The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P151 of 2023
Claim No. CV2022-02672

Between

TERRISA DHORAY

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL:

N. BEREAUX J.A.
M. MOHAMMED J.A.
P. RAJKUMAR J.A.

Date of delivery: July 11, 2023

APPEARANCES:
Mr. A. Ramlogan SC and Mr. K. Samlal instructed by Mr. V. Siewsaran, Attorneys-at-law for the Appellant

Mr. D. Mendes SC and Mr. S. de la Bastide instructed by Ms. S. Dass and L. Thomas, Attorneys-at-law for the Respondent

DISSENTING JUDGMENT

Delivered by Rajkumar JA

Background

(52) The instant appeal is in relation to the decision of the trial judge to refuse an injunction restraining the implementation of section 18 of the Trinidad and Tobago Revenue Authority Act, Act No. 17 of 2021, (the Act) and an order staying the date of operationalization of the Authority created thereunder. By section 18 various options were to be offered, (and have now been offered to all save two hundred public officers), which would have the result of depopulating the offices of the Inland Revenue Division ("IRD") and Customs and Excise Division (CED), and populating/staffing the Trinidad and Tobago Revenue Authority, (the Authority) and the Enforcement Division thereof, with persons from those departments who choose to accept offers of employment with the Authority.

(53) The background to the application for the injunction insofar as is relevant is as follows:

i) The Act was assented to on December 23, 2021 and was to come into force on such date as was fixed by the President by Proclamation;
ii) On July, 19, 2022, the instant proceedings were instituted seeking constitutional relief in respect of the alleged invalidity of the Act;
iii) On April 24, 2023, section 18 of the Act was proclaimed by Legal Notice No.105 of 2023;
iv) A trial date has been set for the hearing of the substantive matter on July 31, 2023 which the parties are working towards.

v) Letters have been issued to 1132 Public Officers of the IRD and CED notifying them of their options pursuant to section 18 to take effect on August 1, 2023;

vi) As at May 25, 2023, letters had not been sent to two hundred of those officers because further personal information was required of and requested from them[1].

(54) On the May 8, 2023 the appellant filed an application for interim relief based upon the proclamation of section 18 and the issue of the letters to the public officers. The interim reliefs sought included i) an order staying the implementation of operation of section 18 of the Act pending the hearing and determination of the claim and, ii) a further interim order suspending and/or staying the date of operationalization of the Authority pending the hearing and determination of the claim. In the exercise of her discretion the trial judge refused to grant any injunction. It is therefore necessary to consider whether the trial judge erred in the exercise of that discretion to the extent that that decision can be characterised as plainly wrong. If it can be so characterised then this court can consider whether on a proper application and balancing of the necessary considerations an injunction should be granted or refused.

Issues

(55) This Court needs to consider:

i) Whether in not granting an injunction the trial judge erred in the exercise of her discretion to the extent that in law that decision was plainly wrong.

[1] See Affidavit of Edwards paragraph 20 (iv) filed 25 May 2023

ii) Whether the factors set out in the cases of American Cyanamid v Ethicon[2], R v Secretary of State for Transport ex parte Factortame No. 2[3], The Chief Fire Officer, Public Service Commission v Elizabeth Felix Phillip [4], Seepersad v Ayres Caesar[5] and RJR MacDonald[6], when properly considered, weigh in favour of, or against, the grant of an injunction.

Conclusion

(56) In the circumstances,

i) The trial judge was plainly wrong in considering that **damages** would be an adequate remedy for the applicant and other employees of the IRD and CED and in not appreciating the possibility of irreparable harm in relation to persons who accepted a Voluntary Separation Package (VSEP) if the Act were later found to be unconstitutional in whole or in part.

ii) The trial judge was correct to conclude that there was a serious issue to be tried and that conclusion is not under challenge in this Appeal. Whether the State is constitutionally entitled to delegate a core function, by the Act in the manner that it has, and whether revenue collection is indeed such a core function, inter alia, remain serious issues to be tried. It is not possible to conclude at this stage how those issues are to be resolved[7]. It is only necessary to consider whether the case is sufficiently firmly based. (Nothing herein

---

[2] [1975] A.C. 396
[3] [1991] 1 A.C 603
[4] Civ. App No. 49 of 2013 per the Honourable Bereaux JA, (delivered 7th October 2013)
[5] [2019] UKPC 7
[6] [1995] 3 S.C.R. 199
[7] In fact there are dicta (in the case of MacDonald discussed hereunder) to the effect that it is undesirable to do so at this stage.

should be taken as any endorsement one way or another in relation to those issues which remain for determination by the trial judge). The trial judge was plainly wrong in concluding, without any analysis whatsoever, that the strength or weakness of either party's case on this issue, could have been a dispositive factor.

iii) In determining the **balance of convenience/balance of justice** the trial judge erred in failing to appreciate that the possibility of irreparable harm resulting from the collection of revenue and all steps incidental thereto, including enforcement **by the Authority**, being declared invalid was just as serious an outcome to be weighed in the scales of the balance of inconvenience to the wider public, as was the presumed irreparable harm to the State in having its plans deferred for altering its approach to revenue collection.

iv) Deferral of the operational date for implementation of section 18 was within the power of the Minister under the Act, and that date was therefore not set immutably in stone.

