Michaelmas Term
[2016] UKPC 38
Privy Council Appeal No 0064 of 2015

JUDGMENT

Barrow (Appellant) *v* Attorney General of Saint Lucia (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

19 December 2016

Heard on 13 October 2016

Appellant	*Respondent*
Eamon Courtenay SC Naima Barrow (Instructed by Simons Muirhead & Burton LLP)	James Guthrie QC (Instructed by Charles Russell Speechlys LLP)

LORD CLARKE:

Introduction

1. This is an unusual appeal because the issues raised in it have now been considered in three different judicial decisions.

2. The appellant was a Justice of Appeal of the Eastern Caribbean Supreme Court. It is agreed between the parties (as set out in the agreed statement of facts and issues ("the SFI")) that the appeal concerns the interpretation of the relevant pension legislation of Saint Lucia, in order to determine whether or not the appellant was entitled to a pension upon his retirement after serving for three years and five months as a Justice of Appeal of the Eastern Caribbean Supreme Court ("the ECSC"). The appellant's case is that he did not need to have actually served for ten years, or any other qualifying period, in order to qualify for a reduced pension. The respondent's case, which succeeded in the High Court and the Court of Appeal, is that the appellant needed to have served ten years in order to qualify for a pension.

The agreed facts

3. The agreed facts as set out in the SFI are these. The prescribed compulsory retirement ages for judges of the ECSC (subject to the possibility of extensions of up to three years in total) are as follows: 62 years of age for a puisne judge, and 65 years of age for a Justice of Appeal: section 8 of the Supreme Court Act 1996, Cap 2:01 of the Laws of Saint Lucia (as amended), which is described in the Act as "this Order". The appellant was born on 8 July 1952. He served as a Justice of Appeal of the ECSC from his appointment on 1 August 2005 until his retirement on 31 December 2008 at the age of 56. He thus served as a Justice of Appeal for three years and five months. His case is that the courts below were wrong to conclude that, because he had not served as a Justice of Appeal for ten years, he was not entitled to a pension. They should have held that seven years were to be added to the three years and five months' service under the Supreme Court (Salaries, Allowances and Conditions of Service of Judges) Order 1974, Cap 2.10 ("the Salaries Order").

4. On 13 December 2008, the appellant first made his claim for a pension to the Chief Justice of the ECSC, who is the Chairman of the Judicial and Legal Services Commission ("the JLSC").

5. On 7 July 2009, the appellant again made his claim for a pension to the Accountant General, on behalf of the Government of Saint Lucia, which (not the JLSC) would be responsible for the payment of a pension in the appellant's case. Thereafter correspondence took place between the appellant and the respondent on behalf of the Government. On 22 May 2010, the Solicitor General, on behalf of the respondent, wrote to the appellant informing him that the circumstances of his claim, together with those of other members of the judiciary, had been made the subject of an Attorney General's Reference to the Court of Appeal. The Reference had been made in order to seek clarification in respect of the applicable legislation.

6. The appellant appeared and was separately represented at the hearing of the Reference, as were the JLSC, the respondent and some of the puisne judges as interested parties. On 22 September 2010 the Court of Appeal (Lord Neuberger of Abbotsbury and Moore-Bick and Bannister JJA (Ag)) gave its opinion ("the Advisory Opinion"), which, in the appellant's case, was that he had not retired in "pensionable circumstances" for the purposes of section 3(1) of the Eastern Caribbean Supreme Court (Rates of Pension) (Judges) Act, No 12 of 1989 ("the Rates Act") because he had not met the requirement of service for ten years, as provided in regulation 4(1) of the Regulations ("the Pensions Regulations") in Schedule 1 of the Pensions Act 1967 ("the Pensions Act"). The Court of Appeal found in the Advisory Opinion that under normal circumstances this was the minimum qualifying period of service for a pension. On the basis of the Advisory Opinion the respondent rejected the appellant's claim to a pension.

The Statutory Framework

7. As set out in para 3 above, under section 8 of the Supreme Court Act, the prescribed compulsory retirement ages for judges of the ECSC (subject to the possibility of extensions of up to three years in total) are as follows: 62 years of age for a puisne judge and 65 years of age for a Justice of Appeal.

