[2023] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00035

BETWEEN	**THE ATTORNEY-GENERAL**	**APPELLANT**
AND	**CENITECH ENGINEERING SOLUTIONS LIMITED**	**1ST RESPONDENT**
AND	**THE INTEGRITY COMMISSION (formerly the Contractor General)**	**2ND RESPONDENT**
AND	**NATIONAL CONTRACTS COMMISSION**	**3RD RESPONDENT**

SUPREME COURT CIVIL APPEAL NO COA2021CV00040

BETWEEN	**NATIONAL CONTRACTS COMMISSION**	**APPELLANT**
AND	**CENITECH ENGINEERING SOLUTIONS LIMITED**	**1ST RESPONDENT**
AND	**THE INTEGRITY COMMISSION (formerly the Contractor General)**	**2ND RESPONDENT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**3RD RESPONDENT**

Louis Jean Hacker and Ms Kristen Fletcher instructed by the Director of State Proceedings for the Attorney-General

Ms Annaliesa Lindsay instructed by Lindsay Law Chambers for the National Contracts Commission

Ransford Braham KC and Neco Pagan instructed by Dabdoub Dabdoub and Co for Cenitech Engineering Solutions Limited

The Integrity Commission (formerly the Contractor-General) not appearing or represented

28, 29 November 2022 and 20 December 2023

Judicial Review – Vicarious liability of Attorney-General as the Crown's representative in judicial review proceedings – Whether Full Court was correct to order assessment of damages against Attorney-General for conduct of statutory body in judicial review proceedings – Sections 2(2) and 13 of the Crown Proceedings Act – Basis upon which damages can be granted in applications for administrative orders under Part 56 of the Civil Procedure Rules, 2002 ('CPR') – Whether an assessment of damages can be ordered in judicial review proceedings in the absence of a claim for breach of Constitution or cause of action in private law – Rules 56.1, 56.9 and 56.10 of the CPR – Section 48(g) of the Judicature (Supreme Court) Act

Costs – Bullock order – Whether the Full Court properly exercised its discretion to make an order that the costs of successful defendants be paid by unsuccessful defendants in judicial review proceedings

MCDONALD-BISHOP JA

[1] Before the court are two appeals emanating from a judgment of the Supreme Court (the Full Court) delivered on 26 March 2021. In its judgment, the Full Court granted relief on an application for judicial review brought by Cenitech Engineering Solutions Limited ('Cenitech') against the National Contracts Commission ('the NCC'), the Integrity Commission (formerly the Contractor-General), the Minister of Agriculture and Fisheries ('the Minister') and the Attorney-General of Jamaica, who were named as the 1st to 4th respondents, respectively (collectively 'the respondents').

[2] The first appeal (COA2021CV00035) is brought by the Attorney-General, and the second (COA2021CV00040) by the NCC. The Attorney-General and the NCC challenge the Full Court's orders that damages be assessed against them in favour of Cenitech, that a case management conference be listed for directions to be given in respect of the assessment of damages, and that they pay Cenitech, the Integrity Commission (formerly the Contractor-General) and the Minister's costs.

[3] An insight into the identity of the parties, the events leading to the proceedings in the Full Court, and the shape of the case in the court below is necessary to contextualise and better appreciate the issues raised in the appeal. This will now be provided.

The parties

[4] Cenitech is a limited liability company that principally engages in building construction, civil engineering works, pipe laying works, general road works and interior construction works.

[5] The Attorney-General is the Crown's representative in civil proceedings, as provided by the Crown Proceedings Act, and the principal legal advisor to the Government.

[6] As it relates to both the NCC and the Integrity Commission (formerly the Contractor-General), the Attorney-General has very helpfully provided a summary of the legislative changes that have impacted the legal status of those institutions in relation to these proceedings, which I gratefully adopt.

[7] Firstly, as pertains to the NCC, at the time the proceedings were initiated in the Supreme Court, the NCC was a statutory body established under section 23B of the Contractor-General Act, with responsibility for, among other things, reviewing and approving applications for registration by prospective government contractors, and grading contractors in relation to the categories for which registration was obtained.

[8] Over the course of 2018 and 2019, the Integrity Commission Act, the National Contracts Commission (Validity and Indemnity) Act, and the Public Procurement Act replaced the NCC with the Public Procurement Commission. They validated the conduct of the NCC from 11 February 1999 to the date the Public Procurement Act came into operation. There was, however, no need to substitute the NCC as a party in the proceedings in light of the extended validation of its conduct by the National Contracts Commission (Validity and Indemnity) Act and section 65 of the Public Procurement Act.

These statutes preserve the liability and legal status of the NCC for the purposes of proceedings against it.

[9] Secondly, although the Integrity Commission is now a party to the proceedings, the Contractor-General originally stood in its place in the court below. When the proceedings were initiated in the Supreme Court, the Contractor-General was a Commission of Parliament established by section 3 of the Contractor-General Act, with the mandate to monitor the award and implementation of government contracts and the grant, suspension or revocation of government licenses. In February 2018, the Integrity Commission Act repealed several provisions of the Contractor-General Act and effectively replaced the Office of the Contractor-General with the Integrity Commission. The consequence of this change is that when Cenitech's application for judicial review was heard, the Office of Contractor-General ceased to exist in the same form it did when the application was initially filed. This resulted in the Contractor-General being substituted as a party in the proceedings below, with the Integrity Commission (formerly the Contractor-General) by order of the Full Court.

[10] Although the Integrity Commission (formerly the Contractor-General) is named a party to both appeals, it has not participated in the proceedings before this court. However, given the role of the Contractor-General in the events that resulted in the proceedings in the Full Court, for the purpose of this judgment, reference will mostly be made to the Contractor-General in dealing with his standing in the proceedings in the court below as one of the original respondents. Reference will only be made to the Integrity Commission (formerly the Contractor-General) wherever the context requires reference to be made to it as a named party to the proceedings.

[11] Lastly, the Minister is the cabinet minister responsible for agriculture and fisheries. The Ministry of Agriculture and Fisheries is a public body that, from time to time, enters into government contracts through, among other things, a tender process in accordance with the Contractor-General Act. In awarding contracts, the Ministry, like every other public body, must first comply with and administer a formal tender and procurement

process. As is evident from the names of the parties to the appeal, although the Minister was a party in the judicial review application in the Full Court, he is not a party to these appeals.

The events leading to the proceedings in the Full Court

[12] Over the course of 2012 and 2013, Cenitech applied for and obtained a certificate of registration from the NCC as a government contractor in the following categories, with the following grades: building construction (grade 1), civil engineering works (grade 1); general road works (grade 1); interior construction works (grade 3); and pipe laying (grade 2).

[13] Following Cenitech's registration in September 2013, the Ministry of Agriculture and Fisheries invited tenders from registered government contractors for the Barracks Relocation Project of the Sugar Transformation Programme, which involved the construction of houses in the parishes of Clarendon and Saint Thomas. Cenitech was one of the successful bidders for the project. The Ministry of Agriculture and Fisheries then made a recommendation to the Cabinet to award the relevant contracts to Cenitech, and on 2 December 2013, the Cabinet approved the recommendation.

[14] Following this approval, on 3 December 2013, the Contractor-General wrote to the NCC, raising several concerns with Cenitech's registration with the NCC. Acting on the concerns raised by the Contractor-General, the NCC, by letter dated 12 December 2013, advised Cenitech of its decision to revoke its registration as a government contractor in all categories for which it was registered, with immediate effect. The letter advised Cenitech that the NCC's decision was "based on misrepresentations made on its application for registration… which were uncovered in an investigation exercise conducted by the Office of the Contractor-General".

[15] On 13 December 2013, the NCC advised the Cabinet Secretary of its revocation of Cenitech's registration. On 23 December 2013, the Cabinet decided to revoke its approval

of awarding the contracts to Cenitech. The contracts previously approved to be awarded to Cenitech were subsequently awarded to at least one other contractor.

[16] Cenitech was not provided with any details of the alleged misrepresentations to which the NCC's letter referred. Cenitech was also not afforded an opportunity to make representations in response to the allegations before the revocation of its registration. After Cenitech's registration was revoked, the Contractor-General held several hearings on several days in December 2013, at which questions were asked and answered by some of Cenitech's employees concerning the alleged misrepresentations on Cenitech's registration applications.

The proceedings in the Full Court

[17] Aggrieved by the revocation of its registration, the Cabinet's subsequent decision to revoke the award of the contracts under the Barracks Relocation Project, the award of the said contracts to the other contractors, and the hearing being conducted by the Contractor-General after its registration was revoked, Cenitech applied for and was granted leave to apply for judicial review.

[18] The application for judicial review was filed by fixed date claim form on 12 February 2014. Cenitech claimed "damages, compensation, judicial review, declarations and administrative orders of certiorari, prohibitions and mandamus" against the respondents. The application set out, in detail, the decisions made by the NCC, the Minister, and the Contractor-General that were being challenged and the general and specific relief sought against them as will be set out, in summary, below.

[19] In so far as is materially relevant, Cenitech sought relief against the NCC in the form of declarations that the revocation of its registration was in breach of natural justice, unreasonable and/or irrational, and, therefore, null and void, and that the failure of the NCC to make regulations prescribing the circumstances in which registration may be cancelled and the procedure for such cancellation, had rendered the revocation of its

registration illegal, null and void. Cenitech also sought an order of certiorari quashing the revocation decision and an order for the reinstatement of its registration.

[20] Concerning the Contractor-General, Cenitech sought declarations that he acted in breach of the principles of natural justice and section 20 of the Contractor-General Act when he advised the NCC that there were misrepresentations on Cenitech's registration application and when he decided to conduct a hearing after Cenitech's registration was revoked. Cenitech also sought an order of prohibition, preventing the Contractor-General from continuing to hold a hearing on the matter, and an order of certiorari quashing related decisions of the Contractor-General.

[21] Against the Minister, Cenitech sought declarations that the Minister, the Government and the Cabinet acted unlawfully and in breach of contract by failing to award the contracts to it and awarding the contracts to another company. Cenitech also sought an injunction to restrain the Minister, the Government, and the Cabinet from awarding the contracts to any other person or entity or permitting any entity other than Cenitech to carry out the works contemplated by the contracts.

[22] Against all parties described in the fixed date claim form as the "said Respondents", Cenitech generally sought against them an order for the reinstatement of its registration with the NCC in the categories and grades in which it was previously registered and damages in the sum of $350,517,209.63, including "loss of profit and/or such other sum as the Court may award as damages and/or restitution and/or compensation including but not limited to interest".

[23] Cenitech's fixed date claim form was supported by three affidavits. For the purposes of these appeals, it is not necessary to recite, in detail, the contents of those affidavits. It suffices to say that the affidavits set out the events and timelines surrounding the impugned decisions of the NCC, the Contractor-General, and the Minister, as well as the details of and circumstances surrounding the hearing conducted by the Contractor-General following the revocation of Cenitech's registration by the NCC.

[24] For reasons that will later become evident, it is observed, and is, indeed, uncontroversial, that Cenitech's fixed date claim form did not specify the capacity in which the Attorney-General was sued. Neither the claim form nor the affidavits in support indicate any decision made by the Attorney-General in respect of which Cenitech sought judicial review or any relief specifically against the Attorney-General for any decision made by him. Cenitech was, therefore, silent in its pleadings and evidence on the status of the Attorney-General in the matter and the basis upon which he was alleged to be liable. Further, neither Cenitech's fixed date claim form nor affidavits in support articulate or particularise a claim for relief against any of the respondents under the Constitution or in the tort of negligence.

The Full Court's judgment

[25] The Full Court (Batts, Stamp and Palmer Hamilton JJ), in a unanimous judgment delivered by Batts J on 26 March 2021, made the following orders:

> "[(i)] It is Declared that [the NCC] acted in breach of the principles of natural justice when it revoked and/or cancelled [Cenitech's] registration in the categories and grades set out hereunder:
>
> | Categories | Grade |
> |---|---|
> | Building | 1 |
> | Civil Engineering Works | 1 |
> | General Road Works | 1 |
> | Interior Construction Works | 3 |
> | Pipe laying | 2 |
>
> (ii) Certiorari will issue to quash [the NCC's] decision, made on the 11th day of December 2013 and contained in a letter dated the 12th day of December 2013, to cancel and/or revoke [Cenitech's] registration as referenced at paragraph (i) above.
>
> (iii) Damages are to be assessed in favour of [Cenitech] and against [the NCC] and [the Attorney-General] by a judge alone in court.

