IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

SUIT NO. M. 49 of 1978

REGINA

vs.

THE INDUSTRIAL DISPUTES TRIBUNAL

THE HALF MOON BAY HOTEL LIMITED APPLICANT

(MOTION FOR PROHIBITION)

CORAM: PARNELL, MORGAN & CAMPBELL,JJ.

Appearances: Berthan Macaulay, Q.C. and H. Phillips for the applicant (THE HALF MOON BAY HOTEL LTD.)

P. Robinson and S. Gayle for the INDUSTRIAL DISPUTES TRIBUNAL

Heard - November 14 and 15, 1978

J U D G M E N T

February 1, 1979

CAMPBELL,J

This is an application brought by the Half Moon Bay Hotel seeking an order prohibiting the Industrial Disputes Tribunal from proceeding with the hearing and determination of a reference made to it by the Minister of Labour on September 8, 1978.

The Half Moon Bay Hotel Limited is a company incorporated under the Laws of Jamaica; it is engaged in tourism and the running of a hotel at Rose Hall, Montego Bay in the parish of St. James and will hereinafter be referred to as "the company". The Industrial Disputes Tribunal is established for the purposes of and by the Labour Relations and Industrial Disputes Act, 1975 (No 14 of 1975) and will hereinafter be referred to as "the tribunal" while the Labour Relations and Industrial Disputes Act, 1975 will be referred to as "the Act".

The application is the culmination of strained relation which developed between the company and the National Workers Union (hereinafter referred to as the Union) from sometime in late 1974.

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Prior to 1974 the relationship between the company and the Union appeared to have been cordial. This relationship, in sofar as it is germane to these proceedings dates back to at least January 3, 1962 when as the precursor of and basic to this relationship, a "Poll" agreement was entered into between the company and the Union. The salient feature of this Poll agreement was that it provided for a poll to be conducted among prescribed employees of the company supervised by the Ministry of Labour to determine whether the said employees desired the Union to represent them. It further provided for a certification of the results of the Poll and for a notification by the Permanent Secretary, Ministry of Labour to the Company and the Union of the result of the poll. The Poll agreement concluded in clause 12 as follows:-

> "If the Union obtains the votes of the majority of the workers listed on the Voter's List the Union shall be accepted by the Hotel as being the exclusive representative of all the employees in such Hotel covered by this Agreement for the purpose of collective bargaining in respect of rates of pay, wages, hours or other conditions of employment concerning all the workers in the Hotel with the exception already stated".

On January 23, 1962 a poll was taken pursuant to the agreement, and on January 25, 1962 both the Company and the Union were notified of the result of the poll which showed that the Union had obtained the votes of the majority of the workers listed on the voters list.

On the basis presumably of the result of the poll the company and the Union concluded a collective agreement on October 26, 1962 which among its terms included:-

(i) recognition of the Union as the bargaining agent on behalf of the employees covered by the agreement;

(ii) Declaration of objective namely, that the general purpose of the agreement was to record orderly collective labour

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relations between the company and the employees represented by the Union;

(iii) recognition by the company of the right of the Union to exercise its functions under the agreement in accordance with recognised Trade Union principles and practice;

(iv) establishment of a "grievance procedure" to deal with complaints arising out of the application and interpretation of the agreement and any other matter made subject to the said procedure with this significant provision:-

> "If no such solution is forthcoming either side shall have the right to direct that the matter be placed before a suitable independent and mutually agreed arbitrator whose decision shall be binding on all parties. Terms of reference to be placed before the arbitrator shall be mutually agreed upon.
>
> In the event of the Union and the Hotel failing to agree on an arbitrator the matter shall be referred by either party to the Ministry of Labour with a request that the Ministry appoint an arbitrator whose appointment and findings shall be binding upon both parties".

This agreement, hereafter referred to as the principal agreement was originally limited to determine on April 30, 1963 but was, thereafter retroactively extend to expire on April 30, 1971 and April 30, 1973 by agreements dated September 4, 1969 and September 17, 1971 respectively.

From the conduct of the parties in twice expressly extending the expiry date of the principal agreement, by and

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through subsequent agreement concluded long after the relevant expiry date in the principal agreement had passed, an inference can reasonably be drawn that it was in the contemplation of the parties that the provisions in the principal agreement should be regarded as still subsisting during the hiatus between the expiry date of the principal agreement and the conclusion of the next succeeding agreement. This is so because the technique adopted in each succeeding agreement was not that of incorporating therein particular provisions of the expired principal agreement but rather the express extension of the expiry date of the said principal agreement albeit that such latter agreement would on the date of extension have expired be non-existent and incapable of extension in the absence of an implied term that the said principal agreement would remain alive and operative notwithstanding the written expiry date.

It was no doubt in reliance on this implied term in sofar as it related to the provision declaring recognition of the Union by the Company as the exclusive bargaining agent for the workers, as well perhaps, as on the poll agreement, that the parties met in or about October, 1974 to negotiate a further collective agreement which, had it been unequivocally accepted as a definately concluded agreement would doubtlessly have exhibited a technique similar to that in the last two agreements namely, that of expressly extending the expiry date of the principal agreement to a new terminal date.

It is now an historical fact that a dispute arose between the Company and the Union as to whether a new agreement had been finally concluded in October, 1974. The Company contended that a definite agreement had been reached which would remain effective between the parties until February 28, 1976, the Union on the other hand maintained that no final agreement had been reached consequent on which it demanded, in assertion of

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its recognition as the representative of the workers that the Company return to the negotiating table.

In one respect at least, the parties were agreed, this was that the terms then being negotiated were intended to be operative to February 28, 1976.

There is no evidence before me as to how many and how serious were the attempts made by the Union to get the Company back to the negotiating table, suffice it to say that the workers did not appear restive no doubt because they were receiving from the Company the new wages and rates which the latter was paying in conformity with its stand that an agreement had been concluded with the Union in October 1974.

