[2015] JMCA App 47

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 76/2014

BEFORE: **THE HON MISS JUSTICE PHILLIPS JA**
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**THE CONTRACTOR-GENERAL OF JAMAICA**	**APPLICANT**
AND	**CENITECH ENGINEERING SOLUTIONS LIMITED**	**RESPONDENT**

Mrs Jacqueline Samuels-Brown QC, and Miss Gillian Pottinger, Miss Cammeca Cookhorn and Lorenzo Eccleston instructed by Firm Law for the applicant

Abraham Dabdoub and Mrs Karen Dabdoub Harris instructed by Dabdoub, Dabdoub & Co for the respondent

13, 14, 16, 17, 22 July and 18 December 2015

PHILLIPS JA

[1] The Contractor General (the applicant) launched investigations into the registration of companies with the National Contracts Commission (NCC) and the award of contracts to these companies under the Barracks Relocation Project and the Jamaica Development Infrastructure Programme (JDIP). One company being investigated was

Cenitech Engineering Solutions Limited (the respondent) who filed an application for leave to apply for judicial review and also sought, inter alia: (i) a stay of the proceedings being conducted that investigated its registration with the NCC and the award of contracts to it under the Barracks Relocation Project and JDIP and (ii) an injunction preventing further investigations into these same issues until the hearing of its judicial review application. The application for leave to pursue judicial review was granted by P Williams J (as she then was) and McDonald-Bishop J (as she then was) granted a stay of the proceedings being conducted by the applicant and restrained the applicant from further investigating these said matters until the determination of the respondent's application for judicial review or until further orders.

[2] The applicant sought permission to appeal the judgment of McDonald-Bishop J on the grounds that inter alia: (i) the learned judge had no jurisdiction to grant a stay where the judge granting leave to pursue judicial review did not so order; (ii) the learned judge had no power to grant an injunction that was not applied for; (iii) the proceedings being conducted by the applicant could not be subjected to a stay; and (iv) in all the circumstances a stay of the proceedings was unnecessary.

Background

[3] The facts stated herein were gleaned from the affidavits of Clava Mantock Junior filed on 30 January 2014, the affidavit of George Knight filed on 4 March 2014 and the affidavit of Tania Bell filed on 4 March 2014, all filed in support of the *ex parte* application for leave to apply for judicial review and the affidavit of Gillian Pottinger filed

on 13 May 2014, in support of the notice of application for leave to appeal McDonald-Bishop J's decision.

[4] The applicant is an independent commission of Parliament established by section 3 of the Contractor-General Act who monitors, inter alia, the award and implementation of government contracts. He also monitors the grant, issue, suspension or revocation of contractors' licences.

[5] The respondent is a company duly incorporated under the Companies Act, with its registered office at 14a Central Avenue, Kingston 10 in the parish of Saint Andrew. Its principal business is building construction, civil engineering works, pipe laying works, general road works and interior construction works.

[6] In an invitation to tender dated 1 September 2013, the Government of Jamaica through the Ministry of Agriculture and Fisheries (the Ministry) sought tenders for the award of a contract in respect of the Barracks Relocation Project for the proposed construction of houses at Springfield, Clarendon; Stokes Hall, Saint Thomas and Hampton Court, Saint Thomas. To be eligible for such an award, the contractor had to be registered with the NCC at the time of the tender in the category of grade 1 for building construction or system building and should also possess a valid tax compliance certificate.

[7] The respondent had been registered with the NCC after having applied for registration in December 2012 and May 2013 in various categories and grades. A

certificate of registration was thereafter issued to the respondent by the NCC dated 18 January 2013 and which expired on 16 July 2014, in various categories and grades, including 'grade 1 in building construction'.

[8] On 27 September 2013, the respondent submitted a tender for three separate work packages at Springfield, Clarendon; Stokes Hall, Saint Thomas and Hampton Court, Saint Thomas under the Barracks Relocation Project. The NCC recommended the award of the said three contracts under the Barracks Relocation Project to the respondent and this was later ratified by Cabinet on 16 December 2013.

[9] On that same date (16 December 2013), the respondent received an email from the NCC containing a letter dated 12 December 2013, which advised the respondent that its certificate of registration had been revoked for misrepresentations made on its application for registration dated 14 December 2012 which were uncovered in an investigation exercise conducted by the applicant. The NCC also advised the Ministry and Cabinet of the revocation of the respondent's registration certificate and its reasons.

[10] Having received that notification, the Ministry then treated the respondent as being ineligible for the award of the contract and so did not formally communicate to it that it had accepted their tender. Cabinet then took a subsequent decision to revoke the approval of the award to the respondent. The Ministry then awarded the contract to Chin's Construction Company Limited with NCC's and Cabinet's approval.

[11] The applicant had launched an investigation into the award of contracts to various companies including the respondent under the Barracks Relocation Project and JDIP. During the course of these investigations, on 6 December 2013, officers acting on behalf of the applicant, visited the registered office of the respondent and sought information regarding its registration particulars and financial capabilities.

[12] On 10 December 2013, Mr George Knight, director of the respondent, was summoned to appear before the applicant to provide evidence with regard to the recommendation for the award of contracts in respect of the Barracks Relocation Project and JDIP. Thereafter, a number of other employees of the respondent were summoned by the applicant, on different dates, to attend hearings in order to facilitate investigations into the award of contracts under the Barracks Relocation Project and JDIP.

[13] It is clear from the transcript of the proceedings that enquiries were being made into the respondent's application for registration and they continued even after the respondent's registration certificate had been revoked. The respondent took issue with these hearings and the revocation of its registration and so, made an *ex parte* application dated 30 January 2014 for inter alia: (i) leave to apply for judicial review; (ii) that the grant of leave operate as a stay of the judicial hearing being conducted by the applicant; and (iii) an interim injunction restraining the applicant from continuing to hold hearings into matters concerning the registration particulars of and the award of contracts to the respondent under the Barracks Relocation Project and JDIP. This

application was made against the NCC, the applicant, the Minister of Agriculture and Fisheries, and the Attorney-General.

[14] The application was heard by P Williams J who, in an order dated 5 February 2014, granted leave to apply for judicial review and further ordered that the application for a stay of the judicial hearing and other interim relief be fixed for the first hearing of the claim on 3 March 2014.

[15] The respondent thereafter filed a claim against the applicant, the NCC, the Minister of Agriculture and Fisheries and the Attorney General for judicial review, damages and various declarations. This claim is presently before the Supreme Court.

Application for interim relief

[16] The application for the stay of the judicial proceedings and other interim relief was first heard by McDonald-Bishop J on 12 March 2014. The NCC, the Minister of Agriculture and Fisheries and the Attorney General were later removed, as defendants, from the application for the stay of proceedings and other interim relief at the respondent's request.

