

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P 351 OF 2023

CLAIM NO.CV 2022-02672

BETWEEN

TERRISA DHORAY

Appellant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

AND

TRINIDAD AND TOBAGO REVENUE AUTHORITY

Interested Party

Panel:

N. Bereaux J.A.

C. Pemberton J.A.

M. Dean-Armorer J.A.

Date of Delivery: May 28, 2024

Appearances:

Mr. A. Ramlogan SC, Ms. J. Lutchmedial and Mr. K. Samlal instructed by Mr. V. Siewasaran and Ms. N. Bisram appeared on behalf of the Appellant

Mr. D. Mendes SC, Mr. S de la Bastide instructed by Ms. S. Dass and Ms. L. Thomas appeared on behalf of the Respondent

JUDGMENT

Delivered by Bereaux J.A.

1. I have read in draft the judgment of Dean-Armorer JA and I agree that the appeal should be dismissed. However, I wish to add a few words of my own if only to make clear that I find it unnecessary to lay down any definitive test of what amounts to a “core power.” The principal issue for determination in this appeal concerned the power of Parliament to establish the Trinidad and Tobago Revenue Authority (“TTRA”) by simple majority when it passed the **Trinidad and Tobago Revenue Authority Act** (“the TTRA Act”). Mr. Ramlogan has cast the appellant’s case as one where the protection offered to her as a public officer under the auspices of the Public Service Commission (by which she is insulated from political interference) is at risk with the imminent operationalization of the TTRA. The TTRA is an agency of the executive with the power to hire, discipline and remove its own employees save for those officers in the Enforcement Division who remain subject to the Public Service Commission.

2. The power to impose a tax is a legislative power wielded by simple majority. That power to impose a tax has not been devolved or transferred by the TTRA Act to an executive agency. It remains with the legislature. Thus, the core power of Parliament to impose a tax remains inviolate. The appellant’s case is that contrary to the finding of James J (“the judge”) taxation cannot be

compartmentalized into different categories such as imposition, assessment, enforcement for the purposes of the Constitution. In other words, taxation is an indivisible executive function. I agree with Dean-Armorer JA that the judge was correct in separating the enforcement function from the other elements of taxation.

3. The question then is whether the power to enforce a tax lawfully imposed by Parliament is a 'core power' (in the sense used by the Board in **Martha Perch and others v AG (2003) 62 WIR 461**) such that it cannot be performed by an executive agency (the TTRA) operating outside of the protection of Chapter 9 of the Constitution. On the facts, the answer is that no such divestment is taking place. The Enforcement Division remains under the control and direction of the Public Service Commission. It is thus not necessary to decide whether tax enforcement amounts to a core governmental power. The security of tenure of those employees in the Enforcement Division is preserved. In that regard the Enforcement Division is in no different a position vis-à-vis the Public Service Commission from that which the Board of Inland Revenue ("BIR") and the Customs and Excise Division ("Customs") currently occupy. The thrust of the appellant's case is that the current regime is constitutionally satisfactory.
4. Finally and importantly, I find it unnecessary to lay down in definitive terms a test for finding what amounts to a 'core power.' To say that it is those

executive functions that involve the exercise of a coercive power introduces a hard and fast formula which is wholly unnecessary for present purposes. This is especially so in circumstances where the Board in **Perch** shied away from laying down any conclusive or binding rule when it had the opportunity to do so. Such a question is best left to be decided on a case by case basis.

5. In all other respects, I concur with Dean-Armorer JA.

Nolan Beraux
Justice of Appeal

I have read the Judgment of Dean-Armorer J.A. and I agree with it.

Charmaine Pemberton
Justice of Appeal

Delivered by Dean-Armorer, J.A.

Introduction

6. In this appeal, we consider the constitutional validity of the ***Trinidad and Tobago Revenue Authority Act (the Act)***. The ***Act*** establishes a Revenue Authority for the purpose of carrying out the functions of taxation, which prior to the ***Act*** fell under the control of the Central Government.
7. In the course of this judgment, we relied on the guidance of the Privy Council in ***Perch v. Attorney-General***¹ where their Lordships recognised the international trend by which modern governments enhance the efficiency of their services by outsourcing various functions to quasi-governmental corporations.
8. Their Lordships recognised as well the countervailing need to ensure that core governmental functions remain within the remit of the central government.
9. In ***Perch***, their Lordships found that the postal service did not perform a core governmental function and that the legislative outsourcing of that function was not unconstitutional.
10. This appeal may be seen as the sequel to ***Perch***. As in ***Perch***, the central question here is whether the functions delegated by the ***Act*** are core governmental functions which by their nature are non-delegable.

¹ Perch v. Attorney-General (2003) 62 WIR 461

11. A further question arose however. It is whether the various stages of taxation can be treated separately, and whether the stages of assessment and collection can be treated as delegable while enforcement remains a core function.
12. We have considered the meaning of the term “*core governmental functions*” and for reasons which will become apparent in the course of this judgment, we hold the view that it was permissible for the stages of assessment and collection of taxes to be treated separately from the stage of enforcement.
13. We hold the view that the functions of assessment and collection are not core functions and there was no constitutional infringement by their being delegated to the revenue authority.
14. As to enforcement, this function continues to fall under the purview of the Public Service Commission and there was no breach in respect of this function.
15. We therefore hold that there was no breach of the implied term that core functions should remain under the supervision of the Public Service Commission.
16. Such was the finding of the Judge at first instance. We agree with his decision and hold that the appeal ought to be and is hereby dismissed.

