

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/2007

**BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

BETWEEN	ALFRED MCPHERSON	APPELLANT
AND	THE MINISTER OF LAND AND ENVIRONMENT	RESPONDENT

**Miss Hilary Phillips, Q.C., Miss Teri-Ann Lawson and Miss Sherise Gayle
instructed by Dunn-Cox for the appellant.**

**Curtis Cochrane and Miss Tasha Manley instructed by Director of State
Proceedings for the respondent.**

November 17, 18 & 19, 2008 and December 18, 2009

SMITH, J.A.

1. This is an appeal from the decision of the Full Court (Mrs. Marva McIntosh, Marsh and Mrs. Norma McIntosh JJ) delivered on July 11, 2007 whereby the Court refused the application of the appellant for judicial review of the decision of the respondent to recommend the revocation of the appellant's appointment as Registrar of Titles.

Background facts

2. By contract dated July 7, 2003, the appellant, an attorney-at-law, was appointed Director, Land Titles in the National Land Agency (NLA) for a period of three years with effect from July 21, 2003. The contract required the appellant "to observe and apply the standard of conduct of public officers as outlined in the Public Service Regulations, 1961 (the PSR) and Financial Regulations in so far as they are applicable and the Human Resource Manual of the Agency." The contract also required the appellant to sign a declaration under the Official Secrets Act and "to declare to the Public Service Commission (PSC) particulars of any investment or shareholdings in any company, occupation or undertaking in keeping with Staff Order 3.6."

3. The appellant was subsequently appointed Registrar of Titles by warrant of the Governor General pursuant to section 4 of the Registration of Titles Act (the RTA) with effect from July 21, 2003.

4. The Notice of his appointments which was published in the Jamaica Gazette of July 21, 2003 reads: "Mr. Alfred McPherson has been appointed to the post of Director, Land Titles/Registrar of Titles in the National Land Agency with effect from July 21, 2003."

5. At the time of the appellant's appointments, the Chief Executive Officer (CEO) of the NLA was Mrs. Elizabeth Stair. Shortly after his appointments, disagreements arose between the appellant and the CEO. According to the appellant these disagreements emanated largely from the CEO's attempts to control his statutory authority as Registrar

of Titles in circumstances where neither the RTA nor the Executive Agencies Act (EAA) entitles the CEO to control and direct the functions of the Registrar. On the other hand, the CEO described the appellant's conduct as becoming "increasingly un-cooperative" and as having a "negative impact on our working relationship."

6. By letter dated January 25, 2006, the CEO of the NLA terminated the appellant's contract of employment with effect from January 26, 2006. Two cheques were attached to the letter. One was made out for \$677,711.19 representing payment for three months salary in lieu of notice and payment for 16 days' vacation leave. The other was drawn for \$1,093,905.93 and was in respect of net gratuity for the period July 21, 2003 to July 20, 2005. The CEO informed the appellant by the said letter that the Governor General had been requested to revoke his appointment as Registrar of Titles.

7. On the same date, January 25, 2006, the appellant's appointment as Registrar of Titles was revoked by the Governor General on the advice of the respondent.

8. The appellant sought and obtained leave for judicial review and by Fixed Date Claim Form dated June 19, 2006 sought the following orders:

- "(1) An Order of Certiorari to quash the decision of the Respondent to recommend that the Appellant's appointment as Registrar of Titles be revoked.
- (2) A declaration that procedures established by the Public Service Establishment Act and the rules of natural justice were not complied with by the Respondent in the decision making process with respect to the making of the said recommendation.

(3) Damages

(4) Costs.”

9. The grounds on which the Orders were sought are:

“(1) The Appellant was at all material times the holder of the post of Registrar of Titles, having been so appointed by the Governor General of Jamaica with effect from June 21, 2003, and as such is personally affected by and has sufficient interest in the subject matter of this application pursuant to Part 56 and 56.3 of the Civil Procedure Rules.

(2) The Appellant’s appointment as Registrar of Titles was evoked by the Governor General upon the recommendation of the Respondent, in breach of the rules of natural justice, the Public Service Regulations 1961 and the Civil Service Establishment Act.”

Proceedings in the Review Court

10. Before the Full Court the appellant, as appellant, contended that the position of Registrar of Titles was at all material times an established post under the Civil Service Establishment Act (CSEA) and that the holder of such a post was entitled to all its privileges and protections afforded to officers in the public service. These entitlements, he argued, flowed from his status as a public officer and were not dependent on his contract of employment as a Director at NLA. Further, the appellant contended that the Instrument of Revocation was wrongly issued in that the recommendation of the termination of his appointment as Registrar was a matter for the PSC and not the respondent. The appellant argued that he held dual appointments – under contract as Director, Land Titles and by virtue of his appointment by the Governor General, as Registrar of Titles. He claimed that he had had a legitimate expectation that the

procedure prescribed by the PSR would apply to him as Registrar. He was a public servant and as such he had a public law entitlement to due process.

11. The respondent contended that the appellant's contract of employment covered both his administrative post of Director, Land Titles in the NLA and his statutory technical duties of Registrar of Titles. The respondent pointed out that the appellant's contract of employment provided the method of termination. The appellant, it was submitted, had no right to be heard before termination since the parties agreed to termination by notice or pay in lieu of notice. Further, the respondent argued, the office of the Registrar of Titles was not a constitutional post and there were no statutory or constitutional restrictions on termination. The appellant's employment as Registrar, it was said, was governed by private contract and thus the public law concept of legitimate expectation would not apply.

12. The Full Court identified the issues as:

- (1) The scope of the appellant's contract of employment – whether it related not only to his position as Director, Land Titles but also to his position as Registrar of Titles.
- (2) The applicable procedure for termination of the appellant's position as Registrar.
- (3) Whether there was any basis for a legitimate expectation that the appellant would be entitled to the protection of the PSR particularly as it relates to termination of employment.

13. All three judges of the Full Court found that not only did the appellant's contract of employment relate to and cover both positions but also that the appellant was

aware of that fact before he accepted the offer with all its terms. In this regard, M.

McIntosh J. said (at p.15 of the judgment; page 454 of the record):

"The Appellant's employment as Director, Land Titles required that he carry out the functions of the Registrar of Titles. In effect, there was one contract for carrying out both duties. The termination of the Director, Land Titles position would result in the termination of the Registrar of Titles position. It would be inconvenient if not impossible for a different procedure to be required for the termination of each function nor would it be feasible for one to be terminated while the other continued."

14. Marsh J. had this to say (p. 22 of judgment, p. 467 of record):

"I accept and do hold that the holder of the post of Director, Land Titles, in the new National Land Agency, would also hold the post of Registrar of Titles, pursuant to the Executive Agency Act. It is patently clear to me, and, as it must have been, to the appellant that the contract made a single provision for salary."

15. N. McIntosh J. expressed herself in this way (p.41 of judgment, p. 480 of record):

"In my view there is ample evidence to support a finding that the contract related to both positions and it is therefore now necessary to consider whether, as a public servant termination of his appointment as Registrar was governed by his contract of employment or the provisions of the PSR and whether the latter provisions may be applicable to a person employed on a fixed term contract to an established civil service post."

16. As regards issue number two, the judges were also ad idem. The learned judges held that since the RTA is silent as to termination, the revocation of the appellant's appointment would have to be by the Governor General by virtue of section 35 of the Interpretation Act. The judges also held that pursuant to section 32 of the Constitution,

the Governor General was obliged to act, as he did, on the recommendation or advice of the respondent as the relevant Minister in this case. It was the view of the learned judges, that since the appellant's appointment as Registrar was not on the advice or recommendation of the PSC, his contention that termination of such appointment was the business of the PSC in accordance with the PSR, had no merit. The judges also found that as a person on a fixed term contract of employment, the appellant was not entitled to invoke the provisions of the PSR, save for those terms and conditions of the regulations which specifically were made terms of his contract. Staff Order 1.9.5, they opined, makes the contract of such an officer the governing factor.

17. The third issue concerns legitimate expectation. Here again, the learned judges were agreed. They held that the appellant had not established any basis for the legitimate expectation for which he contended. Accordingly, as stated before, the appellant's claim for certiorari and declaration was refused.

The Appeal

18. The following five grounds of appeal were filed on behalf of the appellant:

- "(a) That the Full Court erred in law in making findings of fact in judicial review proceedings to the prejudice of the Appellant on the basis of affidavit evidence which was not tested by cross-examination.
- (b) That the Full Court erred in law in holding that the Appellant, as the holder of the public office of Registrar of Titles, was not entitled to the protection of the Public Service Regulations, 1961.
- (c) That the Full Court erred in law in holding that the concept of legitimate expectation could not avail the Appellant in circumstances where although his

appointment as Director, Land Titles was based on an ordinary contract of employment, he was by virtue of his appointment as Registrar of Titles a public servant and thereby entitled to the protection of the Public Service Regulations, 1961.

- (d) That the Full Court erred in law in holding that the Appellant was not entitled to the benefit of the rules of natural justice in the light of his contract of employment.
- (e) That the Full Court erred in law in holding that it was *intra vires* the powers of the Respondent to recommend to the Governor General the revocation of the Appellant's appointment as Registrar of Titles."

The issues

19. The appellant, it would appear, does not lay much store on the first ground. The appellant's attorneys-at-law at paragraph 4 of their written submissions stated that "the essential facts for the purposes of this appeal are largely uncontested." And at paragraph 10 (*ibid*) the attorneys submitted that the real issues which arise for determination of this Court are as follows:

- "(i) whether the Appellant became by virtue of his appointment as Registrar an officer in the public service of Jamaica and as such was entitled to the protection of the provisions of the PSR;
- (ii) whether, if the Appellant did not in fact become an officer in the public service, he had a legitimate expectation that he would be so treated, particularly with regard to questions relating to discipline and the termination of his employment;
- (iii) whether by terminating the Appellant's contract of employment and revoking his appointment as Registrar the Respondent acted in breach of the PSR and/or the rules of natural justice."

