Eddy Ventose

Commonwealth Caribbean Administrative Law

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This book will also consider the alternative methods by which the rights of citizens are protected, including the use of tribunals and inquiries, as well as looking forward to the increasingly significant role of Caribbean Community law and bodies such as CARICOM and the OECS.

Eddy Ventose is Professor of Law at the University of the West Indies, Cave Hill Campus.

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Eddy Ventose

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FOREWORD

by The Rt Hon Sir Dennis Byron
President: Caribbean Court of Justice

Dr Eddy Ventose joined the Faculty of Law as a Lecturer in Law August, 2006, and has been a Professor of Law at the University of the West Indies since May, 2012 and has made a significant contribution to Faculty and University life; lecturing in Intellectual Property Law, Administrative Law and the Law of Contract in the LLB Programme, as well as the Law of Corporate Finance. This latest contribution is written in a style that made it easy to read and the topics and material are interesting and the discussion is both learned and informative. The book makes an important contribution to Caribbean Legal Literature. It supports the mandate of the Caribbean Court of Justice (CCJ) to develop Caribbean Jurisprudence. I have expressed the view that our jurisprudential development is achieved by a number of activities in addition to the judgments delivered by the Court. One important activity is scholarly writings about the jurisprudence of the region. In my view this book is an excellent exhibition of that principle.

The topic is not one on which there is much writing. This contribution therefore is of great value in our constitutional evolution, and at a time when the Caribbean people are examining the extent to which they can have confidence in their judicial systems. This work provides a lot of information on the way in which the courts have been responding to issues and challenges surrounding the rule of law and the protection of citizens from arbitrary State action.

Although the book is intended to be generally a student text, its style makes it accessible to the general public. The content of the work is also useful to the academic, practitioner and judicial officer.

It has examined the case law in detail. It reveals that only three countries have legislated on judicial review – Trinidad and Tobago, Barbados and St Lucia – and provides information and links to the related statutes. It also refers to the rules of civil procedure, in the Eastern Caribbean Supreme Court, where the important issue of *locus standi*, affecting access to justice, is also regulated. In a book of this nature where the jurisprudence of the entire region is being examined, it must be difficult to organise the material. I think that in the main the author has addressed this difficulty satisfactorily and the reader is able to identify the various sources of the referenced law and the variations in application from country to country.

A particular value of this work is in the effective discharge of the daunting challenge of tracing and elucidating the evolving jurisprudential philosophies of regional jurists through a perceptive revelation of their reasoning in the cases referenced. It demonstrates the strength and flexibility of the Common Law tradition as judges grounded in precedent adapt principles to local circumstances.

The issue of citations is also important. The ability of practitioners and judges to study the approach of other Caribbean judges has historically been limited. This book organises the case law on subject matter, and the treatment has been fairly comprehensive. The legal scholar, practitioner and judge now have a source that reveals the development of thinking along subject matter. I have no doubt that this work will be cited in argument before the courts of the region and perhaps even in judgments of the courts.

The author has referenced the CCJ *dictum* that the Treaty of Chaguaramas and the establishment of the CCJ itself has transformed the region into a rule-based system operating under the rule of law. This is a new and important area of discussion for the Caribbean lawyer. The book discusses the relationship between CARICOM law and domestic law by reference to cases from the domestic jurisdictions as well as from the CCJ. In this chapter as in others the manner in which treaty obligations become binding and confer rights on citizens within the region is

examined. In that context the book examines cases in which the court has had to look at the extent of the power of judicial review over the treaty-making power or aspects of it. The status of regional organisations and their susceptibility to judicial review has also been considered.

Finally, the work highlights the need for harmonisation of legislation on this issue. It may well be that the legislative drafters throughout the region will take note. In the final analysis the significance of this work is not derived solely from the fact that it will undoubtedly influence Public Law litigation. It is, above all, Caribbean Legal Literature, produced by an important Caribbean thinker. It will catalyse the development of knowledge and forensic discourse as well as the growth of Caribbean Jurisprudence.

PREFACE

My interest in administrative law started when I was an undergraduate at the Faculty of Law, Cave Hill Campus, University of the West Indies. With teachers such as the now Chief Justice the Hon Sir Hugh Rawlins and the late Professor Margaret DeMerieux, both of whose intellect and passion for administrative law, and public law generally, I admired, it was no surprise that I embraced the opportunity to teach administrative law at the Cave Hill Campus. At that time substantive legitimate expectations had just raised its ugly head in *ex p Hamble Fisheries* only to be rejected by the UK Court of Appeal in *ex p Hargreaves*. Thankfully, the law has subsequently moved on. However, little has changed in relation to the duty to state reasons at common law. There has been a movement to a statutory regime for judicial review with the enactment, in 2000, of the Judicial Review Act of Trinidad and Tobago. The Administrative Justice Act of Barbados 1980 had hitherto been the only legislation relating to administrative law in the Commonwealth Caribbean. These issues and a whole range of others are covered in the pages of this book.

It is important that the Commonwealth Caribbean approach to judicial review and administrative law be explored and this book, by bringing to the fore previously unknown Commonwealth Caribbean decisions, and exploring their underpinnings, attempts to contribute to the development of an indigenous jurisprudence. Public law practitioners, Caribbean courts, academics and students of administrative law now have a work which explores the Commonwealth Caribbean context of administrative law and how Caribbean courts have examined and dealt with the issues as they arise from time to time.

This book is divided into 18 chapters. Chapter 1 provides an introduction to the matters covered by the book. Chapters 2 to 5 cover matters relating to making an application for judicial review. Indeed, they can be considered as jurisdictional matters on which the court must adjudicate in appropriate cases before it considers the merits of a case. Chapter 2 relates to procedural matters in making an application for judicial review; Chapter 3 covers the principles that govern which claimants can bring an action in judicial review; and Chapter 4 relates to the rules relating to whether a defendant or decision is subject to judicial review. Chapter 5 considers issues which might prevent the court from hearing a case even if the applicant has standing and the defendant is a body subject to judicial review. If these are satisfied, and there are exceptions, the court will then proceed to hear the case on the merits, namely an examination of the substantive ground of judicial review. It first considers how discretionary powers are exercised by public authorities in Chapter 7. These grounds of review are as follows: error of fact or law (Chapter 6); abuse of discretion (Chapter 8); legitimate expectations (Chapter 9); procedural fairness (Chapter 13); right to reasons (Chapter 14); and the rule against bias (Chapter 15).

The book also considers two important aspects of public law that impact on the administrative law principles covered, namely, first, the constitutional and human rights dimension of administrative law in the Commonwealth Caribbean in Chapter 11; and, second, the impact of Caribbean Community law on administrative law principles in Chapter 12. With the increasing use of tribunals and inquiries as part of the investigation of administrative errors, it became necessary to consider these in Chapter 16. The book then concludes by examining the remedies applicable in judicial review proceedings, by exploring in Chapter 17 the public law remedies and in Chapter 18 the private law remedies.

The idea for writing this book originated from the need to provide a core text for administrative law to students of administrative law at the Cave Hill Campus, and to others who are

interested in Commonwealth Caribbean administrative law. I wish to thank the Dean of the Faculty of Law, Professor Velma Newton, then Law Librarian, whose conceptualisation of CARILAW, the electronic database of unreported Commonwealth Caribbean decisions, made it possible to provide to the public in an accessible manner what had hitherto been a minefield of previously unheard of Commonwealth Caribbean decisions. I also wish to thank her for her unfailing support and encouragement of my scholarship and research, and for the opportunity to serve as Deputy Dean (Graduate Studies and Research) during her tenure as Dean of the Faculty of Law from 2009 to 2012. I am indebted to Ms Ann St Hill, who proofread most of the chapters of this book, and for the Campus Research Award which provided financial assistance for research and proofreading.

Eddy D. Ventose
Faculty of Law, Cave Hill Campus,
University of the West Indies
30 April 2012

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CHAPTER 1

INTRODUCTORY MATTERS

INTRODUCTION

This book, *Commonwealth Caribbean Administrative Law*, is intended to comprehensively examine the principles and underpinnings of administrative law and judicial review in the Commonwealth Caribbean. It does so by examining, first, the various common law principles applicable to administrative law and, second, legislative provisions in the Commonwealth Caribbean relating to administrative law and judicial review. For the first time, the administrative law principles applicable to the Caribbean context are explored in detail in one work. Whilst the focus of this book is the exploration of the common law principles relating to administrative law, it could not ignore the other public law dimensions that impact on administrative law, namely, first, the constitutional context of judicial review which provide avenues by which citizens might challenge infringements of the Constitution and of their fundamental rights and freedoms; and, second, the legal aspects of the Caribbean Community, its institutions and organs which provide another layer of redress for economic and other wrongs committed by Member States in respect of persons who reside in the Caribbean Community. Importantly too, this book also considers the statutory regime applicable to judicial review under the Administrative Justice Act of Barbados and the Judicial Review Act of Trinidad and Tobago.

The intention is to provide an accessible work which provides the reader with the core principles of administrative law from a Caribbean perspective. The focus, therefore, is on delineating the common law administrative law principles derived from the decisions of Caribbean courts as much as possible. As such, this work relies heavily on reported – and unreported – decisions of Commonwealth Caribbean courts which provide a rich source of previously untapped material made accessible through CARILAW, a database managed by the Faculty of Law Library of the University of the West Indies, of over 32,000 unreported cases from the Commonwealth Caribbean.

JUDICIAL REVIEW PROCEEDINGS

Judicial review proceedings, in constitutional law, are brought in the High Court against arbitrary actions by government, or public authorities endowed by law with coercive powers, which infringe the constitution or the fundamental rights and freedoms of persons. This was admitted by Lord Diplock in the seminal decision of *Thomas v Attorney General of Trinidad and Toba*go.[1] In the context of administrative law, judicial review proceedings are brought against bodies which exercise public law functions; they need not form part of the government, or be a 'public authority', traditionally understood, for that matter. These bodies must breach one or more of the common law rights of persons to be held liable in a judicial review action. Judicial review in the Commonwealth Caribbean is unique in that in the pre-independence period the courts were preoccupied with the simple determination of whether the activities of the State or its organs have breached the common law rights of citizens, while in the post-independence period, the nature of the rights under challenge dramatically changed. This, however,

1 [1982] AC 113.

necessitates an examination of the types of grounds on which claims for judicial review are made and the basis of decisions in that period. More important, too, is what the new independence constitutions bequeathed to Commonwealth Caribbean courts, namely a Bill of Rights against which actions of the State can be impugned. This heralded a new age in Commonwealth Caribbean public law and led to the explosion of such cases in the 1970s and early 1980s. The common law, however, had its limitations and statutory incursions were intended to remedy this, but this has not yet been accepted by many countries. So far, only three Commonwealth Caribbean counties have legislation relating specifically to judicial review: the Administrative Justice Act (AJA) in Barbados (1982); the Administrative Justice Improvement Act (AJIA) in Saint Lucia (1998); and the Judicial Review Act (JRA) in Trinidad and Tobago (2000).

The benefits of having a statutory basis for judicial review was explored in *ex p Belize Alliance of Conservation of Non Governmental Organisations*[2] where the court stated that, in the interests of the integrity of the system of the administration of justice, clarity and ease of access, it would strongly urge that there be enacted in Belize, and for Belize, an autochthonous Administrative Justice Act, which, in its opinion, would bring home in all its plenitude and vigour the practice and procedure of the salutary and increasingly popular remedy of judicial review. It continued that, in this way, practitioners and judges would not need to have recourse to English provisions; a situation compounded by the rapid pace of change in both the landscape and rhythm and, indeed, the very machinery of litigation in that country.[3] The court has noted that the High Court has historically exercised a supervisory jurisdiction over the proceedings and decisions of interior courts, tribunals, public authorities and bodies that perform public duties and functions.[4] The following, in the court's opinion, are the features of this supervisory jurisdiction that is now exercisable under the public law remedy of judicial review. First, the remedy is one of the principal methods by which the courts now control the sometimes unfettered actions of decision-makers. Second, the source of the decision-making power may be either statutory or common law. Third, the remedy of judicial review is not directed at reviewing the merits of a decision but the decision-making process itself. Fourth, it is not within the competence of a court to substitute its own opinion for that of the decision-maker. Fifth, a court of law is not entrusted with the power to make the decision that is being reviewed and must guard against substituting its own concept of merit for that of the decision-maker. Sixth, the court must confine its review to the decision-making process that is being reviewed.[5]

JUDICIAL REVIEW: PROCESS OR MERITS?

It has often been said that judicial review is concerned only with the question of whether the public authority has exercised its power according to law, and that this excludes any consideration by the courts of the merits of the decision. But this alone does not tell us what types of cases the courts will review or the grounds on which it will ensure that the exercise of power by a public authority is in accordance with principles of good administration, fairness etc. Why is this distinction important? Its importance lies in the fact that, in judicial review cases, the courts are usually adamant that they are only exercising some form of supervisory jurisdiction over inferior courts, tribunals and public authorities; and that their focus is on whether the process by which a decision-maker has made his decision was flawless. It is not an appeal on the merits

2 BZ 2002 SC 5.
3 Ibid at 9–10.
4 *Air Caribbean Ltd v Air Transport Licensing Authority* TT 1998 HC 84 at [5].
5 Ibid.

of the case. In other words, the court is not concerned with the actual decision and its consequences, but whether the public authority, in arriving at the decision, offended any of the principles upon which the court would grant a review of the decision made. This has been reiterated in many cases considered in this book. In *Cable and Wireless (Barbados) Limited v Fair Trading Commission*,[6] it was stated that the court has power to review administrative decisions made by inferior courts, tribunals and other bodies in the performance of public acts and duties. In its view, the proper function of the court was limited to scrutiny of the process by which the decision had been reached and did not extend to scrutiny of the merits of the decision itself.[7] The same was echoed in *Harper v Arthur*,[8] where it was pointed out that the court 'is not called upon to say whether his decision is right, but as this is a case of judicial review the function of the Court is to determine whether the process by which the Minister of Finance came to his decision accorded with the notion of fairness and reasonableness'.[9] Again, in *Leacock v Attorney General of Barbados*, the High Court of Barbados claimed that 'judicial review is about the decision-making process. It is concerned not with the merits of a decision but with the way in which the decision was reached'.[10] The importance of these statements is that the courts are recognising the critical role of judicial review, and the boundaries of judicial review are to be respected by the courts since they should focus on whether the process by which a decision has been made is flawed, and not whether the actual decision is one that the decision-maker should have made. However, in later chapters it will be seen that, increasingly, Commonwealth Caribbean courts have adopted an approach where they are actually questioning the decision of public authorities, rather than the process by which the decision was made. Questions relating to the substantive merits of a decision, arguably, should be left to an appeal, and the courts have been careful to make sure that these boundaries are respected. In *James v Ministry of Education*,[11] the court pointed out that:

> [t]he basis of judicial review rests on the free-standing principle that every action of a public body must be justified by law. Judicial review is concerned not with the decision, but with the decision-making process. This principle of law has been enunciated on myriad occasions. Thus the role of the Court in judicial review is merely supervisory and therefore the question is not whether the judge disagrees with what the public body has done but whether there is some recognizable public law wrong.[12]

Whether this continues to be the guiding principle on which the courts decide judicial review cases will be examined in detail in this book.

JUDICIAL REVIEW AND APPEAL

The distinction between an appeal and judicial review has been articulated in many decisions of Caribbean courts, notably in *Kings Beach Hotel Management Limited v National Insurance Board*,[13] where the court pointed out that, first, the 'jurisdiction of the Court of Appeal is defined by statute'; second, '[i]t has no jurisdiction to make a judicial review of a decision of the High Court'; and, third, '[i]ts power is to hear and determine an appeal from any decision or order

6 BB 2003 HC 21.
7 Ibid at [8].
8 BB 2007 HC 12.
9 Ibid at [32].
10 BB 2005 HC 24 at [26].
11 LC 2006 HC 5.
12 Ibid at [17].
13 BB 1992 CA 34. See *Prime Minister and Minister of Finance v Vellos* BZ 2008 CA 30.

made by the High Court and this power . . . is conferred solely by [statute].'[14] The power of judicial review rests with the High Court over decisions of lower courts, tribunals and decisions of public authorities. It follows, therefore, that for the purposes of judicial review proceedings, the High Court is not a public authority. However, it will be seen in later chapters that the courts have adopted a more liberal approach to this issue than was taken in *Kings Beach Hotel Management Limited*. Equally important is the principle that public authorities should be allowed to make decisions and that the court should not impose its view, irrespective of whether it would come to a different conclusion than that of the public authority. In *Leacock v Attorney General of Barbados* it was stated that it was 'no part of my function or indeed of any Court's in a judicial review application to substitute the Court's decision for that of the competent authority. Judicial review is not an appeal'.[15] In *Kings Beach Hotel Management Limited* the court cited *Re Racal Communications Ltd*, where it was stated that the 'jurisdiction of the Court of Appeal is wholly statutory; it is appellate only. The Court has no original jurisdiction'; and that it 'has no jurisdiction itself to entertain any original application for judicial review; it has appellate jurisdiction over judgments and orders of the High Court made by that Court on applications for judicial review'.[16] This makes it clear that an application for judicial review could not be made by the Court of Appeal, and that it is only the High Court which has original jurisdiction to entertain application for judicial review at common law.

The appellate system has its benefits. If an applicant feels aggrieved by a decision, she can appeal it and the Court of Appeal would consider the question of whether the trial judge erred in law. However, this jurisdiction, as noted above, is statutory and governed by the applicable statutory provisions. In *Re Jack Tar Village*,[17] the court pointed out that the right of appeal granted by statute is distinct from the right to seek the review of a tribunal, quoting Wade for the view that the:

> system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful'? Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the Court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the Court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law . . .[18]

It continued, again quoting Wade, that there:

> is no rule requiring what is sometimes called the exhaustion of administrative remedies. One aspect of the rule of law is that illegal administrative action can be challenged in the Court as soon as it is taken or threatened. There is, therefore, no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter; and so even may be an appeal to a Court of law . . . The only qualification is that the Court may prefer to withhold discretionary remedies where the most convenient step is to appeal . . .[19]

14 BB 1992 CA 34.
15 BB 2005 HC 24 at [50].
16 [1980] 2 All ER 634 at 657.
17 BS 1990 SC 14.
18 Wade, *Administrative Law* (5th edn), 1982, New York: Oxford University Press, 234.
19 Ibid at 593.

In other words, a right of appeal is not a substitute for, but an additional procedure to, a judicial review application. Professor Wade pointed out that the 'existence of a statutory right of appeal does not deprive the High Court of its ordinary powers of quashing a tribunal's decision which is *ultra vires* or erroneous on its face' and that it 'has been noticed already that the law often allows alternative remedies, and a decision which is open to appeal may nevertheless be quashed on *certiorari*'.[20] The court has also made it clear that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.[21] In the instant case, the court held that the remedies of appeal and *certiorari* were not mutually exclusive and that it was a matter for the court, in the exercise of its discretion, to determine whether, in the particular circumstances, the order of *certiorari* should be granted. It also stated that while a court, in the exercise of its discretion, might refuse an order in cases where there was a right of appeal, that discretion could only properly be exercised after an application was heard. Since the applicants sought to have the application struck out before it was heard, the court rejected their objection and allowed the application to proceed.[22]

CONCLUSION

The traditional common law principles relating to judicial review have guided Caribbean courts in their approach to judicial review. They have maintained that their role is to examine the process by which decsions of public authorities are made and that they are not to substitute their decision for that of the decision-maker. By doing so, the Commonwealth Caribbean courts are reiterating the traditional English position in respect of judicial review but they, too, have increasingly (but cautiously) been using the grounds of review which are more intrusive where, arguably, the courts are more concerned with balancing the impact of the decision on the individual and the rationale proferred by the decision-maker for the change. Examples of these include the use of proportionality as a substantive ground of review and the test used by the courts in respect of substantive legitimate expectations.

20 Ibid at 822.
21 *Council of Civil Service Unions v Minister of the Civil Service* [1985] 1 CR 14 at 41.
22 BS 1990 SC 14.

CHAPTER 2

APPLYING FOR JUDICIAL REVIEW

INTRODUCTION

The purpose of the Administrative Justice Act of Barbados (AJA) was stated as being to 'provide for the improvement of administrative justice in Barbados and for related matters'. There is no question that the AJA revolutionised the procedural aspects relating to administrative law and judicial review in Barbados. But, more importantly, it did more than that. It expanded the scope of judicial review in relation to areas that were previously considered to be outside the scope of the common law rules relating to administrative law. Section 3(1) of the AJA provides that an application to the court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with the AJA and with rules of court. In addition, section 12 provides that the Judicial Advisory Council may make rules generally for the purposes of this part, namely Part 1, entitled 'Judicial Review'. Section 5(1) of the Judicial Review Act of Trinidad and Tobago (JRA) provides that '[a]n application for judicial review . . . shall be made to the Court and in accordance with this Act and in such manner as may be prescribed by rules of court' and is found in Part 2, which is entitled 'Judicial Review Procedure', and the side note to section 5 is entitled 'Application for judicial review'. Section 5(2) provides for the people who have standing to make an application for judicial review; section 5(3) provides the 'grounds upon which the court may grant relief to a person who filed an application for review'; and section 5(4) says that alternative grounds may be relied upon by an applicant. In addition, sections 5(5) and 5(6) make special provision for public interest litigants and disadvantaged persons. The former provision provides that, subject to sections (1), 6(1) and 11, a person is entitled, when making an application for review under subsection (2)(b) or (6), to make the application in any written or recorded form or manner and by any means. The latter provides that where a person or group of persons aggrieved or injured by reason of any ground referred to in paragraphs (a) to (o) of subsection (3) is unable to file an application for judicial review under the JRA on account of poverty, disability or socially or economically disadvantaged position, any other person or group of persons acting bona fide can move the court under this section for relief under the JRA.

In *C.O. Williams Construction Limited v Blackman*,[1] the trial judge observed that section 12 of the AJA enables the Judicial Advisory Council to make rules generally for the purpose of that part of the Act, and pursuant to this provision the Judicial Review Application Rules were made. The court noted that these rules provide that an application for judicial review must be made by originating motion to the High Court except in vacation when it may be by originating summons to a judge in chambers. It explained that, first, an application must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavit verifying the facts relied on; and, second, that the applicant is required to give notice of the application to the Attorney General and furnish him with copies of the statement and every affidavit in support.[2] As noted in the previous chapter, not all Commonwealth Caribbean countries have legislation relating to judicial review. Therefore, the Rules of the Supreme Court or Civil Procedure Rules govern judicial review applications. In all cases, the applicant must approach the court to have the judicial review application heard. In

1 BB 1989 HC 85.
2 Ibid.

some cases, there will be a requirement to have first been granted leave to apply for judicial review. This aspect will be considered later.

In *Ex p Belize Alliance of Conservation of Non-Governmental Organisations*,[3] the court noted that, ordinarily, after the grant of leave for judicial review, the successful applicant would then proceed to set the matter down for the substantive hearing. In civil matters relating to judicial review this usually occurs by originating motion[4] to a judge sitting in open court or unless the court directs it be done by originating summons,[5] to a judge in chambers. In the United Kingdom, the court may also direct that the matter be heard by originating motion to a Divisional Court of the Queen's Bench Division.[6] The court continued that, first, the notice of motion for the substantive hearing must be served on all persons directly affected. Second, the notice of motion or summons should be served together with copies of the Statement in Support of the applicant's application for leave. Third, each party to the substantive hearing of the application for judicial review must supply to every other party, on demand and payment of the proper charges, copies of every affidavit which he proposes to use at the hearing. Fourth, the applicant must also supply the respondents with the affidavit he used in support of his application for leave. Finally, a respondent who intends to use an affidavit at the hearing must in turn file an affidavit as soon as practicable.[7] The court's permission is required to withdraw acknowledgment of service.[8] Discovery of documents is sometimes necessary to secure important documents relating to the judicial review application.[9]

LEAVE OF THE COURT

The AJA of Barbados contains no requirement that the applicant must first get leave of the court in respect of judicial review applications. In *C.O. Williams Construction Limited v Blackman*,[10] the Privy Council observed that it was a debatable question whether, when proceedings were brought under the AJA, which, in contrast to an application for judicial review in the United Kingdom and some Commonwealth Caribbean countries, might be brought *without leave*, the court should also look at the affidavit evidence filed by the applicant and determine the issue of whether the proceedings should be struck out by reference to the capacity of the evidence to support the case as pleaded. Nonetheless, the Privy Council accepted that the case at bar was argued on the basis that the issue depended on the sufficiency of the evidence, and that it was content to assume, without deciding, that this was the correct approach.[11] In the same decision, in the High Court, the point was made that the JRA and the rules made pursuant to it did not require that leave be obtained before making applications for judicial review.[12] In *Lloyd v Attorney General of Barbados*,[13] it was pointed out that:

> in England the grant of leave by the Court is necessary before a person may pursue an application for judicial review. A provision to that effect is absent from section 8 of the [AJA] and it must, we

3 BZ 2002 SC 5.
4 Ibid.
5 Ibid.
6 Ibid at 4.
7 Ibid.
8 *Frederick v Comptroller of Customs* LC 2009 CA 2.
9 *Minister of Finance v Belize Printers Association* BZ 2005 CA 4.
10 BB 1994 PC 2.
11 Ibid at 5.
12 BB 1989 HC 85.
13 BB 2000 CA 27.

> think, be assumed that such a provision was deliberately omitted so as not to impose any fetter on the adjudication by the High Court of complaints by applicants against the administrative acts and omissions of public officials and authorities.[14]

As a result, there is, therefore, no requirement for an applicant to first seek the leave of the court in Barbados to seek permission to make an application for judicial review.

In Trinidad and Tobago, however, the situation is different. Section 6(1) of the JRA provides that *no* application for judicial review shall be made *unless* leave of the court has been obtained in accordance with the rules of court. Section 6(2) provides that the court shall not grant such leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. Section 7 deals with leave of the court where the judicial review proceedings relate to a matter of public interest. In *Sharma v Brown-Antoine*,[15] the Privy Council noted that the correct test to be applied by courts in considering whether or not to grant leave to apply for judicial review was as follows:[16]

> 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. . . . 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 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.

In *Evelyn v Peterson*,[17] the claimant applied for leave to apply for judicial review to seek a declaration that the failure of the defendant to fix a date for the hearing of the claimant's review of his sentence was unlawful, unreasonable and irrational.[18] The court concluded that, having regard to the passage of eight months since the order of a High Court judge granting leave to apply for judicial review was made, it was satisfied that the claimant had raised an arguable ground for judicial review having a realistic prospect of success.[19] In *Ramlochan v National Housing Authority*,[20] the applicant applied to the court for leave to apply for judicial review. The court noted that the requirement for the grant of leave prior to the commencement of judicial review proceedings was designed to filter out applications which are either groundless or hopeless and quoted Lord Diplock in *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd*,[21] where he said that the purpose of the requirement for leave to be granted is 'to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left . . .'.[22] The court in *Ramlochan* was of the opinion that, although the 'threshold is low, the applicants must demonstrate that there is an arguable case; that a ground for seeking judicial review exists'.[23] After examining the law on legitimate expectations and the facts of the case, it concluded that, 'having regard to the law and the evidence, the applicants have not been able to make a case for the breach of any legitimate expectation'. Accordingly, the court held that the applicants had failed to demonstrate that they had an arguable case and as a result it refused the

14 Ibid.
15 [2007] 1 WLR 780.
16 Ibid at 787.
17 TT 2009 HC 270.
18 Ibid at [2].
19 Ibid at [24].
20 TT 2003 HC 107.
21 [1982] AC 617 at 643.
22 TT 2003 HC 107 at 8.
23 Ibid.

application for leave to apply for judicial review.[24] A logical consequence of this approach is that the court is, therefore, not concerned to delve into the merits of the application at the leave stage. In *Singh v Agricultural Development Bank*,[25] the court noted that 'whether or not the Board's instruction to the applicant was *ultra vires* the Act cannot be determined at the leave stage but on the hearing of the substantive motion' and that '[a]t the leave stage the Court is only concerned with whether the Board's decision to terminate fell within the area of public or private law'.[26] In that decision, the court held that 'the Board was exercising a public law function when it terminated the applicant's employment for failing to implement the Board's decision'.[27] It therefore rejected the respondent's application to set aside leave on the basis that the court 'had no jurisdiction to hear an application or to grant leave because the challenged decision is founded in private law and is not subject to judicial review'.[28] A claimant is not allowed to bring a multiplicity of actions and an attempt to re-litigate a matter will amount to an abuse of the process of the court.[29] It is at the leave stage that the court could identify such actions and prevent them from proceeding. Since the court is not concerned with the merits of the application at this stage, such applications are usually made *ex parte*. This was confirmed in *Sharma v Manning*, where the court noted that '[u]nder normal circumstances the application will be made *ex parte* and the applicant merely required to show that an arguable case exists'.[30]

In *Ex p Willis*,[31] the respondent argued that leave to apply for judicial review was conditional on the applicant making the claim (by filing the fixed-date claim form) within 14 days of the date of the order granting leave. On the facts, the claim form was filed 28 clear days after the leave was granted.[32] The leave lapsed so the court held that there was no proper claim before it and that the claimant could not renew his application for leave to apply for judicial review as this is prohibited by Rule 56.5(3). The applicant argued that the court could intervene and extend the time limited by the Rules for the filing of the fixed-date claim form – either pursuant to the Civil Procedure Rules (CPR), or on the basis of the inherent jurisdiction of the court (a court of superior jurisdiction).[33] The court noted that the main issue was whether the CPR permitted leave to apply for judicial review to be extended where the applicant failed to make an application for judicial review within the 14 days stipulated by Rule 56.4(12). The court held that *Golding v Simpson-Miller*[34] addressed the matter directly and definitively, so that the matter could be dealt with in short order. It claimed that the Court of Appeal in *Golding* was unanimous in holding that there could be no extension of time in such a case, or renewal of an application for leave where the liberty of the subject was not at stake or the matter was not a criminal one: 'The effort . . . to have time extended for the purpose of filing the claim was [a] wasted effort. The Rules forbid an extension of time in the instant circumstances.' In the court's opinion, that view, shortly stated, was the position to be applied in the instant case. As a result, it dismissed the application.

In *Kemper Reinsurance Company v Minister of Finance*,[35] the Privy Council had to consider whether the Court of Appeal of Bermuda had jurisdiction to hear an appeal from an order

24 Ibid at 11.
25 TT 2004 HC 26.
26 Ibid at 16.
27 Ibid.
28 Ibid at 3.
29 *Ayres v Attorney General of Trinidad and Tobago* TT 2009 HC 194 at [10].
30 TT 2005 HC 94 at [5].
31 JM 2009 SC 11. See also *Federal Express Cayman Limited v The Caymanian Protection Board* KY 1989 GC 43.
32 JM 2009 SC 11 at 2.
33 Ibid at 3–4.
34 JM 2008 CA 22.
35 BM 1998 PC 1.

discharging leave to apply for an order of *certiorari*. It found that the Court of Appeal had jurisdiction to hear the appeal and allowed the appeal. The Privy Council noted that the jurisdiction of the Court of Appeal of Bermuda was entirely statutory and derived from the Court of Appeal Act 1964. Section 12 provides as follows:

> (1) Subject to the provisions of subsections (2) and (3) and any rules, any person aggrieved by a judgment of the Supreme Court in any civil cause or matter (including matrimonial causes), whether final or interlocutory, or whether in its original or appellate jurisdiction, may appeal to the Court of Appeal; and any such appeal is hereinafter referred to as a civil appeal. No appeal shall lie to the Court of Appeal against the decision in respect of any interlocutory matter, or against an order for costs, except with leave of the Supreme Court or the Court of Appeal.

The court noted that, first, the term 'judgment' in section 12(1) is defined in section 1 to include 'any decree, order or decision'; and, second, '[t]his language appears *prima facie* wide enough to include the order of Wade J. Insofar as her decision was interlocutory, she gave leave under section 12(2)'.[36]

The Privy Council noted that the question was, therefore, whether the requirement of leave to issue a summons for an order of *certiorari* was sufficiently analogous to a requirement of leave to appeal to attract the reasoning in *Lane v Esdaile*[37] and *Stevenson's case*[38] to enable the court to say that an appeal from the grant or refusal of such leave would so frustrate the policy of requiring leave as to show, by necessary implication, that such orders were excluded from the general right of appeal in section 12 of the Court of Appeal Act 1964. The Board referred to the view of Lord Diplock in *O'Reilly v Mackman*,[39] where he explained that the purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. It continued that, first, this policy had something in common with the policy of requiring leave to appeal, namely to act as a filter against frivolous or unmeritorious proceedings and, second, it was also true that some types of judicial review, for example on the ground of error of law by an inferior tribunal, were, in practice, indistinguishable from appeals.[40] The Board explained that, in principle, however, judicial review was quite different from an appeal; it is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. It continued that in the case of a restriction on the right of appeal, the policy was to limit the number of times that a litigant may require the same question to be decided.[41] The Board explained that the court was specifically given power to decide that a decision on a particular question should be final. It noted that there was obviously a strong case for saying that, in the absence of express contrary language, such a decision should itself be final.[42] However, the Board reasoned that judicial review seldom involved deciding a question which someone else has already decided and that, in many cases, the decision-maker would not have addressed his mind to the question at all.[43] It claimed that the application for leave might be the first time that the issue of the legality of the decision was raised and, in its view, it was by no means obvious that a refusal of leave to challenge its legality should be final. The Board noted that the law reports revealed a number of important points of administrative

36 Ibid.
37 [1891] AC 210.
38 [1892] 1 QB 609.
39 [1983] 2 AC 237.
40 BM 1998 PC 1.
41 Ibid at 3.
42 Ibid.
43 Ibid at 4.

law which had been decided by the Court of Appeal, or House of Lords, in cases in which leave was refused at first instance.[44]

The Board explained that it did not think that it was possible to say that the very nature of the leave requirement for an order of *certiorari* excluded, or made absurd, the possibility of an appeal, but that unless such a conclusion could be drawn, it considered it very difficult to find the necessary intendment restricting the general right of appeal conferred by section 12. It thought that it might be appropriate, as a matter of policy, to restrict that right of appeal, but considered that this was a matter for legislation rather than judicial interpretation.[45] The court has noted that, where the claimants had not sought and obtained leave, which is a pre-requirement, it had no jurisdiction to entertain the proceedings, as there was nothing before it.[46]

MISREPRESENTATION AND NON-DISCLOSURE

Where the applicant has been granted leave to apply for judicial review by the court and 'has deliberately misrepresented the facts', the court will set aside the leave previously granted.[47] The court has made it clear that '[i]t cannot be disputed that there is a duty on an applicant for leave to seek judicial review to disclose all material facts and that this duty is particularly so when the application for leave is made in the absence of the other side'.[48] In *Graham v Commissioner of Police*,[49] it was stated that, in relation to non-disclosure at the leave stage, the following was a broad summary of the legal position: (a) that it is the duty of an applicant to make full and frank disclosure of all material facts upon an application for interlocutory relief so that the judge can effect a proper exercise of his discretion;[50] (b) that even though there may be an omission, it does not necessarily follow that for every omission the injunction may be automatically discharged (the court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an *ex parte* order, nevertheless to continue the order, or to make a new order on terms); (c) that these principles apply with equal vigour to applications for judicial review at the early stages; (d) that material non-disclosure is sufficient to vitiate leave granted for judicial review and that once a court makes a determination that there was material non-disclosure by the applicant, there is no need to go further; (e) that courts should be slow to set aside leave and such leave should only be set aside in the clearest of cases and for the most cogent reasons – non-disclosure of material facts being one of them; and (f) that the respondent may raise this issue at the leave stage and before the hearing of the substantive action.[51]

In addition, the court in *Graham* was of the opinion that it was the duty of the applicant to, first, put all of the facts and, furthermore, all of the relevant law before the court when seeking the court's leave, and moreover asking the court to exercise discretion in his favour – this, in the court's opinion, is referred to as the applicant's duty of candour; and, second:

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44 Ibid at 5.
45 Ibid.
46 *O'Neal v Supervisor of Elections* VC 2009 HC 42. See also *Ogunsalu v Dental Council of Jamaica* JM 2009 CA 22; and *Police Service Commission v Edwards* AG 2003 HC 36.
47 *Charles v The State* TT 2007 HC 33 at 4; *Ex p Belize Telecommunications Limited* BZ 2002 SC 10; *Graham v Commissioner of Police* TT 2006 CA 33; *Knowles v Sylvester* BS 2004 SC 105; and *Selgado v Attorney General of Belize* BZ 2002 SC 13.
48 *Charles v The State* TT 2007 HC 33 at 3.
49 TT 2005 HC 33.
50 See *Jugmohan v Teaching Service Commission* TT 2006 HC 23 (whether document was exempt from disclosure as an internal working document).
51 TT 2005 HC 33 at [14].

> to cite all cases relied upon and adverse to the applicant and I might add seek to distinguish them from the case at bar. This is essentially what an applicant does at the leave stage – asking the Court to review a decision taken, as in this instance, at an executive level. Thus, whilst the classes of reviewable actions may seem to be widening the Courts still maintain a structured approach to its task.[52]

It continued that 'the fundamental flaw of the applicant's approach lay in the assumption that it was the duty of that judge to undertake a search for a point of law'.[53] On the facts, the court held that the non-disclosure of all relevant provisions of the law, in particular, the Motor Vehicle and Road Traffic Act (MVRTA), which governed the decision of the Commissioner of Police and subsequent actions, was fatal to the continuation of the judicial review matter. As a result, the court concluded that the leave granted by Best J should be set aside.[54] On appeal[55] to the Court of Appeal, the appellant argued that the relevant section was section 68(1) and that, as a result, it was difficult to see the relevance of section 68(2), on which the High Court and the respondent had relied. The Court of Appeal claimed that the appellant could not be expected or required to refer to the section only to say that it was not relevant. It therefore disagreed with the trial judge that the appellant was guilty of material non-disclosure if there was a failure to refer to section 68(2).[56] It consequently concluded that the subsequent written reasons by Best J showed that he was 'aware of the relevant provisions of the MVRTA and the points of law that arose. They clearly do not support the respondent's contention of material non-disclosure'.[57] Although the decision of the trial judge was set aside, this case does show the effect of non-disclosure on the claim for judicial review.

In *Ayres v Attorney General of Trinidad and Tobago*,[58] the court pointed out that the 'existence of the prior action of this claimant for Judicial Review of this same failure to promote him retroactively is a very material and relevant fact' and that '[i]t is directly relevant to the question of abuse of process and to the question of promptness'.[59] In that case, the claimant failed to reveal to the court his prior judicial review action in his application for leave to apply for judicial review. Consequently, the court held that this was 'an attempt to hoodwink the Court into proceeding with this application' and, since this was 'a case where the claimant should not be allowed to benefit from his breach of the duty to make full and frank disclosure' the court should 'formally refuse him leave to apply for Judicial Review for this non-disclosure'.[60] In *Rajcoomar v Magistrate Alert*,[61] the first issue the court considered was whether the applicant had been guilty of material non-disclosure so as to entitle it to dismiss his application without regard to the merits of the case; and, if not, whether the respondent's order was procedurally improper.[62] The court stated that '[a]t the *ex parte* hearing the applicant represented to the Court that the magistrate informed him that she had reduced his bail on the second set of charges instead of revoking bail on the first set of charges'.[63] It ruled that the applicant's assertion on oath was at variance with the very clear terms of the notes of proceedings[64] and that it

52 Ibid at [15].
53 Ibid.
54 Ibid at [17].
55 TT 2006 CA 33.
56 Ibid at [22].
57 Ibid at [26].
58 TT 2009 HC 194.
59 Ibid at [17].
60 Ibid at [17].
61 TT 2003 HC 35.
62 Ibid at [23].
63 Ibid at [14].
64 Ibid at [15].

found it 'difficult to believe that the applicant in fact heard what he has claimed and finds on balance of probabilities that the applicant had been untruthful at the application for leave and indeed continues to be untruthful before this Court'.[65] The court was of the view that, consequently:

> this lack of frankness was material in that it would have been clear to the learned trial judge who heard the application for leave, if the truth were told, that the applicant chose not to avail himself of his right to approach a judge in chambers for his bail to be reviewed. The applicant's lack of frankness operated, in all probability, quite deliberately, to conceal his failure to use an effective available alternative remedy.[66]

The court then concluded that, as a result, a 'material non-disclosure entitles the Court to dismiss the application without enquiring into the merits thereof'.[67] It therefore dismissed the application.[68]

DELAY

Section 11(1) of the JRA provides that an application for judicial review shall be made promptly and, in any event, *within three months* from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. Section 11(2) provides that a court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration. Section 11(3) provides that in forming an opinion for the purpose of this section, the court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant. Section 11(4) provides that where the relief sought is an order of *certiorari* in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision. Part 56.5(1) of the CPR of Trinidad and Tobago provides that a judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application. Part 56.5(3) states that 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.[69]

In *Evelyn v Peterson*,[70] the court held that 'the existence of a continuing duty on the defendant to comply with the Order of [the trial judge] and the delay of eight months by the defendant in listing the claimant's sentencing review provided good reason to extend the time for making of the application for leave'.[71] So where the defendant was guilty of not complying with an order of a High Court judge to fix a date for the review, the court held that the order 'ought to

65 Ibid at [16].
66 Ibid at [18].
67 Ibid at [19].
68 Ibid at [20].
69 For the cases under the previous rules, see *Browne v Commissioner of Police* TT 1990 HC 47; *Jones v Solomon* TT 1989 CA 8; *Ramnarine v Jones* TT 1986 HC 92; *Luxsam Industries Limited v Minister of Industry, Enterprise and Tourism* TT 1989 HC 123; and *Maharaj v Attorney General of Trinidad and Tobago* TT 1999 HC 97.
70 TT 2009 HC 270.
71 Ibid at [33].

have been complied with and the defendant remained under a continuing duty to comply with same'.[72] It continued that it 'was not satisfied that the grant of relief in this matter would cause substantial hardship or prejudice to any person and [that it] was also not satisfied that it would be detrimental to good administration', noting also that, 'if anything, it may facilitate and promote good administration to call upon the Registrar to explain the circumstances in which the listing of the sentencing review did not take place until 7 October 2009'.[73] The court has pointed out that there is 'no hard and fast rule as to what constitutes good reason for delay. Each case must be judged according to its own specific merits'.[74] In addition, it stated that a 'good reason for extending the time for an application may also be found in the strength of the merits of a particular case', continuing that 'the stronger the merits of a case the more likely a Court would find that there is good reason to extend the time for making an application'.[75] The court takes a dim view where there is a long delay; for example, in *Greaves-Smith v Public Service Commission*, the court found that:

> the delay of two years and eight months is inexcusable on the facts of this case. This inordinate and protracted delay alone is sufficient to outweigh any merits in the claimant's case. Indeed, I venture to say that it may only be in a very rare case of exceptionally strong and substantial merits that such inordinate delay could be excused.[76]

There have been many cases where the issue of whether the requirements of section 11 of the JRA have been complied with has arisen.[77]

As mentioned above, section 11(1) provides that the applicant must make the application promptly and certainly within three months. Section 11(2) speaks of undue delay. Where an applicant does not fall within the timeframe set by 11(1), the application will lapse unless there is a good reason to justify why an extension should be granted by the court. The interaction between those two provisions has been subject of numerous judicial pronouncements over the years. It has been stated that '[i]t is an essential requirement that an application should be made promptly, and whenever there is failure to act promptly or within three months there is undue delay.'[78] If the applicant has provided the court with no reasons, it is unlikely to exercise its discretion in his favour;[79] and not providing the court with a sufficiently good reason (or reasons) will suffer a like consequence.[80] The merits of a case are also considered when determining whether there are good reasons for allowing the claim under section 11(2). In *Re Thomas-Felix*,[81] the court noted that '[a]n overview of the various issues raised in the Application does not lead

72 Ibid at [31].
73 Ibid at [32].
74 *Greaves-Smith v Public Service Commission* TT 2007 HC 37 at [7]. See also *Sweeting v Darville (Magistrate)* BS 2008 SC 111; *Ex p DYC Fishing Limited* JM 2002 SC 45; *Tulloch Estate Limited v Industrial Disputes Tribunal* JM 2001 SC 78; and *West Bay Management Ltd. (trading as 'Sandals Royal Bahamas') v Attorney General of the Bahamas* BS 2008 SC 101.
75 TT 2007 HC 37 at [8]. See also *Re Walkerwell Ltd* TT 2004 HC 12; *Curry v Attorney General of the Bahamas* BS 2007 SC 61; *Director of Physical Planning, ex p Save Guana Cay Reef Association Limited and Clarke* BS 2008 SC 98; *Francis v Public Utilities Authority* AG 2007 HC 12; *Gillette Marina Limited v Port Authority of Trinidad and Tobago* TT 2002 HC 110; *Golding v Simpson Miller* JM 2008 CA 22; *Jones v Tobago House of Assembly* TT 2003 HC 84; and *Tobias-Douglas v Tobago House of Assembly* TT 2008 HC 297.
76 TT 2007 HC 37 at [15].
77 *Chang v Hospital Administrator* TT 2008 HC 191; *Gillette Marina Ltd v Port Authority of Trinidad and Tobago* TT 2002 HC 110 at 56; *Harridas v Commissioner of Police* TT 2008 HC 229 at [6]; *Lewis v Chief Fire Officer* TT 2005 HC 83 at [8]; *Sharma v Manning* TT 2005 HC 94; and *Menhennet v Magistrate McKenzie* TT 2006 HC 113.
78 *Greaves-Smith v Public Service Commission* TT 2007 HC 37 at [25].
79 *Ramdhanie v Public Service Appeal Board* TT 1986 HC 66.
80 *Maharaj v Commissioner of Prisons* TT 2009 HC 180 at [22].
81 TT 2003 HC 79.

me to conclude that the applicant has demonstrated a prospect of success on any of the grounds.'[82] It then concluded that 'none of the reasons advanced are good reasons for extending the period within which the application should have been made' and that there had 'been undue delay in the making of this application'.[83] Where the court finds that there is undue delay, it may refuse leave to apply for judicial review if the grant of any relief would: (a) cause substantial hardship to any person; (b) substantially prejudice the rights of any person; or (c) be detrimental to good administration.

In *Balwant v Statutory Authorities Service Commission*,[84] the applicant challenged the decision of the Statutory Authorities Service Commission to determine her seniority by the date of her appointment with the San Fernando City Corporation. The applicant had previously obtained leave to apply for judicial review on an *ex parte* application, but the respondent sought to have it set aside on the ground of delay. The court stated, first, that '[b]oth as a matter of plain meaning of section 11(1) and on the basis of the persuasive authority of cases decided in the context of the [similar] English Rule' it was 'clear that section 11(1) lays down a primary requirement that the application be made promptly followed by the secondary requirement that it be made, in any event, within three months'; and, second, '[a]ccordingly, it is quite possible that an application made within three months may not have been made promptly, in which case leave to apply should not be granted by the Court unless it considers that there is good reason for extending the time for such application'.[85] The court was of the opinion that, since the previous order by the High Court judge 'did not expressly extend the time for [the applicant] to make her application for Judicial Review', but it 'did, however, grant leave to [the applicant] to apply for Judicial Review', to that 'extent, it must implicitly have extended the time for [the applicant] to do so'.[86] The applicant argued that 'the respondent [was] not entitled at the substantive hearing of the Motion to reopen this issue of whether leave ought to have been granted, on the basis that there is no good reason for extending the time under section 11(1)'.[87] The court responded that, first, it could see 'no reason, however, why such an application cannot be made in the way that the respondent has made it in this case, i.e. by asking for the issue to be considered at the substantive hearing'; second, '[i]f a respondent adopts this course and the applicant considers that it would be preferable for the issue of whether the leave should be set aside to be determined prior to the substantive hearing', then, in its opinion, 'there would not seem to be any reason why the applicant may not ask the Court to direct that the respondent's application be heard in advance'; and, third, '[s]imilarly, in appropriate circumstances, the Court may direct that this be done even if neither party applies for such a direction, as an exercise of the Court's inherent jurisdiction to regulate its own procedures so as to effectively manage each particular case in a manner that is as efficient as possible.'[88]

However, in *Barrimond v Public Service Commission*,[89] the judge who first granted leave to the applicant did not expressly extend the time to apply for leave although one year had elapsed between the preferment of the charges and the filing of the judicial review proceedings. The court noted that the respondent did not make any interlocutory application to vacate the order granting leave to apply, nor did it file a formal notice of intention to take a preliminary objection at the hearing of the substantive application.[90] The first issue for the court hearing the

82 Ibid at 7.
83 Ibid.
84 TT 2002 HC 67.
85 Ibid at 5.
86 Ibid.
87 Ibid at 7.
88 Ibid at 8.
89 TT 2008 HC 120.
90 Ibid at [6].

substantive judicial review application was whether the leave granted previously to apply for judicial review should be set aside, or, alternatively, whether the substantive application should be dismissed at the trial on the ground of the applicant's undue delay in making the application.[91] The court observed that a respondent was undeniably entitled to rely on section 11 of the JRA, but questioned at what stage was the right to raise delay exercisable. It explained that subsection (2) confers a discretion on the court to refuse leave if there has been undue delay in making the application and that the language in subsections (1) and (2) suggests that the issue is to be determined at the leave stage and not at the substantive application stage.[92] The court noted that, if the application for leave was made at a contested *ex parte* or converted *inter partes* hearing, then the appropriate place to take the objection was at the leave stage. However, it explained that most applications for leave are made *ex parte*, uncontested, and unless the delay was apparent enough to be recognised or was specifically drawn to the judge's attention by the applicant's counsel, and he expressly extended the time, the directive in the first limb of subsection (1) would appear to have been overlooked.[93] The court noted the following observations concerning the application for leave where there is delay. First, where the leave-granting judge expressly extends the time to make the application, the exercise of his discretion is reviewable on appeal or by application to set aside. Second, sometimes evidence of delay is unearthed after the extension is granted and a respondent will have recourse to interlocutory remedies before the leave-granting judge, or another judge, to reverse the grant. Third, cases arise where undue delay is apparent on the papers, but the judge has nonetheless granted leave without expressly extending time to make the application. The court explained that, in

> both cases, which is to say, on grants made *ex parte*, uncontested, where there is apparent delay and time is expressly extended or in cases where the order is silent, the question arises: what is the appropriate stage of the proceedings for the respondent to take the objection? More directly put, can the objection be taken at the substantive hearing, and, if so, by what procedure?[94]

The court noted that the *Balwant* decision, mentioned above, was decided 'before the judgments of the Court of Appeal[95] and Privy Council in *Fishermen and Friends of the Sea v The Environmental Management Authority*'.[96] It continued that the 'proceedings [in that decision] were concerned with whether the leave-granting judge at a contested *ex parte* hearing correctly exercised his discretion in refusing to extend time under section 11 (1) of the JRA' and that '[o]ne of the grounds of appeal was that the judge should have deferred the application for an extension of time to the substantive hearing'.[97] In the Court of Appeal, Nelson JA said:

> I must bear in mind the policy of the JRA was to have a filtering mechanism for applications for judicial review, and further, where such applications are not prompt or later than three months from the impugned decision a second filter, a discretionary extension of time, must be put in place. Thereafter, under our law, if the time for applying for leave has been extended, by section 11(2), which deals only with the leave stage, the application for leave may be defeated if undue delay would cause substantial hardship or prejudice to third parties or detriment to good administration.[98]

91 Ibid at [13].
92 Ibid at [15].
93 Ibid.
94 Ibid at [15].
95 TT 2003 CA 45.
96 [2005] UKPC 32.
97 TT 2008 HC 120 at [17].
98 TT 2003 CA 45 at [37].

He continued that:

> In Trinidad and Tobago we have copied section 31(6) of the UK Supreme Court Act in our section 11 (2), but with substantial changes. The effect of the changes is to disapply the concept of undue delay to applications for substantive judicial review. Section 11(2) deals only with leave applications and not substantive applications.[99]

The court was of the opinion that a judge at a substantive hearing who is reviewing the *ex parte* grant of leave by another judge pursuant to a notice of preliminary objection, or, as in the instant case, on an oral application, would, in the absence of new factual developments or non-disclosure, be carrying out an appellate function within the unaccommodating structural confines of the JRA.[100] The court, while observing that the JRA plainly recognised two separate stages, noted that, although there was a difference of opinion on the operation of the sections between the views of Nelson JA and the *obiter* views of Kangaloo JA in *Sanatan Dharma Maha Sabha of Trinidad and Tobago v Manning*,[101] it was bound by those of Nelson JA and proceeded to apply them.[102] The court was of the opinion that 'undue delay is disapplied from substantive applications, and a notice of a preliminary objection sustains its life only as an appendage of the substantive motion'.[103] It continued that, barring cases where the issue of delay was deferred, if leave has been granted *ex parte* and the order was silent as to an extension of time, it must be presumed that the leave-granting judge extended time: an extension of time was implicit in the grant of leave.[104] The court explained that the following principles apply in such a situation: first, a respondent should promptly make a separate interlocutory application to set aside leave. Second, such an application has an independent life and is not an appendage of the motion for substantive relief, and that application can be heard before or together with the substantive application. Third, the right of appeal against a decision in the interlocutory application is independently preserved. It continued that, where 'an applicant has misrepresented the facts of his timeliness, the prospects of the interlocutory application would be strengthened', and that '[i]f all the evidence of delay is apparent on the papers filed in the leave application, the implied extension of time is made more resistant (but not impervious) to complaint'.[105]

The court, therefore, refused the respondent's oral application to set aside the leave granted by Gobin J, whether by way of preliminary application or as a submission at the substantive application. The court noted *obiter* that applicants for leave have a duty, in cases where untimeliness was apparent on the *ex parte* application, to ensure that the order for leave expressly extends time. It noted that the implied grant of extensions of time raises unseemly and problematic questions; and it should not be allowed to develop into a settled practice. The court also pointed out that it might soon become necessary that costs wasted by respondents on applications to set aside leave are borne by applicants who seek and present imperfect draft orders at the *ex parte* stage.[106] On the facts of the case, it concluded that it would still have been unwilling to dismiss the application on the ground of the applicant's undue delay, because when the applicant became aware that charges had been preferred against her, she wrote to the Director of Personnel Administration complaining about the five-year prosecutorial delay and asking that the charges be withdrawn. It continued that, since there was no reply, she was entitled to believe

99 Ibid at [46].
100 TT 2008 HC 120 at [17].
101 TT 2005 CA 36.
102 TT 2008 HC 120 at [17].
103 Ibid at [18].
104 Ibid.
105 Ibid at [18].
106 Ibid at [19].

that her request was being considered or entertained; it was only seven months later that the appointment of the disciplinary tribunal came to her attention. As a result, the court held that it was only at that time that time began to run and that, since the application for leave was made within three months of this event, the court ruled that it could not take account of the four years and eight months preceding the preferment of the charges, because the applicant was not aware that the matter was proceeding.[107]

In *Sanatan Dharma Maha Sabha of Trinidad and Tobago v Manning*,[108] the issue for the Court of Appeal of Trinidad and Tobago was whether Jones J was plainly wrong when she exercised her discretion to set aside the leave granted to the appellant to apply for judicial review by Gobin J.[109] In deciding this issue, the court examined the circumstances under which there was jurisdiction to set aside an *ex parte* grant of leave for judicial review. It was of the opinion that the approach of Bingham LJ in *Chinoy* was to examine the issue of law raised by the applicant to see whether it could ultimately succeed on the substantive motion for judicial review, and because the learned judge was in 'no doubt' that the application could not ultimately succeed he set aside the leave.[110] The Court of Appeal, speaking though Kangaloo JA, made some interesting observations concerning the scope of section 11(2) of the JRA. It noted that, under this section, the court may refuse leave if it considers that there has been delay in making the application and the grant of any relief would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. It continued by stating that two points concerning this section were worthy of note: first, it would be rare indeed when an applicant on an *ex parte* application for leave would be in possession of material showing that the grant of any relief would not cause substantial hardship or prejudice the rights of any person, or would not be detrimental to good administration. Second, the section appeared on its face to 'disapply the concept of undue delay to applications for substantive judicial review'[111] so that the question of delay and prejudice might only be considered at the leave application. The Court of Appeal observed that this point was not argued before it but that it was 'not saying that this is the effect in law of the section, but on the face of it, it can be argued that the section is capable of that interpretation. . . . This could hardly have been the intention of the draftsman'.[112]

It continued that, first, the effect of these two observations was that questions of undue delay and prejudice etc. were likely to be dealt with at the leave stage on a contested application, whereas these were questions that should, in many cases, be more conveniently and properly considered at the substantive stage after a full hearing; and, second, the effect also had the undesirable result of increasing the number of contested leave applications or encouraging applications to set aside leave, thereby increasing the overall time for the hearing of a matter where leave was granted or not set aside, with the consequent escalation of delay and costs.[113] The court also suggested that section 11(2) be amended to reflect what is in section 31(6) of the Supreme Court Act 1981 of the United Kingdom to make it clear that undue delay may

107 Ibid at [20]. See *R v Secretary of State for the Home Department, ex p Chinoy* [1991] TLR 189 DC.

108 TT 2005 CA 36. See also *National Transport Cooperative Society Limited v Minister of Labour and Small and Micro Enterprise Development* TT 2007 HC 154; *Mahabir v Airports Authority of Trinidad and Tobago* TT 2007 HC 169; *Beddeau v Public Service Commission* TT 2007 HC 247 (considering the effect of Part 56.5(1) and (3) of the CPR in the light of section 11(2) of the JRA); *Chang v Hospital Administrator* TT 2008 HC 191; *De Coteau v Public Service Commission* TT 2004 HC 19; *Digicel (Trinidad & Tobago) Ltd v MacMillan* TT 2007 HC 183; and *Solomon v Statutory Authorities Service Commission* TT 2008 HC 127.

109 TT 2005 CA 36 at [1].

110 Ibid at [15].

111 The court compared this with Nelson JA's comments at paragraph 46 in the *Fishermen & Friends of the Sea* case.

112 TT 2005 CA 36 at [23].

113 Ibid.

preclude leave at the *ex parte* stage or relief on the substantive hearing when the grant of relief would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. The Court of Appeal also noted that section 31(6) was the equivalent to the former Order 53, Rule 4 of the Rules of the Supreme Court 1975 and it is also reflected in Rule 56.5. The amendment of section 11(2), it continued, would, therefore, not only promote greater efficiency but would avoid unnecessary problems in interpretation that were likely to arise. Lastly, the court suggested that perhaps the time had come for the Law Commission to have a look at section 11(2) with a view to making it less problematic.[114]

Section 8 of the AJA states that the court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration. In *Lloyd v Attorney General of Barbados*,[115] the Court of Appeal had to consider the scope of that section. At first instance, the trial judge found that 'the Attorney-General was not the proper party to the proceedings but on a like *in limine* objection struck out the originating notice of motion under section 8 of the [AJA] on the ground that to allow the application to proceed after such a lapse of time would be detrimental to good administration'.[116] The Court of Appeal observed that:

> [t]he language of section 8 has to be unreasonably and excessively strained, in order to support a construction of the section as enabling a Court to strike out *in limine* an application for review under the Act. The grant or refusal of relief is not a matter that falls to be determined at the initial or preliminary stage of a trial. The appropriate relief in a particular case is decided upon after a substantive hearing. To strike out *in limine* such an application is in effect to reinsert in the section a provision requiring leave to make the application which Parliament must be taken to have deliberately excluded.[117]

It continued that the question of 'whether the grant of relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administrations are questions that are more appropriately decided after a full hearing'.[118] Consequently, it held that 'the appeal must be allowed because the appellant did not have the benefit of a full hearing of her application'.[119] The court also ordered that the 'order of the judge is set aside and the case is remitted to the High Court for the application to be determined'.[120]

On the remittal to the High Court,[121] the question was whether there was undue delay by the applicant in filing her application and, if so, whether she was barred from obtaining any relief to which she otherwise would have been entitled.[122] After considering the merits of the application, the court held that '[s]ubject to a determination on the issue of undue delay, [the applicant was] entitled to relief for the wrongful act in declaring her post vacant'.[123] The court conceded that there was *a prima facie* case of undue delay in instituting these proceedings,[124] but

114 Ibid.
115 BB 2000 CA 27. See also *Sandiford v Thompson* BB 1999 HC 2.
116 BB 2000 CA 27.
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
121 BB 2004 HC 18.
122 Ibid at [7].
123 Ibid at [22].
124 Ibid at [60].

that it was 'necessary to closely examine the history of the matter to determine the reason for the delay'.[125] After examining the facts, the court noted that 'against the background of a suspension and the uncertainty of the unresolved accusation of theft, it seems reasonable that she would be reluctant to institute legal proceedings'.[126] It consequently held that 'in all circumstances . . . the failure [of the applicant] to institute proceedings up to the end of September 1989 was reasonable and ought not to be regarded as undue delay'.[127] However, in relation to the period of six years and nine months which elapsed between October 1989 and June 1996 when the proceedings were filed, the court claimed that the position was entirely different: it ought to have become clear to her by October 1989 that an inordinately long period had elapsed since the matter had first arisen and legal action was required.[128] The court found that 'this latter period constituted undue delay in the institution of these proceedings'.[129] The court then noted that, first, 'a decision to grant her relief will have no effect or impact beyond the parties to this application. Justice demands that she be compensated for the harm suffered';[130] second, '[t]here will be no detriment to good administration as a result of a decision to grant her relief under the Act';[131] and, third, 'good administration is founded upon administrative justice', noting that it 'would be detrimental to good administration in this context not to impugn the arbitrary and unlawful decision to declare the post of [the applicant] vacant in circumstances where there was a clear breach of the principles of natural justice'.[132]

AMENDMENTS

In *Digicel (Trinidad & Tobago) Ltd v MacMillan*,[133] the applicant filed an application to amend the application for judicial review to include a claim for an order of *certiorari* quashing a decision of the Arbitration Panel with respect to the costs of the dispute.[134] It argued that 'it was logical that the issue of costs follow this court's determination of the outcome of the dispute between the parties'.[135] The court stated that 'Part 56.13(2) of the [CPR] under the rubric Case Management Conference states the judge may allow the claimant to amend any claim for an administrative order', which it thought gave the 'court the discretion to allow an amendment to an application for judicial review at a case management conference in an appropriate case'.[136] It continued that, despite the fact that the parties were at the pre-trial review stage, it had no doubt that the judge has the discretion, in an appropriate case, to grant an amendment at this stage and that the exercise of this discretion is guided by the substantive law and the overriding objective of the CPR.[137] The court also stated that, first, Part 1 of the CPR requires the court to deal with each case justly; second, Part 1.1 lists some guidelines that a court ought to consider when exercising its discretion under the CPR; third, these guidelines reflect the need to ensure that the case is dealt with expeditiously (Part 1.1(d)) and the need to allot to it an appropriate share of

125 Ibid at [61].
126 Ibid at [64].
127 Ibid at [69].
128 Ibid at [70].
129 Ibid at [71].
130 Ibid at [80].
131 Ibid at [81].
132 Ibid at [82].
133 TT 2007 HC 183.
134 Ibid at 5–7.
135 Ibid at 6.
136 Ibid at 7.
137 Ibid.

the court's resources (Part 1.1(e)).[138] It continued that amending the application at that stage to allow for a review of the new decision would not have met with the objective of dealing with the case justly, because, in the first place, the proximity of the service of the application to the pre-trial review of necessity meant that the respondents' objections of a lack of time to properly consider the application were, in the circumstances, valid objections.[139] This was of particular concern since, in the court's view, had Digicel sought leave to apply for judicial review of this decision, it would have been open to the respondents to object to the leave sought on the grounds of lack of promptness.[140] The court was of the opinion that of even greater concern to it, especially in the light of Part 1.1(2)(e) of the CPR, was the fact that if the amendment was granted then, of necessity, further affidavits and skeleton arguments would be required, thereby necessitating an adjournment of the scheduled dates of the hearing. In the court's opinion, to allow such an amendment at that stage would not lead to an expeditious hearing of a matter already substantially delayed because of the recusal of the judge who granted the leave and gave the initial directions.[141]

In *Ex p Belize Alliance of Conservation of Non Governmental Organisations*,[142] the respondents opposed the amendments sought by the applicant to substitute amended grounds on which it was seeking relief and leave to use further affidavits. The court noted that, first, in so far as amendments generally are concerned, it is settled law – the overriding principle is that all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the court thinks just; and, second, in practice however, an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury to the other side which cannot be properly compensated for by costs.[143] It continued that a guiding principle of cardinal importance on the question of amendment is that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings'.[144] The court asserted that this ameliorative power in the court, to allow amendments in order to be able to get to the heart of the matter in contention between the parties for the purpose of determining the real question or issue raised by or depending on the proceedings, was confirmed even with the formal provision in 1977 of judicial review as a new and comprehensive public law remedy.[145] The court then granted the applicant leave to amend the grounds on which it was seeking relief after a careful perusal of the papers filed and having listened carefully to the arguments and submissions by the attorneys for both sides.[146] It then allowed the amendments sought as they did not, in any event, lead to any prejudice to the respondents, who had yet to file any affidavits in answer to the applicant's application.[147]

In relation to the use of two affidavits, the court noted that both respondents resisted the grant of leave to use these affidavits, because these affidavits would introduce new elements or fresh evidence and in any event they related to issues that arose after the decisions the applicant was seeking to impugn were taken.[148] It noted that the rules permitted the applicant to apply to

138 Ibid.
139 Ibid at 9–10.
140 Ibid at 10.
141 Ibid at 11.
142 BZ 2002 SC 5.
143 Ibid at 4.
144 Ibid at 6.
145 Ibid.
146 Ibid at 8.
147 Ibid.
148 Ibid. See *Chandler v Bernard* TT 1999 HC 31 (unlawful evidence); *Charleau v Commissioner of Police* TT 2006 HC 67 (unreliable evidence); and *Ex p Belize Alliance of Conservation Non-Governmental Organisations* BZ 2002 SC 5.

the court to be allowed to use further affidavits provided it gave notice of its intention to every other party. The court continued that, in the instant case, the applicant had given notice of its intention and served copies of the further affidavits on the respondents.[149] The court continued that, in all the circumstances of the application, first, the applicant should, especially in the light of its amended grounds for the relief sought, be allowed to use the further affidavits it was seeking leave to use; and, second, it was also guided by the consideration that the respondents had yet to file their own affidavits and therefore had ample time to controvert or rebut anything contained in the applicant's affidavits.[150] In respect of admissibility of new evidence after trial, in *Braithwaite v Chief Personnel Officer*,[151] '[s]ince in my opinion no serious injustice will be done, and mindful of the exhortation to discourage applications to put in late evidence (as distinguished from new evidence)' the court declined 'to exercise [its] discretion and hereby deny the application made to re-open this case'.[152]

In *Gillette Marina Ltd v Port Authority of Trinidad and Tobago*,[153] the question raised was '[w]hen can further affidavits be used by an applicant in judicial review proceedings under the Judicial Review Act 2000?'[154] The court replied that '[i]n deciding what paragraphs of the affidavits, if any, are to be struck out, this Court ought to make its decisions bearing in mind this legal and factual context.'[155] It continued that '[i]t is appropriate at this point to deal with an argument that will be determinative of several paragraphs to be considered later. That is, when can "further affidavits" be used by an applicant in judicial review proceedings.'[156] The court concluded that it was 'only where there are new matters raised in the affidavits filed on behalf of any other party to the application that the applicant may be entitled to read and use further affidavits to deal with these new matters'.[157]

COSTS

Where an applicant in a judicial review application has disrespected a magistrate he is penalised in costs.[158] The court has also noted that, although counsel's simple disobedience to the direction attracts the court's disapproval as being discourteous, it does not amount to the serious misconduct which merits a wasted costs order.[159] In *Sandiford v Public Service Commission*,[160] the court noted that it must use its knowledge and experience and, having regard to Order 62, Rule 7(2), and having considered the matter, it took the view that the sums allowed by the Deputy Registrar for counsel's fees fell toward, but not above, the upper limit of what was proper in all the circumstances of the case. In addition, the court explained that the courts have made it clear that, in contentious litigation in which the Chief Justice was involved, the State was not bound to pay the costs of his attorney unless it expressly said so. Therefore, in *Solomon v Attorney General of Trinidad and Tobago*,[161] where the Attorney General gave no undertaking that the State

149 BZ 2002 SC 5 at 9.
150 Ibid.
151 BB 2008 HC 1. See also *Digicel (Trinidad and Tobago) Ltd v MacMillan* TT 2007 HC 73.
152 BB 2008 HC 1 at [30].
153 TT 2003 HC 28.
154 Ibid at 4.
155 Ibid at 5.
156 Ibid at 19.
157 Ibid at 20.
158 *Re Crevelle* TT 2000 HC 17.
159 *Jack v Commissioner of Prisons* TT 2008 HC 262; *Jaggessar v Teaching Service Commission* TT 2009 HC 26; and *Mohan v Chief Fire Officer* TT 2008 HC 230 (considering Part 67.2).
160 BB 2003 HC 14.
161 TT 2007 HC 56.

should meet the Chief Justice's legal costs in a judicial review matter, the Chief Justice had no ostensible authority to engage services of the applicant and bind the State in so doing. As a result, the court ruled that no bill of costs should be taxed and served on the Attorney General. In *Belize Telecom Ltd v Attorney General of Belize*,[162] the issue was 'whether the applicant who is an Interested Party in these proceedings can maintain an application for security for costs'.[163] The court was of the opinion that, '[h]aving been served, the applicant has participated in these proceedings and caused costs to be incurred not only upon itself but also upon other parties to these proceedings', which meant that the 'applicant is, thus, a party to these proceedings and entitled to seek an order from the court for security for costs'.[164] It then concluded that, in its view, it would be 'highly undesirable to have a situation where an interested party being required to take active part in judicial review litigation and thereby incurring costs, and yet has no means to obtain costs for so participating in such proceedings'.[165] It continued that the starting point is section 87 of the Supreme Court of Judicature Act, which confers on the court general power on costs. Section 87(2) provides that subject to section 88 and rules of court, 'the costs of and incidental to any proceeding in the Court shall be in the discretion of the Court or judge.' The court noted that it retained a general jurisdiction on costs which could be exercised to allow an interested party to obtain an order for security for costs in judicial review proceedings under Part 56 of the CPR.[166] The court also stated that, first, the rules empower it to require the claimant to provide security for the costs of the defendant; second, however, they are silent on the power of the court to deal with a claim requiring a claimant to provide for the costs of an interested party in judicial review proceedings; and, third, in its respectful view, those provisions could not be interpreted so as to preclude the court from exercising its discretion to order security for costs on the application of an interested party in judicial review proceedings.[167] It therefore concluded that the applicant was entitled to apply for an order for security for costs against the claimants in this case[168] but, nonetheless, declined to grant it on the facts.