v) While irreparable harm must be presumed on the part of the State if an injunction were granted there is no presumption as to its magnitude. There is the demonstrated possibility of imminent irreparable harm to i) members of the IRD and CED who elect to accept VSEP and ii) to members of the public, who may be the subject to enforcement proceedings by the Authority, with possible attendant constitutional implications if the Act is implemented on August 1, prior to a determination of its constitutional validity. The evidence is not to the effect that damage to the Authority or to the State in the short term will outweigh the imminent irreparable harm to the appellant and the wider public. There is the certainty

that revenue collection can continue if the current state of affairs is preserved if the de facto status quo and current state of affairs is preserved for a further short period. The IRD and CED are already functioning and have been so functioning since at least Independence in 1962.

vi) Neither the projection of enhanced revenue collection, even if it could be achieved within three months, (which is not the respondent's evidence), nor the possibility of downgrading of this country's credit rating, can reasonably be expected to be affected by a three month suspension of the implementation of section 18 to allow for determination of the Constitutional validity of the Act or portions thereof.

vii) If the Act does not survive a challenge to its constitutional validity, a determination of which could reasonably be expected within three months of August 1, 2023, then as the trial judge pointed out, all Acts done pursuant thereto in the interim, would have been invalid and would have had to be reversed[8]. In that event nothing therefore would have been achieved by refusing a time limited injunction at this stage.

viii) On the other hand there would be the scenario of administrative chaos attendant upon a) reversing any transfers of staff to the Authority under section 18, b) reversing any other options exercised under section 18 and repopulating the key revenue collection agencies of the government, i.e. the IRD and CED, c) managing the reversal of and possible litigation attendant upon,

[8] paragraph 45

all steps taken in the interim three month period by the Authority. Not to be ignored is the fact that two hundred public officers as at May 25, 2023 had not yet received letters with the information that would enable them to determine which of the options, including VSEP to accept.

(57) For the reasons above, the balance of justice/convenience is clearly in favour of preserving the status quo until determination of the substantive proceedings. Given that the substantive matter is set for hearing on 31 July 2023, there is no reason why it cannot be heard and determined within three months therefrom. For the avoidance of doubt any injunction granted would be until delivery of judgment or 15 November 2023 **whichever is earlier**. If for any reason the substantive proceedings are not concluded by 15 November 2023, the Applicant would be entitled to renew her application for an injunction before the trial judge who would then be best placed to determine whether or not it should be continued pending judgment.

Orders

(58) In the circumstances,

i) an injunction is granted restraining the implementation of section 18 of the Trinidad and Tobago Revenue Authority Act until 15 November 2023 or determination of the substantive matter whichever is the earlier.

ii) Costs will be costs in the cause to be assessed by the Registrar in default of agreement.

Analysis

(59) The factors that the court had to consider and which the trial judge did consider were those identified in *American Cyanamid*, with the additional consideration of the public interest as a special factor. Those factors are not in dispute in this case and it is not contended that the trial judge misstated any one of them. However their application and the conclusions therefrom are contested.

Reversal of trial judge's discretion

(60) The trial judge exercised a discretion in deciding not to grant an injunction. The law in relation to the approach by an appellate court in relation thereto is encapsulated at paragraph 11 of **AG v Miguel Regis** CA 79 of 2011 as set out below, (all emphasis added).

> *11. The law as to the reversal by a Court of Appeal in Trinidad and Tobago of an order made by a trial judge in the exercise of his discretion is well-established. The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated, for example, that the trial judge disregarded or ignored or* ***failed to take sufficient account of relevant considerations*** *or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion.*

(61) In the instant case as demonstrated hereinafter:-

a) the trial judge failed to take sufficient account of relevant considerations in concluding that damages would be an adequate remedy, including

i) the full nature and extent of irreparable harm to public officers in the BIR and CED who selected the VSEP option,

ii) the full nature and extent of irreparable harm to the public if the Act were to be operationalised, with revenue collected and enforcement commenced by the Authority, prior to a determination of the constitutional challenge,

iii) the irreparable harm to other public officers affected by section 18 of the Act who had not received letters/documentation in relation to offers under section 18,

iv) the de facto status quo of existing and continuing revenue collection by the IRD and CED,

b) in concluding at that stage without any or any sufficient analysis or demonstrated basis "that the defendant's case appears to be stronger than that of the claimant".

I) Whether there is a serious issue to be tried

(62) The Court must be satisfied that there is a serious issue to be tried. The trial judge did appreciate the issues and accepted that there was a serious issue to be tried. She did so at 29, 30 and especially at paragraph 37 of her judgment. At paragraph 29 she identified one issue as follows:

> *29. The first substantive legal issue that the Claimant contends arises for the Court's determination is whether the Act is inconsistent with the Constitution because a person who is employed in the performance of an intrinsically government function is, by virtue of that, a public officer as defined in section 3 of the Constitution; and by virtue of chapter 9 of the Constitution only the Public Service Commission may exercise the powers of appointment, dismissal and disciplinary control over public officers. This will be referred to as "the public officer issue").*
>
> At paragraph 30 she identified a second issue as follows:
> *30. The second substantive issue which, in the alternative, the Claimant contends arises for the Court's determination is whether the Act is inconsistent with Chapter 9 of the Constitution even if the persons performing the functions pursuant to the Act*

are not held to be public officers, by virtue of the fact that Chapter 9 of the Constitution requires the performance of intrinsically government functions to be performed by public officers. This will be referred to as the "performance of government function issue").

