[2014] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 76 AND 87/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**THE MINISTER OF FINANCE AND PLANNING**	
	& PUBLIC SERVICE	**1ST APPELLANT**
AND	**THE FINANCIAL SECRETARY**	**2ND APPELLANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**3RD APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH APPELLANT**
AND	**VIRALEE BAILEY-LATIBEAUDIERE**	**RESPONDENT**

Mrs Nicole Foster-Pusey QC, Miss Carlene Larmond and Basil Williams instructed by the Director of State Proceedings for the appellants

Hugh Wildman and Miss Barbara Hinds instructed by Hugh Wildman & Co for the respondent

8, 9, 10, 11, 30 April and 9 June 2014

MORRISON JA

Introduction

[1] The 1st appellant ('the MOF') is the minister of government with responsibility for the portfolio of finance and planning, while the 2nd appellant ('the FS') is the civil service head of the ministry. The 3rd appellant ('the PSC') is the commission appointed under section 124 of the Constitution of Jamaica ('the Constitution').

[2] Under section 125(1) of the Constitution, the power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is vested in the Governor-General acting on the advice of the PSC. Section 125(3) of the Constitution lays down the procedure to be followed before the Governor-General can act in accordance with the advice of the PSC that any public officer should be removed from office.

[3] The respondent was at all material times a contract employee of the Government of Jamaica ('GOJ'). She was assigned to the Ministry of Finance & Planning ('the MFP').

[4] By letter dated 10 July 2013, the MFP purported to terminate the respondent's employment with effect from 31 July 2013. On 23 August 2013, Sykes J granted leave to the respondent to apply for judicial review of the decision to terminate her employment and, on 19 September 2013, he dismissed a preliminary objection by MFP to the continuation of the judicial review proceedings.

[5] The MFP appealed from the orders of the judge granting leave (SCCA No 87/2013) and dismissing the preliminary objection (SCCA No 76/2013). On 30 April

2014, both appeals having been heard together by the consent of the parties, SCCA No 87/2013 was dismissed, while SCCA No 76/2013 was allowed. These are my reasons for concurring in these decisions.

Background

[6] By an agreement ('the contract') dated 7 July 2011, made between the respondent and the MFP, the respondent was appointed to the position of Commissioner General of Tax Administration Jamaica ('CGTA'). The appointment was for a period of three years, beginning on 1 May 2011 and ending on 30 April 2014, "or such lesser period as shall be agreed between the parties".

[7] Among other things, the contract provided that –

(i) it was subject to renewal by the agreement of both parties for a further period of up to three years (clause 2);

(ii) the respondent would be required to observe and comply with various regulations governing the public service of Jamaica, including the Public Service Regulations 1961 ('the PSR'), the Official Secrets Act and the Staff Orders for the Public Service as well as departmental instructions in force from time to time;

(iii) it was terminable by either party, without cause, giving not less than 30 days' written notice to the other (clause 39).

[8] In due course, acting on the recommendation of the PSC, the Governor-General approved the appointment of the respondent "on contract/gratuity terms" for the period

mentioned in the contract. Notice of the appointment was published in the Jamaica Gazette for 5 April 2012.

[9] For reasons which are neither particularised nor fully explained in the documentation included in the record of appeal, the MFP became dissatisfied with the respondent's performance as CGTA. By letter dated 27 February 2012, the FS notified the respondent of her transfer to the position of Commissioner General, Ministry of Finance & Planning ('CGMFP'), with effect from 28 February 2012.

[10] By letter dated 28 February 2012, the respondent advised the FS that, in accordance with his instructions, she had assumed duties in the new position as of that date. Up to the date of commencement of these proceedings (26 July 2013), she continued to function in that capacity.

[11] Between September 2012 and July 2013, discussions took place between the Solicitor General ('the SG'), representing the MFP, and attorneys-at-law representing the respondent. These discussions were with a view to arriving at a mutually agreeable position as regards the termination of the contract.

[12] No agreement was reached as a result of these discussions and, by letter dated 10 July 2013, the SG notified the respondent's attorneys-at-law that the MFP would be terminating her contract with effect from 31 July 2013. The SG's letter also advised that the respondent would "be compensated for the entire duration of the contract, that is for the remaining period of August 1, 2013 to April 30, 2014". Further to this letter, the respondent's bank account was on 29 July 2013 credited with the sum of

$12,425,789.18, representing the net amount of the sums due to her for the remaining life of the contract.

[13] By letter dated 17 July 2013 (captioned "Re: Viralee Latibeaudiere – Termination of Employment Contract"), the respondent wrote to the Governor-General seeking "your intervention in the captioned matter". The letter complained of breaches of the PSR and the rules of natural justice. However, as at the date of commencement of the hearing of the application for leave, there was no response to this letter.

The course of the proceedings

[14] By notice of application for court orders filed on 26 July 2013, the respondent sought leave to apply for judicial review of the decision to terminate her contract. She indicated her intention to ask for the following orders:

> "(i) A declaration that the 1st Respondent is not empowered by law to terminate the contract of the Applicant as Commissioner General of Tax Administration or otherwise interfere with the discharge of her statutory obligations under the said contract and the Revenue Administration (Amendment) Act;
>
> (ii) A declaration that the 2nd Respondent is not empowered by law or otherwise to terminate the contract of [the] Applicant as Commissioner General Tax Administration Jamaica either on his own volition or pursuant to the dictates of the 1st Respondent.
>
> (iii) A declaration that the 2nd Respondent cannot transfer the Claimant to any other position in the Ministry of Finance and Planning and the Public Service unless the position is an equivalent one and for good and sufficient reason.

(iv) A declaration that the Applicant is the only person lawfully entitled to exercise the powers of Commissioner General Tax Administration Jamaica under the Revenue Administration (Amendment) Act 2011 and any other statute recognizing her authority and all actions taken without the lawful consent and approval of the Applicant is [sic] null and void.

(v) An Order of Certiorari quashing the decision of the First Respondent to terminate the contract of the Applicant;

(vi) An Order of Certiorari quashing the decision of the 2nd Respondent to terminate the contract of the Applicant and the decision of the 2nd Respondent to transfer and/or reassign the Applicant from her post as Commissioner General Tax Administration Jamaica.

(vii) An Order of Prohibition prohibiting the Respondents either by themselves and/or their servants or agents from terminating the contract and employment of the Applicant without following the lawful procedures for termination as set out in Public Service Regulations 1961.

(viii) An Order [of] Mandamus compelling the 3rd Respondents to act according to law and advise the 1st and/or 2nd Respondent on the propriety of transferring and/or reassigning the Applicant to another division in the Ministry of Finance and the Public Service.

(ix) An Order of Prohibition prohibiting the 3rd Respondent from giving effect to the decision of the 1st and/or 2nd Respondent in effecting a transfer and/or reassignment of the Applicant.

(x) An interim and interlocutory injunction against the 3rd Respondent restraining it from making any recommendations to the Governor General concerning the filling of the post of Commissioner General Tax Administration Jamaica until the issues herein are determined by this Honourable Court.

(xi) A permanent injunction restraining the Respondents by themselves or their servants and/or agents from

> terminating the contract and employment of the Applicant without following the procedures prescribed by law for the determination of employment of public officers."

[15] In the grounds in support of the application, it was contended, among other things, that (i) neither the MOF nor the FS was empowered to terminate the respondent's contract otherwise than in accordance with the provisions of the Constitution and the PSR; (ii) the respondent had a legitimate expectation that, in the absence of misconduct on her part or any reasonable ground for terminating it, the contract would be renewed on similar terms and conditions; (iii) neither the FS nor the PSC was empowered to transfer or reassign the respondent from her statutory post of CGTA unless there is an equivalent post in the MFP, or for good and sufficient reasons; and (iv) the assignment of any person other than the respondent to the post of CGTA, in circumstances where she is fit, willing and able to perform her functions, is null and void.

[16] On 26 July 2013, Campbell J granted a without notice interim injunction prohibiting the termination of the contract for a period of 14 days from the date of his order.

[17] The interim injunction was subsequently extended (by Hibbert J) and, on 23 August 2013, the application for leave to apply for judicial review came on for hearing *inter partes* before Sykes J. In granting leave as prayed, the learned judge made the following orders:

"1. The Minister of Finance and Planning and the Public Service and the Financial Secretary are hereby restrained in the following manner:

a) They are restrained whether by themselves and/or their servants and/or their agents from terminating the contract, employment and appointment of the Applicant to the post of the Commissioner General Tax Administration Jamaica or the post of Commissioner General Ministry of Finance and Planning and the Public Service.