20. Before us, learned Queen's Counsel for the appellant did not seek to challenge the eleven (11) findings of fact listed in the Notice of Appeal. Accordingly, I do not propose to address the first ground but will confine myself to the three issues stated above, and of course, to the concomitant facts which are "largely uncontested".

The Status of the Appellant as Registrar of Titles

21. Miss Phillips Q.C. for the appellant, submitted that the position of Registrar was at all material times an established post under and by virtue of the CSEA and that the holder of such office for the time being was accordingly entitled to all the rights, privileges, protections and rules governing the public service of Jamaica. She submitted that the appellant by virtue of his appointment by the Governor General became as a matter of operation of law, a civil servant and thereby subject to the relevant regulations governing the administration of the civil service. She further submitted that the appellant in fact held dual appointments - under contract as Director, Land Titles and, by virtue of appointment under the Broad Seal, as Registrar and that the distinction between a "contract officer" and an "appointed civil servant" has no validity in respect of the appellant. Learned Queen's Counsel contended that there is no post of Director, Land Titles/Registrar of Titles in the National Land Agency. The appellant's contract, she said, was in respect of the post of Director Land Titles and not for Registrar of Titles. Accordingly, she contended, the post of Registrar should be terminated in accordance with the PSR and not under the contract. The Full Court, she stated, erred in holding that the revocation of the appellant's appointment as Registrar did not require a hearing. In the course of the submission, counsel for the appellant

referred to various authorities and statutory provisions including section 4 of the RTA, sections 2 and 13 of the CSEA section 3 (1) of the Civil Service Establishment (General) Order 2003; ***Council of Civil Service Unions (CCSU) v Minister for the Civil Service*** [1985] 1 AC 374; The Public Service Regulations; ***Malloch v Aberdeen Corporation*** [1971] 2 All ER 1278; ***R v East Berkshire Health Authority ex parte Walsh*** [1985] 1 Q.B. 152; ***R v Home Security ex parte Benwell*** [1985] Q.B. 554; ***Horace Fraser v Judicial and Legal Services Commission and the Attorney General*** [2008] UK PC 25, delivered, May 6, 2008, ***Angela Inniss v Attorney General of St Christopher & Nevis*** [2008] UK PC 42 delivered July 30, 2008.

22. Mr. Cochrane for the respondent contended that the appellant was not appointed to the position of Registrar of Titles under or by virtue of the PSR. Only public officers appointed pursuant to the PSR are entitled to have their appointments terminated by and under the procedure prescribed by the PSR. He submitted that the relationship between the appellant and the Government of Jamaica was entirely contractual. Accordingly, he contended, the appellant was subject to the terms and conditions of the contract which differed from those of the "ordinary" civil servants. And the contract was clear as to the procedure for termination. The NLA, he further submitted, was under no statutory or other restriction as to the grounds on which it could dismiss the appellant and, therefore, acted correctly when it terminated his appointment in accordance with the contractual provisions. The appellant's complaint that his appointment as Registrar could not be revoked without him being accorded a hearing

was misconceived, he said. Counsel for the respondent cited ***Ridge v Baldwin*** [1963] 2 All ER 66 among other cases.

23. Counsel for the respondent pointed out that in March 2001 pursuant to section 127 of the Constitution, the Governor General delegated his powers under section 125 to appoint, remove or discipline officers in the NLA to the CEO. As the appellant's appointment as Registrar of Titles was ancillary to his employment as Director, Lands Titles, according to the respondent's view, the termination of the latter would necessarily result in the termination of the former. In the absence of a new or separate contractual arrangement, the appellant could not have continued to carry out his duties as Registrar in the circumstances where his contractual employment had been terminated by the NLA.

24. Mr. Cochrane submitted that the office of the Registrar of Titles is not a constitutional post and is not one in relation to which there is any constitutional or statutory restriction on the manner in which its termination may be effected. Counsel sought to distinguish the instant case from the cases cited by counsel for the appellant. The latter, he submitted either concern cases where there were statutory restrictions on dismissal or they relate to holders of judicial office.

25. Finally, counsel for the respondent, opined that the findings sought by the appellant would lead to absurd consequences. What would be his remuneration, counsel asked rhetorically, if his contract was terminated and he continued as Registrar? Would he, counsel asked, be entitled to receive pay in lieu of notice, a

terminal grant and gratuity (which he has accepted without objection), and continue to receive the salary attached to the post?

Analysis

26. I will start my analysis of this issue (the status of the appellant as Registrar) with the statement that, in my view, this case arose out of an oversight in the implementation of the Government's programme aimed at "reforming and modernizing" the public sector. Under this programme, the NLA was established as an Executive Agency. The Land Titles Division is one of the seven divisions of the NLA. Each Division is headed by a Director who reports to the CEO who in turn reports to the Minister. In the NLA structure, the Director of the Land Titles division, it would appear, was intended to take the place of the Registrar of Titles. Indeed, at paragraph 11 of her affidavit dated 30th October, 2008, the CEO said that the head of the Land Titles Division carries out the statutory functions of the Registrar. However, for this to be legally effective, it would necessitate the amendment of the RTA with a view to bringing the Registrar of Titles within the structure of the NLA and to transferring the functions of the Registrar of Titles to the Director of the Land Titles Division. There is reason to think that after the appellant's contract of employment as Director, Land Titles was signed by the CEO of the NLA and the appellant on the 7th July to become effective on the 21st July 2003, the provisions of section 4 of the RTA were brought to the attention of the CEO and subsequently, steps were taken to have the Governor General issue his Instrument appointing him Registrar of Titles with effect from the same date as his appointment as Director. As the law was, his appointment

as Registrar of Titles was necessary to facilitate his performance of the functions of the Director, Land Titles.

27. It seems to me that the CEO's oversight of section 4 of the RTA explains why the CEO's letter of July 7, 2003 and the contract of employment speak only of the appellant's employment as Director, Land Titles. The letter is captioned "Post of Director, Land Titles" and states:

"I am pleased to advise you that you are being offered employment in the National Land Agency to fill the captioned post in the Land Titles Division..."

In this regard, the contract of employment states at the very beginning:

"The National Land Agency (the Agency) shall employ the Employee and the Employee shall serve in the capacity of Director, Land Titles in the National Land Agency (NLA) on the terms and conditions hereinafter provided..."

No mention whatsoever is made of his employment as Registrar. It was assumed, I think, that his contract of employment governed both posts.

28. In light of the foregoing and the Full Court's findings of fact, it is reasonable to conclude that the relationship between the appellant and the Government of Jamaica in relation to both posts was intended to be governed by the contract of July 7, 2003.

29. The termination clause of the appellant's contract of employment provided that:

"Either party may terminate this Agreement by giving to the other three months' notice in writing or by the National Land Agency paying to the Employee three months' salary in lieu of notice. The National Agency shall be entitled to terminate this Agreement without notice and without pay in lieu of notice at any time during the engagement the Employee –

- (a) commits any serious misconduct or any serious each or non-observance of this Agreement;
- (b) willfully neglects or refuses to carry out the duties assigned to him under this Agreement;
- (c) is convicted of any criminal offence other than an offence which, in the reasonable opinion of the Public Service Commission does not affect his position with the Agency."

The issue then, put simply, is whether the appellant's status as Registrar of Titles was such that notwithstanding the termination clause, his appointment could not be revoked without him being accorded a hearing.

30. **The Law**

Section 125 (1) of the Constitution provides that:

"Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission."

By section 1(i) of the Constitution "public office" means any office of emolument in the public service. And "the public service" means, subject to the provisions of subsections 5 & 6 of the section (which for the purposes of the issue under consideration are not relevant), the service of the Crown in a civil capacity in respect of the Government of Jamaica..." Section 2 of the CSEA states that:

"Public Service means the service of the Crown in a civil capacity, permanent in nature, in respect of the Government of Jamaica so however, that the Minister may, by order,

deem service with any statutory authority or body specified in the order to be public service for the purposes of this Act.”

Section 3 of the CSEA gives the Minister power to constitute and abolish offices in the public service. As stated before, the Registrar of Titles is appointed by the Governor General under section 4 of the RTA and by virtue of section 7 thereof, the office of Registrar is one of emolument determined from time to time by the Minister and paid out of the Consolidated Fund.

By virtue of section 3 (1) of the Civil Service Establishment (General) Order 2003 made pursuant to the CSEA, the offices of Registrar and Deputy Registrar were “established and constituted as offices in the public service.” Indeed Part 11 of the Schedule of the Order lists the Registrar as the senior established officer for the Office of Titles. In light of the above, in my opinion, there can be no argument that the office of the Registrar was not a public office in 2002 when the appellant was appointed thereto. The subsequent orders issued in 2004 and 2005 did not change the status of the Registrar. Thus, at all material times, the appellant in his capacity as Registrar of Titles was a holder of a public office and fell within the purview of section 125(1) of the Constitution.

A Fixed Contractual Term of Office by the Holder of Public Office

31. The appellant’s contract of employment was for a period of three (3) years (clause 1) which could be extended by mutual agreement (clause 2). It seems safe to say that there is nothing in the Constitution inconsistent with the agreement of a fixed contractual term of office in the case of the Registrar of Titles – see *Horace Fraser v*

Judicial and Legal Services Commission (supra) at paragraph 14 and Panday *v the Judicial and Legal Services Commission* (infra) at paragraph 57. In those cases the Board accepted the permissibility of even a short fixed term in the case of members of the lower judiciary. A fixed term in the case of the Registrar of Titles is a fortiori constitutionally permissible.

32. The next question is whether or not as Registrar of Titles the appellant had constitutional or statutory protection against the revocation of his appointment in spite of his contract of employment. As stated before, the contractual clause stipulates that:

“Either party may terminate this Agreement by giving to the other, three (3) months’ notice in writing or by the National Land Agency paying to the Employee three months’ salary in lieu of notice.”

