

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

IN CHAMBERS

SUIT NO. E. 42 OF 1982

ORIGINATING SUMMONS

BETWEEN

CLEVELAND ALLEN

PLAINTIFF

AND

THE JAMAICA MOVEMENT FOR
THE ADVANCEMENT OF LITERACY
LIMITED

DEFENDANT

HEARD: June 24, 25, 1982 - February 10, July 4, 1983.

Dr. Lloyd Barnett and Mrs. Angela Hudson-Phillips for Plaintiff.

David Muirhead Q.C. and Harold Brady for Defendant.

Coram: Wolfe J.

The Plaintiff an educator and administrator by letter of appointment dated the 2nd May 1977 was employed to the Staff of the Defendant Company as an Administrative Assistant. The terms of his employment were set out in a document marked CRA I, By letter dated May 15, 1978 and marked CRA 2 the Plaintiff was appointed to act as Personnel Officer with effect from April 3, 1978. In January 1980 by letter dated January 25, 1980 and marked CRA 3 the Plaintiff was appointed to act as Deputy Assistant Director. Further thereto by letter dated April 22, 1980, marked CRA 4 the Plaintiff was appointed Assistant Director in the Field Operations Department of the Defendant Company.

On the 9th June 1981 a letter marked CRA 6 under the hand of Mrs. Joyce L. Robinson, Director of the "Jamal" Foundation was addressed to the Plaintiff. The contents of the said letter are set out hereunder:

"Mr. Cleveland R. Allen, M.A.,
Assistant Director Field Operation,
JAMAL Headquarters,
47B South Camp Road,
Kingston 4.

Dear Mr. Allen,

I invite reference to our discussion in my office yesterday, 8th June, 1981, in the

presence of Mr. Eric M. Brown, Deputy Director in respect to the manner in which you have been carrying out your responsibilities as Assistant Director Field Operations.

This is to inform you that you are suspended from duties (with full pay) with effect from Wednesday, 10th June, 1981 until further notice. An official investigation will be scheduled in keeping with the procedures of JAMAL Foundation.

Yours sincerely,

Joyce L. Robinson
Director".

(emphasis mine)

Subsequently formal charges were laid against the Plaintiff as set out in a document marked CRA 7 and dated June 17, 1981 and set out hereunder:

"Mr. C. R. Allen, B. A., M. Sc.,
7 West Road,
University Campus,
Mona.

Dear Mr. Allen,

Please refer to my letter to you No. P/A 46 dated 9th June, 1981 suspending you from duties with effect from 10th June, 1981 pending an official investigation into your conduct.

This is to inform you that subject to your election, the Board of Directors of the JAMAL Foundation Ltd. proposes to investigate the following charges:-

1. That you in your capacity as Assistant Director Field Operations in the exercise of your duties as Chairman of the Zone Officers' Conference acted in a manner prejudicial to the stated objects of JAMAL and which conduct constituted a betrayal of the trust and confidence reposed in you by the Board, to wit:

- (a) by abusing the powers vested in you as Chairman of the Zone Officers' Conference.

3.

- (b) by exhibiting a reckless disregard for a sensitive Adult Education Programme dependent on National Support
 - (c) by deliberately and calculatedly misdirecting the business of the Zone Officers' Conference to achieve your own personal ends
 - (d) by introducing to the Zone Officers' Conference extraneous irrelevant and prejudicial literature to the detriment of the JAMAL Programme
 - (e) by introducing readings from certain books and inviting comments thereon from officers under your control in projecting your personal views in support of the doctrine of specific authors irrelevant to the purpose for which the meeting was convened and thereby subverting the priorities and principles of the JAMAL Programme.
2. That you failed in your duties as Assistant Director Field Operations in the handling of the matter relating to the prolonged absence from work of an Area Officer, Rev. A. Braithwaite.
 3. That you in your capacity as Assistant Director Field Operations acted in a manner calculated to deceive the Board by way of non-disclosure relating to your current housing accommodation which led to your receiving continued payments to which you are not entitled.
 4. That you failed in your duties and responsibilities as Assistant Director Field Operations in relation to the monitoring of travelling allowances for the Zone Officer for Kingston B.