Background

17. Ms. Terrisa Dhoray (the Appellant) is a Customs Officer II and is employed at the Customs and Excise Division of the Ministry of Finance. She instituted these proceedings in order to challenge the validity of the **Act** on the ground that it infringed her right to the protection of the law.

18. Before the Judge, evidence was led as to the public policy which motivated the advent of the **Act**.² Evidence was also led as to inimical aspects of the **Act** as well as matters of public concern against the statute.³

19. This Court does not make light of the serious socio-economic issues that have emerged from the evidence which was set out before the Judge. In this appeal however, as in the claim before the Judge, the issues of policy do not arise. The Court is concerned only with the constitutional validity of **the Act**.

The Act under challenge

20. The **Act** was passed in the Senate on September 17, 2021 and in the House of Representatives on December 17, 2021. The Act was passed by a simple majority in both Houses of Parliament.

21. It received the assent of the President on December 23, 2021 and by section 2, was due to come into force on a date as fixed by Proclamation.

² See the affidavit of Colm Imbert filed on February 28, 2023

³ See the affidavits of Terrisa Dhoray and of Leroy Baptiste filed on July 19 and 29, 2023 respectively

22. On March 14, 2022, Her Excellency fixed March 15, 2022, as the date on which certain sections of the Act would come into force.⁴ Significantly, section 18, which makes provisions for the employees of the revenue department, was suspended until further proclamation.

23. We have set out below those sections which relate to the establishment of the Revenue Authority and its Board. We have also set out those sections which provide for the staffing of the Authority.

24. Section 5 of the **Act** establishes the Revenue Authority (*the Authority*) as a body corporate. By section 5(2), the **Act** provides that the Authority shall be an agent of the State. The functions of the Authority are set out at section 6 and they include three of the recognised stages of taxation:

- (a) The assessment and collection of taxes under the revenue laws;
- (b) ...
- (c) The enforcement of the revenue laws;
- (d) The enforcement of border control measures;
- (e) ...the provision of revenue collection services to any statutory or other body to collect public monies;
- (f) ...
- (g) ...

⁴ They were sections 1, 2, 3, 5(1), 6(1)(g), 7, 8, 9, 10, 11, 12, 13, 14(1)(c), 15, 16, 17, 23(1) and (2), 23(a), (b), (c), (e), (f), (g) and (h), 24, 25, 27(1), 28, 29, 30, 31, 32, 33, 35, 36, 38, 41 and 42 and the Schedule of the Act.

25. Section 7 of the Act provides for the establishment of a Board of Management of the Authority and for the qualifications which persons should hold in order to be appointed to the Board.
26. Section 10 provides for the tenure of office of members of the Board, while section 11 provides for the resignation and removal of Board members.
27. Section 8 sets out the functions of the Board. They are:
- (a) the approval and review of the policy of the Authority;
 - (b) the monitoring of the performance of the Authority in the carrying out of its functions;
 - (c) the finances, real property and other assets and resources of the Authority, the securing of contracts, the procurement of goods and services and other administrative activities;
 - (d) human resources, including those related to recruitment, remuneration, promotion, training and development, performance assessment, conditions of work, discipline, termination of employment and superannuation benefits;
 - (e) service standards and performance targets;
 - (f) a code of conduct for the employees of the Authority;
 - (g) the strategic plan, annual budget, monitoring of operation plan and annual report of the Authority;

- (h) the mandate for collective bargaining and approving collective agreements in relation to the terms and conditions of employment of persons employed by the Authority;
- (i) probity in the use and allocation of resources;
- (j) the principles of good corporate governance procedures and practice;
- (k) the internal audit of the Authority; and
- (l) enterprise risk management, other than risks associated with tax compliance.

28. Section 8(2) separates the Board in the exercise of its functions from the Authority, by stipulating that the Board will not be responsible for the functions of the Authority. The Board is further precluded from providing specific direction to the Director General or any employee of the Authority⁵, and is precluded from having access to information which may be obtained by the Authority as a result of the exercise of its functions.⁶

29. By section 8(3), the Minister is authorised to give policy directions to the Board, which is in turn required to give effect to the Minister's directives.

30. Part IV of the Act concerns the staff of the Authority. Section 13 provides for the appointment of the Director General and Deputy Directors General. All Directors General would be appointed on terms and conditions as specified by

⁵ Section 8(2)(a)

⁶ Section 8(2) (b) & (c)

the Board, with the exception of the Deputy Director General-Enforcement, who is required by section 13(a) to be a public officer and the head of the Enforcement Division.

31. The salary of the Deputy Director General-Enforcement falls under the purview of the Salaries Review Commission.⁷

32. Section 14 sets out the responsibilities of the Director General. Significantly, the responsibilities of the Deputy Director General-Enforcement are set out separately. The Director General remains responsible for enforcement by way of civil proceedings (see section 14(1)(b)).