It is the contention of the appellant that his appointment by the Governor General as Registrar makes the terms and conditions of that employment such as to be governed by statute or regulations or the constitution. It was submitted on behalf of the appellant that his entitlement, where termination was contemplated, flowed not merely from contract but from the status that was conferred on him by that appointment. According to learned Queen’s Counsel for the appellant, the appellant could only be dismissed by the Governor General acting on the advice of the Public Service Commission pursuant to section 125 of the Constitution. The appellant, counsel contended, on his appointment became a civil servant by operation of law and thereby was entitled to the protection of the relevant regulations governing the administration of the civil service. By virtue of the PSR the appellant was entitled to be afforded a

hearing, counsel submitted. It should be remembered that the PSR 1961 was preserved by section 2 of the Jamaica (Constitution) Order in Council 1962.

33. As already stated, Mr. Cochrane for the respondent, relying on Ridge *v Baldwin* (supra) submitted that where a contract of employment provides for a means of termination, e.g. by notice, there is no right to be heard before termination.

34. On this point, I prefer the argument of counsel for the appellant. It is clear that if the contract of employment covers the appellant's employment as Registrar, then the termination clause thereof is inconsistent with the protection to which such office is entitled by virtue of Section 125 of the Constitution and the PSR. There is judgment of the highest authority for the view that if the terms of the contract of employment are inconsistent with the constitutional protection afforded, then the latter must prevail - see *Horace Fraser* (supra) at paragraph 17. I will return to this, after dealing with the recommendation of the appellant's dismissal.

35. Now, as stated earlier, section 125 of the Constitution invests the Governor General acting on the advice of the PSC with power to appoint, remove and discipline holders of public offices. Section 127 empowers the Governor General acting on the advice of the PSC to delegate the powers under section 125 to one or more members of the PSC or to such other authority or public officer as may be so specified. On March 19, 2001, the Governor General on the advice of the PSC made an order viz the Delegation of Functions (Public Service) Order 2001 conferring on the CEO the power to appoint, remove or discipline all officers in the NLA except the CEO. The exercise of

such powers by the CEO is subject to the provisions of section 127 (4) of the Constitution and to the PSR, 1961. However, there is no evidence that the office of the Registrar of Titles exists within the structure of the NLA. Indeed, as Miss Phillips points out, the Organizational Chart of the NLA exhibited by the CEO (pages 139-141 of Record) in her affidavit sworn to on the 30th October, 2006 excludes the Registrar of Titles from the NLA structure. Thus, the Delegation of Functions (Public Service) Order 2001 does not give the CEO of the NLA any power in relation to the Registrar. The involvement of the Governor General in the appointment and removal of the appellant as Registrar suggests that this fact did not escape the respondent.

36. The preamble to the Instrument of Revocation of the appellant's appointment as Registrar indicates that his revocation was on the advice of the respondent who had responsibility for the NLA (p.109 of Record). This, in my view, is a clear breach of section 125 (1) of the Constitution which obliges the Governor General to act on the advice of the PSC. Further, regulation 43(2) (i) of the PSR clearly provides that the power to recommend dismissal of a public officer whose basic salary exceeds the prescribed rate, resides in the PSC after due consideration of the report furnished to the PSC by the Committee appointed by the Governor General pursuant to regulation 43(2) (b) to enquire into the charges against the public officer. I should state that regulation 43 (3) provides that if the basic annual salary of the officer does not exceed the prescribed salary rate, the procedure prescribed by paragraph 2 shall apply except that the Commission may recommend that the charges be investigated by the Permanent Secretary, Head of Department or such other officer or officers as may be appointed by

the Governor General. To my mind, it is as clear as can be that the respondent had no authority to recommend to the Governor General the dismissal of the appellant in his capacity as Registrar of Titles.

37. Apart from the fact that the recommendation of the appellant's dismissal was unlawful and consequently the revocation of his appointment could have been declared null and void, the procedure established by the PSR where it is intended to dismiss an officer, was not adhered to. Part V of the PSR contains the regulations which deal with disciplinary proceedings against officers. Regulation 28 states the functions of the Commission concerning the institution of disciplinary proceedings. Regulation 33 provides that:

"An officer in respect of whom a disciplinary enquiry is to be held shall be entitled without charge to him to receive copies of or to be allowed access to any documentary evidence relied on for the purpose of the enquiry. He shall also be given upon request a copy of the evidence... after the evidence is closed."

There is no evidence that regulation 33 was complied with. Regulation 39 speaks to the officer's right to have the recommendation for his dismissal referred to the Privy Council. As we have seen, regulation 43 prescribes the procedure for the dismissal of an officer. This procedure requires, among other things, that the officer be notified in writing of the charge against him and be given the opportunity to state his defence in writing. The respondent's contention, of course, is that the provisions of the PSR were not applicable to the appellant. Indeed, the burden of the respondent's case is that the relationship between the appellant and the Government was purely contractual. Thus,

there is no dispute that the provisions of the PSR were not adhered to. The real issue is whether the constitutional provisions and the PSR override the operation of the contractual provisions.

The Premature Termination of a Civil Servant's Contract of Employment

38. I must now return to the issue as to whether or not a public officer employed by virtue of a fixed term contract may be dismissed pursuant to the terms of the contract. We have seen that the contract of employment provides that either party may terminate the agreement, by giving the other three months notice or by the NLA paying the appellant three months' salary in lieu of notice.

39. Mr. Cochrane cited *Ridge v Baldwin* (supra) in support of his contention that where a contract of employment provides for the means of termination, there is no right to be heard before termination. The House of Lords in *Ridge v Baldwin* (supra) held by a majority that a chief constable, dismissible for negligence in the discharge of his duty, was impliedly entitled to prior notice of the charge against him and a proper opportunity of meeting it before being dismissed for misconduct. Lord Reid rejected the notion that the rules of natural justice applied only to the exercise of judicial functions. Lord Reid expressed the view that the authorities on natural justice have been found difficult to reconcile. The reason for this difficulty, his Lordship thought, was that insufficient attention had been paid to the great difference between various kinds of cases in which it was sought to apply the principle. In reference to cases of dismissal his Lordship said at p.71F:

"These appear to fall into three classes, dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal."

40. In relation to "master and servant" Lord Reid stated that "there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at anytime and for any reason or for none. But if he does so in a manner not warranted by the contract, he must pay damages for breach of contract."

Lord Reid went on to say:

"The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

In my view, the same can be said of the instant case. The Registrar of Titles is not the servant of the respondent, or the CEO of the NLA.

41. In relation to the second category, Lord Reid said:

"Apart from judges and others whose tenure of office is governed by statute all servants and officers of the Crown hold office at pleasure... It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer he need not give any reason."

In the instant case, the Registrar of Titles does not hold office at pleasure. His tenure of office is governed by section 125 of the Constitution and the PSR. The Governor General or the PSC is not entitled to act without reasonable cause. We have seen that section 125(1) of the Constitution vests the power "to remove and to exercise disciplinary control over" holders of public offices in the Governor General acting on the

advice of the PSC. In ***Thomas v Attorney General of Trinidad and Tobago*** [1982] A.C. 113 at page 126H their Lordships' Board held that "remove" in the context of "to remove and exercise disciplinary control over "police officers in Section 99(1) of the Constitution of Trinidad and Tobago must be understood as meaning "remove for reasonable cause" and not as embracing any power to remove at the commission's whim. At p. 127E-G, their Lordships said:

"It may be worthwhile adding as a footnote that even under the successive pre-Independence Constitution of Trinidad and Tobago between 1924 and 1950, the power of dismissal of Crown servants in the colony that was delegated to the Governor by royal letters patent was not the unfettered power to dismiss at pleasure but was restricted to dismissal upon sufficient cause to him appearing.

Although the Governor's decision as to what amounted to sufficient cause in the individual case was not open to judicial review these royal instructions justify the declaration in section 1 of the 1962 Constitution that the right of the individual to equality of treatment from any public authority in the exercise of any functions had already existed in Trinidad and Tobago, so far as the dismissal of public officers was concerned. Their Lordships accordingly answer question 3 in the negative: the survival of the historic legal doctrine of dismissibility at pleasure of police and other public officers was inconsistent with the 1962 Constitution of Trinidad and Tobago and remain inconsistent with its present Constitution as a republic."

There can be no dispute that the provisions of the Constitution of Trinidad and Tobago in so far as they relate to "appointment, removal and discipline" are not dissimilar to the provisions of the Jamaican Constitution. It is therefore my view that on the authority of ***Thomas*** (supra) the doctrine of dismissibility of Crown servants at pleasure does not apply to holders of public office pursuant to section 125 of the Constitution.

42. As regards the third class, Lord Reid gave examples of cases which he said formed an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. It is hardly necessary, I think, to say that in the light of the Board's decision in **Thomas**, the decision in **Ridge v Baldwin** cannot support the respondent's contention.

43. The recent decision of the Board in ***Horace Fraser v Judicial and Legal Services Commission*** (supra) is very instructive and in my view, is determinative of this appeal. The appellant Fraser served as a magistrate in St. Lucia under successive annual contracts, the first commencing on September 6, 2000 and the last on September 6, 2003. Under the Constitution of St. Lucia, the "power to appoint persons to hold or act in offices" which include the office of magistrate and "the power to exercise disciplinary control over persons holding or in [such] offices... and the power to remove such persons from office" are vested in the Judicial and Legal Services Commission (the Commission) section 91(2) & (3).

44. By letter from the Permanent Secretary of the Ministry of Public Service dated January 16, 2004, Fraser was dismissed from his office with effect from January 19, 2004. The appellant Fraser sought constitutional relief against both the Commission and the Attorney General representing the Government of St. Lucia.

45. For the purposes of the instant appeal, the relevant clauses of the agreement for Fraser's employment were 5 and 6:

"5. If the person engaged shall at anytime after the signing hereof neglect or refuse from any clause (sic) other than ill-health) not caused by his own misconduct (as provided in clause 4) become unable to perform any of his duties or to comply with any order, or shall disclose any information respecting the affairs of the Government to any unauthorized person, or shall in any manner, misconduct himself, the Government may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease.