> (iv) A Case Management Conference, with respect to the assessment of damages, is to be listed by the Registrar of the Supreme Court in the upcoming term and, at which, directions with regard to the assessment of damages shall be given.
>
> (v) Costs will go to [Cenitech], and to [the Integrity Commission] and [the Minister] against [the NCC] and [the Attorney-General]. Such costs to be taxed or agreed."

[26] As is evident from the orders, the Full Court agreed with Cenitech that the NCC's failure to afford it a hearing before the revocation of its registration was a breach of the principles of natural justice. The court, therefore, issued a declaration to that end and an order of certiorari to quash the decision to revoke Cenitech's registration (orders (i) and (ii), respectively).

[27] Having found the NCC liable, the Full Court stated that the Attorney-General would "be liable vicariously for the acts and/or omissions of [the NCC], or as the Crown's representative".

[28] In ordering that damages be assessed in favour of Cenitech against the NCC and the Attorney-General and that an assessment of damages be scheduled to that end (orders (iii) and (iv), respectively), the Full Court rejected the Attorney-General and the NCC's submissions that damages could not be awarded as a matter of law, "unless there is pleaded a cause of action in private law (contract or tort) available to [Cenitech]". The court, instead, concluded that rules 56.1(4) and 56.10 of the Supreme Court Civil Procedure Rules, 2002 ('the CPR') expanded the remedies available in judicial review proceedings. Thus, so long as the facts in the judicial review claim before the court "could support an actionable wrong, an award of damages may be made". It was, therefore, unnecessary for Cenitech to plead any cause of action provided that the relevant facts are alleged or contained in a supporting affidavit.

[29] In the court's view, the right to award damages arose on two factual bases, which are summarised as follows:

(i) The decision to revoke Cenitech's registration without a hearing gave rise to a remedy at law for damages for breach of its constitutional right to a fair hearing pursuant to subsections 16(2) and (3) of the Constitution independently and instead of the right to pursue judicial review; and

(ii) The NCC chairman's implicit admission, in his affidavit, of an administrative failure on the part of the NCC gave rise to the "real prospect of a claim in negligence".

[30] Regarding the Integrity Commission (formerly the Contractor-General), the Full Court found that the Contractor-General could not be faulted for the failures of the NCC and, therefore, it was not liable for breach of any duty owed to Cenitech.

[31] The Full Court similarly found that the Minister could not be faulted for not awarding the contract after the NCC revoked Cenitech's registration. In the court's view, the Minister "acted as any reasonable Minister of Government would in the circumstances...". In those premises, the court found no evidence that the Minister's decision was due to an improper purpose, wrong considerations, or was unreasonable in the Wednesbury sense. The court further concluded that a contract had not been signed between the Government and Cenitech; therefore, Cenitech had no viable cause of action for breach of contract against the Minister.

[32] Finally, regarding costs, the Full Court found that Cenitech had succeeded against the NCC and the Attorney-General. In its view, the Attorney-General, "representing the Crown… bears ultimate responsibility for [the NCC's] conduct and exposure". Therefore, the NCC and the Attorney-General would be liable to pay Cenitech's costs. The court further noted that although the Integrity Commission (formerly the Contractor-General) and the Minister successfully resisted the application for judicial review, their joinder as respondents was not unreasonable. Thus, bearing in mind rule 56.15 of the CPR, no costs order would be made against Cenitech in relation to them. Instead, it was appropriate to order the NCC and the Attorney-General to pay the costs of the Minister and Integrity Commission (formerly the Contractor-General).

The issues for consideration in the appeals

[33] The Attorney-General and the NCC's notices of appeal list seven and eight grounds of appeal, respectively. It is clear from the listed grounds of appeal that there is no challenge to the Full Court's declaration that the NCC acted in breach of the principles of natural justice or the order of certiorari quashing the NCC's decision to revoke Cenitech's registration (orders (i) and (ii), respectively). Instead, both appeals collectively challenge the orders of the Full Court for damages to be assessed, that a case management conference be listed to facilitate the assessment of damages, and that the Attorney-General and the NCC are to pay the costs of the successful respondents (orders (iii), (iv) and (v), respectively).

[34] There is also considerable overlap among the grounds of appeal filed in both appeals, particularly with respect to the Full Court's approach in ordering that damages be assessed in favour of Cenitech and for the successful parties' costs to be paid by the NCC and/or the Attorney-General. Accordingly, it is deemed convenient and expedient to deal with the common grounds of appeal together, where necessary, as their resolution will warrant consideration of the same principles of law and rules of procedure. The stand-alone grounds relative to each appellant will be accorded separate treatment.

[35] Across both appeals, the following four broad issues have been distilled from the grounds of appeal for determination by this court:

(1) Whether the Full Court erred in ordering that damages be assessed against the Attorney-General on the basis that he was vicariously liable, or liable as the Crown's representative, for the acts and omissions of the NCC *(Attorney-General's grounds (i), (ii), (iii) and (iv))*.

(2) Whether the Full Court erred in ordering that damages be assessed against the NCC and the Attorney-General in the absence of a claim for breach of the Constitution and a cause of action in private law *(Attorney-General's grounds (v) and (vi); NCC's grounds (i), (ii), (iii), and (vii)).*

(3) Whether the Full Court erred in ordering damages to be assessed in the absence of findings and a decision as to the cause of action for which liability arises and the basis on which damages are to be assessed *(NCC's grounds (iv), (v) and (vi)).*

(4) Whether the Full Court erred in ordering the Attorney-General to pay the costs of Cenitech and for the Attorney-General and the NCC to pay the costs of the Integrity Commission (formerly the Contractor-General) and the Minister *(Attorney-General's ground (vii) and the NCC ground (viii))*.

The applicable standard of review

[36] Before addressing the issues raised, it falls to be said, from the outset, that the decision by the Full Court to grant relief on Cenitech's application for judicial review was an exercise of the court's discretionary power to grant relief in judicial review proceedings, whether in the form of prerogative remedies or otherwise (see **The Attorney General of Jamaica and Anor v Machel Smith** [2020] JMCA Civ 67 ('**Machel Smith**')). Similarly, awarding costs in the judicial review proceedings was an exercise of the court's discretion under section 47(1) of the Judicature (Supreme Court) Act and rules 56.15 and 64.6 of the CPR.

[37] Lord Diplock's guidance in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, regarding the deference which must be accorded by an appellate court to the exercise of discretion by a court of first instance on an interlocutory application is, therefore, germane. This court has adopted the **Hadmor** principles as being of general application in all cases involving the exercise of discretion by a judge or tribunal at first instance. The principles are, therefore, not confined to interlocutory proceedings. In **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, Morrison JA (as he then was), adopting Lord Diplock's guidance to be of general application, stated that the Court of Appeal ought not to interfere with a lower court's exercise of discretion unless it can be shown that the court-

(i) misunderstood or misapplied the law relevant to the case;

(ii) misunderstood or misapplied the evidence that was before it;

(iii) improperly found that facts existed or did not exist; or

(iv) reached a decision that "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it".

[38] With this guidance in mind, I have considered the issues in both appeals.

Issue (1) – Whether the Full Court erred in ordering that damages be assessed against the Attorney-General on the basis that he was vicariously liable, or liable as the Crown's representative, for the acts and omissions of the NCC *(Attorney-General's grounds (i), (ii), (iii) and (iv))*.

The Attorney-General's submissions

[39] The Attorney-General argued that the Crown Proceedings Act ('CPA') is the avenue by which the Attorney-General is held liable for the conduct of the NCC. In finding the Attorney-General liable for the conduct of the NCC, the Full Court failed to appreciate that the proceedings before it were judicial review proceedings and not civil proceedings within the meaning of the CPA. Thus, relying on this court's decision in **Brady & Chen Limited v Devon House Development Ltd** [2010] JMCA Civ 33 ('**Brady & Chen**'), the Attorney-General submitted that the CPA did not apply, and so he could not be vicariously liable, or liable as the Crown's representative, for the acts and omissions of the NCC. Accordingly, the Full Court was wrong to order damages to be assessed against the Attorney-General for the conduct of the NCC.

[40] The Attorney-General further submitted that even if the CPA applied, the NCC is not a Crown servant for whose conduct he could be liable under the CPA. On examining sections 23A to 23J of the Contractor-General Act, it is clear that the NCC was not subject to the direction or control of the Crown, a Minister of Government, the Cabinet or any other Crown servant. Therefore, the Minister, having not been found liable on Cenitech's

judicial review claim, and in the absence of any wrongdoing by the Attorney-General himself, the Attorney-General could not be liable in damages for the conduct of the NCC or any other party to the claim.

Cenitech's submissions

[41] Cenitech argued that the Attorney-General should be estopped from raising the CPA as a bar to the award of relief against him because he participated in the proceedings before the Full Court without objection and is now raising the CPA for the first time on appeal. In any event, Cenitech submitted, the Full Court was correct to find that the Attorney-General was liable for the conduct of the NCC because the proceedings involved a breach of the constitutional right to a fair hearing, contrary to sections 16(2) and 16(3) of the Constitution. Cenitech argued that the Full Court appreciated that the constitutional right to a fair hearing had been breached and that it was entitled to damages, which were the ultimate responsibility of the Attorney-General. In advancing this argument, Cenitech submitted that the CPA makes no provision for claims brought pursuant to section 19 of the Constitution but the CPA is nevertheless applicable, having due regard to the Constitution.

[42] Cenitech further contended that the NCC is a statutory body set up by a valid and subsisting law, performs its functions for and on behalf of the Government of Jamaica, and receives its funding from the Government of Jamaica's consolidated fund. Therefore, it is a Crown servant, and in this regard, the Attorney-General was properly joined as the State or Crown's representative.

[43] Cenitech relied on **Brady & Chen** and **M v Home Office** [1994] 1 AC 37 and contended that the NCC falls within the definition of the "Crown" by being part of the executive branch of government.

Discussion and findings on issue (1)

(i) Whether the Attorney-General should be estopped from relying on the CPA to avoid liability

[44] In addressing the parties' arguments relative to the standing of the Attorney-General *vis-à-vis* the NCC, within the context of the CPA, it is considered necessary to first dispose of Cenitech's submission that the Attorney-General should be estopped from relying on the CPA in arguing that the award of relief against it was improper. According to Cenitech, the point regarding the applicability of the CPA was never raised in the Full Court.

[45] Even though the Attorney-General has raised the issue of its liability within the framework of the CPA, for the first time, on appeal, I will permit it to do so because the need to argue this point would have arisen due to the Full Court's judgment. The court found the Minister not liable on the claim and only the NCC and the Attorney-General liable. It is a relevant and proper point to take at this stage for reasons which will be briefly stated.

[46] Firstly, an examination of the relevant pleadings in the claim brought against the Minister and the Full Court's findings regarding those pleadings is imperative. In this context, there were no pleadings disclosing for whose acts or omissions, or in what capacity, the Attorney-General was sued. So, there was nothing to expressly show Cenitech's reliance on the principles of vicarious liability or that the Attorney-General was sued in his personal capacity. In the end, the pleadings revealed no nexus whatsoever that was being made between the Attorney-General and the other respondents.

[47] Under the heading in the fixed date claim form, "Details of the Claim and Relief being sought including Interim Relief", Cenitech set out its claim against the Minister. Against the Minister, it averred, in essence, that the Minister, "Government of Jamaica and/or Cabinet of Jamaica" acted unlawfully and in breach of contract in relation to the revocation of its registration and the award of the contract to another company. It also

sought an injunction against the Minister, the Government and/or Cabinet. With these pleadings, Cenitech's claim sought to impugn the conduct of the Minister, the Government and the Cabinet. This would have invoked the interest and participation of the Attorney-General as the Crown's representative.

