constitution the offices include those of magistrates, registrars of the High Court and any public office in the offices of the Attorney-General or the department of the Director of Public Prosecutions.

¹⁰ Grenada Civil Appeal No 8 of 1999 (unreported).

[9] In the Inniss case Redhead JA quoted from the speech of Lord Diplock in **Hinds v The Queen**¹¹ where His Lordship stated:

“The distinction between the higher judiciary and the lower judiciary is that the former are given a greater degree of security of tenure than the latter. There is nothing in the constitution to protect the lower judiciary against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries while they are in office **or providing that their appointments to judicial office shall be only for a fixed term of years** ... The only protection that is assured to them by section 112 is that they cannot be removed or disciplined except on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council.” (Emphasis in the quote)

[10] Redhead JA found that by applying the decision in the **Holdip** case to the **Inniss** case the trial judge fell into error because the constitutional protection that the office holder enjoyed in the former was not the same in the latter. After considering the impact of the decisions in **Endell Thomas v Attorney General of Trinidad and Tobago**¹² and **Shrinivas Ganesh v Union of India**¹³ on the question of removal from office Redhead JA concluded¹⁴

“... I ... [have] no doubt that having regard to the decision in **Hinds** (supra) that appointments of magistrates, registrars of the Supreme Court and other officers of [the] lower judiciary for a short or fixed term [of] years do not conflict with the constitution ...”

Redhead JA went on to expressly hold that

“there was no breach of any constitutional right involving the respondent”

and that

“In my judgment what was involved was a breach of legal contract which the respondent entered into with the Government ...”.¹⁵

The other members of the court concurred in the judgment of Redhead JA with Archibald JA expressly holding that the trial judge was wrong to conclude that the termination clause in the contract was *ultra vires* the Constitution.¹⁶

¹¹ [1976] 2 WLR 366 at 377

¹² [1982] A.C. 113

¹³ (1956) 43 A.I.R. 455.

¹⁴ At paragraph [49] of the Inniss judgment.

¹⁵ At paragraphs [55] and [56] of the Inniss judgment.

¹⁶ At paragraph [78] of the Inniss judgment.

- [11] Mr. Bennett QC, counsel for the Commission in the instant appeal, says that had the attention of Shanks J been drawn to the decision in the **Inniss** case the learned judge would not have held that a termination of Mr. Fraser's employment amounted to a breach of his constitutional rights. Further, says the Commission, the judge would not have held that termination pursuant to the clause in the contract amounted to a removal from office within the meaning of s 91 of the Constitution and was thus void as it was not for reasonable cause. Finally, the Commission submits, the court would not have held that the Government had contravened s 91 by removing the magistrate from office when it had no power so to do . The Commission contends that it is clear from the **Inniss'** case that the Government had a contractual right to remove the magistrate from office by notice without having to state any cause for so doing .
- [12] Counsel for Mr. Fraser was unable to distinguish **Inniss** although he tried to do so by arguing that the constitutional procedure for removal in St. Christopher and Nevis was more elaborate and therefore gave greater protection to an office holder by requiring the Governor General to exercise the power of removal only upon the recommendation of the Judicial and Legal Services Commission which was itself obliged to first consult the Public Services Commission. It seems to me that distinction makes no difference to the effect of the decision in **Inniss** because what that case upheld was not the exercise of the constitutional power of removal but the validity and exercise of the contractual power of termination of employment before the expiration of the term of the appointment.
- [13] Counsel for Mr. Fraser cited no contrary decision, whether from this or another jurisdiction, and we take it that none exists. This did not deter counsel from firmly asserting that the decision in **Inniss** was bad law.
- [14] Mr. Astaphan SC, counsel for the Government, was also of the view that the **Inniss** decision was wrong and ought not to be followed.¹⁷ He submitted that the court of appeal

¹⁷ The divergence in the stances taken by the Commission and by the Government arose from the view of the Commission that the Government, in writing the magistrate in the terms of its first letter (see paragraph 4, above), had not acted as the Commission had recommended, which was to simply terminate in exercise of a contractual right to do so. Instead, in the view of the Commission, by purporting wrongly to terminate for cause the Government had made

in that case failed to distinguish between the determination of a contract by effluxion of time, which was not a removal,¹⁸ and termination by the intervention or act of the executive, which counsel argued was a removal.

[15] There were several reasons based on constitutional law and policy for drawing a fundamental distinction between those two modes of determination of a contract, Mr. Astaphan argued. The first is that if the Executive could intervene at whim and prematurely terminate a contract by giving notice the entire purpose of the protection intended by the Constitution would be seriously undermined. Counsel argued that what happened in the **Inniss** case was a good example of what could not have been intended.¹⁹

[16] A second reason for drawing the distinction between the two modes of determination of employment, in counsel's argument, is that determination by effluxion of time does not require any intervening act by the executive and is not a removal.