In *Carib Info Access Limited v Water and Sewage Authority*,[169] the court noted that the 'general rule, therefore, is that costs should follow the event. Thus, a party who had discontinued proceedings would normally be required to pay the other party's costs.'[170] It continued that there are exceptions to this rule, for example, where judicial review proceedings are not pursued to a full hearing and the issue of costs cannot be resolved between the parties. The court explained that, depending on the circumstances that lead to the discontinuance, it might appear to the court that some order should be made as to costs in whole, or in part. If, for example, it continued, the discontinuance was due to the matter becoming academic, or settled, on some authority, the appropriate order in such case was either no order as to costs, or that each party should bear its own costs.[171] The court summarised the law as follows: first, the court has the power to make a costs order where substantive proceedings have been resolved without a trial, but the parties have not agreed on costs. Second, the overriding objective is to do justice between the parties, without incurring unnecessary court time and additional costs, and to avoid discouraging parties from settling judicial review proceedings, for example, by one party making a

162 BZ 2008 SC 3. See also *Hoare v Registrar of Lands* BZ 2004 CA 3; and *Rickhi v Commissioner for Co-operative Development* TT 2007 HC 9.
163 BZ 2008 SC 3.
164 Ibid.
165 Ibid.
166 Ibid.
167 Ibid.
168 Ibid.
169 TT 2008 HC 33.
170 Ibid at [7].
171 Ibid.

concession at an early stage.[172] Third, keeping those objectives in mind, it is important to identify the circumstances and the manner in which the proceedings had been resolved without a trial because this would have an effect on the court's exercise of its discretion. For example, (a) in the absence of good reason otherwise emanating from the circumstances of the case, the default position is no order as to costs should be made; (b) where the respondent, recognising that he or she is likely to fail, has pre-empted his failure by doing what was asked of him by the applicant, he or she should not only fail to recover his costs, but pay the applicant's costs; (c) where the question has become academic through the respondent deciding to short-circuit proceedings without the respondent accepting a likelihood of failure, he should not be deterred from this by the threat of liability for the applicant's costs. Rather, there should be no order and costs should lie where they fall; similarly where some action independent of the parties has rendered the outcome academic; and (d) at each end of the spectrum, there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion; in between, the position will, in shifting degrees, be less clear. The court explained that how far it will be prepared to look into previously unresolved substantive disputes will depend on the circumstances of the particular case, not least the costs at stake and the conduct of the parties. Fourth, that either party is legally aided would normally be irrelevant.[173]

The court continued that 'where a matter is not to proceed on the merits but there is no agreement on costs, and where the parties leave it to the court to determine what should be done on costs', the court 'has to form some kind of view of the factual context to decide who should pay costs to whom'.[174] After examining the evidence, the court stated that both Carib Info and WASA (the Water and Sewage Authority; and by proxy the Minister who had the 'responsibility' for WASA) failed to comply with their respective obligations. The court explained that all the parties were trying to understand the workings of a new legislation and the consequence of their efforts was that proceedings were brought which, arguably, did not become academic, but were probably always academic. Therefore, it held that all the parties shared responsibility for this, and that, on the facts, there was no reason to depart from the normal order for cases where judicial review proceedings are withdrawn because they have become academic.[175] As a result, the court ruled that it would confirm that Carib Info be granted leave to withdraw the proceedings and that all parties should bear their own costs.[176]

In *Graham v Police Service Commission*,[177] it was stated that there were several issues arising from the parties' actions and understanding of the role and function of the Pre-Action steps and what responsibilities fell to them. The court then explained the role of the Pre-Action steps in judicial review proceedings as follows: first, the Pre-Action Protocols form part of a Practice Direction given by the Chief Justice. The CPR empowers the Chief Justice to make these Practice Directions for the better functioning of the CPR and, by extension, fulfilling the overriding objective of dealing with cases justly (Part 1.1 of the CPR: 'The overriding objective of these Rules is to enable the court to deal with cases justly'). It continued that, for that reason, the Pre-Action Protocols in Trinidad and Tobago cover such areas of litigation as Personal Injury Actions, claims for a specified sum of money and, more relevant to this matter, claims for Administrative Orders.[178] Second, the Practice Direction mandating the use of Pre-Action

172 Ibid.
173 Ibid.
174 Ibid at [8].
175 Ibid at [43].
176 Ibid at [44].
177 TT 2008 HC 166.
178 Ibid at [13].

Protocols ('Protocols') states that the objectives are early and full exchange of information, avoidance of litigation by settlement of matters and to support the efficiency of the CPR. (The objectives of the Protocols are: (1) to encourage the exchange of early and full information about the prospective legal claim; (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and (3) to support the efficient management of proceedings under the CPR where litigation cannot be avoided.)[179] Third, paragraph 2.1 of the Protocol provides in part that '[i]f proceedings are issued the Court may take into account the failure of any party to comply with a Protocol when deciding whether or not to make an order under Part 66' (Costs – General). The court held that this meant that the court may use the non-compliance with a protocol to enable it to decide whether to award costs or not or to make a reduced order for costs.[180]

Fourth, although Part 2.3 states that the court expects parties to comply with the protocols, it was not likely to be concerned with 'minor infringements' of the Practice Direction or the protocols[181] and Part 2.4 outlines the powers of the court if it forms the view that, had the protocols been complied with, there might not have been litigation. These powers, in the court's view, include ordering the party at fault to pay the costs of the proceedings or part thereof, or order the party at fault to pay the costs on an indemnity basis subject to placing the innocent party in no worse a position than he would have been had there been compliance.[182] The court continued that:

> When a claimant has not complied with the procedure required by a protocol, Part 3.1 states that he has failed to comply with that protocol. When the defendant fails to make a preliminary response to the letter of claim within the time limited by the particular protocol or has failed to make a full response within the time stipulated by the protocol for that purpose, he is found to have failed to comply with that protocol.[183]

The court then went on to say that, where appropriate, it would expect all parties to comply with the protocol, and would consider compliance or non-compliance in the award of costs.[184] It explained that the claimant is expected to send a letter to the defendant to identify the issues in dispute and 'establish whether litigation can be avoided'. The court noted that the letter should also specify the relief claimed, and the letter in response should follow from the defendant within 30 days of the receipt of the claimant's letter; and that, in addition, where it was not possible to reply within the time limit, the defendant should send an interim reply and propose a 'reasonable extension' accompanied by reasons for the request for the extension.[185]

After considering the evidence, the court held that the general rule was that costs follow the event and that, since it did not consider that there was a winner or a loser in the instant case, it wondered what approach it should follow. It explained that, in such circumstances, the court must, therefore, look to what the justice of the case required and, in making an award for costs in public law matters, the court must be mindful not to make such an award as to discourage early settlement of matters. Two of the factors that guided the court were, first, the overriding objective to do justice between the parties and, second, the circumstances of each case.

179 Ibid at [14].
180 Ibid.
181 Ibid at [15].
182 Ibid at [16].
183 Ibid at [17].
184 See Appendix D Paragraph 1.5: 'All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of his or her case. Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it and will take into account compliance or non-compliance when making orders for costs.'
185 TT 2008 HC 166 at [19].

It therefore concluded that, in the absence of any good reason to make any other order, the fallback position was to make no order as to costs.[186] It explained that the major issues would be to do justice between the parties. The court considered, first, the scant regard for time limits, whether imposed by the Pre-Action Protocols or the CPR, which it held weighed heavily against the Public Service Commission (PSC) and the Ministry of National Security. Second, save for the delay complained of in dealing with the alleged misconduct complaint, it did not think that, on the very face of it, the complaint about the downgrading of the staff reports might not have met with success. Taking all things into consideration, the court was minded to award a reduced order for costs in the applicant's favour, which was based on the costs budget set by the court, and ordered that a statement of costs be submitted by the applicant to cover the period from the time of filing to the date of the filing of the notice of discontinuance, to be assessed.[187] The court then ordered that: (i) the defendants pay the claimant's costs of the action but reduced by 60 per cent; (ii) the claimant file a statement of his costs to cover the period from the time of filing to the date of the filing of the notice of discontinuance.[188]

PARTIES

When making an application for judicial review, a claimant must identify the party against whom he is seeking the various forms of relief. In *Hong Ping v Public Service Commission*,[189] the applicant sought judicial review of the decision of the PSC to dismiss him from the police service, following a recommendation of a tribunal set up to investigate and hear evidence against him. He appealed the PSC's decision and the Public Service Appeal Board (PSAB) upheld and affirmed the PSC's decision.[190] The court claimed that the central question was whether the PSC was the proper defendant, because it was the PSAB that affirmed the decision of the PSC. It noted that the PSAB 'made a decision. It was not the [PSC's] decision that led to [the applicant's] termination of employment. The [PSAB] was therefore an essential party to bring before the Court in these proceedings'.[191] It therefore held that the 'action filed was misconceived as the wrong party was sued and the lapse of nine months between the effective decision and the time of filing works against any opportunity to regularise the situation at this time'.[192] In *IDM Direct Marketing Corporation v Attorney General of Barbados*,[193] the respondent argued that 'the Attorney-General was not a proper party to the proceedings as he was not responsible for any act or omission within section 2 of the [AJA] since these are not civil proceedings within the meaning of section 14(2) of the Crown Proceedings Act.'[194] The court noted that '[i]n order to determine whether the Attorney-General is a proper party to these proceedings one must examine the act or omission he exercised or failed to exercise in pursuance of any power or duty conferred on him by the Constitution or by any enactment' and that, '[u]nder the proviso to section 72(1) of the Constitution, it is stated that 'the Attorney-General shall be assigned the

186 Ibid at [33].
187 Ibid at [34].
188 The court in *Evelyn v Peterson* TT 2009 HC 270 – that failure of the claimant's attorney to have issued a pre-action protocol letter in accordance with Appendix D to the Practice Direction issued by Chief Justice Sharma on 15 November 2005 – goes more to the issue of costs (at [21]).
189 TT 2007 HC 124.
190 Ibid at [1].
191 Ibid at [11].
192 Ibid at [22].
193 BB 1997 HC 47. See also *Kirvek Management and Consulting Services Limited v Attorney General of Trinidad and Tobago* TT 2000 HC 3.
194 BB 1997 HC 47.

functions of principal legal adviser to the Government' and that '[t]here is no allegation or contention that the Attorney-General exercised or failed to exercise any power or duty conferred on him by that provision'.[195] It continued that the only other enactment relevant to these proceedings is section 70 of the Magistrates Jurisdiction and Procedure Act, which provides for the issue of search warrants and the detention or disposal of articles seized thereunder.[196] The court claimed that the 'section is directed to, and confers powers and duties on, magistrates and police and parish constables named in the search warrant' and that it 'confers no power or duty on the Attorney-General, and there is therefore no act or omission that he could have exercised or failed to exercise under that section'.[197] Consequently, it concluded that '[in] the circumstances [it was] of opinion that if these proceedings were continued against the Attorney-General they would fail. I therefore hold that the Attorney-General is not a proper party to these proceedings and he is accordingly discharged'.[198]

In *Shazar Distributors v Attorney General of Barbados*,[199] the Comptroller of Customs decided not to deliver three vehicles imported into Barbados to the plaintiff because he had not submitted the required documentation. An investigation was commenced by the customs officials to determine the truth and accuracy of declaration of value and it was decided that, while the investigation was ongoing, delivery of vehicles to the plaintiff would be delayed until at least the completion of the investigation. The claimant argued that, in so far as the Rules[200] stipulate that only notice of an application for judicial review should be served on the Attorney General, the Attorney General was not intended to be a party to such applications.[201] The court accepted that 'it is the well-established practice in these Courts to join the Attorney General as a party to applications for judicial review'.[202] The court claimed that 'no prejudice can result as the Attorney General would be called upon, in any event, to represent the Comptroller of Customs'[203] and refused 'the application to strike out the Attorney General as a party to these proceedings'.[204] The court in *Mount Six Mens Company Limited v Chief Town Planner*[205] also considered the issue of whether the Attorney General should be a party to judicial review proceedings and, if so, what appropriate procedure should be followed. In that case, the respondents argued that: first, 'Rule 2(3) requires that the applicant give notice of the Application to the Attorney General not later than the day before the Application is made and points out that while the Application was filed on 18th February, 1999 it was not served on the Attorney General until 24th February, 1999'; second, 'that Rule 3(1) of the Rules requires that the Notice of Motion must be served on all persons directly affected' and that '[i]n this regard says counsel, allegations have been made against the Minister of Town and Country Planning and the Minister of Housing whose acts and omissions are being questioned but who have not been served'; and, third, '[i]n breach of Rule 3(3) of the said Rules the affidavits filed by the applicants do not state any reason why the Minister of Town and Country Planning and the Minister of Housing, being persons who ought to have been served, have not been served.'[206] The court replied that 'service of the application was effected after the time prescribed for doing so' but considered

195 Ibid.
196 Ibid.
197 Ibid.
198 Ibid.
199 BB 2006 HC 13.
200 Judicial Review (Application) Rules made under the Administrative Justice Act.
201 BB 2006 HC 13 at [3].
202 Ibid at [5].
203 Ibid at [10].
204 Ibid at [11].
205 BB 2003 HC 9.
206 Ibid at [7].

that 'as the hearing of the matter did not commence until 18th June, 1999, there would have been no prejudice to the respondents by virtue of late service on the Attorney General'.[207] It continued that, while it appeared on the face of the pleadings that the Minister of Housing and the Minister of Town and Country Planning were persons directly affected and, that, as persons directly affected, they should have been served, it considered that, in accordance with Order 2, Rule 1, Rules of the Supreme Court, 1982, this should be treated as an irregularity[208] and ordered that they should be served. It also claimed that the affidavits filed did not state any reason why they had not been served, so it would also treat this as an irregularity and ordered that they should also be served.[209]

The respondent submitted that the Attorney General should be struck out as a respondent[210] and that 'there has been no administrative act or omission on the part of the Attorney General within the meaning of the [AJA]' and that 'the proceedings are not civil proceedings within the meaning of the Crown Proceedings Act and Section 18 of the [AJA] cannot be invoked to justify making the Attorney General a respondent'.[211] The applicant submitted that 'acquisition of land in Barbados is done in the name of the Crown under statutory power that the applicant is seeking a declaratory judgment against the Crown' and 'that the Governor General is the representative of the Crown and in the circumstances the Attorney General is a proper party'.[212] The court noted that counsel referred to *Hochoy v N.U.G.E.*,[213] where Wooding CJ suggested 'that in future the practice be followed by naming the Attorney General as defendant whenever the validity of any act of state done by the Governor General is being called into question'.[214] It also noted that, in *C.O. Williams Construction v Blackman*,[215] it was the Cabinet's exercise of its statutory function that was held to be properly the subject of judicial review and that the Attorney General was on that basis found to be properly a respondent.[216] The court, therefore, held that 'the applicant is seeking a declaratory judgment against the Crown and it seems proper . . . that the Attorney General be a party to the proceedings as representative of the Crown',[217] ruling that it would not strike out the Attorney General as a party to the proceedings.[218] In addition, the court in *Glinton v Cash*[219] claimed that it was of the view 'that as a matter of courtesy, applicants ought in proceedings against the Crown to name the Attorney General as defendant and refrain from joining the Governor General as a respondent. The proprieties and civilities make such a course eminently desirable'.[220]

In *Persad v Nicholas*,[221] the 'central issue [was] whether a person (the appellant) can sustain an appeal pursuant to section 23 of the [JRA] notwithstanding the fact that he was neither applicant nor respondent in the proceedings in the Court below'.[222] Section 23(1) provides that a person aggrieved by a decision of the court, including an interlocutory order, under the JRA is entitled to appeal that decision as of right to the Court of Appeal. After reviewing the

207 Ibid at [12].
208 Ibid at [13].
209 Ibid at [14].
210 Ibid at [15].
211 Ibid at [16].
212 Ibid at [17].
213 (1964) 1 WIR at 181.
214 [1995] 1 WLR 102.
215 BB 2003 HC 9 at [18].
216 Ibid at [24].
217 Ibid at [25].
218 Ibid at [26].
219 BS 1985 SC 2.
220 Ibid at 27.
221 TT 2006 CA 15.
222 Ibid at [1].

authorities, the court held that the 'test to determine a person aggrieved is whether that person is directly affected by the decision in question, or . . . where an order has been made against him which prejudicially affects his interests'.[223] In the instant case, the court noted that the order made was against the interest of the appellant so he could be considered a person aggrieved. It continued:

> Whatever the test, however, it seems that the person must be a party or at least similarly involved as the Attorney General was in order to exercise a right of appeal. Generally speaking, a person does not pursue litigation or any type of court proceeding unless he seeks some form of relief. It is not an academic exercise; there must be purpose in litigation and that generally is to seek relief or some remedy against the offending party. One cannot stand on the outside, so to speak, and claim relief; one must be a party to the proceeding. If for example, A sues B in negligence, A can seek relief in damages but C, A's wife, cannot unless she is made a party to the action.[224]

The court claimed that, first, '[t]he parties to a judicial review claim will be the claimant, the respondent and any interested persons'; second, '[t]he respondent will generally be the public body whose decision is under challenge and an interested person will be someone whose interest is adversely affected by the decision'; and, third, '[i]n fact, section 5(2)(a) of the [JRA] provides that the court may grant *relief* to any person whose interests are adversely affected by a decision'.[225] Consequently, it reasoned that, from the inception of these proceedings, Nicholas was required to name the appellant as respondent in accordance with the rule. The court noted that there was no explanation why the appellant was not so named and not served. In its view, the 'failure to do so resulted in the appellant having to apply to be joined in the proceedings. In effect therefore the appellant was someone who by possibility should have been a party initially'.[226] The court observed that section 23 gives an aggrieved person a right of appeal and that, although counsel for the respondent argued that unless the appellant was a party to the proceeding he could not exercise that right, the court held that it was not the rule that a person must always be a party in order to do so. The court further held that Order 53 required Nicholas, when making the application for leave to file for judicial review, to name the appellant as a respondent, but he did not do so. It claimed that if the appellant had been named as a respondent from the inception of the proceedings, the question remained whether he would have been entitled to appeal in the capacity of a person who could have by any possibility been made a party to the action by service.[227]

The court also considered the effect of section 14 of the JRA. Section 14(1) makes provision for joinder and provides that any person who has an *interest* in a decision which is the subject of an application for judicial review may apply to the court to be made a party to the proceedings. Section 14(2) provides that the court may: (a) grant the application either unconditionally or subject to such terms and conditions as it thinks fit; (b) refuse the application; or (c) refuse the application but allow the person to make written or oral submissions at the hearing.[228] The court noted that section 14 did not define the word 'interest' so it was left to the judge hearing the application to determine the extent of the 'interest' before deciding whether or not to grant the application. It continued that the JRA was relatively new and the application of certain provisions might not be at all clear. In rejecting the appellant's suggestion that the section was a codification of the common law and should be applied along those lines, the court

223 Ibid at [24].
224 Ibid.
225 Ibid at [26].
226 Ibid at [28].
227 Ibid at [33].
228 *Alleyne v Singh* TT 2005 CA 49.

asserted that, while there was nothing to indicate this, the proper view was the application of the section required no radical departure from the then existing practice in the absence of clear words to that effect.[229] It continued that the section recognised that there was a difference between joining a person as a party and allowing a person to be heard only (by way of submissions or otherwise). In light of this, the court was of the opinion the section should be construed as follows: on an application to be joined, if the applicant shows that his interest was adversely affected, the judge hearing the application should generally join him as a party because, in such circumstances, he would be entitled to relief. It continued:

> if, however, the applicant cannot show that his interest is adversely affected and so is not entitled to relief it is open to the judge to either permit the applicant to be heard at the hearing, depending on the nature of his interest, e.g. a commercial one or otherwise, or to refuse it altogether.[230]

The court further noted that there was a distinction between being joined as a party and being heard only and it was an important distinction, claiming that Turner J summed up the effect of the distinction when granting leave to be heard only in *R v The Secretary of State for the Environment Transport & the Regions ex p Garland*[231] when he accepted that the only practical effect between a person who was directly affected and one who should be heard was that the former had a right of appeal while the latter did not.[232] As a result, it ruled that '[t]he provisions of section 14 therefore do not assist the case of the appellant.'[233]

The court went on to say that '[s]ince it is apparent that the rules of court are silent upon instances in which a non-party may appeal, section 37(1) [of the Supreme Court of Judicature Act] allows the law in force in England on the appointed date to be applied' and that the 'Old Chancery Rule is one such law'.[234] It claimed that the Old Chancery Rule was to the effect that it was not necessary that the person who appealed should be actually a party to the record; it was sufficient if he had an interest in the question which might be affected by the judgment of the order appealed from. In other words, the test was whether he could be made a party to the action by service.[235] The court held that:

> [i]n the absence of express provision in the [JRA], it is difficult to accept the argument that the [JRA] modified the right of appeal under the rule by abolishing the need for leave to appeal. While in the context of the right of appeal the expression 'persons aggrieved' in section 23 is much wider than the expression 'parties to the proceedings' in the Adoption Act in *Re B*, it does not necessarily follow that the expression would ordinarily include those persons who were not parties to the proceedings. A person whose interest is directly affected and who declines to take part in the proceeding in the High Court could hardly complain if the decision goes against his interest and then finds that there is no right of appeal available to him.[236]

It continued that:

> [i]t would be a different matter, however, if he were a person who would by possibility have been a party by service and was not served, as in this case. The Old Chancery Rule would apply and he could seek the leave of the Court of Appeal to pursue an appeal. I would prefer therefore to hold that leave, notwithstanding the provisions of section 23, would be required. It is true that the

229 TT 2006 CA 15 at [30].
230 Ibid at [31].
231 (2000 unreported).
232 TT 2006 CA 15 at [32].
233 Ibid at [33].
234 Ibid at [35].
235 Ibid at [34], citing *Daniell's Chancery Practice* (8th ed), London: Sweet & Maxwell, 1985,Vol 12, 1111.
236 TT 2006 CA 15 at [42].

> rule requires leave should be sought before filing the appeal, but leave is always a matter for the discretion of the Court of Appeal. Had the appellant applied for it prior to filing his appeal the very same argument used here would have been advanced and it is unlikely that it would have been refused, given the circumstances.[237]

The court, therefore, ruled that given the exceptional circumstances of the case, with the failure to name and serve the appellant as a respondent initially, the exercise of the discretion at this stage would cause no injustice to either party, particularly to the one responsible for the omission. As a result, the court granted leave to the appellant to pursue the appeal on the substantive issue, because he was a person who possibly could have been made a party to the proceedings and to deprive him of the right of appeal would be unjust in all the circumstances. It also claimed that the granting of leave, however, would render otiose the appeal against the refusal to join the appellant as a party and would not save the appeal against the order for costs, it having been filed out of time.[238]

In *Sookanan v Conservator of Forests*,[239] the applicant applied for judicial review of certain decisions made by the Minister of Agriculture, Lands, Fisheries and Food Production and/or the Conservator of Forests, including the revocation of a licence or permission granted to the applicant to purchase teak. The court noted that the respondents took a point *in limine* to the effect that each of the officers named as respondents to the motion by virtue of his office was not a corporation sole, and, therefore, the proceedings were a nullity. The High Court judge agreed with the submission but held that the naming of the officers was a mere irregularity, and he made an order substituting the Attorney General as the respondent. On appeal,[240] the Court of Appeal of Trinidad and Tobago noted that '[t]he main question still remains to be answered, i.e. to lend legality to these proceedings must the appellant have brought them against the Conservator of Forests and the Minister of Agriculture in both name and designation as has been submitted by counsel for the respondents?'[241] After examining the authorities, the Court of Appeal pointed out that two principles emerge from the cases: first, that an order for judicial review may be obtained to protect rights in public law, and where upon such an application a breach of a person's right in private law has been established instead, such a person may nevertheless obtain an appropriate order; and, second, that where there was an allegation of an infringement of a right by a public authority (and that expression must include a person holding public office by virtue of any law) the proper procedure was to apply for judicial review. The court questioned who must be the respondents to such application.[242] The court observed that 'in matters which were formerly on the Crown side where the Attorney General may not be made a defendant, the proper party should be the relevant officer *eo nomine*'.[243] It continued that the appellant sought, not only a declaration, but also an order of *certiorari* as well as an order of *mandamus*, claiming that such prerogative remedies did not lie against the Crown, since it was at the suit of the Crown that they were sought, at least notionally, but that they lay against ministers and other government agencies.[244] Therefore, the court concluded that respondents were the proper parties and the judge was wrong to remove them from the motion paper and substitute the Attorney General.[245]

237 Ibid at [43].
238 Ibid at [44].
239 TT 1985 HC 119.
240 TT 1986 CA 14.
241 Ibid.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.

In *Parris v Commissioner of Police*,[246] in relation to a claim for judicial review in respect of the jurisdiction of the magistrate to authorise the further detention of a defendant in circumstances where that defendant was absent from court, the court accepted the submission of the attorney for the State that it was the magistrate who was a proper party to such a claim; and that, since the magistrate was not an agent of the State, the magistrate could not be represented by the Attorney General.[247] In *Forbes v Attorney General of Jamaica*,[248] Harris JA addressed the issue of the *locus standi* of the Attorney General, as the majority ruled that he was not a proper party to these proceedings. He stated that the claim was one for judicial review and that a claim for judicial review was instituted at the instance of the Crown against an authority, the decision of which was challenged. Harris JA continued that the Attorney General could be a party as a claimant in an application for judicial review but not a respondent. Since the remedy sought by way of a declaration was essentially for an order for *certiorari*, he claimed that it followed, therefore, that the Attorney General had been improperly cited as a respondent.[249] A third party company may not seek to set aside the proceedings for judicial review, but may participate in these proceedings to the extent that their interests were prejudiced by these proceedings, and may take all necessary and proper steps to protect their legitimate interests.[250] In *Musa v Lui*,[251] the court had to consider the question whether the applicant should be granted leave to join the Attorney General, whether as a sole or third respondent. The applicant argued that the intention was to join the Attorney General as a merely nominal party, indicating, too, that the Attorney General was a proper party to all actions brought against public authorities or officials, particularly actions such as the instant one, in which, as he put it, 'the relief sought relates to the power of the Prime Minister to appoint a specific commission of inquiry.' The court noted that the instant action or procedure had been commenced in breach of the provisions of section 42(5) of the Constitution, which provides that: '(5) Legal proceedings . . . against the State shall be taken in the case of civil proceedings, in the name of the Attorney General . . . .' The court explained that it was beyond question that the Attorney General was a proper party to an action or procedure such as the one in question.[252] It continued that the very phraseology employed in instituting the action made it plain that the applicant sought judicial review in respect of acts of the Government or acts of State. The court was of the view that, by section 42(5) of the constitution, this procedure or action was required to have been commenced against the Attorney General. It claimed that it held the view that, like an *ex parte* application for leave to apply for a prerogative order under the old Order 53, an *ex parte* application for leave to apply for judicial review under the current Order 53 should be regarded as commencing when the *ex parte* application for leave was filed.[253] The court was of the view that the unequivocal language of section 42(5) rendered it wholly unnecessary to embark on a judicial exercise having as its object the identification and isolation of neat statements of applicable principle from other judgments. It therefore concluded that, having regard to the wording of section 42(5), the launching of these proceedings against the respondents only resulted in fundamentally flawed proceedings which could not stand, absent joinder of the Attorney General.[254] The court then questioned whether, in the circumstances, the applicant should be granted leave to join the Attorney

246 TT 2005 HC 41.
247 Ibid.
248 Ibid.
249 JM 2006 CA 78 at 46–7.
250 *Lavaggi v The Physical Planning and Development Board* VC 2003 HC 22 at [12].
251 BZ 1998 SC 10.
252 Ibid.
253 Ibid at 4.
254 Ibid at 6.

General, whether as a third or sole respondent.[255] The court replied in the negative, claiming that to grant such leave would, in its opinion, be tantamount to allowing the applicant to change one action into another of a different character. It continued that the court could properly take into account that, although the action could not be sustained, the other, resulting from the joinder, might lie.[256] As a result, the court dismissed the application for joinder, upheld the preliminary objection of the respondents and ordered the action to be struck out.

INCORRECT PROCEDURE

What happens in a case where the applicant has misconceived the nature of the claim at issue and brings a private law action where the facts clearly reveal that the action should have been brought in judicial review? The court in such cases must ensure that it applies the relevant rules fairly so as not to prevent worthy applicants from access to the courts. However, the court should be very cognisant that applicants might deliberately seek to avoid the procedural hurdles of judicial review proceedings by bringing private law actions against public authorities. In *Clark v Attorney General of Trinidad and Tobago*,[257] the issue was whether the claimant had commenced a judicial review action in an incorrect way. The claimant used a writ to commence application for judicial review. In respect of the declaration sought in the Writ of Summons, the defendant contended that, first, the plaintiff's challenge of the decision of a public authority, namely the Commissioner of Prisons, who terminated her employment in the prison service, could only proceed by way of judicial review where she could seek a declaration but not by Writ of Summons; and, second, the Commissioner of Prisons was a public authority and, accordingly, any decision made by the Commissioner of Prisons could only be challenged by way of judicial review.[258] In addition, the defendant also argued that, although the plaintiff in the Writ of Summons sought damages for breach of contract and for wrongful dismissal, on a perusal of the Statement of Claim, the cause of action and relief sought were essentially matters for judicial review since nowhere in the Statement of Claim did the plaintiff allege facts in support of wrongful dismissal and, further, the plaintiff did not allege that there was a contract between the plaintiff and defendant which was breached. It continued that the correct method of redress was for the plaintiff to seek judicial review of the administrative act of dismissal by the public authority, that is, the Commissioner of Prisons; and, in any event, the plaintiff also sought the order of *certiorari* which was not available on a Writ of Summons.[259] The court was of the view that, where it considered that relief sought in judicial review proceedings should not be granted on an application for judicial review but might have been granted if it was sought in an action begun by Writ, the court may, instead of refusing the application, order the proceedings to continue as if they had in fact been commenced by Writ of Summons.[260] However, the court explained that there is no converse power under the Rules of the Supreme Court (RSC) to permit an action begun by Writ to continue as if it were an application for judicial review. The proceedings, in its opinion, must be commenced afresh by an application for judicial review, so it therefore upheld the submissions made by the defendant with regard to her objection *in limine*, claiming that the plaintiff must not be permitted to circumvent

255 Ibid at 7.
256 Ibid at 9.
257 TT 1991 HC 224. See *Sykes v Minister of National Security and Justice* JM 1993 CA 12.
258 TT 1991 HC 224 at 9.
259 Ibid.
260 Ibid at 10.

Order 53[261] and its restrictions, namely: (i) the requirement to obtain leave *ex parte* before commencing proceedings; (ii) a time limit in the absence of good reason of three months within which to bring proceedings; (iii) the absence of provisions for automatic discovery placing its availability firmly within the discretion of the court; (iv) cross-examination is only allowed at the discretion of the court; and (v) terms may be imposed as to costs and/or security as a condition of granting leave.[262]

In *Marshalleck v Inspector's Branch Board of the Police Federation*,[263] the defendant argued that the claimants should have proceeded by way of judicial review under Part 56 and not by way of ordinary action. The court explained that the courts 'should now take a more flexible approach to procedural matters'.[264] It claimed that the framers of the Civil Procedure Rules in Jamaica believed that there was some useful purpose to be served by treating judicial review as separate from ordinary actions.[265] The judicial review procedure, the court explained, expressly placed an onus on the party seeking leave to establish that he has a good arguable case. In addition, it noted that the leave requirement was intended to weed out unmeritorious cases.[266] The court was of the view that this imposes a cost on no one other than the applicant; there was no defendant who had, at this stage, to expend resources responding to a claim or to apply to have the claim dismissed summarily, if the defendant felt that that was an appropriate response. It continued that once the applicant got leave it was an indication, though not conclusive, that he would not be kicked out on a summary judgment application if one were to be made.[267] The reason, in the court's opinion, for this was to be found in Rule 56.13(3), where a great detail was required from the applicant for judicial review; and where he was late in his application he must give a 'good reason' before the court could exercise its discretion to extend the time within which to make the application. It continued that these were distinct advantages that accrue, indirectly, to the intended defendant; and that he ought to be able to rely on the courts to insist that its processes be followed and minimum thresholds met so that his time and resources were not engaged until the court accepted that the required threshold had been met.[268] The court was of the opinion that, having regard to the expense of litigation, this safeguard was a salutary one. It explained that it could be argued that the leave requirement was part of furthering the overriding objective in that it ensured that only cases that appear to have a good prospect of success went before the courts.[269] The court claimed that, first, unless the minimum requirement was met there was no need to spend more of the court's time and resources to deal with the matter; second, if leave was denied and there was either no appeal or a successful appeal from this denial then this would be a good example of the courts disposing of a case justly; and third, all this could be done before the public authority's resources were engaged to discourage cases lacking merit.

The court continued that to insist on correct procedure in respect of public bodies was not simply a question of a wrong or right approach to procedure – the rationale was found in public policy,[270] the applicable public policy being that public bodies should be able to get on with the

261 Made under the Supreme Court of Judicature Act.
262 *Belize Bank Limited v Association of Concerned Belizeans* BZ 2008 CA 2 (considering Part 56 of the CPR, in particular, Part 56.1(1) and (2)). See also *Bowlah v Attorney General of Trinidad and Tobago* TT 2009 HC 302 (application for leave to amend claim form).
263 JM 2004 SC 57. See also *Republic Telecommunications Limited v Attorney General of Trinidad and Tobago* TT 1987 HC 1 for a similar issue under the old rules.
264 JM 2004 SC 57 at 6.
265 Ibid.
266 Ibid.
267 Ibid at 7.
268 Ibid.
269 Ibid.
270 Ibid.

business of administration rather than worry about whether a claim form is going to land on their doorsteps. The court explained that this was buttressed by the fact that the judicial review rules require the applicant to come to court within three months of the date of the act or omission that provided the basis of the application.[271] It continued that the time limit was not one derived from any high legal principle but simply the result of the collective wisdom of the rules committee, which decided that three months was a reasonable time for the aggrieved person to act. The court was of the opinion that the further removed in time from the three-month expiration the application was made, the greater was the burden on the applicant to justify why he should be allowed to revisit an issue that had passed; and that nothing was wrong with that.[272] It continued that administrators were not to be kept in limbo. In addition, the court noted that, first, if it were intended to obliterate the procedural distinction between public and private law matters the rules committee would have done so; second, the fact that they maintained the distinction must mean something; and, third, it could not be that they intended the courts to ignore the distinction in the name of flexibility.[273] The court noted that, based upon the authorities cited to it, the courts had shown the desired flexibility by allowing claimants to pursue public law challenges in the context of litigating private law rights.[274] However, in its view, the attempt at harmonising the rules, as indicated by Lord Woolf, must not obscure the fact that in purely public law disputes judicial review was the only route to go, noting further that if it were otherwise then it would mean that litigants could ignore the procedure and launch an ordinary action in order to circumvent the important procedural steps, especially if they were out of time for judicial review.[275] It agreed with Lord Denning's proposition in *O'Reilly v Mackman* that to go by a method that permitted you to sidestep the safeguards against abuse when a clear procedure was provided by the courts was itself an abuse of process; the very fact of having to say why you wish to challenge a public authority and to say, if the application was late, why it was late, were important procedural safeguards.[276] The court claimed that it would be wrong, in principle, to assimilate the two procedures to the point where they were indistinguishable. It asked: what would be the point of appointing gatekeepers and then tearing down the walls, answering that judges might think the rules committee was foolish to maintain the distinction but the solution was not to ignore the rules under the banner of flexibility.[277]

The court explained that Lord Woolf was undoubtedly sensitive to the possible charge that his prescription might have the undesired and unintended effect of emasculating the concept of abuse of process, which was why he was careful to indicate that the court still had the power to control abuses; and the fact that an action was commenced within the limitation period did not immunise it from the charge of abuse of process.[278] It then listed the following factors that Lord Woolf indicated could be taken into account when a court was deciding whether its process was abused: (a) whether there was delay of a party commencing proceedings other than by way of judicial review within the limitation period; (b) the nature of the claim; (c) if the remedy sought is discretionary, was there delay in commencing the action?; and (d) does the claim affect the public generally or does it affect only the parties? This process, the court explained, by its very nature involved weighing a number of factors in order to decide how the

271 Ibid.
272 Ibid.
273 Ibid.
274 Ibid at 7–8.
275 Ibid at 8.
276 Ibid.
277 Ibid.
278 Ibid.

judicial power to control abuse of process should be exercised.[279] It continued that it seemed clear that the weight of each factor could not be constant but would vary according to each case. The court asked: what was the inherent virtue of this approach; why should it produce less litigation than the approach that took a stricter approach to proper procedure? It explained that, at the time of writing, the Master of the Rolls' proposition had not been tested by experience and it seemed to be more of a hope than a description of what actually existed.[280] The court noted the simple fact that, to date, there was no empirical data that suggested that Lord Woolf's proposition would produce the desired result and that it was good to remember that it was hoped that the House of Lords' decision in *Birkett v James*[281] would have settled the principles regarding the power to strike out an action on the grounds of undue delay and prejudice, thereby forestalling litigation on the issue.

The court then summarised the legal principles from the cases as follows: (a) a claimant cannot escape the procedural requirements for judicial review by filing an ordinary action where no issue of private law arises; (b) a defendant in response to an ordinary action initiated against him can challenge the lawfulness of a decision made by a functionary acting under a statute if the action is based upon or precipitated by the decisions of the functionary; and (c) a claimant can initiate an ordinary action if the action implicates private law issues despite the fact that the defendant is a public body acting under a statute.[282] The court explained that, on the facts, the claimants sought to ground their claim in the tort of negligence, noting that this was always going to be a difficult proposition since they would have been hard pressed to establish that this was an appropriate private law vehicle in which to transport their claim. It also explained that there was no claim grounded in contract or any other area of private law; what they were claiming was that the Superintendent did not exercise fairly the power given to him, under the rule-making powers of the Inspectors' Branch Board, to conduct elections.[283] The court was of the opinion that this was a pure public law matter and that from its reading of the statute membership in the Federation and the various boards that make up Federation, the matter did not rest in contract. In addition, it noted that it appeared that once a police officer is below the rank of Assistant Superintendent he is automatically a member of the Police Federation; he does not have to pay any dues or sign any membership form; in short all police officers below the rank of Assistant Superintendent are involuntary members of the Federation.[284] It continued that, if any member was disgruntled with his representatives he or she was not free to join any organisation having as its object improvement in pay and working conditions. The court noted that what was complained in the instant case did not arise because of any contract between the members of the Federation; neither was there any 'echo' of contract.[285] The court was convinced that the instant case involved a possible breach of Rule 19 and/or any other rule of the second schedule to the Constabulary Force Act and that the right the claimants sought to vindicate could be appropriately protected by judicial review. Therefore, the court ruled that since there was no private law issue, the *O'Reilly v Mackman* principle was the controlling legal precept, concluding that the claimant should have begun his matter by judicial review and struck out the claim as an abuse of process.[286]

279 Ibid at 8–9.
280 Ibid at 9.
281 [1978] AC 297.
282 JM 2004 SC 57 at 9.
283 Ibid.
284 Ibid at 10.
285 Ibid.
286 Ibid.

CHAPTER 3

CLAIMANTS AND STANDING

INTRODUCTION

The courts are very vigilant in protecting their processes from abuse by busybodies who attempt to misuse the process of the courts for purposes other than to vindicate their rights. Also, they have attempted to ensure that a person challenging a decision of a public authority has some relationship to the decision made in order to challenge that decision. That requirement is known as *locus standi*.[1] This chapter will look at the principles that guide the courts in making that determination. It will also look at the issue of whether third parties may be allowed to intervene in a judicial review application if they have a specific interest affected. The issue of capacity to bring judicial proceedings will also be examined. The issue of standing is important because it prevents busybodies from coming to court to litigate matters in which they have no particular interest. Since the role of the court is to vindicate the rights of the citizenry, it stands to reason that only persons whose common law rights have been, are being, or are about to be infringed, should have the necessary *locus standi* to approach the High Court for relief. However, the courts have ensured that even if a person does not have a particular interest, he may bring an action in the High Court in the public interest.

LOCUS STANDI IN JUDICIAL REVIEW

Section 6 of the Administrative Justice Act of Barbados (AJA) contains the requirement for *locus standi* in Barbados. It provides that the court has a discretion to grant an application for judicial review to any person whose interests are adversely affected by an administrative act or omission; or any other person if the court is satisfied that that person's application is justifiable in the public interest. It is important to note that the provision relates to any person, and does not specifically state 'any individual', so a company or any other legal person can apply for judicial review under the AJA. Section 5(2) of the Judicial Review Act of Trinidad and Tobago (JRA) provides that the court may, on an application for judicial review, grant relief in accordance with the JRA to: (a) a person whose interests are adversely affected by a decision; or (b) a person or a group of persons if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case. Section 6(1) of the JRA provides that no application for judicial review shall be made unless leave of the court has been obtained in accordance with the rules of court. Section 6(2) provides that the court shall not grant such leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.[2] Section 7(1) of the JRA provides that, notwithstanding section 6, where the court is satisfied that an application for judicial review is justifiable in the public interest, it may, in accordance with this section, grant leave to apply for judicial review of a decision to an applicant whether or not he has a sufficient interest in the matter to which the decision relates.

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1 *Glinton v Cash* BS 1985 SC 2; *Re Hanoman* GY 1999 HC 1; *Ishmael v Attorney General of Trinidad and Tobago* TT 2008 HC 184; *Seaga v Attorney General of Jamaica* JM 1997 SC 83; and *Selgado v Attorney General of Belize* BZ 2002 SC 13.

2 See *Khan v Chief Immigration Officer* TT 2008 HC 279 at [27]–[28].

Part 56.2 of the Civil Procedure Rules (CPR) 2000 governs the question of standing to apply for judicial review in Eastern Caribbean countries. It provides that: (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 body or group that can show the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; (e) any statutory body where the subject matter falls within its statutory limit; or (f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution. In addition, rule 56.13(1) provides thus: at the hearing of an application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form.

How these provisions have been applied by the courts will now be explored. Where there was a contractual relationship between the parties, the court would be inclined to find that the claimant had *locus standi*.[3] It has been noted that 'the conclusion of the Court that the claimant does not have sufficient interest to make application for judicial review in these proceedings [means that the claimant] was unable to show a strong case on the merits'.[4] In *Pindling v Bahamas Electrical Corporation*, the court noted that 'sufficiency of interest remains an inescapable requirement under Order 53 but the Court is now less astute to find it missing and it is only in a clear case that it will be disposed of as a preliminary issue; the Court looks both to the legal element and the factual element of the case'.[5] It continued that:

> a private person is not entitled to bring an action in his own name for the purpose of preventing public wrongs, and therefore the Court has no jurisdiction to grant relief, whether interlocutory or final, or whether by way of injunction or declaration, in such an action. It therefore follows that since the plaintiff has no sufficient interest in this matter per se, his action was clearly misconceived and is accordingly struck out with no order as to costs.[6]

In *Ex p James*,[7] the applicant applied to the court for an order of *certiorari* to quash the decision of the Disciplinary Committee of the Barbados Bar Association and a further order of prohibition preventing the committee from proceeding with the formal hearing of the complaint which was before it.[8] The committee had rejected the second limb of the applicant's preliminary objection that, on a proper interpretation of section 12(1) of the Legal Profession Act, the phrase 'any person alleging himself aggrieved by an act of professional misconduct' must only apply to a person who was a client of the attorney in question.[9] The court agreed with counsel for the respondent that the issue was whether the expression 'person . . . aggrieved' in section 12(1) of the Legal Profession Act was limited to persons who are or were 'clients' of the Attorney-at-Law with the consequence that only a client of an Attorney-at-Law can properly institute disciplinary proceedings against him for professional misconduct.[10] The court, therefore, ruled:

3 *Melnyk v Barbados Turf Club* BB 2007 HC 22 at [28].
4 *Next Level Engineering Limited v Attorney General of Antigua and Barbuda* AG 2007 HC 26 at [217].
5 BS 1996 SC 44.
6 *Spencer v Cazone Del Mare Ltd* AG 1993 HC 1 at 7.
7 JM 2006 SC 110.
8 Ibid at 4.
9 Ibid at 3.
10 Ibid at 5.

> as a matter of law, that the expression, 'a person alleging himself to be aggrieved by an act of professional misconduct (including any default) committed by an attorney', was clearly wide enough to encompass persons who were not clients of the attorney who were being charged with misconduct.[11]

It continued that, insofar as the essence of the challenge of the applicant to the Disciplinary Committee's Ruling was to the *locus standi* of the complainant, it would regard the submission as devoid of merit and that acceding to it would make a mockery of the legislation and its purpose.[12] The court held that 'the decision by the Committee that the complainant is an "aggrieved person" and therefore one competent to bring his complaint before the Committee, is one which is not reviewable given the authorities to which reference was made.'[13] The court also accepted that the reliance of the Disciplinary Committee on the analyses of the various judgments of the law lords in *R v IRC, ex p National Federation of Self Employed and Small Businesses Ltd*[14] as to who may properly be considered as having an 'interest' in a matter such as an application for judicial review, sufficient to allow such a person to bring proceedings, was well founded.[15]

In *Benjamin v Attorney General of Antigua*,[16] the court considered the issue of standing in respect of an application for judicial review. The court noted, following the decision of the Court of Appeal in *Spencer v Attorney General of Antigua and Barbuda*,[17] that the matter of standing should be considered after a determination of the substantive issues raised by the application.[18] It continued that, in *Attorney General v Martinus Francois*,[19] Rawlins JA, as he then was, elaborated on the new approach:

> [the] approach that was recommended in *Spencer* accords with good law and reason. An applicant for a declaration can have no *locus standi* in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is a sufficient nexus between an applicant and the subject matter of the claim to give him or her *locus standi*.[20]

The court noted that, based on the relevant rules of CPR 2000 coupled with the remedies sought by the claimant, the matter of standing came down to sufficient interest and rights.[21] It went on to say that the term 'sufficient interest', in relation to standing for judicial review purposes, had its genesis in Order 53 of the English Rules of the Supreme Court and the celebrated case of *R v IRC, ex p National Federation of Self Employed and Small Businesses Ltd*,[22] where the House of Lords determined that the test of standing was whether the applicant could show a strong enough case on the merits judged in relation to his own concern with it. In that decision, Lord Scarman said that the applicant, 'having failed to show any grounds for believing that the Revenue has failed to do its statutory duty, has not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application'.[23] In the instant

11 Ibid.
12 Ibid at 13–14.
13 Ibid at 14.
14 [1982] AC 617.
15 Ibid.
16 AG 2007 HC 54.
17 AG 1998 CA 3.
18 AG 2007 HC 54 at [239].
19 LC 2004 CA 3.
20 AG 2007 HC 54 at [240].
21 Ibid at [247].
22 [1982] AC 617.
23 AG 2007 HC 54 at [248].

case, the court explained it had already made a determination that the claimant had no rights in law based on the proceedings instituted. As a result, it held that this:

> fact alone undermines many of the claimant's submissions on the question of standing. In other words, because of this fact the claimant is unable to show a strong enough case on the merits judged in relation to his own concerns with it. Or to use Mr Justice Hugh Rawlins' language the claimant is unable to show a 'sufficient nexus' with the subject matter of the claim to give him standing.[24]

The court continued that the claimants must also show that his rights were adversely affected.[25] It noted there was no right of the people of Antigua and Barbuda to use Victoria Park, and that the claimant had no personal rights over the lands of Victoria. The court also noted that the fact that the claimant lived in the area, and was the Parliamentary representative for the constituency within which Victoria Park fell, was of no legal consequence in the context of the issue before it.[26] Therefore, it concluded that the absence of rights on the part of the claimant also affects the declarations sought.[27]

In *Frank v Attorney General of Antigua*,[28] the court stated that:

> [t]he procedural law governing the *locus standi* of a person who applies for a declaration or injunction in relation to public rights and interests is now well settled. If the application for the declaration or injunction is made in proceedings for judicial review, the *locus standi* of the applicant is determined by reference to whether or not the applicant has a sufficient interest in the matter to which the application for judicial review relates. If the application for the declaration or injunction is made in proceedings other than proceedings for judicial review, the applicant must establish that the respondent has infringed or threatened to infringe the applicant's present or future legal or equitable rights or interests or that there was a dispute between the applicant and the respondent as to those rights or interests or as to the respective rights or interests of the applicant and the respondent. The basis of the applicant's *locus standi* in the latter proceedings is some infringement or threatened infringement of or some dispute in relation to the applicant's legal or equitable rights or interests.[29]

It noted that nowhere in the appellant's affidavit, running to some 106 paragraphs, did he allege any infringement or threatened infringement by the Government of Antigua and Barbuda of any legal or equitable right or interest of his, or of any other inhabitant of Barbuda; nor did the appellant allege any previous dispute between him (or any other inhabitant of Barbuda) and the Government in regard to any of the rights or interests that he sought to be declared and protected. The court asserted that it could only declare and protect legally established rights and interests and that, except in the case of a judicial review of the decision or action of a public authority, it was a precondition of such declaration or protection that there was a previous infringement, or threatened infringement of, or dispute in regard to those established rights and interests. Since that precondition was not satisfied on the facts before it, the court ruled that the appellant had no *locus standi* to claim the relief sought in the application for judicial review.[30]

The court in *Graham v Commissioner of Police*[31] noted that an applicant must demonstrate that he had the necessary standing to apply for judicial review; and that an applicant had standing

24 Ibid at [249].
25 Ibid at [250].
26 Ibid at [251].
27 Ibid at [252].
28 AG 1994 CA 15.
29 Ibid.
30 Ibid.
31 TT 2006 CA 33.

if he could show that he had a sufficient interest in the matter to which the application related. Additionally, it claimed that if he did not have a sufficient interest the court should not grant leave, as stipulated in section 6 of the JRA.[32] It continued that, although section 5(2)(a) of the JRA deals with the grant of relief and not leave to apply for judicial review, an applicant should not be allowed to proceed to a substantial hearing unless the court is satisfied that he has been or would be adversely affected by the decision complained of.[33] The court noted that, first, 'the term sufficient interest has been given a generous interpretation and it is generally accepted that the hurdle of sufficient interest over which an applicant must go is set at a low level. There is nothing in the JRA that suggests it was meant to alter this position';[34] and, second, '[n]otwithstanding that someone does not have a sufficient interest, or even in cases where he has, the Court may grant leave to apply for judicial review where the application is justifiable in the public interest'.[35] It was of the view that section 7(1) provides that leave is to be granted in accordance with the section. The court continued that where it considered that leave should be granted on the basis that an application was justifiable in the public interest it must have regard to the other provisions of section 7. These provide, *inter alia*, for the publication in a daily newspaper of notice of the application which invites persons with a more direct interest in the matter to apply to be joined as a party in the proceedings. It also claimed that if someone with a more direct interest applied, the court had the discretion to grant leave to that person instead of the original applicant and that, in the instant case, leave was not granted under section 7.[36]

The court noted that, in the instant case, the trial judge was of the opinion that the appellant did not have standing to make the application for judicial review, because he had not convinced her that he possessed either sufficient interest in the subject matter or that he was adversely affected by the respondent's decision to implement the traffic restrictions. It noted that the 'judge unfortunately did not elaborate on why she was not so convinced. I am, however, unable to agree with the judge.'[37] The court explained that 'an applicant must possess a sufficient interest in the matter to which the application relates' and that it was 'therefore necessary to identify the matter to which the application relates and in which the interest is said to subsist'.[38] The judicial review application related to the exercise of the powers given to the respondent under the Motor Vehicles and Road Traffic Act to impose traffic restrictions. The appellant argued that the powers were not properly used, with the result that the resulting traffic restrictions were illegal and that, as Assistant Commissioner of Police, the respondent had a duty and an obligation to see that no illegal traffic arrangements were put in place.[39] In other words, he had a right to insist that the traffic restrictions be properly put in place. The court accepted that it was difficult to say that the appellant had no interest to ensure that the law was not properly implemented and that he should turn a blind eye to the implementation of traffic restrictions which were an obvious illegality.[40] It claimed that they were restrictions that potentially affected every road user and possibly others and which carried punitive sanctions. The court noted that, first, as part of the executive level of the police service, he had an obvious interest which was emphasised by his position as Assistant Commissioner of Police; and that he

32 Ibid at [27].
33 Ibid at [29].
34 Ibid at [31].
35 Ibid at [32].
36 Ibid at [33].
37 Ibid at [34]. See *Graham v Commissioner of Police* TT 2005 HC 33.
38 TT 2006 CA 33 at [35].
39 Ibid at [36].
40 Ibid.

had an interest in what happened in the district under his command.[41] Second, he also had other concerns as a member of the police force and as part of the executive since he was concerned that there was risk of litigation over the legality of the traffic restrictions, and a finding that it was illegal could bring the police service into disrepute. In light of those factors, the court ruled that the appellant had a sufficient interest in the matter to which the application related and that, as a member of the police service and as an Assistant Commissioner of Police, it could not be said that his interests were not adversely affected.[42]

The court accepted that the respondent was acting in a quasi-legislative capacity when he purported to make the traffic restrictions to convert High Street into a pedestrian mall and that this action affected at least every road user.[43] It claimed that a breach of the traffic restrictions carried punitive sanctions and every road user would have had a sufficient interest to challenge the legality of the traffic plan. However, persons with a sufficient interest to challenge the traffic plan were not limited to road users; the appellant, as part of the police force and a member of the executive, also had a sufficient interest to uphold the rule of law.[44] The court claimed that breaches of the law by the police service would impact adversely on the service and, in the instant case, the appellant was more than simply a member of the police service as he was in charge of the southern region where the traffic plan was implemented. Of critical importance too for the court was that, in the instant case, there was more than the simple allegation that the respondent was attempting to introduce the traffic plan illegally; and there were also the allegations of the political overtones surrounding the introduction of the traffic plan, namely the independence of the police force and whether it could be seen to be bowing to the will of the ruling party.[45]

In *Sharma v Manning*,[46] the court had to consider whether the applicant had a sufficient interest in the matter to which the application relates, pursuant to section 6(2) of the JRA. The applicant claimed that every citizen had the necessary *locus standi* to bring the instant application and *a fortiori*; and that the applicant, as a member of the opposition with interested constituents, must have the required *locus standi*.[47] The applicant sought an order of *mandamus* directing the respondents to publish within seven days the reasons for the continuing failure of and/or refusal by the public authorities for which they are responsible to comply with the provisions in Part II and section 7(4) of the Freedom of Information Act (FIA). The court noted that, since the respondent was not precluded from raising the question of the applicant's interest or standing at the hearing of the substantive application, the question was the threshold required of the applicant at the leave stage.[48] The court then quoted from *R v Monopolies and Mergers Commission ex p Argyll Group plc*,[49] where Sedley J stated that: (a) the threshold at the point of the application for leave was set only at the height necessary to prevent abuse; (b) to have 'no interest whatsoever' is not the same as having no pecuniary or special personal interest; it was to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody; (c) beyond this point, the question of standing had no materiality at the leave stage; (d) at the substantive hearing 'the strength of the applicant's interest was one of the factors to be weighed in the balance'; in other words, there might well be other factors which properly

41 Ibid.
42 Ibid.
43 Ibid at [39].
44 Ibid.
45 Ibid.
46 TT 2005 HC 94.
47 Ibid at [13].
48 Ibid at [14].
49 [1986] 1 WLR 763.

affected the evaluation of whether the applicant in the end had a 'sufficient interest' to maintain the challenge and – what may be a distinct question – to secure relief in one form rather than another.[50] The court noted that, although there was no evidence of any prejudice suffered by the applicant as a result of the breaches alleged that had been placed before it, at the initial stage all that it was required to do was to ensure that the applicant was not a meddlesome busybody.[51] It also noted that:

> [t]he object of the FIA is stated to extend to the members of the public the right to access of its information if the applicant is a member of the public. Of even more importance is the fact that he is the member of the opposition charged with the responsibility of monitoring the FIA, a responsibility the opposition is entitled to assume in furtherance of their constitutional role. It may very well be that, if leave is granted, at the hearing of the substantive application the question of sufficient interest will fall to be assessed against the whole legal and factual context of the application before the Court. At this stage this is not my concern; the applicant has, to my mind, demonstrated that he has achieved the necessary threshold level. In the circumstances I find that at this stage the applicant has shown a sufficient interest to apply for the judicial review sought.[52]

This aspect of the case was not challenged on appeal to the Court of Appeal.[53]

In *Trinidad and Tobago Civil Rights Association v Manning*,[54] the appellants appealed to the Court of Appeal arguing, *inter alia*, that the trial judge erred in law in holding that they lacked *locus standi* to have brought the judicial review proceedings and in further holding that they did not meet the requirements of section 5(6) of the JRA. The appellants, villagers who live near to the Forres Park Garbage Dump ('the Dump') in Forres Park, Claxton Bay, claimed to be adversely affected by activities at the Dump and sought the protection of the Environmental Commission ('the Commission'). They, however, felt aggrieved by the decision or action of the Cabinet not to reappoint members of the Commission.[55] The court noted that the villagers were poor and socially or economically disadvantaged, so that the appellant, a body duly incorporated under the laws of Trinidad and Tobago, which is a public-spirited organisation established to promote and protect, *inter alia*, the rights of the citizens of Trinidad and Tobago for the attainment of a fair and just society, filed for judicial review on their behalf.[56] The court noted that it was:

> not in dispute that the appellant approached the Court for judicial review pursuant to s. 5(6) of the JRA. This is therefore not a judicial review application in the public interest, pursuant to s. 5(2)(b) of the JRA and the provisions of s. 7 in respect of such public interest litigation have accordingly not been followed. The persons who were aggrieved were the several villagers and the appellant acted on their behalf because of their disadvantaged position. The villagers, therefore, had to be aggrieved by the decision of Cabinet on one or more of the grounds spelt out in s. 5(3) of the JRA. The villagers must have been deprived of a legitimate expectation, to take one example, or must have suffered from a breach of the rules of natural justice, or from the perpetration of fraud, or must have been the victim of bad faith. But none of this is alleged in relation to them. These matters are all alleged in relation to Mr Justice Hosein who himself has not complained.[57]

50 TT 2005 HC 94 at [17].
51 Ibid at [19].
52 Ibid at [20].
53 TT 2009 CA 23.
54 TT 2007 CA 51. See also *Peoples United Respecting the Environment v Environment Management Authority* TT 2009 HC 134.
55 TT 2007 CA 51 at [4].
56 Ibid at [6].
57 Ibid at [12].

It explained that the appellant did not have the right to advance the grounds that were personal to Mr Justice Hosein (a former member of the Commission). The court applied the following *dicta* in *Durayappah v Fernando*[58] where it was stated that '[t]hough the Council should have been given the opportunity of being heard in its defence, if it deliberately chooses not to complain and takes no step to protest its dissolution, there seems no reason why any other person should have the right to interfere.'[59] The court, therefore, concluded that, first, 'the learned judge was correct when she decided that the appellant had no standing to challenge the decision or action of the Cabinet on the grounds which were personal to Mr Justice Hosein'; and, second, '[t]his is not to say that the appellant did not have the standing to challenge the decision of the Cabinet on the Constitutional grounds. They did, as the learned judge correctly found.'[60]

In *Re Clegghorn*,[61] the court, on the question of standing, referred first to the celebrated case of *R v IRC, ex p v National Federation of Self Employed and Small Businesses*,[62] where a more liberal approach was introduced to the test for standing. In that decision, the Federation of Self Employed and Small Businesses Ltd was accorded standing in order to challenge a decision of the Inland Revenue Commissioners, which related to an arrangement conducted with casual workers in the printing industry. It was held that, at the threshold stage, the court was required only to form a *prima facie* view on the available material; that view could alter at the second stage on the application for judicial review itself. On the facts of *Re Clegghorn*, the court was of the view that, where a former employee of the bank was impugning a decision on the ground that there was intent to defraud, it would be difficult not to accord that individual *locus standi*, because this would involve a consideration of the merits. As a result, the court thought it unwise to reject the applicants' claim on the ground that they lack sufficient interest.[63]

In *Northern Jamaica Conservation Association v Natural Resources Conservation Authority*,[64] the court noted that Part 56 of the CPR of Jamaica speaks to four classes of person: (a) applicants for judicial review; (b) defendants; (c) persons directly affected; and (d) person or body with a sufficient interest. The court noted that Environmental Solutions Limited (ESL) had not applied for judicial review and neither was it a defendant.[65] It continued that:

> [t]he expression, sufficient interest, is found also in rule 56.2(1). This provision deals with persons who have *locus standi* to apply for judicial review. Rule 56.2(2) lists some of the persons who fall within the expression, 'person, group or body which has a sufficient interest in the subject matter of the application'. This phrase cannot be interpreted in the abstract. It has to be looked at in the context of the nature of the application and the remedy sought. As one judge has put it, the sufficiency of interest cannot be determined without looking at the person's complaint. It may be said that the cases on sufficient interest have arisen mainly in the context of an application for judicial review and are not applicable to the instant application. Assuming that argument to be correct the cases nonetheless provide some framework in which to view the current application.[66]

The court observed that '[a] careful reading of rule 56.15 (1) makes it clear that when the word interest is used it cannot possibly mean that one looks at the reason for a decision and then decides that a person has sufficient interest' and that sufficient interest was not an *ex post facto* determination but was to be determined before or during the hearing by looking at what the

58 [1967] AC 337 at 353.
59 TT 2007 CA 51 at [13].
60 Ibid at [14].
61 TT 1996 HC 137.
62 [1982] AC 617.
63 TT 1996 HC 137.
64 JM 2006 SC 65.
65 Ibid at [25].
66 Ibid at [26].

person who was claiming sufficient interest was saying and, as Lord Wilberforce said in the *Inland Revenue Commissioners* case, '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 to the breach of those said to have been committed'.[67]

Section 6 of the AJA provides that a court may on an application for judicial review grant relief in accordance with this Act to: (a) a person whose interests are adversely affected by an administrative act or omission; or (b) any other person if the Court is satisfied that that person's application is justifiable in the public interest in the circumstances of the case.[68] In *Ramdeem v Registrar of the Supreme Court of Justice*,[69] the Registrar of the Supreme Court of Justice decided that a foreign attorney had to pay requisite subscription fees in order to represent the applicant. The question arose as to whether the applicant had standing to apply for judicial review.[70] The court noted that the requirement for proper standing in judicial review cases was different on an application for leave to apply for judicial review as opposed to an application for judicial review.[71] It then noted that section 7(1) of the JRA provided that, notwithstanding section 6, where the court is satisfied that an application for judicial review is justifiable in the public interest, it may, in accordance with that section, grant leave to apply for judicial review of a decision to an applicant whether or not he has a sufficient interest in the matter to which the decision relates. Section 7(7) states that in determining whether an application is justifiable in the public interest the Court may take into account any relevant factor, including: (a) the need to exclude the mere busybody; (b) the importance of vindicating the rule of law; (c) the importance of the issue raised; (d) the genuine interest of the applicant in the matter; (e) the expertise of the applicant's ability to adequately present the case; and (f) the nature of the decision against which relief is sought. Section 5(1) provides that an application for judicial review of a decision of an inferior court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the court in accordance with the JRA and in such manner as may be prescribed by rules of court. Section 7(2) provides that the court may, on an application for judicial review, grant relief in accordance with the JRA: (a) to a person whose interests are adversely affected by a decision; or (b) to a person or a group of persons if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case.

The court was of the opinion that, as a result of these provisions, first, an applicant for judicial review must obtain the leave of the court, which would only be granted if the court considered him to have a sufficient interest in the matter to which the application relates; second, the court would nevertheless grant leave to an applicant whether or not he had a sufficient interest in the matter where it was satisfied that the application for leave was justifiable in the public interest;[72] and third, once leave to apply for judicial review was obtained, the applicant must then apply for judicial review which was the application for the substantive reliefs sought.[73] It continued that two types of applicants were entitled to relief from the court: (1) a person whose interests are adversely affected by a decision; or (2) a person or group of persons regardless of their personal interest in the matter, if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case.[74] The court agreed with the

67 Ibid at [27].
68 *Scotland District Association v Thompson* BB 1996 HC 19 and BB 1996 CA 33.
69 TT 2008 HC 205.
70 Ibid at [7].
71 Ibid at [8].
72 Ibid at [10].
73 Ibid at [11].
74 Ibid at [12].

applicants that their standing in the proceedings fell to be determined in accordance with section 5(2)(a) of the JRA and it did not think that it could be disputed successfully that the application was one which was not justifiable in the public interest in the circumstances of the case as provided by section 5(2)(b) of the JRA.[75] The court claimed that the requirement of a sufficiency of interest at the leave stage was the same in Trinidad and Tobago as it was in England and that, at the other stage – that is, the application for judicial review – the requirement in England was different since it remained a sufficiency of interest whereas in Trinidad and Tobago the applicant must be a person whose interests are adversely affected.[76] As a result of the different requirement for standing in England and Trinidad and Tobago at the post leave stage, it claimed that the English authorities on standing at the post leave stage were not applicable in Trinidad and Tobago.[77] In addition, the court noted that the question of whether or not the applicant had standing to apply for judicial review must, therefore, be resolved by first determining whether she was a person whose interests were adversely affected by the decision of which she complained.[78] On the facts, it was not in doubt that the applicant was not a person whose interests were adversely affected by the decision.[79] The court explained that this requirement was far more stringent than that of 'sufficiency of interest' – since, at the leave stage, the applicant only had to show an arguable case – namely, that the demand by the respondent for the sum of $3,100.00 as a precondition for the special admission to Mr Peter Carter QC had an unfavourable effect upon her and/or her affairs.[80]

The court was of the view that the applicant must show that the actual outcome of the application would adversely affect her in some way, adding that she had not done so, and on the facts of this case, she could not do so.[81] It continued that the applicant was not the person who paid the sum of $3,100.00 to the Supreme Court and there was no evidence that that sum was received from her by the payer, Mr Peter Carter QC.[82] The court then questioned: what were the adverse effects to her interests? The court claimed that when one considered the reliefs claimed by the applicant, her lack of standing appeared all the more obvious. Since she was not the person who paid the said sum, the court questioned how it could grant her a declaration that she was not liable to pay the said sum.[83] Further, the court wondered, if the claim for repayment of the sum were to succeed, to whom should payment be made? It replied that it was not the applicant, since she did not pay that sum in the first place. It continued that the sum should be made payable to Mr Carter, who was not a party to the judicial review action. The court held that the proper applicant should have been Mr Peter Carter QC.[84] As a result, it dismissed the application, with costs to be paid by the applicant certified fit for advocate attorney to be taxed in default of agreement.[85]

In *Belize Bank Limited v Association of Concerned Belizeans*,[86] the issue was whether action should have been brought by way of judicial review. The court noted that one ground of appeal was that the judge erred in law and misdirected herself in finding that the claimants, having sought declaratory relief in relation to public law issues, did not have to proceed by way of judicial

75 Ibid at [13]
76 Ibid at [14].
77 Ibid at [16].
78 Ibid at [17].
79 Ibid at [18].
80 Ibid at [19].
81 Ibid at [20].
82 Ibid at [21].
83 Ibid at [22].
84 Ibid at [23].
85 Ibid at [24].
86 BZ 2008 CA 2.

review and comply with the requisite procedural steps set out in Part 56 of the CPR. The appeal was brought by an interested party, joined by leave of the court. Rule 56.2(1) provides that 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'. The court noted that, while there can be no fixed definition of 'sufficient interest', it was common ground that the phrase describes a test of standing that was relatively easy to satisfy, or 'a generous conception of *locus standi*'.[87] The appellants argued that, if rule 56.1(1)(c) created a 'free standing' right to seek declarations in respect of public law rights, independent of judicial review, then, in the absence of a new test of standing being specified in relation to that relief, the traditional test of standing should apply.[88] In respect of declarations, the court noted that Lord Diplock had observed that 'the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else.'[89] The court was of the opinion that some support for the appellant's contention could be found in some dicta in *Attorney General of Saint Lucia v Francois*[90] which was of particular value because of the fact that Part 56 of the Eastern Caribbean Supreme Court CPR 2000 was in almost identical terms to Part 56 in Belize.[91] Rawlins JA, after referring to *Gouriet v Union of Post Office Workers*, restated the traditional private law test of standing and commented as follows:

> [151] Part 56.2 of the Rules then provides very liberal and relaxed rules of standing for application for judicial review. These, as we have seen, relate to applications for the prerogative orders. Interest groups and bodies are particularly facilitated. There is still a requirement that the person or body should be 'adversely affected' by the decision. Interestingly, Part 56.2(d) of the Rules confers standing on a body or group that can show that the matter complained of is of public interest, and the body or group possesses expertise in the subject matter of the application.

The court claimed that the respondent also found some solace in the judgment of Rawlins JA referring to his statement that, although historically *locus standi* had been a threshold issue in public law cases, 'inexorable changes' in recent years 'have sometimes resulted in the determination of substantive issues before *locus standi* is considered'.[92] The court claimed that it found this a more difficult point, because, while it saw the force of the argument that the specific reference in rule 56.2(1) to standing in judicial review may point to an intention on the part of the rule makers to preserve a distinction between that test and the traditional test of standing in relation to actions for a declaration, it could not ignore the movement in public law away from 'technical restrictions on *locus standi*'.[93] The court continued that what rule 56.1(1)(c) entitled a claimant to do was to claim for a declaration in proceedings in which there was in fact a party which was 'amenable to [a] remedy in public law', that is, the Crown, a court, a tribunal or any other public body.[94] It continued that the introduction of the CPR in Belize in 2005 was a significant watershed, making it strongly arguable that, by structuring Part 56 in the way in which they did, the rule makers fully intended a further transformation of the old rules of standing with respect to declarations.[95] The court claimed that, for the purposes of the appeal,

87 Ibid at [40].
88 Ibid at [41].
89 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501.
90 LC 2004 CA 3.
91 Ibid.
92 Ibid at [43].
93 Ibid at [44].
94 Ibid at [46].
95 Ibid at [47].

it was unnecessary to express a concluded view on this, for at least two reasons. Firstly, and importantly, nothing in relation to *locus standi* was canvassed before the trial judge. Secondly, and of equal importance, a final determination on the question of standing would be premature at what was still a very preliminary stage of the proceedings.[96] It continued that, in *Inland Revenue Commissioners*, the House of Lords held that it was wrong for the lower courts to take *locus standi* as a preliminary issue, which was effectively what the appellant asked the court to do, in a case in which that question had to be taken together with the legal and factual context of the application.[97] The court claimed that was a case of judicial review, in which leave was required, which was not the situation in the instant case.

In *Attorney General of Saint Lucia v Francois*,[98] the Court of Appeal noted that the claimant brought an application for judicial review on the ground that he was a citizen of St Lucia, a taxpayer and a person who was entitled to vote in St Lucia.[99] His constitutional claim was dismissed on the ground that he did not have the requisite *locus standi*. The question for the Court of Appeal was whether he had a sufficient interest to give him the necessary nexus with the subject of the claim for declaratory relief outside of the Constitution.[100] The court noted that, historically, *locus standi* had been a threshold issue that was determined before the substantive issues in public law cases but that, in recent years, there have been changes that have sometimes resulted in the determination of substantive issues before *locus standi* is considered, namely, *Re Blake* and *Spencer*.[101] In the former case, the Court of Appeal had regard to the merits of an application that challenged the appointment of a Prime Minister after inconclusive general elections; and it found that the application was unmeritorious and, therefore, decided that it was unnecessary to consider whether the applicant had *locus standi*, either by way of sufficient interest or relevant interest, in the subject matter of the application. The second decision, in its opinion, confirmed and commended this approach. The Court of Appeal noted that, although the applications in *Spencer* were for declarations under the Constitution, there was no reason why the approach that was used and recommended in that case could not also be used in claims for judicial review and for declarations outside of the Constitution.[102] As a result, the Court of Appeal ruled the:

> approach that was recommended in *Spencer* accords with good law and reason. An applicant for a declaration can have no *locus standi* in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is sufficient nexus between an applicant and the subject matter of the claim to give him or her *locus standi*.[103]

On the facts, the Court of Appeal, therefore, held that the applicant did not have *locus standi* because it found the claim to be unmeritorious and that, in any event, the applicant would have encountered some difficulty on the test of standing for declarations articulated in *Gouriet v Union of Post Office Workers*.[104]

96 Ibid at [48].
97 Ibid.
98 See also *Francois v Attorney General of Saint Lucia* LC 2003 HC 54.
99 LC 2004 CA 3 at [143].
100 Ibid.
101 Ibid at [144].
102 Ibid at [145].
103 Ibid at [146].
104 [1978] AC 435.

INTERVENERS

Section 14 of the JRA deals, generally, with applications, by interested persons, to be made a party to judicial review proceedings. In particular, section 14(1) provides that any person who has an interest in a decision which is the subject of an application for judicial review may apply to the Court to be made a party to the proceedings. Section 14(2) provides that the Court may: (a) grant the application either unconditionally or subject to such terms and conditions as it thinks just; (b) refuse the application; or (c) refuse the application but allow the person to make written or oral submissions at the hearing. In *Alleyne v Singh*,[105] the Court of Appeal of Trinidad and Tobago observed that the High Court had 'a wide discretion under this section and a range of options lies at its disposal, one of which is that the applicant may be made a party to the suit or may be given the opportunity to make submissions, although the application is refused'.[106] It noted that the trial judge pointed out that, throughout the hearing, counsel for the appellants sought leave for them to intervene as parties to the suit and had not argued that they be heard in opposition to the motion. It explained that the conventional approach to such applications had always been flexible, in that, in most instances, parties were joined by consent with little regard, at the point of entry, to costs implications or to *locus standi* in the event of an appeal. The court continued that the instant case 'demonstrate[d] however, that intervention ought not to be permitted as a matter of course. Stricter adherence to the provisions of the rules is appropriate. It is a prerequisite that an applicant furnish the Court with sufficient information in support of his application'.[107] The court then noted that '[a] person directly affected must be served and is automatically a party to the suit.'[108]

The court explained that the trial judge held that there were two categories of persons who may be heard in judicial review proceedings – persons who are directly affected and persons who desire to be heard in opposition.[109] The Court of Appeal, however, held that rule 5(7) and section 14 of the JRA must be read together, but that a person may have an interest in a decision but may, or may not, wish to oppose the decision. This, it continued, was in contrast to the position in England where it was not unusual for public interest bodies to seek to enter a proceeding for judicial review, with the object of supporting the litigation.[110] It went on to say that, in order to construe the expression 'directly affected', it was necessary to begin with first principles. First, judicial review concerned the primary method by which courts exercise supervisory jurisdiction over public bodies to ensure that they observe the principles of public law. Second, a person who was 'directly affected' became a party to the proceedings. Third, that person was entitled to adduce evidence, to appear at and make interlocutory applications, and to appear at the hearings and make representations.[111] Fourth, the phrase 'directly affected', therefore, connoted that the third party was directly affected simply by the decision, without the intervention of any intermediate agency.[112] Fifth, the primary objective of intervention or entry, in order to present argument in the substantive application, should, therefore, to be for the purpose of assisting the court in its determination the issues.[113] The court, therefore, concluded that:

105 TT 2005 CA 49 at [7].
106 Ibid at [6].
107 Ibid at [5].
108 Ibid at [6].
109 *Singh v Agricultural Development Bank* TT 2005 HC 102 at [5].
110 Ibid at [7].
111 Ibid at [8].
112 Ibid at [9].
113 Ibid at [14].

