2025 JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO 86/2018

BETWEEN	**MINISTRY OF NATIONAL SECURITY**	**APPELLANT**
AND	**LYN'S FUNERAL HOME LIMITED**	**1ST RESPONDENT**
AND	**GATEWAY MORTUARY SERVICES AND FUNERAL SUPPLIES LIMITED (T/A MORGAN'S FUNERAL HOME)**	**2ND RESPONDENT**
AND	**ST MICHAEL'S FUNERAL HOME LIMITED**	**3RD RESPONDENT**
AND	**WITTER & SON COMPANY LIMITED**	**4TH RESPONDENT**
AND	**ROBERT'S FUNERAL HOME AND SERVICES LIMITED**	**5TH RESPONDENT**

Miss Faith Hall instructed by the Director of State Proceedings for the appellant

Oraine Nelson instructed by Oraine Nelson and Co for the respondents

26, 28 July 2022 and 19 December 2025

Judicial review – Application to set aside grant of leave to file a claim for judicial review– Jurisdiction of a judge of concurrent jurisdiction to set aside orders granted ex parte – Rules 11.16 and 56.3 of the Civil Procedure Rules, 2002 ('CPR')

Judicial review – Whether affidavit sworn in support of leave application was properly before the court and in compliance with rule 56.3 and 56.9(3)(d) of the CPR

Judicial review – Whether there was sufficient basis to set aside the grant of leave to file a claim for judicial review – Whether there is an arguable ground

for judicial review with a realistic prospect of success – Rules 56.2(2)(a), 56.2(2)(e), 56.6(1), 56.6(2) and 56.6(5) of the CPR

P WILLIAMS JA

[1] I have had the opportunity of reading, in draft, the judgment of Simmons JA and agree with her reasoning and conclusion. I have nothing to add.

SIMMONS JA

[2] This is an appeal from the judgment of Wolfe-Reece J ('the learned judge') who, on 21 August 2018, refused the appellant's application to set aside the orders of McDonald J, granting the respondents leave to file a claim for judicial review.

[3] This appeal was heard on 26 and 29 July 2022, on which date the court considered the parties' submissions and promised to provide a decision at a later date. The delay is sincerely regretted.

Background

[4] Lyn's Funeral Home Limited, Gateway Mortuary Services and Funeral Supplies Limited (T/A Morgan's Funeral Home), St Michael's Funeral Home Limited, Witter & Son Company Limited and Robert's Funeral Home and Services Limited (collectively referred to as 'the respondents') are private funeral homes/morgue service providers which engage in the receipt and storage of bodies of deceased individuals and prepare these bodies for burial.

[5] By contracts entered into with the Government of Jamaica ('GOJ') through the Ministry of National Security ('the appellant'), the respondents were engaged to retrieve, store and transfer bodies for post-mortem examination in medico-legal cases, as directed by the police or the Institute of Forensic Science and Legal Medicine in the Ministry of National Security. These medico-legal cases included homicides, suicides, motor vehicle accidents, sudden deaths where there were no known medical conditions and suspicious deaths where foul play was suspected.

[6] Under their respective contracts, the respondents were responsible for collecting and storing the bodies of the deceased until the date of the post-mortem. Thereafter, the family would be responsible for the body of the deceased.

[7] Jamaica Constabulary Force ('JCF') Force Orders dated 11 February 2016 ('the First Force Orders') were issued by the Commissioner of Police ('the Commissioner'), setting out protocols to be followed by police officers when engaging a contracted funeral home, such as any one of the respondents, to request a post-mortem in medico-legal cases. The First Force Orders state as follows:

> "There continues to be confusion among our officers in matters to do with sudden death and when to call the contracted funeral home and request a post mortem from the Forensic Laboratory. After several meetings with the Ministry of National Security the following have been agreed and are hereby promulgated for compliance in all instances.
>
> ...
>
> 1. **Suspicious Death**
>
> This is a legal/medical case; Police MUST call the contracted funeral home and request a post mortem from the Forensic Laboratory.
>
> 2. **Sudden Death Where The Deceased Has No Known Medical Condition**
>
> This is a legal/medical case; Police MUST call the contracted funeral home and request a post mortem from the Forensic Laboratory.
>
> 3. **Sudden Death Where The Deceased Had A Known Medical Condition**
>
> This is not necessarily a legal/medical case although a medical autopsy may be required.
>
> 1. The Police MUST call the contracted funeral home to collect the body.

2. Within 48 hours the police must determine whether a doctor will sign a Medical Certificate of Cause of Death in which case the body will be released to the family to be dealt with by a funeral home of their choice.

3. If there is no doctor willing to sign a Medical Cause of Death Certificate **but there is no suspicion of foul play**, then the family will make arrangements for a medial autopsy to be performed. (Not by the Forensic Laboratory).

…" (Emphasis supplied)

[8] Apparently, there was still some confusion among officers surrounding when the respondents' services ought to be engaged. To provide clarity, the Commissioner issued force orders dated 24 June 2016 ('the Second Force Orders'), after consultation with the appellant. The Second Force Orders made changes with respect to police officers' engagement of the respondents in cases of sudden death where the deceased had a known medical condition. It reads:

> "There continues to be confusion among our officers in matters to do with death at home and when to call the contracted funeral home and request a post mortem from the Forensic Lab. After several meetings with the Ministry of National Security the following have been agreed and are here[by] promulgated for your compliance in all instances.

Situation		Required Action
1.	Suspicious death	This is a legal/medical case; Police **must** call the contracted funeral home and request a post mortem from the Forensic Lab
2.	Sudden death where the deceased has no known medical condition	This is a legal/medical case; Police **must** call the contracted funeral home and request a post mortem from the Forensic Lab.
3.	Sudden death where the deceased has a known medical condition.	This is not necessarily a legal/medical case although a medical autopsy may be required. 1. Where the police have ascertained that there is a doctor who is willing to sign the Medical

		Certificate of the Cause of Death, especially in the case of the aged, **the police will note the name of the doctor for inclusion in the Station Diary as well as the Sudden Death Register, and allow the family to contact a funeral home of their choice**. 2. Where it is not clear whether or not there is a doctor willing to sign the Medical Certificate of Cause of Death, **the police must call the contracted funeral home**. Within 48 hours the police must determine whether a doctor will signa [sic] [a] Medical Certificate of Cause of Death in which case the body will be released to the family to be dealt with by a funeral home of their choice. 3. If there is no doctor willing to sign a Medical Cause of Death Certificate but **there is no suspicion of foul play**, then the family will make arrangements for a medical autopsy to be performed. (Not by the Forensic Lab)…" (Emphasis supplied)

[9] Consequently, the Second Force Orders sought to change the circumstances in which police officers are mandated to contact a contracted funeral home in cases of sudden death where the deceased had a known medical condition. The First Force Orders directed the police to contact the respondents to collect the body of the deceased in all cases of sudden death where the deceased had a known medical condition. However, it also directed that the police were to, within 48 hours, determine whether a doctor would sign a medical certificate of cause of death ('the certificate'), in which case, the body would be released (from a contracted funeral home) to the family to be dealt with by a funeral home of their choice. The Second Force orders, on the other hand, in cases of sudden death where the deceased had a known medical condition, stated that it was now only mandatory for the police to contact the respondents (contracted funeral homes) for

the removal and storage of a body, where it was unclear whether a doctor was willing to sign the certificate.

[10] The respondents took issue with these changes, which they said breached their contracts with the GOJ and weakened the integrity of the process by which deaths are authenticated in Jamaica. They asserted that the new protocols are prejudicial to the operation of their businesses and are contrary to the interests of the public as a whole.

[11] The parties were unable to resolve the matter amicably pursuant to their respective contracts, and therefore, the respondents sought the intervention of the court.

Proceedings in the court below

[12] On 4 October 2017, the respondents filed a notice of application for court orders for leave to apply for judicial review in which they sought the following orders:

> (1) That the time be extended for the respondents to file their application for leave to apply for judicial review;
>
> (2) A declaration that the Force Orders dated 24 June 2016 is unlawful;
>
> (3) A declaration that the Force Orders dated 24 June 2016 is in breach of the respondents' legitimate expectations;
>
> (4) An order of *certiorari* quashing the Force Orders dated 24 June 2016; and
>
> (5) An order of *mandamus* directing the appellant to restore the Force Orders dated 11 February 2016.

[13] The application was based on the following grounds:

> "1. The [respondents] had a legitimate expectation to the continued discharge of functions/duties as funeral home/morgue service providers to the government of Jamaica

> via the Ministry of National Security in cases of sudden deaths, the cause of which was unknown.
>
> 2. The [respondents] had a legitimate expectation to be heard and or the opportunity to make representations regarding any contemplated change in policy, by the Ministry of National Security, relieving them of their functions/duties as funeral home/morgue service providers in cases of sudden deaths, the cause of which was unknown.
>
> 3. The change in policy relieving the [respondents] of their functions/duties as funeral home/morgue service providers has adversely affected the [respondents].
>
> 4. The Force Orders, and or any changes thereto, dealing with the rendering of funeral home/morgue service providers in cases of sudden deaths, the cause of which was unknown is a matter of public interest and the [respondents] possess expertise with respect thereto."

[14] The application was supported by an affidavit sworn to by directors of the respondents on 21 June 2017, which was filed on 4 October 2017 ('the respondents' affidavit'). The appellant and the Attorney General were joined as respondents to the application but were not served.

[15] The respondents in that affidavit stated that before the issue of the Second Force Orders, the police were mandated to contact them in all cases of sudden death. It was also stated that they were neither informed of the changes beforehand nor afforded the opportunity to make representations on how they would be affected. The respondents asserted that they had a legitimate expectation that the original arrangements would continue and that the issuing of the Second Force orders breached those arrangements.

[16] It was also asserted that the matter is one of public interest as the Second Force Orders, which allow "any" doctor to sign the certificate, appear to circumvent the Registration (Births and Deaths) Act, which specifies that "the doctor" who treated the deceased is to sign the certificate. In addition, the respondents argued that the provision allowing the police to release a body to the family for them to make arrangements for an autopsy to be held where there is "no suspicion of foul play" and no doctor who is willing

to sign the said certificate also raises concerns of public interest. This was of concern as it was unclear to the respondents how the police would determine whether there was "foul play".

[17] The respondents indicated that the grounds for the application for judicial review arose on 24 June 2016 when the Second Force Orders were issued. Their explanation for the nine-month delay in applying for leave was that it was due to their attempts to reach an amicable solution with the appellant and other stakeholders, including the Commissioner of Police.

[18] It is noted that, in the notice of application, the respondents acknowledged that they had an alternative remedy by way of a claim for breach of contract. They, however, indicated that they opted to apply for judicial review based on the challenges they would encounter in proving damages, as they were unaware of the precise number of sudden deaths that had been referred to other funeral homes by the police.

[19] On 20 October 2017, the application for leave was heard *ex parte* by McDonald J, who granted an order for the extension of time within which the respondents were permitted to file their application for leave to apply for judicial review. They were also granted leave to file their claim for judicial review. The appellant and the Attorney General were not present or represented at that hearing.

[20] Accordingly, a fixed date claim form and affidavit in support were filed by the respondents on 3 November 2017 seeking the following orders by way of judicial review:

> "1. A Declaration that the Force Orders of 24th June 2016 are unlawful.
>
> 2. A Declaration that the promulgation of the Force Orders of 24th June 2016 was in breach of the [respondents'] legitimate expectations.
>
> 3. A Writ of Certiorari quashing the said Force Order of 24th June 2016.

> 4. A Writ of Mandamus directing the [the appellant and the Attorney General] to restore the Force Orders of 11th February 2016."

[21] The affidavit in support of the claim was sworn to by Jacqueline Morgan, a director of the 2nd respondent, who stated that the said affidavit was being made on behalf of all the respondents.

[22] The formal order granting the extension of time and permission to file the claim for judicial review was served on the appellant and the Attorney General on 21 February 2018.

[23] The appellant and the Attorney General, by notice of application filed 6 March 2018, sought to set aside the orders of McDonald J. Amended notices were filed 9 March 2018 and 9 May 2018. The appellant also applied to remove the Attorney General as a party to the proceedings. In summary, the application to set aside the order was based on the following grounds:

> (1) The delay in making the application was inordinate;
>
> (2) No good reason had been provided for the delay;
>
> (3) Alternative remedies were available to the respondents that had not been exhausted;
>
> (4) The issues raised by the respondents are private law issues and not suitable for judicial review;
>
> (5) The concept of legitimate expectation is one of public law and is inapplicable to the contractual relationship between the parties; and
>
> (6) The respondents had no *locus standi* to bring the claim.

[24] The application was supported by the affidavit of Tonelle Beecher, sworn on 6 March 2018. The respondents, in opposing the application, relied on the affidavit of Craig

Carter, sworn on 9 March 2018 ('the Carter affidavit'). The matter was heard by the learned judge who, as stated in para. [2] above, refused to set aside the orders granting leave to the respondents to file a claim for judicial review. The Attorney General was, however, removed as a party. The learned judge granted leave to appeal.

The notice and grounds of appeal

[25] The appellant filed its notice and grounds of appeal, on 27 August 2018, seeking the following orders:

> 1. That the appeal be allowed.
>
> 2. That leave to apply for judicial review be refused; and
>
> 3. That the respondents' claim be struck out.

The appellant also applied for costs.