At paragraph 37 she concluded that,

"In the instant case, it is clear that the issues that arise are neither frivolous or vexatious. The Claimant's challenge to the validity of the Trinidad and Tobago Revenue Act has shown that there are serious issues to be tried. The Claimant having "crossed the threshold" referred to by Lord Goff in Factortame, I will now address the broad issue of whether it is just and convenient to grant the interim relief sought".

Her analysis in relation to this issue cannot be faulted and there is no appeal or cross appeal in relation to this finding.

Serious Issue to be Tried - Constitutionality

(63) In relation to the first issue the constitutionality argument identified by the trial judge was reinforced by the appellant's submission that under section 14 (4) of the Act whilst it was contemplated that persons in the Enforcement Division would be public officers who would be under the control of the Public Service Commission, (PSC), that very section contemplates other employees of the Enforcement Division who would be under the control of the Board constituted under the Authority. That allows for the possibility therefore of the replacement over time of "Public Officers" in the Enforcement Division by persons who are not "Public Officers". Such persons would not enjoy the insulation from the Executive that public officers currently do under the Constitution. Therefore, section 14(4) of the Act does not unambiguously support the argument that revenue collection

and enforcement would continue to be performed by public officers because it allows for the contrary possibility.

(64) With respect to the **second issue** the trial judge found that this was also a serious issue to be tried. She was entitled to so find given that in ***Perch*** at paragraph 13 it was suggested that there may be certain core governmental functions such as the Police Service or the Prison Service which cannot be constitutionally divested, (although revenue collection via tax and customs duties was not specifically identified as one). It was contended that the instant fact situation is distinguishable from the postal workers in **Martha Perch and Ors v AG [2003] UKPC 17** because unlike such workers employees of the IRD and CED perform a core non-delegable public function which is constitutionally required to be performed by public officers insulated from the Executive by the Public Service Commission, (PSC). The authorities on this issue including ***Perch*** are not sufficiently clear to allow a court at this stage to make a preliminary pronouncement, far less determination as the trial judge purported to do, on the relative strengths of the arguments on either side. It is clear that these are issues that need to be the subject of a full hearing before the court hearing the substantive matter.

(65) While section 74(3) of the Constitution appears to permit Parliament to confer or delegate powers on persons or authorities, the issues of i) whether a core governmental function can be delegated to a semi-autonomous governmental body, ii) whether revenue collection and enforcement is such a function and iii) if so is it required to be performed by persons with the status of public officers, insulated from the Executive by the intermediary of the PSC, are not susceptible to a preliminary determination/assessment.

(66) While the respondent cited the cases of **Chue v The Attorney General of Guyana** 72 W.I.R 213 and **Griffith v Guyana Revenue Authority** [2007] 3 LRC 324 (an application for special leave to appeal in relation to a terminated employee of the Guyana Revenue Authority), neither is sufficiently clear authority in support of the position that revenue collection and enforcement can be delegated as to allow a court at this stage to make a sensible pronouncement on the strength of the arguments on either side.

(67) Both of those issues need to be considered and a final determination made by the court after hearing the substantive matter. At this stage it is enough to identify that these are serious issues to be tried. While a court may be entitled to take into account a preliminary view on the strengths of the respective cases, it must explain the basis upon which it forms such a view. The trial judge erred in concluding, without explaining its reasoning, that the defendant's case appears to be stronger than that of the claimant, and further erred in utilizing this unsubstantiated conclusion as one basis for refusing the injunction sought. In ***MacDonald*** the Supreme Court of Canada specifically noted at page 340 *"Furthermore at this stage an appellate court would not normally have the time to consider even a complete factual record properly. It follows that a motions court, should not attempt to undertake the* ***careful analysis required*** *for the consideration of section 1 in an interlocutory proceeding"*. This would apply with equal force to the constitutional issues raised herein both in relation to the validity of the Act, and the constitutional validity of enforcement proceedings taken thereunder.

II) Irreparable Harm

(68) The trial judge appreciated that the appellant had to establish irreparable harm and cited paragraph 38 of ***MacDonald*** as set out hereunder, albeit

that she did so under the heading of adequacy of damages (all emphasis added).

> *Adequacy of damages*
> *38. In the case of **RJR MacDonald** Judges Sopinka and Cory of the Canadian Supreme Court explained at page 341 "At this stage the only issue to be decided is whether **a refusal to grant relief** could so adversely affect the applicants' own interests that the **harm could not be remedied** if the eventual decision on the merits does not accord with the result of the interlocutory application. "Irreparable" refers to the **nature** of the harm suffered **rather than its magnitude**. It is harm which either **cannot be quantified in monetary terms** or which **cannot be cured**, usually because one party cannot collect damages from the other … The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases."*

(69) The trial judge concluded in relation to the Appellant and other public officers who may have been adjudged to have suffered loss or prejudice (or harm) because of being forced to exercise an option under section 18, that they would be entitled to compensation in damages for it. She identified the alleged **irreparable harm** to them at paragraphs 40-41 of her judgment.

