IN THE JUDICIAL COMMITTEE **JCPC 2024/0016**
ON APPEAL FROM THE COURT OF APPEAL
OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN

JUDICIAL AND LEGAL SERVICE COMMISSION **Appellant**

and

MARCIA AYERS-CAESAR **Respondent**

RESPONDENT'S CASE

SUMMARY

1. The Court of Appeal's decision that the Appellant ("the JLSC") unlawfully pressurised the Respondent to resign in breach of s.137 of the Constitution, and thereby deprived her of the protection of the law contrary to s.4(b) thereof, is based on three central findings.
   1) On a proper construction of its decision made at about 12.45 pm on 27 April 2017, the JLSC decided that the threshold for triggering disciplinary proceedings under s.137 of the Constitution had been met, and further decided to offer her the "option" between either (a) resigning as a High Court judge and returning to the magistracy, or (b) facing the probability of disciplinary proceedings under s.137 of the Constitution. That option was in reality a threat as to what would happen if she did not resign. (See Bereaux JA at paragraphs 138 [**EB862**]; and 150 [**EB870**], and for the time of the decision, see the Judge's judgment at paragraph 318 at [**EB513]**.)
   2) The Chief Justice, in a meeting which appears to have started shortly before 3.30 pm that afternoon, communicated this decision and this threat to the Respondent, and did so with the JLSC's authority. (See Mendonca JA at paragraph 60-61 **[EB/xxx]** and Bereaux JA at paragraph 162-175 [**EB876-886**]. For the time the meeting started see the Respondent's evidence recited by

Bereaux JA at paragraphs 44 and 45 **[EB/837]**, which does not appear to have been disputed.)

3) That threat brought pressure to bear on the Respondent, as a result of which she offered to tender her resignation (at about 4 pm) on that same afternoon, before formally tendering it to the President at about 5.30 pm (Mendonca JA at paragraphs 48 to 51 **[EB/05-806]**, and Bereaux JA at paragraphs 176-182 [**EB886-891**], and for the time, see the Respondent's husband's evidence at paragraph 10, [**EB/1503]**, and see the WhatsApp messages referred to below sent at 4.34 pm).

2. The JLSC's appeal, in essence, complains that in coming to these findings, the Court of Appeal wrongly ignored and failed to take into account the background leading up to these events on 27 April 2017, as found by the Judge.

3. However:

1) On the first point, the Court of Appeal's decision was based on the proper interpretation of the minute of the JLSC's decision on 27 April 2017.
2) On the second, it was based on that minute and the Chief Justice's own evidence as to what he said at the meeting and as to his authority.
3) On the third, the Court was bound to review the Judge's finding to the contrary, because he had failed to test it against the unchallenged evidence of contemporaneous statements made by the Respondent (in particular the Respondent's WhatsApp messages and the evidence of her husband), and indeed against his own finding that her press release announcing her resignation that day had been pre-prepared for her even before her meeting with the Chief Justice. All this showed in clear terms that immediate pressure was brought to bear on her to resign *on that very day*, and that she felt she was being forced to resign immediately. Further, having so reviewed the evidence, the Court was entitled (indeed bound) to replace it with its own finding that she resigned because she was pressurised into doing so.

4. Accordingly, there is no proper basis for allowing this appeal, because given its findings of fact, the Court of Appeal was correct in law in holding that the pressure to resign was unlawful. Thus:

1) As Mendonça JA put it, the JLSC's decision to convey to the Respondent a threat that if she did not resign it was highly probable or there was a distinct probability that she would face proceedings under s.137, since the threshold to trigger such proceedings had been met, went beyond the Commission's constitutional remit and was ultra vires, as it sought to procure the removal of a Judge otherwise than by s.137, and thus bypassed the constitutional safeguards for securing judicial independence (paragraph 64 **[EB811]**).
2) As Bereaux JA put it, the JLSC cannot use the threat of disciplinary proceedings to force the resignation of a Judge: such an ultimatum is not a legitimate use of the Commission's powers (paragraph 141 [**EB864**]). A resignation procured in this way effectively removes a judge from office and bypasses the s.137 process, with all of its safeguards. It thus undermines the s.137 process, the independence of the judiciary and the Constitution (paragraph 158 [**EB873**]).

5. In short, the JLSC cannot lawfully convey to a Judge a threat of proceedings under s.137 of the Constitution in order to procure her resignation. That amounts to an unlawful attempt to procure her removal from office otherwise than by the procedure under s.137, which is the only constitutional means of removal of a Judge.

6. This statement of law does not appear to be in dispute in this appeal. As the Court of Appeal held, it is a particular instance of the general statement made by the Board in Rees v Crane [1994] 2 AC 173 at 187H-188A:

> *"It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways."* [Emphasis in underlining added.]

7. Put another way, and as the Court of Appeal also held, the JLSC procured the termination of the Respondent's appointment in *"other ways"*. But as Bereaux JA rightly said: a forced resignation brought about by such a threat is an arbitrary removal from office which bypasses the constitutional process under s.137(3) with

all the protections that are accorded the judge[1]; it undermines the process and thereby undermines the independence of the judiciary[2].