On or about January 15, 1976 the Union commenced proceedings in the Supreme Court against the Company in a suit intituled National Workers Union vs. Half Moon Bay Hotel seeing declaration as whereunder, namely:-

"(1) A declaration that there is not a collective labour agreement due to expire on the 28th day of February, 1976 in force between the Plaintiff and the Defendant;

(2) A declaration that the Plaintiff is at liberty before the 28th day of February, 1976 to enter labour negotiations with the Defendant on behalf of the workers of the Half Moon Hotel."

This conduct of the Union in commencing proceedings against the Company must have taken the latter by surprise after some twelve years at least of cordial relationship, it must have been even more surprised because there was no manifest grievance by the workers who to the knowledge of the Union were receiving the wages and other benefits negotiated in October, 1974.

On the evidence it is not clear what real benefit and or advantage the Union hoped to secure from the proceedings,

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especially is this so because the second declaration sought did not ask the Court to declare the existence of any right held and or enjoyed by the Union in relation to the Company which the latter was in duty bound to recognise and respect. It sought a declaration as to a mere liberty or freedom.

Again it is not immediately understandable why the Union did not seek a resolution and/ determination of its dispute with the company by and through the machinery established in the "grievance procedure" laid down in the principal agreement dated October 26, 1962 which as I have found was one of the provisions kept alive beyond the expiry date of the said agreement. The absence of the Union as a party in the present proceeding has severely restricted the evidence placed at the courts' disposal on the basis of which the Union's conduct would have been more readily understood.

The next stage in the chronology of events is the judgment on appeal dated July 12, 1978. The Union has construed the judgment as declaring that "the NWU is entitled to exercise the legal rights granted them by the workers to negotiate on their behalf".

This interpretation was propounded by the then President of the Union Mr. Carlyle Dunkley in an open letter dated July 25, 1978 published in the issue of the Star newspaper dated August 2, 1978.

The company on the other hand positioned itself firmly and securely on the reasons for judgment delivered by the Court of Appeal on July 31, 1978. In a letter to the Union dated August 2, 1978 the company stated that its interpretation of the judgment of the Court of Appeal as elaborated in the reasons therefor was that whether or not it should negotiate with the Union was a matter which lay within its absolute and unfettered discretion. In the aforesaid letter the Union was further notified that because of the

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acrimonious nature of its recent correspondence coupled with the wrong interpretation given of the decision of the Court of Appeal, the company was not prepared to recognise the Union or to enter into negotiation with it. The letter ended with a further notification to the effect that in the interest of the workers the company would be prepared to negotiate with the Union should the latter apply for bargaining rights under the Act and subsequently obtain the majority of the votes of the workers consequent on a poll taken as provided for under the Act. This letter was copied to the Honourable Minister of Labour as well as to the Honourable Attorney General.

Pausing here, it seems clear that the legal proceedings mounted by the Union against the company achieved nothing of substance so far as the Union is concerned, it however, led to disastrous consequences in that it destroyed the cordial relations previously subsisting between them. It resulted in the lawful repudiation by the company of the consensual arrangement which previously existed expressly or impliedly and generated an attitude of mutual intransigence which is the antithesis of good industrial relations.

The Union convinced that it had won a resounding victory in the Court sought the assistance of the Honourable Minister of Labour to persuade, an erring company to desist from "flouting the decisions of the courts of Jamaica" in refusing to negotiate.

The Ministry of Labour to whom the company had communicated its interpretation of the judgment and reasons of the Court of Appeal, and to whom it had equally notified its refusal to recognise the Union save and except in accordance with the provisions of the Act, instead of adopting its traditional persuasive and conciliatory approach reacted by charging the company with defiance of the Court of Appeal's ruling, as also of breach of fundamental industrial relations

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and ordered that the company attend "concilliatory meeting" at the Ministry of Labour. The charge against the company and the order to attend concilliatory meeting were contained in a Telegram dispatched on August 28, 1978 requiring attendance at this concilliatory meeting either on August 29, 1978 or August 30, 1978. The Telegram concluded with these words:-

> "your failure to attend will leave no alternative than for me to use my new powers under Section 11A of the Labour Relations and Industrial Disputes Act to refer dispute to the Industrial Dispute Tribunal which will subpoena you to attend meeting".

The Company failed and or neglected to attend this concilliatory meeting consequent on which the Ministry of Labour by letter dated September 8, 1978 addressed to the Tribunal and copied to the company and the Union made a reference to the Tribunal in terms as hereunder:-

> "to determine and settle the dispute with the Half Moon Hotel on the one hand and certain workers employed by the hotel and represented by the National Workers Union on the other hand over -
>
> (a) the refusal of the management of the Hotel to meet with the Union to continue megotiations in respect of claims served on the management of the Hotel, by the Union for increase wages and improved fringe benefits on behalf of the said workers, and
>
> (b) the denial by the management of certain privileges and rights of the National Workers Union which represent the said workers".

It is against this background that the company seeks the order of prohibition against the Tribunal.

The submissions of Mr. Berthan Macaulay, for the applicant Company may be summarised as follows:-

1. On the face of the documents before the court including the document recording

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the terms of reference to the tribunal there is no industrial dispute within the definition of industrial dispute contained in Section 2 of the Act in that

(i) there is no dispute however characterised between the workers as such and the company;

(ii) what is apparent to the face of the reference and in the light of the documents before the court is a recognition issue that is to say, a claim by the Union to be recognised by the Company which the company is lawfully resisting as not founded in contract in any judicial decision or by statute this recognition issue even if described as a dispute is not an industrial dispute as defined in Section 2(d) of the Act;

(iii) Further or in the alternative, even if the recognition issue is capable of being comprehended in "industrial dispute" as defined, the act clearly shows that it is not a matter in respect of which jurisdiction is conferred on the Tribunal because the act expressly sets out the procedure for resolving a recognition issue with built in sanction against failure to respect and or act in conformity with a recognition established under the Act.