> *40. The Claimant invited the court to consider that from the 1st May 2023 the employees of the IRD and the CED find themselves faced with a life changing decision, and three months within which to make the decision. This choice is as a result of the proclamation of section 18 of the Act. 17.*
>
> *41. The Claimant submitted that a greater possibility of harm exists for the Claimant than for the Defendant should the Court refuse to grant the interim relief sought. The Claimant's irreparable harm is characterised by a. the Claimant's career being prejudiced because the choices she is faced with will deprive her (and the other public officers employed with the IRD and CED and falling within section 18(1)) of the constitutional protection and procedural safeguards they enjoy in the public service based on the role of the Public Service Commission; b. The life changing decision the Claimant is faced with is based on or a*

false and/or illegal premise; and c. If the State were allowed to continue to operationalise the Authority and public officers (employed with the IRD and CED and falling within section 18(1)) made their choice pursuant to section 18(2), and the Claimant were successful in the substantive proceedings this would lead to serial litigation and administrative chaos and confusion.

45. I am satisfied that in the event that the Claimant is successful in the substantive proceedings, all acts done in pursuance of section 18 will have no legal basis. Consequently, the TTRA will have to cease performing the function of administering tax and customs law and the government will have to resume those functions. There would be a reversal of all the options exercised by public officers pursuant to section 18(2) and the public officers who exercised their option would remain in their substantive office. Where any of them are adjudged to have suffered loss or prejudice because of being forced to exercise an option, they would be entitled to compensation in damages.

She concluded at paragraph 49 that if the claimant succeeded at trial, she would be adequately compensated in damages.

49. It is highly likely that the Claimant, should she succeed at trial, would be adequately compensated for any loss or prejudice she would have suffered by any of the Defendant's continued acts between the application of (sic) interim relief and the culmination of the trial.

(70) Because the trial judge considered this to be a factor relevant to her determination, further consideration of the effect of the proclamation of section 18 of the Act, (set out hereunder), is warranted to assess whether or not it is likely to cause either harm that can be compensated in damages, or irreparable harm:

18. (1) This section applies to an officer who, on the date of the coming into force of this Act—
(a) holds a permanent appointment to; or
(b) holds a temporary appointment to, and has served at least two continuous years in, Employment of staff Employment for specific tasks Options available to public officers an office in the Public Service on the establishment of the Inland Revenue Division or Customs and Excise Division.

> *(2) A person to whom this section applies may, within three months of the coming into force of this Act,* ***or within such extended period as the Minister may,*** *by Order subject to negative resolution of Parliament* ***allow,*** *exercise one of the following options:*
> *(a)* ***voluntarily retire*** *from the Public Service on terms and conditions agreed between him or his appropriate recognised association and the Chief Personnel Officer;*
> *(b)* ***transfer to the Authority*** *with the approval of the appropriate Service Commission on terms and conditions which, taken as a whole, are no less favourable than those enjoyed by him in the Public Service;*
> *(c) be appointed on* ***transfer*** *by the Public Service Commission* ***to a suitable public office in the Enforcement Division*** *on terms and conditions which, taken as a whole, are no less favourable than those enjoyed by him in the Public Service on the date of the coming into force of this Act; or*
> *(d)* ***remain in the Public Service*** *provided that an office commensurate with the office held by him in the Public Service prior to the date of the coming into force of this Act, is available.* (All emphasis added)

(71) Following that analysis, it is necessary to look at the options offered to the appellants and consider what would happen if the injunction is not granted but they are ultimately successful at trial.

Persons who accept a Voluntary Separation Package (VSEP) – Whether irreparable harm

(72) In relation to the appellant and other public officers in the BIR and CED it appears that persons who accept the Voluntary Separation Package, (VSEP) by August 1, 2023 are required to make a life altering decision which has the potential to then be reversed. The life altering nature of that decision involves the natural and logical possibilities i) voluntarily ceasing to be employed, ii) receiving a package of financial compensation, iii) finding alternative ways to occupy themselves including possibly seeking equivalent employment and making the necessary psychological adjustment, iv)

reorganisation of personal finances to accommodate the changed reality a) that there will be no regular monthly salary as a public officer, and b) management instead of a lump sum. In relation to the latter, any such lump sum would be of severely limited practical utility if liable to be repaid in full if the appellant is successful.

(73) In the case of persons who would have resigned from the public service but accepted a VSEP package, a decision to do so could be reversed only at great inconvenience, if at all. Their restoration to the Customs and Excise Division or the Inland Revenue Department would logically and necessarily require unwinding the offer made, reinstating them in their previous position, presumably with no loss of seniority, and require return by them of any sums paid to them under the package. This process would need to be repeated across the board for several employees.

(74) In addition to this category of persons, the possibility of reversal of their VSEP acceptance and their return to work after having made the major decision to retire would not only be highly inconvenient and disruptive, but it can fairly be characterized as giving rise to irreparable damage.

(75) It could not be assumed that the VSEP option would be left intact, because the divestment of staff from the IRD and CED would need to be reversed in order to reconstitute those departments to allow them to resume functioning.

(76) However, the exercise of the other options would not appear to cause irreparable or un-compensable damage as explained hereunder.

Transfer to the Authority

(77) In the case of persons who accepted transfers to the Authority, on terms and conditions no less favourable than those that they currently enjoy, if the operationalization of the Authority were to be found to be unconstitutional they would need to return to their previous employment in the public service, again with no loss of benefits or seniority. This position appears to be less difficult to reverse.