8. As the Board has said, speaking of the importance of fair process for the protection of judicial independence in Chief Justice of Trinidad and Tobago v Law Association of Trinidad and Tobago [2018] UKPC 23 at [18]:

> *"Judicial independence is secured in a number of ways, but principally by providing for security of tenure: in particular this requires that a Judge may only be removed from office, or otherwise penalized, for inability or misbehaviour and not because the government does not like the decisions which he or she makes. It is also required that removal from office should be in accordance with a procedure which guarantees fairness and the independence of the decision-makers from government."* [Underlining added]

Further preliminary points

9. There are five further points which show that the threat was wholly unreasonable and *ultra vires*.

10. First, as held by both Mendonca JA and Bereaux JA, the JLSC wanted a "quick fix" to abate the public furore and to address the Respondent's part-heard matters by getting her to return to the Magistracy[3]. But on any footing, that is not a proper purpose for which the power of removal under s.137 can be used, still less a proper purpose for which the JLSC can threaten to institute such proceedings (even if, contrary to the above, threats could be used in certain circumstances).

11. Second, it was anything but clear that the Respondent would have been removed from her office if an investigation had been commenced under s.137(3). First, any such investigation would have had to have taken into account her long history of judicial service and the fact that she had only recently been held to be fit to be appointed as a High Court judge; and second, it would have to take into account that the list of 28 outstanding matters of which she had informed the Chief Justice

[1] Paragraph 146 [**EB866**]
[2] Paragraph 158 [**EB873**]
[3] Paragraph 156 [**EB872**], paragraph 65 **[EB812]**

on 10 April 2017 before her appointment (and which did not prevent her swearing in the next day) was compiled by her on the basis of information provided to her by the Port of Spain Note Taking Unit, and there was no electronic case management system in the Magistrates Court[4]. Further, all of her outstanding matters, with the exception of the *Lutchmedial* matter (of which the Chief Justice was aware as he had raised it with her before 11 April 2017) were in the Port of Spain Magistrates Court[5]. On the face of it, therefore, it was understandable that she believed that this was the extent of her outstanding cases. As for the list of 53 cases, this was not drawn to her attention until 25 April 2017, nor was it discussed with her until 26 April 2017 (see paragraphs 16 and 17 of the SFI).

12. As Bereaux JA put it *"It is quite presumptuous to assume that the fact that the section 137 threshold had been crossed or triggered meant that removal of the judge would be the necessary result (but that seems to be the basis of the threat in this case). It is because of that uncertainty that the [JLSC] could not use the fact of the trigger to pressure and intimidate the judge into resigning and returning to the Magistracy. Section 137 offers the judge the protection of putting forward a defence or an explanation"*, which she had put forward in her affidavit, together with possible solutions. In order to achieve its desired result the Commission departed from constitutional process and denied the Respondent the safeguards of a fair process[6.]

13. Third, on any footing, the JLSC's real purpose was not so much to warn the Respondent that disciplinary proceedings might be instituted against her, as to make a threat to ensure that she returned forthwith to the Magistracy to finish off her outstanding cases. That purpose, however, would not have been served by the institution of disciplinary proceedings, which would inevitably have taken a considerable time, in which period (at least on the JLSC's apparent understanding of the matter) she could not have sat and finished her cases as a magistrate. This confirms that the purpose of the communication was not really to convey a

[4] Paragraph 17 [**EB306**], paragraph 7(c)-(d) [**EB/42/7**]
5 Paragraph 18 [**EB1307**]
6 Paragraph 159 [**EB874**]

(genuine) warning, which might be permissible, but to convey an "either/or" threat, which is not.

14. Fourth and in any event, no doubt because of the great rush with which everything was handled on 27 April 2017, no proper consideration was given to other alternatives which would have allowed the Respondent to finish her outstanding matters without having to resign as a High Court judge. In particular, as set out below, no consideration was given to the JLSC appointing her under s.111 of the Constitution *"to act"* as a Magistrate (that is to say, without formal long term appointment as such) so she could finish them without having to resign in the meantime.

15. Finally, as discussed further below, what was so wrong, and what created the pressure, was the undoubted speed with which everything was forced through on 27 April 2017 to secure the Respondent's resignation, without her being offered any time to reflect on the matter and to take advice before making such a momentous decision, a point which the Judge entirely ignored. She was, as Bereaux and Yorke-Soo Hon JJA held, *"railroaded"* into handing in her resignation[7].

16. This written case first explains why, in the Respondent's submission, the Court of Appeal's decision was correct on the three main issues identified above, and then goes on to deal with the criticisms of it made in the JLSC's written case.

The Court of Appeal's first finding: the nature of the JLSC's decisions

17. As said in the summary, the Court of Appeal's finding on the first point (the JLSC's decision), and its reversal of the Judge's finding, was based not on a resolution of a dispute of fact, but on a proper interpretation of that decision, as recorded in the JLSC's own minute of it.

18. The JLSC's decision, as recorded in its minute[8], was:

[7] Paragraph 181 **[EB889-890]**
[8] **[EB1695-1696]**

"The Commission decided that the information before it triggered and met the threshold for disciplinary enquiry but considered also the need for the expending of Mrs. Ayers-Caesar's outstanding part-heard matters.

The Commission then decided that:

- *Mrs. Ayers-Caesar be given the option of withdrawing from the High Court Bench and returning to the Magistracy to discharge her professional responsibilities; and*
- *In the event she refuses to withdraw, the Commission would consider instituting disciplinary action in accordance with Section 137 of the Constitution of Trinidad and Tobago.*

The meeting ended at 2.45 pm."

