REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P 200 of 2014

BETWEEN

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Appellant

AND

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Respondent

PANEL: **P. Jamadar J.A.**
N. Bereaux J.A.
R. Narine J.A.

APPEARANCES:

Mr. R. Martineau, S.C., Mr. K. Ramkissoon and Mr. S. Sharma for the Appellant.

Mr. G. Peterson, S.C. and Mr. Kingsley Walesby for the Respondent.

DATE DELIVERED: 28th October, 2016.

Delivered by P. Jamadar, J.A.

Introduction

1. The most challenging cases are often those in which two or more competing and legitimate jurisprudential values are in tension with each other. Determining which one prevails in any given situation, as one interprets and applies the law, is influenced in part by context, circumstances and also ideology. This case is such a case.

2. I have had the benefit of reading the draft judgments of both Bereaux and Narine JJA, who agree on several points, but in the end disagree on the final outcome. Bereaux JA, in agreement with the trial judge, has concluded that based on the section 35 of the Freedom of Information Act (FOIA) public interest override,[1] access to the information sought (with certain reservations) should be ordered. Narine JA is of the contrary opinion.

3. I agree with the trial judge and Bereaux JA, that based on the section 35 public interest override, in the particular circumstances of this case, the trial judge's declaration and orders for disclosure should be upheld. In my opinion the respondent is entitled to the information requested in the Freedom of Information Application dated the 20th April, 2012; including both the instructions and advice sought as ordered by the trial judge, and redacted further only to remove the identities of and other personal information about the authors of these documents. I would therefore order that the information sought, as redacted above, is to be provided within seven (7) days of this court's judgment.

4. The background facts and issues are comprehensively set out in the trial judge's judgment,[2] as well as in the judgments of both Bereaux and Narine JJA. I see no need to repeat them in this judgment. In summary, this case involves a demand by the respondent for the disclosure of instructions and legal advice, in relation to the appellant's decision to bypass the Central Tenders Board with respect to public tenders for the development of valuable State lands in Trinidad.

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[1] See: **Caribbean Information Access Ltd. v Minister of National Security**, Civ. App. No. 170 of 2008, at paragraphs 38, 47 and 48; and **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 17.

[2] See paragraphs 3 – 16.

Issues

5. The issues before this court have also been clearly identified in the judgment of Narine JA[3] and I adopt them as follows:

> "The issues that fall to be determined in this appeal are as follows:
>
> (i) Whether the Minister is entitled to rely on the additional reason provided in his letter of 4th December 2012, which raised legal professional privilege for the first time (as a basis for non-disclosure of the information sought by the respondent).
>
> (ii) Whether legal professional privilege applies to the information requested by the JCC.
>
> (iii) Whether parliamentary privilege attaches to the Minister's statement made in the Senate on 28th February 2012.
>
> (iv) Whether the JCC is entitled to rely on the Minister's letter dated 1st March 2012 as evidence of waiver of legal professional privilege.
>
> (v) Whether the Minister waived legal professional privilege by making the statement in the Senate on 28th February 2012 and/or by his letter dated 1st March 2012.
>
> (vi) Whether the judge was correct in finding that the requested information should be released in the public interest under section 35 of the Act."

The First Issue

6. On the first issue, whether the appellant can rely on the additional reason of legal professional privilege as a basis for not disclosing the information sought, I am in agreement with both Bereaux and Narine JJA, and with the trial judge, that such reliance is permissible in this case.

7. In **Ashford Sankar v Public Service Commission,**[4] this court declined to permit the introduction of new reasons for the refusal to disclose information, where those reasons were

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[3] At paragraph 19 of his judgment.
[4] Civ. App. No. 58 of 2007.

unsupported by any evidence and were raised for the first time in written and oral submissions at the hearing before the trial judge.

8. In that context and in those circumstances, this court stated as follows:[5]

> *"22. It seems to me that having regard to the object of the Act as expressed in section 3 and the obvious bias in favour of providing access to information, there is an onus on a public authority which is refusing access to a document on the ground of public interest to comply strictly with the requirements of sections 23 and 27(3). The respondent failed to comply with the clear provisions of the Act to provide proper reasons for its refusal, so as to enable the appellant to make an informed decision as to whether or not he would challenge the refusal by way of judicial review. In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal."*

9. Narine JA has explained in his judgment in this appeal,[6] that the court's opinion in **Sankar's** case is to be understood contextually:

> *"In expressing its reluctance to permit public bodies to supplement inadequate reasons for refusal to provide information, the court was not laying down a principle that would apply in all cases. Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will*

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[5] See the judgment of Narine JA, at paragraphs 22 – 25, and in particular at paragraph 22 **(Sankar v PSC).**
[6] At paragraph 31.

hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal. In such a case, the applicant may not be entitled to the information requested but may be compensated for unnecessary legal costs he has incurred."

10. As I have already indicated, both Bereaux and Narine JJA agree that in this matter permission was properly given to the appellant to rely on a 'new reason' for the non-disclosure (based on exemption) of the information sought; to wit, refusal under section 29(1) of the FOIA on the basis of legal professional privilege.