2. The Public Service Commission is restrained in the following manner:

a) It is restrained from terminating, or taking any steps to terminate the contract including making any recommendations to the Governor General to terminate the contract, employment and appointment of Applicant to the post of Commissioner General Tax Administration Jamaica or the post of Commissioner General Ministry of Finance and Planning and the Public Service;

b) It is restrained from advertising, interviewing persons or soliciting applications for the post of Commissioner General Tax Administration Jamaica;

c) It is restrained from making any recommendations to the Governor General for the permanent appointment of anyone to the post of Commissioner General Tax Administration Jamaica.

3. Paragraphs 1 & 2 of this Order have effect until further ordered, or matter is heard and determined by the Supreme Court.

4. The sum of Twelve Million, Four Hundred & Twenty Five Thousand, Seven Hundred & Eighty Nine Dollars & Eighteen Cents ($12,425,789.18) paid to [the] Applicant by the Ministry of Finance and Planning and the Public Service is to be returned by the Applicant, and the Ministry of Finance and Planning and the Public Service is to accept receipt of Twelve Million, Four Hundred & Twenty Five Thousand, Seven Hundred & Eighty Nine

Dollars & Eighteen Cents ($12,425,789.18) by personal cheque from the Applicant.

5. Until further ordered, the Applicant is to continue to receive all salaries, emoluments, benefits, allowances and entitlements due to her, in the post of Commissioner General Ministry of Finance and Planning.

6. All salaries, emoluments, benefits, allowances and entitlements due to the Applicant in the capacity as Commissioner General Ministry of Finance and Planning for the month of August 2013, are to be paid to the Applicant, no later than 12:00 noon, Wednesday, August 28, 2013.

7. That this order does not apply to the Tax Administration Jamaica Act 2013 (Act No. 10 of 2013).

8. Costs to be costs in the claim.

9. The Applicant's Attorney-at-Law is to prepare, file and serve the Formal order.

10. First Hearing on the 19th September 2013 at 10:00 am.

11. Hearing on the 29th and 30th October 2013."

[18] In keeping with this order, the respondent in due course returned the sum of the $12,425,789.18 to the MFP.

[19] In granting leave, Sykes J applied what Lords Bingham and Walker described in their joint opinion in ***Sharma v Browne-Antoine et al*** [2006] UKPC 57, (2006) 69 WIR 379, para. [14] (4), as the "ordinary rule", which is that "the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy".

[20] Sykes J considered (at para. [9]) that the instant case was "a replica copy" of ***McPherson v The Minister of Land and Environment*** (SCCA No 85/2007, judgment delivered 18 December 2009) (`***McPherson***'), in which this court held that, once a public servant is appointed by the Governor-General acting on the advice of the PSC under section 125(1) of the Constitution, that person can only be removed from office by the Governor-General acting on the advice of the PSC. Among other authorities, the judge also referred to the decision of the Privy Council in ***Fraser v Judicial & Legal Services Commission*** [2008] UKPC 25, (2008) 73 WIR 175 (`***Fraser***'), in which an attempt to dismiss a magistrate from office by notice under the provisions of a fixed term contract before its expiry, was held to be invalid.

[21] In the result, after considering whether any discretionary bars existed, Sykes J granted leave to apply for judicial review and made the consequential orders set out above. With characteristic robustness, the learned judge said this (at para. [19]):

> "The allegations reveal a unilateral act by the executive to rid itself of the applicant. The idea that the executive can ignore the Constitution, ignore clear and unambiguous authority from the Court of Appeal of Jamaica, and from our highest court, the Judicial Committee of the Privy Council must be rejected. This court cannot accept a deliberate attempt by the Government to circumvent the Constitution of Jamaica, our supreme law. If the Solicitor General is correct, that a 'buy-out' is a legitimate tool to deprive a public servant of the protection of our highest law, the Constitution, then it means that any public servant appointed by the Governor General acting under section 125 (1) of the Constitution of Jamaica can be summarily dismissed by the expedient of placing money in his or her bank account and sending a letter of dismissal for this is what the 'buy out' looks like in this case. With such a concept, the role of the various service commissions under

> the Constitution would be eliminated. This court cannot be too emphatic in its absolute and total rejection of this idea. Thus a public servant who has done no wrong could suddenly find himself or herself without a job because the executive branch of government, aided and abetted by the various commissions, could 'buy' him out against his will, without due process and without following lawful procedure. This would mean a reintroduction of the colonial era-principle that a public servant could be dismissed without cause."

[22] On 18 September 2013, some 25 days after receiving leave, the respondent filed a fixed date claim form. When the substantive matter came on for its first hearing before Sykes J on the following day, 19 September 2013, counsel for the MFP took the preliminary objection that the fixed date claim form was not filed within 14 days of the grant of leave, as required by rule 56.4(12) of the Civil Procedure Rules 2002 ('the CPR'), and the leave had therefore lapsed.

[23] The learned judge disagreed, on the basis that, leave to apply having been granted during the long vacation, the time for filing the fixed date claim form did not begin to run until 16 September 2013 when the Michaelmas Term begun. That being so, it was held that the fixed date claim form had been filed within time and the preliminary objection was accordingly dismissed. However, in recognition of what the judge described (at para. [19] of his reasons) as "the procedural importance of the point", leave to appeal was granted.

SCCA No 87/2013

[24] In this appeal, the MOF relied on a total of eight grounds of appeal:

"(a) The learned Judge erred as he failed to appreciate the distinction between the Respondent's case and that of the case of **Alfred McPherson v The Minister of Land and Environment** (SCCA NO 85/2007) in that the respondent had been compensated for and had received all that she was entitled to under the contract of employment prior to termination;

(b) The learned Judge erred as he failed to appreciate that permitting the Respondent to apply for judicial review over 17 months after her transfer from the post of Commissioner General Tax Administration to Commissioner General Ministry of Finance and Planning has detrimental implications for good and proper administration.

(c) The learned Judge erred in law by holding that the Respondent met the relevant threshold test and has a real prospect of success;

(d) The learned Judge erred by holding that the Public Service Commission and the Ministry of Finance, Planning and the Public Service had no lawful authority to bring the Respondent's employment contract to an end in circumstances where the Respondent and been compensated for all that she was entitled to for the remaining period under her contract of employment.

(e) The learned judge failed to have any or any sufficient regard to the evidence and application of the Respondent by which she alleged that she has a legitimate expectation that her contract would be renewed. The learned judge therefore proceeded on an incorrect premise when he instead found that the Respondent has a legitimate expectation that the Government will act lawfully when seeking to end her contract.

(f) The learned judge in failing to find that the Claimant had alternate redress by way of a reference to the local Privy Council;

(g) The learned Judge erred in granting leave to apply for judicial review in respect of remedies not falling with the rubric of judicial review;

(h) The learned Judge erred in law and failed to have any or any proper regard to the clear language of s. 16 of the Crown Proceedings Act in his finding that an injunction can be granted against the Attorney General of Jamaica. Further the learned judge misdirected himself in law when he applied **Gairy v Attorney General of Grenada** to the instant case;

(i) The learned Judge erred in law in that he failed to have sufficient regard to the fact that the non-disclosure by the Applicant that she had (by way of letter dated February 28, 2012) assumed duties in the Ministry of Finance, Planning and Public Service as Commissioner General thereof and the fact that this non-disclosure was material discretionary bar to the Respondent obtaining injunctive relief."

[25] In her submissions in support of these grounds, the learned Solicitor General very helpfully grouped and argued them under the following headings: (i) the threshold grounds (grounds (a), (c), (d) and (g)); (ii) the discretionary bar grounds (grounds (b) and (f)); legitimate expectation (ground (e)); and injunctive relief (grounds (h) and (i)).

[26] On the threshold grounds, the Solicitor General submitted that, although the learned judge had correctly identified the applicable test (as explained by Mangatal J, as she then was, in ***Digicel (Jamaica) Ltd v The Office of Utilities Regulation*** [2012] JMSC Civ 91), he had nevertheless erred in its application to the facts of this case.