6. (1) The Government may at any time determine the engagement of the person engaged on giving him three months' notice in writing or on paying him one month's salary.
- (2) the person engaged may, at any time after the expiration of three months from the commencement of any residential service; and while serving in the state determine his engagement on giving to the Government three months' notice in writing or paying to the Government one month's salary.
- (3) If the person engaged terminates his engagement otherwise than in accordance with this Agreement he shall be liable to pay to the Government as liquidated damages, three months' salary."

46. Leading up to Fraser's dismissal, reports of corruption were made against him in drug cases based upon his acquittal of the defendants at the close of the prosecution's case and his granting bail in another case. Retired Justice Odel Adams was appointed to investigate these reports. Justice Adams found that Fraser "in acquitting the defendants reached a wrong decision, but not so wrong as to give rise to any adverse inference about his integrity." He found "no acceptable excuse for a grant

of bail involving the revocation of an order by Shanks J that the defendant surrender his passport." Justice Adams wrote to the Commission that in the light of his report, he believed it to be justifiable to lay against Fraser a charge of gross incompetence but concluded that:

"Having reflected on the matter however, I believe that the Commission may wish to consider that Magistrate Fraser's service be terminated pursuant to the notice provisions in his contract."

(See paragraph 6 of their Lordships' judgment)

47. The Commission agreed with Justice Adam's recommendation. It wrote to the Ministry of Public Service and attached a copy of Justice Adam's report and recommendation. By this letter, the Commission recommended that clause 6 of Mr. Fraser's contract be invoked and that his contract be determined with immediate effect upon paying to him one month's salary in lieu of notice.

48. The Ministry in turn wrote to Mr. Fraser informing him that the Commission had advised the Ministry that due to improper conduct on his part, his contract should be terminated with immediate effect. As the Board pointed out, Justice Adams, the Commission and the Ministry took the view that it was open to them to recommend or take a simple contractual step consisting of termination under clause 6 instead of the Commission charging the appellant with an act of misconduct. (The procedure laid down by the code in St. Lucia for the hearing of such a charge is elaborate and time consuming).

49. In supporting the “contractual step” before the Board, counsel for the Commission relied on the decision of the Court of Appeal (St. Christopher and Nevis) in ***Attorney General v Angela Inniss*** (supra). Miss Inniss is a Barrister and Solicitor. She was appointed to the offices of Registrar of the High Court and of Additional Magistrate on the recommendation of the Public Service Commission after consultation with the Judicial and Legal Services Commission pursuant to section 83 (2) of the Constitution of St. Christopher and Nevis. On June 18, 1996, she entered into a two year contract with the Government. Clause 8 (i) of her contract is identical to Clause 6(1) of the Fraser contract. After she had served for about one year and nine months, the Permanent Secretary of the Establishment Division, on behalf of the Government, wrote to Miss Inniss purporting to terminate her contract. The letter stated inter alia:

“In accordance with clause 8(i) of your employment contract between His Excellency the Governor General and yourself...the Government decided to ‘determine your engagement’ as Registrar of the Supreme Court (sic) and Additional Magistrate with immediate effect.”

It was common ground that there was no recommendation by the Judicial and Legal Services Commission that her contract should be terminated.

50. Miss Inniss commenced proceedings by way of a constitutional motion in the High Court against the Attorney General. Moore J. rejected the Attorney General’s argument that the government properly determined Miss Inniss’ appointment in the exercise of the power that it had under the contract. He held that her constitutional rights had been breached in that the letter purporting to determine her contract was in breach of section 83(3) of the Constitution which provides:

“The power to exercise disciplinary control over persons holding or acting in offices to which this section applies and the power to remove such persons from office shall vest in the Governor General, acting in accordance with the recommendation of the Judicial and Legal Services Commission.

Provided that before making any recommendation as to the exercise of the powers conferred by this subsection in any case the Judicial and Legal Service Commission shall consult with the Public Service Commission.”

51. The Court of Appeal of the Eastern Caribbean Supreme Court allowed an appeal from Moore J’s judgment. The Court held that there was no breach of Inniss’ constitutional rights but that there was simply a breach of contract.

52. In the *Fraser* appeal before the Board the second respondent, the Attorney-General, joined the appellant in submitting that the Court of Appeal’s decision in Inniss was wrong. The Board had no doubt that *Inniss* was wrongly decided and that the Court of Appeal’s decision should be overruled. In fact, the Court of Appeal’s decision in *Inniss* was overturned by the Board on July 30, 2008. Indeed, the respondent in that case did not seek to support the Court of Appeal’s decision.

53. The Board was of the view that the issue in the *Fraser* case was a short one: were the Commission and the Ministry taking steps to “remove” the appellant from his office, when they recommended and gave notice to determine his term of office under contractual provisions prior to its natural expiry date? The Board accepted that there was nothing in the Constitution inconsistent with the agreement of a fixed contractual term of office – see paragraph 14. At paragraph 16 their Lordships stated:

"The expiry in the ordinary course of a fixed term cannot be described as a "removal." But provisions whereby the Ministry engaging a member of the lower judiciary can bring a term of office to an end prior to its natural expiry fall into a different category..."

In paragraph 17 their Lordships expressed the view that:

"In ordinary language, the use of clauses 5 and/or 6 to bring an officer's engagement to an end prior to its natural expiry involves a 'removal' of the officer."

The Board went on to say:

"Section 91 does not expressly refer to the need for or the making of any contractual agreement with the authorities in the local jurisdiction, or indicate how the protection afforded in respect of discipline and removal is to fit with any such agreement. If the two are inconsistent the constitutional protection afforded by s. 91 must prevail."

54. In reference to the effect of the termination clauses in Mr. Fraser's contractual agreement, their Lordships said (paragraph 18):

"Thus, a purported contractual termination under clause 5 clearly constitutes a removal and cannot be effective unless the Commission has beforehand determined, in accordance with a proper procedure that reasonable cause exists under one of the stated heads. As to clause 6, the Board has expressed its view that a notice to determine the engagement prior to its natural expiry constitutes a removal; and on that footing such a notice can once again only be justified in the event, determined by the Commission that reasonable cause for such removal exists. The constitutional protection therefore operates over and above any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date."

The Board emphasized the point that removal whether outright or under a contractual provision was in the light of section 91 (section 125 of the Jamaican Constitution) only

permissible if made pursuant to a decision reached by the Commission at the time of the removal. And such a decision could only validly be reached if the Commission, determined in accordance with the proper procedure, that reasonable cause existed for the officer's removal.

55. Mr. Cochrane for the respondent sought to distinguish **Fraser** and **Inniss** from the instant case on the ground that their appointments and removal were governed by the Judicial and Legal Services Commission and thus they had constitutional protection. I am unable to accept that the fact that the powers to appoint, remove and discipline in the cases of **Fraser** and **Inniss** were vested in the Judicial and Legal Services Commission makes them distinguishable from the present case. I have endeavoured to show that the appellant in the instant case was a holder of public office. As such and as I have stated before, it is my view that he was entitled to the protection afforded by section 125 of the Constitution and by the special procedure set out in the PSR. Under section 125 the Governor General can only act in accordance with the recommendation of the PSC. The protection afforded to Mr. Fraser as a member of the lower judiciary under section 91 of the Constitution of St. Lucia (section 112 of the Jamaica Constitution) appears to me to be effectively the same as the protection offered to public officers under section 125 of the Jamaican Constitution. In the case of **Inniss** under section 83 (3) of the Constitution of St. Christopher & Nevis, the Governor General could only act in accordance with the recommendation of the Judicial and Legal Services Commission. In that case, the protection intended for the lower judiciary is

also effectively the same as under section 125 for Public Officers. Accordingly, in my opinion the decisions of the Board in **Fraser** and **Inniss** are applicable to this appeal.

56. It is only fair to state that the Full Court did not have the benefit of their Lordships' decision in **Fraser**. Submissions before the Full Court were concluded before their Lordships' decision, was handed down. If the Full Court had the benefit of that decision their judgment would probably have been different.

57. Their Lordships' decision in **Dattatreya Panday v the Judicial and Legal Service Commission** P.C. Appeal No. 33 of 2007 delivered December 1, 2008 was brought to our attention after we had reserved judgment. That case was an appeal to the Board from the Court of Appeal of Mauritius. It concerns the termination of Mr. Panday's appointment as a temporary District Magistrate. Mr. Panday's temporary appointment did not specify any natural expiry date but was subject at any time to one month's notice. There was evidence that the relevant authority formed the view that Mr. Panday was not suitable for further employment as magistrate. Mr. Panday was dismissed without being told of the considerations which led the Commission to consider taking such a step and he had no opportunity to respond before the decision. The Board was of the view that Regulation 9 of the Judicial and Legal Service Commission Regulations was applicable to that case. Regulation 9 is effectively the same as Regulation 26 of the PSR which concerns retirement in the public interest. The Board was of the view that the termination of Mr. Panday's appointment was

procedurally unfair and so ineffective. That case, in a limited way, supports the appellant.

Conclusion

58. In the light of the foregoing, it is not necessary to consider the issue of legitimate expectation. On the authority of their Lordships' decision in *Fraser*, I hold that the termination of the appellant's appointment as Registrar of Titles under the contractual provision, without more, was unconstitutional in the light of section 125 of the Constitution. Under this section, reasonable cause for such removal must exist. Such reasonable cause must be determined by the PSC in accordance with the procedure prescribed by the PSR. Section 125 precludes the operation of the contractual provision for summary determination. The appellant could not therefore be dismissed otherwise than in accordance with procedure prescribed by the PSR. As the Board said in *Fraser*, it is necessary to interpret and read together the Constitution and the contractual arrangement in a way which provides the intended protection. The agreement between the appellant and the respondent must be read as permitting removal under the agreement only in the event, determined by the Commission, that reasonable cause for such removal exists. In the instant case, no such reasonable cause was determined by the Commission to exist. Accordingly, I would allow the appeal and set aside the Full Court's order dated July 11, 2007. It is not disputed that the appellant has already received payments for three months' salary in lieu of notice, for 16 days' vacation leave and payment in respect of gratuity.