In keeping with the usual practice as provided for in the JAMAL Foundation Staff Manual, I have to inform you that:-

- (a) You should forward within seven days of the delivery of the charges, a written reply to the charges and any observations you may desire to make thereon;
- (b) that you may attach to the written reply statements from your witnesses;
- (c) that you may elect in your written reply to have the charges dealt with by the investigating Committee on the basis of the written reply and statements, if any,

of witnesses, or to have an oral enquiry before the Board's investigating Committee (if this is not stated in the letter it will be presumed that you have selected to have the charges dealt with on the basis of the written reply); and

- (d) that the investigating Board Committee may, after considering the written reply and the statements if any, of the witnesses, hold an oral enquiry notwithstanding your selection.

You will be informed in due course of the date, time and venue of the oral enquiry.

Your sincerely,

Joyce L. Robinson
Director".

After due notice to the Plaintiff as set out in a letter dated June 30, 1981 and marked CRA 8 an Inquiring Committee enquired into the charges as laid and in a document dated November 18, 1981 CRA 9 the Committee recorded its findings and Recommendations as set out hereunder:

"FINDINGS AND RECOMMENDATIONS:

Charge One:

The evidence presented to the Committee did not support this charge.

Charges Two, Three and Four:

There was evidence of procedural breaches in the matters referred to in these charges

Recommendation:

The Committee recommends -

- a) that Mr. Cleveland Allen be reinstated with no loss of salary or perquisites;
- b) that he be given a stern reprimand with a notation on his personal file;
- c) that his performance be closely monitored for a period of six (6) months.

Mr. John J. Searchwell
Rev. Webster Edwards
Mr. Simon Clarke - Chairman
Date: November 18, 1981."

On the 22nd December 1981 a letter the contents of which are recited below, and, which was marked CRA 10 was addressed to the Plaintiff

"Mr. Cleveland Allen, B.A., M.Sc.,
17 West Road,
Mona,
Kingston 7.

Dear Mr. Allen:

Please refer to our letter to you No. DAD 7/1-B dated 17th June, 1981, and to the Oral Enquiry subsequently held into a number of charges preferred against you by the Disciplinary Committee of the Board of Directors of the JAMAL Foundation.

I now hereby inform you that based upon the findings of the Investigating Committee, the Board has decided that you should be re-instated in a sub-ordinate position. Accordingly it has been decided to appoint you as a Zone Officer. You are therefore called upon to report to the Director on Monday, 4th January, 1982 at 8.30 a.m., when you will be afforded details on your new assignment.

As a result of the foregoing, you are asked to hand over immediately, the motor car which was assigned to you, to the Acting Deputy Director.

Yours sincerely,

Eric M. Brown
Acting Director".

It is against this historical background of facts that the Plaintiff on the 15th day of March 1982 commenced these proceedings and sought to have the following questions determined by this Court.

"A. The Determination of the Court on the following questions, namely:

1. Are the Rules set out in the Jamal Staff Manual part of the terms of the contract of service between the Plaintiff and the Defendant and as such govern all substantive, jurisdictional and procedural matters of discipline?
2. Do the Findings dated November 18th, 1981 of the Disciplinary Committee which was constituted as the Investigating Committee to inquire into the Charges preferred against the Plaintiff provide any legal basis for the infliction of any punishment by the Defendant on the Plaintiff, having regard to the provisions of the said Rules?

3. Can the Defendant under the said Rules impose any punishment or inflict any penalty on the Plaintiff which is greater or more severe than that recommended by the said Committee?
4. Can the Defendant under the said Rules lawfully review or alter the findings of the said Committee, or reject its recommendations without there having been an application by the Plaintiff for such a review?
5. Can the Defendant lawfully under the said Rules, review the findings of the said Committee, reconsider and reject its recommendations in the absence of the Plaintiff and without having given the Plaintiff an opportunity to be heard?"

The Plaintiff further sought the following relief:

"A Declaration that -

the action or decision of the Defendant purporting to transfer and reduce the Plaintiff in rank and office is in contravention of the said Rules, in breach of contract, illegal and void."

Re Question 1.

Are the rules set out in the Jamal Staff Manual part of the terms of the contract of service between the Plaintiff and the Defendant and as such govern all substantive, jurisdictional and procedural matters of discipline?