[27] In the first place, she questioned the grant of leave to apply for certiorari against the MOF, pointing out that there was no evidence that the minister had acted to terminate, or did in fact terminate, the respondent's contract. Secondly, the Solicitor General submitted that neither prohibition nor mandamus was an appropriate remedy in

these circumstances, the one having to do with proceedings which are in train and require to be halted, and the other being applicable to cases in which there has been a refusal by a public body to carry out a legal duty vested in it. And thirdly, with regard to the grant of leave to challenge the decision of the MFP to terminate the contract, it was submitted that that decision was not amenable to judicial review because, in this case, the FS was not performing a public duty owed to the respondent, but rather was exercising a contractual option to terminate a fixed term contract. The decision was therefore, "operational and not disciplinary".

[28] Expanding on the third point, the Solicitor General sought to distinguish cases in which an attempt is made to terminate a contract of a person in public service employment in accordance with the notice provisions of the contract (such as ***McPherson***), from cases in which it is intended to compensate the employee in full for the entire remaining period of the contract (such as the instant case). In the latter situation, it was submitted, the employee is placed in the same position as she would have been in had she remained in the position until the end of the fixed term contract and there is therefore no need for any disciplinary/termination procedures to be invoked. Nor is there in these circumstances any economic disadvantage to the employee. Accordingly, leave to apply for judicial review ought not to have been granted to the respondent in this case.

[29] In support of these submissions, the learned Solicitor General referred us, naturally, to ***McPherson***, as well as to the decision of the Court of Appeal of England

and Wales in ***R (on the application of Tucker) v Director General of the National Crime Squad*** [2003] EWCA Civ 57.

[30] On the discretionary bar grounds, the Solicitor General pointed out that the application for leave to apply for judicial review of the decision to transfer the respondent from the position of CGTA to that of CGMFP was made some 17 months after that decision had been conveyed to and acted on by her. This delay, it was submitted, had detrimental implications for good and proper administration, bearing in mind the provisions of rule 56.6 of the CPR.

[31] The Solicitor General also submitted that an alternative remedy was in fact available to the respondent, by virtue of the fact that she had not exhausted the remedy available to her by way of recourse to the Privy Council under the provisions of section 127(4) of the Constitution.

[32] As regards the question of legitimate expectation, the Solicitor General pointed out that the respondent based her claim on a legitimate expectation, not supported by the evidence, that the contract would have been renewed. It was therefore submitted that the learned judge acted on an incorrect premise in finding that the respondent had a legitimate expectation that the GOJ would act lawfully when seeking to end the contract.

[33] On the question of injunctive relief, Miss Larmond, in the light of a dictum of Smith JA in ***Brady & Chen Ltd v Devon House Development Ltd*** [2010] JMCA Civ 33, para. [22], did not pursue the point taken in the skeleton arguments that the judge

had erred in failing to have regard to section 16 of the Crown Proceedings Act in granting injunctive relief against the Attorney General. However, in reliance on the decision of the Privy Council in ***Forbes v The Attorney General*** [2009] UKPC 13, (2009) 75 WIR 406, Miss Larmond did question the appropriateness of an injunction against the Attorney General in this case, since the Attorney General was not himself a party to the judicial review proceedings. Further, it was submitted, an order enjoining the respondent's transfer from the position of CGTA was an act in vain, since the transfer had been effected and acted on well over a year before. And lastly, and in any event, it was submitted, the judge should have treated the respondent's failure to disclose that she had accepted her transfer from the position of CGTA to that of CGMFP as a material non-disclosure warranting the discharge of the previously granted interim injunction.

[34] In response, Mr Wildman identified the central question for consideration and determination in the appeal as whether a public officer appointed by the Governor-General under section 125(1) of the Constitution, albeit on contract, can be terminated without following the procedure laid down in that section. He submitted that Sykes J had correctly applied the decision of this court in ***McPherson*** in concluding that the respondent's contract could not have been properly terminated without the process laid down by section 125(1) being followed.

[35] In support of this submission, in addition to ***McPherson***, Mr Wildman placed heavy reliance on the decisions of the Privy Council in ***Fraser***, ***Inniss v Attorney General of Saint Christopher and Nevis*** [2008] UKPC 42, (2008) 73 WIR 187

('Inniss'), ***Panday v Judicial and Legal Services Commission*** [2008] UKPC 52 and ***Thomas v Attorney-General*** (1981) 32 WIR 37 (`***Thomas***'); and the decision of the Court of Appeal of Grenada in ***Attorney General v Grenada Bar Association*** (GD 2000 CA 2, judgment delivered 21 February 2000) (`***Grenada Bar Association***').

[36] On the issue of legitimate expectation, Mr Wildman relied on the following statement by Sir Vincent Floissac CJ in ***Chief Immigration Officer of the British Virgin Islands v Burnett*** (1995) 50 WIR 153, 158:

> "A complainant will be held to have *locus standi* by way of a relevant or sufficient interest in an actual or intended decision or action of a public authority…if the decision or action disappointed or threatens to disappoint the complainant's legitimate expectation that certain benefits or privileges will be granted to him or that certain rules of natural justice or fairness would be observed in relation to him before the decision or action is made or taken."

[37] In this case, it was submitted, the respondent had a legitimate expectation under the Constitution that GOJ would not terminate her employment without following the procedure laid down in section 125(1) of the Constitution. Sykes J had therefore been correct to arrive at the conclusion which he did.

[38] On the amenability of the Attorney General to judicial review, Mr Wildman submitted that GOJ's reliance on ***Forbes v Attorney General*** was misplaced, in that there can be no doubt that, in an appropriate case, judicial review will lie as a remedy against an arm of the Crown.

[39] And finally, on the question of injunctive relief, Mr Wildman referred us to ***McLaughlin v Governor of the Cayman Islands*** [2007] UKPC 50, in which it was held that the purported termination of a public officer's employment, in breach of the rules of natural justice and the relevant public service regulations, was ineffective in law to terminate his employment, with the result that the officer's tenure in office continued until it lawfully came to an end or he resigned. In these circumstances, it was submitted, Sykes J had been correct to grant an injunction to preserve the status quo until the lawfulness of the termination of the respondent's employment was determined.

What the rules say

[40] Rule 56.3(1) of the CPR provides that a person wishing to apply for judicial review must first obtain leave. The application may be made without notice (rule 56.3(2)) and must be verified by evidence on affidavit containing a short statement of all the facts relied on (rule 56.3(4)). The application for leave must be considered "forthwith" by a judge (rule 56.4(1)), who may give leave without hearing the applicant (rule 56.4(2)). However, where (a) the judge is minded to refuse the application; (b) the application includes a claim for immediate interim relief; or (c) it appears that a hearing is desirable in the interests of justice, the judge must direct that a hearing be fixed (rule 56.4(3)). Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave (rule 56.4(12)).

[41] Rule 56.6 addresses the issue of delay:

"(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

(2) However the court may extend the time if good reason for doing so is shown.

(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.

(5) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

Was the threshold for leave met in this case?

[42] Both counsel accepted that the test approved by the Privy Council in ***Sharma v Browne-Antoine et al*** (para. [19] above) and applied by Sykes J in this case is the appropriate test (see also a very helpful discussion by Mangatal J in ***Digicel (Jamaica) Ltd v The Office of Utilities Regulation***, paras [22]-[27]). It is therefore necessary to determine whether the learned judge was correct in thinking that, on the material before him, the respondent had shown an arguable ground for judicial review with a

realistic prospect of success. And further, that the prospective claim for judicial review was not subject to any discretionary bar, such as delay or an alternative remedy.

[43] At the heart of the matter, as both counsel agreed, is whether it was open to the MFP, notwithstanding the provisions of section 125(1) of the Constitution and the PSR, to terminate the respondent's employment, either before its natural expiry date or at all, by means of an accelerated payment in full to her of all her entitlements under the contract, without following the procedure laid down in section 125(1) and the regulations.

[44] Before turning to ***McPherson***, which the judge considered, and Mr Wildman submitted, to be decisive of the question, it may be helpful to look briefly at some of the earlier cases in this area. The decision of the Privy Council in ***Thomas***, which is mentioned in all the subsequent cases, is a good starting point. At issue in that case was whether a police officer, as a public servant, was dismissible at pleasure from the police force of Trinidad & Tobago. In a judgment delivered by Lord Diplock, the Privy Council held that he was not. Considering section 99(1) of the Constitution of Trinidad & Tobago, by which the power to appoint and "to remove and exercise disciplinary control over" police officers was vested in the Police Services Commission established by the constitution, Lord Diplock said this (at page 384):

> "To 'remove' from office in the police force in the context of section 99(1), in their Lordships' view, embraces every means by which a police officer's contract of employment (not being a contract for a specific period), is terminated against his own free will, by whatever euphemism the

> termination may be described, as, for example, being required to accept early retirement...
>
> …'remove' in the context of 'to remove and exercise disciplinary control over' police officers in section 99(1) (and in the corresponding sections relating to the other public services) must be understood as meaning 'remove for reasonable cause', of which the commission is constituted the sole judge, and not as embracing any power to remove at the commission's whim."