[26] The grounds on which the appellant relies are as follows:

> "1. The learned judge failed to have any, or any sufficient, regard to the relevant test to be applied to set aside an order granted ***ex parte*** for leave to apply for judicial review.
>
> 2. The learned judge erred in conflating the issue of whether the learned judge at the leave court was correct in proceeding to hear ***ex parte***, an application which was not ***ex facie***, 'Without Notice' with whether a judge of co-ordinate jurisdiction could set aside the orders of another judge which had been obtained ***ex-parte***;
>
> 3. The learned judge failed to have any, or any sufficient, regard to the effect of the affidavit of the Respondents having been sworn well in advance of the 'originating document', (the Notice) and to the fact that the proceedings before McDonald J., having been spent, there was no opportunity to cure the irregularity.
>
> 4. The learned judge failed to have any, or any sufficient, regard to the fact that the affidavit filed by the Respondents

in Support of the Claim Form failed to strictly comply with [the] provisions of rule 56.9(3)(d) of the CPR.

5. The learned judge failed to have any, or any sufficient, regard to the fact that the Respondents did not have the requisite ***locus standi*** to bring an application for judicial review.

6. The learned judge failed to have any, or any sufficient, regard to the several instances of non-disclosure on the part of the Respondents which ought to have resulted in the leave granted being set aside.

7. The learned judge in examining the issue of whether leave ought to have been set aside, failed to have any, or any sufficient, regard to the fact that by virtue of the inordinate delay and the failure to explain sufficiently, or at all, the said delay, this ought to have resulted in the Respondents having been refused leave for judicial review, and would have been a cogent basis on which she ought to have found that 'leave plainly ought not to have been granted'.

8. The learned judge failed to consider sufficiently, or at all, the fact that the Respondents had an alternative remedy and that consequently, leave ought to have been set aside.

9. The learned judge failed to have any, or any sufficient, regard to the fact that the Respondents did not demonstrate any arguable grounds for review having a realistic prospect of success; and in particular, that the Respondents' case did not demonstrate that they had a legitimate expectation to be consulted prior to the promulgation of the June Force Orders and that [the] force orders did not result in any statutory breaches.

10.The learned judge failed to have any, or any sufficient, regard to the fact that there was no proper party before the court, the Respondents having failed to join the Commissioner of Police who has the responsibility to issue Force Orders.

11. The learned judge failed to have any, or any sufficient, regard to the fact that even if the Respondents were to succeed in their claim the judgment would be nugatory as the Minister of National Security cannot compel the Commissioner of Police to issue Force Orders.

12. The learned judge failed to have any, or any sufficient, regard to the fact that the Force Orders being sought by the Respondents to replace the existing Force Orders contained one of the same 'breaches' being alleged by the Respondents which demonstrated that and that there was no merit to the Respondents' allegations." (Bold as in original)

[27] The grounds of appeal raise the following issues:

(1) Whether the learned judge had the jurisdiction to set aside the order granting permission to apply for judicial review that was made *ex parte* (grounds 1 and 2).

(2) Whether the affidavit in support of the application was properly before the court (grounds 3 and 4).

(3) Whether there was sufficient basis for the grant of leave to file a claim for judicial review (grounds 5, 6, 7, 8, 9, 10, 11 and 12).

Issue (1): Whether the learned judge had the jurisdiction to set aside the order granting permission to apply for judicial review that was made *ex parte* (grounds 1 and 2).

Appellant's submissions

[28] Miss Hall, on behalf of the appellant, submitted that the 12 grounds of appeal can be subsumed under grounds 1 and 2. She stated that the main contention is that the learned judge erred when she found that she had no jurisdiction to set aside the orders that had been granted *ex parte* by McDonald J. Counsel also submitted that the learned judge did not have regard to the relevant test for setting aside an order granted on an *ex parte* application for leave to apply for judicial review. Reference was made to **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and anor** [1991] 4 All ER 65 at 70 ('**Vehicles and Supplies**').

[29] Miss Hall submitted that whilst the power to set aside an order granting leave to file a claim for judicial review is to be exercised sparingly, in this case, it is evident that leave ought not to have been granted.

[30] Miss Hall submitted that the learned judge had the jurisdiction to set aside the order under rule 26.1(7) of the Civil Procedure Rules, 2002 ('the CPR') and erred when she ruled that she did not. That rule, it was argued, states that the power to make an order includes the power to vary or revoke the said order. Where the order in question was made *ex parte*, it was submitted to be trite law that it can be set aside by a court of competent jurisdiction. Reference was made to **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgment delivered 11 April 2008, in support of that submission.

[31] Counsel also submitted that the court has the inherent jurisdiction to set aside an order made in a party's absence where it is demonstrated that the order ought not to have been made. It was submitted that the learned judge erred when she failed to consider this principle in refusing the appellant's application. Reference was made to rules 25 and 26 of the CPR, which have been incorporated into the judicial review proceedings by rule 56.13(1) of the CPR (see **Sharma v Brown-Antoine and others** [2007] 1 WLR 780 ('**Sharma**')).

Respondents' submissions

[32] Mr Nelson submitted that it is settled law that a judge of co-ordinate jurisdiction cannot set aside an *ex parte* decision. As such, the learned judge had no jurisdiction to set aside the order in question. Counsel stated that the power to do so was reserved to the Court of Appeal upon finding that there was a misrepresentation or a failure to disclose material information to the leave court at the hearing. Reference was made to **Strachan v The Gleaner Co Ltd and another** [2005] 1 WLR 3204 ('**Strachan v The Gleaner Co Ltd**') in support of that submission.

Discussion

[33] It is common ground that prior to commencing a claim for judicial review, a party must obtain the leave of the court (see rule 56.3(1) of the CPR). This application, in keeping with rule 56.3(2) of the CPR, may be made without notice (see also rule 11.8 (2) of the CPR).

[34] An *ex-parte* order, being provisional in nature, may be set aside by a judge of concurrent jurisdiction. Rule 11.16 of the CPR provides:

> "**Application to set aside or vary order made on application made without notice**
>
> 11.16(1) **A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again**.
>
> (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
>
> (3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule." (Emphasis supplied)

[35] The applicability of this rule to situations in which an order has been made *ex parte* was confirmed by Brooks JA (as he then was) in **Ranique Patterson v Sharon Allen** [2017] JMCA Civ 7. In that matter, the applicant sought permission to appeal against an order made on 21 October 2016 by K Anderson J refusing her application to set aside an *ex parte* order made by Campbell J on 13 May 2015. The applicant had not been notified of the hearing. Before this court, she complained that K Anderson J erred in ruling that he had no jurisdiction to set aside Campbell J's order. She also asserted that he failed to recognise that she had not been served with notice of the application.

[36] Brooks JA, in addressing the issue, stated:

> "[26] On the issue of jurisdiction, it must also be said that **Mason v Desnoes and Geddes Limited** and **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33 **demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party**, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. **Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order**." (Emphasis supplied)

[37] The court ruled that K Anderson J erred when he concluded that he did not have the jurisdiction to set aside Campbell J's order, and it also granted the application for leave to appeal.

[38] The later decision of **Bardi Limited v McDonald Milligen** [2018] JMCA Civ 33 is consistent with this reasoning. In that case, Phillips JA, who delivered the court's decision, having reviewed **Vehicles and Supplies** and **WEA Records Ltd v Visions Channel 4 Ltd and Others** [1983] 2 All ER 589 ('**WEA Records**'), relied on the statement of the law as articulated by Sir John Donaldson MR in **WEA Records**. In exploring the jurisdiction of a judge to set aside an order made *ex parte*, Phillips JA stated:

> "[24]…
>
> > 'In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court on an ex parte application. This jurisdiction is conferred by s 16(1) of the Supreme Court Act 1981. **Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte**. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6. Whilst on the subject of jurisdiction, it should also be said that there is no

> power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14(3)) to entertain a renewed ex parte application, it does not hear original applications save to the extent that they are ancillary to an appeal. **As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this.** He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision'." (See page 593) (Emphasis supplied)

[39] The learned judge of appeal further observed as follows:

> "[25] **The Master of the Rolls therefore acknowledged and reiterated that an order made on an ex parte application can be reviewed by another judge and varied and or discharged. He said that jurisdiction is inherent in the provisional nature of any order made ex parte**." (Emphasis supplied)

[40] This was the position even prior to the CPR. In **Vehicles and Supplies**, a 1991 decision of the Privy Council, the court stated that an order made *ex parte* is provisional

in nature and that a judge of the Supreme Court has jurisdiction to set aside an order granting leave to file a claim for judicial review. Counsel for the respondents relied on **Strachan v The Gleaner Co Ltd** to assert otherwise. Respectfully, his reliance on that case is misplaced as their Lordships clearly stated that even where judgment was granted after a contested assessment of damages, a judge of the Supreme Court had the jurisdiction to set aside the default judgment on which it was based.

[41] Based on rule 11.16 of the CPR and the above cases, it is clear that the learned judge had the discretion to set aside the order of McDonald J. She, therefore, erred in concluding that she did not. In the circumstances, grounds 1 and 2 succeed.

Issue (2): Whether the affidavit in support of the application was properly before the court (grounds 3 and 4).

Appellant's submissions

[42] Counsel submitted that the learned judge failed to consider that the affidavit supporting the application for judicial review was sworn before the notice of application, and as such, was not properly before the court. This was said to be an irregularity that could not be cured, as the proceedings were already spent and were a nullity (see **Challenge International Airlines Inc v Challenge International Airlines Jamaica & Jamaica Dispatch Services Ltd** (1987) 24 JLR 228 ('**Challenge International Airlines**').

[43] It was also contended that the affidavit supporting the claim form breached rule 56.9(3) of the CPR, as it did not state the grounds on which the claim was being made. Counsel noted that this requirement is specific to claims for judicial review, and it must, therefore, have been the intention of the legislature that the grounds must be included in a sworn document as opposed to being set out in the claim form. It was submitted that this is a mandatory requirement, and a failure to comply with this rule resulted in the claim being a nullity. This failure, they say, required the learned judge to set aside the order granting leave to file a claim for judicial review.

Respondents' submissions

[44] Mr Nelson agreed that an affidavit ought not be deposed before an action is commenced. He, however, stated that a notice of application is not an originating document as it does not commence an action. A notice of application is not a claim form, petition, writ, summons or other similar document. The action did not commence until leave had been granted, and the fixed-date claim form had been filed. Alternatively, he argued that the early execution of the affidavit would not render the application subject to being struck out (see **Challenge International Airlines** and **Practice Direction** [1969] 2 ALL ER 639).

[45] On the second issue, he asserted that the respondents were compliant with rule 56.9(3)(d) of the CPR as they set out the grounds of their application for leave for judicial review in their affidavit.

Discussion

[46] Grounds 3 and 4 require an examination of rules 56.3 and 56.9(3)(d) of the CPR. Rule 56.3 states that the application for leave to apply for judicial review must state the grounds on which relief is being sought. It also provides that the application must be verified by evidence on affidavit, which must include a short statement of all the facts relied on. The appellant has complained that the affidavit, having been sworn approximately four months before the filing of the notice of application, was invalid.

[47] The notice of application for leave to apply for judicial review is dated 2 October 2017 and was filed on 4 October 2017. However, the supporting affidavit was sworn to on 21 June 2017. The issue, therefore, is whether this was an irregularity and, if so, how the learned judge on hearing the application ought to have treated with it.

[48] This issue arose in **Bobette Smalling v Dawn Satterswaite** [2020] JMCA App 15. Phillips JA, who delivered the decision of this court, stated:

> "[13] Mrs Hay was indeed to [sic] correct to concede that the affidavit of Bobette Smalling, which predated the motion it

> was filed intending to support, was irregular. However, she was also correct in her submission that the authorities referred to and relied on by Mr Wilkinson of **Challenge International Airlines Inc** and **The Assets Recovery Agency v Robert Sylvester Dunbar**, indicate that that irregularity is indeed one that could be cured and give guidance as to how it can be cured."

[49] The learned judge of appeal conducted an extensive analysis of the decisions in **Challenge International Airlines** and **The Assets Recovery Agency v Robert Sylvester Dunbar and another** [2017] JMSC Civ 47 ('**Assets Recovery**'). The conclusion of the court was as follows:

> "[19] So, **although the affidavit of Bobette Smalling would have been irregular and prematurely sworn**, in my view, it could have been referred to, considered and acted on by the court. No prejudice could therefore have been suffered by the respondent and the intervenors. They could not have, in any way whatsoever, been taken by surprise, as they had been served with the motion and the affidavit and had responded to it. The affidavit, which was re-sworn and re-filed on 9 March 2020, would also have cured the filing of the irregular affidavit." (Emphasis supplied)

[50] Similarly, in **Challenge International Airlines,** Rowe P, who delivered the decision of the court, stated that an affidavit that pre-dated the filing of the claim could have been relied on as it had been incorporated into a later affidavit.

