

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

Claim No. ANUHCV 2011/0025

IN THE MATTER of The Representation of the People
(Amendment) Act 2001

IN THE MATTER of the recommendation of the Prime Minister to remove Sir Gerald Watt, QC
as Chairman of the Electoral Commission

IN THE MATTER of an application for leave for Judicial Review

IN THE MATTER of an application for an Administrative Order

BETWEEN

SIR GERALD A. WATT, KCN, QC

-and-

Claimant

(1) THE ATTORNEY GENERAL
(2) THE PRIME MINISTER
(3) JUNO SAMUEL

Defendants

Appearances:

Dr. David Dorsett for the Claimant

Mr. Sanjeev Datadin, with Ms. Sheri-Ann Bradshaw for the 2nd and 3rd named Defendants.

2011: November 22

2012: January 25

[1] **Remy, J.:** On the 1st March 2011, and with the leave of the Court, the Claimant Sir Gerald Watt, filed a Fixed Date Claim seeking "Judicial Review of the decision of the 2nd Defendant (which decision was executed by Her Excellency the Governor-General, represented in these proceedings by the 1st Defendant) that Claimant be removed as Chairman of the

Antigua and Barbuda Electoral Commission ("ABEC") and that the Claimant's office in ABEC be that of ordinary member."

[2] The Claimant's Fixed Date Claim was supported by an Affidavit filed on the same day. In that Affidavit, the Claimant deposed that he had reviewed his Affidavits filed on the 13th and 25th January 2011 in support of his application for leave to bring a judicial review claim and that he wished to incorporate the contents of those Affidavits into the Affidavit in Support of the Claim. An additional Affidavit was filed by the Claimant on the 22nd March 2011. The four Affidavits will be referred to in this Judgment in chronological order as follows:-

- a) The first Affidavit (Affidavit #1) filed on 13th January 2011.
- b) The second Affidavit (Affidavit #2) filed on 25th January 2011.
- c) The third Affidavit (Affidavit #3) filed on 1st March 2011.
- d) The fourth Affidavit (Affidavit # 4) filed on 22nd March 2011.

[3] The facts relied on by the Claimant in support of his claim can be distilled from his Affidavits filed, in particular Affidavit #1 and Affidavit #2, and are as follows:-

- (a) The Claimant was duly appointed as Chairman of ABEC with effect from 1st October, 2005. On 29th April 2010, the 2nd Respondent represented to the Governor General that the question of the removal of the Claimant from the office of Chairman of ABEC be investigated. On 23rd June 2010 a tribunal headed by Justice of Appeal Ian Forte, a retired Justice of Appeal of Jamaica (the Tribunal), was established for the said purpose of investigating if the Claimant should be removed on the ground of inability. On 16th July 2010 the Governor General suspended the Claimant from the functions of his office. On 14th October 2010 the Tribunal issued a report to the Governor General commending the Claimant and advising that it could not recommend that he be removed as Chairman of ABEC. By letter dated 20th December 2010, the Governor General wrote to the Claimant informing him that the Tribunal did not recommend his removal as Chairman of ABEC. The Governor General in the said letter further directed the Claimant to resume the functions of his office on 10th January 2010.

(b) By letter dated 5th January the 2nd Respondent wrote to the Claimant stating: "I am confident that you will agree that the people of this fair nation reasonably expect, and rightfully deserve, an Electoral Commission in which they have full faith and confidence and more particularly, a Chairman in whom they repose confidence given that the very crux of our democracy rests with this institution and its members. It is evident that you no longer enjoy that confidence." The 2nd Respondent in the said letter further informed the Claimant that he (the 2nd Respondent) had written to Her Excellency the Governor General recommending that the Claimant be relieved of his position as Chairman of ABEC.

[4] Under cross-examination, the Claimant testified that, since the filing of the action, he has not been prevented access to ABEC. He stated that he has since attended meetings of ABEC as a Commissioner, but did not perform the functions of Chairman. He testified that the 3rd Defendant convened those meetings and performed the functions of Chairman at the meetings. He stated that when he attended the meetings, he believed that he should have participated as Chairman. He added that his "honest belief" was that, although he participated as a Commissioner, he felt he was legally the lawful Chairman of that Commission, and he still does and "that's why he's here."

[5] The Claimant testified that he has not been lawfully removed as Chairman. He is of the view that "as a practical matter, he attends the meetings as Commissioner to serve the country, not because he accepts that he could be removed as Chairman and continue to be a member." He stated that he has brought those proceedings (for judicial review) to be restored to his "lawful position" and so it made "legal sense to continue" to attend the meetings of ABEC. He explained what he meant by "legal sense" in those terms:- "The legal sense is that I had filed judicial review proceedings in order to regularize my position, not because I accepted that my removal was correct."

[6] The Claimant further testified that his appointment as Chairman was made on the recommendation of the Prime Minister (the 2nd Defendant) in consultation with the Leader

of the Opposition. He acknowledged that he was not aware that there was a "public advertisement" for the position, and further acknowledged that he did not have a hearing before the appointment was made. He stated that in relation to the letter which he received from the Governor-General in relation to his removal as Chairman, he did not respond in writing, but responded publicly. He also stated that he did not respond in writing to the Prime Minister but responded publicly, by means of a public statement which was over the media and that he gave a statement in writing to the Observer Radio.

- [7] Under re-examination, the Claimant was directed to the two Instruments of his appointment. He stated that both Instruments state, at the bottom thereof, that he is appointed as "Chairman of the Electoral Commission."

RELIEF SOUGHT

- [8] The remedies sought by the Claimant as stated in his Fixed Date Claim are as follows:
- i. "An injunction prohibiting the 3rd Defendant whether by himself, his servants, or agents, or howsoever otherwise from continuing to act as Chairman of ABEC, from continuing in office as Chairman of ABEC, from convening meetings, and taking decisions on behalf of ABEC whether purporting to act under the Representation of The People (Amendment) Act 2001, or otherwise, and from issuing any orders or instructions to the election officers and staff, administration or otherwise, or acting in any way to their detriment.
 - ii. An order of mandamus requiring the 1st Defendant (as the (sic) representing Her Excellency the Governor-General in these proceedings) do produce and deliver to the Claimant a dated and signed copy of the report of the Tribunal established under section 4 of the Representation of the People (Amendment) Act 2001 and issued on 14th October 2010, which report the Governor-General referred to in her letter to the Claimant dated 20th December 2010.

- iii. An injunction prohibiting the 2nd Defendant whether by himself, his servants, or agents, or howsoever otherwise from continuing impeding, interfering, or otherwise hindering the Claimant from fulfilling the functions of Chairman of ABEC.
- iv. An injunction prohibiting the 2nd Defendant whether by himself, his servants, or agents, or howsoever otherwise from continuing impeding, interfering, or otherwise hindering the Claimant from attending and/or entering the offices and headquarters of the Antigua and Barbuda Electoral Commission situated at the David Shoul Building, Queen Elizabeth Highway, St. John's, Antigua, or wherever such offices and headquarters may be otherwise situated from time to time.
- v. A declaration that the recommendation of the 2nd Defendant to the Governor General on 5th January 2010 that the Claimant be relieved of his position as Chairman of ABEC is illegal, namely, contrary to sections 3 and 4 of the Representation of the People (Amendment) Act 2001, and is therefore null, void, and of no legal effect.
- vi. A declaration that the decision of the 2nd Defendant on 5th January 2010 to recommend to the Governor General that the Claimant be relieved of his position as Chairman of ABEC is irrational, in light of the report of Forte tribunal finding no fault with the Applicant or his discharge of the office of Chairman of ABEC, and is accordingly unlawful.
- vii. A declaration that the decision of the 2nd Defendant on 5th January 2010 to recommend to the Governor General that the Claimant be relieved of his position as Chairman of ABEC is procedurally unfair, namely, the Claimant was not given an opportunity to be heard with respect to the allegation he no longer had the "full faith and confidence" of "the people of this fair nation", accordingly unlawful.
- viii. A declaration that any and all actions taken pursuant to the recommendation of the 2nd Defendant given on 5th January 2011 that the

Claimant be removed as Chairman, including any actions taken by Her Excellency the Governor General Dame Louise Lake-Tack, GCMG, DStJ, is of (sic) null, void, and of no legal effect whatsoever.