The Court takes the view that to ascertain the answer to the question posed herein regard must be had to the terms and conditions to attached/the Plaintiff's employment.

The Plaintiff in paragraph 2 of his affidavit dated the 12th day of March 1982 averred that the terms and conditions of his appointment were set out in letter dated May 2, 1977 and marked CRA 1. In this regard he is supported by Mr. Steadley Webster, Chairman of the Board of Directors of the Defendant Company, who at paragraph 5 of his affidavit dated June 8, 1982 deposed as follows:

"I have read the Affidavit of the Plaintiff dated the 12th day of March, 1982 and I agree with paragraphs 2 to 6 therein."

The contents of the letter of appointment referred to at paragraph 2 of the Plaintiff's affidavit and marked CRA 1 are set out hereunder:

"Mr. Cleveland R. Allen
17 Bretford Avenue
Kingston 10

Dear Mr. Allen,

It is my pleasure to inform you that you have been appointed to the post of Administrative Assistant with the Jamaican Movement for the Advancement of Literacy Limited (JAMAL) in the Administration Department. This appointment takes effect from 2nd May, 1977.

The conditions of your appointment are as follows:-

1. You will be required to serve a probationary period of three months.
2. Should your appointment continue on completion of the probationary period, one month's notice on either side will be required for its termination.
3. You will be paid a salary of Seven Thousand Five Hundred Dollars per annum in the scale \$6900 x 300 - 8100. Salary will be paid monthly.
4. You will be required to keep a motor car for the performance of your duties and will be paid Upkeep Allowance and mileage in accordance with Government rates. This allowance is payable monthly.
5. You will be subject to the rules governing staff as determined by the Board.
6. Leave facilities and general conditions of service are in accordance with decisions of the Board and in most instances are similar to those in force in the Civil Service of Jamaica.
7. You are requested to submit your National Insurance Number and, if previously employed, your N.I.S. and Income Tax leaving Certificates.

Please note that as a full-time employee, you will be required to obtain the permission of the Board prior to undertaking private work or engaging in trade, employing yourself in commercial or agricultural undertaking at any time during your employment. Any departure from this regulation will violate your contract.

I look forward to your association with the Programme and trust that it will be profitable not only to the Board, but to yourself as well.

Yours sincerely,

Joyce L. Robinson (Mrs.)
Director."

Condition No. 5 of the letter under consideration unequivocally states that the Plaintiff "will be subject to the rules governing staff as determined by the Board".

At paragraph 6 of the Plaintiff's affidavit the Plaintiff swore "That at all material times the Rules governing staff which were issued by the Board of Jamal were and are contained in the Booklet known as "Jamal's Staff Manual" which is exhibited as CRA 5. Let me state at this juncture that in relation to CRA 5 it is patently clearly that CRA 5 as exhibited is incomplete and in this regard, I accept the evidence of Miss Leila Thomas at paragraph 3 of her affidavit dated the 24th day of June 1982 that the complete Jamal Staff Manual is that referred to in her affidavit and exhibited as SW 2.

Rule 1.2 of Chapter 1 of the Staff Manual states as follows:

"The provisions in these Rules shall apply to all employees of the Jamal Foundation".

Rule 1.3 states: "Employees may be liable to disciplinary action in respect of breach of any of these Rules".

Rule 1.4 states: "These rules are terms of the Boards contract of service with each employee and are deemed incorporated therein".

Rule 1.1(f) defines employee as follows:

"Employee" means paid member of staff.

Before answering the question let me advert to CRA 2 dated the 15th May, 1982 by which the Plaintiff was appointed to act as Personnel Officer with the Defendant Company. Paragraph 4 of CRA 2 states:

"All other terms and conditions of your acting appointment remain the same as stated in your letter of appointment dated 2nd May, 1977 (CRA I)".

In January 1980 by letter dated 25th January 1980 CRA 3 the Plaintiff was appointed to act as Deputy Assistant Director in the Field Operations Department of the Defendant Company with effect from the 9th January 1980. Paragraph 3 of the said letter states:

"All other terms and conditions of your acting appointment remain the same as stated in your original letter of appointment dated 2nd May 1977".