[17] During the application for the stay and other interim relief, McDonald-Bishop J explored a number of issues including: (i) jurisdiction to grant a stay and other interim relief; (ii) whether or not the hearings being conducted by the applicant were amenable to a stay; (iii) the statutory context within which the applicant had been conducting his investigations and hearings; (iv) the relationship between a stay and an interim

injunction in judicial review proceedings; (v) the availability of other protection to the applicant; and (vi) whether interim relief should be granted to the respondent.

[18] Although not specifically addressed in the submissions of the applicant's counsel, McDonald-Bishop J raised the issue as to whether she had jurisdiction to order a stay in circumstances where rule 56.4(9) of the Civil Procedure Rules, 2002 (CPR) states that a judge must direct whether or not the grant of leave to apply for judicial review operates as a stay. P Williams J however, did not so direct. McDonald-Bishop J in citing rules 56.13(1) and 26.1(2)(v) of the CPR and section 48(g) of the Judicature (Supreme Court) Act (JSCA) found that she had the power to entertain an application for a stay. The learned judge also cited rules 17.1(1)(a) and 56.4(10) of the CPR and sections 49(h) and 48(g) of the JSCA to show that she also had jurisdiction to entertain the application for the injunction sought by the respondent in its application for leave.

[19] To decide whether or not the hearings being conducted by the applicant were amenable to a stay, McDonald-Bishop J examined cases such as **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Another** [1991] 4 All ER 65 and **Gorstew Limited and Hon. Gordon Stewart O.J. v The Contractor-General** [2013] JMSC Civ 10 to show that stays can be granted to halt proceedings of inferior courts or tribunals. McDonald-Bishop J also examined the statutory framework of the Contractor-General Act in particular sections 4, 5, 17 and 18, and concluded that despite the need for the applicant's independence in the exercise of his statutory powers, he was nonetheless subject to the authority of the court. The learned judge

further found that in carrying out his functions, the applicant was exercising powers which could be the subject of judicial review and the hearings being conducted by the applicant were 'judicial proceedings' that were amenable to a stay.

[20] In examining the statutory framework within which the applicant operates, while McDonald-Bishop J recognized that the applicant's investigation was not solely centered on the respondent, she nonetheless found that it involved issues relating to the respondent's registration with the NCC. While the learned judge also acknowledged that the applicant was carrying out his duties in a statutory framework and had been given very wide powers as evidenced in sections 4, 17, 18 and 30 of the Contractor-General Act, she went on to find that the court was not prevented from determining whether or not the exercise of his powers in the instant case was indeed appropriate.

[21] Mrs Jacqueline Samuels-Brown QC, for the applicant contended that a stay was unnecessary in all the circumstances since the respondent had a right to silence and could not be forced to say anything to incriminate itself and moreover the respondent's registration with the NCC had already been revoked so there was nothing to stay. After considering the arguments, McDonald-Bishop J found that there were no other remedies available to the respondent since the constitutional right to silence was reserved for persons charged with a criminal offence and additionally, the respondent could not refuse to co-operate with the applicant in light of the criminal offences for which it could be charged under section 29 of the Contractor-General's Act. The learned judge also cited the case of **Regina (H) v Ashworth Hospital Authority and**

Others; Regina (Ashworth Hospital Authority) v The Mental Health Review Tribunal for West Midlands and North West Region and Others [2002] EWCA Civ 923 to support her finding that a stay was necessary, despite the revocation of the respondent's registration with the NCC, since it would increase the effectiveness of the judicial review process should the respondent succeed in its application.

[22] In considering whether interim relief should be granted and the type of interim relief that should be granted, McDonald-Bishop J relied on **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] UKPC 16 and **Regina (H) v Ashworth Hospital Authority and Others** to support her finding that the respondent was entitled to interim relief. In deciding which interim relief was more appropriate in all the circumstances, the learned judge examined the various submissions advanced by the parties, authorities and legal texts to find that there were serious issues to be tried and the respondent had an arguable case on which he might succeed. In finding that damages and other financial relief was not an adequate remedy and after finding that the balance of convenience was in the respondents favour, McDonald-Bishop J also found that it was appropriate to grant both a stay and an injunction. The learned judge's reasons for so doing were stated at paragraph [149] of her judgment where she said:

> "I form the view that a mere stay of the proceedings would mean that the 2nd respondent could be left free to embark on another enquiry not related to the one commenced in December 2013 but which could involve the claimant's registration with the NCC. It would seem to me that not only should the proceeding in being be stayed but that the 2nd respondent should also be restrained in his own right from

conducting this or any enquiry into or touching and concerning the registration of the claimant with the NCC until the determination of the court proceedings. The court cannot act in futility."

[23] After making these findings, McDonald-Bishop J made the following orders:

"1. That from the date hereof, being 29 April 2014 [the date of the judgment], until the determination of the claimant's application for judicial review or until further orders:

i) there shall be a stay of that aspect of the judicial hearing being conducted by the 2nd respondent into the application of the claimant for registration and all matters relating and incidental thereto which forms part of the investigation into the recommendation for the award of contracts - Proposed Barracks relocation project - Constructions of Houses - Springfield, Clarendon; Stokes Hall, St. Thomas; and Hampton Court, St. Thomas; and (2) the Jamaica Infrastructure Development Programme (JDIP), that commenced on or before 12th day of December 2013; and

ii) the 2nd respondent, by himself, his servants or agents, is restrained from continuing to hold the judicial hearing that commenced on or before 12th day of December 2013 or from commencing any other hearing or investigation into the claimant's application for registration with the NCC or matters incidental and relating thereto whether as part of the wider investigations into (1) recommendation for the award of contracts - Proposed Barracks re-location project - Constructions of Houses - Springfield, Clarendon; Stokes Hall, St. Thomas; and Hampton Court, St Thomas; and (2) the Jamaica Infrastructure Development Programme (JDIP), or otherwise.

2. The requirement for the claimant to give an undertaking as to damages is dispensed with.

3. Costs of this application shall be costs in the claim.

4. …"

[24] Immediately after the judgment was delivered, the applicant through one of its counsel Mrs Tameka Jordan sought permission to appeal against the decision to grant a stay but this application, heard orally, was refused by McDonald-Bishop J.

The application for permission to appeal

[25] The applicant then sought permission to appeal against that decision, in this court, in a notice of application for leave to appeal filed 13 May 2014. The grounds of the application advanced therein were as follows:

> a. That on the 29th April 2014 Her Honour [sic] Mrs. Justice McDonald-Bishop refused the applicant's application for leave to appeal her decision.
>
> b. That on 29th April 2014 the [sic] Her Honour [sic] Mrs. Justice McDonald-Bishop ordered that the Contractor General of Jamaica stay his investigations pending the determination of the Judicial Review Hearing.
>
> c. That pursuant to Sections 18 and 24 of the Contractor General Act, the Contractor General of Jamaica is permitted by law, as part of its [sic] investigative powers, to conduct hearings for the purpose of gathering information and its investigation.
>
> d. Pursuant to Rule 1.8(1)-(4) of [the] Court of Appeal Rules.
>
> e. Such further grounds as are set out in the Affidavit of Gillian Pottinger filed herein."