In the circumstances, I would remit the matter of an award for constitutional damages to the Supreme Court for determination. The appellant should, in my view, have his costs in this Court.

HARRISON, J.A.

Introduction

59. This is an appeal from a decision of the Full Court (Marva McIntosh, Marsh, and Norma McIntosh, JJJ.), delivered on July 11, 2007, refusing an application by Mr. Alfred McPherson ("the appellant") for judicial review of the decision of the Minister of Land and Environment ("the respondent") recommending revocation of his appointment as Registrar of Titles.

The Background Facts

60. I now turn to the basic facts. The appellant is a practising attorney-at-law in Jamaica and held the positions of Director, Land Titles in the National Land Agency, and Registrar of Titles, between July, 2003 and January, 2006.

61. In 2002, Mrs. Elizabeth Stair was the Chief Executive Officer (the CEO) of the National Land Agency (the NLA) and had overall responsibility for the performance, financial management and general conduct of the NLA.

62. The NLA was established pursuant to the Executive Agencies Act (2002) and was created from the merger of four (4) government departments, namely: the Office of Titles, the Surveys Department, the Lands Department and the Land Valuation

Department. The Delegation of Functions (Public Service) Order 2001 (the Order) gave the CEO power to hire, discipline and terminate staff employment of all officers, falling under the NLA. The Order states as follows:

"GOVERNOR GENERAL

In exercise of the power conferred on the Governor General by section 127(1) of the Constitution of Jamaica, and of every other power hereunto enabling, the following Order is hereby made on the advice of the Public Service Commission:

1. This Order may be cited as the Delegation of Functions (Public Service) Order, 2001.
2. In this Order "officer" has the same meaning as in the Public Service Regulations 1961.
3. Subject to the provisions of section 127 (4) of the Constitution of Jamaica, and of the Public Service Regulations 1961, the powers of the Governor General specified in the Schedule to this Order shall be exercisable by the appropriate authority specified in the Schedule in relation to the respective offices and officers specified in that Schedule."

SCHEDULE

Offices And Officers	Powers	Appropriate Authority
All offices in the National Land Agency except the Office of the Chief Executive Officer, and all officers except the Chief Executive Officer.	Appointment Removal Disciplinary Control	The Chief Executive Officer

.....

.....

However, on a perusal of section 4 of the Registration of Titles Act (the RTA), it is readily seen that the Registrar of Titles can only be appointed by, and by inference, removed from office by, the Governor General. Section 4 provides inter alia, as follows:

"4. The Governor General may from time to time appoint by warrant under his hand and the Broad Seal of Jamaica a fit and proper person, being a member of the Bar of Jamaica, England, Scotland, or Northern Ireland or being a Solicitor of the Supreme Court or of the Supreme Court of Judicature of England, Scotland, or Northern Ireland, or a Writer to the Signet of Scotland, to be the "Registrar of Titles"(hereinafter called the Registrar)..."

63. Two (2) advertisements appeared in the Jamaica Daily Gleaner inviting interested persons to apply for the post of Director, Land Titles. The advertisement of December 8, 2002 stated inter alia, that "The Director will hold the statutory post of Registrar of Titles and will be responsible for the administration of the Registration of Titles Act and the Registration (Strata) Titles Act." However, the second advertisement which is dated February 3, 2003 did not mention the duality of functions. The CEO deposed in her affidavit of October 30, 2006 that the omission to mention the office of Registrar of Titles in the second advertisement was due to an effort to reduce the costs of the advertisement. The second advertisement stated inter alia, that the applicant had to be a qualified attorney at law with a minimum of ten (10) years admission to practice. Both advertisements had also stated that the Director would report to the CEO.

64. The CEO received several applications, including that of the appellant. Interviews were held and the appellant was the successful candidate. His offer of the post,

Director, Land Titles, was contained in a letter dated July 7, 2003 from the CEO which states as follows:

"July 7, 2003

Mr. Alfred McPherson
Attorney-at-Law
78 Slipe Road
KINGSTON 5

Dear Mr. McPherson:

Post of Director, Land Titles

I am pleased to advise that you are being offered employment in the National Land Agency to fill the captioned post, in the Land Titles Division - 93 Hanover Street, Kingston.

In this regard, I am attaching three (3) copies of your Contract of Employment, which outlines your terms and conditions of employment.

Kindly advise if you are willing to accept this offer, by signing and returning the three copies of the Contract. Also, please indicate the date on which you will assume duties.

Yours sincerely,
Elizabeth A Stair
Chief Executive Officer"

65. The CEO deposed in her affidavit of October 30, 2006 that prior to the signing of the contract, she had met with the appellant and discussed with him the structure of the NLA and his role as Director, Land Titles. She also stated that she had pointed out the dual function of the post of Director, Land Titles and Registrar of Titles. At paragraph 20 of her affidavit she stated:

"20. The contract executed between the NLA and Mr. McPherson outlined the duties to be assumed by him, including that he shall:

- a) undertake such duties and exercise such powers, as outlined in the Job Description and or Profile issued;
- b) in the discharge of such duties and exercise of such powers, observe and comply with all resolutions, regulations and directions from time to time made or given by the Chief Executive Officer."

66. The appellant was appointed to the post of Director, Land Titles, for a period of three (3) years with effect from July 21, 2003. The terms of his "Engagement" and "Termination" of the contract are set out below and state inter alia:

"TERMS OF ENGAGEMENT:

The National Land Agency (the Agency) shall employ the Employee and the Employee shall serve in the capacity of Director, Land Titles, in the National Land Agency (NLA) on the terms and conditions hereinafter provided.

.....

iv) The Employee will be required to observe and apply the standard of conduct of public officers as outlined In the Public Service Regulations, 1961, and Financial Regulations in so far as they are applicable and the Human Resource Manual of the Agency.

.....

TERMINATION:

Either party may terminate this Agreement by giving to the other three (3) months' notice in writing or by the National Land Agency paying to the Employee three months' salary, in lieu of notice. . -

The National Land Agency shall be entitled to terminate this Agreement without notice and without pay in lieu of notice if at any time during the engagement the Employee -

- a) commits any serious misconduct or any serious breach or non-observance of this Agreement;
- b) willfully neglects or refuses to carry out the duties assigned to him under this Agreement;
- c) is convicted of any criminal offence other than an offence which, in the reasonable opinion of the Public Service Commission, does not affect his position with the Agency."

67. On July 21, 2003, the appellant's appointment was published in the Jamaica Gazette and it reads as follows:

"Mr. Alfred McPherson has been appointed to the post of Director Land Titles/Registrar of Titles in the National Land Agency with effect from July 21, 2003."

68. The appellant was appointed Registrar of Titles by the Governor General, by warrant under the Broad Seal, in accordance with the provisions of section 4 of the RTA. This appointment was also effective from July 21, 2003.

69. The relationship between the CEO and the appellant became extremely strained over a period of time. There were many disagreements between them. The appellant contended that the disagreements had largely emanated from the CEO's efforts to control his statutory authority as Registrar of Titles.

70. In view of the deteriorating situation which existed between the CEO and the appellant, the CEO terminated the appellant's employment on January 25, 2006. No reasons were given for the termination. The letter from the CEO stated as follows:

"January 25, 2006.

I wish to advise that in accordance with the termination clause in your contract of employment dated July 7, 2003, your employment has been terminated with effect from January 26, 2006.

I attach for your attention, two cheques as follows:

1. Three (3) months' salary in lieu of notice and payment for 16 days vacation leave to credit: \$677,711.19 and
2. Net gratuity for the period July 21, 2003 to July 20, 2005: \$1,093,905.93

The Governor General has been requested to revoke your appointment as Registrar of Titles.

Yours faithfully,

Sgd. Elizabeth A Stair (Mrs.)
CEO/Commissioner of Lands"

71. The Governor General was advised by the respondent that the appellant's appointment as Registrar of Titles should be revoked as of January 25, 2006. The appellant was duly advised as set out hereunder:

"GOVERNOR-GENERAL

TO: MR. ALFRED MCPHERSON

WHEREAS the Minister of Land and Environment with responsibility for the National Land Agency has advised that your appointment as Registrar of Titles should be revoked:

NOW THEREFORE I, HOWARD FELIX HANLAN COOKE, Member of the Order of the Nation, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, Commander of the Order of Distinction, Governor-General of Jamaica, in exercise of the power conferred on me by Section 4 of the Registration of Titles Act, and Section 35 of the Interpretation Act and acting in accordance with such advice, do hereby revoke your appointment as Registrar of Titles with effect from January 25, 2006.

Given under my hand at this 25th day of January, 2006.

GOVERNOR-GENERAL"

72. The Appellant was paid three (3) months' salary in lieu of notice in addition to a gratuity of \$1,093,905.93. These payments were accepted by him.

The Judicial Review Proceedings

73. On June 19, 2006 the appellant brought judicial review proceedings in the Supreme Court as a result of the termination of his employment as Registrar of Titles.

He sought the following reliefs:

- "1) An Order of Certiorari to quash the decision of the Respondent to recommend that the Applicant's appointment as Registrar of Titles be revoked.
- 2) A declaration that procedures established by the Public Service Establishment Act and the rules of natural justice were not complied with by the Respondent in the decision making process with respect to the making of the said recommendation.

- 3) Damages.
- 4) Costs"

74. The grounds on which the Applicant sought the said Orders are as follows:

- 1) The Applicant was at all material times the holder of the post of Registrar of Titles, having been so appointed by the Governor General of Jamaica with effect from June 21, 2003, and as such is personally affected by and has sufficient interest in the subject matter of this application pursuant to Part 56 and 56.3 of the Civil Procedure Rules.
- 2) The Applicant's appointment as Registrar of Titles was revoked by the Governor General upon the recommendation of the Respondent, in breach of the rules of natural justice, the Public Service Regulations 1961 and the Civil Service Establishment Act.

