

[2008] CCJ 10 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE
CO-OPERATIVE REPUBLIC GUYANA**

**CCJ Appeal No. CV 3 of 2007
GY Civil Appeal No. 77 of 2003**

BETWEEN

STEPHEN EDWARDS

APPELLANT

AND

**THE ATTORNEY GENERAL OF GUYANA
THE PUBLIC SERVICE COMMISSION**

RESPONDENTS

**Before The Right Honourable
And the Honourables**

**Mr Justice de la Bastide, President
Mr Justice Nelson
Mr Justice Pollard
Mr Justice Wit
Mr Justice Hayton**

Appearances

**Mr Roopnarine Satram, Mr Chandraprakesh Satram and Mr Mahendra Satram
Attorneys for the Appellant**

Mr Vashist Maharaj and Ms Sueanna David Attorneys for the Respondents

JUDGMENT

of

The President and Justices Nelson, Wit and Hayton

Delivered jointly by

The Honourable Mr. Justice Rolston Nelson

and

The Honourable Mr. Justice David Hayton

on the 16th day of December 2008

and

JUDGMENT

of the Honourable Mr. Justice Pollard

JUDGMENT OF THE RIGHT HONOURABLE MR JUSTICE MICHAEL DE LA BASTIDE, PCCJ AND THE HONOURABLE JUSTICES NELSON JCCJ, WIT JCCJ AND HAYTON, JCCJ:

Introduction

[1] This is an appeal from a judgment of the Court of Appeal of Guyana (C. Singh, Kissoon and Chang JJ.A.) delivered orally on March 22, 2007. The Court of Appeal dismissed that appeal and affirmed an order of Jainarayan Singh J made on November 14, 2003 on the ground that constitutional proceedings brought some twenty years after termination of the appellant's employment constituted unreasonable delay and were an attempt to abuse the process of the court. The Court of Appeal subsequently granted the appellant leave to appeal to this Court without specifying any particular ground for this. However, the Appellant's then counsel subsequently wrote to the Caribbean Court of Justice advising that leave had been granted under section 6(d) of the Caribbean Court of Justice Act, No. 16 of 2004. This permits appeals as of right where the High Court has special jurisdiction under Article 153 of the Constitution for the protection of fundamental rights within Articles 138-151. After hearing full argument on this appeal this Court agrees with the courts below that the appeal should be dismissed for the reasons set out hereunder.

The facts

[2] Stephen Edwards, the Appellant, held the position of Acting Deputy Registrar-General of Births and Deaths in 1980. On March 28, 1980 he was charged summarily with accepting \$50.00 from a member of the public as a reward for supplying two certified extracts from the Register of Births and Deaths contrary to section 105(2)(a) of the Summary Jurisdiction (Offences) Act, Cap 8:02. On January 20, 1981 a magistrate dismissed the charges against the Appellant.

[3] By letter dated September 28, 1981 the Appellant was notified that he had been dismissed from the Public Service with effect from September 19, 1981. The dismissal of the

Appellant took place without affording him a prior hearing. No reason for the dismissal was given by the Public Service Commission.

[4] Some seven (7) years later the Appellant by writ of summons dated July 7, 1988, accompanied by a Statement of Claim, sued the Attorney-General and the Public Service Commission in respect of his dismissal. We shall refer to these proceedings as “the first action”. Harper J. dismissed the first action on the ground that it was statute-barred.

[5] In the first action the Appellant treated his employment as automatically terminated by the dismissal letter of September 28, 1981 and no longer subsisting. Indeed, the Appellant at paragraph 8 of the Statement of Claim states:

“The Plaintiff no longer wish (sic) to be employed by Public Service Commission”.

[6] It is to be noted that by paragraph 7 of the Statement of Claim in the first action the Appellant pleads but does not claim the loss of his gratuity and pension rights. Having regard to his summary dismissal this head of loss could only have referred to such superannuation benefits as had accrued as at the date of his dismissal. In the first action the Appellant claimed (1) a declaration that his dismissal was unconstitutional and (2) damages for wrongful dismissal. Mr. Gibson for the Appellant/Plaintiff abandoned his claim for damages and pursued only the claim for a declaration. It appears that the limitation point was taken *in limine* as a preliminary point before Harper J. The Court of Appeal rejected Harper J’s ruling that the claim was statute-barred and ordered a retrial.