Additional grounds sought in the application for permission to appeal can be gleaned from the affidavit of Gillian Pottinger filed 13 May 2014, which ought properly to have been stated in the notice of application for permission to appeal, were as follows:

1. The applicant has a real chance of success if leave were to be granted to appeal since the appeal involves matters of law and the appropriateness of the judge's exercise of discretion in granting a stay and an injunction.
2. The investigations being conducted by the Office of the Contractor-General are of national importance and as such, it is in the public interest that the stay is lifted and the injunction is set aside and the Office of the Contractor-General is permitted to continue its investigations.
3. Removing the stay will not impact any decision arrived at in the judicial review proceedings.

Proposed grounds of appeal

[26] The draft notice of appeal attached to the affidavit of Gillian Pottinger filed 13 May 2014 that would seek to challenge McDonald-Bishop J's grant of the stay and the injunction contained 15 grounds of appeal that can be summarized as follows:

i) The learned judge failed to pay sufficient regard to the fact that the investigations being conducted by the applicant were of national importance and were being conducted in the public interest.

ii) McDonald-Bishop J, in granting the stay and the injunction, interfered with the exercise of the wide powers granted to the applicant by virtue of the Contractor-General Act.

iii) McDonald-Bishop J's grant of the stay is a nullity since the stay ought to have been granted by the judge who granted leave to appeal pursuant to the CPR.

iv) The learned judge was wrong to conclude that the hearings being conducted by the applicant could be subjected to a stay since they were merely a part of the investigation and were not judicial in nature.

v) The learned judge erred in granting the injunction since it had not been sought or properly applied for by the respondent.

vi) The grant of a stay and an injunction were not necessary since there would be no prejudice to the respondent if the stay and the injunction is lifted since it had not been proved that the respondent would be subject to any substantial prejudice and the respondent had been protected by the rule against self-incrimination. The balance of convenience therefore lay with the respondent in continuance of its investigations.

Additional applications

[27] On 26 June 2015 the respondent filed a notice of application for court orders seeking inter alia: (i) to strike out the application for permission to appeal or in the alternative; (ii) an order that certain paragraphs in the affidavit of Gillian Pottinger filed

13 May 2014 in support of the application for leave to appeal be struck out; (iii) that the second affidavit of Gillian Pottinger filed 2 June 2015 be struck out; and (iv) wasted costs and/or costs to the respondent. However by letter addressed to the registrar of the Court of Appeal dated 16 July 2015, the following was agreed between Mr Abraham Dabdoub counsel for the respondent and Mrs Jacqueline Samuels-Brown for the applicant:

> "1. The respondent, Cenitech Engineering requests that the Court treat the document entitled "Applicant's Expanded Skelton Arguments/ Submissions" as its "Written Submissions" ordered by the Court on 11th May 2015.
>
> 2. Once the matter in (1) above meets the court's approval the applicant [Cenitech] will not pursue the first order sought in its application filed on the 26th June, 2015, that is to say, its application that the application for leave to appeal be struck out.
>
> 3. As it relates to the order that paragraphs be struck from the Affidavit of Gillian Pottinger filed on the 13th of May, 2014 the parties have agreed that paragraphs 15 to 30 be excised from the said Affidavit.
>
> 4. The parties have also agreed that the 2nd Affidavit of Gillian Pottinger filed on the 9th July 2015 be struck out."

Applicant's submissions on the application for permission to appeal

[28] The submissions advanced by Mrs Samuels-Brown in support of the application for permission to appeal deviated somewhat from the grounds of appeal advanced, so I will endeavour to focus in a summary way on the oral arguments advanced in support of her application in court and also the arguments advanced in her written submissions.

[29] It was Mrs Samuels-Brown's contention that in judicial review proceedings, the jurisdiction to grant a stay is gleaned from rule 56.4(9) of the CPR, which is inextricably linked to the grant of leave. Therefore, a judge who grants an application for judicial review ought to make the order granting a stay. Since P Williams J did not grant the stay, the question of the stay was moot and consequently, McDonald-Bishop J had no power to direct that there should be a stay of the proceedings.

[30] Mrs Samuels-Brown, in relying on **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Another**, contended that the applicant's decision to investigate could not be the subject of any order for a stay. Moreover, by virtue of **Moran v Lloyds (A Statutory Body)** [1981] 1 Lloyd's Rep 423 and **Herring v Templeman and others** [1973] 3 All ER 569, the hearings being conducted by the applicant were not judicial proceedings since the applicant only had the power to report and recommend and could not take disciplinary action. Mrs Samuels-Brown also commented that the learned judge herself harboured doubts as to whether she had the power to grant a stay which was evident in paragraph [41] of the judgment, where she said:

> "I have felt it necessary to address the issue out of an abundance of caution, because there is nowhere else in the in the [sic] Rules, particularly in part 56, where it is expressly provided that the judge at first hearing can direct a stay…"

[31] While Mrs Samuels-Brown accepted that section 48 of the JSCA empowers a judge to grant interim relief, she asserted that part 17 of the CPR states that when

applying for an injunction, a specific application must be made in a prescribed form. Since no such application had been made, counsel submitted that McDonald-Bishop J had no power to grant an injunction.

[32] Mrs Samuels-Brown submitted further that there was no basis for McDonald-Bishop J's grant of stay of the proceedings for two main reasons. The first was that the respondent's application for interim relief would only properly lie against the NCC and the Ministry, since the applicant had merely passed information to the NCC who had revoked the registration certificate of the respondent. Therefore, counsel stated, neither a stay nor an injunction could cure the impact of a decision already spent. Secondly, there is a constitutional protection against self incrimination pursuant to section 18(5) of the Contractor-General Act which had been claimed by the respondent and which had been given effect to by the applicant in the hearings.

[33] Learned Queen's Counsel Mrs Samuels-Brown argued that all these factors taken cumulatively increased the chances of the applicant's success on appeal. However, should the court decide that there was no real chance of success, she invited this court to examine the case of **Smith v Cosworth Casting Processes Limited** [1997] EWCA Civ 1099 which held that, leave to appeal may be granted where there is no realistic prospect of success, but where the case is concerned with matters of public interest and raises an issue which the law ought to clarify. She also invited the court to examine **The Iran Nabuvat** [1990] 3 All ER 9 which held that in deciding whether to grant

leave to appeal, the court should also look at whether or not the appeal is arguable and also raises a novel issue.