33. Section 14(3) identifies the staff of the enforcement division as:

(a) The Deputy Director General-Enforcement and such other public officers who may, for the purposes of the enforcement of the Customs laws, the Excise Act or other revenue laws, exercise the powers, authorities and privileges conferred by those laws; and

(b) Such other employees of the Authority as the Board thinks fit.

34. By section 14(4), the power to appoint, remove, transfer and exercise disciplinary control over the Deputy Director General-Enforcement and other public officers of the Enforcement Division is vested in the Public Service Commission.

⁷ See section 13(5)

35. Section 14(4) goes on to invest in the Board the power to appoint, remove, transfer and exercise disciplinary control over “...the other employees of the Enforcement Division.”

36. Section 18 is critical. It sets out the options which are available to persons who held either a permanent appointment or a temporary appointment in an office in the public service on the establishment of the Inland Revenue Division or the Customs and Excise Division. Four options are made available to these officers. They may voluntarily retire from the public service on terms agreed with the CPO⁸. They may be transferred to the Authority, with the permission of the appropriate Service Commission.⁹ Thirdly, they may opt to be transferred to the Enforcement Division of the Authority.¹⁰ Lastly, the officer may choose to remain in the public service provided that there is an office commensurate to the office which he held prior to the date on which the Act came into force.¹¹

37. The Judge at first instance (*the Judge*) dismissed the Claim in its entirety.

38. At the outset, the Judge identified the two main arguments which were presented on behalf of the Appellant. They may be summarised in this way:

⁸ See section 18(2)(a)

⁹ See section 18(2)(b)

¹⁰ See section 18(2)(c)

¹¹ See section 18(2)(d)

- That there were certain core government functions which would only be entrusted to public servants who enjoy the protection of Chapter 9 of the Constitution.
- And that the transfer of core governmental functions to people who are not public officers is in breach of the Constitution.

39. These were the arguments with which the Judge grappled and ultimately rejected.

40. The Judge identified six (6) stages of taxation and proceeded to consider the following issues:

- Whether the Assessment and Collection of Taxes are core governmental functions.¹²
- Whether the Assessment and Collection of Taxes are delegable to a body corporate controlled by a Minister.¹³

The Judge also considered the provisions in respect of the enforcement division separately.¹⁴

41. In respect of the first issue, the Judge considered the authorities of *Perch*¹⁵, *Ranaweera v. Ramachandran*¹⁶, *Griffith v. Guyana Revenue Authority*¹⁷ and

¹² See paragraph 16 of the Judgment

¹³ See paragraph 38 of the Judgment

¹⁴ See paragraph 50

¹⁵ *Perch v. Attorney-General* (2003) 62 WIR 461

¹⁶ *Ranaweera v. Ramachandran* [1970] AC 962

¹⁷ *Griffith v. Guyana Revenue Authority* (2006) 69 WIR 320

Chue and another v. Attorney General of Guyana¹⁸ and held that it was unhelpful to use descriptions such as “*intrinsically governmental functions*” etc. He opined that it was necessary to evaluate the activity and assess whether on the facts, the activity in question was a core governmental function that could only be performed by the State.

42. The Judge examined the words of Lord Bingham in ***Perch*** and held that ***Perch*** did not stand as authority for saying that the assessment and collection of taxes are core functions of government or that all aspects of core governmental functions cannot be devolved. He held in particular that the assessment and collection of taxes were not core functions.¹⁹

43. In respect of the second issue, the Judge noted that at the Court of Appeal in ***Perch***, Justice Nelson identified the imposition and not the assessment and collections of taxes as not being delegable to statutory corporations.²⁰

44. The Judge cited and relied on ***Astaphan & Co Ltd v The Comptroller of Customs***²¹ as authority for suggesting that the legislative function in the imposition of taxes was delegable and not in breach of separation of powers.²²

¹⁸ *Chue and another v. Attorney General of Guyana* (2006) 72 WIR 213

¹⁹ See paragraph 37 of the Judgment

²⁰ See paragraph 40 of the Judgment

²¹ *Astaphan & Co Ltd v The Comptroller of Customs* (1996) 54 WIR 153

²² See paragraph 41 of the Judgment

45. The Judge adopted the reasoning of Chang JA in **Chue**²³ and held that the Authority was an agent of Government and that the executive function of taxation had not been removed from the central government. The Judge held further that the assessment and collection of taxes were not core functions, which were non-delegable to agents of the State.²⁴ The Judge observed further that with the exception of the Enforcement Division, the employees of the Authority are not public servants.²⁵ As to the Enforcement Division, the Judge held that according to the **Act**, the power of appointment, removal and disciplinary control remained with the Public Service Commission in respect of officers of the Enforcement Division.