- ix. A declaration that the appointment of and/or continuation in office by the 3rd Defendant as Chairman of the Antigua and Barbuda Electoral Commission is contrary to law, ultra vires the provisions of the Representation of the People (Amendment) Act 2001, and is null, void, and of no legal effect.
- x. A declaration that the 3rd Defendant holds the office of member of ABEC (and that of Member only) pursuant to his appointment of 2010 and that he continues to hold the said office until such time as he (1) vacates the same in the manner prescribed by section 3(5) of the Representation of the People (Amendment) Act 2001 or (2) is removed from office in the manner prescribed by section 4 of the Representation of the People (Amendment) Act 2001.
- xi. An order of certiorari quashing the appointment of the 3rd Defendant as Chairman of ABEC, the position of the Chairman of ABEC not being vacant.
- xii. A declaration that all actions and decisions taken by the 3rd Defendant as Chairman of the Antigua and Barbuda Electoral Commission whether purported to be taken under the authority of the representation of The People (Amendment) Act 2001, or the Representation of The People (Amendment) Act 2002 are null and void and of no legal effect, including but not limited to the signing off of the Register of Electors, and any matter involving the staffing and operations of ABEC.
- xiii. A declaration that the Claimant is entitled to receipt of a dated and signed copy of the report of the Tribunal established under section 4 of the

Representation of the People (Amendment) Act 2001 issued on 14th October 2010.

- xiv. A declaration that the decision of 16th July 2010 to suspend the Claimant “as a member and Chairman of the Antigua/Barbuda Electoral Commission with effect from 19th July, 2010” was contrary to section 4(4) of the Representation of the People (Amendment) Act 2010 (sic).
- xv. A declaration that the suspension of the Claimant from the functions of his office as Chairman of ABEC ceased upon the issuance of the recommendation of the Forte Tribunal on 14th October 2010 that the Claimant not be removed from the office of Chairman of ABEC and that from the 14th day of October the Claimant was fully vested with the lawful authority to exercise the functions of the office of Chairman of ABEC, to the exclusion of all others, and that the Claimant’s reinstatement to the functions of his office and the tenure of his office as Chairman of ABEC continues until the Claimant (1) vacates the office of Chairman pursuant to section 3(5) of the Representation of the People (Amendment) Act 2001 or (2) is removed from office pursuant to section 4 of the Representation of the People (Amendment) Act 2001.
- xvi. A declaration that the actions of any person other than the Claimant in exercising the functions of office of the Chairman of ABEC after the cessation of the Claimant’s suspension from the functions of his office as Chairman of ABEC on 14th October 2010 is null and void and of no legal effect.
- xvii. Damages on the footing of aggravated damages and vindicatory damages.
- xviii. Costs.
- xix. Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act;

- xx. Interest pursuant to section 7 of the Judgments Act;
- xxi. Any other relief that the Court deems fit.”

[9] The 1st Defendant filed no Affidavits and adduced no evidence.

[10] The 2nd Defendant filed no Affidavits and adduced no evidence.

THE CASE ON BEHALF OF THE 3rd DEFENDANT

[11] The 3rd Defendant Mr. Juno Samuel (Mr. Samuel) filed two Affidavits; the first Affidavit was filed on the 21st January 2011, followed by the 2nd Affidavit filed on the 9th March 2011. The 2nd Affidavit was subsequently re-filed to ensure compliance with the Civil Procedure Rules (CPR) 2000.

[12] In his Affidavit filed on the 21st January 2011, Mr. Samuel deposed that on the 6th day of January 2011 he was appointed to be a member of ABEC and as the Chairman of ABEC by two separate and distinct instruments of appointment. He stated that he received his instruments of appointment from Her Excellency the Governor General of Antigua and Barbuda. He added that the Claimant was similarly appointed as member and Chairman of the ABEC on the 1st October 2005. Further, that, upon the recommendation of the Honourable Prime Minister, the Claimant was appointed to be a member of ABEC and also appointed to perform the functions of Chairman of ABEC. Mr. Samuel deposed that the Justice Ian Forte Tribunal (the Tribunal) did not recommend the removal of the Applicant from the ABEC.

[13] In his Affidavit of 9th March 2011, which purported to be an Affidavit in answer to the Claimant's Affidavit #3, Mr. Samuel deposed that he was advised that “the recommendation complained of by the Second Defendant as matter of law is not justiciable as it is a recommendation without a consequence.” Mr. Samuel further deposed that the act complained of by the Claimant “is revealed to be the act of Her Excellency the Governor-General.” He added that he was advised that the Governor-General “is not bound to act on the recommendation of the Second Named Defendant and the only

inference that can be drawn in law is that the Governor-General acted in accordance with her own considered opinion.”

[14] Under cross-examination, Mr. Samuel testified that he is a member of ABEC. He stated that the Commission consists of five (5) persons and that these persons occupy five (5) offices. He stated that the office which he holds is that of Chairman, and that as Chairman of the Commission, he is a member but that he does not occupy two offices. He testified that it is not correct that if the Chairman is removed from his office, he is removed from the Commission. He explained that he (the Chairman) could be a member of the Commission even after he has been removed from his Chairmanship. Mr. Samuel further testified that the office which each person has is the position of member and each person is a member. Two of those members who have those positions as members carry out two (2) separate functions.

[15] Under re-examination, Mr. Samuel testified that when he said that two of those members who have positions as members carry out two separate functions, he meant that one of those members is the Deputy Chairman of the Commission and he carries out the function of Deputy Chairman. The other member is the Chairman who carries out the function of Chairman.

ISSUES

[16] Learned Counsel for the Claimant Dr. Dorsett states that there is “a single overriding issue that falls for consideration in the instant case”, namely “was the revocation of the appointment of the Claimant as Chairman of the Commission permissible by law?”

[17] Learned Counsel for the 2nd and 3rd named Defendants Mr. Sanjeev Datadin in his submissions contends that the trial raises issues of the construction and application of sections 3 and 4 of the Act and also raises issues relating to the exercise of the powers provided for in the Act by the Prime Minister (the Second Defendant). Counsel submits that the following questions therefore fall to be considered by the Court:-

- a) Upon a true construction of the Representation of the People (Amendment) Act 2001 how is a Chairman of ABEC to be removed?
- b) Upon a true construction is the recommendation of the Second Respondent, that is, the Honourable Prime Minister, reviewable?

[18] The Court will deal with the questions posed for consideration by Mr. Datadin in paragraph 17 above, as they encapsulate the issue of whether or not the revocation of the appointment of the Claimant as Chairman of ABEC was permissible by law.

SUBMISSIONS OF COUNSEL

[19] At the close of the hearing, and on the oral application of Counsel for the 2nd and 3rd Defendants, the Court ordered that the parties file written submissions within 10 days instead of the 7 days as stated in the Rules. Counsel for the Claimant Dr. Dorsett filed his submissions within the specified period. Counsel for the 2nd and 3rd Defendants Mr. Datadin filed his Submissions after the specified period. The Court, nevertheless, has taken his submissions into account in its judgment.

THE STATUTORY FRAMEWORK

[20] Section 3 and 4 of the Representation of the People (Amendment) Act 2001 (the Act) provide for “the establishment of ABEC and for the appointment and removal of members of ABEC.”

[21] Section 3 of the Act provides for the appointment of members. The relevant provisions of Section 3 are as follows:-

- “3.
 - 1. For the purposes of conducting elections under this Act, there shall be established the Electoral Commission.

2. The Commission shall consist of a Chairman, a Deputy Chairman, and three other Members who shall be persons of integrity.
3. The Chairman and two other members of the Commission shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, by instrument under the Public Seal and two other members shall be appointed by the Governor-General, acting on the recommendation of the Leader of the Opposition after consulting with the Prime Minister, by instrument under the Public Seal.
4.
5. "The Office of a member of the Commission becomes vacant:-
 - a) at the expiration of seven years from the date of his appointment but he shall be eligible for reappointment;
 - b) where any circumstances arise, that, if he were not a member of the Commission, would cause him to be disqualified for appointment as a member; or
 - c) if he resigns his office by writing under his hand addressed to the Governor General;
 - d) if he dies."
6. Where a member of the Commission, other than the Chairman, is unable by reason of his illness, or for any other reason, to perform the functions of his office the Governor-General may in accordance with the manner prescribed by subsection (3) appoint a person to act as temporary member of the Commission and authorize him to perform the functions of that office.
7. If the chairman is unable by reason of his illness or for any other reason to perform the functions of his office, the Deputy Chairman shall perform the functions of that office."