19. As the Court of Appeal correctly pointed out, by this the JLSC:

1) Decided that the threshold for proceedings under s.137 had been met[9];
2) Decided that the Respondent be given the "option" of resigning *and* that if she refused to resign it would consider invoking s.137[10]: that is to say a threat that unless she resigned, it would consider invoking s.137.

Further, as the Court of Appeal correctly pointed out, the JLSC also:

3) At the same time decided that the Chief Justice would communicate its position orally to the Respondent[11] (this was not in dispute);
4) Decided to authorise the Chief Justice, as he put it (and who gave the only evidence as to what the Commission had asked him to do) among other things to invite the Respondent to consider "her options"[12].

20. In his judgment, as Bereaux JA correctly pointed out[13], the Judge failed properly to consider the effect of the first two parts of this decision, because, it appears, he rejected the principal basis on which the Respondent had put her case (namely, the JLSC had decided to bring about her removal by recommending to the President

[9] Para 58 [**EB808**]
[10] e,g, para 57 and 58 [**EB808**]
[11] Para 59 [**EB808**]
[12] Para 165 [**EB880-1**]; and cf para 62 [**EB810**]
[13] Para 132(i) **[EB/857]**

that her appointment be revoked)[14]. In any event, he simply does not explain how the first two parts of these decisions can be construed in any other way than the way the Court of Appeal held, that is to say, it had decided to make a threat that unless the Respondent resigned, it would consider invoking s.137.

The Court of Appeal's second finding, on the Chief Justice's authority and the capacity in which he was acting

21. There is no doubt what the Chief Justice, even on his own evidence, communicated to the Respondent in their meeting on 27 April 2017. This is set out in paragraphs 44 to 54 of his affidavit, which is recited in full in Bereaux JA's judgment[15].

22. In particular, as he said in paragraph 44 of his affidavit:
    1) He told her that in *"in my personal view, as Chief Justice"*, having regard to the way in which she had managed her elevation to the High Court Bench, and her inaccurate information about her part-heards, her *"continued presence on the High Court Bench was becoming untenable"*; and
    2) *"I told her that the JLSC had met and considered the matter sufficiently serious to trigger a disciplinary inquiry but had made no decision in that regard. Rather it was felt that she should be given the option of withdrawing from the High Court Bench and returning to the Magistracy to discharge her professional responsibilities by completing her part-heard matters"*.

First question: did the Chief Justice have authority to say these things with the JLSC's authority?

23. The Judge, however, held that the only *"option"* that the JLSC decided to put to the Respondent was simply to resign or not to resign, because it had not framed any charges[16]; and that therefore, this was the limit of what the Chief Justice was authorised to tell her.

24. However, as the Court of Appeal held, this was plainly wrong.

[14] Para 215 **[EB/480]**
[15] **[EB/843-846]**
[16] See paragraphs 264 to 266 **[EB/494]**

1) The JLSC did not give any evidence saying that the Chief Justice's authority was limited to informing the Respondent that she had the option of resigning or not resigning[17];
2) The minute did not record any such limitation of his authority[18];
3) The decision to give the Respondent the "option" of resigning cannot be isolated from the other limb of that option, i.e. what would happen if she did not[19]; and
4) The only direct evidence as to his authority came, in oral evidence, from the Chief Justice himself, who made it clear enough that he understood himself to have been authorised to communicate the whole of the Commission's position to the Respondent[20].

25. In short, the judge's finding that the JLSC gave the Chief Justice only the limited authority described above was not based on any evidence and was at odds with his evidence. The Court of Appeal was therefore right to overturn it.

26. It follows that the Court of Appeal was bound to interfere and entitled to make its own findings on this question too, and to go on to find that the JLSC decided to convey to the Respondent not only the proposal that she should resign, but also what was in prospect if she did not.

Second question: what was the effect of what the Chief Justice said?

27. As the Court of Appeal held, the effect of what the Chief Justice said was designed to put pressure on the Respondent to resign (in the words of Mendonça JA[21]) or intended to pressure the Respondent into resigning (in the words of Bereaux JA[22]). That is the clear inference, primarily, from the nature of the ultimatum given, as both Mendonça JA and Bereaux JA found. Further, it is supported by the other circumstances identified by the Court of Appeal, including the following:

[17] Para 61 [**EB809**]; para 163 [**EB877**]; para 167 [**EB881**]
[18] Para 61 [**EB809**]
[19] Para 61 [809]; para 163 [**EB877**]
[20] Para 165-6 [**EB878-881**]
[21] Paragraph 64 [**EB811**]
[22] Paragraph 139 [**EB863**]

1) As was admitted, the JLSC wanted an urgent solution to the public furore, and the solution that it alighted upon was to have the Chief Justice persuade the Respondent to resign as a matter of urgency[23];
2) The Chief Justice on the morning of 27 April 2017 (i.e. before his meeting with the Respondent in the afternoon) instructed his office to draft in advance the Respondent's media statement which announced her resignation and her visit to the President to deliver her resignation[24]; and
3) During his meeting with her, the Chief Justice arranged for the Respondent to visit the President immediately afterwards to hand him her letter of resignation[25].

28. See also, in this regard, the oral evidence of the Chief Justice, who said that he told the Respondent of the Commission's decision so that she *"understood all of the possibilities"* and accepted in effect that he was telling her of the risk she faced if she did not take his advice and resign ([**EB1071**] lines 35 to 42).

Third question: was what the Chief Justice said something that fell within his power to deal with matters of an administrative nature?