The Appeal

46. Ms. Dhoray appealed. She identified ten (10) grounds of challenge, which may be subsumed under five (5) broad points of challenge. They were:

- The Appellant contended that the Judge erred in holding that assessment, collection and enforcement of taxes were not “core functions of government” as conceptualised in **Perch**.²⁶

²³ Chue and another v. Attorney General of Guyana (2006) 72 WIR 213

²⁴ See paragraph 48 of the Judgment

²⁵ See paragraph 49 of the Judgment

²⁶ See Grounds 2 & 3

- Secondly, the Appellant averred that the Judge erred in holding that the executive function of taxation was capable of being delegated to the Authority.
- The third category of challenge concerned the purview of the Public Service Commission. The Appellant contended that the Judge was wrong to find that there was no interference with, or trespass on the jurisdiction of the Public Service Commission.
- A further challenge was that the enforcement functions are being carried out by public servants. The Appellant contended that the Judge erred in his interpretation of section 14(3) that enforcement functions are being performed by public servants under the jurisdiction and control of the Public Service Commission.
- Finally, the Appellant averred that the Judge was wrong in holding that the Director General did not have control over the Deputy Director General-Enforcement.

Submissions for the Appellant

47. Mr. Ramlogan opened his submissions by clarifying that the challenge does not concern whether the state can or cannot privatise a function of the government.²⁷

48. Counsel submitted rather that the Constitution is based on a highly sophisticated form of separation of powers, which is beyond the separation of executive, legislative and judiciary. In the submission, the separation extended to institutions within the executive arms which were intended to function independently of the Executive.²⁸

49. Counsel argued that the assessment, collection and enforcement of taxes are core governmental functions and that the Judge was wrong to have separated them.

50. Because these are core governmental functions, they had to be performed by persons under the protection of a Service Commission, unless there was an amendment as envisaged by section 54 (1) and (2) of the ***Constitution***.

51. Mr. Ramlogan argued that it would be inconsistent with the intent and structure of the Constitution to transfer the performance of essential tasks of government to persons who did not enjoy the protection of Chapter 9.

²⁷ See paragraph 7 and 8 of the Written Submissions of the Appellant

²⁸ See paragraph 9 of his Written Submissions

52. Counsel argued that the Judge was wrong to hold that the assessment and collection of taxes were not core functions of government. In support, Counsel relied on the words of Lord Diplock in *Ranaweera*²⁹.

Respondent's Submissions

53. Mr. Mendes, for the Respondent, made detailed submissions on *Perch*³⁰ and submitted that there was no support in that case for any principle relating to a “core function of government”.

54. Counsel argued that the Privy Council fell far short of holding that every function which is intrinsically governmental cannot constitutionally be devolved on a corporation analogous to TT Post.³¹

55. Mr. Mendes referred to section 74(1) of the Constitution and submitted that there was no provision in the Constitution which prohibited the execution of the assessment and collection of taxes by non-public officers.

56. As to the doctrine of separation of powers, Mr. Mendes referred to section 74 and submitted that the separation of powers doctrine does not bar the legislature from devolving the functions of the assessment and collection of

²⁹ *Ranaweera v. Ramachandran* [1970] AC 962

³⁰ *Perch v AG* (2003) 62 WIR 461

³¹ See paragraph 10 of the Written submissions for the Respondent

taxes to a body such as the Authority.³² Counsel argued that there is nothing in the Constitution to suggest that collecting of taxes is the domain of the Executive.

Discussion

57. The Claim, which engaged the attention of the High Court, and the appeal which now engages our attention, are together an attack on the constitutional validity of the **Act**. The question which therefore arises is whether the **Act**, having been passed with a simple majority, is in contravention of an express or implied provision of the Constitution.

58. Before progressing any further, we remind ourselves of the presumption of constitutionality as recently stated by Lady Hale in ***Suratt and others v. The Attorney General of Trinidad and Tobago***³³ and to observe that the claimant who asserts that an Act of Parliament should be declared unconstitutional carries a very heavy burden. This principle will be considered more fully below.

59. Mr. Ramlogan, in his arguments before us, has candidly conceded that there is no contravention of any express provision. The claim therefore required

³² See paragraph 34 of the Respondent's written submissions

³³ *Suratt and others v. The Attorney General of Trinidad and Tobago* [2007] UKPC 55

consideration of whether there is contravention of an implied constitutional provision.

60. Mr. Ramlogan submitted that structurally, the Constitution requires that public officers be insulated from political interference. This is achieved by the constitutionally established Service Commissions. This is of course well-established and cannot be doubted since the decision of the Judicial Committee in ***Thomas v. Attorney General of Trinidad and Tobago***³⁴.

61. The question which therefore arises is whether the Constitution impliedly recognises functions within the public service that, by their nature, can be regarded as core governmental functions and which may only be performed by persons who enjoy the protection of a Service Commission. In this discussion we have explored the meaning of “*core governmental functions*” by reference to decided cases.

The Authorities:

Perch v. Attorney General³⁵

62. The words “*core governmental functions*” were first articulated by Lord Bingham in delivering judgment on behalf of the Board in ***Perch v. Attorney-General***. The salient facts of ***Perch*** centred on the Trinidad and Tobago Postal

³⁴ *Thomas v. Attorney General of Trinidad and Tobago* [1982] AC 113

³⁵ *Perch v. Attorney-General* (2003) 62 WIR 461

Corporation Act (TTPCA), which established the Trinidad and Tobago Postal Corporation. The Corporation was charged to provide inland and foreign postal services. By section 36 of the TTPCA, postal workers were provided with a number of options. They could opt to retire voluntarily from the Public Service; to be transferred to the Corporation with the approval of the Public Service Commission or to remain in the Public Service, provided that there was an office available in the Public Service commensurate to the office held before the date of the assent of the Act.