ISSUE NO. 1 - HOW IS A CHAIRMAN OF THE ABEC TO BE REMOVED?

[22] The submissions of Learned Counsel for the 2nd and 3rd Defendants, Mr. Datadin with respect to this issue are as follows:-

- (a) The Representation of the People Act (the Act) sought to establish the ABEC and to provide for the appointment and removal of officers thereto and to further provide for the role and function of the ABEC and for all related matters necessary for the efficient functioning of the ABEC.

- (b) That the distinction between Members and Chairman (of ABEC) is of particular importance to the instant case. That the literal meaning of the words of Sections 3 and 4 of the Act seem to establish clearly the office of Member of the ABEC, but that in relation to Chairman of ABEC it makes mention in Section 3(3) of the appointment, but that nowhere in the Act is mention made for the removal of Chairman.
- (c) Counsel submits that the “mischief and purpose of the legislation must be identified.” He states that the Court must apply the “purposive approach” and cites the case of **Pepper v Hart**¹. He further submits that “statute entrenches the removal of a Member of the ABEC by requiring the establishment of a tribunal to consider the removal upon complaint by the Prime Minister or Leader of the Opposition.” He states that “the entrenchment is more significant when there is no provision whatsoever to provide for the removal of the Chairman.” Counsel further submits that the statute could not have intended that the Chairman could never be removed as that would be contrary to public policy and established legal principles.
- (d) Counsel further submits that the Chairman of ABEC performs a function; that the Instruments of appointment issued to both the Claimant and the Third Respondent indicate clearly that a Member of ABEC is “wholly distinct from the Chairman of the ABEC.” He states that “the only reasonable interpretation that could be applied to the Act when the mischief and purpose of the Act is analysed is that Chairman is an additional function to be performed by a Member of the ABEC.” He submits that this “reasoning” is supported by the following:-
- i). Chairman is not provided for separately in the removal of Members of ABEC. Further, the Claimant submitted without objection to the Forte Tribunal which was established to consider complaints against Members of the ABEC including the Claimant.

¹ [1993] AC 593

- ii). The Claimant 'correctly' accepted in his evidence that if the Forte Tribunal had recommended he be removed he would have been removed as a Member of ABEC and could no longer perform the functions of Chairman.
- iii). The Chairman being a mere additional function performed by a Member of the ABEC is not entrenched; this would indicate that Parliament placed less emphasis on the role of Chairman than that of a Member.
- iv). The Claimant has continued to attend the meetings of ABEC as a Member; accepting that he was still a Member of ABEC. Counsel states that if it was that the Claimant was of the view that a Chairman was a single office and that he was not appointed as Member to perform the additional functions of Chairman, then he ought not to have attended the meetings.
- v). It is the further submission of Learned Counsel that the silence of the Act would mean that Section 18 of the Interpretation Act Cap 224 of the Laws of Antigua and Barbuda would apply.

[23] The Court notes that, in the submissions filed by Dr. Dorsett on the 30th day of November 2011 on behalf of the Claimant, the items of relief stated as (i) to (iv) in paragraph 9 above have been omitted.

The rival submissions of Dr. Dorsett's with respect to the above issue (Issue No. 1) are as follows:-

- i). A plain and common sense reading of the Act admits of one interpretation: A person who is a member of the Commission – whether he be the Chairman, Deputy Chairman, or a Member – is subject to removal as provided by Section 4 of the Act. The language of Section 4 (1) of the Act is clear.

- ii). Sections 3 (1) and (2) of the Act establishes a five- person Commission with each person having an office. One person to an office and one office to a person. The persons and offices of the Commission are as follows:-
- i. Office of Chairman
 - ii. Office of Deputy Chairman
 - iii. Office of Member
 - iv. Office of Member, and
 - v. Office of Member
- iii). Each office has a title. The title of each office is a proper noun. The proper noun constituting the title of each office is capitalized. **It is not by accident that in section 3(2) of the 2001 Act that the office of each member of the Commission begins with a capital letter, including the offices of "Members"**. Each commissioner is "a member of the Commission" but not every "member of the Commission" holds the office of "Member". The word "member" is a common noun, and is not capitalized. The word "member" is not a title but the word "Member" is. The word "mistress" is not a title but the word "Mistress" is. Likewise, the word "Doctor" is a title, but the word "doctor" is not. That much is planned from an elementary understanding of the English Language. Three Commissioners have as the title of their office the title of Member, but all Commissioners are members.
- iv). The 3rd Defendant under cross-examination testified that the Commission consists of five (5) persons each person holding an office. He also testified that if a Commissioner lost his office he lost all of his office and none of his office remains. The Chairman if he loses his office loses all of his office and none of his office remains. The Chairman if he loses his office loses his Chairmanship. If the Chairman loses his Chairmanship he has no other office and is no longer a member of the Commission. One cannot be a member of the Commission unless one holds an office whether it be that of Chairman, Deputy Chairman or Member. If the Chairman loses his office of Chairman he loses all of his office and does not retain an office of Member because he never held the office of

Member. Whilst he was Chairman he was a member (common noun) but not a Member (proper noun). Being "a member" is not an office. Being "a Member" is. Being "a member" simply means being a constituent part of the Commission - a person belonging to the Commission. Being "a Member" means being the holder of an enumerated and peculiar office, one specified by section 3(2) of the 2001 Act.

- v). To suggest that the Claimant when he was appointed was appointed to two offices is ludicrous and outrageous. If such an argument were to be accepted it would lead to illogical and bizarre results. Adopting such an argument would lead one to holding as true that the 2001 Act provides for the appointment of a single person to hold the Office of Chairman and the office of Member simultaneously. This single person with two offices would have two votes by which he would be able with one vote to vote "Yea" on an issue and use the other vote to vote "Nay" on the same issue. What would be true of the single person holding simultaneously the Office of Chairman and Office of Member would doubtless apply to another – the person holding simultaneously the Office of Deputy Chairman and Office of Member.

[24] Dr. Dorsett referred to the letter dated 5th January, 2011 in which the Governor-General wrote to the Claimant in the following terms:-

"Dear Sir Gerald Watt,

On 30th December 2010, the Prime Minister, the Honourable Dr. Baldwin Spencer wrote to me as follows:-

"Please be advised Your Excellency that Commissioner Sir Gerald Watt Q.C. no longer enjoys my confidence to act in the capacity of Chairman of the Commission. Consequently, I am recommending that you terminate his appointment as Chairman of the Antigua/Barbuda Electoral Commission with immediate effect."

Sir, acting on the above, please find attached your letter of Revocation as Chairman of the Antigua/Barbuda Electoral Commission.

Further, be advised that the letter of Revocation as Chairman does not affect your position as Member [with a capital "M" as in the original] of the Antigua/Barbuda Electoral Commission.

Yours Sincerely,

.....
Dame Louise –Lake Tact GCMG, DGN, DSt. J
Governor-General of Antigua/Barbuda"

[25] Dr. Dorsett states that the former Governor-General had on 3rd October, 2005 issued to the Claimant two instruments. The bottom of each instrument reads:

"Instrument appointing –
GERALD OWEN ANDERSON WATT, Esquire Q.C as Chairman of the Electoral Commission"

[26] Counsel states further that the body of one instrument states that the Claimant has been appointed "as Chairman of the Electoral Commission", while the body of the other instrument states that the Claimant has been appointed "as a Member of the Electoral Commission". According to Dr. Dorsett, something is clearly "amiss" with one or other of the instruments. He submits that the "Instrument appointing - **GERALD OWEN ANDERSON WATT, Esquire Q.C** as Chairman of the Electoral Commission" but which states in its body that he has been appointed as a "Member" is "a souvenir and a memento", since he would not want to characterize anything issued under the hand of the Governor-General as "superfluous", which is how the Claimant in his evidence characterized one of the Instruments.