[34] Mrs Samuels-Brown further submitted that, since the instant case involves issues of interpretation of the Contractor-General Act, which have never been pronounced upon before, by any court, this issue merits a ruling by the appellate court. Moreover, the functions being performed by the applicant were being done in the public interest and so any attempt to curtail those functions ought to be explored judicially. Mrs Samuels-Brown further argued that there were various issues which necessitated legal interpretation including:

a) the nature of the applicant's investigative functions, the extent of its powers and how they were to be exercised;
b) the significance of the applicant's characterization of its hearings as 'judicial hearings'; and
c) the meaning and import of sections 18(2), 18(3), 18(5) and 23(2) of the Contractor-General Act.

Consequently, counsel submitted that these unresolved issues should be a basis upon which the court could grant permission to appeal.

Respondent's submissions in response to the application for permission to appeal

[35] Mr Dabdoub rejected any suggestion that the inherent jurisdiction of a judge could be limited in the manner described by Mrs Samuels-Brown. He submitted that the proper interpretation of rule 56.4(9), is that it requires that the judge granting leave to

apply for judicial review must direct whether or not the grant of leave operates as a stay of the proceedings but the provision does not mandate that an application for interim relief must be heard by the judge granting leave to apply for judicial review.

[36] It was also Mr Dabdoub's contention that there were various rules in the CPR which give a judge the power to grant interim remedies, for example rules 26.1(2)(v) and 56.4(10) of the CPR and sections 48(e), (g) and 49(h) of the JSCA. Rules 17.1(a) and 56.1(4) of the CPR contemplate that a judge may grant an injunction during any stage of the judicial review process.

[37] Mr Dabdoub endeavoured to persuade this court that McDonald-Bishop J was correct to find that the hearings and investigations being conducted by the applicant were subject to a stay. He submitted that although in **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Another**, Lord Oliver of Aylmerton stated that executive decisions already spent were not amenable to a stay, that statement, he said, was inapplicable to the instant case, because the hearings being conducted by the applicant were judicial and not executive in nature. In support of this argument, he cited section 18(2) of the Contractor-General Act which describes the investigative hearings being conducted by the applicant as 'judicial proceedings'. He also submitted that the hearings being conducted by the applicant were judicial in nature since witnesses gave evidence on oath and the Contractor-General himself, had referred to the hearings being conducted as 'judicial proceedings'.

[38] Mr Dabdoub further explored the wide investigative powers vested in the applicant as stated in sections 15, 16, 17, and 18 of the Contractor-General Act which are akin to those judicially exercised by a Supreme Court judge. This, he contended, further proved that the proceedings being conducted by the applicant were indeed judicial and not executive. He also submitted that the positions outlined in **Moran v Lloyds** and **Herring v Templeman** are inapplicable to the instant case since both cases addressed the exercise of administrative and not judicial functions.

[39] Mr Dabdoub also contended that, although the respondent's registration had already been revoked by the NCC, the grant of a stay of proceedings was necessary since the applicant continued to hold judicial hearings even after the revocation of the respondent's registration. He cited **Regina (H) v Ashworth Hospital Authority and Others** to show that even where a decision had already been made, a successful judicial review challenge could operate to correct the damage that had been done or may acknowledge that some damage had been done. Mr Dabdoub further asserted that the protection against self-incrimination did not apply in civil proceedings and cited **The Independent Commission of Investigations v Digicel (Jamaica) Limited** [2015] JMCA Civ 32 in support of that position.

Discussion and analysis

Criteria for the grant of leave to appeal

[40] McDonald-Bishop J had made orders that, inter alia, granted a stay of the proceedings being conducted by the applicant pending the outcome of the judicial

review claim with respect to matters concerning the respondent. This order would be interlocutory for the purposes of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA) which prescribes that:

> "No appeal shall lie---
>
> without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except..."

Therefore, the jurisdiction of this court cannot be invoked without the leave of the court below or leave from this court itself save in matters specifically excepted. The applicant was denied leave to appeal by McDonald-Bishop in the court below and has thus sought permission to pursue an appeal in this court.

[41] Rule 1.8(9) of the Court of Appeal Rules, 2002 (CAR) provides that permission to appeal will only be given if the court considers that an appeal will have a "real chance of success" which means that the prospects of success should be "realistic as opposed to fanciful" (**Swain v Hillman and another** [2001] 1 All ER 91). This principle has been confirmed in a number of cases coming from this court such as **Donovan Foote v Capital and Credit Merchant Bank Limited and Anor** [2012] JMCA App 14 where my learned brother Morrison JA (as he then was) said at paragraph [41] that:

> "I therefore accept that, in order for leave to appeal to be granted in this case, the applicant must show that he has a real, and not a fanciful or unrealistic chance of success in the proposed appeal..."

In refusing the application for permission to appeal, my learned brother Morrison JA stated at paragraph [55] of the judgment that "… the applicant had not made good his submission that an appeal by him in the instant case would have a real – or indeed, any – chance of success".

[42] The question of the appropriate criteria for the grant of leave to appeal was raised as an issue by Mrs Samuels-Brown in her submissions when she argued that the criteria for the grant of permission to appeal should be expanded. Mrs Samuels-Brown asked this court to consider the cases of **Smith v Cosworth** and **The Iran Nabuvat** which both held that in deciding whether to grant permission to appeal, an assessment as to whether the appeal had a realistic prospect of success was not the only criterion. **Smith v Cosworth** involved an application to set aside an order granting leave to appeal. Lord Woolf MR in deciding whether to grant leave to appeal said in part:

> "1. The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.
>
> 2. The court can *grant* the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.
> ..."

The Iran Nabuvat concerns an application for review of an ex parte order granting leave to appeal. Lord Donaldson of Lymington MR in rejecting the notion that the only appropriate test was probability or reasonable likelihood of success stated that "no one should be turned away from the Court of Appeal if he has an arguable case if the appeal involved a novel point."

[43] Smith JA in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited and National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and Design Matrix Ltd** SCCA No 109/2007 App No 166/2007 judgment delivered 26 September 2008 seemed to have accepted the argument that the criteria for the granting of permission to appeal could be extended. At pages 9-10 of his judgment he said:

> "The use of the word "general" to describe "rule" suggests that this rule applies barring special exceptions. Thus leave may also be granted in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. See Lord Woolfe MR Practice Note (Court of Appeal: procedure 1998) (1998) 1 All ER 186. It has been said that the phrase "real chance of success" means "realistic" as opposed to a "fanciful" prospect of success - See **Swain v Hillman** (**2001**) 1 All ER 91 which was applied by this court in **Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No. 103/2004 delivered May 25, 2005.
>
> The following principles may be extracted from the authorities:
>
> (1) Generally, leave will be given unless an appeal will have no realistic prospect of success. A fanciful prospect is not sufficient.