63. The appellants in *Perch* initially opted to remain in the Public Service. When no commensurate office was found, however, they claimed that the imposition of a choice violated their right as enshrined at section 121 of the Constitution.

64. The appellants succeeded at first instance. The Court of Appeal, however, allowed the appeal. In the course of delivering judgment on behalf of the Court of Appeal, Justice Nelson JA considered the argument for the Appellants, that Parliament was not empowered to transfer offices in the Postal Service from the jurisdiction of the Public Service Commission to that of a statutory corporation, which was under the control of a Minister.

65. Nelson JA rejected the argument and noted that implicit in the argument was the notion that there are certain governmental operations that are non-

delegable to public or private corporations.³⁶ Nelson JA then made this observation:

“Implicit in the argument of counsel for the respondents is the notion that there are certain government operations that are non-delegable to public or private corporations. It may well be that matters involving the defence of the Republic, the maintenance of law and order, national security, the power to impose taxes and such matters cannot be delegated to statutory corporations. Equally it is clear from Hinds v R [1977] AC. 195 (P.C.) that a jurisdiction which is exercised by the Supreme Court cannot properly be transferred to the lower judiciary unprotected by security of tenure or to a statutory body either directly or indirectly under the control of a Minister.”³⁷

66. Nelson JA was careful to state that, not having heard full arguments, he was not expressing any final view.

67. Perch and the other appellants took their appeal to the Judicial Committee.

Their appeal was dismissed. Lord Bingham, writing on behalf of the Board, summarised the argument for Perch and the other appellants in this way:

“...the postal service operated directly by the Government before 1999 remained a postal service operated by the Government, despite the changes made by the 1999 Act in the means by which the service was delivered, since the new corporation was subject to close governmental control.”³⁸

³⁶ Civil Appeal 118 of 1999 *The Attorney General of Trinidad and Tobago v Perch and others* at page 17

³⁷ *Ibid*

³⁸ *Perch v. Attorney-General* (2003) 62 WIR 461, 467

68. Lord Bingham continued the summary of the Appellant's argument:

"This was not a pure privatisation...but a postal service run by the Government in a different way and those who worked for the new corporation worked in the service of the Government in a civil capacity, just as when they had worked for the old Post Office. They remained entitled to the protection of s 121(1)".³⁹

69. Lord Bingham, alluding to the international trend towards divestment by governments, said:

"[13] The 1999 Act exemplifies a widespread international trend towards the divestment by Governments of functions previously carried on by them directly or indirectly but forming no part of the core functions of Government (such as defence, the maintenance of law and order and the administration of justice) and lending themselves to commercial non-governmental operation in the interests of efficiency and economy..."⁴⁰

70. Lord Bingham continued:

"If it were sought to devolve the Police Service or the Prison Service to a corporation analogous to Trinidad and Tobago Post there would be strong arguments for holding that such a change contradicted express terms of the Constitution and assumptions on which it was based."⁴¹

71. Lord Bingham distinguished the matter before the court, clarifying that no such problem arose before the Board, saying:

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

“There is nothing intrinsically governmental in collecting and delivering letters and parcels, any more than there is in operating telephones, or trains, or lotteries, or meteorological offices, or scientific laboratories, or libraries, or hospitals.”⁴²

72. These words of Lord Bingham have not only resonated through the two decades which followed, but in fact forms the measure by which the Appellant’s claim falls to be decided.

73. Ultimately, Lord Bingham expressed the complete agreement of the Board that the establishment of the new postal corporation involved no breach of constitutional rights of the Appellants.

The Attorney General of Trinidad and Tobago v. Carmel Smith⁴³

74. The concept of the “core governmental functions” was alluded to in ***The Attorney General of Trinidad and Tobago v. Carmel Smith***, where their Lordships considered the procedural question of whether the Attorney General was a proper party to constitutional proceedings concerning the Statutory Authorities Service Commission. In holding that the Attorney General was not a proper party in such circumstances, their Lordships held as follows:

“24. In the Board’s opinion the scheme and language are clear. The Attorney General is to represent the State (in effect, Central Government). The Attorney General is also to represent (except in

⁴² Perch v. Attorney-General (2003) 62 WIR 461, 468

⁴³ The Attorney General of Trinidad and Tobago v. Carmel Smith [2009] UKPC 50

judicial review proceedings) statutory bodies which (presumably because of their core functions) are deemed by section 19(8) and (9) to be part of the State.”⁴⁴

75. Those “*statutory bodies*” were the Service Commissions which were established by the Constitution. They included the Public Service Commission, the Police Service Commission and the Teaching Service Commission. On the authority of ***Carmel Smith*** these Service Commissions perform “core functions” of the State.

Chue and another v Attorney General of Guyana⁴⁵

76. ***Chue*** was an authority relied upon by the Respondent. We found it to be of limited value in determining whether taxation, in all or any of its stages, can be described as core governmental functions, since it appeared to have been accepted, in the course of the decision, that taxation was a core governmental function. There was therefore no examination of the issue.