> (1) the fact that an applicant has close ties or direct involvement with the public authority whose decision is challenged does not automatically bring that person within the purview of Order 53, rule 4(2), rule 5(7) or section 14; (2) the appellants Sita Jagmohan and Jacqueline Rawlins have pointed to no facts to support their case that their good character has been impugned; (3) the appellant Alleyne was not a person 'directly affected' within the meaning of the rule. If indeed, he were a person with an 'interest in the decision' he was in fact heard. There was compliance with the *audi alteram partem* rule; (4) the appellant Paul chose not to file an affidavit in the substantive proceeding and he has not complained that he has suffered any prejudice; (5) none of the appellants has demonstrated that the Bank has adopted a position which is in conflict with his or her own; (6) the trial judge cannot be faulted when, in the exercise of her discretion, she refused the application.[114]

In *Re Sawmillers Cooperative Society Ltd*,[115] the applicant challenged 'the decisions of the Minister of Culture, Land and Marine Resources and/or of the Director of Forestry in respect of the allocation of coupes for certain teak and pine reserves for the year 2000. A coupe is permission to harvest the trees in a certain area.'[116] The court claimed that the proposed interveners were persons who had been allocated coupes in the year 2000 and who were members of the Sawmillers Cooperative Society Ltd (SCS). It also noted that the interveners sought leave to intervene in the proceedings on two grounds, namely: (i) they wanted to dispute the authority of the deponents of the affidavits in support of the application for judicial review to bring that application on behalf of the SCS; and (ii) they contended that they had been and would continue to be affected by the decisions or orders made in the matter. The court stated that, in relation to the test to be applied as to who was a 'proper person' for the purposes of a judicial review application, it agreed with counsel for the interveners that the public law test for giving leave to intervene was inapposite to public law proceedings where applicants sought to challenge decisions on grounds which, otherwise, did not apply to private law proceedings such as illegality, irrationality or procedural impropriety and could seek declarations without necessarily pursuing a right to compensation for pecuniary loss.[117] It reiterated that not every busybody could seek judicial review of a decision and, while not proposing to define or categorise the classes of persons who might be proper persons to intervene in an application for judicial review, it was of the view that it must include those persons whose interests are directly and adversely affected by the decisions of the relevant body. On the facts, the court observed that the interveners alleged that they had been granted coupes for the year 2000, but because of the stay granted in the proceedings, they had to shut down their operations and some sent workers home; they also paid bonds of varying amounts to the State; some incurred substantial mobilisation costs and begun felling trees and paid substantial royalties to the State. In light of these facts, the court ruled that these 'interveners have been and will continue to be directly and adversely affected by the decisions and/or orders made in this matter and are proper persons who ought to be given leave to intervene in this action'.[118] The court continued that, even if it were to apply the private law test for intervention, the interveners had demonstrated that their pecuniary and proprietary rights had been and would continue to be directly affected by the proceedings. As a result, the court ruled that the question of whether they were duly authorised to bring the application for judicial review was only of academic interest for the purposes of the application to intervene. It then granted leave to the interveners to join the proceedings and

114 Ibid at [15].
115 TT 2000 HC 119.
116 Ibid at 3.
117 Ibid.
118 Ibid at 6.

ordered that all documents in the proceedings be served on them and gave consequential directions for the service of affidavits on behalf of and against them.[119]

PUBLIC INTEREST LITIGANTS

Section 5(2) of the JRA provides that a court may, on an application for judicial review, grant relief in accordance with the JRA: (a) to a person whose interests are adversely affected by a decision; or (b) to a person or a group of persons if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case.[120] The Government of Trinidad and Tobago introduced in Parliament the Judicial Review (Amendment) Bill, 2005 ('the 2005 Bill'). Its aim was to limit the categories of persons who might apply for judicial review by repealing section 5(2)(b) of the JRA.[121] This was the section which gave the court jurisdiction to deal with public interest litigation. The applicants in *Trinidad and Tobago Civil Rights Association v Attorney General of Trinidad and Tobago*[122] were an incorporated body and an individual, respectively, who had in the past (in the case of the first applicant) and who in the future intended to promote the public interest by bringing public interest litigation, who argued that the 2005 Bill was inconsistent with the Constitution. The respondent submitted that, as a result of the prorogation of Parliament, there was no longer any reason for the court to hear the application; that the 2005 Bill was no longer before Parliament; and the issues raised were now rendered purely academic.[123] The court responded, stating that, first, the issues raised in the litigation were of great public importance; and second, the 2005 Bill raised questions concerning the separation of powers, the rule of law, interference with the supervisory jurisdiction of the courts and access to the courts by individuals. As a result, it ruled that it was an appropriate case for it to consider the issues which arose and to grant such advisory opinions or declarations as were justified.[124] In addition, the court noted that the aim of the 2005 Bill was to remove the jurisdiction of the High Court to consider judicial review applications where such were brought by litigants acting in the public interest.[125]

In respect of the challenge to the constitutionality of a Bill, the court cited the following principles summarised in the judgment of Lord Nicholls of Birkenhead in *Methodist Church in the Caribbean and the Americas v Speaker of the House of Assembly*:[126] (i) the court had jurisdiction to consider a claim that a Bill if enacted would contravene the Constitution. This jurisdiction should be exercised sparingly; (ii) as far as possible the court should avoid interfering with the legislative process; the proper time to intervene is after the completion of the law-making progress; and (iii) in exceptional cases, where it is necessary to intervene to provide the protection which it must under the Constitution, the court may be required to intervene before enactment. An example of a case where exceptional circumstances are made out is where the consequences of an offending provision are immediate and irreversible and give rise to substantial damage or prejudice.[127] In applying these principles, the court claimed that the question

119 Ibid.
120 *Sharma v Registrar to the Integrity Commission* TT 2005 HC 61.
121 Ibid at [3].
122 TT 2005 HC 98. See also *Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment* [2004] UKPC 6. At first instance see: BZ 2002 SC 14.
123 TT 2005 HC 98 at [6].
124 Ibid at [11].
125 Ibid at [14].
126 (2000) 59 WIR 1.
127 TT 2005 HC 98 at [16].

was whether the instant case was an exceptional one but accepted that the issue was academic because the 2005 Bill was no longer before Parliament; however, it stated that, having decided to continue to hear the case, there was no reason for it not to indicate its findings on the issues raised in the judicial review application.[128] The court continued that it must be remembered that the beneficiary of public interest litigation was not the person who had taken the trouble to challenge the decision; it was, by definition, the public.[129] The court noted that the enactment of the 2005 Bill would have denied the public interest litigant standing to challenge decisions such as the one at issue. It continued that, even if such access might have been restored eventually after a successful challenge, it was arguable that the public could have been exposed to substantial damage and prejudice in the meantime. The court was of the opinion that, if the issue had remained live, it would have been inclined to the view that there was reason enough to hold this to be an exceptional case. It explained that, first, access to the court to address public wrongs was an important safeguard for the protection of the citizenry and that denial of that access even for a limited time exposes the public to risk.[130] Second, the instant case was not simply one where the validity of legislation was at issue; it concerned the legality of executive policy albeit contained in the 2005 Bill. In its view, this meant that the protection of the law to which the applicants have availed themselves was access to the court for a determination of the legality of that policy.[131]

The court then considered one of two questions: whether the removal of access to the court by the 'public interest' litigant breached a right protected by section 5 of the Constitution.[132] It claimed that the judges at common law conceived the test of standing; they developed and liberalised it over the years; they lowered the threshold in public interest cases to accommodate and encourage the public interest litigant; and public interest litigation had developed and was recognised as a greatly valued dimension of the judicial review jurisdiction.[133] The court noted that, in promoting the 2005 Bill, the executive was clearly attempting to remove from the consideration and determination of the judiciary the issue of standing in 'public interest' litigation. It asserted that, had the policy been carried out, the public interest litigant whose access to the High Court had been recognised as part of the protection of the law would be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting the public interest considered and determined by the High Court.[134] The court then concluded that the de facto right of the public interest litigant to access the High Court and to have the matter of standing considered by a judge in his discretion or judgment was converted to a right protected by section 4 of the Constitution; and, therefore, the removal of the access to the High Court by a public interest litigant was a breach of the right to protection of the law.[135] The court then observed that the role of the bona fide public interest litigant in a relatively young democracy such as Trinidad and Tobago was critical to the maintenance of the rule of law; and that this was more so at a time when, for the most part, the population was crippled and consumed by fear for personal safety, and protection of family and property. It continued that, in this environment, when there were still to be found persons who were genuinely public-spirited who could emerge out of the state of paralysis to act with the intention to promote the rule of law, they should be encouraged; and that, if they were shut out

128 Ibid at [17].
129 Ibid at [20].
130 Ibid at [21].
131 Ibid at [24].
132 Ibid at [29].
133 Ibid at [49].
134 Ibid at [50].
135 Ibid.

either on technicalities by judges or by overstepping of the executive, it may as well pave the road to tyranny. The court also claimed that the public interest litigant was the watchdog that might yet prove to be more valuable to society than the one that actually barks; and in saying this, it wished to make it clear that there had been no suggestion of any improper motive on the part of the executive for the policy in the 2005 Bill.[136]

CAPACITY

In *La Clery Football Club v St Lucia Football Association*,[137] the court considered the issue of the effect of the absence of legal personality in the parties to the judicial review application. It noted that, under Part 56.2 of the CPR, an application for judicial review may be made by any person, group or body, including any body or group acting at the request of a person or persons with sufficient *locus standi*. However, it reiterated that Part 56.2 must be read in conjunction with Part 21, which permitted the court to appoint representative parties. The court explained that this point was argued before Sylvester J in *Fontenoy United Football Club v Grenada Football Association*,[138] who held that the parties, being unincorporated, non-statutory, domestic bodies, could only sue and be sued through representatives. In the instant case, the court claimed that the defect could be cured upon a proper application to the court and that it did not consider that defect to be fatal to the application.[139] In *Sykes v Minister of National Security and Justice*,[140] the Court of Appeal noted that Mr Bryan Sykes, a Crown Counsel in the Office of the Director of Public Prosecution on his own behalf and on the behalf of an unincorporated body, the Legal Officers Staff Association (LOSA), appealed an order of the Supreme Court refusing to issue *certiorari* to quash the decision of the Ministry of National Security and Justice, which decided to withhold salaries during the period when local officers in the civil service were involved in industrial action. In addition, the court also refused to make an order of prohibition to compel any other paymaster of the executive from making a similar decision.[141] The Court of Appeal noted that the appellant contended that the Full Court of the Supreme Court was in error when it adjudged that LOSA was not a proper party to the proceedings in the Supreme Court, and that its application be struck out with costs to the respondents.[142] The Court of Appeal agreed with the respondents that LOSA was not recognised as having any legal existence apart from the members of which it was composed. It explained that its object was akin to that of a trade union, but it was not registered as such. In addition, the court noted that a registered trade union might seek redress through its trustees and officers in the courts, but that was by virtue of the Trade Unions Act. The Court of Appeal clarified that the same applied to a registered company but that the underlying principle was that the applicant, in judicial review proceedings, must be legally cognisable. It continued that it could not be the law that any group of persons might assume a name and then seek redress against a legal entity, unless some statute gave them that right. On the facts, the Court of Appeal noted that the relief sought affected individuals, not the LOSA, and that the decision complained about was that individual legal officers who participated in industrial action would not be paid for the days they were engaged

136 Ibid at [56].
137 LC 2008 HC 10.
138 CIDA HCV 2001/0551.
139 LC 2008 HC 10 at [6].
140 JM 1993 CA 12.
141 Ibid.
142 Ibid.

in such action. It noted that, although LOSA might have had some legal recognition under the terms of the Labour Relations and Industrial Disputes Act, these proceedings have nothing to do with the object of the LOSA or with bargaining rights. As a result, the Court of Appeal held that LOSA was not competent as an applicant in the proceedings and that the Full Court was right in holding that LOSA was not competent to bring the application for judicial review.[143]

COMPANIES

In *Attorney General of St Kitts and Nevis v Lawrence*,[144] the court considered the question of whether the respondent had a *locus standi* in challenging the constitutionality of the impugned National Bank Ltd (Special Provisions) Act 1982. In order to do this, the court claimed that it was incumbent upon the respondent to establish, not merely that the law complained of affected or invaded his fundamental rights guaranteed by the Constitution, but also that it was beyond the competency of the Legislature.[145] It continued that no one, whose rights are directly affected by a law, could not raise the question of the constitutionality of that law. The court was of the opinion that a corporation had a legal entity separate from that of its shareholders and that, therefore, in the case of a corporation, whether the corporation itself or the shareholder would be entitled to impeach the validity of the statute would depend upon the question whether the rights of the corporation or of the shareholders had been affected by the impugned statute.[146] In addition, the court claimed that it might happen that, while a statute might infringe the fundamental rights of a company, it might also affect the interests of its shareholders; in such a case, the shareholders also could impugn the constitutionality of the statute. On the facts, the court ruled that if the respondent could allege and show an infringement in relation to him then he gained *locus standi*, and he became entitled to raise the constitutionality of the entire law in relation to the property of the company.[147] Having concluded that his application was well founded in relation to himself, the Court of Appeal held that the trial judge was correct to consider the law in its general application and to declare, as he did, on the question of its validity. Although this decision related to judicial review in the context of a constitutional challenge, the same reasoning would apply to judicial review in the context of administrative law proceedings.

143 Ibid.
144 KN 1983 CA 1.
145 Ibid at 12.
146 Ibid.
147 Ibid.

CHAPTER 4

DEFENDANTS AND DECISIONS SUBJECT TO JUDICIAL REVIEW

INTRODUCTION

Commonwealth Caribbean courts have been preoccupied, as one might expect, with the issue of determining which decisions of public bodies are subject to judicial review. This question is different from the one considered in the previous chapter, which was concerned primarily with determining whether a particular applicant has standing to bring judicial review proceedings in the High Court. In this chapter, the issue is whether a decision made by a body is reviewable; or indeed whether that body is one that is subject to judicial review. Examples include the mercy committee, the Director of Public Prosecutions, administrative tribunals,[1] local government and town councils, to name just a few. This then raises the question as to what it means when one says a 'decision' is subject to judicial review; and what bodies are subject to judicial review. Does it mean that the public authority must have made a final determination or adjudication for the jurisdiction of the court to be invoked? It is arguable that decisions in this context must embrace 'all acts and omissions or conduct engaged in prior to the making of such a determination'.[2] While the focus here is not on delineating whether the decision is an administrative one, that will be determined in the context of whether the decision is one that is subject to judicial review. Sometimes the issue is clear cut, but this is not always the case and the courts are usually engaged in an analysis of whether a particular decision of a public authority is subject to judicial review on one or more of the usual grounds.[3] In addition, this chapter will also consider the types of decisions that are subject to judicial review by the courts.

STATE INSTITUTIONS

It is clear that the machinery of the state comprises the various state institutions which govern the various countries in the Commonwealth Caribbean. This then raises the question of which body forms the government and the role of the executive. Section 64 of the Constitution of Barbados under the heading 'Executive Powers' reads: (1) There shall be a Cabinet for Barbados which shall consist of the Prime Minister and not less than five other ministers appointed in accordance with the provisions of section 65; and (2) The Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Barbados and shall be collectively responsible therefor to Parliament. But it is well known that although Cabinet determines the general policy of the government, it is left to the members of the public service to implement the policies of Cabinet. In addition to the public service, governments have established numerous state-owned corporations, statutory authorities that carry out activities similar to those which were once carried out by public servants. So while the Executive comprises the Cabinet of Ministers, Parliament comprises both elected and nominated members of the House of Parliament. Section 48 of the Constitution of Barbados

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1 *Sowatilall v Persaud* GY 1971 CA 4; and *Sowatilall v Fraser* GY 1960 FSC 14.
2 Western Australia Law Reform Commission: Judicial Review of Administrative Decisions, Options for Reform (Project no 95, June 2002) 1.
3 *Re Johnson* AI 2002 HC 3.

provides that, subject to the provision of this Constitution, Parliament may make laws for the peace, order and good government of Barbados. Legislative power is therefore vested in Parliament. The day-to-day administration of the government, as mentioned above, is carried out by public officers. In addition to the Executive and the Legislature, the Judiciary is the other important state institution. The various Commonwealth Caribbean constitutions provide for the manner of appointment and removal of judges of the High Court and the Court of Appeal. It will be seen through the chapters of this book that where any of the state institutions or other public authorities acts in a way that is *ultra vires* or in breach of the rules of natural justice, judicial review would lie to correct the wrong done to any applicant who has *locus standi*. The detailed rules relating to which bodies are public authorities for the purpose of judicial review applications are considered in this chapter and the applicants and standing in Chapter 3. The matter of the institutions which carry out functions which were once carried out by public officers has been a major issue in the context of determining whether such persons are public officers and therefore subject to the protections guaranteed to public officers under the constitutions of Commonwealth Caribbean countries.

It is arguable, therefore, that judicial review attempts to ensure that the bodies that are directly entrusted with the governance of the country do so on terms that are fair and do not impact negatively on the common law rights of the citizens and also to ensure that they act lawfully. Where any of these bodies act contrary to the provisions of the Constitution, it is clear that judicial review will lie, as was the case in *Hinds v R*,[4] where Parliament acted unlawfully in creating a court that usurped the powers of the High Court without appropriate constitutional amendment; *Maharaj v Attorney General for Trinidad and Tobago*,[5] where a member of the judiciary acted contrary to the rules of natural justice which breached the fundamental rights and freedoms of a citizen; and *C.O. Williams Construction Ltd v Blackman*,[6] where it was accepted that the Executive (Cabinet) arguably acted unlawfully in taking into account irrelevant considerations in awarding a government contract. Where the breach concerned does not impact on one or more of the common law rights, the cause of action would be solely for constitutional infringement. However, as will be explored in Chapter 11, some breaches of common law rights are also infringements of the Constitution which would allow the applicant to bring an action to vindicate his constitutional right subject, of course, to the rules relating to exhaustion of remedies. It is clear, therefore, that the state institutions, namely Cabinet, the Legislature and the Judiciary, must not only respect the fundamental rights and freedoms of individuals enshrined in the various constitutions of Commonwealth Caribbean countries, they must also not act in ways that affect the common law rights of persons and they must not act *ultra vires*, particularly where that affects the rights of the citizenry.

It is not only state institutions that must respect common law rights and act lawfully; the courts have made it clear that any person who exercises a public law function will be amenable to judicial review. Additionally, there has been a plethora of institutions which form part of the state apparatus, for example town and city councils, constituency councils and other forms of local government. There are also bodies, as mentioned above, such as the Inland Revenue Authority and the Post Office, which carry out functions that were originally carried out by government. In some of the cases considered, the issue was whether the officers employed by these bodies are public officers.

4 [1977] AC 1
5 [1977] 1 All ER 411; [1979] AC 385.
6 BB 1994 PC 2; [1995] I WLR 102; (1994) 45 WIR 94.

PUBLIC AUTHORITIES

Cabinet

In the Commonwealth Caribbean, given the nature of our constitutional democracies, the constitutions usually provide for who the Executive is, but that definition does not exhaust what bodies or authorities are subject to judicial review. The Executive usually comprises the members of Cabinet who are responsible for various ministries. Cabinet usually makes decisions on behalf of the government and makes policy that is generally followed by the civil servants. For example, as mentioned above, the function of Cabinet is defined in section 64 of the Constitution of Barbados under the heading 'Executive Powers': (1) There shall be a Cabinet for Barbados which shall consist of the Prime Minister and not less than five other ministers appointed in accordance with the provisions of section 65; and (2) The Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Barbados and shall be collectively responsible therefor to Parliament. But not all decisions of the Executive or Cabinet are reviewable; initially, the courts held steadfast to the principle that prerogative powers are not reviewable but they are taking an increasingly liberal view of this principle, holding that prerogative powers, such as the power to make treaties, the prerogative of mercy, the appointment of ministers, royal assent of Bills and the summoning and dissolution of Parliament, are all, in principle, reviewable.[7] The Executive is not limited to members of Cabinet, but extends to civil servants in the exercise of their public functions, and also includes statutory corporations which exercise some public law functions. The divide between public and private law functions is increasingly becoming blurred with the privatisation of many of the functions previously carried on by central government.[8] The range of functions carried on by government departments, ranging across health, education, transport, planning[9] and immigration all affect the lives of citizens and are all subject to the rule of law.[10] Where their interaction with the public leads to any allegation of unfairness, it will be challenged in the courts.

The leading decision on whether Cabinet is subject to judicial review is the Privy Council decision of *C.O. Williams Construction Ltd v Blackman*.[11] In that decision, the appellant applied for judicial review against Mr Blackman, the Minister of Transport and Works, and against the Attorney General, representing the Cabinet, in respect of the actions taken by Blackman and the Cabinet in connection with the award of the Highway 2A contract to Rayside. Blackman had urged the Cabinet to award the contract to Rayside, notwithstanding a recommendation of the Special Tenders Committee, supported by the World Bank, that the appellant's tender should be accepted.[12] In the Board's view, the appeal raised the following issues: (1) Was the decision of the Cabinet to accept the Rayside tender an exercise of prerogative power or of the statutory power conferred by rule 148 of the Financial Administration and Audit (Financial) Rules 1971?; (2) Is a decision of the Cabinet of the kind here in question such as to be subject in principle to judicial review?; (3) If question (2) is answered affirmatively, is there any ground on which the Cabinet's decision might be impugned under section 4 of the Administrative

7 *Joseph and Boyce v Attorney General of Barbados* [2006] CCJ 3 (AJ); (2006) 69 WIR 104.
8 *Chue v Attorney General of Guyana* (2006) 72 WIR 213; *Perch v Attorney General of Trinidad and Tobago* [2003] UKPC 17; (2003) 62 WIR 461 (PC); [2003] All ER (D) 324 (Feb); *Griffiths v Guyana Revenue Authority* [2006] CCJ 2 (AJ); 69 WIR 320.
9 *Proprietors of Strata Plan No. 103 v Developments Advisory Board* KY 2000 GC 68.
10 See *Hunte v Evelyn and Transport and Harbours Department* GY 1970 CA 7.
11 [1995] 1 WLR 102; (1994) 45 WIR 94.
12 Ibid at 98.

Justice Act of Barbados (AJA)?; (4) If questions (2) and (3) are answered affirmatively, is there any effective relief which may be available to the appellant?[13]

In relation to the first issue, the Board stated that '[i]t is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded' and that, 'so long as the statute remains in force, the function can only be exercised in accordance with its provisions'.[14] Responding to the second issue, the Board explained that '[w]hen the Cabinet exercises a specific statutory function which, had it been conferred on a Minister instead of the Cabinet, would unquestionably have been subject to judicial review, their lordships can see no reason in principle why the Cabinet's exercise of the function should not be subject to judicial review to the same extent and on the same grounds as the Minister's would have been.'[15] The Board continued that 'by virtue of the provision in the Interpretation Act that "words in the singular shall include the plural", the word "Minister" in the definition may be read in the plural as applicable to the Cabinet when exercising "any power or duty conferred or imposed . . . by any enactment" '. It continued, however, that 'if this view is not correct, the Cabinet, in their lordships' judgment, is unquestionably an "other authority of the Government of Barbados".'[16] Although observing that it 'would be quite inappropriate at this stage for their lordships to comment in detail on the effect of this evidence', in respect of the third issue, the Board claimed that it 'need say no more than that [the evidence] is, in their judgment, sufficient to sustain a *prima facie* case for impugning the Cabinet's decision on one or more of the grounds on which it is attacked under section 4 of the [AJA]'.[17] In relation to the last issue, the Board agreed with counsel for the respondent that, first, the possible grant of a declaration alone would be academic and of no value to the appellant and could not justify the continuation of the proceedings; and, second, the appellant, even if successful in striking down the Cabinet's decision, had no remedy in damages at common law.[18] However, the Board was not able to opine on the respondent's third argument that section 5(2)(f) of the AJA, on its true construction, was only intended to authorise the recovery, in judicial review proceedings, of damages otherwise recoverable at common law, not to create an independent cause of action for damages sustained in consequence of an administrative malfeasance under section 4. This was because, in its view, 'the interpretation of section 5 of the [AJA] raises a question of difficulty and importance which it would be quite inappropriate for their lordships to determine without the benefit of any opinion expressed by the courts in Barbados and on an application to strike out.'[19]

In *Re Galbaransingh*,[20] the applicants sought judicial review in respect of certain decisions and recommendations contained in a report concerning matters relating to the Piarco Airport Development Project produced by a committee appointed by the Cabinet of the Government of Trinidad and Tobago. The court drew a distinction between a Cabinet committee properly so called, and a committee of persons appointed by the Cabinet, which obtained in the instant case. It noted that the application before it did 'not question the exercise by Cabinet of any power statutory or otherwise' although 'in appropriate instances, a decision of the Cabinet will not be excluded from review'.[21] The court explained that although a 'decision maker may have

13 Ibid at 99.
14 Ibid.
15 Ibid at 100.
16 Ibid at 101.
17 Ibid.
18 Ibid.
19 Ibid.
20 TT 1997 HC 136.
21 Ibid.

no legal power to affect individuals, the decision may have *de facto* consequences such as leading other bodies to exercise powers they possess'.[22] It held that the Cabinet committee was reviewable on the basis that 'the appointment of the Committee by the Cabinet was yet another indicator that the committee was performing a public duty' and that the committee 'was appointed to achieve a benefit for the public; the intervention was in the public interest'.[23] The court noted that the committee 'operated under authority of the government and that it was performing a duty related to a matter of public concern.' Consequently, it held that the applicants satisfied 'the test to bring the action in public law'.[24]

In *HMB Holdings Ltd v Cabinet of Antigua and Barbuda*,[25] the issue was whether the decision of Cabinet to compulsorily acquire the appellant's land was unlawful. In answering that question, the court had to first answer the question of whether the decision of Cabinet was subject to judicial review. The Board claimed that, although the Cabinet's decision as to what is a public purpose and that the land is required for that purpose is not justiciable, this did not mean that the decision is immune from judicial review. It continued that the Attorney General conceded that the door was not closed entirely and that he accepted that the decision could be challenged on the ground that it was manifestly without foundation.

Ministers of government

In *All Trinidad Sugar and General Workers Trade Union v the Minister of Planning and Mobilisation*,[26] the applicant applied for judicial review claiming, *inter alia*, a declaration that the decision of the Minister of Planning and Mobilisation and Minister of Finance to direct the Board of Directors of Caroni (1975) Limited to form a subsidiary company of Caroni (1975) Limited, to be called Caroni Diversified Products Company Limited, was unlawful. The court quoted the *CCSU* case for the view that the 'decision or action challenged must have been made by a public authority or body empowered to perform public functions and its decision or action made in its public law capacity affecting public law rights, obligations and expectations'.[27] As a result, the court noted that it 'must determine what it regards as public law rights, public law performance and public law expectations'.[28] The applicant argued that it was not challenging the decision of Caroni (1975) Limited but the decision or action of the two respondent ministers, one of whom's powers were derived from statute, namely the Minister of Finance, continuing that they 'were performing public law functions in the discharge of their duties and by their actions and inactions public law rights, obligations and expectations of the applicants were affected'.[29] The court was of the opinion that the Minister of Planning and Mobilisation, who had responsibility for Caroni (1975) Limited, was accountable to Parliament, and that he 'acts in a public law capacity when he performs functions or gives directions' to the company.[30] Moreover, the court claimed that:

> any directions given by the Minister of Planning and Mobilisation or decisions taken must accordingly be in a public law capacity and therefore acting in public law he is entitled to give policy

22 Ibid.
23 Ibid.
24 Ibid.
25 [2007] UKPC 37.
26 TT 1990 HC 186.
27 Ibid at 14.
28 Ibid at 14–15.
29 Ibid at 15.
30 Ibid at 52.

> directions to Caroni Limited and in so giving directions it is not for this Court to question the decision arrived at once it is arrived at after due and fair regard to all.[31]

Consequently, the court stated that there was 'no logical reason why the impugned decision in the instant case should not be the subject of judicial review'.[32] However, the court claimed that the Minister of Planning and Mobilisation 'was performing an executive act of Government when he gave the policy direction to the Board of Caroni (1975) Limited to register Caroni Diversified Products Company Limited and to work out the mechanisms'.[33] This meant that he was 'acting in public law and acted lawfully under prerogative powers and common law in giving' that policy direction.[34]

In *Star Telecommunications Company Limited v Ragbir*,[35] the applicant brought a judicial review claim arguing that the decision taken by the Ministry of Information, Communications, Training and Distance Learning ('the Ministry') to reject its proposal, on the sole ground that the proposal 'did not meet the 4.00 p.m. deadline', in response to a request for proposals (RFP) in respect of licences to provide a cellular telecommunication system for Trinidad and Tobago, was unlawful. The question for the court was whether there was a 'sufficient public law element to bring the case within the scope of the Court's public law jurisdiction'. The court, citing *ex p Datafin*, observed that 'the absence of a statutory underpinning does not necessarily take an action outside of the domain of public law.'[36] The court was of the opinion that 'in determining whether there is a public law element, the source of the power is not the only consideration' and the court 'will consider other relevant circumstances, such as the nature of the function and the subject matter of the claim'.[37] Therefore, it claimed that, 'even in the area of the "source of power", the public law element question may involve determining the "nature of the function" and the "subject matter of the claim".'[38] It noted that 'the very difficult question that is relevant to this case [was] whether the exercise of the common law contractual power by the government is subject to judicial review.'[39] On the facts of the case the court held that 'the central government, acting in the exercise of its common law power to contract through one of its Ministries, published the relevant RFP.'[40] It was of the opinion that, although there was 'no 'statutory underpinning', the source of the power is the central government. In other words, the central government was 'directly involved in this exercise' and the 'RFP by its very terms reveals its public nature', in that it sought 'proposals for licences to provide a cellular telecommunication system for Trinidad and Tobago'.[41] However, the court pointed out that, as a result of the RFP, there may be an initial contract between the central government, acting through one if its ministries, and the successful proposer; but that the matter did not end there – it might lead to the eventual grant of a licence to operate cellular telecommunication systems in Trinidad and Tobago; consequently, 'the grant of such licences will determine who will or will not be allowed to conduct business in the public realm.'[42] The court disagreed with the restrictive approach, observing that where the State, 'acting by the central government through one if its Ministries,

31 Ibid at 52–3.
32 Ibid at 53.
33 Ibid.
34 Ibid at 55.
35 TT 2000 HC 51.
36 Ibid at 3.
37 Ibid at 5.
38 Ibid.
39 Ibid at 12.
40 Ibid.
41 Ibid at 15.
42 Ibid at 19.

chooses to exercise its prerogative or common law power to contract and where the nature of that function is clearly public (as it is in this case) . . . it cannot hide behind the veil of the "contractual nature" of the exercise of its power'.[43] In the court's view, this was so 'especially where . . . what is being challenged, are alleged criteria laid down in advance by the Ministry and the exercise of the Minister's powers in relation to same in the context of procedural fairness'. It then stated that:[44]

> I see no good or sufficient reason why (*ex p Hibbit*[45] apart), given the principle that all discretionary powers exercised by public bodies are to be exercised in the public interest in accordance with normal public law principles, and on the facts of this case, including the source of the power, the nature of the function being exercised, the subject matter of the claim, the pre-contractual stage of the matter and the procedural complaints which are the subject of this challenge, this Court should hold that there is no sufficient public law element to make these proceedings amenable to judicial review. In this post modern era, when the principles of transparency, openness and accountability are the increasing norm for the conduct of public affairs and the maintenance of a free and democratic society, there is no good reason why the exercise of central government's prerogative or common law power to contract should enjoy an exemption from judicial review of procedural impropriety, whether the challenge is on the basis of illegality, irrationality, abuse or excess of power or otherwise.

Therefore, the court concluded that 'in the circumstances of this case there is a sufficient public element to justify this matter being brought within the scope of judicial review'.[46] In many of those decisions concerning bids, the issue was whether the process of tendering by either a statutory corporation or a Ministry was one that attracts public law remedies; in other words, whether the process of procurement of services from private sector entities meant that the process was of a public nature solely because of the involvement of a public authority.

Permanent secretaries

The courts have not only held that ministers of government are amenable to judicial review, but have also claimed that an acting permanent secretary was 'a public functionary and public law consequences flowed from her decision which impact on the rights of the officers'.[47] Citing *ex p Datafin* for the view that 'once the activities of a body were of a public law character the body was susceptible to judicial review', Blenman J, in *Hector v Attorney General of Antigua and Barbuda*, held that the 'decision of the Acting Permanent Secretary is susceptible to judicial review'.[48] The test to be applied is 'whether an entity susceptible to judicial review is to determine the nature and purpose of its functions, as well as the source of its power'.[49] In applying that test, she claimed that it was important to find out whether 'the entity concerned dealt with matters that redound to [the] benefit of the public or are concerned with matters, merely commercial in nature'.[50] Where the dividing line is to be drawn is notoriously difficult to ascertain because public bodies make decisions that have both public and private law consequences; and statutory bodies, which are involved in a purely commercial enterprise, may also attract the court's

43 TT 2000 HC 51.
44 Ibid.
45 *Ex p Hibbit and Sanders* [1993] COD 326.
46 TT 2000 HC 51.
47 *Hector v Attorney General of Antigua* AG 2006 HC 14 at [67].
48 Ibid.
49 *Maharaj v National Fisheries Company Ltd* TT 1996 HC 60.
50 Ibid.

supervisory jurisdiction by making decisions which have public law consequences.[51] Where the decision, to charge the applicants a throughput fee of 10 cents plus VAT per litre of fuel purchased, was essentially a management decision relating to the economic survival of the company, it cannot be the subject of the court's scrutiny.[52]

The decision maker

In *James v Ministry of Education*,[53] the court had to identify who exactly was the decision maker for the purposes of the judicial review application. The court noted that, first, '[i]t is the argument of the claimant that the role and position within the public administration matrix is coloured by the fact that administrative law is rooted in the law of partnership and that the law of partnership itself is based upon agency principles'; and, second, '[t]herefore each partner is agent for the other partner. The claimant argues that a government department does not operate on its own, that it operates through agents, the public servants.'[54] Citing the case of *Carltona Ltd v Commissioners of Works*,[55] in which Lord Greene MR stated that 'constitutionally the decision of the officer is the decision of the Minister', the claimant argued that where the defendant held out an officer as having the authority to do certain things, then this would essentially be the government acting, the officer being the alter ego of the minister in question. The claimant also argued that the government operated on the 'Indoor Management Rule', a principle applied in the case to the effect that 'a non-insider or a third party dealing with the defendant is entitled to assume that there has been due compliance with all matters of internal management (administration) and procedure' and even an unauthorised act of an officer/agent of the defendant, acting with apparent or ostensible authority, would bind the defendant.[56] The defendants countered that the claimant premised his entire case on a decision he claimed was made by the Ministry of Education and that, to determine who was the decision maker, regard must be had to the creation of the authority. They also argued that it was the Cabinet of St Lucia which made the decision to create the scholarship award, the decision approving the award to the claimant and, consequently, only the Cabinet had the power to make the decision to revoke the scholarship that was awarded to him to study his LLB degree at Holborn College, England.[57] It was also argued that, first, the documentation exhibited by the claimant in his pleadings indicated that the decision to award the scholarship was made by the Government of St Lucia through the Cabinet and not by the Ministry of Education and, therefore, that decision could only be revoked by the Cabinet; second, a clear distinction should be made between the managers of the scholarship and the person who communicated the decision as approved by the decision maker; and, third, the appellant failed to satisfy the court that the respondent was the decision maker – the one who decided against the appellant's application or who authorised the Permanent Secretary to do anything; and so the presumption of regularity should prevail and, consequently, the appellant's appeal should fail.[58] The court noted that while the Cabinet is collectively responsible for all things done in the execution of its functions, it also would be held responsible for actions carried out by a single minister while executing the

51 Ibid.
52 Ibid.
53 LC 2006 HC 5.
54 Ibid at [20].
55 [1943] 2 All ER 560.
56 LC 2006 HC 5 at [21], citing *Royal British Bank v Turquand* (1856) Ex Ch 101 and confirmed in *Rolled Steel Products (Holdings) v British Steel Corp.* [1986] CA 104.
57 LC 2006 HC 5 at [22].
58 Ibid at [23].

functions of his office; and that minister in turn is responsible for the actions of his permanent secretary who is in control of the administration of the government department. The court cited the following principle of Lord Greene MR in the *Carltona* case:[59]

> In the administration of Government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . . The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the Department. . . . Constitutionally, the decision of such an official is of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority . . .

The court accepted that, first, the scholarship was awarded by the Government of St Lucia; second, the claimant was advised of the award of the scholarship by the Ministry of Education; third, the bond which was signed by the claimant was with the Government of St Lucia through the Director of Finance of the Ministry of Finance; and fourth, the letter by which the claimant was informed of the refusal of further payment of the award was only forwarded by the Ministry of Education.[60] The court ruled that the letter from the Ministry of Education was couched in such terms that it was not possible to conclusively determine that it was the Ministry of Education or the Permanent Secretary who made the decision to terminate the award.[61] It continued that, while it is understood that within the Cabinet, the Minister of Education has responsibility for the portfolio of education on behalf of the government, it could not be assumed that, because the matter related to education, it was the Ministry/Minister which made the decision. The court was of the opinion that it was clear from the memorandum that it was the Cabinet which awarded the scholarship and which would, therefore, be responsible for terminating it. The Ministry of Education 'was merely the harbinger of the news' and the Cabinet had not, by any indication, divested itself of responsibility for the scholarship.[62] The court held that, while it accepted the claimant's argument with respect to the authority of the Permanent Secretary and his being responsible as the alter ego of the Minister, he failed to substantiate his allegations and, therefore, prove to the satisfaction of the court that the first defendant was the decision maker whose actions were subject to judicial review.[63]

AMENABILITY TO JUDICIAL REVIEW

It is well understood that for a decision to be the subject of judicial review it must fall within the realm of public law and not private law. That determination arose for direct consideration in *Re Jamat Muslimeen*,[64] where the respondents argued that the application related to a matter in private law rather than one in public law. The appellant sought judicial review of the decision of the Commissioner of Police and the Chief of Defence to enter the appellants' premises, occupy a building thereon, and continue to remain on the premises. The judge, after examining the leading United Kingdom authorities, claimed that 'the source of the decision-making power in judicial review proceedings must emanate from: (a) a Statute; (b) subordinate

59 [1943] 2 All ER 560 at 563.
60 LC 2006 HC 5 at [29].
61 Ibid at [36].
62 Ibid at [37].
63 Ibid at [38].
64 TT 1991 HC 10.

legislation made under a statute; or (c) the prerogative i.e. the common law'.[65] Such decisions, he continued, 'issuing from those sources of power are public law decisions amenable to judicial review'.[66] The court rejected the view that, when leave is granted for judicial review, the granting of such leave precludes a respondent from taking the point that the matter is not one in public law but one in private law,[67] on the basis that there was no such rule of law.[68] The judge stated:[69]

> I have consistently held the view that if a person has a right of action under the ordinary law; and one under the Constitution, that person may opt as to whether he will pursue his right under the Constitution or his right under the ordinary law which for all practical purposes would be a right in private. In my respectful and humble view, this appears to me to be the effect of section 14 of the Constitution. In judicial review proceedings a person has no such choice. His remedy must be one in public law alone. There is no question of his having a remedy both in private law and in public law.

The court was of the opinion that although cases 'under the Constitution fall within the realm of public law, and judicial review cases are also within the realm of public law, these two procedures are not necessarily interchangeable'.[70] It stated that the 'question as to whether the applicant is in lawful or unlawful occupation of the lands of the state is in my view a matter of private law not public law'.[71] It continued that a public right only arises where the source of the power purported to be exercised by the decision maker is derived from statute, subordinate legislation, or the prerogative, and that neither the police nor the army purported to exercise any power of entry under the Defence Act or the Police Service Act.[72] The court was of the opinion that it 'does not necessarily mean that because a public authority is involved that the matter must be one for judicial review'.[73] It was of the view that the proper test of whether a body was subject to judicial review was not that it was a public body, or that it was endowed with coercive powers; the proper test of whether a public body, as decision maker, was amenable to judicial review was that it must purport to act under a statute, under subordinate legislation or under the prerogative. On the facts, the court held that, by entering on to the appellants' lands, the police and the army were purporting to exercise a common law right of self-help, the validity of which must be tested at trial in a civil action. In other words, the police and the army were not exercising any power derived from a statute, subordinate legislation or the prerogative but, rather, the reason for the entry of the respondents was the unlawful occupation of state lands by the appellants. Therefore, the appellants' remedy sounded only in contract or tort; it was certainly, in the court's opinion, not a case for judicial review.[74]

The issue that arose in *Griffith v Barbados Cricket Association*[75] was whether the Barbados Cricket Association (BCA) was subject to judicial review. In that decision, the applicant, Griffith, sought, through judicial review proceedings, declarations against the BCA that, first, its decision that the result of the First Division cricket match played on the final day of the BCA's

65 Ibid.
66 Ibid.
67 Ibid at 7.
68 Ibid at 8.
69 Ibid.
70 Ibid at 9.
71 Ibid at 13.
72 Ibid.
73 Ibid.
74 Ibid at 14.
75 (1989) 41 WIR 48. See also *Moncur v Griffin* BS 2005 SC 76; *Mosca v Trinidad and Tobago Racing Authority* TT 1994 HC 5; *Ramdial v Trinidad and Tobago Racing Authority* TT 1985 HC 64 and *Zaidie v The Jamaica Racing Commission* JM 1981 SC 21.

First Division series between St Catherine and the Police Sports Club was *ultra vires*; and, second, the match was played in accordance with the rules of the competition.[76] The court noted that the association comprised a group of individuals and cricket clubs whose objects, as stated in the Constitution and general rules of the association, were to promote and control the game of cricket in Barbados and to join with the other West Indian territories and Guyana to promote the game in the West Indies generally. The BCA was set up by an Act of Parliament. The court was of the opinion that the BCA was 'given power by its acts and decisions to affect the cricketing lives of those who play for the member clubs and to deprive those clubs of the awards which they claim to have won according to the competition rules' and that these were 'good reasons why the court cannot close its doors to cricketers and clubs who complain against the exercise of that power'.[77] That was the extent of the court's reasoning why the BCA was subject to judicial review. Surely, that was an insufficient basis to decide whether a body is subject to judicial review since, if it were, then this test would expand the scope of judicial review beyond its public law boundaries.

This was remedied in *Barbados Cricket Association v Pierce*,[78] where the court had to answer the same question, namely whether the BCA was a body that was amenable to judicial review. Sir Denys Williams CJ, in answering that question, made reference to the decision of *ex p Datafin plc*,[79] where the English Court of Appeal, in deciding whether the Panel on Take-overs and Mergers was amenable to judicial review, stated that the Panel operated '*wholly in the public domain*' and that its 'jurisdiction extends throughout the United Kingdom. *Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel*. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets worldwide.'[80] It then continued that:[81]

> In my view, and quite apart from any other factors which point in the same direction, given the leading and continuing role played by the Bank of England in the affairs of the panel, the statutory source of the powers and duties of the Council of the Stock Exchange, *the wide-ranging nature and importance of the matters covered by the code, and the public law consequences of non-compliance, the panel is performing a public duty in prescribing and operating the code* (including ruling on complaints).

There was no question then that, in the circumstances, the Panel was subject to judicial review. In commenting on that decision, Sir Thomas Bingham MR in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*[82] claimed that the effect of *ex p Datafin* was 'to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers'.[83] In *ex p Aga Khan*, the issue was whether the Jockey Club was amenable to judicial review. The court said although the Jockey Club has power:

> the mere fact of power, even over a substantial area of economic activity is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public

76 (1989) 41 WIR 48 at 51.
77 Ibid at 58.
78 (1999) 57 WIR 29.
79 [1987] 1 All ER 564.
80 Ibid at 583 (emphasis added).
81 Ibid at 587 (emphasis added).
82 [1993] 2 All ER 853. See also *R v Insurance Ombudsman, ex p Aegon Life Insurance Limited* [1994] CLC 88 (whether the Insurance Ombudsman Bureau was subject to judicial review); *R (on application of West) v Lloyd's of London* [2004] 3 All ER 251 (whether Lloyd's of London was amenable to judicial review).
83 [1993] 2 All ER 853 at 864.

> law. If control is needed, it must be found in the law of contract, the doctrine of restraint of trade . . . and all the other instruments available in law for curbing the excess of private power.[84]

The court, therefore, rejected the argument that the Jockey Club was subject to judicial review. In *Council of Civil Service Unions v Minister for the Civil Service*,[85] Lord Diplock was of the opinion that, first, '[o]f course the source of the power will often, perhaps usually, be decisive'; second, '[i]f the source of power is a statute or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review'; and, third, '[i]f, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.'[86] He continued: 'But in between these extremes there is an area in which it *is helpful to look not just at the source of the power but at the nature of the power*' and, second, '[i]f the body in question is exercising public-law functions, or if the exercise of its functions has public-law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review.'[87]

On the facts of *Barbados Cricket Association v Pierce*, the court held that *ex p Datafin* did not assist the applicants, because, first, the nature of the functions of the BCA which were challenged were in no way comparable to those of the Panel on Take-overs and Mergers in that case; and, second, the source of the BCA's power to determine the dispute was not the private Act, which incorporated the BCA and made consequential provision, but the rules of the BCA, of which the cricket clubs were members and which enabled them to participate in the Fire Cup Competition.[88] In addition, the court pointed out that, although the Jockey Club exercised exclusive control over horse racing in Great Britain, it was held in *ex p Aga Khan* that it was not amenable to judicial review; this was not the case with the BCA. It noted that the BCA never had sole control over cricket in Barbados and that, consequently, it was also not amenable to judicial review.[89] Since the BCA was a 'domestic body and the nature of the function that is under challenge not being public or governmental', the applicant's remedy was in private law not public law; therefore, their judicial review application failed.[90] The determining point for the court was that the BCA was a private body that regulated its own affairs by agreement between the members.[91]

Where the matter complained of arose out of an alleged breach of contract and not from the exercise of an administrative function, it will not be subject to judicial review.[92]

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84 Ibid at 875.
85 [1984] 3 All ER 935.
86 Ibid at 949–50.
87 Ibid (emphasis added).
88 (1999) 57 WIR 29 at 37.
89 Ibid at 38.
90 Ibid.
91 See *La Clery Football League v St Lucia Football Association* LC 2008 HC 10 at [6] (where it was held that the contractual nature of the relationship between members of the Association based on its rules and regulations meant that it was not subject to judicial review); and *Re Flores* TT 1985 HC 123 ('The fact that the applicant holds a licence issued by the Authority established under the Act or the fact the Authority under its Rules exercise discipline over the applicant do not in my view give the applicant any public law remedy arising out of the public rights and duties imposed on the Authority by the Act.')
92 *Francis v Cochraine* AG 2004 HC 53 ('On consideration of the merits, I am of the opinion that the defendants' submission that this matter is not a case for judicial review as it arises out of a contractual relationship between the parties and not as a result of an administrative action by a public body is correct' (at [21]); and *Re Flores* TT 1985 HC 123 ('The grant of a licence to the applicant in my judgment constitute a contract between the Authority and the applicant and that there is no element of public law involved when the disciplinary procedure laid down in the Rules are invoked which would attract administrative law remedies' (at 8).

STATUTORY CORPORATIONS

The question of whether a statutory corporation was subject to judicial review arose for consideration in *National Contractors Limited v National Development Corporation*.[93] In that decision, the applicant sought judicial review of a decision of the National Development Corporation to accept the tender presented by another company in place of the applicant's for the construction of access roads and drainage facilities in Vieux Fort. The court was of the opinion that 'the preliminary issue to be determined is whether the defendant's acceptance or rejection of a tender for works and the defendant's decision in regard thereto are private acts and are governed by private law or are public acts and are governed by public law'.[94] After copious citations of arguments of counsel, the judge again noted that the 'central issue in this matter is whether the defendant's refusal or failure to accept a tender for works is subject to judicial review', holding that the 'National Development Corporation Act of 1971 does not confer any such powers on the defendant Corporation' and that it was 'quite clear that when the defendant invites tenders for work, it is exercising a private function governed by private law of contract'.[95] The court was of the opinion that it was important to 'look not only at the general powers of the defendant Corporation but also its specific powers'. The specific power being challenged was 'the power of the defendant to reject tenders', which the court accepted was a 'contractual power and the defendant reserves the right to award contracts to the lowest bidder'.[96] The court, therefore, ruled that it was not convinced that 'an invitation to tender and its acceptance and/or rejection is governed by public law'.[97] It concluded that matters such as the defendant's rejection of the applicant's tender were 'of a private nature and as such, fall within the realm of private law and are not public acts and matters governed by public law subject to judicial review'.[98]

In *NH International Caribbean Limited v Urban Development Corporation*,[99] the Court of Appeal of Trinidad and Tobago had to consider that same issue, namely whether the grant of a tender by the statutory corporation, The Urban Development Corporation of Trinidad and Tobago (UDECOTT), was subject to judicial review. Warner JA was of the opinion that there:

> is now an extensive body of authority in support of the 'function test' – unless therefore the source of power of a decision maker originated from statute or prerogative and clearly provided the answer, consideration must be given to the nature of the power and function to be exercised to see whether the decision had a sufficient public element, flavour or character to bring it within the purview of public law.[100]

After considering the authorities, he held that UDECOTT was a public body for the following reasons: (a) the State was in effect acting through the agency of UDECOTT to design, finance and construct the building; (b) the State was either providing the funds or necessary government guarantees; (c) the lands belonged to the State; and (d) all of UDECOTT's functions were

93 LC 2000 HC 10. See also *Seereeram Bros Ltd v Central Tenders Board* TT 1994 HC 89; *Jusamco Pavers Ltd v Central Tenders Board* TT 2000 HC 29; *Moonilal Ramhit and Company Limited v The Couva/Tabaquite/Talparo Regional Corporation* TT 2001 HC 78; and *Moores Air Express Service Ltd v The Postmaster General* JM 2004 SC 13.
94 LC 2000 HC 10 at [5].
95 Ibid at [43].
96 Ibid at [46].
97 Ibid.
98 Ibid at [47].
99 TT 2006 CA 11. In *Mohamdally v Medical Board of Trinidad and Tobago* TT 2009 HC 294 the court held that the Medical Board, as constituted by the Medical Board Act, is a public authority for the purpose of s 4(k)(i) of the Freedom of Information Act (at [19]).
100 TT 2006 CA 11 at [12].

carried out for the benefit of the public or a section of the public.[101] He continued that '[i]t is common ground, however, that not all of the decisions of a public body are amenable to judicial review' and that if, for example, 'the impugned decision concerned a policy not to treat with any of the pre-qualified contractors whose members were unionized, that decision would be reviewable' and that the 'determination that the case sounds in public law is only a threshold issue'.[102] He then claimed that the authorities indicated that judicial review of the decisions of a public body would not be appropriate where: (a) the decision was commercial in nature, such as the purchase of goods or services or in consequence of a tendering process; (b) where its decisions were not subject to duties conferred by statute; and (c) there was no allegation of fraud, corruption or bad faith. Consequently, he held that the trial judge was 'correct when he held that the decision was not amenable to judicial review'.[103]

Kangaloo JA pointed out that 'the critical question is whether the decision of the respondent to award a contract after a tendering process is a decision which sounds in public law or private law, for the purpose of relief.'[104] He continued that 'a decision of a private body which exercises public functions is reviewable if the decision has a sufficient public element or flavour' and that the issue, in the instant case, was 'whether a decision to award a contract based on the tender procedures has a sufficient public flavour to it or whether it is strictly speaking a commercial activity with remedies, if any, in private law'.[105] Kangaloo JA concluded that the decision to award a contract as a result of a tender amounted to nothing more than the participation in the normal commercial activity of a corporate entity, in much the same way as a decision to employ personnel or to engage in contractual relations with others for the supply of items for the day-to-day running of the respondent.[106] He continued that this did not mean that:

> none of the respondent's decisions is immune from judicial review challenge. Certain of its decisions are obviously reviewable, for example a decision of the respondent to construct low-income or government subsidised housing in a prime residential or even agricultural area would obviously be a decision with sufficient public law flavour as to be reviewable, but a decision to tender and award a contract based on an apparently regular tender procedure, in my view, is entirely different.[107]

He claimed that the principles from the two authorities[108] include: (a) a tender process without statutory underpinning does not give rise to public law rights; (b) the nature of a tender process undertaken by a governmental nature of the body is not changed because of the governmental body – it is no different from the procedure adopted in ordinary commercial situations; and (c) if the obligation breached in tender procedures is fairness, that obligation could not be equated to the obligation of fairness of government departments, such as immigration and inland revenue, to give rise to public law relief, because tender procedures are rooted in the common law right to contract.[109] Kangaloo JA then concluded that, 'largely because of the lack of statutory underpinning for the tender process in this case, but also because of the intrinsic commercial and contractual nature of the tender process itself', he was of the opinion that 'the decision

101 Ibid at [16].
102 Ibid.
103 Ibid at [21].
104 Ibid at [6].
105 Ibid.
106 Ibid.
107 Ibid at [7].
108 *R v Lord Chancellor, ex p Hibbits and Sanders* (1993) COD 306; and *R v Legal Aid Board, ex p Donn & Co. (A firm)* [1996] 3 All ER 1.
109 TT 2006 CA 11 at [21].

complained of does not have a sufficient public law element or flavour to be amenable to judicial review'.[110]

Sharma CJ, dissenting, claimed that this issue was 'whether the matter arises in private or public law. This area of public law is regarded as a veritable legal minefield fraught with all sorts of legal niceties.'[111]After examining the arguments of counsel, he acknowledged that 'the distinction between matters arising under public or private law is quite complex'.[112] Sharma CJ was of the opinion that it was 'clear from the authorities that there are many grey areas between public authorities and private bodies and oftentimes there may be some overlap of functions' and that each case therefore 'must depend on its own facts'.[113] He stated that the trial judge held that there 'was no contention with the conclusion reached that the respondent is a private entity, as it was incorporated and is a private limited liability company'.[114] He was of the opinion that, although there was 'a strong impulse to simplistically dismiss the matter as a building contract in private law with no public law underpinnings', on a 'more mature consideration and after looking at the authorities' the instant claim was 'injected with sufficient public law elements'.[115] Sharma CJ cautioned that 'not all transactions of the respondent would be susceptible to judicial review, for example any litigation involving the purchase of a truck by the respondent will clearly be a matter in private law',[116] claiming that some of the 'factors which have influenced [his] conclusion that the respondent's contract possessed a sufficient public element' were (a) the evidence that the respondent is performing the government's infrastructural development; (b) the fact that the State was the sole shareholder in the respondent; (c) the public interest in any undertaking of the government; and (d) the general public interest in every aspect of such a vital Ministry.[117]

In *Re Mahabir Raman*,[118] it was argued that Mr Raman Mahabir, the Chief Executive Officer of the Tunapuna/Piarco Regional Corporation (the 'Corporation'), had no claim in judicial review, because there was 'no element of public or administrative law rendering the alleged acts of the [Corporation] susceptible to judicial review', but that his main claim was that 'the respondent was guilty of dereliction of duty and a breach of his contract of service. There was no public law element in the ordinary relationship of master and servant.'[119] The court was of the opinion that as 'a tribunal of inferior jurisdiction its actions and decisions are also liable to review by the Courts, subject to the provisions of section 129(3) of the constitution'.[120] It continued that the 'true test of the Court's jurisdiction . . . is whether the powers and functions of the respondent are public in nature', observing that it is that issue 'which determines the issue of jurisdiction'.[121] The question of whether the 'function arises out of statute or under a contract is no longer of singular significance'.[122] The court stated that:[123]

> The question of reviewability is no longer answered only by identifying the source of the power being exercised by the decision-maker whose action is being challenged, although this remains a

110 Ibid at [40].
111 Ibid at [51].
112 Ibid at [59].
113 Ibid at [61].
114 Ibid.
115 Ibid at [64].
116 Ibid.
117 Ibid at [65].
118 TT 1999 HC 67.
119 Ibid.
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid.

> relevant consideration. The recent approach is to identify the type of functions performed by the public authority and to determine whether they are functions of a public law system, are of a public law character or have public law consequences.

The court concluded that when 'the powers, duties and functions of the respondent are examined it is evident that by either test his functions are of a public nature and are subject to the supervisory jurisdiction of the High Court'.[124] It was of the opinion that the 'Chief Executive Officer is essential to the proper functioning of the Corporation' and section 10(1) of the Municipal Corporation Act provides that the powers of a Municipal Corporation shall be exercised by its council which shall act through its chief officers and staff. In addition, the court claimed that the council exercised the powers of the Corporation and acted through each of its chief officers, including the Chief Executive Officer, and through its staff, whose actions and decisions impacted on the lives of the burgesses within the municipality.[125] In other words, the respondent's responsibilities and duties to the Corporation 'affect[ed] the public interest'. The court held that this case was 'not simply a case of an employee failing to carry out the terms of his contract. In this case his duties and functions impact directly on the proper workings of the Council and of the Corporation itself and he is an important functionary in the execution of the governmental power of the Council.'[126]

In *East Caribbean Liquid Gas Company Limited v National Gas Company of Trinidad and Tobago*,[127] the applicant, East Caribbean Liquid Gas Company Limited, applied for an order quashing the decision of the respondents in rejecting their proposals and refusing to have further discussions with them in respect of the implementation of the Trinidad and Tobago Natural Gas Treatment Plant Project.[128] The first question for determination by the court was whether the decision of the National Gas Company of Trinidad and Tobago and the concurrence of the Minister were matters which attracted judicial review. It noted that it 'was not disputed that a decision of a State enterprise such as the respondent company is one on which the supervisory jurisdiction of the Court may have focused'.[129] In other words, the issue for the court was 'whether there is a public law element when a State enterprise and a private individual or body corporate are negotiating with a view to entering into a contract'.[130] Rather than focus on that question, the court reasoned that 'if it is proved that the applicant had such a legitimate expectation in its relations with the respondent, a State enterprise engaged in the exploitation of natural resources, this would be a public law element sufficient to attract judicial review'.[131]

In *Industrial Risks Consultants Limited v Petroleum Company of Trinidad and Tobago Ltd*,[132] the first issue was 'whether Petrotrin is a public body performing or exercising a public function and therefore susceptible to judicial review'.[133] The Petroleum Company of Trinidad and Tobago Ltd (Petrotrin) was an oil company which carried on the business of producing refining, storing, transporting, supplying, marketing, selling and distributing petroleum and other oils, and any products thereof, in any part of the world.[134] The judge explained that, in answering that first issue, he 'must first decide whether Petrotrin is a public body or public authority and next,

124 Ibid.
125 Ibid.
126 Ibid.
127 TT 1989 HC 126.
128 Ibid at 10.
129 Ibid at 11.
130 Ibid at 12.
131 Ibid at 14.
132 TT 1997 HC 36.
133 Ibid at 4.
134 Ibid at 1.

whether in the exercise of its powers, or performance of its duties, a public element is involved'.[135] The applicant argued that Petrotrin was a wholly owned company of the Government of the Republic of Trinidad and Tobago, and was performing, or was presumed to be performing, a public function or exercising a power involving a public element in processing the tenders and awarding the insurance broking contract to Insurance Brokers West Indies Limited (IBWIL) while rejecting their tender.[136] The court explained that to 'determine whether Petrotrin is exercising a public function [it] must examine its source of power, the nature of its functions and the nature of the applicant's dispute or challenge', noting also that 'Petrotrin's source of power is the Memorandum and Articles of Association. It is contractual in nature and not statutory.'[137] It continued that the 'activities of providing refining and marketing petroleum and other oils are commercial for making profits and not for the benefit of the public'.[138] The dispute, which arose as a result of the selection of IBWIL as insurance brokers over the applicants, occurred in the 'exercise of [Petrotrin's] contractual powers to award contracts'; the court concluded that the 'dispute is therefore a private law dispute and not justiciable under common law'.[139]

The question of whether a body is subject to judicial review does not only arise in the context of administrative law; as the following case shows, it can sometimes be an important aspect of a criminal matter. In *Moonan v Director of Public Prosecution*,[140] the appellant was alleged to have corruptly given to another a car as a reward for favourable consideration to the appellant in respect of contracts between Republic Telecommunications Company Limited and Trinidad and Tobago Telephone Company Limited ('Telco') contrary to the Prevention of Corruption Act ('1921 Act'). The applicant sought judicial review of the decision to lay the second information against him. The second information contained the same charge as the first with some minor differences.[141] The issues for the court were first, whether the second information was defective; second, whether the proceedings purported to be commenced by the second information were additionally an abuse of the process of the court; and, third, if the first two issues were established in favour of the appellant, whether the trial judge ought to quash the second information. The applicant argued that the second information did not disclose any offence known to the law because Telco was not a public body within the meaning of the 1921 Act.[142] The Court of Appeal noted that if Telco was 'not a public body, then there can be no valid committal and accordingly the second information may be said to be defective'.[143] It was of the opinion that this was an issue to be decided by the magistrate as a point *in limine* rather than by the Court of Appeal. The Court of Appeal observed that the definition of 'public body' in the 1921 Act 'showed quite clearly that the phrase was intended to have a restricted and limited meaning' and that 'for Telco to be said to be a public body for the purposes of the 1921 Act it must be either a local authority or a public authority'.[144] It was of the opinion that local authorities 'perform strictly governmental duties, that is, duties that the central government should perform like the maintenance of local roads, the upkeep of cemeteries and markets' and, it was clear, therefore, that Telco was not in that category. After examining various authorities,

135 Ibid at 4.
136 Ibid.
137 Ibid at 6.
138 Ibid.
139 Ibid at 6–7.
140 TT 1991 CA 25. See also *Lawrence v Financial Services Commission* JM 2008 CA 56.
141 The only difference being that in the second, Telco was described as 'a public body' whilst in the first it was described as 'a state enterprise' and the second was laid under section 3(2) of the Prevention of Corruption Act, Chapter 11:11 of the 1921 Act, while the first was laid under section 3(1) of the 1987 Act.
142 TT 1991 CA 25.
143 Ibid.
144 Ibid.

the Court of Appeal concluded that it was 'quite clear that Telco [was] a company acting for profit although conducting undertakings for the benefit of the public' and was, therefore, 'not a public body for the purposes of the 1921 Act'.[145] Consequently, it held that the 'second information laid against the appellant, in my opinion, creates no offence known to the law under the 1921 Act' and 'therefore, there can be no prospect of a conviction on the second information, and accordingly, proceedings on the second information ought not to have been instituted'.[146] In *Singh v Agricultural Development Bank*,[147] the court noted that '[t]he [Agricultural Development Bank] was established by statute. . . . Its objects are to encourage and foster the development of agriculture and commercial fishing and industries connected therewith and to mobilise funds for the purpose of the development. . . . It is not disputed that the respondent is a public body.'[148]

PUBLIC SERVICE AND OTHER COMMISSIONS

One area that has seen a huge increase in recent years is that relating to public service. There is no question that the Public Service Commission, the Police Service Commission and the Teaching Service Commission are public authorities which would be subject to judicial review and, indeed, to redress under the Constitution for infringements of the Bill of Rights. In one of the first decisions relating to the service commissions, *Thomas v Attorney General of Trinidad and Tobago*,[149] the argument was never made that the Police Service Commission was not subject to judicial review, and, clearly, quite rightly so in light of the coercive powers that these bodies have to appoint, discipline and remove public officers from office. It was surprising, therefore, that counsel for the Police Service Commission ('the Commission') in *Nelson v Attorney General of Antigua*,[150] in respect of a claim for dismissal by the Commission, claimed that the issue was 'not a matter that falls within the ambit of the public law'.[151] The judge made short shrift of that argument, asserting that she had 'no doubt that the Commission is a public functionary and public law consequences flowed from its decision which can impact on the rights of the [Police] Commissioner'.[152] Since the applicant's case was that 'his termination was unlawful since the Commission breached well-established principles of natural justice', the court held that they 'they fall squarely within public law and are amenable to judicial review'.[153] The defendant's application to dismiss, therefore, failed. However, in some instances, the court still engaged in a discussion of whether the rejection of an applicant's application by the Teaching Service Commission, on the basis that he was considered not to be a suitable candidate for the teaching service, was subject to judicial review.[154] The court held that, because there was 'no statutory underpinning with respect to the powers of appointment at the Teaching Service Commission, there are no criteria to be used to determine such appointment and therefore the decision of the Commission not to accept his application is not in the circumstances susceptible to judicial review'.[155] This case is seemingly an aberration in light of the clear public law functions carried out by such constitutionally created service commissions. In *Re Aubrey Norton*,[156] the judge noted that in:

145 Ibid.
146 Ibid.
147 TT 2004 HC 26.
148 Ibid at 13.
149 [1982] AC 113.
150 AG 2009 HC 9.
151 Ibid at [42].
152 Ibid at [43].
153 Ibid at [49].
154 *Redoy v Teaching Service Commission* TT 1994 HC 116.
155 Ibid.
156 GY 1998 HC 1. See also *Re Oswald Wilson* TT 2003 HC 75.

> deciding whether *certiorari* lies against the Elections Commission and its Chairman I can do no better than adopt Lord Parker's formula. It is a statutory body of persons of a public as opposed to a purely private or domestic character whose function is to determine supervisorily and administratively matters affecting the citizens of Guyana with a duty to act in a manner 'to ensure impartiality and fairness' which in effect means to act judicially.[157]

The court, citing *ex p Datafin*, therefore, ruled that '*certiorari* lies against the decisions of the Elections Commission and its Chairman'.[158]

SUPERVISOR OF INSURANCE

With the increasing expansion of the State in regulating aspects of corporate and commercial life and the setting up of regulatory bodies to monitor aspects of insurance, company and finance, it was hardly surprising that the question of whether the decision of the supervisor of insurance arose for consideration in *Narsharm v Supervisor of Insurance*.[159] In that decision, the applicant claimed the decision of the supervisor of insurance, prohibiting it from writing motor insurance, was unlawful, on the basis that, first, the supervisor breached the principles of natural justice in that it denied the applicant an opportunity to be heard; second, it was an unreasonable or improper exercise of discretion; third, it was an abuse of power or was made in bad faith; and fourth, the decision was made upon an absence of material evidence or was otherwise unfair.[160] In the High Court, Chase J refused the reliefs sought and dismissed the application. Disagreeing with the trial judge, the Court of Appeal held that 'the rules of natural justice do apply in respect of the acts or omissions of the supervisor to the extent that they fall within the ambit of section 16(1)(a) of the [AJA] and to the extent that they can be challenged at common law in any circumstances in which section 16(1)(a) does not apply.'[161] Having considered the evidence, the Court of Appeal found that, first, the concerns of the office of the supervisor were well founded and that the supervisor had reasonable grounds for proposing an investigation into the business of the company under section 37 of the Insurance Act; second, the company was afforded an opportunity to explain the reasons for its non-compliance with the conditions of its registration, which were referred to in the notice requiring the company to show cause; third, the supervisor's refusal to grant an extension of time was, in the circumstances, a reasonable exercise of his discretion. It disagreed with the trial judge that the Insurance Act was constituted as a special Act excluding the application of the AJA, or that the acts or omissions of the supervisor were not susceptible to review under the AJA; and that Parliament intended that the acts or omissions of the supervisor under the Insurance Act should be outside the scope of review of the AJA.[162]

CHIEF IMMIGRATION OFFICER

As was noted above, one of the guidelines the courts used to determine whether a particular decision was subject to judicial review was whether or not the power was exercised pursuant to

157 GY 1998 HC 1 at 9.
158 Ibid.
159 BB 1999 CA 2. See also *ex p Dyoll Insurance* JM 2007 SC 17; *Kiss Baking Company Limited v National Insurance Board of Trinidad and Tobago* TT 2008 HC 148; and *Equitable Insurance Company Limited v Barscotti* TT 1986 HC 101.
160 BB 1999 CA 2 at 14.
161 Ibid at 24.
162 Ibid at 33.

a statute. This was clearly articulated in the decision of *Sparman v Greaves*,[163] where the applicant sought judicial review of the decision of the Chief Immigration Officer to revoke the permission to reside and work in Barbados granted to him in 2001. The first issue considered by the court was whether the decision of the Chief Immigration Officer to revoke the permission granted to the applicant to reside and work in Barbados was subject to review by the court.[164] After hearing arguments from both sides on the issue of jurisdiction, the court ruled that it was premature to determine the application on the narrow basis of jurisdiction without hearing the application and, consequently, reserved decision on this issue until it determined the application.[165] The decision before the court was that of the Chief Immigration Officer revoking the 'status' of CARICOM (Caribbean Community) Skilled National granted to the applicant.[166] It then pointed out that 'the decision in question does not fall within the category of decisions protected from review by the Court.'[167]

The court stated that the words of section 16 of the AJA were 'clear and unambiguous' and that, properly construed, 'it is abundantly clear that Parliament intended the principles of natural justice to be adhered to by any person or body entrusted with decision-making powers to refuse, modify, or revoke any licence, permission, qualification or authority or to impose any penalty under any law.'[168] It continued that the section mandated all decision-making bodies to observe the principles of natural justice and then specifically listed those bodies which must observe those principles in relation to a disciplinary matter involving a member of the service. Those bodies were the Judicial and Legal Service Commission, the Public Service Commission, the Police Service Commission, the Statutory Boards Service Commission and the Minister responsible for Town and Country Planning. In addition, the court noted that it was explicitly stated that this section did not restrict the applicability of the principles of natural justice in any other case. As a result, the court concluded that 'although the Minister responsible for Immigration or a government official under the Immigration Act is not specifically mentioned in the Second Schedule, they are certainly caught by the provisions of s. 16 (2).'[169]

EMPLOYMENT

Since judicial review proceedings could only be brought against public authorities, there are a myriad of cases where the issue was whether, in the context of employment, the dispute was a public law matter or a matter for private law.[170] In *Singh v Agricultural Development Bank*,[171] the court noted that:

163 BB 2004 HC 21.
164 Ibid at [17].
165 Ibid at [19].
166 Ibid at [43].
167 Ibid at [44].
168 Ibid at [46].
169 Ibid at [47].
170 See *Re Godfrey Caesar* GY 1989 CA 4; *Ex p Squire* JM 1983 SC 14 ('In the light of the authorities cited and the position of the applicant referred to above I am of the opinion that the relationship between the applicant and the Scientific Research Council was that of master and servant and therefore *certiorari* does not lie in respect of the decision to dismiss him' (at 17)) and on appeal: JM 1984 CA 17; *Re Hadeed* TT 1987 HC 87 (where the applicant fails in his judicial review claim, he can be permitted to continue as if he had commenced the claim in private law); *Colebrooke and Christian Congregation of Jehovah's Witnesses of the Bahamas v The National Insurance Board* BS 2008 SC 92; *Darkoh-Agyem v Director of Legal Studies* KY 1998 GC 27; *De Verteuil v Port Authority of Trinidad and Tobago* TT 1996 CA 36; *Ferguson v The Bahamas Agricultural and Industrial Corporation* BS 2005 SC 82; *Tyndall v Attorney General of Guyana* GY 2004 CA 6; *Turnbull v Abraham* VG 2007 HC 30; and *Wilson v Board of Management of Maldon High School* JM 2007 SC 85.
171 TT 2004 HC 26.

> Having reviewed the authorities cited and the statutory provisions and considering that the [Managing Director] is charged with the day-to-day administration and control of the business of the Bank and is answerable to the Board which is itself charged with managing the Bank, I hold that the Board [of Directors] was exercising functions of a public nature when it hired the applicant and that this is not a pure master and servant situation. Further the Board could only terminate the applicant's employment for misconduct or neglect of duties or breach of stipulations or for any of the matters contained in section 16 of the [Agricultural Development Bank (Amendment) Act 1995].[172]

The courts did not always get the terminology right; for example, in *Chang v Hospital Administrator*, the court opined that '[t]o my mind, there are two considerations in relation to whether there is a public law interest/element in this matter': 'first is whether the applicant held an office, which was underpinned by specific statutory provisions';[173] and, second, 'whether or not there is the existence of statutory underpinnings with respect to dismissal in the applicant's terms and conditions of employment'.[174]

In *Ali v North West Regional Health Authority*[175] the first issue the court considered was whether the decision of the North West Regional Health Authority (NWRHA) to terminate the applicant's contract of employment as an administrator of the Primary Health Care Centres gave rise to any right to bring an action in judicial review proceedings.[176] The court noted that the question whether there were statutory underpinnings in the contract of employment made between the NWRHA and the applicant could only be properly answered after a careful examination of the terms and conditions of the contract.[177] It noted that there were special restrictions on dismissal in the applicant's contract of employment which underpinned her position.[178] The court was of the view that, although it was generally accepted that employment by a public authority did not, per se, inject any element of public law into the contract of employment, where 'the contract of employment makes provision for special statutory restrictions on dismissal or other statutory underpinnings of the employee's contract, as is clearly manifested in the applicant's case', in its view 'the presence of such statutory underpinnings would have the effect of injecting into the contract the element of public law'.[179] It noted that since 'a considerable portion of the applicant's contract is controlled or governed by the Act and other subsidiary legislation', it was 'of the view that public law issues are bound to arise'.[180] In *Braithwaite v Port Authority of Trinidad and Tobago*,[181] the applicant sought judicial review of the decision of the respondent to abolish his post of Engineering Assistant III, claiming that it was void and of no effect. The court accepted that there was 'no statutory underpinning of the applicant's post of Engineering Assistant III except in relation to his pension rights'.[182] The court was of the opinion that, first, the creation of the post of Engineering Assistant III; second, the appointment of the applicant to act in that post; third, the confirmation of the applicant's appointment; fourth, the process of negotiating and eventually determining the terms; fifth, the conditions of the applicant's employment as well as those which attached to the post; and, sixth, the termination of the applicant's employment, were 'all matters which are governed and

172 Ibid at 14.
173 TT 2008 HC 191 at 4.
174 Ibid at 5.
175 TT 2004 HC 111.
176 Ibid at 23.
177 Ibid at 24.
178 Ibid.
179 Ibid.
180 Ibid at 25.
181 TT 1998 HC 118.
182 Ibid at 24–5.

regulated by private law and not public law'.[183] It continued that 'Parliament has created no special rights for the applicant under any statute' and that, therefore, there was 'no statutory underpinning in respect of these matters that gives the applicant any public law rights or any standing to invoke public law remedies in relation to any of these matters'.[184] In a strange twist, the court then considered each ground of challenge without considering and making a ruling on this initial question.