[51] A comparable question arose for consideration in **Assets Recovery,** where Batts J, in resolving this issue, stated:

> "[12] The second point made by Mrs. Senior Smith is that the affidavit in support of the application predates both the Claim and the application by several months. In other words, assuming that the claim filed and served in March 2016 is valid, the affidavit in support was dated 14th May, 2015. The application for a restraining order which was served on her was filed on the 8th March, 2016. Counsel relied on **Challenge International Airlines Inc v Challenge International Airlines Ja. Ltd. et al** SCCA 63/86 unreported judgment 5 June 1987 as authority for a

> submission that in that situation the application should be dismissed. **I agree that, save in exceptional circumstances, the affidavit in support ought not to predate the application and its originating process. If it does, it cannot be relied upon. In the Challenge Enterprise case however the Lord President Rowe applied an exception to that principle which also applies in the case before me. The principle is not applied where the Defendant has filed an affidavit responding to the irregular affidavit**, as per the Lord President, Rowe:
>
> > 'It became crystal clear to us that the court could not understand the affidavit of Mr. Gordon White of December 9, 1986, without looking at the affidavit of Mrs. Jones to which it made such full references**. We therefore hold that Mrs. Jones affidavit was incorporated into that of Mr. Gordon White, and that it could be looked at by the learned trial judge and become the basis of his orders granting to the respondents, an interlocutory injunction'**." (Emphasis supplied)

[52] The circumstances in the instant case can be distinguished from those in **Challenge International Airlines**. In both **Assets Recovery** and **Challenge International Airlines**, there had been a response to the irregular affidavit as the matters were heard *inter partes*. The offending affidavits had also been served. That is not the case here. The appellant in this matter was not served with the notice of application and the affidavit in support, and the application was heard *ex parte*. There was, therefore, no response to the irregular affidavit during the proceedings before McDonald J. Reference was only made to that affidavit when the appellant applied to set aside the order of McDonald J, by which time it had been served. The affidavit in support, having been filed months before the notice of application, was indeed irregular and the irregularity was not waived. That fact ought to have been considered by the learned judge as a basis on which the *ex parte* order of McDonald J could have been set aside. Ground 3, therefore, succeeds.

[53] The next question for consideration is whether the affidavit filed in support of the fixed date claim form complied with rule 56.9(3)(d) by stating the grounds on which relief is being sought. The appellant contends that the respondents failed to comply with this requirement. The rule states:

> "**How to make an application for administrative order**
>
> 56.9 (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –
>
> (a) judicial review;
>
> (b) relief under the Constitution;
>
> (c) a declaration; or
>
> (d) some other administrative order (naming it),
>
> and must identify the nature of any relief sought.
>
> (2) The claimant **must** file with the claim form evidence on affidavit.
>
> (3) The affidavit must state –
>
> (a) the name, address and description of the claimant and the defendant;
>
> (b) the nature of the relief sought identifying –
>
> (i) any interim relief sought; and
>
> (ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;
>
> (c) in the case of a claim under the Constitution, setting out the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;

(d) **the grounds on which such relief is sought**…"
(Emphasis supplied)

[54] The affidavit in support of the fixed date claim form does not state the grounds on which the respondents are relying. This is a clear breach of 56.9(3)(d) of the CPR. The next step, therefore, is to consider whether this non-compliance was fatal to the claim. Non-compliance with a rule under part 56.9 of the CPR was addressed by this court in **Jamaica Defence Force Co-Operative Credit Union v Georgette Smith** [2019] JMCA Civ 7. The central question in that appeal was whether the learned judge in the court below erred in entering judgment in default of defence, where the claim was for relief under the Constitution, albeit not instituted in accordance with part 56 of the CPR. McDonald-Bishop JA (as she then was), who delivered the decision of the court, stated:

> "[30] There is no issue joined between the parties, and rightly so, that claims for relief under the Constitution are to be instituted and proceeded with, in accordance with Part 56 of the CPR. Rule 56.9(1) provides that a party wishing to obtain constitutional relief must commence its application by a fixed date claim form (form 2) and identify the nature of the relief that is being sought. A claimant must file with the fixed date claim form, evidence on affidavit as required by rule 56.9(2). **Rule 56.9(3) states what the affidavit should contain. Apart from the relief being sought, it should include the provision of the Constitution, which the claimant alleges has been, is being or is likely to be breached**."
> (Emphasis supplied)

[55] McDonald-Bishop JA, in determining whether the approach of the learned judge was correct, stated:

> "[32] It is indisputable that the respondent had failed to comply with the rules just explained. These failures were brought to the attention of the learned judge and he accepted that they existed. He, however, was of the view that the flaws could be corrected…"

[56] At first instance, K Anderson J, had opined that since part 56 of the CPR did not specify any consequences for the failure to comply with those rules, the court is empowered in the exercise of its general powers of case management to set matters

right where the applicant had failed to utilise the correct procedure in the initiation of his claim for the alleged breaches of his constitutional rights.

[57] Having examined K Anderson J's treatment of this issue, as set out at paras. [20], [21] and [22] of his judgment, McDonald-Bishop JA stated:

> "[38] The learned judge was correct in his assessment at paragraphs [20] and [22] that the respondent had run afoul of the requirements of Part 56. He was also correct in stating that he was empowered, in furthering the overriding objective to deal with the case justly, to actively manage it, which would include, among other things, the power to rectify matters where there had been a procedural error. In short, the learned judge was correct in his declaration that he was empowered to invoke his general powers of case management, particularly those conferred on him by rule 26.9 of the CPR, in treating with the error in procedure."

[58] McDonald-Bishop JA, having referred to rule 26.9 of the CPR, which speaks to the consequences of a failure to comply with a rule or practice direction, further stated:

> "[40] **By virtue of the fact that the relevant rules that were breached by the respondent were silent as to the sanctions to be invoked for violation of them, rule 26.9 could have been engaged in the resolution of the issue before him, as the learned judge himself recognised**. He had the power, therefore, to refuse to strike out the claim, as was urged on him by the appellant. That was a matter completely within his discretion. In **Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter** [2017] JMCA Civ 3, this court stated that once the consequence for the breach of a rule is not provided by the CPR or otherwise, then rule 26.9 gives a judge an 'unfettered discretion' as to how to proceed in resolving the breach.
>
> [41] Similarly, in **Chester Hamilton v Commissioner of Police**, [2013] JMCA Civ 35, this court considered the question whether the provisions of rule 26.9 of the CPR could cure the failure of a party to file an affidavit with the fixed date claim form as is required by rule 56.9(2) and (3) of the CPR. Phillips JA, in speaking for the court, reasoned, in allowing the appeal, that in cases where there had been a

> failure to comply with a rule, the court is empowered by virtue of rule 26.9(3) to make orders to put matters right.
>
> [42] **It is in the light of rule 26.9(3) and the relevant authorities that counsel for the appellant have posited, and rightly so, that the learned judge would have been empowered by the rules, to refuse the application to strike out the claim and instead, make orders to remedy the procedural error**. In keeping with this position, counsel contended that the learned judge, having noted the procedural defect and the court's powers under rule 26.9, 'ought to have made an order to put matters right' before proceeding to enter default judgment. They recommended the approach adopted by this court in **Business Ventures and Solutions Inc v Anthony Dennis Tharpe and Capital One NA (Trustee of the estate of Alexander Burnham)** [2012] JMCA Civ 49." (Emphasis supplied)

[59] Whilst it is acknowledged that the affidavit filed in support of the fixed date claim form does not explicitly state the grounds on which the respondents were seeking relief, a review of its contents reveals that it substantively raised issues of the alleged breach of natural justice by the appellant. The respondents have asserted that they had a legitimate expectation to be consulted before the policy change, as evidenced by the Second Force Orders. This is evident from a perusal of paras. 18 to 35 of the respondents' affidavit.

[60] There is no prescribed consequence for failure to comply with rule 56.9(3)(d) of the CPR. The irregularity in the instant case could, therefore, be cured by an undertaking to file and serve a supplemental affidavit. In this regard, we are reminded of the court's reasoning in **Jamaica Defence Force Co-Operative Credit Union v Georgette Smith,** which is recounted in paras. [53] to [56] above (see also **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ 35). Both authorities affirm that where no specific consequence is provided for a procedural defect, the court's general case management powers under rule 26.9 of the CPR may properly be invoked to "put matters right". The same reasoning is applicable in the present case. The learned judge would have been entitled to treat with any procedural error in a similar manner.

[61] Therefore, although the learned judge may not have considered this issue, it did not provide a basis on which to set aside the grant of leave, as the breach could be cured. If, however, I am wrong, this breach of the rules would not, in my view, have rendered the proceedings a nullity, as the situation could be rectified using the court's general case management powers to "put matters right" (see rule 26.9 of the CPR). In the circumstances, I am satisfied that ground 4 has merit and accordingly succeeds The success of this ground does not however, change the outcome of this appeal.

Issue (3): Whether there was sufficient basis to set aside the grant of leave to file a claim for judicial review (grounds 5, 6, 7, 8, 9, 10, 11 and 12)

[62] The resolution of this issue is dependent on whether the learned judge erred in not setting aside the grant of leave. Was this a case in which it was plainly demonstrated that leave ought not to have been granted? (see **Sharma** at page 789). This court does not have the benefit of the learned judge's reasons for her decision.

[63] Judicial review is concerned with the examination of the manner in which a decision of a public body was made (see **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141 at 155 ('**Chief Constable of the North Wales Police**')). Its focus is on whether the decision-making process was lawful, fair and reasonable.

[64] The learned authors of De Smith's Woolf & Jowell, Principles of Judicial Review, 5th ed, at para. 15–025 state:

> "Where permission has been granted, a respondent may apply to set aside a grant of permission on the grounds that the application discloses absolutely no arguable case or that there had not been frank disclosure by the applicant of all material facts both of fact and law."

[65] The court, when considering such an application, is to be guided by the principles in **R v Secretary of State for the Home Department ex parte Nazir Chinoy** (1991) 4 Admin LR 457, which were affirmed in **Sharma** at page 792, by Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, who in their joint judgment stated:

> "It is clear, on the authority of *Chinoy* 4 Admin LR 457, that **the leave previously granted should not have been set aside unless the court was satisfied on inter partes argument that the leave should plainly not have been granted**." (Emphasis supplied)

[66] In **Sharma** at page 789, the Board stated that the power to set aside the grant of leave is to be exercised "very sparingly". It was also stated that an application to do so will succeed where, on an *inter partes* hearing, the court is satisfied that leave ought not to have been granted.

[67] The learned judge was, therefore, obliged to consider whether the respondents satisfied the test in **Sharma**, which was set out at page 787 of the decision of the Board:

> "(4) The ordinary rule now 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: *R v Legal Aid Board, Ex p Hughes (*1992) 5 Admin LR 623, 628 and *Fordham*, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application… It is not enough that a case is potentially arguable: -an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733."

[68] In the absence of any written reasons from the court below, it is for this court to determine whether the learned judge would have been correct in finding that the respondents had satisfied the test based on the material before her.

[69] In **Attorney General of Trinidad and Tobago v Ayers-Caesar** [2019] UKPC 44, Lord Sales, who delivered the majority judgment of the Board, stated that the test is the same on an appeal from a refusal of leave. He stated thus:

> "2. The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave

> to apply for judicial review is low. The Board is concerned only to examine whether [the applicant for judicial review] has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage."

[70] **National Bank of Anguilla (Private Banking and Trust) Ltd (in Administration) and another v Chief Minister of Anguilla and others** [2025] UKPC 14, provides guidance on the approach that is to be taken by an appellate court in these circumstances. In that case, Lord Reed and Lady Rose, in their joint judgment, stated at para. 84:

> "84. Deciding whether there is an arguable ground for judicial review is not an exercise in discretion. Accordingly, when the judge in the present proceedings refused leave to apply for judicial review on the ground that there was no arguable ground for judicial review with a realistic prospect of success (or, as he put it, possibly pitching the test somewhat higher, 'a good arguable case with a reasonable prospect of success'), he was not exercising a discretion. **It follows that, on the appeal against his decision, the Court of Appeal was not reviewing an exercise of discretion. It should not, therefore, have confined itself to the limited grounds on which the exercise of discretion might be reviewed on appeal, but should have considered whether the judge had erred in concluding that there was no arguable ground for judicial review.** If it concluded that he had, it should then have reconsidered the matter itself. In approaching the appeal as a review of the exercise of discretion, the Court of Appeal accordingly erred in law. It is therefore necessary for the Board to consider the question anew." (Emphasis supplied)

(See also **Lynden Simpson and anor v Permanent Secretary Ministry of Transport and Mining and ors** [2025] JMCA Civ 17.)

[71] In determining this issue of whether there is an arguable ground for judicial review with a realistic prospect of success, the following questions arise for our consideration:

(i) Whether relief has been sought against the proper party (Grounds 10 and 11).

(ii) Whether the respondents have the *locus standi* to make the claim (Grounds 5, 9 and 12), which necessarily contemplates:

A. Whether the matter falls within the ambit of public or private law

B. Whether the respondents had a legitimate expectation to be consulted before the issuance of the Second Force Orders.

C. Whether the matter is of public interest.

(iii) Whether the respondents complied with their duty of disclosure (Ground 6)

(iv) Whether there was an inordinate delay in the filing of the application (Ground 7)

(v) Whether there is an alternative remedy available to the respondents (Ground 8)

(i) Whether relief has been sought against the proper party.

Appellant's submissions

[72] Miss Hall submitted that the claim has no realistic prospect of success as the proper parties are not before the court. She stated that force orders are not decisions but are the means by which policy decisions are communicated. Therefore, if the respondents wish to challenge the policy decision, it is that decision, not the force orders, which should

be the subject of the application and the claim. Counsel stated further that the respondents in their notice of application are seeking orders mandating a change in the force orders that are issued by the Commissioner, who is not a party to these proceedings.