77. ***Chue*** proved however to be relevant to the issue of separation of powers, which we consider later in this discussion.

Ranaweera v Ramachandra⁴⁶

78. ***Ranaweera*** was a decision of the Privy Council from the Supreme Court of Ceylon, now Sri Lanka, and was decided in 1970.

⁴⁴ The Attorney General of Trinidad and Tobago v. Carmel Smith [2009] UKPC 50 at para 24

⁴⁵ Chue and another v Attorney General of Guyana (2006) 72 WIR 213

⁴⁶ [1970] AC 962

79. Lord Diplock, delivering a dissenting judgment, had this to say:

“The assessment and collection of taxes to defray the expenses of the central government of the country is a classic constitutional function of central government itself. The performance of this function must needs be undertaken by natural persons for the purpose of administering the fiscal legislation on the central government's behalf. Those natural persons who so administer it, at any rate if appointed by a Minister of the Crown acting in his official capacity and if paid out of the central revenues of Ceylon, are in my view “servant of the Crown.”⁴⁷

80. Mr. Ramlogan has commended **Ranaweera** to us and in particular the recognition by Lord Diplock that *“The assessment and collection of taxes to defray the expenses of the central government of the country is a classic constitutional function of central government itself”*.

81. We are mindful of the strength of these words emanating from Lord Diplock. We are however reluctant to place full reliance on this statement for reasons set out here. Lord Diplock's judgment was a dissenting judgment. More importantly, the issue before their Lordships in **Ranaweera** was different from the matter which now engages our attention. Their Lordships considered whether the members of the board of review were servants of the crown. Here, we are considering whether taxation is a core governmental function so as to render it non-delegable.

⁴⁷ [1970] AC 962, 974

Analysis

82. It therefore continues to be our task to decide, from principles expounded in ***Perch***, whether the assessment and collection of taxes are non-delegable core functions.

83. We therefore embark on a consideration of the issue from fundamental principles of constitutional law. The first principle is the plenitude of legislative power which is invested in Parliament by section 53 of the Constitution. This power is limited by sections 5, 13 and 54 of the Constitution, so that certain changes may only be made with prescribed majorities in the Houses of Parliament. Parliament may not bring into being legislation that contravenes express provisions of the Constitution, without the stipulated majority.

84. Parliament is also prohibited from passing legislation which offends the implied provisions of the Constitution. This was the effect of ***Hinds v. The Queen***⁴⁸, where the separation of powers was held to be an implicit provision in the Constitution of Jamaica.⁴⁹

85. The second principle is that of the presumption of constitutionality. This principle was re-affirmed by the Privy Council in ***Suratt v Attorney General of Trinidad and Tobago***⁵⁰, where Baroness Hale of Richmond stated at paragraph 45 of her judgment:

⁴⁸ *Hinds v. The Queen* [1975] UKPC 22

⁴⁹ *Ibid*

⁵⁰ *Suratt and others v. The Attorney General of Trinidad and Tobago* [2007] UKPC 55

*“It is a strong thing indeed to rule that legislation passed by a democratic Parliament ... is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one ...”*⁵¹

86. In the present appeal, the words “*core governmental functions*” is not an expression that may be found in the Constitution. Mr. Ramlogan has conceded as much. So that the task of the Appellant has been to show that it is implied into the Constitution that certain functions are core and are therefore non-delegable.

87. We accept however, on the authority of ***Perch***, that implied in the Constitution is the principle that there exist functions that by their nature are non-delegable. This is the clear effect of the words of Lord Bingham in ***Perch***. The question that must be resolved is what are those functions and whether they include any or all of the stages of taxation.

88. It was not expressly stated by Lord Bingham, but it seems sufficiently clear, that the implied provision as to core governmental functions is based on the observations of Lord Diplock in ***Thomas v. Attorney General of Trinidad and Tobago***⁵². In his judgment, Lord Diplock addressed an argument on behalf of

⁵¹ Ibid

⁵² *Thomas v. Attorney General of Trinidad and Tobago* [1982] AC 113

the Attorney General, that Thomas, as a public servant, was dismissible at pleasure. Lord Diplock uttered his oft quoted words, that is, *“to speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer’s metaphor to cloak a political reality.”*⁵³

89. Lord Diplock went on to show how the ability to dismiss at pleasure could create the prospect of a ruling political party converting the service into what *“might function as a private army of the political party that had obtained a majority of the seats in Parliament.”*⁵⁴

90. The device employed by the framers of the Constitution was to create autonomous Service Commissions to effect the appointment, transfer and dismissal of persons under their charge, so that those persons would be protected from political interference. The autonomous Commissions serve to protect the individual public servant from political interference. So it would not be possible for the individual public servant to be victimized by politically motivated discipline or dismissal.