2. The reference to the Tribunal by the Honourable Minister of Labour in exercise of powers conferred on him by Section 11(1)(a) of the Act is null and void because Section 11(1)(a) is unconstitutional being contrary to Section 23(1) and Section 24(1) of the constitution.

For the Tribunal Mr. P. Robinson submitted in substance that the matter stated in the reference constituted an industrial dispute as defined in Section 2(d) of the Act; since Section 11(1)(a) is not unconstitutional the reference by the Minister of Labour of the dispute to the Tribunal was valid and there is accordingly no basis for an order of Prohibition.

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The Act in Section 2 defines Industrial Dispute as:-

> "A dispute between one or more employers or organisations representing employers and one or more workers or organisations representing workers where such dispute relates wholly or partially to -
>
> (a) terms and conditions of employment or the physical conditions in which any workers are required to work; or
>
> (b) engagement or non-engagement or termination or suspension of employment of one or more workers; or
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> (c) allocation of work as between workers or group of workers; or
>
> (d) any matters affecting the privileges rights and duties of an employee or organisation representing employers or of any worker or organisation representing workers."

Both the Company and the Tribunal have conceded that the dispute as stated in the reference to the Tribunal, if it is to be regarded as an Industrial Dispute must come within the definition contained in Section 2(d) since there is not on the face of the documents before us or in the Submissions, any dispute whatsoever relating to Section 2(a)(b) or (c).

There can be no doubt that there is a dispute between the Union and the Company, the Union claiming a right to meet and negotiate with the Company on behalf of employees with respect to whom it has representational rights while the Company is saying that even if the Union has representational rights the Company is not prepared to negotiate with it, further that any recognition which it, the Company had in the past accorded the Union, is withdrawn and for the future it will only recognise the Union as and when the latter establishes representational rights under the Act.

The crucial issue is whether such a dispute is an industrial dispute and so referable to the Tribunal for determination under the Act.

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Prior to the passing of the Act, a claim to recognition was not enforcable by an order of court, such a claim was not conceived as having any legal foundation because no worker had a right to demand that the Trade Union of his choice is recognised by an employer and "a fortiori" no Trade Union as such had any right to be recognised. Disputes pertaining to non-recognition were not thus cognisable in court which dealt with rights and duties known to the law.

The Union seeks to by-pass the fundamental issue of recognition by saying in effect that it has already been recognised. Further that its recognition amounts to a right conferred by agreement between the parties. No doubt the Union seeks to rely on the Poll Agreement of 1962, and also on the principal agreement to the extent that its main provisions particularly that declaring recognition of the Union are impliedly kept alive pending the conclusion of a new collective agreement. This raises the further issue namely, whether rights purportedly conferred in collective agreements or other agreements between an employer and a Trade Union are enforceable.

The better legal view of such agreements is that they are not enforceable because in the contemplation of the parties, having regard to the climate of opinion in which the said agreements are made, they were never intended to be enforced by order of Court but only by industrial action -
See Ford Motor Co. vs. Amalgamated Union of Engineering and Foundry Workers [1969] 2 Q.B. 303. Thus even where the purported rights are grounded in agreements they still do not savour of rights known to the law and a dispute in relation thereto is not amenable for adjudication by a court.

The Union again seeks to by pass the fundamental problem of recognition by asserting that the Court of Appeal has declared the existence of a right to negotiate enuring in its favour.

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It is to be regretted that such an erroneous construction has been put on the judgment of the court of appeal in the suit commenced by the Union against the Company. This erroneous construction is also shared by the Ministry of Labour as evidenced by the tone of its telegram to the Company dated August 28, 1978.

The Court of Appeal nowhere in its judgment or reasons for judgment declared the existence of any such right of recognition or entitlement in the Union to negotiate on behalf of the company's employees. This is made patently clear from the following excerpt from the reasons for judgment:-

> "Parties may agree to meet and discuss and see if they can conclude an agreement or contract, but the agreement or arrangement to meet is not itself a contract or an agreement enforceable at law.
>
> It is perhaps for that reason that the appellants (the Union) were content to seek a declaration that they were "at liberty to enter into labour negotiation" and it is on that basis that we propose to grant the declaration sought. It is not therefore necessary to state whether the respondents (the Company) are under a duty to negotiate or to enquire whether under the constitution or otherwise they are compelled to negotiate. We do not think it is practicable to compel anyone to negotiate."

The Court of Appeal thus made it clear that in upholding the appeal of the Union it was not elevating the status of the declaration sought nor was it changing its legal character. It declared that the Union was "at liberty to enter into labour negotiation" meaning that it is free to do so to the extent that the exercise by it of such liberty or freedom does not encroach on the liberty or freedom of others. In plain words the declaration was that while the Union was free to approach the company to negotiate, the latter was not legally bound to receive the Union much less to negotiate with it. There was no right as such vested in the Union and no court would in the circumstance order the

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company to meet and negotiate with the Union. The Court of Appeal, contrary to declaring any right vested in the Union, declared the validity of the accepted principle that a dispute as to recognition was not amenable to adjudication by a court. To the extent that the Union was thus seeking to obtain an order from the Tribunal which would not be made by the Supreme Court, the company would be justified in invoking the jurisdiction of this court to prohibit the Tribunal from adjudicating on the ground that it would constitute an excess of jurisdiction were it to order the Company to meet and negotiate with the Union. Such an order would be contrary to the principle of the common law established applied and enforced in Jamaica, namely, that an unwilling party will not be ordered to maintain continuous personal relations with another since this is not only undesirable but in most cases impossible to enforce.

Has the Act changed the position either as to the character of a recognition right or as to its legal enforceability?

The Act for the first time in Jamaica statutorily created a right in a Trade Union to recognition with the derivative bargaining rights. It also prescribes the procedure for establishing such recognition and bargaining rights.