Transfer to the Enforcement Division of the Authority

(78) In the case of persons who transfer to the Enforcement Division, if the operationalization of the Act is subsequently found to be unconstitutional their position would be similar to that of persons who were transferred to the Authority itself. They would need to return to their positions at the IRD and CED. Transfers to the Authority and the Enforcement Division would both have been on terms no less favourable than those enjoyed by them in the public service. Because persons who transferred to the Enforcement Division would not have lost their status as public servants/officers reversal in that case would be even less difficult.

Persons who remain in the Public Service if a suitably equivalent position therein can be identified

(79) With respect to those persons who elected to remain in the public service their position would have remained unchanged. Such officers who exercised the option to remain in the public service but were made redundant in the meantime would be treated as never having left.

(80) It would appear that the greatest inconvenience would be caused to those persons who accepted a VSEP package on the assumption that their

employment at the IRD or CED would be coming to an end unless they elected one of the other options.

(81) The concern was expressed that there was no guarantee that persons who applied for transfer to the Authority may not have received a position there. However that was addressed by Mr. Edwards in his affidavit where he confirmed that there were sufficient positions available at the Authority to accommodate all persons currently employed at the IRD and CED.

(82) The trial judge recognised at paragraph 45 that if the claimant were successful on the substantive proceedings that:

i) all acts done in pursuance of section 18 would have no legal basis;
ii) as a consequence the TTRA would have to cease performing the function of administering Tax and Customs Law;
iii) that the government would have to resume those functions;
iv) there would be a reversal of all the options exercised by public officers pursuant to section 18 (2);
v) public officers who exercised any of those options would remain in their substantive office.

She concluded however that where any of them are adjudged to have suffered loss or prejudice because of being forced to exercise an option, they would be entitled to compensation in damages.

(83) As demonstrated above, with respect to persons who exercise the VSEP option and arranged their future plans and financial affairs on that basis, the inconvenience and irreparable harm to that entire class of persons will extend beyond that which can be readily compensated by an award of damages.

(84) The trial judge erred in her assessment of the compensability of the harm to persons who exercised the VSEP option and in further failing to appreciate that 200 of them had not even been in receipt of letters identifying the options available to them so as to enable an informed decision. Damages could not have been an adequate remedy for such persons.

Balance of Justice – Public Interest

(85) The trial judge considered whether the balance of convenience or justice lay in granting or refusing an injunction. She referred at paragraphs 38, 42 and 50 of her judgment to the case of **RJR MacDonald**[9] cited by the Judicial Committee of the Privy Council in the case of **Seepersad (a minor) v Ayers Caesar and others**[10] at paragraphs 12 and 15.

> *12. In summary, the appellant argues that the Court of Appeal should have adopted the tri-partite test to the grant of interim relief in cases involving constitutional rights applied by the Supreme Court of Canada in Manitoba (Attorney General) v Metropolitan Stores Ltd [1987] 1 SCR 110 and RJR-MacDonald Inc v Canada (Attorney General) [1994] 1 SCR 311: first, there should be **a preliminary assessment of the merits** to see **whether there was a serious issue to be tried** (adopting the **less stringent merits test** laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] AC 396); second, it must be determined **whether the applicant would suffer irreparable harm** if the application were refused; and third, an assessment must be made as to **which of the parties would suffer the greater harm from the granting or refusal of the remedy pending a decision on the merits**. …*
>
> *15. The Board agrees that the tri-partite test in RJR-MacDonald is appropriate when considering interim relief in constitutional cases.*

The Balance of Inconvenience and the Public Interest

[9] [1995] 3 S.C.R. 199
[10] [2019] UKPC 7

(86) In ***MacDonald*** at 342 it was stated (endorsing dicta in the case of Metropolitan Stores) that the test involved a determination of which of the two parties would suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits". In constitutional cases the public interest is a special factor that must be weighed in the balance of convenience or justice. At page 350 under the heading "Balance of Inconvenience" it was stated "Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which they contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies".

(87) At paragraphs 43 and 50 of the judgment the trial judge further referred to ***RJR MacDonald*** as follows, (all emphasis added):

> *42. …At page 346 the Learned Judges stated "In the case of a **public authority** the onus of **demonstrating irreparable harm** to the public interest is **less than that** of a **private applicant**. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. **The test will always nearly be satisfied** simply **upon proof that the authority is charged with the duty of promoting or protecting the public interest** and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, **the court should** in most cases **assume that irreparable harm to the public interest would result from the restraint of that action**. **A court should not**, as a general rule, **attempt to ascertain whether actual harm** would result from the restraint sought. **To do so would in effect require judicial inquiry** into whether the government is governing well, since **it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate***

> ***the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights."***
>
> *50. …Judges Sopinka and Cory at page 343-344 referred to the chapter "An Inconvenient Balance: The Injunction as a Charter Remedy", in Berryman, ed., Remedies: Issues and Perspectives, 1991, 271. They stated "As Cassels points out at p. 303: While it is of utmost importance to consider public interest in the balance of convenience,* ***the public interest in Charter litigation is not unequivocal or asymmetrical*** *in the way suggested in Metropolitan Stores.* ***The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation. It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups. We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. …*** *When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather,* ***the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought."***

In the instant case it must therefore be presumed on behalf of the State that an injunction would cause some degree of irreparable harm to the public interest and no investigation is permitted into whether the legislation is likely to achieve its desired outcome. That is not a function of a court.