8. Section 13 of the Supreme Court Act provides that for the purposes of any laws relating to the grant of pensions the judges are to be in the service of such State as the Chief Justice may direct and that his direction is to have effect as an appointment to a pensionable office in that service. It was agreed that the questions raised by the Reference were to be determined on the assumption that the judges whose position is under consideration have by virtue of the Chief Justice's directions been appointed to pensionable office in the State of Saint Lucia, whose legislation therefore governs their pension rights. Similar legislation was in force in the other member states and territories.

9. The Pensions Act came into effect on 1 December 1967. It repealed earlier Acts. As summarised in the Advisory Opinion, section 2 of the Pensions Act is concerned with interpretation, and section 2(1) contains a number of definitions of expressions

used "[i]n this Act", including a detailed definition of "pensionable emoluments". Section 3 is concerned with the Pension Regulations, which are set out in Schedule 1 to the Act, and subsection (3) states that "pensions, gratuities and other allowances may be granted ... in accordance with the Regulations contained in the Schedule ...". Section 4 provides that pensions "under this Act" should be "charged on and paid out of [the] Consolidated Fund".

10. Section 6 of the Pensions Act sets out the circumstances in which pensions may be granted to those who have been in the public service; that is to those who are described as public "officers". Section 6(1) provides that a pension shall not be granted under the Act to any officer except on his or her retirement in one or other of a number of defined cases. The primary condition is that the officer in question has retired from public service on or after attaining the age of 55 years, but subsections (7) to (10) make provision for those who have served for at least ten years and have retired before attaining the age of 55 to receive a reduced pension. The Advisory Opinion correctly noted that those subsections did not apply here.

11. The Pensions Regulations, in Schedule 1 to the Act, came into effect on the same day. Regulation 2 defines "qualifying service" as "service which may be taken into account in determining whether an officer is eligible by length of service for pension, gratuity or other allowance". The Regulation also defines "pensionable service" as "service which may be taken into account in computing pension under these Regulations".

12. Regulation 4(1) provides for every person who has been in the public service for ten years or more to be granted a pension on his or her retirement of 1/480th of pensionable emoluments for each month of service. As the Advisory Opinion observed, it follows that, at least under normal circumstances, ten years is the minimum qualifying period of service for a pension. Ten years' service would entitle an officer to a pension of one quarter of his full pensionable emoluments, as it would amount to 120 months of service. Those who have served for less than ten years may receive a gratuity under regulation 5.

13. Regulation 14(1) defines "qualifying service" by reference to what is in effect actual service. Regulation 14(2) provides that "[a] period which is not qualifying service ... shall not be taken into account as pensionable service". The effect of regulation 15(1) is that, at least in general, "only continuous public service shall be taken into account as qualifying service". Regulation 18(1) deals with cases where an officer has served in different jobs and, as the Advisory Opinion points out, it refers to "an officer who has had a period of no less than three years' pensionable service before his retirement". The Pensions Act and Regulations cover all the judges of the ECSC.

14. The Salaries Order came into force in 1974. It was made by the JLSC as delegated legislation under section 11(1)(a) of the Supreme Court Act. It is principally concerned with various allowances payable to judges in addition to their salaries. For present purposes, the critical provision is section 12, which is entitled "PENSIONS" and provides:

> "In computing the pension of a judge who on retirement from the service holds one of the offices mentioned in Schedule 1 to this Order the additions in the said Schedule mentioned shall be made to his or her period of service.
>
> However, no addition shall be made which together with the number of years of his or her actual pensionable service amounts to more than 400 months."

Schedule 1 identifies the office holders as the Chief Justice, a Justice of Appeal and a puisne judge and provides that the additions which "shall be made to his or her period of service" are ten years, seven years and five years respectively.

15. The Rates Act was passed in 1989. Its long title is "[a]n Act to provide for pensions for Judges of the ECSC and for matters connected therewith or incidental thereto." Section 3(1)(a) of the Rates Act provides:

> "(1) The pension payable to a Judge upon his retirement in pensionable circumstances shall be computed as follows:
>
> > (a) In the case of the Chief Justice, if he has had continuous service as a Judge for a period of not less than ten years, at a rate equivalent to his full annual pensionable emoluments at the date of his retirement. In any other case he shall receive a pension at a rate equivalent to three-fourths of his full annual pensionable emoluments."