By letter dated the 22nd April 1980 CRA 4 the Plaintiff was appointed Assistant Director in the Fields Operation Department with effect from the 4th February 1980, a post which he held up to the time of his trial. Condition 5 of the appointment as set out in CRA 4 states as follows:-

"You will be subject to the rules governing staff which the Board may issue from time to time".

It was conceded by both sides that the rules contained in the Jamal Staff Manual are the only rules issued by the Board up to the time of the hearing of this summons.

Notwithstanding, Mr. Muirhead for the Defendant argued that the rules were not applicable to the Plaintiff as he was not an employee in the strict sense of the word but rather an officer. This contention Mr. Muirhead argued is supported by the definition of "Assistant Director" at rule 1.1(d) of the Jamal Staff Manual.

Rule 1.1 (d)

"Assistant Director means the officer in charge in charge of a Department of the JAMAL Foundation" (emphasis mine)

It is significant that the very rules which it is contended do not apply to Plaintiff make provisions as to his appointment. At Chapter 2 rule 2.1 (c) states "Appointment to the JAMAL Foundation are made on the following basis":

2.1.(c) "Assistant Director - by the Director following interview by a Sub-committee of the Board composed of the Chairman, Director, Deputy Director and two members of the Board".

Having set out how each category of worker is to be appointed rule

2.2. states:

"On first appointment to the JAMAL Foundation all employees will be required to serve a probationary period of three months unless it has been otherwise agreed upon at the time of appointment".

(emphasis mine)

I hold that officer at section 1.1(d) and employee are interchangeable terms and that the use of the word officer therein does not remove the Plaintiff from the category of employee as defined by rule 1.1(f). In the absence of any evidence that the Plaintiff was performing "a labour of love" I hold that he is an employee within the meaning of the JAMAL Foundation Staff Manual and consequently the said rules are part of the terms of the contract of service between the Plaintiff and the Defendant as stated by rule 1.4(Supra). A natural consequence of this finding therefore is that Chapter VI of the said rules dealing with discipline and the procedures therein are applicable to the Plaintiff and govern all substantive, jurisdictional and procedural matters of discipline between the Plaintiff and the Defendant.

Question 2.

Do the findings dated November 18th, 1981 of the Disciplinary Committee which was constituted as the Investigating Committee to inquire into the charges preferred against the Plaintiff provide any legal basis for the infliction of any punishment by the Defendant on the Plaintiff having regard to the provisions of the said Rules?

The findings of the Investigating Committee as set out in CRA 9 and which have been already set out herein reveal that in relation to charge one the Committee found that "the evidence presented to the Committee did not support this charge". In relation to Charges 2, 3, and 4 the Committee found as follows:

"There was evidence of procedural breaches in the matters referred to in these charges".

In the light of the question posed, can it be said that the findings in relation to charges 2, 3 and 4 amount to findings of guilt? If the answer is in the affirmative then clearly the Plaintiff would be liable to be punished as set out in Chapter 6 of the JAMAL Staff Manual and the question posed for the determination of the Court would of necessity attract an affirmative answer. If on the other hand it is held that such findings do not amount to findings of guilt then the answer to the question would be in the negative.

Each of the three charges must be examined in an effort to interpret the findings of the Committee.

Charge 2

"That you failed in your duties as Assistant Director Field Operations in the handling of the matter relating to the prolonged absence from work of an Area Officer, Rev. A. Braithwaite".

The gravamen of the charge as I understand it is that the Plaintiff committed a dereliction of his duty. In relation to this charge the Committee found "evidence of procedural breaches". My first observation arising from the findings is that the Committee has not made a finding as to who committed the procedural breaches. Was it the Rev. Braithwaite by his prolonged absence from work? Or does it mean that the Plaintiff was guilty of "procedural breaches" in his handling of the matter. Let me be generous and say that the finding of "procedural breaches" relates to the Plaintiff's handling of the matter. Does it mean that he is guilty of the charge as laid?

The charge is, to say the least vague, and in the circumstances, placing the most generous interpretation upon it, I understand it to mean that the Plaintiff took no steps in dealing with the matter. If this interpretation is correct then a finding of "procedural breaches" could very well be interpreted to mean that Plaintiff did take steps to deal with the matter but that the steps taken were not in accordance with the Rules of JAMAL.

Section 1.6 of Rules is instructive.