In *Finn-Hendrickson v Minister of Education*,[185] the issue was whether the judicial review application in respect of the disciplinary action taken against the applicant, namely suspending her pay and treating her absence on legal advice as a resignation, without notice, was 'outside of the scope of the present public law application'.[186] The court was of the opinion that, although the applicant was a public officer, a 'complaint about a breach of the [Occupational Safety and Health Act 1982] alone, therefore, will usually in my judgment constitute a purely private law matter unless the breach is linked in a material way with a breach of the public protections for the employment of a public officer.'[187] The court referred to *Evans v Minister of Education*,[188] noting that, there, it 'dealt with the no public law test rather pithily and concentrated on the public law nature of the statutory power to determine the appointment of a teacher'.[189] The court opined that 'there can be no real doubt that the applicant is potentially a candidate for judicial review because the freedom to dismiss her, as well as discipline her, is restricted by the Public Service Commission Regulations.'[190] Therefore it ruled that the applicant's case 'fell on the public law side of the line' in terms of whether the judicial review claim is permissible.[191]

A literal approach to the issue was taken in *Gooding v Trinidad and Tobago Electricity Commission*,[192] where the applicant had applied for judicial review in respect of his employment with the Trinidad and Tobago Electricity Commission (T&TEC). The court noted that the Statutory Authorities Act defined a Statutory Authority as a 'local authority and any commission, board, committee, council or body (whether corporate or incorporated) established or under an Act other than the Companies Ordinance declared by the President under section 3 to be subject to the provisions of this Act'.[193] Consequently, it held that 'this exclusion gives T&TEC more of an independent corporate personality and gives it more of the qualities of a limited liability company incorporated under the Companies Ordinance' and that, therefore, it was 'not a public authority'.[194] The court then confusingly pointed out that:[195]

> The fact that Trinidad and Tobago Electricity Commission is a 'public authority' does not per se make the claim a matter of public law. There is, I think, a dichotomy in the functions of a public authority. This is found in its relationship with the public and its contractual obligations with its employees.

It continued that the 'applicant is seeking a declaration that his dismissal was made in excess of jurisdiction is *ultra vires*, void and of no effect' and that this 'certainly arises from a contract of

183 Ibid at 26.
184 Ibid.
185 BM 2008 SC 8.
186 Ibid at [14].
187 Ibid at [40].
188 [2006] Bds LR 52.
189 BM 2008 SC 8 at [42].
190 Ibid at [46].
191 Ibid at [47].
192 TT 1987 HC 184. See also *Clark v Attorney General of Trinidad and Tobago* TT 1991 HC 224.
193 TT 1987 HC 184 at 9–10.
194 Ibid at 10.
195 Ibid at 13.

employment which established a relationship of master and servant, and is a private right'.[196] The court concluded that there was no 'element of "public" or "administrative" law in [the] application which renders it susceptible to, or suitable for, proceedings for judicial review', noting that it was of the 'view that the [private law remedies] are available to the applicant and these have not been used'.[197] Even where applicants were employed by a public statutory authority, in which there is an element of public employment or service even though their status is not one protected by statute, as is for example that of judges, the court held that the 'mere fact of employment by a public authority did not *per se* render such employment subject to public law remedies' and that there 'had to be statutory restrictions on dismissal' which 'underpinned the employees' position to enable him to be entitled to seek judicial review'.[198]

Where to draw that line is notoriously difficult, because, for example, actions such as the decision of the Acting Permanent Secretary to send police officers on 90 days accumulated leave 'are matters of a hybrid nature since they touch and concern both the officers' legal rights to vacation leave and they question the appropriateness of the Acting Permanent Secretary's decision'.[199] The court, therefore, concluded that those issues 'fall within both the parameters of private law and public law', thereby permitting the judicial review application.[200] The issue about which the applicant complains must 'affect the applicant's right *qua* subject or member of the public' rather than in her personal capacity.[201] Another difficult case was where someone was employed in two capacities, one which was public and the other which was private and governed by a contract of employment. That issue arose in *McPherson v Minister of Land and the Environment*,[202] where the applicant was employed as Director, Land Titles but this position had dual functions, namely, that of the Director *and* the Registrar of Titles. The court noted that, first, there was no evidence that there was any separation of the functions or the powers of Director of Land Titles and of Registrar of Titles; second, there was no separate remuneration for the two functions; third, the contract was the only document which related to the employment of the applicant and he did not challenge the fact that it related to both positions until his contract was terminated.[203] It therefore noted that 'the contract entered into by the applicant was an ordinary contract of service between the applicant and the Government of Jamaica and the applicant is subject to the terms and conditions of that contract'.[204] The court was also of the opinion that the office of the Registrar of Titles was not a constitutional post and there were no statutory or constitutional restrictions on termination.[205] As a result, it concluded that, first, the 'contract entered into by the applicant was an ordinary contract of service which created an entirely contractual relationship between the applicant and the Government of Jamaica'; and, second, '[t]he applicant is subject to the terms and conditions of that contract which was clear as to the procedure for termination and there is no right to be heard before

196 Ibid at 14.
197 Ibid.
198 *Grant v Port Authority* TT 1987 HC 134 ('In my view, when one looks at the development of the rights of employees and the parallel revolution, which took place in the Statutory provisions governing the relationship between the employers and employees, it must have been the intention to create a separate forum for the resolution of industrial disputes of any nature and to remove from the realm of public law situations like those in the instant case.').
199 *Hector v Attorney General* AG 2006 HC 14 at [65].
200 Ibid at [66].
201 *Johnson v Commissioner of Prisons* TT 2000 HC 142 ('Lastly the function of the respondent in removing the applicant from the band or choir does not affect the applicant's right *qua* subject or member of the public but *qua* member of the band and possibly as an employee of the State within the prison service.')
202 JM 2007 SC 74.
203 Ibid at 9–10.
204 Ibid at 10.
205 Ibid at 12.

termination.'[206] Since 'there was one contract for carrying out both duties', the court held that the termination of the position of Director, Land Titles would also result in the termination of the Registrar of Titles position; consequently, it would be 'inconvenient if not impossible for a different procedure to be required for the termination of each function nor would it be feasible for one to be terminated while the other continued'.[207]

The fact that a person was employed by a public body was not determinative of whether public law remedies were available; the remedies would 'apply where there are special statutory restrictions on dismissal which underpins the employee's position'.[208] The terms and conditions of employment must be statutorily provided for it to attract the public law remedies.[209] The court must first find that the matter complained about was a public law matter before it could addresses the public law grounds on which the applicant brought his claim, for if the matter was not within the scope of judicial review, it ended there.[210] Where it was clear on the facts that the applicant's claim was in private law but he brought an action in public law, the court would not be hesitant to find that this amounted to an abuse of the process of the court.[211] In *Wallace v Minister of Education*,[212] the applicant applied for, *inter alia*, a declaration that the purported cancellation by the Minister of Education of the school transportation contract awarded to her was unlawful.[213] After examining the leading authorities, the court held that there was 'no public law element in, or any statutory underpinning of, the contract which would bring it within the purview of judicial review', because, first, the action had 'failed the public law rights test'; and, second, 'it was not "fortified by statute" as May LJ has put it in [*ex p Walsh*] to bring it in the sphere of public law'.[214] The judge continued that the applicant had not persuaded him that her case had 'met the essentials to fall within the ambit of judicial review. Judicial review is not a panacea for all ills'; and that it 'should only be dispensed by prescription which should clearly bear the stamp of "public law".'[215] The court was of the view that 'the applicant has had available to her the redress under the common law to sue for breach of contract.'[216]

EDUCATIONAL INSTITUTIONS

Given the importance of educational institutions to our societies, it is hardly surprising that there has been litigation concerning the scope of not only the responsibilities that the administrators owe to their employees, but the nature of the relationship between these institutions and students as well. Where the school is a public school, the issue is not whether the school is a public authority but whether it has acted unlawfully in that capacity. Tertiary-level institutions are not immune from the jurisdiction of the courts. In *Ex p Mignott*,[217] the applicant applied for judicial review of the decision of Principal of the Norman Manley Law School ('NMLS') to remove her from the position of Course Director of Conveyancing and Registration of Title. The court noted that, notwithstanding the 'public importance of the [Council of Legal

206 Ibid at 14–15.
207 Ibid at 15. See also the judgment of Marsh J at 33–4; and McIntosh J at 43.
208 *Turnbull v Abraham* VG 2007 HC 30 at [25].
209 *Re Bain* BS 1993 SC 10 at 31.
210 *Romain v Water and Sewage Authority* TT 1997 HC 13.
211 Ibid.
212 BS 2003 SC 60.
213 Ibid at [3].
214 Ibid at [32].
215 Ibid at [33].
216 Ibid at [31].
217 JM 2002 SC 28.

Education, the NMLS], the Principal and their respective public duties this does not per se introduce any element of public law in disputes between them and their staff to attract the remedies of administrative law'.[218] The issue to be decided was 'whether the contract of employment of the applicant is buttressed by any statutory or procedural requirement about, not her dismissal, but her removal from the benefit or gain as Course Director' – 'in other terms whether there is any public element injected or underpinning her contract of employment'.[219] After considering the various statutory provisions and case law, the court concluded that 'an implied term of the contact that each member of staff or tutor can be assigned or re-assigned duties in relation to any course of the Law School and any complaint or dispute about this sounds in contract i.e. private law and not public law'.[220]

In *Ex p Edwards*,[221] the court had to consider whether the board of the School of Physical Therapy ('the School') was a body of persons amenable to the supervisory jurisdiction of the High Court. It noted that it was true that the board was not set up by statute, but the fact that it was set up by the Minister of Health ('the Minister') did not render its acts any less lawful.[222] It continued that the prerogative orders have been issued not only to tribunals set up by statute but to tribunals whose authority was derived, *inter alia*, from the Executive; moreover, the board, though set up under the executive powers of the Minister and not by statute, had the recognition of Parliament in debate, and Parliament as well as other public agencies provided the money to satisfy its needs. The court explained that the 'absence of a statutory power should not in itself be a conclusive reason for a refusal by the Courts to entertain proceedings in which it was alleged that an essentially public authority had breached the rules of natural justice'.[223] In its view, to draw so sharp a distinction between the exercise of different governmental powers solely on the basis that, if the discretion was not to be found in statute it must be found in contract, was difficult to justify as a matter of principle; and the gravity of the consequences of the decision was a further factor to which the courts have repeatedly referred.[224]

The court reasoned that the provisions of the rules of the School were for the protection of the public and to ensure that competent and well-trained professionals were delivered to the public. It claimed that there was no agreement between the applicant and the School which would form the basis for removing the supervisory jurisdiction of the court.[225] It was of the opinion that there was no reason, in principle, why the fact that no authority from Parliament was required by the executive government, to entitle it to decide who should remain in the School as a student, should exempt the board from the supervisory control of the Supreme Court over that part of its functions which were judicial in character. The court explained that no authority was cited to it which would compel it to decline jurisdiction, noting further that the applicant had an interest in the proper performance by the board of its judicial functions as well as the public whose money the board utilised in the administrative machinery of the School.[226] It noted that it was the Full Court of the Supreme Court which was equipped to deal with these matters expeditiously and it expressed the hope that, in future, it was to that court that these types of problem would be submitted; and that the temptation to deal with problems arising from breaches of

218 Ibid at 3.
219 Ibid at 19.
220 Ibid at 20.
221 JM 1989 SC 45.
222 Ibid at 4.
223 Ibid at 5.
224 Ibid.
225 Ibid at 9.
226 Ibid.

natural justice by way of originating summons or the like would be avoided.[227] The court then concluded that, in the light of the public nature of the board coupled with the quasi-judicial nature of its proceedings, the only appropriate remedy in this case was by judicial review.[228]

DIRECTOR OF PUBLIC PROSECUTIONS

Introduction

Over the years, Commonwealth Caribbean courts have had to deal with the question of whether the Director of Public Prosecutions (DPP), in exercising his constitutional powers, is subject to judicial review.[229] However, in a trilogy of decisions,[230] two of which emanated from the Commonwealth Caribbean, the Judicial Committee of the Privy Council has had to reconsider the scope of the discretion given to the DPP under Commonwealth Caribbean and analogous constitutions. It is of acute importance that the nature and scope of these powers be properly delineated in light of the perception in the minds of the public in the Commonwealth Caribbean that the executive wields too great an influence on decisions whether to prosecute named individuals, or whether to discontinue prosecutions already commenced. The courts in the Commonwealth Caribbean considered this issue as early as 1973 but, nearly forty years later, the issue is still being considered and delineated by the courts in these jurisdictions. This section aims, first, to examine the powers of the DPP under the provisions of Commonwealth Caribbean constitutions, to better understand the breadth of such powers; second, to explore the bases for intervention by the courts; and third, to examine the approach of the courts in judicial review applications relating to decisions of the DPP. The office of the DPP is established by the Constitution in all Commonwealth Caribbean countries. For the purposes of this analysis, I will use relevant sections of the Constitution of Saint Vincent and the Grenadines relating to the office, functions and security of tenure of the DPP, since its provisions are typical of those found in the constitutions of the Commonwealth Caribbean countries.[231]

Scope of the DPP's powers

Section 64(1) of the Constitution establishes that there shall be a DPP whose office shall be a public office. Further, section 64(2) outlines the broad powers of the DPP 'in any case in which he considers it desirable to do so': (a) to institute and undertake criminal proceedings against any person before any court of law (other than a court martial) in respect of any offence alleged to have been committed by that person;[232] (b) to take over and continue any such criminal

227 Ibid.
228 Ibid at 10.
229 This section borrows heavily from E. Ventose, 'Judicial Review of the Discretion of the Director of Public Prosecutions under Commonwealth Caribbean Constitution' (2011) *West Indian Law Journal* 81.
230 *Mohit v The Director of Public Prosecutions of Mauritius* [2005] UKPC 20 [2006] 1 WLR 3343; *Sharma v Browne-Antoine* [2006] UKPC 75 [2007 1 WLR 780 (Trinidad and Tobago); and *Marshall v The Director of Public Prosecutions* [2007] UKPC 4.
231 See generally, sections 87–9 of the Constitution of Antigua & Barbuda; articles 92A–92C of the Constitution of The Bahamas; sections 79 and 101 of the Constitution of Barbados; sections 50 and 108 of the Constitution of Belize; sections 72 and 88 of the Constitution of Dominica; sections 71 and 86 of the Constitution of Grenada; articles 116, 187 and 203 of the Constitution of Guyana; sections 94–6 of the Constitution of Jamaica; sections 65 and 81 of the Constitution of St Kitts and Nevis; section 73 and 89 of the Constitution of Saint Lucia; sections 64 and 81 of the Constitution of St Vincent & the Grenadines; and section 90 of the Constitution of Trinidad & Tobago.
232 That power is not exclusive: it can be exercised by the police by legislation: *Benjamin v Commissioner of Police* AG 2009 HC 33 at [63]–[74].

proceedings that have been instituted or undertaken by any other person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority. These powers, generally, are conferred upon the DPP and represent the plenitude of the powers granted to him under Commonwealth Caribbean constitutions.[233]

Are decisions of the DPP subject to judicial review?

With such wide powers given to DPPs under Commonwealth Caribbean constitutions, it was inevitable that the issue of whether their decisions to prosecute, not to prosecute or to discontinue proceedings would come before the courts. The question of whether the decision of the DPP was subject to judicial review first arose in *Tappin v Lucas*, where the Court of Appeal of Guyana had no hesitation in stating emphatically that, in the exercise of his powers under the Constitution of discontinuing a prosecution, the DPP 'is in effect performing an administrative act in nature akin to the exercise of a quasi-judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution'.[234] Emphasising that the theory behind the power of the courts in the judicial review of administrative action was in reality the doctrine of *ultra vires*, the Court of Appeal asserted that '[a]s long as the [DPP] then proceeds within his legal powers and acts *intra vires*, this court will be powerless to interfere'.[235] If, however, the DPP strays beyond his proper bounds, then his actions can be controlled by the supervisory power of the courts. There is no question now that decisions of the DPP are reviewable, so much so that Thom J, at first instance, in *Andrews v The Director of Public Prosecutions*[236] was able to state that it was settled law that the decision of the DPP made pursuant to section 64 of the Constitution of Saint Vincent and the Grenadines is subject to judicial review. This view was not challenged on appeal.[237] Similarly, the Supreme Court of Jamaica in *Tapper v Director of Public Prosecutions*[238] had no difficulty in asserting that the DPP cannot simply do whatever he wishes without regard to the rights of the citizen or the laws of the country and that his action was plainly subject to judicial review. Similarly, Smith J, too, in that decision, claimed that there was no real dispute as to whether or not the court may review the DPP's exercise of the power to enter a *nolle prosequi*.[239]

Judicial review of decisions of the DPP

(i) Decision to discontinue prosecution

In *Mohit v Director of Public Prosecutions of Mauritius*,[240] the issue for the Privy Council was whether a decision by the DPP of Mauritius to discontinue a private prosecution, in exercise of his

233 See *Re King's Application* (1988) 40 WIR 15; *Tappin v Lucas* (1973) 20 WIR 229; *Sylvester v McDowall* VC 1974 CA 3; *Grant v Direct of Public Prosecutions* (1980) 30 WIR 246; [1982] AC 190; and *Brooks v Director of Public Prosecutions* (1994) 44 WIR 332; [1994] 1 AC 568.
234 (1973) 20 WIR 229 at 235.
235 Ibid.
236 VC 2008 HC 13.
237 VC 2008 CA 1 at [9].
238 JM 1999 SC 4.
239 Ibid at 13.
240 [2005] UKPC 20 [2006] 1 WLR 3343. See *Martin v Director of Public Prosecutions* AG 2004 HC 46 for an unsuccessful challenge to the decision of the DPP not to take over and discontinue the private criminal proceedings against the applicant, while taking over and discontinuing criminal proceedings brought by the police against the applicant (at [11]–[12]).

powers under section 72(3)(c) of the Constitution of Mauritius, was in principle susceptible to review by the courts. The Board rejected the reasons advanced by the Court of Appeal of Mauritius for holding that the DPP's decisions to file a *nolle prosequi* or not to prosecute were not amenable to judicial review, on the basis that, first, the complainant may have no remedy against any suspected tortfeasor; second, the alternative course of resort to private prosecution was not an available option where it is a private prosecution which the DPP has intervened to stop; and, third, the recognition of a right to challenge the DPP's decision did not involve the courts in substituting their own administrative decision for his. However, the Board argued that where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.[241] The Privy Council quoted at length from the decision of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions*,[242] where the Supreme Court pointed out that, although it was not necessary to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise, it was sufficient, in cases involving the exercise of prosecutorial discretion, to apply established principles of judicial review.[243] In doing so, the Supreme Court held that it would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review, because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.[244] This approach, the Supreme Court emphasised, subsumed concerns about separation of powers.[245] The Supreme Court also stated that if the decision of the DPP was made under the powers conferred on him by the Constitution, it must be exercised within constitutional limits,[246] continuing that a purported exercise of power by the DPP would be reviewable if it were made:[247]

1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law.
2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.
3. In bad faith, for example dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
5. Where the DPP has fettered his or her discretion by a rigid policy e.g. one that precludes prosecution of a specific class of offences.

The Supreme Court also noted that there might be other circumstances not precisely covered by the above pronouncements in which judicial review of a prosecutorial discretion would be available, but arguments that the DPP's power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant

241 [2005] UKPC 20 [2006] 1 WLR 3343 at [13].
242 [2003] 4 LRC 712.
243 Ibid at 735.
244 Ibid.
245 Ibid.
246 Ibid.
247 Ibid at 735–6.

considerations or otherwise unreasonably, it thought, were unlikely to be vindicated. This was because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings, and that it was not 'easy to conceive of situations in which such decisions would be reviewable for want of natural justice'.[248]

As a result, the Privy Council in *Mohit* held that it should approach the issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution of Mauritius were subject to judicial review, whatever the standard of review might be, unless there was some compelling reason to infer that such an assumption was excluded.[249] It then proceeded to ask whether there was a compelling reason in the instant case, reasoning that it cannot be accepted that the extreme possibility of removal under section 93 of the Constitution of Mauritius provided an adequate safeguard against unlawfulness, impropriety or irrationality. Consequently, it held that there was nothing to displace the ordinary assumption that a public officer exercising statutory functions was amenable to judicial review on grounds such as those listed in the *Matalulu* case.[250] According to the Board, this meant that the appeal should be allowed and the Supreme Court invited to reconsider the appellant's applications in the light of its judgment and any evidence there may then be, including any reasons the DPP may choose to give.[251] However, the Board cautioned that it was for the DPP to decide whether reasons should be given and, if reasons were given, how full those reasons should be, noting that the English authorities showed that there was, in the ordinary way, no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This, the Board emphasised, was a matter for the judgement of the DPP, to be exercised in the light of all relevant circumstances, which might include any reasons already given. The Board continued that, on remittal, the Supreme Court of Mauritius must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief.[252]

(ii) Decision to prosecute

The question of whether the decision of the DPP to prosecute a person was subject to judicial review arose for consideration by the Privy Council in *Sharma v Brown-Antoine et al.*[253] In that decision, the Deputy DPP authorised prosecution of the Chief Justice of Trinidad and Tobago for attempting to pervert the course of justice by allegedly attempting to influence the course of a trial being conducted by the Chief Magistrate. The Chief Justice denied the allegations and sought judicial review of the decision of the Deputy DPP to prosecute him, and for a stay of the criminal proceedings against him pending determination of the judicial review proceedings. The application was successful in the High Court but was overruled by the Court of Appeal. On further appeal to the Privy Council, the issue was whether the decision to prosecute the Chief Justice, by whosoever made, should be examined by way of judicial review, or whether the criminal process (subject to any application the Chief Justice may hereafter make) should at this stage be allowed to take its course.[254] Their lordships also pointed out that it was 'well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of

248 Ibid at 736.
249 [2005] UKPC 20 [2006] 1 WLR 3343 at [20].
250 Ibid at [21].
251 Ibid at [22].
252 Ibid.
253 [2006] UKPC 75 [2007] 1 WLR 780.
254 Ibid at [2].

what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review', citing *Matalulu* and *Mohit*. They continued that it was also 'well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy',[255] noting that the language of the cases shows a uniform approach, for example 'rare in the extreme';[256] 'sparingly exercised';[257] 'very hesitant';[258] 'very rare indeed';[259] and 'very rarely'.[260] They then outlined a number of reasons various courts have given for their extreme reluctance to disturb decisions by the DPP to prosecute by way of judicial review, including:[261]

(i) 'the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits';

(ii) 'the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account' (counsel's argument in *Mohit* . . . accepting that the threshold of a successful challenge is 'a high one');

(iii) the delay inevitably caused to the criminal trial if it proceeds;

(iv) 'the desirability of all challenges taking place in the criminal trial or on appeal'. In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself; and

(v) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts . . .

Having accepted those principles as correct, their lordships pointed out 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.[262]

Conclusion

In light of the discussion above, it now seems to have been settled by the courts in the Commonwealth Caribbean and the Privy Council that decisions of the DPP are subject to judicial review. The courts have accepted that the traditional grounds of judicial review, aptly summarised by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[263] in terms of procedural impropriety, illegality and irrationality (and possibly proportionality), are applicable to the actions of the DPP, whether it relates to decisions to prosecute, not to prosecute, or to stop private or public prosecutions. If the DPP acts outside of the powers conferred upon him by the Constitution, the courts, as guardians of the Constitution, will not hesitate to intervene to ensure that he acts in accordance with law. However, the courts have stated that, given the wide discretion given to the DPP under the Constitution, it will only be in rare cases

255 Ibid.
256 *R v Inland Revenue Commissioners, ex p Mead* [1993] 1 All ER 772, 782.
257 *R v Director of Public Prosecutions, ex p C* [1995] 1 Cr App R 136, 140.
258 *Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449.
259 *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49.
260 *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63.
261 [2006] UKPC 75 [2007] 1 WLR 780 (Trinidad and Tobago) at [14].
262 Ibid at [22].
263 [1985] AC 374 (HL).

that the courts will intervene, particularly where the case of unlawful action is blatant, for example in *Tapper v DPP* where the court granted a declaration that the decision of the DPP to enter a *nolle prosequi* was unlawful. The burden of proof is a high one and, unsurprisingly, such applications are seldom successful. Indeed, in most of the decisions considered in this section the courts rejected the view that decisions of the DPP, on the facts of these cases, were not reviewable, except in *Tapper*. That rarity does not mean that the courts are impotent to intervene where there has been a clear misuse of power by the DPP, contrary to the provisions of the Constitution, as occurred in *Tapper*. This emphasises the broad discretion granted to the DPP to make such decisions, the constitutional power being his alone to exercise, and the approach of the courts fitting neatly into the whole concept of judicial review in the first place – that the courts are concerned with the process by which the decision was made and not the substantive decision itself.

Therefore, the court will not concern itself with the question, for example, of whether the DPP was justified in deciding to prosecute someone but, rather, whether in making that decision, the DPP acted unlawfully, i.e. whether he acted illegally, irrationally or whether there were any procedural improprieties relating to his decision. They are not to substitute their decision for that of the DPP but only to declare whether the decision of the DPP is lawful or not. Although not bound to provide reasons for his decision, if the DPP does so provide, the court can then determine whether any grounds of review can be discerned from the reasons provided and, if so, judicial review will surely lie. The Privy Council has hinted it does not accept that the DPP is bound to give reasons for his decisions or that there could be any inquiry concerning the sufficiency of any reasons provided by the DPP, rejecting the views of Forte P in the Jamaica Court of Appeal, who thought that judicial review would lie in the absence of reasons.

CIRCUIT COURT

Although judges have been made liable in public law for actions that infringe the fundamental rights and freedoms of individuals, it is not every action by a judge that would attract public law remedies. Indeed, the courts are in fact very hesitant to find that actions of the courts are reviewable. It is well known that the inferior courts, namely the coroner's and the magistrates' court, are subject to judicial review.[264] The question of whether the circuit court was subject to judicial review arose in the decision of *Forbes v Attorney General of Jamaica*.[265] In that decision, the appellant claimed that there was a fraudulent conspiracy by members of the police to ensure that Allen, the accused, was acquitted of murder. She claimed that, in the circumstances, the proceedings were a sham, and applied for leave to bring judicial review proceedings against the Attorney General for an order of *certiorari* to quash the acquittal and a declaration that the trial was a nullity.[266] Both the Full Court and the Court of Appeal rejected the application on the ground that the circuit court was a superior court of record and, therefore, not amenable to judicial review.[267] On appeal to the Privy Council, the Board had no doubt that:

> the courts below were right. Judicial review is not an available remedy in this case and the grounds upon which the Chief Justice refused leave are unassailable. Judicial review is the procedure by which the Supreme Court ensures that inferior courts and administrators act lawfully and within

264 See also *Banana and Ramie Products Co Ltd v Ministry of Lands and Natural Resources* BZ 1989 CA 8.
265 JM 2009 PC 1.
266 Ibid at [3].
267 Ibid at [4].

> their powers. It is not a mechanism by which one judge of the Supreme Court can quash the decision of another.[268]

The Board was of the opinion that the possibility of a second trial 'serves to emphasise the inappropriateness of judicial review proceedings against the Crown for the purpose of bringing about the result sought by the appellant'.[269] It continued that, if it were to accept that it:

> should extend the power of judicial review to enable the Supreme Court to quash one of its own decisions and assume that, upon a full investigation of the facts, it turned out that the acquittal had indeed been obtained by fraud and that this justified a declaration that the verdict had been a nullity. What then? Presumably the Director of Public Prosecutions would indict him again. But the issue would then be whether he could rely on his right to plead *autrefois acquit*, a right protected by section 20(8) of the Constitution.[270]

268 Ibid at [5].
269 Ibid.
270 Ibid at [7].

CHAPTER 5

EXCLUSION OF JUDICIAL REVIEW

INTRODUCTION

Although the applicant may have *locus standi*, the court may, nonetheless, decide that the matter does not fall within the purview of the courts – because, perhaps, it was excluded from adjudicating on the matter because of an ouster clause – or the court may exercise its discretion not to grant judicial review in a wide variety of cases. This chapter attempts to evaluate the various factors that may preclude a court from examining the merits of a judicial review application. Therefore, judicial review is not a right that the applicant has in all circumstances. Although he is able to bring a claim to the courts, there exist various bars that will prevent the courts from considering the judicial review application itself. Some of them are procedural, such as alternative remedies, and some are substantive, for example an applicable ouster clause. The courts have to balance the need to ensure that the rights of applicants are vindicated, on one hand, and to ensure that rules and procedures are adhered to, on the other hand.

DISCRETIONARY REMEDY

Judicial review started its life as a common law action by which the courts were able to control the actions of administrative bodies. Therefore, the courts were able to exert a lot of influence on the action itself in the context of the remedy that the claimant sought. Although many of the cases have noted that the remedies were themselves discretionary and, therefore, the courts exercised their discretion when they awarded them, the courts' powers were wider than that. This section will first consider the nature of the discretion that the courts exerted in the context of remedies and will then consider the broader discretion exercised by the courts in the context of the judicial review application itself. The court has noted that '[*c*]*ertiorari* is a specialised remedy which operates in the area of public law and is essentially a discretionary remedy. Where the conditions for its exercise do not exist, it ought not to be invoked.'[1] It has also been stated that '[t]he law is well-established. Judicial review is a discretionary remedy and cannot be pursued without a claimant first obtaining leave of the court' and that '[i]n determining whether or not to grant leave one of the factors the court is called upon to consider is whether or not the claimant has an alternative form of redress and if so why judicial review is more appropriate or why the alternative has not been pursued.'[2] The court has also made it clear that '[t]he grant of a declaration is a discretionary remedy, the fact that Parliament has placed the power to determine the relevant cost basis specifically on the Authority to my mind presents a situation into which this court is loath to trespass without good and proper reasons. I see no such reasons in this case.'[3] The court's discretionary powers do not lie to quash a decision of a court of coordinate jurisdiction: first, '[i]n the instant case the proceedings as filed are misconceived. *Certiorari* may not be granted by way of subjecting a decision of a Circuit Court to judicial review by a Full Court, which is of equal jurisdiction'; and, second, '[n]or may a

1 *Brown v Resident Magistrate* (1995) 48 WIR 232 at 237. See also *Re Jack Tar Village* BS 1990 SC 14; and *Re Clarke* (1971) 17 WIR 49.
2 *Commonwealth Trust Limited v Financial Services Commission* VG 2008 HC 20.
3 *Digicell (Trinidad and Tobago) v MacMillan* TT 2007 HC 183 at 52.

declaration, a discretionary remedy, be granted 'to quash the verdict'. The declaration has no coercive force and therefore could not 'quash' a decision of any Court'.[4] In addition, it has been noted that:

> *[c]ertiorari* being a discretionary remedy, it only remains to consider whether it should be granted. The record reveals what appears to be a strong case for the Supervisor's action pursuant to s 22(2) of the [Administrative Justice Act of Barbados (AJA)]. But the [AJA] has set standards for the conduct of those administering the affairs of Government and refusal of relief where there is a clear case for review would frustrate the whole purpose of the legislation. Moreover it cannot be assumed that an aggrieved party, if given an opportunity, would not have put forward some fact or circumstance that might have affected the outcome.[5]

Indeed, the court has noted that '[t]he applicant is therefore acting in open defiance of section 3 of the Act. He cannot expect this Court to aid him in such illegality: equity will not aid a wrongdoer' and that '[*m*]*andamus* and prohibition are discretionary remedies and in the circumstances this Court will not exercise its discretion to aid the applicant.'[6] In other words, the court will be very guarded before exercising its jurisdiction to quash decisions of bodies which are not inferior tribunals; it will refuse relief to a party who has participated in an illegality and since the remedies that it provides are discretionary, it will consider a myriad of factors before providing them in any particular case.

The much broader context arises in circumstances where the court, depending on the circumstances of the case, would exercise its discretion not to allow a claim for judicial review in light of a countervailing public or other interest asserted. In *Gulf Insurance Limited v Central Bank of Trinidad and Tobago*,[7] the issue was whether the decision of the Central Bank to facilitate the transfer of the assets and undertakings of the Trinidad Co-operative Bank Limited (TCB) to First Citizens Bank Limited (FCB) was *ultra vires* the Central Bank Act[8] (CB Act), and whether, even if *intra vires* the CB Act, that decision was *ultra vires* the powers of the Governor of the Central Bank as contained in the CB Act. The court stated that, even if it had held that the decisions of the Central Bank were *ultra vires*, it was now impractical to quash the decisions, some eight or more years after, since to do so would affect innocent third parties, namely the depositors and other creditors of FCB.[9] In addition, the court explained that the sale of TCB was part of a composite transaction involving the National Commercial Bank and the Workers' Bank and their depositors and creditors and that none of them was a party to the litigation. The court continued that, moreover, some 84 per cent of the shareholders of TCB (including the Central Bank, which owned 50.1 per cent of TCB) had accepted the decisions of the Central Bank *qua* regulator. In such a case, the court continued, even if the acts and decisions of the Central Bank were *ultra vires* (and they were not), a court might, in such circumstances, consider that a litigant shareholder should be left to its remedies at common law or in corporate law generally.[10] The court cited the decision of *R v Secretary of State for the Environment, ex p Walters*[11] for the view that:

> [a]s the grant of judicial review may have substantial adverse consequences for a large number of blameless individuals beyond the applicant himself, in an appropriate case, of which this is one, the exercise of discretion permits account to be taken of these conflicting interests. . . . The

4 *Forbes v Attorney General of Jamaica* JM 2006 CA 78 at 19.
5 *Narsham Insurance (Barbados) Ltd v Supervisor of Insurance* (1999) 56 WIR 101 at 126.
6 *Worme v Bend* BB 2002 HC 17.
7 TT 2002 CA 35.
8 As amended by the Central Bank and Financial Institutions (Non-Banking) (Amendment) Act.
9 TT 2002 CA 35 at 41.
10 Ibid at 41–2.
11 (1997) 10 Admin. LR 265, 295.

> discretion of the Court is a broad one to be exercised in the light of the varied and sometimes conflicting circumstances of each individual application . . .[12]

It also cited *R v Monopolies and Mergers Commission ex p Armin Plc*,[13] which related to the takeover bid of Guinness for Distillers that was referred to the Monopolies Commission. Before the Commission could meet to consider the bid, Guinness persuaded the chairman to lay aside the reference on the ground that the proposal to make the arrangements specified in the reference had been abandoned. The chairman obtained the consent of the Minister to treat the Guinness proposal as abandoned. Guinness then put in a new bid. The rival bidder, Argyll Plc, as a minority shareholder of Distillers, challenged the decision of the chairman and the consent of the Minister. The Court of Appeal, while holding that it was the Commission and not its chairman who had statutory authority to treat the proposal as abandoned, refused any relief by way of judicial review. It also stated that:

> [l]astly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary. The financial public has been entitled to rely on the finality of the announced decision to set aside the reference and upon the consequence that, subject to any further reference, Guinness were back in the ring, from 20 February until at least 25 February when leave to apply for judicial review was granted, and possibly longer in the light of the judge's decision. This is a very long time in terms of a volatile market and account must be taken of the probability that deals have been done in reliance upon the validity of the decisions now impugned.[14]

With this in mind, the court, in the instant case, concluded that:

> [i]n the context of the instant case there can be little doubt that financial positions have been taken by depositors and creditors, formerly of TCB, in FCB since September 12, 1993. Further, the assets and undertakings of the three banks have been blended and intermixed one with the other. It is now too late to grant the summary remedy of judicial review. In my judgment even if the decisions were *ultra vires*, the Court could properly withhold remedies for unlawful administrative action including declaratory relief because the grant of such remedies might have an adverse impact on third parties.[15]

Another example of this was in the case of *Lloyd v Attorney General of Barbados*,[16] where the court had to consider the following issues: (i) whether the decisions to: (a) suspend Judy Lloyd from her post of clerical officer and (b) declare that post vacant, were unlawful and consequently of no legal effect; (ii) if both decisions were, or either of them was, unlawful was she entitled to any relief and, if so, what relief; and (iii) whether there was undue delay by her in filing her application and, if so, was she barred from obtaining any relief to which she otherwise would have been entitled?.[17] It noted that, on an application for judicial review, the court was empowered, under the provisions of section 5 of the AJA, to grant relief by making any of the orders therein specified.[18] It continued that, in appropriate circumstances, the court may make an order for *certiorari* quashing unlawful acts or it may make an order of *mandamus* requiring performance of a public duty (section 5(1)). In addition or alternatively to orders for *certiorari* and *mandamus*, the court might grant a declaratory judgment or damages in money (section 5(2))[19] and the court was further empowered to grant any one or more of the foregoing remedies, either together or

12 TT 2002 CA 35 at 42.
13 [1986] 1 WLR 763.
14 TT 2002 CA 35 at 42–3.
15 Ibid at 43–4.
16 BB 2004 HC 18.
17 Ibid at [14].
18 Ibid at [23].
19 Ibid at [24].

in the alternative as law and justice might require, and whether applied for in the original application or not (section 5(3)).[20] The court explained that it was very clear from the use of the word 'may' in section 5 of the AJA that the court's power to grant relief to an aggrieved applicant was discretionary and that it was equally clear that the court must exercise that discretion properly taking into account all relevant factors.[21]

On the facts of the case, the court claimed that the harm suffered by the applicant was very grave and substantial and that, when all the factors are taken into consideration, including the undue delay, a decision to grant her relief would have no effect or impact beyond the parties to the application. As a result, the court ruled that justice demanded that she should be compensated for the harm she suffered.[22] The court held that there would be no detriment to good administration as a result of a decision to grant her relief under the AJA. The respondents argued that to grant relief would be detrimental to good administration because an order for *mandamus* would create hardships on the person presently in the post and have a ripple effect causing substantial prejudice to that person and other persons as regards appointment and promotion. The court accepted that an order for *mandamus* or a declaration that the applicant was entitled to resume her post as clerical officer would have such an effect. As a result, the court denied the declaration sought that she resume her post as well as the order for *mandamus*. However, the court explained that neither an order for *mandamus* nor a declaration was the only kind of relief the court had discretion to grant under the AJA.[23] It clarified that 'good administration is founded upon administrative justice. It would be detrimental to good administration in this context not to impugn the arbitrary and unlawful decision to declare the post of Judy Lloyd vacant in circumstances where there was a clear breach of the principles of natural justice'[24] and that the court would hold that, notwithstanding the undue delay in instituting these proceedings, Judy Lloyd was not barred from obtaining any relief under the AJA. However, that delay would be considered in relation to the relief granted.[25]

NON-JUSTICIABILITY

Introduction

The courts are very cognisant of their limited role in judicial review proceedings. As was stated in Chapter 1, the courts are concerned with the process by which the decision was made and not the substantive merits thereof. Since judicial review concerns the court's ability to exercise power over executive or administrative action, the courts are minded that they should tread carefully, lest they usurp the function of the executive in determining and executing policy. So while they have the power to declare unlawful administrative action, the courts have been hesitant in extending their power into certain areas which they believe quite properly belong to the executive sphere. These categories have been defined by the courts in various decisions which include certain policy decisions, actions by the head of state, treaty provisions, and matters

20 Ibid at [25].
21 Ibid at [29].
22 Ibid at [80].
23 Ibid at [81].
24 Ibid at [82].
25 Ibid at [83]. See also *PPC Limited v Governor of the Turks and Caicos Islands* TC 1999 SC 6, where the applicant sought judicial review of a decision of the Governor of the Turks and Caicos Islands to grant a Public Supplier's Licence under the Electricity Ordinance to Caicos Utilities Limited, and to refuse the applicant's application for the same. The court considered the exercise of discretion under sections 5(1)(b), 53(3) and 57(2) of the Constitution.

relating to national security and the military and defence force. The courts have particularly avoided deciding political questions. The following case provides a classic example. In *Vellos v Prime Minister of Belize*,[26] the claimants sought, by way of judicial review, declarations in relation to an omission or failure by the Prime Minister to request the Governor General to issue a Writ of Referendum contrary to section 3(1) of the Referendum Act in respect of proposed constitutional amendments contained in the Belize Constitution (Sixth Amendment) Bill, 2008.[27] The defendants argued that the claimants' case was political and, therefore, non-justiciable.[28] The court, after examining the submissions of the parties, concluded that it was 'not satisfied that the requirement of a referendum pursuant to section 2(2)(a) is a fetter on the Legislature or unconstitutional or that the claimants' case is misconceived or political and, therefore, non-justiciable as has been argued for the defendants'.[29]

Policy decisions

The executive determines policy. This is beyond question. Where, in doing so, they have exceeded the powers granted to them, or have acted contrary to the rules of natural justice, the courts will intervene. However, not all policy decisions will be reviewed by the courts. In *Digicel Limited v Telecommunications Regulatory Commission*, the court stated that '[t]he Policy Document purports to limit licences to the three established operators during what has been termed the transitional phase', second, '[c]learly, the amount of service providers a market can sustain is a matter which is not within the domain of the Court to determine' and, third, '[i]n other words it is not a justiciable issue as such matters fall to be determined by Government policy.'[30] In *HMB Holdings v The Cabinet of Antigua and Barbuda*, the court stated that the claimant had not alleged that its lands were not acquired for the public purposes; neither did it plead or allege that the specified public purposes were fraudulent or the acquisition a colourable or fraudulent device.[31] Section 3 of the Lands Acquisition Act provides that 'the declaration shall be conclusive evidence that the lands to which it relates is required for a public purpose'. The court claimed that the public issue set out in the declaration was not a justiciable issue, citing *Spencer v Attorney General of Antigua and Barbuda*.[32] The court explained that the burden of proof was on the claimant to establish fraud and such an allegation must be clearly pleaded with full particulars and established by clear, cogent and convincing evidence; however, it noted that, on the facts, no such pleading or evidence existed in the instant case.[33] In another case, the court quoted from the decision of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[34] that '[a] decision will be non-justiciable where the reasons for the decision maker taking one course rather than another tend to exclude from the attention of the Court competing policy considerations which need to be weighed, which judges are ill qualified to perform.'[35] Of interest was the courts' approach to non-justiciability. It was noted in Chapter 3, where the courts examined circumstances where the subject matter of the judicial review application contained or was material of a private nature and, as a result, not subject to judicial review. The

26 BZ 2008 SC 22.
27 Ibid at [2].
28 Ibid at [22].
29 Ibid at [50].
30 VG 2007 HC 14 at [76].
31 AG 2002 HC 19 at 21.
32 AG 1998 CA 3.
33 AG 2002 HC 19 at 21–2.
34 [1985] AC 374.
35 *Industrial Risks Consultants Ltd v Petroleum Company of Trinidad and Tobago* TT 1997 HC 36 at 8.

courts are using the same issue and rephrasing it as a non-justiciable issue, at least in one case. There, the court noted that the defendant, Petroleum Company of Trinidad and Tobago (Petrotrin), was 'not a public body performing a public function and is not amenable to judicial review. It exercises contractual powers in awarding contracts. It operates for profits and not for the benefit of the public'.[36] It went on to say that:

> [i]ts activities of providing refining and marketing petroleum and other oils are commercial for making profits and not for the benefit of the public. The dispute arises from the selection of [a company] as Insurance Brokers over the applicants in exercise of its contractual powers to award contracts. The stage reached was before the formation of a contract with the applicants. It was after the stage of offer by means of written tender and oral presentation but there was no acceptance by Petrotrin and therefore no constituted contract. The dispute is therefore a private law dispute and not *justiciable* under common law.[37]

Actions of the Executive

All Commonwealth Caribbean constitutions provide for various functions to be exercised by the Head of State, usually the Governor General, or the President in the case of Trinidad and Tobago or Dominica. Examples of such functions include assenting to Bills; appointment of judges on the advice of the relevant service commission or persons; dissolution of Parliament acting in accordance with the advice of the Prime Minister; appointment of ministers acting in accordance with the advice of the Prime Minister, from the members of the upper and lower Houses of Parliament. In addition, these constitutions provide that executive power resides in Her Majesty and this is exercised on her behalf by the Governor General. The question is whether, in acting pursuant to any of those functions, the action of the Head of State is reviewable, despite the ouster clause which ousts the jurisdiction of the courts in some of the cases where the Head of State so acts. In *Re Blake*,[38] one of the issues considered by the Court of Appeal of the Eastern Caribbean Supreme Court was whether the Governor General's administrative decision to appoint or retain Dr Kennedy Simmonds as Prime Minister was justiciable. The court stated that '[t]he decision to appoint a Prime Minister or any other Minister of Government is one of the many decisions which are made in the exercise of prerogative powers' and 'which are not justiciable or subject to judicial review for the simple reason that the subject matter of the decision is not amenable to the judicial process'.[39] The court quoted from *Council of Civil Service Unions v Minister for the Civil Service*, where Lord Roskill said that:

> [m]any examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[40]

36 Ibid at 9.
37 Ibid at 6–7 (emphasis added). See also *Next Level Entertainment Limited v Attorney General of Antigua* AG 2007 HC 26 ('The short answer therefore is that the matter of an implied contract is not justiciable in judiciable review proceedings' (at [72])); *NH International (Caribbean) Limited v Urban Development Corporation* TT 2006 CA 11; and *Turnbull v Abraham* VG 2007 HC 30.
38 (1994) 47 WIR 174 at 175. See also *Francois v Compton* LC 2002 HC 10.
39 Ibid at 180.
40 [1985] AC 374 at 418.

The Court of Appeal continued that, in its assessment of whether a proposed Prime Minister was likely to command the support of the majority of the Representatives, the Governor General was free to consult not only the Representatives themselves but other persons who should know how the Representatives were likely to behave under certain pressures and circumstances. It explained further, citing *Adegbenro v Akintola*[41] for the view that the words 'it appears to him', the judgement as to the support enjoyed by a Premier was left to the Governor's own assessment, and there was no limitation as to the material on which he was to base his judgement or the contacts to which he might resort for the purpose. The court also explained that there would have been no difficulty at all in so limiting him if it had been intended to do so.[42]

The court observed that, first, '[i]f the decision of the Governor-General to appoint a Prime Minister was made subject to judicial review, the results could be horrendous'; second, '[i]t would mean that the Head of State might be required to divulge sensitive confidential opinions and information imparted by the Representatives and other persons and would be exposed to all the undesirable consequences of such disclosure'; and, third, '[p]ublic policy dictates that the Head of State should be spared those consequences.'[43] It also observed that '[t]he answer to the question who is "likely to command the support of the majority of the Representatives" is subjective and the Constitution makes it subjective to the Governor General's personal judgment. The answer is an elusive issue which is *not justiciable.*'[44] It cited Lord Brightman's statement in *R v Hillingdon London Borough Council, ex p Puhlhofer*[45] that:

> [w]here the existence or non-existence of a fact is left to the judgement and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.[46]

The court then concluded by stating that, first, the 'Constitution itself provides the procedure for determining whether the Governor-General's decision and the opinion on which the decision was based were correct'; second, '[t]hat procedure is a motion of no confidence in the Government'; and, third, '[t]he outcome of such a motion would establish conclusively whether or not the Prime Minister in fact commands the support of the majority of the representatives.'[47]

Cabinet is usually charged with exercising the policy-making function of the State and usually appoints committees to look into various issues. In *Re Galbaransingh*,[48] the applicants applied for judicial review of certain decisions and recommendations contained in a report produced by the respondents, a committee appointed by the Cabinet of the Government of Trinidad and Tobago. The court noted that '[a]lthough the concept of justiciability has never been precisely defined, Lord Diplock in the *C.C.S.U.* case describes matters of national security as an excellent example of a non-justiciable issue, because the judicial process is totally inept to deal with that type of problem. Other examples of non-justiciable matters are set out in *Lewis.*'[49] In *Re Office of Prime Minister*,[50] the applicant sought judicial review of the decision of the

41 (1963) 3 All ER 544.
42 (1994) 47 WIR 174 at 181.
43 Ibid.
44 Ibid (emphasis added).
45 [1986] 1 AC 484, 518.
46 (1994) 47 WIR 174 at 181.
47 Ibid at 181–2.
48 TT 1997 HC 136.
49 *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.
50 TT 2002 HC 114.

Governor General of Trinidad and Tobago. After a General Election held on 10 December 2001 in Trinidad and Tobago between the two major political parties, there was an even division between the elected parliamentary representatives, following which the President of the Republic of Trinidad and Tobago appointed the Honourable Patrick Manning, the leader of one of the political parties, as Prime Minister, being the person who, in his judgement, was most likely to command the support of the majority of the members of the House.[51] In April of 2002, the House of Representatives was convened and it proved impossible to elect a Speaker of the House so Parliament was, therefore, prorogued. The applicants argued that the continued retention of the Office of Prime Minister by the Honourable Patrick Manning, without calling a General Election and against the background of a non-functioning Parliament, was illegal and unreasonable, because it had been demonstrated that Mr Manning was unable to command the support of the majority of the members of the House of Representatives, and that, as a result, the principle of the collective responsibility of Cabinet to Parliament, enshrined in section 75 of the Constitution, was being frustrated to the detriment of the applicants, who were unable to question the performance of the Government through their parliamentary representative.[52]

The court noted that the essential issue was whether the Prime Minister's holding of that Office after 3 July 2002, without causing a date to be announced for a General Election, was illegal.[53] The first issue that arose was whether the court had the jurisdiction to entertain the application. The court claimed that, based on the several Commonwealth cases cited by the applicants, it could be readily deduced that the courts would not shirk from examining issues with a distinct political flavour which, by their substantive nature, however, involved the need to examine the Constitution, statute law or the common law, to see whether what was broadly described as a 'political power' had been exercised within the ambit of the relevant law.[54] It continued that the court would, however, have no jurisdiction if the issue raised was wholly or very substantially a political one, which, by its nature and in reality, involved the exercise of a political judgment, as opposed to a legal one. The court explained that a classic formulation of the general guidelines to be employed in identifying what were political questions was to be found in the judgment of Brennan J in the United States Supreme Court decision of *Baker v Carr* where he stated that:

> [p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding, without an initial policy determination of a kind clearly for non-judicial discretion.[55]

The court then ruled that the naming of a date for a General Election pre-eminently involved political policy, political strategy and other political considerations which were non-justiciable. It continued that, in such a matter, the court would be making an unwarranted incursion into the purely political jurisdiction of the Prime Minister and the Executive, thereby violating the principle of the separation of powers, were it to accede to the granting of the reliefs sought by the applicant.[56]

51 Ibid at 2.
52 Ibid at 3.
53 Ibid.
54 Ibid at 4.
55 (1962) 369 US Reports 186 at 217.
56 TT 2002 HC 114 at 5.

In addition, the court explained that the mechanism for the removal of and the vacation from the office of a Prime Minister was provided by section 77 of the Constitution, adding that there was no special mechanism provided for the situation in which a Prime Minister retained office and where the elected representatives were equally split and the House of Representatives had been unable to elect a Speaker.[57] It noted the applicant's argument that the mechanism provided could not be operated because the House of Representatives had been unable to effectively convene. The court claimed that this was, however, the only method and mechanism provided, and its inability to be operated did not mean that a licence for abuse of power existed. It noted that, in any event, on the material before it, there was no evidence to suggest that there had been an arguable abuse of power on the part of the Prime Minister. In its view, the Constitution itself provided the necessary safeguards against the possibility of such abuse in very practical terms, by the provisions of sections 112, 113 and 114, under Chapter 8 dealing with finance. The court was of the view that these were powerful safeguards against possible abuse of power, perhaps some of the most powerful and institutionally pragmatic that could have been devised. The court then noted that:

> apart from my conclusion on the political question issue, I am of the further view that because of the practical constitutional checks and balances provided, together with the specific mechanism for the removal from Office of a Prime Minister and the vacation of Office of a Prime Minister, this Court does not have the jurisdiction in public law at this stage to direct a Prime Minister to announce a date for a General Election by a certain period, failing which the Office of Prime Minister would be declared vacant.[58]

It continued that this was, first, 'not to say, however, that in the case of an abuse of the essential constitutional checks and balances themselves, judicial review cannot be sought to review arguably illegal and unreasonable administrative acts and decisions'; and, second, '[v]indication of the rule of law would warrant the intervention of the Court in such an extreme circumstance.'[59]

The court, therefore, concluded that it had no jurisdiction to entertain the application. It explained that declaratory relief in judicial review would not be granted if the issues raised were academic, hypothetical and/or premature or, moreover, a combination of all three. The court noted that the Prime Minister stated that General Elections would be held in Trinidad and Tobago if a Speaker was unable to be elected and/or a budget passed. It claimed that the court did not operate in a vacuum and that it took judicial notice that an attempt would be made to convene Parliament. The court continued that, depending on what transpired in the Parliament, the House of Representatives might well become duly constituted by the election of a Speaker and the passing of a budget, or the Prime Minister might be left with no practical choice but to call a General Election, a matter which, the court emphasised, was for his political judgement. As a result, it ruled that an election might well be called before the time suggested by the applicants; and that the issues raised in the application were, therefore, of academic significance at this stage, and were also raised prematurely.[60]

National security

Perhaps one of the most important functions of the State is to defend the country in times of war and to ensure that its security is not compromised as a result. Such is the nature of the

57 Ibid at 6.
58 Ibid.
59 Ibid.
60 Ibid.

power that the courts usually avoid addressing such issues and they have accepted that national security considerations would trump considerations of natural justice. However, the threshold is a high one and the courts are not willing to let the Executive simply claim a national security interest that could trump natural justice or deny a person his liberty. In *Oliveira v Attorney General of Antigua and Barbuda*,[61] the applicant was a Guyanese national who had been living in Antigua and Barbuda for over ten years, acquired property there and was married to a naturalised Antiguan and had children. After he had been charged, tried, convicted and eventually freed by the Court of Appeal for some sexual offences, the Director of Public Prosecutions discontinued all criminal proceedings against him. He was subsequently deported after his release from prison.[62] The applicant was able to return to Antigua with a new passport which did not indicate that he had previously been deported. The court was uncertain whether the immigration authorities had followed the letter of the law in deporting him in the first instance. On realising that the applicant was again in Antigua, the immigration authorities took him into custody.[63] The applicant's passport was only returned to him on the instructions of the Attorney General despite a judge's earlier ruling that this be done. He was released and went into hiding.[64] The Cabinet subsequently deemed him a prohibited immigrant, which precipitated the judicial review application by the applicant that he was entitled to be registered as a citizen of Antigua and Barbuda. He claimed damages for the State's alleged contravention of his fundamental rights, and sought an order that the Cabinet's decision was unlawful.[65]

The court noted that '[n]ational security issues are not wholly outside judicial review but the court will confine itself to deciding whether the decision-maker, usually a minister, is acting in good faith within the language of the governing legislation, if any.'[66] It claimed that the court could also look at evidence to determine if the issue was genuinely one of national security; beyond that, it continued, the court would accept the opinion of the State as to what national security required and a claim of national security would normally suffice to exclude a right to be heard. Therefore, the court claimed that, while there was no denying that the law enabled the Cabinet to deem that a person was a prohibited immigrant, it was also in the contemplation of the legislature that this executive discretion should be exercised only in very clear cases.[67] It continued that it was clear to the court that, while it could properly enquire into the decision itself, save in limited situations, at the very least it had to be provided with credible bases in order for the State to substantiate the decision to deem a person a prohibited immigrant. The court was of the opinion that it was usual for the State to have a person who could properly provide the evidence as to the exercise of the Cabinet's discretion and that 'one would not have thought that an Immigration Officer would not have been able to provide admissible or reliable evidence in relation to the Cabinet decision'; and that it was 'of particular importance since the relevant section provides several bases on which Cabinet can deem a person a prohibited immigrant'.[68]

The court opined that, while it was no part of its function to determine whether the Cabinet decision was fair or just, the sole issue for it to determine was whether the decision was rational. The court, it continued, would not abdicate its responsibility to review executive decisions, not on the basis of whether they were right or wrong, but of whether, for example, they were irrational or illegal. The court then made reference to the principles stated in *Council of*

61 AG 2009 HC 15.
62 Ibid at [64].
63 Ibid at [65].
64 Ibid at [66].
65 Ibid at [67].
66 Ibid.
67 Ibid.
68 Ibid at [69].

Civil Service Unions v Minister for the Civil Service which, it noted, were very helpful in dealing with the issue of national security; in that case, the failure of the Secretary of State to consult with employers before taking a decision which prevented them from continuing to belong to trade unions. The issue arose as to whether the decision was reviewable based on two grounds, namely that it was dealt with as the State's prerogative and, secondly, it concerned matters of national security. Lord Fraser stated that:

> The question is one of evidence. The decision whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the Courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching a decision on national security.[69]

The court further noted that Lord Scarman, in the *Council of Civil Service Unions v Minister for the Civil Service*, said:

> Where a question as to the interest of national security arises in judicial proceedings, the court has to act on evidence. In some cases a judge is required by law to be satisfied that the interest is proved to exist, in others the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officers as to what is required to meet it, unless it was possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held.[70]

The court was of the clear opinion that in *Council of Civil Service Unions v Minister for the Civil Service*, a genuine case of national security, no less a person than the Secretary of State provided the court with the requisite information. In the instant case, the court asserted that, first, 'let it be clear that there ought to be evidence from the Cabinet indicating that it took the decision to deem Mr Oliveira an undesirable visitor or alien'; second, '[i]t is usual for this evidence to be provided by either the Cabinet Secretary or a member of Cabinet but certainly not from an Immigration Officer'; and, third, '[t]he quality of the evidence adduced by the State falls short of what is required to enable the Court to conclude that the decision was rational.'[71] In these circumstances, the court accepted the principle in *HMB Holdings*[72] as binding, namely that the decision of Cabinet was open to challenge on the ground that it was irrational or illegal. The court was of the view that there was no reason why the decision of Cabinet could not be challenged on the ground that it was without foundation.[73] It explained that, while the decision as to who was an undesirable citizen rested exclusively within the purview of Cabinet, the court claimed that the High Court was surely clothed with the power to determine whether any such decision was rational. The court further explained:

> It is apposite to repeat that the Court is not prepared to accept that a person was a threat to national security based on the mere say so of an Immigration Officer, without more. There is no credible evidence presented by the State in this regard. The Court recognises that in cases of threat to national security, Cabinet should not be required to divulge the extent or source of information on which it acted in coming to the conclusion that a person is a threat. The Court is, however, satisfied on the evidence presented that the facts of this case fail to meet the threshold required for establishing that it was a matter of national security.[74]

69 Ibid at [70].
70 Ibid at [71].
71 Ibid at [72].
72 *HMB Holdings Ltd v Cabinet of Antigua and Barbuda* [2007] UKPC 37.
73 AG 2009 HC 15 at [73]. See *Sparman v Greaves* BB 2004 HC 21.
74 AG 2009 HC 15.

The court continued that there was no doubt that 'matters of breaches, national security or matters of that gravity do suffice to enable Cabinet to deem a person an undesirable immigrant' and that 'it is not part of the Court's function to determine who should or should not be deemed a prohibited immigrant'.[75] However, it noted that 'even in cases of national security the court has a duty to consider the circumstances and context of the case' when called upon to review the exercise of a discretionary power; and that 'evidence is also needed so that the court may determine whether it should intervene to correct any alleged excesses or abuse of power or irrationality'.[76] On the facts of the case, the court ruled that there was no evidence placed before it concerning the bases on which Cabinet relied to deem the applicant a prohibited immigrant.[77] Consequently, it concluded that it could place very little weight, if any, on the statement of the Immigration Officer in relation to the issue of national security, a matter which predated the Cabinet decision; and that, in any event, the applicant must lead credible evidence from which the court could properly conclude that the Cabinet decision was irrational.[78] The court then held that, based on the circumstances of the instant case, there was no credible evidence on which it could properly conclude that the decision taken by the Cabinet to deem the applicant an undesirable immigrant was a rational one, and it was driven to conclude that the Cabinet's decision to deem the applicant an undesirable inhabitant or visitor had no basis since none was provided.[79]

The military and defence force

Allied with national security considerations are matters relating to the military and defence force. The courts have noted that matters concerning the internal workings of these are not to be subject to judicial review. In other words, they are non-justiciable and the courts would not inquire into the merits of the case where either of these is implicated on the facts. In *Re Clarke*,[80] the court refused the application for an order of *certiorari* by Private Ian Hugh Clarke to quash the Order of the Chief of Staff of the Jamaica Defence Force that the applicant be discharged from the Jamaica Defence Force. The court noted that, '[a]lthough no submissions were made to us by either party on the question of the Court's jurisdiction in relation to the decisions of military authorities', it considered it 'appropriate to take the opportunity in this judgment to indicate our views particularly as the previous application for an Order of *Certiorari* had been granted by a Full Court'.[81] It then quoted *Council of Civil Service Workers v Minister of the Civil Service*, where it was made clear that the question whether a decision or action was non-justiciable and cited the following from *Judicial Review of Administrative Action*:[82] 'Special considerations apply where procedural errors have been committed by authorities administering military discipline'; and the courts 'have always shown a marked aversion from seeming to interfere with the proceedings of military authorities except where the civil rights of an individual have been infringed . . .'.[83] The court noted that there was an abundance of authority of respectable vintage and sufficient consistency to support this proposition.[84] The court, quoting from various decisions,[85] noted that:

75 Ibid at [74].
76 Ibid.
77 Ibid at [75].
78 Ibid at [76].
79 Ibid at [79].
80 JM 1994 SC 71.
81 Ibid at 6.
82 de Smith, *Judicial Review of Administrative Action* (4th edn), 1980, London: Stevens, 146.
83 JM 1994 SC 71 at 6.
84 Ibid at 6–7.
85 In *Re Mansergh* (1861) 1 B & S 400 and in *R v Army Council, ex p Ravenscroft* [1917] LTR 300.

> In the application before us we are asked for an order which would establish the status of the applicant as still being a soldier in the Jamaica Defence Force. His civil rights are in no way affected. Although, regrettably, we have not had the benefit of argument on this point and we dismissed the application for the good and sufficient reasons already stated, had we been alerted and submissions made, we are of the opinion that we would have been justified in dismissing the application for the additional reason [of national security] which we have now addressed.[86]

A similar issue was considered in *Young v Chief of Staff of the Barbados Police Defence Force*[87] where the applicant, Edwin Young, a member of the Barbados Defence Force, applied for an order of *certiorari* to quash (a) the decision made by the Deputy Chief of Staff of the Barbados Defence Force in which the Deputy Chief of Staff, in a summary trial, adjudged the applicant to be guilty of conduct that was prejudicial to good order and military discipline; and (b) the decision of the Chief of Staff in which the Chief of Staff, after reviewing the evidence, confirmed the decision of the Deputy Chief of Staff.[88] The court noted that, first, '[t]he question which this Court must now decide is whether it has the power to intervene in matters relating to military law and the discipline of the Defence Force and to grant any of the orders sought'; second, '[t]here is no doubt on the evidence that the applicant was a soldier and that the commanding officer had jurisdiction to try him summarily under the Defence Act and in accordance with the Defence Rules of Procedure, 1984 made thereunder'; and, third, '[i]t must also be conceded that the Chief of Staff had the power under section 116 of the Act to review the summary findings and the award made by the commanding officer in respect of the applicant.'[89] It also stated that the applicant sought to have: (a) the conduct of the commanding officer in relation to his conduct of the summary trial; (b) his award of punishment; and (c) the conduct of the Chief of Staff in relation to his review of the summary trial and award reviewed under the provisions of the AJA.[90] The court ruled that the orders of *certiorari* and *mandamus* should not be granted under the AJA, because the High Court should not intervene in matters relating to military law and discipline. It continued that the applicant, by becoming a soldier and receiving his pay as such, agreed and consented to be subject to military discipline and that, in the present case, he was found, by his commanding officer, guilty of conduct prejudicial to the good order and discipline of the Force.[91] The court stated that since the applicant considered himself wronged by his commanding officer, he sought redress by petitioning the Chief of Staff under section 116 of the Defence Act for a review. The court explained that the grounds on which he sought relief from the Chief of Staff under the Defence Act were the same grounds on which he sought relief from the High Court. The court stated that the Chief of Staff examined each ground of his petition, reviewed the evidence and confirmed the finding of the summary trial. As a result, the court ruled that the applicant had no reason to complain, since he had all that the military law – to which he engaged to submit when he entered that service – entitled him to have. The court, therefore, concluded that it would not intervene and grant him relief under the AJA and dismissed the application.[92]

ABUSE OF PROCESS

The jurisdiction of the court should only be invoked in appropriate cases to right wrongs done by public authorities, and the courts are very wary of allowing its processes to be abused by

86 JM 1994 SC 71 at 8–9.
87 BB 1993 HC 50.
88 Ibid.
89 Ibid at 7.
90 Ibid.
91 Ibid.
92 Ibid.

applicants. Where this occurs, the court will quite rightfully not hear the matter, or reject the judicial review application as an abuse of process. In *Ayres v Attorney General of Trinidad and Tobago*,[93] the claimant applied for leave to apply for judicial review of the decision not to promote him to the post of Petty Officer in the Trinidad and Tobago Coast Guard retroactively from 1 January 1998.[94] In respect of the issue of whether the application was an abuse of the process of the court, the court noted that '[a]buse of process is akin to the doctrine of *Res Judicata*. It applies to matters which could or should have been propounded in earlier litigation but were not.'[95] It then cited *Talbot v Berkshire County Council*[96] for the proposition that:

> [t]he rule [in *res judicata*] is thus in two parts. The first relates to those points which were actually decided by the court; this is *res judicata* in the strict sense. Secondly, those which might have been brought forward at the time but were not. The second is not a true case of *res judicata* but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process . . .[97]

The court noted that, in respect of the instant case, it was *res judicata* of the second kind and was more usually referred to as abuse of process.[98] It was of the opinion that section 15(1) of the Judicial Review Act of Trinidad and Tobago (JRA) provides that, where a person had a duty to make a decision and there was no law which prescribed a time period to make that decision, a person who was adversely affected by the failure to make that decision may apply for judicial review in respect of the failure to make a decision on the ground that there had been unreasonable delay in making that decision.[99] The court claimed that the claimant had written to the Defence Council to promote him retroactively to 1 January 1998 and this was done in October 1999. The Defence Council, the court continued, was under a duty to consider his complaint and make a decision on the issue pursuant to section 14 of the Defence Act. The Defence Council had failed to do so.[100]

The court also argued that, since February 2004, the attorneys for the claimant had written to the Minister of National Security and the Chief of Defence Staff requesting the Defence Council to make a decision on the issue.[101] In these circumstances, the court observed that the claimant could and should have brought an application for judicial review under section 15(1) of the JRA for the failure of the Defence Council to make a decision on his complaint on 13 October 2000 (the commencement date of the JRA). However, the claimant commenced the prior action for judicial review against the Chief of Defence Staff on 27 October 2004, which sought the same relief, namely a retroactive promotion to 1 January 1998.[102] The court noted that there was no reason why the claimant and/or his attorneys-at-law did not pursue his application against the Defence Council. In addition, it noted that there was no reason why the claimant and/or his attorneys-at-law did not, in the prior action, make an application under section 15(1) of the JRA to challenge the failure of the Defence Council to make a decision on his request for a retroactive promotion.[103]

93 TT 2009 HC 194.
94 Ibid at [1].
95 Ibid.
96 [1993] 3 WLR 708.
97 Ibid at 713.
98 TT 2009 HC 194 at [8].
99 Ibid at [9].
100 Ibid.
101 Ibid at [10].
102 Ibid.
103 Ibid.