(2) Leave may also be given in exceptional circumstances, even though the case has no real prospect of success, if there is an issue which, in the public interest, should be examined by the Court of Appeal.
..."

[44] The argument that by virtue of **The Iran Nabuvat** the criteria for the grant of permission to appeal could be extended had been advanced by counsel in **Donovan Foote v Capital and Credit Merchant Bank Limited and Anor**. However, at paragraph [41] of the judgment, this court ruled that the test in this case could not override the clear language of rule 1.8(9) of the CAR.

[45] **Smith v Cosworth**, **The Iran Nabuvat** and the ensuing practice directions, including Lord Woolfe's practice direction cited by Smith JA in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited and National Commercial Bank v Evanscourt Estate Company Limited and Design Matrix Ltd**, were based on the English Civil Procedure Rules. Rule 52.3(6) of the English Civil Procedure Rules provides that:

"Permission to appeal will only be given where-

(a) the court considers that the appeal would have a real chance of success; or

(b) there is some other compelling reason why the appeal should be heard..."

There is no indication that in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited and National Commercial Bank v Evanscourt Estate Company Limited and Design Matrix Ltd** the specific

provisions of the English Civil Procedure Rules had been considered by Smith JA against the provisions of the Jamaican CAR in order to recognise the distinction between both rules. Smith JA seems to have interpreted the word 'general' describing 'rule' to mean that there could be some other basis on which permission to appeal may be given. However, the rule states that permission to appeal in civil cases "will only be given" if the court considers that the appeal will have a real chance of success. That clearly indicates a stringent and limited application. It could not in my view also embrace exceptional circumstances, or issues in the public interest.

[46] When comparison is made between the English Civil Procedure Rules with respect to the criteria for permission to appeal and the CAR from this jurisdiction (stated in paragraph [41] herein), it is evident that the rules in the CAR do not contain any provision that permission to appeal may be granted based on 'compelling reasons' but only addressed permission being given if the appeal had a 'real chance of success'. The fact that there are glaring differences between the English Civil Procedure Rules and the CAR means that dicta in cases which generally extend the criteria for the grant of permission to appeal cannot apply in this jurisdiction. While it is true that this application may have raised novel issues and invited public interest, it is my view that the arguments upon which these considerations have been based are more suitable for the judicial review application in the Supreme Court and should be canvassed there.

[47] In light of the foregoing, there is no legal basis upon which this court can extend the criteria for an application for permission to appeal and consequently, in my view,

the success of an application for permission to appeal is still based on whether the appeal has a real chance of success.

Applications for leave to obtain judicial review, a stay of proceedings and an injunction

[48] Based on the grounds of the application for permission to appeal, the grounds filed in the proposed appeal and various arguments advanced by the parties in relation thereto, there are, in my view, four main issues which this court must examine in order to decide whether the applicant has shown that the proposed appeal has a real chance of success:

i) Did McDonald-Bishop J have jurisdiction to grant a stay in light of the provisions of rule 56.4(9) of the CPR?

ii) Did McDonald-Bishop J have jurisdiction to grant an injunction where a specific application was not made for the same?

iii) Were the proceedings being conducted by the applicant amenable to a stay?

iv) Was a stay of the investigations by the applicant still necessary after revocation of the respondent's registration?

In light of rule 56.4(9) of the CPR, does a judge, other than the judge granting leave to apply for judicial review, have jurisdiction to grant a stay?

[49] It was a point of contention as to whether McDonald-Bishop J had the power to grant a stay in circumstances where rule 56.4(9) provides that the judge who grants leave to proceed to judicial review must direct whether the grant of leave operates as a

stay, and in this case the order for a stay of proceedings had not been made by P Williams J who granted leave. The learned authors of Halsbury's Laws of England, (2009) Volume 11 at paragraph 529 stated that:

> "...The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Civil Procedure Rules or under the court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation."

In order to ascertain whether there is an arguable appeal on this point, it is necessary to do an analysis of the CPR and the JSCA to ascertain whether McDonald-Bishop J had the power to grant a stay in circumstances where the judge granting leave to apply for judicial review did not so order.

The Civil Procedure Rules

[50] Under rule 26.1(2)(e) of the CPR the court may stay the whole or part of any proceedings or either generally or until a specified date or event. However, it is necessary to review rule 56.4 of the CPR specifically since this rule governs the hearing of the application for leave to apply for judicial review and this is relevant to the instant case.

[51] Rule 56.4(9) is of great significance in these deliberations because Mrs Samuels-Brown contended that based on this rule the order for the stay should have been made by the judge who granted leave (P Williams J) and not another judge. The rule states that:

> "Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings."

This rule seems to mandate that where orders of certiorari or prohibition are sought, the judge must direct whether or not the grant of leave operates as a stay of the proceedings. It does not mandate that the application for a stay or other interim relief must only be heard by the judge who grants leave to proceed to judicial review.

[52] What is interesting about the CPR is that although rule 56.4(9) appears to be mandatory, the remaining provisions in rule 56.4 of the CPR do not seem to restrict the judge's power in this way. The relevant provisions of that rule are as follows:

Rule 56.4(3):

> "However, if –
> (a) the judge is minded to refuse the application;
> (b) the application includes a claim for immediate interim relief; or
> (c) it appears that a hearing is desirable in the interests of justice,
> the judge must direct that a hearing be fixed."

Rule 56.4(8):

> "The judge may grant leave on such conditions or terms as appear just."

Rule 56.4(10):

> "The judge may grant such interim relief as appears just."

[53] Rule 56.4(3) suggests that where an application for leave includes an application for immediate interim relief, a hearing must be fixed. This rule does not direct that both applications must be heard by the same judge, at the same time and on the same date

and further reinforces the point that an application for leave to pursue judicial review which had included an application for interim relief may be dealt with separate and apart from the application for leave. Rule 56.4(8) provides that a judge may grant leave on the terms and conditions that appear just, and rule 56.4(10) gives the judge the power to grant any interim relief that appears just. Again, in my view, there are no provisions in these rules, which prevented McDonald-Bishop J from granting a stay and other interim relief, but rather, the provisions expanded the orders which she could make.

[54] There are other provisions in the CPR that seem to reinforce McDonald-Bishop J's jurisdiction to grant the stay. By virtue of rule 56.13(1), parts 25 to 27 of the CPR are applicable to ensure an expeditious and just trial of the claim. Part 25 of the CPR speaks to the objective of case management conferences and under rule 26.2(v) of the CPR the court may "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective". Part 27 of the CPR speaks to the procedure to be followed when holding case management conferences.

Statute

[55] The inherent jurisdiction of the court to stay proceedings is preserved by the JSCA. Sections 27, 48(e) and 48(g) are as follows:

> Section 27 provides that:
>
> "Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island

all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island,..."