29. Notwithstanding this, the Judge held that the steps taken by the Chief Justice fell within the permitted range of administrative action by the Chief Justice, short of the invocation of s.137 proceedings, contemplated by the Board in Rees v Crane at 193B.

30. However, the situations contemplated by the Board in Rees v Crane for such steps fall into a different and distinct category from the present case. The complaints identified at 193B of the Board's judgment, capable of resolution by administrative action of the Chief Justice, were of a kind described by Lord Slynn as *"isolated complaints of a purely administrative nature"*. As the Court of Appeal correctly found, the complaint that the Chief Justice took to JLSC on 27 April 2017 could not be so described: the Chief Justice informed the meeting that he considered the Respondent's position to be untenable; another member agreed; the JLSC found

[23] Discussed by Mendonça JA at paragraphs 65 to 67 [**EB812**]
[24] See Bereaux JA, "Evidence of Pressure" at paragraph 181 (ii) and (iii) [**EB890**]
[25] Bereaux JA, paragraph 181 (i) [**EB889**]

that the conduct was sufficiently serious to trigger s.137; and the JLSC decided that she should be asked to resign.

31. The JLSC's decision therefore could not be understood simply as giving approval to an administrative action by the Chief Justice in his capacity as Chief Justice; these were decisions and actions of the JLSC.

The Court of Appeal's third finding, on why the Respondent resigned

32. The judge found that the words spoken by the Chief Justice did not cause the Respondent to resign; and further that she did not resign because of any threat or pressure placed upon her, but out of intense embarrassment as to what had happened.

33. He made that finding notwithstanding:

1) His own finding that the Respondent's press release of 27 April 2017, which said that she had resigned *on that day*, had been pre-prepared at the Chief Justice's instigation in the morning before he had even met her to discuss the issue. This was despite the Chief Justice's evidence, in paragraph 54 of his statement, and in cross-examination, to the effect that in fact it was prepared only in the afternoon and *after* his meeting with the Respondent, which was flatly contradicted by Ms Pierre (one of the JLSC's witnesses). Further, and relatedly, Ms Pierre, whose evidence the Judge accepted, said that the Chief Justice did indeed tell the Respondent in their meeting that a media statement had already been prepared ([**EB1163**] line 22, line 35).

(2) The meeting started only at some point around 3.30 pm (see e.g. [**EB1107**] lines 31-39).

(3) The unchallenged evidence of the Respondent's husband that at about 4 pm on that day, she called him in an extremely distressed state to say that she was being *"forced to resign"*, otherwise they were going to get rid of her and she had no choice[26].

[26] Paragraph 10 of **EB/1503**

(4) The Respondent's WhatsApp messages sent at 4.34 pm/4.35pm which said *"Going to Pres House, was asked to resign"*[27] then (a little later), in answer to the questions from one of them, *"Why? How come? By whom?"*, her replies *"CJ" "It's too late", "Or else they were going to advise the Pres"*[28].

(5) There was no challenge to the WhatsApp messages, or any suggestion that they were manufactured or did not represent the true position or her understanding at the time.

34. Accordingly, as the Court of Appeal found, the judge plainly erred, because these matters were powerful contemporary evidence of what really caused the resignation, and he did not at any point of his judgment check his finding to the contrary against any of them, or consider how they might affect his finding. As Mendonça JA correctly pointed out, if the judge was to make findings at odds with the effect of such material contemporaneous statements it was incumbent on him to explain why (paragraph 45 [**EB802-3**]). He failed to do so, as Mendonça JA carefully demonstrated (in his paragraphs 46 to 48 [**EB803-5**]).

35. The Court of Appeal was therefore entitled, indeed bound, to review the findings, and to consider the matter afresh and to make its own findings. See Martin De Roche v Joyce Cameron-Finch Civ. App. 236 of 2009 at [13] and [17]; Yaqoob v Royal Insurance [2006] EWCA Civ 885 at [36], [38], [45] and [49]; Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [67]; Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 at [164]; Ramsaran v Hoodan Civ. App. 66 of 1991 upheld on appeal [1997] UKPC 47.

36. Further, in making its own findings, the Court of Appeal was entitled to find (indeed bound to find) that the Respondent resigned because of the threat made to her by the Chief Justice on behalf of the Commission. That finding is supported by:

1) The evidence of the WhatsApp messages and the Respondent's husband set out above;

[27] **EB/246-247, 249**, cf paragraph 16 of **EB/259**, and paragraph 6 of **EB/264**

[28] **EB/249-250**

2) The matters discussed by Mendonça JA at his paragraph 51 [**EB806**] (i.e. that the Respondent arrived at her meeting intending to propose a solution whereby another magistrate would complete her part-heard matters, but within a very short time had agreed to resign);
3) The matters discussed by Mendonça JA at his paragraph 84 [**EB819**] (i.e. the ways in which surrounding pressure was imposed upon the Respondent); and
4) The matters discussed by Bereaux JA under his heading "Evidence of Pressure" [**EB889-891**] (i.e. in particular the "railroading" of the Respondent by pre-preparation of her largely untrue resignation statement and by arranging for her to hand her resignation to the President immediately).

37. In particular, it is to be noted that there was no particular evidence on which the JLSC had relied for its submission that the Respondent resigned out of embarrassment and a desire to make amends, and this was merely an inference which the JLSC said should be drawn from the background facts as to what had occurred before 27 April 2017. But as Mendonca JA said, when speaking of her husband's unchallenged evidence *"I cannot begin to conceive how any of that is consistent with the [Respondent] admitting she erred and wished to make amends"*[29].