The court ruled that, with respect to the argument that a different decision was being challenged in the action, the argument lacked merit: at the time when the claimant brought the prior action for judicial review, he was fully aware of all the facts with respect to the failure to promote him retroactively; he could and should have made an application against the Defence Council for the failure to promote him at that time pursuant to section 15(1) of the JRA.[104] As a result, the court held that his failure to do so then, and to try to do so subsequently was an attempt to have a second bite of the cherry, was an abuse of the process of the court. In addition, the court noted that the claimant waited until he had retired from the service to challenge the failure to promote him retroactively.[105] The Defence Council, the court argued, could hardly be expected to promote him when he had already retired since this might have been *ultra vires*. The court claimed that the applicant's action was an attempt to have a second attack upon his non-retroactive promotion at a time when it would have no effect on his career; and an attempt to litigate a matter, which could and should have been litigated in the prior action in 2004.[106] It further asserted that the claim that the claimant did not have all the material facts at the time of the prior application lacked merit, since the claimant ought to have stood on his own facts. In addition, the court claimed that, even if someone else was promoted retroactively, this did not affect the fact that he could and should have made an application in the prior action under section 15(1) of the JRA for the failure to make a decision on his retroactive promotion.[107] As a result, the court concluded that the claimant was seeking to re-litigate a matter which he could and should have litigated four years earlier and that this was an abuse of the process of the court.[108]

ALTERNATIVE REMEDY

At common law and under various statutory provisions, the court is given the power to reject applications for judicial review if the applicant has an alternative remedy, under either the common law or legislation. Where such remedies exist, the claimant must exhaust them before making an application to the court.[109] A failure to do so might result in the application being refused. In *Balroop v Public Service Commission*,[110] the applicant was a public servant in the public service of Trinidad and Tobago. Pursuant to the provisions of the Freedom of Information Act 1999 (FIA), the applicant applied to the Public Service Commission (PSC) for certain information in three categories. Three of the issues the court considered were: first, the nature of the judicial review process under the FIA; second, whether recourse to the Ombudsman was an alternative remedy; third, if so, did the applicant's failure to use this avenue constitute an abuse of process such as to vitiate the entire proceedings; and fourth, if not, could the applicant apply for judicial review?[111] In relation to the first issue, the court noted that: first, the procedure to be

104 Ibid at [12].
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid at [13].
109 *James v Spencer* AG 2004 HC 49, citing *Halsbury's Laws of England* Vol. 1(1) 4th edn, para 61, stated that 'in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal. However, judicial review may be granted where the alternative statutory remedy is "nowhere near so convenient, beneficial and effectual" or "where there is no other equally effective and convenient remedy" '.
110 TT 2005 HC 45. See also *Stoneham v Attorney General of Bermuda* BM 2008 SC 17; *Nelson v Attorney General of Antigua and Barbuda* AG 2009 HC 9; *Carib Info Access Limited v The Minister of Public Utilities* TT 2006 HC 123; and *Sharma v Integrity Commission* TT 2006 CA 16.
111 TT 2005 HC 45 at [6].

followed by an applicant for judicial review did not change except as expressly provided for by statute; second, the FIA did not create a regime separate and apart from that contained in the JRA as governed procedurally by Order 53; and third, section 39 of the FIA did not stand alone, nor did it create a new species of rights. The court continued that the JRA and Order 53 state that an applicant must first seek leave of the court before applying for judicial review, so an applicant under the FIA must conform to the substantive and procedural requirements as contained in the 'parent' Act and Rules of the Supreme Court.[112] It also stated that 'the reference to the hearing of the application by a judge in chambers merely seeks to preserve the tenor and integrity of the subject matter attended by the [FIA]. Nothing more.'[113] In relation to the second question, namely whether the Ombudsman was an alternative remedy under the JRA, the court stated that '[t]here is no dispute that referral of matters to the Ombudsman is an alternative to the Court/litigation process. However, when can an applicant avail himself of this avenue?'[114] It continued that section 38A1 of the FIA provided that a person aggrieved by the refusal of a public authority to grant access to an official document may, within 21 days of receiving notice of the refusal under section 23(1), complain in writing to the Ombudsman. The court was of the opinion that the language of the section was unambiguous and the fundamental condition for invoking the Ombudsman's jurisdiction was the receipt of the notice of refusal from the public authority pursuant to section 23(1) of the FIA.[115] In response to the other issues the court replied that, first, section 39 of the FIA did not enable an applicant to approach the court for judicial review as of right; second, the Ombudsman was an alternative remedy available to an applicant under the FIA provided there was an active refusal by the public authority to satisfy the request for information and notice of that refusal was communicated in accordance with the FIA; third, judicial review proceedings were not an abuse of process once the Ombudsman's jurisdiction could be invoked; and, fourth, judicial review proceedings might be invoked once section 39 was satisfied.[116]

In *Barrimond v Public Service Commission*,[117] the applicant was a Customs Officer in the Customs and Excise Division of the Public Service and sought judicial review of the respondent's decision to prosecute or try three disciplinary charges preferred against her. The charges arose out of an incident that occurred in the course of her duties as a customs officer. The respondent argued that the applicant had an alternative remedy before the disciplinary tribunal and that she could raise a preliminary objection to the prosecution on the following grounds: (a) that the delay of almost six years was unreasonable and 'amounted to punishment in itself'; (b) that it was unreasonable for the respondent to prefer charges after such a long delay; and (c) that the delay interfered with her ability to defend herself.[118] The respondent submitted that this preliminary objection could provide an effective alternative remedy. In relation to the third issue, the court noted that '[a]n alternative remedy or avenue of redress must be "more convenient, expeditious and effective" than that provided in judicial review proceedings.'[119] It continued

112 Ibid at [8].
113 Ibid at [9].
114 Ibid at [10].
115 Ibid at [11].
116 Ibid at [17]. These conclusions were applied in *Baptiste v Police Service Commission* TT 2009 HC 276 [54]. See also *Provident Bank Trust of Belize v Belize Companies and Corporate Affairs Registry* BZ 2007 SC 17 (where the court had to examine the provisions of sections 28 and 29 of the Stamp Duties Act, which created the alternative form of redress to the complaint of a taxpayer in order to determine whether it was clear that recourse to court had been excluded; and section 36 of the International Banking Act).
117 TT 2008 HC 120. See also *Sharpe v Public Service Commission* TT 2007 HC 117 and *Stennet v Attorney General of Jamaica* JM 2005 SC 100.
118 TT 2008 HC 120 at [30].
119 Citing *R v Devon County Council, ex p Baker* [1995] 1 All ER 73, and *Saga Trading Limited v The Comptroller of Customs and Excise* TT 1998 HC 132.

that, in most cases where alternative relief was available, the decision or action under review was impeachable before a body that has legal authority to provide the same or similar relief afforded by the High Court. On the facts, the court noted that: first, the disciplinary tribunal was empowered to try the guilt or innocence of the applicant; second, it was appointed by the respondent to do that; and, third, the charges were framed by the respondent and were before the tribunal in accordance with the respondent's mandate.[120] The court continued that the relief sought by the appellant was meant to nullify the charges and destroy that mandate and questioned the right of the respondent to exercise the mandate. It explained that, in order to take a preliminary objection, the applicant must first submit to the jurisdiction of the tribunal to determine the charges.[121] This, the court noted, flew in the face of her legal right to de-legitimise its jurisdiction and it was not a right that the tribunal could protect, save on the basis of a preliminary objection. The court found it difficult to treat the preliminary objection as a substantive alternative remedy, especially when it was based on an appreciation of technical law in a state of evolution, and would be advanced before a quasi-judicial body that might not readily grasp its technicalities.[122] In its view, the relief sought in the instant proceedings was undoubtedly more convenient, expeditious and effective; it went to the heart of the complaint in a direct and efficacious manner, and with all the legal issues fully ventilated. However, the courts have been extremely reluctant to interfere in prosecutorial decisions.[123] It also stated that:

> [a] delay of six years, between the commission of the offence and the trial, is an exceptional circumstance. It compromises the applicant's ability to defend herself. It raises questions of whether a fair trial is possible. In cases where exceptional circumstances arise, especially before a trial begins, it is often preferable that a body other than the one conducting the trial reviews those circumstances. Oversight involves remoteness from a process, and the ability, from a great distance, to view a matter panoramically.[124]

It then concluded that the applicant had been treated unfairly and it would therefore quash the respondent's decision to prosecute or try the three disciplinary charges and that the disciplinary proceedings be permanently stayed.[125]

In *Kirk Freeport Plaza Limited v Immigration Board*,[126] the defendant argued that the trial judge erred in holding that exceptional circumstances arose in this case.[127] It was also argued that there was an alternative remedy by way of appeal and that judicial review was not an appropriate remedy. One of the applicants, Island Companies Ltd (ICL), received notification that its application to the Immigration Board consenting to the transfer of 51 of its shares to a non-Caymanian Company had been refused and, in those circumstances, it should have appealed against the decision of the Immigration Board.[128] The defendants argued that it was well established that, except in exceptional circumstances, judicial review should not be invoked where other remedies are available. The Court of Appeal of the Cayman Islands stated that the trial judge accepted the principle that there was a well-established and highly authoritative line of judicial pronouncements that where there was an alternative remedy, and especially where Parliament had provided a statutory appeal procedure, it was only exceptionally that judicial

120 TT 2008 HC 120 at [31].
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid at [32].
125 Ibid at [33].
126 KY 1997 CA 5.
127 Ibid at 5.
128 Ibid.

review would be granted before the alternative remedy was exhausted.[129] The applicant argued that the reasons stated by Smellie J, at first instance, for his conclusion that this was an exceptional case could not be faulted; and that there was no absolute rule of law to the effect that a person must exhaust a statutory right of appeal before seeking judicial review. The Court of Appeal quoted from Wade and Forsyth, *Administrative Law*[130] the view that '[a]n administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter.'[131] After considering numerous authorities, the court concluded that 'there is a strong view that judicial review should not be granted where there is an alternative remedy of appeal, except in exceptional circumstances' but that 'the cases suggest that in certain circumstances judicial review may be granted where there is an alternative remedy of appeal. There is discretion in the judge to decide the appropriate remedy'.[132] It continued that '[i]n the instant case, the matter to be decided was whether any one of the decisions of the Board was a valid decision and legally binding', which, it claimed, 'involved the question of procedural fairness and also the issue as to what were to be regarded as exceptional circumstances'.[133] The court claimed that '[Kirk Freeport Plaza Ltd] had also been granted leave to apply for judicial review of the Board's decision to rehear the application on May 29, 1996' and that '[i]n such an application the Board may well have been faced with arguments as to the previous decisions.'[134] The court noted that, first, ICL had been granted leave to apply for judicial review of the decisions of the Board; second, there was therefore a link between the two applications for judicial review; and, third, from the arguments presented to it, there were legal issues to be resolved. It therefore held that there was no reason for holding that the judge did not properly exercise his discretion in holding that there were exceptional circumstances in this case and that judicial review was the appropriate remedy. The court concluded that, in its view, judicial review was the most effective and convenient remedy for deciding the issues which were involved in the matter.[135]

In *Commonwealth Trust Limited v Financial Services Commission*,[136] one issue considered by the court was whether Commonwealth Trust Limited (CTL) was entitled to judicial review in the light of the alternative statutory remedy of an appeal to the Financial Services Appeals Board (FSAB) that was available to it. The defendant argued that section 44 of the Financial Services Act (FSA) gave any person who was aggrieved by any decision of the Financial Services Commission (FSC) a right of appeal to the FSAB which was established by section 42 of the FSA. It also argued that CTL had an alternative remedy available to it and the court should decline to exercise its discretion in its favour; in other words, CTL should be left to pursue its statutory remedy.[137] The court noted that it was not disputed that the FSA gave an aggrieved person a statutory right of appeal to the FSAB but that it was established that, when this dispute arose, the FSAB was not properly constituted and so was unable to function, neither was it up and running when the case was heard.[138] In these circumstances, the court claimed that the question, then, was whether the mere existence of this right without more was sufficient to be

129 Ibid.
130 Wade and Forsyth, *Administrative Law* (7th edn)1994, Oxford: Clarendon Press, 721.
131 KY 1997 CA 5 at 10.
132 Ibid at 11.
133 Ibid at 12.
134 Ibid.
135 Ibid. See also *Minnis v Attorney General of The Bahamas* BS 1998 SC 83 (considering the Lotteries and Gaming Act); *Mount Six Mens Company Limited v Chief Town Planner* BB 2006 HC 22; and *White v Kuzych* [1951] AC 385.
136 VG 2008 HC 20.
137 Ibid.
138 Ibid at [26].

regarded as an available alternative remedy such as to weigh against granting relief to CTL.[139] The court was of the opinion that the law was well established: judicial review was a discretionary remedy and could not be pursued without a claimant first obtaining leave of the court.[140] It continued that, first, in determining whether or not to grant leave, one of the factors the court was called upon to consider was whether or not the claimant had an alternative form of redress and, if so, why judicial review was more appropriate or why the alternative had not been pursued; second, in considering whether or not to grant the actual application this was also one of the factors the court would bear in mind but it did not follow that, because there was an alternative remedy, the court would automatically refuse the application; and, third, if the court was satisfied that the alternative remedy existed and was suitable in the particular case then it would deny the application.[141] On the facts, the court claimed that it must first determine whether the alternative remedy was in fact available in the sense that a claimant could actually obtain redress in the manner prescribed by the statute. It noted that, while it was correct that section 42 of the FSA made provision for an appeal to the FSAB, the fact remained that the FSAB was not functioning. The court continued that, if the law made provision for an alternative remedy but the remedy, in fact, could not be accessed through no fault of the claimants, how then could one say that it was truly available, or that it was capable of being used, which was the ordinary sense of 'available'? As a result, the court concluded that, having regard to the fact that the FSAB was not functioning, it could not be said that an alternative remedy was available.[142]

In *Furguson v McNicholls*,[143] the court accepted the principle stated in *R v Secretary of State for the Home Department, ex p Swati*[144] that '[b]y definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, Judicial Review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.'[145] The court also accepted the view in *Ex p Waldron*[146] that:

> whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker or slower, than procedure by way of Judicial Review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a Court should take into account when deciding whether to grant relief by Judicial Review when an alternative remedy is available.[147]

Following those authorities, the court concluded that section 13 of the Extradition (Commonwealth and Foreign Territories) Act created not only an appellate or review procedure to a warrant of committal, but also, in the light of the breadth of the language in section 13, an alternative remedy contemplated by section 9 of the JRA.[148] In *Gaskin v Attorney General of Barbados*,[149] the court noted that '[t]here is a basic principle of Judicial Review that it should not be invoked unless the applicant has exhausted the adequate alternative remedies', continuing that 'there is a significant series of cases where the High Court has exercised its

139 Ibid.
140 Ibid at [27].
141 Ibid.
142 Ibid at [28].
143 TT 2008 HC 246. See also *Mahabir v Airports Authority of Trinidad and Tobago* TT 2007 HC 169.
144 [1986] WLR 477.
145 Ibid at at 485 C.
146 [1985] WLR 1090.
147 Ibid at 1108.
148 Ibid.
149 BB 2007 HC 16.

discretion to turn away judicial review applications where the applicant has failed to pursue another remedy.'[150] The court then cited the leading authority of *R v Epping and Harlow General Commissioner, ex p Goldstraw*[151] where Sir John Donaldson MR stated that 'it is a cardinal principle that save in the most exceptional circumstances, [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used.'[152] The court noted that this approach was taken by Kentish J in *Six Mens Company Limited v The Chief Town Planner*[153] where, on *in limine* submission, she applied the principle outlined in *Ex p Epping* in refusing to allow judicial review on the ground that the applicant had an alternative remedy available and should have pursued that remedy. In rejecting the application on the basis that the applicant had available an alternative remedy, the court also pointed out that there were no 'exceptional circumstances' justifying judicial review.[154]

In *Harricrette v The Anti Dumping Authority*,[155] the court examined the issue of whether the existence of an alternative statutory remedy – that is to say, the right of appeal under section 27 of the Anti Dumping Act (ADA) – meant that no public law relief was available to the applicant, and, therefore, the grant of leave to commence proceedings previously granted should be set aside, or the proceedings stayed. In answering that question, the court noted that the existence of the right of appeal under section 27 of the ADA, in the circumstances of this case, provided an effective alternative remedy and, as there were no exceptional circumstances, that precluded the applicant from obtaining public law relief. As a result, the court ruled that the decision of Narine J to grant the applicant leave to commence the proceedings should be set aside.[156] The court cited, with approval, the statement of Archie J in *Saga Trading Limited v The Comptroller of Customs and Excise*[157] that '[t]here is now a substantial body of judicial authority which supports the proposition that where there is an effective alternative remedy, the discretion to grant judicial review will only be exercised in "exceptional circumstances".'[158] The court adopted this passage, accepting that it succinctly and accurately summarised the effect of all the authorities which had been cited to Archie J. It noted that, since this was an application for judicial review, where there was an alternative remedy it must ask itself, first, whether the alternative remedy provided under section 27 of the ADA was effective; what was the Tax Appeal Board, and what was it empowered to do under the ADA, and the other relevant legislation; second, on a proper construction of the circumstances in which the applicant found itself: what did it need to have done; and, third, given the Tax Appeal Board's powers, was it potentially able to do for the applicant what the applicant needed to have done.[159] The court held that the Tax Appeal Board was perfectly able to provide an effective alternative remedy that could potentially cure the problem faced by the applicant, namely the imposition of a duty. It continued that it was a specialist body; it had the variety of expertise required; it could talk the language of commerce; and in its analysis of what might have gone wrong, or what might be right, it could provide guidance for the future exercise of powers under the ADA.[160] Accordingly, the court decided, following the principle articulated by Archie J in *Saga Trading*, that the applicant's only hope was to persuade it to exercise its discretion to keep this case that exceptional

150 Ibid at [18].
151 [1983] 3 All ER 257.
152 Ibid at 262.
153 BB 2006 HC 22.
154 Ibid at 22.
155 TT 2001 HC 22.
156 Ibid at 14.
157 TT 1998 HC 132.
158 TT 2002 HC 132 at 33.
159 Ibid at 20.
160 Ibid at 33.

circumstances existed having a bearing on the exercise of that discretion. It then concluded that it had little hesitation in finding that, on an application of the appropriate rigorous test, there was nothing on the facts to suggest that 'exceptional circumstances' were present that would persuade it to exercise its discretion to retain jurisdiction over the matter.[161]

In *Minnis v Attorney General of the Bahamas*,[162] the court had to consider the question of whether the decisions of the Bahamas Gaming Board were amenable to judicial review. The claimants argued that 'the action as pleaded was not for judicial review'. The court summarised the relevant authorities as follows: (1) that where statute or contract has provided a procedure for appeals against a decision of a domestic tribunal or decision-making body, a complainant is required to exhaust that appellate procedure before applying to the court for a judicial review of the decision complained of; (2) that in rare and exceptional cases the court would exercise its discretion to allow judicial review where the domestic appellate procedure has not been exhausted or pursued; and (3) that an allegation of breach of natural justice without more, does not constitute a rare and exceptional case upon which the court would exercise its discretion to allow judicial review where there has been a failure to exhaust or pursue the domestic appeal procedure. Therefore, the court ruled that, in the particular circumstances of this case, it would not interfere as the claimants were bound by the statute to pursue its appeals procedure before they could issue their writs and uphold the contentions of counsel for the defendants in this regard.

DISPUTES OF FACT

Before the court can exercise its power to grant remedies in judicial review applications, the applicant must adduce evidence to show that a decision had been made which affected him and that it was made in circumstances which fall within one or more of the established grounds of judicial review. In other words, there must be evidence that establishes the factual basis of the claimant's case. If this is not shown, the courts would have no choice but to dismiss the judicial review application. In *Cove v The Prime Minister of the Commonwealth of the Bahamas*,[163] the court noted that no evidential or factual foundation was laid to ground the allegations contained in the second category of 'decisions'. That category included the refusal and/or failure of the Government to observe the rules of natural justice in the decision to not give statutory notice to the applicants, as members of the public or in their respective individual capacities, nor make, or cause to be made, proposals for compensations in accordance with Article 27 of the Constitution of the Bahamas without first hearing the applicants in an unbiased fashion or hearing them at all in relation to the proposed development at the Clifton Bay Development Area, which it was believed would alter the rights of the applicants substantially. The plaintiffs, as citizens of the Bahamas, sought judicial review of the decision to approve the proposed development of a particular area of land over which they had acquired certain prescriptive rights.[164] There was no evidence to support the allegation that the executive or the defendants either failed or refused to do any of the things alleged in the second category. The court claimed that, to the contrary, the evidence suggested that at least one of the applicants made submissions and voiced objections to the executive and apparently obtained official information with regard to the proposal in question. It continued that there was nothing before it to suggest that

161 Ibid at 37.
162 BS 1998 SC 83.
163 BS 1999 SC 61.
164 Ibid.

these decisions were made by the defendants or any member of the executive.[165] The court asserted that it was most important there be evidence of the decisions which were to be the subject of review and that it was unable to say, therefore, whether the applications or representations were made by the applicants and whether the refusals or failings referred to in the second category of decisions occurred.

It continued that, under the old rules of court, so significant was the requirement that there be evidence of the decision sought to be impugned that, in *certiorari* proceedings, a copy of the decision had to be produced; continuing that, while the change in the rules clearly admitted to some relaxation of this requirement, *prima facie* proof must still be given of the decision which was sought to be impugned before leave to apply for judicial review could be given.[166] The court referred to *Wynne v Secretary of State for the Home Department*[167] where, on an application for judicial review, the applicant had not made the necessary applications in order to obtain the decision necessary for judicial review. The court, in that decision, held, in those circumstances, that there was no relevant decision and any questions arising in those circumstances would be hypothetical until the application had been made and a decision made. On the facts of the instant case, the court held there was no justifiable decision before it in respect of which judicial review might be had and that, therefore, it should refuse leave.[168] The court noted, when the application was viewed as a whole, that it was clear the applicants primarily asserted that they had acquired certain prescriptive rights to certain parts of property under the Quieting Titles Act, which was the subject of the proposed developments. It explained that any such action would, or certainly could, involve substantial dispute of fact and such cases have always been regarded as unsuitable for judicial review even where there was a subsidiary public law issue involved. As a result, the court refused the application for leave to apply for judicial review.[169]

DELEGATED LEGISLATION

The subject matter of the application must relate to something that the court could actually review. Judicial review of administrative action must relate to actions of public authorities which impact on persons. Judicial review of administrative action is not concerned with reviewing legislation; that is a matter for judicial review of legislation – a constitutional matter. However, the court in the cases considered accepted implicitly that this might not always be the case and that exceptionally judicial review might lie. This was made clear by the courts in relation to delegated legislation which was sought to be impugned on the usual grounds of judicial review. In *Nutrimix Feeds Limited v Manning*,[170] the applicant sought judicial review of a decision of the Cabinet and/or the Minister of Finance to reduce the import surcharge on chicken parts of non-Common Market origin from 86 per cent to 40 per cent, which it regarded as unlawful. That decision was contained in the Budget Statement dated 8 October 2004 on the Appropriation Bill 2005. The court cited *R v Asif Javed; R v Ali; R v Ali*,[171] where the UK Court of Appeal held that the court was entitled to review, on grounds of illegality, procedural impropriety or unreasonableness, the legality of subordinate legislation made by a Minister and approved by affirmative resolution of both Houses of Parliament; but the extent to which a

165 Ibid.
166 Ibid.
167 [1993] 1 All ER 575.
168 BS 1999 SC 61.
169 Ibid.
170 TT 2007 HC 87.
171 [2001] 1 WLR 323.

statutory power was open to judicial review on the ground of irrationality depended critically on the nature and purpose of the enabling legislation. The court noted that, in the *Ali* case, the simple question there was whether Pakistan was a country in which there was, in general, no serious risk of persecution, and the Court of Appeal held that the court could 'review the material facts and form its own judgment, even if the result is discordant with statements made in parliamentary debates'.[172] It continued that the evidence was clear in that case and it would appear that conflicting factors were absent. In the instant case, the court claimed that, although unreasonableness was not pursued by the applicant, the decision must be outrageous or absurd before the court could intervene.[173] The court claimed that the target area was particularly large where the weight to be given to the conflicting factors was primarily a matter of 'political and economic' judgement and where a particular political and economic policy was implicit in the enabling statute itself. The court observed that the political and economic implication and thrust of the Order reducing the surcharge clearly were reserved for the Minister of Finance who was answerable to Parliament, *a fortiori* in a legislative function dealing with a revenue matter in which the court must be particularly cautious about intervening.[174]

The court also stated that, in relation to unfairness and/or breach of natural justice, it noted that the defendant argued that, in the absence of a statutory requirement of fairness, it was difficult to invoke the principles of natural justice as the basis of a challenge to delegated legislation,[175] relying on the decision of Megarry J in *Bates v Lord Hailsham of St Marylebone*.[176] In that decision, he expressed the opinion that the rules of natural justice do not affect the process of legislation whether primary or delegated, continuing that:

> In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course the informal consultation of representative bodies by the legislative authority is commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections, I do not know of any implied right to be consulted or make objections, or any principle upon which the Courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative.[177]

The same approach was articulated in *Re Cleland's Application for Judicial Review*,[178] where the applicant argued that the rules of natural justice required that the department should consult with residents affected along the roads to be closed before it made an Order to that effect. In rejecting the argument, the court, applying the *dicta* of Megarry J, said that:

172 TT 2007 HC 87.
173 Ibid.
174 Ibid.
175 Ibid at [14].
176 [1972] 1 WLR 1373.
177 Ibid at 1378 B–E.
178 Unreported, 10 April 1992 (England and Wales).

> The Order was legislative rather than administrative. The 1986 Orders empower the Department to make Orders upon the terms set out, and road closing Orders are made by the Department from time to time under this power, taking the form of statutory rules. This in my view is part of the process of delegated legislation, and is not made any the less so by reason of the fact that the Order applies for a limited time, and its immediate effects bear most directly upon a limited class of persons residing along the roads closed. The Department is in my opinion entitled to make the closing Order without consultation, and the Secretary of State as Minister in charge of that Department is responsible only to Parliament. I do not consider that an arguable case can be made out for any right to consultation, since the fact that the Order is a legislative instrument made under delegated powers puts an end to the plaintiff's contentions.[179]

After noting that this approach was adopted and applied in Canada[180] and Australia,[181] the court concluded that the power exercised in making the Provisional Collection of Taxes Order was clearly a legislative power and that it was reluctant to apply the principles of fairness and natural justice in relation to that Order.[182] It continued that, if such principles were applicable at all, it must be an exceptional case, which the instant case was not. The court further concluded that the authorities show that the circumstances in which subordinate legislation would be successfully challenged on the ground of legitimate expectation would be rare, *a fortiori* where the Minister of Finance was acting on a legislative matter within his authority on a revenue matter in the Budget.[183]

IMPROPER FORUM

The courts are very cognisant of their limited role in judicial review applications and, as such, they have made it clear that, in some cases, other bodies are better equipped than they are to deal with certain matters, at least before the jurisdiction of the courts is invoked. One such example is where the court believes that another body is best able to deal with the issues before it becomes involved. This issue, it must be noted, it closely aligned with the one mentioned above relating to alternative remedies. In *Cable Bahamas Limited v Public Utilities Commission*,[184] the claimant sought judicial review of the decision of defendants that optical Ethernet technology could not be used on the claimant's internet service provider licence. In answering the question of whether the internet service provider agreement encompassed the use of optical Ethernet technology, the court examined the question of whether another forum was better suited for the dispute at hand rather than the courts. In rejecting the application, the court concluded that the other ground on which the application for judicial review failed was that, on the facts of the case, it was a most inappropriate course of action.[185] In its view, since the affidavits contained opposing opinions on the key issue, on the face of the record and the state of the expert evidence it was almost impossible for the court to decide which side should be preferred. The court noted that the case was replete with technical jargon uttered by persons on both sides who were experts in the field of technology and telecommunications.[186] As a result, it held that the court

179 Ibid.
180 *Penikett and Yukon Territorial Government v Prime Minister of Canada and Attorney General of Canada* 45 DLR (4th) 108).
181 *Austral Fisheries Pty Ltd and the Minister for Primary Industries and Energy* (1992) 37 FCR 463.
182 TT 2007 HC 87 at [15].
183 Ibid.
184 BS 2002 SC 28. See also *Digicel (Trinidad and Tobago) Ltd v MacMillan* TT 2007 HC 184.
185 BS 2002 SC 28 at 40.
186 Ibid.

was ill-equipped to adjudicate the pertinent issue.[187] It continued that the Supreme Court appellate forum and procedure provided in section 7 of the Telecommunications Act were better suited for the exercise, because it would afford the parties ample opportunities to test the experts, where necessary by cross-examination, and, should the matter subsequently come before the court, would provide it with much more evidence for its consideration and decision. In addition, the court noted that, in such a case, there would be great scope to allow the video and graphic demonstration the applicants had proposed, but which was rejected by the court.[188]

PREMATURITY

There must be a genuine dispute before the application for judicial review can be entertained by the court. Where the statute requires a decision maker to make a particular decision, an applicant cannot bring an application for judicial review for failure of that public authority to decide the matter without first making such a request of the public authority. In *Carib Info Access Limited v Minister of Public Utilities*,[189] the applicant made a written request to the second respondent under the FIA for: (a) a copy of all written contracts awarded within the last two years for the provision of goods and services; and (b) in all cases where professional services were rendered, the brief particulars of services, persons or firms or organisations that provided services indicating the fees and disbursements paid during the last two years. The Communications Manager of the second respondent advised the applicant that the second respondent was a public authority within the meaning of section 4 of the FIA, and that this request should be directed to the responsible minister, namely the Minister of Public Utilities.[190] The applicant subsequently brought an application for judicial review and was granted leave to apply for judicial review only in respect of information requested in the first part of the request, that is, in respect of copies of all written contracts for the provision of goods and services for the previous two years. The court explained that the main issues in the case were, first, whether the request should have been made to the responsible minister; and, second, whether the applicant had an alternative remedy.[191]

The court noted that section 22(1) of the FIA clearly set out the persons who may make the decisions in respect of a request made to a public authority[192] and that section 22(2) applied where no arrangements had been made or published under section 7 of the FIA in respect of the document requested. It claimed that, in such a case, for the purpose of enabling an application for judicial review to be made, the decision was deemed to have been made by the responsible minister.[193] The court was of the view that the deeming provision did not override the express words of section 13(5), which made it clear that an application for access to an official document held by a public authority shall be made to the responsible minister. The language, in its opinion, was clearly mandatory in its terms that it was intended to apply to a situation where an applicant for judicial review was unable to identify the actual decision maker in a public authority.[194] In such a case, the court continued, the responsible minister was deemed to have made the decision for the purpose of bringing the application.[195] The court therefore held

187 Ibid at 41.
188 Ibid.
189 TT 2006 HC 123. See also *Galbaransingh v Attorney General of Trinidad and Tobago* TT 2007 CA 44.
190 TT 2006 HC 123 at 2.
191 Ibid.
192 Ibid at 3.
193 Ibid.
194 Ibid.
195 Ibid at 4.

that the request should have been made to the responsible minister, and not to the public authority itself. On the facts, the court noted that it was not in dispute that the request was made to the public authority and that no request was made to the responsible minister despite a letter from the second respondent advising the applicant to so direct his request.[196] As a result, the court held that it followed that, first, the second respondent was not a proper party to the judicial review action and the application against it must be dismissed; and, second, the application for judicial review against the first respondent was premature, since no request had been made of him. Therefore, it concluded that the application against the first respondent must also be dismissed.[197]

The issue was again considered in *MacIntosh v Police Service Commission*,[198] where the applicant applied for leave to file a judicial review claim against the defendant. The applicant was a member of the Police Service, and was aggrieved that he had not been promoted to the rank of inspector from the rank of sergeant.[199] The court reiterated that judicial review proceedings concerned the power of the courts to pronounce upon the methodology utilised by a decision maker in arriving at its decision or, expressed another way, whether the proceedings empower the court to scrutinise the procedural component of decisions made by competent authorities; and that it was not an appeals process.[200] In addition, the court claimed that it was essential, therefore, that there must be a decision to be reviewed, even if it was a decision to do nothing; and that decision must be one communicated to the person seeking to question it.[201] It claimed that it was of critical importance that 'whilst the decision-making process may impugn the decision made by the maker, the Court cannot strike down that decision and substitute its own if the method of arriving at the decision was flawless'.[202] The applicant argued that his application for leave was not premature and the application was a fit and proper case to grant leave to apply for judicial review.[203] The defendant argued that, first, the application was not properly commenced because it was premature; second, it was not that the court would not grant leave in the face of existing adjudication proceedings; third, the intervention would be done only in exceptional circumstances; fourth, the normal procedure was to allow the body to proceed to its decision; and fifth, it was when there was need to challenge the decision arrived at that the court's supervisory powers to review were invoked.[204] On the facts, the defendant argued that the decision-making process was not complete at the date of the application for leave; that the process was still in train and that the correct procedure was to await the outcome of the process before seeking redress.[205] In other words, judicial review was a remedy of last resort. After analysing the facts, the court held that there was no decision made in relation to the applicant's representations concerning his promotion, so there was, therefore, no decision to challenge by way of judicial review.[206] The court ruled that, on becoming aware of his claim, the applicant chose not to invoke the court's assistance but to follow the procedure in the PSC Regulations. It

196 Ibid.
197 Ibid.
198 TT 2007 HC 49. See *Maraj v Board of Inland Revenue* TT 1996 CA 27 where it was stated that '[i]n my view, if the appellants wished to mount a challenge to what the Revenue were doing by way of judicial review, then they ought to have waited at least until the assessment was made and then challenged that assessment. They did not do so. In my opinion the challenge was mounted prematurely'; *Ogunsalu v Dental Council of Trinidad and Tobago* TT 2005 HC 93; and *Thompson v Brancker* BB 2004 CA 20.
199 TT 2007 HC 49 at [1].
200 Ibid at [2].
201 Ibid at [3].
202 Ibid.
203 Ibid at [9].
204 Ibid at [10].
205 Ibid.
206 Ibid at [11].

noted that the process was still in train and that no decision was yet made concerning the applicant's representations. Since there was no decision and there was no evidence of exceptional circumstances warranting its intervention, the court concluded that it could not see how the application for leave could be favourably considered.[207]

PUBLIC INTEREST CONSIDERATIONS

Where there is an overwhelming public interest consideration, the court may decide to lean in favour of not favouring granting the remedies sought in an application for judicial review. In *Nagles v Superintendant of Prisons*,[208] the applicants sought, in judicial review proceedings, *inter alia*, a declaration that the decision of the respondent to place them in maximum security and or detain them under the same terms and conditions as a person who was under sentence of death was an unreasonable or irregular or improper exercise of discretion. In addition, the applicants argued that the decision was made taking improper or irrelevant considerations into account and/or in breach of the rules of natural justice and/or in the absence of any evidence.[209] The court was of the opinion that the minister's certificate was not decisive and that the interests of government, for which the minister should speak with full authority, did not exhaust the public interest. It continued that another aspect of that interest was that impartial justice should be done, not least between the citizen and the Crown.[210] The court noted that it was for it to balance the conflicting interests and decide where the weight of public interest predominates. In other words, the court must determine for itself whether the information sought should be disclosed and, in the instant case, the reasons why the Superintendent of Prisons placed the applicants in maximum security was relevant to the matters under consideration, having regard to the relief which the applicants sought.[211] Nonetheless, the court considered that disclosure of this information would prejudice the public interest in the proper functioning and security of the prison and it also considered that this was where the weight of public interest predominated.[212] As a result, the court ruled that the Superintendent of Prisons would not, therefore, be ordered to disclose the reasons or considerations why the applicants were kept in maximum security.

OUSTER CLAUSES

Introduction

One issue that has plagued Commonwealth Caribbean public law is the issue of how the courts should deal with ouster clauses. These clauses purport to oust the jurisdiction of the court to review the exercise of a power by a public authority and are usually found both in legislation and in the Constitution. The central question, then, is whether these clauses are meant to shield the unlawful use of power by a public authority. The courts had traditionally maintained that these clauses shielded functionaries from judicial review but they have come to accept, albeit reluctantly, that they do not shield actions of public authorities that go outside their jurisdiction,

207 Ibid at [13].
208 BB 2000 HC 10.
209 Ibid.
210 Ibid.
211 Ibid.
212 Ibid.

applying the seminal but problematic case of *Anisminic v Foreign Compensation Commission*.[213] However, some decisions of Commonwealth Caribbean courts have held steadfastly to the pre-*Anisminic* approach in relation to statutory ouster clauses. In relation to constitutional ouster clauses, the courts have adopted a very pragmatic approach. Where the matter concerns the Head of State, the courts have accepted that the ouster clause is a complete bar to judicial review. However, where the issue concerns other public authorities or bodies, for example the various service commissions, the courts claimed that the ouster clause will not prevent it from inquiring into the merits where the act concerned breached the rules of natural justice or the fundamental rights and freedoms enshrined in the Bill of Rights.

Statutory ouster clauses

The courts have noted that '[i]t seems clear that, notwithstanding the purported "ouster of the Court's jurisdiction" pursuant to a privative or "finality" clause such as this, the Court retains its review jurisdiction where either: (a) the decision of the tribunal is a nullity; or (b) the tribunal had made an error of law which affected its jurisdiction.'[214] In *Attorney General of Trinidad and Tobago v Lopinot*,[215] the court noted that, in this regard, the authorities show that the use of the word 'final' in an ouster clause in an enactment was not conclusive; and, notwithstanding the use of this expression, the decision of a tribunal or authority might still be disturbed by the court; and that the court may intervene by way of *certiorari* or by a declaratory order, as the case may be, if an executive authority or tribunal, in the exercise of its discretionary powers under a written law, acted either without jurisdiction or in excess of it.[216] In *Bristow Caribbean Limited v Registration Recognition and Certification Board*,[217] the court noted that *Anisminic* established that the High Court had a supervisory jurisdiction over the proceedings and decisions of inferior courts despite an ouster clause. It continued that the veil of the ouster clause would be removed if there was a jurisdictional error; and that, in order to determine whether there was such an error, the High Court had developed and applied modalities of legality, irrationality and procedural impropriety.[218] The court was of the opinion that, since then, the concept of a jurisdictional error had been extended to include a misdirection of itself in law by a tribunal. In *Attorney General of the Bahamas v Ryan*,[219] the respondent, who had been ordinarily resident in the Bahamas Islands since 1947, was issued in 1966 with a certificate that he belonged to the Bahamas for the purposes of the Immigration Act 1963, and, thereby, he gained Bahamian status. In June 1974, he applied for registration as a citizen of the Bahamas under article 5(2) of the Constitution. He attended an interview at which questions were asked about his activities since 1947, but no suggestions were made that he might have done anything that would be a ground for the Minister to refuse his application either under paragraphs (a) to (e) of the proviso to section 7 of the Bahamas Nationality Act 1973 or 'for any other sufficient reason of public

213 [1969] 1 All ER 208.
214 *Dyoll Insurance Company in Liquidation* JM 2007 SC 17.
215 (1983) 34 WIR 299 (considering section 11(3) of the Town and Country Planning Act and section 2(2)(e) of the Constitution); *Re Application by the Aviation and Allied Workers' Union for Judicial Review* TT 1995 HC 21; *Griffith v Barbados Cricket Association* (1989) 41 WIR 48; *Reid v City of Kingston Credit Union Limited* JM 2008 CA 71; *Republic Bank Limited v Registration Recognition and Certification Board* TT 1994 HC 128; *Sowatillall v Fraser* GY 1960 FSC 14; *Sparman v Greaves* BB 2004 HC 21; and *Trinidad and Tobago National Petroleum Marketing Company Limited v Registration Recognition and Certification Board* TT 2008 HC 177.
216 Citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 and *Attorney General (Bahamas) v Ryan* [1980] AC 718.
217 TT 2001 HC 19.
218 Ibid.
219 [1980] AC 718.

policy'.[220] His application, however, was refused and at no time was he given any reasons for that refusal. He applied to the court for a declaration that, on the true construction of the Constitution, he was entitled to be registered as a citizen of the Bahamas.[221] The Supreme Court held that the respondent was entitled to a fair hearing in accordance with the principles of natural justice and, since he had not been given an opportunity to be heard, the Minister's decision was a nullity, but the two judges differed on whether the court was entitled to grant the declaration with the result that the summons was dismissed. The respondent appealed and the Court of Appeal allowed the appeal and made a declaration that, at the inception of the proceedings, the respondent was entitled to be registered as a citizen of the Bahamas subject to his compliance with article 5(3) of the Constitution.

On appeal to the Privy Council, Lord Diplock stated that the relevant ouster provision of section 16 of the Bahamas Nationality Act 1973 (BNA) was as follows: 'The decision of the Minister on any such application [sc. for registration as a citizen of the Bahamas] . . . shall not be subject to appeal or review in any court.'[222] He continued that 'appeal' in the context of an ouster clause meant re-examination by a superior judicial authority of both findings of fact and conclusions of law as to the legal consequences of those facts made by an inferior tribunal in the exercise of a jurisdiction conferred upon it by statute to decide questions affecting the legal rights of others, and the substitution of the superior judicial authority's own findings of fact and conclusions of law for those of the inferior tribunal. Lord Diplock explained that in a 'review', the function of the superior judicial authority was limited to re-examining the inferior tribunal's conclusions of law as to the legal consequences of the facts as they had been found by the inferior tribunal.[223] He claimed that it was by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision-making authority, the Minister, had jurisdiction to make; and that, if in purporting to make it, he had gone outside his jurisdiction, the decision was *ultra vires* and was not a 'decision' under the BNA. Lord Diplock stated that the Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which included executive authorities exercising quasi-judicial powers, might, in appropriate proceedings, either set it aside or declare it to be a nullity, citing *Anisminic*.[224] Lord Diplock continued that it had long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice was outside the jurisdiction of the decision-making authority. As a result, the Board concluded that the ouster clause in section 16 of the BNA did not prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and was *ultra vires*.[225]

Constitutional ouster clauses

The courts are now confident in asserting that '[a]n ouster clause therefore shields a determination from appeal or review unless the person or authority empowered to make the decision makes one which is a nullity because it goes outside the prescribed jurisdiction or fails to obscure the rules of natural justice.'[226] In addition, the court in *Philip v Attorney General of the Bahamas* claimed that:

220 Ibid.
221 Ibid.
222 Ibid.
223 Ibid.
224 Ibid.
225 Ibid.
226 *Philip v Attorney General of the Bahamas* BS 1992 SC 44.

> [t]hese decisions are therefore to the same effect: a determination may not be inquired into unless the empowered tribunal exceeds, in the view of the Court, its jurisdiction or renders a decision which is otherwise a nullity and well illustrate how ouster clauses are construed, even though a constitution is generally construed more liberally than ordinary legislation. But what is of greater significance, given the role and function of the constitution, is that an ouster clause, but for the limited potential opportunities to challenge a determination, produces finality.[227]

In *Thomas v Attorney General of Trinidad and Tobago*,[228] the Privy Council had to consider the scope of section 102(4)(a) of the Constitution, which provides that the question whether 'a commission to which this section applies [here the Police Service Commission] has validly performed any function vested in it by or under this Constitution . . . shall not be inquired into in any court'. In that decision, the appellant was dismissed from the police service for alleged acts of indiscipline. He argued that he was wrongfully dismissed from the police service and claimed damages for breach of his constitutional rights. The Board had to consider whether section 102(4) precluded it from determining the issue of whether he was wrongfully dismissed from the police service. Lord Diplock noted that whether that clause ousted the jurisdiction of the court to inquire in any circumstances into the validity of administrative orders made by the Police Service Commission (PSC) was a question that this Board deliberately left open in *Harrikissoon v Attorney General of Trinidad and Tobago*.[229] He continued that the question that it was sought to have decided was the validity of the PSC's order removing him from the police service, which it made in purported exercise of disciplinary control over him. Lord Diplock claimed that jurisdiction to remove him from the police service and also generally to exercise disciplinary control over him while he remained a member of the police service was expressly conferred upon the PSC by section 99(1) of the Constitution:

> in words so ample, simple and unqualified that they are in marked contrast to the detailed and restrictive definitions of the jurisdiction of administrative tribunals that are normally found in the Acts of Parliament which set them up. Their Lordships use the expression 'jurisdiction' rather than 'power' because of the use of this expression in *Anisminic* . . .[230]

The Board explained that '[i]n exercising such jurisdiction the commission is clearly performing a function vested in it by the Constitution' and 'the question whether it has performed it validly by removing the plaintiff from the police service falls fairly and squarely within the language of section 102(4)(a) as a question into which by the Constitution itself the court is prohibited from inquiring'.[231] Additionally, it noted that:

> [h]aving granted to government employees a security of tenure superintended by autonomous commissions it may well have been thought not to be in the interest of efficient government if every appointment, promotion, transfer, termination of employment, made by the commission, or disciplinary penalty imposed by it, were left open to attack in a court of law with the delay in determining the status of individual officers within the public service that, as the instant case so dramatically illustrates, recourse to the courts would be likely to involve.[232]

The Board claimed that '[i]f the [PSC] had done something that lay outside its functions, such as making appointments to the teaching service or purporting to create a criminal offence,

227 Ibid.
228 (1981) 32 WIR 375; [1982] AC 113.
229 [1980] AC 265.
230 [1982] AC 113 at 134.
231 Ibid.
232 Ibid.

section 102(4) of the Constitution would not oust the jurisdiction of the High Court to declare that what it had purported to do was null and void'.[233] It also noted that there was:

> another limitation upon the general ouster of the jurisdiction of the High Court by section 102(4) of the Constitution; and that is where the challenge to the validity of an order made by the commission against the individual officer is based upon a contravention of 'the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations' that is secured to him by section 2(e) of the Constitution, and for which a special right to apply to the High Court for redress is granted to him by section 6 of the Constitution. *Generalia specialibus non derogant* is a maxim applicable to the interpretation of constitutions. The general 'no *certiorari*' clause in section 102(4) does not, in their Lordships' view, override the special right of redress under section 6.[234]

Thomas has been followed by many Commonwealth Caribbean courts, which claim that 'since the applicant is challenging the validity of the decisions of the Commission as a contravention of rights guaranteed by the Constitution, section 129(3) does not oust the jurisdiction of the Court'.[235] The courts have explained that, first, 'the ouster clause bites, once the function being performed by the commission and for the purposes of this case, by any person doing work in relation to the work of the commission, is within the constitutional jurisdiction of the commission'; and, second, '[t]here are, however, two exceptions when the ouster clause would not apply, viz. if the commission did something that lay outside its functions or where there is a challenge to the validity of an order made by a commission against an individual officer based upon a contravention of his right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.'[236] The court also pointed out that *Harrikissoon* and *Thomas* suggested a difference of approach when one was leading with an ouster clause to a statutory enactment in which domestic tribunals are performing quasi-judicial functions, and an ouster clause contained in a Constitution in which a commission whose creation, jurisdiction and powers were contained in the Constitution itself. Where such a commission was created by a Constitution, it claimed that it was intended to be somewhat autocratic and only subject to such constraints as pointed out by Lord Diplock in *Thomas*.[237] In addition, the court opined that 'when the Court is called upon to deal with the effect of an ouster clause contained in a Constitution in respect of a decision made by a commission, whose creation, powers, and jurisdiction derive from the constitution, it must so interpret the ouster clause that the supremacy of the constitution is preserved.'[238]

In *Re Aubrey Norton*,[239] the applicant sought an order that the decision of the chairman of the Elections Commission to declare Janet Jagan as President of Guyana was void. One of the issues for the court was whether it had jurisdiction to determine the proceedings and whether its jurisdiction was ousted by Articles 177(4) and (6) of the Constitution. The court noted that the common law of England was the common law of all of the English-speaking Commonwealth

233 Ibid at 135.
234 Ibid.
235 *Bissessar v Attorney General of Trinidad and Tobago* TT 2004 HC 59; *Charles v de la Bastide* TT 1999 HC 55; *Durity v Judicial and Legal Service Commission* TT 1994 CA 36; *Gerald v Governor of Montserrat* KN 2003 HC 14; *Guness v Public Service Commission* TT 1999 HC 4; *Jones v Solomon* TT 1989 CA 8, (1989) 41 WIR 299; *Philip v Attorney General of the Bahamas* BS 1992 SC 44; Re Rivas (1992) 54 WIR 112; and *Police Service Commission v Murray* TT 2000 CA 11.
236 *Charles v de la Bastide* TT 1999 HC 55.
237 Ibid.
238 Ibid. See also *Alleyne v Manning* TT 2008 HC 90, where the court considered the ouster clause in section 80(2) of the Constitution of Trinidad and Tobago.
239 GY 1998 HC 1. See also *Barnwell v Attorney General of Guyana* (1993) 49 WIR 88, where the court considered Article 226(6) of the Constitution of Guyana. It also considered articles 197(5), 197(7) and 132(8).

Caribbean territories which, as colonies, inherited the English judicial system.[240] It explained that, therefore, the principles accepted in *Anisminic* would in large measure be applied in the courts of the Commonwealth Caribbean. The court noted that *Anisminic*, however, was concerned with review of the jurisdiction of a statutory administrative tribunal with a statutory ouster clause, adding that the instant case was concerned with a constitutional ouster clause which was not unique to the Constitution of Guyana. It stated that many constitutions of Commonwealth Caribbean countries contain ouster clauses in relation to various functions of public and political officials but that they were, however, different in their interpretation and application.[241] After citing *Thomas*, the court was of the opinion that the import of that decision was that there was no intrinsic difference between a constitutional ouster clause and a statutory ouster clause, and the same principles will apply in construing them. However, it emphasised that the legal effect of these clauses depended in no small measure on the contexts in which they appeared and the language used.[242]

The court was also of the opinion that courts should lean towards literally interpreting exclusionary or ouster clauses in statutes relating to parliamentary affairs, thus leaving no room for liberal or expansive interpretations.[243] Such interpretations, in its view, might give rise to varying and variable opinions, leading to uncertainty in matters relating to the parliamentary system which should not be constricted by a plethora of judicial *dicta*.[244] In addition, the court asserted that another dimension with regard to the rationale for constitutional ouster clauses, pertaining to the parliamentary system, was that their inclusion in constitutions had more to do with political stability. It was also of the opinion that the draftsmen and crafters of the Constitution intended, in 1980, that the person elected to the high office of President of Guyana should be insulated and shielded from inquiry into his/her election, and that the validity of the election should not be the subject of direct judicial scrutiny.[245] The court held that what Article 177(6) sought to do was to preclude any direct challenge to the election of the person named in the instrument executed under the hand of the Chairman of the Elections Commission.[246] It continued that there are two words of significance in Article 177(6) and these are that the instrument executed under the hand of the Chairman of the Elections Commission stating that the person named therein was declared elected as President shall be *conclusive evidence* that such a person was so elected.[247]

In *Re Blake*,[248] the appellant filed an *ex parte* originating summons alleging that the Governor General's decision to appoint or retain the Prime Minister and to establish a minority Government was unconstitutional and that such decision infringed (or was likely to infringe) the appellant's fundamental rights and freedoms. The appellant sought a declaration by the court based on these allegations, but, in effect, claimed an order of *mandamus* requiring the Governor General to remove the Prime Minister from office, to dissolve Parliament and to call a General Election.[249] Hylton J refused the application and the appellant appealed to the Court of Appeal, since the Governor General's decision was protected by section 116(2) of the Constitution which states: 'Where by this Constitution the Governor General is required to perform any

240 GY 1998 HC 1 at 11.
241 Ibid.
242 Ibid at 12.
243 Ibid.
244 Ibid at 13.
245 Ibid at 14.
246 Ibid.
247 Ibid.
248 (1994) 47 WIR 174.
249 Ibid.

function in his own deliberate judgment or in accordance with the advice or recommendation of, or after consultation with, any person or authority, the question whether the Governor General has so exercised that function shall not be inquired into in any court of law.' Sir Vincent Floisac CJ held that section 116(2) of the Constitution was an *unequivocal* constitutional ouster of the jurisdiction of the High Court to entertain any application for judicial review of a decision made by the Governor General in the exercise of the constitutional and prerogative powers conferred upon him by section 52 of the Constitution.[250]

250 Ibid.

CHAPTER 6

JURISDICTION OVER FACT AND LAW

INTRODUCTION

The question of jurisdiction is one that has engaged the attention of the courts on numerous occasions. What happens if a body or person, in arriving at a decision, makes a mistake as to the nature of their powers, the scope of their powers, the relevance of evidence, or whether there was any evidence at all. There is, of course, the *ultra vires* doctrine and the courts were always quick to say that a decision was *ultra vires*, but the exact basis on which that finding was made was hardly ever articulated. In this chapter, it is hoped to make sense of the powers granted to public authorities and how they use them. At the centre of it all is the fact that such powers are discretionary and, therefore, allow some scope for the public authority to make a lawful decision taking such lawful considerations into account. However, even when this is done, the courts still have the power to declare such action as void if it is outside jurisdiction. Error of law has been seen as an aspect of illegality which is part of the broad *ultra vires* doctrine.[1] Important, too, is the principle that public authorities are bound by the constituent instrument that defines and outlines the powers that they are to exercise. If they exercise powers outside the scope of the instrument, it will be declared to be unlawful by the courts. In defining the boundaries of the exercise of powers it is critical that one first interpret the nature and extent of those powers. It is only after this is done that the courts can properly determine whether the public authority has acted outside those powers.

ERROR OF LAW

Introduction

The courts have made clear that, first, 'judicial review is concerned with the legality of the decision made, not with the merits of the particular decision'; second, '[t]he Court is therefore clothed with the authority to review public acts and to ensure that they are lawfully exercised in accordance with the power delegated to the specific functionary and thus in accordance with the legislation'; and, third, '[i]f a public body, though acting within its jurisdiction, makes an error of law, the Court will not be slow to intervene in order to ensure that the body reconsiders the matters and acts in a procedurally correct manner.'[2] This also occurs 'where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess.'[3] The court will be hesitant to grant judicial review on the basis of error of law where properly considered arguments reveal a mere dissatisfaction with advice presented.[4] There is a distinct lack of understanding of what error of law means, so much so that it has been argued that a decision can be so 'unreasonable as to amount to an

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1 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.
2 *Blaize v Architects Registration Board* AG 2007 HC 20 at [57].
3 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935. See also *Digicel (Trinidad and Tobago) Limited v MacMillan* TT 2007 HC 183; and *Digicel Limited v Telecommunications Regulatory Commission* VG 2007 HC 14.
4 *Chandler v Bernard* TT 1999 HC 31.

error of law'.[5] Although the courts in the United Kingdom have moved away from distinctions concerning errors of law within and outside the jurisdiction of the decision maker, some courts in the region have not done so. In *Durity v Judicial and Legal Service Commission*,[6] the court pointed out that any 'error of law would have to be outwith its jurisdiction and not simply an error of law within its jurisdiction' and that the 'latter error goes to the validity of its acts and functions and is saved from enquiry by the "ouster" clause unless, of course, there has been an infringement of a fundamental right in the performance of its functions'.[7] As a result, the judge rejected the objection, based on lack of jurisdiction, on the power of the Judicial and Legal Service Commission (JLSC) to discipline as misconceived. It continued that the:

> Constitution empowers the [JLSC] to discipline the applicant for misconduct, a power derived from the provisions of the Constitution itself and any error in carrying out this function, subject to the limitations set out above, would be an error within its jurisdiction not saved by the ouster clause. In this way the autonomy of the [JLSC] is preserved and the supremacy of the Constitution maintained.[8]

Where a public authority has directed itself correctly in law, the court 'on judicial review will not interfere, unless it considers [the] decision . . . was irrational'.[9] The court will, however, 'only quash a decision if the error of law was relevant to the decision-making process'.[10] An applicant should not lightly seek judicial review on the basis of error of law if there was little evidence on which to base the ground, because it would be 'frivolous or abusive of the Court's process'.[11] In *McClean v Barbados Light and Power Co Ltd*,[12] the judge quoted *Barbados Telephone Co. v Attorney General of Barbados*[13] for the view that 'an error of law can arise from a variety of circumstances including the misinterpretation of a statute or any other legal document or a rule of common law as well as those mentioned above' and 'the determination of primary facts is not a matter of law, but to make a finding unsupported by any evidence is an error of law.'[14] In that decision, the application related to errors made by the Public Utilities Board (PUB) in the calculations on which the rates were fixed. The court held that 'it has not been shown that the methodology adopted by the [PUB] is defective or that it was misapplied, the other because, although error has crept into the application of an appropriate methodology, the difference is not so substantial as to affect the rates to the extent of making them unfair or unreasonable.'[15] Consequently, the court dismissed the application.

A public authority must act only on the basis of legal authority; to do otherwise would amount to an error of law.[16] In doing so, it must focus only on the considerations spelt out in the statute and not on extraneous considerations.[17] Where either of these occurs, *certiorari* will lie to quash the decision.[18] Where a magistrate fell into error as to the law relating to abuse of process and the extent of her power as a magistrate to stay proceedings for an abuse of process,

5 *Coxon v Minister of Finance* BM 2007 CA 8. See also *PPC Ltd v Governor of the Turks and Caicos Islands* TC 1999 SC 6 at [57].
6 TT 1994 CA 36.
7 Ibid at p 4 of judgment of Hamel Smith JA.
8 Ibid.
9 *Kiss Baking Company Limited v National Insurance Board of Trinidad and Tobago* TT 2008 HC 148 at 18.
10 *Lawrence v Financial Services Commission* JM 2008 CA 56 at 16.
11 *Re Mathurin* LC 1988 HC 1 at 4.
12 BB 1980 HC 34.
13 BB 1974 HC 16.
14 BB 1980 HC 34.
15 Ibid.
16 *Ex p Panton* JM 1990 SC 7 at 7.
17 *Ex p Jamaica Civil Service Association* JM 2002 SC 10 at 17.
18 *Re Rebencio Chan* BZ 1984 SC 19.

certiorari would also lie.[19] In the case of a person who 'alleges lack of jurisdiction, or excess of jurisdiction or error of law, the onus is on the one who alleges to show that the decision-maker did not correctly understand the law which regulated its power or did not give effect to the power'.[20] The public authority must actually have the power to make a decision before it can lawfully exercise it.[21] The court has also pointed out that '*certiorari* lies to quash error of law on the face of the record of inferior Courts and statutory tribunals, not quash awards of arbitrators. Error of law on the face of the award is referable rather to arbitration proceedings'.[22] It has also pointed out that '*certiorari* would lie from the decision of the Commissioner . . . for a jurisdictional defect, but not for error on the face of the record; an error of law not on the face of the record is not, of course, of itself ever a ground for *certiorari*'.[23] Some errors of law are better suited for challenge in the appeal court rather than as a constitutional challenge.[24] For example, in *Stanisclaus v Attorney General of Trinidad and Tobago*, where a magistrate imposed a sentence of five years in default of payment of the fine in circumstances where there was only jurisdiction to impose a maximum of three years in default, it was held that this constituted a breach of the applicant's right not to be deprived of his liberty except by due process.[25] A misinterpretation of the law will also amount to an error of law.[26] In *Thomas v Attorney General of Trinidad and Tobago*, the Court of Appeal stated that, first, '[t]he alleged illegality – the creation of disciplinary offences without statutory authority – is an error of law within jurisdiction in the process of exercising the function or jurisdiction, which was properly assumed and entered upon by the Police Commission'; and, second, '[a]t the highest it could only have been a wrong exercise, and not a usurpation of jurisdiction. There was no lack of jurisdiction.'[27] The appointment of a civil servant to a non-existent position was also an error of law.[28]

Statutory interpretation

The courts have had to determine whether the public authority or decision maker has acted outside the scope of the powers granted to it under statute. To do this, the court must first determine the proper meaning attributable to the words used in the statute. In other words, the courts must engage in an exercise of statutory interpretation. This was the case in *Alexandra Resort and Villas Ltd v Registrar of Time Share*[29] on an application for judicial review of the refusal by the Registrar of a time-share to approve the disbursement of certain funds. The court pointed out that section 10 of the Time-Sharing Ordinance (TSO) established a scheme whereby all funds received from a purchaser, in respect of the sale of a time-share, were placed by the seller in escrow during the statutory cancellation period, which was seven days from signature of the contract for purchase. The purpose of this was to protect the purchaser's right to a refund if he cancelled during the cancellation period. Upon the expiration of the cancellation period, the funds in the escrow account were to be disbursed according to a statutory

19 *Ex p Ragoonan* TT 2002 HC 45 at [5].
20 *Republic Bank Limited v Registration Recognition and Certification Board* TT 1994 HC 128 at 15.
21 Ibid.
22 *Sampson v Air Jamaica* Ltd JM 1992 CA 53 at 2.
23 *Sowatilall v Fraser* GY 1960 FSC 14.
24 TT 2002 HC 55 at 8.
25 Ibid at 6.
26 *Streeter v Immigration Board* KY 1998 GC 32 at 10; *Tudor v Public Service Appeal Board* TT 1985 HC 46 at 20; and *Ex p Palace Amusement Ltd* JM 1982 SC 42 at 15.
27 TT 1979 CA 1 at 77.
28 *The Institute of Jamaica v Industrial Disputes Tribunal* JM 2004 CA 15 at 27.
29 TC 2002 SC 8. See also *Cable and Wireless (Barbados) Ltd v Fair Trading Commission* BB 2004 CA 9 at paras [47] and [77]; and *Cable and Wireless (West Indies) Ltd v The National Telecommunication Regulatory Commission* LC 2003 HC 53.

regime, and only with the consent of the Registrar of time-share.[30] The Registrar refused permission to disburse funds in the escrow account in respect of the units sold on instalment terms, on the basis that the calculations submitted were incorrect, because the Registrar (on advice) considered that the expression 'funds which are received from a purchaser' in section 10(1)(a) of the TSO meant the total purchase price, and not the amount actually paid.[31] Pursuant to section 10 of the TSO, the Registrar required that the total purchase price be paid into the escrow account, notwithstanding that it had not all been received from the purchaser, and would not approve any payments until that had been done.[32]

The court ruled that 'all funds which are received from a purchaser' in section 10(1)(a) means funds actually received and that this was 'the only meaning that the words can bear on their face, and it accords with the purpose of the provision which is to protect the purchasers' funds during the cancellation period, and ensure that they are available for refund in the event of cancellation'.[33] It explained that '[t]he reality is that the legislation is not framed to fit instalment sales' and that the 'Registrar has attempted to interpret it in order to make it do so, but in doing that has gone beyond the limits of the law as presently drafted.'[34] The court, therefore, concluded that '[i]t follows that I also consider that the exercise of discretion by the Registrar was based on an error of law, and in principle I think that an order of *Mandamus* would be justified.'[35] In *Cable Bahamas Ltd v Public Utilities Commission*,[36] the applicant argued that the Public Utilities Commission (PUC) exceeded its jurisdiction and accordingly its decision was founded wholly on error of law. The PUC's statutory function, it contended, was to establish technical standards so the court ruled that, therefore, that the PUC had no jurisdiction to determine which actual technologies could be used but rather just the technical standards to be met. Accordingly, as the PUC acted on an error of law by exceeding its jurisdiction or assuming jurisdiction that it did not legally have, its decision was liable to be quashed.[37] The court rejected that claim on the basis that 'no definitive decision has been made by the PUC which would give the case a basis for judicial review. In other words no proper foundation exists for making the impugned conduct of the PUC amenable to judicial review.'[38] Many of the decisions under this head relate to utilities regulation. In *Digicel (Trinidad and Tobago) Limited v MacMillan*,[39] it was argued that the:

> Panel fell into error by concluding that the 'economic principle of efficiency' obliged it to construe the clear words of the [Telecommunications Act (TA)] so as to introduce the principle not only into the calculation of a Concessionaire's costs but so as to oblige each Concessionaire to calculate its costs and thereby fix its prices, not by reference to its own costs (even if reasonable or efficient considering its own circumstances), but on the basis of the costs of a static efficient telecommunications network operator in the period that such an operator would reach that static efficiency.[40]

The applicant argued that this central conclusion permeated through the whole of the Arbitration Panel's reasoning and was at the foundation of its error of law.[41] The court pointed

30 TC 2002 SC 8 at [3].
31 Ibid at [4].
32 Ibid.
33 Ibid at [6].
34 Ibid at [10].
35 Ibid at [12].
36 BS 2002 SC 28.
37 Ibid at 32.
38 Ibid.
39 TT 2007 HC 183.
40 Ibid at 27.
41 Ibid at 28.

out that '[a]ll statements that fall from the mouths of decision makers . . . are liable to scrutiny as an error of law vitiating the decision' and that '[w]hat must be established is an error of law in the actual making of the decision which error affects the decision itself.'[42]

The court explained that the question for consideration was not whether the Panel was correct in determining that the regulatory scheme, as established by the TA, did not preclude the establishment of rates based on reciprocity, but rather whether, in coming to that decision, the Panel applied the law correctly.[43] In other words, the court asked whether this was a conclusion which it was open to the Panel to make if properly directed in the law. The court responded that the answer to this question was yes, and that it could not conclude that the Panel incorrectly applied the relevant law.[44] In its opinion, the approach adopted by the Panel in this regard could not be faulted and the Panel had considered the section and, in particular, the words 'on a cost basis, in such a manner as the Telecommunications Authority [(Authority)] may prescribe' as it was required to do. It arrived at its conclusion after considering all the pronouncements of the Authority in this regard and all the relevant provisions of the TA, the Concessions, the Regulations, the interconnection guidelines and relevant benchmarks.[45] The court noted that, if the Panel erred at all, it erred in that it was perhaps a little too zealous in its approach to the dispute.[46] However, the court ruled that over-zealousness was not, as yet, as far as it was aware, a ground for challenge by way of judicial review. As a result, the court concluded that the Panel committed no error of law in coming to its decision.[47] The court has made clear that if a tribunal misinterprets the law, then there would be an error on the face of the record which will be quashed by the court.[48] But any such error of law must go to jurisdiction for that remedy to lie; otherwise, the only remedy for the applicant was by way of an appeal.[49]

Service commissions

As was seen in previous chapters, there was hardly any question that public service commissions were subject to judicial review so it should be equally unsurprising that they too can make errors which go to jurisdiction when they make decisions that affect public officers. In *Jones v Solomon*,[50] the applicant sought judicial review of the decision of the Public Service Commission (PSC) to retire him in the public interest. The Court of Appeal noted that the PSC fell into grave error by adopting a completely wrong approach in not taking into account the fact that the respondent had been given an acting position in a post higher than his substantive post and so exceeded its jurisdiction.[51] The questions which arose for consideration by the Court of Appeal were, *inter alia*: (a) what comprised the record on the face of which the error of law could be discerned; and (b) if the error of law was patent on the face of the record, was a *certiorari* procedure available if the error did not go to jurisdiction.[52] It accepted that 'the record comprises the document initiating the proceedings, the pleadings (if any) and the adjudication but not the evidence or the reasons unless the tribunal chooses to incorporate them.'[53] The court explained that '[f]or the

42 Ibid.
43 Ibid at 30.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid at 31.
48 *Ex p Clive Green* JM 1989 SC 11 at 17. See also *Re Storr* BS 1987 SC 58 at 5.
49 *Re Dasrath* VC 1987 HC 7.
50 TT 1989 CA 8.
51 Ibid at 9.
52 Ibid at 13.
53 Ibid at 15.

error of law to have any effect, it must be patent on the face of the record. It was not open to the judge therefore to analyse the evidence in his attempt to find a latent error.'[54] It continued that it was 'evident from an examination of the record as constituted in this case that no error is discernible on its face'.[55] The court stated that the '*certiorari* procedure is available to quash for error which is patent on the face of the record', noting that, however, 'where statute ousts the power of the High Court to review decisions of inferior tribunals, then *certiorari* is only available where the error goes to the tribunal's jurisdiction.'[56] It then concluded that the PSC acted within its jurisdiction in removing the respondent from the public service on retirement in the public interest for what it considered to be reasonable cause, that is to say, that he was temperamentally unsuitable to hold the post of Organisation and Management Officer I.[57] Where the Teaching Service Commission (TSC) accepted the recommendation of a School Board to reject an application for the post of principal where the Board had taken into account irrelevant considerations, the court held that 'when the [TSC] acted on that recommendation it committed an error of law; and condoned the wrongful action of the Board'.[58]

Fundamental rights and freedoms

The question of whether an error of law has been made is not only relevant in administrative law; the courts have also made it plain that it also relates to whether there has been some infringement of a fundamental right or freedom under the Constitution. In some cases the court has made it clear that 'the distinction to be made between substantive error of law and procedural impropriety was relevant to whether the requirement of due process mandated by section 1(a) had been satisfied, and is not necessarily relevant to breaches of the freedoms.'[59] It further held that, 'even if publication of the story had been wrongly held to be a contempt, that was a substantive error of law and was no more susceptible of collateral attack by a constitutional motion than any error of interpretation of a statute made by a judge in the course of a criminal trial.'[60]

Mistaken view of the law

A mistake of law would also amount to an error of law. Thom J in *Andrews v Director of Public Prosecution*[61] quoted the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions*[62] where it stated that a:

> mistaken view of the law upon which a proposed prosecution is based will not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced. Where a complaint is particularised in such a way as to raise the question of law for determination it may be struck out or where an indictment does the same, the indictment may be quashed. Such an error of law does not fall within the category of an error of law which goes to the Director of Public Prosecution's powers to prosecute.[63]

54 Ibid at 16.
55 Ibid at 16–17.
56 Ibid at 17.
57 Ibid at 22.
58 *Maharaj v Teaching Service Commission* TT 1994 HC 100.
59 *Ali v Attorney General* TT 2002 CA 47 at 41.
60 Ibid at 43.
61 VC 2008 HC 13.
62 [2003] 4 LRC 712.
63 Ibid.

The court continued that:

> an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the Director of Public Prosecution's power or vitiates the proper exercise of the Director of Public Prosecution's discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The Director of Public Prosecution is empowered to make such judgments even though they may be wrong on law or mistaken on the facts.[64]

Interim relief

Where a judge 'erred in holding that there was an arguable issue that the parties to the judicial review proceedings and the arbitration proceedings may be regarded as the same',[65] the Court of Appeal of Belize in *Belize Water Services Limited v Attorney General of Belize* held that the judge erred in law in holding that there was an arguable case that, for the purposes of the judicial review proceedings and the arbitration proceeding, the parties might be regarded as the same and that the arbitration proceedings are vexatious, unconscionable and oppressive.[66] The court also stated that, in its view, the errors of law by the judge fall within the statement of law enunciated by Lord Diplock in *Hadmor Productions v Hamilton*.[67] The respondent argued that the finding of the judge should not be categorised as a patent error of law which should enable the Court of Appeal to reverse his discretion but, subsequently, correctly conceded that the appellant was correct.[68] The Court of Appeal also pointed out that it was more concerned about the complete disregard that the comparative exercise, undertaken by the trial judge between judicial review proceedings and the arbitration proceedings, itself demonstrated because of the fundamental difference between judicial review and a private law action, whether commenced in court or by arbitration.[69] It continued that, '[a]s counsel for the appellant submitted, one is a public law matter, and the other is a private law matter' and:

> given that the parties to each may be different (as is plainly the situation in this case) and that the available remedies may be different, the genesis of both sets of proceedings from a similar – or even identical – factual matrix may not necessarily be of any particular significance.[70]

The court then cited *Hadmor Productions v Hamilton*[71] for the well-known statement by Lord Diplock of the basis on which an appellate court might be at liberty to interfere with a judge's exercise of his discretion to grant an interlocutory injunction. There, it was made clear that the appellate court was not permitted to substitute its own view of the facts for those of the judge who made the order; indeed, the appellate court was required to defer to the judge's exercise of his discretion and to interfere only where it could be demonstrated that he proceeded on 'a misunderstanding of the law or the evidence before him' or where his decision to grant or refuse the injunction was 'so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached' the conclusion that he did.[72] On the facts, he held that 'interference within the *Hadmor* formulation is amply justified

64 VC 2008 HC 13.
65 *Belize Water Services Limited v Attorney General of Belize* BZ 2005 CA 20 [20].
66 BZ 2005 CA 20 at [32].
67 [1983] 1 AC 191.
68 BZ 2005 CA 20 at [32].
69 Ibid at [12].
70 Ibid.
71 [1983] 1 AC 191.
72 BZ 2005 CA 20 at [4].

in this case by the misapprehension by the learned judge of this important distinction' between judicial review proceedings and arbitration proceedings.[73]

Reasons

The question of whether it is unlawful for a public authority to not provide reasons for decisions will occupy significant attention in a later chapter. However, suffice it to say here that the court has pointed out that the 'modern tendency is to infer that where reasons ought to be delivered and there are none the matter was not considered by the tribunal and in such circumstances a finding that there was a error of law is permissible'.[74] Whether this is a jurisprudentially sound basis to develop the general right to reasons will be explored later.

ERROR OF FACT

Errors of law and errors of fact

Does it make a difference whether the public authority has made an error of law or an error of fact? The courts treat both as jurisdictional so both form bases on which a court would quash a decision of a public authority. In *Re Dyoll Insurance Company Limited*,[75] the applicant applied to the court, in judicial review proceedings, for an order of *certiorari* to quash the decision of an arbitrator on the basis that it had found that the applicant's failure to deliver a registered title, which was in its possession or control, to the second respondent, was the cause of the loss of the second respondent's supply of a goods contract with the Ministry of Education, Youth and Culture and a consequent loss of profit arising therefrom.[76] In other words, the applicant argued that 'there was no evidence of a causal connection between the two things and that, accordingly, any award which was premised on such a cause was bad in law as there was no fulfilment of the legal requirement for there to be causation between the conduct or behaviour complained of, and purported consequential loss.'[77] After considering the leading authorities, the court was of the view that 'just as the decision in *Anisminic* has expanded review for error of law substantially to include errors made in the course of the proceedings (as opposed to errors going to jurisdiction) so too has review of error of fact expanded.'[78] It continued that it was 'prepared to hold that whereas the role of the Court is not to "find different facts" than those found by the tribunal whose decision is being called into question, there are cases where it is open to the Court to question as to whether "the mistake of fact is (so) fundamental", that it could "vitiate the basis upon which the decision has been made" '.[79]

It explained that a 'mistake of fact is likely to add great weight to a contention that the decision-maker has failed to take all relevant factors into account'.[80] In relation to error of law, counsel for the applicant claimed that the 'Registrar had not understood and applied the legal

73 Ibid at [15].
74 *Blake v Director of Public Prosecutions* JM 1998 CA 39.
75 JM 2007 SC 17. *McClean v Barbados Light and Power Company* BB 1980 HC 34; *McClean v The Barbados Telephone Company Limited* BB 1996 HC 9.
76 JM 2007 SC 17 at 2.
77 Ibid.
78 Ibid at 18.
79 Ibid at 20.
80 Ibid.

concept of causation' and that, as a result of that error of law, the Registrar had exceeded his jurisdiction and the award ought to be set aside.[81] The court held that '(given the alternatives based upon which the learned authors suggest it would be possible to find that there had been a reviewable error of law) in the instant case, there has been an application, or perhaps more correctly a misapplication, of the legal test'.[82] It explained that '[t]he expression "error of law" encapsulates illegality as a ground of review. It is no longer legally relevant (as it once was) to ask whether the error caused the decision-maker to exceed its jurisdiction', noting also that '[a]ll a plaintiff need show is that the decision-maker erred and that error was material (the error must influence the "outcome of the decision".'[83] It continued that, first, '[t]o assert that a body has committed an error of law requires explanation not only as to how the error of law was committed but also why the alleged error is an error of law'; and, second, '[t]his will facilitate understanding of what an applicant for review really has in mind.'[84] Consequently, the court 'formed the view that in the instant case, there is reviewable error of law'.[85]

No evidential basis – error of law or fact?