[48] From this perspective, it is not unreasonable or unjust to accept, as counsel for the Attorney-General submitted, that the Attorney-General did not take any point regarding the CPA because the Minister was a party to the proceedings, and there was a claim for relief, including for breach of contract, against the Minister, the Government and the Cabinet. With the Minister discharged from liability and no relief granted in relation to the Government of Jamaica or the Cabinet, the Attorney-General was of the view, and correctly so, as will be shortly demonstrated, that there was no other basis on which he could be held vicariously or personally liable for damages to be awarded against him.

[49] In the light of the Attorney-General's position *vis-à-vis* his responsibility for matters pertaining to the Minister, who was not held liable for anything in the proceedings, the point would have had to be taken after the judgment was delivered and the Attorney-General was held liable for the actions of the NCC and as representative of the Government. In other words, the need for the Attorney-General to deploy the CPA to defend its position in the appeal was only triggered by the Full Court's judgment holding him liable on the basis it did.

[50] For the foregoing reasons, no legitimate objection can be taken to the Attorney-General's arguments regarding the applicability of the CPA in the appeal. It provides an appropriate legal basis to challenge the decision of the Full Court in finding him liable in the claim. Given the special circumstances attendant on the Attorney-General's position as the Crown's representative and the failure of Cenitech to specifically plead in what capacity he was joined to the claim, Cenitech's objection cannot be upheld in the interests of justice.

[51] In any event, Cenitech would have had sufficient notice of the point being taken by the Attorney-General on appeal and so would have been afforded a reasonable opportunity to respond to it, which it did. Accordingly, I would hold that the Attorney-General is not estopped from relying on the CPA in the appeal.

(ii) Whether the CPA precludes the liability of the Attorney-General

[52] I now turn to resolve the Attorney-General's central contention regarding the applicability of the CPA.

[53] It is well established that the CPA is the avenue through which the Attorney-General may be joined as a party to civil proceedings and held liable as the representative of the Crown in respect of the conduct of the State or Crown servants. Therefore, the resolution of the issue raised by the Attorney-General requires a close examination of the circumstances in which the Attorney-General can be held liable for the conduct of others in a representative capacity under the CPA.

[54] As counsel for the Attorney-General submitted, the CPA permits the Attorney-General to sue and be sued, as the representative of the Crown, in circumstances where a suit, prior to the passage of the Act, would have been brought by or against the Crown in relation to the conduct of the State, State entities and State employees who are Crown servants. In the words of Bingham JA in **The Attorney General v Gladstone Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 95/1997, judgment delivered 24 May 2000, the CPA "…extended the principle of vicarious liability as between private persons falling into the category of master and servant or employer and employee" to the Crown. To this end, section 13 of the CPA provides that any proceedings falling within the ambit of the CPA and which would fall to be instituted by or against the Crown shall be instituted by or against the Attorney-General.

[55] Critically, the CPA limits its applicability to only "civil proceedings". Section 2(2) of the CPA defines civil proceedings to exclude "proceedings which in England would have

been taken on the Crown side of the Queen's Bench Division". These proceedings have been traditionally referred to as "Crown side proceedings".

[56] Whether judicial review proceedings fall within the definition of "civil proceedings" under the CPA, and thus whether the CPA permits the Attorney-General to sue and be sued, in a representative capacity, in judicial review proceedings, was notably considered by this court in **Vehicles and Supplies Limited v Northern Industrial Garage Limited and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 10/1989, judgment delivered 16 June 1989. In that case, two companies commenced judicial review proceedings seeking orders of certiorari and/or prohibition and/or mandamus to quash certain allocations made by the Minister of Foreign Affairs, Trade and Industry, pursuant to his powers under section 8 of the Trade Act and the Motor Vehicles (Sale and Distribution) Order, 1985.

[57] The Minister argued, among other things, that the judicial review proceedings were in respect of a ministerial decision, which fell within the definition of civil proceedings under the CPA. Thus, it was argued that the proper party to the proceedings was the Attorney-General, not the Minister. The Court of Appeal carefully examined the provisions of the CPA, its English antecedent Act, and the case law interpreting that English Act and found that judicial review proceedings were proceedings for prerogative orders, which, in England, were Crown side proceedings. Thus, the court was unanimous that the judicial review proceedings before it were Crown side proceedings and not civil proceedings to which the CPA applied, so the Attorney-General was not a proper party to the proceedings.

[58] At page 15 of the judgment, Rowe P explained-

> "A series of English cases have decided that the provision in the English Crown Proceedings Act 1947, similar in language to Section 16 of the Jamaican Statute of 1959, relates only to civil proceedings and does not extend to Crown side proceedings.
> …

> I find that Crown side proceedings do not fall to be dealt with under the Crown Proceedings Act. The direct consequence of this is that there is no statutory requirement for Crown side proceedings to be commenced against the Attorney-General and that in the instant case the Attorney-General was neither a necessary nor a proper party to the action."

[59] In this regard, the Court of Appeal's conclusion was uncritically affirmed by the Privy Council in **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited and another** [1991] 4 All ER 65 at 70 ('**Vehicles and Supplies**').

[60] **Vehicles and Supplies** was later followed by the Privy Council in **Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union** [2011] UKPC 4 ('**Bahamas Hotel**'), almost two decades after it was decided. **Bahamas Hotel** concerned an application for judicial review of the decisions by the Minister of Immigration, Labour and Training and the Registrar of Trade Unions to hold a ballot under the Bahamian Industrial Relations Act 1970 and to register a trade union.

[61] The question arose whether the Attorney-General was a proper party to the proceedings. At para. 36 of the judgment, citing **Vehicles and Supplies**, the Privy Council held that the Bahamian Court of Appeal erred in concluding that the Attorney-General was a proper party "since proceedings by way of judicial review are not 'civil proceedings' within the meaning of [section 12 of the Bahamian Crown Proceedings Act]". The Board further stated that the Attorney-General would "only very rarely be a proper respondent to judicial review proceedings, since most decisions taken by the Attorney-General himself are not amenable to judicial review (Gouriet v Union of Post Office Workers [1978] AC 435, 487-488)".

[62] Since **Vehicle and Supplies**, this court has also interpreted the provisions of the CPA to the same end in **Brady & Chen** (see para. 22).

[63] The judicial pronouncements on the inapplicability of the CPA in judicial review proceedings are clear and consistent. The CPA permits claims against the Attorney-

General, as representative of the Crown, in civil proceedings concerning the wrongful conduct of the state or Crown servants. The CPA specifically defines "civil proceedings" to exclude Crown side proceedings. Judicial review proceedings are Crown side proceedings which do not fall within the ambit of the CPA. The CPA, therefore, does not provide any legal basis for a claim and, by extension, the grant of relief against the Attorney-General in a representative capacity or based on vicarious liability, in judicial review proceedings. It will be proper to join the Attorney-General as a party to judicial review proceedings for decisions personally made by him, and the instances in which that will be permitted are decidedly rare.

[64] Although, in the instant case, the capacity in which the Attorney-General was joined is not expressly stated, the Full Court found him liable in a representative capacity for the acts of the NCC or as the representative of the Government. This could not have been a proper finding in the judicial review proceedings in the light of the CPA and the jurisprudence interpreting it.

[65] To circumvent the fact that the Attorney-General is excluded from liability by the provisions of the CPA, counsel for Cenitech submitted that the proceedings were not purely judicial review proceedings. According to them, the proceedings also involved Cenitech's constitutional right to a fair hearing, the tort of negligence and a cause of action for breach of contract in a manner that would justify relief being granted against the Attorney-General under the CPA.

[66] I cannot accept this submission. It is clear from Cenitech's fixed date claim form and affidavits in support that the proceedings before the Full Court were not for relief under the Constitution. Even if the proceedings were not purely judicial review proceedings, as Cenitech contended, but involved the vindication of constitutional breaches, constitutional claims, like judicial review claims, are not civil proceedings within the meaning of the CPA. Therefore, in any event, the CPA could not ground vicarious liability in the Attorney-General.

[67] As it relates to negligence, there was no pleading or evidence by Cenitech alleging, or even intimating, a claim that the NCC was liable in negligence to Cenitech. Relatedly, the Full Court did not find the NCC liable in negligence to Cenitech, and there is no judgment or order by the Full Court to that effect. In the circumstances, the CPA could not be invoked to justify the order that damages be assessed against the Attorney-General based on negligence by the NCC, as no such claim was pleaded or proved by Cenitech against the NCC. The absence of properly brought claims for relief or orders made by the Full Court under the Constitution and the tort of negligence is the subject of more detailed discussion under Issues 2 and 3 below.

[68] In relation to the claim for breach of contract, no breach of contract was alleged against the NCC but only against the Minister and, by extension, the Government and Cabinet of Jamaica. Neither the Minister, the Government, nor the Cabinet was held liable, by the Full Court, for breach of contract. Therefore, that claim failed. The applicability of the CPA to a claim for breach of contract would not arise to justify the award of damages against the Attorney-General for the conduct of the NCC. Accordingly, the fact that there was a claim for breach of contract against the Minister, the Government and the Cabinet cannot be used by Cenitech to defend the Full Court's order that damages be assessed against the Attorney-General since it failed on that claim.

[69] With those causes of action highlighted by Cenitech removed from the equation, there is no other identified or identifiable cause of action that would give rise to the vicarious liability of the Attorney-General under the CPA in the circumstances of this case.

[70] I also agree with counsel for the Attorney-General that the scheme of the Contractor-General Act does not support the conclusion that the NCC was a Crown servant for whose conduct the Attorney-General would be liable (see sections 3, 5, 23C-23J of the Contractor-General Act) in the judicial review proceedings.

[71] Furthermore, leaving aside the provisions of the Contractor-General Act, it should also be noted that Cenitech's fixed date claim form did not seek to establish a

servant/master or agent/principal relationship between the NCC and the Crown. No material facts were pleaded to establish the Crown's purported liability for the NCC's actions, and there was no evidence before the Full Court of any relationship between the NCC and the Crown. In my view, the NCC cannot be said to be a party to a servant/master or agent/principal relationship with the Crown as would exist between a Crown servant and the Crown, whether for the purposes of the CPA or otherwise.

[72] In these premises, it is fair to say that the Attorney-General could not have been vicariously liable, or liable as the Crown's representative, as the Full Court found, for the acts or omissions of the NCC in the judicial review proceedings. Accordingly, the Full Court was wrong as a matter of law to order that damages be assessed against the Attorney-General for the conduct of the NCC in that context.

[73] Therefore, there is merit in the Attorney-General's grounds of appeal, which contend that the Full Court erred in concluding that the Attorney-General is "vicariously liable for the acts and/or omissions of the [NCC] as the Crown's representative" and in ordering that damages be assessed against the Attorney-General on that basis.

Issue (2) – Whether the Full Court erred in ordering that damages be assessed against the NCC and the Attorney-General in the absence of a claim for breach of the Constitution and a cause of action in private law *(Attorney-General's grounds (v) and (vi); NCC's grounds (i), (ii), (iii), and (vii)).*

[74] In rejecting the argument that damages could not have been awarded in what were judicial review proceedings, the Full Court reasoned, in part, that Cenitech "may have brought a claim for constitutional redress in the form of damages independently of and/or instead of this claim for judicial review" and that there was an implied admission that gave rise to a real prospect of a claim in negligence. Based on that reasoning, it concluded that Cenitech had remedies at law that attracted damages. From this statement, it seems reasonable to conclude that the Full Court, by way of an alternate basis, ordered damages to be assessed for the claim Cenitech could have brought for breach of the Constitution and the prospects it had to bring a claim in negligence.

[75] The Full Court arrived at that conclusion after considering rules 56.1(4) and 56.10 of the CPR and some relevant authorities. Therefore, there is a specific focus on these rules in considering the grievance of the Attorney-General and the NCC regarding the order for damages made against them.