[7] At the retrial on December 6, 1996 Burch-Smith J held that the delay of six and a half years in launching the action was unreasonably long and an abuse of the process of the court, especially since the Appellant, whose substantive post was Clerk of the Court, was no stranger to the law, lawyers and the courts. He added that the Appellant never sought to explain his delay. The claim was dismissed with costs. On June 24, 2000 the Court of Appeal upheld the judgment of Burch-Smith J.

[8] On August 8, 2001 the Appellant commenced a second action (“the second action”) by a Notice of Motion relying on Articles 40, 142, 144, 214 and 215 of the Constitution claiming:

- (a) A declaration that the applicant was compulsorily retired from the Public Service on the 19th day of November, 1980 (sic).
- (b) An Order directing the payment to him of the sum of \$200,289.00 (two hundred thousand, two hundred and eighty nine dollars).
- (c) An order directing the payment to him of such sum due to him by way of superannuation as ex gratia (sic) payment and pension.
- (d) Costs.

[9] The following questions arise: (1) whether the second action seeks any relief that could not have been claimed in the first action and (2) whether the second action is not defeated by the delay of twenty years in instituting it.

Nature of relief sought in second action

[10] Counsel for the Appellant contended that the dismissal of the Appellant without a hearing and without reasons should be treated as a compulsory retirement within the terms of section 8(c) of the Pensions Act Cap. 27:02, which provides:

“8. No pension, gratuity or other allowance shall be granted to any officer except on his retirement from the public service in one of the following cases –

- (a) on or after attaining the age of fifty-five years or, in special cases with the approval of the Minister on or after attaining the age of fifty years or, in special cases as mentioned in the proviso to section 11, or in the case of transfer to other public service on or after attaining the age at which an officer is permitted by the law or regulations of the service in which he is last employed to retire on pension or gratuity or on or after attaining the age of fifty-five years whichever is earlier;
- (b) on the abolition of his office; or

- (c) on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he belongs by which greater efficiency or economy can be effected; or
- (d) on medical evidence to the satisfaction of the Minister that he is incapable by reason of some infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent; or
- (e) on termination of employment in the public interest as provided in this Act:...”

[11] Counsel’s attention was drawn to the very terse terms of the letter of dismissal of September 28, 1981, which expressly refers to termination by dismissal as opposed to termination by reason of compulsory retirement for the purpose of “facilitating improvement in the organization of the department”. Ultimately, counsel conceded that the court could not deem the dismissal of the Appellant to be “a compulsory retirement” in the absence of any evidence of any compulsory retirement for the purposes delineated at paragraph 8(c) of the Pensions Act Cap. 27:02.

[12] As to the claim for the payment of \$200,289.00, counsel for the Appellant frankly admitted that he was unable to assist the Court as to the nature of this claim or as to what it constituted. At the end of the day counsel abandoned this claim. One may note that if counsel who originally drafted this claim had intended this to cover damages for wrongful dismissal, this had been raised and abandoned in the first action.

[13] The final subsisting claim in the second action was an order for “superannuation by way of ex gratia payment and pension”. Although it was difficult to conceive of an order to make a discretionary payment of superannuation benefits, it is clear that a mandatory order for the payment of superannuation benefits accrued at the date of dismissal could have been made in the first action, if (which seems unlikely) a case within section 8 of the Pensions Act had been established. In any event, no claim for accrued pension benefits i.e. pension benefits already earned was made in the first action as noted at [6] above. The Appellant therefore has not established an entitlement to any accrued pension or superannuation benefits under the Pensions Act.

[14] Counsel for the Appellant next contended that since an order on the constitutional motion in the second action would make the dismissal a nullity, the Appellant would be entitled to be treated as if he continued to be employed up to the normal retirement date of July 31, 1990, with the result that the Appellant could properly claim all his superannuation benefits as if he had worked until retirement.