11. In my opinion, the following principles set out in **Sankar's** case on this issue remain valid:

(a) There is a statutory onus and duty on a public authority which is refusing access to information to strictly comply with the requirements of sections 15 and 23 of the FOIA. In this regard, the mandatory obligation denoted by the use of the word 'shall' in section 23(1) is significant. This is so, even if the consequence of non-compliance is not to deprive a public authority of relying on 'new reasons'. The statute therefore creates a positive obligation to state reasons for a decision to deny access and to do so within thirty days after the day on which the request is made. It is also important to note the positive obligation on the public authority, where it has decided to deny access to information requested, to inform an applicant of his/her right to apply for judicial review (or to complain to the Ombudsman)[7].

(b) In the context of these statutory obligations and from a pragmatic point of view, it may be unjust and could be contrary to the principles of fundamental fairness once court proceedings have commenced, to permit a public authority to provide 'new reasons' as and when they see fit and/or 'as of right' and without any form of explanation. Such permissiveness may not only be unfair, but could also serve

[7] See section 23(1) (d) and (e) of the FOIA.

to undermine the intentions and purposes of specific provisions of the FOIA and the statutory regime and time limits set out therein.

(c) Courts exercise a responsible duty to supervise and to allow or disallow reliance on 'new reasons', in the legitimate exercise of a court's judicial discretion in applying both procedural and substantive law, when such reliance is sought outside of a specific statutory regime and time table. This is certainly so once formal court proceedings have begun, in which event the court's permission must be sought (generally on an application setting out reasons and supported by evidence).

12. Thus, while I agree with Bereaux JA that there is nothing in the FOIA that specifically prohibits reliance on a reason not stated in the section 23 notice; I also note that the very FOIA prescribes the positive obligation to provide reasons within a particular time limit.[8]

13. This court in the **Caribbean Information Access Ltd.** case explained:[9]

"The FOIA has provided a statutory right to information from public authorities subject to exceptions and exemptions. It is always for the public authority to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested. The exemptions provided for in section 28 are quite specific and limited. Thus, given the statutory right to access; the duty to assist in facilitating disclosure; the mandate to disclose even exempt documents where on a balance it is in the public interest to do so; the mandate to redact exempt documents in order to render them non-exempt so to facilitate disclosure; and the duty to interpret and apply the provisions of the FOIA (including the exemption provisions) in such a way so as to 'facilitate and promote ... the disclosure of information"; there is no presumption in favour of exemption from disclosure of or access to documents held by public authorities."

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[8] See sections 19(2), 21(7) and 23, of the FOIA; and see **Caribbean Information Access Ltd. v Minister of National Security,** Civ. App. No. 170 of 2008, at paragraphs 8 – 10 and 17 – 19.
[9] At paragraph 27.

14. In my opinion therefore, a public authority is not prohibited from relying on 'new reasons', but to do so the authority must satisfy a court, in the exercise of its judicial discretion, that to grant permission will enable the court to deal with the matter justly (and all that that concept incorporates in the current jurisprudence of Trinidad and Tobago). To hold otherwise would be to practically render otiose the purposes intended by sections 15 and 23(1) (a),(d) and (e) of the FOIA.

The Second Issue

15. On the second issue, whether legal professional privilege applies to the information requested (section 29(1) of the FOIA), I am in agreement with Narine JA that prima facie and technically it does apply in relation to both the instructions given and the advice received.[10] I therefore also agree that the real issue on this point is whether there has been waiver of the legal professional privilege by reason of either the Minister's statement in the Senate on the 28th February, 2012, or his letter to the respondent of the 1st March, 2012 (the next day).

The Third, Fourth and Fifth Issues

16. In relation therefore to the third, fourth and fifth issues, I state as follows:

(i) I adopt the general discussions by both Bereaux and Narine JJA on parliamentary privilege and its prima facie application in the particular circumstances of this case to the statement made by the Minister in the Senate on the 28th February, 2012.

(ii) However, like Bereaux JA, I specifically reserve my position on whether the British approach has unequivocal application in Trinidad and Tobago. In Trinidad and Tobago the Constitution is the supreme law (this is declared specifically to be so by section 2 of the 1976 Republican Constitution).[11] It is the Constitution which creates the State of Trinidad and Tobago, that defines its architecture, and embodies the core principles and values that "the People" have

[10] See paragraphs 33 – 38 of the judgment of Narine JA.