[27] Dr. Dorsett stated that the Governor-General by letter dated 16th July 2010 suspended the Claimant as "member [with a small "m"] and Chairman of the Antigua/Barbuda Electoral Commission." He submitted that the act of the Governor-General must be viewed in light of statute, namely Section 4 (4) of the 2001 Act which provides as follows:

"4. (4) If the question of removing a member has been referred to a tribunal under this section, the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may suspend that member from the functions of his office [emphasis supplied] and any such suspension may at any time be revoked by the

Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, and shall in any case cease to have effect if the tribunal recommends to the Governor-General that the member should not be removed.”

[28] According to Dr. Dorsett, it would appear that the Governor-General was ostensibly suspending the Claimant from his Office of Chairman- not from his Office as Member as per “the souvenir instrument.” Counsel argues that “this begs the question: Had the Tribunal recommended the removal of the Claimant on the ground of inability and/or misbehavior could the unable and misbehaving Claimant continue in the Office as Member?” Counsel opines that the answer would be in the affirmative only “if legal insanity was adopted as the rule of law.”

[29] Dr. Dorsett further submits that the Governor-General, exceeded her powers in suspending the Claimant from his office when the 2001 Act strictly limits her to suspending him from the “functions of the office”. He states that the 2001 Act provides that a member of the Commission remains in office until it is vacated as provided by section 3(5) of the 2001 Act or the officeholder is removed as per section 4(2) of the 2001 Act. He states that the Governor-General is empowered to suspend “a member from the functions of his office” if that member is the subject of a tribunal inquiry. The power to suspend a “member from the functions of his office” is applicable to each and every such member of the Commission whatever office he holds whether it be that of Chairman, Deputy Chairman, or Member. Any suggestion that a member could be the holder of 2 offices simultaneously (e.g., the Office of Chairman and Office of Member) and be suspended “from the functions” of one office but not from the other is simply unreal and an outrage. Dr. Dorsett further submits that if the 2001 Act contemplated that a member holding two offices could be suspended from the functions of one office but not from the functions of the other then the 2001 Act “would be condemning that member to two horses at the same time, each horse running in the opposite direction.”

[30] It is the further submission of Dr. Dorsett that the 2001 Act “is not a model of clinical and efficient legal drafting” and that it is “somewhat clumsy.” He states that, notwithstanding its imperfection, a plain and commonsense reading of the 2001 Act admits of one

interpretation, namely that a person who is “a member of the Commission” - whether he be the Chairman, Deputy Chairman or a Member – is subject to removal as provided by section 4 of the 2001 Act. The language of section 4(1) of the 2001 Act is clear in that it states that “A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and **shall not be so removed except in accordance with the provisions of this section** [emphasis supplied].

LAW AND ANALYSIS

[31] The Court is of the view that, by virtue of Sections 3(2) and 3 (3) of the Act, it is clear that the Chairman is a member of the Commission and that the Commission consists of five (5) persons, each being a member of the Commission. The Court agrees with the submission of Dr. Dorsett that the persons and offices of the Commission are as follows:-

1. Office of Chairman
2. Office of Deputy Chairman
3. Office of Member
4. Office of Member, and
5. Office of Member

[32] The Court also agrees with the submission of Dr. Dorsett that being a “member” simply means being a constituent part of the Commission – a person belonging to the Commission; while being a “Member” means being the holder of an enumerated and peculiar office, one specified by section 3 (2) of the Act. The Court is of the further view that the office of Chairman, being one to which that person is specifically appointed, is not merely an additional function to be performed by a Member of the ABEC – as submitted by Learned Counsel for the Defendants -, but is of itself a specific position and a specific office. I would like to point out that subsection 3(3) of the Act has been repealed by the Representation of the People (Amendment) Act 2002 and substituted by the following:-

“3(3) The Chairman and two other members of the Commission shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, by instrument under

the Public Seal and the Deputy Chairman and one other member shall be appointed by the Governor-General, acting on the recommendation of the Leader of the Opposition after consultation with the Prime Minister, by instrument under the Public Seal.”

This fortifies my view that the office of “Member” is specific as is that of “Chairman”.

[33] It is significant that the 3rd Defendant himself under cross-examination, testified that the Commission consists of five (5) persons each person holding an office. If the office of Chairman and that of Deputy Chairman were merely additional functions to be performed by a Member of ABEC, it would mean that the Commission need only comprise or consist of three persons, not five persons, with two of the three persons performing two functions and, as it were, wearing two hats.

[34] Applying the purposive approach to statutory interpretation, the Court is of the view that Section 3 (2) of the Act should be read as follows:-

“The Commission shall consist of a Chairman, a Deputy Chairman and three other **PERSONS KNOWN AS** Members and who shall be persons of integrity.”

In the view of the Court, the addition of the highlighted words would remove any seeming confusion about a “member” as opposed to a “Member”. It would make it pellucidly clear that the Commission consists of 5 persons and that these persons comprise a Chairman, a Deputy Chairman and three (3) Members. Each of these persons is a member of the Commission (ABEC) and each has a specific office and function and further each has one vote. The Court accepts the submission of Dr. Dorsett that it could not have been the intention of Parliament that the Chairman or indeed the Deputy Chairman would be entitled to have two votes on the same issue.

[35] The Court is also of the view that the removal of a member of the Commission, inclusive of the Chairman, is governed by Section 4 of the Act. The Court is of the further view that, considering the statutory language in its context, it cannot be otherwise.

[36] Section 4 of the Act is in the following terms:-

“(4)

1. A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall be so removed except in accordance with the provisions of this section.
2. A member of the Commission shall be removed from office by the Governor-General if the question of his removal has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the Governor-General he ought to have been removed from office for inability as aforesaid or for misbehavior.
3. If the Prime Minister or Leader of the Opposition represents to the Governor-General that the question of removing a member of the Commission under this section ought to be investigated then –
 - (a) The Governor General may appoint a Tribunal which shall consist of a chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court; and
 - (b) The tribunal shall inquire into the matter and report on the facts thereof to the Governor-General and recommend to him whether the member ought to be removed under this section
4. If the question of removing a member has been referred to a tribunal under this section, the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may suspend that member from the functions of his office and any such suspension may at any time be revoked by the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition and shall in any case cease to have effect if the tribunal recommends to the Governor-General that the member should not be removed.
5. If the office of Chairman is vacant, the functions of that office shall be exercised by a person appointed by the Governor-General acting in accordance with the advice of the Prime Minister after consultation with the Leader of the Opposition to be the Chairman.
6. If the office of Deputy Chairman is vacant, the functions of that office shall be exercised by a person appointed by the Governor General acting in accordance with the advice of the Leader of the Opposition after consultation with the Prime Minister to be the Deputy Chairman.”

[37] The Court is further of the view that the submission of Counsel for the 2nd and 3rd Defendants that the Act makes provision for the appointment of Chairman but not for the removal of Chairman, is without merit. I hold that there is no need for the Act to provide separately for the removal of Chairman as the Chairman is a member of the Commission and the Act is clear on the procedure to be followed for the removal of a member.

[38] As to the further submission of Counsel that Section 18 of the Interpretation Act Cap 224 (the Interpretation Act) would apply, the Court is of the view that Counsel's argument lacks logic. Section 18 of the Interpretation Act states as follows:-

"18 (1) - Subject to the Constitution, words in an enactment authorizing the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested –

(a) power, at the discretion of the authority, to remove or suspend him."

[39] On the one hand, Counsel submits, quite correctly, that by virtue of Section 3 (3) of the Act, the Chairman shall **be appointed by the Governor General acting on the recommendation of the Prime Minister** (my emphasis). However, Counsel's argument deviates from the path of logic and reason when he submits that "the application of Section 18 to the issue at hand would mean that the Honourable Prime Minister, the Second Respondent, **as the person authorized by statute to make the appointment** is in law entitled to remove the person **he has appointed**" (my emphasis). Counsel further submits that the silence of the Act would make Section 18 applicable. Counsel cannot have it both ways. Counsel is at pains to point out, (see paragraph 43 & 44 below), that it is the Governor General and not the Prime Minister who appoints the Chairman and that the Prime Minister recommends and does not appoint. He now submits that the Prime Minister is entitled to remove the Chairman since he is authorized by statute to appoint him! I find this reasoning illogical and inconsistent.