[73] Counsel also made the point that by virtue of section 3(2A) of the Constabulary Force Act ('the Act') "The **Minister** may give to the Commissioner directions as to the policy to be followed by the Force (emphasis supplied)".

[74] She, however, directed the court's attention to section 3(2)(a) of the Act, which states that the Commissioner has "sole operational command and superintendence of the Force". In this regard, it was submitted that even if the orders sought by the respondents were granted, they would be rendered nugatory as the appellant can neither change nor compel the Commissioner to change the force orders. Reference was made to **Glenroy Clarke v Commissioner of Police** (1996) 52 WIR 306 ('**Glenroy Clarke**') in support of that submission. In the circumstances, it was submitted that the learned judge erred in not setting aside the grant of leave.

Respondents' submissions

[75] Mr Nelson submitted that the appellant is the proper party to the claim, given its role in the issuing of the First Force Orders and the Commissioner's need for consultation with the appellant before the issuance of the Second Force Orders. He stated that if the Commissioner of Police is the proper party, the court can make an order pursuant to rule 56.13(2)(b) of the CPR that the claim be amended to add the Commissioner as a party. Counsel submitted further that the review court may permit the Commissioner to be heard pursuant to rule 56.13(c) of the CPR even if he is not named as a party and the claim form was not served on him. In this regard, reliance was placed on **Vera Dallas (by her attorney Elmeda Robinson) v L.P. Martin Company Limited (trading as L.P. Martin Funeral Home)** [2018] JMSC Civ 78 ('**Dallas**').

Discussion

[76] It must be noted that prior to the issuing of the Second Force Orders, by letter dated 20 April 2016, addressed to the President of the Funeral Directors' Association of Jamaica ('the policy letter'), the appellant informed the said association of a change in its policy in cases of sudden death. The letter states:

> "I refer to recent discussions with providers of Funeral Homes/Morgue Services who are not contracted by the Ministry of National Security. Previous discussions with our contracted Funeral Homes are also relevant. The Ministry's primary responsibility includes creating the policy and legislative framework to deter and apprehend perpetrators of crime. As such, we are constantly revising our policies and procedures to address systemic weaknesses that could be exploited resulting in the miscarriage of justice.
>
> The Ministry is aware that there have been concerns arising from recently issued instructions (specifically item 3 in the attached) related to the treatment of sudden death cases. The concerns revolve heavily around the requirement for the police to call a Contracted Funeral Home in all cases of **sudden death** whether or not the deceased had a known medical condition. The other major concern is related to the transfer of bodies to a Funeral Home of the family's choice after the relevant administrative processes i.e. where Medical Cause of Death Certificates have been provided by a doctor….
>
> Notwithstanding the foregoing, we accept that the family should have the option of selecting a funeral home of their choice once a doctor signs a Medical Cause of Death Certificate. As such, please note that the recently issued guidelines include a mechanism that allows the body to be released to the family within 48 hours as long as this Certificate is provided." (Emphasis as in original)

[77] It was also noted in the policy letter that where bodies are released by the contracted funeral homes within 48 hours, the family is not to be charged. If "storage extends beyond the 48 hours, into a weekend (after business hours on a Friday through to Sunday) or a public holiday and the bodies cannot be released until the next regular

working day, the additional charges for storage are to be borne by the [appellant] and not the family".

[78] Section 3(2A) of the Act states that "The Minister may give to the Commissioner directions as to the policy to be followed by the Force". Force orders are not issued by the appellant. That power resides with the Commissioner. The decision to retain the services of the respondents in certain cases is a matter of policy. The Second Force Orders are, therefore, in keeping with the change in the appellant's policy.

[79] In this matter, the respondents seek a declaration that the Second Force Orders are unlawful and that they be quashed. The question is whether the Commissioner should be made a party to the proceedings for having issued the Second Force Orders in keeping with the appellant's change in policy.

[80] The Commissioner, by virtue of section 3(2)(a) of the Act, is responsible for the "sole operational command and superintendence of the Force". This point was made in **Glenroy Clarke**, which was relied on by the appellant. In that case, the Commissioner of Police refused the appellant's application for re-enlistment in the force. The Full Court refused to quash the orders, and Mr Clarke appealed to this court. Carey JA confirmed that the Commissioner has "sole command and superintendence of the Force". His Lordship also stated at page 309 that "[t]he level of conduct or performance is to be determined by the Commissioner, and the court has no power to set the standard of acceptable conduct in the Force".

[81] The Supreme Court in the decision of **Regina, ex parte Ira Raphington v The Commissioner of Police and The Attorney General for Jamaica**, (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 00925, judgment delivered 25 October 2007 has interpreted that the words, " 'command and superintendence' gives the Commissioner the authority to make administrative decisions in the best interest of the Constabulary Force as a whole and the public which it serves" (see page 6).

[82] As previously stated, the respondents have sought a declaration that the Second Force Orders are unlawful. They have also sought an order to quash the Second Force Orders and an order of *mandamus* directing the appellant to restore the First Force Orders. They have asserted that the Second Force Orders are in breach of their legitimate expectation to be consulted before any change was made to the policy.

[83] The grounds on which the respondents have sought judicial review clearly indicate that the respondents' issue is with the policy decision made by the appellant on the GOJ's behalf. The Second Force Orders are the means by which the Commissioner implemented the policy decision. However, that is not the end of the matter. The respondents' affidavit in support of the fixed date claim form states that their agreement with the GOJ was acknowledged and ratified by the appellant and the JCF by the issuance of the First Force Orders. They also aver that in doing so, the Commissioner was acting as the appellant's agent "after consultation and/or with the approval" of the appellant. The Second Force Orders, they say, were also issued after that process. Even if that is correct, the reliefs sought are centred around the Second Force Orders and are aimed at quashing those orders and reinstating the First Force Orders.

[84] No relief has been sought concerning the policy decision that was communicated by the policy letter. The respondents have instead sought relief in respect of the actions of the Commissioner, who is not a party to these proceedings. Mr Nelson has argued that, based on the approach taken by the court in **Dallas**, the Commissioner could, if he so desires, participate in the proceedings although he is not a party. With respect, that case does not, in my view, assist the respondents. In **Dallas**, Jackson Haisley J relied on the decision of the Full Court in **Natasha Richards and Phillip Richards v Errol Brown and the Attorney General** [2016] JMFC Full 05 (incorrectly cited as [2012] JMSC Civ 151) in which it was stated that rule 12.13 of the CPR which excluded a defendant from being heard on an assessment of damages where a judgment had been entered against him was unconstitutional. That is not the case here, as the Commissioner is not a party.

[85] If, for argument's sake, the relief sought is granted, the appellant's policy decision would be unaffected, as force orders are merely the means by which decisions are communicated. This would render the judgment nugatory and would also create an untenable situation where the policy of the GOJ, as communicated by the policy letter, would be at variance with the terms of the First Force Orders. Such a situation would, in my view, be contrary to good governance. The respondents' challenge ought to be directed at the change in the GOJ's policy.

[86] In order to link the appellant to the circumstances and vice versa, a substantial amendment to the pleadings would be required. The respondents have argued that an amendment to the claim can be made under rule 56.13(2)(b) of the CPR, which states that a judge at the first hearing of the fixed date claim form may:

> "allow the claimant to –
>
> (i) amend any claim for an administrative order."

[87] In **Diamantides v JP Morgan Chase Bank and others; JP Morgan Chase Bank and others v Pollux Holding Ltd** [2005] EWCA Civ 1612, Moore-Bick LJ, who delivered the decision of the court, stated:

> "16 …On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the Claimant to start again."

[88] In this matter, the Commissioner ought to be joined if the respondents intend to impugn the validity of the Second Force Orders. An application to add the Commissioner as a party will have to be made, and the court will, in my view, have to be satisfied that there is "an arguable ground for judicial review" that has a realistic prospect of success against him.

[89] Whilst it is accepted that the saving of expenses is part of the court's mandate to deal with cases justly, it would not be appropriate in these circumstances to allow the matter to proceed based on an intended amendment. As no application was made, the precise terms of any such amendment are not known. In the circumstances, grounds 10 and 11 succeed.

[90] The success of these grounds, is in my view, determinative of the appeal. However, in light of the extensive submissions of the parties on the remaining grounds, I will now consider the issues raised in those grounds.

(ii) Whether the respondents have the *locus standi* to bring the claim

Appellant's submissions

[91] Miss Hall submitted that the respondents have no *locus standi* to bring the claim as the crux of the matter is an alleged breach of contract by the appellant that has resulted in a loss of income to the respondents. This, it was submitted, is a private law issue and not a matter for the review court. Counsel stated that the respondents' reliance on rule 56.2(2) of the CPR is, therefore, misplaced as the matter is not one of public interest.

[92] Miss Hall also dealt with the issue of whether the appellant was required to consult the respondents before changing its policy. Counsel submitted that the learned judge failed to have any or sufficient regard to the fact that the respondents did not demonstrate that they had a legitimate expectation to be consulted before the Second Force Orders were issued. Counsel argued that no such legitimate expectation could have existed, as the respondents' contracts are with the GOJ. In any event, it was the Commissioner who had issued the First Force Orders, and he is not a party to the proceedings. Reference was made to **Lackston Robinson v Daisy Coke and ors** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2003, judgment delivered 8 November 2006, in which the court stated as follows at page 19:

> "Where a person has no legal right to a benefit or privilege as a matter of private law he may have a legitimate expectation of receiving such benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law…"

[93] Counsel stated that the issue of legitimate expectation does not arise in this case as no representation or promise was made to the respondents by the Commissioner. She pointed out that force orders are lawful commands given to police officers by the commissioner of police and are not directed to members of the public. Further, they are subject to change to address the concerns of the police, non-contracted funeral homes and the general public. Counsel also pointed out that the appellant's policy, as indicated in the policy letter, was also subject to change.

[94] The respondents, she said, were not consulted before the issuance of the First Force Orders, and as such, there could be no legitimate expectation of consultation prior to the issuance of the Second Force Orders.

[95] It was submitted that the alleged public interest claimed by the respondents is a contrivance on their part to bring themselves within the ambit of judicial review. Counsel stated that there is no merit in the respondents' assertion that the terms of the Second Force Orders lend themselves to the possibility of cases of sudden death not being properly investigated and being in breach of the Registration (Births and Deaths) Act and the Coroner's Act.

[96] The respondents, counsel submitted, have no greater interest than that of the ordinary citizen and have no statutory or other remit to ensure the proper investigation of deaths, nor have they pointed to any effect, save financial, which the changes in the protocol will have on them. Reliance was placed on **R v The Principal of the Norman Manley Law School ex parte Janet Mignott** (unreported), Supreme Court, Jamaica Suit no M 9/2002, judgment delivered 17 May 2002 ('**Janet Mignott**'), **Regina v Industrial Disputes Tribunal (ex parte J Wray and Nephew Limited)** (unreported), Supreme Court, Jamaica, Claim no. 2009HCV04798, judgment delivered 23

October 2009 and **Lennox Hines v Electoral Commission of Jamaica and others** [2015] JMSC Civ 90.

[97] In the circumstances, Miss Hall argued that the respondents have no *locus standi* to bring the claim and, as such, the order granting leave ought to have been revoked.

Respondents' submissions

[98] Mr Nelson submitted that there are two aspects to the claim. The first is the respondents' individual grievances pertaining to the changes brought about by the Second Force Orders and its impact on their contracts. In this regard, counsel argued that the respondents had a legitimate expectation of being consulted before any changes were made to the policy. The second is that the modifications raise an issue that is of public importance. Mr Nelson stated that, as individuals, the respondents have the right to bring an action in their own right.

[99] Mr Nelson also submitted that the respondents have an arguable case as they had a legitimate expectation that the arrangements specified in the First Force Orders would continue and that they would be consulted if there were to be any changes to those arrangements. He stated that as a result of the Second Force Orders, the respondents have not been contacted to pick up and store bodies where the deceased had a known medical condition. He asserted that the appellant in the policy letter had committed to retaining the First Force Orders and the practice and procedure that had developed in relation to the said force orders. Counsel stated that the fact that the change in the arrangements set out in the First Force Orders had caused pecuniary loss to the respondents was only incidental to their right to be consulted before the issuance of the Second Force Orders. As such, the matter was amenable to judicial review.

[100] Where the public's interest is concerned, Mr Nelson submitted that the Second Force Orders breach section 35 of the Registration (Births and Deaths) Act and the Coroners Act. The complaint is that the Second Force Orders speak to "a doctor" signing the certificate, thereby removing the requirement for it to be signed by "the doctor" who

had been treating the deceased. It was submitted that this change in the force orders placed the respondents in a peculiar position and that whilst an issue arose as to breach of contract, this did not render the claim a classic breach of contract case. Reference was made to **Legal Officers' Staff Association and others v The Attorney General and another** [2015] JMFC FC 3 for the submission that an application for judicial review may be appropriate even where private law remedies are available.

[101] The respondents submitted that this matter is one of public interest in which they have the expertise, and as such, they had sufficient *locus standi*. They contended that as practitioners in the mortuary/funeral services industry, they have specialised knowledge and can speak to the deleterious effects arising from the changes introduced in the Second Force Orders, as compared to those contained in the First Force Orders. Those effects are not limited to matters affecting the respondents' contracts, but the changes also impact the public, as the burial of a deceased should only take place where there is satisfactory evidence of the cause of death. It is thus a matter of public importance. Furthermore, the legality of the procedure permitted by the Second Force Orders is also of importance. In support of their submissions, they relied on **Regina v Greater London Council Ex parte Blackburn and another** [1976] 1 WLR 550 and **Gorstew Limited and Hon. Gordon Stewart OJ v The Contractor-General** [2013] JMSC Civ 10 ('**Gorstew Limited**').