[11] Section 2 of the Constitution states: "This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

affirmed and agreed to be governed by – and to which they have purportedly given their consent. The Constitution as foundational text, is not 'just' another law, it is the People's ultimate law. It is therefore the People who have assented to the content of the Constitution and declared it to be supreme.[12]

(iii) Thus, in Trinidad and Tobago the Constitution and not Parliament (as in the UK) is supreme. In so far as section 55 of the Constitution incorporates the British notions of Parliamentary freedom of speech and the protection and privileges associated with it, that may be self-evident. What is less so, is the effect of section 5 of the Constitution on the applicability of section 55.[13]

(iv) It would appear that the only constitutionally permissible exceptions to the prohibition against infringements of the sections 4 and 5 enshrined fundamental rights and freedoms, are those provided for in Chapter 1 of the Constitution itself (which contains the statement of rights and freedoms) and in section 54 of the Constitution (which prescribes how alterations to the Constitution can be made). To be specific, section 55 of the Constitution seemingly enjoys no such prima facie excepted status in the context of the application of the fundamental rights and freedoms (though section 4(i) makes freedom of thought and expression a fundamental right). This therefore begs the question, can parliamentary privilege, per se, be invoked, where what is at stake are alleged breaches of the fundamental rights and freedoms of the citizen? It is not hard to imagine interesting constitutional questions that can arise around say, the section 4(b) and 4(c) fundamental rights in relation to possible statements made in Parliament.[14]

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[12] See the Preamble – "Whereas the People of Trinidad and Tobago – (c) have affirmed … (b) respect … (c) have asserted … (d) recognize … (e) desire … Now therefore the following provisions shall have effect as the Constitution of the Republic of Trinidad and Tobago."

[13] Section 5(1) states as follows: "Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared."

[14] For those who live here, it does not take a fertile imagination to conjure up situations that can give rise to these issues.

(v) On the issue of implied waiver of legal professional privilege, I also adopt the discussion of this issue by Narine JA, and in particular his consideration of the Australian cases[15] of **Mann**,[16] **Osland**,[17] and **British American Tobacco**.[18] In short, the relevant test is whether, in all the circumstances and in the context of the conduct of the person claiming the privilege, it can be said that the behaviour of the person relying on the privilege is inconsistent with the maintenance of the privilege.

(vi) The test for implied waiver of legal professional privilege is an objective one, to be judged on the standard of reasonableness and probability. Referred to as the 'Inconsistency Test', it focuses on "whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect" – **Mann**, at paragraph 29. "What brings about the waiver is the inconsistency, which the courts where necessary informed by considerations of fairness, perceive between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large." – **Mann**, at paragraph 29.

(vii) Disclosure of the gist or conclusion of the legal advice does not necessarily effect a waiver – **Osland**, at paragraph 44. As before, it all depends on the particular circumstances and whether the requisite inconsistency exists between the disclosure (conduct) by the person seeking to rely on the privilege and the maintenance of confidentiality.

17. I am therefore in agreement with Narine and Bereaux JJA, that:

(i) Legal professional privilege prima facie applies to the instructions given and advice received which are the subject matter of this case.

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[15] See paragraphs 39 – 42 of the judgment.
[16] **Mann v Carnell** (1999) 201 CLR 1.
[17] **Osland v Secretary to the Department of Justice** (2008) 234 CLR 275.
[18] **British American Tobacco v Secretary of Health and Ageing** [2011] FCAFC 107.

(ii) Section 29(1) of the FOIA deems those instructions and that advice exempt documents.

(iii) The statement of the Minister in the Senate on the 28th February, 2012, disclosing the gist of the advice is protected by parliamentary privilege.

(iv) The disclosure of the gist of the advice, both in the Senate on the 28th February, 2012 and by letter to the respondent on the 1st March, 2012, does not constitute a waiver of legal professional privilege; as there is no sufficient inconsistency between either the content or circumstances of that disclosure and the maintenance of the confidentiality protected by the privilege. No considerations of fairness related to the disclosure of the gist of the advice, in the circumstances of this case, justify a consequence of waiver of the legal professional privilege enjoyed by the Minister (on an application of the ordinary principles).

(v) In the Senate, the Minister was simply discharging his Parliamentary duty to answer a question posed to him by a member of that Chamber. In the letter, the Minister was replying to a specific and formal request by the respondent in terms consistent with the limited disclosure given in the Senate. There is no evidence therefore of any obvious unfair advantage sought or gained by the Minister by reason of his limited disclosures.

The Sixth Issue

18. On the sixth and final issue, whether the instructions and advice should be disclosed pursuant to section 35 of the FOIA – the public interest override provision, I am in agreement with Bereaux JA and the trial judge that they should be.

19. Section 35 of the FOIA[19] has been interpreted by this court as follows:[20]

"It is to be noted that section 35 mandates the public authority to consider and override any initial assessment of and claim to exemption, where, any of the first four conditions in section 35 exist and/or where "in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from so doing"."

20. Once exemption is claimed by a public authority, the section 35 public interest override assessment and analysis must be undertaken by a public authority. Thus, following any claim in this case to exemption from disclosure pursuant to section 29(1) of the FOIA, the appellant was obliged to carry out the section 35 evaluation in the context of the exemption claimed, before deciding to deny access to the information sought. Furthermore, the gravamen of this evaluation also had to be disclosed in the appellant's reasons (in writing) for denying access to the information sought by the respondent.[21]

21. The justification for this public interest evaluation and override, even where documents are considered exempt, has both specific and general statutory underpinnings, as well as a constitutional warrant.