[15] We are conscious of the dual dimension of the public employment relationship i.e. the public law and the private law elements. The notion taken from public law that a dismissal may be a nullity presents problems in terms of the relief appropriate in a case where a considerable period of time numbered in years has passed since dismissal during which the employee has performed no services for the employer. One possible approach is to say that the consequences of such nullity must vary “according to the facts of the particular case”, including whether the employee remained ready, willing and able to work for the employer notwithstanding the termination and sought relief in the courts expeditiously: see the approach taken by Lord Bingham of Cornhill in *McLaughlin v H.E. the Governor of the Cayman Islands*.¹ However, it may be more appropriate to treat the State as any private employer, as this Court indicated obiter in *Brent Griffith v Guyana Revenue Authority*.² In this way, a court might focus on the private law contractual obligation; see also the approach of the Canadian Supreme Court in *Her Majesty The Queen in Right of Newfoundland v Andrew Wells*.³ We need not consider the merits of these contrasting approaches.

[16] In the instant case the Appellant indicated at paragraph 8 of his Statement of Claim in the first action that he no longer wished to be employed by the Public Service Commission. In those circumstances the Appellant could not properly be treated as having remained in office till his normal retirement date. The effect of the Appellant’s statement of intention is that he is not entitled to pension and superannuation benefits claimed in the second

¹ [2007] UKPC 50; [2007] 1 WLR 2839 at [14], [16], [17]

² [2006] CCI 2 (AJ)

³ [1999] 3 SCR 199

action. We leave open the question whether he might have claimed damages for being deprived of the opportunity to earn these benefits.

[17] It is apparent that the second action by the Appellant sought to treat his dismissal as ineffective for breach of a fundamental right to a fair hearing and to contend that he had been deprived of pension and superannuation rights which constituted property. By bringing an action entirely under the Constitution it was thought the ruling by the Court of Appeal in the first action might have been circumvented.

[18] Generally, to start proceedings to put forward a claim that could and should have been advanced in earlier proceedings is an abuse of process: *Henderson v Henderson*⁴ as glossed by Lord Bingham in *Johnson v Gore Wood & Co*⁵. In *Johnson v Gore Wood & Co* (a firm) (supra) the House of Lords considered that the rule that all related claims should be advanced in the same proceedings was not a rigid one but on the facts of the case held there was no abuse of process since the plaintiff's financial inability to bring forward all his claims in the earlier action was caused by the defendant. Such abuse of process is distinct from cause of action estoppel or issue estoppel. The public interest is that there should be finality in litigation and that litigation should be conducted efficiently and economically. Further, it is in the interest of good administration that disputes between the State and citizens should be brought to a conclusion as speedily as possible. All the issues in the second action could and should have been raised in the first action, especially after Mr. Gibson of counsel abandoned the action for damages and claimed only a declaration that the dismissal was unconstitutional. On this ground alone the decision of Singh J and the Court of Appeal should be affirmed.

⁴ [1843-60] ALL ER Rep 378

⁵ [2002] 2 AC 1 at 30-31.

Delay and abuse of process

[19] The second action was begun on August 8, 2001 some 20 years after the dismissal of the Appellant. Jainarayan Singh J delivered judgment on November 14, 2003. The Court of Appeal in turn pronounced on March 22, 2007 in favour of the judgment of Singh J dismissing the second action.

[20] Chang J.A. in delivering the judgment of the court said this:

“This Court is unable to interfere with the finding of fact made by the trial judge that, in filing his Motion 20 years after his alleged compulsory retirement from the Public Service, the Appellant was guilty of unreasonable delay in asserting or seeking to enforce his claim to property rights in court. As such, this Court cannot set aside the decision of the trial judge to dismiss the Appellant’s motion for abuse of process on the ground of undue delay.”

For the reasons expressed in [21] and [22] below we endorse this finding.