[76] Part 56 of the CPR generally deals with applications for administrative orders, including applications for judicial review and relief under the Constitution. In Part 56 proceedings, however, the court is not limited to granting administrative orders. Rule 56.1(4) permits the court to grant an injunction, restitution, damages, and orders for the return of property, whether real or personal, "in addition to or instead of an administrative order", without requiring the parties to issue further proceedings.

[77] Following rule 56.1(4), rule 56.10 explicitly provides for the joinder, in Part 56 proceedings, of claims for damages and other relief. It is necessary to set out rule 56.10 in its entirety as it provides the relevant legal context within which the submissions of the parties, the judgment of the Full Court, and the resolution by this court of the issue regarding the award of damages may be better understood. Rule 56.10 reads, in full:

> "**Joinder of claims for other relief**
>
> 56.10 (1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that-
>
> (a) arises out of; or
>
> (b) is related or connected to,
>
> The subject matter of an application for an administrative order.
>
> (2) In particular the court may award –
>
> (a) damages;
>
> (b) restitution; or
>
> (c) an order for return of property,
>
> to the claimant on a claim for Judicial Review or for relief under the constitution if–

(i) the claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

(3) The court may however at any stage-

(a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or

(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and

(c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."

The Attorney-General and NCC's submissions

[78] The Attorney-General and the NCC agree in their submissions on this issue regarding the meaning and applicability of rule 56.10. They argue that in order for damages to be assessed, as the Full Court ordered, there must first be a finding of liability on a "viable private cause of action", which was both specifically pleaded and proven. Where there is no pleaded and proven private law cause of action, no award of damages can be made for such cause of action in proceedings under Part 56. Cenitech did not plead any private law cause of action, which would entitle it to an award of damages and or loss of profits in relation to that cause of action. Neither did the Full Court identify a cause of action, for which the NCC was liable, as the basis upon which it could have awarded damages. The Full Court was, therefore, wrong to order an assessment of damages in the absence of a pleaded and proven cause of action.

[79] In advancing this argument, the Attorney-General and the NCC placed significant reliance on this court's decision in **Machel Smith**. In that case, this court, through Edwards JA, reasoned, in summary, that damages may be awarded in administrative

proceedings only where there is a pleaded and proven cause of action for which damages would be an available remedy. The Attorney-General and the NCC also prayed in aid pronouncements in the cases of **Delapenha Funeral Home Limited v The Minister of Local Government and Environment** (unreported), Supreme Court, Jamaica, Claim No 2007 HCV 01554, judgment delivered 13 June 2008; **X v Bedfordshire County Council** [1995] 2 AC 633; and **Berrington Gordon v The Commissioner of Police** [2012] JMSC Civ 46.

Cenitech's submissions

[80] Cenitech argued that the Full Court was enabled by rule 56.10 of the CPR, section 19 of the Constitution and the common law to award damages on its application for judicial review. According to counsel on its behalf, the Full Court was correct to point out that a cause of action need not be pleaded but that it was sufficient for the contents of the pleadings or the relevant facts in the affidavit to justify the grant of an award of damages.

[81] Additionally, counsel for Cenitech argued that rule 56.10(2)(a)(iii) of the CPR states that the court must be satisfied that the claimant "could have issued a claim for [damages]". This rule, they said, enables the Supreme Court to make an award of damages without a finding of liability for a cause of action in private law or liability for a breach of a constitutional right. Counsel contended that having found a possible claim for negligence and for relief under the Constitution, the Full Court had satisfied the requirements of the rule. The Full Court was correct to determine that the wording of the CPR was more expansive and allowed for the grant of damages in more circumstances than would have been permitted under the laws of England.

[82] Accordingly, Cenitech submitted that the decision of this court in **Machel Smith**, which held that there is no right to claim damages in administrative proceedings outside of a pleaded and proven cause of action, is "manifestly wrong" as it restricts the rule that damages may be available in administrative proceedings and ignores the expansive wording of Part 56 of the CPR. The decision also ignores the fact that Jamaica has a

written Constitution. To apply those restrictions to limit the award of damages, by extension, restricts the court's ability to fashion remedies to vindicate constitutional rights, counsel maintained.

[83] Cenitech commends for the court's consideration the cases of the **Honourable Attorney-General and another v Isaac** [2018] UKPC 11 and **Belize Bank Limited v The Association of Concerned Belizeans and others** (unreported), Court of Appeal, Belize, Supreme Court Civil Appeal No 18 of 2007, judgment delivered 13 March 2008, to contend that the position under the Jamaican CPR should be distinguished from the Civil Procedure Rules of England and Wales (the 'UK CPR'). Cenitech has also relied on **Sam Maharaj v Prime Minister** [2016] UKPC 37; **Chief Constable of the North Wales Police v Evans** [1982] WLR 1155; **Paul Zamulinksi v The Queen** 1957 CanLII 301 (CA EXC); and **Emms v The Queen et al** 1979 CanLII 245 (SCC), [1979] 2 SCR 1148, to strongly submit that the courts have positively considered the award of damages for the breach of the right to a fair hearing or purely administrative wrongs, in the absence of some other cause of action.

Discussion and findings on issue (2)

(i) The absence of a constitutional claim

[84] Rules 56.1 and 56.2 of the CPR distinctly establish the types of applications that fall within Part 56, which are labelled "applications for an administrative order". There are four types identified, with the three most notable types, for immediate purposes, being applications for judicial review, relief under the Constitution, and a declaration. The rules that address an application for relief under the Constitution are rules 56.1 and 56.9 of the CPR. Rule 56.10 of the CPR, as already indicated, applies to the joinder of claims for "other relief", separate from the relief available in applications for administrative orders, to be included in applications for administrative orders. It does not speak to the joinder of an application for constitutional relief to one for judicial review, as those are separate applications for administrative orders to which Part 56 applies. The wording of rule 56.10(2) makes that indisputable as it states, in summary, that the court may award

damages, restitution or an order for the return of property to the claimant on a claim for judicial review or for relief under the Constitution in certain specified circumstances. Therefore, constitutional relief is not a form of "other relief" that the court may consider or grant within the ambit of rule 56.10 if not expressly claimed. Thus, Cenitech's argument, and the Full Court's view, that rule 56.10 provides a gateway for granting constitutional relief, in the absence of a claim for such relief, cannot be accepted as correct in law or principle.

[85] In any event, even if rule 56.10 applies to the joinder of a constitutional claim with a judicial review claim, Cenitech made no application for constitutional relief in its fixed date claim form or the affidavits filed in support. Instead, it sought judicial review, declarations, damages and injunctions that were never indicated to be for a constitutional breach.

[86] Section 19 of the Constitution enables a person who alleges that any of his fundamental rights and freedoms has been, is being, or is likely to be contravened, in relation to him, to apply to the Supreme Court for redress. The Supreme Court is empowered by the same section to give such directions and make such orders as it may consider appropriate for the enforcement of the right to which the person is entitled. The section does not provide the procedure for the making of such applications.

[87] It is in Part 56 of the CPR that the procedure is to be found. Rule 56.9 sets out the requirements to be satisfied for making such a claim. Rule 56.9 specifically requires a party seeking relief under the Constitution to specify in its claim form, *inter alia*, that relief is being sought under the Constitution and the section of the Constitution under which relief is claimed (rules 56.9(1)(b) and 56.9(3)(c)). Cenitech's fixed date claim form failed to comply with these procedural requirements. Nothing in the fixed date claim form or the affidavits in support discloses that Cenitech's claim was alleging or establishing a breach of sections 16(2) and 16(3) or any other provision of the Constitution. It also sought no relief for any such breach, be it in the form of damages or otherwise.

[88] Notwithstanding the failure of Cenitech to plead a case for relief under the Constitution or to seek damages for breach of the Constitution, the Full Court reasoned that Cenitech's constitutional right to a fair hearing was breached and that it could have brought such a claim. The court further opined that Cenitech has a remedy at law for breach of its constitutional right to a fair hearing. The question now is: could the Full Court have granted such a remedy of its own motion in the absence of such a claim for redress? Rule 56.10 does not provide the answer.

[89] My first point of departure from the Full Court's reasoning and conclusion is the statute from which the court derives its jurisdiction – The Judicature (Supreme Court) Act. Section 48 of the Act provides for the concurrent administration of law and equity. Section 48(g) provides:

> "The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, **all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter**; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided." (Emphasis added)

[90] This section means that for the court to grant relief not expressly sought, the claim must be ***properly brought forward*** by the relevant party to whom the relief is being given in that cause or matter. If section 48(g) is not satisfied, the CPR cannot assist because it can create no jurisdiction and only makes provision for how the court's jurisdiction should be exercised. With this in mind, it is quite obvious that Cenitech did not bring itself within section 48(g) of the Judicature (Supreme Court) Act for constitutional relief to be granted, especially in the form of damages, because it failed to comply with the procedural requirements prescribed by the CPR for the bringing of such a claim. On no objective reading of the fixed date claim form and affidavits in support could it be said that Cenitech "properly brought forward" a claim for relief under the

Constitution. The fact that a claim "may" have been brought is not the same as saying one was "properly brought forward" as the law requires. Also, the fact that a claim "may" have been brought does not fit within the provision of rule 56.10(1) (even if that rule were applicable). The rule expressly states that an applicant may include, in an application for an administrative order, "a claim for any other relief or remedy" that arises out of or is related or connected to the subject matter of an application for an administrative order. Cenitech did not include in its fixed date claim form or supporting evidence any claim for relief or remedy under the Constitution, even if that could have been regarded as "other relief" within the contemplation of the rule.

[91] The Full Court relied on two authorities in arriving at its conclusion that the revocation of Cenitech's registration, in the circumstances, breached Cenitech's constitutional right to a fair hearing: **Doris Fuller (Administratrix Estate Agana Barrett Deceased) v The Attorney-General** (1998) 56 WIR 337 ('**Doris Fuller**'); and **Maharaj v Attorney-General of Trinidad and Tobago (No 2)** [1979] AC 385 ('**Maharaj No 2**'). The Full Court noted that in **Doris Fuller**, claims for assault, battery and false imprisonment were joined with a claim for breach of constitutional rights and that in **Maharaj No 2**, damages were awarded for breach of the constitutional right to a fair hearing. These cases, however, do not justify the approach of the Full Court as, in both cases, there were proper claims for breaches of the Constitution before the court.

[92] By way of illustration, in **Doris Fuller,** there was a distinctive and separate claim for breach of the Constitution expressly brought pursuant to what was then section 17 of the Constitution. The court noted, at page 346, that the pleadings evidenced a "… distinction between the claim for false imprisonment and the claim for breach of fundamental rights for inhuman and degrading treatment as foreshadowed in the indorsement on the writ". This observation led the court to quote from para. 6 of the appellant's statement of case, which particularised the alleged breach of the "constitutional rights to freedom of the person, to freedom of movement and to protection from inhuman and degrading treatment" by members of the Jamaica Constabulary Force.

[93] As can be seen, there were explicit and defined pleadings, with particularity, alleging breaches of the Constitution. No such pleading, or any at all, regarding constitutional breaches was made in the instant case.

[94] **Maharaj No 2** concerned a constitutional claim to vindicate the appellant's right not to be deprived of liberty without due process under the Constitution of Trinidad and Tobago. The Privy Council considered whether the High Court of Trinidad and Tobago had jurisdiction to inquire into and grant relief for the alleged breach of the appellant's constitutional right, and whether the Attorney-General was properly joined as a party to the proceedings against whom relief could be granted. In answer to the issue of joinder, the Privy Council noted that "[t]he redress claimed by the appellant under section 6 [of the Constitution of Trinidad and Tobago] was redress from the Crown (now the State) for a contravention of the appellant's constitutional rights by the judicial arm of the state".

[95] It is abundantly clear that **Maharaj No 2** was a constitutional claim and not one treating with the issue of an unclaimed constitutional breach in judicial review proceedings, as in the instant case. To the extent that **Maharaj No 2** considered issues similar to those raised by the Attorney-General in this appeal, it was concerned, in a very limited sense, with the propriety of seeking or granting relief against the Attorney-General in the context of constitutional proceedings. In the circumstances, **Maharaj No 2** does not establish, as a matter of principle, that the Attorney-General is a proper party against whom relief can be granted in these dissimilar proceedings for judicial review.