Statutory Underpinnings

22. The specific statutory underpinning is clearly section 35 of the FOIA. However, section 35 itself exists contextually within the FOIA. Section 3 of the FOIA establishes as the objective of the legislation, "the right of members of the public to access to information in the possession

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[19] Section 35 of the FOIA states: "Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—

(a) abuse of authority or neglect in the performance of official duty; or
(b) injustice to an individual; or
(c) danger to the health or safety of an individual or of the public; or
(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

[20] See **Caribbean Information Access Ltd. v Minister of National Security**, Civ. App. No. 170 of 2008, at paragraph 38.

[21] See **Caribbean Information Access Ltd. v Minister of National Security,** Civ. App. No. 170 of 2008, at paragraphs 47 and 48.

of public authorities …". Section 3(2) effectively gives rise to a general presumption in favour of disclosure. There is therefore to be 'freedom of information'. This objective of a presumptive general right to information, is to be "limited only by exemptions and exemptions necessary for the protection of essential public interests …".[22]

23. Section 3(1)(b) of the FOIA thus assists in the interpretation of section 35, by further qualifying the mandate that "… a public authority shall give access to an exempt document where … in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so." That is to say, the denial of justification in the public interest must be 'necessary for the protection of essential public interests'. Thus, denial of the section 35 public interest override, in cases of exempt documents, is only justified where to do so is necessary for the protection of essential public interests having regard to both the benefit and damage that may arise from granting access. The word 'essential' qualifies both the type of public interests and the degree of circumstances that justify denial of the section 35 override.

24. Moving beyond section 3 of the FOIA, it is quite clear that the FOIA was intended to be binding on the State.[23] Moreover, and so as to reinforce the general statement of the objective of the FOIA stated in section 3, section 11 is unequivocal, when it states:

> *"(1) Notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document.*
>
> *(2) Nothing in this Act shall prevent a public authority from—*
>
> *(a) giving access to documents or information;*
>
> *(b) amending documents,*
>
> *other than as required by this Act where it has the discretion to do so or where it is required to do so by any written law or order of a Court."*

[22] See section 3(1)(b) of the FOIA.
[23] See section 6 of the FOIA.

25. Indeed, section 14 of the FOIA creates a duty on public authorities to assist applicants to get the information that they seek. This duty of assistance is facilitative, and finds further expression in the obligation to deal with applications "as soon as practicable",[24] and where a decision is made to deny access to information sought, in the further obligation to give written reasons explaining why this is so and informing an applicant of his/her right to approach either the courts or the Ombudsman to seek further redress.[25]

26. These five principles, the general right to information, the general presumption in favour of disclosure, the duty to facilitate access to information, the obligation to explain in writing why a decision to deny access has been taken (and to do so promptly), and the obligation to inform an applicant of his/her rights to redress that are available, are all part of the context in which the evaluative and balancing exercise mandated by section 35 is to be carried out.

27. Thus one would reasonably expect, that if a public authority has decided that a document is exempt and that it should not disclose the document even after having carried out the section 35 public interest override evaluation, that in its written reasons it would detail the following: (i) the reasons for claiming exemption (and in the cases where section 35 (a) to (d) would apply, that there is no reasonable evidence of the four stated factors having occurred or having been likely to have occurred); (ii) and most importantly, why denying access is necessary for the protection of essential public interests, including the factors it considered in relation to both benefit and damage that may arise from granting access to the information sought.

28. When one fully appreciates the breadth and depth of both the duties and obligations on public authorities under the FOIA, it also becomes apparent that, even though there is no positive prohibition against the introduction of 'new reasons' to justify denial of information sought, such permissiveness runs contrary to the entire thrust of the legislative scheme and prima facie undermines its objectives and intentions. Disclosure of information is what the FOIA is all about. Significantly, the process that the legislation sets out for denying access is also premised on full and frank disclosure.

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[24] See section 15 of the FOIA.
[25] See section 23 of the FOIA.

Constitutional Warrant: Active Participation in Public Affairs

29. There is an addition to all of the above, an underpinning constitutional value that is facilitative of the FOIA generally, and specifically of the general right to information from public authorities.

30. This court in **John Reginald Phelps Dumas v Attorney General**[26] stated as follows:[27]

> *"In a modern, democratic society founded on the ideology of participatory democracy, such as Trinidad and Tobago, every citizen has a legitimate interest in the upholding of the Constitution and the rule of law. The courts as guardians of the Constitution, have the duty and responsibility to ensure that the Constitution and the rule of law are upheld."*

This value of participatory democracy is embodied and enshrined as a constitutional value pursuant to clause (c) of the Preamble to the Constitution, which provides: "Whereas the People of Trinidad and Tobago – (c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institution of the national life and thus develop and maintain due respect for lawfully constituted authority".