[17] The third and most important reason, counsel urged, is that notwithstanding that magistrates are treated in the Constitution under Chapter VI, which deals with the Public Service, magistrates form part of the judiciary. That being so, counsel submitted, the provisions of s 91 (3) of the Constitution must be considered in the context of the Constitution as a whole and, therefore, its consideration must be informed by the doctrine of separation of powers. It is anathema to that doctrine, as I understood the argument of counsel, that the Executive should be allowed to interfere with the contractual employment of a magistrate prior to its scheduled termination. Such interference could only be lawful

itself liable for wrongful termination and the damages that flowed from this. On the other hand, the view of the Government was that it had simply acted in a ministerial capacity or as an agent of the Commission and followed its directive in invoking the termination clause (in its second letter), which it had no independent desire to do. Each of these two defendants in the court below thought that the other should be solely liable to pay any damages that might be awarded.

¹⁸This was the finding of Shanks J: that determination by effluxion of time was not a removal.

¹⁹ It is to be noted that Mr. Astaphan regarded a contractual provision for termination by notice as unconstitutional if it was exercisable by the Executive but not if it was exercisable by the Commission, which he observed, was endowed with constitutional authority to remove a magistrate. Counsel's position was that the power that s 91 gave to the Commission to remove a magistrate from office did not limit it to doing so only in the exercise of disciplinary control and therefore the Commission was empowered, if it made provision for it in a contract of employment, to remove a magistrate.

and constitutional if done by the Commission, as distinct from the Executive, counsel argued.

[18] The final argument from the Government on this aspect was that the Constitutional guarantee, contained in s 8 (1), to a fair hearing before an independent and impartial court would be violated by having a court presided over by a magistrate whose employment was terminable by the Executive as a matter of whim. By being so susceptible a magistrate could not be said to be independent and impartial. It would be otherwise, the Government again concedes, if the right to terminate the contract were exercisable by the Commission.

[19] The arguments of counsel evoked the deep concern of this court about the protection afforded to magistrates and their ability to function independently and impartially. The temptation to critique the existing constitutional order and to offer thoughts for its improvement must, however, be resisted as being matters for constitutional reform, and all that goes into that process, rather than matters for a judicial exercise. It is certain, as was clarified in the speech of Lord Diplock in **Hinds**²⁰, that it was no accident that magistrates are given less constitutional protection than judges. Although it is a legacy from our colonial past, as counsel submitted, that magistrates are treated in the Constitution in the chapter that deals with the public service and not in the chapter that deals with the judiciary, it is the fact that they are so treated and that there is the attendant lesser constitutional protection. Magistrates, it should be noted, are grouped in section 91 of the Constitution with other legal officers (such as registrar, deputy registrar and crown counsel) rather than in a discrete category of the lower judiciary. Magistrates are therefore given no higher or different protection in their employment than is given to a registrar or a crown counsel; section 91 applies equally to all legal officers mentioned in the section and not specifically to judicial officers.

[20] It is this recognition of the fact that magistrates are not given the constitutional protection that is given to judges that founded the decision in **Inniss**. It clearly emerges from that decision that the court was fully seized of the distinction between termination by removal

²⁰ See paragraph 9, above

from office in the exercise of the constitutional power and termination pursuant to a contractual provision. This was the very pith of that decision.²¹ Accordingly, I do not accept the premise of Mr. Astaphan's attack on the decision in **Inniss**, which is that the court failed to recognize that termination by the executive in reliance on the provision in the contract was removal from office and that this failure misled the court into upholding a contractual provision for termination that was in reality a provision for removal.

[21] I consider, however, that even if I am wrong in that view it makes no difference that the court failed to treat contractual termination as removal from office. This is because the court in **Inniss** (1) specifically decided that a registrar/additional magistrate, unlike the DPP in the **Holdip** case, had no constitutional security of tenure the which she could not "bargain away" and (2) decided by necessary implication, in reversing the trial judge who had held that the clause in the contract that allowed the Government to terminate by notice "was null and void and of no effect,"²² that such a clause in a registrar's contract did not violate the constitutional provision that vested the power to remove in the Governor General. **Inniss** therefore decided that contractual termination did not offend the constitutional provision relating to removal. It does not matter, then, if contractual termination was also removal; **Inniss** decided that such a removal was valid.