[96] Secondly and relatedly, the failure to properly bring forward a claim for constitutional relief had serious implications for the Full Court's ability to adjudge the breach of a constitutional right. As counsel for the Attorney-General correctly argued, for a violation of the Constitution to be found, the court must first conduct an analysis within the confines of section 13(2) of the Charter of Fundamental Rights and Freedoms. Therefore, having regard to that provision, the person against whom the claim is made must be afforded the opportunity to, at least, assert that the alleged breach is justifiable in a free and democratic society. The mere fact that the rights may be engaged or,

indeed, infringed would not be the end of the matter. A section 13(2) analysis must be conducted as a matter of law before it can be adjudged that there is, in fact, a violation of the Charter (see **The Attorney General and another v Jamaica Bar Association** [2023] UKPC 6). This analysis was not demonstrably undertaken by the Full Court.

[97] In the absence of an articulated claim and underlying facts in Cenitech's fixed date claim form and supporting affidavits, concerning an alleged breach of the constitutional right to a fair hearing, the NCC and the Attorney-General would not have had the opportunity to defend such a claim and to advance the possible justifications as required by section 13(2) of the Constitution.

[98] Given all I have said above, I am clearly of the view that rule 56.10 of the CPR was not engaged to permit the court to grant constitutional relief in the absence of a claim for that relief. Accordingly, the Full Court would have been wrong to use rule 56.10 as a basis for granting damages for constitutional redress in the circumstances.

[99] Finally, it is worth noting that it is not in all cases that a breach of natural justice will automatically give rise to a claim or the grant of relief under the Constitution. Of course, there is strong authority for the principle that a breach of natural justice can engage the constitutional rights to protection of the law and due process, thereby giving rise to a breach of those rights and the grant of a remedy under the Constitution. This, as a matter of principle, was firmly established by the Privy Council in **Rees v Crane** [1994] 2 AC 173, a well-known case from Trinidad and Tobago. In sum, Lord Slynn, who delivered the judgment of the Board, concluded, in so far as is immediately relevant, that the protection of the law provision in section 4(b) of the Constitution of Trinidad and Tobago included the right to natural justice (see page 188G of the report). Therefore, the breach of the principles of natural justice by the public authority, in that case, also contravened the applicant's right to the protection of the law afforded by section 4(b) of the Constitution of Trinidad and Tobago.

[100] Later, citing **Rees v Crane**, their Lordships in **Durity v Attorney General for Trinidad and Tobago** [2008] UKPC 59, at para. 29, similarly opined that "the constitutional right to the protection of the law and the principles of natural justice demand that particular attention must be paid to the need for fairness in the investigation" of alleged misconduct by the appellant in that case. However, at para. 28 of the judgment, their Lordships stated:

> "Whether this was a case for the appellant's immediate suspension is more open to question. But their Lordships agree with the Court of Appeal that it cannot be said that the appellant was deprived of the protection of the law when this step was taken against him. **It was open to him to challenge the legality of the decision immediately by means of judicial review. Taken on its own therefore this complaint is not one that stands up to examination as an infringement of the appellant's constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the Commission's decision to suspend him. The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, the value of the safeguard that is provided by section 14 [of the Constitution of Trinidad and Tobago (analogous to section 19 of the Constitution of Jamaica)] will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action**…". (Emphasis added)

[101] The preceding authorities, among several others from Trinidad and Tobago, were again considered by the Privy Council in **Sam Maharaj v Prime Minister**, one of the cases cited by counsel for Cenitech. In that case, their Lordships stated at para. 40 of the judgment:

> "While, therefore, *Rees v Crane* and *Durity v Attorney General* should not be interpreted as laying down an inflexible rule that every instance of failure to observe the rules of natural justice will give rise to a constitutional claim, in general, where a prompt and effective

legal remedy cannot be or is not provided, such a claim will arise." (Emphasis added)

[102] Accordingly, there is no inflexible rule of general application that every breach of the rules of natural justice will give rise to a constitutional claim or the grant of relief under the Constitution. Therefore, the mere fact that it was found that the NCC had not given Cenitech the right to be heard before its registration was revoked did not mean that Cenitech was, without more, entitled to relief under section 19 of the Constitution, in the absence of such a claim.

[103] Having regard to section 19 of the Constitution, section 48(g) of the Judicature (Supreme Court) Act, Part 56 of the CPR, and the relevant case law, I conclude that there was no basis in law for the Full Court to grant any relief under the Constitution. The simple fact is that no claim for damages, or any other remedy, for breach of the Constitution was made. The Attorney-General and the NCC stand on good ground in this aspect of their challenge to the Full Court's decision that damages be assessed in favour of Cenitech.

(ii) Absence of a private law cause of action in judicial review proceedings

[104] I now turn to consider whether there is a private law cause of action that would ground the Full Court's order that damages be assessed against the Attorney-General and the NCC within the legal framework of Part 56 of the CPR.

[105] Taking full consideration of the Full Court's reasoning, regarding rules 56.1(4) and 56.10 of the CPR, which preceded the order for damages to be assessed, it is clear that the Full Court was of the view that:

(i) Part 56 of the CPR has expanded the circumstances in which damages are available and thereby created a new right to damages in administrative proceedings;

(ii) the focus of Part 56 is not the pleading and proving of a cause of action but whether the facts before the court could support an actionable wrong;

(iii) it is not strictly necessary to plead and prove a cause of action so long as the court ascertains whether the facts disclose a cause of action that has the potential to lead to an award of damages; and

(iv) in the circumstances of Cenitech's case, no cause of action having been pleaded in the fixed date claim form, the evidence was sufficient to support a potential claim in negligence, and, therefore, it was appropriate to order that damages be assessed.

[106] It is necessary to discuss the issue now under consideration only in relation to the NCC as it was its acts and omissions that led to the proceedings and the Full Court's conclusion that the Attorney-General should be held vicariously liable or liable as the Crown's representative.

[107] The general rule under English law is that there is no right to an award of damages in judicial review proceedings. Thus, in **R v Secretary of State for Transport, ex p Factortame Ltd (No 2)** [1991] 1 AC 603, for example, Lord Goff stated, "[t]here is no general right to indemnity by reason of damage suffered through invalid administrative action". Of course, the general rule admits to an exception, and that is, for an award of damages to be made in administrative proceedings, the "claim for damages must be based on a private law cause of action" (see **X v Bedfordshire County Council** at page 730 per Lord Browne-Wilkinson).

[108] The general rule has survived the implementation of the UK CPR. Thus, in **R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2005] UKHL 57, the House of Lords stated that "[o]ur law does not recognise a right to claim damages for losses caused by unlawful administrative action… There has to be a distinct cause of action in tort…".

[109] Rule 56.10 of the CPR, indisputably, provides for the joinder of private law causes of action with administrative claims and for certain remedies that may be granted in the private law cause of action. The remedies contemplated by rule 56.10 include an award

of damages. The meaning and effect of the rule have been considered by this court on two previous occasions. The first was in **Michael Levy v Attorney-General of Jamaica** [2013] JMCA App 11 ('**Michael Levy**'), on a motion for conditional leave to appeal to Her Majesty in Council, and the second, in **Machel Smith**.

[110] In **Michael Levy**, one of the relevant questions before the court was whether the underlying judicial review claim, which sought relief by way of damages that were "neither quantified nor particularised" and which did not plead a cause of action relative to the judicial review, could satisfy the $1,000.00 value threshold for appeals as of right to Her Majesty in Council under section 110(1)(a) of the Constitution. The court was required to determine whether the judicial review claim, by its inclusion of a claim for damages, could satisfy the value threshold.

[111] In answer to this question, Morrison JA (as he then was), who wrote the unanimous judgment of the court, examined rule 56.10 and its antecedent rules of procedure. Morrison JA accepted that, like its English predecessor, rule 56.10 "...creates no new cause of action". Instead, it "enables a claim for damages for breach of a private law duty resulting from unlawful conduct by a public authority to be joined in a public law application" (see paras. [21] – [23], referring to Supperstone and Goudie's Judicial Review by Michael Supperstone QC and James Goudie QC, 1997). Thus, Morrison JA reasoned-

> "[22] …rule 56.10(2) falls to be regarded as facilitative only, in the sense of permitting an applicant for judicial review to join an action for damages in the same proceedings, provided that at the time of the filing of the judicial review application the claimant could have filed a claim for such a remedy."

[112] Applying these principles, Morrison JA concluded that the pleadings and affidavits did not disclose a cause of action for which a remedy in damages was available. Therefore, the claim for damages could not support the contention that the matter in dispute satisfied the value threshold for an appeal as of right to the Privy Council.

[113] In **Machel Smith**, there was an appeal against, *inter alia*, an order made by a judge for an assessment of damages following the grant of an order of certiorari quashing a decision of the Commissioner of Police to dismiss a police officer from the Jamaica Constabulary Force. The Attorney-General appealed the judge's order on the basis that the judicial review application did not particularise a cause of action upon which damages could have been awarded. Thus, there was no basis upon which the judge could have ordered an assessment of damages.

[114] After examining rules 56.1 and 56.10, Edwards JA (speaking on behalf of the court in a unanimous judgment) discussed the law and procedure applicable to claims for damages in administrative proceedings, at paras. [65] and [66], which I have summarised as follows:

> (1) It is accepted that a claim for damages may be included in a claim for administrative orders, and such damages may be awarded by the court hearing the administrative proceedings, if they could have been awarded in a claim for damages in private law;
>
> (2) Where a claim is being made for damages along with an administrative remedy, the factual basis in support of the cause of action alleged must be pleaded and proved to justify the award of damages;
>
> (3) The CPR, being procedural in nature, does not create any new right to damages; therefore, the cause of action in relation to which damages are sought must have existed at the time the application for judicial review was filed.

[115] With that said, the court rejected arguments by counsel for the respondent that "there is no requirement or prerequisite for a separate private law cause of action in administrative proceedings to be made in order for damages to be awarded". In rejecting that argument, the court found that the order of certiorari and declaration granted by the court below did not lead to automatic compensation in the absence of a cause of action.

It was, therefore, necessary for the respondent to have identified a cause of action in the claim; and neither the fixed date claim form for judicial review nor the affidavits in support disclosed a pleaded cause of action. The court, accordingly, concluded that the judge erred in ordering the matter to proceed to assessment of damages. As a consequence, it allowed the Attorney-General's appeal.

[116] The reasoning and conclusions of this court in **Michael Levy** and **Machel Smith** regarding a claim for damages in judicial review proceedings are consistent. Having examined the wording of rule 56.10 of the CPR, I unreservedly associate myself with the reasoning of this court in both cases.

[117] Rule 56.10 is a package of procedural rules that regulates the court's ability to entertain claims for a range of remedies under the same procedural umbrella of an application for administrative orders made under Part 56. In so far as it relates to a claim for relief in damages, with which we are immediately concerned, rule 56.10 permits such a claim to be included in applications for administrative orders. It also stipulates the general circumstances required for the inclusion of such a claim; specific conditions for the treatment of such a claim; and the court's powers of management and power to award costs relative to the inclusion of such a claim.

[118] Therefore, rule 56.10 can be said to lay out a scheme for the trial of different species of claims (both administrative and non-administrative in nature) in the same proceedings, without the need for parties to issue a multiplicity of claims to be heard in multiple proceedings, with the attendant costs, expense and pressure on the court's limited resources. Examined through this lens, rule 56.10 of the CPR does not attempt, in any way, to address the substantive legal requirement (as distinct from the procedural requirements) to obtain a remedy in damages, which has been claimed in an application for administrative orders. Rule 56.10(2) puts the burden on the claimant on a claim for judicial review or relief under the Constitution to include in the claim form a claim for the other relief or remedy being sought or to set out facts in his affidavit or statement of case justifying the grant of such relief. The setting out of facts, whether in the claim form,

statement of case or affidavit, is simply aimed at satisfying the pleading requirements in civil proceedings. The rule does not abolish the substantive principle of law that a claimant must plead and prove his case.