31. In **Dumas**[28] this court explained the value of participatory democracy further, as follows (albeit in a different context):

> *"116. The Preamble to the 1976 Republican Constitution indicates that the type of democracy that the Constitution creates, includes clear elements of civic republicanism, in which there is both an encouragement and expectation of citizens' participation in the democratic process. In this sense, the encouragement of citizens' participation in the democratic process, is a part of the Trinidad and Tobago constitutional ethic and value system that must inform a court's approach to issues of standing in non-Bill of Rights constitutional review actions. Such a constitutional*

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[26] Civ. App. No. P 218 of 2014.
[27] Civ. App. No. P 218 of 2014, at paragraph 103,
[28] Civ. App. No. P 218 of 2014, at paragraphs 116 and 117.

ethic does not rely entirely on public interest litigation being pursued by the State and its organs – usually through the Attorney General. Rather, it recognizes, both for theoretical and pragmatic reasons, that it is the right and even the duty of citizens to get involved in appropriate cases in such public interest litigation.

117. Indeed, the 1976 Republican Constitution of Trinidad and Tobago has as an underpinning ethic, a participatory political ethos, in which the upholding and vindication of the rule of law form an integral part of the model of democratic governance."

Thus, far from being mere busybodies, citizens who have a bona fide and legitimate interest in public affairs have a constitutional warrant to get involved.

32. This reliance on the Preamble of the Constitution, raises an important question as to what uses or purposes can the Preamble of the Constitution of Trinidad and Tobago be put to? There is now a growing body of both case law and academic literature that confirms the actual use of the Preamble as an aid to interpretation and even as a source of law, and the legitimacy of such usage.[29]

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[29] Tracy Robinson, Senior Lecturer in the Faculty of Law, UWI, Jamaica, in an article entitled 'Our Inherent Constitution', states as follows in relation, inter alia, to the Preamble of the Trinidad and Tobago Republican Constitution:

> 'All Caribbean independence constitutions, except Jamaica, have preambles. They begin, 'we the people of …,' establishing the authorship of the constitutions. They express the moral and political aspirations of the political community. This includes affirmation of the principles of the rule of law, human dignity and the pre-eminence of individual freedom and human rights. Many also express a strong desire for social and economic equality and some mention regard for civil, political, social, economic and cultural rights. Caribbean judges have turned to the language of the preambles – 'Men and institutions only remain free when freedom is founded on the rule of law' – to confirm the rule of law as a constitutional value. Judges must uphold it and have regard to it in interpreting constitutional provisions, like the redress clause in the bill of rights, that express the rule of law's commitment to access to justice.
>
> The place of the preamble in constitutional interpretation is receiving growing attention by modern courts. Although not separately enforceable, increasingly courts are stressing that that they are not 'pure embellishment' or 'meaningless verbiage or empty rhetoric'. In Bowen v AG, Conteh CJ said that there was 'an indissoluble link, an umbilical cord, if you will, between the Preamble of the Constitutions and its dispositive provisions'; the preamble, he argued, 'animates' the constitutions. In Matthew v State the dissenting opinion, which is destined to gain more prominence and force, noted that while the preamble

33. In January, 2016, I noted in relation to a series of election petitions,[30] that:

"The Constitution is the supreme law and any other law inconsistent with it is void to the extent of the inconsistency (section 2, 1976 Constitution). Thus the general and governing interpretative principle is that constitutional values 'trump' all other legal values and all other laws must be read so as to conform to and be consistent with constitutional values. In Trinidad and Tobago two core constitutional values are: (i) the establishment of 'a democratic society' in which, inter alia, there is active participation in national life through which is developed and sustained 'due respect for lawfully constituted authority';[31] and (ii) 'freedom' founded upon 'moral and spiritual values and the rule of law'.[32]

By section 11(1) of the Interpretation Act, the preamble to a written law is a part thereof intended to help reveal meaning and purpose. These provisions in the Preamble to the Constitution are therefore integral to discovering agreed and operative constitutional values."

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could not override the clear words of the constitutions, courts could have regard to the preambles in interpreting the texts. It added that interpretations that conflicted with the preambles would be suspect.

De la Bastide CJ, as he then was, argued that the Trinidad and Tobago republican constitution was 'resilient and amorphous', capable of change in response to the needs of the people. He acknowledged that it would be difficult to figure out the appropriate direction in which to chart progress through constitutional interpretation, but said that if 'we bear in mind the right principles and we focus on the preamble our task can be made a little lighter.' Conteh CJ recently went a bit further, saying that the new preamble to the Belize Constitution was more than an aid to interpretation because 'it fills the text with meaning and gives the Constitution itself a shape and form reflecting the very essence, values and logic of the Belizean people.' The preamble of the republican constitution of Trinidad and Tobago and the reform Belize constitution are post-independence preambles crafted and approved in Caribbean lawmaking spheres. In a turn around, the Chief Justices in both territories relied on them to counter the traditional critique of Caribbean constitutions – that they are not really our own – treating the preambles as the best evidence of the values, desires and hopes of 'we the people.' [See, 'Transitions in Caribbean Law: Lawmaking Constitutionalism and the Confluence of National and International Law', Ian Randle, 2013, at 248.]