Where a decision maker forms a view concerning a particular issue without any factual basis, the court seems to be divided as to whether this properly amounts to an error of law or error of fact. In *Bovell v Commissioner of Police*,[86] the applicant sought judicial review of the decision or administrative act of the Commissioner of Police on the basis that it was against the weight of evidence, or reached upon an absence of evidence adduced in the disciplinary proceedings brought against the applicant.[87] After considering the evidence, the court concluded that there was no evidence to support the Commissioner's findings of fact that the applicant was voluntarily in the company of two men and saw one pass a firearm to the other. It continued that to find facts on no evidence was to err in law and that it was clear therefore that the conclusions reached by the Commissioner were unreasonable in all the circumstances.[88] Where the court finds that there was no evidence provided on which the allegations could reasonably be brought against the applicants, it would grant an order of *certiorari* to quash the decision or act of the Commissioner in issuing the Notice of Allegations which was sent to the applicants.[89] The court in *Government of the United States v Heath*[90] noted that if 'there is an error of law made by the Senior Magistrate which would show that he exceeded his jurisdiction then it would be open to this Court to quash the decision'.[91] It continued that the discussions engaged in by the Senior Magistrate on the cogency, credibility and sufficiency of evidence, coupled with his adverting to the constitutional provision as to the innocence of the respondents, suggested that the Senior Magistrate was seeking to determine if there was sufficient evidence adduced to make him feel sure that the respondents were guilty of the offences which they were accused of having committed rather than looking to see or considering whether there was sufficient evidence to warrant the committal of the respondents.[92] As a result, the court held that 'on the face of the

81 Ibid at 21.
82 Ibid.
83 Ibid at 28.
84 Ibid.
85 Ibid.
86 BB 1995 HC 19.
87 Ibid.
88 Ibid.
89 *Brancker v Thompson* BB 2001 HC 10.
90 KN 1998 HC 1.
91 Ibid.
92 Ibid.

record the Senior Magistrate considered matters he ought not to have considered; and he appeared to have sought to use a jurisdiction that he did not have.'[93] It then concluded that '[i]t was the duty of the Senior Magistrate to consider the whole of the admissible evidence before him; but he did not do so as he stated in the reasons he had for reaching the decision he did', concluding that '[o]n the face of the record therefore there is an error of law by the Senior Magistrate in not considering the evidence he was bound to consider.'[94]

The courts are consistent in asserting that it 'is an error of law to make a finding unsupported by any evidence.'[95] In *Makhan v Mc Nicolls*,[96] the court held that the respondent committed an error of law in finding that a *prima facie* case of the offence of misbehaviour in public office had been made out against the applicant, when the evidence did not disclose an essential element of the offence, namely that the applicant wilfully and intentionally abused a power or discretion which he had by virtue of his office.[97] Any decision must be made on adequate documentary evidence[98] or be supported by evidence.[99]

SUBJECTIVITY

Not all jurisdictional questions relate to whether there has been an error of law or an error of fact.[100] Sometimes a public authority is given a discretionary power by statute and, therefore, it must be exercised lawfully. Where the statute provides for such subjective criteria, the view of the decision maker is not determinative,[101] because the court would have the final say in determining whether, on the facts before it, the public authority had reasonable cause to have decided as it did, taking into account of the relevant circumstances of the case. In *R v Commissioner of Customs*,[102] the Commissioner of Customs ('the Commissioner'), having reviewed the information he received, believed that the applicants had committed breaches of the Customs Act (CA). In the exercise of his discretion, he advised the police that the applicants should be charged under the CA. The police obliged and charged the applicants for being knowingly concerned in the fraudulent evasion of import duties of customs, contrary to section 210(1) of the CA, and the second applicant was arrested in connection with the charges. The court held that the Commissioner 'is the repository of a statutory discretion, the proper exercise of which may lead him to institute Court proceedings against any person who he reasonably believes on the material before him has committed an offence against the [CA]'.[103] It continued that, before initiating court proceedings under section 210(1), for instance, he might, where the importer admitted liability, mitigate or remit the penalty that would be incurred under that subsection.[104] In addition, the court pointed out that, whenever the Commissioner exercised this discretion, he performed, in its opinion, an essentially administrative function which was an integral part of the execution of a wider administrative responsibility with which he was invested by the Revenue Administration Act and the CA.[105] The court therefore held that when the

93 Ibid.
94 Ibid.
95 *Holiday Inn Sunspree Resort v Industrial Disputes Tribunal* JM 2007 SC 11 at 9.
96 TT 2003 HC 88.
97 Ibid at 28.
98 *Matthew v Dental Council* BB 1996 HC 1.
99 *Ex p Serv-Wel of Jamaica Ltd* JM 1982 SC 9 at 30.
100 *Kennedy v Latchman* TT 2003 HC 113.
101 See *The Registrar to the Integrity Commission v Sharma* TT 2006 CA 3.
102 JM 1993 SC 4.
103 Ibid.
104 Ibid.
105 Ibid.

Commissioner decided to institute charges against the applicants he was only making a preliminary decision without binding and conclusive or final legal effect, there being as yet no determination in court of the ensuing summary proceedings.[106] The court was of the opinion that:

> if in the instant case the Commissioner reasonably believes that on the material before him a *prima facie* case exists against the applicant for fraudulent evasion of customs duties he might, where appropriate, invoke his powers of mitigation under section 219 or proceed in court under the relevant section of the legislation.[107]

Where section 29(1) of the Town and Country Planning Act (TCPA) provides that the Minister 'may grant planning permission, either unconditionally or subject to such conditions *as they think fit*', the discretion granted by the words in italics was not unlimited.[108] It was wrong, therefore, for the Minister to superimpose the condition which effectively amounted to saying that he was 'prepared to give you approval once you satisfy whatever we ask you to do'.[109] The court noted that, in enforcing the provisions of the TCPA, the Attorney General must follow its provisions; he had no right to issue a writ before an enforcement notice was served in accordance with the provisions of the TCPA and he was not, therefore, entitled to injunctive and declaratory relief in respect of the erection by the respondents of a building in breach of the provisions of the TCPA.[110] One of the important decisions in this area is *Burroughes v Katwaroo*,[111] where the applicant sought judicial review of the decision of the Police Commissioner to revoke his licence on the basis that it was 'contrary to the established principles of natural justice by reason of the fact that no procedural steps in accordance with the principles of natural justice were taken before such revocation and no reasons were given for revocation of the said licence'.[112] Section 21 of the Firearms Act (FA) states that the Commissioner of Police may revoke any licence, certificate or permit, *inter alia*, 'if he thinks fit'. The Court of Appeal of Trinidad and Tobago observed that:

> [i]n any event, in exercising that particular discretion he was enjoined to act fairly bearing in mind that the livelihood of Katwaroo would have been affected by his decision and that the decision itself involved an imputation on Katwaroo's character, and that in the event, it was not good enough . . . that in a case such as this the Commissioner need only say that 'he thought it fit' which incidentally according to counsel he did not even think it prudent to tell Katwaroo.

and that:

> [o]n the facts and on the findings of the learned judge the Commissioner was in breach of the rules of natural justice firstly as to the requirement of a hearing or in the alternative his duty to act fairly. The Commissioner had acted capriciously in the matter. This was implicit from the facts and findings of the learned judge.[113]

The Court of Appeal was of the opinion that 'it cannot be gainsaid that with respect to the cancellation of a licence under section 21(d) that the language, "if he thinks fit" is of such a kind as to vest the Commissioner with wide discretion' but that, although Parliament might have empowered a competent authority to take such action 'as it thinks fit' the courts would not necessarily allow this formula to debar it from its power of review of the exercise of the competent

106 Ibid.
107 Ibid.
108 *Arawak Homes Limited v Minister of Public Works* BS 1998 SC 50.
109 Ibid at 14.
110 *Attorney General of Trinidad and Tobago v Chatoor* TT 1984 HC 142.
111 TT 1985 CA 76. See *Globe Detective and Protective Agency Ltd v Commissioner of Police* TT 1997 HC 113.
112 TT 1985 CA 76.
113 Ibid at 13.

authority's discretion even though it is a purely executive one.[114] It asked how best could the court resolve the issue in the light of the competing claims of the parties, looked at against the background of the undisputed facts and/or the findings of the learned judge, the admittedly wide discretion with which the Commissioner was endowed and the court's approach in public law to the grant of discretions of the sort? The court replied that the answer must lie in the area of an approach by way of a resort to the facts (admitted and/or found) as disclosed by the record, the undoubted discretion with which the Commissioner was endowed by section 21(d), the conduct of the Commissioner in relation to those facts – admitted or proved – and the modern approach in public law to a situation of the kind.[115] It continued that, admittedly, the expression 'as he thinks fit' connoted an element of subjectivity; and, for that reason, including the fact that the subject matter with which the FA was concerned was of a highly sensitive nature, as a general rule, the courts should be slow to question the decision of the Commissioner in these matters.[116] However, the court claimed that this was by no means a prescription for accepting that, as a matter of law, the expression 'as he thinks fit', in itself, indicated that the discretion of the Commissioner was wholly unfettered in the area of revocation of a licence as distinct from the grant of such. It continued that it was in disagreement with his view that the due process clause of the Constitution in relation to Katwaroo and his fundamental right to the enjoyment of property had been violated by the act of the Commissioner.[117] The court continued that, by the same token, if the Commissioner was minded to revoke a firearm user's licence he must do so because he thinks fit on reasonable grounds.[118] It explained that a reasonable ground, among others, could be that the holder thereof had, since the grant to him, displayed evidence of intemperate habits or had since become of unsound mind or that the circumstances giving rise to the grant to him at the time no longer obtained. The court was of the view that the Commissioner is required to act if he thinks fit on reasonable grounds and not merely because 'he thinks fit' and no more; if that be the case then it seems to me that he would be acting not reasonably, but arbitrarily or capriciously.[119]

In *Edoo's Drugs Limited v The Pharmacy Board of Trinidad and Tobago*,[120] the applicant owned and operated a pharmacy and sought judicial review of the respondent's decision to impose a restriction on the opening and closing hours of its business.[121] The first issue for the court was whether the respondent, in providing forms for the applicant to apply for a licence, had jurisdiction to request information on a separate sheet of paper attached to Form I and, secondly, in granting a pharmacy licence, whether it also had jurisdiction to stipulate opening and closing hours on Form J.[122] The court noted that the duty bestowed upon the respondent by section 27B (3) of the Pharmacy Board Act (PBA) to 'ensure [when considering the grant of a licence] that the operations of pharmacies are controlled by pharmacists' did not allow it to unilaterally alter the Form J pharmacy licence set out in the schedule to the regulations. Nonetheless, the court claimed that the respondent was not powerless if it had a fear that a pharmacy would not be controlled by a pharmacist because the PBA provided appropriate remedies for such circumstances.[123] The unilateral alteration of the legal form, in the court's opinion, was not one of them. It claimed that the respondent could: first, monitor the pharmacy and take disciplinary steps including the institution of a criminal complaint should a pharmacy fall out of the control of a pharmacist;

114 Ibid at 14–15.
115 Ibid at 17.
116 Ibid at 18.
117 Ibid.
118 Ibid at 19.
119 Ibid.
120 TT 2007 HC 207.
121 Ibid at [1].
122 Ibid at [8].
123 Ibid at [13].

and second, refuse to grant a pharmacy licence if it had sufficient evidence that a pharmacy would not be under a pharmacist's control.[124] The court cautioned that the respondent should take great care, however, in exercising these options, explaining that the grant of or refusal to grant the licence must, however, in keeping with the statutory mandate in section 27B (3), be consistent with 'the provision to the public of full, efficient and economic service' in the supply of drugs and pharmaceutical goods. The court held that it did not think this mandate could be creatively construed to allow the respondent to unilaterally amend a statutory form, emphasising that such wide powers should be clearly set out in a statute.[125] It continued that there might be obvious good sense in stipulating business hours based on the pharmacy's actual business hours or the hours of its responsible pharmacist, but, in order for the stipulation to be effective, as a condition to its grant, the form of the pharmacy licence must comply with the regulations. The court stated that the respondent had the power to consult with the Minister under section 40, and the Minister had the power to make regulations, including regulations governing the licensing of pharmacies.[126] Noting that the Minister was the only person who can legally alter the statutory forms, the court observed that the respondent should have approached the Minister rather than unilaterally alter the Form J pharmacy licence, placing restrictions on the applicant's business hours. The court did not think that the respondent was wrong to request information about a pharmacy's business hours and the availability of responsible or relief pharmacists.[127] It accepted that the fact that the questionnaire, or request for information, was attached to the application form did not, in itself, make the application form *ultra vires*, claiming that it was the respondent's duty to have the most accurate or up-to-date information about the management of pharmacies, and the request for such information was not unreasonable, whether it came together with the licence renewal application or by a separate memorandum.[128]

The court continued that, although the licence merely duplicated the business hours voluntarily supplied by the applicant as its business hours, and those of its responsible pharmacist, the stipulation on the face of the pharmacy licence was actually a condition that would expose the applicant to penalty should it conduct business outside of the stipulated hours.[129] It claimed that a pharmacy which was under the control of a pharmacist, in accordance with the PBA, was, therefore, prevented from carrying out after-hours business, and that was only so because of the condition appearing on the pharmacy licence. The stipulation, the court held, was blind to the possibility that a pharmacist might be called out of his bed at midnight to fill an emergency prescription.[130] In that case, even though the pharmacy would be under the control of the pharmacist and, therefore, in compliance with the PBA, the court cautioned that the pharmacy would nonetheless be prevented from conducting its business. It noted that compliance with legal procedures in judicially reviewable decision making had nothing whatsoever to do with the pros and cons of the decision, but with the way or manner that the decision was taken or implemented.[131] The court reasoned that, in order to be effective as a stipulation, the respondent should have sought the Minister's assistance and amended Form J. It did not do so; as a result, the court held that, although the attachment of the questionnaire to Form I was *intra vires*, the alteration and issuance of the purported Form J pharmacy licence was done without lawful authority, and was *ultra vires* the regulations made under the PBA.[132]

124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid at [14].
130 Ibid.
131 Ibid.
132 Ibid.

NON-COMPLIANCE WITH STATUTORY REQUIREMENT

Another means by which a decision of a public authority could be held unlawful is if it did not comply with the statutory provision that regulated the exercise of its power.[133] In other words, it had either exceeded its jurisdiction or exercised a jurisdiction it did not have in the first place. In *Arawak Trust Company Limited v Holden*,[134] the claimant applied to the court for injunctive relief to restrain the Inspector of Banks and Trust Companies ('the Inspector') appointed under section 15 of the Virgin Islands Banks and Trust Companies Act (BTCA) from disclosing any information obtained from its files to any person whomsoever, pending the determination of an application for judicial review of the Inspector's action. The court stated that, having regard to the general scheme of the BTCA, it seemed to it that one could construe section 15(2)(b) or indeed section 15(2) of the BTCA without reference to the provisions of section 15(3), which both amplified and circumscribed the powers of the Inspector in the carrying out of his regulatory functions. It claimed that section 24 of the BTCA, on pain of penal sanction, expressly prohibited disclosure by the Inspector of any information relating to the affairs of a licensee or of a company managed by a licensee which he had acquired in the performance or exercise of his duties or functions except to a banking supervisory authority outside the Virgin Islands and with the consent of the licensee.[135] It was of the opinion that the Inspector had a duty in law to assist in the investigation of any contravention of the laws of the Virgin Islands that he had reasonable grounds to believe has or may have been committed by a licensee or by any of its directors or officers and in the performance of his functions; and he was entitled to have access to the books, records etc. of any licensee but not of the companies' books, records etc which were protected by the provisions of secrecy and confidentiality.[136] The court, therefore, concluded that:

> however laudable the Inspector's intentions may be or may have been in his resolve to assist in combating a massive worldwide fraudulent scheme, there is no doubt . . . that by divulging confidential information obtained from the companies' files to another person (other than a banking supervisory authority) without the consent of the party affected, the Inspector would thereby have transcended the scope of his authority and violated the secrecy provisions of the Act thus rendering himself liable to criminal prosecution.[137]

On appeal,[138] the Court of Appeal noted that section 24(1) of the BTCA was patently ambivalent; it imposed a statutory duty upon the Inspector to refrain from disclosing the information referred to in the subsection. It also noted that that statutory duty, of course, engendered a correlative statutory right in favour of licensees and companies with respect to non-disclosure.[139] The court claimed that the subsection simultaneously conferred upon the Inspector a statutory right to disclose the information 'for the purpose of the performance or exercise of his duties and functions'. As a result, it held that the Inspector's statutory duty and the licensee's correlative statutory right were circumscribed by the Inspector's statutory right.[140] The court noted that the limits of the Inspector's statutory duty and the licensee's correlative right must, therefore, be

133 *Communication Workers Union v Nealco Enterprise Ltd* TT 1994 IC 27; *Da Silva v Da Silva* VC 1981 CA 1 ('That the relevant provisions of sections 9 and 27 of the Act as to a marriage solemnized (a) at the office of the Registrar and (b) between the hours of ten a.m. and four p.m. are not mandatory but directory only, and as such do not go to the validity of this marriage.'); and *CJ Tours Service v Saint Lucia Air and Sea Ports Authority* LC 2007 CA 13.
134 VG 1994 CA 6. See also *Gulf Insurance Limited v Central Bank of Trinidad and Tobago* TT 2002 CA 35.
135 VG 1994 CA 6.
136 Ibid.
137 Ibid.
138 VG 1994 CA 10.
139 Ibid at 4.
140 Ibid.

determined by reference to the scope of the Inspector's duties and functions for the accommodation of the performance or exercise of which the Inspector's statutory right is granted.[141] It continued that the functions specified in section 15(2) were assigned to the Inspector, and the specific powers conferred upon the Inspector by section 15(3) were manifestly extensive. The court was of the opinion that those functions and powers were, in fact, mere illustrations of the Inspector's comprehensive control of the banking and trust businesses in the Virgin Islands and were intended to be performed or exercised for the purpose of fulfilling the legislative intention expressed in the long title to the BTCA.[142] The court was of the opinion that, to enable the Inspector to perform and exercise his statutory duties and functions and, in particular, the examinational function prescribed by section 15(2)(b) and the investigatory function prescribed by section 15(2)(c), section 24 of the BTCA conferred upon him a statutory right of disclosure. It claimed that the statutory right was necessarily generous and exclusive and, when exercised for the purpose for which it was intended, it operated to exclude the Inspector's statutory duty and the licensee's correlative statutory right with respect to non-disclosure.[143] Consequently, the court held that a breach by the Inspector of his statutory duty under section 24 of the BTCA could only arise in a case where the Inspector had disclosed information beyond the purview of his statutory right of disclosure or for a purpose extraneous to the performance or exercise of his wide statutory duties and functions.[144] On the facts, the Court of Appeal concluded that the purported cause of action was a suspicion of breach by the respondent of his statutory duty under section 24 of the BTCA. It noted that the appellant relied on the respondent to disclose the information demanded in the originating summons in the hope that the appellant would thereby transmute his suspicion into fact.[145] The question, therefore, for the Court of Appeal was whether disclosure could be ordered in those circumstances and for such a purpose.[146] Therefore, it further concluded that disclosure of the information demanded by the applicant should not be ordered merely on the basis of a suspicion of breach of a statutory duty and at a stage of the proceedings when the proven facts lend greater probability to the exercise of a statutory right to disclose the information than to the breach of a converse statutory duty to refrain from disclosure. In its view, an order for disclosure in these circumstances would amount to a judicial licence to embark on a fishing expedition, which was not the intended purpose of such an order.[147]

In *Francois v Attorney General of Saint Lucia*,[148] the applicant brought an action in the High Court alleging procedural impropriety by the Parliament of St Lucia in authorising the Minister of Finance to enter into a Fixed Rate Bond facility with the Royal Bank of Trinidad and Tobago Merchant Bank Ltd (RBTT) for the purpose of refinancing the Government's obligations in respect of the former Hyatt Hotel. In addition, the applicant claimed that Statutory Instrument No. 4 of 2003, which purported to be made under the authority of section 39 of the Finance (Administration) Act 1997 (the F(A)A) was illegal, void and of no legal effect. The court, at first instance, accepted that a guarantee, by its very nature, only triggered off on the occurrence of a contingency, namely the default of the principal debtor, and that, as a result, the issue had to be answered in the affirmative and that what the Government, represented by the Minister of Finance, entered into were in fact 'guarantees' within the meaning of section 41 of the F(A)A.[149]

141 Ibid at 7.
142 Ibid.
143 Ibid at 17.
144 Ibid at 18.
145 Ibid.
146 Ibid at 21.
147 Ibid.
148 LC 2003 HC 54. See also *Texaco Caribbean v Minister of Science and Technology* JM 2007 SC 69.
149 LC 2003 HC 54 at [35]. Section 42 provides that 41, 'no guarantee . . . shall be binding upon Government unless that guarantee is . . . approved by resolution of Parliament.'

The court, however, accepted that the guarantees were not approved by resolution of Parliament on the dates that they were executed.[150] It noted that the guarantees which were executed by the Minister of Finance, on behalf of the Government, were binding on the State;[151] and that the import of section 39 of the F(A)A[152] was clear – it specifically referred to the purposes for which the Minister of Finance could borrow from any bank or financial institution, and concluded that 'refinancing of Government's obligations to the former Hyatt Hotel was not one of those purposes'.[153] Having found that Parliament only had the power to approve a resolution submitted to it by the Minister independently of the cause or source of the financial obligation incurred by the Government once it is satisfied that the resolution related to one of the purposes specified under section 39(1) (a) to (d) of the F(A)A, the court held that Parliament did not have the requisite power to authorise borrowing under section 39 in respect of refinancing its obligations in respect of the Hyatt Hotel.[154] The court was also of the opinion that, since both the actions of the Minister of Finance and Parliament in respect of refinancing the Government's obligations in respect of the Hyatt Hotel were *ultra vires* the F(A)A, the only logical conclusion was that section 78[155] of the Constitution would have been or was breached. Therefore, the court concluded that the Constitution, like the Finance Act, was clear and unambiguous: 'no moneys shall be withdrawn . . . except to meet expenditure that is charged upon the [Consolidated] Fund . . . .'[156]

On appeal,[157] Saunders JA, in the Court of Appeal, asked what section 41 meant. He claimed that the key phrase in the section was 'shall be binding', which, according to him, was saying that guarantees may exist but, if those guarantees involve any financial liability, they could only bind the Government if one of two conditions was satisfied, namely they must either be given in accordance with an Act of Parliament or they must be approved by a resolution of Parliament. He noted that, when the Prime Minister gave the guarantee, he was doing nothing wrong or unlawful; he was perfectly entitled to do so. However, because that guarantee involved a financial liability, Parliamentary approval was required before it could be made binding on the Government.[158] Saunders JA continued that, in a constitutional democracy such as obtains in St Lucia, the executive authority conceives and executes policy but Parliament has control of the purse strings of the State. He noted that representatives of the executive authority (the Governor General, the Prime Minister, Ministers of Government and their subordinates) invariably entered into contracts from time to time but no funds could be taken out of the Consolidated Fund to meet any liabilities incurred in connection with those contracts unless such funds were approved by Parliament. In other words, such approval might be granted at any time before a charge was made upon the Consolidated Fund to satisfy any liabilities thereby incurred. Saunders JA claimed that the smooth running of Government would be entirely frustrated if, for example, each time the Prime Minister, or a Government Minister, sought to enter into a contract, it was first necessary to convene a meeting of Parliament in order to seek

150 LC 2003 HC 54 at [42].
151 Ibid at [51].
152 Section 39 (1) of the Act states as follows: 'The Minister may, by resolution of Parliament, borrow from any bank or financial institution for any of the following purposes: (a) the capital or recurrent expenditure of Government; (b) the purchase of securities issued by any Government or government agency; (c) on-lending to any statutory body or public corporation; or (d) making advances or payments to public officers as authorised by any enactment or the Staff Orders.'
153 LC 2003 HC 54 at [59].
154 Ibid at [62].
155 Section 78(1)(a) of the Constitution states that 'no moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by this Constitution or by any law enacted by Parliament.'
156 LC 2003 HC 54 at [66].
157 LC 2004 CA 3.
158 Ibid at [80].

and obtain approval.[159] He stated that the Parliament of St Lucia unanimously approved the borrowing of US$41 million for purposes that included 'refinancing Government's obligations in respect of the former Hyatt Hotel'. Saunders JA was of the view that it was true the resolution was made pursuant, not to section 41 but, rather, to section 39 of the F(A)A and claimed that what was important, however, was that the monies, approved by Parliament to be borrowed, were to be used, in part, for the same purpose as the subject matter of the guarantee previously given by the Prime Minister. Therefore, in his opinion, the resolution by Parliament constituted sufficient approval by Parliament of the Prime Minister's previously given guarantee, explaining that it was of no use getting caught up in the issue of whether Parliament should have made its resolution pursuant to section 41 instead of section 39. This issue, he rightfully noted, was a matter going to Parliament's control over its own procedure and, since no hint of unconstitutionality arose, the courts would not interfere in such an issue. Consequently, he concluded that the action should have been dismissed on this ground.[160]

Saunders JA also noted that there was another reason why the appeal should have been allowed. He explained that, quite apart from the matter of guarantees, and whether approval for the same must be prior or could be granted after the event, the resolution passed was made pursuant to section 39(1)(a) of the F(A)A. Saunders JA claimed that that section was free standing.[161] In rejecting the appellant's suggestion that the phrase 'the capital or recurrent expenditure of Government' related only to monies expended on such matters as roads, schools, hospitals, payment of civil servants and the like, Saunders JA claimed that there was abundant case law to support the view that the development of tourism and the generation of employment and revenue are legitimate public purposes. Government, in his opinion, was not obliged or required by law, itself, to develop tourism or generate employment or revenue and legitimate Government expenditure for these purposes, far from being confined to assets owned by Government, may extend to works or projects conceived, owned or engaged in by private parties.[162] Saunders JA claimed that, in order for the court to determine whether expenditure fell within section 39(1)(a), it was necessary to have regard to the declared purpose for which the funds were required, and the provision of funds for the realisation or completion of the former Hyatt Hotel was a legitimate public purpose in light of the undoubted boost to St Lucia's tourist industry thereby intended. As a result, he held that monies borrowed for and expended on that purpose were embraced by the phrase 'capital or recurrent expenditure of Government'. Consequently, Saunders JA ruled that the Minister of Finance was entitled to seek parliamentary approval for the provision of such funds; and that, once the approval had been granted, disputes about the need to have obtained prior approval for the giving of the guarantee became entirely otiose and the case should have been dismissed on this ground as well. Section 78(1)(a) of the Constitution states that no moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by the Constitution or by any law enacted by Parliament. Saunders JA noted that the Resolution that was unanimously approved by Parliament was gazetted as Statutory Instrument No. 4 of 2003 and that, when gazetted, that Statutory Instrument was 'a law enacted by Parliament'. He noted that one may regard that law as subsequent approval of the previously given guarantee or one might see it as approval that was entirely independent of the guarantee. In either case, Saunders JA concluded, it constituted compliance with section 78 of the Constitution.[163]

159 Ibid at [81].
160 Ibid at [82].
161 Ibid at [84].
162 Ibid at [85].
163 Ibid at [87].

In *Mossell (Jamaica) Limited v Office of Utilities Regulation*,[164] the Minister of Industry, Commerce and Technology ('the Minister') issued a Direction ('the Direction') on 9 April 2002 that purported to restrict the powers of the Office of Utilities Regulation ('the OUR'). The OUR considered that the Minister had no power to issue this Direction and on 22 May 2002 the OUR issued a Determination Notice ('the Determination'), some aspects of which both they and the Minister considered contravened the Direction.[165] The Board noted that the application for judicial review raised the following issues: (a) was the Direction within the Minister's powers; (b) if it was not, was the OUR still obliged to comply with it unless and until it was set aside by a court; (c) did the Determination contravene the terms of the Direction; and (d) was the Determination within the powers of the OUR and lawfully made?[166] Dukharan J, at first instance,[167] held that: (a) the Direction was within the Minister's powers; (b) the OUR was bound to comply with the Direction unless and until it was set aside by the court; (c) the Determination contravened the terms of the Direction and was consequently unlawful; and (d) it was unnecessary to consider this as a separate issue.[168] On appeal,[169] the Court of Appeal, reversing Dukharan J, held as follows: (a) the Direction was outside the Minister's powers and invalid; (b) the OUR was under no obligation to comply with the Direction; (c) the Determination did not contravene the terms of the Direction; and (d) the Determination fell within the powers of the OUR and was lawfully made.[170] For present purposes, only the first two issues will be examined.

Section 4(4) of the Office of Utilities Regulation Act 1995 ('the OUR Act') gave the OUR the 'power to determine, in accordance with the provisions of this Act, the rates or fares which may be charged in respect of the provisions of a prescribed utility service.' Section 6 of the Telecommunications Act ('the TA') provides that: 'The Minister may give to the Office such directions of a general nature as to the policy to be followed by the Office in the performance of its functions under this Act as the Minister considers necessary in the public interest and the Office shall give effect to those directions.' The Minister, then, acting pursuant to this section, claimed that, as a matter of policy: (i) the OUR was not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor; and (ii) the OUR was to facilitate competition and investment for the new mobile carriers in Jamaica. The Board noted that section 6 of the TA empowered the Minister to give directions of 'a general nature as to the policy to be followed by the [OUR] in the performance of its functions under this Act'.[171] It also claimed the OUR accepted that the second paragraph of the Direction fell within the power conferred by this section but argued that, first, the Direction was not general but very specific and, second, the Direction ordered the OUR not to perform some of its statutory functions.[172] The respondent argued that the Direction was general in that it was not directed against a particular competitor, or section of the competition, and did not seek to set a particular rate or rates; it imposed a general prohibition on intervention in the market.[173] The Board was of the view that the scope of the power conferred on the Minister by section 6 could readily be deduced by the terms of the section itself. It reasoned that the section provided for Directions to be followed by the OUR in the performance of its statutory functions; those functions included duties. As a result, the Board

164 [2010] UKPC 1.
165 Ibid at [1].
166 Ibid at [2].
167 JM 2003 SC 42.
168 [2010] UKPC 1 at [3].
169 JM 2007 CA 25.
170 [2010] UKPC 1 at [4].
171 Ibid at [33].
172 Ibid.
173 Ibid at [35].

ruled that a Direction must be one that was possible for the OUR to follow in carrying out its duties under the TA, and that a Direction that prohibited the OUR from carrying out those duties could not lawfully be made by the Minister.[174]

In relation to the question of whether the OUR was obliged to comply with the Direction even though it was *ultra vires*, the Board claimed that this issue raised subsidiary issues that were not explored, either before the lower courts or before it.[175] It asked: what remedy, if any, would Cable and Wireless (Jamaica) Limited have had if the OUR failed to take action because of the Direction? What remedy, if any, would Digicel have had if the Direction had been *intra vires*? After citing the leading authorities of *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*[176] and *Boddington v British Transport Police*,[177] the Board noted that subordinate legislation, executive orders and the like were presumed to be lawful. It continued, however, that if and when they were successfully challenged and found to be *ultra vires*, generally speaking, it was as if they had never had any legal effect at all: their nullification was ordinarily retrospective rather than merely prospective and there may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others.[178] The Board ruled that it could not be doubted that the OUR was perfectly entitled to act on the legal advice it received and to disregard the Minister's Direction.[179]

MANDATORY OR DIRECTORY

The old approach

In the past, when confronted with the issue of whether a particular requirement was complied with, the courts usually resorted to determining whether it was a 'mandatory' or 'directory' requirement.[180] One court has noted that it 'has long been established that where the procedural rule is regarded as mandatory, disobedience of it will render void or voidable what has been done, but where it is directory disobedience will be treated as an irregularity not affecting the validity of what has been done'.[181] In the early case of *Active v Scobie*,[182] the question for the court was whether votes recorded in ink were validly cast in accordance with the provisions of the Roseau Town Council Ordinance (RTCO). Section 39(2) of the RTCO provides that voting shall be by ballot conducted in the manner thereinafter provided while section 42 states that the presiding officer shall provide, *inter alia*, materials for electors to mark the ballot papers and directions for the guidance of electors in voting. Section 47 requires the presiding officer to put

174 Ibid at [37].
175 Ibid at [41].
176 [1975] AC 295.
177 [1999] 2 AC 143.
178 [2010] UKPC 1 at [44].
179 Ibid.
180 *Springer v Doorly* BB 1950 CA 2.
181 *Jones v Solomon* TT 1989 CA 8. See also *McEnearney Alstons Ltd v McEnearney (Barbados) Alstons Ltd* BB 1990 HC 34; *Porter v The Jamaica Racing Commission* JM 2004 CA 11 at 14; *Scriven v Hanna* BS 1993 CA 5 at [56]; *Communication Workers Union v Nealco Enterprise Ltd* TT 1994 IC 27; and *Ex p World Telenet International Limited* JM 2000 SC 65.
182 DM 1969 HC 6; *Gomez v Klonaris* BS 1994 SC 13; *Harrison v R* JM 1982 CA 22 at 3; and *Holder v Lalla* TT 1995 HC 78 ('I have come to the conclusion that the giving of a warning notice was mandatory and that giving it under Regulation 84 achieved the same purpose as Regulation 81 [of the Police Service (Amendment) Regulations 1990] as he was warned of the disorderly conduct in contemplation of disciplinary proceedings and consequently there is substantial compliance and no invalidity of the hearing and determination.')

directions on a table in the compartment set aside for the voter's directions for their guidance as prescribed in Form F in the schedule to the RTCO. The direction was that: '[t]he voter will go into one of the compartments and with the pencil provided in the compartment place a cross on the right hand side opposite the name of the candidate for whom he votes.'[183] The court pointed out that in the leading case of *Woodward v Sarsons*[184] it was held that the provision about the use of a cross on a ballot paper was directory and not mandatory and it was sufficient if the paper was so marked as to show that the voter intended to vote for someone and that it indicated which of the candidates he intended to vote.[185] In the instant case, the court concluded that it was 'of the opinion that the enactments in the schedule F relative to the use of a pencil are directory enactments as opposed to the mandatory enactments in the sections of the body of the [RTCO]'.[186]

In *Barrow v Hoyte*,[187] the court had to consider whether the following words in the Christian Mission Act (CMA) were mandatory or directory: 'A meeting of the representatives of the churches of the Mission shall take place *annually* in the month of January.' It noted that, in interpreting the section, it was essential that due regard be paid first to the intention of the legislature. The court claimed that the intention of the provision was to secure the publication of a financial statement each year, recording the dealings of the outgoing Board of Management, and to secure the election of a General Superintendent and Treasurer for the following year.[188] It then concluded that 'the term "annually" is mandatory, and it would follow that the terms "for the past year" and "for the ensuing year" having been used, and the first meeting of the representatives under the CMA having been held in January, the meeting of representatives must of necessity take place in the month of January.'[189] In *Biggs v Commissioner of Police*,[190] the appellant argued that the Chief Magistrate erred in law in holding that the requirement to lay in Parliament the Statutory Instrument entitled No. 74 of 1980 was directory and not mandatory.[191] The court noted that there was 'contention between the parties as to whether the provision 'subject to negative resolution' makes the terms of section 33 [of the Extradition Act (EA)] mandatory or merely directory' and that '[o]ne must go to the Interpretation Act to discover what the expression "subject to negative resolution" means'.[192] It then concluded that the Interpretation Act left no doubt that it was the duty of the Minister responsible for external affairs to lay the Statutory Instrument before Parliament and the only way in which that duty could be deemed to be otherwise than imperative or mandatory was if there was, in the EA, some contrary intendment in the words of the EA itself.[193] Consequently, the court held that the failure to lay in Parliament the Statutory Instrument in accordance with the provisions of section 33 of the EA was fatal. This meant that the Statutory Instrument was invalid for this reason.[194]

In *Brown v Francis-Gibson*,[195] the Court of Appeal noted that '[a] statutory provision is mandatory if the legislative intention is that the statutory formality which it prescribes should be strictly observed and that any violation of the statutory provision or any non-compliance with the statutory formality nullifies the petition.'[196] It also noted that a statutory provision was

183 DM 1969 HC 6 at 7.
184 (1874–1880) All ER 262.
185 DM 1969 HC 6 at 7.
186 Ibid at 8.
187 BB 1951 HC 1.
188 Ibid.
189 Ibid.
190 BB 1981 HC 21.
191 Ibid at 2.
192 Ibid at 3.
193 Ibid at 4.
194 Ibid.
195 VC 1995 CA 1. See *Star Telecommunication Company Limited v Ragbir* TT 2000 HC 51.
196 VC 1995 CA 1 at 2–3.

directory if the legislative intention was that it might be waived or substantially fulfilled and that the petition might be validated by such waiver or substantial fulfilment.[197] It continued that 'the statutory provision which prescribes the time for service of notice of the nature of the security given with respect to an election petition has been held to be mandatory with the consequence that failure to observe the prescribed time invalidates the petition.'[198] The court then concluded that it would affirm the decision on the triple ground upon which the learned judge relied, to the 'effect that the appellant had failed to observe three of the statutory formalities prescribed by mandatory statutory provisions relating to the presentation of an election petition'.[199] In *Re Citrus Co of Belize Ltd*,[200] the issue was whether a formal report to the Citrus Board by processors and producers was a precondition for jurisdiction. The matter was remitted to the Citrus Board for determination of a mandatory second payment to producers. The court noted that there was nothing unusual in the courts' forming their own criteria for determining whether the particular procedural rule was to be regarded as mandatory or directory. It claimed that '[i]f mandatory, disobedience will render void or voidable what has been done' and '[i]f directory, disobedience will be treated as irregularity not affecting the validity of what has been done'; and one 'must look to see if at least there was "substantial compliance" so as to qualify the irregularity as mere irregularity'.[201] It continued that it would 'consider the whole scope and purpose of the Citrus (Processing and Production) Act . . . to assess the importance of the provisions disregarded and the general object intended to be secured by section 18'. The court noted that, if directory, nullification was the natural and usual consequence of disobedience but there was the discretion to be exercised where the court finds mere procedural or formal rules breached and to be trivial in nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced; or if serious public inconvenience would be caused by holding them to be mandatory, or if the court was for any reason disinclined to interfere with the act or decision that was impugned.[202] The court then explained that it was mandatory, in the determining of annual prices of citrus fruit, for the following factors to be taken into consideration: returns from sale of citrus; quantities of citrus available for export or exported and the value of orange oil and any by-products. It also noted that the mandatory second payment was predicated on this and the Citrus Board must have this information certainly after 30 June in the year of operation.[203]

In *Colonial Life Insurance Company (Trinidad) Limited v Toppin*,[204] the court observed that, by the combined effect of sections 283(f) and (h) of the Companies Act (CA), two duties were imposed upon a receiver: first, to prepare financial statements of his administration at such intervals and in such form as were prescribed; and second, to file with the Registrar of Companies a copy of any such financial statement within 15 days of its preparation.[205] In the instant case, the court had to consider whether a receiver could be relieved of those duties and, as such, found it necessary to first determine whether Parliament intended those duties to be mandatory or directory.[206] After considering the intention of the statutory provisions, the court concluded that, first, in so far as these provisions related to the duty of a receiver to prepare and file financial statements of his receivership, that duty could only be properly construed as mandatory (to

197 Ibid at 3.
198 Ibid.
199 Ibid at 16.
200 BZ 1991 SC 8.
201 Ibid.
202 Ibid.
203 Ibid.
204 BB 2004 HC 12.
205 Ibid at [50].
206 Ibid at [51].

hold otherwise would render nugatory the requirement for accountability and transparency so essential to receivership and defeat the object of the legislature);[207] and, second, in so far as sections 283(f) and (h) of the CA related to the intervals at which and the form in which the financial statements were to be prepared, they were directory.[208] Therefore, the court concluded that the defendant was not relieved of his duty under sections 283(f) and (h) to prepare and file financial statements of his administration.[209]

The modern approach

The modern approach to the question of whether a requirement is mandatory or directory was articulated by the Privy Council in *Charles v Judicial and Legal Services Commission*.[210] In that decision, the Board had to consider the effect of a breach of time limits in respect of discipline and misconduct in the public service. The main question for the Board was the effect a breach of the time limits in regulation 90 had on subsequent proceedings of the Judicial and Legal Service Commission (JLSC).[211] The Board noted that the leading authority is *Wang v Commissioner of Inland Revenue*,[212] where it was pointed out that in such questions, namely an alleged failure to comply with a time provision, 'it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions' – first: whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time; and, second, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?[213] In answering the first question, the Board explained that the framers of regulation 90 (the JLSC) must have intended those involved to comply with the relevant time provisions. The answer to the second question, in the Board's opinion, involved an examination of: (i) the role of regulation 90, and its individual parts, in the overall regulatory scheme; (ii) the purpose and policy of the time provisions; and (iii) a judgement as to whether those who promulgated the regulations intended that breach of a time limit should deprive the JLSC of jurisdiction, thus rendering any later purported decision or determination null and void.[214] The Board stated that it seemed highly unlikely that the JLSC could have intended that breaches of time limits, at the investigation stage, would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. It was of the view that a self-imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime.[215]

The Board continued that the same picture emerged when reference was made to the text of regulation 90 and subsequent regulations. Regulations 90(1), 90(4) and 90(5) all use the phrase 'for the information of the [JLSC]', thereby underlining that the inquiry function of the investigating officer is to gather material to enable the JLSC to discharge its task of deciding

207 Ibid at [59].
208 Ibid at [60].
209 Ibid at [61].
210 [2002] UKPC 34. A similar issue arose in *Singh v Public Service Commission* TT 1996 HC 219 where the court, applying *Charles*, held that PSC regulation 90(5) is mandatory and that non-compliance renders subsequent proceedings void. However, the more recent decision of *Ramdatt v Public Service Appeal Board* TT 2007 HC 112 does not mention *Charles* at all.
211 [2002] UKPC 34 at [3].
212 [1994] 1 WLR 1286.
213 Ibid at 1296.
214 [2002] UKPC 34 at [11].
215 Ibid at [12].

whether the officer under investigation should be charged. The Board argued that, although the time limits in regulation 90 were incidentally of benefit to that officer, it viewed them as designed primarily to expedite the investigation process for the benefit of the public interest in having matters of indiscipline or misconduct effectively investigated and dealt with. As a result, it noted it was unlikely that breach of a time limit was intended to lead to the frustration of that ultimate purpose.[216] It also noted that regulation 90(6) laid down no time limit for the JLSC to make the decision whether to charge the officer and that the words 'as soon as possible' presupposed a decision to charge had already been made.[217] The Board continued that the same position was apparent when consideration was given to regulation 91 and other regulations which dealt with the establishment of disciplinary tribunals and matters associated with their proceedings; noting that, for example, no time limit was prescribed in regulation 95 for the appointment by the JLSC of a disciplinary tribunal. It claimed that it was conceivable that, if the time limits in regulation 90 were designed primarily in the interests of the officer under investigation, to the extent of precluding further steps on breach, there would be corresponding time limits in regulation 95 and its cognate provisions. The Board noted the disciplinary tribunal's obligation under regulation 96(1) to find the facts and make its report 'as soon as possible', but that this showed the contrast with the lack of time constraints applying to the JLSC's role under both regulation 90(6) and regulation 95(1).[218]

As a result, the Board reasoned that, first, if a complaint was made about the non-fulfilment of a time limit the giving of relief will usually be discretionary; second, this discretionary element underlined the fact that problems arising from breach of time limits and other like procedural flaws were not generally susceptible of rigid classification or black and white *a priori* rules. In the instant case, the Board noted that the delays were in good faith, they were not lengthy and they were entirely understandable; the appellant suffered no material prejudice; no fair trial considerations were or could have been raised; and no fundamental human rights were in issue.[219] As a result, it concluded that, bearing in mind the relevant aspects of regulation 90 and its regulatory environment, and the other relevant circumstances of the case, including the lack of significant impact of the time defaults on the appellant, it was of the clear view that the regulations could have been framed with the intention that breaches of the kind in issue would deprive the JLSC of jurisdiction to act as it thought fit on the investigating officer's report and thereby fulfil its public responsibilities.[220]

Recent courts have said that an 'inquiry into whether the regulations [relating to service commissions under Commonwealth Caribbean constitutions] said to be breached were mandatory or directory was unhelpful'.[221] In *Seereeram v Public Service Commission*,[222] although the court noted that 'in the recently decided cases it has been stated that classification into mandatory and directory regulations is unhelpful and misleading', it applied the cases preceding *Charles* to conclude that 'sufficient justification for me to hold – as the "first step" within the guidelines of *Ex p Jeyeanthan*[223] – that the regulations concerning discipline are mandatory'.[224] This decision was applied in *Gibbs v Attorney General*,[225] where the court had to consider whether the applicant

216 Ibid at [13].
217 Ibid at [14].
218 Ibid at [15].
219 Ibid at [17].
220 Ibid at [18].
221 *The Police Service Commission v Murray* TT 2000 CA 11. See also *Charles v de la Bastide* TT 1999 HC 55.
222 TT 2001 HC 169.
223 [1999] 3 All ER 231.
224 TT 2001 HC 169 at 43.
225 TT 2002 HC 131.

was lawfully transferred by the Commissioner of Police in contravention of Regulation 28[226] of the PSC Regulations 'which is mandatory in nature, and in circumstances where his right to the protection of the law under section 4(b), and his right to equality of treatment from a public authority in the exercise of a public function under section 4(d) of the Constitution have been contravened'.[227] The court noted that 'no police officer has a constitutional right not to be transferred' and that, therefore, 'the question as to whether regulation 28 was mandatory or directory in nature thereby requiring the Commissioner of Police to comply strictly with the requirement as to time is a matter that ought to have been pursued by the applicant in judicial review proceedings.'[228] It explained that:

> [a] police officer has no constitutional right not to be transferred, so that compliance with the time frame involves no fundamental human rights and freedoms. When one looks at regulation 28 in the context of the administrative scheme, Regulation 28 is but part of an administrative scheme allowing the Commissioner of Police to properly manage and administer the police service.[229]

It continued that there might be many reasons why a Commissioner of Police would wish to transfer officers at short notice and that, in such a case, statutory sanction was provided by allowing the Commissioner of Police to resort to the statutory exception, namely 'except where the exigencies of the service do not permit'.[230] The court was of the opinion that, in the context of a regulatory framework which provided for a 14-day period of notice when an officer was being transferred 'except where the exigencies of the service do not permit', 'exigencies' connoted urgency, that is, a pressing necessity. It noted that the court was not told, in the instant case, that the applicant was transferred because of the exigencies of the service, otherwise that would have been deposed to in the respondent's affidavits.[231]

The court, applying *Wang*, pointed out that it did not seem that the legislature intended that a failure to comply with the 14-day period of notice would deprive the Commissioner of Police of jurisdiction and render his decision to transfer the applicant null and void. It continued that, having had delegated to him the responsibility of managing and micro-managing a large part of the police service, it would seem that it would not be in the interest of good administration if every transfer made without complying with the statutory period was liable to be set aside. The court was of the opinion that the Regulations were introduced for the better working of the police service and not to find a technicality to inhibit the efficient functioning of the police service.[232] It therefore concluded that the 14-day period of notice was a directory requirement, with the consequence that if there was non-compliance with the requirement as to time that did not invalidate the transfer.[233] The court also rejected the applicant's complaint of discrimination, not on the basis that the regulation was discriminatory, but on the basis of the administration of the regulation, concluding that 'the regulation in question is merely directory, not mandatory in nature'.[234]

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226 28. (1) Where the Commission proposes to transfer a police officer, the Commission shall, except where the exigencies of the service do not permit, make an order of transfer in writing and shall give not less than fourteen days notice to the officer who is to be transferred. (2) In considering the transfer of a police officer the Commission shall take into account any hardship that such transfer may occasion to the officer. (3) Sub Regulation (2) shall not apply where a transfer is ordered as a penalty imposed for an offence under these Regulations.
227 TT 2002 HC 131 at 13.
228 Ibid at 14.
229 Ibid at 17.
230 Ibid.
231 Ibid at 19.
232 Ibid.
233 Ibid.
234 Ibid at 24.

In *Ramdatt v Public Service Appeal Board*,[235] the court had to consider whether procedural regulations contained in the Police Service Commission Regulations were mandatory or directory and whether an omission by the Commissioner of Police to comply with such regulations would vitiate the disciplinary proceedings which ensued. It noted that the purpose of Regulation 84(1)[236] was to notify the police officer in question of the charge which he had to answer. The court noted that this was to satisfy one of the entrenched requirements of natural justice that a person charged should be notified of the charge which he had to meet.[237] It continued that 'the notification is critical. If no notice had been given, in my view, there would have been a serious breach of natural justice in respect of the claimant.'[238]

In *Richards v Constituency Boundaries Commission*,[239] the applicant sought, *inter alia*, a declaration that (a) section 50(2) of the Constitution was mandatory; and (b) the constitutional provisions of section 50(2) of the Constitution of St Christopher and Nevis, being mandatory, any submission of a Report to the Governor General purportedly pursuant to section 50(1) and, subsequently, to the National Assembly, was inconsistent with, in contravention of and in breach of the provisions of section 50(2) and was null, void and of no effect.[240] Section 50(2) provides that reports under subsection (1) shall be submitted by the Commission at intervals of not less than two nor more than five years. The court explained that it was 'common ground that the test which must be applied in the context of the interpretation of the word "shall" in section 50(2) is whether or not in this case the Constitution intended total invalidity where there is non-compliance'.[241] In applying that test, the court explained that:

> the following factors must be brought into the equation: section 50(2) is part of the Supreme Law of the land and is deeply entrenched; the fundamental role of the Constituency Boundaries Commission generally, and in particular, the connection between the Commission and the holding of free and fair elections; the powers of the Commission in making recommendations with respect to boundaries so as to ensure that there is equality of representation; and the place occupied by elections in a parliamentary democracy such as St Kitts and Nevis.[242]

It then, applying the reasoning in the cases of *Charles* and *Soneji*,[243] determined that section 50(2) was directory but there were factors which could render it otherwise. This was because, in its opinion, in holding the provision was directory in *Charles*, Mr Justice Tipping had made mention that if there was 'no material prejudice, no fair considerations were or could be raised and no fundamental human right was in issue'. In other words, it depended on context and circumstances.[244]

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235 TT 2007 HC 112.

236 (1) Where a report or allegation is received from which it appears that a police officer may have committed an offence, the Commissioner shall, in addition to making a report as required by regulation 77, concurrently warn the police officer in writing of the report or allegation and shall forthwith refer the matter to an investigating officer appointed by him.

237 TT 2007 HC 112 at [21].

238 Ibid at [22].

239 KN 2009 HC 19. See also *Walcott v Attorney General of Saint Lucia* LC 1996 HC 1, where the court held that the word shall in section 79(1) of the St Lucia Constitution 1978 is to be construed as being directory and not mandatory. Section 79(1) of the constitution states that the 'Minister for the time being responsible for Finance shall cause to be prepared and laid before the House before, or not later than 30 days after, the commencement of each financial year estimates of the revenues and expenditure of Saint Lucia for that financial year'.

240 KN 2009 HC 19 at [4].

241 Ibid at [166].

242 Ibid at [168].

243 *R v Soneji* [2006] 1 AC 340.

244 KN 2009 HC 19 at [172].

CHAPTER 7

RETENTION OF DISCRETION

INTRODUCTION

There is no question that various pieces of legislation confer on public authorities a discretion to make certain decisions. The question becomes how they are to exercise that power that is granted to them. It has often been said that public authorities do not have unfettered discretion. How then are they to exercise the powers granted to them by legislation? The courts have noted that '[f]or when executive discretion is not arbitrarily exercised, it is not within the province of the Courts to pry into the propriety of what exclusively concerns policy and administration or to sit on appeal within the domain of facts for the purpose of looking at the matter from another angle.'[1] This issue is largely played out in the licensing cases.[2] In *Ex p Thompson*,[3] the applicant applied for an order of *certiorari* to quash a decision of Collector General to fine him for illegal importation of motor cars and parts and to confiscate the items. There was no evidence that the Collector General exceeded or abused his power. The courts have held that the Cabinet, in arriving at a policy decision, was exercising a discretionary power and in such circumstances there was no entitlement by the legal officers to be heard. The Cabinet, as the principal instrument of policy for the Government of Jamaica, had the authority to make the decision which they did.[4] The courts have reiterated that discretion granted to public authorities must be exercised reasonably.[5]

RETENTION OF DISCRETION

General

Discretion is conferred on public authorities in a variety of ways; for example, the statute may provide that a public authority may, 'in its discretion and on such conditions as it may impose, grant permission' to do such and such a thing; or it may provide that the public authority 'may at any time revoke a liquor licence held by any person'. How, then, is that power to be exercised by a public authority? In *Bahadur v Attorney General of Trinidad and Tobago*,[6] the applicant sought a declaration that the decision of the Transport Commissioner to suspend his driving permit, after he was charged with manslaughter and dangerous driving, was null and void. Section 87(1) of the Motor Vehicle and Road Traffic Ordinance (MVRTO) provided that if and when any person is charged with manslaughter arising out of the use of any motor vehicle, or with contravening the provisions of section 70 or section 71, it shall be lawful for the

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1 *Brandt v Attorney General of Guyana* GY 1971 CA 2 at 16.
2 In *Re Cable and Wireless Jamaica Ltd* JM 1999 SC 53, the applicant claimed that 'The Minister of Commerce and Technology in granting the said licences has acted in abuse of the statutory discretion under the Radio and Telegraphic Control Act.'
3 JM 1984 SC 6.
4 *R v Ministry of National Security and Justice* JM 1992 SC 37.
5 *Griffith v Commissioner of Police* BB 1994 HC 46. See also *Hector v Attorney General of Antigua and Barbuda* AG 2006 HC 14; *Saga Trading Limited v The Comptroller of Customs and Excise* TT 1998 HC 132 and *Guscott v Minister of Education* JM 1984 SC 23.
6 TT 1988 CA 17.

Licensing Authority ('the Authority') to order the suspension of the driving permit of the person so charged pending the determination of the charge. The court considered the following question: was the exercise by the Authority to suspend a driving permit under the provisions of section 87(1) of the MVRTO validly carried out if the Authority did not allow the holder of the permit first to be heard?[7] In the course of answering that question, the court had to opine on the discretion provided to the Transport Commissioner under section 87(1). The court noted that the 'authority which the [Authority] derives under section 87(1) of the [MVRTO] to suspend a driving permit is in the nature of an executive discretion'[8] and cited *Padfield*[9] for the view that:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act: the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law in the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any reason so uses his discretion as to thwart or run counter to the policy and object of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.[10]

The court noted that the Authority gave no reasons for the suspension of the appellant's driving permit so it could not determine whether he had exercised his discretion properly.[11] It continued that it would appear there was a consistent practice where, on notification by the Commissioner of Police that a person had been charged with manslaughter, dangerous driving or driving under the influence of liquor, the Authority automatically suspended his driving permit pending the determination of the charges against him. The question for the Court of Appeal was whether it was necessary for the Authority to hold an enquiry or give an opportunity to the appellant to be heard and whether the Authority should have taken into account the principles set out in *Padfield* before it came to the decision to suspend the appellant's driving permit. The court ruled that since section 3(3) of the MVRTO provides for the Trinidad and Tobago Transport Board to hear and determine any appeal submitted by an aggrieved person against any order or decision of the Authority, the appellant had no right to be heard before the Authority suspended his driving permit.[12]

In *Portmore Citizens Advisory Council v Ministry of Transport and Works*,[13] the applicants applied to the court for: (a) an order of *certiorari* to quash the designation of the Minister of Transport and Works ('the Minister') by way of the Toll Roads Act (Designation of Highway 2000 Phase 1) Order 2002 ('the Order') so far as it related to the Portmore segment; and (b) a declaration that the designated alternative route (the Mandela Highway) was unlawful and not in conformity with section 8(2) of the Toll Roads Act (TRA). The issue for the court was whether the Minister acted *ultra vires* in designating the alternative route as that via the Mandela Highway under the TRA, specifically the Order.[14] Section 8(1) of the TRA provides that: 'The Minister may, by order: (a) Subject to subsection (2) designate any road as a toll road for the purposes of this Act.' Subsection 8(2) provides that: 'No road shall be designated as a toll road under subsection (1)(a) unless in the area in which the toll road is to be established there is an alternative route accessible to the public by vehicular and other traffic.' The claimant argued that

7 Ibid at 14.
8 Ibid at 16.
9 Ibid.
10 Ibid.
11 Ibid at 17.
12 Ibid at 20.
13 JM 2005 SC 73.
14 Ibid at [9].

subsection 8(2) was mandatory; and that the Minister had some discretion as to what roads he chose to designate as toll roads, but that his discretion was constrained by an absolute prohibition that whatever road he chose there must be an alternative route and, in this respect, there was no discretion.[15] The respondent argued that these sections only meant that the Minister had some discretion as to which roads to designate as toll roads and which roads to designate as alternative routes and that the only statutory limitation was that the alternative route must comply with subsection (2).

The court reasoned that section 8(1) of the TRA gives the Minister a discretion as to which roads to designate as toll roads and that this discretion was fettered by subsection (2), which imposed a mandatory obligation on the Minister to designate an alternative route to the designated toll road.[16] It continued that this alternative route must be 'in the area' of the toll road and must be accessible to other traffic. The court explained that, where there was more than one contender for the alternative route, the Minister possessed an inferred discretion to determine which of the routes was more reasonable after consideration of all the circumstances.[17] The court found that the Port Henderson Road, which the claimants suggested as a possible alternative route, was not a reasonable alternative route for the following reasons: (a) on leaving the Port Henderson Road, one would have to enter onto the new toll road as it would be impossible to connect with the existing Portmore Causeway; (b) if the residents of Portmore were contending that they should be exempt from paying a toll, how then would the money expended for the building of the bridge be recouped?; and (c) how would the genuine residents of Portmore be determined?[18] The court also held that the Minister exercised his discretion to designate a toll road in the proper and lawful manner as there was, indeed, a lawful designated alternative route to the toll road. The designated alternative route was lawful as it was within the area of the toll road and was accessible to vehicular and other traffic as is required by the TRA.[19]

The court, in determining whether the Minister acted illegally or unlawfully, applied the legal principles from De Smith, namely:

> [a]n administrative decision is flawed if it is illegal. A decision is illegal if: (i) it contravenes or exceeds the terms of the power which authorises the making of the decision; or (ii) it pursues an objective other than that for which the power to make the decision was conferred. The task of the court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within the four corners.[20]

Applying these principles to the instant case, the court ruled that the Minister had the discretion to designate any road to be a toll road under section 8(1) of the TRA, but that his discretion was constrained by subsection (2) in that he shall not make any such designation unless there was an alternative route within the area of the toll roads, which was accessible to vehicular and other traffic.[21] The basis of the legality, the court continued, was dependent on the interpretation of the words 'in the area', which it interpreted to mean 'within a reasonable distance' of the toll road as was practicable in the particular circumstance. This interpretation was applied to considerations of the Mandela Highway as the alternative route and the court held that that

15 Ibid at [11].
16 Ibid at [13].
17 Ibid at [23].
18 Ibid.
19 Ibid.
20 De Smith, Woolf and Jowell, *Judicial Review of Administrative Actions* (5th edn), 1995: London: Sweet & Maxwell at para 6–001, p 295.
21 JM 2005 SC 73 at [36].

roadway satisfied the criterion. It therefore concluded that the Minister did not act illegally and the court could not overturn his decision.[22]

Before the applicant could claim that a public authority has not exercised a discretion in his favour, he first had to ensure that what he complained about was actually a decision of the public body, and not an invitation to discuss the issue.[23] The court has made clear that where a body has a discretion to grant permission to develop land either unconditionally, or subject to such conditions it may think fit, or to refuse permission, the exercise of that discretion would be unimpeachable unless: (a) a wrong principle of law was applied; (b) it was exercised unreasonably; (c) it was exercised otherwise than in accordance with the principles of natural justice; or (d) it results in a conflict with the development plan in force.[24] The discretion to renew the licence must be exercised in a fair manner and must not be discriminatory, but the applicant should provide evidence of such discrimination; failing which the case would be dismissed.[25] A public authority could only lawfully exercise discretion that was bestowed on it by legislation. Where a public authority decided to exercise a discretion that it did not possess the court would be swift to declare that action was unlawful. This was the case in *Kozeny v Attorney General of The Bahamas*,[26] where the applicant sought judicial review of a decision made by the Attorney General to direct the Commissioner of Police to serve process from the Czech Republic on the applicant under the provisions of section 3 of the Criminal Justice (International Co-operation) Act 2000 (CJ(IC)A). The court noted that the Attorney General had discretion under section 3(2) of the CJ(IC)A to direct the Commissioner of Police to cause process to be personally served on a person where there was a proper request within the provisions of the CJ(IC)A, emanating from a foreign court exercising criminal jurisdiction.[27] The court noted that the request from the Czech Republic was not within the provisions of the CJ(IC)A.[28] It reasoned that it followed that the Attorney General's direction to the Commissioner of Police was not authorised by the CJ(IC)A.[29] The court explained that Parliament did not confer any power on the Attorney General to reconsider a directive given to the Commissioner of Police. As a result, the court quashed the directive of the Attorney General to the Commissioner of Police.[30]

Discretionary powers must be exercised in accordance with the law and must be exercised reasonably; and their exercise must be just and fair.[31] In *Bahamas Air Traffic Controllers Union v The Government of the Commonwealth of the Bahamas*,[32] the issue for the court was whether the Permanent Secretary or Head of Department, acting under the provisions of order 1125 of the General Orders, whilst continuing to pay to the applicants, air traffic controllers, their remunerations, could insist that the applicants stay away from work for the duration of three months or indefinitely, colloquially known as sending them on garden leave or administrative leave. This period of leave enabled the Minister of Transport, Aviation and Local Government ('the Minister') to investigate an alleged unlawful industrial action and disruptions in flight services at Nassau International Airport. This was done, notwithstanding that the duration of such leave might, by virtue of regulation 75(3) of the Bahamas Civil Aviation (Air Navigation) Regulations 2000,

22 Ibid.
23 *National Frequency Management Unit v Vieira Communications Ltd* GY 2000 CA 1.
24 *Member of Executive Council v The Bermuda Drug Co. Ltd* BM 1972 SC 27.
25 *Lynch v Trinidad and Tobago Racing Authority* TT 1985 HC 126. See also *Luxsam Industries Ltd v Minister of Industry, Enterprise and Tourism* TT 1989 HC 123.
26 BS 2003 SC 12.
27 Ibid at [19].
28 Ibid.
29 Ibid.
30 Ibid at [20].
31 *Bahamas Air Traffic Controllers Union v The Government of the Commonwealth of the Bahamas* BS 2001 SC 23 at 24.
32 BS 2001 SC 23.

result in the applicants losing their certification to operate as air traffic controllers.[33] The court noted that order 1125 of the General Orders conferred on the Permanent Secretary or a Head of Department a discretionary power, explaining that it provided that, pending a decision as to interdiction, the officer may, if it was considered necessary in the public interest, be prohibited by the Permanent Secretary or by the Head of Department, where there was no post of Permanent Secretary, from carrying on his duties, but he may not be deprived of any portion of his emolument.

The court then quoted its previous decision where it was stated that '[e]minent writers in public law have said that all power is subject to control, and Courts refuse to recognise that there is anything like unlimited power. And every power must be exercised with discretion, because discretion is an element in all power.'[34] The court noted that it was clear, and without a doubt, that at the end of the three months' garden leave or administrative leave the applicants would be 'de-certified' as air traffic controllers and they would be unable to function as licensed air traffic controllers.[35] As a result, their licences would have to be sent back to the Minister in accordance with the provisions of regulation 75(3) to enable their licences to be so endorsed. In the court's opinion, this result would have been achieved without the applicants being afforded a fair hearing or a hearing at all in accordance with the Public Service Commission Regulations.[36]

It continued that, in this matter, the Permanent Secretary or the Head of Department, in exercising that discretionary power conferred, was obliged to choose such a period of garden leave or administrative leave that would not bring about the consequences referred to in regulation 75(3) before a decision was made for disciplinary action.[37] On the facts, the court held that the Permanent Secretary or the Head of Department had fallen short of that obligation. The court held that:

> exercise by the Permanent Secretary or the Head of Department of that discretionary power conferred by order 1125 of the General Orders in such a manner as he has done as to deprive the applicants of their ratings and consequently their licences to function as Air Traffic Controllers even before the decision for a disciplinary action was made, without regard to the provisions of regulation 75(3) and the obligation of the employer or the Ministry to provide the applicants with work and without a fair hearing or a hearing at all, was not a proper exercise of that discretionary power in accordance with the law, nor can the exercise of his authority in the manner he has done be considered a reasonable exercise of that power or authority. His authority is not unlimited in that regard.[38]

The court ruled that 'the manner in which the Permanent Secretary in this case exercised the discretionary power conferred on him by order 1125 of the General Orders cannot be considered fair and just'.[39] The court quoted *Cuming Campbell Investments Pty Ltd v Collector of Imposts* for the view that '[t]he Courts, while claiming no authority in themselves to dictate the decision that ought to be made in the exercise of such a discretion in a given case, are yet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed'; and, second, '[e]ven then a Court does not direct that the discretion be exercised in a particular manner not expressly required by law, but confines itself to commanding the officer by writ of *mandamus* to perform his duty by exercising the discretion according to law.'[40] In the

33 Ibid at 3.
34 *Comptroller of Customs v Munroe* CA, on appeal from BS 1998 SC 155.
35 BS 2001 SC 23 at 16–17.
36 Ibid at 17.
37 Ibid at 26.
38 Ibid.
39 Ibid.
40 (1938) 60 CLR741.

instant case, the court held that the decision by the Permanent Secretary or the Head of Department to place the 22 applicants in Group A on a three months' 'garden leave' or 'administrative leave' and the decision to keep the eight applicants in Group B away from their employment indefinitely without a reason, albeit with full pay, should not to be allowed to stand. As a result, the court quashed the two decisions, ruling that the applicants were to be allowed to return to their duties.[41]

In *Bank of Bermuda v Minister of Community Affairs and Sport*,[42] the court had to consider the scope of the discretion granted to the Human Rights Commission (HRC) under the Human Rights Act (1981) (HRA). Section 18(1) provides that where it appears to the HRC that: (i) it is unlikely in the circumstances to be able to settle the causes of a complaint; or (ii) the HRC has been trying for a period of nine months to settle the causes of a complaint but has been unsuccessful, and the complaint is not of such a kind or of such gravity as to warrant a prosecution, the HRC shall refer the complaint to the Minister who may, *in his discretion*, refer it to a board of inquiry appointed under subsection (2). The court noted that the Minister of Community Affairs and Sport's ('the Minister') role in the statutory scheme was clearly stated in section 18(1) of the HRA and that, in the stated circumstances, the HRC '*shall*' refer the complaint to him, and he '*may, in his discretion*', refer it to a board of inquiry which he appoints under section 18(2).[43] The court noted that when a complaint of unlawful discrimination was made to the HRC, the HRC was under a duty to investigate and 'endeavour to settle the causes of' the complaint.[44] If it failed to achieve a settlement within nine months, or if it appeared to the HRC that a settlement was unlikely, the HRC was required to refer the complaint to the Minister ('*shall* refer' – section 18(1)). The court explained that there was only one situation where the HRC may reach a decision as to the merits of the complaint: if it is of the opinion that the complaint was without merit, it may dismiss it 'at any stage', but only after it has given the complainant 'an opportunity to be heard' (section 15(8)).[45] The court explained that the extent of the discretion which the Minister was required to exercise could be defined, in part, in negative terms.[46] It noted that he did not perform an adjudicative role; the purpose of the reference was to enable a board of inquiry to decide on the merits of a complaint which the HRC had been unable to settle (and in which no criminal proceedings have been instituted). The court claimed that the Minister was required to do more than merely 'steer' the complaint towards a board.[47] It continued that he must, first, be entitled to consider, at least, whether the statutory scheme had been complied with and the complaint had been properly referred to him; and, second, also be entitled – indeed must be required – to take the 'public interest' into account.

The wide discretion given to some public authorities under legislation is usually conferred to protect the public interest.[48] Although legislation may provide discretion to public officials, the court has made it clear that 'all discretions are not equal for there exists in law a power coupled with a duty . . . It applies in circumstances where a refusal to exercise the discretion would render the legislation, to some extent, an exercise in futility'.[49] So where a town and country planner had a discretion or power under legislation with respect to the creation of a

41 BS 2001 SC 23 at 27.
42 BM 2005 CA 23.
43 Ibid at [70].
44 Ibid at [13].
45 Ibid.
46 Ibid at [71].
47 Ibid.
48 *Jaglal v Lakhan* TT 2003 HC 12.
49 *Benjamin v Attorney General of Antigua and Barbuda* AG 2007 HC 54 at [146].

development plan, that power, exceptionally, 'may be construed as imposing a duty to act, and even a duty to act in one particular manner' and that this could 'be a situation where a power is given to a public officer for the purpose of being used for the benefit of persons who are specifically pointed out'.[50] The exercise of discretion was limited by reasonableness, so where the Architects Act mentions examination (if considered necessary) for persons wishing to be registered as architects in Antigua and Barbuda, the court in *Blaize v Architects Registration Board*[51] held that the Architects Registration Board (ARB) should exercise its discretion lawfully with respect to requiring an examination and that, on the facts on the case, the ARB had not done so and refused to entertain the reasonable concerns of the applicants.[52] The court held that the ARB adopted an unreasonable policy and did not properly or reasonably exercise its discretion. Consequently, the court ordered the ARB to register the applicants as architects since they were abundantly qualified and could not be reasonably refused to be registered.[53]

Constitutionality of discretionary powers

Some applicants have argued that the mere fact that legislation confers on a public authority a discretion to make a decision that may or may not affect his or her fundamental rights or freedoms meant that those particular sections are unconstitutional. The first such case was *Bellot v Attorney General of Dominica*,[54] where the applicant sought a declaration from the High Court that section 5 of the Public Order Act (POA) offended the Constitution of Dominica and was, therefore, void in so far as it purported to vest the power in the Minister for Public Order ('the Minister') and/or the Commissioner of Police to grant permission to exercise his fundamental rights under the Constitution.[55] The applicant sought, but was refused, permission from the Deputy Commissioner of Police to hold a march. The court noted that the mere fact that a Minister might have an interest in the policy that was the subject of the protest could not automatically make the provision unconstitutional.[56] It then cited *Francis v Chief of Police* for the view that:

> in cases where a discretionary power is granted to an executive authority the mere fact that the power may possibly be arbitrarily exercised is no ground for declaring the law granting such power unconstitutional, for there is no presumption that the power will in fact be so exercised. Indeed it should be assumed that the recipient of the power will, in exercising it, act in good faith.[57]

The court then held that to hold otherwise would mean persons protesting any police action could successfully challenge the discretion of the Commissioner of Police to grant permission.[58] It also held that, since the Minister was ultimately responsible for public order in Dominica, he was also an appropriate person in whom to vest the discretion to grant or refuse permits. As a result, the court ruled that it was unable to see how his inclusion could render the statute unconstitutional.[59]

It clarified that the claimant did not allege any abuse of discretion and did not deny he was not in compliance with the requirements of the POA and that the reason for the denial

50 Ibid at [149], quoting De Smith, Wolf and Jowell, *Judicial Review of Administrative Action* (5th edn), op. cit., at paras 6–011 to 6–0012.
51 AG 2007 HC 20.
52 Ibid at [36].
53 Ibid. See also *Brandt v Attorney General of Guyana* GY 1971 CA 2.
54 DM 2004 HC 16.
55 Ibid at [1].
56 Ibid at [13].
57 [1970] 15 WIR 1 at 15.
58 DM 2004 HC 16 at [13].
59 Ibid at [15].

of permission, as stated by both the Deputy Commissioner and the Minister, was that non-compliance.[60] The court was of the opinion that the legislature considered the Commissioner of Police and the Minister, the persons responsible for public order, as the appropriate persons to regulate public processions and meetings in public places obviously because of the potential impact on public safety and public order.[61] The court asserted that the fact that the discretion granted to the Minister under section 5(2) of the POA could possibly be arbitrarily exercised did not render it unconstitutional, claiming that there was no question any arbitrary decision by a minister would be just as subject to judicial review as would be that of a Commissioner of Police. The applicant argued that the Minister, in deciding whether to grant permission, was acting in a quasi-judicial capacity and as such he was acting as a judge in his own cause and that this, therefore, offended the *nemo judex in re sua causa* rule.[62] The court replied that the POA was regulatory in nature; that both the Commissioner of Police and the Minister performed administrative functions and that none of the cases cited by the claimant showed that the granting of a licence involved the exercise of a judicial power. As a result, it concluded that neither section 5 of the POA nor the provision of criminal sanctions offended the Constitution.[63]

A similar issue arose in *Goodwin v Attorney General of Antigua and Barbuda*,[64] where the plaintiffs also argued that, by the wording of the Business Licence Act (BLA), they were dependent upon the discretion of the Minister to practise their profession as medical and legal practitioners. Section 3(3) of the BLA provides that the Minister, upon receipt of an application in respect of a business carried on immediately prior to the coming into force of the BLA, and upon payment of the fee prescribed in relation to that business, causes an annual licence to be issued in the prescribed form for the approval in respect of that business.[65] The plaintiffs also argued that, by giving the Minister a discretion under the BLA to issue a licence, without which they could not practise their profession, the BLA deprived them of a right to work or earn a livelihood.[66] The court pointed out that the plaintiffs were medical and legal practitioners who had invested a lot of money and effort to set up their individual practices in order to earn a livelihood. It claimed that if, as was argued and accepted by the court, the Minister had a discretion to grant a licence and the plaintiffs' right to earn a livelihood was dependent on a discretion to be exercised by the Minister, the Minister might very well refuse to grant the licence upon which the plaintiffs depend to earn their livelihood, thereby depriving them of their right to that livelihood. Therefore, the court concluded that this deprivation was offensive to the right to life as conferred by section 4 of the Antigua and Barbuda Constitution; moreover, it was of the view that section 20(2)(iii) of the BLA could also lead to that result of deprivation of the right to work.[67] The court did not explain how this infringement came about but this decision seems to be against the grain of authority emerging from *Bellot*, which was considered above, and *Francis*, which will now be examined.