[45] In ***Fraser***, a case from St Lucia, it was sought to dismiss a magistrate before the expiry of the fixed term contract under which he held office, pursuant to the notice provisions of the contract. After referring with approval to the passage from Lord Diplock's judgment in ***Thomas*** quoted above, Lord Mance, who delivered the judgment of the Board, said this (at para. 16):

> "The expiry in the ordinary course of a fixed term [contract] cannot be described as a 'removal'. But provisions whereby the Ministry engaging a member of the lower judiciary can bring a term of office to an end prior to its natural expiry date fall into a different category."

[46] With reference to the terms of the particular contract under consideration, Lord Mance continued (at para. 18):

> "Thus, a purported contractual termination under clause 5 clearly constitutes a removal and cannot be effective unless the Commission has beforehand determined, in accordance with a proper procedure, that reasonable cause exists under one of the stated heads. As to clause 6, the Board has expressed its view that a notice to determine the engagement prior to its natural expiry constitutes a removal; and on that footing such a notice can once again only be justified in the event, determined by the Commission, that reasonable cause for such removal exists. The constitutional

> protection therefore operates over and above any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date."

[47] ***Fraser*** was followed and applied in ***Inniss***, with the result that the purported termination pursuant to a provision for notice in the fixed term contract of a person holding the offices of registrar and additional magistrate, was held to be a breach of her constitutional rights; and in ***Panday v Judicial and Legal Service Commission*** (a case from Malaysia), in which it was held that a temporary magistrate could not be dismissed by the one month's notice stipulated for in his contract.

[48] It is against this unbroken background of authority that this court came to consider the case of ***McPherson***. In that case, the appellant was appointed on a three year contract to the position of Director, Land Titles, in the National Land Agency. As in this case, the appellant's contract was underpinned by a formal public service appointment by the Governor-General (as Registrar of Titles) and the nature of the obligations imposed on and undertaken by the appellant explicitly imported some of the usual incidents of public service employment (for example, adherence to the PSR and the Financial Regulations and the signing of a declaration under the Official Secrets Act). When it was sought to terminate his employment under terms of the contract some six months short of its natural expiry date, the appellant successfully challenged the decision to recommend to the Governor-General the revocation of his public service appointment, on the ground of non-compliance with the provisions of section 125(1) of the Constitution and the PSR.

[49] In reference to the decisions in ***Fraser*** and ***Inniss*** Smith JA observed (at para. 55) that the protection afforded by the constitutions of St Lucia and St Christopher and Nevis to members of the lower judiciary was "effectively the same as the protection offered to public officers under section 125 of the Jamaican Constitution". He therefore concluded (at para. 58) that the decisions of the Board in those cases were applicable to the case of Mr McPherson:

> "On the authority of their Lordships' decision in Fraser, I hold that the termination of the appellant's appointment as Registrar of Titles under the contractual provision, without more, was unconstitutional in the light of section 125 of the Constitution. Under this section, reasonable cause for such removal must exist. Such reasonable cause must be determined by the PSC in accordance with the procedure prescribed by the PSR. Section 125 precludes the operation of the contractual provision for summary determination. The appellant could not therefore be dismissed otherwise than in accordance with procedure prescribed by the PSR. As the Board said in Fraser, it is necessary to interpret and read together the Constitution and the contractual arrangement in a way which provides the intended protection. The agreement between the appellant and the respondent must be read as permitting removal under the agreement only in the event, determined by the Commission, that reasonable cause for such removal exists. In the instant case, no such reasonable cause was determined by the Commission to exist."

[50] Both Harrison and Dukharan JJA agreed. Harrison JA said (at para. 113) that "any recommendation by the respondent to the Governor General to terminate the appellant's contract without cause, prior to its natural expiry would constitute a removal from his position as Registrar of Titles and be in breach of section 125 of the Constitution". And Dukharan JA added (at para. 131) that the recommendation by the

respondent to the Governor-General "to terminate the appellant's contract, without cause, before expiry is a clear breach of the Constitution".

[51] ***McPherson*** therefore fits neatly into a line of cases which establish that, under constitutional arrangements which vest the power to appoint and dismiss public servants in what Lord Diplock described in ***Thomas*** (at page 382) as "autonomous commissions", the removal from office of a public servant, albeit serving under contract, cannot be effected prior to the natural expiry date of the contract otherwise than by way of the route prescribed by the constitution and any applicable regulations governing the public service.

[52] As I have already indicated, Sykes J considered this case to be "a replica copy" of ***McPherson***. In her very careful argument on this point, the learned Solicitor General sought to persuade us that this case is in fact distinguishable from ***McPherson***, principally on the basis that, unlike in that case, MFP did not purport to terminate the respondent's contract pursuant to the notice clause, but rather sought to effect a "buy out" of it by paying up in full her entire entitlement under it. Therefore, it was submitted, to the extent that the termination procedures created by the PSR were designed to protect a public servant from economic disadvantage in the event of arbitrary termination, the respondent was fully protected from such disadvantage by being paid up in full.

[53] It seems to me to be strongly arguable that this is a distinction without a difference: whether it is sought to achieve it by notice pursuant to the contract (as in

McPherson) or by a payment of the employee's full entitlement under the contract (as in this case), the desired outcome at the end of the day is the removal of the public officer from the position to which he/she has been appointed by the Governor-General, prior to the natural expiry date of the contract under which he/she holds office. In these circumstances, the constitutional protections designed to insulate public servants from removal from office otherwise than in accordance with the established procedures under the PSR appear to me to be as apt to vindicate a public servant's reputation, as they are to protect her economic interests. It is therefore difficult to see why a different rule should apply in the case of a "buy out" of the contract, once it has the effect of removing the officer from her position before its natural expiry date.

[54] In considering this issue, I have not lost sight of ***R (on the application of Tucker) v Director General of the National Crime Squad***, on which the Solicitor General relied in support of her submission that the decision to "buy out" the respondent's contract was not amenable to judicial review. In that case, Scott Baker LJ posed three questions (at para. [24]) for consideration in determining whether a public body with statutory powers was exercising a public function amenable to judicial review or not: (i) whether the defendant was a public body exercising statutory powers; (ii) whether the function being performed in the exercise of those powers was a public or private one; and (iii) whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

[55] I have no doubt that this can in an appropriate case be a helpful approach to the task of identifying the precise boundary between public and private law. But it seems to

me that the decision to "buy out" the respondent's contract in the instant case is sufficiently proximate in kind, albeit not identical, to the decisions which were successfully challenged in ***Fraser***, ***Inniss*** and ***McPherson*** so as to make resort to any other set of definitional criteria unnecessary in this case. In the light of these decisions, it appears to me that Sykes J was clearly correct in determining that, in this case, the respondent had demonstrated a reasonable prospect of succeeding on her substantive judicial review application.

[56] Sykes J also considered (at para. [26] of his judgment) that the respondent had "a legitimate expectation that the Government will act lawfully when seeking to end her contract". But in so saying, it is clear that, as the Solicitor General pointed out, the learned judge mistook the nature of the legitimate expectation which the respondent claimed, which was "a legitimate expectation that if there is no misconduct on her part and she performs her tasks competently and there is no other reasonable ground for terminating her contract and employment her contract would be renewed on similar terms and conditions". The respondent therefore founded her application on an expectation that the contract would be renewed, in respect of which there was absolutely no evidence to support any such expectation. I therefore think that the learned judge was plainly in error in thinking that the respondent was entitled to leave on this ground as well.

Were there any discretionary bars to the grant of leave in this case?

[57] Having determined that it was open to the judge to have concluded that the respondent had shown a reasonable prospect of success on the application for judicial review, it is still necessary to consider whether he ought nevertheless to have given effect to any discretionary bar in this case. The two which arise for consideration are delay and the availability of an alternative remedy.

[58] As far as delay is concerned, I will say at once that, as far as the respondent's application for leave to challenge the decision to transfer her from the post of CGTA to that of CGMFP is concerned, the learned judge did not, in my view, give any or any sufficient weight to either the fact that (i) the application was being made nearly 17 months after the respondent was notified of the transfer and (ii) the respondent had not only indicated her acceptance of the transfer but had been performing the functions of CGMFP over that entire period.