Section 5 of the Act dealing with recognition and bargaining rights is an hereunder:

> "Section 5(1) - If there is any doubt or dispute -
>
> (a) as to whether the workers, or a particular category of the workers in the employment of an employer wish any, and if so which trade union to have bargaining rights in relation to them; .....

The Minister may cause a ballot of such workers to be taken for the purpose of determining the matter.

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(3) Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot the Minister shall refer the dispute to the Tribunal for determination. The Tribunal shall in determining any dispute referred to it under this subsection have regard to the provisions of any regulations made under the Act and for the time being in force in relation to ballots.

(4) The Minister shall, as soon as may be after he has ascertained the result of any ballot taken under this Act issue to the employer and every trade union concerned in that ballot a certificate in such form as may be prescribed, setting out the result of the ballot.

(5) If the result of the ballot shows that the majority of the workers who were eligible to vote indicated that they wish a particular trade union to have bargaining rights in relation to them, their employer shall so soon as he receives the certificate referred to in subsection (4) recognise that trade union as having bargaining rights in relation to the workers who were eligible to vote and in relation to any bargaining unit in which they may, for the time being be included

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(8) Any employer who contravenes the provisions of subsection (5) or (6) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two thousand dollars and in the case of a continuing offence to a further fine not exceeding fifty dollars for each day on which the offence continues after conviction.

I have set out in extenso the above relevant provisions to highlight the fact that the Act itself which creates the right expressly appoints the Minister as the person with exclusive power and jurisdiction to entertain a claim to recognition and bargaining right and to declare recognition for bargaining purposes established through the procedure of the ballot, it has further expressly provided that only ancillary disputes relating to the category of workers of whom the ballot should be taken or the persons who should be eligible to vote are referable by the Minister to the Tribunal but not the main recognition issue itself. Significantly enough the section does not describe the issue which has to be determined as an "industrial dispute" but merely as a dispute. The use of the words "If there is any doubt or dispute" in section 5 against the express use of the words "industrial dispute" in sections 8, 9, 10, 11, 11A and 12 of the Act in my view is a clear indication that disputes as to whether a Trade Union should be accorded recognition for bargaining purposes do not come within the definition of Industrial dispute in Section 2(d).

Section 2(d) of the Act expressly refers to "matters affecting privileges, rights and duties" which presupposes the prior and independent existence of the privilege, right or duty; since the only right available to the Union is the statutory right to recognition under Section 5(5) and since this is not on the evidence found to have been established in accordance with the

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procedure laid down in Section 5, the undoubted dispute which exists between it and the company does not constitute an Industrial dispute in the sense of being on a matter affecting any right of the Union and consequently the Minister had no jurisdiction to refer that dispute to the Tribunal which latter equally has no jurisdiction to entertain the same.

On another equally valid ground it appears to me that the Tribunal is without jurisdiction. This ground in my view is independent of whether the composite of facts constitute an industrial dispute or a mere dispute. It is based solely on the express provisions of Section 5, this section as I have stated not only creates the right to recognition but it provides the procedure both for the creation of the right for its enforcement. In Wilkinson v. Barking Corporation /1948/ 1 All E.R. 564 - Asquith, L.J. in considering Section 35 of the Local Government Superannuation Act 1937 said:-

> "It is undoubtedly good law that where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement a party seeking to enforce that right must resort to this remedy or this Tribunal and not to others."

I would respectfully adopt that statement and hold by analogy that where as in this case the Act creates the right and prescribes the procedure to be followed leading to the creation of the right no other method of creating the right is available, and the Tribunal would be exceeding its jurisdiction were it to declare the existence of a right of recognition with the derivative right to negotiate which does not have its origin in the procedure prescribed in Section 5.

I would accordingly allow the application of the Company on the ground that the facts do not constitute an industrial dispute and that accordingly the reference to the Tribunal is invalid also on the alternative ground that the dispute in question amounting as it does to a recognition dispute is expressly

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reserved for determination exclusively by the Minister under Section 5.

Having concluded that the application of the Company should be allowed for the reasons stated it is unnecessary for me to express an opinion as to whether or not section 11(a)(1) of the Act is unconstitutional and I accordingly decline to do so.

Morgan J:,

There is no need to recount the facts surrounding the matter before us, or to add to that which my brother Campbell J, has done so fully and adequately.

I wish only to advert to one aspect of the argument which Mr. Robinson for the Industrial Disputes Tribunal urged in the course of his submissions which was delivered with his usual clarity, force and ingenuity.

He submitted inter alia that the right to be recognized is embodied in the collective labour agreement of 1962 made between the Union and the Hotel and called the Principal Agreement, an agreement which by implication continues under normal Industrial practice.

This agreement executed on the 26th October, 1962 had over the years been ratified, amended and extended by three-yearly periods. It is my view that to make it valid and subsisting ratification and extension must be by agreement, prior to the date of its expiration or on a date subsequent to its expiration and clearly expressing therein that it is to operate retroactively. In this manner the terms would become mutually binding.

I can see nothing which by conduct or by writing would make this agreement by implication alive ad infinitum.

The 2nd paragraph of the Principal agreement reads:

> " The Hotel recognises the National Workers Union as the bargaining agent on behalf of its employees covered by this contract."

The first clause of the agreement dated 17th September 1971 reads:

> " The Agreement made between the Union and the Hotel and dated 26th October, 1962 (hereinafter referred to as the Principal Agreement) shall be extended to April 30, 1973, subject to such amendments as have already been made prior to this date if the same still remain valid and subsisting".

The Court of Appeal in its judgment No. 47/77 (See N. W. U. v. Half Moon Bay Hotel (Supreme Court Civil Appeal) on an issue between the parties held that the agreement made between the Hotel and the Union in 1974 was not a validly concluded agreement or in the

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alternative there has been no existing agreement since 1973.