In *Francis v Chief of Police*,[68] the appellants were charged with using a noisy instrument during the course of a public meeting without first obtaining permission in writing from the Chief of Police, contrary to section 5 of the Public Meeting and Processions Act (PMPA). They argued that the law contravened sections 10 and 11 of the Constitution. Section 5(1) of the PMPA provides that any person who, in any public place or at any public meeting, uses any

60 Ibid at [18].
61 Ibid at [19].
62 Ibid at [20].
63 Ibid at [22].
64 AG 1997 HC 30.
65 Ibid at 27.
66 Ibid at 30.
67 Ibid at 33.
68 KN 1970 CA 1. See *Maximea v Attorney General of Dominica* DM 1973 HC 1; and on appeal: DM 1974 CA 1.

noisy instrument for the purpose of announcing or summoning any public meeting or public procession or during the course of any public meeting or public procession, in any case without having first obtained the permission in writing of the Chief of Police so to do, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding one hundred dollars. Section 2(2) provides that the Chief of Police may, in his discretion, grant permission to any person to use a noisy instrument for the purpose of any public meeting or public procession upon such terms and conditions and subject to such restrictions *as he may think fit.* The court noted that '[t]he language of section 5 of the [PMPA] makes it quite clear that in order to use a noisy instrument, which by section 2 includes a loudspeaker, at a public meeting a permit must first be obtained from the Chief of Police so to do.'[69] The question for the court was whether the necessity for obtaining such a permit constituted a derogation from the freedoms which sections 10 and 11 of the Constitution sought to preserve for the individual.[70]

It also made clear that the provisos to section 10(2) of the Constitution allowed the impositions of reasonable restrictions on the exercise of the freedoms conferred by the section on the individual. The court claimed that a loss of freedom as a consequence of section 5 of the PMPA could only be established if it could be shown that the act complained of did not fall within the scope of the provisos: the freedoms contemplated by section 10 could, therefore, only be enjoyed by individuals in so far as their enjoyment did not constitute a nuisance to others. It continued that if, in fact, it did, then the exercise of that freedom was to that extent restricted by the Constitution.[71] The appellant conceded that there was nothing unconstitutional in the legislature regulating the use of loudspeakers but nonetheless argued that what was wrong was that section 5(2) of the PMPA gave an unfettered discretion to the Chief of Police without providing for any judicial review of that discretion once exercised. The court disagreed with that view because 'there can be no presumption that because an unfettered discretion is placed in the hands of any person, or authority, that that discretion will be exercised arbitrarily.'[72] It considered the following factors: (a) that the use of loudspeakers at any time and in any place could quite well constitute a nuisance; (b) that the Chief of Police, as the senior officer entrusted with the enforcement of law and order, should best be able to assess the extent to which freedoms of some individuals might be enjoyed without causing disturbance to others; and (c) that the discretionary power given in this case was limited in its application and duration. As a result, it concluded that there was:

> nothing wrong or unconstitutional in the legislative authority placing a discretionary power in that responsible functionary, the Chief of Police, to decide in what circumstances loudspeakers may be used. Clothed with such a discretionary power it must be assumed that the officer will exercise his discretion with reason and justice, and in keeping with the responsibilities of his office: to argue otherwise, especially as in the instant case where no application for a permit to use a loudspeaker at the particular public meeting was ever made, was merely speculative argument and consequently untenable.[73]

Firearms licences

One of the areas in which the issue of whether a public authority has exercised discretion granted to it lawfully is in the area of licences, in particular, firearms licences. In *Burroughes v*

69 KN 1970 CA 1 at 6.
70 Ibid at 6.
71 Ibid.
72 Ibid.
73 Ibid at 6–7.

Katwaroo,[74] the appellant claimed the decision of the Police Commissioner to revoke his licence was unlawful, as it was contrary to the established principles of natural justice since the applicant was not allowed a right to be heard before the revocation, and no reasons were given for the revocation of his licence. The question for the Court of Appeal of Trinidad and Tobago was whether the Police Commissioner properly exercised his discretion under section 21 of the Firearms Act (FA) in purporting to revoke the appellant's licence.[75] Section 21 of the FA provides: 'The Commissioner of Police may revoke any licence, certificate or permit, *inter alia*, (d) In any other case, *if he thinks fit*.' The court noted that the function of the Police Commissioner under the FA was purely executive and that the court's right, if any, of judicial review, would have to be determined by the language used creating the power and the context in which it is exercised. It claimed that 'it cannot be gainsaid that with respect to the cancellation of a licence under s. 21(d) that the language, "if he thinks fit", is of such a kind as to vest the Commissioner with wide discretion.'[76] The court was of the opinion that, although Parliament might have empowered a competent authority to take such action 'as it thinks fit', the court would not necessarily allow this formula to debar it from its power of review of the exercise of the competent authority's discretion even though it was a purely executive one.[77] The court questioned how best it could resolve the issue in the light of the competing claims of the parties against: (a) the background of the undisputed facts; (b) the admittedly wide discretion with which the Commissioner was endowed; and (c) the court's approach in public law in cases such as *Padfield* to the grant of discretions of the sort. It responded that the answer must lie in the area of: (a) an approach by way of a resort to the facts (admitted and/or found) as disclosed by the record; (b) the undoubted discretion with which the Commissioner was endowed by section 21(d); (c) the conduct of the Commissioner in relation to those facts – admitted or proved; and (d) the modern approach in public law to a situation of the kind.[78] The court noted that the expression 'as he thinks fit' connoted an element of subjectivity and that, for this reason, including the fact that the subject matter with which the FA was concerned was of a highly sensitive nature, as a general rule, the courts, in its opinion, should to be slow to question the decision of the Police Commissioner in such matters. However, it cautioned that this 'is by no means a prescription for postulating that as a matter of law the expression "as he thinks fit" in itself indicates that the discretion of the Commissioner is wholly unfettered in the area of revocation of a licence as distinct from the grant of such'.[79]

Again, it observed that, under the FA, the possession of a firearm was absolutely prohibited unless the holder was an 'exempted' person and that the exercise by the Police Commissioner of his discretion to allow an applicant to hold and keep a firearm did not clothe it with anything else but that of a privilege.[80] In other words, the court clarified that once a person was granted a licence to keep and use a firearm that person would have the privilege to do so, provided he kept within the boundaries of the law and/or satisfied any conditions attaching to its use and

74 TT 1985 CA 76; (1985) 40 WIR 287. This decision was applied in *Globe Detective and Protective Agency Ltd v Commissioner of Police* TT 1997 HC 113 in relation to the claim by the appellants that first respondent exceeded his jurisdiction by cancelling his firearm user's licence without hearing any evidence and that the cancellation was in breach of the rules of natural justice and that the applicants were not afforded an opportunity to be heard. The court found that the applicants were allowed a right to be heard and they had made ample use of it. The court also found no necessity to have held an oral hearing as prejudice had been suffered by the applicants by not being told who made the allegations against the second applicant. It therefore dismissed the application.

75 TT 1985 CA 76 at 10. See also *Singh v Commissioner of Police* TT 1983 HC 61.

76 TT 1985 CA 76 at 14.

77 Ibid.

78 Ibid at 18.

79 Ibid.

80 Ibid at 19.

provided also that the privilege was not terminated permanently or temporarily by any action on the part of the Police Commissioner acting reasonably and in the bona fide exercise of his powers under section 21 or 22 of the FA.[81] The court reasoned that '[i]f a holder of a gunsmith or firearm dealer's licence is convicted of an offence against the [FA] it is axiomatic that the Commissioner in revoking the licence would have done so on reasonable grounds'.[82] In addition the court noted that if the Police Commissioner was 'minded to revoke a firearm user's licence he must do so because he thinks fit on reasonable grounds' and that '[a] reasonable ground among others could be that the holder thereof has since the grant to him displayed evidence of intemperate habits or has since become of unsound mind or that the circumstances giving rise to the grant to him at the time no longer obtains.'[83] It then held that, in its view, the Police Commissioner was 'required to act if he thinks fit on reasonable grounds and not merely because "he thinks fit" and no more; if that happens, he would be acting not reasonably, but arbitrarily or capriciously'.[84]

In exercising his discretion the Commissioner of Police must not act arbitrarily or capriciously. This meant that before he could revoke any firearms licence he must satisfy himself that the licence holder was unfit to be entrusted with a firearm and not leave that investigation and decision to his subordinates.[85] In *Naraynsingh v Commissioner of Police*,[86] the appellant's firearms licence was revoked by the respondent Commissioner of Police ('the Commissioner') pursuant to section 21 of the FA. The basis of the Commissioner's decision was that during the execution of a civil debt, at the appellant's home, a second (unlicensed) firearm was allegedly found on the premises.[87] The appellant brought a judicial review application, claiming, *inter alia*, that the Commissioner's decision was reached unfairly and without any sufficient investigation having been made into the circumstances of the alleged finding of the second firearm.[88] The question for the Privy Council's determination was whether the Commissioner acted fairly in those circumstances in reaching his conclusion that the appellant's licence should be revoked.[89] In other words, could he properly 'think [it] fit' to revoke the licence without making any further enquiry into the matter and without giving the appellant any further or better opportunity of contesting the allegation that a second firearm had indeed been found at his house, rather than, as he himself was alleging, been planted there? The Board replied that the Commissioner was required to act fairly in the exercise of the administrative power conferred on him by section 21.[90] The appellant argued that, in the circumstances, the Commissioner had no alternative but to hold some form of inquiry, an oral hearing at which the appellant could have confronted the alleged finder of the second firearm, in particular, given that this opportunity had been lost to him by the prosecution's non-attendance before the magistrate.[91] The Board rejected that argument, relying on *Burroughs v Katwaroo*[92] and *Globe Detective and Protective Agency Ltd v Commissioner of Police* as correct pronouncements concerning the exercise of this section 21(d) power of revocation of a firearm user's licence by the courts of Trinidad and Tobago:[93] the Commissioner was

81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid.
85 *Ex p Bruxo* GD 1992 HC 8.
86 TT 2004 PC 6.
87 Ibid at [3].
88 Ibid at [4].
89 Ibid at [16].
90 Ibid at [17].
91 Ibid at [18].
92 (1985) 40 WIR 287.
93 TT 2004 PC 6 at [19].

not required to convene an oral hearing before exercising this power; he could adopt an exclusively written procedure.

The Board was not convinced that the procedure adopted in the instant case and, in particular, the perfunctory nature of the Commissioner's own inquiry into the facts satisfied the requirements of fairness.[94] It explained that the Commissioner was not entitled to reject the appellant's allegation that the firearm was perhaps planted at his house by the levy party without more, simply on the basis of the material before him: substantially more in the way of investigation was required to be undertaken.[95] In the circumstances, the Board ruled that further inquiries plainly could and should have been made, reiterating that 'it will always be necessary for the Commissioner to ascertain more about the circumstances of whatever it is which inclines him to revoke a licence than was ascertained here.'[96] In its view, there would be some circumstances where further information may simply not be available, or the facts might be plain enough. However, the Board claimed that, as happened in the instant case, where further information obviously was available, and where there were a number of puzzling features of the case (not least why so many people should have attended the appellant's home to enforce a small debt), then a fair procedure demanded that further inquiries be made, particularly having regard to the abandonment of the criminal prosecution.[97] As a result, the Board quashed the Commissioner's decision to revoke the appellant's licence.[98]

Liquor licences

Another area where the issue has arisen is cases dealing with liquor licences in light of the impact that non-renewal of such licences might have on the livelihood of the applicant. Where such decisions are to be made, the court must ensure that the public authority has exercised its discretion lawfully and in a way that respectfully takes into account the legitimate interests of the licence holder. In *Butler & Sands and Company Ltd v The Licensing Authority of New Providence*,[99] two basic issues arose for consideration by the court: first, was the Licensing Authority (Authority) correct in refusing the applications because Mr Everette Sands sold his shares in Butler & Sands Ltd to Kereland Ltd in 2000 without reference to the Authority? Secondly, could the Authority properly refuse the applications for licences for 2001 on the ground that franchise agreements made with the operators of some of the stores were contrary to the spirit and intention of the Liquor Licenses Act (LLA)?[100] Section 8(1) gives the Authority discretion to grant and transfer licenses on such conditions and restrictions as it may determine. Section 8(2) permits the cancellation of a licence or imposition of conditions at any time. It provides that the licensee must be given the opportunity to respond to any complaint made against it to the Licensing Authority. Under section 13, licences remain in force for a year and terminate on 31 December each year. The section also regulated the conditions to be observed in respect to the issue of licenses. In summary, these conditions relate to: (a) the location of the premises that were licensed, and (b) the requirement that the Authority must be satisfied that the applicant was a fit and proper person to be entrusted to sell intoxicating liquors.[101] The

94 Ibid at [20].
95 Ibid at [21].
96 Ibid at [23].
97 Ibid.
98 Ibid at [24].
99 BS 2001 SC 19. See also *Sargent v Knowles* BS 1994 SC 40; *Moxam v Liquor Licensing* Board KY 1998 GC 16; and *The Bermuda Perfumery v The Market Place* BM 1993 CA 23.
100 BS 2001 SC 19 at 2.
101 Ibid at 3.

court claimed that the Authority must be satisfied that licences were only granted to fit and proper persons; and that, where the applicant was a company, the Authority had the right to know whether the identity of its shareholders affected the company being a fit and proper person to be entrusted to sell intoxicating liquors to the public. Section 14 required the approval by the Authority for a transfer of a licence from one person to another, or the transfer of a licence from one premises to another. It continued that, however, there was nothing in the LLA that suggested that Parliament gave the Authority the power to supervise the transfer of shares in a company that had been granted a licence. As a result, the court held that the Authority misinterpreted the law when it concluded that the transfer was a violation of the LLA.[102] In addition, the court noted that the change in the ownership of shares in Butler & Sands did not change their corporate personality and that the sale of its shares did not transfer any of the licences from one person to another.[103]

Immigration

An area fraught with difficulty is immigration, where public officials often exercise draconian powers of expulsion of persons from a territory or may prevent persons from entering a country. Such powers should not lightly be exercised to the detriment of any person and the courts have been vigilant in ensuring that in the exercise of such powers, immigration authorities do not exceed the power given to them under statute. In *DaCosta v Minister of National Security*,[104] the plaintiff was a former Chief Justice of The Bahamas Supreme Court and a retired member of the Bahamas Court of Appeal. He was also a member of the Courts of Appeal of Bermuda and the Turks and Caicos Islands.[105] The court noted that, while he was employed in the service of the Government of the Bahamas, the plaintiff was entitled, by virtue of section 17 of the Immigration Act (IA), to land in the Bahamas. It continued that, after the plaintiff's retirement from the Court of Appeal, his status depended on section 25(2) of the IA, which states: 'Where any person ceases to be a person to land in the Colony in accordance with the provisions of section 17, the provisions of this section shall apply to that person upon the expiration of such period of time as reasonably to allow for the departure of that person from the Colony as the Director of Immigration may in his discretion allow.'[106] The court was of the opinion that the plaintiff, therefore, was entitled to a reasonable time to leave the Bahamas and, as a precondition to any prosecution against him for remaining illegally in the Bahamas, it was incumbent on the Director of Immigration to give him notice of a final date for his departure. After his unsuccessful application to the Director of Immigration to reside permanently in the Bahamas to engage in gainful occupation as a legal consultant to local practising attorneys, the plaintiff requested six months to enable him to effect the transfer to Bermuda. This was refused by the Director of Immigration, who permitted him to remain in the Bahamas for only four weeks.[107]

The court noted that, under the IA, the Director of Immigration, acting on behalf of the Board of Immigration, had the power to fix a time as reasonable to allow for the plaintiff's departure from the Bahamas. In its view, such period was in the Director's discretion but this discretion was not unfettered as it had to be exercised reasonably.[108] The applicant argued that

102 Ibid at 4.
103 Ibid at 5.
104 BS 1986 SC 16. See also *Centeno v The Chief Immigration Officer* TT 1983 HC 119; *Re The Caymanian Protection Law* KY 1981 GC 11; and *Streeter and K Coast Development v Immigration Board* KY 1998 GC 32.
105 BS 1986 SC 16 at 3.
106 Ibid.
107 Ibid at 4.
108 Ibid at 3.

the period of four weeks was not a reasonable period within the meaning of section 25 of the IA.[109] The court pointed out that section 25(2) of the IA provides for a reasonable period of time for the plaintiff's departure. It continued that the court was, therefore, entitled to review the Director's decision on the ground of *Wednesbury* unreasonableness to ascertain whether she had given the plaintiff a reasonable period of time for his departure. The court explained that the IA used the word 'reasonably' in relation to the Director's discretion, and that the position was to be distinguished from the *Wednesbury* case where the word was omitted. In its view, in the IA there was a statutory obligation of reasonableness. It explained that the issue was a very narrow one: whether the refusal by the Director of Immigration to extend the time period by ten additional days was unfair, unreasonable and an improper exercise of her power.[110]

In *Ex p Schaper*,[111] the applicant's permit to visit in Belize was revoked by the Director, Immigration and Nationality ('the Director') on the instructions of the Minister of Human Resources, Youth, Women and Culture ('the Minister'). He sought judicial review of that decision on the basis that the Director failed properly to exercise the discretion vested in him under the provisions of section l0 of the IA. Section 10(1) of the IA provides that: 'A permit granted under this ordinance may at any time be revoked by the Minister in his discretion or by any minister acting on the direction of the Minister, and may also be revoked where the terms of the permit so provide.' The court was of the opinion that the last sentence in that section was additional to the discretion given under the first sentence.[112] The applicant argued that the discretion must be judicially exercised and that the Minister had failed properly to exercise his discretion and had not given the applicant any opportunity or chance of a hearing, nor had he provided any reasons as to why the permit was revoked. By doing so, the applicant also argued that the Minister breached the rules of natural justice which provided the applicant with a fair hearing and an opportunity to rebut any charges made against him.[113] In addition, it was argued that the applicant received no prior warning and the Minister at least should have given the applicant written information with reasons for the revocation of the permit as well as extending to the applicant an opportunity to counteract those reasons. As a result, he claimed that, since there was a denial of natural justice, the Minister failed to exercise his discretion judicially as he ought to have done.[114]

The respondent argued the Minister acted lawfully in revoking the applicant's permit under section 10 of the IA. He further argued that the proviso to section 10(2), when properly construed, indicated that if the permit was revoked by the direction of the Minister then, under that section, the court could intervene. The proviso to section 10(2) states that '[p]rovided that the Court may, if the permit was not revoked by or by the direction of the Minister, order the permit to be restored and the immigrant to be released'.[115] The court noted it must be remembered that the remedy of *certiorari* was discretionary in nature and that it may be denied even in those cases where it might appear there had been a breach of natural justice. The question, therefore, for the court was whether or not the ministerial discretion, exercisable under section 10 of the IA, was absolute. The respondent argued that the discretion vested in the Minister by section 10 was absolute. The court explained that to resolve this issue, it must examine closely sections 10(1) and 11. Section 11(1) provides that: 'The kinds of permits which

109 Ibid at 6.
110 Ibid at 9. See also *Delapenha Funeral Home Ltd v The Minister of Local Government and Environment* JM 2008 SC 72.
111 BZ 1995 SC 2.
112 Ibid at 5.
113 Ibid.
114 Ibid.
115 Ibid at 6–7.

may be issued to a person entitling such persons to enter and remain temporarily within Belize shall be as follows: (i) an in transit permit; (ii) a dependant's permit; (iii) a temporary employment permit; (iv) a student's permit; (v) a special permit; and (vi) a visitor's permit. (2) The issue of any permit of a kind mentioned in this section shall be in the absolute discretion of the principal immigration officer.' The court claimed that, from the wording of section 11, it was abundantly clear that the issue of a visitor's permit was in the absolute discretion of the immigration officer. As a result, it concluded that it 'must be that the revocation of any said permit will be in the absolute discretion of the Minister and indeed Parliament must have so contemplated'.[116] The court, therefore, dismissed the application.[117] The court in this case took a very restrictive approach to the exercise of discretion and it seems to be an aberration in light of the approach taken in the majority of cases that examined the scope and nature of the exercise of discretion by public authorities. It is submitted that this decision is incorrect because it cannot be the case that a public authority has an absolute discretion to revoke a person's permit under the IA. This is contrary to the leading authorities and should not be followed.

In *Marks v Minister of Home Affairs*,[118] the appellant's application for the extension of a work permit was refused by the Minister of Home Affairs ('the Minister'). The appellant had lived in Bermuda since 1976 but in 1983 he was informed that his work permit would not be renewed. The court had to consider the nature of the Minister's discretionary power under the IA, observing that, generally, it was of the essence of natural justice that it should be observed generally in the exercise of discretionary power. It continued that it was 'axiomatic that statutory powers must be exercised reasonably and in good faith, and in accordance with the spirit as well as the letter of the empowering Act' and that the 'principle is an old one and dates at least from the sixteenth century'.[119] The court was of the opinion that section 61(4) of the IA clearly lays down guidelines for the Minister: The Minister, in considering any application for the grant, extension or variation of permission to engage in gainful occupation, shall, subject to any general directions which the Cabinet may from time to time give in respect of the consideration of such applications, take particularly into account the character of the applicant and, where relevant, of his or her spouse; the existing and likely economic situation of these islands; the availability of the services of persons already resident in these islands and local companies; the desirability of giving preference to the spouses of persons possessing Bermudian status; the protection of local interests; and generally, the requirements of the community as a whole, and the Minister shall, in respect of any such application, consult with such public authorities as may, in the circumstances, be appropriate, and shall in particular, in the case of an application for permission to practise any profession in respect of which there is established any statutory body for regulating the matters dealt with by that profession, consult with that body.[120] The court claimed that, first, 'the Minister in discharging his duty is subject to general directions from the Cabinet; he must take into particular account certain designated matters'; and second, 'he is required to consult appropriate public authorities and professional bodies established by statute in the case of applications to practise a profession.'[121] In addition, it claimed that 'unfettered governmental discretion is a contradiction in terms because it is inconsistent with the rule of law' but that 'even if there were such a concept it is patently clear that the discretion of the Minister of Home Affairs is not unfettered and the *Wednesbury* principle applies to the exercise of his discretion.'[122]

116 Ibid at 11.
117 Ibid.
118 BM 1984 CA 1.
119 Ibid at 14.
120 Ibid at 15.
121 Ibid at 16.
122 Ibid at 17.

The court explained 'that in exercising his discretionary power the factor which weighed heaviest with the Minister was the advice which he received from the Bermuda Medical Council and the Bermuda Medical Society'.[123] It continued that the Bermuda Medical Council was a body that the Minister was obliged to consult before exercising his discretion. The court was of the view that section 61 did not confer on the Minister unfettered discretion as to whether to extend any permission previously given; section 61(4) obliged him to consider any general directions which the Cabinet might give: he must take 'particularly into account' the matters outlined in paragraphs (a) to (f) of subsection (4) and if, in all the circumstances, the person to whom the permission related has a reasonable expectation that permission previously given shall be extended, the rules of natural justice applied.[124] Since the applicant had enjoyed six years of automatic renewals, the court held that he should have been given an opportunity to make representation before the non-renewal of his permit.[125]

Telecommunications

Issues relating to telecommunications are an extension of the licensing cases where providers seek licences from the relevant authority and that power, as noted above, should be lawfully exercised – the discretion granted to refuse to grant a licence to operate a network or provide a service should not be exercised arbitrarily and the applicant should not be discriminated against. In *Digicel v Telecommunications Regulatory Commission*,[126] the claimant sought, *inter alia*, a declaration that the terms on which it was invited to apply for a telecommunications licence ('Invitation') under the Telecommunications Act (TA) were unreasonable and amounted to a denial of its right to apply for a licence in accordance with the provisions of the TA. The court was of the view that section 91 of the TA gives the Telecommunications Regulatory Commission (TRC) power to issue such guidelines, standards and other requirements relating to telecommunications *as it thinks fit*, which shall constitute the Telecommunications Code, and to publish the same on its website and in the Gazette.[127] Section 15(2) states that, subject to subsection (10), a person who wishes to operate a network or provide a service described in subsection (1) shall apply to the TRC for a licence in the manner prescribed in the Telecommunications Code ('the Code').[128] The court noted that there can be no doubt that the TRC had authority to issue a Code and to make provisions for applying for a licence in the Code.[129] The court claimed that the Invitation was clearly part of the Code even if it presently formed the whole Code; and that it purported to set out the procedure for applying for a licence which was by invitation to the persons designated therein, the three interested parties.[130]

The court noted that, with respect to the TRC's obligation to determine applications under section 15(7) on an 'objective, transparent and non-discriminatory basis', the applicant argued that this meant 'no more than that the Respondent is required to act on published not private criteria and material, and must exercise its discretion in accordance with the law'. It continued that 'non-discriminatory' means that 'in considering applications before it, the respondent could not grant or refuse an application on different criteria for different applicants. In other

123 Ibid at 20.
124 Ibid at 36.
125 Ibid.
126 VG 2007 HC 14.
127 Ibid at [55].
128 Ibid at [56].
129 Ibid at [57].
130 Ibid.

words, it cannot be subjective or selective. It must act consistently.'[131] The court also pointed out that, under section 15(7), the TRC had a duty in carrying out its functions to take account of ministerial policy and policy directives as conveyed to it by the Minister.[132] In the court's opinion, this meant that 'the [TRC] should take account of or consider ministerial policy in determining whether or not to grant licences as the grant of a licence is a matter in the [TRC's] sole discretion as it alone has been vested with the authority to issue licences, not the Minister.'[133] The court cautioned that this did not mean ministerial policy was the only relevant concern and it did not mean that the TRC must, without exercising its own deliberate judgement, simply rubber stamp the Minister's decision which appeared to be the effect of the Invitation, as this would defeat the purpose of the TA as stated in its long title. It explained that there was nothing wrong with having a policy, provided always that it was appreciated that each application must be considered on its own merits and that this was true of the TRC's own policy as well as ministerial policy. By restricting applications as it did, the court concluded that the TRC did not exercise its discretion in framing the Invitation.[134]

Environmental

There has been a spate of decisions in the environmental field in the Commonwealth Caribbean in recent years. This shows that applicants are increasingly becoming aware of their rights and obligations under statutes and vigorous in defending those rights in the courts. In *Friends and Fishermen of the Sea v The Environment Management Authority*,[135] Friends and Fishermen of the Sea (FFOS) contended that the decision of the Environment Management Authority (EMA) to issue the Certificate of Environmental Clearance (CEC) was unlawful on the grounds of illegality, procedural impropriety, unreasonableness and/or irrationality. It was also argued by FFOS that the decision was an abuse of public power; that the EMA fettered its discretion; that it failed to consider the relevant matters in exercising its discretion; and that its decision was tainted with bias.[136] The court noted that the CEC was granted subject to the imposition of an extensive list of conditions that were both protective and preventative measures.[137] These conditions also included monitoring programmes which were designed to compel the interested party to forward scientific data relating to specific environmental impacts to the EMA. As a result, the court ruled that it could not be said that the EMA failed to take precautionary measures in light of the scientific uncertainties of the nature and extent of the serious irreversible threats to the environment. In its view, the principle was adhered to.[138] The court explained that the National Environmental Policy gave no express indication of what preventative measures should be taken and that it was clear that the threat must be serious and irreversible and must be adequately substantiated by scientific evidence.[139] It reasoned that the measures adopted were left to the discretion of the EMA and, in the exercise of its discretion, the EMA considered the measures appropriate to the threats as identified by FFOS and by Dr Naraynsingh-Chang. The court therefore concluded that, given the criticisms of the

131 Ibid at [42].
132 Ibid at [68].
133 Ibid.
134 Ibid.
135 TT 2004 HC 113.
136 Ibid at 2.
137 Ibid at 55.
138 Ibid.
139 Ibid.

reliability of Dr Naraynsingh-Chang's report, the EMA could neither be found to have ignored the principle nor to have acted illegally given the manner in which its discretion was exercised.[140]

ABDICATION

Where a decision maker is granted the power under legislation to make a decision, it must make that decision itself and cannot allow itself to be dictated to or abdicate that responsibility to another person. The public authority must exercise its own discretion and not those of another person in making its decision. In *National Level Engineering Limited v Attorney General of Antigua and Barbuda*,[141] the court cited Alexis for the view that 'a functionary, armed with a discretion, can solicit the opinions of others as well as other information on the subject so long as he does not allow policy or a decision to be dictated to him.'[142] In relation to abdication, the court again quoted the following from Alexis: 'What an administrator may not do is to unlawfully abdicate his own discretion in favour of the view of others or succumb to the dictation of others.'[143] The court explained that there can be no illegality if the Minister merely sought information in arriving at his decision. In *Bell v Commissioner of Police*,[144] the applicant was dismissed from the police service after he was charged with a criminal offence. He was also charged with a disciplinary offence. The question for the court was whether the decision to discharge him was *ultra vires* the powers of the Commissioner of Police (Commissioner). Section 38 of the Police Act (PA) gives the Commissioner the authority to review disciplinary proceedings, other than those scheduled by himself, where the officer was found guilty; and there was no right of appeal under section 38.[145] Regulation 9 of the Police Regulations states that an officer who was dissatisfied with a decision on any of the disciplinary offences mentioned in Regulation 6 with which he was charged may appeal therefrom in the manner provided by section 39 of the PA. Section 39(1) provides for an appeal not to the Commissioner but to the Governor; and section 39(2) provides for an appeal to the Commissioner where a disciplinary tribunal has imposed a punishment. The court, after holding that the latter was not applicable in the instant case, further held that the Commissioner's action in sending the appeal to the Governor together with the Commissioner's recommendation was not an abdication of the Commissioner's statutory duty.[146] It continued that he could have delayed matters by returning the letter to the applicant asking him to rectify his procedure, but chose not to allow the appeal to be bogged down with procedural errors but instead sent it to the proper person, holding that the Commissioner should be commended, not chastised, for doing so.[147]

Commissioner of Prisons v Phillips[148] related to the events after the unsuccessful coup in Trinidad and Tobago. The respondents argued that, notwithstanding the express reference to the words used in the unenforceable 'pardon document' (having been obtained under duress),

140 Ibid at 56.
141 AG 2007 HC 26. See *NH International (Caribbean) Ltd v Urban Development Corporation of Trinidad and Tobago* TT 2005 HC 50.
142 Alexis, 'Judicial Review of Administrative Action' (unpublished PhD Thesis, University of Cambridge, 1980) at 180.
143 Ibid.
144 VG 2007 HC 34. See also *Century National Merchant Bank Limited v Davies* JM 1997 CA 21; and *Warnerville Grains Mill Limited v The Minister of Agriculture Lands, and Marine Resources* TT 1994 HC 50.
145 VG 2007 HC 34 at [49].
146 Ibid at [51].
147 Ibid.
148 TT 1993 CA 19.

that document was, nonetheless, a product of the exercise of the power under section 87(1) of the Constitution of Trinidad and Tobago by the President and was not pursuant to or by the directions of the 'Major Points of Agreement' document which had been drawn up in the Red House by the respondents and signed by members of the Government who were being held hostage there. The appellant referred to Wade, in dealing with 'Discretions Surrender, Abdication, Dictation', who stated:

> Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is *ultra vires* and void. So strict are the Courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them.[149]

They also noted: 'There must always be a difference between seeking advice and then genuinely exercising one's own discretion, on the one hand, and, on the other hand, acting obediently or automatically on someone else's advice or directions.'[150] The court noted that the President's adviser indicated to him that the document did not purport to be an exercise of the power under section 87(1) but something prepared only with reference to the Major Points of Agreement document which was to be sent in as a 'discussion' document.[151] The President, however, claimed that he had no intention of granting any amnesty to the respondents, nor was he prepared to sign the draft document presented to him by the advisers.[152]

The Court of Appeal then considered the question of law applicable to the exercise of one's own discretion and to the interpretation of the words in the pardon document. In relation to the former, the court accepted that this required the exercise of the President's *own* discretion.[153] It explained that:

> discretion has been referred to as an 'absolute unfettered' discretion in the sense that the President is under no duty to consider the exercise of the power in any given situation as opposed to an unfettered discretion in which the donee is under a duty to act one way or the other. Notwithstanding this obvious distinction, however, between the 'absolute unfettered' discretion and the 'unfettered' one coupled with a duty to act, in the absence of some specific limitation in the conferring Statute or Act, when one is challenging the legality of the exercise of such a power the principles are the same. And, a basic principle is that a discretionary power must, in general, be exercised only by the authority to which it has been committed.[154]

The court continued that 'when a power has been conferred on a person in circumstances indicating that trust is being placed in his individual judgment, he must exercise that power personally unless he has been expressly empowered to delegate it to another'.[155]

The Court of Appeal noted that if, therefore, the ordinary meaning was attributed to the words 'as required of me by the document headed Major Points of Agreement' the meaning was clear: the granting of the amnesty was governed or controlled by the *dictates* of the Major

149 Wade, *Administrative Law* (6th edn), 1989, New York: Oxford University Press, 368.
150 Ibid at 369.
151 TT 1993 CA 19.
152 Ibid at 4.
153 Ibid.
154 Ibid at 7.
155 Ibid at 9.

Points of Agreement and that agreement expressly required the President to act in a particular way and he followed the dictates of that agreement.[156] The court noted that it could see no good reason, and none had been offered, why the words should not be given their ordinary meaning. In those circumstances, it noted that one could conclude that the discretion, having been exercised pursuant to the dictates of another or pursuant to some agreement, was *ultra vires* the subsection and void.[157] However, the court also explained that it was quite possible, notwithstanding the use of those words 'as required of me by . . .', for the President to exercise his own deliberate judgement under the subsection independently of the dictates of the agreement.[158] In other words, it explained that, while the agreement might demand a grant of amnesty the President might think that it was a fit and proper case, notwithstanding the demands, that an amnesty be granted pursuant to section 87(1) and he might do so quite properly.[159] The court claimed that, first, this was a question of fact to be determined from the evidence of the President and the surrounding circumstances; and, second, it was also a matter of credibility, and particularly so in cases of this kind where it was a simple matter for the unscrupulous to resort to deception.[160]

The court questioned whether the President intended to exercise the discretion given him under section 87(1) or whether he was acting pursuant to the requirements of the Major Points of Agreement, claiming there were authorities which supported the view that 'intention' was an essential element to the validity of the exercise of a power.[161] It continued that, although there was no direct reference made to the particular power, yet since the President's action was about pardoning it could be concluded that he intended to act under section 87(1).[162] The court claimed that there was also a further hurdle to overcome: the express words of the document and the intention of the President at the time, noting that, in his affidavit, the President claimed that: (i) he had no intention of exercising his power of pardon in favour of the respondents; (ii) before initialling the pardon document, he was advised that the pardon document was issued pursuant to the Major Points of Agreement and not pursuant to section 87(1); (iii) the distinction he made between the pardon document and a proper amnesty; and (iv) the purpose for which he initialled the document was to prolong the discussions and to save lives.[163]

The Court of Appeal was of the view that the exercise of the power under section 87(1) called for the exercise of the President's own deliberate judgement: he must address his mind to the issue and make his decision.[164] It continued that the law did not allow him to delegate that decision or to surrender it to the dictates of any other person. In other words, he certainly could not and must not act in accordance with, or because of, someone else's direction or dictates; it must be his act in the sense that it must be the fruit of the exercise of his own judgement.[165] The court noted that, first, the pardon document was issued pursuant to the Major Points of Agreement document and nothing else; and that the evidence demonstrated that it was not his decision to grant the pardon; and second, the advice he received confirmed that he was acting pursuant to the agreement and not pursuant to section 87(1). Therefore, the court held that when the President initialled the pardon document, in accordance with the advice he received

156 Ibid.
157 Ibid at 18.
158 Ibid at 21.
159 Ibid.
160 Ibid.
161 Ibid at 24.
162 Ibid.
163 Ibid at 28.
164 Ibid at 32.
165 Ibid.

and with the use of the express words 'as required of me by the document headed Major Points of Agreement . . .', he was not exercising his own deliberate judgement under section 87(1) but was acting pursuant to the dictates of the agreement.[166] The court explained that the President was required to issue a pardon pursuant to the agreement and he fulfilled the requirements of that agreement. It continued that, in doing so, he surrendered his discretion to the dictates of the agreement.[167] The court held that his intention not to grant an amnesty through the exercise of his deliberate judgement was clear throughout and was made manifest by the wording of the document.

DELEGATION

A related concept to abdication is that when a public authority is granted a power to make a decision it cannot delegate that power to another person unless this is expressly provided for in the statute or is a reasonable implication in the circumstances. In *Ramdat v Public Service Appeal Board*,[168] the applicant sought, via application for judicial review, to impugn the decision of the Public Service Appeal Board (PSAB) to dismiss his appeal and to reaffirm the order of the Police Service Commission (PSC).[169] The court noted that the application for judicial review was made in respect of the decision of the PSAB and not of the PSC, the body charged by the Constitution with authority to exercise disciplinary control over police officers. The appointment of the investigating officer had been signed by the same Assistant Commissioner of Police and not by the Commissioner of Police,[170] which meant there was non-compliance with regulation 84 of the Police Service Regulations. The court held that the Assistant Commissioner could not be regarded as the alter ego of the Commissioner of Police. However, it accepted that he had an implied delegated authority, which he could further delegate with the implied authority of the Commissioner of Police.[171] It therefore held that it was 'entirely permissible for the [PSAB] to hold that the Assistant Commissioner, when he signed the warning notice, was acting under the implied delegated authority from the Commissioner of Police'.[172] There have been a number of decisions relating to whether it was lawful for disciplinary actions in the public service to be delegated, in particular in Trinidad and Tobago, with the Public Service Commission (Delegation of Powers) Order.[173] The court has noted that only where there was due delegation to subordinate officers could the functions of the Public Service Commission be lawfully exercised.[174]

In *Ramlogan v Mayor, Alderman and Burgesses of the Borough of San Fernando*,[175] the court noted that the Town and Country Planning Act (TCPA) provided a comprehensive code for the orderly

166 Ibid.
167 Ibid.
168 TT 2007 HC 112. See also *Warnerville Grains Mill Limited v The Minister of Agriculture Lands, and Marine Resources* TT 1994 HC 50.
169 TT 2007 HC 112 at [1].
170 Ibid at [5].
171 Ibid at [9].
172 Ibid at [10]. See also *Marshall v Deputy Governor of Bermuda* BM 2008 SC 10.
173 *Maharaj v Teaching Service Commission* TT 2003 HC 24. See also *Nichols v Attorney General of the British Virgin Islands* VG 2007 HC 18; *Northern Construction Ltd v Attorney General of Trinidad and Tobago* TT 2002 HC 104; *Paterson v Attorney General of Antigua and Barbu*da AG 1982 HC 13; *Ramkhalawan v Jones* TT 1986 HC 115; *Holder v Llala* TT 1995 HC 78; *Lewis v Commissioner of Police* DM 2004 CA; and *Johnson v Commissioner of Prisons* TT 2000 HC 142.
174 *Ajit v Sankar* GY 1969 CA 9. See *Evelyn v Chichester* GY 1970 CA 1; *Finn-Hendrickson v Minister of Education* BM 2008 SC 8; *Gonzales v Commissioner of Police* TT 1997 HC 144; Re Ali GY 1974 HC 26; *Bhaggan v Attorney General of Trinidad and Tobago* TT 1986 HC 85; and *Daniel v Police Service Commission* TT 2007 HC 108.
175 TT 1985 HC 65.

development and use of land throughout Trinidad and Tobago and vested in the Minister the overall responsibility for such development.[176] However, it continued that Parliament did not intend to deprive local authorities of the control which they had exercised in this respect and that it was reasonable to assume that the Minister would wish to consult and draw upon the experience of local authorities which had been granting planning permission and enforcing development procedures over a considerable period of time before the passing of the TCPA.[177] The court explained that the reason for the provision in section 10 of the TCPA was the empowering of the Minister to delegate to the council of any local authority his functions to grant or refuse applications. However, the court held that, until the Minister delegated his functions, he retained it, and a local authority, in these circumstances, would have no control over the development and use of land within its area where there was no delegation by the Minister.[178] The court also pointed out that it would expect the delegation contemplated by the TCPA to be in a more substantial form, for example by an Order published in the Trinidad and Tobago Gazette. On the facts, it held there was no evidence that such delegation had been made in the instant case.[179] Additionally, the court noted that the public interest required that an applicant for permission to develop land should not be left in doubt as to which authority he was responsible to, or if responsibility was divided, the extent of the authority which was delegated by the Minister to the local authority. It also pointed out that the local authority should not be left in any doubt as to what powers had been delegated to them by the Minister.[180] In *Benjamin v Attorney General of Antigua and Barbuda*,[181] the claimant argued that there was no evidence of delegation by the Development Control Authority (DCA) to the Town and Country Planner (TCP).[182] Section 5(5) of the Physical Planning Act (PPA) provides that: 'without restricting the generality of subsection (4) the [DCA] may delegate any of its duties to the Chief Town Planner.' The court noted that Parliament intended that the delegation was to be purely administrative given the fact there were no words requiring legislative action.[183] It continued that, under section 6(3), the TCP was given general responsibility of the DCA for the administration and operation of the system of planning for which the PPA provided and section 6(4) prescribed the specific duties which must be performed. Section 6(5) provides that the TCP shall sign and issue all development permits, refusals of development permission, enforcement notices and other documents authorised by the DCA to be issued under the provisions of the PPA. Section 6(6) provides that the TCP has the powers conferred upon him by this PPA and the duties that he is required by this PPA or by the direction of the Minister or the authority to perform. The court, therefore, concluded that the scheme of the PPA was such that delegation from the DCA to the TCP was a purely administrative matter which was at large and, as such, might be effected in a variety of ways.[184]

It has been argued that delegation may not arise when an officer exercises a power or discretion entrusted to the Minister that is the exercise or act of the Minister.[185] In *Richards v Constituency Boundaries Commission*,[186] the claimants claimed that the Constituency Boundaries

176 Ibid at 18.
177 Ibid.
178 Ibid.
179 Ibid at 19.
180 Ibid.
181 AG 2007 HC 54.
182 Ibid at [126].
183 Ibid at [128].
184 Ibid at [129].
185 *Paterson v Attorney General of Antigua and Barbuda* AG 1982 HC 13. See also *Bermuda Telephone Co Ltd v Minister of Communications* BM 1991 CA 28; and *Re Directions by the Minister of Health to Regional Health Authorities* TT 2000 HC 96.
186 KN 2009 HC 19.

Commission (CBC) abdicated its functions or fettered its discretion, citing Michael Fordham, for the view of the:

> [b]asic duty not to abdicate/fetter: a public body's basic statutory functions are inalienable. It must own its functions and actions. Bodies are not entities to surrender or ignore their powers and duties, nor 'fetter' themselves to a particular course or approach.[187]

They argued that the Boundaries Technical Committee (BTC) established by the Parliamentary Constitutional and Electoral Reform and Boundaries Committee had no jurisdiction to make any recommendations to the CBC. Under section 49(3) of the Constitution of St Kitts and Nevis, the CBC was the only entity empowered to confer powers, and/or impose duties on any public officer or authority of the Government for the purpose of reviewing the number and the boundaries of constituencies. In addition, they claimed that the BTC was appointed and functioned prior to the members of the CBC being appointed and so any report produced by the BTC was null, void and of no effect. The applicants also argued that the minutes of the meetings of the CBC reflected an abdication to the BTC and that, other than the most cursory discussion in relation to Nevis and a few districts in St Kitts, there was little analysis of the matters before the BTC; and that there was also little or no analysis or independent thought with respect to the boundaries.[188] The respondents argued that the provision of 'technical support' to the CBC did not, and could not, fetter the exercise of a discretion or function and that the CBC was not obliged to consider or accept any finding or recommendation from the BTC. It continued that the BTC had no function other than to collate data and provide technical support; it had no executive or coercive powers; all that it could do, and did, was to provide technical support. The CBC, the respondents explained, was entitled under the provisions of section 49(3) of the Constitution, or its implied powers, to consider, accept or reject any support or recommendations from the BTC. They argued that there was no evidence of any advance statement or assurance given by the CBC that it would accept whatever was submitted to it by the BTC; and that the evidence showed that there was vigorous debate and, at the end, the CBC did not accept all of the findings or recommendations of the BTC.[189]

The court observed that the CBC's report stated that the CBC accepted, in principle, the recommendation made in the BTC's report in relation to eight constituencies.[190] The court relied on Fordham for the following views with respect to abdication/fettering of the following basic propositions of law: first, '[i]t is elementary that a public body should "own" its functions and decisions. Bodies are not entitled to surrender or ignore their powers and duties. Nor may they "fetter" their discretion by over committing themselves to a particular course or approach'; second, '[a] public body is not entitled to surrender its independent judgment to a third party. Nor is one public body entitled to procure such a surrender from another'; and, third, '[a] public body or decision-maker may not "give away" its functions to another person or body.'[191] After examining the evidence, the court noted the following: first, the CBC did very little original work pursuant to its function under section 50(1) of the Constitution; and, second, the Chairman of the CBC gave evidence that the CBC was not bound to accept the BTC's recommendations but its report made clear that the recommendations were accepted in principle.[192] The court, therefore, ruled that the CBC abdicated in favour of the BTC.[193]

187 Fordham, *Judicial Review Handbook* (4th edn), 2004, Oxford: Hart, [356].
188 KN 2009 HC 19 at [357].
189 Ibid at [358].
190 Ibid at [361].
191 Fordham, op. cit., at paras 50.1 to 50.3.
192 KN 2009 HC 19 at [367].
193 Ibid at [368].

A public body could only delegate powers if it was provided for in the legislation that created it.[194] The applicant alleging delegation must adduce evidence to show that the responsible person had either expressly or impliedly delegated one or more of its functions.[195] In *Lewis v Minister of Finance*,[196] notices issued under section 5 of the Bermuda Tax Collection Act (BTCA) were served on the two appellants, which required them to appear before an examiner, designated by the Minister under the BTCA, so that they could provide and give depositions and produce documents relating to the accounts and financial systems of various companies controlled by them. One of the issues the court considered was whether the examiner was permitted to delegate his function under the regulations made under the BTCA.[197] The appellant argued that the legislation required the Minister to appoint an examiner who, suitably qualified, would question the witness himself. This was what, in their opinion, was required by the use of 'conduct the examination' in section 4(2)(a) of the Bermuda Tax Convention (section 10) Regulations 1995 and Order 39, rule 4(a), which provides that a witness shall be 'examined before' an examiner.[198] In addition, the appellant argued that the examiner was appointed to perform a judicial function, not an administrative one, and that, as a matter of general principle, *delegatus non potest delegare*, he was not entitled to delegate the function to another person; and that, under the Regulations, the examiner had the role of inquisitor, not just referee.[199]

The court accepted the appellants' arguments that the examiner was appointed to perform a judicial function, and that his duties could not be delegated to any other person.[200] However, it claimed that this did not mean that the examiner must ask all the questions himself, or that no questions might be asked by other persons who were present or represented at the hearing.[201] The function of the examiner, in the court's opinion, was to obtain the relevant information from the witness, and he may conduct the proceedings as he saw fit. The court stated that there were practical reasons which meant that the process of obtaining the information could be more speedily and efficiently carried out if direct questions were asked by persons who were familiar with the case. As a result, the court concluded as follows: (1) an examiner appointed under the Regulations performs a judicial function which he cannot delegate to any other person; (2) his function is to conduct an examination at which the witness is required to make a deposition, in order to provide certain information as defined in the section 5 notice which has been served on the witness; the primary responsibility for questioning the witness rests upon the examiner personally; (3) nevertheless, the examiner may properly 'conduct the examination' by permitting representatives of the party which has requested the information, that is, the United States authorities, to ask direct questions of the witness with the object of obtaining the information which the witness has been directed to provide.

In *Re Direction of the Ministry of Health to Regional Health Authorities*,[202] the court noted that if one minister purported to delegate a duty which was specifically imposed upon him to another minister, or if he authorised another minister to perform such a specific duty, he would be acting *ultra vires*; similarly, if one minister abdicated his responsibility for such a specific duty and

194 *Jamaica Stock Exchange v Fair Trading Commission* JM 2001 CA 1. See also *Warnerville Grains Mills Limited v Minister of Agriculture, Lands and Marine Resources* TT 1994 HC 50; and *Camacho and Sons Limited v Collector of Customs* AG 1971 CA 16.
195 *City Market v Bahamas Commercial Stores, Supermarkets and Warehouse Workers Union* BS 2001 CA 5.
196 BM 2004 CA 50.
197 Ibid at [12].
198 Ibid at [67].
199 Ibid at [68].
200 Ibid at [74].
201 Ibid at [78]
202 TT 2000 HC 96.

left it to another minister, he too would be acting *ultra vires*.[203] In *Suisse Security Bank and Trust Limited v Francis*,[204] the issue was whether the revocation of the applicant's banking licence by the Governor of the Central Bank ('the Governor') was in breach of an existing injunction granted by the court. One of the issues for the court was whether the Governor had delegated the power of revocation to an officer of the Central Bank. The applicant argued that the action of the respondent in suspending and/or revoking their licence was illegal since this was not done by the respondent as required by section 14 of the Banks and Trust Companies Regulation Act (BTCRA), but by an officer of the Central Bank who had no power so to do; and the respondent had no power to delegate this function to such an officer.[205] In addition, they argued that the purported notice and grounds issued by the respondent were illegal as same were not issued by the respondent as required by section 14(2) of the BTCRA, but by another officer. The applicants also argued it was clear from the evidence that the letter informing them of the revocation did not emanate from the respondent but from an officer of the Bank who expressed the view, in accordance with section 14(1), that he was of the opinion that the licence should be revoked and also went on to state the purported reasons in accordance with section 14(2). It followed, therefore, in the opinion of the applicant, that the respondent had not actually taken into account certain factors as he delegated the function to someone else who had done so and, therefore, had not complied with the statutory requirements.[206]

The issue for the court was whether or not the notice issued was unlawful because it was issued not from the respondent but from an officer in the Central Bank. It noted that an element which was essential to the lawful exercise of power was that it should be exercised by the authority upon whom it was conferred, and by no one else.[207] The court explained that, first, the principle was strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power so intended was delegable; and second, the courts were rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as *ultra vires* action taken by agents, subcommittees or delegates, however expressly authorised by the authority endowed with the power.[208] In addition, it claimed that a discretionary power must, in general, be exercised only by the authority on which it had been conferred and that it was a well-known principle of law that when a power has been conferred on a person in circumstances indicating that trust was being placed in his individual judgement and discretion, he must exercise that power personally unless he had been expressly empowered to delegate it to another.[209] The court was of the opinion that the maxim *delegatus non potest delegare* (a presumption of statutory interpretation) did not enunciate a rule that knew no exception; it was a rule of construction which made the presumption that 'a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute.'[210] It explained that, where the exercise of a discretionary power was entrusted to a named officer, for example, a chief officer of police, a medical officer of health or an inspector, another officer could not exercise those powers in his stead unless express statutory provision had been made for the appointment of a deputy, or unless, in the circumstances, the

203 Ibid at 23.
204 BS 2003 SC 63.
205 Ibid.
206 Ibid.
207 Ibid at 9.1.
208 Ibid.
209 Ibid.
210 Ibid at 9.2.

administrative convenience of allowing a deputy or other subordinate to act as an authorised agent very clearly outweighed the desirability of maintaining the principle that the officer designated by the BTCRA should act personally.[211]

The court noted that, in determining whether a statute should be interpreted as authorising or prohibiting a particular act of delegation, the courts had commonly taken a particularly strict view in relation to the delegation of functions of a judicial or disciplinary nature, or where they regarded the statutorily designated decision maker as having been selected because he was especially suited or qualified for the task.[212] It noted that section 14(l)(a)(i) of the BTCRA expressly provides that the respondent may, by Order, revoke the licence of a licensee if, *in the opinion of the respondent*, the licensee was carrying on business in a manner detrimental to the public interest or to the interests of depositors or other creditors.[213] The court also noted that, first, the BTCRA conferred power on the respondent to take action if he was of such opinion; second, the only person on whom the power to take the action stipulated was conferred was the respondent; third, it was the respondent's opinion that such action should be taken and not in the opinion of anyone else; fourth, the BTCRA, therefore, clearly vested the power in the respondent who alone could exercise it and not delegate it to any other person; and fifth, section 14(2) expressly provided that where the respondent was of the opinion that any action under section 14(1)(a)(i) should be taken, the respondent should give the licensee notice in writing of his intention to do so, setting out in such notice the grounds on which he proposed to act.[214] The court explained that it was clear that the BTCRA conferred on the respondent the obligation to give the reasons for his opinion for the proposed action and no one else.[215] It noted that the respondent, after receiving the objection of the licensee, must determine what action he would take and, thereafter, accordingly, inform the licensee; and that, pursuant to section 14(4), it was the respondent who had to decide whether to revoke the licence or remove the suspension and no one else.[216] In the court's view, it was obvious that these functions were conferred expressly by the BTCRA on the respondent and no one else.

After reviewing sections 14(1)(2) and (4) of the BTCRA, the court held that they clearly showed that the respondent was exercising a judicial function or quasi-judicial function, in that he must first have an opinion on which reasons were given, and, thereafter, he was to consider the objection of the licensee and make a determination accordingly.[217] It claimed that it was well established law from the cases that a judicial function could not be delegated. The court reasoned that the BTCRA specifically conferred power on the respondent as the person in whose opinion action should be taken concerning the suspension or revocation; the respondent's reasons for so doing, the respondent's consideration of the licensee's objection and the determination whether or not to exercise the power of revocation, were clearly vested in, and to be exercised by, the respondent and no one else.[218] This, in the court's opinion, was a judicial or quasi-judicial function which could not be delegated as was clear from the authorities. On the facts, the court noted that the letter to the appellants was signed by the Manager of the Bank's Supervision Department, which clearly showed that it was he and not the respondent who was of the opinion that the licence should be revoked. It claimed it was he who invited

211 Ibid.
212 Ibid at 9.3.
213 Ibid at 9.4.
214 Ibid at 9.5.
215 Ibid.
216 Ibid.
217 Ibid at 9.6.
218 Ibid at 9.7.

statements to him of objections and it was he who had suspended the licence.[219] It continued that the fact that the letter also enclosed a notice signed by the respondent did not detract from the fact that it was the Manager who had exercised all the powers that were conferred by the statute on the respondent, because the reasons required for the exercise of the function were not given by the respondent as was required for the determination consequent on the respondent's opinion.[220] The respondent, in the court's view, merely signed the notice of suspension but the opinion to revoke, the grounds for same and the request for the appellant to object, the time within which to do so, and the suspension, were not done by the respondent but by the Manager of the Bank's Supervision Department. In relation to the issue that the notice issued to the applicant by the Central Bank was unlawful, because it was not from the respondent but from an officer of the Bank, the court accepted that 'a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority; but that this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute'.[221] It therefore held that the circumstances of the instant case clearly indicated that Iqbal Singh was a senior officer in the Central Bank who was implicitly authorised by the Governor to write as he did and that his opinion was obviously embraced and subsumed by the formal decision made by the Governor. These actions, in the court's opinion, amounted to unlawful delegation.[222]

219 Ibid at 9.9.
220 Ibid.
221 Ibid.
222 Ibid.

CHAPTER 8

ABUSE OF DISCRETION

INTRODUCTION

Having been granted discretion by various pieces of legislation and the Constitution, the question is how the courts should control abuse of that discretion by public authorities. The previous chapter was concerned with ensuring that public authorities actually use the discretion granted to them. This chapter is concerned with controlling that use of discretion and ensuring that it is lawfully exercised. As such, it will examine the various forms of abuse of discretion found in the case law, namely acting in bad faith; improper purpose; taking into account irrelevant considerations; and fettering of discretion. The extent to which these principles guide public authorities when they are exercising a statutory or constitutional power will be explored, using the relevant case law from the Commonwealth Caribbean as the basis for argumentation and discussion.[1] The court has noted that *ultra vires* is a broad term that covers decisions taken in bad faith, made without consideration of relevant matters or upon consideration of irrelevant matters, which no reasonable authority could make, and those made without regard to procedural requirements, including natural justice principles.[2]

FETTERING OF DISCRETION

Public authorities are allowed to make decisions that affect the public on a day-to-day basis. In making these decisions, they are allowed to take various considerations into account, and may even take into account the public interest. They are allowed to make policies that guide them in making decisions but these policies cannot be applied so rigidly as to prevent them from exercising their discretion to consider each individual case on its merits. Where this happens, the courts will not hesitate to quash any decision made pursuant to such policy and also to declare the policy unlawful for fettering the discretion of the public authority.[3] In *Maharaj v Statutory Service Commission*,[4] the applicant sought, through judicial review proceedings, an application for an order of *certiorari* to quash the decision of the Statutory Authorities Service Commission (SASC) to appoint one officer to act as Deputy Director of the National Lotteries Control Board (NLCB) instead of another. The issues that arose for consideration were: first, whether the SASC acted lawfully in seeking to obtain the concurrence of the Prime Minister as a precondition to appointing the applicant to act in the office of Deputy Director of the NLCB; second, whether the objection or lack of concurrence by the Prime Minister was a bar to the appointment of the applicant by the SASC to act in the office of Deputy Director of the NLCB; and third, whether the applicant had been treated fairly, in accordance with the principles of natural justice.[5] The court accepted that the substantive holder of the post of Deputy Director of the NLCB had been suspended, leaving the NLCB in need of an acting Deputy

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1 See *Francois v Attorney General of Saint Lucia* LC 2003 HC 54; and *Goodwin v Attorney General of Antigua and Barbuda* AG 1997 HC 30.
2 *Adams v Commissioner of Police* AI 2009 HC 19.
3 *Air Caribbean Ltd v Air Transport Licensing Authority* TT 1998 HC 84.
4 TT 2005 HC 7.
5 Ibid at 11.

Director. As a matter of law, it continued, the SASC had, and continued to have, the power to appoint an officer to act in the post of Deputy Director. The court noted that, first, the applicant had been interviewed and had actually been selected by the SASC to fill the vacancy of acting Deputy Director; second, the SASC, pursuant to a practice that it had adopted, consulted the Prime Minister as to the appointment of the applicant; third, the Prime Minister's objection was final and another officer was appointed in the applicant's place; and, fourth, the SASC justified its recourse to the Prime Minister by alluding to section 6 of the Statutory Authorities Act (SAA), which empowered the SASC to regulate its own procedure and the Statutory Authorities Regulations, which also empowered it to consult anyone who appeared to be proper or desirable. The court also claimed that, in the event that the Prime Minister had been consulted pursuant to regulation 8, fairness would have required that the applicant be apprised of the reasons for his proposed rejection and be allowed to make representations against it.[6] The court was of the view that the SASC, having received the objection of the Prime Minister, felt constrained to depart from their original selection. In its opinion, the so-called procedure was, in reality, an adoption by the SASC of a self-imposed fetter on their jurisdiction by conferring on the Prime Minister an unsolicited power of veto.[7] The court claimed that if this was to be achieved it must be accomplished by a statutory amendment and that, in the absence of clear statutory authority, the rejection of an officer on the simple lack of approval by the Prime Minister would amount to the abdication of authority to an unauthorised person and, therefore, be contrary to law.[8] As a result, the court concluded that the rejection of the applicant and the appointment of another were decisions which were flawed on the ground specified at section 5(3)(h) of the Judicial Review Act of Trinidad and Tobago (JRA). On appeal,[9] the Court Appeal agreed, ruling that, first, 'the judge's appraisal and her reasoning cannot therefore be faulted. The judge appropriately concluded the Commission imposed a fetter on their own jurisdiction'; and, second, '[t]he quashing of the decision was therefore appropriate' and '[i]n remitting the matter to the Commission for its consideration, the court was complying with the law's insistence that judicial review is concerned with reviewing the decision-making process and not the merits of the decision.'[10]

In *Brandt v Attorney General of Guyana*,[11] the court noted that:

> the law which enables the executive to expel an alien in this country is statutory; that under the Constitution, to justify this expulsion it must be effected under the authority of that law; that law does not bestow arbitrary and unfettered discretion, it must be exercised within the category of what is 'conducive to the public good'; that there is no compulsion to allow the alien to be heard initially before the order is made; that if the alien, in the exercise of his constitutionally guaranteed right of free speech, attracts the wrath of 'expulsion' his speech must be reasonably capable of being construed as 'detrimental to the preservation of peace and good order'; that the executive must act within the proper limits of its jurisdiction; and that if it does so, the courts, although of a different mind, will not interfere with what is essentially within their province. To do so would be to dabble within the region of fact to assess how adequate the evidence is.[12]

In *Campbell v Commissioner of Police*,[13] the claimant sought judicial review of the decision to bypass him for promotion. The policy for promotion was based on a points system which the

6 Ibid at 12.
7 Ibid at 13.
8 Ibid.
9 TT 2008 CA 11.
10 Ibid at [18].
11 GY 1971 CA 2.
12 Ibid.
13 TT 2008 HC 302. See also *Sankar v Public Service Commission* TT 2006 HC 128.

applicant alleged was unfair and unreasonable. The claimant also argued that, first, the points system was *ultra vires* the Police Service Regulations; and (b) second, he was not given a fair hearing. In addition, he argued that the scheme adopted by the Police Service Commission (PSC) did not take account of the realities of serving officers of the police service.[14] In other words, it was 'rigid and inflexible and placed a fetter' upon the PSC's discretion in its application of the requirements of the regulations. The applicant added that, while the points system reflected the categories set out in regulation 20, the PSC and the Commissioner of Police had limited the breadth of the PSC's discretion by limiting the categories available and by placing a time period upon the categories to be considered.[15] He also argued that the system only encapsulated academic qualifications and that there was an unrealistic bias towards academia as opposed to the practical training courses and examinations directed at making the officers more functional, as the claimant's curriculum vitae evidenced.[16] The court noted that, in *Daniel v Police Service Commission*,[17] it had upheld the legality of the points system and that reasons it gave in that case were of equal application in the instant case.[18] In that decision, the court pointed out that:[19]

> The Commission after consultation with the Commissioner of Police and the representative association for police officers adopted a weighting system which it applied in the exercise of the regulation 20 criteria. It was entirely within the jurisdiction of the Commission to adopt a system which embodies the criteria set out in regulation 20. It did this in response to its own dissatisfaction and that of the police service generally with the previous manner of application of the old regulation 20 criteria. Having read the evidence and examined the relevant departmental orders, I find that the points system adopted by the Commission to be within the provisions of regulation 20 and simply gives effect to the provisions of the regulation. It is an attempt to deal equitably with a system of promotion which has been the source of some considerable dissatisfaction among police officers. The Commission is entitled in the exercise of its functions under regulation 20 to adopt a system which gave effect to criteria set out in regulation 20 in a manner which it considers to be fair and equitable. In my judgment, the system is entirely consistent with the criteria set out in regulation 20 and is far more equitable than previously obtained.

The court held that there was no reason to depart from that view, because it was the same system under review in the instant case.[20] The applicant argued that the points system was *ultra vires* the regulations because it was rigid and inflexible and placed a fetter on the PSC's discretion in its application of the requirements of regulations 15 and 20, and that the system effectively altered regulation 20. The court, disagreeing, claimed that the system sought to apply the criteria set out in regulation 20 as equitably as possible and this adequately reflected the categories set out in regulation 20.[21] It continued that, because a points system was adopted, there would be some rigidity in its application but there was also an element of rigidity in regulation 20 per se. The court noted that the making of representations under regulation 15 allowed the PSC to consider cases of hardship which the points system might not accommodate.[22] In its view, this corrected any rigidity or inflexibility in the system and it was, therefore, important that the PSC gave its genuine and independent consideration to the representations of any

14 TT 2008 HC 302 at [12].
15 Ibid at [13].
16 Ibid.
17 TT 2007 HC 108.
18 TT 2008 HC 302 at [24].
19 TT 2007 HC 108 at [28].
20 TT 2008 HC 302 at [25].
21 Ibid.
22 Ibid at [26].

aggrieved officer who had been bypassed for promotion. The court also observed that, while it might consider the comments of the Commissioner on the representations of the officer concerned, it must be careful not to act on the diktat of the Commissioner but bring its own judgement to bear on the matter. In addition, the court was of the view that the concern of the PSC must be directed at the actual performance of the police officer at the time when the promotion was under consideration.[23] Past performance, in its view, could not be relevant if, at the time of promotion, the officer was unmotivated and stagnant. Additionally, it claimed that if, for any reason, an officer who was consistently proficient in his work may have had a bad year for personal reasons, those were again matters for representations to the PSC.

The court concluded that it was not necessary that the claimant should have been given an opportunity to reply to the Commissioner's comments, because the PSC was engaged in the consideration of promotions of a quite considerable number of officers; and that any such opportunity would have had to be extended to all other officers in the interest of fairness.[24] It continued that the comments of the Commissioner were sought as a matter of practicability since the PSC was not in charge of the day-to-day affairs of the police service and the Commissioner had a far better knowledge of the officer and access to information concerning him.[25] The court, therefore, ruled that, provided the PSC exercised its own independent judgement, having received those comments, it was entitled, as a matter of procedure, to invite the Commissioner's views – those views were solicited as a matter of good administrative practice. In addition, the court claimed that the unchallenged evidence of the Director of Pesonnel Administration, the senior public servant of the PSC, that the PSC gave its own consideration to the representations of the officers and the recommendations of the Commissioner.[26] Because the PSC did not engage in the day-to-day management and deployment of police officers, the court was of the opinion that it must have regard to the comments of the Commissioner but, given that it was charged with the duty of promoting police officers, the PSC must view the objections objectively and critically, asking appropriate questions and seeking clarification when necessary. In the instant case, the court concluded that the PSC exercised its own judgement when it did not promote the claimant.[27]

The same issue was again considered by the court. Where a policy adopted contains inbuilt flexibility, the court will not find that in acting in accordance with that policy a public authority would be fettering its discretion. In *Ganga v Commissioner of Police*,[28] although the claimants contended that the points system, used by the Commissioner of Police in relation to promotions within the police service, fell within regulation 15 of the PSC Rules, they nonetheless argued that the Police Commissioner and the PSC limited the breadth of discretion available to the PSC: firstly, by the recommendation process, and secondly, by limiting the categories available and placing time periods upon the categories to be considered.[29] The court noted that the key issue was whether the system adopted by the PSC allowed for flexibility. The court quoted from Supperstone, Goudie and Walker for the following important principle of law to determine whether there had been a fettering of a discretion:

> Thus a policy or rule may be adopted which effectively decides normal cases, provided that the policy or rule is itself proper, and that the deciding authority retains a willingness to consider each case. The last point may appear at first sight to be procedural formalism carried to excess, but it

23 Ibid.
24 Ibid at [34].
25 Ibid.
26 Ibid at [35].
27 Ibid.
28 TT 2007 HC 240.
29 Ibid at [54].

> serves two important purposes: to allow an opportunity for the cases which are not 'normal' to identify themselves, and to allow applicants the hope of persuading the deciding authority to reconsider the policy in the light of a new consideration.

It continued that the public authority must always be willing to listen to anyone with something new to say, especially where they have to deal with a multitude of similar actions.[30] The court noted that the points system was 'the core criterion for the assessment of all qualified officers for promotion', and agreed that there was an inbuilt flexibility in the system, because, first, regulation 20(g) provides for the Police Commissioner to make specific recommendations for filling the particular office; and second, regulation 20(i) enables the PSC to call for special reports.[31] It continued that, once the procedure was followed whereby the police officer was informed in advance of the points awarded and allowed to make representations to the PSC, there was no rigidity in the system. It continued that there was nothing to suggest that any other system was employed with regard to the claimants and what had been demonstrated to the court was that the PSC was willing to listen to any representations made by the claimants. As a result, the court ruled that the points system and the procedure which allowed the claimants to be informed in advance and to make representations on their own behalf were neither irrational nor unfair.[32] In addition, it held that the procedure allowed for particular circumstances to be considered and it did not fetter the exercise of the discretion by the PSC. In concluding, the court held that the points awarded by the Police Commissioner were not considered as binding and the PSC still retained a free exercise of discretion, adding that the procedure applied by the Police Commissioner and the PSC, in fact, served the useful purpose of giving reasonable guidance to both the claimants and the decision makers.[33]

In *Christie v Ingram*,[34] the claimant, the Leader of the Opposition of the Bahamas, applied for judicial review, seeking a declaration that, in exercising the functions conferred upon him by Article 39(4) and Article 40 of the Constitution, the first respondent, the Prime Minister, unlawfully fettered his discretion by virtue of a pre-determined intention: (a) to advise the Governor General to appoint only one of the senators recommended by the applicant; (b) to advise the Governor General to appoint Mrs Wright and Mr Musgrove to the Senate irrespective of the views of the appellant and contrary to the Constitution; and (c) to advise the Governor General to appoint Mrs Wright and Mr Musgrove to the Senate irrespective of their lack of membership or significant current affiliation with the Progressive Liberal Party. The applicant argued that the term 'consultation' imported some degree of discretion which, in public law, was always constrained by general principles and the overriding purpose of the statute, in this case, the Constitution, and these required the Prime Minister not to 'fetter his discretion'; that is, to 'keep his mind ajar' and not to decide in advance to reject the Leader of the Opposition's nominees.[35] It continued that, when the Prime Minister wrote that 'I am minded to accept your recommendation for one of the three Senators to be appointed under Article 39(4)'[36] before the Leader of the Opposition had even submitted his list to propose nominees, 'this constituted a clear fetter of the Prime Minister's discretion'.[37] The court replied that, although certain

30 Ibid at [56]. Supperstone, M (Goudie, J and Walker, P), *Judicial Review* (3rd edn), 2005, London: LexisNexis Butterworths.
31 TT 2007 HC 240 at [57].
32 Ibid at [58].
33 Ibid.
34 BS 2008 SC 109.
35 Ibid at [13].
36 Three Senators shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister after consultation with the Leader of the Opposition.
37 BS 2008 SC 109 at [13].

general principles of public law informed the considerations relevant to this case, it was not persuaded that the concept of fettering of a decision maker's discretion was relevant to resolving the issue in the instant case.[38] In *Francis v Public Service Commission*,[39] the court held that section 129(4) of the Constitution of Saint Lucia, which provided that 'no penalty may be imposed on any public servant except as a result of disciplinary proceedings', imposed no fetter on the Chief Fire Officer's power to post an officer. It accepted that, while there was no statutory restriction on the Chief Fire Officer's power to post Fire Officers, it was clear that this power was not intended to be used as a means of disciplining an officer. As a result, it held that, if the movement of the applicants was in order to discipline them, there was no doubt that the action of the Chief Fire Officer was *ultra vires* his powers.