At paragraphs 51 to 53 the trial judge further directed herself as follows:

> *51. In the Factortame case, Lord Goff opined at page 673 "So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law,* ***matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing it in the public interest,…to render it just or convenient to restrain the authority for the time being from enforcing the law****."*
>
> *52. Lord Goff further opined, where a party seeks an interlocutory injunction restraining a public authority from enforcing an apparently authentic law, the court should not grant such an injunction "****unless it is satisfied****, having regard to all of the circumstances that* ***the challenge to the validity of the law is prima facie, so firmly based as to justify so exceptional a course being taken****."*
>
> *53. The principles enunciated in RJR Macdonald [1991] AC 2 p. 674 C-D were applied by McLachlin C.J.C. of the Canadian Supreme Court in Harper v Canada (Attorney General) 2000 SCC 57: "****The assumption of the public interest in enforcing the law weighs heavily in the balance****. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that* ***only in clear cases will interlocutory injunctions against the enforcement of a law on grounds on unconstitutionality succeed****."*

However Major J in his dissenting opinion would have denied the application for a stay of the injunction which had been granted by the Alberta Court of Appeal. He was inclined in that case to have considered that the injunction to suspend the enforcement of limits on third party spending on advertising in the course of a federal election campaign, should remain in place.

(88) In ***MacDonald*** the Supreme Court of Canada emphasised at page 333 that "*A careful balancing process must be undertaken*". It noted also that "*On the other hand the charter (of Fundamental Rights and Freedoms), charges the courts with safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment it is struck down as unconstitutional might in some cases be to condone the most blatant violation of charter rights*."

(89) The following principles in relation to public interest relevant to the instant case can be extracted from the case above:

i) A court must be satisfied after analysis and taking into account all relevant considerations that a clear case has been demonstrated before it can grant an interlocutory injunction against the enforcement of a law.

ii) It is to be assumed on the part of the State or public authority that irreparable harm would be caused by restraint of the legislation.

iii) The State does not have a monopoly on a claim to rely on public interest considerations.

iv) The appellant is entitled to draw to the attention of the court its own irreparable harm as well as potential harm that may realistically be suffered by other categories of the public if the legislation is implemented.

v) The public interest may not always gravitate in favour of enforcing existing legislation.

(90) The respondent contended forcefully that even if the Act were to be declared invalid and that all revenue collected thereunder turned out to be collected by an Authority which was not empowered to do so, in practical terms taxpayers could claim no damage far less irreparable harm. That was

because i) the liability to pay tax, ii) the assessment of that tax, iii) the collection of that tax, and iv) the enforcement of its collection, were all provided for by an underlying legislative structure which remained unaffected by the Act.

(91) According to that argument, such taxpayer's liability to pay tax would be unaffected by the fact that it may have been collected by the Authority rather than by the BIR, and such taxpayer would be entitled to a discharge of tax liability. This would be so even in respect of a payment collected by the Authority because his liability was to pay tax in discharge of his obligations to the State and that in effect is what he did. In that case, the performance of those functions by the Authority for the purpose of collecting revenue resulted in no damage when all such revenue was to be paid lawfully into the Exchequer Account from where it would be transferred to the Consolidated Fund.

(92) Accordingly the respondent contends that the balance of convenience/justice would not be in favour of taxpayers and if an injunction is not granted but the appellant is ultimately successful there would be no prejudice or irreparable harm to anyone from whom the Authority had collected tax or customs duties. That is because i) the Act would have been valid until set aside and ii) any amounts collected would be going to the Consolidated Fund, the same destination as any sums collected by the IRD or the CED. Any tax payers who had made payments to the TTRA would be entitled to a release and discharge from the State in respect of that Tax liability in the event that the State had to resume and take over from the TTRA tax collection functions.

Irreparable Harm to the Public

(93) While this argument at first sight may have attraction because of its practical simplicity it requires ignoring the fact that the collection of monies, tax, and property from a citizen would be by an entity which may or may not ultimately be found to have no legal existence, far less authority to perform revenue assessment, collection, and enforcement functions. If performance of those functions turned out to be unlawful a court cannot ignore the entrenched right of the public not to be deprived of property without due process of law. It is not simply collecting tax owed and paying it over to the Consolidated Fund. There are many steps associated with that process. They include assessment, collection, and enforcement, all of which are currently performed by the IRD and CED without pending constitutional query on the lawfulness of their ability to do so, unlike the current status of the Authority.

(94) Public interest includes both the concerns of society generally and the particular interest of identifiable groups. The trial judge referred to the principle in *MacDonald* that "*The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim*". While referring to this the trial judge did not apply it in relation to her recognition at paragraph 45 of her judgment that all acts done in pursuance to section 18 would have no legal basis and that the TTRA, (if it had not been enjoined at an interlocutory stage), would have to **cease** performing the function of administering tax and customs law. The possibility of unlawful enforcement of revenue collection clearly has the potential to cause irreparable harm in easily envisaged scenarios.