[102] Mr Nelson submitted that the court has adopted a liberal approach to the issue of *locus standi* in matters concerning the public's interest. Reference was made to **Jamaicans for Justice v Police Services Commission and another** [2015] JMCA Civ 12, in support of that submission. Counsel also relied on **R v Greater London Council, ex parte Blackburn and another** [1976] 3 All ER 184, **R v Commissioner of Police of the Metropolis, ex parte Blackburn** [1968] 2 QB 118 and **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617, for the proposition that "an otherwise 'stranger' may have standing to apply for judicial review where the matter is of public importance".

[103] Counsel asserted that the respondents have demonstrated that they have sufficient interest in the subject matter of the claim.

Discussion

[104] Rule 56.2 of the CPR provides that a person or legal entity seeking an order for judicial review must have "sufficient interest" in the subject matter to ground their application for judicial review. It states as follows:

> "56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.
>
> (2) This includes –
>
> (a) **any person who has been adversely affected by the decision which is the subject of the application**;
>
> (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
>
> (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
>
> (d) any statutory body where the subject matters falls within its statutory remit;
>
> (e) **any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application**…" (Emphasis supplied)

[105] The appellant has submitted that, despite being adversely affected, the respondents do not have sufficient interest to bring a claim for judicial review. This was asserted on two bases. Firstly, that the matter is grounded in the respondents' alleged financial losses based on the appellant's alleged breach of contract and is thus a matter

of private law, and secondly, that the subject matter of the claim is not one of public interest.

[106] The issue of what amounts to sufficient interest/*locus standi* was explored in **Chief Immigration Officer of the British Virgin Islands v Burnett** (1995) 50 WIR 153. There the court stated, at page 158, that:

> "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 (1) if the decision or action infringed or threatens to infringe any constitutional, statutory or common law right whatsoever vested in the complainant or (2) if the decision or action infringed or threatens to infringe the complainant's specific constitutional, statutory or common law right to the observance of the formalities required by the 'audi alteram partem' rule of natural justice or (3) **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**." (Emphasis supplied)

[107] The issue was also addressed by the United Kingdom's Supreme Court in **AXA General Insurance Limited and others v The Lord Advocate and others** [2011] UKSC 46. Lord Hope DPSC, who delivered the decision of the court, stated at paras. 169-170:

> "169… The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. As Lord Hope, delivering the judgment of the court, said in **Eba v Advocate General for Scotland** (Public Law Project intervening) (Note) [2011] UKSC 29, 2011 SLT 768, [2011] 3 WLR 149, para 8:
>
> > '… the rule of law … is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it: West v Secretary of State for Scotland 1992 SC 385, 395. This favours an unrestricted

access to the process of judicial review where no other remedy is available.'

There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.

170. For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. **A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts**. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context**. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted**. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the

> purposes of judicial review in that context." (Emphasis supplied)

[108] The issue of whether an applicant has sufficient interest may be resolved at the permission stage if it is clear that the applicant either has no interest or insufficient interest in the subject matter of the application. In **Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd** [1981] 2 All ER 93, Lord Wilberforce stated at page 96:

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application; then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed**. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates**." (Emphasis supplied)

[109] In this matter, rule 56.2(2)(a) and (e) of the CPR have been engaged. The appellant has not asserted that the respondents have not been adversely affected by the issuance of the Second Force Orders. They would, without more, have satisfied the requirements of rule 56.2(2)(a) of the CPR. Further, or in any event, the appellant has focused on the issues of whether the respondents' complaint is, at its core, essentially one for breach of contract and, as such, falls within the realm of private law and is therefore not subject to judicial review, and whether it is a matter of public interest.

A. Whether the matter falls within the ambit of public or private law

[110] Judicial review is concerned with the examination of the process by which a decision of a public body was made (see **Chief Constable of the North Wales Police**).

Its focus is on whether the decision-making process was lawful, fair, and reasonable. Where a party wishes to challenge such decisions, the provisions of Part 56 of the CPR prescribe the procedure to do so.

[111] It is trite that the remedy of judicial review is primarily concerned with issues of public rather than private law. This was the position expressed by the Master of the Rolls, Donaldson MR, in the appellate decision of **R v East Berkshire Health Authority, ex parte Walsh** [1984] 3 ALL ER 425, who stated at page 429:

> "the remedy of judicial review is only available when an issue of 'public law' is involved, but as Lord Wilberforce pointed out in *Davy v Spelthorne BC* [1983] 3 All ER 278 at 285 …the expressions 'public law' and 'private law' are recent immigrants."

[112] It was ultimately held, in that case, that an applicant for judicial review had to show that a public law right which he enjoyed had been infringed; and that where the terms of employment were controlled by statute, employees might have rights both in public and private law but a distinction had to be made between an infringement of a statutory provision giving rise to public law rights and those that arose solely from a breach of contract of employment.

[113] Purchas LJ further explained at pages 441-442:

> "In order that there should be a remedy sought by [the applicant] which makes available to him the relief granted by R.S.C., Ord 53, **it is clear that there must be something more than a mere private contractual right upon which the court's supervisory functions can be focused**. Section 31 of the Supreme Court Act 1981, although recognizing the wider remedies available under R.S.C., Ord 53, is no statutory justification for extending the area of jurisdiction beyond that of a supervisory function which is to be directed in relation to remedies sought against public or similar authorities whose actions under their statutory or other powers call for the court's intervention." (Emphasis supplied)

[114] This was an issue which arose for consideration in **Lafette Edgehill and others v Greg Christie (Contractor-General of Jamaica)** [2012] JMCA Civ 16. In that case, the employment contracts of the appellants who were employed by the Contractor-General were terminated. Under the appellants' respective employment contracts, the Contractor-General was entitled to terminate the services of an employee at any time by either giving three months' notice in writing or by the payment of three months' salary in lieu of notice. The appellants, upon failing to report an incident of an unlawful act to the Contractor-General (being in the position of ensuring integrity) were terminated and given three months' salary in lieu of notice. The appellants, being aggrieved, sought judicial review of that decision.

[115] This court, in deciding whether the matter was appropriate for judicial review, stated:

> "[79] In this case it is pellucid that once the authority contracts on specific terms with its employees, they engage 'private law' rights and only if the employer fails to provide these terms, will the employer have public law rights to compel compliance. Additionally, **it is only in circumstances where a public right hitherto enjoyed has been breached that judicial review will be applicable**. …" (Emphasis supplied)

[116] The case of **Janet Mignott**, cited by the appellant, is also relevant. In that matter, the applicant, an attorney at law and associate tutor at the Norman Manley Law School, sought leave to apply for an order of *certiorari* in respect of a decision made by the principal of that institution, removing her from her position as the course director of the conveyancing course and re-assigning her to other tutorial duties at the school.

[117] Daye J (Ag), as he then was, found that the primary question was whether there was a *prima facie* arguable case. On this point, he said, at pages 6-7:

> "Just to say from the outset that, in my view, if on an ex parte application for leave, the application can not [sic] survive a preliminary objection or an objection in limine such as the court has no jurisdiction to hear it because it is founded in

> private Law, i.e. contract, tort, or any private right conferred by statute and not in public law, then it will fail the test that there is a prime facie arguable case."

[118] The interplay between private and public law in contractual matters where the government is a party was explored in **The State of Mauritius and another v The CT Power Limited and others** [2019] UKPC 27 ('**Mauritius v CT Power**').

[119] The facts are that CT Power sought to construct a new electricity-generating plant for Mauritius. The proposed client was the Central Electricity Board ('the CEB'). In order to implement the project, CT Power was required to obtain an Environmental Impact Assessment licence (the 'EIA Licence') under the Environment Protection Act 2002. CT Power's initial application for the EIA Licence was rejected, but following an appeal to the Environmental Appeal Tribunal, it was issued subject to certain conditions. Condition 15 of the EIA Licence (the 'Condition') required CT Power to provide proof of its financial capabilities for the duration of the project to the satisfaction of the Ministry of Finance.

[120] It was also a condition of CT Power's agreement with the CEB, that the agreement would only come into effect once CT Power had put in place a separate Implementation Agreement with the Ministry of Energy. The latter agreement was to include a guarantee by the Government to ensure payment for supplies of electricity due to CT Power from the CEB. The final terms of the implementation agreement were not agreed upon, and it was never signed. There was a change of Government, and the new Minister of Energy sought a letter of comfort regarding the equity financing for the project, and a draft of that letter was agreed upon by the parties. The letter was subsequently provided by CT Power, but the Minister declared that the draft letter did not comply with the Government's requirements as regards the letter of comfort. Ultimately, the Cabinet decided not to proceed with the project. This information was posted on the website of the Prime Minister's Office. The Minister of Energy subsequently stated in the National Assembly that the Government would not sign the Implementation Agreement because "CT Power could not establish its financial capabilities to the satisfaction of the Government". CT Power was not directly informed of the Cabinet's decision.

[121] CT Power later applied for judicial review against the Ministry of Finance and the Ministry of Energy. The summary of the proceedings before the Mauritian Supreme Court were summarised in the decision of the Board as follows:

> "34……On 25 May it commenced these proceedings by applying for leave to apply for judicial review against the Ministry of Finance and the Ministry of Energy, seeking a declaration that it had complied with Condition 15 and an orders of mandamus directing the Ministry of Energy to sign the Implementation Agreement on behalf of the Government (this was later amended to a claim for declaratory relief). The CEB was joined as an interested party. The Supreme Court granted leave on 16 July 2015. The case proceeded to a full hearing in the Supreme Court in early 2016. At the hearing, the Ministry of Energy, supported by the CEB, submitted that the decision not to sign the Implementation Agreement was not amenable to judicial review because it was a purely private and commercial act….
>
> 35. On 7 July 2016 the Supreme Court gave judgment in favour of CT Power:
>
> > (i) The court reviewed English, Privy Council and Mauritian authorities and concluded that the decision not to enter into the Implementation Agreement was amenable to judicial review; … and in deciding whether or not to cause the Government to enter into the Implementation Agreement the Minister of Energy was exercising his responsibility for the conduct of the business of Government and his Ministry as assigned under section 62 of the Constitution of Mauritius: paras 25-43;
> >
> > (ii) As regards the claim for judicial review of the decision not to sign the Implementation Agreement, the court held that CT Power enjoyed a legitimate expectation founded on what was set out in clause 7 of the draft Implementation Agreement that it would have nine months after that agreement was signed in which to provide proof of its financial capabilities, so that it was unreasonable, unfair and against legitimate

expectation for the Minister to refuse to sign the Implementation Agreement on the basis that no such proof had been provided in advance of signing; also, the court did not accept that CT Power had been informed in meetings after 5 December 2014 that the signing of the Implementation Agreement would be subject to the submission of a letter of comfort, so the legitimate expectation flowing from clause 7 continued to have effect and the refusal of the Ministry of Energy to sign the Implementation Agreement was 'unreasonable, unfair and against the legitimate expectation of CT Power': paras 44-48;

(iii) In relation to the claim for judicial review of the decision of the Ministry of Finance not to confirm that CT Power had complied with Condition 15 of the EIA licence, the court referred to leading authorities on legitimate expectation; noted that it was only in the exchange of affidavits in the judicial review proceedings that CT Power was informed of the reasons of the Ministry of Finance for rejecting the Avendus letter as a satisfactory letter of comfort and had not been given an opportunity to make representations why it was satisfactory; and held that, assuming that the draft letter of comfort proposed at the meetings on 15 and 16 January 2015 was in final form (as maintained in the affidavit evidence for the Ministry of Finance: see above), nonetheless CT Power had a legitimate expectation to be consulted and given an opportunity to make representations before the Avendus letter was rejected, and fairness would require that CT Power be informed why the Avendus letter did not satisfy the Ministry's requirements and be given an opportunity to explain why in its view it did so: paras 49-57;

(iv) The court made two declarations to reflect the reasoning in its judgment: (a) that the reasons invoked by the Ministry of Finance in its affidavits to decide that Condition 15 had not been satisfied were 'unreasonable, irrational and in breach of the legitimate expectation of CT Power'; and (b) that the reasons invoked by the Ministry of Energy for

not signing the Implementation Agreement were 'misconceived, unreasonable and irrational and in breach of the legitimate expectation of [CT Power]'."

[122] CT Power's claim for judicial review was successful before the Mauritian Supreme Court. The Ministry of Finance and the Ministry of Energy appealed to the Privy Council against the Supreme Court's decision.