[40] In the instant case, the undisputed evidence is that the Governor-General appointed the Tribunal. The Tribunal, as mandated by Section 4 (3) of the Act, inquired into the matter and reported to the Governor-General and recommended that the Claimant should not be

removed. Nowhere in the Act does it state that after the Tribunal had reported to the Governor-General, that it was then up to the Prime Minister to make recommendation to the Governor – General to remove the Claimant. Yet, he purported to so. The 2nd Defendant wrote to the Claimant, stating that “I wish to advise you that I have written to Her Excellency the Governor-General recommending that you be relieved of your position as Chairman.” The Governor-General subsequently wrote to the Claimant informing him that she was in receipt of a letter from the 2nd Defendant and stating that, “Sir, acting on the above (the recommendation) please find attached your letter of Revocation as Chairman of the Antigua/Barbuda Electoral Commission.”

ISSUE NO. 2 - UPON A TRUE CONSTRUCTION, IS THE RECOMMENDATION OF THE SECOND RESPONDENT, THAT IS, THE HONOURABLE PRIME MINISTER, REVIEWABLE?

- [41] The remedies sought by the Claimant include the making of several declarations by the Court among which are declarations that the decision of the 2nd Defendant, namely the Prime Minister to recommend to the Governor-General that the Claimant be relieved of his position as Chairman of ABEC is illegal, irrational and is procedurally unfair.
- [42] The 3rd Defendant in his Affidavit of 9th March 2011 deposed as follows: - “I am advised and verily believe that the recommendation complained of by the Second Defendant (sic) as a matter of law is not justiciable as it is a recommendation without a consequence.” He deposed further that the act complained of by the Claimant “is revealed to be the act of Her Excellency the Governor-General” and that he was further advised that “the Governor-General is not bound to act on the recommendation of the Second-named Defendant and the only inference that can be drawn in law is that the Governor-General acted in accordance with her own considered opinion.”

SUBMISSIONS OF COUNSEL

- [43] It is the submission of Learned Counsel for the 2nd and 3rd Defendants Mr. Datadin, that the Act requires that a Member of the ABEC be given a hearing before a tribunal before he can be removed from office, but that there is no such privilege granted to the performance of the functions of Chairman of the ABEC. Counsel states that "the silence of the legislature" in the instant case "reasonably means that it was not intended that a hearing be afforded a Chairman because he performed those functions on a recommendation. A recommendation for which in fact there was no legal consequence." Learned Counsel submits that whether a recommendation can in fact be the subject of judicial review proceedings is a matter dependent upon the context in which they arise. He submits that the legislature clearly intended that the appointment of members to the ABEC be made by the Governor General but that the appointment is to be made on recommendation of the political leaders. Further that the legislative scheme contemplates a two-fold process; namely, a recommendation by a political leader and then an appointment by the Governor-General.
- [44] Counsel submits that the act of appointment is that of the Governor General and not the political leader who merely recommends. The recommendation is in essence a personal choice which is entirely that of the political leader, who is not obliged to consult anyone or appease anyone in making that recommendation; it is solely in his domain. He states further that the Governor-General is entitled to act outside of the recommendation; and that the Constitution of Antigua and Barbuda states that whether the Governor-General acted on the recommendation or not cannot be questioned in a Court. This would mean, argues Counsel, that the recommendation is not, in the context of the statute, one which could be amenable to judicial review.
- [45] It is the further submission of Counsel for the 2nd and 3rd Defendants that the Second Respondent's act is only preliminary to an appointment. That it is the act of appointment which the Court is entitled to review and that to challenge the recommendation is to challenge the part of the two-fold process which does not have a legal consequence.

LAW AND ANALYSIS

[46] De Smith's Judicial Review, at page 122 paragraph 3-025 states:-

"In some cases it has been suggested that the court should not consider a claim for judicial review because the public authority has not actually taken any decision amenable to review."

However, the learned writer, at page 123 paragraph 3-027 states:-

"In other cases the Court has been invited to decline exercise its powers of review because the public authority's action is characterized as being without legal effect. The Courts now take a broad view and it is no longer necessary for a claimant to demonstrate that a decision or action has direct legal consequences upon the claimant..."

[47] The learned writer goes on to state in paragraph 3-028:-

"A series of decisions may be made in relation to a claimant; the question may arise as to which of them is amenable to review. Thus, a preparatory step on the way to making a formal, legally binding decision may not be reviewable. A decision may be part of a two-tier process, so that an initial determination is superseded by a later one, with the effect that the first decision may no longer be challenged; or what purports to be a second decision may in reality be only a confirmation of an initial decision and so not itself reviewable....."

[48] The Court is of the view that, in the instant case, the recommendation of the 2nd Defendant is amenable to review. The Court is also of the view that the said recommendation was not a "preparatory step on the way to making a formal legally binding decision." For the purposes of the Statute, the body authorized to take the 'preparatory step' in the removal of the Claimant from his office, was the Tribunal. The 2nd Defendant usurped the authority of the Tribunal; he purported to make recommendation to the Governor-General after the Tribunal had already submitted its report to the Governor-General and made its recommendation not to remove the Claimant from office.

- [49] In Council of **Civil Service Unions v Minister for the Civil Service** ² Lord Diplock stated that one could conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground he called "illegality", the second "irrationality" and the third "procedural impropriety".

ILLEGALITY

- [50] De Smith's Judicial Review, 6th edition at page 226, paragraph 5-003 states:-

"The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker... The Courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the 'four corners' of their powers or duties."

- [51] The learned writer goes on to say that "the test of illegality is whether the decision-maker strayed outside the terms or authorized purposes of the governing statute."

- [52] The Court is of the view that , because he had no authority to make the recommendation which he made to the Governor-General , the decision of the 2nd Defendant to make the said recommendation to the Governor General is contrary to the Act and is therefore illegal and unlawful, and is subject to the supervisory jurisdiction of the Court. The Court is also of the view that since the recommendation of the 2nd Defendant is illegal, that any consequential decisions or actions emanating from that recommendation, including that of the Governor-General, are themselves tainted with illegality, as they will be the fruit of an illegal act. An illegal act cannot bear legal fruit.

- [53] The Court is also of the view that the action of the Governor-General in revoking the appointment of the Claimant from his position as Chairman of ABEC is in excess of her jurisdiction. It is in contravention of Section 4(2) of the Act. She "strayed outside the terms or authorized purposes of the governing statute", namely the Representation of the People Act. Her action was therefore unlawful. Similarly, the appointment by the

² ([1985] AC 374 at 410,

Governor-General of the 3rd Defendant to the position of Chairman is illegal, since the Claimant's tenure of office as Chairman was not lawfully brought to an end. Further, it is apparent that the office of Chairman of ABEC had not become vacant, as the provisions of Section 3(5) did not apply. The appointment of the Third Defendant as Chairman of ABEC is therefore a sterile act; it has no effect, and therefore that appointment is a nullity.

IRRATIONALITY

[54] Counsel for the Claimant submits that the attempt to remove the Claimant from his office is irrational. He submits that the Tribunal established under the Act thoroughly investigated the performance of the Claimant and found no reason to remove him. He states that shortly after the Tribunal issued its report, the 2nd Defendant recommended to the Governor-General that the Claimant be removed from his office. It is the further submission of Dr. Dorsett that the 2nd Defendant properly directed himself when he wrote to the Governor-General asking that the matter of the removal of the Claimant be investigated, but that the 2nd Defendant "misdirected himself in law" when he recommended that the Governor-General terminate the Claimant's appointment with immediate effect. I agree with Counsel's submission. Lord Diplock's classification of 'irrationally' or 'unreasonableness' takes into account "decisions reached in the exercise of a statutory discretion that are unlawful because it can be shown that in reaching the decision the body exercising the discretion has acted on an erroneous view of the applicable law." – see **Bromley London Borough Council v Greater London Council**³.

[55] Michael Supperstone and James Goudie in their text *Judicial Review*, at page 216, paragraph 8.23.1 state that: "The Court will intervene where the facts found taken as a whole could not reasonably warrant the conclusion of the decision-maker."