Section 48(e) provides that:

"No proceeding at any time when pending in the Supreme Court shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of such proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; but nothing in this Act contained shall disable the Court from directing a stay of proceedings in any cause or matter pending before it if it thinks fit, and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not been passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Court, by motion in a summary way, for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as is just."

Section 48 (g) provides that:

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

[56] Having analysed these sections of the JSCA, it is clear, that section 27 stipulates that the Supreme Court may exercise all such jurisdiction (i.e. jurisdiction not conferred on it by that Act or any other Act), as was exercisable by it immediately before the commencement of the Act, which would include the inherent jurisdiction to grant a

stay. Section 48(e) confirms a judge's inherent jurisdiction to grant a stay of proceedings in any matter before it, and section 48(g) empowers the court to grant any remedy it deems just which would include a stay. It therefore follows that a Supreme Court judge is empowered to grant a stay of proceedings.

[57] In concluding this issue, even if we were to accept that the provisions in rule 56.4(9) of the CPR suggest that on the grant of leave to pursue judicial review, the judge must direct whether or not the grant of leave operates as a stay of proceedings, which in my view and in the circumstances does not appear to be the case, the provisions in the CPR cannot supersede legislative provisions in the JSCA. Although McDonald-Bishop J, was not the judge who granted leave, by virtue of the numerous provisions of the CPR and sections 27, 48(e) and 48(g) of the Judicature (Supreme Court) Act, she had the power to grant the stay of proceedings. Consequently, the attempt being made by the applicant to challenge McDonald-Bishop J's exercise of discretion has no real chance of success.

Is there jurisdiction to grant an injunction that was not applied for?

[58] Mrs Samuels-Brown submitted that McDonald-Bishop J had no jurisdiction to grant an injunction because this remedy had not been specifically applied for in the *ex parte* (without notice) application for leave to apply for judicial review in accordance with part 17 of the CPR. However, as Mr Dabdoub correctly submitted, in the said application filed 30 January 2014, at 'section 2' order numbered '18', the respondent did seek an interim injunction against the applicant in the following terms:

> "An interim injunction restraining the 2nd Respondent from continuing to hold the Judicial Hearing into the (1) recommendation for the award of contracts - Proposed Barracks Relocation project - Constructions of Houses - Springfield, Clarendon; Stokes Hall, St. Thomas; and Hampton Court, St. Thomas; and (2) the Jamaica Infrastructure Development Programme (JDIP), commenced on the 12th December 2013 pending the outcome of the judicial review."

Evidence in support of this application can be found in the affidavit of Clava Mantock Junior filed 30 January 2014 in support of the without notice application for leave to apply for judicial review.

[59] In my view, McDonald-Bishop J correctly stated at paragraph [52] of her judgment that by virtue of rule 17.1(1)(a) of the CPR the court may grant interim remedies including an interim injunction. In relation to an application for leave to pursue judicial review, rule 56.1(4) of the CPR provides that the court may in addition to or instead of an administrative order, grant private law remedies which includes an injunction. Rule 56.4(10) of the CPR provides that the court can grant any interim relief as appears just. Paragraph [53] herein also sets out additional rules under which McDonald-Bishop J could have granted an injunction.

[60] The inherent jurisdiction of this court to grant orders for the just determination of cases, which would ipso facto include an interim injunction is preserved in section 27 and section 48(g) of the JSCA. However, the power to grant an interim injunction is specifically conferred upon the court by section 49(h) of the JSCA which states that:

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be

> made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."

[61] In deciding to grant an injunction, McDonald-Bishop J found that there were serious issues to be tried and that the balance of convenience lay with the respondent. These findings were not challenged before the court. Nonetheless, I find that there would have been no irremediable harm caused to the applicant in these circumstances since the stay and the injunction relate specifically to the respondent with regards to its registration with the NCC and the contracts it was awarded under the Barracks Relocation Project and JDIP and additionally, would not prevent the applicant from conducting investigations generally in relation to these projects in the public interest. On the contrary, if a stay had not been granted, the proceedings would have continued thereby rendering the judicial review proceedings nugatory. It follows therefore, that the balance of convenience lies in the respondent's favour and I therefore agree with McDonald-Bishop J's conclusion in that regard.

[62] In light of the fact that the respondent sought an interim injunction in its application for leave to apply for judicial review and in light of the provisions of the CPR and the JSCA which recognise the ability of a Supreme Court judge to grant an interim

injunction, in my view, McDonald-Bishop J was empowered to grant interim relief in the form of an interim injunction. The arguments advanced by Mrs Samuels-Brown to challenge the learned judge's discretion to grant an injunction therefore must fail and would not appear to have any real chance of success on appeal.

Were the hearings or proceedings being conducted by the applicant amenable to a stay?

[63] The Judicial Committee of the Privy Council in **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor** addressed the issue of the types of decisions that were amenable to a stay. In that case, the applicants, who were retail motor dealers in Jamaica, were aggrieved at a reduction in the allocation of imported motor vehicles made to them for the year 1988–89 by the sole importer which was licensed by the Minister of Foreign Affairs Trade and Industry to import motor vehicles into Jamaica at the direction of the minister. The applicants sought leave to apply for an order of certiorari to quash the allocations, alternatively an order of prohibition directed to the minister preventing him from implementing the allocation or alternatively an order of mandamus directing the minister to make a fair allocation. They further sought an order that all allocations be stayed pending final determination of the proceedings. Ellis J made an *ex parte* order granting the relief sought including the stay of allocations. The minister applied for the order to be set aside on the grounds that the allocation had already been made and that well before the order was made by the judge instructions had been given to the import corporation to order vehicles. That

application was heard by Clarke J who lifted the stay. The applicants appealed to this court which allowed the appeal and reimposed the stay.

[64] The minister appealed to the Privy Council to decide, *inter alia*, whether a stay of proceedings which arose when leave was granted pursuant to section 564B(4) of the Judicature (Civil Procedure Code) Law of Jamaica to apply for an order of prohibition or certiorari was in the nature of injunctive relief and, if so, whether injunctive relief could be granted against the Crown and/or officers of the Crown. It was held, *inter alia*, that a stay of proceedings had no application to an executive decision that had already been made. Lord Oliver of Aylmerton in delivering the judgment of the Board at page 71 said:

> "...A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (eg to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled (see *La Grange v McAndrew* (1879) 4 QBD 210). Section 564B(4) of the Civil Procedure Code provides:
>
> > '... the grant of leave under this section to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of

> the application or until the court or judge otherwise orders.'
>
> This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made. In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless. If it was desired to inhibit JCTC from implementing the allocation which had been made and communicated to it or to compel the appellant, assuming this were possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved only by an injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made. The appellant's apprehension that that was what was intended by the order is readily understandable, but if that was what the judge intended by ordering a stay, it was an entirely inappropriate way of setting about it. He had not been asked for an injunction nor does it appear that he considered or was even invited to consider whether he had jurisdiction to grant one. Certainly none is conferred in terms by s 564B. An injunction cannot be granted, as it were, by a sidewind and if that was the judge's intention it should have been effected by an order specifying in terms what acts were prohibited or commanded. As it was there were no 'proceedings' in being upon which the 'stay' could take effect...”