[21] Article 153 of the Constitution, which is equivalent to section 14 of the Trinidad and Tobago Constitution, provides for redress for breach of fundamental rights, but there is no limitation period fixed for access to the courts for breach of such rights. In *Durity v Attorney-General of Trinidad and Tobago*⁶ although the specific issue was whether the Public Authorities Protection Act, Chap. 8:03 applied to deprive the Appellant of a constitutional remedy one year after the cause of action arose, the Privy Council made general observations on the application of time limits to constitutional actions brought in respect of fundamental human rights and freedoms. We endorse the comments of Lord Nicholls of Birkenhead, who said⁷, in commenting on Mr. Durity’s five-year delay in seeking constitutional relief for suspension from office:

“In the present case Sinanan J held this was the position regarding Mr. Durity’s application for constitutional relief in respect of the Commission’s decision to

⁶ (2002) 60 WIR 448, [2003] 1 AC 405

⁷ At [36]

suspend him from office. The Commission made this decision in August 1989. It was over five years later that Mr. Durity first sought to challenge this decision. As already noted, the Court of Appeal refused an application by Mr. Durity to amend his judicial review proceedings to introduce such a challenge. Given the lapse of time and the absence of explanation, that decision by the Court of Appeal was plainly correct.”

In the sequel to this judgment, *Durity v Attorney- General of Trinidad and Tobago*⁸ their Lordships considered that the continuation of the suspension for thirty-three months was so unreasonable as to amount to an abuse of power.

[22] In support of the views of the courts below, counsel for the respondents also relied on section 39 of the Interpretation and General Clauses Act, Cap 2:01 (“where no time limit is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed”). We do not consider that section 39, incorporated into the Constitution by Article 232(9), has any direct application to this case since the Constitution does not mandate the filing of constitutional proceedings. It is a potent reminder, however, of the need for expedition in all matters related to the Constitution. In the instant case the dismissal took place in 1981. While the Appellant is not wholly to blame for the delay owing to the course the first action took in the courts between 1988 and June 2000, the root cause of the delay was his tardiness in vindicating his rights. In August 2001 when he brought this action twenty (20) years after his dismissal he was in fact seeking to circumvent the decision in the first action filed in 1988. That first action had already been dismissed for inordinate unexplained delay in bringing those proceedings. Accordingly, we find that in the present case there was delay in bringing the second action amounting to an abuse of process.

⁸ [2008] UKPC 59

Conclusion

- [23] (1) The second action constitutes an abuse of process in the glossed *Henderson v Henderson* sense since all the relief claimed could and should have been claimed in the first action, which had already been heard and finally determined.
- (2) Even if the breach of a fundamental right could be established, the delay in seeking redress has been so inordinate that in the absence of a cogent explanation for the delay, the second action must fail as an abuse of process.

Accordingly the appeal is dismissed with costs, and the judgment of the Court of Appeal is affirmed.

- [24] We have read the judgment of Pollard J. in draft. We do not consider it necessary or appropriate to determine in this appeal the issues relating to the interpretation and application of Articles 142, 144(8) and 153(2) of the Constitution. Our omission to do so, however, should not be taken as an indication that we agree with the views expressed by the learned judge on these issues.

JUDGMENT OF THE HONOURABLE JUSTICE POLLARD, JCCJ:

- [25] I agree with the Court of Appeal, that this appeal should be dismissed for abuse of the process of the court due to inordinate delay in prosecuting the claim. However, I feel constrained to examine some issues which in my opinion, are of considerable importance but were not addressed.

- [26] Since the lapse of time between the accrual of the alleged right and filing of the action exhausted a protracted period of approximately 20 years, during which time several important amendments were made to the substantive provisions of the 1980 Guyana Constitution and most of which took effect on 7th August, 2001, one day before the Applicant deliberately filed his constitutional motion, it is important to discern what were the Appellant's legal rights, constitutional or otherwise, and the appropriateness of the procedure relied on to vindicate his claim.

Was the applicant entitled to invoke the constitutional jurisdiction of the court in vindicating his claim?