Paragraphs (b) and (c) make identical provision for Justices of Appeal and puisne judges, save that, instead of ten years, the periods referred to in the first sentence are 12 years and 15 years respectively.

16. Section 3(2) of the Rates Act provides that "nothing contained in this Act shall operate to prevent a judge from opting to have his pension computed under the provisions of the Pensions Act ... in lieu of under the provisions of this Act".

17. Section 6(3) of the Rates Act states that "[a] person who retires in circumstances other than under the provisions of this Act, shall be entitled to have his pension computed under the provisions of the Pensions Act ...". The Advisory Opinion noted that each of the other member states and territories has enacted laws in terms almost identical to, and to precisely the same effect as, the Rates Act, save that the Anguillan legislation omitted section 6.

The proceedings

18. On 24 February 2011 the appellant issued a claim form seeking a declaration that he was entitled to be paid a pension in accordance with the Rates Act and, in the alternative, a declaration that he was entitled to be paid a gratuity in accordance with the Pensions Regulations. The facts were not (and are not) in dispute and the matter proceeded on affidavits without cross-examination of the deponents.

19. The appellant contended that the Advisory Opinion was seriously flawed inter alia by the failure of the Government to place before the court material that provided the legislative history of the legislation to be interpreted. He asserted in particular that the provisions of the Rates Act should be interpreted as subject to the previous interpretation and application of section 12 of the Salaries Order, which provides for the computation of pensions by the addition of set periods (in the case of a Justice of Appeal seven years) to the period of actual service of the judge concerned. The appellant argued that these "add-on years" fell to be taken into account in the calculation of the period of service that qualifies a judge for a pension. He further argued that at the time of the passing of the Rates Act, the Salaries Order had been interpreted and applied in this way, which was clearly and widely known in the Eastern Caribbean regions and by the States' finance officers. Further, Parliament was aware of this when it passed the Rates Act.

20. The respondent did not accept that this was the effect of the Salaries Order, because (among other things) the evidence of the Chief Registrar and Secretary of the JLSC was that such "add-on years" were only applied in the case of judges who had retired upon reaching their prescribed compulsory retirement age. The respondent argued that section 12 of the Salaries Order affected only the computation of a pension payable to a judge who had otherwise retired "in pensionable circumstances" within section 3(1) of the Rates Act.

21. As reflected in the Grounds of Appeal before the Court of Appeal, the appellant also argued in the High Court that the effect of the Rates Act was to remove altogether the need for a judge to serve a number of qualifying years to become entitled to pension. In reliance on the previous practice, namely that before the Advisory Opinion was given, the respondent had paid pensions by taking into account the "add-on years" years

under the Salaries Order to enable a judge to qualify for a pension. The appellant asserted a legitimate expectation that this practice would be followed in relation to him.

The High Court

22. In the High Court Wilkinson J ("the judge") rejected the appellant's submissions in a judgment delivered on 12 December 2012. She held that the effect of section 12 of the Salaries Order was not to apply the "add-on years" to increase the period of service qualifying a judge for a pension, but was, instead, limited to the computation of the amount to be paid to a judge who was otherwise entitled to a pension under the Act and the Regulations. She rejected the appellant's claim to a legitimate expectation on the basis that the practice of granting the "add-on years" had been applied only in those cases where a judge retired upon attaining the prescribed compulsory retirement age and not in cases where a judge had retired upon reaching 55 years of age. She also held that, in the light of her interpretation of the legislation, for the court to order payment of pension would be to order an unlawful act.

The Court of Appeal

23. The appellant appealed to the Court of Appeal comprising Baptiste JA and Thom and Kentish-Egan QC, JA [Ag]. On 27 October 2014 the Court of Appeal dismissed all the grounds of appeal except on costs. The Court of Appeal accepted that it was the previously settled practice recommended by the JLSC to pay pensions to Justices of Appeal whose pensionable service on retirement at pensionable age fell short of the minimum ten years. However, it noted that the practice had two features. First, the JLSC construed and applied the "add-on years" in the Salaries Order as qualifying years; and secondly, "add-on years" were used to qualify a judge to receive a pension only if he or she retired at the mandatory age of 62 (for a High Court Judge), or 65 (for a Justice of Appeal). The Court of Appeal held that for over 30 years the Salaries Order had been wrongly interpreted and wrongly applied in this way by those responsible for administering the Rates Act and the Pensions Act. It also held that the legal meaning of section 12 of the Salaries Order was as found by the judge.