[65] What is clearly stated in this case is that although a stay can be granted against administrative/executive decisions, a stay cannot be granted against an executive decision that had already been made. However, the main issue in the instant case related to whether the proceedings being conducted by the applicant were judicial proceedings that could be subjected to a stay (when the decision to revoke the respondent’s licence and award of contracts previously granted to the respondent had already been made). It is therefore prudent to ascertain the true nature of the

proceedings being conducted by the applicant before considering whether a stay was necessary in the instant case.

[66] Mrs Samuels-Brown in relying on **Moran v Lloyds** and **Herring v Templeman** contended that these hearings were not judicial in nature but were merely administrative because the powers conferred upon the applicant were used to further his investigations. In **Moran v Lloyds**, auditors conducted hearings to determine whether disciplinary proceedings should be held against the claimant and a decision was made that there was prima facie evidence to pursue disciplinary proceedings against him. The claimant sought an injunction to stop the proceedings and it was held that an injunction was inapplicable to the proceedings since the hearing was only relative to the question as to whether charges should be laid and did not adversely affect the applicant.

[67] In **Herring v Templeman** an academic body made a recommendation to the governing body of a college to dismiss a student. When the recommendation was made, a hearing was held so that the student could provide reasons why he should not be dismissed. A decision was taken to dismiss him and he sought to appeal that decision on the basis that, *inter alia*, he should have been given a hearing by the academic board before his dismissal was recommended. It was held, *inter alia*, that there was no implied obligation to accord a student a hearing. Also in any event, the board only had the power to make recommendations to expel.

[68] The cases of **Moran v Lloyds** and **Herring v Templeman** are clearly distinguishable from the case at bar since the powers that are conferred upon the applicant far outweigh those stated in those cases. In order to make an assessment of these powers, one must examine sections 15-18 of the Contractor-General Act which reads as follows:

> "15. (1) Subject to subsection (2), a Contractor-General may, if he considers it necessary or desirable, conduct an investigation into any or all of the following matters-
>
> (a) the registration of contractors;
> (b) tender procedures relating to contracts awarded by public bodies;
> (c) the award of any government contract;
> (d) the implementation of the terms of any government contract;
> (e) the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence;
> (f) the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licences.
>
> (2) A Contractor-General shall not, without the prior approval of the Secretary to the Cabinet acting at the direction of the Cabinet, investigate-
>
> (a) any government contract or any matters concerning any such contract entered into for purposes of defence or for the supply of equipment to the Security Forces; or
> (b) the grant or issue of any prescribed licence for the purposes of defence or for the supply of equipment to the Security Forces,
>
> and any report or comment thereon by the Contractor-General shall be made only to the Cabinet.
>
> 16. An investigation pursuant to section 15 may be undertaken by a Contractor-General on his own initiative or as a result of representations made to him, if in his opinion such investigation is warranted.

17. (1) A Contractor-General may adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of this Act, may obtain information from such person and in such manner and make such enquiries as he thinks fit.

(2) Nothing in this Act shall be construed as requiring a Contractor-General to hold any hearing and, no person shall be entitled as of right to comment on any allegations or to be heard by a Contractor-General.

…

18. (1) Subject to the provisions of subsection (5) and section 19 (l), a Contractor-General may at any time require any officer *or* member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person.

(2) Subject as aforesaid, a Contractor-General may summon before him and examine on oath-

(a) any person who has made representations to him, or

(b) any officer, member or employee of a public body or any other person who, in the opinion of the Contractor-General, is able to furnish information relating to the investigation,

and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.

(3) For the purposes of an investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

…

(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

…"

[69] By virtue of these sections, it is clear that the applicant has considerable power when investigating all matters related to the contract award process and when exercising these powers he is indeed carrying out a judicial function. Section 16 of the Contractor-General Act empowers the applicant to undertake an investigation on his own initiative and section 17 allows the applicant to conduct hearings to further his objectives in ensuring lawfulness and transparency in the contract award process. In these hearings, the applicant has the power to hear and receive evidence from persons on oath. Section 18 of the Contractor-General Act classifies these hearings as judicial proceedings within the meaning of section 4 of the Perjury Act which defines judicial proceedings as a "proceeding before any court, tribunal, or person having by law power to hear, receive and examine on oath". In conducting these hearings, the applicant has the power of a Supreme Court judge.

[70] The Contractor-General himself had referred to these hearings as judicial proceedings for example:

1) In exhibit "GK 2" which is the transcript of proceedings held on 17 December 2013 attached to the affidavit of George Knight dated 4 March 2014, the chairman of the hearing Mr Craig Berrisford said at page 126 of the transcript:

> "Mr Knight, lets go back to that question because I don't think we can necessarily accept that response, that you cannot divulge that information. This is a judicial proceeding so we are going to ask [sic] full response to that particular question. And you may consult with your attorney."

2) Exhibit "TB 5" is the transcript of proceedings held on 14 January 2014 attached to the affidavit of Tania Bell dated 4 March 2014, the Contractor-General said at page 282 of the transcript:

> "For the purposes of the exercise the hearing is being conducted pursuant to Section 18 of the Contractor General Act. I am going to ask Miss Bell to indicate that what she has been required to do is to provide answers to the Contractor General exercising powers as a High Court Judge. In that regard I am giving you an option which you can seek to clarify Miss Bell from your legal advisors whether you wish to give evidence on oath, if for any reason that for religious or otherwise you choose not to swear on the Bible you could affirm and if you don't choose to do that either I think you could give true answers."

3) At page 32 of the same proceeding (page 305 of the transcript) the Contractor-General said:

> "I am addressing Mr Dabdoub, if Mr Dabdoub wishes to yield to you he may do so, we are still in a judicial hearing it is not a free-for-all still, Mr Dabdoub will advise you how we do this..."

4) In the same proceedings, Mr Maurice Barrett, Chief Investigator, said at page 315 of the transcript:

> "Miss Bell you visited the office sometime in December 2013, similar judicial proceedings, do you recall being asked to provide this documentation to us or to make them available?"