[59] In the landmark decision of ***O'Reilly v Mackman*** [1983] 2 AC 237, the House of Lords held that a person seeking to establish that a decision of a public authority infringes rights which he is entitled to have protected under public law must as a general rule proceed by way of an application for judicial review under the rules which at that time governed applications for judicial review (RSC Ord 53, r 1(1)), rather than by way of an ordinary action. The objective of this decision was to prevent circumvention of the protections built into the judicial review procedure to safeguard public authorities against groundless and unmeritorious applications, notably the requirement for leave and the strict time limits for making applications. In my view, although the decision has, in the more than 30 years since it was made, been

distinguished and qualified in a variety of circumstances (see generally Jonathan Manning, Sarah Salmon and Robert Brown, Judicial Review Proceedings, 3rd edn, paras 3.9-3.57), Lord Diplock's explanation (at page 284) of the public policy consideration underlying the protections enshrined in the judicial review procedures remains valid:

> "…the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law."

[60] Reflecting a similar policy consideration, rule 56.6(5)(b) of the CPR requires the judge considering the question of leave to apply for judicial review to have regard to whether the grant of leave would be likely to be "detrimental to good administration".

[61] In my view, this is a case in which it must surely have been detrimental to good administration for the decision to transfer the respondent from one senior position at the highest reaches of the public financial sector to another to be impugned almost a year and a half after the respondent had not only accepted the transfer, but had performed the functions of the office to which she had been transferred over that same period. In the interim, as the evidence in fact showed to have happened in this case, other persons will also have been assigned to perform the functions of the office from which the respondent was transferred.

[62] Sykes J's failure to attribute any significance to the gap in time between the transfer and the application for leave arose, it is clear, because he did not appreciate that one aspect of the respondent's application related to the decision to transfer her

from the position of CGTA. Thus, he regarded the respondent's reference to the transfer in February 2012 as having been intended only "to put the sequence of events before the court which has led her to believe that the July letter was really the culmination of a plan to remove her that began in February 2012" (para. [22]). In my respectful view, the learned judge was clearly in error on this point and, despite the natural reluctance to interfere with the exercise of a discretion, I consider that he ought to have declined to grant leave to the respondent to challenge the transfer.

[63] But this leaves unaffected the judge's decision to grant leave to the respondent to challenge the decision to terminate her employment. No question of delay can possibly arise in that respect: the letter advising the respondent of the decision was dated 10 July 2013 and the application for judicial review was made, just over two weeks later, on 26 July 2013.

[64] In so far as the availability of an alternative remedy is concerned, reliance was placed on section 127(4) of the Constitution, which provides, so far as is material, that -

> "Where, by virtue of an instrument made exercisable under subsection (1) of this section, the power to remove or to exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Public Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council…"

[65] Sykes J took the view that, "Section 127(4) is not authorising illegality or encouraging unconstitutional conduct…[it] assumes that the person who removed or

exercised disciplinary control had the lawful authority to do so and did so lawfully" I think that this was a view that was fairly open to the judge and I am not inclined to go behind it. In any event, the subsection plainly gives an option to the officer ("may apply") and does not, either expressly or by implication, require that an application to the Privy Council should be made as a precondition to any challenge to an administrative decision affecting him or her.

[66] In all the circumstances, therefore, I am clearly of the view that the judge's decision to grant leave to the respondent to apply for judicial review of the decision to terminate her employment was one which was properly open to him in this case. I would therefore dismiss the appeal against the grant of leave in this respect.

Injunctive relief

[67] Section 16(2) of the Crown Proceedings Act provides as follows:

> "The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

[68] As Smith JA pointed out in ***Brady & Chen Ltd v Devon House Development Ltd*** (at para. [22]) –

> "…section 16(2) does not prohibit the court from granting injunctive relief against an officer of the Crown in judicial review proceedings. This is so because by virtue of section 2 (2), the phrase 'civil proceedings' does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division."

[69] In the light of this clear and, if I may say so with respect, plainly correct statement of the position, Miss Larmond was obviously correct in not maintaining that section 16(2) would have been an obstacle to the grant of an injunction against the Attorney General in this case. However, she did place some reliance on the statement by Lord Hoffmann in ***Millicent Forbes v The Attorney General*** (at para. [6]) that "[j]udicial review does not lie against the Crown as such and the Attorney General can have no role in this case except as representative of the Crown".

[70] Although Sykes J was clearly not impressed with this point, which was also urged before him, in the end he did not extend the interim injunction to include the Attorney General:

> "If Miss Larmond's argument is correct then it means an Attorney General can be as unlawful as he wants to be and there would be no power to constrain him – a truly stunning conclusion in a constitutional democracy where the constitution is the supreme law. The injunction was extended but excluded the Attorney General because the court took the view that restraining the other respondents would be sufficient to maintain the status quo until the hearing and not because this court accepted the proposition that an injunction cannot be granted against the Attorney General."

[71] In the light of the stance ultimately taken by the learned judge on this point, his obvious lack of enthusiasm for Miss Larmond's argument can only be regarded as obiter. Accordingly, I do not consider it necessary - or wise - for this court to embark on what would clearly be, in the context of this appeal, a purely academic discussion.

[72] Miss Larmond's strongest challenge to the judge's decision to continue the injunction which had been previously granted on the without notice application was that the respondent was guilty of a material non-disclosure, not having revealed that she had in fact accepted her transfer to the position of CGMFP and had been performing the functions of that office for 17 months.

[73] As I have already pointed out (at para. [66] above), the learned judge failed to appreciate that the decision to transfer her from the position of CGTA was in fact the subject of specific challenge by the respondent. Had Sykes J kept this in mind, it seems to me that he could well have considered that the fact that the respondent had accepted the transfer (and, by the time of the without notice application for an injunction, had already performed in the new position), would have been a material consideration for the judge who considered that application and ought therefore to have been disclosed in the application before him. And had he formed this view, Sykes J could also have regarded the respondent, on the basis of long established principle, as "in mercy before the court, that is to say liable to have the order set aside on that ground" (per Ralph Gibson LJ in ***Brink's-MAT Ltd v Elcombe and Others*** [1988] 3 All ER 188, 193; see also, for the general principle of the consequences of material non-disclosure on an *ex parte* application, ***R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac*** [1917] 1 KB 486 and ***Jamculture Ltd v Black River Upper Morass Development Co. Ltd and Another*** (1989) 26 JLR 244).

[74] But it is also well established that this severe consequence is a matter of discretion for the judge hearing the *inter partes* application and that it is open to the court "to continue the injunction or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained" (per Balcombe LJ in ***Brink's-MAT Ltd v Elcombe and Others***, page 194). I cannot therefore say with any degree of certainty that Sykes J would have exercised his discretion differently had he appreciated the true force of the non-disclosure alleged against the respondent in this case. It seems to me that the judge might well have taken the view that, given the strength of the principle that the employment status of a person in the respondent's position ought not to be affected without resort being had to the procedures established under the Constitution and the PSR, it would be right to continue the injunction until the hearing of the substantive judicial review application. I would therefore decline to disturb the learned judge's exercise of his discretion in all the circumstances.

[75] That having been said, however, the question which next arises is whether this court, having determined that the judge was right to grant leave, should extend the injunction beyond 30 April 2014, which is the natural expiry date of the contract. In contending that we should, Mr Wildman makes the simple, but far-reaching submission that, by virtue of the fact that the respondent holds a public office, her appointment can only be terminated by way of the procedures established under the Constitution and the PSR, irrespective of the expiry date stated in the contract. In reply to this submission the learned Solicitor General points out that the natural expiry date of the

contract was regarded as a relevant factor in ***Thomas***, ***Fraser*** and ***Inniss*** and that there is nothing in the Constitution that is inconsistent with the use of a fixed date contract in the public sector.

[76] In the leading cases of ***Thomas***, ***Fraser*** and ***McPherson***, the restriction on the capacity of the executive to remove a public servant serving under contract from office is expressly qualified by reference to the natural expiry date of the contract. I take this qualification to mean that, save in the case of a legitimate expectation that the contract will be renewed (as to which, see Eddy Ventose, Commonwealth Caribbean Administrative Law, pages 232-235, and the cases there cited), where the contract comes to an end through effluxion of time, resort to any special termination procedures will generally not be necessary in order to effect the removal of the public officer from office.