(95) Voluntary compliance with revenue collection functions by the Authority may, for the reasons advanced by counsel for the respondent, pose less of a problem. However in the case of a party who is not prepared to voluntarily

comply with a demand by the Authority, the status of enforcement proceedings by it, and actions incidental thereto would be less clear. It is not an adequate response to contend that they would have remedies after the fact in law or even under the Constitution. The role of the court is to avoid the possibility of that situation, not to pretend that it is non-existent and to ignore it. In the case of enforcement proceedings by the Authority prior to the determination of their constitutional validity, the real possibility exists of constitutional issues arising therefrom and the possibility of irreparable damage to the public, which cannot be discounted or ignored.

(96) Given the extreme importance of the revenue collection function of the State it is all the more imperative that there be no question mark over the legal basis for the collection of that revenue. There is no such question mark over the legal basis of the existing collection of revenue by the IRD and the CED. The balance of convenience therefore weighs strongly in maintaining the de facto status quo on the basis of which the public debt is now secured.

(97) Given that possibility of irreparable harm, the issue therefore is whether it is in the public interest for the TTRA, while subject to a constitutional challenge as to whether it can validly perform the functions of administering tax and customs law, should nevertheless be allowed to take on the functions currently being performed by the BIR and CED and to commence such functions with staff from the IRD and CED with effect from August 1, 2023.

Irreparable Harm to the State

(98) The respondent contends that it should because of projections of increased efficiency, enhanced tax collections, and the fear that if the TTRA is not

operationalised, that the credit rating of this country will be eventually downgraded. In that event, the Government's ability to borrow and the expense of borrowing would be compromised.

(99) Apart from that it has a) spent various sums on i) having a Strategic Plan prepared by Earnest and Young, ii) spent $298,429.00 on a recruitment exercise for senior staff and iii) spent $123,562.00 to rent venues for meetings with staff from the IRD and CED. As to these latter expenditures, even if they all need to be repeated, which is doubtful, in the context of what is at stake in this litigation – (collection from the entire tax base of this country to the extent of potentially billions of dollars), those expenditures are not sufficient to have any impact on the balance of convenience.

(100) The newly created Authority has advertised vacancies for thirteen senior personnel, whose recruitment would be unaffected by any injunction. There is no indication as to whether those vacancies, important on their face to operationalization by August 1, 2023, have yet been filled.

Which of the parties is likely to suffer greater harm

i) if an injunction is not granted and

ii) if an injunction is granted

(101) The appellant contends that apart from the irreparable harm and damage to the appellant, other public officers, and the public, i) the functions that the TTRA seeks to commence for the first time on August 1, 2023 are already being performed, and have been so performed since this country's Independence in 1962, and ii) there is no guarantee even on the respondent's evidence that commencement of those functions by the TTRA, despite suggestions, projections, and speculations, would result in any enhancement to revenue collection that is actually quantifiable at this

stage[11], If an injunction is granted, although irreparable harm to the State is presumed, its relative magnitude must be assessed in this context.

Where does the balance of justice lie

(102) It is the law that in the case of legislation that has been passed, that irreparable damage/prejudice/harm to the State is assumed and not questioned, (and there can be no suggestion therefore in this case that such irreparable harm to the State does not exist). What must also be factored into the analysis however is the extreme dislocation, inconvenience and irreparable harm to the public that would result if an injunction is not granted, and the Authority commences revenue collection, only to be found to have done so under an Act which does not survive constitutional challenge. In that case any interim steps permitted to be taken by the Authority would themselves aggravate and exacerbate extreme inconvenience and irreparable harm, not only to the appellant and the general public but to the State itself if they have to be reversed. The trial judge erred in failing to complete her analysis as to the impact of her finding at paragraph 45 taken to its logical conclusion, and wrongly concluded that the balance of justice and public interest lay with the Authority because those matters were remediable in damages without explaining how they could possibly be.

(103) Further the Authority's claim to be preparing for that deadline of 1st of August 2023 is inconsistent with the delay in the steps actually taken by the Authority itself to operationalize it. On its own admission 200 employees of the CED and the IRD did not receive letters as of the date of swearing the affidavit of Mr. Edwards. It matters not whose fault it is. However it is an

[11] See report of Dr. Moore at pages 7 -8 of exhibit "MM8", record of appeal.

illustration of the dangers of proceeding in haste in the implementation of this Act to completely reverse the basis on which revenues in this country have been collected since its Independence.

(104) The calculus that determines where the balance of justice/inconvenience lies in this case must be significantly dependent upon the time frame during which any implementation of section 18 is deferred. For example no one can seriously contend that deferring the implementation of section 18 by one day could have any catastrophic consequences. The longer the period of deferred implementation however the stronger the possibility of the **magnitude** of irreparable harm increasing. However given the possibility of irreparable damage to each of the parties identified above a balance has to be struck to meet the justice of this specific case.

(105) The issues that arise in that context are far more significant than any inconvenience or irreparable harm to the State that would arise in relation to a short delay in operationalizing the Act until its constitutionality has been pronounced upon by a court. When the evidence of imminent and irreparable harm to the appellant and public officers of the IRD and CED are considered, together with the imminent and irreparable harm to the public if an injunction is not granted, is contrasted with the less imminent irreparable harm to the State if a time limited injunction is granted, the balance clearly lies in preserving the de facto status quo and granting an injunction[12] to allow a reasonable time for the determination of serious issues in the substantive claim. The deadline of 1st of August 2023 is not set in stone. The Act itself provides for flexibility in that deadline.