"An employee who absents himself from duty without permission except in the case of illness or other unavoidable circumstances shall render himself liable to disciplinary action".

It is my considered opinion that a finding of "procedural breaches" is not a finding upon which I would be entitled to hold that it was an unequivocal finding of guilt in respect of the charge as laid.

Re Charge 3.

"That you in your capacity as Assistant Director Field Operations acted in a manner calculated to deceive the Board by way of non-disclosure relating to your current housing accommodation which led to your receiving continued payments to which you are not entitled".

This charge alleges the perpetration of a fraud by the Plaintiff. Does the finding of "procedural breaches" mean that the Committee found that the Plaintiff was entitled to payments received by him, but that the method by which he claimed these payments was not in keeping with the procedures laid down by the Defendant Company or that the Plaintiff received payments to which he was not entitled as stated in the charge. I am inclined to the former view and I am buttressed in this view by the recommendations of the Committee. No responsible Committee, such as the one which heard the charges, having found a senior officer guilty of fraud as set out in the charge would in my view recommend that the officer be reinstated with no loss of salary or perquisites. I am of the firm view that had the committee found the officer guilty of the charge as preferred they would have at least recommended that he be made to refund his ill-gotten gains.

Re Charge 4.

"That you failed in your duties and responsibilities as Assistant Director Field Operations in relation to the monitoring of travelling allowances for the Zone Officer for Kingston B".

As indicated when charge 3 was discussed a finding of "procedural breaches" is not in my view a finding that the specific allegation in charge 4 was proved.

For the reasons which I have adumbrated I hold that there was no finding of guilt made by the Committee and therefore there

was no legal basis for the imposition of any punishment upon the Plaintiff. To contend as Mr. Muirhead did that the recommendation of sanctions by the Investigating Committee is evidence of a finding of guilt is in my respectful submission to beg the question.

It is worthy of note that Mr. Simon Clarke the chairman of the Investigating Committee and a member of the Board of Directors of the Defendant Company filed an affidavit dated the 8th June 1982 and nowhere in the affidavit does he even attempt to say as a member of the Investigating Committee that the Committee found that charges 2, 3, and 4 as laid were proved.

It is left to Mr. Steadley Webster, Chairman of the Board of Directors not a member of the Investigating Committee, at paragraph 13 of his affidavit dated the 8th June 1982 to say:

"That I disagree with the inference the Plaintiff seeks to place upon the findings and recommendations of the investigating committee. That the statements made in the document marked CRA 9 relating to charges 2, 3 and 4 amount to a finding that these charges have been proved to the satisfaction of the investigating committee".

Surely, Mr. Webster is entitled to disagree with the interpretation which the Plaintiff seeks to place upon the findings of the Investigating Committee. It is equally true that the Plaintiff is also entitled to disagree with Mr. Webster's interpretation. What Mr. Webster is not however entitled to do is to make binding upon the court his interpretation of the findings. The task of interpreting the meaning of the findings is the preserve of the Court.

Assuming that I am correct in holding that the findings do not amount to a finding of guilt of the charges as laid, can it be said that the findings of the Committee amounted to a finding of guilt of alternative charges? I would unhesitatingly answer the question in the negative as no such power is given to the Committee.

Rule 6(3)(d)(VI) states:

"At the close of the enquiry, the Investigating Committee will consider the charges, the written reply and the statement, if any and the evidence given at the oral enquiry and shall find as a fact whether or not any of the charges has been established, and shall report its findings to the Deputy Director along with its recommendations".

Clearly the words "and shall find as fact whether or not any of the charges has been established" must refer to

charges as laid. Any finding as to alternative charges is in my view Ultra Vires the rule from whence the Committee derives its power.

Question 3

Can the Defendant under the said Rules impose any punishment or inflict any penalty on the Plaintiff which is greater or more severe than that recommended by the said Committee.

This question as I understand it predicates a situation where there is a finding of guilt. The rules as set out in the Staff Manual empowers the Defendant, acting through the Director, to impose punishment or inflict a penalty upon the Plaintiff which varies from the recommendations of the Investigating Committee or the Deputy Director. This means that the Director is not bound by the recommendations of either the Investigating Committee or the Deputy Director. However the Director is given no power to vary the findings of either the Committee or the Deputy Director.