91. The Service Commissions would serve a second function of preventing the ruling party from converting the Service into what can function as their private army.⁵⁵

⁵³ Thomas v. Attorney General of Trinidad and Tobago [1982] AC 113, 123E

⁵⁴ Thomas v. Attorney General of Trinidad and Tobago [1982] AC 113, 124A

⁵⁵ Ibid

92. Bearing *Thomas v. Attorney General of Trinidad and Tobago* in mind, one confronts the need of Governments to divest for the purpose of the efficient functioning of Government. This was alluded to by Lord Bingham in the course of his judgment in *Perch*. Divestment necessarily implies that functions originally performed by persons under the protection of a Service Commission, would be performed by persons who did not enjoy such protection. Such functions may be performed by persons who formerly held posts in the public service or they may be performed by entirely new persons. In either event, their appointment, discipline and termination will be in the hands of a company, quasi-governmental or otherwise, and not in the hands of the autonomous commissions.

93. We proceed to consider the respects in which such a transfer is in breach of the terms implied by Part 9 of the Constitution, which creates and defines the duties and powers of the Service Commissions.

94. Lord Bingham was of the view that there were governmental functions which were not “core”. The transfer of non-core functions would not be offensive to the Constitution. He gave examples without establishing a specific test.

95. According to Lord Bingham, those were functions which lend themselves “to *commercial non-governmental operation in the interests of efficiency and*

*economy*⁵⁶ Examples of these were many: operating telephones and trains, lotteries, scientific laboratories and hospitals.

96. Then there were examples of the core functions in respect of which one might expect *“strong arguments for holding that such a change contradicted the express terms of the Constitution and the assumptions on which it was based”*.

They were the police and prison services. There should be added the administration of justice and the imposition of taxes as identified by Nelson JA at the Court of Appeal.

97. It seems clear to us that the non-delegable functions are those that are linked to the exercise of coercive powers, that is to say, those functions the exercise of which have the potential to affect the civil liberties of the individual citizen. They clearly do not include innocuous commercial type functions of postal services, transport services, health services, all of which were listed by Lord Bingham. These functions may be transferred by Parliament without fear of constitutional infringement and therefore by simple majority.

98. Those functions, however, which may result in the creation of a private army, to borrow the words of Lord Diplock, are core functions. The police and prison services and the defence force clearly exercise coercive powers.

⁵⁶ *Perch v. Attorney-General* (2003) 62 WIR 461, 467

99. It is likewise undeniable that the exercise of judicial power affects the rights of the citizen. The exercise of judicial power exerts an indirect effect on the rights of citizens through the power to make mandatory orders which can be compelled by actions on behalf of the executive.

100. We ask ourselves rhetorically into which category does taxation fall. The Judge identified six (6) stages of taxation:

(i) *Imposition*: where the government formulates and enacts tax laws, a charge to tax, therein, specifying the types of taxes, tax rates, and the conditions under which they apply.

(ii) *Assessment*: where the tax liability of individuals, businesses, or other entities based on criteria are set out in law is determined.

(iii) *Collection*: where the calculated taxes are collected (be this by way of voluntary payment by the taxpayer or through deduction at source mechanism involving a tax collecting agent).

(iv) *Enforcement*: where tax authorities take measures to collect unpaid taxes.⁵⁷

101. The Judge held the view that the stages of assessment and collection should be treated separately from enforcement. In support, the Judge noted that the

⁵⁷ Bennett in his article "*Navigating Uncertain Waters: A Critical Review of Withholding Tax Law and Practice in Trinidad and Tobago*" (Bulletin for International Taxation, 2016 Vol 70, No. 3).

functions were identified separately at section 6 of the **Act**. We find no good reason to depart from that finding in this regard. The different stages are processed separately and with law-abiding citizens, there would be no need to implement the stage of enforcement. In real life, enforcement is indeed separate from the earlier stages.

102. In respect of the stage of assessment, we observe that the assessment which the Authority is empowered to conduct is in reality an arithmetical stage of the process and does not confer on the assessor any coercive power.

103. Collection is also not coercive and is generally voluntary. The function of collection is often carried out by third parties in case of value added tax (VAT) collection and Pay-As-You-Earn (PAYE). These processes have been carried out by third parties for many years and it would be artificial at this time to suggest they can only be exercised by public officers. Moreover, there is no exercise of coercive power in collection. The employer who deducts PAYE for the purpose of remitting taxes to the Board of Inland Revenue cannot compel payment. A similar observation may be made in respect of the retailer who deducts VAT from customers. They clearly have no coercive power.

104. The process of enforcement under the **Act** continues to be performed by public officers, who by section 14(3) of the **Act** continue to be under the purview of the Public Service Commission. In respect of enforcement therefore, there was no delegation of a core governmental function.

105. It follows that we hold the view that there was no transfer of non-delegable core functions away from the Public Service. We accordingly find no reason to disagree with the Judge on this issue and turn now to the separation of powers.

Separation of Powers

106. As to the principle of separation of powers, we observe at the outset that there was no reference to it in the Originating Motion, as filed by the Appellant on July 19, 2022. There was also no reference to the doctrine in the judgment of the Judge or in the Grounds of Appeal.