[123] The Board's treatment of this issue is reproduced below:

> "*The ambit of the court's judicial review jurisdiction*
>
> 41. The next submission made by Mr Guthrie was that the Supreme Court was in error in holding that the refusal by the Ministry of Finance to confirm that CT Power had satisfied Condition 15 and the refusal of the Ministry of Energy to cause the Government to enter into the Implementation Agreement were amenable to judicial review. **Mr Guthrie contends that, as a matter of principle, both decisions lie outside the scope of the judicial review jurisdiction of the court, because they both involve matters of commercial judgment and are decisions of a purely private nature having nothing to do with public law. The Board disagrees**…
>
> 43. **The Board also considers that the decision of the Ministry of Energy to refuse to sign the Implementation Agreement is in principle within the scope of the court's judicial review jurisdiction**. It is true that a decision whether or not to enter into a contract involves deciding whether to accept obligations sounding in the private law of contract. However, a contract is made between legal persons, and **where the person who is a proposed party to a contract is a public authority the way in which it may behave is subject to rules of public law**; **and whether the public authority has acted lawfully in accordance with those rules is a matter which may be subject to judicial review.** The Board would add that the same point about the relevance of rules of public law can be made regarding a decision by a public authority whether and how to exercise rights sounding in private law conferred by a contract into which it has entered:

> see **Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd** [1994] 1 WLR 521 (PC), in particular at p 526A-D (decision to give notice to terminate a commercial contract for the bulk supply of electricity). Again, it is a separate question what public law standards apply and whether the Ministry of Energy did anything unlawful in terms of those standards in taking the decision it did: see below.
>
> 44. The Board agrees with the ruling of the Supreme Court at para 42 of its judgment that clause 12.7 of the Implementation Agreement cannot oust the judicial review jurisdiction of the court. In the Board's view, that is for three reasons: (i) the Implementation Agreement was not signed and never came into effect; (ii) in any event, clause 12.7 is irrelevant to the issue of the availability of judicial review: it is a provision which is concerned with a quite different topic, namely to ensure that the Government would not attempt to rely on the principle of sovereign immunity to deny the enforceability of the Implementation Agreement if that agreement were signed; and in addition (iii) **a contract between a public authority and a private party cannot remove the judicial review jurisdiction of the court, which exists to safeguard the public interest.**" (Emphasis supplied)

[124] It is clear from the above extract that the question of whether judicial review would be appropriate is dependent on the circumstances of each case.

[125] In this matter, the respondents have a contractual relationship with the appellant. The terms of their engagement, they say, changed with the issuance of the Second Force orders. They have complained that they have since suffered a decline in business, which obviously would affect their earnings.

[126] The crux of the matter, therefore, appears to be the reduction in respondents' earnings resulting from the non-referral of certain cases to them. They have asserted that due to the changes in the protocols for the handling of sudden deaths, there has been a "marked reduction in the number of calls received from the police to receive and/or store deceased" and that "several other funeral home operators, since the change in the force orders, have been receiving dead bodies".

[127] In my view, those are private matters to be resolved between the respondents and the appellant within the terms of their contracts. They do not concern public rights. That is not to say that judicial review is not available in matters of contract between a public entity and private individuals (see **The State of Mauritius and another v CT Power Ltd and other**). Therefore, there is merit in the appellant's contention that the respondents are not entitled to bring a claim for judicial review on this basis.

[128] The question is whether the change in the policy was done in such a way as to amount to a breach of natural justice (see **Chief Constable of the North Wales Police v Evans** at 155, per Lord Brightman). In this regard, the respondents have raised the issue of the alleged breach of their legitimate expectation to be consulted regarding the GOJ's change of the policy.

B. Whether the respondents had a legitimate expectation to be consulted before the issuance of the Second Force Orders

[129] The circumstances in which a legitimate expectation may arise were explained in Wade and Forsyth Administrative Law 10th ed, 2009 at page 449, which states:

> "It is not enough that an expectation should exist; it must be in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate for some countervailing consideration of policy or law. But some points are relatively clear. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation."

[130] The ways in which a legitimate expectation may arise were explained in Halsbury's Laws of England, Volume 61A, 2018 at para. 50 as follows:

> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an

> implied representation or promise made by the authority, including an implied representation, or from consistent past practice, in all instance the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded."

[131] In **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935 ('**Council of Civil Service Unions**'), Lord Diplock had this to say at page 949:

> "Judicial review, now regulated by RSC Ord 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision.
>
> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker [that it] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences."

[132] As stated by Straw JA in **Paymaster Jamaica Limited v The Postal Corporation of Jamaica** [2018] JMCA Civ 6 at para. [91], "[t]he concept of legitimate expectation is a function of the rules of natural justice". In **Council of Civil Service Unions** at 950, Lord Diplock stated the three grounds on which review may be sought. These are illegality, irrationality and procedural impropriety. Furthermore, Lord Roskill went on to state that the duty to act fairly is the focus when considering the latter ground. At page 954, he stated thus:

> "The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled.
>
> The introduction of the phrase 'reasonable expectation' into this branch of our administrative law appears to owe its origin to Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904 at 909, [1969] 2 Ch 149 at 170(when he used the phrase 'legitimate expectation'). Its judicial evolution is traced in the opinion of the Judicial Committee delivered by Lord Fraser in A-G of *Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 at 350–351, [1983] 2 AC 629 at 636–638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective 'legitimate' in this context and use it in this speech even though in argument it was the adjective 'reasonable' which was generally used. The principle may now [sic] said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

(See also **Chief Constable of the North Wales Police** at 1160.)

[133] In **R (on the application of Bhatt Murphy (a firm) and others) v Independent Assessor; R (on the application of Niazi and others) v Secretary of State** [2008] EWCA Civ 755 ('**Murphy**'), the court stated that there are two types of legitimate expectations, procedural and substantive. The former may arise where:

> "[29] ……where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy."

[134] On the other hand, substantive legitimate expectation arises where:

> "[32] **...**the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it. Thus it is to be distinguished from a merely procedural right."

(see also **Regina v North and East Devon Health Authority, Ex parte Coughlan** [2001] QB 213)

[135] In **Murphy**, the court at para. [28] also stated thus:

> "[28] Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. **The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power**: see for example *ex parte Coughlan* paras 67ff; *ex parte Begbie* [2000] 1 WLR 1115, 1129F-H." (Emphasis supplied)

[136] As stated by Harris P (Ag) in **Derrick Wilson v The Board of Management of Maldon High School and another** [2013] JMCA Civ 21 at para. [29]:

> "[29] Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision,

> in the interests of good administration of justice, the rules of natural justice prevail."

[137] The respondents have raised the issue of procedural impropriety by asserting that they had a legitimate expectation that they would be afforded an opportunity to be heard before any changes were made to the policy, as outlined in the First Force Orders, and certainly before the issuance of the Second Force Orders. At para. 12 of the respondents' affidavit in support of their notice of application for judicial review, they state:

> "12. That the foregoing changes were not communicated to us prior to their being put in place. Neither were we given an opportunity to make any representation as to how same would affect us and in the circumstances whether we were in agreement."

[138] At para. 15, they indicated as follows:

> "15. That the foregoing has injured our legitimate expectation as contracted funeral homes to the government of Jamaica with the acknowledgement of the first Force Orders to continue to receive and store all deceased bodies in the circumstances noted and be permitted to make representations in respect of any changes contemplated with respect thereto."

[139] The respondents have also sought to challenge the validity of the Second Force Orders. However, as it has already been noted, the Commissioner is not the decision-maker. That is the responsibility of the appellant on behalf of the GOJ. There is no mention of the policy decision that would have been within the purview of the appellant. In this regard, it must be borne in mind that force orders are directions issued to officers by the Commissioner and not by the appellant. Once again, the respondents' attack, therefore, seems to be directed at the wrong target.

[140] The Commissioner, based on the affidavit of the respondents, made no promise to them that they would be consulted if there was to be any change in the force orders concerning the collection and storage of dead bodies. There is also no assertion in the respondents' affidavit that the Commissioner had consulted them before issuing the First

Force Orders. There was, therefore, no course of conduct pertaining to the issuing of force orders on which the respondents could rely.

[141] In the circumstances, the legitimate expectation to be consulted or to be heard by the appellant claimed by the respondents cannot be said to be reasonable. Ground 9, therefore, succeeds.

C. Whether the matter is of public interest.

[142] The respondents assert that the matter falls within rule 56.2(1)(e) of the CPR based on an alleged conflict between the Second Force Orders and the Registration (Births and Deaths) Act and the Coroner's Act. The respondents also expressed concern that police officers may be operators or affiliated with other funeral homes and, as such, business may be diverted from them.

[143] They have also pointed to the possibility that certain cases may not be thoroughly investigated by the police or may not be investigated at all. A further concern is the likelihood of business being diverted from them to other funeral homes.

[144] Clause 1 of Appendix A of the contracts between the GOJ and the respondents states that the contracted funeral homes will be contacted by the JCF to collect bodies "that are deemed to be a Medico-Legal case after the scene is processed". There is also a list specifying the Medico-legal cases which must be handled by the police up to the point of post-mortem. Cases of sudden death where the deceased had a known medical condition are not necessarily treated as legal/medical cases in both force orders. The respondents have taken issue with the discretion given to the police, in cases of sudden deaths where the deceased had a known medical condition, to allow the family of the deceased to contact a funeral home of their choice, where a doctor is willing to sign the certificate.

[145] At para. 9 of the Carter affidavit, it was stated that the claim seeks to address certain alleged statutory breaches and the "prevention of any abuse of a systemic

weakness in the process of authentication of deaths in Jamaica arising from the [Second Force Orders]".

[146] Also, at para. 10, the affidavit states:

> "… it is the essence of the claim for Judicial Review is [sic] that the law (Coroners Act and/or [Registration (Births and Deaths) Act gives no discretion to the police to decide if a case is to be investigated by the state or not and as such requires the Court's intervention."

[147] Paras. 14 and 16-33 of the respondents' affidavit in support of the notice of application for judicial review (filed 4 October 2017) are also relevant to the issue of public interest. However, only paras. 14, 16-20, 22, 30 and 33 need to be detailed here. They state:

> "14. That the receipt by these several other funeral homes is a concern given that to our knowledge there are police officers who operate funeral home [sic] or otherwise engage in agreements with other funeral homes to be awarded a commission for calling said funeral homes to collect deceased.
>
> …
>
> 16. Further that the change to the Second Force Orders is a matter of public interest in respect of which, as funeral homes /morgue providers, we have expertise.
>
> 17. That the public interest is in assuring that the cause of death in respect of deceased whether having a known illness or not is properly established prior to said bodies being registered under the Registration (Births and Deaths) Act so as to be buried. Indeed where a deceased having a known illness; but whose death is nonetheless caused by untoward means, registration of such a deceased so as to allow burial would defeat the administration of justice and result in secret criminal actions not being brought to light.
>
> 18. That in this regard [the] Registration (Births and Deaths) Act requires by virtue of section 22 thereof that every death be registered.

19. Further by section 32 of the said Act the registrar may register a death only upon receipt of information from an informant as to said death and who provides a Medical Certificate of Cause of Death or a Burial Orders issued by the Coroner, Justice of the Peace, Officer or Sub-Officer of the Jamaica Constabulary Force.

20. By section 35 of the said Act the only time an informant is allowed to produce a Medical Certificate of [Cause of] Death in cases of sudden death, to the Registrar is where the deceased had a known medical condition and was being treated [by] a registered medical practitioner for same prior to his death. In such a case the informant as to the death may secure and produce to the Registrar a medical certificate of cause of death from the said medical practitioner who was treating the deceased prior to his death.

…

22. That the second Force Orders by allowing the family of the deceased to engage a Funeral Home of their choice where the police 'have ascertained that there is **a** Doctor who is willing to sign the Medical Certificate of the Cause of Death' circumvents the Registration (Births and Deaths) Act since '***the*** doctor' who treated the deceased if the deceased, was a deceased with a known illness, is not necessarily the doctor who may sign the certificate under the second Force Orders - rather '**a**' doctor refers to any doctor.

…

30. From the foregoing we are of the considered opinion that the second Force Orders is also not in conformity with the Coroners Act. In this regard line 3 of said Force Orders by giving the police (any police officer not being the designated officer as required under the Act) power to allow the deceased's family to engage a funeral home if the police is satisfied that a doctor is willing to sign the Medical Certificate of Cause of Death. This is a violation of the Coroners Act since only 'the' doctor who treated the deceased if he had a known illness for which he was being treated before death can sign the certificate…

…

33. Additionally, this stipulation that where '**there is no suspicion of foul play**' thereby allowing for the family members of the deceased to engage a funeral home of their choice and make arrangements for [an] autopsy of their choice is equally a matter of public concern….." (Emphasis as in original)

[148] Section 35 of the Registration (Births and Deaths) Act states:

"With respect to certificates of the cause of death the following provisions shall have effect-

(a) The Registrar-General shall from time to time furnish to every Registrar printed forms of certificates of cause of death by registered medical practitioners; and every Registrar shall furnish such forms gratis to any registered medical practitioner residing in such Registrar's district.

(b) **In case of the death of any person who has been attended during his last illness by a registered medical practitioner that practitioner shall sign**, and give to some person required by this Act to give information concerning the death, **a certificate stating to the best of his knowledge and belief the cause of death**, and such person shall upon giving information concerning the death, or giving notice of the death, deliver that certificate to the Registrar, and the cause of death as stated in that certificate shall be entered in the register, together with the name of the certifying medical practitioner.