[27] Although no express, definitive finding was made in this behalf by the courts below, in my opinion, it is the subject of a compelling inference that both of the courts below correctly treated the present action as invoking the protective, constitutional or fundamental rights jurisdiction of the High Court addressed below. This jurisdiction is prescribed to be exercised in accordance with the relevant provisions of the *Fundamental Rights (Procedure and Practice) Act 1988*. It does appear from the facts found that the Appellant sought to rely on his alleged entitlement to a salary and superannuation benefits under the Pensions Act Cap. 28:01 in order to bring his claim within the provisions of Article 142 of the 1980 Guyana Constitution and, *a fortiori*, his constitutional right, pursuant to Article 153 of that instrument, to invoke the special constitutional jurisdiction of the courts below in order to vindicate such a claim.

[28] In this connexion, it may be appropriate to draw attention to the *dicta* of Chancellor George in **Mohammed Ali v Teaching Service Commission**⁹ regarding this peculiar jurisdiction of the High Court and which reads as follows:

“Paragraph 1 empowered an aggrieved party to apply to the Supreme Court (now the High Court) for redress in the event of a *perceived or anticipated breach* of any of his rights as set out in articles 1-125 (138-151 of the 1980 Constitution) and paragraph 2 gave that court an original jurisdiction, a *jurisdiction hitherto unknown to hear and determine such issues.*” (emphasis supplied)

[29] The aforementioned *dicta* of Chancellor George appeared to have found favour some two decades before with Lord Diplock who averred in **Jaundoo v Attorney-General**:¹⁰

⁹ (1991) 46 WIR at 175 e

“To apply to the High Court for redress was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and *was not descriptive of any procedure which then existed under the rules of court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created.*”

[30] The constitutional or fundamental rights jurisdiction of the High Court was liable to be invoked by any person *alleging* a breach of his fundamental rights through the employment of a constitutional action. Establishment by Counsel of the Appellant’s allegations were sought to be made on the basis of relevant Guyana authorities on the issues.

[31] In this context, I propose to borrow somewhat generously from one such authority, to wit, *Harry v Thom*¹¹ in order to put the alleged breach of the Appellant’s fundamental right not to be deprived of his property without compensation in its proper perspective, as follows:

“It appears, though the point was not taken before us, that the question of the deprivation of a fundamental human right is involved, the protection of which is enshrined in the Constitution of Guyana, Art. 8(1) of which reads as follows:

‘No property of any description shall be compulsorily taken possession of, and no interest in a right over property of any description shall be compulsorily acquired, except by or under the authority of a written law

¹⁰ (1971) 16 WIR 141

¹¹ Per Crane J in *Harry v Thom* (1967) 10 WIR at p 356 EFGH

and where provision, applying to that acquisition or taking of possession is made, a written law.’

This fundamental right of the subject to protection from deprivation of property under the above article has of late received judicial interpretation in the case of *Denis Lilleyman & Others v C.I.R. & A-G*- See Action No. 1905/1962/Demerara; affirmed on appeal to the British Caribbean Court of Appeal in *C.I.R. & Attorney-General v Lilleyman*. At C page 509 (ibid) the view of Cummings J at first instance was upheld: that the phrase “interest in or right over property of any description” under Article 12 of the Constitution of British Guiana which is in substance Article 8 of the Constitution of Guyana means ‘money’”.

[32] In *Harry v Thom*, the High Court was called upon to determine whether the aggrieved plaintiff, a teacher, who was entitled to 18 days sick leave with pay but was only given such leave without pay, had been deprived of her property within the meaning of the relevant provisions of the 1961 British Guiana Constitution (now Article 142 of the 1980 Guyana Constitution currently in force). After an intellectually rigorous and juridically incisive analysis Crane, J determined:

“On the contrary it seemed to us that Lucille Harry’s interest in the proceedings was patently live seeing that it touched and concerned depriving her of her money *which we have shown to be a fundamental right protected by the Constitution, unless the discretion to deprive her of it were properly exercised.*” (emphasis supplied)

The part of the *dictum* in bold is particularly relevant in this case which is essentially concerned with procedural fairness and where the Appellant’s salary, pension and superannuation rights had been arbitrarily terminated without affording him an opportunity to be heard and, consequently indulging an act of executive lawlessness.