On a construction of this judgment and the agreement as quoted, it is my opinion that the entire agreement of 1962 called the Principal agreement came to an end also in 1973 as there is no other document produced ratifying or extending the terms of the Principal agreement. With the expiration of the collective agreement came also the expiration of paragraph 2 mentioned above, concerning the recognition formally accorded the Union.

I have read the judgment of Campbell J, and have had the opportunity of reading the judgment of Parnell J, which he is about to deliver. I am in agreement with their reasoning and conclusions. I agree that prohibition should go.

Parnell, J.

I am entirely of the same opinion. If this was an ordinary case, I would not have considered it necessary to add anything further to what has fallen from the lips of my learned brother Campbell. But this is not an ordinary case. It involves legal considerations of momentous importance and it calls for a respectful reflection on a recent decision of our Court of Appeal. I, therefore, think it right to make a brief contribution of my own. And since in life, when everything else appears to fail, it is a good thing to rely on common sense, I shall make no apology in calling in aid, the words of a famous judge of the Victorian era:

> "The business of a judge is to find a good legal reason for the conclusions of common sense." per Lord Esher: 113 L.T.38 at 39.

My brother Campbell has outlined the facts in some detail. As a result I will not dwell on th[illegible] for any length of time. But to the history of the intercourse between the union and the hotel management, I must return.

Outline of events

Two affidavits have been placed before us. One is from the Director of Industrial Relations in the Ministry of Labour. The other is from Mr. Vincent Bancroft Edwards, a senior executive of the National Workers Union (hereinafter referred to as the "N.W.U." or the "union").

I am able to collect the following particulars from the affidavits:

1. An agreement in writing dated the 3rd January, 1962 and made between the union and Half Moon Bay Hotel (hereinafter called the "hotel" or the "employer"), called for the taking of a poll on January 23, 1962 to determine bargaining rights for certain workers of the employer.

2. A poll was held on January 23, aforesaid resulting in the union obtaining 120 votes out of a possible 172. Bargaining

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rights having been acquired by the union, negotiations were entered into with the employer touching the employment and the general working conditions of the workers.

3. On the 26th October, 1962, a collective agreement was executed between the union and the employer. And it was expressly declared that the agreement:

"shall remain in force until 30th April,1963."

4. The agreement of October 26, 1962 was subsequently extended to April 30, 1973. The last extension of the principal agreement was effected by an agreement dated September 17, 1971.

5. Since the expiration of the collective agreement on April 30, 1973, there has not been any further mutually agreed arrangement in writing between the parties in which the employer has accorded recognition of the union as the bargaining agent of the workers. And this point was subsequently used as the base for litigation in the High Court with a further airing in the Court of Appeal.

N.W.U. takes employer to Court

An aggrieved employer poured out its lamentations at the conduct of the union, in a letter dated the 2nd August, 1978 - two days after the Court of Appeal gave judgment on an appeal from the order of Wright,J. The letter is addressed to the union with copies sent to the Honourable Minister of Labour and to the Attorney General. The employer's fulminations are not concealed. The attorneys for the employer wrote on behalf of their client. Paragraph 1 of the letter states:

> " Our clients, the Half Moon Hotel & Cottage Colony, feel very much aggrieved by the conduct of the N.W.U. Having negotiated with the Union and agreed the terms, our clients in good faith paid the wages, rates and increases which the Union agreed to, and have continued to do so. This had always been the practice between the Union and our clients. Both parties had always acted in good faith with one another. But thereafter, the Union took our clients to Court on a pure technical point that the agreement was subject to ratification by the workers. Resort to such course of action has never been the case before. Our clients have therefore lost faith completely in the Union. The result of the Court action has involved our clients in enormous legal expenses over a matter which could easily have been settled."

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Genesis of the complaint

It seems that the union and the employer had entered into discussions with a view to concluding a collective agreement. It is not clear whether the agreement would have been a fresh contract if concluded or an adoption of the agreement of October 26, 1962, with appropriate amendments. But something happened on the way to peace. The terms as to wages, rates and benefits for the workers were settled as between the union and the employer. However, a dispute between the parties arose. The union took the stand that it bargained on the footing that the agreement - or that part which touched wages and increases - was to be ratified by the workers. On the other hand, the employer bargained on the footing that what the union bona fide contended for and agreed to on behalf of the workers, was binding in accordance with good trade union practice.

Each side maintained its posture. Intransigence - an element which does not thrive well in the industrial front - put in an appearance.

N.W.U. makes a move

The proposed new agreement would have covered the period 1974-1976. If it had been concluded, the collective agreement would have run to February 28, 1976.

On the 15th January, 1976, the union started proceedings in the High Court. It was racing against time. The expiry date of a "notional concluded" agreement had only about 44 days to run. The union sought a declaration in these terms:

(1) " A declaration that there is not a collective labour agreement due to expire on the 28th day of February, 1976 in force between the plaintiff and the defendant.

(2) A declaration that the plaintiff is at liberty before the 28th day of February, 1976 to enter labour negotiations with the defendant on behalf of the workers of the Half Moon Hotel."

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The employer fought the union's case and stoutly maintained that:

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> "a clear and unequivocal agreement was reached at the meeting of the 17th October 1974 (apart from some minor details) and that there was therefore a collective labour agreement in force, not due to expire until the 28th February, 1976."

On October 24, 1977, the case came on for trial before Wright, J. who found for the union on declaration (1) but the learned judge refused the relief sought on declaration (2). The reason for refusing the relief is put on the ground that the union can only claim bargaining rights pursuant to a poll conducted under the Labour Relations and Industrial Disputes Act of 1975. This being the case the union cannot claim any right to be at liberty to enter negotiations with the employer (defendant) on behalf of the workers.

The opinion of Wright, J. a judge of great learning and experience, always carries weight and force. With great respect, however, I do not agree with his conclusion with regard to declaration (1) but to some extent, I agree with his reasoning with regard to (2). I shall state my reasons later.