The cause of death shall in such certificate be stated as nearly as may be in plain English." (Emphasis supplied)

[149] Counsel did not indicate in his submissions the section of the Coroner's Act with which the Second Force Orders may be in conflict. However, the respondents in their affidavit assert that sections 6, 7 and 9 of the Coroners Act may be impacted by the Second Force Orders. Section 6 of the Coroner's Act gives the coroner jurisdiction in cases

of sudden death where the cause is unknown to make an order for an autopsy to be conducted. The section states:

> "6 - (1) Subject to subsection (1A), where a Coroner, or Justice, or designated police officer is informed that the dead body or part thereof, of a person, is lying within the jurisdiction of such Coroner, or Justice, or within the parish in respect of which such designated police officer is assigned, and there is reasonable cause to suspect that such person has died, either a violent, or an unnatural death, or has died a **sudden death**, of which the cause is unknown, **or that a medical certificate of cause of death under the Registration (Births and Deaths) Act in respect of such person will not be forthcoming** or that such person has died in prison, or in such place, or under such circumstances, as to require an inquest in pursuance of any law, it shall be lawful for such Coroner, Justice, or designated police officer, in his discretion, to direct any duly qualified medical practitioner to make a post mortem examination of the dead body." (Emphasis supplied)

[150] Where a death has occurred in the circumstances set out in section 6 of the Act, the officer in charge of the station at which it is reported is required to notify the designated police officer. That designated officer is then required to inform the Coroner of the death, cause an investigation to be made into the circumstances of the death and report to the coroner.

[151] It is my understanding that Mr Nelson's submission is premised on the assumption that the coroner is involved in all cases of sudden death. That is incorrect. Section 6 of the Coroners Act states the circumstances in which a death has to be reported to the coroner. One such instance is where the person dies "under such circumstances as to require an inquest...". The coroner's jurisdiction is also triggered where a sudden death has occurred, and the cause is unknown or a medical certificate of cause of death "will not be forthcoming". Section 35 of the Registration (Births and Deaths) Act speaks to a medical practitioner who has been attending to the deceased, signing the said certificate. The Second Force Orders have not stated the position any differently.

[152] The concerns of the respondents appear to be grounded in the assumptions that medical practitioners are either unaware of, or inclined to disregard, the circumstances in which they may lawfully sign a certificate of the cause of death in cases of sudden death, and further that non-contracted funeral homes lack the requisite competence to perform such functions. Where the provisions of the Coroners Act are concerned, that legislation is only engaged in cases of sudden death where "a medical certificate of cause of death under the Registration (Births and Deaths) Act in respect of such person will not be forthcoming".

[153] Both force orders set out the procedure to be adopted where there is "a" medical practitioner willing to sign the medical certificate of the cause of death, and both require the police to contact the "contracted funeral home" where no doctor is willing to do so. That has not changed. The only change in the procedure is that the police are no longer mandated to contact a contracted funeral home where the deceased had a known medical condition and a medical practitioner is willing to sign the certificate. In such cases, the body can be released to the family, who can then contact a funeral home of their choice. Where there is no suspicion of foul play, but there is no doctor willing to sign a certificate, under both force orders, the family of the deceased is tasked with making the arrangements for an autopsy to be conducted.

[154] The request that the Second Force Orders be quashed and that the First Force Orders be reinstated is, in these circumstances, curious.

[155] The crux of the matter appears to be the reduction in the respondents' earnings resulting from the non-referral of certain cases to them. They have asserted that due to the changes in the protocols for the handling of sudden deaths, there has been a "marked reduction in the number of calls received from the police to receive and/or store deceased" and that "several other funeral home operators, since the change in the force orders, have been receiving dead bodies". The respondents also expressed concern that police officers may be operators or affiliated with other funeral homes and, as such,

business may be diverted from them. However, to qualify for relief by way of judicial review, the process by which a particular decision was made must be challenged.

[156] The issues raised by the respondents are contractual and ought to be resolved within the terms of their contracts with the appellant. As stated above in para. [127], judicial review is available in matters of contract between a public entity and private individuals. (See **Mauritius v CT**). Moreover, the argument that the Second Force Orders breach the Coroners Act, and the Registration (Births and Deaths) Act is not likely to succeed. In the circumstances, the respondents did not have a sufficient public law interest or standing to bring this claim, as their primary grievance arises from alleged contractual breaches and commercial considerations rather than any unlawful exercise of public power.

[157] Having concluded that this matter is essentially one of private law, in order to clothe the respondents with the requisite *locus standi*, they would have had to establish that they had a legitimate expectation to be consulted by the Commissioner before the issuance of the Second Force Orders. Based on the documentary evidence, the respondents may have a legitimate expectation that the appellant would have discussed the matter with them regarding the change in policy, but there is no challenge to the policy. The respondents are seeking to challenge the force orders. Therefore, I have focused on whether there was a legitimate expectation that the Commissioner would discuss the matter with the respondents before issuing the Second Force Orders, based on the reliefs sought in the claim. I have concluded that no legitimate expectation arose regarding the Commissioner.

[158] Regarding the public interest component, the respondents have failed to demonstrate to this court that rule 56.2(2)(e) of the CPR has been engaged. In the circumstances, grounds 5, 9, and 12, therefore, succeed.

(iii) Whether the respondents complied with their duty of disclosure - ground 6

Appellant's submissions

[159] Miss Hall submitted that the learned judge ought to have set aside the order for leave on the basis that the respondents failed to comply with the duty of full disclosure, which is a requirement where an application for leave is made *ex parte*. Reference was made to **Monica Haughton v Personnel Committee of the Board of Management of Liberty Hill Primary School and others** [2015] JMSC Civ 207 ('**Monica Haughton**'), in support of that submission. The respondents, she said, failed to disclose the following matters, which were both substantial and material:

> "i. the existence of previous contracts with the 1st Appellant;
>
> ii. the existence of previous force orders issued by the JCF in relation to the subject matter of the contract;
>
> iii. that the affidavit was sworn more than eleven (11) months after the relevant decision (the Affidavit stated that it was in excess of 9 months…and by the time the application was filed it would have been in excess of thirteen (13) months);
>
> iv. details of all communications with the 1st Appellant, the Commissioner of Police, the Public Defender and Office of the Contractor General;
>
> v. the Minutes of the meeting to which the letter of April 11, 2017 letter refers;
>
> vi. that they were not the only contracted funeral homes (essentially that there were others who are suitably qualified), and
>
> vii. Any evidence explaining the further delay between the swearing of the affidavit and the filing of the application."

[160] Counsel further asserted that the respondents:

> "i. Failed to highlight relevant clauses of the contract in the affidavit, such as, the clause which dealt with the alternative remedies within the contract itself (this is even more important because leave applications are usually in a short time and [the] judge may not get to

make a detailed review of all the exhibits as they would at trial), and

ii. Failed to highlight in the affidavit that the February force orders was not put in place until some 4 months after the contract (and so could not have formed the basis of any legitimate expectation)."

[161] In respect of non-disclosed item vi above, counsel submitted that this omission was material and crucial, as the court may have been led to believe that if the bodies were not retrieved or stored by any of the respondents, there were no other authorised and or reputable morgues/funeral homes to do so. This, counsel said, would affect the public's interest. In any event, there is no basis on which it could be said that the contracted funeral homes were engaged for any reason other than the fact that their bids were among the lowest. There is also nothing to indicate that the non-contracted funeral homes were incompetent, inadequate, unethical, or unreliable.

[162] It was submitted that, had the above matters been brought to the attention of the learned judge, there would have been a different outcome on the leave application.

Respondents' submissions

[163] Counsel, in his written submissions, stated that there was no material non-disclosure on the part of the respondents before the court that granted leave. Where the previous contracts between the parties and the appellant are concerned, Mr Nelson contended that the existence of previous contracts would not have had any weight on the leave court's deliberation of the matter, nor would such information have assisted the parties in their applications. In any event, it was submitted that the dispute between the parties concerned the 2015 contract, which was before the court.

[164] The disclosure of previous force orders was said to be irrelevant as the "diminishing pick-up/storage of bodies" was only observed after the Second Force Orders. It was asserted that all relevant documents in their possession had been disclosed.

[165] Mr Nelson stated that the issue of delay was considered by the leave court and dealt with accordingly. Counsel submitted that any delay on their part was not inordinate and, in any event, was sufficiently explained and good reason provided by way of affidavit evidence.

[166] Counsel also contended that the issue of the Second Force Orders is relevant regardless of the stance to be taken by any other funeral homes. Moreover, the contracts with the other funeral homes are parish-specific, and they discharge different functions.

Discussion

[167] The failure of an applicant for judicial review to make full and frank disclosure is one of the discretionary bars to be considered by the leave court. In **Monica Haughton**, which was relied on by the appellant, Campbell J opined at para. [27]:

> "[27] … the ability to grant leave without hearing the parties, requires full and frank disclosure and calls to focus the coercive powers of the court where there is a failure to adhere to these principles."

[168] In that case, his Lordship also referred to **O'Reilly and others v Mackman and others** [1983] 2 AC 237 in which Lord Diplock stated at page 280:

> "The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on: so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit."

[169] The importance of disclosure in matters that are heard *ex parte* was discussed in **Alexander Williams and another v Barry Group Limited** [2020] JMSC Civ. 223,

which dealt with the issue of non-disclosure on an *ex parte* application for an injunction. Barnaby J (Ag), as she then was, explored the issue in detail, referencing authorities from the English Court of Appeal at para. [12]:

> "[12] A number of authorities concerned with material non-disclosure on an ex parte application for an interim inunction were cited, but I believe it sufficient to refer only to the decision in **Brink's MAT Limited v Elcombe and Others** [1989] 1 F.S.R. 211 (1987) 1350, which was relied on by Counsel for the parties. The following principles distilled by Ralph Gibson L.J., with which the rest of the court agreed is [sic] instructive.
>
> *(*1*) The duty of the applicant is to make 'a full and fair disclosure of all the material facts…*
>
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers…*
>
> *(3) The applicant must make proper inquiries before making the application… The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
>
> *(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant… and (c) the degree of legitimate urgency and the time available for the making of inquiries…*
>
> *(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by that breach of duty:' see per Donaldson L.J. in Bank Mellat v Nikpour, at p. 91, citing Warrington LJ in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486 at 509.*

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': per Lord Denning M.R. in Bank Mellat v Nikpour [1985] FSR 87 at 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms,

> *'… when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant… a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed: per Glidewell L.J. in Lloyds Bowmaker Ltd. v Britannia Arrow Holdings Plc. [1988] 1 W.L.R 1343H-1344A'."* [Italics as in original]

[170] I have found it useful to set out in tabular form the complaints of the appellant and the responses of the respondents thereto.

COMPLAINT	**RESPONSE**
Previous contracts between the respondents and the appellant.	The absence of any reference to previous contracts with the Ministry was not material and would not have formed a part of the court's deliberation. Further, there is no indication that such contracts would

	have been admissible in evidence. In any event, the court was supplied with the 2015 contract which was the subject of the dispute.
The existence of previous force orders	The issue of illegality did not arise before the issue of the Second Force Orders nor did they result in a reduction in the number of dead bodies being collected and stored by the respondents.
The swearing of the affidavit more than 11 months after the relevant decision.	The delay in swearing to the affidavit was conceded, and the leave court exercised its discretion.
Details of all communication between the appellant, the Commissioner, the Public Defender and the Office of the Contractor-General.	The respondents provided proof of all communications that were in their possession.
The minutes of the meeting to which the letter of 11 April 2017 refers.	The respondents are not in possession of the minutes of that meeting.
The respondents were not the only funeral homes contracted by the GOJ.	The fact that there were other funeral homes contracted with the GOJ was irrelevant. The issue of the illegality of the Second Force Orders is arguable, whether or not other contracted funeral homes object to it.

[171] As stated above, the respondents in pursuing leave were obligated to place before the learned judge all material information to ensure a proper assessment of the matter. However, it is to be noted that the failure to comply with this duty is not determinative of the matter, and the extent of any non-disclosure must be analysed within the context of the case.

[172] The learned judge had the discretion to determine whether there was any material non-disclosure by the respondents. On my analysis of the complaints of the appellants and the responses thereto, it cannot be said that the learned judge erred in concluding that there was no material non-disclosure. In the circumstances, ground 6 fails.

(iv) Whether there was an inordinate delay in the filing of the application - ground 7

Appellant's submissions

[173] Miss Hall submitted that the learned judge failed to consider that there was an inordinate delay on the part of the respondents in seeking leave to apply for judicial review. Counsel stated that the application for leave was filed approximately one year and four months from the date of the alleged decision, which resulted in the breach of rule 56.6(1) of the CPR. This rule requires the application to be made promptly and, in any event, within three months from the date when grounds for the application first arose (see **Clayton Powell v The Industrial Disputes Tribunal and another** [2014] JMSC Civ. 196). It was submitted that the delay in the instant case was inordinate and detrimental to good administration (see **Randean Raymond v The Principal Ruel Reid and another** [2015] JMCA Civ 59 ('**Randean Raymond**').

[174] Counsel argued that whilst the respondents applied for an extension of time to file the application for leave, the reasons provided for the delay were insufficient to overcome the discretionary bar to allow for such an extension. The reason proffered was that the delay was due to negotiations and/or consultations with the appellant and other persons. This initial delay is coupled with the delay in filing the supporting affidavit. The respondents have flouted the relevant rules of the court, which were put in place to ensure that judicial review cases are dealt with expeditiously, and it would be contrary to good justice to allow the Second Force Orders under which the police have been operating for almost two years to be reversed now.

Respondents' submissions

[175] Mr Nelson submitted that the delay in making the application was not inordinate. He also pointed to the respondents' affidavit, which he said provided a good reason for the delay in making the application. The sufficiency of the reasons he said was considered by McDonald J, who exercised her discretion in granting the order. Reliance was placed on **Strachan v The Gleaner Co Ltd** and **Gorstew Limited**.