[33] From its inception, our Court has been called upon to determine whether pension and superannuation benefits were “property” within the meaning of Article 142 of the 1980 Guyana Constitution and whose deprivation without compensation entitled a person aggrieved to invoke the High Courts’ constitutional jurisdiction in accordance with Section 3 of the Fundamental Rights (Practice and Procedure) Act 1988. There can be no doubt, in my opinion, that the judgment of Crane J pointedly operates to clarify judicial determination of the status of pension and superannuation benefits in the Guyana Constitution. It is common ground that salary, pension and superannuation benefits are expressible in terms of a monetary value and which were determined by courts of competent jurisdiction in Guyana to constitute property within the meaning of Article 142 of the Guyana Constitution. This Article replicated Article 12 of the 1961 British Guiana constitution which was in turn replaced by Article 8 of the 1970 Guyana Constitution without amending its essential juridical thrust.

[34] Whether such property was owned by the Appellant is, in my opinion, a mixed issue of law and fact to be determined by the courts. Thus, whether the Appellant fell within the class eligible for pensionable and superannuation benefits is a question of fact; however, whether such benefits to which he might have been entitled under the applicable law had accrued to the Appellant such as to establish entitlement thereto as his property, is a matter of law. In the instant case, the mere establishment of accrual did not conclusively prove entitlement which also required an appropriate certificate from the competent official pursuant to Section 4(3) of the Pensions Act Cap. 28:01. Further, an employee’s benefits might have accrued and even vested in accordance with relevant provisions of the Pensions Act Cap 28:01, yet the employee concerned might not have been in a position to establish entitlement because a competent official or institutional agency, *in the proper exercise of a discretion*, had determined that such benefits must not be paid – hence the relevance and significance of Crane J’s *dictum* above in bold. It is beyond doubt, however, that the *dictum* of Crane J would now have to be qualified in consequence of the amendment set out in Article 149B of the 1980 Constitution, and

which was intended to reflect the changed ideological orientation of the post colonial administration.

[35] On the basis of the foregoing it was juridically feasible to determine whether the Appellant owned property and was entitled to constitutional relief for property of which he was allegedly deprived contrary to the Constitution, thereby bringing him within the provisions of Article 142 and entitling him to invoke the constitutional jurisdiction of the court pursuant to Article 153. But, even if it is conceded, that the Appellant was not entitled to vindicate his claim by constitutional action on the basis of Article 142, an issue which is now before our Court for determination, this would not be the end of the matter; nor would the failure of the Appellant's constitutional motion, in my respectful opinion, operate to compromise the juridical status of the motion as such. At the material time, the Appellant appeared, in my opinion, to have had the constitutional right to a fair hearing by reference to the fundamental rule of natural justice and of which, in my opinion, he was arbitrarily deprived by the improper exercise of an executive discretion to terminate his employment.

[36] In support of the opinion ventured above, attention must be directed to Article 144(8) of the 1980 Guyana Constitution which replicated in substance the provisions of Article 5(1) of the 1961 British Guiana Constitution which reads as follows:

“In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality.”

[37] These provisions of the 1961 British Guiana Constitution were reproduced in the judgment of Chancellor George of the Court of Appeal who, in construing them, maintained:

“The case, **Ridge v Baldwin** [1963] 2 WLR 935, has established beyond question the general principle that where no relationship of master and servant exists between a statutory or other disciplining body and the employed person, the latter cannot be removed from his office, or indeed be otherwise disciplined, without being first informed of the allegations against him and being given an opportunity to be heard in his defence, ...”¹²

[38] Continuing his juridical analysis of these provisions, Chancellor George asseverated:

“In **Re Sarran’s Application** (1969) 14 WIR 361 the Court came to the unanimous conclusion that in the exercise of its powers of “removal” under article 96(1) of the 1966 Constitution, an expression which embraces all forms of dismissal, the Public Service Commission or any delegate of that commission acted in a judicial or quasi-judicial capacity, a view which must, in my opinion, be also applicable to all the other service commissions and persons who are constitutionally vested with such powers. And, it was stated in **Ridge v Baldwin**, an essential requirement for the performance of any judicial or quasi-judicial function is that the decision-maker observes the principles of natural justice.”