[119] It has been stated and restated by this court, as well as others, including the Privy Council, that the rules do not and, indeed, are incapable of expanding or restricting the jurisdiction of the Supreme Court in civil proceedings. In **Beverley Levy v Ken Sales & Marketing** [2008] UKPC 6, the Privy Council, explaining the procedural nature of the CPR, stated that "while Rules can regulate the exercise of an existing jurisdiction, they cannot by themselves confer jurisdiction". Applying this statement of principle, H Harris JA in **William Clark v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9 stated at para. [43] that "[r]ules, being regulatory, are restricted within the machinery of the exercise of existing jurisdiction".

[120] This would mean that rule 56.10 of the CPR cannot override section 48(g) of the Judicature (Supreme Court) Act, which confers power on the court to grant relief in the absence of an expressed claim for such relief. For such private law relief to be granted, the cause or matter in which damages may be awarded must be properly brought forward by the claimant. The CPR, therefore, cannot expand the jurisdiction conferred by section 48(g) and obviate the requirement for the claim to be properly brought before the court. It would also mean, of necessity, that the CPR, being procedural in nature, is also incapable of altering or abolishing the substantive legal requirements to be satisfied to establish causes of action in private law and the relief that should flow from them.

[121] To accept, as the Full Court did, that rule 56.10 was intended to "expand, not restrict, the remedies available" in Part 56 proceedings or that the rules have created a new "right" to claim damages so as to permit the award of damages where there is only a prospect of a claim in private law disclosed, is to accept that damages are available for breach of a private law right in an administrative claim without the need for pleading and proving a cause of action. In effect, this would mean that rule 56.10 of the CPR would have changed the substantive legal requirements for an award of damages in civil

proceedings. Such a proposition is fundamentally inconsistent with the nature of the CPR and the substantive law and cannot be accepted. In these premises, it is clear that the Full Court erred in its reasoning, which, in effect, is that rule 56.10 has created a new right to damages to be awarded on only the real prospect of a claim in private law, without the need for the claimant to plead and prove such cause of action and his entitlement to damages for it.

[122] What rule 56.10(2)(c)(ii) has done, as the Full Court was correct to point out, is to make it plain that the court can award damages (and other remedies) if satisfied that "the facts set out in the claimant's fixed date claim form, affidavit **or** statement of case" (emphasis added) justify the grant of those remedies. The rule is framed disjunctively but clearly indicates that for damages to be awarded, the factual basis giving rise to that entitlement must be provided by the claimant; nothing is said in the rules that the facts grounding the claim for relief may come from the defendant's statement of case or evidence as the Full Court seemed to believe.

[123] Rule 56.10(2)(c)(ii) must, therefore, be read together with the general requirement articulated in cases such as **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 ('**McPhilemy'**) and **Conticorp SA & Ors v The Central Bank of Ecuador and Ors** [2007] UKPC 40 ('**Conticorp**') that a party's statement of case must be sufficiently pleaded to advert the other parties of the case they are required to meet. In **McPhilemy**, a case decided at the advent of the UK Civil Procedure Rules in England and Wales, Lord Woolf put it this way:

> "Pleadings [are] required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

[124] Along the same lines, Lord Neuberger in **Conticorp** pithily remarked that "the ultimate purpose of one party's pleading is to inform the other party of the case that is being made out against him".

[125] Thus, although the court may ground an award of damages on the facts set out by the claimant in either the pleadings, statement of case or affidavits in support, the facts disclosed by him must be sufficient to place the opposite party and the court on notice of the facts advanced that would support the grant of relief in private law.

[126] In the instant case, the claimant did not plead or deposed to any fact towards establishing the tort of negligence. More specifically, no mention was made in the fixed date claim form of any duty of care owed by the NCC to Cenitech. No breach of any such duty was particularised and no loss or damage suffered as a result of such a breach was averred, as is required under the substantive law of negligence. The affidavits filed in support of the fixed date claim form are also devoid of any such factual averments. Further, none of the reliefs sought by Cenitech pertained, in any way, to the tort of negligence.

[127] It was the Full Court that found "a real prospect of a claim in negligence" that it said arose from what it regarded as an "implied admission" of an administrative failure in the affidavit of the NCC's chairman. The admission to which the Full Court refers was that the NCC appears to have erroneously registered Cenitech in the first place because "on the strength of its own document", Cenitech "was not qualified to be registered in the grades that it was" (see para. [15] of the Full Court's judgment). The admission, as the Full Court found it to be, was not any formal admission to a pleaded case by Cenitech to render it probative of the cause of action.

[128] No pleadings came from Cenitech establishing a cause of action in negligence as required by rule 56.10(2). The NCC, as respondent, assumed no duty to plead and prove Cenitech's case. Additionally, it is quite doubtful and, indeed, arguable whether what the Full Court regarded as an implied admission of an administrative failure amounted to negligence or satisfied the requirements for the proof of negligence. Mere carelessness is not enough. Furthermore, even if that were enough, the reasoning of the court that there is a "real prospect of a claim" in negligence is certainly not the same as saying, at

the very least, that facts in support of it were averred in the affidavits filed by Cenitech and that that it found that negligence was proved to the requisite standard of proof.

[129] In the absence of a clear case advanced by Cenitech in the pleadings or the affidavits to establish a cause of action in the tort of negligence, it was not correct for the Full Court to hold that a real prospect of a claim for such cause of action provided a proper basis to grant remedy at law in damages. It was barred from so doing by section 48(g) of the Judicature (Supreme Court) Act, rule 56.10 of the CPR and the substantive law of negligence.

[130] Furthermore, as a matter of fairness, the private law cause of action in negligence, having not been raised in the pleadings or in the evidence, the respondents would have had no notice of it being before the court, and, as a consequence, no opportunity to respond to it. Therefore, to allow damages to be awarded to Cenitech on the assertion of the Full Court, in its reasoning, that there is a "real prospect of a claim in negligence" would not be in the broader interests of justice or in keeping with the overriding objective to do justice between the parties, which is applicable to the interpretation and application of rule 56.10 of the CPR. The respondents would have been surprised by the court, of its own motion, attributing to Cenitech a cause of action that was not disclosed anywhere in its statement of case or evidence.

[131] Therefore, while rule 56.10 of the CPR was described in **Michael Levy** as giving the "power to award damages" in judicial review proceedings, it is not a power, given to the court, upon the joinder of claims under rule 56.10, to relieve a claimant of the duty to show that he has a cause of action in private law, which could have been brought at the same time as the judicial review claim. The claimant is also not relieved of the obligation to ultimately prove the private law cause of action by evidence. The joinder of private law claims with administrative claims, under Part 56 of the CPR, ought not to be viewed as authority to whittle away at the substantive requirement in law for a party to prove its entitlement to damages or the other remedies that may be granted under rule 56.10.

[132] Bearing in mind the wording and nature of rule 56.10 of the CPR, and this court's previous decisions in **Michael Levy** and **Machel Smith**, it is clear that the Full Court erred as a matter of law in concluding as it did, that rule 56.10 of the CPR expanded the circumstances in which damages can be awarded in Part 56 proceedings. Even if the rule has modified the procedure regarding where the facts supporting the private law claim may be disclosed, it certainly has not obviated the need for a cause of action arising in private law to be disclosed and, above all, proved as a prerequisite for the award damages in judicial review proceedings under Part 56. Indeed, there is no basis upon which to depart from this court's previous decision in **Machel Smith,** as suggested by counsel for Cenitech.

[133] On the basis of the foregoing analysis, I conclude that the Full Court erred in its reasoning that Cenitech had a remedy at law in damages because it had a real prospect of a claim in negligence, and it may have brought a claim for breach of its constitutional rights to a fair hearing. Neither was pleaded nor proved by Cenitech. It is apparent that this erroneous view led the court to order that damages are to be assessed, which cannot be permitted to stand. I find in favour of the Attorney-General and NCC on this issue.

Issue (3) – Whether the Full Court erred in ordering damages to be assessed in the absence of findings and a decision as to the cause of action for which liability arises and the basis on which damages are to be assessed *(NCC's grounds (v) and (vii)*

[134] The problem with the Full Court's order for damages to be assessed does not end with its interpretation and application of rule 56.10 of the CPR. There are additional difficulties with the order it made. The court seemed to have ordered an assessment of damages on the basis that it could do so in the judicial review claim, without more, or alternatively, if it is wrong on that front, it could order damages because Cenitech may have brought a claim for damages for breach of its constitutional right to a fair hearing independently, or instead, of its claim for judicial review, and that Cenitech had a real prospect of a claim in negligence against the NCC.

[135] In its judgment, the Full Court only granted a declaration regarding breach of natural justice and granted the judicial review remedy of certiorari with the follow-up order that damages are to be assessed. No judgment was granted for breach of the Constitution or negligence to which the award of damages could relate.

[136] It is against this background that the Attorney-General and the NCC complain that although the Full Court had made such assertions during the course of its reasoning, there was no finding or decision made or judgment granted, which discloses what it is that damages were being awarded for and the basis on which they should be assessed by a single judge, as ordered. The basis for the award of damages would affect the measure of damages that the assessment judge would be obliged to apply and so the Full Court's judgment ought to have established the basis for the award.

[137] I find that the contention of the Attorney-General and the NCC is not without merit. The Full Court's observations concerning the right to a fair hearing under the Constitution and a possible cause of action in negligence were not findings of fact and law that, on a balance of probabilities, it found those causes of action made out, having regard to the pleadings and/or the evidence. Also, there was no judgment or consequential orders holding any of the respondents liable to Cenitech under the Constitution or in negligence. Although it made an order for damages to be assessed, the Full Court did not pronounce judgment on a cause of action for which the damages to be assessed was the remedy.

[138] As it relates to the reasoning of the Full Court, regarding Cenitech's remedy at law, either for breach of the Constitution or in negligence, it is settled law that the reasoning of the court is not its decision. Therefore, the reasoning has no binding force unless it finds expression in an order or judgment of the court (see **Ministry of National Security and others v Everton Douglas and others** [2023] JMCA Civ 39 at paras. [48] – [50]). Therefore, the Full Court's reasoning concerning breach of the Constitution and negligence would have had to find its way in the decision of the court as reflected in its judgment or order, to have any binding force, and to ground the assessment of damages, which it ordered against the NCC and the Attorney-General.

[139] On a reading of the order made, it seems reasonable to conclude that the damages ordered to be assessed relate to the judicial review remedies granted for breach of natural justice and nothing else. This seemed to have emanated from the Full Court's initial and central reasoning that rule 56.10 of the CPR permits the award of damages in judicial review proceedings and so the general rule no longer applies in our jurisdiction. However, I endorse the position that the general rule is left unchanged with the advent of the CPR.

[140] The principle from the authorities, as made clear at para. 21 of **Michael Levy**, is that damages may be awarded for "breach of a private law duty resulting from unlawful conduct by a public authority". In **Century National Merchant Bank Limited and Others v Omar Davies and Others** [1998] UKPC 12, the Privy Council reinforced the need for a nexus between the private law remedies claimed and the unlawful conduct by a public authority when it stated, at para. 17, that:

> "**Counsel for the appellants put in the forefront of his submission that the appellants were seeking private law remedies. But counsel conceded that those remedies are unavailable <u>if the appellants have failed to show that there is an arguable case that the Minister in purporting to exercise his public powers acted unlawfully.</u>** Their Lordships have decided the critical questions of law against the appellants. They have failed to demonstrate an arguable case." (Emphasis added)

[141] Similarly, in the Judicial Review Handbook (2020), the learned author usefully discussed the law relating to procedural ultra vires, procedural impropriety and procedural unfairness (see paras. 61.1 – 61.4.1). He explained procedural ultra vires in these terms, at para. 61.4:

> "**Procedural obligations may be imposed on a public authority by a legally relevant instrument (including policy guidance)**, **so that the authority acts unlawfully by breaching them.** This is an intersection where unlawfulness and procedural unfairness meet. That intersectional nature (or overlap) is reinforced by the fact that common law procedural fairness imposes (or implies) duties by supplementing a legislative scheme. **Where a procedural**

> **requirement is breached, the Court identifies the consequence by analysing the context and circumstances, asking what consequence was intended by the instrument**." (Emphasis added).