38. Accordingly, the Respondent submits in summary that there is no basis for interfering with the above three findings of the Court of Appeal (i.e. that the Commission did decide to convey the threat to the Respondent; that the Chief Justice conveyed it with its authority; and that this was intended to persuade and did persuade her to resign). It follows: (1) that the Court of Appeal was right to allow the Respondent's appeal and find in favour of her claim; and (2) that the JLSC's appeal ought to be dismissed.

Response to the JLSC's submissions

39. The JLSC's written case does not set out the precise arguments in support of each of its criticisms, in particular on the three main points above. Rather, it has said that it will develop each argument orally (see the summary at paragraphs 6 and 7 of its

[29] Paragraph 49 **[EB805]**

case; and the same approach in respect of each Court of Appeal judge individually, at paragraphs 95, 98, 100 and 101).

40. That said, the Respondent will address the main errors identified by the JLSC below.

Alleged errors regarding the Commission's decisions and intentions

Wrongly finding that the JLSC's decisions were designed or intended to force a resignation?

41. At paragraph 6(e) of its case the JLSC has submitted that the Court of Appeal, having found that it acted without malice, erred in finding that its decisions were designed and intended to coerce the Respondent into resigning by the threat of s.137 proceedings (referring to Mendonça JA at paragraph 64 [**EB811**] and Bereaux JA at paragraph 139 [**EB863**]); and, at paragraph 6(f), that it erred in finding that the Chief Justice conveyed the threat of s.137 proceedings in order to coerce the Respondent into resigning.

42. Relatedly, it has submitted (at paragraph 95(d)) that Bereaux JA erred in construing the minute as an ultimatum to the Respondent and wrongly decided that the Commission and Chief Justice had no power to inform a judge that her conduct was seriously in default and could amount to misbehaviour; and (at paragraph 95(g)) that he erred in construing the Chief Justice's evidence as amounting to evidence that he was authorised to convey to the Respondent a threat of s.137 proceedings.

43. As for Mendonça JA's judgment, the JLSC submits (at paragraph 98(e)) that he made the first error ascribed to the Court of Appeal above; and (at paragraph 98(d)) that he erred in construing the minute as authorising the Chief Justice to communicate to the Respondent the alternatives of resign or face the threat of s.137 proceedings.

44. These criticisms are unfounded largely for the reasons already given. The Court of Appeal was entitled to find that the JLSC's decisions were designed (per Mendonça JA) or intended (per Bereaux JA) to pressure the Respondent into resigning, for the reasons set out above. In particular:

(1) Mendonça JA's finding that the JLSC acted without malice did not preclude a finding that it intended to put pressure on the Respondent to resign, for the reasons he himself gave in making the said finding[30]: it was a decision taken in response to public uproar, designed as a quick fix to a problem that required an urgent solution, but made without perhaps taking the time to assess the full consequences. See also Bereaux JA's judgment at paragraph 184[31]: the JLSC had no sinister motive; but its zeal to pursue what it perceived to be the public interest led it to venture outside its legal remit.

(2) As to the JLSC's decisions, Bereaux JA did not construe the minute itself as an ultimatum to the Respondent. As set out above, he found that the JLSC had decided to deliver an ultimatum to the Respondent and based that finding on the minute, but also (a) on the evidence as to what the Chief Justice said and did and (b) the Chief Justice's evidence as to the JLSC's decisions.

Wrongly finding the Chief Justice spoke with the JLSC's authority?

45. As to the Chief Justice's authority, the Court of Appeal was right to find, for the reasons already given, that there was no evidence and no justification for the limit placed on that authority by the judge. Mendonça JA did not derive his findings as to authority from construing the minute, but from the obvious and undisputed fact that the JLSC had authorised the Chief Justice to communicate its position to the Respondent and from the fact that there was no reason to find that it had authorised him to communicate only part of its position (paragraphs 61 and 62 [**EB809-810**]). As for Bereaux JA, his analysis of the Chief Justice's evidence (paragraph 165-6 [**EB878-881**]) was correct and was supported by other evidence (paragraphs 163, 164 and 167).

46. Further, Bereaux JA did not decide that the JLSC and the Chief Justice had no power to inform a Judge that her conduct was seriously in default and could amount to misbehaviour; he decided that it would be unlawful to do so as a means of conveying the threat of s.137 proceedings for the purpose of putting pressure on her

[30] Paragraph 65 **[EB/812]**
[31] Paragraph 184 **[EB894]**

to resign, particularly in circumstances where, as he found, she was railroaded into an immediate decision.

Alleged errors regarding the effect of the threat

47. The JLSC says that the Court of Appeal erred in setting aside the judge's finding that the Respondent was not pressured or coerced into resigning by the JLSC's acts (paragraphs 95(i) and 98(g)), because it disregarded the Judge's assessment of the Respondent's WhatsApp messages and of her husband's evidence. It has also submitted that Mendonça JA erred in setting aside the judge's finding that the Respondent could not have felt threatened because she would have known the true effect of s.137 (paragraph 98(f)).

48. But there is nothing in this. As said above, Mendonça JA carefully demonstrated that the Judge (a) paid only "inconsequential" regard to the Respondent's WhatsApp messages and the evidence of her husband and (b) in particular failed to treat with this evidence in a way that could be reconciled with his findings that the Respondent had not felt threatened and had not resigned because of any threat. See in particular Mendonça JA's judgment at paragraphs 40 to 48 [**EB800-805**].