[39] In my considered opinion, the *dicta* of George C must be seen to apply *aequo vigore* to Article 144(8) of the 1980 Guyana Constitution which, in substance, replicates section 5(1) of the 1961 British Guiana Constitution and which reads as follows:

¹² Mohammed Ali v Teaching Service Commission (1991) 46 WIR at p 173

“Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other tribunal, the case shall be given a fair hearing within a reasonable time.”

[40] In support of George C judicial interpretation of the constitutional provisions referred to, I would wish to call in aid the *dicta* of Lord Denning MR in **Breen v Amalgamated Engineering Union** as follows¹³:

“Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so, the courts can review its decision, just as it can review the decision of a statutory body ... If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need to be given: see the cases cited in **Schmidt v Secretary of State for Home Affairs [1969] 2Ch 149 at 170/171**. *But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reason should be given why he is being turned down and he should be given a chance to be heard*. I go further: if he’s a man who has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then those should be afforded him, according as the case may demand.” (emphasis added)

¹³ [1971] 2 QB 175 at 191

Indeed, the fundamental and unqualified importance of procedural fairness in determining the rights of parties constituted the gravamen of this Court's determination in **Attorney-General of Barbados & Ors. v and Jeffrey Joseph & Anor.**¹⁴

[41] On the concurrent finding of facts established in the present case, it does appear to be the subject of a compelling inference, as may be deduced from the *dicta* of George C and Denning MR cited above, that the Appellant's case falls squarely within the terms of Article 144(8) of the 1980 Guyana Constitution entitling him to allege a breach of his fundamental right and, consequently, to invoke the constitutional jurisdiction of the High Court pursuant to Article 153 of the Constitution and Section 3(1) of the *Fundamental Rights (Practice & Procedure) Act (1988)* which designated the writ of summons and the originating motion as the prescribed procedures for invoking the constitutional jurisdiction of the court.

[42] It may also be apposite to mention in this context that by Act. No. 10 of 2003, Article 149B was added to the 1980 Guyana Constitution to provide that "(e)very public sector worker shall enjoy an absolute and enforceable right to any pension or gratuity granted to him or her under the provision of any law or collective agreement of any kind whatsoever." Although the Appellant's motion was outwith this provision, that provision was designed to articulate in the clearest of terms the intention of the drafters in other relevant provisions of the Constitution. The effect of this provision was to put beyond all doubt the status of pensions and superannuation benefits as a fundamental right protected by the 1980 Guyana Constitution and entitling a person alleging a breach thereof to invoke the constitutional jurisdiction of the court by a constitutional action pursuant to Article 153 and the *Fundamental Rights (Practice and Procedure) Act 1988*. The enhanced, determinate constitutional status of pensionable and superannuation rights may also be discerned from Articles 214 and 215 of the Constitution.

¹⁴ (2000) 69 WIR

Did the courts below fall into egregious error by treating the Appellant's constitutional motion as an abuse of the process of the court?

[43] As intimated above, the High Court below approached the Appellant's action as a constitutional motion but declined to explain the basis of its determination. In my opinion, however, a constitutional motion must be construed to mean an authorized action invoking the constitutional jurisdiction of the court,¹⁵ consisting of its protective fundamental rights jurisdiction intended to secure the vindication of such rights *allegedly* contravened by the impermissible or abusive employment of state power. There can be no doubt that the mere commencement of an action prescribed by the Fundamental Rights (Practice and Procedure) Act 1988 on the basis of an alleged breach of a fundamental right set out in Articles 138-151 of the 1980 Guyana Constitution is sufficient to characterize the action, correctly, as a constitutional action. In Guyana, the procedures to be employed, as mentioned above, are a writ of summons or originating motion prescribed in Section 3 of the Fundamental Rights (Practice and Procedure) Act 1988. Granting the validity of the definition ventured above, the issue which fell to be determined was the identification and location in the 1980 Guyana Constitution of the rights allegedly contravened.

[44] But, even granting that the Appellant was entitled to avail himself of a constitutional action as construed above, the question to be determined is: was the invocation of his entitlement in the circumstances of this case an abuse of the process of the High Court? There is persuasive authority supportive of the view that where another remedy is available and which was accessible or employable timeously, the court should refrain from exercising its inherent discretion to grant constitutional relief unless some feature argued persuasively in favour of such a course of action: *Attorney-General v Siewchand*

¹⁵ See *Attorney-General of Trinidad and Tobago v Ramsaroop* [2005] UKPG 15 p. 328.