[22] The cogency of the concerns raised by counsel's arguments, notwithstanding, in my respectful view there is no basis for considering that the decision in **Inniss** should not be followed. The Privy Council settled in **Attorney General of St. Christopher and Nevis v Reynolds**²³ that save for the three exceptions stated in the well-known case of **Young v Bristol Aeroplane Co. Ltd**²⁴ the Court of Appeal is bound by its own decisions on points of law and it should follow its own decisions and leave it to the final appellate tribunal to correct any errors of law which may have crept into any previous decision. Therefore, applying that principle, it is only if the decision in **Inniss** was given per incuriam, or

²¹ See paragraphs [42] and [43] where Redhead JA identifies the rival contentions of counsel as to the ability to terminate pursuant to contract and the ability to terminate pursuant only to the constitution and see the last sentence in paragraph [50] where he found that there is a constitutional guarantee that the removal of a magistrate must be by the mode stipulated in the Constitution.

²² See paragraph [23] of the judgment of Redhead JA in **Inniss**.

²³ (1979) 43 WIR 108.

²⁴ [1944] 2 All ER 293

conflicted with a previous decision of this court or was inconsistent with a decision of the Privy Council that this court could choose not to follow **Inniss**. There is no suggestion that any of those situations obtained; therefore this court is bound to follow **Inniss**.

[23] It follows from this conclusion that I would reverse the decision of the learned trial judge and enter judgment dismissing the claim against both the Commission and the Government. I would order that the Government pay the one month's salary in lieu of notice that it acknowledged in its termination letters it was liable to pay to the magistrate. In the instant case the same clause 6 of the contract that I have found to be valid provided that the Government could terminate on paying one month's salary in lieu of notice. It is settled law that where a party to an employment contract is given the right in the contract to terminate and he wrongfully terminates in breach of the contractual provision for termination, the damages that he will be liable to pay for wrongfully terminating will not be greater than he would have been liable to pay had he terminated in accordance with the termination clause in the contract.²⁵ It does not matter in the instant case, therefore, even if the Government is treated as having wrongfully terminated in accordance with its first letter to the magistrate rather than as having properly terminated in accordance with its second (superseding) letter to the magistrate, because the damages would not be greater than if it had properly terminated.

[24] In the **Inniss** case Redhead JA, with whom Bruce-Lyle JA (Ag.) agreed, relied on the provision in the contract for three months notice of termination to be given as the basis on which to award damages equivalent to three months' salary less deductions that would have been made. That award seems to conflict with the provision in the contract that one month's salary should be paid in lieu of notice. However, the **Inniss** case is to be distinguished in relation to the award of damages because counsel for the appellant in that case, the Government, consented to an award of either six months' salary²⁶ or in the sum

²⁵ *Gunton v London Borough of Richmond Upon Thames* [1980] 3 All ER 577 at 588. The reasoning that underlies that principle is the assumption that "the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself, that is to say, that he would have determined the contract at the earliest date at which he could properly do so."

²⁶ According to the judgment of Redhead JA, at paragraph [69]

of \$65,000.00.²⁷ It seems to me that the court made the award that it did in the context that the appellant conceded that an amount greater than one month's salary should be awarded. It is true that the award made in Inniss was expressed to be and was in fact a considered award and not the product of a concession.. The award was made after consideration of a number of cases dealing with what was an appropriate notice period in circumstances where the contract was silent on the issue of notice.²⁸ After considering the cases cited to him on appropriate notice Redhead JA dismissed these on the basis that in the case before him

“the parties have contracted that the notice that should be given by either side if there is to be a termination is three months.

“[65] In the premises therefore the respondent is entitled to damages calculated on the basis of three months' salary less contributions which she would have made.”

[25] That extract shows that the contractual right to terminate and pay one month's salary in lieu of notice did not form any part of the consideration of the court. This was understandable in the context of the concessions that the Government made.²⁹ The concession that a sum of the order mentioned by counsel for the Government should be paid to Ms. Inniss may well explain why the contractual right to terminate on paying one month's salary was not even mentioned. Whatever the explanation the fact is that Inniss proceeded on the footing that damages were to be calculated by reference to the amount of notice that ought to have been given without giving any consideration whatever to the contractual provision for payment of one month's salary in lieu of notice. It cannot therefore be said that Inniss decided that the measure of damages for failing to terminate in accordance with the contractual provision for termination is the equivalent of the salary for the three months for which notice should have been given rather than one month's salary in lieu of notice.

²⁷ According to the judgment of Archibald JA (Ag.), at paragraph [80].

²⁸ See paragraph [65] per Redhead JA.

²⁹ See paragraph 24, above.