24. The Court of Appeal acknowledged the appellant's assertion that the legislature recognised the problem or mischief of the unattractive level of remuneration and benefit for judges and that the Rates Act was intended to make provisions that were "more favourable and advantageous than existing pension provisions": para 62. It stated that it agreed with that, but did not agree with the appellant's argument that the additional years provided for by section 12 of the Salaries Order were already included in the unattractive level of pension benefits that needed to be made more favourable. The Court of Appeal held that for this to be so it would be necessary to hold that under

section 12 the add-on years were intended to form part of a judge's period of qualifying service, which it had found, in agreement with the judge, was not the case.

25. In this context the Court of Appeal also acknowledged the appellant's argument that at the time it passed the Rates Act the Legislature must have known of the previously applied interpretation of the Salaries Order and must have considered this practice as part of the unsatisfactory state of the law to be improved upon or changed altogether by the Rates Act. However the Court of Appeal dismissed this argument as requiring the drawing of an inference that was not justified on the evidence before it. The Court of Appeal found that section 12 of the Salaries Order operated on Regulation 4(1), not to supersede it, but to vary the formula and augment the rate of pension to be paid to a judge by adding months to his pensionable service. The Court of Appeal considered and rejected the appellant's argument that the Rates Act eliminated the need for qualifying years of service to become entitled to a pension. As to legitimate expectation, the Court of Appeal upheld the judge's decision that the previous practice was applied only to judges who had reached compulsory retirement age and the appellant could have no legitimate expectation.

Issues before the Board

26. The issues before the Board were formulated by or on behalf of the appellant as follows: (1) On a proper interpretation of the legislation, did the retirement of the appellant before he had actually served for ten years mean he had not retired in "pensionable circumstances" and so was not entitled to a pension? (2) Was the settled practice of adding on years to a judge's actual years of service wrong? (3) Was it of any significance or effect in interpreting the Rates Act that at the time of its passing Parliament knew that judges were treated as qualifying for pension with the benefit of the add-on years stated in the Salaries Order? (4) Was the appellant's expectation to a pension legitimate having satisfied one of two requirements and the other requirement having been determined to have been erroneously applied?

27. The respondent prefers the formulation of the issues as identified by the judge and the Court of Appeal. They are these: (1) whether the appellant is entitled to be paid a pension pursuant to either the Pensions Act or the Rates Act or both; and (2) whether the appellant, if he fails to qualify for a pension, has made out a case of legitimate expectation based on past recommendations of the JLSC and payments made by the Government to retired judges pursuant to those recommendations.

The Advisory Opinion

28. The Advisory Opinion considered what it described as two central questions. The first is whether section 12 of the Salaries Order is concerned with computing the

amount of the pension payable to a judge (limited to 400 months of pensionable service) or whether it is also relevant to the calculation of the period of service that will qualify a judge for a pension; that is whether it falls to be taken into account for assessing qualifying service as well as pensionable service.

29. The second of the central questions identified in the Advisory Opinion revolves around the meaning of the expression "retirement in pensionable circumstances" in section 3(1) of the Rates Act. Does it refer back to the Pensions Act and Regulations, and if so to what extent, and if not what meaning does it have?

30. The Advisory Opinion noted at para 21 that, as the argument developed, it became apparent that there were really two main issues. The first was whether the Rates Act is a self-contained piece of legislation, which permits no, or very limited, reference to the Pensions Act and Regulations for the purpose of determining its meaning and effect. The particular issue was the effect of the words "retirement in pensionable circumstances" in the opening part of section 3(1). The Advisory Opinion considered this issue between paras 23 and 42 under the heading "the ambit of the Rates Act". It considered the second issue between paras 43 and 54 under the heading "section 12 of the Salaries Order." It is convenient to consider those issues in turn.