75. The appellant contended inter alia, before the Full Court, that he had not received any notice of charges preferred against him and that there was no hearing under the Public Service Regulations 1961 (the PSR) or under any law, into the conduct of his duties as Registrar of Titles. He also contended that the revocation of his appointment as Registrar upon advice of the Minister of Land and Environment was in breach of the principles of natural justice and of the PSR. He argued that he legitimately expected that his appointment to such an important public office would not be terminated without a hearing into any charge or charges before the Public Service Commission.

76. On the 31st January 2007, the Full Court dismissed the application for judicial review.

The Grounds of Appeal and Orders Sought

77. The appellant lodged Notice of Appeal in the Registry of the Court of Appeal on August 9, 2007. The grounds of appeal state as follows:

- “a. That the Full Court erred in law in making findings of fact in judicial review proceedings to the prejudice of the Appellant on the basis of affidavit evidence which was not tested by cross examination.
- b. That the Full Court erred in law in holding that the Appellant, as the holder of the public office of Registrar of Titles, was not entitled to the protection of the Public Service Regulations 1961.
- c. That the Full Court erred in law in holding that the concept of legitimate expectation could not avail the Appellant in circumstances where although his appointment as Director, Land Titles was based on an ordinary contract of employment, he was by virtue of his appointment as Registrar of Titles a public servant and thereby entitled to the protection of the Public Service Regulations 1961.
- d. That the Full Court erred in law in holding that the Appellant was not entitled to the benefit of the rules of natural justice in light of his contract of employment.
- e. That the Full Court erred in law in holding that it was intra vires the powers of the Respondent to recommend to the Governor General the revocation of the Appellant’s appointment as Registrar of Titles.”

The Appellant sought the following Orders:

- “a. That the appeal be allowed;

- b. An Order of Certiorari to quash the decision of the Respondent to recommend that the Appellant's appointment as Registrar of Titles be revoked;
- c. A declaration that the procedures established by the Public Service Regulations 1961 and the rules of natural justice were not complied with by the Respondent in the decision making process with respect to the making of the said recommendation;
- d. An Order that the Appellant is entitled to damages to be assessed;
- e. Costs."

78. Miss Hilary Phillips, Q.C. for the appellant, stated in her written submissions that since nothing turned on disputed matters of fact on the affidavit evidence, she would not be arguing ground (a). She submitted however, that the following issues arose for determination in respect of the other grounds of appeal:

- (i) whether the appellant became by virtue of his appointment as Registrar of Titles, an officer in the public service of Jamaica and as such entitled to the protection of the provisions of the Public Service Regulations;
- (ii) whether the appellant had a legitimate expectation that he would be treated as an officer in the public service, particularly with regard to questions relating to discipline and the termination of his employment; and
- (iii) whether by terminating the appellant's contract of employment and revoking his appointment as Registrar, the respondent acted in breach of the PSR and/or the rules of natural justice.

I do agree with learned Queen's Counsel that the appeal should be considered under these heads. I now turn to the submissions.

The Submissions

Issue No. 1

Whether the appellant as Registrar, became by virtue of his appointment, an officer in the Public Service of Jamaica and as such entitled to the protection of the provisions of the Public Service Regulations, 1961.

Issue No. 111

Whether by terminating the appellant's contract of employment and revoking his appointment as Registrar, the respondent acted in breach of the PSR and/or the rules of natural justice.

It is my view that these two (2) issues can be conveniently dealt with together.

79. Miss Phillips Q.C. submitted on behalf of the appellant that the position of Registrar is, and was at all material times, an established post under and by virtue of the Civil Service Establishment Act, and as such, the holder of that office was accordingly entitled to all the rights, privileges, protections and rules governing the public service of Jamaica. She argued that the appellant became, as a matter of operation of law, a civil servant and is thereby subject to the relevant regulations governing the administration of the civil service. She further submitted that the appellant in fact held dual appointments under contract as Director, Land Titles, and by virtue of appointment under the Broad Seal, as Registrar.

80. Learned Queen's Counsel also submitted that the respondent acted in breach of the PSR when he advised the Governor General that the appellant's appointment should

be revoked. She submitted that regulation 43(2) of the PSR clearly provides that the power to recommend dismissal of a civil servant is the responsibility of the Public Service Commission, after consideration of a report produced by a Committee appointed to conduct an enquiry into charges leveled against the civil servant. She therefore submitted that the advice given by the respondent to the Governor General was ultra vires the powers under the regulations.

81. Miss Phillips, Q.C. also referred to and relied on three (3) recent decisions of the Judicial Committee of the Privy Council (the Privy Council). They are, **Horace Fraser v Judicial and Legal Services Commission and the Attorney General** [2008] UKPC 25 delivered May 6, 2008; **Angela Inniss v Attorney General of St. Christopher and Nevis** [2008] UKPC 42 delivered July 30, 2008 and **Panday v Judicial and Legal Service Commission** [2008] UKPC 52 delivered April 9, 2008. These judgments were delivered subsequent to the judgment handed down by the Full Court in the instant matter.

82. Miss Phillips Q.C. submitted in the alternative, that even if the appellant was not entitled to rely on the provisions of the PSR, the rules of natural justice required (i) that he be notified formally of the factors that informed the decision to seek the revocation of his appointment; and (ii) that he be afforded a hearing in respect of charges against him. Queen's Counsel referred to **Ridge v Baldwin** [1963] 2 All ER 66, in which it was emphasized that the duty to act in conformity with the rules of natural justice could, in some situations, simply be inferred from a duty to decide what the rights of an

individual should be (per Lord Reid). She also referred to **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278; **Leech v Governor of Parkhurst Prison** [1988] AC 533.

83. Miss Phillips, Q.C. submitted that in the instant case the relationship between the parties and the position occupied by the appellant were such as to oblige the respondent to afford the appellant the benefit of the rules of natural justice. She argued that these rules, which clearly apply to the revocation of the appellant's appointment as Registrar, may in fact also be extended to the decision to terminate his contract as Director, Land Titles, because of the significant and substantial statutory underpinning of the contractual relationship.

84. Learned Queen's Counsel further submitted that once the rules of natural justice are held to apply, the simple question for the Court is that posed and answered by Lord Mustill in **R. v. Home Secretary, ex parte Doody** [1994] 1 AC 531, 560:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often- cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute

which creates the discretion, as regards both its language and shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

85. Learned Queen's Counsel submitted that in the instant case, the elementary principles of fairness required - at the very least - that the appellant should have been advised of the considerations which weighed with the authorities in deciding to terminate his contract and to recommend the revocation of his appointment as Registrar, and that he be afforded a hearing to enable him to respond to those charges.

86. Mr. Cochrane, for the respondent, submitted that where a contract of employment provided that termination should be by notice, there was no right to be heard before termination of the contract. He submitted that the relationship between the appellant and the Government of Jamaica was entirely contractual and that in those circumstances, the appellant was subject to the terms and conditions of the contract between the parties which provided inter alia, that:

"Either party may terminate this Agreement by giving to the other three months' notice in writing or by the National Land Agency paying to the Employee three months' salary in lieu of notice..."

87. Mr. Cochrane argued that the NLA was under no statutory duty or other restriction to provide the grounds on which it had terminated the contract of the appellant.

88. Mr. Cochrane further argued that the appellant's contract of employment had covered both his administrative post of Director, Land Titles and his appointment as Registrar of Titles. He submitted that the appellant's employment as Director, Land Titles required him to carry out the functions of the Registrar of Titles, and that the appointment as Registrar was therefore ancillary to that of Director. Mr. Cochrane submitted:

- (i) that the termination of the Director position would necessarily result in the termination of the Registrar's post; and
- (ii) that in the absence of a new or separate contractual arrangement, the Appellant could not have continued to carry out his duties as Registrar in circumstances where his contract of employment had been terminated by the NLA.

89. Mr. Cochrane finally submitted that it could not have been the intention of the parties, that two different procedures were required for termination of each function, or that one could be terminated while the other continued. The consequences of such a finding, he said, would be both far-reaching and absurd.

The Discussion

90. It is a fact that as Director, Land Titles Division, the appellant had the responsibility for:

- a) the day to day operations of the Division;
- b) giving legal and technical advice;
- c) productivity and improvements; and
- d) making short and long term planning for reform and modernization of the processes and practices of land titles registration.

91. As Registrar of Titles, the appellant was empowered to investigate and deal with applications for bringing land under the operation of the RTA.

92. It is also a fact that there was only one contract in respect of the employment of the appellant. The offer spoke only of the post of Director, Land Titles, which he accepted. But, it was necessary however, to appoint him Registrar of Titles, having regard to certain functions that he had to perform.

93. There seems to be some disagreement however, between the parties as to when the appellant had become aware that the position of Director, Land Titles, included performing functions as Registrar of Titles. At paragraphs 5 and 6 of the appellant's affidavit sworn to on March 31, 2006, he deposed as follows:

"5. At the third interview for the said position, I was made aware that the position has dual functions namely that of the Director, and the Registrar of Titles ("Registrar") under the Registration of Titles Act (RTA). However, at that time, the Chief Executive Officer (CEO) of the NLA, Mrs. Elizabeth Stair invited me to accept the post of Director, and I accepted that offer. A true copy of the offer letter dated July 7, 2003 is annexed hereto and thereto marked "Exhibit 2" for identification.

6. On July 21, 2003, I accepted the post of Director, a contract was duly executed by myself and the CEO on behalf of the NLA. A true copy of the contract dated July 7, 2003 is annexed hereto and marked "Exhibit 3" for identification. Under the terms of the contract I was appointed for a term of three years commencing as of July 21, 2003."

94. The CEO stated however, in her affidavit of October 30, 2006 that the Job Description Profile, which was attached to the appellant's contract, indicated that, in addition to his managerial function, his overall responsibilities as head of the Titles Division would encompass (i) issuing certificates of title to land as provided by the Registration of Titles Act and (ii) registering all dealings with existing Certificates of Title such as mortgages, transfers, etc.