See also, 'The Preamble in Constitutional Interpretation', Liav Orgad, International Journal of Constitutional Law (2010) 8 (4), 714; 'The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians', Anne Twomey, Sydney Law School, Legal Studies Research Paper No. 14/30 (March 2014); and 'The Invisible Constitution', Laurence Tribe, Oxford University Press, 2008.

[30] See, **Returning Officers and Ors. v Mahabir and Ors.**, Civ. App. No. S 229 – 234, Jamadar JA, at paragraphs 28 and 29.

[31] Paragraph (c), Preamble, 1976 Constitution.

[32] Paragraph (d), Preamble, 1976 Constitution.

34. Indeed, the Caribbean Court of Justice, in a 2015 unanimous decision,[33] affirmed its earlier statements on the normative function of constitutional preambles, as follows:

> "[54] The preamble of a Constitution cannot be treated as mere surplusage. This court has recognised the normative functions served by the preamble in the Boyce decision with Wit JCCJ noting that, they 'fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general' and further that '[t]hese normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document'."[34]

35. Tracy Robinson and Arif Bulkan, two of the Caribbean's leading constitutional scholars,[35] in a forthcoming article,[36] have most recently stated in relation to preambles such as in Trinidad and Tobago: "Caribbean judges have insisted that constitutional preambles are not 'pure embellishment' and that they are a part of the wider context of the constitutions and should assist in determining the meaning of the constitutions, especially when difficult questions of interpretation arise."[37] And, Lawrence Tribe, Professor of Constitutional Law at Harvard University, writing in 2008 in relation to the American Constitution, explains that interpretations and applications must be chosen that are "... more consistent with the Constitution read in light of its preamble's overriding concern(s)."[38]

36. As this court has also already explained:[39] "By virtue of section 11(1) of the Interpretation Act, the Preamble is to be construed as a part of the Constitution and as an aid to explaining its meanings and purposes." Thus the Preamble of the Trinidad and Tobago Constitution is by way of specific statutory provision at the very least an 'interpretative

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[33] **Maya Leaders Alliance v A.G.** (2015) 87 WIR 178, 207.
[34] Citations refer to A.G. v Boyce (2006) 69 WIR 104, at paragraphs 18 and 19.
[35] Tracy Robinson is a Senior Lecture at the Faculty of Law, UWI, Mona Campus, Jamaica, and Arif Bulkan is also a Senior Lecturer at the Faculty of Law, UWI, St. Augustine Campus, Trinidad. Both have most recently co-authored, with Justice A. Saunders JCCJ, the constitutional text 'Fundamentals of Caribbean Constitutional Law', Sweet and Maxwell, 2015.
[36] 'Constitutional comparisons by a supranational court in flux: The Privy Council and Caribbean bills of rights', Modern Law Review, forthcoming 2017.
[37] Citing with approval Sharma JA, in **Boodram v AG** (1996) 47 WIR 459; and Wit JCCJ, in **AG v Joseph and Boyce**, CCJ Appeal No 2 of 2005.
[38] The Invisible Constitution, above, at page 167.
[39] **Dumas v Attorney General**, Civ. App. No. P 218 of 2014, at paragraph 45.

preamble'.[40] As such, the Preamble is a 'good means to find out the meaning of the statute' and 'the key to open understanding thereof.'[41] In Trinidad and Tobago therefore, given the detail and content of the 1976 Republican Constitution's Preamble and its clear and specific statements of the core principles and values upon which the Constitution and the State of Trinidad and Tobago are based, it embodies a guiding and authoritative framework for constitutional interpretation.[42]

37. However, beyond the interpretation of the Constitution itself, as the supreme law and where multiple interpretations and applications may exist in relation to all other legislation, a preference is to be exercised in favour of the options that accord best with the constitutional values and principles enshrined in both the Preamble and the formal text of the Constitution itself. Indeed, one may venture to say that the Constitution being the supreme law, courts may have a positive duty to promote the values and principles that are contained in the Preamble, which have been declared by 'the People' as underpinning both the Constitution and the establishment of the State of Trinidad and Tobago as a society governed by the rule of law (which is not necessarily to say that the Preamble constitutes an independent source of rights).[43] It is this ideological and values-laden consensual character of the Preamble, that confers its authoritative and interpretative function.

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[40] Liav Orgad usefully posits three types of constitutional preambles: (i) ceremonial – symbolic, (ii) interpretive, and (iii) substantive – 'The Preamble in Constitutional Interpretation', above.

[41] Edward Coke, Institutes of the Laws of England, 79 (1628).

[42] It may be that sooner than later we will escape from the colonial constitutional prisms and prisons of interpretation, that thus far seem to have shackled us to a past modality of constitutional jurisprudence that inhibits the full flourishing of 'the People's' aspirations and hopes embodied in their Preamble to the Constitution. Why is it, that the core principles and values articulated in the Preamble, such as, say, 'the dignity of the human person', and 'social justice', and 'participatory democracy', and 'the rule of law', should not constitute the axis around which the sections 4 and 5 enumerated rights, as well as all other laws, constitutional or otherwise, are seen as revolving and therefore to be interpreted in furtherance of their meanings? Can our Preamble, in the context of the Constitution of Trinidad and Tobago and not as some generic 'Westminster' constitution, be a source of substantive rights, at least in the way inquired about above?