---

[12] This is clearly unlike the situation in ***MacDonald*** where the injunction sought was by Tobacco companies to restrain advertising restrictions both pending determination of their substantive appeal on its constitutionality and for a period thereafter. There were also countervailing public health interests weighing in favour of its enforcement.

(106) The public interest requires an early determination of the substantive matter. However it does not require that section 18 of the Act be operationalised with all the inconvenience and extreme dislocation amounting to irreparable harm to the appellant, the other officers to the IRD and CED, and the public that would be occasioned if the Act were operationalised on the 1 August 2023 but the appellant were to be ultimately successful. Granting an injunction could not prevent i) the filling of senior positions which have been advertised, ii) the continuing collection of revenue by the IRD and CED or iii) the continuing collection and enforcement of revenue by the IRD or CED.

Conclusion

(107) In the circumstances,

i) The trial judge was plainly wrong in considering that **damages** would be an adequate remedy for the applicant and other employees of the IRD and CED and in not appreciating the possibility of irreparable harm in relation to persons who accepted a Voluntary Separation Package (VSEP) if the Act were later found to be unconstitutional in whole or in part.

ii) The trial judge was correct to conclude that there was a serious issue to be tried and that conclusion is not under challenge in this Appeal. Whether the State is constitutionally entitled to delegate a core function, by the Act in the manner that it has, and whether revenue collection is indeed such a core function, inter alia, remain serious issues to be tried. It is not possible to conclude at this stage

how those issues are to be resolved[13]. It is only necessary to consider whether the case is sufficiently firmly based. (Nothing herein should be taken as any endorsement one way or another in relation to those issues which remain for determination by the trial judge). The trial judge was plainly wrong in concluding, without any analysis whatsoever, that the strength or weakness of either party's case on this issue, could have been a dispositive factor.

iii) In determining the **balance of convenience/balance of justice** the trial judge erred in failing to appreciate that the possibility of irreparable harm resulting from the collection of revenue and all steps incidental thereto, including enforcement **by the Authority**, being declared invalid was just as serious an outcome to be weighed in the scales of the balance of inconvenience to the wider public, as was the presumed irreparable harm to the State in having its plans deferred for altering its approach to revenue collection.

iv) Deferral of the operational date for implementation of section 18 was within the power of the Minister under the Act, and that date was therefore not set immutably in stone.

v) While irreparable harm must be presumed on the part of the State if an injunction were granted there is no presumption as to its magnitude. There is the demonstrated possibility of imminent irreparable harm to i) members of the IRD and CED who elect to accept VSEP and ii) to members of the public, who may be the subject to enforcement proceedings by the Authority, with possible attendant constitutional implications if the Act is implemented on

[13] In fact there are dicta (in the case of MacDonald discussed hereunder) to the effect that it is undesirable to do so at this stage.

August 1, prior to a determination of its constitutional validity. The evidence is not to the effect that damage to the Authority or to the State in the short term will outweigh the imminent irreparable harm to the appellant and the wider public. There is the certainty that revenue collection can continue if the current state of affairs is preserved if the de facto status quo and current state of affairs is preserved for a further short period. The IRD and CED are already functioning and have been so functioning since at least Independence in 1962.

vi) Neither the projection of enhanced revenue collection, even if it could be achieved within three months, (which is not the respondent's evidence), nor the possibility of downgrading of this country's credit rating, can reasonably be expected to be affected by a three month suspension of the implementation of section 18 to allow for determination of the Constitutional validity of the Act or portions thereof.

vii) If the Act does not survive a challenge to its constitutional validity, a determination of which could reasonably be expected within three months of August 1, 2023, then as the trial judge pointed out, all Acts done pursuant thereto in the interim, would have been invalid and would have had to be reversed[14]. In that event nothing therefore would have been achieved by refusing a time limited injunction at this stage.

viii) On the other hand there would be the scenario of administrative chaos attendant upon a) reversing any transfers of staff to the

[14] paragraph 45

Authority under section 18, b) reversing any other options exercised under section 18 and repopulating the key revenue collection agencies of the government, i.e. the IRD and CED, c) managing the reversal of and possible litigation attendant upon, all steps taken in the interim three month period by the Authority. Not to be ignored is the fact that two hundred public officers as at May 25, 2023 had not yet received letters with the information that would enable them to determine which of the options, including VSEP to accept.

(108) For the reasons above, the balance of justice/convenience is clearly in favour of preserving the status quo until determination of the substantive proceedings. Given that the substantive matter is set for hearing on 31 July 2023, there is no reason why it cannot be heard and determined within three months therefrom. For the avoidance of doubt any injunction granted would be until delivery of judgment or 15 November 2023 **whichever is earlier**. If for any reason the substantive proceedings are not concluded by 15 November 2023, the Applicant would be entitled to renew her application for an injunction before the trial judge who would then be best placed to determine whether or not it should be continued pending judgment.

Orders

(109) In the circumstances,

i) An injunction is granted restraining the implementation of section 18 of the Trinidad and Tobago Revenue Authority Act until 15 November 2023 or determination of the substantive matter whichever is the earlier.

ii) Costs will be costs in the cause to be assessed by the Registrar in default of agreement.

Peter Rajkumar
Justice of Appeal