49. Mendonça JA's analysis on this issue was supported by that of Bereaux JA at paragraphs 176 to 182 [**EB886-891**] (the Chief Justice's own evidence as to why the Respondent resigned, the WhatsApp messages, her husband's evidence, and railroading the Respondent by making an immediate appointment to visit the President and by pre-preparing her media statement, a matter to which the judge gave no proper consideration).

50. Further, the same objection applies to the point that the Court of Appeal should not have interfered with the Judge's finding that the Respondent knew of s.137 and could not have believed that the JLSC could threaten her with removal: that is to say, in making this finding he failed to address the evidence of her contemporaneous statements of what she believed in her telephone call with her husband, and in her

WhatsApps, all of which contradicted it. So Mendonça JA was entitled (indeed bound) to infer that the Respondent's understanding of s.137 was at best imperfect.

Failure generally to appreciate the trial judge's advantage and give effect to his findings

51. At paragraph 6(a) the JLSC submits that the Court of Appeal: *"failed to have regard to Harris J's advantage as the trial judge who was fully seized of the entire case and fully entitled on the extensive written and oral evidence, having assessed the parties' credibility, to reject the Respondent's case in a comprehensive and balanced judgment"*.

52. Related to this, it submits that Bereaux JA, having accepted that the judge was entitled to reject the Respondent's and accept the Chief Justice's account of their conversation on 27 April 2017, failed to consider the consequences of this for findings in respect of the parties' cases (paragraph 95(b)); and that Mendonça JA, having accepted the same findings of the judge, was wrong to isolate the judge's consideration of the evidence of the Respondent's husband and her WhatsApp messages (paragraph 98(c)).

53. But again these criticisms are unfounded because, for the reasons above, the Court of Appeal was bound to review the Judge's central findings on the questions of authority, and of whether the Respondent resigned because of pressure to do so, given his complete failure to take into account evidence of central importance on the issue; and the Court of Appeal carefully and properly explained its reasons for doing so.

54. Further, the Court of Appeal did consider how the Judge's undisturbed findings, largely accepting the Chief Justice's account of his meeting with the Respondent, were to be reconciled with its finding that the Respondent resigned because of a threat made to her. Mendonça JA, having made the latter finding (paragraphs 48 [**EB805**] and 51 [**EB806**]) and having accepted the judge's former finding (paragraph 52 [**EB806**]), also directly raised the question whether the two could be reconciled (paragraph 55 [**EB807**]). He then carefully considered what decisions

the JLSC made and the effect of what the Respondent was then told (paragraphs 56 to 69 [**EB807-814**]).

Failure to have proper regard to events before 27 April 2017

55. The JLSC has submitted that both Bereaux JA and Mendonça JA failed to have proper regard to the context of events in the days before 27 April 2017 and the judge's assessment of this context.

56. It is difficult to respond to this criticism without knowing what conclusions, on the JLSC's case, are to be drawn from the context, and why this either supports the Judge's findings or undermines those of the Court of Appeal. But anyway, all that the context does is to explain why the JLSC made the decisions it did: it does not show that it used lawful constitutional means to achieve its desired result.

57. Further, the Court of Appeal did have regard to the point that it might be said that the Respondent had responsibility for the problems caused by her part-heard matters. Mendonça JA expressly referred to this at his paragraph 87 [**EB821**]: *"One may take the view that the entire part-heard issue is largely of the Appellant's creation and because of that the Appellant might not be regarded in too sympathetic a light. Be that as it may …"*.

58. Finally, insofar as it is being suggested that the events leading up to the 27 April 2017 might explain why the Respondent resigned (rather than because of pressure exerted on that day) this line of argument runs into the same objection: it is contradicted by all the WhatsApp and other evidence discussed above. Further, the question whether she resigned from embarrassment was specifically considered by the Court of Appeal. Thus, Mendonça JA at his paragraph 49 expressly considered the Judge's conclusion that the Respondent understood *"she erred and wished to make amends"* against the evidence of her contemporaneous statements and behaviour; but he concluded, in paragraph 50, that *"it is more probable that her resignation was not voluntary and not driven by a sense of embarrassment as the Trial Judge held"* [**EB805**]. As said above, there was nothing in particular that sensibly led to any other conclusion.

Whether the Respondent's acts were capable of amounting to misbehaviour under s.137

Were the views of Bereaux JA and Yorke-Soo Hon JA on this material to their decision?

59. The JLSC has submitted that Bereaux JA and Yorke-Soo Hon JA erred in deciding that the information before the JLSC about the Respondent's conduct did not amount to a case of "misbehaviour" for the purposes of s.137 and did not meet the threshold for proceedings under that section.

60. However, whether or not these views were correct, they were not material to Bereaux JA's and Yorke-Soo Hon JA's decisions, and they are not material to the outcome of this appeal. On the contrary, it is clear both from their judgments, and from Mendonca JA (who made no finding on the point) that the Court's decision applied whether or not the threshold for s.137 proceedings had been met. Thus, for instance, all that Bereaux JA said at paragraph 160 [**EB875**] was that the absence of good reason to institute disciplinary action made the JLSC's breach of s.137 "more egregious", not that this constituted the breach in the first place. Further, that the finding was not central to his decision is shown by the fact that he decided against awarding vindicatory damages [**EB893**]. And it is shown too by his remarks at paragraphs 184 and 185 [**EB894**], that the question for the Court is the JLSC's fidelity to the Constitution, once the Respondent's conduct had come under question.