The ambit of the Rates Act

31. Under this heading the Advisory Opinion first considered in paras 23 and 24 the three different constructions advanced for the words "retirement in pensionable circumstances" in section 3(1) of the Rates Act. The JLSC contended that it means retirement at, as opposed to retirement before, the mandatory retirement age, as specified in section 8(1) of the Supreme Court Act; that is retirement, irrespective of length of service, on attaining the age of 62 or 65. The puisne judges argued that it refers to retirement in circumstances in which a judge would be entitled to receive a pension under the Pensions Act and Regulations; that is retirement aged at least 55 with at least ten years' public service. Justice Barrow contended that it means retirement aged at least 55 with no minimum period of service; that is retirement at any time after 55, with no other requirement.

32. The Advisory Opinion (in para 26) recognised that there was plenty of scope for argument as to the meaning of the expression "retirement in pensionable circumstances" in section 3(1). However it expressed the firm view that the puisne judges' contention was correct. It recognised that the JLSC's interpretation was attractive on policy grounds but concluded that it involved attributing to the expression a meaning which it could not support and it also wrongly treated the Rates Act as embodying a free-standing pension scheme. It rejected Justice Barrow's interpretation on the basis that it

involved an impermissibly partial incorporation of the requirements of the Pensions Act and Regulations into section 3(1) of the Rates Act.

33. The Advisory Opinion (in para 27) expressed the view that, in the absence of any definition in the Rates Act of the expression "in pensionable circumstances", its meaning must be determined by reference to the legislative and other context existing at the time that the Rates Act was passed; that is, by reference to the requirements of the Pensions Act and Regulations. It added that, giving the language of section 3(1) its natural meaning, it was very hard to see what else the legislature could have intended. On that basis a judge must have attained the age of 55 and must have been in the public service (although not exclusively as a judge, whether of the ECSC or otherwise) for at least ten years in order to retire "in pensionable circumstances". The Board agrees.

34. Moreover it agrees with the Advisory Opinion expressed in para 28 that this interpretation of the words "in pensionable circumstances" ties in well with the use of another undefined expression, namely "pensionable emoluments", in section 3(1)(a), (b), and (c). This is because, since the Rates Act gives no guidance as to how one assesses such emoluments, it is very hard to see an answer to the point that the obvious way to determine a Judge's "pensionable emoluments" for the purposes of section 3(1) is by referring back to the Pensions Act and Regulations, which use and define that expression. As the Advisory Opinion put it, if one refers to the Pensions Act and Regulations to determine the extent of a judge's "pensionable emoluments", it is not easy to discern why one should not perform the same exercise to determine whether a Judge has retired "in pensionable circumstances".

35. As the Advisory Opinion put it at para 29, there is nothing in the Rates Act which provides how a judge's pension payable under that Act is to be paid. This would cause a problem if the Rates Act were seen as introducing a self-contained regime. If however it is seen as constituting an alternative basis of assessing the level of pension payable to a judge under the umbrella of the Pensions Act and Regulations, no problem arises: section 4 of the Pensions Act applies. It provides for pensions to be charged on and paid out of the Consolidated Fund.

36. In para 30 the Advisory Opinion gave its reasons for saying that the title of the Rates Act and the provisions of section 3(2) also provide some support for this conclusion. The title suggests that the Rates Act is concerned with changing the rate, or amount, of pension, not the qualification for a pension. Section 3(2), with its reference to computation, seems to assume that a judge who is within section 3(1) will also have a right to a pension under the Pensions Act and Regulations, which is consistent with the conclusion in the Advisory Opinion.

37. See also paras 31 to 37, where the Advisory Opinion gave further reasons for preferring the submissions of the puisne judges to those of the JLSC. In particular the Board accepts the summary in para 34 as follows:

> "Despite the attraction of the JLSC's argument in practice, we are unable to accept it. Quite apart from the difficulties of treating section 3(1) of the Rates Act as wholly independent of the requirements of the Pensions Act and Regulations, it is, in our view, simply impossible to derive that interpretation from the language of the opening words of section 3(1) of the Rates Act. Retirement 'in pensionable circumstances' is just not capable of meaning retirement which is only at the compulsory retirement age, irrespective of whether there would then otherwise be an entitlement to a pension."