[77] There is in my view no inconsistency between this conclusion and Lord Bingham's statement in ***McLaughlin v Governor of the Cayman Islands*** [2007] UKPC 50, para. 14, that the holder of a public office who is purportedly dismissed by a public authority in excess of its powers, or in breach of natural justice, or unlawfully "remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, **until his tenure of office is lawfully brought to an end by resignation or lawful dismissal**" (emphasis mine). At the natural expiry date of the contract of employment under which the public officer is engaged, it seems to me, his tenure in office will have lawfully come to an end by effluxion of time.

[78] ***Grenada Bar Association***, a decision of the Court of Appeal of Grenada upon which Mr Wildman placed heavy reliance, is the only case to which we were referred which suggests otherwise. In that case, Mr Malcolm Holdip was engaged by the Government of Grenada on a two year contract to be the Director of Public Prosecutions. Giving effect to the contract, the Governor-General, acting on the advice of the Judicial and Legal Services Commission, appointed Mr Holdip to the office of Director of Public Prosecutions ('the DPP') for two years. At the end of this period, the government declined to renew the contract. This led to the initiation of proceedings by the Grenada Bar Association, in which it was contended that the contractual clause appointing the DPP for a fixed period was null and void and that he held office subject to termination in accordance with the provisions of the constitution, and not otherwise. The contention succeeded both before the judge at first instance (Alleyne J, as he then was) and in the Court of Appeal (Byron CJ, Satrohan Singh and Redhead JJA).

[79] In a judgment with which the other members of the court agreed, Byron CJ considered (at para. [12]) that the effect of the relevant provisions of the constitution was to accord to the DPP "the same qualities of independence as the judiciary to ensure that the criminal justice system is independent of political and other improper influences and operates on the lofty principles of equality before the law". Any diminution in the security of tenure of the DPP would result in a diminution of the independence of the office. Having regard to the constitutional provision that "the Director of Public Prosecutions shall vacate his office when he attains the prescribed age" (section 86(5)), Byron CJ concluded (at para. [24]) that the limitation of the appointment of Mr Holdip

as DPP to a two year period was ultra vires the power of appointment and therefore void and of no effect:

> "In my view, the language of the section taken as a whole leads to the conclusion that the Constitution prescribes that the Governor-General appoints during good behaviour and ability to perform; he does not appoint during pleasure. Consequently, the holder of the office of Director of Public Prosecutions cannot be removed on any ground other than inability or misbehaviour before he attains the prescribed age. This leads inevitably to the ruling that he cannot be removed on the basis of the effluxion of time."

[80] It will immediately be seen from this account of the case that the decision in ***Grenada Bar Association*** turned entirely on the question of whether it was permissible for the Governor-General to have appointed Mr Holdip to the office of DPP on a fixed term contract, in the face of constitutional provisions which granted to the DPP the same security of tenure as a member of the higher judiciary and clearly stated that the person appointed as DPP should hold office until "the prescribed age", that is, the age of retirement. This, in my view, establishes a clear point of distinction between that case and the instant case, in which it has not been contended that the appointment of the respondent to the position of CGTA on a fixed term contract was in beach of the Constitution or otherwise *ultra vires* the power of the Governor-General acting on the advice of the PSC. I do not therefore think that the decision in ***Grenada Bar Association*** can in any way affect the view I have already expressed as to the effect of the natural expiry date of the contract.

[81] It follows from this, in my view, that, irrespective of whether the respondent is entitled to a declaration that the purported "buy out" of the contract was a breach of her constitutional rights and due process under the PSR, it is clear that the contract, and her employment to GOJ, came to an end on 30 April 2014, which was the natural expiry date of the contract. In my judgment, there can be no question in these circumstances of an extension of the interlocutory injunction beyond that date.

[82] I would therefore dismiss the appeal against Sykes J's decision to (i) grant leave to the respondent to apply for judicial review of the decision communicated to her by the Solicitor General's letter dated 10 July 2013 to terminate the contract by way of a "buy out" of the contract; and (ii) continue the injunction previously granted by Campbell J until the hearing of the judicial review application, or further order. I would, however, order that the injunction be discharged as at 30 April 2014.

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[83] The requirement for leave as a precondition to making an application for judicial review is contained in rule 56.3(1) of the CPR ("A person wishing to apply for judicial review must first obtain leave."). As has already been observed, rule 56.4(12) provides that –

> "Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

[84] The effect of rule 56.9(1)(a) and (2) is that a claim for judicial review must be made by fixed date claim form supported by evidence on affidavit. As has also already

been seen, it is common ground that the respondent, having been granted leave to apply for judicial review on 23 August 2013, did not file her fixed date claim form until 18 September 2013. So the claim, which should, on a literal reading of the rules, have been filed no later than 5 September 2013, was filed some 13 days after the last date for filing.

[85] When the matter came on for a first hearing before Sykes J on 19 September 2013, the appellants contended that the fixed date claim form had been filed out of time, the leave granted to the respondent had lapsed and the claim for judicial review was therefore not properly before the court. Sykes J rejected this contention, on the basis that, leave having been granted during the court's long vacation, time did not begin to run for the purposes of rule 56.4(12) until the date the vacation ended on 16 September 2013:

> "[12] This court accepts that Part 56 is silent on what happens during the long vacation and it would seem that in light of [the] wording of rules 2.2 and 3.5, that time does not run during the long vacation. This court is not convinced by an argument from silence should be used [sic] to shut out the applicant where there a [sic] clear rule that speaks to the long vacation.
>
> [13] The true position would seem to be that where there are rules of general application in the CPR and a specific part does not address an issue or provides a rule contrary to the general rule then that general rule applies unless there is some compelling logic to hold otherwise."

[86] As can be seen from the above extract from his judgment, the learned judge relied on rules 2.2 and 3.5, which provide as follows:

> "2.2 (1) Subject to paragraph (3), these Rules apply to all civil proceedings in the court.
>
> (2) '**Civil Proceedings**' include Judicial Review and applications to the court under the Constitution under Part 56…
>
> 3.5 (1) During the long vacation, the time prescribed by these Rules for filing and serving any statement of case does not run.
>
> (2) However this rule does not override any order of the court which specifies a date for service of a statement of case."

[87] The issue in this appeal is whether the judge was correct in treating the 14 day filing requirement of rule 56.4(12) as being subject to rules 2.2 and 3.5

[88] The appellants relied on four grounds of appeal:

> "a) The learned Judge erred in law as he failed to appreciate that once the Respondent did not file her Fixed Date Claim Form for Judicial Review within fourteen (14) days of the Order granting leave, then the leave lapsed and the proceedings purportedly commenced by the filing of a Fixed Date Claim Form twenty-seven (27) days after the grant of leave are invalid;
>
> b) The learned Judge erred in law by holding that rule 3.5 of the CPR overrides rule 56.4(12) as the grant of leave to the Respondent was conditional on the Respondent making a claim for Judicial Review pursuant to Rule 56.4(12) within fourteen (14) days of the grant of leave

> c) The learned Judge erred in law by failing to appreciate that Part 56 of the CPR is a special and self-contained Part dealing with Administrative Law proceedings and that general rules cannot override the specific requirements in Part 56 unless that part expressly so provides;
>
> d) The learned Judge erred in law by not having sufficient regard to the decision of this Court in ***Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller*** SCCA No 3/08 (unreported) (delivered April 11, 2008) and the dicta therein providing that at the leave stage general provisions of the CPR should not be imported into Part 56 unless expressly so provided for in Part 56."

[89] On the first ground, Miss Larmond submitted that, the respondent not having filed and served her claim for judicial review within 14 days of the grant of leave, the leave lapsed irremediably. Taking the other three grounds together, Miss Larmond submitted that the learned judge erred in law by holding that rule 3.5, not having been specifically imported into Part 56 by the framers of the rules, has the effect of extending the period for bringing judicial review proceedings. In support of this submission, Miss Larmond relied on what she described as "the special nature" of administrative law proceedings, the procedure for which is set out in Part 56, without reference to the general rules of the CPR. The practical consequence of Sykes J's decision, Miss Larmond pointed out, was that an applicant needed only to obtain leave at the beginning of the long vacation so as to defeat the 14 day filing deadline stipulated by rule 56.4(12).