[56] The Court is also of the view that the Governor-General, in reaching her decision to revoke the appointment of the Claimant based on the recommendation of the 2nd Defendant, also misdirected herself in law. Her decision was therefore unreasonable.

³ [1983] 1 AC 768, 821A-B

PROCEDURAL UNFAIRNESS

[57] The Claimant deposed in his Affidavit that the 2nd Defendant acted in a procedurally unfair manner in that he failed to give him an opportunity to make any representations to him prior to implementing an adverse decision against him.

[58] De Smith in Judicial Review at page 317 paragraph 6-002 states that:-

"Procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision and so ensure the decision's integrity. It deals with issues such as the requirement to consult, to hear representations, to hold hearings and to give reasons for decisions."

[59] The submission of Learned Counsel for the Claimant under this head is directed to the fact that the 2nd Defendant sought to remove the Chairman from the Commission on the ground that "he has lost confidence in its Chairman." The letter dated 5th January 2011 from the Governor-General to the Claimant is instructive and is again reproduced:-

"Dear Sir Gerald Watt,

On 30th December 2010, the Prime Minister, the Honourable Dr. Baldwin Spencer wrote to me as follows:-

"Please be advised Your Excellency that Commissioner Sir Gerald Watt Q.C. no longer enjoys my confidence to act in the capacity of Chairman of the Commission. Consequently, I am recommending that you terminate his appointment as Chairman of the Antigua/Barbuda Electoral Commission with immediate effect."

Sir, acting on the above, please find attached your letter of Revocation as Chairman of the Antigua/Barbuda Electoral Commission.

Further, be advised that the letter of Revocation as Chairman does not affect your position as Member of the Antigua / Barbuda Electoral Commission.

Yours sincerely,

.....
Dame Louise Lake-Tack GCMG, DGN, DSt.J
Governor-General of Antigua / Barbuda."

[60] The letter from the Honourable Prime Minister to the Claimant is dated 5th January 2010, is hereby reproduced:-

"Sir Gerald O.A. Watt, Q.C.
Belle Vue Heights
St. John's, Antigua

Dear Sir:

On behalf of the government, citizens and residents of Antigua and Barbuda, I wish to thank you for your service to the nation during the period you served as Chairman of the Antigua & Barbuda Electoral Commission.

However, I am confident that you will agree that the people of this fair nation reasonably expect, and rightly deserve, an Electoral Commission in which they have full faith and confidence and more particularly, a Chairman in whom they repose confidence given that the very crux of our democracy rests with this institution and its members. It is evident that you no longer enjoy that confidence.

I wish to advise you that I have written to Her Excellency, the Governor-General, recommending that you be relieved of your position as Chairman.

Let me take this opportunity to wish you all the best in the future and in your endeavours.

Yours sincerely,

Dr. The Hon. Winston Baldwin Spencer
Prime Minister"

[61] Based on the above letter, the reason given by the Prime Minister for his recommendation that the Claimant be "relieved of his position as Chairman" is that he is not deserving of that position, because he no longer enjoyed the "full faith and confidence" of the "people" of Antigua and Barbuda. The letter does not state in what way the "people" of Antigua and Barbuda conveyed their lack of faith and confidence in the Claimant.

[62] It is the submission of Counsel for the Claimant Dr. Dorsett that the 2nd Defendant has given no reason for having lost confidence in the Claimant. Dr. Dorsett further contends that the 2nd Defendant, who has attended several of the hearings, has chosen not to

disclose his reason by evidence on Affidavit. Counsel submits that the Court is entitled to make adverse inferences against the 2nd Defendant, and states that the proper inference to be taken from the 2nd Defendant's failure to disclose his reason is that he has no reason and/or no proper reason for losing confidence in the Claimant.

[63] The Court is of the view that the Prime Minister had a duty not only to disclose the reason why he lost confidence in the Claimant, but that he (the Prime Minister) was also bound to disclose his reasons for concluding that the Claimant no longer enjoyed the "full faith and confidence" of "the people" of Antigua and Barbuda. It is beyond dispute that the Claimant was adversely affected by the Prime Minister's recommendation to the Governor-General to terminate his appointment as Chairman "with immediate effect". The Court is guided by the following statements of Lord Donaldson of Lynton **MR in R v Civil Service Board, ex p Cunningham**⁴:-

"The principles of public law will require that those affected by decisions are given reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is."

[64] The Claimant's case is that the 2nd Defendant, in recommending that the Claimant be removed from his position as Chairman of ABEC, acted illegally, irrationally and in a procedurally unfair manner. His case is also that the decision of the 2nd Defendant was implemented by the Governor-General represented in the proceedings by the 1st Defendant. He contends that the decision that was implemented was illegal and patently unfair. Further, it is the submission of Counsel for the Claimant, Dr. Dorsett that "every unlawful act complained of has its genesis in the unlawful recommendation of the 2nd Defendant. What the 2nd Defendant did set every illegal act in motion."

[65] The Court has perused the evidence and the submissions of Learned Counsel for the Claimant and those of Counsel for the 2nd and 3rd Defendants and has noted the

⁴ [1991] 4 All ER 310

authorities. The finding of the Court is that the recommendation of the 2nd Defendant was illegal; it was also irrational and was procedurally unfair.

[66] The decision of the Governor –General to remove the Claimant from the office of Chairman of ABEC was made pursuant to the recommendation of the 2nd Defendant, conveyed to her by letter. The process to be followed for the removal of the Chairman is laid down by Statute. It states that there must first be a Tribunal set up and that the Governor General then acts based on the recommendation of the Tribunal. The 2nd Defendant usurped the authority of the Tribunal; he purported to make recommendation to the Governor-General after the Tribunal had already submitted its report to the Governor-General and made its recommendation not to remove the Claimant from office. The 2nd Defendant thus exceeded his authority. It is not a question of whether the 2nd Defendant's recommendation had merit, but the fact that he had no authority to make the recommendation. His recommendation conveyed by letter to the Governor-General was therefore illegal. The Court is also of the view that the decision of the Governor-General to revoke the appointment of the Claimant as Chairman of the Commission and to appoint the 3rd Defendant was made in excess of jurisdiction and is therefore unlawful.

REMEDIES

[67] The remedies sought by the Claimant include: "An order of certiorari quashing the appointment of the 3rd Defendant as Chairman of ABEC, the position of the Chairman of ABEC not being vacant." The Claimant also seeks several declarations; he also seeks damages, "including aggravated and vindictive damages."

[68] Certiorari does not lie to determine whether an inferior tribunal acted rightly or wrongly in a matter but rather whether it acted lawfully or unlawfully. According to Supperstone, Goudie & Walker's Judicial Review, at page 557, paragraph 16.3.2:-

"The modern quashing order is an order granted by the High Court which quashes a decision of an inferior court, tribunal, public authority or any other body or persons who are susceptible to judicial review. It is therefore a declaratory remedy concerned with existing decisions which pronounces upon the lawfulness of that decision. Technically it

requires the decision to be brought up into the High Court so that its validity can be determined. In modern practice it is an order by which the court rules as to the continuing legal validity of decisions vitiated by illegality... A quashing order may be granted in respect of not only decisions but also statutory instruments, rules, guidance, circulars, policies, advisory reports, advisory opinions and recommendations."

[69] The law is settled that judicial review is discretionary. Certiorari is therefore a discretionary remedy and may not be granted even where the Claimant may have made a strong case on the merits. In **Rv (Bibi) v Newham London Borough Council**⁵, it was stated that: - "The court has two functions – assessing the legality of actions by administrators and, if it finds unlawfulness on the administrators' part, deciding what [remedy] it should give." The court can take into account various factors in the exercise of its discretion. In the case of **Nichol v Gateshead Metropolitan Borough Council**⁶, it was stated that: "The court has an overall discretion as to whether to grant a remedy or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following: (1) The nature and importance of the flaw in the challenged decision (2) The conduct of the claimant (3) The effect on administration of granting the remedy..."