38. In paras 38 to 42 the Advisory Opinion gave reasons for rejecting the appellant's construction of the expression "retirement in pensionable circumstances". It is sufficient to refer specifically only to para 38, which is in these terms:

> "For Justice Barrow it was submitted that the words 'retirement in pensionable circumstances' in section 3(1) of the Rates Act only require a judge to have attained the age of 55 when he retires. This submission can be said to avoid the problem faced by the submission of the JLSC, as it gives the words 'in pensionable circumstances' a meaning which imports into section 3(1) of the Rates Act the requirement of section 6(1) of the Pensions Act that a person is at least 55 when he or she retires. However, it disregards the requirement of regulation 4(1) of the Pensions Regulations that a person has been in public service for at least ten years when he or she retires. That is very hard to justify: regulation 4(1) specifies a condition which requires to be satisfied by a person seeking a pension just as clearly and firmly as section 6(1)."

The Board agrees.

Section 12 of the Salaries Order

39. The Advisory Opinion discussed section 12 of the Salaries Order in paras 43 to 54, where it considered and accepted the submission that section 12 relates only to the computation of the amount of a judge's pension and does not have any bearing on the period of service necessary to qualify for a pension. It correctly concluded that the distinction between qualifying service and pensionable service is clear from Regulation

2 of the Pensions Regulations. It noted in para 43 that the puisne judges and the appellant submit that the additional period is to be taken into account in calculating qualifying service as well as pensionable service under the Pensions Act and Regulations, and, moreover, it is to be taken into account in determining pension rights under section 3(1) of the Rates Act.

40. In the following paragraphs it reached broadly these conclusions. The purpose of the Salaries Order was to make additional provision for judges' emoluments and allowances. Section 12, which deals with pensions, must be interpreted in the light of the Pensions Act and Regulations, which was the only legislation governing judicial pensions then in force. It provides that the additional periods set out in the Schedule are to be added to the judge's period of service in "computing" his or her pension. It also provides that the total pensionable service shall not exceed 400 months. That provision has to be read and understood in the context of Regulation 4 of the Pension Regulations, which provides for a pension to be computed at the rate of 1/480th of pensionable emoluments for each month of pensionable service. It follows that the maximum pension which can be achieved by the operation of section 12 is five sixths of pensionable emoluments at the date of retirement.

41. Section 12 is concerned solely with the computation of pensionable service, which is the determination of the number of months a judge is treated as having served for the purposes of calculating the amount of his or her pension and is not directed to the period that must be served in order to qualify for a pension. In effect, it is a means of enhancing judicial pensions, not a means of accelerating them. The Opinion noted that that seems clear from the natural meaning of the opening words of section 12, which begins, "In computing the pension of a judge". The Opinion correctly added that the section is concerned with the computation of the pension, not with the question of entitlement to a pension. It assumes that there is a right to a pension. The Board agrees that this interpretation of section 12 derives support from the fact that it uses the same word, namely "computing", as is found in the definition of "pensionable service" (and which is not to be found in the definition of "qualifying service") in Regulation 2 of the Pensions Regulations. The interpretation is also supported by the last sentence of section 12, which is aimed solely at the quantum of a judicial pension, not the entitlement to such a pension. Thus section 12 does not bestow a right to a pension where none existed before.

42. The Opinion also relied (in para 47) upon the reference to the number of years of his or her "actual pensionable service", which harks back to section 14(1) of the Pensions Regulations which defines qualifying service in terms of the period actually served. The section therefore draws a distinction between actual service and the additional years in a way which suggests that they are not intended to count as years of service that would affect qualification for a pension. All that is required is to add the period stipulated in section 12 of the Salaries Order to the pensionable service in order to assess the quantum of the pension for a particular judge. As the Opinion put it in para

50, section 12 is only concerned with pensionable service (which is solely relevant for calculations under the Pensions Act and Regulations), and has nothing to do with periods mentioned in the first sentences of section 3(1)(a), (b) and (c).

43. In conclusion, the Board agrees with the construction placed upon the relevant statutory provisions in the Advisory Opinion and, indeed, by the judge and the Court of Appeal, so far as they relate to the ambit of the Rates Act and section 12 of the Salaries Order.

The appellant's case

44. Having set out its conclusions on the construction of the relevant provisions, the Board turns to the other specific points relied upon in the appellant's case. First, criticisms are made as to the process which led to the Advisory Opinion. In para 4 of the appellant's case, he relies upon what is called the exceptional nature of the Reference. He adds that the three members of the panel were all ad-hoc appointees, that all were non-West Indians and that two had no known prior awareness of the law, practice, legal traditions or institutions of the Eastern Caribbean. No evidence was taken. There was no witness statement, affidavit or oral evidence. There was no disclosure. To the extent that the Opinion was based on any facts or assumed facts, such facts were only those that the Attorney General placed before the court.