[90] In support of these submissions, in particular on the first ground, Miss Larmond relied on the decision of this court in ***Golding and the Attorney General of Jamaica***

v Simpson Miller (SCCA No 3/2008, judgment delivered 11 April 2008); the decision of Phillips JA sitting as a single judge of this court in ***Andrew Willis v The Commissioner of Taxpayer Audit and Assessment Department/Commissioner of Inland Revenue*** (App No 190/2009, judgment delivered 19 January 2010); and the decision of Rattray J in the Supreme Court in ***Dwight Reid and others v Greg Christie and the Attorney General of Jamaica*** (Claim Nos HCV 02877/2009, HCV 02878/2009, HCV 02879/ (consolidated), judgment delivered 30 April 2010). It may be convenient to consider them briefly before coming to Mr Wildman's response to the argument based on them.

[91] The issue in the leading case of ***Golding v Simpson Miller*** was whether there was any power in a judge of the Supreme Court under the rules to extend the time for filing of a claim for judicial review beyond the 14 days stipulated by rule 56.4(12). In that case, leave to apply for judicial review was granted by Beckford J to the respondent on 13 December 2007. Up to 10 January 2008, the date fixed for the first hearing of the matter, the respondent had not yet filed a claim for judicial review as required by rule 56.4(12). When the parties appeared before D McIntosh J on that date, the learned judge granted the respondent's application for an extension of time within which to file her claim for judicial review.

[92] An appeal to this court from the judge's order succeeded. All three judges who heard the appeal spoke to the conditional nature of the leave granted under rule 56.4(12). After referring to the language of the rule ("leave is conditional on the

applicant making a claim for judicial review within 14 days of receipt of the order granting leave"), Panton P said this (at pages 8-9, para. 11):

> "One does not require the use of a dictionary to appreciate that 'conditional' means 'not absolute', 'dependent'. In the instant circumstances, the leave that was granted was dependent on the applicant making her claim within fourteen days of the order. By ordinary calculation, the claim ought to have been made by the 27th December that is within fourteen days from the 13th December, 2007, the date of the order of Beckford, J."

[93] At page 15, Smith JA explained that -

> "Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim form for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute."

[94] And Harris JA, for her part, made the identical point (at page 33):

> "It is a cardinal rule of construction that words must be given their ordinary and natural meaning. The words of the rules are plain. There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4 (12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9 (1)(a) and 56.9 (2). It follows therefore that it would be obligatory on the part of the applicant to present the requisite documents within the time specified."

[95] The court therefore came to the unanimous conclusion that, in assuming a power to extend time in circumstances in which no such power existed, D McIntosh J

had fallen into error. The fixed date claim form with supporting affidavit not having been filed within the prescribed time, the condition upon which the grant of leave was dependent "remained unfulfilled and the leave thereby lapsed" (per Harris JA, at page 34).

[96] And finally on this case, I should note that it was attempted to argue that, in considering an application to extend the time within which to make a claim for judicial review pursuant to the grant of leave, the court could have regard to the general provisions of the CPR relating to applications for court orders in other circumstances. In rejecting this submission, Panton P said this (at page 8):

> "Part 11 of the [CPR] provides 'general rules' in relation to application [sic] for Court Orders, whereas part 56 deals specifically with Administrative Law. Where it is intended that these special rules are to be affected by other rules, it is so stated. For example, in Rule 56.13(1), it is provided that Parts 25 to 27 of the Rules apply…
>
> It cannot be that without there being a statement to that effect, the special rules are to be watered down by any and every other provision in the body of Rules. That would make a mockery of the entire Rules, and provide countless loopholes for dilatory litigants and their attorneys-at-law. The whole point of providing for the orderly conduct of litigation would be defeated."

[97] ***Golding v Simpson Miller*** was followed and applied by Phillips JA in ***Andrew Willis v The Commissioner of Taxpayer Audit and Assessment Department/Commissioner of Inland Revenue*** (para. 13):

> "There are 2 stages to the application to obtain an order for judicial review. Firstly, one must obtain leave in order to file the claim. Pursuant to the rules, once that leave is obtained, it must be acted on and if the claim is not filed within 14 days of obtaining leave, it lapses. That leave is conditional on filing the claim within the time stated in the rules, which is 14 days of receipt of the grant of leave. If the condition is not satisfied, then the leave is no longer valid. Any claim filed outside of that period is invalid."

[98] These authorities were both followed and applied by Rattray J in ***Reid and others v Christie and the Attorney General***. In that case, the claimants filed fixed date claim forms challenging their dismissals from the Office of the Contractor General without having first obtained leave. Leave was in fact granted *ex parte* a month later. When objection was taken to this unusual approach, the court was invited to "put matters right" (pursuant to rule 26.9(2) and (3)) by treating the fixed date claim form as having been filed after the grant of leave. Because of the nature of judicial review proceedings, Rattray J considered (at para. 21) that this was not an appropriate approach in these circumstances:

> "I am of the opinion that Judicial Review proceedings are in a different category from ordinary civil proceedings and this is perhaps best exemplified by the explicit rules applicable to administrative actions, as provided for in Part 56 of the [CPR]. It is therefore of importance that Applicants adhere to the specific procedure delineated in Part 56."

[99] As a result, the learned judge held (at para. 22) that the filing of the fixed date claim forms without leave having first been obtained was more than a mere technicality: "This was a clear breach of Rule 56.3(1) of the [CPR]". The fixed date claim forms were accordingly struck out.

[100] These cases therefore establish that (i) under the CPR, judicial review proceedings are in a different category from ordinary civil proceedings; (ii) save where otherwise specifically indicated in the rules themselves, Part 56 of the CPR provides a specific procedure for the conduct of judicial review proceedings which should be adhered to; (iii) leave to apply for judicial review is conditional on a claim for judicial review being filed within 14 days of the grant of leave; and (iv) if this condition is not satisfied, the leave lapses and any claim filed outside of that period is invalid.

[101] Mr Wildman did not seek to impugn the correctness of these decisions, in particular ***Golding v Simpson Miller***. But that case, he submitted, should be "confined to its particular facts and circumstances". As Sykes J had done in his judgment, Mr Wildman pointed out that in that case leave was obtained on 13 December and that, in the absence of any provision suspending the running of time during the Christmas vacation of the court, it was incumbent on the respondent to file the fixed date claim form within the 14 day period prescribed in rule 56.4(12). However, he submitted, the situation in this case is different, because, leave having been granted on 23 August 2013, during the court's long vacation, rules 2.2 and 3.5 of the CPR applied, with the result that time did not run. Mr Wildman submitted further that the long vacation "is prescribed for the benefit of the Judiciary and Attorneys", and has the force of law guaranteed under section 37 of the Judicature (Supreme Court) Act. Accordingly, it was submitted, the appellants' reliance on ***Golding v Simpson Miller*** was misconceived.

[102] In support of these submissions, Mr Wildman referred us to the judgments of the Privy Council in ***MacFoy v United Africa Co. Ltd*** [1962] AC 152; of Megarry J in ***In re Showerings, Vine Products & Whiteways Ltd's Application*** [1968] 3 All ER 276; and of Michael Davies J in ***Esso Petroleum Co Ltd v Dawn Property Co Ltd*** [1973] 3 All ER 181.

[103] In the first of these cases (***MacFoy***), in the absence of an express provision in the Rules of the Supreme Court of Sierra Leone that the times set by the rules for the filing and delivery of pleadings should run in the long vacation, the Privy Council applied the practice and procedure of the High Court of England. On that basis, it was held that, either by the terms of RSC Ord. 64, r.4 (the relevant English rule) or by the practice of the court, it was a breach of the rules for the plaintiff to have served a statement of claim during the long vacation otherwise than by the direction of the court or a judge.

[104] In the second case (***In re Showerings***), the court was concerned with whether it was appropriate to order the hearing of a petition to sanction a scheme of arrangement for the merger of two companies during the long vacation. After referring to the relevant rule (RSC Ord. 64, r. 4(2), which required the judge considering such an application to be "satisfied that there is an urgent need for the trial or hearing to take place in the Long Vacation", Megarry J observed (at page 277) that "[t]hat sub-rule sets a high standard". The learned judge went on to speak to the value of the long vacation to the members of staff of the Companies Registry, pointing out that "[t]he volume of work has increased greatly in recent years, and the Long Vacation represents the only

period when it is possible for a substantial part of the staff to be simultaneously absent from duty, enjoying the leave to which they are entitled".

[105] And, in the third case (***Esso Petroleum***), Michael Davies J applied the same exacting standard to a request for the hearing of a motion for an interlocutory injunction during the long vacation, observing (at page 184) that "[t]here is not…such urgency here as requires me to let the plaintiffs jump the queue…"

[106] These decisions, Mr Wildman submitted, demonstrate the inviolability of the long vacation. The point gains greater force, he submitted further, from section 37 of the Judicature (Supreme Court) Act:

> "(1) Sittings of the Supreme Court shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year.
>
> (2) Provisions shall be made by rules of court for the hearing during vacations of urgent applications."