Discussion

[176] This ground of appeal is premised upon rule 56.6(1) of the CPR, which stipulates that:

> "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."

[177] In any event, a judge, on hearing an application for leave, may be guided by rules 56.6(2) and (5) which are set out below:

> "(2) However the court may extend the time if good reason for doing so is shown.
>
> …
>
> (5) When considering whether to refuse leave or to 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."

[178] In understanding the scope of this rule, reference is made to the decision of this court in **Randean Raymond** where F Williams JA (Ag), as he then was, had this to say:

> "[32] Having examined the learned judge's decision, it is, I think, best to highlight some of the provisions of rule 56.6, which establish the parameters within which an application for extension of time for leave to apply for judicial review should be considered. Looking at rule 56.6(1), for example, it is important first to note that an application for leave ought to

be made 'promptly'. Second, having regard to rule 56.6(2), what an applicant has to establish in order to win an extension of time is to show 'good reason' for the court doing so. As a third observation, we know as well from a reading of rule 56.6(3) that, in essence, time begins to run from when the grounds for the application first arose. In this case there is no dispute concerning that date; and that date is taken to be 27 March 2013 – that is, the date of the appellant's letter of termination. **Finally in respect of rule 56.6, we know from rule 56.6(5) that where a court is considering the matter of delay as a primary factor in deciding whether or not to grant leave or relief, it should consider whether the effect of granting the said leave or relief would be to cause substantial prejudice or hardship to the rights of any person; 'or' be detrimental to good administration.**

[33] It is useful to observe at the outset of this discussion, (as submitted at paragraph 16 of the respondents' submissions), that rule 56.6 gives no indication as to the matters that should be given consideration in an application for extension of time. The only stated requirement is that 'good reason' be shown. **The statement of this requirement by itself, standing alone and with no connected governing principles, guidelines or ground rules, presages the conclusion (similar to an application for the grant of leave), that the matter is entirely discretionary**. What this further means is that any case relating to what another court might have considered to be good reason, while indicating an approach that another judge might have taken in seeing whether good reason existed in those particular circumstances, could never be binding on this court; but, at the most, persuasive only.

[34]… It is important to have a clear understanding of this rule; and in particular sub-paragraph (a) and also sub-paragraph (b), which indicate that, in considering the question of delay, a court might consider the effect of that delay in (a) causing hardship or prejudice; 'or', (b) being detrimental to good administration. In other words, the sub-paragraphs are to be read disjunctively – that is, the rule contemplates that the court should consider prejudice and/or hardship on one hand; or detriment to good administration, on the other. If I am correct in this view, then considering the effect of delay on good administration would obviate what might have been

> any necessity for a consideration of hardship and/or prejudice." (Emphasis supplied)

[179] When assessing whether there was good reason to extend time, the following statement of Dunbar Green J (Ag) (as she then was) in **Constable Pedro Burton v The Commissioner of Police** [2014] JMSC CIV 187 is useful:

> "[24] The question which arises is whether this delay should act as a bar if it were found that there are good reasons to allow the application. The import of rule 56.6 is that it is not so much a question of whether there are good reasons for the delay as good reasons to extend time (See **R (Young) v Oxford City Council** (2002) EWCA Civil 240). Albeit, the existence of unexplained delay could be decisive in an exercise of discretion whether to grant leave for extension of time (see **R v Secretary of State ex p Furneaux** [1994]] 2 ALL ER 652, 658. It is my view that the applicant's pursuit of a statutory remedy is good reason for the delay. But that is not the end of the matter. The court must now decide whether good reason exists to extend time.
>
> [25] Maurice KJ in **R v Secretary of State for Trade and Industry Exp. Greenpeace** [200] Env L.R. 221, 261-264 stated that good reasons for extending time could include no hardship or prejudice to third party rights, no detriment to good administration were permission granted, and a public interest requirement for the application to proceed. It is also recognised that a good reason for extending time may also be found in the reasons for delay as well as the strength of the merits of a particular case."

[180] Considering the above extracts, it is clear that the decision whether to grant leave where there has been a delay was a matter for the learned judge's discretion. The circumstances in which this court is permitted to interfere with such an exercise of discretion are now well settled. As stated by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at para. [20]:

> "This court will therefore set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that

> particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 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."

[181] In the instant case, this court, without the learned judge's reasons, has difficulty in saying whether the learned judge exercised her discretion judicially or was demonstrably wrong. We must, therefore, consider "…whether [the] decision, without reasons, demonstrates a proper exercise of the learned [judge's] discretion" so as not to warrant the intervention of this court (see **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25, at para. [47]). If we find that the learned judge's exercise of her discretion must be set aside based on the established principles in **Hadmor Productions Ltd and others v Hamilton and others** at 1046 per Lord Diplock, this court is "… entitled to exercise an original discretion of [its] own".

[182] This issue was addressed by the respondents in paras. 35-37 of their affidavit in support of the application for judicial review. They stated that the grounds for the application arose on 24 June 2016, when the Second Force Orders were issued. An explanation was given for the delay up to 25 April 2017. However, no reason was given in that affidavit for the further delay of four months ending 4 October 2017, when the notice of application for leave was filed. The Carter affidavit did not take the matter any further. At para. 6 of that affidavit, it was merely stated that the delay was a result of the parties being in negotiations and that McDonald J had been informed of this.

[183] Based on the evidence in both affidavits, it was open to the learned judge to find that a reasonable explanation had been given for the delay up to 25 April 2017 and that the delay was not inordinate. However, the absence of any explanation for the further four months' delay is a matter for concern, as there was no material on which the learned judge could be said to have exercised her discretion. The delay was over the three months permitted by the CPR and could be viewed as inordinate. In the circumstances of this case, where the policy decision has not been challenged, and no explanation has been given for the additional period of delay, ground 7 succeeds.

(vi) Whether there is an alternative remedy available to the respondents - ground 8

Appellant's submissions

[184] Miss Hall submitted that the order for leave ought to have been set aside on the ground that there is an appropriate alternative remedy. Counsel stated that the respondents have conceded in their notice of application that they have an available alternative remedy by way of an action for breach of contract and have opted to apply for judicial review as a result of the challenges they would face in proving the financial losses arising from the changes brought about by the Second Force Orders.

[185] The respondents, counsel argued, ought to have pursued and exhausted the alternative remedy set out in the contract before seeking judicial review. She submitted that the issues in this matter can be resolved in private law proceedings, and that judicial review proceedings should be restricted and guarded against unmeritorious claims.

[186] In the circumstances, the learned judge ought to have set aside the order granting leave.

Respondents' submissions

[187] Mr Nelson did not resile from his position that this matter has a public law component. He submitted that the respondents had a legitimate expectation to be consulted if a change in the force orders was being contemplated. Where the alleged statutory breaches are concerned, counsel submitted that the respondents, as practitioners in the mortuary industry, have specialised knowledge of the deleterious effects of the change in the force orders.

Discussion

[188] Judicial review is a remedy of last resort. In **Glencore Energy UK Ltd v Revenue and Customs Commissioners** [2017] EWHC 1476 (Admin), Green J stated at para. 40:

> "40. The basic principle is that **judicial review is a remedy of last resort such that where an alternative remedy exists that should be exhausted before any application**

> **for permission to apply for judicial review is made.** Case law indicates that where a statutory alternative exists, granting permission to claim judicial review should be exceptional. The rule is not however invariable and where an alternative remedy is nonetheless ineffective or inappropriate to address the complaints being properly advanced then judicial review may still lie. (see also **R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council** [2002] 3 All ER 97 at 110)." (Emphasis supplied)

[189] In Auburn et al, Judicial Review Principles and Procedure, 1st ed., 2013, the learned authors state at para. 26.92:

> "At the permission stage, the court will consider whether it should exercise its discretion and refuse permission to apply for judicial review because an adequate alternative remedy is available; the issue is not that of whether there is arguably an adequate alternative remedy."

[190] The existence of an alternative remedy is not an absolute bar to the grant of leave. In **Independent Commission of Investigations v Everton Tabannah and Worrell Latchman** [2019] JMCA Civ 15 Brooks JA (as he then was), at para. [62], stated thus:

> "[62] It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave. The relevant part of rule 56.3(3) states:
>
> 'The application [for leave to apply for judicial review] must state –
>
> …
>
> (d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. …' **The issue is whether the alternative is more suitable than judicial review**." (Emphasis supplied)

[191] Leave will, therefore, not be granted where it is clear that an adequate or suitable remedy is available to the applicant. In the instant case, this was a matter for the discretion of the learned judge. The basis on which this court is permitted to interfere with the learned judge's exercise of her discretion was already set out in para. [178] above.

[192] The notice of application for leave in this matter states:

> "There is an alternative form of relief by way of an action for breach of contract available to the applicants. However, an application for judicial review is more appropriate because the applicants would encounter challenges proving damages on account of their lack of knowledge as to the precise number of sudden death cases referred by police officers to funeral homes/morgues other than the applicants. Further, judicial review is more appropriate because the custody/possession of dead bodies, in cases of sudden deaths where the cause is unknown, by funeral homes/morgues previously not accepted as service providers creates a material risk of sudden deaths caused by illegal actions of third parties not being disclosed."

[193] Clause 8.1 of the respondents' contracts with the GOJ (through the Ministry of National Security) makes provision for the settlement of disputes. It reads:

> "**Amicable settlement**
>
> Any claim for loss or damage arising out of breach or termination of [the] Agreement **shall** be settled between the Procuring Entity and the Supplier by negotiation. If this negotiation is not successfully settled within fifteen (15) days after the date of initiation or negotiation or within such longer period as the parties may mutually agree, then the parties will jointly agree, within ten (10) days after the date of the expiration of the period in which the parties should have successfully concluded their negotiations, to appoint a Mediator to assist in reaching an amicable resolution of dispute. This procedure shall be private and without prejudice. If the parties fail to agree upon the appointment of a Mediator within the stipulated period, then, within seven (7) days of expiration of this period, the Procuring Entity shall request appointment of a Mediator by the Dispute Resolution

> Foundation of Jamaica. The mediator shall not have the power to impose a settlement on the parties. If the dispute is not resolved between the parties within 30 days after the appointment of the mediator by the dispute resolution foundation of Jamaica, the mediator shall advise the parties of the failure of the mediation.
>
> For the purposes of this clause, a negotiation is deemed to have been initiated as of the date of receipt of notice by one party of a request from the other party to meet and negotiate the matter in dispute.
>
> For the purposes of this clause, a mediator is deemed to have been appointed as of the date of notice of such appointment being given to both parties.
>
> **Dispute settlement**
>
> In the event of the failure of the mediation between the parties, the mediator will record those verifiable facts that the parties have agreed. Subsequently the case will be handled by arbitration. The parties agree to accept the award of the arbitrator as binding and irrevocable within the powers of the Arbitration Act of Jamaica. The mediator's role in the dispute resolution process shall cease upon appointment of the arbitrator. During the dispute settlement process, the supplier shall continue to perform the work in accordance with this contract. Failure to do so shall be considered a breach of contract." (Emphasis as in original)

[194] The above clause sets out the procedure to be adopted in the event of a breach of contract. Based on the documentation before this court, there is no indication that the parties have gone to either mediation or arbitration.

[195] Mr Carter at para. 7 of his affidavit stated that although the parties have a contractual relationship, it was not being relied on to ground the claim. He said that the claim is based on the respondents' legitimate expectation to be consulted before the force orders were changed. As stated above, the respondents' claim for breach of a legitimate expectation on the basis of the Force Orders is unsustainable. The learned could not have exercised her discretion to preserve the grant of leave, as the basis for judicial review was wrong from the start. Ground 8, therefore, also succeeds.

Conclusion

[196] In this matter, the learned judge had the jurisdiction to set aside the *ex parte* order granting leave. Where an application is made to set aside the grant of leave to file a claim for judicial review, the ultimate question is whether there was sufficient evidence on which to grant the application for the grant of leave. In deciding whether to set aside the grant of leave, a matter for the learned judge's consideration was whether the respondents had the *locus standi* to bring the claim. This required consideration of the issues of legitimate expectation and whether the matter is one of public interest. In my view, the respondents failed to establish that they had the requisite *locus standi*.

[197] In any event, a claim for judicial review is a challenge to the manner in which a decision of a public body was made. The reliefs sought by the respondents are directed at the Second Force Orders. However, the issuing of the Second Force Orders is not a decision, and even if it were, the appellant did not issue those directives. The learned judge was, therefore, plainly wrong in the exercise of her discretion when she refused the appellant's application to set aside the *ex parte* order of McDonald J. In these circumstances, I believe the appeal should be allowed. On the issue of costs, there is no reason to deviate from the general rule that costs follow the event. Therefore, the costs of the appeal are awarded to the appellant, to be taxed if not agreed.

LAING JA (AG)

[198] I, too, have read the draft judgment of Simmons JA and agree with her reasoning and conclusion.

P WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The order of Wolfe-Reece J, made on 21 August 2018, refusing the appellant's application to set aside the *ex parte*

order of McDonald J granting leave to the respondents to apply for judicial review, is set aside.

3. The order for leave to apply for judicial review granted *ex parte* by McDonald J, on 20 October 2017, is set aside.

4. The fixed date claim filed by the respondents on 3 November 2017 is struck out.

5. Costs of the appeal to the appellant to be agreed or taxed.