- [26] On that analysis of Inniss there is no basis for holding that the magistrate is entitled to other than the one month's salary in lieu of notice for which the contract provided and pursuant to which provision the Commission and the Government³⁰ acted.
- [27] The result of the appeal, in my view, would be that the magistrate has failed to obtain any of the relief that he claimed except for the award of one month's salary which the Government had acknowledged in its initial letter of termination was due to the magistrate.³¹ In accordance with the general rule contained in rule 56.13 (6), that in applications for constitutional relief the court should not award costs against an unsuccessful applicant unless it considers that the application was unreasonably made or conducted, I would make no order for costs against the magistrate. With considerable reluctance, because there was no need to litigate a claim for one month's salary which is all that the magistrate obtains from this litigation on my judgment, I would award to the magistrate prescribed costs calculated on one month's net salary.
- [28] I gratefully acknowledge the considerable assistance rendered in the presentations of Mr. Bennett and Mr. Astaphan.

Denys Barrow, SC
Justice of Appeal

- [29] **RAWLINS, J.A.:** This is an appeal by the Judicial and Legal Services Commission of the Eastern Caribbean Supreme Court ("the Commission") against a Judgment that Shanks J (Ag.) delivered on 10th January 2005. The respondents resisted the appeal by Cross Appeals dated 13th and 20th July 2005, respectively. In this case, the government of St. Lucia, acting on the recommendation of the Commission, terminated the employment of the 1st respondent, Mr. Fraser, as a Magistrate, by invoking Clause 6(1) of his contract of employment. The Clause permitted the government to end his engagement at any time by giving him three months notice or by paying him one month's salary instead. However, the

³⁰See paragraph 4, above.

³¹ Shanks J, in the High Court judgment, did make the point that in its second letter the Government made no mention of salary in lieu of notice; see paragraph [6]

government terminated his employment summarily, without either giving notice or a month's salary in lieu of notice, stating that the termination was because of improper conduct.

[30] The result of the termination of his employment was that the Magistrate claimed compensation/damages for loss of earnings, inconvenience and distress. He also claimed exemplary damages against the Commission and the government for their oppressive and arbitrary action. He also prayed for various declarations. He asked the Court to declare that his removal from office was done in breach of natural justice, capriciously and with repugnance to the Constitution. He also sought declarations that the Commission abused its powers, acted arbitrarily and removed him at its pleasure, whim or fancy. He asked the Court to declare that when he was removed from office on the ground of misconduct, which was not substantiated, that action was an incursion into the independence of the judiciary.

[31] In his Judgment, the learned trial Judge found that the termination of the Magistrate's contract amounted to a "removal" from office within the meaning of section 91(3) of the Constitution of St. Lucia. The Judge held, however, that it was the Commission that contravened section 91(3) because its recommendation induced the government to remove the Magistrate from office without proper cause. The Judge awarded the Magistrate \$10,000.00 damages against the Commission for distress and inconvenience resulting from the contravention. He also ordered the Commission to pay damages to be assessed on the equivalent of the Magistrate's net loss of salary and benefits, including gratuity, for the period that remained for the subsistence of the contract. This was the period 19th January 2004 to 5th September 2004. He awarded no costs in accordance with Part 56.13(6) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules").

[32] While the parties were pursuing enforcement and appeal proceedings, the Magistrate was paid the sum of \$10,000.00. This was prior to the assessment of that part of the damages for the period to 5th September 2004. On 12th October 2005, the High Court conducted an

assessment hearing and ordered Commission to pay the Magistrate \$69,955.12, inclusive of the costs of the assessment.

[33] The gravamen of the Commission's appeal is that the learned judge erred when he held that it (the Commission) contravened section 91(3) of the Constitution by inducing the Government to terminate the magistrate's employment under Clause 6(1) of the contract. The Commission has insisted that by summarily terminating the Magistrate's employment, the government breached their contract and is solely responsible for that breach. The Commission also appealed against the award of damages.

[34] This Judgment first considers whether the Judge erred when he held that the termination of the employment of the Magistrate was in breach of section 91(3) of the Constitution.

Was section 91(3) breached?

[35] Section 91(1) of the Constitution of St. Lucia states that section 91 applies to the offices of Magistrate, Registrar and Assistant Registrar of the High Court. It also applies to any public offices in the Departments of the Attorney General, the Parliamentary Commissioner, the Chief Elections Officer or the Director of Public Prosecutions, but not to the Heads of these Departments because other provisions apply to them. Section 91 would also apply to such other offices connected with the Court as Parliament may prescribe. Section 91(2) vests the power to appoint persons to hold the offices to which section 91 apply in the Commission. Section 91(3) vests the power to exercise disciplinary control over persons who hold offices under section 91, as well as the power to remove them from office in the Commission.