107. The relevance of separation of powers to this appeal was introduced by Mr. Ramlogan in the course of his reply submissions and in *viva voce* submissions at the hearing of the appeal. Mr Ramlogan drew an analogy between the role of Service Commissions and the doctrine of separation of powers. He formulated this argument in his opening remarks at the hearing of the appeal and said:

“My Lord, I think this is an appeal that...It really is somewhat philosophical in terms of the approach that we take on it because it’s like...It’s almost analogous to, like, the separation of powers principle, where it’s not expressly provided for in the Constitution, yet, still it is imbued in the very...and implicit in the structure of the Constitution.”⁵⁸

⁵⁸ See the transcript at page 4 line 40.

108. Accordingly, it was not being argued that the **Act** is in breach of the separation of powers. Rather, Mr. Ramlogan was asserting that the role of the Service Commissions, in insulating the Public Service from political interference, is implicit in the Constitution in the same way in which the doctrine of the separation of powers is implicit in the Constitution.

109. In so far, therefore, as Mr. Ramlogan has argued that the principle of political insulation by Service Commissions may be compared to the principle of separation of powers, we are forced to disagree. In respect of the Service Commissions, the role is expressly provided for. It is not a supra-constitutional principle and cannot be employed to place on Parliament restrictions which were not imposed by the Constitution.

110. Nevertheless, the relevance of separation of powers to this appeal was extensively addressed by Mr. Mendes and we find it useful to consider whether the **Act** is in breach of separation of powers.

111. Mr. Mendes relied on **Chue**⁵⁹ where Chang JA of the Court of Appeal of Guyana examined provisions analogous to sections 53 and 74(3) of the Constitution of Trinidad and Tobago. Chang JA held the view that Article 99(2) (equivalent of section 74(3) (TT)) enables Parliament to confer any executive

⁵⁹ Chue and another v Attorney General of Guyana (2006) 72 WIR 213

function on any person or authority. Article 99(2) drew no distinction between core and non-core governmental functions and there could be no warrant for the court to seek to restrict Parliament in the exercise of legislative power conferred upon it.⁶⁰

112. In Trinidad and Tobago, section 53 of the Constitution invests Parliament with the plenitude of legislative power, which must be exercised in accordance with the Constitution.⁶¹

113. Parliament is also expressly empowered by section 74(3) of the Constitution to confer functions on persons and authorities other than the President.

114. These sections are set out below:

“53. Parliament may make laws for the peace, order and good government of Trinidad and Tobago, so, however, that the provisions of this Constitution or (in so far as it forms part of the law of Trinidad and Tobago) the Trinidad and Tobago Independence Act 1962 of the United Kingdom may not be altered except in accordance with the provisions of section 54.”

115. Section 74 (1) and (3) provide:

“74. (1) The executive authority of Trinidad and Tobago shall be vested in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.

...

⁶⁰ Chue and another v Attorney General of Guyana (2006) 72 WIR 213, 220 E-F

⁶¹ See sections 13 and 54

(3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.”

116. The power conferred on Parliament by section 74(3) is not, however, an unlimited power. It is subject to the Constitution. This was recognised in **Chue** where Chang JA said:

“But, as beforementioned, art 99(2) cannot be interpreted so as to result in the conferment on Parliament of legislative power in derogation of presidential executive authority. It must be restrictively construed in deference to the fundamental principle of separation of powers.”⁶²

117. There would be no encroachment however on the executive authority if functions are devolved on entities who act as agents of the State. In that way, the executive authority remains in the President while the external entity plays the role of agent of the State. In this way, the intrinsically executive authority is never removed from the State.⁶³

118. At section 5(2) of the **Act**, Parliament provides that the newly minted Authority “*shall be an agent of the State*”. The executive authority of the State therefore remains intact, while the functions are delegated to the Authority to be carried out as agent of the Executive. The **Act** cannot therefore be faulted for infringing on the principle of separation of powers.

⁶² Chue and another v Attorney General of Guyana (2006) 72 WIR 213, 221

⁶³ Chue and another v Attorney General of Guyana (2006) 72 WIR 213, 222

Protection of the Law

119. In the Originating Motion, the Appellant claimed that there was a breach of the right to the protection of the law as conferred by section 4(b) of the Constitution.

120. Mr. Ramlogan, at the hearing of the appeal, indicated that the Appellant claimed the breach of the section 4(b) right in her capacity as a member of the public, being entitled under the Constitution to the service of customs and income tax officers who are insulated from political interference. The Appellant also claimed that her rights were infringed as an employee of the Customs and Excise Division.⁶⁴

121. Mr. Ramlogan readily conceded however that it was not his case that the Appellant had any fundamental right to an office in the government service.⁶⁵

122. We have found that the **Act** was not in breach of the Constitution. We have found that the Appellant has not succeeded in displacing the presumption of constitutionality of the **Act**. The **Act** being valid and constitutional, cannot be a basis for a finding of a breach of section 4(b). We therefore find that the Appellant has failed to establish that she suffered a breach of her right at section 4(b).

⁶⁴ See page 49 of the Transcript from line 23

⁶⁵ See page 50 line 2 of the Transcript

Disposition

123. We find no reason to depart from the findings of the first instance Judge. The Appeal is accordingly dismissed.

M. Dean-Armorer J.A.⁶⁶

⁶⁶ JRC: Ricardo Ramnath JRC II