Hearing before Court of Appeal
and its development

When the matter went before the Court of Appeal (Zacca, Henry and Carberry, JJ.A.) the judgment of Wright, J. was unanimously reversed to the extent that the union was granted a declaration in (2) of the union's prayer. The result is that the Union was told on July 31, 1978:

> "that it was at liberty before the 28th February, 1976 to enter labour relations with the defendant on behalf of the workers of the Half Moon/Hotel."
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> /Bay

In giving its reasons, the Court of Appeal appreciated the point made on behalf of the employer that if in fact, the employer is determined not to negotiate with the union:

> "no power in law can make them do so."

However, the Court held that:

> "the grant of the declaration for what it is worth, will at least remove from their chosen stand the cover of apparent reliance on legal rights said to flow from the agreement they themselves set up, and their apparent reliance on a court decision that the appellants were not at liberty to negotiate with them."

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See p.14 of Judgment in N.W.U. v. Half Moon Bay Hotel (Supreme Court Civil Appeal 47/1977).

I shall respectfully cite two other passages from the judgment from pages 14 and 15.

(1) "The effect of our declaration then is that we can see no reason in law why these two parties should not sit down and negotiate with one another on matters that should be of mutual interest: the terms and conditions of employment of the Hotel workers at Half Moon Bay Hotel."

(2) "It may also be that an action will one day arise in which the Courts will have to decide to what extent, if at all, collective labour agreements such as this, create enforceable legal obligations which one side may enforce against the other."

Construction put on judgment

It appears that the union and the Minister of Labour have both construed the judgment of the Court of Appeal in awarding the second declaration to have the following results:

(1) The employer is bound to recognise the union as the bargaining agent of the workers;

(2) The union has the right to continue negotiations with the employer and the employer is under a legal duty to hear the union with a view to an agreement being executed.

(3) The employer has no justification whatever in maintaining its present posture in its refusal to recognise or entertain the union as a bargaining agent and that the "dispute" can be cured by referring it to the Industrial Disputes Tribunal.

The Minister refers dispute to Tribunal

On or about August 28, 1978, the Ministry of Labour sent a telegram to the Manager of the hotel warning him of the consequences of his "defiance of a recent court ruling." The Manager had stoutly refused to attend any conciliatory meeting arranged by the Ministry. He was told in plain language that if he did not attend a certain meeting to be held on either August 29 or 30, the matter would be referred to a Tribunal for settlement. The Manager of the hotel refused to attend any of the meetings

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and as a result, by letter dated the 8th September, 1978, the parties were informed that the Minister had decided to refer the matter to the Industrial Disputes Tribunal with the following terms of reference:

(a) the refusal of the management of the Hotel to meet with the Union to continue negotiations in respect of claims served on the management of the Hotel by the Union for increased wages and improved fringe benefits on behalf of the said workers; and

(b) the denial by the management of certain privileges and rights of the National Workers Union which represents the said workers.

By letter dated the 15th September, 1978, the Attorneys-at-Law of the employer informed the Minister of Labour that their clients did not intend to recognise the National Workers Union. Three other points were made in the letter as follows:

(1) The employer has no dispute with the workers in the hotel;

(2) Even if there was a dispute, the employer was not prepared to treat with the union;

(3) If the Industrial Disputes Tribunal were to proceed to act on the reference, legal proceedings would be taken in the Supreme Court to prohibit the Tribunal from acting.

In the 6th paragraph of the letter dated August 2, 1978, and addressed to the Union, the legal stand of the employer is put in clear language -

> "However, in the interest of the workers, should you apply for bargaining rights under the 1975 Labour and Industrial Relations Act, and if as the result of a poll, the majority of the workers decide that they wish you to represent them, then our clients would of course, thereafter, be pleased to negotiate with the union."

Summary of the stand by the employer

(1) The union's conduct in taking the employer to court with its attendant legal costs, is inexcusable and as a result recognition will not be accorded it as the bargaining agent of the workers

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under any of the expired collective agreements executed prior to April 30, 1973. The employer has lost confidence in the union.

(2) That since the operation of the 1975 Act, no poll has been taken to determine whether the union still has bargaining rights.

(3) That no recognition will be accorded the union unless or until, a poll is held pursuant to the Act and the union is selected by a majority of the workers.

(4) That there is no power to compel the employer to recognise the union, even if it is believed that the union has bargaining rights, as a result of the collective agreement executed on the 26th October,1962 and extended by subsequent agreements to April 30, 1973.

(5) That the Minister has no power to refer the circumstances of the stand taken by the employer to a Tribunal for settlement.

Employer moves to prohibit Tribunal

On the 27th September, 1978, Orr, J. granted leave to the employer to apply for an order of prohibition against the Tribunal entertaining the reference to which I have referred.

The grounds relied on before Orr, J and before us, are as follows:

(a) "that section 11A(1)(a) of the Labour and Industrial Relations Act is unconstitutional and contrary to section 23(1) and section 24(1) of the Constitution";

(b) "that there is no industrial dispute between the applicant and the workers or the National Workers Union (whom the applicant does not now recognise.)"

Main Submissions of Counsel

Mr. McCaulay for the employer and Mr. Patrick Robinson for the Tribunal put their submissions with force and clarity. It was a pleasure listening to them. No disrespect is intended if I refrain from dealing with such portions of their arguments which touch the constitutionality of section 11A(1)(a) of the Act as provided by a recent amendment to the principal Act of 1975. The section provides as follows:

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"Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may on his own initiative -

(a) refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties."

It is a good rule that in a country which has a written constitution, the Supreme Court which is empowered to hear proceedings touching the constitutionality of an Act of Parliament should be guided by certain rules which may be self imposed if necessary. And the reasons for this are simple.