[36] Mr. Ogilvy, Counsel for the Mr. Fraser, submitted that the Magistrate was removed without good cause. He noted that Mr. Bennett, QC, Counsel for the Commission, had accepted this proposition. The learned trial Judge agreed that the evidence supported this. The facts show that certain allegations of misconduct were made against Mr. Fraser. The Commission appointed a retired Judge to investigate the allegations. He found that the

circumstances of the allegations justified a charge being brought against Mr. Fraser. He suggested, however, that the Commission may have wished to consider that the Magistrate's employment be terminated pursuant to Clause 6(1) of his contract of employment.

[37] The Commission subsequently wrote to the Permanent Secretary in the Ministry of the Public Service indicating that it agreed with the investigating Judge's recommendation. In turn, the Commission recommended that the government should invoke Clause 6(1) to terminate Mr. Fraser's employment. The government ultimately terminated his employment summarily purportedly on the ground of improper conduct.

[38] Mr. Ogilvy submitted that it was immaterial that Clause 6(1) of the contract was invoked as the basis for terminating the Magistrate's employment. This, he said was because sections 91(2) and (3) vest the power to appoint and to remove a magistrate from office in the Commission. He insisted that, in effect, the Magistrate was removed from office. He contended that the clauses in the contract, which purported to place power to appoint and remove the Magistrate in the hands of the government are inconsistent with sections 91(2) and (3) of the Constitution, and must therefore give way to those latter sub-sections. These submissions mirror the submissions of Mr. Astaphan SC, that the contract of employment contained several unconstitutional provisions, by which, according to Mr. Astaphan, the Government improperly reserved for itself the power to terminate the services of the magistrate, upon giving notice, and for no particular reason.

[39] Mr. Astaphan submitted that since the Constitution, by section 93(3), vests the power to discipline and to remove a Magistrate from office in the Commission, it was unconstitutional for the government to purport to terminate the employment of a Magistrate under the termination provision in their contract. Mr. Astaphan submitted, further, that since the government had no power to terminate the Magistrate's employment prior to the determination of the contract, it was the Commission that removed him from office through the instrumentality of the government who acted as the administrative or ministerial agent of the Commission. He insisted that the government merely carried out what was a

mandatory direction from the Commission, which obliged the government to remove the Magistrate on the Commission's behalf pursuant to the latter's exclusive power to remove magistrates from office under section 91(3) of the Constitution. According to Mr. Astaphan, ultimately, Clause 6(1) of the contract of employment was in conflict with section 91(3) of the Constitution because the clause permitted the government to do what this constitutional provision reserved to the Commission.

[40] These were persuasive submissions. Where a Magistrate contracts to permit the government to terminate his employment with notice or with payment in lieu, the government could terminate the Magistrate's service for any or for no reason, and without proper disciplinary proceedings, prior to the determination of the contract. It could, under the termination clause, terminate a magistrate's employment against the wishes of the Magistrate. This could amount to a removal from office, a jurisdiction, which appears to be peculiarly within the purview of the Commission by virtue of section 91(3) of the Constitution. It could even appear that Clause 6(1) might be impugned on the ground of unconstitutionality, to the extent that it seems that the clause permits a magistrate to contract out of section 91(3), in the same manner as a contractual term that is inimical to statute might be impugned for illegality. Mr. Astaphan expressed the view that section 93(3) provides the only constitutional safeguard to the independence of a magistrate therefore cannot contract out of it.

[41] However, Mr. Bennett submitted that the termination of a contract by notice is not a "removal" within the meaning of section 91(3) of the Constitution. According to Mr. Bennett, termination under Clause 6(1) is not a unilateral act if it is carried out in accordance with the prior agreement between the parties as to the mode of termination. It would be a consensual act. Mr. Bennett further submitted that where a magistrate or any officer who falls under section 91(1) of the Constitution is employed under a contract for a fixed term, a Clause 6(1) type provision, which provides for termination by notice or payment in lieu, does not contravene the constitution. He cited, as authority, **The Attorney General of St. Christopher and Nevis v Angela Inniss**, St. Christopher and Nevis Civil Appeal No. 6 of 2000 (19th November 2001).

The Inniss case and the present case

[42] An examination of **Inniss** shows that it is on all fours with the present case. In that case, Ms. Inniss, a Lawyer, entered into a contract of employment with the government as a Registrar and Additional Magistrate. Section 83 of the Constitution of St. Christopher and Nevis is in identical terms as section 91 of the Constitution of St. Lucia. Ms. Inniss's contract of employment contained a termination clause [Clause 8(1)], which was in identical terms to Clause 6(1) of the Magistrate's contract in the present case. Ms. Inniss' contract was due to expire on 19th June 1998. However, by letter dated 20th February 1998, the government purported to end her engagement with immediate effect. The letter, which the Permanent Secretary wrote to her, stated the following, among other things:

"You will be paid one month's salary in lieu of notice in keeping with the terms of your contract and your gratuity will be prorated to reflect the period of your employment."