[70] The case of **Murray v The Police Service Commission** – (Suit No 5534 of 1996, decided 14th March 1997, High Court Trinidad and Tobago), and referred to on page 287 of Albert Fiadjoe's Commonwealth Caribbean Public Law is illustrative of the point that the courts may refuse a remedy if to grant one would be detrimental to good administration or would serve no useful purpose. The facts of the Murray case as stated by Fiadjoe are as follows:-

"In that case, the Applicant was superseded in the job for the post of Deputy Commissioner of Police. The Court found that Mr. Murray had been deprived of a fair hearing of his entitlement to have been appointed to the post of Deputy Commissioner. It was argued, however, that since an appointment had already been made to the post, the court ought not to exercise its discretion in such a way as to affect the right of that incumbent. The Court felt persuaded by that argument."

⁵ [2002] 1 WLR 237

⁶ (1988) 87 LGR 435, 460

Ramlogan J stated thus:-

"The remedy is discretionary and the court would not grant an order of certiorari if no good would result. If an order of certiorari is granted then Mr. Guy's appointment would thereby be quashed, someone would have to be appointed in his place and the process for appointment of a Deputy Commissioner would have to start all over again. More than this, even if the Commission were able to reconsider its appointment before the applicant's date of retirement on 2 June 1997, it is hardly likely that the applicant would be appointed to the post at this stage. An order for certiorari or a declaration would serve no useful purpose."

The Court in that Murray case instead awarded costs to the Applicant.

[71] In light of the totality of the evidence, I am of the view that the instant case is one in which to grant the remedy of certiorari is merited. I accordingly find that the order, namely "an order of certiorari quashing the appointment of the 3rd Respondent as Chairman of ABEC, the position of Chairman of ABEC not being vacant" should be granted. I find that there is nothing in the conduct of the Claimant that militates against the grant of the order. Further, unlike in the Murray case cited above, if the appointment of the 3rd Defendant is quashed, there is no process of appointment which would have to start all over again. The Claimant would rightfully resume his place as Chairman of the Commission (ABEC) since he had never lawfully been removed from that position. The 3rd Defendant would continue to be a member of the Commission, since he is in possession of an Instrument under the hand of Her Excellency the Governor-General appointing him as a "Member of the Electoral Commission with effect from the sixteenth day of August 2010." The Court is of the view that the grant of the order of certiorari, in the instant case, cannot therefore be construed as being detrimental to good administration.

[72] Supperstone, Goudie and Walker (supra) state that: "a quashing order is a constitutive remedy in the sense that the grant of such an order by itself destroys the legal validity of the action which is quashed by the order. No further actions by the applicant or respondent is required to achieve this."

- [73] The Court finds it necessary to address the issue raised by Counsel for the Defendants at the permission stage of the hearing, namely, whether the proper parties are before the Court. The Court notes that this issue was not addressed in the submissions of Counsel for the 2nd and 3rd Defendants. Further, and as stated above, no submissions were filed by Counsel for the 1st Defendant. To bring this issue into context, a short background is necessary.
- [74] In the course of his oral submissions at the permission stage of the instant case, Learned Counsel Mr. Datadin, who also appeared as Counsel for the 2nd & 3rd Defendants along with Ms. Sherri-ann Bradshaw, stated among other things that the Honourable Prime Minister (the 2nd Defendant) and the Chairman (the 3rd Defendant) "ought not properly to be included in any judicial review proceedings." He added that the Prime Minister and Mr. Samuel should not have been named as respondents "since it was the decision of the Governor-General who is by statute represented by the Attorney-General" which was being challenged. Learned Counsel added that "if the complaint is against the Prime Minister's recommendations only, then Prime Minister Spencer should be involved in the matter. And, if the complaint is only against the act of Sir Gerald's removal then the Governor-General, through the Attorney General, should be made answerable."
- [75] Learned Counsel for the 1st Defendant Ms. Alicia Aska submitted, at the permission stage of this matter, that the Attorney General was made a party to the proceedings pursuant to the Crown Proceedings Act. She submitted that judicial review claims do not fall within the purview of Section 13 of the Crown Proceedings Act and that the Attorney General would not in law be the proper party. Counsel cited the Court of Appeal decision of **Richard Frederick & Lucas Frederick v The Comptroller of Customs and The Attorney General**⁷.
- [76] In its ruling on the grant of leave to file Judicial Review proceedings, delivered on the 22nd February 2011, this Court stated inter alia:-

⁷ Saint Lucia HCVAP 2008/037

"Parag. 62 - As to whether the named Respondents are the proper parties to the application for judicial review, the Court notes that no point in limine was taken by any of the Respondents, but rather, the Counsel for the 2nd and 3rd Respondents sought to argue on the application for leave that the 2nd and 3rd Respondents were not proper parties to the proceedings and that the proper party is the Governor General, who is represented by the Attorney General (the 1st Respondent), while Counsel for the 1st Respondent sought to argue on the application for leave that the Attorney General was not a proper party to the proceedings.

Parag. 63 - As previously stated, the Court is of the view that the threshold for the grant of leave for judicial review has been met by the Applicant. The Court is also of the view that all the relevant parties concerned with the alleged ultra vires actions are before the Court, with the Prime Minister and the purportedly appointed replacement Chairman of ABEC named as Respondents, as is the Attorney General on behalf of the Governor General, and leave is accordingly granted to the Applicant to apply for judicial review. It would then be for the Court dealing with the application for judicial review to adjudicate on any issues raised."

[77] There was no appeal against the above ruling. However, when the matter came up again before the Court on the 26th day of September 2011, for hearing after leave was granted to the Claimant to file his claim for judicial review, Counsel for the 2nd and 3rd Defendants Mr. Datadin took a point in limine that the proper parties were not before the Court. The matter was adjourned to the 22nd November, 2011, which was the earliest date available to the Court. On that date, this Court gave an oral ruling as follows:-

"On the 26th September 2011, this matter came up for hearing of the substantive matter. Mr. Datadin took a point in limine, namely the wrong parties were before the Court. The matter was adjourned for a ruling on this preliminary issue after argument.

In my ruling of 22nd February 2011, I stated, in paragraph 63 that:-

'The Court is of the view that the threshold for the grant of leave for judicial review has been met by the Applicant. The Court is also of the view that all the relevant parties concerned with the alleged ultra vires actions are before the Court, with the Prime Minister and the purportedly appointed replacement Chairman of ABEC named as Respondents, as is the Attorney General on behalf of the Governor General, and leave is accordingly granted to the Applicant to apply for judicial review.'

To revisit that issue would mean that I would be reviewing my own decision. To be clear, that decision cannot be reviewed by myself acting as an Appellate Court of myself. The

only meaning that can be given to the sentence "it would then be for the Court dealing with the application for judicial review to adjudicate on any issues raised", is that it remains a live issue to determine whether judicial review should be ordered of a decision made, by any one of the three Respondents. The headnote to the Court of Appeal decision of **Roland Browne v The Attorney General and the Public Service Commission**⁸ reads inter alia:-

"At the first hearing, which is for case management under the CPR, the learned Judge erroneously went behind her Order granting leave ... By striking out the claim, she (the Learned Judge) was communicating that she was either wrong in granting leave to apply for judicial review, or that she had jurisdiction to review her earlier order granting leave."

In her judgment, the Learned Judge stated that "the judicial statement of Lord Millet in **Leymon Stracham v The Gleaner Company Limited and Dudley Stokes**⁹ is eminently applicable :

'Whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.'

The point in limine is rejected by the Court."

[78] Dealing now with the issue of the parties, the Court notes that:-

- (a) There is nothing in either of the two Affidavits deposed to by the 3rd Defendant or in his evidence at the trial in which he claims that he is not a proper party to the proceedings.
- (b) With respect to the 2nd Defendant, it would appear that the issue raised by Learned Counsel Datadin is that the 2nd Defendant's recommendation is not amenable to judicial review, and not strictly that he is not a proper party.

⁸ Saint Lucia HCVAP2010/023

⁹ Privy Council Appeal No. 22 of 2004

As stated above, the finding of the Court is that the said recommendation is amenable to judicial review. In any event, the Court is of the view that the 2nd Defendant is a proper party to the proceedings.