[43] Note in this regard, section 5(1) of the Constitution Act, 1976, which gives the courts very wide powers to modify existing laws inconsistent with provisions of the Constitution other than sections 4 and 5 (which latter category of instances are saved notwithstanding any inconsistencies – see section 6(1) of the Constitution). And see: **Johnson v AG** [2009] UKPC 53, at paragraph 22; **Roodal v State of Trinidad and Tobago** [2005] 1 AC 328, at paragraph 87; and **DPP v Mollison** [2003] 2 AC 411, 427 – all of which speak to the powers and duty of a court to modify existing laws so as to bring them into alignment with the Constitution; and therefore query, into alignment with core constitutional values.

38. This focus on the Preamble is not without solid foundation. It is the Preamble of the Trinidad and Tobago 1976 Republican Constitution that establishes the basis for and the values inherent in the embodying text of the Constitution itself. It is in this light and in furtherance of these clearly articulated and quite detailed five preambular clauses that "... the People of Trinidad and Tobago ..." consent and agree to "the following provisions (having) effect as the Constitution of the Republic of Trinidad and Tobago".

39. In my opinion therefore, the core constitutional value of public participation in the 'institutions of the national life' so as to 'develop and maintain due respect for lawfully constituted authority' (stated at clause (c) of the Preamble), bolstered by the constitutional commitment to 'freedom ... founded on respect for ... the rule of law' (stated at clause (d) of the Preamble), is a legitimate constitutional lens through which the issues before this court should be viewed and analyzed.

Protection of Essential Public Interests?

40. Thus when one comes to the evaluative exercise demanded by section 35 of the FOIA, in so far as denial of access to information is justified, both a public authority (initially) and a court of review (subsequently) are obliged to carry out the required balancing exercise in the context of the above-stated statutory and constitutional framework and values. It is critical to note, that in the carrying out of this evaluative exercise it is for the public authority to demonstrate that denial of access is justified because it is necessary for the protection of essential public interests. As already explained, 'essential' qualifies both the type of public interests, as well as the degree of circumstances that justify denial of the section 35 public interest override mandate.

41. The relevant question on this issue therefore, is whether, on the available evidence and in all the circumstances, it is justifiable in the public interest to grant access to the instructions given and the legal advice received, having regard to both any benefit and to any damage that may arise from granting access (keeping in mind that any justification for denial of access must be necessary for the protection of essential public interests)?

42. Narine JA has helpfully summarized the appellant's and respondent's arguments on the benefits and damage that may arise from disclosure of the information sought.[44] There is no need for me to repeat those submissions here and I consequently adopt his summary of them.

43. In this case the appellant did not inform the respondent that the section 35 evaluation had been carried out, nor did the statutory reasons provided condescend to any particulars sufficient to justify refusal for the protection of essential public interests. In this regard it is important to reiterate that it is generally for the appellant (and not the respondent) to demonstrate the justification for denial of access, even in relation to prima facie exempt documents, once disclosure in the public interest is reasonably self-evident.

44. In this case, given the constitutional values of participatory democracy and of upholding the rule of law, it is prima facie in the public interest to disclose why the usual statutory regime for tendering pursuant to the Central Tenders Board should be by-passed in favour of a process under the sole control of a Ministry of Government, for the purpose of selecting land developers in relation to State lands. Indeed, the respondent considered this alternative process a 'matter of grave public concern', hence its request under the FOIA and the initiation of these proceedings.

45. No useful purpose will be served by a rehashing of the arguments, as Bereaux JA has ably demonstrated why access to the documents sought is in the public interest. I adopt his lengthy reasoning on this point.

46. I however wish to make a few further comments in support of granting access in the public interest. These are as follows:

(i) Decisions such as this one must also be made in the context of the historical and social circumstances that are peculiar to Trinidad and Tobago. In this regard, this court unanimously stated in **Ashford Sankar v Public Service Commission**:[45]

> *"As noted earlier in this judgment, the object of the Act is to make information freely accessible to the public with a view to*

[44] See paragraphs 72 – 75 of the judgment.
[45] Civ. App. No. 58 of 2007, at paragraph 34.

promoting transparency and accountability in the decision-making of public authorities. It is an important piece of legislation in a post-colonial society in which bureaucrats have historically been reluctant to expose their decisions to the glare of public scrutiny. Freedom of access to information is also important in a society that is politically polarized along ethnic lines, and in which appointment to public office, and decisions involving the allocation of state resources are often the subject of speculation and mistrust. Against this historical and social background, the right to access information from public authorities must be jealously guarded, and must not be allowed to be whittled down. Information requested must be provided unless refusal of access to information is expressly permitted by the Act, and the public authority provides adequate and intelligible reasons for refusal."