95. It is abundantly clear that the post of Registrar of Titles falls under the provisions of the Civil Service Establishment Act and Part 11 of the Schedule to the Civil Service Establishment (General) Order 2003 lists the Registrar of Titles Office as one of the "established offices" in the public service. The Registrar is therefore an established officer within the civil service.

96. Now, the word "officer" has been interpreted in section 2 of The Civil Service Establishment Act to mean:

"an officer in the public service"

And, 'public service' has been defined in the said section to mean:

"...the service of the Crown in a civil capacity, permanent in nature, in respect of the Government of Jamaica, so, however, that the Minister may, by order, deem service with

any statutory authority or other body specified in the order to be public service for the purposes of this Act.”

97. It is also abundantly clear that the post of Registrar of Titles was not created under the Constitution of Jamaica (the Constitution) but section 125 of the Constitution makes provision for the appointment and removal of officers within the civil service and provides as follows:

“125 –(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission.”

98. The appellant did not seek to challenge the termination of his contract as Director, Land Titles, in his application before the Full Court but sought judicial review of the decision of the respondent who had recommended revocation of his appointment as Registrar of Titles. In summary, this is how the Full Court dealt with the matter.

99. Marva McIntosh, J. found inter alia:

- (i) that the appellant was aware that his contract of employment related to the post of Director Land Titles and to his appointment as Registrar of Titles;
- (ii) that the method of termination agreed to in the contract related to both positions;
- (iii) that the appellant’s appointment as Registrar of Titles could not in these circumstances, be terminated pursuant to the procedure set out in the Public Service Regulations that provide for the holders of permanent posts in the Civil Service.

- (iv) that in effect, there was one contract for carrying out both duties and that the termination of the Director, Land Titles position would result in the termination of the Registrar of Titles post. It would be, she said, inconvenient if not impossible, for a different procedure to be required for the termination of each function nor would it be feasible for one to be terminated while the other continued.

100. Marsh, J. stated at page 463 of the Record of Appeal as follows:

"It is, on the evidence before me, abundantly clear that not only did the contract relate to and cover both positions, but also that the Applicant was well aware of this before he accepted the offer with all its terms."

The learned judge continued at page 466:

"The Applicant cannot successfully claim that his appointment was in accordance with the procedure for appointment set out in the Public Service Regulations 1961. His selection was not supervised by the Public Service Commission as required by Regulation 15 of Part III of the Public Service Regulations. His contract had several features which distinguished his employment from that of the average or "ordinary civil servant." He was contractually due the payment of a gratuity, and was entitled to participate in a performance incentive scheme. It is clear that he makes no quarrel with the termination of his employment as Director, Land Titles and kept the money paid him in lieu of notice. His application for relief on the Fixed Date Claim Form related exclusively to matters relating to the appointment as Registrar of Titles.

The two positions held by the Applicant prior to his dismissal were so inextricably bound that it would surely be nonsense to have one terminated in one way, according to the contract and the other in another way and perhaps at another time."

101. Norma McIntosh, J. was of the view that the contract related to the positions of Director and Registrar. The learned judge said that the question which had to be answered was whether, as a public servant, termination of his appointment as Registrar was governed by his contract of employment or by the provisions of the PSR and whether the latter provisions were applicable to a person employed on a fixed term contract to an established civil service post. The learned judge held inter alia at page 491 of the Record of Appeal:

"The Governor General's appointment was merely an enabling formality to put the Director in a position to perform all the functions which he had agreed and undertaken to perform under the contract of employment. I am in agreement with the submission that although he became a public officer that did not make him subject to the provisions of the PSR and that his employment in relation to both positions was governed by the terms and conditions of his contract of employment.

There was no statutory underpinning in the sense of any restrictions on his employer's right to terminate his employment in accordance with the contract. He could have had no legitimate expectation that the provisions of the PSR as it related to termination would have applied to him. The fact that certain specific provisions of the PSR were imported into his contract of employment could not reasonably be taken as any inducement, promise or representation that the regulations relating particularly to termination would be applicable especially when his contract of employment specifically provided for termination and made no reference to the PSR in that regard. He has failed to show any representation made to him or inducement which could reasonably form the basis for any expectation as contended for by him."

102. Before us, Mr. Cochrane has argued that the post of Registrar of Titles could not stand by itself on the termination of the post of Director of Land Titles. He further argued that although the appellant's contract alluded to the Public Service Regulations within a limited scope, his situation was quite unlike the appointment of public officers whose services are terminated by the procedure provided under the Regulations.

103. Miss Phillips, Q.C., argued on the other hand however, that the real issue in this appeal is whether the appellant's contract appointing him Director, Land Titles could override his entitlement to the protection of the Public Service Regulations, as Registrar.

104. I now turn to the Privy Council cases referred to by Miss Phillips, Q.C. in the course of her submissions. In my view, these cases are useful in deciding the outcome of this appeal.

105. In **Horace Fraser v. Judicial and Legal Services Commission and The Attorney General** (supra), the appellant was appointed under contract as a magistrate but with a contractual proviso giving the Judicial Services Commission the right to determine the contract on three months' notice or payment of one month's salary. The appellant was summarily dismissed from office without any appropriate procedure being followed by the commission. One of the issues which arose for consideration by their Lordships' Board was whether the provisions of the appellant's contract could be regarded as overriding the constitutional protections to which his office as a Magistrate entitled him. The case held inter alia, that the contractual

provisions could not override the Constitution. Lord Mance stated *inter alia*, at paragraph 20 of the judgment:

“... it is necessary to interpret and read together the Constitution and the contractual arrangements in a way which provides the intended protection. The agreement between the appellant and the Ministry must be read as permitting removal under the agreement only in the event, determined by the Commission, that reasonable cause for such removal actually exists. Here, no such reasonable cause was determined to exist...”

106. The factual situation in **Angella Inniss** (*supra*) was somewhat similar to that in **Fraser** so that case simply confirmed the earlier ruling in **Fraser**. In that case, the appellant was summarily dismissed from office. Section 83(3) of the Constitution of St. Christopher and Nevis gave the power to exercise disciplinary control and to remove from office to the Governor General ‘acting in accordance with the recommendation of the Judicial and Legal Services Commission’. The appellant argued that this provision overrode or precluded the operation of the contractual provision for summary determination but the Court of Appeal did not accept the submission. While considering the **Fraser** case, the Privy Council expressed that they had no doubt that the **Inniss** case was wrongly decided and that the Court of Appeal’s decision should be overruled.

107. In the **Panday’s** case (*supra*) the appellant was also appointed by the Judicial and Legal Service Commission. The letter of appointment stated that his employment could be terminated by one month’s notice. It also stated that the appointment was subject to the Judicial and Legal Service Commission Regulations 1967 (Mauritius).

There were complaints about **Panday's** performance and he was warned on several occasions that he had to improve. His appointment was terminated in 2006. The commission did not communicate to him the considerations that led it to terminate his appointment, nor was he given an opportunity to make representations. It was **Panday's** case that the termination of his appointment was a breach of the Constitution, in that it involved a breach either of the Regulations or of the general requirements of procedural fairness and justice. The commission argued that the Regulations had no application, and that s. 86 of the Constitution conferred on it a very broad freedom as to how to proceed, subject only to limits based on procedural fairness, which had not been exceeded. The Court of Appeal concluded that the Regulations had no application to temporary magistrates. It also found that there was no basis for implying into the terms of employment of temporary magistrates any requirement that such employment should only be terminated for good cause or after giving the magistrate an opportunity to demonstrate that no such cause existed. The court also observed that a full disciplinary hearing would only have been required if the commission had been dismissing him for misconduct.

108. **Panday's** appeal to the Privy Council was also allowed. Their Lordships held *inter alia*, that the appellant had the assurance, under the language of the Constitution itself, that his appointment would continue unless the commission, after following appropriate procedures came to the view that there was reasonable cause not to do so.

109. In the instant appeal, there was one contract in place for the post of Director, Land Titles, but there was also an understanding between the parties that the appellant would be performing the function of Registrar of Titles. In order for him to carry out his responsibilities as Registrar, the Governor General had to appoint him pursuant to the provisions of section 4 of the (Registration of Titles Act). Although he was paid one salary under the contract, there seems to be no dispute that as Registrar of Titles, the appellant was a public servant. I therefore pose the following question: *If the terms of an appointment prescribe its period of existence and also provide expressly that it may be terminated by either party giving notice to the other or by payment of salary in lieu of notice, can the contract override the rights, privileges and protections of public servants under the Constitution and rules governing the public service of Jamaica?*

110. Mr. Cochrane argued that in the absence of a new, or separate contractual arrangement, the appellant could not have continued to carry out his duties as Registrar since his contract of employment had been terminated by the NLA. He further argued that this kind of situation could lead to absurd consequences. But, I respectfully disagree with the position taken by Mr. Cochrane. Under the "Terms of Agreement" (supra) the appellant was required to observe and apply the standard of conduct of public officers as outlined in the Public Service Regulations, 1961 and Financial Regulations.

111. It is abundantly clear that the post of Registrar of Titles falls under the provisions of the Civil Service Establishment Act and Part 11 of the Schedule to the Civil Service

Establishment (General) Order 2003 lists the Registrar of Titles Office as one of the “established offices” in the public service. One can safely conclude that the Registrar is therefore an established officer within the civil service.

112. Section 125 of the Constitution also makes provision for the appointment and removal of officers within the civil service and provides as follows:

“125 - (1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission.”