[79] With respect to the 1st Defendant, as stated above, the contention of Counsel for the 1st Defendant is that judicial review claims do not fall within the purview of the Crown Proceedings Act (ACT) and that consequently the Attorney General was not a proper party to the suit. Mr. Datadin, who incidentally was not on record as appearing as Counsel for the 1st Defendant, was quite emphatic that the Governor-General is amenable to suit in the Courts of Antigua and Barbuda and that she ought to have been brought before the Court.

[80] Paragraph 1 of the headnote in the Frederick case cited above reads:-

"1. The object of the Crown Proceedings Act (CPA) is to provide for the institution and maintenance of actions by and against the Crown in respect of liabilities arising in contract, tort or like actions committed by its servants or officers. The claim made in this case does not fall into those classes of civil proceedings being in the nature of a review of the exercise of the power used by a public officer (the Comptroller). Such claims for constitutional redress are not civil proceedings for the purpose of the CPA.

[81] George-Creque, J.A. in delivering the judgment in the Frederick case, at paragraph 32 of her judgment states that "CPR 2000 recognises that claims for judicial review and claims for constitutional redress, being public law proceedings are "a peculiar specie of civil proceedings" and "provides a regime of rules in Part 56 which are applicable only to proceedings of this kind." The Learned Judge goes on to say that under Part 56.11 of CPR, the Court is granted additional powers of case management at the first hearing. "For example, the judge is empowered to allow any person or body appearing to have a sufficient interest in the subject matter to be heard whether or not served with the claim form as well as direct the manner in which such person or body may be heard.

[82] In paragraph 34 of the judgment, the Learned Judge had this to say:-

“These specific provisions are clearly designed, in my view, to achieve a basic objective – that of ensuring the widest possible public participation, where warranted, in a matter involving public law considerations. Once such proceedings are viewed and placed in their proper context under CPR the argument as to whether the Attorney General alone can be a proper party loses force. By then, it ought to be readily apparent that the CPA has no applicability in such proceedings. What is clear is that a claim form seeking constitutional redress must be served on the Attorney General. This does not however preclude other persons being joined as defendants. That is also clear from the general tenor of CPR 56. ... In the instant case, the acts complained of are those of the Comptroller. Even if the Comptroller was not named and served as a party, power is given to the court to direct that he be heard. However, he has been made a defendant, in my view, quite rightly, by the appellants. What is not right however is for the appellants to say: “as Comptroller, he cannot be heard or that he can be heard only through the Attorney General.”

[83] I am of the respectful view that, based on the above, it does not follow that, in the instant case, that the Attorney General cannot be named and served as the representative of the Governor-General. In any event, it is my respectful view that a finding that the Attorney General as representative of the Governor – General is a proper party to the proceedings does not offend or do violence to the over-riding objective of the Civil Procedure Rules (CPR) 2000, namely that the Court deal with cases justly.

[84] The Claimant also claims “Damages on the footing of aggravated damages and vindictory damages.”

It is the submission of Dr. Dorsett that the Claimant is entitled to “substantial damages, including aggravated and vindictory damages.” He states further that “in the realm of public law the award of vindictory damages is for the purpose of vindicating the rights of persons who have been done wrong by public bodies.” Counsel further submits that the 2nd Defendant has sought to compromise the Commission’s impartiality and independence by seeking to remove from the Commission its Chairman on the ground that he has lost confidence in him (the Chairman). He states that no reason is given by the 2nd Defendant for having lost confidence in the Claimant. It is the submission of Counsel that the

"willfulness" of the 2nd Defendant's behavior makes the case a proper one for aggravated damages.

[85] It is Counsel's further submission that the 2nd Defendant "has not shied away from his decision to recommend the termination of the Claimant's appointment." He submits that the 2nd Defendant "**has boasted in Parliament**" that among other things, "**at the end of the day a fu me decision.**" Counsel contends that although the 2nd Defendant would, at that stage, have been aware that of the findings of the Tribunal, both by virtue of being advised of the same by the Governor-General and because the Governor-General had presented the findings of the report of the Tribunal in a national telecast, he nevertheless "went his own way."

[86] The Court is of the view that, while the Claimant is entitled to damages, he has not made out a case for the "substantial damages" which he claims, nor for the grant of aggravated and/or vindicatory damages.

[87] In conclusion, therefore, the finding of the Court is that the Claimant's case has been proved on a balance of probabilities. The Claimant is therefore entitled to the relief stated in the Order.

My Order is as follows:-


1. The Order of Certiorari quashing the appointment of the 3rd Defendant as Chairman of ABEC is granted.
2. The Court makes the following declarations, namely:-
 1. A declaration that the recommendation of the 2nd Respondent to the Governor General on 5th January 2010 that the Claimant be relieved of his position as Chairman of ABEC is illegal, namely, contrary to sections 3 and 4 of the Representation of the People (Amendment) Act 2001, and is therefore null, void, and of no legal effect.

2. A declaration that the decision of the 2nd Respondent on 5th January 2010 to recommend to the Governor General that the Claimant be relieved of his position as Chairman of ABEC is irrational, in light of the report of Forte tribunal finding no fault with the Applicant or his discharge of the office of Chairman of ABEC, and is accordingly unlawful.
3. A declaration that the decision of the 2nd Respondent on 5th January 2010 to recommend to the Governor General that the Claimant be relieved of his position as Chairman of ABEC is procedurally unfair, namely, the Claimant was not given an opportunity to be heard with respect to the allegation that he no longer had the "full faith and confidence" of "the people of this fair nation", and is accordingly unlawful.
4. A declaration that any and all actions taken pursuant to the recommendation of the 2nd Respondent given on 5th January 2011, that the Claimant be removed as Chairman, including any actions taken by Her Excellency the Governor General Dame Louise Lake-Tack, GCMG, DStJ, are null, void, and of no legal effect whatsoever.
5. A declaration that the appointment of and/or continuation in office by the 3rd Respondent as Chairman of the Antigua and Barbuda electoral Commission is contrary to law, ultra vires the provisions of the Representation of the People (Amendment) Act 2001, and is null, void, and of no legal effect.
6. A declaration that the 3rd Respondent holds the office of member of ABEC (and that of Member only) pursuant to his appointment of 2010 and that he continues to hold the said office until such time as he (1) vacates the same in the manner prescribed by section 3(5) of the Representation of the People (Amendment) Act 2001 or (2) is removed from office in the manner prescribed by section 4 of the Representation of the People (Amendment) Act 2001.
7. A declaration that all actions and decisions taken by the 3rd Respondent as Chairman of the Antigua and Barbuda Electoral Commission whether purported to be taken under the authority of the representation of The People

(Amendment) Act 2001, or the Representation of The People (Amendment) Act 2002 are null and void and of no legal effect, including but not limited to the signing off of the Register of Electors, and any matter involving the staffing and operations of ABEC.

8. A declaration that the decision of 16th July 2010 to suspend the Claimant "as a member and Chairman of the Antigua/Barbuda Electoral Commission with effect from 19th July, 2010" was contrary to section 4(4) of the Representation of the People (Amendment) Act 2001.
 9. A declaration that the suspension of the Claimant from the functions of his office as Chairman of ABEC ceased upon the issuance of the recommendation of the Forte Tribunal on 14th October 2010 that the Claimant not be removed from the office of Chairman of ABEC, and that from the 14th day of October 2010 the Claimant was fully vested with the lawful authority to exercise the functions of the office of Chairman of ABEC, to the exclusion of all others, and that the Claimant's reinstatement to the functions of his office and the tenure of his office as Chairman of ABEC continues until the Claimant (1) vacates the office of Chairman pursuant to section 3(5) of the Representation of the People (Amendment) Act 2001 or (2) is removed from office pursuant to section 4 of the Representation of the People (Amendment) Act 2001.
 10. A declaration that the actions of any person other than the Claimant in exercising the functions of office of the Chairman of ABEC after the cessation of the Claimant's suspension from the functions of his office as Chairman of ABEC on 14th October 2010 are null and void and of no legal effect.
3. The Claimant is entitled to and continues to be the Chairman of ABEC.
 4. The 1st and 2nd Defendants to pay to the Claimant damages to be assessed.

5. Costs to the Claimant to be determined on the basis of prescribed costs based on the amount of damages assessed.


Jennifer A. Remy
High Court Judge