(ii) In so far as it has been advanced as a damaging effect, that the candour of law officers (to give advice) can be affected, and that somehow ordering disclosure in this case will cause a 'chilling effect', with the consequence that the government will not be able to receive full and frank advice from its law officers, I find those arguments both pessimistic and flawed.

First, in this case the instructions were given and the advice sought by the appellant Ministry from the Attorney General and the advice was received from the office of the Attorney General (and it seems also from the Legal Unit of the Ministry). This is therefore a case where one organ of the State sought the advice of its own internal legal unit and also the advice of the legal advisor to the State (the Attorney General). These were all public officers, discharging public functions in furtherance of the affairs of State.

I find it hard to accept that such public officers would somehow be inhibited to do their sworn public duty to give full and frank advice, because s/he believed that

somehow that advice may be disclosed to the general public. Public officers are expected to always be acting for the public good and to be independent and impartial in the advice they give.

It is surely a pessimistic person who thinks so lowly of local public officers, to suppose that they do not have the necessary integrity and courage to give the advice that they consider right, irrespective of whether it may be disclosed at some subsequent time.

Second, it is flawed, because as this court observed[46] in relation to a 'frankness and candour' argument advanced in relation to non-legal public servants, adopting the views of Lord Keith in **Burmah Oil Co. Ltd v Bank of England**:[47]

> *"The notion that every competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration ... that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so."*

This court[48] also agreed with the words of Lord Upjohn in **Conway v Rimmer**,[49] to wit:

> *"I cannot believe that any Minister or any high level ... civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject ... by the thought that his observations might one day see the light of day".*

All the more so, I say, with respect to legal officers in any Ministry in Trinidad and Tobago and certainly in relation to the Attorney General of Trinidad and Tobago. I reject out of hand the suggestion that any attorney general or lawyer in

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[46] **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 28.
[47] [1980] AC 1090 at 1133.
[48] **Ashford Sankar v Public Service Commission**, Civ. App. No. 58 of 2007, at paragraph 27.
[49] [1968] AC 910 at 994.

a public office in Trinidad and Tobago would be inhibited to give his or her full and frank advice, because it may at some time become public.

(iii) Positively, disclosure of both the instructions by and the advice to the appellant will advance the core constitutional values of participatory democracy, the involvement of persons in national life, protection of the rule of law, and will engender due respect for lawfully constituted authority.

It is positively in the public interest for the public to be satisfactorily informed why it is justifiable to circumvent the usual statutory regime for tenders in relation to State projects (the Central Tenders Board), in preference for ministerially controlled tenders. There has been no evidence that the disclosure of either the instructions or the advice, will somehow cause damage in any concrete way to any actual person(s) or projects, or will somehow endanger any particular national interests.

Disclosure can however erase the existing suspicion and mistrust in relation to the selected process of exclusive ministerial tendering, and so engender public trust and confidence in the adopted process.

If for some reason, disclosure results in the adopted process being demonstrated to be flawed or unacceptable, then there is obvious vindication of the rule of law. And, if the adopted process is accepted as legitimate, then the rule of law is also vindicated.

(iv) The value of legal professional privilege is not deleteriously undermined by disclosure in this case, because there has been no evidence to show an actual need to keep, or any benefit in keeping, either the instructions or advice secret – except for reliance on the philosophical policy considerations underpinning the principle.

Why should the State want to keep secret from the public the justification for not following the usual and statutorily prescribed process for tendering State projects? What is there that so essentially needs to be protected? This is not advice in relation to any particular person, transaction or event. It is advice in relation to the legitimacy of a generic process adopted by the State. One would imagine it is a matter of almost pure legal interpretation and advice. Certainly no evidence has been forthcoming to demonstrate otherwise.

Indeed, one wonders on an aside, why is it, if Parliament is representative of the People, and Government is for the People, that general advice in relation to the conduct of the affairs of the People should be privileged in relation to them? Who is really the 'client' in this client/lawyer relationship?

47. Like Bereaux JA, I am of the opinion that, in the circumstances of this case, the public interest, transparency and accountability benefits far outweigh any damage that may be caused to the principle of legal professional privilege by the disclosure of the documents sought. Having carried out the requisite balancing exercise, I can find no justifiable and sufficiently essential public interest considerations of type or degree to support non-disclosure of the documents sought. It is maybe worth reminding ourselves, that whereas freedom, transparency and accountability are the hallmarks of a participatory democracy, secrecy lies at the heart of dictatorships.

Conclusion

48. For all of these reasons I join with Bereaux JA in dismissing this appeal. I will therefore, like the trial judge, order disclosure of both the instructions and the advice, redacted as described by the trial judge and to also include the identities of and any other personal information about the authors of these documents. In my opinion disclosure of the instructions is essential contextually for an accurate interpretation of the advice given by the Attorney General and the legal officers in the Ministry. The parties will be heard on the issue of costs.

Peter Jamadar
Justice of Appeal