[142] The fact that Cenitech was not given an opportunity to be heard did not mean, without more, that there was unlawfulness or procedural impropriety that could give rise to a private law remedy. Indeed, there was no specific pleading or evidence that the NCC acted unlawfully when it did not give Cenitech an opportunity to be heard before its registration was revoked. Furthermore, the Full Court has failed to demonstrate that Cenitech has proved that the NCC acted unlawfully so as to justify a private law remedy in the form of damages for the breach of natural justice. In the end, there is no definitive finding, expressed in the judgment or order of the Full Court, of an unlawful act on the part of the NCC or any cause of action giving rise to a private law claim, for which damages could be awarded in the Part 56 claim.

[143] The absence of findings or a judgment awarding damages was labelled by this court in **Machel Smith** as a "fundamental failing" by the trial judge in that case. The court noted that the learned judge did not make an order awarding general damages in relation to a cause of action but simply made orders that an assessment of damages take place. In the court's view, "the result was that no order was made awarding general damages". The court reasoned:

> "[79] In **R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** it was plainly stated that there must be a claim that can be particularised as the basis of how the damages should be quantified. Therefore, a cause of action must be identified on which general damages may be awarded before it can be set for assessment of the quantum. The whole point of allowing the joinder of the claim for damages to a judicial review claim is that in making such a claim along with an application for prerogative orders or a declaration, the court will be placed in a position to be able to award damages without further proceedings. In a really difficult case (which this case is not one such) it may be necessary, after general damages is awarded, for further and better particulars to be provided in order to quantify the award. However, if the court hearing the claim finds itself in a position where it cannot

> make an order that general damages are awarded in a sum to be assessed, it means the claim has not been made out and ought to have been dismissed." (Emphasis as in original)

[144] In similar stead to the conclusion of this court in **Machel Smith**, the absence of a finding reflected in the court's order, establishing liability for any cause of action arising under the Constitution or in private law, is a fundamental pitfall. There was, therefore, no judgment or order on the issue of the liability of the NCC for negligence or breach of the Constitution to ground an order for damages to be assessed against it and the Attorney-General.

[145] If this court were to affirm that damages are to be assessed in the absence of a proven private law cause of action and a decision as to liability for such cause of action, it would mean that the Supreme Court can award damages for a private law cause of action, in judicial review proceedings, without any finding that the cause of action has been made out. A claimant in those proceedings would simply have to demonstrate, in the words of the Full Court, "a realistic prospect of a claim". Such a course would unreasonably and unjustifiably dichotomise the court's treatment of private law claims, which stand alone, and private law claims that are joined with administrative claims. This would mean that claimants who join private law claims with an administrative claim would benefit from more favourable treatment by the court because there would be no need for those claimants to plead and, ultimately, prove their claim for damages on a balance of probabilities. It cannot be said on any reasonable construction of Part 56 of the CPR that it was intended by or has resulted from the framing of rule 56.10 that a mere prospect of a claim in private law entitles a claimant to an award of damages in judicial review proceedings. Such a construction of the rule would lead to manifest absurdity and injustice, which cannot be countenanced by this court.

[146] In defence of the Full Court's reasoning, Cenitech has relied on several authorities to justify the order made against the Attorney-General and the NCC for damages to be assessed. However, none of those cases have proved helpful to its case. It is enough to state that nothing in any of them stands for the proposition that, as a matter of principle,

damages can be awarded in judicial review proceedings, without a pleaded and/or proven private law cause of action or a constitutional claim and without a definitive finding of liability for a particular cause of action expressed in a decision, judgment or order.

[147] The failure on the part of the Full Court to indicate its findings of liability and to pronounce judgment upon the liability of the Attorney-General and the NCC, whether under the Constitution or for negligence, is fatal to its order that damages be assessed in favour of Cenitech.

[148] Having examined the authorities cited by the parties, I believe, for all the reasons stated above, that the approach taken by the Full Court cannot be endorsed by this court. The Attorney-General and NCC are correct that the Full Court erred in ordering damages to be assessed in the absence of findings and a decision as to the cause of action for which liability arises and the basis on which damages are to be assessed.

[149] The grounds of appeal challenging the order of the Full Court that damages be assessed against the Attorney-General and the NCC are meritorious.

Issue (4) – Whether the Full Court erred in ordering the Attorney-General to pay the costs of Cenitech and for the Attorney-General and the NCC to pay the costs of the Integrity Commission (formerly the Contractor-General) and the Minister *(Attorney-General's ground (vii) and the NCC's ground (viii))*

[150] The Full Court made its costs order against the NCC on the basis that it had failed to successfully defend Cenitech's judicial review claim. Thus, the NCC was required to pay Cenitech's costs. Further, because the joinder of the Minister and the Integrity Commission (formerly the Contractor-General) was reasonable in the court's view, the NCC was also ordered to pay their costs. The court further ordered the Attorney-General to pay the costs of Cenitech, the Minister and the Integrity Commission (formerly the Contractor-General) on the basis that the Attorney-General was the Crown's representative and bore "the ultimate responsibility for the NCC's conduct and exposure".

The Attorney-General's submissions

[151] Counsel for the Attorney-General submitted that the NCC was not a Crown servant and operated independently of the Attorney-General for the purpose of the proceedings. Further, there was no public law wrong committed by the Minister or the Attorney-General. No allegations were made or orders sought against the Attorney-General. Thus, the Minister and the Attorney-General were successful parties in Cenitech's judicial review application, and the court erred in making a costs order adverse to him.

The NCC's submissions

[152] Counsel for the NCC submitted that the Full Court ought not to have ordered it to pay the costs of the Minister and Integrity Commission (formerly the Contractor-General). It was submitted that neither of those parties was in the proceedings at the instigation of the NCC. Cenitech joined those parties seeking remedies against them. The NCC should not be made liable for their costs because the Full Court did not fault the actions of either of them.

Cenitech's submissions

[153] In support of the Full Court's costs order, counsel for Cenitech contended that the court was correct to order the NCC and the Attorney-General to pay costs, as they were unsuccessful respondents to the judicial review claim. The basis of the order to pay the other unsuccessful respondents was that it was reasonable for Cenitech to have joined them in the claim. Reliance was placed on **Bullock v London General Omnibus Company** [1907] 1 KB 264.

[154] Alternatively, if the court agrees that the Attorney-General is not liable to pay costs, the NCC should bear the costs of the Attorney-General and the Integrity Commission (formerly the Contractor-General) in this court and the court below.

Discussion and findings on Issue 4

[155] The Supreme Court's discretion to award costs is governed by section 47(1) of the Judicature (Supreme Court) Act, which provides that "[i]n the absence of express provision to the contrary the costs of and incidental to every proceeding in the Supreme Court shall be in the discretion of the Court…".

[156] The general rule as to costs in proceedings under the CPR is set out in rule 64.6, which states:

> "(1) If the court decides to make an order about costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

[157] Rules 56.15(4) and (5) contain specific rules on the award of costs in Part 56 proceedings. Those rules state-

> "(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.
>
> (5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

[158] The CPR does not expressly provide for the making of orders for unsuccessful co-defendants to pay the costs of successful co-defendants. Those orders, like the order for costs made by the Full Court, are now broadly referred to as Bullock and Sanderson orders (often collectively referred to as Bullock orders) in keeping with the decision of the court in **Bullock v London General Omnibus Company,** which was cited by counsel for Cenitech. However, it has not been disputed, and rightly so, that the power to make such orders falls within the broad discretion of the court under section 47(1) of the

Judicature (Supreme Court) Act and rule 64.6 of the CPR. In **Irvine v Commissioner of Police for the Metropolis and Others** [2005] EWCA Civ 129, the English Court of Appeal concluded that the jurisdiction to grant Bullock orders survived the implementation of the UK CPR. I do not doubt that the same obtains in this jurisdiction with the implementation of the CPR.

[159] Furthermore, I am also of the view that the specific rules contained in rule 56.15(4) and (5) do not impinge upon the court's discretion to order an unsuccessful defendant to pay the costs of successful defendants in the context of Part 56 proceedings. As the Privy Council in **Toussaint v Attorney-General Saint Vincent & The Grenadines** [2007] UKPC 58 noted, relative to rule 56.13 of the Eastern Caribbean Civil Procedure Rules 2000 (which is materially identical to rule 56.15(5) of the CPR), the provision is designed to protect unsuccessful applicants for judicial review from cost orders against them, but was not meant to protect a public body or the State from paying costs when it was unsuccessful in defending an administrative law claim. It, therefore, appears that nothing in the letter or spirit of rule 56.15(5) prevents the court from making an order that an unsuccessful co-defendant pay the costs of a successful co-defendant in Part 56 proceedings.

[160] With that said, it is necessary to consider the general principles governing the making of a Bullock order. They were discussed by the English Court of Appeal in **Irvine v Commissioner of Police** and stated to be, in summary:

(i) Bullock orders are made where a claimant sues more than one defendant in the alternative and succeeds against only one. Though the court's discretion is not limited to claims brought in the alternative, it will not be usual to make a Bullock order where the successful defendant was not sued in the alternative to the unsuccessful defendant.

(ii) The purpose of the order is to "avoid injustice that when a claimant does not know which of two or more defendants should be sued for a wrong

done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against whom the claimant has failed".

(iii) There are no hard and fast rules as to when it is appropriate to make a Bullock order – whether such an order is to be made is entirely within the discretion of the court.

(iv) The discretion to make a Bullock order must be exercised having regard to the overriding objective of the CPR.

(v) In exercising its discretion, the court should have regard to all the circumstances, including whether the claims against the defendants are connected; whether the claimant was reasonable in joining and pursuing a claim against the unsuccessful defendant; and whether one defendant blames the other defendant for the wrong alleged to have been committed against the claimant.

[161] It is accepted that the award of costs was within the discretion of the Full Court, but that discretion must be exercised judicially and with due regard to the overriding objective. The question is whether it failed to do so, as contended by the Attorney-General and the NCC.

Whether the Attorney-General should pay Cenitech's costs

[162] The only reason for awarding costs against the Attorney-General in favour of Cenitech was expressed to be that the Attorney-General "represented the Crown" and "bears the ultimate responsibility for the NCC's conduct and exposure".

[163] It is clear from the reasoning of the Full Court that it hinged the Attorney-General's liability for Cenitech's costs on its view that the Attorney-General was responsible for the NCC's conduct in revoking Cenitech's registration and its failure in resisting Cenitech's

judicial review application. However, there is merit in the Attorney-General's contention that he should not have been ordered to pay Cenitech's costs in the proceedings for the reasons outlined below.

[164] In making its order for costs, the Full Court erroneously treated the Attorney-General as an unsuccessful respondent to the application for judicial review. For the reasons already expressed, the Attorney-General was not a proper party against whom substantive relief ought to have been granted on account of the liability of the NCC. Having regard to the provisions of the CPA and the legal status of the NCC under the Contractor-General Act, no relief could have been granted in the circumstances against the Attorney-General for anything done by the NCC. Given the findings of the Full Court, the application for judicial review failed in respect of the Minister on whose behalf the Attorney-General participated in the proceedings. Indeed, having found no liability on the part of the Minister, the claim ought to have been dismissed against him in the final judgment of the court, but no such order was made.

[165] Be that as it may, the Full Court has disclosed no good and acceptable reason for requiring the Attorney-General, being the successful party, to pay the costs of Cenitech that was unsuccessful in relation to him. The Full Court, therefore, failed to exercise its discretion judicially and in accordance with the overriding objective. This provides a basis for this court to interfere with the exercise of its discretion and set aside this order made against the Attorney-General in favour of Cenitech. I would rule accordingly.