(1) When the Supreme Court is called upon to consider the constitutionality of an Act or a section of an Act, it assumes the role of an umpire between the Constitution (which is the supreme law) and the Legislature (which is the supreme law making body). Where an umpire has a choice between two rules on which to found a ruling, it is open to him to select the one which is less controversial.

(2) In general terms, an Act of the legislature is not to be declared void unless the violation of the constitution is so clear as to leave no room for reasonable doubt.

(3) A constitution is not framed like a civil or criminal code. Its outlines are marked and its objects are stated but minor points or ingredients germane to the objects may be omitted. The founding fathers may deliberately leave these silent or delphic provisions to the good judgment of the judges who may have to grapple with them.

(4) A written constitution is intended to serve present and future generations. As a living organism it should be made to serve the society in the climate existing when its aid is summoned.

In the United States, the Supreme Court has its own self imposed rules when it is considering the constitutionality of an Act. One of these rules was stated by Brandeis, J. as follows:

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> "The Court will not enter upon the question of the constitutionality of an Act, unless it is absolutely necessary." See Ashwander v.TVA, (1936), 397 U.S. 288 at 346-348.

A close study of section 25 of the Constitution indicates that apart from incorporating the doctrine of "last resort" to which I have referred, the founding fathers have given an indication to the judges of the Supreme Court that they should not seek - unless absolutely necessary - a confrontation with the legislature or meddle with policies which Parliament thinks are peculiar subjects for the political arena only.

I am satisfied that a decision in this case can be given without pronouncing on the spirited arguments of both counsel concerning the validity of the impugned section. As a result I shall now turn to the main submissions on the second ground relied on by the applicant.

Mr. McCaulay put forward his main submissions in this way:

(a) There is no industrial dispute between the parties inasmuch as the matter between the parties does not come within the definition of "industrial dispute."

(b) There is no evidence that the applicant (employer) made any commitment to recognise the union as bargaining agent of the workers nor any commitment not to revoke any admission of recognition it may have made prior to April 8, 1975, the date when the Act came into force.

(c) By referring the matter to the Industrial Disputes Tribunal, the Minister was inviting the Tribunal to act outside its jurisdiction.

(d) The right of recognition of a trade union, is conferred by section 5(5) and section 5(6) of the Act. And the Act itself has provided its own sanction for refusing to recognise a trade union which can show its bargaining rights acquired by virtue of the Act.

(e) Where there is a doubt or dispute whether a trade union can claim bargaining rights in relation to a particular category of workers, the Minister is required to cause a ballot to be taken and this has not been done.

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Mr. Robinson urged his main submissions along these lines:

(1) If there is a matter which affects the privileges, rights or duties of either the union or the employer, there is a dispute within the meaning of the definition section.

(2) The union is claiming bargaining rights on behalf of the workers and the employer is denying the existence of such rights on the basis that it no longer recognises the union having any such rights. The dispute or difference between the parties is, therefore, caught by the definition. And once it is shown that an industrial dispute arises, the Minister has power to refer it to the Tribunal.

(3) The poll agreement of 1962 still subsists and that agreement has an implied clause that it can only be terminated by normal industrial practice.

(4) The right, if any, of the employer to withdraw recognition under the 1962 poll agreement is a matter which could be dealt with by the Tribunal.

When the submissions are put in the form that I have summarised - and in the way that I understand them - they have a certain amount of attraction. But an attractive submission does not necessarily contain some or any validity. A return to certain fundamental principles can do no harm. I shall state them briefly:

(1) The trade union movement has been built up on two main planks. One is that it holds out itself as the agent or mouth-piece of the workers it represents. In order to maintain a certain amount of discipline within its organisation, it operates under certain rules and each member of the union is required, as a condition for membership, to abide by the rules. For at least 26 years it has been the established law in Jamaica that workers are bound by any contract bona fide made on their behalf by their trade union and that the workers are not free to repudiate what has been agreed to between their employer

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and their union. See N.W.U. v. Sprostons Ltd. (Daily Gleaner August 15, 1952). This case was cited with approval in Danton v. Alcoa Minerals, (1971), 17 W.I.R. 275 at pages 297-298.

(2) A collective labour agreement is not a legally enforceable contract. It is and always has been construed to give rise to mutual obligations only. For years in Britain and certainly in the Commonwealth Countries, the trade union leaders have shied away from the notion that a collective agreement should confer legally enforceable rights. A wild cat strike called by a hot-headed trade unionist contrary to the agreement may cripple a budding industry and yet the offending trade union executive cannot be called upon to pay damages. The legal position is stated concisely in Halsbury's Laws of England, 3rd edition, vol. 38 at p.140. And in Ford Motor Co. v. Amalgamated Union of Enquiry and Foundry Workers and Others, A.E.R. (1969) 1 W.L.R. 339 at pages 349-355, Geoffrey Lane, J. outlined the true legal position concerning the force of a collective agreement. A report of a Royal Commission is quoted at p.353D of the judgment as follows:

> "Collective agreements themselves cannot be termed as contracts in law, as quite apart from the Trade Union Acts, the parties do not intend to be legally bound; the agreements are deliberately written in a way which would require radical amendment if this intention had been present."

To the two planks to which I have referred, I must add a third. And it is this: up to April 8, 1975, when the Labour Relations Act came into force, there was no power anywhere to compel an employer to recognise a trade union as the bargaining agent of the workers of that employer. But the Act introduced a radical change and compels an employer, to the extent of the Act, outlined in section 5(8) to recognise a trade union whose bargaining rights can be traced to a poll being held pursuant to section 5 of the Act. Where before the Act came into force, an employer refused to recognise a duly accredited trade union, the sanction against him was the force of public opinion and the consequences - sometimes of a disastrous nature - of industrial action.

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Since April 8, 1975, a recalcitrant employer will face, in addition to what I have stated, criminal charges for his refusing to recognise a trade union duly accredited by way of a poll as the bargaining agent for the workers.