She was not paid in accordance with this promise.

[43] Ms. Inniss filed a Motion by which she sought declarations, including a declaration that section 83(3) of the Constitution of St. Christopher and Nevis was contravened. She contended that the letter, which purported to terminate her employment in accordance with Clause 8(1) of her contract contravened section 83(3). She insisted that the letter was null and void as it purported to exercise disciplinary control over her in her office, when the power under section 83(3) is vested in the Commission. She also contended that the method by which she was removed denied her right to due process of law. She claimed damages, including exemplary damages. The High Court agreed with these submissions. The trial Judge held that that Clause 8(1) of the contract under which the government purported to terminate her contract was null and void and of no effect. The Judge awarded her damages and exemplary damages.

- [44] This Court noted, in Paragraph 24 of the Judgment, the finding of the trial Judge that holders of offices specified in section 83(1), (similar to those under section 91(1) of the Constitution of St. Lucia), could not by contract bargain away the protection against removal from office, which section 83(3) afforded them. The reason, which the trial Judge gave, was that section 83(3) provided a mechanism for the removal of those office holders that was outside of the control of the executive. Redhead, JA observed, in Paragraphs 24 and 25 of the Judgment, that this language was strikingly similar to that which Sir Dennis Byron CJ used in **Attorney General of Grenada v The Grenada Bar Association (the Holdip case)**, Grenada Civil Appeal No. 8 of 1999. It was his view that the trial Judge erred because he had thereby elevated Registrars, Magistrates, Crown Counsel and other office holders specified in section 83(1) to the status similar to that which the Constitution gave to Judges and Directors of Public Prosecution.
- [45] Under Caribbean Constitutions, the office of Director of Public Prosecutions (DPP) is given protections, which are in some ways akin to those which our Constitutions have attached to the office of a Judge. It will be recalled that the offices of DPP and other specified offices are excepted from the provisions of section 91 of the Constitution of St. Lucia. Section 89 of the Constitution of St. Lucia provides constitutional protections for office of DPP. Under sub-sections 89(7) and (8) of a DPP could only be removed from office for inability to exercise the functions of the office or for misbehaviour. For this purpose, the Governor General must first appoint a tribunal consisting of Judges under section 89(9) to investigate any allegations of inability or misbehaviour. It is within the sole purview of the tribunal must recommend removal.
- [46] Section 87 of the Constitution of Grenada is in similar terms to section 89 of the Constitution of St. Lucia. In **the Holdip case**, the Chief Justice stated that by entering into a contract for 2 years the DPP could not have waived his right to be removed from office only in accordance with section 87 of the Constitution of Grenada. This, he said, was because section 87 is for the benefit of the citizen, and it is not the right of the appointed DPP to give away. In **the Inniss case**, however, a similar contention did not find favour with this Court. This Court held that holders of office specified in section 83(1) of the

Constitution of St. Christopher and Nevis do not have the same safeguards that a holder of the office of DPP enjoys.

- [47] In arriving at that decision, this Court considered the distinction which Lord Diplock made in **Hinds v the Queen** [1976] 2 WLR 366, at page 377, between the constitutional position of Judges and that of Magistrates. Redhead JA, with whose Judgment Bruce-Lyle JA (Ag.) fully concurred, concluded, at Paragraph 50 of the Judgment, that given the difference between the constitutional safeguards which a DPP enjoys as against that which a Registrar and office holders specified under Section 83(1) of the Constitution of St. Christopher and Nevis have under Section 83 (3), the trial Judge erred when he held that Clause 8(1) of Ms. Inniss' contract of employment was null and void. He held, however, that the government breached the contract by not terminating it contract strictly in accordance with Clause 8(1), because it did not give one month's salary in lieu of notice. This decision meant that by invoking Clause 8(1) of the contract to terminate Ms. Inniss employment, the government did not infringe the provisions of section 83(3) of the Constitution of St. Christopher and Nevis.
- [48] Ultimately, the decision in **Inniss** means that neither section 91 nor any other provision in the Constitution prevents a magistrate from contracting in a manner which permits his or her employment to be terminated by the government and not by the Commission in accordance with section 91(3) of the Constitution.
- [49] The circumstances in which Ms. Inniss' employment was terminated and the contractual and constitutional provisions, which were the subject of her case, are similar to those in issue in the present case. I can find no ground on which to distinguish them. Additionally, there is nothing to suggest that the decision in **the Inniss case** was given *per incuriam*, conflicts with another decision of this Court or that it is irreconcilable with a decision of the Privy Council. On the authority of **Young v Bristol Airplane** [1944] 2 All E. R. 293, confirmed by the Privy Counsel in **Attorney General of St. Christopher and Nevis v John Reynolds** (1979) WIR 108, these are the circumstances in which this Court could depart from its own previous decision.