Whether the Attorney-General and the NCC should pay the costs of the Minister and the Integrity Commission (formerly the Contractor-General)

[166] The Full Court was further satisfied that the NCC and, therefore, the Attorney-General, being, in its view, unsuccessful respondents to Cenitech's application for judicial review, should be held liable for the Contractor-General and Minister's costs. Thus, a Bullock order was appropriate.

[167] As is obvious, the Full Court's treatment of the Attorney-General as an unsuccessful party was also the basis of its Bullock order. The court, therefore, failed to consider that although the joinder of the Contractor-General and the Minister, as parties to the judicial review application, may have been reasonable, as it concluded, and that those parties were successful in resisting the judicial review claim, the Attorney-General was not an unsuccessful defendant in respect of whom a Bullock order could have been made. This is for the same reasons stated above in relation to the order the court made in favour of Cenitech.

[168] Furthermore, in making the Bullock order against the NCC, which was unsuccessful on the claim, in part, the Full Court failed to consider the justice of the case in the context of rule 56.15 and the principles derived from case law regarding the making of a Bullock order.

[169] Given the court's finding that Cenitech was reasonable in bringing its claims against all the respondents, rule 56.15 was found to offer protection to Cenitech in relation to the Integrity Commission (formerly the Contractor-General) and the Minister. Therefore, by virtue of rule 56.15, there was no real chance of an adverse costs order being made against Cenitech for its unsuccessful claims against the Minister and Integrity Commission (formerly the Contractor-General). There was also no risk of the erosion, diminution or elimination of any damages or costs that Cenitech would have recovered from the NCC, the unsuccessful respondent. Furthermore, the Minister and the Integrity Commission (formerly the Contractor-General) were not sued in the alternative to the NCC.

[170] Thus, the purpose of a Bullock order, as established in **Irvine v Commissioner of Police**, which is to protect a claimant from losing the benefit of their success, where the joinder of multiple defendants was reasonable, was not engaged at all.

[171] Furthermore, although there is no hard and fast rule as to when it is appropriate to make a Bullock order, and it is entirely within the discretion of the court, the discretion must be exercised judicially, having regard to all the circumstances and the overriding

objective. When the case is considered with the dictates of the overriding objective in mind, it does seem that the making of an order for the NCC to pay the costs of the Minister and the Integrity Commission (formerly the Contractor-General) in the circumstances was not consonant with the overriding objective and was unwarranted.

[172] It has also not escaped attention that no judgment or order dismissing the claim against the Minister and the Integrity Commission (formerly the Contractor-General) was entered on the record. Technically speaking, then, there was no judgment in their favour to which an order for costs could have been pegged. Again, the reasoning of the court regarding their non-liability did not find its way into its decision or judgment. The proper course was for the court to give judgment in their favour (either dismissing the claim or refusing the application) and then make the order for costs relative to them.

[173] Despite this omission of the Full Court, nothing affects the finding of the court (as expressed in its reasoning) that those respondents were not liable. Accordingly, this court would have to exercise its power under rule 2.14 of the Court of Appeal Rules, 2002 ('the CAR') and make the proper order the Full Court should have made. By way of reminder, rule 2.14 of the CAR empowers this court "to give any judgment or make any order, which in its opinion, ought to have been made by the court below". This order is necessary for consequential orders for costs to be made.

[174] I am, therefore, satisfied that the Full Court erred as a matter of principle in ordering costs against the Attorney-General and the NCC in favour of the Minister and the Integrity Commission (formerly the Contractor-General). The costs order in that regard should be set aside.

[175] Having set aside the costs orders appealed against by the Attorney-General and the NCC, it now falls for this court to exercise its own discretion and make the order that the court below ought to have made in accordance with rule 2.14 of the CAR. In so doing, I am mindful of the following:

(i) The Attorney-General was not a party against whom relief was granted. Therefore, the Attorney-General was a successful party to the claim, and Cenitech was an unsuccessful party against the Attorney-General.

(ii) Bearing in mind rule 64.6 and 56.15(5), costs should only be awarded against Cenitech, in favour of the Attorney-General, if the court is satisfied that Cenitech acted unreasonably in bringing the application for judicial review and naming the Attorney-General as a party to it.

(iii) Despite my conclusion that the Attorney-General was not a proper party against whom relief could have been granted in these proceedings, it does not follow that Cenitech has acted unreasonably to warrant an award of costs against it. The Attorney-General participated fully in the proceedings below and has only raised an issue regarding its joinder following the grant of relief against it by the Full Court. The Attorney-General's willing participation in the proceedings as a named party fundamentally undermines any argument that Cenitech acted unreasonably in joining the Attorney-General as a party.

[176] In all the circumstances, I would hold that the Attorney-General should be made to bear its costs in the court below, and I would so order.

[177] The NCC has not appealed the order that it should pay Cenitech's costs. So that order stands undisturbed.

[178] The Full Court found it was not unreasonable for Cenitech to join the Minister and the Integrity Commission (formerly the Contractor-General) as parties to the judicial review application. I would not disturb that finding as there is no appeal against it. The Minister and Integrity Commission (formerly the Contractor-General) should stand in the same position as to costs because rule 56.15(5) applies to them as public authorities, as it does to the Attorney-General.

[179] Thus, in accordance with the standard of review to be applied by this court in treating with the exercise of the Full Court's discretion, there is sufficient basis for this court to set aside the Full Court's order for costs in favour of the Minister and Integrity Commission (formerly the Contractor-General) and order that they too bear their own costs. I would order accordingly.

Conclusion

[180] The Full Court erred in law in making an order that damages be assessed against the Attorney-General and the NCC. There was no legal basis upon which the Full Court could have ordered that damages be assessed in the judicial review proceedings, in the absence of a pleaded and proven cause of action in private law or liability under the Constitution; and in the absence of a judgment or order establishing such liability and the corresponding relief.

[181] For these reasons, order (iii) made by the Full Court, that damages be assessed against the Attorney-General and the NCC, should be set aside. As a consequence, order (iv) that a case management conference is to be scheduled to facilitate the assessment of damages, should also be set aside. The claim ought properly to have been dismissed against the Attorney-General.

[182] On the issue of costs for the proceedings in the Full Court, the court erred in principle when it awarded costs against the Attorney-General. The Attorney-General was a successful party in those proceedings, and there is no basis to apply the exception to the general rule that costs follow the event and make an order adverse to the Attorney-General as a successful defendant in favour of Cenitech or any other respondent.

[183] Given the nature of the proceedings below and the provisions of rules 64 and 56.15 of the CPR, the Attorney-General should bear his own costs.

[184] The Full Court failed to exercise its discretion judicially and in accordance with the overriding objective when it made a Bullock order against the Attorney-General and the NCC to pay the costs of the Minister and the Integrity Commission (formerly the

Contractor-General). Given the principles that govern the making of a Bullock order, the rationale for making such orders and the circumstances of the case, including that Cenitech is not required to pay any costs to the unsuccessful respondents, it is not in keeping with the overriding objective for the NCC to pay the costs of the Minister and Integrity Commission (formerly the Contractor-General). The successful respondents were also public authorities against whom the Full Court found it was reasonable for Cenitech to bring the claim. They stood in no different position from the Attorney-General in terms of liability.

[185] In the circumstances, given the omission of the Full Court to refuse the application for judicial review against the Minister and the Integrity Commission (formerly the Contractor-General), in keeping with its findings, I propose that the necessary order now be made pursuant to rule 2.14 of the CAR.

[186] Like the Attorney-General, the Minister and Integrity Commission (formerly the Contractor-General) should bear their own costs.

[187] In the circumstances, the Attorney-General and the NCC succeed in their respective appeals.

[188] Accordingly, the appeals should be allowed.

[189] This now leads to the question of how costs in the appeal should be awarded.

Costs of the appeal

[190] As stated earlier, the Integrity Commission (formerly the Contractor-General) has not participated in the proceedings before this court. It seems then that the issue of the costs of the appeal would arise only in relation to the participants in the appeal – the Attorney-General, the NCC and Cenitech.

[191] The Attorney-General and the NCC are fully successful on their appeals and, in keeping with the general rule that costs follow the event, should ordinarily be awarded

the costs of the appeals against Cenitech. Rule 56.15(5), which offered some protection to Cenitech in the court below, does not apply to the appeals (see rule 1.1(10) of the CAR). The question that remains is whether, given the general rule, and the inapplicability of rule 56.15(5), Cenitech should be ordered to pay the Attorney-General and the NCC's costs in the appeals. We have not had much assistance, by way of submissions, on this question. We would, therefore, seek submissions from the parties before arriving at our final determination.

[192] I propose that the following orders be made the final orders of the court:

1. The claim is dismissed against the Minister of Agriculture and Fisheries and the Integrity Commission (formerly the Contractor-General).

2. On the Attorney-General's appeal (COA2021CV00035):

    (i) The appeal is allowed.

    (ii) Orders (iii), (iv) and (v) contained in the judgment of the Full Court delivered on 26 March 2021 in respect of the Attorney-General are set aside.

    (iii) The claim is dismissed against the Attorney-General.

    (iv) Substituted for order (v) is an order in the following terms:

    > *"(iii) Costs in the application for judicial review are awarded to Cenitech to be paid by the National Contracts Commission, as are agreed or taxed. The Attorney-General, the Minister of Agriculture and Fisheries and the Integrity Commission (formerly the Contractor-General) shall each bear their own costs."*

    (v) The parties to this appeal are to make submissions within 14 days of this order regarding the award of costs on appeal, failing which the order of the court shall be each party to bear its own costs.

3. On the National Contracts Commission's appeal (COA2021CV00040):

    (i) The appeal is allowed.

    (ii) Orders (iii), (iv) and (v) contained in the judgment of the Full Court delivered on 26 March 2021 in respect of the National Contracts Commission are set aside.

    (iii) Substituted for order (v) is an order in the following terms:

    > *"(iii) Costs in the application for judicial review are awarded to Cenitech Engineering Solutions Limited to be paid by the National Contracts Commission, as are agreed or taxed. The Attorney-General, the Minister of Agriculture and Fisheries and the Integrity Commission (formerly the Contractor-General) shall each bear their own costs."*

    (iv) The parties to this appeal are to make submissions within 14 days of this order regarding the costs of the appeal, failing which the order of the court shall be each party to bear its own costs.

EDWARDS JA

[193] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning, conclusion and proposed orders and have nothing to usefully add.

HARRIS JA

[194] I, too, have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning, conclusion and the orders she has proposed, and I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The claim is dismissed against the Minister of Agriculture and Fisheries ('The Minister') and the Integrity Commission (formerly the Contractor-General).

2. On the Attorney-General's appeal (COA2021CV00035):

    (i) The appeal is allowed.

    (ii) Orders (iii), (iv) and (v) contained in the judgment of the Full Court delivered on 26 March 2021 in respect of the Attorney-General are set aside.

    (iii) The claim is dismissed against the Attorney-General.

    (iv) Substituted for order (v) is an order in the following terms:

    > *"Costs in the application for judicial review are awarded to Cenitech Engineering Solutions Limited to be paid by the NCC, as are agreed or taxed. The Attorney-General, the Minister and the Integrity Commission (formerly the Contractor-General) shall each bear their own costs."*

    (v) The parties to this appeal are to make submissions within 14 days of this order regarding the award of costs on appeal, failing which the order of the court shall be each party to bear its own costs.

3. On the National Contracts Commission's appeal (COA2021CV00040):

    (i) The appeal is allowed.

    (ii) Orders (iii), (iv) and (v) contained in the judgment of the Full Court delivered on 26 March 2021 in respect of the National Contracts Commission are set aside.

    (iii) Substituted for order (v) is an order in the following terms:

    > *"Costs in the application for judicial review are awarded to Cenitech Engineering Solutions Limited to be paid by the NCC, as are agreed or taxed. The Attorney-General, the Minister and the Integrity Commission (formerly the Contractor-General) shall each bear their own costs."*

(iv) The parties to this appeal are to make submissions within 14 days of this order regarding the costs of the appeal, failing which the order of the court shall be each party to bear its own costs.