The radical change in the state of the law was brought about as a direct result of the decision of the Full Court in Danton's case. Danton's decision, to which I was a party, has not been disturbed - as far as I am aware - by a higher court. It is only Parliament which has intervened to accord recognition of a trade union in the manner it has outlined.

It seems to follow that where a pre-1975 collective agreement is relied on by a trade union, the employer is free - subject to his facing industrial action - to withdraw recognition of the union in question. This is a legal right which has not been affected by the Act. To submit such a claim which is made by an employer to a Tribunal for settlement is to ask the Tribunal to find whether a legal right which is crystallised before a reference is formulated, does or does not exist in fact.

Comments on previous proceedings

It is with humility and with great respect and restraint that I shall attempt to show why, to a certain extent, Wright, J erred in granting the declaration in part one of the prayer sought by the union and why the learned judges in the Court of Appeal fell into error. And it is because of a misinterpretation of the legal effect of the judgment of the Court of Appeal, why some confusion has emerged and we now have this unnecessary litigation before us. And these are my reasons:

(1) Wright, J and the Court of Appeal proceeded on the erroneous hypothesis that an arrangement or a plan towards a final collective agreement having been agreed between a union and an employer, the union is free to reject it subsequently on the basis that the workers for whom the union acted have rejected the terms of the arrangement.

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Such a move is contrary to the law as established and is also an invitation to encourage chaos and indiscipline on the industrial scene. And no sensible employer will sit down around a conference table with a trade union official on the basis that what is agreed on can be rejected by the workers. The employer is entitled to assume that the trade union is empowered to bargain for and on behalf of the workers. And the best having been obtained, the terms and conditions as settled will form the fulcrum of the agreement. The words of Goddard, L.J. (as he then was) in Evans v. National Union of Printing, (1938) 4 A.E.R. 51 at p.54 should be noted:

> "As I said in the course of argument, the great benefit of a trade union is that you can have collective bargaining between employers and employed, and, if the union come to an agreement or come to a decision regarding any man or body of men, and then that man or body of men refuses to be bound, it destroys the confidence that should exist between the employers and the union, and is to the detriment of collective bargaining."

(2) A collective agreement is dependent on mutual trust and obligation free from any legal enforcement. It confers on the parties no legal right - which is capable of enforcement. The rule is that a declaration can only be made where the plaintiff can show that his legal right has been breached or threatened. See Halsbury's Laws, 3rd edition, vol.22 - p.748.

(3) A court of law, like equity, does not act in vain. It should not make any order which is incapable of enforcement or which may be disobeyed with impunity.

With respect, there is in law no such thing as "a declaration for what it is worth." Before a declaration is made, the court must be satisfied that the award will serve a useful purpose. And a useful purpose is not served when the court in making the declaration expresses some doubt as to its usefulness or validity. (See the words of Lord

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Goddard, C.J. in Attorney General v. Colchester Corp. (1955) 2 Q.B. 207 at 217).

(4) Where there is no existing justiciable controversy between the parties, an action for declaration is not maintainable. It is the function of a declaratory judgment to dispel a doubt and not to create or encourage one. Although it is permissible for a party to seek a mere declaration, he must still show that he could have sought other relief for a legal wrong if he so desired. This rule has a history of nearly 150 years.

(5) Before the coming into operation of the Labour Relations and Industrial Disputes Act, it was open to an employer to refuse recognition to a trade union or to withdraw it subsequently to recognition being accorded. The "statutory recognition" which the Act has introduced must be proved to have been acquired before an employer may be hauled before the court.

When Socrates was invited by a friend to worship at the temple of the sea-god, he skillfully dodged the seductive suggestion. He knew a bad sample when he saw one. Mr. Robinson built his arguments around the words contained in the definition of "industrial dispute." We were invited to pay our worship at the shrine of the statutory definition. I paid a visit to it, looked at the picture and left convinced that the embellishment of language ought not to obscure the vision of the judge. No judge should get himself impaled on the horns of a dilemma when he can safely escape the pinch.

Under section 12(9) of the Act, an award of the Tribunal must be complied with. A criminal offence is committed if the award is disobeyed. It is a vain thing to say that a man who has an established right has no duty to vindicate it if he so desires. The Tribunal should be rescued from the embarrassing and uncomfortable position of being invited to make an award touching a man's legal right which could not have been

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validly made by the Supreme Court if the matter had been committed to its jurisdiction in the first instance for adjudication.

It seems to me that the declaration made by the Court of Appeal must be construed as a judgment given per incuriam. As a consequence its effect as an authority has been lost although it is the rationale if detected, which is binding and not the actual decision based on the facts.

I am not impressed with the conduct of the union in this long drawn out and costly litigation. And I have noted that before us no counsel has appeared to protect its interest. There is no merit in the assumption that in an industrial relation matter, the union and the workers have all the rights and the employer or management has none. There must be mutuality. Between the parties, a certain amount of respect, tolerance and confidence ought to be engendered and maintained. What is at issue here is a simple matter. The employer is saying in effect something like this:

> "I have the right to withdraw my recognition of the union as bargaining agent under the 1962 agreement. But I acknowledge the right of the union or the Minister to take steps under the Act to cause recognition to be re-established. Where this has been done the union will be free to continue where we broke off in 1974."

The position taken by the employer is not only reasonable but it is in accordance with the law of the land.

In the trade union rivalry of today, which the Labour Relations and Industrial Disputes Act acknowledges, blustering timorousness on the part of any trade union should be rejected with vigour. If the union is afraid or unwilling to accept the challenge of the employer, the blame must not be placed at its door. And in my view justice and common sense speak eloquently on the side of the proposition that the Minister ought not to be allowed to surmount the claim of the employer by a tactical manoeuvre well intentioned as it appears to be. The posture adopted by the employer has not raised any justiciable industrial dispute for adjudication by the Industrial Disputes Tribunal. For the reasons I have endeavoured to outline, I agree that prohibition should go.