Rule 6(3)(d)(VII)

"The Deputy Director shall consider the findings and shall report such findings to the Director along with his recommendations and such findings and recommendations may vary from the findings and recommendations of the Investigating Committee".

Rule 6(3)(d)(VIII)

"The Director shall consider the findings and recommendations at (vi) and (vii) above and shall take action as follows:-

- (a) If it has been found that the charges have not been established, he shall so inform the employee in writing;

If it has been found that the charges has been established, he shall so inform the employee in writing and shall also inform the employee of the penalty to be imposed upon him. Such penalty may vary from the recommendations at (vi) and (vii) above.

It is patently clear from the rules cited above that the power to impose penalty is vested in the Director and such penalty as the Director imposes is not in any way circumscribed by the recommendations of either the Committee or the Deputy Director. Where the procedure used is that of the Oral Enquiry the Director may impose any penalty as prescribed in Rule 6.(6) (a) - (e) be it more or less severe than the recommendations made by the Committee or the Deputy Director.

Question 4.

Can the Defendant under the said Rules lawfully review or alter the findings of the said Committee or reject its recommendations without there having been an application by the Plaintiff for such review?

Rule 6(7)(1) sets out the procedure to be followed upon review.

"The employee shall have the right to apply to the Board to review the findings or the penalty imposed upon him, stating the grounds on which his application is based".

This rule provides the Plaintiff with a right of Appeal.

This right is exercisable only at the instance of the Plaintiff. The Board cannot of its own initiative undertake a review of the findings of the Committee or the Deputy Director, neither can it of its own initiative review the penalty imposed by the Director.

Question 5.

Can the Defendant lawfully under the said Rules, review the findings of the said committee, reconsider and reject its recommendations in the absence of the Plaintiff and without having given the Plaintiff an opportunity to be heard?

In considering the question posed the observation of Professor S.A. de Smith is rather helpful.

"Today we can adopt a presumption that the rule will apply in the following situation:

1. Where the deciding body is a court or tribunal, such a body may nevertheless be empowered or required by statute to act *ex parte* (hearing one side only) in special circumstances - for example, to order that a person suffering from a prescribed infectious disease be detained in hospital.
2. Where, although the deciding body is not a distinct tribunal, its functions involve the holding of hearings or inquiries, or the determination of disputes between parties, or where it is required to determine questions of law and fact in individual cases and its decisions will have a direct impact on the interests of the individual concerned.

3. Even if these conditions are lacking, a body vested with a discretionary power may be under an implied duty to observe natural justice before it acts or decides if
- (a) its discretion is subject to legal limitations so that it can be compared to a "judicial discretion" or
 - (b) the impact of its act or decision will be particularly severe on the legally recognized interests of the person directly affected by it for example, because it deprives him of liberty or property or status or livelihood or imposes a heavy penalty on him, or casts a serious slur on his reputation" .

Constitutional and Administrative Law by S.A. de Smith
pp 564 - 5.

In dealing with the principle of audi alteram partem in ALFRED THANGARAJAH DURAYAPPA of Chundikuly, Mayor of Jaffna vs W.J. Fernando and Others 1967 2 A.C. p. 337 at p. 349 Lord Upjohn had this to say:

"In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined".

Any review by the Defendant of the findings of the Investigating Committee in a matter where misconduct and fraud are alleged against the Plaintiff, a person of the status of Assistant Director. Field Operations must be in accordance with the rules of natural justice and therefore the principle of "audi alteram partem" ought to have been observed.

In any event rule 6.7(1) supra is a clear indication that the Plaintiff has a right to be heard in any review by the Board.

I cite with approval the words of Parnell J. in R v Commissioner of Police ExParte Tennant (1977) 15 JLR p. 79 at p. 83

"And I would be surprised if an Act of Parliament can be found in these modern days which would support a contention that the rules of natural justice can be relegated to a furnace by a tribunal when a man's reputation, his right to work, and his right to property are at stake".

I therefore answer the question in the negative.

Summary of Answers to Questions:

1. Yes.
2. No
3. Yes
4. No
5. No.

In the light of the answers to the questions posed I am of the view that the Plaintiff is entitled to the relief prayed and the declaration is granted in terms of the summons.