- [50] It is no doubt troubling that a government, who appears from time to time as a party before a magistrate should have the option to terminate the services of a magistrate because Clause 6(1) type provisions in their contracts permit this. It was out of this concern that Mr. Astaphan submitted that the separation of powers doctrine, and/or the right of citizens, by virtue of sub-sections 8(1) and (6) of the Constitution, to have their cases heard by an independent and impartial Court, must at least mean that the executive could not terminate the employment of a magistrate prior to the effluxion of the period of the contract.
- [51] There is some force of reason, however, in Mr. Bennett's submission, that section 91(3) of the Constitution does not purport to protect magistrates in their role as judicial officers, but only in their role as professional legal employees of the State. The protection is not peculiar to judicial officers because it is the same that is afforded to Registrars, Crown Counsel and Public Officers in Departments of the Parliamentary Commissioner, Chief Elections Officer and the DPP. This bears out the observation which Lord Diplock made in **Hinds v R** (1976) 24 WIR 326, at page 336, that the framers of our Constitutions did not protect the independence of members of the lower judiciary as they protected the independence of members of the higher judiciary. Lord Diplock further noted that nothing in our Constitutions protect the lower judiciary from Parliament abolishing their offices or providing that their appointment shall only be for a fixed term of years.
- [52] It is unfortunate that **the Inniss case** was not brought to the attention of the learned trial Judge when the present case was heard in the High Court. On the authority of this case, I am constrained to hold that he erred when he held that the government, induced by the Commission, contravened section 91(3) of the Constitution when it terminated the employment of the Magistrate by invoking Clause 6(1) of the Magistrate's contract.
- [53] The further question, which now arises, is whether the government breached the contract by summarily dismissing the Magistrate.

Breach of contract

[54] Notwithstanding the promise in the termination letter to Ms. Inniss that she would have been paid one month's salary in lieu notice, when her appeal was heard, it was discovered, and conceded, that she was not paid. In the result, this Court held that the nonpayment constituted a breach of Clause 8(1) of the contract. In the present case, the termination was not carried out in accordance with Clause 6(1), because the Magistrate's contract was summarily terminated. Similarly, it was conceded that Mr. Fraser was not paid the one-month's salary in lieu of notice to which he was entitled under Clause 6(1). This constituted a breach of contract.

[55] It is now therefore necessary to determine who is responsible and liable for this breach. , therefore, whether the government, or whether the Commission, by inducing the government.

Inducement

[56] I earlier referred to Mr. Astaphan's submission that only the Commission has the power to terminate the employment of a magistrate by virtue of section 91(3) of the Constitution. He said that the inevitable and legal consequence of this is that when the government terminated the employment of the Magistrate, it had no power independent of the Commission to do so. According to Mr. Astaphan, the government was obliged to carry out the Commission's "recommendation" to terminate the Magistrate's employment because under section 91(3) of the Constitution, the circumstances, and the actual words the "recommendation", the Commission's letter was really a directive to the government to remove the Magistrate. The termination letter was sent to Mr. Fraser on this basis as the Permanent Secretary who sent it had had no independent or separate discretion from the Commission, which would have enabled the Permanent Secretary to refuse to act on the directive.

[57] Mr. Bennett submitted that although the Commission recommended the termination of the Magistrate's employment, it specifically recommended termination in accordance with Clause 6(1), rather than in breach of it. He noted that the second termination letter of 16th January 2005, which superseded the first, informed the Magistrate that he was summarily dismissed from office for improper conduct. In my view this was in error because there were no disciplinary proceedings against the Magistrate under section 91 of the Constitution. More importantly, however, in relation to the breach, there was no notice or salary in lieu of such notice as Clause 6(1) required, and the Commission recommended termination in accordance with that clause.

[58] This conclusion is borne out by the actual terms of the Commission's letter of 5th January 2005 to the Permanent Secretary, in which the Commission recommended the termination of the Magistrate's employment. The letter stated, in part, as follows:

"The Commission has seen the report of Justice Adams and agrees with the recommendation for termination. In the circumstances, the Commission recommends that clause 6 of Mr. Fraser's contract be invoked and that his contract be determined with immediate effect upon paying to him one month's salary in lieu of notice. Please find attached for your information and attention a copy of Justice Adams' report and recommendations. The Commission should be grateful for your immediate attention and action."

[59] The decision to terminate summarily was clearly at variance with the recommendation of the Commission. The Commission did not induce the government to breach the contract. The government is therefore solely liable for terminating the employment of the Magistrate in breach of their contract. The trial Judge should have entered Judgment for Mr. Fraser on this ground in accordance with Part 56.8(2) of the Rules. The question then is what is the measure of damages to which Mr. Fraser is entitled for the breach?