45. It is not entirely clear what point is being made. It was not suggested before the panel or indeed in the High Court or the Court of Appeal that any member of the panel should have recused himself on the ground that he was not sufficiently aware of the true position. However, that is not quite the point being taken. As the Board understands it, the point being taken is that the respondent did not disclose a full picture to the panel.

46. This was not however a point taken on behalf of the appellant at the Reference. That is notwithstanding the fact that the appellant played a full part in the Reference. He lodged written submissions and was represented at the Reference on 20 and 21 September 2010 by leading counsel and two juniors. No attempt was made to seek disclosure of more material.

47. In the High Court proceedings, the appellant did not make the ad hominem points now made against the members of the panel, although he could have done. In any event, as is pointed out on behalf of the respondent, the judge and the Court of Appeal reached the same conclusions as the panel, even though no such criticisms could be made of them. The Board is firmly of the view that it should focus on the issues of construction, as it has done above.

48. The appellant did however accuse the Attorney General of concealing critical facts from the court in the Reference. These were facts that showed that the law and practice have always been applied by the decision makers as not requiring a judge to serve a qualifying period of ten years. The Attorney General responded in the High Court to say that the facts which were not disclosed to the Court were never in his possession but were in the possession of the JLSC, which participated in the Reference. The appellant submits that, however responsibility is apportioned for that conduct, if this "seminal information" had been disclosed to the Reference, it is virtually certain that the Reference would have produced a different opinion.

49. The Board does not accept this submission. This material could have been put before the Reference on behalf of the appellant. In any event, the Board accepts the submission on behalf of the respondent that the panel had regard to the local context and had the assistance of local counsel on all sides. Moreover, there is no basis upon which the appellant can challenge the decisions of the judge or the Court of Appeal on these grounds. There is no evidence that they were unaware of the previous practice. Further, much of the material which the appellant now submits should lead to a different construction of the relevant legislation was, as a matter of fact, before the panel.

50. Paragraph 51 of the Advisory Opinion is in these terms:

> "We were presented with some extra-statutory material (which was not relied on by [counsel for the appellant] … in argument) consisting of the Report briefly referred to above, which preceded the passing of the Rates Act. The Report referred to submissions made by the Chief Justice, which stated that the effect of section 12 of the Salaries Order 'is that the Chief Justice acquires pensionable status on the day after his appointment, a Justice of Appeal after three years' service, and a Puisne Judge after five years' service'. The Report was referred to by the Prime Minister in Parliament when introducing the Bill which became the Rates Act."

As was correctly submitted on behalf of the respondent, the Report there referred to by the Court of Appeal is the same Report as that now relied upon by the appellant.

51. The appellant submitted that the views of the Chief Justice should be given particular weight due to his role as chairman of the JLSC, the body responsible for the administration of pensions and for making the Salaries Order. However, as the Advisory Opinion states in paras 52 and 53:

> "52. The Report and Parliamentary debate, both in 1988, plainly cannot be relied on to construe the Pensions Act and Regulations which were enacted more than a decade earlier. We are also unpersuaded that the contents of the Report can be relied on in relation to the interpretation of the Rates Act, although the point is not quite so straightforward. As Mr Bennett [counsel for the JLSC] said, what the Chief Justice said outside court about certain legislation, though deserving of respect, is not admissible in court when construing that legislation. Further, it is one thing to interpret legislation by taking into account express and unambiguous statements made in Parliament by the member sponsoring that legislation; it would be quite another to rewrite legislation to accord with a mistake in interpretation of an earlier statute which that member made according to what he said in Parliament. The rule in *Pepper v Hart* is concerned with the construction of statutes, not with the equivalent of rectification of statutes.
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> 53. Quite apart from this, it is not by any means clear that the committee accepted the Chief Justice's argument as recorded in para 3 of the Report. The Report followed an earlier 'Report and recommendations', which we have not seen, and which may throw further light on the issue. Anyway, it is the understanding of the Prime Minister, and indeed the legislature, not the understanding of the Committee, which would be relevant for the purpose of this argument. Although the Prime Minister stated that the Government was seeking to implement the recommendations of the Committee in the Rates Act, it does not follow that he, or the Government, agreed with the view of the Committee as to the effect of the Pensions Act and Regulation. Quite apart from this, as Mr Astaphan [counsel for the appellant] fairly pointed out, the Rates Act did not in fact implement the recommendations of the Committee - at least if those recommendations were as contained in the Report."