The charges the JLSC is now making in its written case

61. Further, and so far as material, the charges now articulated by the JLSC against the Respondent have developed somewhat from those recorded in its minute of 27 April 2017. The minute [**EB1694**] records that the Chief Justice told the meeting that on 10 April 2017, at his request, the Respondent had provided him with a report of her outstanding matters, listing twenty-three[32] such matters; and that the subsequent audit revealed that there were fifty-three such matters, not twenty-three. The minute then records the concerns expressed by the JLSC arising from this information, and

[32] A mistake: the number was 28

in particular whether the Respondent *"had misled the Chief Justice and the [JLSC] with respect to the number of outstanding matters"* [**EB1695**]. In other words, the concern was that the Respondent had misled them by reporting that she had just twenty-three outstanding matters; as she had said in her report on 10 April 2017, the day before she was sworn in.

62. It is true that the Chief Justice expanded upon these reasons in his evidence given on 20 June 2018 (see paragraphs 12 to 14 [**EB1536**]) but the Court of Appeal was entitled to look primarily to the JLSC's contemporaneous recorded reasons for acting as it did. (And retired Justice of Appeal Stollmeyer for his part recalled the problem as being simply the difference between 28 and 53 part heard matters: paragraphs 8 and 9 [**EB1582**].)

63. The JLSC now puts its accusations in more prejudicial terms. It begins its written case (paragraph 4) by recounting five occasions on which, it says, the Respondent failed to disclose the true extent, number and complexity of her part heard matters (including in the meetings on 25 and 26 April 2017 when the longer list of 53 matters was discussed). And at paragraph 101 of its case it says that she gave a *"repeatedly inaccurate account of her part heards to the Chief Justice and the public"* and avers that this did in fact cross the threshold of misbehaviour within the meaning of s.137.

64. These accusations go beyond what was put below, and in any event they are immaterial to the outcome of this appeal, because whether they are justified or not is not a matter on which the Judge made (or could properly make) any findings, and they make no difference to the question whether the JLSC procured the Respondent's resignation by unlawful means.

Should the Court of Appeal have set aside the judge's findings on natural justice?

65. At paragraph 95(h) the JLSC has submitted that Bereaux JA erroneously set aside the judge's finding that the Respondent was heard and the JLSC afforded her natural justice.

66. This is a reference to Bereaux JA's statement at paragraph 161 of his judgment [**EB875**] in the context of his discussion whether the threshold for proceedings under s.137 threshold had been met. Bereaux JA referred to the judgment of the Board in Rees v Crane and held that any decision that the Respondent's conduct crossed the s.137 threshold should not have been arrived at without hearing from the Respondent; and he found that she was not given that opportunity.

67. But again the point is unfounded and anyway it does not go to the central points in the appeal.

68. The Judge's approach to natural justice was three-fold.

(1) First, he found that no final decision had been taken to invoke the s.137 procedure, and that what the JLSC had meant by saying that it would *"consider"* doing so if the Respondent refused to resign was that it would make a further investigation, which would include giving the Respondent an opportunity to make representations (paragraphs 326-7 [**EB516-7**]).

(2) Second, he found that the JLSC, by pursuing a solution short of s.137 without any coercion of the Respondent, had acted in pursuance of the requirements of fairness and natural justice (paragraph 328 [**EB517**]).

(3) Third, he found that the Chief Justice's discussions with the Respondent concerning her part-heard matters had in fact given her the opportunity to explain the discrepancies between the full list of matters and her earlier oral and written accounts and answer the allegations levelled at her by the public, the legal fraternity and then the Chief Justice (paragraphs 330 to 337 [**EB518-522**]).

69. It is not necessary, for the central issues in this appeal, to resolve the differences between these approaches. However, the Respondent submits that, to the extent they are in conflict, Bereaux JA was right and the judge wrong, and that there was a lack of natural justice in the way the JLSC decided that the threshold for disciplinary proceedings had been met.

(1) All that the Respondent's meetings with the Chief Justice before 27 April 2017 afforded her was some opportunity, at short notice, to address her part heard matters; and, on 26 April 2017, to address discrepancies between the final list and her earlier statements (as said, she was not told that there were 53 part-

heards until 25 April). But the relevant opportunity to be heard in relation to s.137 is whether there are sufficient grounds to allege conduct which would justify the invocation of disciplinary proceedings under it. That means an opportunity to be heard by the JLSC, not the Chief Justice, after being told what the charges were (in particular what level of fault was being placed at her door), with a fair opportunity to consider them before responding. But she was not so informed or heard by the JLSC. So Bereaux JA was right to say that she was not afforded the relevant opportunity to be heard.

(2) Further, although the Judge found that the Respondent would probably have an opportunity to be heard before a final decision was made by the JLSC, that opportunity, on the evidence of the Chief Justice which he recited at his paragraph 252 [**EB490**] would have been of little materiality given that (a) the JLSC expressly found that *"the threshold for disciplinary enquiry"* had been triggered and met and (b) the JLSC authorised the Chief Justice to tell this to the Respondent in order to persuade her to resign. Further, as Bereaux JA held at paragraph 159 [**EB873-4**], by pressuring the Respondent into resignation by a threat, the JLSC deprived the Respondent of that opportunity.

(3) Further and in any event, the whole process was unfair because the Chief Justice pressed the Respondent into making false statements in which she accepted the blame and absolved the JLSC of responsibility: see Bereaux JA paragraph 181 (iii) [**EB890**].