Damages

[60] The general principle is that damages for breach of contract are intended to compensate the injured party, as far as money could do so, for the loss suffered as a result of the breach. The objective is to put that party in the position in which he would have been had the breach not occurred. In the present case, Mr. Fraser would no doubt contend that had

the breach not occurred he would have been entitled to salary and benefits for the rest of the period of the contract. That would be for the same period for which the trial Judge awarded him damages. The same claim was made in **the Inniss case**. In **Inniss**, this Court held that since, by virtue of Clause 8 (1) of her contract, Ms. Inniss was entitled to three months notice had there been no breach, damages for the breach was to be calculated on the basis of three months salary. (See Paragraphs 60, 61 and 66 of the Judgment.).

[61] In **Inniss**, it was open to this Court to hold, on the authority of **Gunton v London Borough of Richmond Upon Thames** (supra) that Ms. Inniss was entitled to receive one month's salary in lieu of notice, particularly as that was the promise, which the termination letter contained. Archibald JA (Ag.) suggested that the government should, in accordance with a concession, which its Counsel apparently made, pay either six months salary, less deductions, or some \$65,000.00 damages. However, Redhead JA, with whom Bruce-Lyle JA (Ag.) agreed, decided to award damages by reference to the notice period. I see no reason to depart from the majority decision, much as I have thought about it, and having noted the decision and analysis of Barrow JA on this issue. Mr. Fraser is therefore entitled to three months salary, less deductions, as damages for the breach of his contract. The exact sum is to be assessed by the Master.

[62] However, Mr. Fraser is not entitled to the sum of \$10,000.00, which he was awarded for distress and inconvenience. In **Inniss**, this Court noted that in **Addis v Gramophone Co. Ltd.** [1909] A.C. 488, the House of Lords held that a claimant is not to be compensated for injured feelings in a case of wrongful dismissal. This Court also noted that the authors of Chitty on Contracts stated, at paragraph 1440 of Volume 1 of the 23rd Edition, that the principle also extends to cases of breach of contract. It is trite principle that exemplary damages are not available for breach of contract and that damages for distress, inconvenience, discomfort and disappointment are not available for breach of contract unless these were inimical to the very object of the contract. (See, for example, **Jackson v Horizon Holidays Ltd.** [1975] 3 All E.R. 92.). Mr. Fraser shall therefore repay to the Commission the sum of \$10,000.00, which he received from the Commission.

Costs

[63] The general rule, which flows from Part 64.6 of the Rules, is that an unsuccessful party must be ordered to pay the costs of an unsuccessful party, unless there are circumstances for which the Rules provide, which dictate otherwise. I see none of the circumstances that would take the award of costs outside of the general rule. Part 56.13(6) of the Rules provides, as a general rule under that Part, that no order for costs may be made against an applicant for an administrative order unless the Court considers that the applicant acted unreasonably in making the application or in the conduct of the application. This provision is intended for the benefit of an applicant, not for the benefit of a respondent in public law proceedings. This Rule could not provide the basis for not awarding costs to Mr. Fraser either in this Court or in the High Court. He is therefore entitled to prescribed costs on the damages awarded to him. Since Part 64.4 of the Rules enables this Court to make costs orders for proceedings in this Court, as well as the proceedings that gave rise to the appeal, I would award Mr. Fraser costs in this appeal as well as in High Court. These will be the prescribed costs on the damages that I awarded in this Court.

Order

[64] Premised upon the foregoing, I also allow the Commission's appeal against the Judgment of the trial Judge and set aside the damages awarded by the trial Judge against the appellant Commission. I shall also dismiss the cross-appeals filed by the respondents, but, in accordance with Part 56.8(2) of the Rules, I award damages to the 1st respondent, Mr. Fraser, for breach of contract, against the 2nd respondent, the said damages shall be assessed by the Master on the basis of three months salary, less deductions. The 2nd respondent shall pay the prescribed costs of the appellant in this Court and in the High Court. The 1st respondent shall meet its own costs in the proceedings in this Court and in the High Court.

Hugh A. Rawlins
Justice of Appeal

[65] **GORDON, J.A.:** I have had the benefit of reading the judgments of my brothers Barrow and Rawlins and concur with their conclusions with respect to the efficacy of the magistrate's contract of service. I depart, however, from the reasoning of Rawlins JA in relation to the damages which can be awarded in this case to the magistrate. I concur with the reasoning of Barrow JA both in respect of the quantum of damages and as to the costs order proposed by him.

Michael Gordon, QC
Justice of Appeal