(The three court terms in each year are the Hilary Term which runs from 7 January to the Friday before Good Friday, the Easter Term, which runs from the Wednesday after Easter Monday to 31 July and the Michaelmas Term, which runs from 16 September to 20 December (rule 3.3). Rule 3.4(1) designates the period beginning 1 August in each year the "long vacation".)

[107] I am bound to say that, in my respectful view, not much of this has anything to do with the matter at hand, which is whether the 14 days prescribed by rule 56.4(12) are to be treated as running during the long vacation. Section 37(1) speaks to the

manner in which the Supreme Court is to sit, subject to the designated vacation periods, throughout the year. Two of the three cases cited by Mr Wildman (***In re Showerings*** and ***Esso Petroleum***) address the criterion to be applied in deciding whether to hear matters during the long vacation ("an urgent need"), a matter which is expressly dealt with in section 37(2), which enables the making of provisions for the hearing of "urgent applications". Probably closest to the mark is ***MacFoy***, but because it turned ultimately on the provisions of the English rules as to the filing of pleadings during the long vacation, it does not appear to me to be particularly helpful beyond its particular context.

[108] So this brings us back then to rules 2.2, 3.5(1) and 56.4(12). Sykes J took as his starting point the consideration that rule 56.4(12) is silent as to what happens during the long vacation. Therefore, he concluded, combining rule 2.2 (which applies the CPR to all civil proceedings, including judicial review) and rule 3.5 (which states that the time for filing any statement of case does not run during the long vacation), the time for filing a claim for judicial review under rule 56.4(12) does not run during the long vacation (see para. [12] of his judgment).

[109] It seems to me, with respect, that by importing these general provisions of the CPR into Part 56, the learned judge failed to have sufficient regard to the special nature of judicial review proceedings and the fact that Part 56, as consistently interpreted by the courts, was plainly intended by the framers of the rules to be, save where otherwise indicated, a self contained code for the conduct of such proceedings.

[110] I have already referred to what Lord Diplock characterised in ***O'Reilly v Mackman*** as the need "for speedy certainty" as to whether or not a particular administrative decision is valid (see para. [58] above). The requirement of expedition in the bringing and conduct of judicial review proceedings finds a clear reflection, in my view, in the content of Part 56 itself. So, for example, an application for leave to apply for judicial review must "be made promptly and in any event within three months" of the decision complained of (rule 56.6(1)) (which may be contrasted with the usual six year limitation period in ordinary civil proceedings); an application for judicial review "must be considered forthwith by a judge of the Court" (rule 56.4(1)); and, on granting leave, the judge "must direct when the first hearing or, in a case of urgency, the full hearing of the claim for judicial review should take place" (rule 56.4(11)). Further, as has already been seen, an explicit factor for the consideration of the judge in a case of delay is whether the grant of leave or relief will "be detrimental to good administration" (rule 56.6(5)(b)).

[111] It is against the backdrop – and as an integral part - of this general theme of expedition, it seems to me, that rule 56.4(12) falls to be considered. The "compelling logic", to borrow the judge's phrase, of the entire scheme of Part 56 is what clearly suggests to me that a provision that the time for filing a statement of case, which would include a fixed date claim form for judicial review, does not run during the long vacation, cannot have been intended by the framers of the rules to apply to judicial review proceedings. As Miss Larmond pointed out, one startling consequence of the judge's decision is that an applicant who obtained leave at the beginning of the long

vacation would not be obliged to move the application along by filing his claim for judicial review until the beginning of the Michaelmas Term six weeks later, thus wholly defeating the objective of expedition.

[112] For these reasons, I considered that, on the material that was before him in this case, the learned judge ought to have upheld the preliminary objection, on the basis that, the respondent's claim for judicial review not having been filed within the 14 day period prescribed by rule 56.4(12), the leave granted to her for that purpose had lapsed.

[113] But be all of this as it may, during the hearing of the appeal, Miss Larmond brought it to the attention of this court that, unknown to the learned judge or the parties at the time of the hearing in the court below, rule 3.5(1) had in fact been amended by the Rules Committee of the Supreme Court, with effect from 15 November 2011. The amended rule 3.5(1) provides as follows:

> "During the long vacation, the time prescribed by these Rules for filing and serving any statement of case **other than the claim form**, or the particulars of claim contained in or served with the claim form, does not run." (Emphasis mine)

[114] The amended rule thus makes it clear that the long vacation does not affect any time prescribed for the filing of a claim form or the particulars of claim contained in or served with the claim form. The hearing before the judge had therefore proceeded on a mistaken premise and, in the light of this provision, the appellants' preliminary objection ought to have succeeded. The judge's contrary conclusion and Mr Wildman's argument

in support of it in this appeal are plainly unsustainable. It follows from this, in my view, that this appeal must be allowed. And, because there was no recognisable claim before the judge, the various orders made by him, including the orders granting injunctive relief, were made without jurisdiction and must necessarily fall away completely.

Conclusion

[115] These are my reasons for concurring in the court's decision to dismiss SCCA No 87/2013 and to allow SCCA No 76/2013. As regards the costs of both appeals, I would order that the parties should file written submissions on costs within 28 days of the date of delivery of the court's reasons for judgment. Thereafter, I would propose that the court should make a ruling in writing on the costs within a further 28 days.

An afterword

[116] I have now had an opportunity to read the concurring observations of my sister Lawrence-Beswick JA (Ag). I wish to say that I agree entirely with the point she makes concerning the timely notification to the legal profession and the public of amendments to the CPR, whenever they are made.

McINTOSH JA

[117] In my opinion, Morrison JA has clearly set out herein the reasons for the decision of the court which was handed down on 30 April 2014. I have nothing useful to add.

[118] However, our sister Lawrence-Beswick JA (Ag) has added what are in my view some useful comments concerning publication of amendments, which those who have charge over such matters would do well to note.

LAWRENCE-BESWICK JA (Ag)

[119] I have had the privilege of reading the judgment in draft of my learned brother Morrison JA. I agree with his reasoning and conclusion.

[120] I would only add a comment concerning the publication of amendments to the Civil Procedure Rules (CPR).

[121] In this matter, at first instance, the issues concerning judicial review were thoroughly and robustly argued before a senior judge by senior counsel representing all the parties. The matter was argued based on the unamended rules. It was not until the matter had reached this court that it appears that counsel became aware of an amendment to the CPR which had been published some 2 years earlier, in 2011 in the Jamaica Gazette, and which was at the foundation of the arguments.

[122] This, in my view, illustrates the need for the legislature to make provision for a more effective method of publicizing amendments to the CPR.

[123] The CPR were promulgated by the Rules Committee of the Supreme Court exercising powers conferred by section 4 of the Judicature (Rules of Court) Act. Section 4 (1) of that Act provides:

> "4. (1) It shall be the function of the Committee to make rules (in this Act referred to as "rules of court") for the purposes of the Judicature (Civil Procedure Code) Law, the Judicature (Appellate Jurisdiction) Act, the Judicature (Supreme Court) Act, the Judicature (Supreme Court) (Additional Powers of Registrar) Act, the Justices of the Peace (Appeals) Act, the Indictments Act and any other law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court, or the Court of Appeal or any Judge or officer of such respective Court."

[124] Section 3 of the Interpretation Act accords these rules of court the status of regulations, a type of subsidiary legislation. The relevant portions of section 3 provide that:

> "regulations" includes rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms
> …
> "rules of court", when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court."

[125] Section 31(1) of the Interpretation Act provides the method by which regulations are published. According to the section:

> "31. (1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication."

[126] Currently, notifications as to amendments are also by way of publication in the Jamaica Gazette.

[127] The amendment was therefore properly gazetted but, it appears that it did not reach the attention of any of these senior and learned legal practitioners. I am aware

that this is not the first case to come before this court where amendments to the provisions of the CPR had not come to the attention of counsel. I believe it is fair to say that this occurrence may be due to the fact that access to the Jamaica Gazette has become less ready than it was in the past.

[128] I therefore make bold to say that the time has come for at least an additional and regular method of publication of the amendments which could be expected to have a wider readership than the Gazette. It may well be that the legislature should determine if publication of amendments in the daily newspapers should be the preferred and/or an additional method of publication.