[71] Furthermore, there is nothing stated in the Constitution or the Contractor-General Act that lists the applicant as a part of the executive arm of the government. As a consequence, the hearings being conducted by the applicant were not executive in nature, they were indeed judicial proceedings being conducted by an inferior tribunal

and were in train. The proceedings were 'not spent' and so the decision could not have been already made. So to the extent that the applicant is not exercising an executive decision which has already been made, then that aspect of Lord Oliver of Aylmerton's statement in **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor** will not apply. Moreover, **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor** also held that a stay "makes perfectly good sense in the context of proceedings before an inferior court or tribunal" and as the hearings being conducted by the applicant had in fact been judicial proceedings, they were clearly amenable to a stay. Consequently, this argument has no real chance of success and must fail.

Necessity of a Stay

[72] Mrs Samuels-Brown had contended that a stay against the applicant was not necessary because: (i) there was a right against self-incrimination provided for in section 18(5) of the Contractor-General Act and the Charter of Fundamental rights and freedoms and (ii) the NCC had already made the decision to revoke the applicant's registration.

Right against self-incrimination

[73] Section 18(5) of the Contractor-General Act provides that "no person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law". This section clearly does not give the respondent a right to silence.

The constitutional right to silence is found in section 16(6)(f) of the Charter of Fundamental Rights and Freedoms which clearly reserves this right for persons charged with criminal offences and is inapplicable to civil proceedings. Moreover, failure to comply with the applicant's investigations may result in criminal charges pursuant to section 29(b) of the Contractor-General Act as follows:

> "Every person who-
> (a) ...
>
> (b) without lawful justification or excuse-
> (i) obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or
>
> (ii) fails to comply with any lawful requirement of a Contractor-General or any other person under this Act; or
>
> (c)…
>
> shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment."

[74] Based on these principles, I must respectfully disagree with Mrs Samuels-Brown's submissions in this regard. To the extent that McDonald-Bishop J correctly, recognised that the right not to say anything to incriminate oneself was inapplicable to the instant case, any argument to the contrary must also fail and cannot have a real chance of success.

Revocation of respondent's registration with the NCC

[75] Mrs Samuels-Brown had also sought to convince this court that the grant of a stay was unnecessary because the respondent's registration with the NCC and the subsequent contract award were already revoked. Mr Dabdoub, on the other hand, submitted that a stay was necessary since investigations were continuing. He further argued that an injunction was necessary to stop the initiation of new proceedings. I will now assess whether these arguments have merit.

[76] A stay may be necessary if one wishes to prevent the taking of steps to make a decision, prevent the implementation of the decision that had been made or reverse the permanent outcome of a decision that was unlawful. This notion was upheld in **Regina (H) v Ashworth Hospital Authority** where a patient who had a long history of violent conduct, had been detained for about six years in a special hospital pursuant to legislation. Despite objections from a majority of doctors, a mental health review tribunal ordered his discharge from detention, without after-care arrangements being in place for him, and in circumstances where his previous releases into the community had been unsuccessful. The hospital detained the patient. A judge stayed the tribunal's decision pending the hospital authority's application for judicial review of that decision which was subsequently refused. It was held, inter alia, that the court had jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision had been fully implemented. Dyson LJ in delivering his judgment examined three scenarios: (i) where an order was made but had not yet taken effect; (ii) where an order is made but had not yet been carried out and (iii) where an order

had already been implemented. It was held that the court had a jurisdiction to grant a stay in all three cases. In relation to the third case he said at paragraph 46:

> "I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be *suspended*. How can one say of a decision that has been fully implemented that it should *cease* to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. Take a decision by a tribunal to discharge a patient. The order has effect for the purposes of being implemented, ie, releasing him into the community. But it also has effect in a more general sense: it declares that at the time it was made, the tribunal was not satisfied that the criteria for the patient's continued detention were fulfilled. If the order is ultimately quashed, it will be treated as never having had any legal effect at all: see *R (Wirral Health Authority) v Finnegan and DE* [2001] EWCA Civ 1901, [2002] 02 LS Gaz R 27. If that occurs, it will be treated as if it had never been made, and the patient will once again become subject to the Mental Health Act regime to which he was subject before the order was made. It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented as in cases B and C."

It would therefore mean that although the respondent's registration with the NCC and the award of contracts was revoked, a stay could nonetheless be used to preserve the status quo in the event the revocation is deemed unlawful or quashed. Consequently, I cannot agree with the submissions advanced by Mrs Samuels-Brown in this regard and

in light of the above, find that in respect of this submission, the applicant will have no chance of success on appeal.

[77] In the instant case, the investigations and the proceedings being conducted by the applicant were ongoing and it follows that they could be stopped pending judicial review. This view had been accepted in a number of cases including the Board itself in **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor** and **Regina (H) v Ashworth Hospital Authority**. Fraser J in **Gorstew Limited and Hon. Gordon Stewart O.J. v The Contractor-General** at paragraph [172] also noted that the cases of **Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor** and **Digicel (Jamaica) Limited v The Office of Utilities Regulation** [2012] JMSC Civ 91 (which followed the decision of the Board) were distinguishable from cases where "decisions had been taken and implemented and since the investigations are ongoing, the court may grant a stay bringing them to a halt, pending the determination of the judicial review".

[78] It therefore follows that the decision of McDonald-Bishop J to grant a stay despite the revocation of the respondent's registration with the NCC and the award of contracts cannot be faulted. In my view, a stay was necessary to halt the investigations and the proceedings that were ongoing despite the revocations. As a consequence, there could be no real chance of success on this argument on appeal.

Conclusion

[79] On the grounds put forward by counsel for the applicant, I have found no basis upon which the powers of the Supreme Court could be restricted so that a judge is unable to grant a remedy where he/she deems it just and fit. The hearings being conducted by the applicant were in fact judicial hearings by their very nature and the definition and hence were amenable to a stay. The fact that investigations and hearings persisted even after the revocation of the respondent's registration necessitated the grant of a stay. Since the injunction was granted only in relation to investigations into the respondent's registration with the NCC and the award of contracts in respect of the respondent under the Barracks Relocation Project and JDIP, this would not result in irremediable harm to the applicant and so an injunction was properly granted restraining the specific proceedings/investigations. The issues relating to the interpretation of the Contractor-General Act were matters to be canvassed in the substantive hearing, so I make no comment on them in this application. Consequently, as indicated above, no arguments have been advanced by the applicant that translates to a real chance of success on the proposed appeal and therefore, in light of all these circumstances, in my view, the application for permission to appeal ought to be refused.

BROOKS JA

[80] I have had the privilege of reading, in draft, the characteristically comprehensive and well structured judgment of my learned sister, Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA (AG)

[81] I have read the draft judgment of my learned sister Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

PHILLIPS JA

ORDER

The application for permission to appeal the judgment of McDonald-Bishop J is refused. Costs are awarded to the respondent to be agreed or taxed. The hearing of the fixed date claim form should proceed with some dispatch.