113. The power to ‘remove’ an officer of the public service from office is therefore vested in the Governor General and most importantly, he is required to act on the advice of the Public Service Commission. As Lord Mance said in the **Fraser** case, “the issue is ultimately a short one”: were the CEO and respondent taking steps to ‘remove’ the appellant from his office, when they recommended and gave notice to determine his term of office under the contractual provisions prior to its natural expiry date? In my judgment, any recommendation by the respondent to the Governor General to terminate the appellant’s contract without cause, prior to its natural expiry would constitute a removal from his position as Registrar of Titles and be in breach of section 125 of the Constitution. It is further my view that the constitutional protection under section 125 would operate over and above any contractual provisions that would have ended his contract of employment. It therefore means that any purported removal of the appellant from his post as Registrar could not be effective unless the Public Service

Commission had beforehand determined, in accordance with a proper procedure, that reasonable cause had existed prior to the expiration of the appellant's three years contract of employment. This line of reasoning would certainly be in conformity with the decision of their Lordships' Board in the **Fraser** case which held inter alia, that the constitutional protection overrode the contractual provision for a summary determination of the appellant's employment as Registrar. What is also abundantly clear is that the respondent had no power to have advised the Governor General on the revocation of the appellant's appointment as Registrar of Titles. Such an advice ran afoul of the provisions of section 125 of the Constitution.

114. It is therefore my considered view that there is merit in the submissions of Miss Phillips, Q.C. in respect of the grounds of appeal raised in issues 1 and 3. In the circumstances, the appellant's appeal ought to be allowed. Like my brother, Smith, J.A. I conclude that the appellant having succeeded on these two issues, there would be no further need for me to consider the remaining issues.

DUKHARAN, J.A.

115. This is an appeal from a decision of the Full Court refusing an application by the appellant for judicial review of the decision of the respondent recommending the revocation of the appellant's appointment as Registrar of Titles.

116. The background facts and the proceedings in the Full Court as well as the grounds of appeal have been adequately set out by my brothers Smith, J.A. and Harrison, J.A. and so it is unnecessary for me to do so again.

117. Miss Hilary Phillips, Q.C. for the appellant submitted that with the exception of ground a, which she would not be arguing, the following issues arose for determination in respect of the other grounds of appeal:

- (i) whether the appellant became by virtue of his appointment as Registrar of Titles, an officer in the public service of Jamaica and as such entitled to the protection of the provisions of the Public Service Regulations;
- (ii) whether the appellant had a legitimate expectation that he would be treated as an officer in the public service particularly with regard to questions relating to discipline and the termination of his employment; and
- (iii) whether by terminating the appellant's contract of employment and revoking his appointment as Registrar, the respondent acted in breach of the Public Service Regulations and/or the rules of natural justice.

118. Miss Phillips, Q.C., submitted that the position of Registrar was at all material times an established post under and by virtue of the Civil Service Establishment Act, and as such, the holder of that office was entitled to all the rights, privileges and protections governing the public service of Jamaica. The appellant by virtue of his appointment by the Governor General became, as a matter of operation of law, a civil servant and thereby subject to the relevant regulations governing the administration of the civil service. It was further submitted that the appellant held dual appointments,

under contract as Director, Land Titles, and by virtue of appointment under the Broad Seal as Registrar and that the distinction between a "contract officer" and an "appointed civil servant" has no validity in respect of the appellant.

119. Learned Queen's Counsel further submitted that there was clearly a breach of regulation 43 (2) (i) of the Public Service Regulations (PSR) when the respondent recommended the revocation of the appellant's appointment. The action of the respondent was a further flaw in the decision to revoke the appellant's appointment. It was also submitted that the power to recommend the dismissal of a civil servant is that of the Public Service Commission. This was clearly ultra vires the powers given by the regulations.

120. It was further submitted in the alternative by the learned Queen's Counsel that even if the appellant was not entitled to rely on the provisions of the PSR, the rules of natural justice required that he be notified of the factors that led to the revocation of his appointment and that he be afforded a hearing in respect of the charges against him. Counsel further submitted that the requirement of fairness demands that once the rules of natural justice are held to apply, the simple question for the Court is that posed and answered by Lord Mustill in **R v Home Secretary, ex parte Doody** [1994] 1 AC 531, 560:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a

presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

121. It was submitted that the appellant ought to have been advised of the considerations which weighed with the authorities in deciding to terminate his contract and to recommend the revocation of his appointment as Registrar, and that he be afforded a hearing to enable him to respond to the charges.

122. Mr. Cochrane, for the respondent, submitted that the relationship between the appellant and the Government of Jamaica was entirely contractual. The appellant was therefore subject to the terms and conditions of that contract. The termination clause in the appellant's contract of employment provided that:

"Either party may terminate this agreement by giving to the other three months' notice in writing or by the National Land

Agency paying to the employee three months' salary in lieu of notice ..."

Counsel further submitted that where a contract of employment provided for a means of termination, e.g. by notice, there was no right to be heard before termination. The appellant's employment as Director, Land Titles, required him to carry out the functions of the Registrar of Titles, and his appointment as Registrar of Titles was therefore ancillary to that engagement. The termination of the former would necessarily result in the termination of the latter. In the absence of new or separate contractual arrangements, the appellant could not have continued to carry out his duties as Registrar in circumstances where his contract of employment had been terminated by the National Land Agency. Counsel further submitted that it could not have been the intention of the parties that a different procedure would be required for the termination of each function, or that one could be terminated while the other continued. The consequences of such a finding would be both far-reaching and absurd.

123. The appellant, before the Full Court, was not challenging the termination of his contract as Director, Land Titles, but challenged the right of the respondent to recommend the revocation of his appointment as Registrar of Titles.

124. When the appellant accepted the post of Director, Land Titles, the contract of employment was for that post alone. Because of the nature of the post, he also had to perform the functions of the Registrar of Titles. The appellant at the third interview for the position of Director, Land Titles, was made aware of the dual functions, namely, that of the Director and the Registrar of Titles under the Registration of Titles Act. The

appellant was duly appointed as Registrar of Titles to enable him to carry out functions that overlapped with Director, Land Titles.

125. The main issues to be determined in my view are whether the appellant could be dismissed without cause and whether the respondent had the authority to recommend to the Governor General the termination of the appellant's post of Registrar of Titles.

126. The Registrar of Titles office is listed as one of the "established offices" in the public service under the Civil Service Establishment Act and the Registrar is an officer in the civil service. Although the post of Registrar of Titles is not a constitutional post, there are provisions in the constitution that deal with the appointment and removal of officers within the civil service. Section 125 (1) of the Constitution of Jamaica provides:

"Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission."
(emphasis mine)

127. The Full Court (comprising Marva McIntosh, J., Marsh, J. and Norma McIntosh, J.) was of the view that the method of termination agreed to in the contract related to both positions of Director, Land Titles and Registrar of Titles, that, in effect, there was one contract for carrying out both duties and that the termination of the Director, Land Titles position would result in the termination of the Registrar of Titles post. The two positions held by the appellant prior to his dismissal were so inextricably bound that it

would surely be nonsense to have one terminated in one way, according to the contract, and the other in another way.

128. During her closing arguments, the case of **Fraser v Judicial and Legal Services Commission and the Attorney General** [2008] UKPC 25 delivered May 6, 2008 was referred to by Miss Phillips, Q.C. It is to be noted that the Full Court did not have the benefit of the decision in this case. In **Fraser's** case, the appellant had several annual contracts in St. Lucia as a magistrate. Reports of corruption in drug cases were made against him. He was dismissed from his office by a letter from the Permanent Secretary of the Ministry of the Public Service on the recommendation of the Judicial Services Commission. The issue was whether the provisions of the appellant's contract could be regarded as overriding the constitutional protections to which his office as a magistrate entitled him. It was held that the contractual provisions could not override the constitution. Under the Constitution of St. Lucia, the "power to appoint persons to hold or act in offices" which include the office of magistrate and the "power to exercise disciplinary control over persons holding or in [such] offices ... and the power to remove such persons from office" are vested in the Judicial and Legal Services Commission. In this case, retired Justice Odel Adams was appointed to investigate the reports against Fraser. In his report, Justice Adams wrote to the Commission that based on his investigations, he believed it would be justifiable to lay a charge against Fraser for gross incompetence.

The Commission agreed with Justice Adams' recommendation and wrote to the Ministry of the Public Service recommending that clause 6 of Mr. Fraser's contract be invoked and that his contract be determined with immediate effect. It was the view of the Board that the Commission should instead have charged the appellant Fraser with an act of misconduct. It was not open to Justice Adams, the Commission or the Ministry to take a simple contractual step of his termination under clause 6.

129. In **Angela Inniss v Attorney General of St. Christopher and Nevis** [2008] UKPC 42, delivered 30 July, 2008, the appellant had been appointed Registrar and additional magistrate under a two year contract, which contained a clause that the contract was capable of determination at any time or by three months' notice, or by paying one month's salary in lieu of notice. She was summarily dismissed. The judge, at first instance who found in her favour, expressed the view that framers of the Constitution evidently considered the holders of such office to provide such an important service that there should be a mechanism for their removal which lay outside the control of Executive. On appeal, the respondent conceded in the light of **Fraser's** case that there was a breach of the appellant's constitutional right.

130. The decision in **Fraser's** case is quite instructive and in my view quite applicable to the instant case. There is no doubt that the appellant in the instant case had a contract for the post of Director, Land Titles and also functioned as Registrar of Titles. As Registrar of Titles, he was an officer in the civil service. The post of Registrar of Titles comes within the provisions of the Civil Service Establishment Act. The appellant

held a public office. Section 125 (1) of the Constitution makes provisions for the appointments and removal of public officers. It states that disciplinary control over persons holding or acting in any such offices is vested in the Governor General acting on the advice of the Public Service Commission.

131. In my view, section 125 of the Constitution guarantees protection in that it is only on the advice and recommendation of the Public Service Commission to the Governor General that a holder of public office can be removed from office. The recommendation by the respondent to the Governor General to terminate the appellant's contract, without cause, before expiry is a clear breach of the Constitution. The respondent was therefore clearly wrong in recommending the termination of the appellant's post as Registrar of Titles.

132. Accordingly, I would allow the appeal and set aside the order of the Full Court. Costs to the appellant to be taxed if not agreed.

SMITH, J.A.

ORDER:

Appeal allowed. Order of the Full Court dated July 11, 2007 set aside. The matter of an award for constitutional damages remitted to the Supreme Court for determination. Costs to the appellant to be taxed if not agreed.