The JLSC's other criticisms of Bereaux JA

70. At paragraph 95(e) the JLSC's case criticises Bereaux JA for accusing the Chief Justice of *"downplaying the Appellant's determination that no final decision had been taken to invoke section 137"*. But what Bereaux JA said (paragraph 152 [**EB869**]) was that the Chief Justice did not deny that a threat was issued (as was indeed the case), but that he had sought to downplay its force by saying that no final decision had been taken to invoke s.137. Further, this was simply part of Bereaux JA's analysis, which is obviously correct, that the fact that no final decision was made did not mean that the threat was not made or that it was any less real.

71. At paragraph 95(f) the JLSC's case criticises Bereaux JA on the basis that he erroneously construed s.137 and found without basis that the Chief Justice could in law have the difficult conversation with the judge only without the involvement of the JLSC. This is a reference to Bereaux JA's remarks (at paragraphs 154 to 155 [**EB871-2**]**)** about the limits on the kinds of administrative action a Chief Justice can take, as envisaged by the dicta of Lord Slynn in Rees v Crane at 193B. But Bereaux JA's remarks were obiter, as they addressed the possibility of a different factual situation to the present case, and so they are immaterial to this appeal. And in any event, there is no reason for saying that Bereaux JA was wrong on this point.

Ostensible authority

72. The JLSC's case does not identify any error made by Bereaux JA in addressing the question of the Chief Justice's ostensible authority to communicate the whole of the JLSC's position to the Respondent on 27 April 2017, but contends that the Court of Appeal erred on this issue (paragraph 102(c)).

73. For the reasons given above, the Chief Justice clearly had actual authority. But that said, insofar as it may be relevant, the Respondent respectfully agrees with and adopts the reasoning of Bereaux JA on ostensible authority at paragraphs 168 to 175 [**EB881-886**]. She adds that this could also be analysed as a case of vicarious liability, because by assigning to the Chief Justice the responsibility of making an oral communication, rather than, as would normally be the case, of making it itself in a formal written communication, it created a risk that he would go outside his authority (if there was a limit on it) without the Respondent being in a position to realise this. (Cf *Cox v. Ministry of Justice* [2016] AC 660.)

Could the JLSC have resolved the matter by re-appointing the Respondent a Magistrate?

74. Finally, it is respectfully submitted that, had the JLSC given proper consideration to the matter, it could simply have appointed the Respondent to act as a Magistrate while remaining a Judge of the High Court and solved the part heard problems without having to appoint another person to finish them. As at 27 April 2017 the JLSC was uncertain as to whether the Respondent's promotion to the High Court

bench meant that she was to be taken as having resigned as a Magistrate [**EB1695**], but it did not consider the alternative of simply re-appointing if this was its effect.

75. S.111(1) of the Constitution empowers the JLSC to appoint persons to hold "*or act in"* the offices to which s.111 applies (i.e. such offices as may be prescribed by virtue of s.111(4)). S.3(2) of the Judicial and Legal Service Act and the Second Schedule to that Act provide that the offices to which s.111 applies include the offices of Magistrate, Senior Magistrate, Chief Magistrate and Deputy Chief Magistrate. Further, s.3B of the Summary Courts Act empowers the JLSC, on the recommendation of the Chief Justice, to appoint Magistrates to hold office on contract. In other words, the JLSC has the power to appoint people to make temporary appointments to the office of Magistrate.

76. Further, there is no prohibition against appointing High Court judges either in the relevant statutes or the Constitution. The only prohibition which applies to judges of the High Court in the Constitution is that they are prevented from sitting in Parliament: hence s.136(4) provides that a judge must vacate office if appointed a Senator or nominated for election to the House of Representatives. Further, there is no prohibition in the Summary Courts Act or any other statute that prevents a High Court from acting temporarily as a magistrate: the only prohibition on other offices or activities to which a magistrate is subject that they must not engage in various political activities (s.9 of that Act).

77. Accordingly, there being no express prohibition against a judge of the High Court being appointed to act as a Magistrate, there was no reason why the JLSC could not have made a temporary appointment of the Respondent to resolve the problem. See, in this context the judgment of the Court of Appeal in Sookar v AG CV2010-04777 at [36].

78. Further, as the Respondent said in her evidence, there was a related factual precedent. Master Quamina, after being appointed a Master of the High Court by the JLSC, acted as a Magistrate to complete part-heard matters while remaining a Master (end of sub-paragraph 2(c) [**EB1777**]); and in oral evidence the Chief Justice accepted that there had been such cases ([**EB1061**] line 47 to [**EB1062**] line 10).

79. Had the JLSC not acted in haste, it could have alighted upon this solution. Further, as Bereaux JA said at paragraph 159, the s.137 procedure would have afforded the Respondent the protection of putting forward a defence or an explanation; and in her defence she could have put forward suggested solutions to the imbroglio created by her promotion [**EB873-4**].

Conclusion

80. For all the reasons given above, the Respondent submits that the Court of Appeal was right to overrule the judge in respect of the critical decisions set out above, and to make the findings that it did; and further, that the JLSC has identified no good reason to interfere with the decisions of the Court of Appeal. Accordingly, she respectfully asks the Board to dismiss the JLSC's appeal.

PETER KNOX KC
RAMESH L MAHARAJ SC
RONNIE BISSESSAR SC
ROBERT STRANG
VARIN GOPAUL-GOSINE

21 October 2024