*Ramroop*¹⁶ Indeed, it is settled law that where some alternative procedure, be it in common law or administrative law is available, the complainant should not seek redress by way of constitutional motion.¹⁷ However, there is good ground for advancing the opinion that the position in Guyana has changed over time.

[45] Prior to the amendment of the 1980 Guyana Constitution there was a proviso to Article 153(2) which read as follows:

“Provided the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.”

This proviso was deleted for reasons unknown and operated to bring the remaining language of the 1980 Guyana Constitution more in line with relevant provisions of some constitutions of the Commonwealth Caribbean States. Despite this, however, it is my respectful opinion that the interpretation to be placed on these instruments must be qualitatively different, given the intervening juridical metamorphosis of the Guyana provision. More importantly, this amendment of the 1980 Guyana Constitution has received authoritative judicial interpretation by the High Court as discussed below.

[46] It may be argued with considerable persuasive force that the deletion of this proviso from Article 153(2) removed the obligation, peremptorily imposed on the High Court by the 1980 Guyana Constitution, to desist from exercising its fundamental rights jurisdiction “if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.” As such, the High Court was no longer obliged to desist from employing its constitutional jurisdiction where it was persuaded that the complainant had an adequate alternative procedure in the common law or administrative

¹⁶ [2005] 66 WIR 334.

¹⁷ *Jaroo v Attorney-General of Trinidad and Tobago* [2002] UKPG 5

law or any other law. The Court of Appeal was not unmindful nor insensitive to the juridical implications of this important amendment which must be seen as operating to disapply several judicial regional determinations to the Guyana jurisprudential landscape despite the apparent convergence of the language of commitment in relevant regional constitutional provisions. My opinion is based on a significant development in the jurisprudence of Guyana which diverged from that of other Commonwealth Caribbean states.

[47] In *Shelly Bryan v Attorney-General & Commissioner of Police*,¹⁸ Chancellor Bernard, as she then was, averred:

“However, I have to consider whether the Court can turn a blind eye to the fact that we are now aware that the proviso to Article 153 has been removed, and any person alleging breaches of Articles 138 to 151 can now seek redress in the High Court regardless of whether other remedies are available. Can this court as a court of last resort continue to hide behind the proviso and deny the Appellant’s right to take whatever action is deemed necessary to recover money seized by the police, the continued retention of which is no longer lawful?”

[48] The language of commitment employed in the proviso which is reproduced above was peremptory enough to place the Guyana Court of Appeal as the court of last resort on notice that its deletion constituted an important modification in the applicable law. The determination of the Chancellor was made when the Court of Appeal was Guyana’s highest court and must be seen to be conclusively determinative of the issue in the Guyana context.

¹⁸ CA No 88 / 2000

[49] And, given the construction the Court of Appeal placed on the removal of this extremely important proviso, it would be disingenuous to determine that the following *obiter* of Lord Hope in *Jaroo v Attorney-General of Trinidad and Tobago*¹⁹ has continuing relevance in Guyana:

“Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure [by originating motion seeking redress under Section 14 of the Trinidad and Tobago Constitution which corresponds to Article 153 of the Guyana Constitution] the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it.”

[50] Similarly, the determinations of George J in *Kent Garment Factor v Attorney-General*²⁰ approving the *obiter* of Lord Diplock in *Harrikissoon v Attorney-General of Trinidad and Tobago*²¹ and equally inappropriate *dicta* of Lord Nicholls in *Ramroop v Attorney-General of Trinidad and Tobago*²² must also be disapplied in the developing Guyana jurisprudence. Accordingly the appeal is dismissed with costs, and the judgment of the Court of Appeal is affirmed.

¹⁹ [2003] UKPC 5 at 39

²⁰ [1991] 46 WIR 177 at 189

²¹ [1980] AC 265 at 268

²² [2006] 1 AC 328