52. It was noted on behalf of the respondent before the Board that the report referred to in para 53, which is available to the Board, was prepared in 1985 by Chief Justice Robotham. The Board accepts the respondent's submission that it does not affect the construction of the Rates Act any more than the later report for similar reasons to those set out in paras 52 and 53 of the Advisory Opinion quoted above. It further accepts the submission that the panel was fully aware of the parliamentary context.

53. In all these circumstances the Board is not persuaded that any of the material relied upon is sufficient to alter the opinion expressed above that the construction of the statutory material reached in the Advisory Opinion and by the courts below is correct. Accordingly the Board answers the first question posed in para 27 above, namely

whether the appellant is entitled to be paid a pension pursuant to either the Pensions Act or the Rates Act or both in the negative. It also answers questions (1) to (3) posed in para 26 above in the negative.

Legitimate expectation

54. The Board turns to the question whether the appellant is entitled to a pension based on the principle of legitimate expectation. This is in essence the question posed by both question (4) in para 26 above and by question (2) in para 27. In the latter formulation it asks whether the appellant, if he fails to qualify for a pension on the true construction of the statutory provisions, has made out a case of legitimate expectation based on past recommendations of the JLSC and payments made by the Government to retired judges pursuant to those recommendations.

55. This question was expressly considered by both the judge and the Court of Appeal. It was not considered as part of the Reference. Both the judge and the Court of Appeal held that the appellant had not established a right based upon legitimate expectation. The judge summarised her conclusions in para 63 of her judgment as follows:

> "… the court on examination of the evidence of the claimant and the Secretary of the JLSC finds that while one factor might have been common with the facts surrounding the claimant's retirement, namely the short period of service, there was one factor that was certainly dissimilar and that was that the JLSC only recommended payment on the achievement of sixty two (62) years for a Puisne Judge and 65 for a Justice of Appeal. No payments had been recommended to a Judge retiring at the age of fifty five (55) years or fifty six (56) years as was the case of the claimant. Admittedly the claimant could hold the position that he was retiring pursuant to the age fixed by the Pensions Act and not the Supreme Court Act. The factors not being on all fours with each other, the Court finds that there could be no legitimate expectation."

56. As was correctly submitted on behalf of the respondent, the Court of Appeal, in a further detailed analysis, confirmed the judge's conclusion at paras 84 to 89. In particular it was submitted that no judge who had retired in similar circumstances to the appellant (ie below the prescribed retirement ages of 62 years for a puisne judge, and 65 years for a Justice of Appeal) had been paid a pension. Reliance was placed in particular upon the following conclusions of the Court of Appeal. It said at para 86:

> "The promise or representation held out to the appellant based on the practice of the JLSC was this: on his retirement as a justice of appeal at the mandatory age of 65 with three years' service, seven years would be added to his service to give him the necessary qualifying years. The promise or the practice was built on the fulfilment of an essential condition, attaining the mandatory retirement age of 65. The appellant could readily prove the legitimacy of his expectation to be paid a pension if, based on this practice, he had retired at age 65 and had served for only three years and five months."

In fact the appellant had retired at the age of 56 and at para 89 the Court of Appeal continued:

> "The evidence showed that for its part, the JLSC unequivocally applied the practice so that a High Court judge or justice of appeal who retired before reaching the mandatory retirement age did not get the benefit of the add-on years and was not paid a pension. I agree with the finding of the learned trial judge that the appellant could have no legitimate expectation in this case."

57. In these circumstances the Board accepts that, in the face of concurrent findings of fact, however it is formulated, the appellant's claim based on legitimate expectation cannot possibly succeed.

Conclusion

58. For these reasons the Board concludes that the appellant's appeal must be dismissed and will humbly advise Her Majesty to that effect. Subject to any submissions made on behalf of the appellant within 28 days of the hand down of this judgment, the respondent's costs before the Board must be paid by the appellant.