Where a public authority knowingly fetters its discretion, in circumstances where it has acted to prevent unfairness to an applicant, the court would award damages to redress that wrong to the applicant. In *Graham v Police Service Commission*,[40] the applicant brought a judicial review application claiming *certiorari* to quash the decision of respondent not to backdate his promotion to Assistant Commissioner of Police to the time when he began acting in the position. The court noted that the position that the PSC could not stipulate a retroactive effective date of promotion to rectify the unlawful erosion of the applicant's relative seniority unless there was a vacancy amounted to a self-imposed unlawful fetter upon the jurisdiction and powers of the PSC.[41] It continued that the PSC had, and could, in fact, exercise its powers to stipulate a fair retroactive date to remedy the unfairness and injustice suffered by the applicant. It continued that the PSC had recognised the merit in the applicant's representations from time to time and had on two occasions backdated his appointments when the facts were brought to its attention.[42] The court explained that the PSC felt, however, that its hands were tied by the lack of appropriate vacancies and had been unable to remedy the wrong done to the applicant. As a result, the court ruled that an award of damages for breach of constitutional rights and a directive to the PSC would go some way towards the remedying the injustice done to the applicant.[43]

In *Jusamco Pavers Ltd v Central Tenders Board*,[44] the applicant filed a motion for declaration that contracts issued pursuant to tender notices were null and void; *certiorari* to quash proceedings; *mandamus* requiring the respondent to re-invite tenders; and prohibition to prevent the award of the contracts. Section 24 of the Central Tenders Board Ordinance (CTBO) provided that the Central Tenders Board, after having considered the tenders received by it, was obligated to accept the lowest price, save for good reason.[45] The court accepted that this demonstrated the importance of price and that the criteria dealing with price awarded marks to tenderers who were at or closest to the estimate of the engineers ('Engineer's Estimate') and also stated that tenders which contained a bid price too far below the Engineer's Estimate would not be considered. The applicant claimed that this was to abolish the lowest price policy established by the CTBO and to substitute in its place some other policy; that this was indicative of the fact that the respondent did not understand the relevant law; and that this was also evident from the

38 Ibid at [26]. See also *Commissioner of Prisons v Phillips* TT 1993 CA 19.
39 TT 2006 HC 97.
40 TT 2007 HC 254.
41 Ibid at [11].
42 Ibid at [50].
43 Ibid at [51]. See also *Gumbs v Attorney General of St Kitts and Nevis* KN 2003 HC 13 (relating to the exercise of discretion under section 67(1) of the Vehicles and Road Traffic Act); and *Guscott v Minister of Education* JM 1984 SC 23 (considering section 79(3) of the Education Act).
44 TT 2000 HC 29. See also *Moonilal Ramhit and Company Limited v The Couva/Tabaquite/Talparo Regional Corporation* TT 2001 HC 78; *H.M.B. Holdings v Cabinet of Antigua and Barbuda* AG 2002 HC 19; and *The Queen v Minister Responsible for Crown Lands* BS 2006 SC 92.
45 TT 2000 HC 29.

marks given to price which was less than 10 per cent of the total marks set by the evaluation specifications. Further, they argued that, in so far as the specification relating to price stated that tenders, with a price too far below the Engineer's Estimate, were not to be considered, it amounted to an unlawful fetter on the discretion of the respondent.[46] The respondent argued that, under the CTBO, it had the discretion to depart from the lowest price for good reason and that it had, in the evaluation specification, advanced such reasons why the lowest price would not be accepted. It continued that the specification relating to price did not of itself supplant the lowest price; what it did was set out the likely good reasons why the lowest price would not be accepted.[47] They also argued that the specification could only be attacked on the basis of irrationality and it was not irrational and that, as the specification was not unlawful, the question was whether the lowest price was, in fact, not accepted; and there was no evidence of this. In relation to the applicant's submission that the specification, in so far as it stated that a price too far below the Engineer's Estimate was not to be considered, the lawyer for the respondent argued that it was the duty of the respondent to listen to anyone who contended that the specification should not apply to him but there is no duty to state that in the specification itself.[48]

The court disagreed with the respondent's view that, on the face of it, the criterion relating to price did not supplant the notion of the lowest price. In its view, that was precisely what it did when it said that offers of a certain sum below the Engineer's Estimate would not be considered. The court claimed that the Engineer's Estimate was taken as the most accurate price based on an accurate and realistic assessment and representation of the market forces with respect to the cost of producing, supplying, transporting, spreading and rolling hot asphalt mixes; and that it was representative of a price determined by normal market forces.[49] The court explained that the tenderer, however, might not be subject to normal forces and might be quite able to supply asphalt at a price below the Engineer's Estimate, yet his tender might not be considered or accepted. In its view, that might be an exceptional case but the marks awarded to price in an unexceptional case could result in someone with a higher price being preferred to someone with a lower price because the former might have scored higher on the other criteria although the latter might be just as capable of performing the contract for which tenders were invited.[50] The court explained that the evaluation specifications should further the purposes and objects of the CTBO. The price specification, in its view, offended against the object of securing the lowest price contained in section 24 of the CTBO.[51] The object of securing the lowest price could not be achieved if the specification relating to price could have the effect of a tenderer with a higher price obtaining the contract ahead of someone with a lower price. Under the CTBO the lowest price might be departed from for good reason. The court reasoned that the respondent could not seek to standardise reasons in advance of the tenders without considering each tender to ascertain whether there were in fact good reasons.[52] Closely related to this, in its opinion, was the element of the price specification which stated that the respondent would not consider tenders where the price was too far removed from the Engineer's Estimate. The court then quoted the following statement from Bankes LJ in *R v Port of London Authority, ex p Kynoch Ltd* with approval:

> There are, on the one hand, cases where a tribunal in the honest exercise of its discretion has adopted a policy and, without refusing to hear an applicant intimates to him what his policy is,

46 Ibid at 12.
47 Ibid.
48 Ibid 14.
49 Ibid 16.
50 Ibid.
51 Ibid 18.
52 Ibid.

> and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicant would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule or come to a determination not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.[53]

It also quoted the following from Lord Reid in *British Oxygen v The Minister of Technology*:[54]

> I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that page cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not shut (his) ears to the application . . . I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What they apparently must not do is to refuse to listen at all.

The court held that the price specification, in stating that tenders containing a bid price below a certain sum would not be considered, clearly expressed the position that the respondent would not consider tenders of that nature.[55] It observed that it fell into the category of cases referred to by Bankes LJ where the authority had passed rules or adopted a policy that it would not hear applications at all. The court stated that the response from the respondent to the applicant's objections defended the criteria and that, in other words, the respondent saw nothing in the applicant's objection not to apply the evaluation specifications.[56] That, in the court's opinion, was clearly different from saying that it would consider the applications to see whether the price criterion should apply to them. It continued that such a policy was over rigid with the result that the respondent could fail to consider tenders so as to give effect to its statutory obligation to accept the lowest price save for good reason.[57] The court then quoted from *R v Secretary of State for Home Department, ex parte Venables*[58] where Lord Browne-Wilkinson stated that:

> the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power *nunc pro tunc*. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration and the future exercise of that power factors which may then be relevant to such exercise.

After considering these authorities, the court held that the respondent must be prepared to consider tenders even containing a bid price falling below what it considered to be a realistic price, because that tenderer might be quite capable of achieving that price.[59] It further held that even if that was an exceptional case, the policy must be sufficiently flexible to consider that case so as to give effect to the statutory policy to obtain the lowest price save for good reason.

In *Liverpool v Attorney General of Trinidad and Tobago*,[60] the applicant, by originating motion, sought a declaration that the action of the State via its servant, the Commissioner of Police ('the Commissioner'), in conducting or proceeding with an investigation and report into allegations against the applicant contained a letter written by an anonymous person, was

53 [1919] 1 KB 176.
54 [1974] 3 All ER 165 at 174.
55 TT 2000 HC 29 at 18.
56 Ibid.
57 Ibid.
58 [1977] 3 WLR 33 at 47.
59 Ibid.
60 TT 1996 HC 155.

unconstitutional and illegal. One issue for the court was whether the action of the applicant, who claimed that he had a legitimate expectation, based on a circular memorandum, that no notice would be paid to an anonymous letter and that no investigation would be carried out in respect of the same.[61] The court noted that there was no practice by the Commissioner with regard to such letters. The respondent argued that a close reading of regulation 57(1) of the Police Service Regulations, and of the 'D&B circular #6/87', showed clearly that a circular was not a standing order.[62] The court noted that a circular was not a document provided for by regulation 57(1) of the regulations – it fell outside the regulations and was published for the purpose of information – continuing that it would be incorrect to submit that a circular was meant to be followed.[63] It claimed that regulation 57(1) must be interpreted according to the set rules of statutory interpretations and that 'Orders' in regulation 57(1) include four types of orders: Standing Orders; Departmental Orders; Divisional Orders; or Branch Orders. The court claimed that there was, by virtue of the rules of statutory interpretation, an implied exclusion of all other kinds of orders; and that there were only four kinds of documents that may properly be described as statutory documents or statutory instruments, as having been made pursuant to a written law.[64] It noted that the circular in question notified police officers about the advice received from the Solicitor General; it was neither prohibitive in nature nor a mandatory instrument in form; and it was not binding on anyone; it was an administrative document; and it had no legal force. The court was of the opinion that, first, the 'circular itself would be illegal, null and void if its plain meaning results in the fettering of the discretion of the Commissioner of Police'; second, '[i]t is a rule of administrative law that an authority is not permitted to fetter its own discretion by the proclamation of overly rigid policies'; and, third, '[n]o Commissioner of Police is empowered to fetter his own discretion by proclaiming an over rigid policy.'[65] The court continued that, first, the Commissioner is given a statutory discretion by the Police Service Act and this discretion is one which should not be fettered; and, second, he is required to treat each complaint on its merit and it would be illegal action on his part to abandon this discretion and hide behind a policy.[66]

The court ruled that a plain reading of 'D&B circular #6/87' indicated that it contained no direction or instruction (express or implied) from the Commissioner that it should be followed and that it was designed for information (or advice) only. The position, it continued, was the same, more or less, with the circular memorandum from the Director of Personnel Administration which was circulated to Heads of Departments and to all Permanent Secretaries, which offered advice to them as to how anonymous letters containing allegations against public officers should be treated.[67] However, the court noted that the circular memorandum was not binding on the Commissioner. It continued that the Commissioner was free to depart from it and that he was not under any obligation to follow it, noting that mere common sense would indicate that the Commissioner could not be bound by so over rigid a policy.[68] The court noted that, for example, if the Commissioner were to receive a letter from an anonymous writer declaring that the Commissioner's office would be destroyed by two explosives planted by four named junior police officers at some specific date in the future, what was he to do? It questioned whether he was to ignore the letter and sit down with his arms folded and do nothing simply

61 Ibid at 4.
62 Ibid at 5.
63 Ibid at 6.
64 Ibid.
65 Ibid.
66 Ibid at 8.
67 Ibid.
68 Ibid.

because it emanated from a source unknown, or should he not cause the letter and its subject matter to be investigated.[69] It continued that the discretion of the Commissioner in this respect should not be fettered and that it was part of his duty at common law to investigate and inquire into serious allegations and complaints of this nature; section 56 of the regulations bestowed on him such authority. The court held that, therefore, there was nothing in law (or in the Constitution) which prevented the Commissioner from investigating the letter in question, and consequently it could not be said that he acted arbitrarily, illegally, improperly, unfairly or unreasonably; or that he had misused or abused his powers in this regard.[70] The court ruled that the Commissioner was under no obligation to follow the D&B circular or the circular memorandum, neither of which has the force of law. Therefore, it concluded that '[i]n the result, the Commissioner's action in causing the anonymous letter to be investigated did not result in an infringement by the State of the applicant's constitutional right and that the D&B circular was a policy guideline which cannot fetter the discretion of the Commissioner of Police.'[71]

In *Save Guana Cay Reef Association Ltd v The Queen*,[72] the appeal related to an attempt to halt a large-scale development of the north-west part of Great Guana Cay ('the Cay'), an island north of Great Abaco on the northern edge of the Bahamas archipelago. The Heads of Agreement was entered into by the Government and six Bahamian companies. The Privy Council noted that Clause 6 of the Heads of Agreement was of particular importance, since it had been attacked, on the one hand, as being *ultra vires* and, on the other hand, as an improper fetter on official discretion.[73] In clause 6.1, the Government agreed to grant various leases described in the recitals to the agreement. The Board claimed that it was common ground that the terms of these proposed leases were not defined with sufficient precision to constitute enforceable obligations as they were, in effect, 'agreements to agree'. Clause 6.1 also provided for the Government to grant concessions and exemptions available under the Hotels Encouragement Act. Clause 6.2 provided for the developers to be granted import and export licences in connection with so much of the development as qualified for benefits under the Hotels Encouragement Act.[74] Clause 6.3 provided for a franchise in respect of the desalination plant. Clause 6.4 provided for the Government to expedite approvals under the International Persons Landholding Act. Clauses 6.5, 6.6 and 6.7 provided for electricity, telephone and road infrastructure.[75] The Board then went on to say that it was clear that not all the provisions of the Heads of Agreement created legally enforceable obligations, especially as regards the Crown and Treasury lands, noting that, probably, some of the other provisions created legal obligations.[76] The Board noted that the Heads of Agreement, whether or not legally enforceable at all, established a framework through which the development could proceed with the Government's general blessing, subject to the grant of all necessary permits and licences being considered in due course by the appropriate specialised authorities (and subject, in the case of the Crown and Treasury lands, to the special statutory restrictions on their disposal).[77] It continued that it was surprising and regrettable that the Government thought fit to proceed with the completion of the leases and licence while the Court of Appeal was still considering its

69 Ibid at 9.
70 Ibid.
71 Ibid.
72 BS 2009 PC 3.
73 Ibid at [23].
74 Ibid.
75 Ibid.
76 Ibid at [44].
77 Ibid.

judgment in the matter. However, the Privy Council was not persuaded that there was any element of excessive exercise of official powers in entering into the Heads of Agreement.[78] The Board concluded on the issue of 'irrationality and fettering' by stating that they could be considered quite briefly.[79] It continued that the proposed development represented a very important choice for the people of the Bahamas (and especially for those living on or near the Cay), with far-reaching economic, social and environmental consequences; and that it was a decision to be taken at a very high level by democratically elected representatives and one with which the court would be very slow to interfere. The Board, therefore, concluded that the decision required an overall strategic plan and the putting in place of the Heads as a framework for progress did not involve any improper fettering of official discretion.[80]

IMPROPER PURPOSE

In deciding whether to make a decision, public authorities must act in accordance with the stated purpose of the legislation granting them the power to make decisions. In other words, they must not act for an improper purpose. The court in *Adams v Commissioner of Police* noted that, first, '[i]n considering whether the Commissioner abused the discretion conferred upon him by section 11 of the Police Act, it must be shown that he took into account and acted upon matters that were immaterial or irrelevant or that he exercised his statutory power for an improper purpose' and, second, '[i]t is a basic rule of natural justice that the decision-maker must take into account only those factors that are relevant and material for the purpose of exercising the discretion.'[81] In *Francis v Public Utilities Authority*,[82] the applicant applied for leave to apply for judicial review of the decision of the defendant to deny it electricity. The applicant argued that a statutory power must not be exercised for a purpose for which it was not intended, that is, for an 'improper purpose'.[83] The court noted that the cases in this area of the law suggest that the courts have used this ground as a basic tool to strike down acts, omissions and decisions of public authorities which have strayed beyond the basic purpose. In general, an act by such a body which serves to promote private interest has been viewed with grave suspicion by the courts. The court then cited *West India Electric Co. v Kingston Corporation*[84] where it was held that a company, which could acquire land compulsorily for the erection of buildings in order to promote the efficient operation of its tramway, could not acquire such lands in order to build houses for its European employees. It held that to focus on the comfort and efficiency of the employees was to serve an improper purpose, different from building an efficient tramway. The court then allowed the applicant leave to apply for judicial review against the decision on one or more grounds, including improper purposes.

Francois v Attorney General of Saint Lucia[85] concerned the lawfulness of guarantees entered into by the Government of St Lucia. The applicant argued that power must be exercised for a proper and not for an improper purpose and that there are four specific purposes for which the Minister of Finance may borrow under section 39(1) of the Finance (Administration) Act (F(A)A), and 'refinancing Government's obligations in respect of the former Hyatt Hotel' was not

78 Ibid.
79 Ibid at [45].
80 Ibid.
81 AI 2009 HC 19 at [43]. See *Charleau v Commissioner of Police* TT 2007 HC 123.
82 AG 2007 HC 12.
83 Ibid at [26].
84 [1914] AC 989.
85 LC 2003 HC 54.

one of those purposes.[86] Section 39(1) of the F(A)A states as follows: 'The Minister may, by resolution of Parliament, borrow from any bank or financial institution for any of the following purposes: (a) the capital or recurrent expenditure of Government; (b) the purchase of securities issued by any Government or government agency; (c) on-lending to any statutory body or public corporation; or (d) making advances or payments to public officers as authorised by any enactment or the Staff Orders.' The applicant claimed that section 39 could not have been clearer, as it specifically referred to the purposes for which the Minister of Finance could borrow from any bank or financial institution and that 'refinancing of Government's obligations to the former Hyatt Hotel was not one of those purposes.'[87] The High Court judge concluded that the Minister of Finance acted *ultra vires* the F(A)A in even seeking a resolution of Parliament to borrow moneys from the Consolidated Fund to refinance such a project.[88] On appeal,[89] Saunders JA, in the Court of Appeal, stated that the phrase 'the capital or recurrent expenditure of Government' related only to monies expended on such matters as roads, schools, hospitals, payment of civil servants, and the like. He claimed that there was abundant case law to support the view that the development of tourism and the generation of employment and revenue are legitimate public purposes. Government was not obliged or required by law, itself, to develop tourism or generate employment or revenue. He also noted that legitimate government expenditure for these purposes, far from being confined to assets owned by government, might extend to works or projects conceived, owned or engaged in by private parties.[90] Saunders JA claimed that, in order for the court to determine whether expenditure fell within section 39(1)(a), it was necessary to have regard to the declared purpose for which the funds were required and the provision of funds for the realisation or completion of the former Hyatt Hotel was a legitimate public purpose in light of the undoubted boost to St Lucia's tourist industry thereby intended. As a result, he held that monies borrowed for and expended on that purpose were embraced by the phrase 'capital or recurrent expenditure of Government'.[91]

In *Re Crutchfield*,[92] the applicant argued that the expulsion order made by the Minister of Foreign Affairs, as the Minister responsible for immigration and deportation, was made for an improper purpose or was a mere sham used to effect extradition and not for the purpose for which the power was statutorily conferred and, therefore, should be quashed.[93] The respondents argued that, even if the court assumed jurisdiction to go behind the expulsion order, there was no evidence that the order was a mere 'sham' or was made for an improper purpose and the court should be slow to cast aspersions on the integrity of the Minister or impugn his motives for making the order. They continued that, in making the order, the Minister might legitimately take into account the relations of Belize with friendly powers and the desirability of bringing fugitive offenders to justice.[94] The respondents also argued that the court could not inquire into the merits of the Minister's decision, but the question was whether the Minister ordered the expulsion of the applicant for the improper purpose of surrendering a fugitive criminal to the United States of America which was amenable to the supervisory jurisdiction of the court. In determining whether the expulsion order was made for an improper purpose or was a mere sham, the court noted that, from a close scrutiny of the expulsion order, there was

86 Ibid at [57].
87 Ibid at [59].
88 Ibid at [60].
89 LC 2004 CA 3.
90 Ibid at [85].
91 Ibid.
92 BZ 1998 SC 9.
93 Ibid at 3.
94 Ibid.

nothing, on the face of that document, which stated that the applicant was to be deported to the United States.[95] The court noted that, although section 3(1) of the Aliens Act states that 'It shall be lawful for the Minister, if he thinks fit, in any expulsion order, instead of requiring the alien to leave Belize within a fixed time, to order that the alien be arrested, and deported from Belize in such manner as the Minister may, by the expulsion order, or subsequently, direct,' there was no evidence that the Minister had given any direction as to the manner in which the applicant was to be deported from Belize.[96]

The question for the court was, assuming the applicant was deported as a result of a request from the United States Government, whether that fact would invalidate the expulsion order. The court then quoted from Wade and Forsyth, which sets out the proper approach of a court in circumstances such as those obtaining in *Soblen's case*[97] and which was relevant to this issue under the caption 'Duality of purpose':

> Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is *ultra vires*.[98]

The court, quoting from the *Soblen case*, claimed that in that decision discovery had been refused by the Crown and it was known what factors had weighed with the Home Secretary, which impelled him to form the opinion that it would be conducive to the public good to make a deportation order.[99] The court held that there was no evidence before it that the expulsion order against the applicant was issued to comply with a request from the United States Government. It continued that, based on the authorities, even if such a request was made by the United States Government, this would not invalidate the expulsion order as long as the Minister addressed his mind to the important question of whether it would be in the public interest or for the welfare of Belize that the applicant, an alien, be expelled from Belize, which was reflected on the face of the expulsion order.[100] The court claimed that it was not without significance that no case had been cited by the applicant where the expulsion order was actually quashed on the ground that it was a 'sham' or 'extradition in disguise' and that, even in the *Soblen case*, where the 'purpose' test was first articulated, the court went to great lengths to uphold the expulsion order even though discovery had been refused by the Crown. The court held that authorities demonstrated the extreme reluctance of the courts to quash an expulsion order by imputing a 'sham' or *mala fides* to the Minister who made the order.[101] Therefore, it concluded that the '*Soblen* purpose test', which was the gravamen of the applicant's submission, had been considerably whittled down in actual practice and was now of academic interest only. In addition, the court observed that it was not without significance that in almost every case where the test was applied, the deportee ended up in the country which wanted him and had in fact made a request for him![102]

95 Ibid at 5.
96 Ibid.
97 *R v Brixton Prison (Governor), ex p Soblen* [1962] 3 All ER 641.
98 Wade and Forsyth, *Administrative Law* (7th edn) 1994, Oxford: Clarendon Press, 436.
99 BZ 1998 SC 9 at 12.
100 Ibid.
101 Ibid.
102 Ibid at 14.

BAD FAITH

The court can consider the question of bad faith in relation to both the applicant and the respondent.[103] The courts are hesitant to interfere with decisions of public authorities, but '[u]nless it can be shown that there was bad faith or manifest absurdity the Court ought not to interfere because to do so would be to tread on delicate ground possibly beyond its constitutional boundary'.[104] They have also made it clear that 'as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis of the allegation' and that '[t]his is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud'.[105] It has been said that the:

> keystone upon which the exercise of all public functions rest, as all the authorities show is good faith. The existence of bad faith in the exercise of any administrative function is sufficient warrant for the Court to say that that is an improper exercise and so is unlawful. The onus rests upon the applicant to show bad faith, and that in the absence of anything to the contrary, the Authority must be presumed to be acting properly.[106]

The court has noted that '[t]here is an underlying suggestion that the defendant acted in bad faith by refusing to recommend the claimant's application for No Pay Study Leave either initially or after being urged by the PSC to reconsider' but that 'the claimant has produced no direct evidence of bad faith. Accordingly this Court rejects that suggestion'.[107] In *Benjamin v Minister of Information and Broadcasting*,[108] the applicant alleged that the decision of the Minister of Information, to suspend his radio programme, infringed on his freedom of expression enshrined in the Constitution of St Kitts and Nevis.[109] One of the issues for the court's consideration was whether the Minister had acted in bad faith when he suspended the programme.[110] The applicant argued that the reason given for suspension of the programme was a cover for effecting some other purpose. The court noted there were facts established that might raise such an inference but that it was a serious thing to allege that the decision of the Minister and his colleagues was made in bad faith in the sense that it was taken dishonestly or intentionally to spite the applicant.[111] Without that evidence, the court held it would make no such finding, holding that *mala fides* on the part of a minister had to be grounded in more concrete evidence than the evidence presented by the applicant, continuing that the courts would not be quick to find bad faith on the part of a minister. In addition, it noted that *mala fides* had not been specifically pleaded and that the applicants should not rely on that ground unless they had particularly pleaded it; in which case the Minister would then have an opportunity to respond to that allegation.[112]

In *Richards v Constituency Boundaries Commission*,[113] in discussing whether the respondents acted in bad faith, the court quoted Fordham for the view that '[j]udicial review will lie where a decision made is shown to have acted in bad faith. This is something which should not lightly be

103 *Attorney General of Antigua and Barbuda v Antigua Slipway* AG 1996 HC 2.
104 *Caribbean Book Distributors (1996) Ltd v Ministry of Education* TT 1997 HC 175.
105 *Delapenha Funeral Home Ltd v Minister of Local Government and Environment* JM 2008 SC 72.
106 *Marcano v Attorney General of Trinidad and Tobago* TT 1985 HC 63.
107 *Mottley v Permanent Secretary of Ministry of Education* TT 2009 HC 18 at [38].
108 AI 1998 HC 3. See also *Hector v Attorney General of Antigua and Barbuda* AG 2006 HC 14; and *Franklyn v Permanent Secretary* BB 2003 HC 10 (considering section 11 of the Bill of Sale Act and Order 18, rule 8(3)).
109 AI 1998 HC 3 at [4].
110 Ibid.
111 Ibid.
112 Ibid.
113 KN 2009 HC 19.

alleged and is difficult to prove' and that 'judicial review will lie where the decision-maker was motivated by some aim or purpose regarded by the law as illegitimate'.[114] The claimant argued that the following acts constituted bad faith on the part of the respondents: first, the act of preparing the report by the Constituency Boundaries Commission (CBC) on constituency boundaries ('the Report') in the absence of consultation with the People's Action Movement (PAM) or any constituents; second, there was no evidence to show that the White Paper Committees carried out any consultation whatsoever on boundaries, whatever else they consulted on; third, the inordinate haste by the Government to have the Report laid before the National Assembly; fourth, the intention to frustrate comment and a free and democratic environment by having the Report signed on one day and rushed through Parliament on the next, in spite of there being an application for an injunction; fifth, the statements of the Deputy Prime Minister and the Prime Minister as to their intention to use boundary changes to defeat the applicant and the candidates of the PAM; and, sixth, the failure of the members of the BTC (Boundaries Technical Committee) to sign their Report.[115] The applicants claimed that not only was there bad faith, but the Government acted for improper purposes. The respondents argued it was trite law that bias or bad faith must be properly pleaded and proved and that bias and bad faith could not be imputed or established by a side wind; they must be expressly pleaded and established by strong and compelling evidence.[116] They also argued that no viable allegation of bias or bad faith had been specifically pleaded or directed against the CBC, Electoral Commission, the Supervisor of Elections and the Governor General. Accordingly, the judicial review proceedings against them should be dismissed. The respondents continued by stating that bad faith and improper motive were serious allegations directed at the conduct and motive of a particular person; and they argued that these grounds of review were similar, if not akin, to misfeasance in that knowledge, motive and intent of the person, minister or authority accused were important facts for determination by the court.[117] The respondents also stated that, quite apart from pleading any defect, there was simply no evidence whatsoever of any knowledge, motive and intent reasonably capable of establishing bad faith or improper motive on the part of any member of the CBC, executive or legislature.[118] It claimed that the accused persons had to be made parties and the allegations directed against them made in express terms. In this case, there was no pleading or cogent evidence of bad faith against any individual member of the CBC, Cabinet or National Assembly. As a result, the respondents argued that the claimants failed to establish bias, bad faith, fraud or improper purpose as alleged or at all.[119]

The court noted that the applicant, Richards, cited a number of events or actions which he characterised as constituting bad faith, namely the statement by the Deputy Prime Minister; the preparation of the Report by the CBC without consultation; and the laying of the said Report in the House of Assembly by the Prime Minister. The court was of the opinion that the burden of proof with respect to bad faith was high and that it was difficult to prove.[120] It then noted that bad faith involved proof of fraud or dishonesty, malice or personal self-interest.[121] The court, agreeing with the respondents that the claimant's allegations of 'bias, bad faith and ulterior motive are pleaded in vague and general terms', observed that the authorities and practitioners' texts showed that mention of the requirement, with respect to fraud, must be expressly pleaded

114 Fordham, *Judicial Review Handbook* (4th edn), Oxford: Hart, 2004, 23.
115 KN 2009 HC19 at [321].
116 Ibid at [322].
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid at [328].
121 Ibid at [330].

and properly particularised. The court then quoted *C J Touring Service v St Lucia Air and Sea Ports Authority*[122] for the view that '[m]aliciousness, fraud or any other improper motive on the part of a respondent cannot be presumed; it must be asserted and proved'.[123] It then noted that, generally, with respect to the allegation of bad faith, the pleadings and particulars did not reach the threshold of proof required.[124] The court therefore agreed with the respondents that, in relation to bad faith, the pleadings and the evidence were insufficient and that 'bias, bad faith and ulterior motive cannot be established by surmise or speculation'.[125]

In *Andrews v Director of Public Prosecutions*,[126] the applicant challenged the decision of the Director of Public Prosecutions (DPP) to take over two criminal complaints and discontinue them. In respect of whether the DPP was actuated by bad faith or bias, the applicant argued that the court must infer bad faith from the actions of the DPP when he gave the applicant an ultimatum to provide the statement by midday of 4 February 2008 when the letter was received on the morning of 4 February 2008. After the statement was not provided by midday, the DPP purported to take over and discontinue the proceedings.[127] In addition, the applicant argued that the demand by the DPP for the provision of a statement within two hours showed the DPP had fettered his discretion by a rigid policy.[128] The court agreed with the respondents that in this case there was no basis for the allegation of bad faith.[129] In its view, the matters referred to existed prior to the appointment of the DPP by the Governor General acting on the advice of the Judicial and Legal Services Commission. The court referred to the decision of the Court of Appeal in *Spencer v Attorney General of Antigua and Barbuda*,[130] where it stated that allegations of bad faith pleaded in vague and unparticularised terms were an abuse of the process of the court. In this case, the allegation of bad faith was, indeed, vague and unparticularised. The court, therefore, held that the request for evidence of the commission of an offence within a specified time after private criminal complaints had been filed could not be considered to have been done in bad faith.[131] On appeal,[132] the Court of Appeal noted that the trial judge found there was no evidence of bad faith on the part of the DPP and that, in the absence of strong and compelling evidence of political interference or that the DPP acted dishonestly, fraudulently or corruptly, then, the presumption was that the DPP acted independently and impartially.[133]

In *Maraj-Naraysingh v Attorney General of Trinidad and Tobago*,[134] the applicant sought judicial review of the delay of eight months by the DPP after his committal to file indictments against her. In respect of the claimant's argument that the decision of the DPP was actuated by *mala fides*, she claimed that her detention was for no reason at all but simply to oppress her.[135] The respondent argued that there was no evidence of bad faith and that the DPP was careful in his handling of the case. The DPP sought advice from Dana Seetahal SC, an experienced criminal attorney at the private bar, to assist with the question whether an application ought to be made to a judge in chambers for a warrant of committal and arrest of the applicant pursuant to

122 LC 2007 CA 13.
123 KN 2009 HC 19 at [332].
124 Ibid at [333].
125 Ibid at [335].
126 VC 2008 HC 13.
127 Ibid at [43].
128 Ibid at [44].
129 Ibid at [45].
130 [1999] 3 LRC 1.
131 VC 2008 HC 13 at [46].
132 VC 2008 CA 1.
133 Ibid at [14].
134 TT 2007 HC 40.
135 Ibid at [21].

section 23(5) of the Indictable Offences Act.[136] He explained that this course of action was taken for three reasons: (i) the fact that an experienced magistrate had decided that there was no case to answer in relation to the applicant; (ii) the fact that the same magistrate, even though committing the claimant, nevertheless expressed the view publicly that the case against the claimant was weak; and (iii) the fact that the matter had attracted a significant amount of public attention. The DPP explained that, having reviewed the committal proceedings, and having considered Ms Seetahal's advice, he decided to make an application to the judge in chambers at the High Court of Justice for a warrant for the arrest and committal of the applicant for the murder of Dr Chandra Naraynsingh.[137] The respondent countered that the evidence disclosed evidence of bad faith on the part of the defendant because he wished to cause her detention to be prolonged and in violation of sections 4 and 5 of the Constitution.[138]

The court explained that *mala fides* was not dishonesty: a public authority must exercise its powers reasonably and in good faith – that is, for legitimate reasons – no moral obliquity was imputed; and that issues of motives and malice were left to the clear but unusual cases of actual dishonesty or if the decision maker was motivated to act by spite or ill-will.[139] It also claimed that *mala fides* could not cover a situation in which the decision maker genuinely thought his action was in the public interest. The court pointed out that it was established that for this ground to be pursued a claimant must state and prove the facts relied upon.[140] In the absence of such plea or evidence, it claimed that the presumption was that a public authority had duly performed its duties and functions and that the maxim *omnia praesumuntur rite esse acta* applied. The court explained that it was not permissible to make sweeping statements about bad faith in submissions or ask a court to make inferences 'from the evidence'.[141] It noted that the evidence must be presented directly and, whatever one thought about the competence or knowledge base of a person, one could not impute bad faith unless there was cogent evidence. In addition, it observed that the decision might be challenged on other grounds but certainly not on the basis of *mala fides* without facts being pleaded and evidence being presented. On the facts, it concluded that since no evidence was presented, that ground of attack failed.[142]

In *Lakhansingh v Attorney General of Trinidad and Tobago*,[143] the applicant challenged the detention of his vehicle pending an investigation and the question arose as to whether the vehicle was seized or detained. The applicant sought to impugn the *bona fides* of Officer Maloney, who had seized his vehicle, by claiming that the document dated 27 November 1996 issued by Officer Maloney, relating to the seizure of the vehicle and the surrounding circumstances, and his statement on the affidavit were untrue.[144] The court noted that, in public law proceedings, the onus of proof lay on the applicant; and that his failure to cross-examine the deponents of affidavits, especially where there are allegations of bad faith, meant that, in cases of conflict, the court ought to proceed upon the basis of the respondent's affidavit. The court then cited from *Judicial Remedies in Public Law*:

> Allegations of bad faith on the part of a decision-maker may have to be investigated by cross-examination. If there is a dispute of fact and no cross-examination is allowed, the Courts will proceed on the basis of the affidavit evidence presented by the person who does not have the onus

136 Ibid.
137 Ibid.
138 Ibid at [22].
139 Ibid at [23].
140 Ibid at [24].
141 Ibid.
142 Ibid.
143 TT 1998 HC 68. See also *Moore v Attorney General of Trinidad and Tobago* TT 1997 HC 177.
144 TT 1998 HC 68 at 7–8.

> of proof. As the onus is on the applicant to make out his case for judicial review, this means that in cases of conflict, the Courts will proceed on the basis of the respondent's affidavit.[145]

In *Lui and Hang v Attorney General of Dominica*,[146] the court had to consider whether the filing of conspiracy charges, together with the substantive charges against the applicant, amounted to an abuse of process. The applicants argued that there was no requirement to plead bad faith.[147] The court explained that the even narrower question was whether or not bad faith must be pleaded in these circumstances. The respondent, on the other hand, argued that bad faith or dishonesty must be pleaded.[148] The court noted that the cases cited by the respondent were those which related either to a plea of bad faith, as a matter of choice, because of the case being advanced,[149] or in the exceptional circumstance where a court may grant judicial review with respect to a decision of the DPP. The court then cited, with approval, Lord Steyn's statement in *Ex p Kebilene* that he 'would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review'.[150] The court continued that it agreed with the following statement from *R v Panel On Takeovers Ex Parte Fayed*: '[b]ut it seems to me that in the absence of fraud, corruption or *mala fides*, judicial review will not be allowed to probe a decision to charge individuals in criminal proceedings. It would be unworkable to extend judicial review into this field'.[151] It noted that the respondent filed over 300 substantive charges, and about 18 months later three further conspiracy charges were also filed against the appellants.[152] The trial judge found that the filing and prosecution of the substantive charges were oppressive and, as such, constituted an abuse of process.[153] The Court of Appeal noted that, having regard to the facts as found by the learned trial judge and the authorities cited, it agreed that the filing of over 300 charges and the prosecution thereof constituted an abuse of process and bad faith; therefore, it decided to affirm the trial judge's order in this connection.

IRRELEVANT CONSIDERATIONS

Legislation sometimes provides for the considerations that may lawfully be taken into account by a public authority in arriving at its decisions. Where the statute is silent on this issue, it does not mean, therefore, that a public authority can take into account any consideration it wishes when making decisions that affect persons in society. The courts have made it clear that they would construe the legislation to determine what matters the public authority may properly take into account, or examine the various considerations to determine whether they were proper considerations given the context and purpose of the legislation. In *Richards v Constituency Boundaries Commission*,[154] the court also considered whether the Constituency Boundaries Commission (CBC) took into account irrelevant considerations in their decision relating to boundaries contained in their final report. The claimants argued that the CBC failed to take into account relevant

145 Lewis, *Judicial Remedies in Public Law* (3rd edn), 2004, London: Sweet & Maxwell, 258.
146 DM 2008 CA 6.
147 Ibid at [23].
148 Ibid at [28], citing *R v Director of Public Prosecutions, ex p Kebelene* [2000] 2 AC 326.
149 See *Smith & Anor v L.J. Williams Ltd* (1980) 32 WIR 395; *Attorney General v KC Confectionery Ltd.* (1985) 34 WIR 387; and *Bhagwandeen v Attorney General* [2004] UKPC 21.
150 *Ex p Kebelene* at 371.
151 [1992] BCLC 938.
152 Ibid at [34].
153 Ibid at [35].
154 KN 2009 HC 19.

considerations and instead took into account irrelevant considerations.[155] The court stated that, if the exercise of a discretionary power had been influenced by considerations that could not lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court would normally hold that the power had not been validly exercised. It continued that it might be immaterial that an authority had considered irrelevant matters in arriving at its decision if it had not allowed itself to be influenced by those matters; and it might be right to overlook a minor error of this kind even if it affected an aspect of the decision.[156] Section 50(1) of the Constitution imposed two obligations on the CBC: first, to review the number and boundaries of the constituencies into which St Kitts and Nevis is divided; and second, to submit a report thereon to the Governor General. The claimants argued that the CBC did not address its mind to the number of constituencies (increasing or decreasing) but only to boundaries, which was a significant breach of a mandatory provision of the Constitution, and this alone was sufficient to render the report of the CBC null and void and of no effect.[157] In addition, they argued that the CBC was required, under section 50(1), to comply with the requirements of the Second Schedule to the St Kitts and Nevis Constitution. Under rule 2 of Schedule 2 it is stated that: constituencies shall contain as nearly equal numbers of inhabitants as appear to the CBC to be reasonably practical but it may depart from this rule to such extent as it considers expedient to take into account the following factors: (a) the requirements of rules and the difference in the density of populations in the respective islands of Saint Christopher and Nevis; (b) the need to ensure adequate representation of sparsely populated rural areas; (c) the means of communication; (d) geographical features; and (e) existing administrative boundaries.[158] The claimants pointed out that the minutes of the CBC and the report did not reflect any discussion on (a), (b) and (d) at all; in respect of (a) there was virtually no discussion but a recognition of the BTC's density of population tables and no analysis took place; there was a cursory discussion of (e) regarding the boundaries in Nevis and virtually little or none in respect of St Kitts.[159] They argued that the evidence showed that the CBC relied on three matters: the BTC Report, the Voters' Lists and the *Baron* case.[160] As a result, the claimants contended that from a perusal of the minutes of the CBC, the excessive reliance on both the Voters' Lists and the *Baron* case were irrelevant considerations; and that Schedule 2 spoke in terms of 'inhabitants' not 'voters'.[161]

The respondents argued there was no serious dispute that the CBC considered the material and the report of the BTC.[162] They argued the fact that 'voters' also may have been discussed or considered by the CBC was irrelevant; what was important, however, was that Rule 2 was considered and applied. In addition, the claimants argued that there was no question that the BTC's report and minutes showed that the dominant considerations were population, inhabitants and geographical features.[163] This, in their opinion, was the clear evidence of the Chairman of the CBC and Miss Beverly Harris of the BTC; and that, accordingly, the use or reference to voters, which was the dominant or only consideration, could not affect the lawfulness of the recommendations made by the CBC.[164] The court claimed that the CBC, being the only body charged with the function of delimiting constituency boundaries, was

155 Ibid at [336].
156 Ibid.
157 Ibid at [337].
158 Ibid.
159 Ibid.
160 *Constituencies Boundary Commission v Baron* [2001] 1 LRC 25.
161 KN 2009 HC 19 at [337].
162 Ibid at [338].
163 Ibid.
164 Ibid.

significant as it pointed to section 49 of the Constitution which confirmed the statement.[165] It was of the opinion that it was common ground that the Constitution was the Supreme Law and Parliament could not by the ordinary law-making process vest similar functions in another body without amending the Constitution in the manner prescribed.[166] The court stated that the BTC was a creature of subsidiary legislation which purported to vest in it functions similar to that of the CBC. This, the court held, was inconsistent with the Constitution and void to the extent of its inconsistency; and the further academic point was that the BTC was not a creation of the CBC under section 49(3) of the Constitution and that, indeed, it was unconstitutional.[167]

The claimants claimed that the relevant considerations included the requirements of section 50(1) and Schedule 2 of the Constitution.[168] On the other hand, they pointed to the admission by the Chairman of the CBC that the CBC placed reliance on three matters: the BTC Report, the Voters' Lists and the *Baron* case, which, in their view, were irrelevant considerations. The respondents argued that the BTC's Report was valid and relevant and that there was compliance with Schedule 2.[169] The court noted that a consideration of the BTC Report was sufficient to deal with this issue, noting that this rested on the proposition that the BTC, to the extent that it assumed or exercised the constitutional functions of the CBC, was void.[170] It claimed that, as a consequence, the report which it prepared and submitted to the CBC was nugatory and, therefore, of no effect. The court ruled that there could be no issue with the fact that the CBC considered the BTC report, which it had no legal or constitutional obligation to do. The court pointed out that in the CBC's report dated 29 June 2009 there was no room for doubt, as at page 4 the following was stated in this form: 'The Commission accepted in principle the recommendation made in the Report of the Boundaries Technical Committee in respect of the eight (8) constituencies in the island of St. Christopher.'[171] The court then quoted from Fiadjoe, *Commonwealth Caribbean Public Law*, the view that: '[t]he basic rule is that a public functionary must not stray from the confines of the power conferred upon him. He must factor into the exercise of his discretion only those considerations which are relevant and material for that purpose.'[172] It then noted that Fiadjoe uses as part of his thesis the case of *C.O. Williams Construction Ltd v Attorney General of Barbados* in which it is held, in effect, that in awarding a contract based on tenders, the desire to redress historical injustices of the past was an irrelevant consideration.[173] Additionally, the court quoted *Garner's Administrative Law*, in which the court's approach in this context was explained thus:

> In reviewing decisions on this ground, the courts look to the governing statute to see what factors or matters are required to be taken into account in reaching a decision as to the exercise of power; and conversely, what factors or matters should not be taken into account. Other factors may be permissive (i.e. are relevant but not required to be taken into consideration) rather than obligatory or prohibited considerations (i.e. factors which must or must not be taken into account).[174]

In examining the issue of irrelevant considerations, the court opined that it was hardly necessary to go beyond section 49 of the Constitution, the CBC's report and the BTC's report.[175] It

165 Ibid at [341].
166 Ibid at [342].
167 Ibid at [343].
168 Ibid at [344].
169 Ibid at [345].
170 Ibid at [346].
171 Ibid at [347].
172 Fiadjoe, *Commonwealth Caribbean Public Law* (3rd edn) at 36.
173 KN 2009 HC 19 at [349].
174 Garner, Jones and Thompson, *Garner's Administrative Law* (8th edn), 1996, London: Butterworths at 223.
175 KN 2009 HC 19 at [350].

reasoned that the Constitution, being the supreme law, vested functions in the CBC to the exclusion of all other bodies; and with power to regulate its own procedure and the methodology whereby this might be affected. As such, therefore, the court ruled that the CBC had no power to accept or consider any recommendation from another body which purported to exercise the same or similar functions.[176] The BTC, in its view, could not feature in that equation by virtue of a Resolution of the House of Assembly. The court held that the BTC was a nullity to the extent that it purported to exercise the same or similar functions to those of the CBC and its report suffered the same fate.[177] More importantly, in the court's opinion, the CBC was under no legal or constitutional obligation to even consider, far less accept, the recommendations of the BTC which had no legal or other effect anyway; such action would constitute an irrelevant consideration which tainted the CBC's report with illegality.[178] In addition it ruled that section 49(3) of the Constitution provided no basis upon which the CBC could lawfully rely on the BTC's report and its recommendations.[179]

Texaco Caribbean Inc v Minister of Science and Technology[180] concerned the question of the validity of regulations made by the Minister of Science and Technology under the Weights and Measures Act. The claimants argued that a decision of an authority might be impugned on the basis that the authority took into account irrelevant or wrong considerations.[181] They suggested that the regulations were premised upon irrelevant considerations of 'balancing the equities among members of the petroleum and oil fuel trade' and seeking to redress a perceived grievance on the part of the gasoline retailers. The court noted that, as a statement of law, that was correct and it was applicable even where the irrelevant consideration was one which was bona fide and with good intentions.[182] Accordingly, it continued, a decision would not be in accordance with law if all mandatory relevant considerations had not been taken into account or if irrelevant considerations had been allowed to influence the decision. Additionally, the court noted that mandatory considerations of the statute must be given effect by the decision maker and these might be either express or implied.[183] The court explained that the statutory requirement for publication and a thirty-day period for the receipt of comments from the public would indicate that it was mandatory for the public at large, and not just the narrow interests, to be fully consulted in respect of the regulations. It claimed that there was non-compliance with the conditions for publication, review and comments by 'any person' wishing to make written comments and the time for such comments to be received.[184] On the other hand, it accepted there was little by way of hard evidence to support the suggestion that the Minister took account of irrelevant considerations, namely the 'balancing of the equities' and the special interests of the retailers, in making the regulations and it did not believe that this finding could be made, nor was it necessary to be made, to decide whether to grant the relief sought by the claimant.

In *Williams v Police Service Commission*,[185] the court considered the issue of whether the Police Service Commission acted on the basis of irrelevant considerations when it failed to appoint the applicant, who had acted in the post of Inspector of Police for approximately two years, to that post but appointed another person, namely Edward Fontaine. The court noted that, if a

176 Ibid.
177 Ibid at [351].
178 Ibid.
179 Ibid.
180 JM 2007 SC 69.
181 Ibid at 24.
182 Ibid at 26.
183 Ibid.
184 Ibid.
185 DM 2001 HC 1. See also *Maharaj v Teaching Service Commission* TT 1994 HC 100.

tribunal ignored a relevant consideration or took into account an irrelevant consideration, its decision might be set aside by *certiorari* as having been made in excess of justification and the court was free to hold, therefore, that the power to appoint had not been validly exercised.[186] The court noted that it was left to infer from the surrounding circumstances that the influence of extraneous factors must have been manifest in the decision to appoint Edward Fontaine or it acted out of bias against the applicant, citing *R v Lancashire County Council, ex p Huddleston*, for the statement of Sir John Donaldson, MR where he opined that:

> if the allegation is that a decision is *prima facie* irrational and that there are grounds for inquiring whether something immaterial may have been considered or something material omitted from consideration, it really does not help to assert boldly that all relevant matters and no irrelevant matters were taken into consideration without condescending to mention some at least of the principal factors on which the decision was based.[187]

In *Chitolie v Attorney General of Saint Lucia*,[188] the issue for the court was whether the Comptroller of Customs acted properly in rejecting the declared value of the vehicle imported by the applicant. The court noted that the applicant presented his invoice, bill of lading and other documents evidencing payments that he actually made to the Japanese exporter and was requested by the Customs Officer to provide further documentation to substantiate the declared value.[189] The court noted that, under section 102(1) of the Customs Act, the Customs Officer may, at any time within five years of the importation, require the importer to furnish him in such form and manner, as he may require, any information relating to the goods.[190] The court questioned what other documents the applicant could have reasonably provided in the circumstances as he was importing one car. It was of the view that the defendants did not advance any acceptable reason, authorised by the statute, for finding that the invoice price of the vehicle, as properly adjusted to include all incidental related costs, charges and expenses, was not the transaction value of the vehicle in question. The court continued that the procedure undertaken by the Customs Department in order to revalue and re-assess the duty payable on the applicant's vehicle was wrong as it was not authorised by statute.[191] The court claimed that the Customs Department was entitled to assess the costs, charges and expenses and add them to the Cost Insurance and Freight price, but a revaluation of the transaction value of the vehicle itself was *ultra vires* the act. It continued that there must be evidence to prove that the invoice presented was fraudulent or fictitious and that reasonable suspicion was not enough.[192] The court held that a comparable analysis of research done by the Customs Department could not be the basis for the rejection of the invoice and accompanying documents of the contract price of the vehicle; nor could a visual inspection of the vehicle suffice. In its view, these considerations were not authorised by statute and were, therefore, irrelevant considerations.[193]

186 DM 2001 HC 1 at 8.
187 [1986] 2 All ER 941 at 945.
188 LC 2003 HC 12.
189 Ibid at [18].
190 Ibid.
191 Ibid at [19].
192 Ibid.
193 Ibid.

CHAPTER 9

LEGITIMATE EXPECTATIONS

INTRODUCTION

The concept of legitimate expectations has also been a thorny issue in the Commonwealth Caribbean. The courts have struggled to come to terms with its underpinnings, rationale and scope. But, in the main, the developments in the Caribbean have followed the approach of the United Kingdom courts, except in the context of the Bill of Rights. The scope of legitimate expectations has been expanded by the courts in recent years, in particular by the Caribbean Court of Justice in *Joseph and Boyce v Attorney General of Barbados*[1] and the Privy Council in *Paponette v Attorney General of Trinidad and Tobago*,[2] where they have explained the requirements of legitimate expectations in due process terms, breathing new life into the concept, and propelling it into the realm of Commonwealth Caribbean human rights law. Importantly, the courts, too, have been explaining the meaning of the concept, its limitations, scope and relevance to international treaties. The courts have had to define what a legitimate expectation is and how it might be protected: either in terms of procedural protection or of substantive protection, which came much later. The courts have, however, been very hesitant to expand the reach of the concept and have sometimes acknowledged that there could be circumstances in which a public body might effectively be bound by a representation made by a person with apparent authority to act on its behalf.[3] This, in the court's opinion, 'could give rise to an estoppel, in private law terms, or to a "legitimate expectation" in the language of public law, and even a defective decision might be upheld'.[4] Some comments are necessary about these statements. First, the court accepts that a representation might bind the public authority in some (undefined) circumstance, and this might lead to a legitimate expectation on the part of the recipient. Second, the use of the word 'estoppel' was unsurprising since the courts initially thought that legitimate expectation operated like an estoppel to prevent the public authority from reneging on the promise it made. Third, and of particular interest, was the court's assertion that even a 'defective decision might be upheld', because it did not say anything about why the decision itself was defective so this could not be used as a general principle of law. It is well settled now that a legitimate expectation cannot arise where it would make the decision maker act contrary to statute or otherwise act unlawfully.

However, not all persons are entitled to a legitimate expectation. For example, the court has made it clear that a constable who had a history of aberrant behaviour could not claim a legitimate expectation to re-enlistment.[5] Indeed, too, the courts have accepted that, in relation to telecommunication services, the legislation contemplated that anyone who was desirous of providing a service could apply once he or she could meet the criteria laid down in the code for making such applications.[6] As such, any applicant would have a legitimate expectation that any application procedure adopted would be one that fell within the four corners of the legislation and this would give it a sufficient interest to make the claim if he/she could establish that the

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1 [2006] CCJ 3; (2006) 69 WIR 104.
2 [2010] UKPC 32.
3 *Bank of Bermuda Limited v Minister of Community Affairs & Sport* BM 2005 CA 23 at [48].
4 Ibid.
5 *Clarke v Commissioner of Police* JM 1996 CA 4.
6 *Digicel Ltd. v Telecommunications Regulatory Commission* VG 2007 HC 14 at [67].

application procedure introduced by the public authority was illegal.[7] The claimant who claims a legitimate expectation must not have acted improperly in relation to the acts giving rise to the so-called expectation.[8] In addition, the court has accepted that an expectation created as a result of an undertaking which had specific time limits would expire at the end of the specified time limits.[9] So where, for example, in *Cabinet of Antigua and Barbuda v HMB Holdings*,[10] a consent order entered into by the Attorney General before the Court of Appeal that the Government would not proceed with the acquisition of the appellant's property within six months from that date, the court held that the undertaking was clear, precise and unambiguous; that is, that the Government would not proceed with the acquisition of the respondent's lands within six months of the giving of the undertaking.[11] In *Andrews v Director of Public Prosecutions*,[12] the applicant complained that he had a legitimate expectation that the private criminal complaints purportedly taken over by the Director of Public Prosecutions (DPP) would have been continued. The court noted that both claimant and defendant agreed that the applicant had a right to institute private criminal proceedings.[13] It continued that it could not be disputed that the applicant's right to institute criminal proceedings was subject to the powers of the DPP, under section 64 of the Constitution, to take over such private criminal proceedings and continue or discontinue such criminal proceedings.[14] The court agreed with the respondents that any expectation which the applicant might have had was subject to the constitutional power of the DPP to discontinue such proceedings.[15] This ground also has no realistic prospect of success, as it was clear that the constitutional power of the DPP could not be fettered by a legitimate expectation. The court has claimed that legitimate expectations were capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.[16] The expectations, it continued, might be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.[17] The court was of the opinion that where a promise or practice is found to have induced a legitimate expectation of a substantial benefit, it will similarly decide whether frustrating that expectation will amount to an abuse of power, citing *R v North & East Devon Health Authority, ex p Coughlan*.[18] This sets the scene for the types of issues that will be considered in this chapter: first, what are the necessary requirements

7 Ibid.
8 *The Minister of the Environment v Barnes* BM 1994 CA 24.
9 *HMB Holdings v Cabinet of Antigua and Barbuda* AG 2002 HC 19.
10 AG 2003 CA 3.
11 Ibid at [17].
12 VC 2008 HC 13. See also *Tapper v Director of Public Prosecutions* JM 1999 SC 4; *Observer Publications Ltd v Matthew* AG 1997 HC 48 (where the court had to consider the effect of the issuance of a business licence under section 5(1), (3) (4)(b) the Business Licence Act, 1994); *The Bermuda Perfumery v The Marketplace* BM 1993 CA 23; *Maharaj v Attorney General of Trinidad of Tobago* TT 1999 HC 97 (considering sections 1(2), 3, 39(1) and 40 of the Public Authorities Protection Act); *Re Gayman Jurisingh* (1993) 48 WIR 301; *Ali v North West Regional Authority* TT 2004 HC 111; *Andrews v Director of Public Prosecutions* VC 2008 HC 13; *Tapper v Director of Public Prosecutions* JM 1999 SC 4; *Burnett v Chief Immigration Officer* VG 1994 HC 3 (considering section 23(1)(n) of the Immigration and Passport Ordinance); *Francois v Compton* LC 2002 HC 10 (considering section 55(2) of the Constitution); *Gegg v Minister of Natural Resources and the Environment* BZ 2008 SC 27 (considering the Environmental Protection Act); and *Callender v The Queen* BS 1999 SC 72.
13 VC 2008 HC 13 at [40].
14 Ibid.
15 Ibid at [41].
16 *Cable and Wireless (West Indies) Ltd v The National Telecommunication Regulatory Authority* LC 2003 HC 53 at [92]. See also *Cable and Wireless (West Indies) Ltd v The National Telecommunication Regulatory Commission* VC 2003 HC 20; and *Re Guyana Telephone and Telegraph Co Ltd* GY 1997 HC 1.
17 VC 2008 HC 13 at [40].
18 [2000] 3 All ER 850.

for a legitimate expectation to have any form of legitimacy in the eyes of the law; second; what is the nature of the promise or representation made to a person that would give rise to a legitimate expectation; third, what previous or established practices, or policies, give rise to legitimate expectations; and fourth, where such expectations are found to exist, what should the courts do? In other words, what test should the court use to determine whether it should give effect to a legitimate expectation of a person? These are the major searching questions that have also plagued Commonwealth Caribbean courts and will be explored in this chapter.

LEGITIMACY REQUIREMENTS

Clear, ambiguous and unqualified

One of the requirements for a legitimate expectation to be effective is that the promise, the representation that gave rise to the expectation, should be clear, unambiguous and unqualified. This is an essential requirement because the claimant cannot claim to have expected the public authority to act in a particular way if the representation was unclear or was ambiguous, *a fortiori* if it was a qualified one. It is also important because a public authority should not be held bound by an expectation that was not clear, ambiguous or qualified – in such circumstances, it would not be reasonable for the applicant to have relied on such an expectation. In the cases considered, this is one of the things the court considers in determining whether the expectation is in fact a legitimate one. In *Air Caribbean Ltd v Air Transport Licensing Authority*,[19] the applicant argued that the respondent represented to them and agreed that it would be the sole operator and would have exclusive rights to all domestically generated passenger and freight traffic between Trinidad and Tobago and, in reliance on that representation, it had expended a sum in excess of fifteen million Trinidad and Tobago dollars. The court noted that the principle of legitimate expectation was an emergent doctrine, the boundaries of which had not been definitively determined, and that the categories of legitimate expectation had been the subject of widespread academic commentary.[20] After citing *R v Devon County Council, ex p Baker*,[21] it continued that the principles contained in *ex p Baker* concluded a line of authorities dealing with substantive legitimate expectation that firmly and authoritatively anchored the concept in the legal *terra firma*. The court noted that the equitable doctrine of estoppel had its place in the realm of private law as opposed to public law and that the doctrine had sometimes been described as equivalent to legitimate expectation. It continued that this had always been a useful device so as to facilitate a description of a legitimate expectation and was not to suggest that an applicant must prove the ingredients of estoppel in order to establish a legitimate expectation. The appellant argued that the respondent deprived it of its legitimate expectation that the exclusive right contracted or represented would not be frustrated by the respondent except where the overriding public interest demanded it and that the representation made by the Cabinet committee created a substantive right.[22]

The court continued that there was no evidence to indicate that the respondent made any representation or contracted with the applicant in respect of any of the matters alleged; that there was no evidence of any oral or written communication from the respondent to the applicant that showed any such contract or representation; and that the only evidence of a

19 TT 1998 HC 84. See also *Sealey v Manning* TT 2007 HC 189.
20 TT 1998 HC 84 at 17.
21 [1995] 1 All ER 73.
22 TT 1998 HC 84 at 17.

representation came from the Cabinet committee or from the Ministry of Works and Transport.[23] The court claimed that, in order to establish a legitimate expectation that amounted to a substantive right, there must be a clear and unambiguous representation by a decision maker upon which it was reasonable for an applicant to rely.[24] It continued that the applicant, in its initial proposal in response to the request for proposals, expressed a desire to be the sole provider of all passenger and freight traffic on the Tobago domestic route. The court claimed that this traffic then amounted to 80 per cent of the freight traffic on the route; and, subsequently, on 16 April 1992, the applicant requested of the Cabinet committee that it be allowed the exclusive right to all domestically generated passenger and freight traffic on the same route.[25] It claimed that it was the Permanent Secretary in the Ministry of Works and Transport, who, by letter dated 15 March 1993 to the applicant, indicated that Cabinet had noted that the financial viability of the applicant's proposal was dependent on a guarantee of a minimum of 80 per cent of the passenger traffic. The court claimed that the Permanent Secretary in the Ministry of Works and Transport was not entitled to make a representation to the applicant on behalf of the respondent and, in fact, did not do so. It was of the opinion that the letter of 15 March from the Permanent Secretary did no more than represent to the applicant that it was entitled to 80 per cent of the passenger traffic – which, in any event, the Permanent Secretary was not authorised to do – and not the exclusive right to all domestically generated passenger traffic on the route.[26] The court, then, concluded that, on the evidence, the respondent did not make any representations, or enter into any contract with the applicant which granted to the applicant exclusive rights to all domestically generated passenger and freight traffic on the route.[27] In addition, it explained that the representations were made by the Cabinet committee in circumstances where they conflicted with those of another organ of the executive, namely the Ministry of Works and Transport. The court also stated that the Cabinet committee was not authorised to make any representation binding the respondent and, in any event, whatever representations it made were not clear and unambiguous.[28]

It was clear that, in the circumstances, the court found that there was no such representation made to the applicant. If there was no representation, that is the end of the matter. In any event, the court went on to consider whether, if such expectation was actually made, it also satisfied the requirements for a legitimate expectation. Given the confusion as to what was said and when it was said, the court was understandably correct in holding that there was no clear representation made by the defendant to the claimant concerning exclusive rights to domestically generate passenger and freight traffic between Trinidad and Tobago. It is of importance, too, that the court did not focus on the reliance supposedly placed on the alleged representation. Reliance, the court has made clear, is part of the factual matrix in determining whether it is unfair to allow the public authority to renege on the promise made – it does not form part of the legal requirement for a legitimate expectation to exist.

Where an applicant claims a legitimate expectation, the burden is on him to show that it was reasonable to rely on the promise made. The court will consider all the circumstances in making that determination because an applicant cannot claim a legitimate expectation where, in light of available information to him, or to surrounding circumstances or practices of which

23 Ibid at 19.
24 Ibid at 20.
25 Ibid.
26 Ibid.
27 Ibid at 21.
28 Ibid.

he is well aware, he has not acted reasonably. In *Persad v Comptroller of Customs and Excise*,[29] the issue for the court was whether a memorandum of 5 August 2002 created a legitimate expectation that the applicant would ultimately be posted to Tobago.[30] The court quoted from Aldous and Alder in *Applications for Judicial Review: Law and Practice of the Crown Office*[31] for the view that:

> [i]n the context of statements or undertakings, the factual ingredients of a legitimate expectation are as follows: (i) The authority's statement or undertaking must be clear and unambiguous and not merely tentative or provisional; (ii) It must be reasonable for the applicant to have relied upon the expectation raised by the authority. Subjective belief on the part of either applicant or authority will not suffice; (iii) Except when the authority gives a formal undertaking, the applicant must make full disclosure to the authority of all relevant information; (iv) The applicant must perhaps have suffered some detriment in reliance upon the statements of the authority. The position is unclear . . . .[32]

The memorandum informed the applicant that he was selected for a tour of duty in Tobago and that, if he did not make representations within three days of receipt of the memorandum, it would be understood that he had accepted the 'posting'. The applicant argued that the memorandum, in unambiguous terms, told him that he had been selected for a tour of duty in Tobago for one year with effect from 1 November 2002. The court noted that the first question to be asked, therefore, was whether the memorandum to the applicant contained an express, unqualified and unambiguous representation that he would be posted to Tobago.[33] The court claimed that when one looked at the definition of what constituted a 'posting' under Regulation 2 of the Civil Service Regulations, it was clear that an officer could not be said to have been 'posted' until he actually took up the assignment, which was why a 'with effect from' date was given.[34] The court explained that there could be several intervening factors which might stand in the way of an intended posting being realised; for example, the 'exigencies of the civil service'. This, it explained, although it could not be used as an automatic, self-contained and convenient justification for re-assignments, was nevertheless apt to describe the occasional need to review and defer assignments because of intervening and other circumstances.[35] As a result, the court held that, at the highest, the memorandum was a notification of an intention to post the applicant to Tobago.[36] It also noted that the memorandum did not effect the posting nor did it, in unambiguous and unqualified terms, represent to the applicant that he would, in fact, be posted to Tobago, irrespective of any circumstance. Therefore, the court held that the first criterion for establishing a legitimate expectation had not been satisfied.[37] In addition, the court explained that, in the interest of completeness, it would address the second criterion for the existence of a legitimate expectation, as to whether it would have been reasonable for the applicant to rely on an expectation which he claimed was created by the memorandum that he would ultimately have been posted to Tobago. The court claimed that such an expectation would not have been reasonable for the following reason: the applicant, a customs and excise officer of considerable experience, appreciated that it was on the basis of the distribution sheet that an officer would know his posting for a particular month.[38] Consequently, the court held

29 TT 2003 HC 48.
30 Ibid at 19.
31 2nd edn at 9.
32 TT 2003 HC 48 at 20.
33 Ibid at 21.
34 Ibid.
35 Ibid at 21–22.
36 Ibid at 22.
37 Ibid.
38 Ibid.

that it could not, therefore, be concluded that it was reasonable to assume that the applicant intended any representation of an outposting to Tobago to be binding, given his obvious appreciation of the significance of the distribution sheet in finalising and effecting the assignments. The court therefore concluded that another important criterion to found the existence of a legitimate expectation had also not been satisfied.[39]

Doctrine of estoppel

The court has also linked the concept of legitimate expectation to the doctrine of estoppel, noting that, first, '[t]he equitable doctrine of estoppel has its place in the realm of private law as opposed to public law'; second, '[t]he doctrine of estoppel has sometimes been described as equivalent to legitimate expectation'; and third, it 'has always been a useful device so as to facilitate a description of legitimate expectation and not to suggest that an applicant must prove the ingredients of estoppel in order to establish a legitimate expectation'.[40] Although some courts had initially attempted to ground the doctrine of legitimate expectation as a subset of estoppel, this has, rightfully, not gained any currency over the years. Importantly, the courts have made it clear that the legitimate expectation is based on the notion of good public administration by which public authorities should act fairly and consistently with the public. And this makes sense if one remembers this when the elements of the doctrine are explored.

Unlawful expectations

An important question which has challenged the scope of the doctrine of legitimate expectation is whether the court should give effect to a legitimate expectation that is unlawful. The Commonwealth Caribbean courts have made it abundantly clear that such expectations have no legitimacy and could not be held valid in the face of a statute making the action itself unlawful. In other words, the unlawfulness of a practice, promise, policy or the like is sufficient for the courts to reject it as not being 'legitimate' in law. And, as mentioned above, good public administration favours the courts to uphold the law, even in the face of expectations created and reliance placed on such unlawful expectations. If the expectation is unlawful, it is no answer that the applicant had relied, even to his detriment, on that expectation. It seemed, therefore, that the unlawfulness of an expectation is a complete answer to the question of whether a public authority should be bound by any such expectation. How then would the courts deal with a situation where the public authority actively encouraged persons to act in a particular way, with the knowledge that their actions were contrary to law? To allow the public authority to be protected by the 'defence' of unlawful representation seems unfair, but the courts should be consistent in this regard. There should be no exceptions to this even though this would lead to unfairness in particular cases. The courts have held that persons who unlawfully squat on state lands could not claim a legitimate expectation to occupy the lands in question.[41] In *Auburn Court Ltd v Kingston & St Andrew Corporation*,[42] the applicant claimed a legitimate expectation on the basis of an alleged statement by the Deputy Building Surveyor of the Kingston & St Andrew Corporation (KSAC) that its application for building permission would have been granted. The principle of legitimate

39 Ibid.
40 *Air Caribbean Ltd v Air Transport Licensing Authority* TT 1998 HC 84.
41 *Jabar v Rowley* TT 1993 HC 1. See also *Jones v House of Assembly* TT 2003 HC 84; *Ramlochan v National Housing Authority* TT 2003 HC 107; *Sampson v National Housing Authority* TT 2003 HC 91 and *Oropune Village Multipurpose Co-operative Society Ltd v Oropune Development Ltd* TT 2003 HC 47.
42 JM 2001 CA 38.

expectation, the court accepted, had been firmly based since *Council of Civil Service Unions v Minister for the Civil Service*[43] and was defined as 'an express promise given on behalf of a public authority'.[44] The Court of Appeal of Jamaica noted that, on the facts, the Full Court found that no legitimate expectation arose in favour of the appellant and that the applicant could place no reliance upon anything which might have been said by the officers in relation to the grant of permission, concluding that there was no such assurance or undertaking. The Court of Appeal agreed with this decision, holding that, although a public officer could bind a public authority in some instances, in the instant case, the building surveyor's assurances could not be expected to be binding on the KSAC in circumstances where his alleged assurances would amount to an endorsement of the unlawful conduct of the appellant in commencing a construction without the required permission. In the court's opinion, such conduct attracted criminal sanction under section 10(2) of the KSAC Building Act. On the facts, however, the court held that no such assurance was given and that, consequently, no legitimate expectation arose in favour of the appellant. In addition to finding that there was no such representation in the first place, which should have ended the inquiry, the Court of Appeal went on to consider, *obiter*, the question of whether any such expectation would be 'legitimate' in light of the fact that it would have been unlawful under the KSAC Building Act. The Court of Appeal correctly noted that it could not amount to a legitimate expectation in light of the fact that it was contrary to statute.

The courts have not only considered whether an alleged legitimate expectation is contrary to statute but also whether it is unlawful of itself – i.e. because the policy which generated the legitimate expectation was applied too rigidly and, therefore, amounted to a fettering of discretion. In *Elcock v Attorney General of Trinidad and Tobago*,[45] the applicant challenged the decision of the Cabinet of Trinidad and Tobago to advise the President of the Republic of Trinidad and Tobago to refuse his re-appointment to hold office as a member of the Industrial Court, arguing that the new policy against re-appointing members who had attained the age of 65 was unlawful since it breached his legitimate expectations. The applicant argued that he held a legitimate expectation, which had been frustrated by the Cabinet of Trinidad and Tobago, by virtue of a long-standing practice that he would be re-appointed to hold office as a member of the Industrial Court, as long as his re-appointment had been recommended by the President of the Industrial Court.[46] In considering whether the applicant held a legitimate expectation, the court considered whether the legitimacy of the expectation was compromised by the illegality of the policy which guided the Cabinet on the issue of re-appointment. The respondent argued that, before the introduction of the new policy, the Government was guided by a policy of re-appointing members of the Industrial Court upon the recommendation of the President of the Industrial Court.[47] In addition, it argued that the earlier policy was illegal because of its rigidity but that this could not constitute the foundation for a legitimate expectation.[48] The respondent further argued that it was impossible for the applicant to hold a legitimate expectation that the Government would adhere to the old policy, since the old policy was itself unlawful.[49] The court accepted that it was established in *Attorney General of Hong Kong v Ng Yuen Shui*[50] that good administration required public authorities to abide by their promises provided the implementation did not conflict with their statutory duty.[51] Consequently, it held that a

43 [1985] AC 374.
44 Ibid.
45 TT 2008 HC 53.
46 Ibid at [27].
47 Ibid at [28].
48 Ibid.
49 Ibid at [36].
50 [1983] 2 AC 629.
51 TT 2008 HC 53 at [37].

legitimate expectation could not legally be based on an illegal promise, practice or policy.[52] As such, it was, therefore, necessary for the court to consider whether the old policy was unlawful.[53] The court claimed that, if it decided, having regard to decided authorities, that the old policy was unlawful, it would necessarily follow that any expectation held by the applicant was not legitimate and could not form the basis for relief in judicial review. After reviewing the evidence, the court was of the opinion that it fell short of suggesting that the old policy was so rigid as to prevent the Cabinet from listening to any applicant who had something new to say; for example, the member who has not engaged the recommendation of the President of the Industrial Court.[54]

The court was of the opinion that the argument of the appellant – that the Cabinet had delegated their authority to the President of the Industrial Court – was unsupported by the evidence, which only disclosed no more than a long-standing practice of consultation with the President of the Industrial Court and re-appointment on his recommendation.[55] In addition, it noted that there was no evidence that consultation with the President of the Industrial Court was a salve or a plaster to cover up the problem of government appointing officers to sit on a tribunal, where government itself was often a litigant.[56] The court noted that, first, no reason was offered in the evidence for the existence of the old policy; second, it was more probable that the President of the Industrial Court, being the immediate superior of members, was conveniently placed to comment on the members' strengths and shortcomings and, for this purpose, Cabinet relied on his recommendation.[57] As a result, the court held it followed that the new policy, which came to light for the first time in the affidavit of the Attorney General, could not be struck down on the ground of illegality; Cabinet, in its view, was entitled to adopt a new policy on the ground of the age of the Member to be appointed, as it had been entitled to formulate and to implement the old policy.[58]

Since the policy was not unlawful, the next issue was whether the Cabinet was in breach of that legitimate expectation engendered by the policy.[59] The court held that, first, there was no question that Cabinet was entitled to depart from the long-standing practice; second, fairness required, however, that prior to departing from the long-standing practice, Cabinet, through the Attorney General, had an obligation to notify the applicant of its intention to depart from the existing policy and to give the applicant an opportunity to be heard in opposition to its intention;[60] and, third, in failing to notify the applicant of its intention to depart from the old policy and in failing to invite and to hear the applicant's representations, the defendant acted with procedural impropriety and in breach of the rules of natural justice.[61] In addition, it noted that the applicant's legitimate expectation could have been no higher than an expectation that he would be treated in accordance with the prevailing policy and that if government wished to depart therefrom it would first observe the dictates of natural justice by first notifying him of their intention to replace the existing policy sufficiently in advance of implementing the change, so as to enable him to prepare representations which he wished to make in order to persuade them against implementing the change and, second, hearing his representations before

52 Ibid at [38].
53 Ibid at [39].
54 Ibid at [43].
55 Ibid at [45]. See also *Benjamin v Attorney General of Antigua and Barbuda* AG 2007 HC 54.
56 TT 2008 HC 53 at [46].
57 Ibid.
58 Ibid at [48].
59 Ibid at [49].
60 Ibid at [50].
61 Ibid at [51].

implementing the decision.[62] The court explained that in its view, the adherence to the requirements of natural justice would have satisfied the requirements of fairness in the instant case.

In *Hallet v Chairman Alderman Councilors and Electors in the Region of Tunapuna/Piarco*,[63] the respondent attempted to remove vendors from a public market to facilitate repairs and they brought a judicial review action claiming that they had a legitimate expectation that they would remain there based on statements made by the former Minister that they would not be ejected. The court noted that it was well known that a legitimate expectation of a substantive benefit would arise where a promise or representation of some kind was made to an aggrieved person by a public official.[64] It continued that it was unable to find any such representation and/or promise made to the applicants by any public official. The court noted that, if, however, the statement alleged to have been made by the then Minister, that no one could evict the applicants from their stall, was a representation made by a public official upon which the applicants could rely for the purpose of invoking the principle of legitimate expectation of a substantive benefit, then the submission was without merit.[65] However, it claimed that the law was quite clear: Bylaw 11 of the Country Markets (Macoya Off-Highway Market) Bylaws 1990 stipulated the conditions under which the applicants could be ejected from their stalls and no representation made to the contrary by a public official could override the express provisions of the law. Again, the courts are accepting that no unlawful representation made by any public official would give rise to a legitimate expectation. In *Lawrence v Financial Services Commission*,[66] the appellant argued he had a legitimate expectation that he would have been allowed to continue his commercial activities without any need for any registration under the Insurance Act. The court was of the opinion that the appellant was aware of the requirement for registration because an application for registration was submitted on his behalf.[67] The evidence was that the application for registration was not approved but the appellant, nonetheless, settled insurance policies in breach of the Insurance Act. The court found it difficult to understand how a legitimate expectation could arise in such circumstances, noting that the appellant's expectation was clearly not legitimate. It continued that the appellant's claim he had a legitimate expectation for procedural fairness was entirely baseless: a legitimate expectation could not be in conflict with the law.[68] The court was of the opinion that where a person had no legal right to a benefit or privilege as a matter of private law, he might have a legitimate expectation of receiving such benefit or privilege and, if so, the courts would protect his expectation by judicial review as a matter of public law. For the appellant to establish substantive legitimate expectation, the court ruled that he would have to show an express promise or undertaking given by or on behalf of the Financial Service Commission that was not in conflict with its statutory duty and, on the facts, the appellant had failed to do so.

Actual or ostensible authority

For a promise or undertaking to be binding on a public authority the person who makes the promise or gives the undertaking must have either actual or ostensible authority to do so. This is because they must be speaking on behalf of the public authority when such binding promises are made and only if that authority – actual or ostensible – is present would the court hold that

62 Ibid at [54].
63 TT 2008 HC 179.
64 Ibid at [12].
65 Ibid.
66 JM 2008 CA 56.
67 Ibid at 18.
68 Ibid at 18–19.

the public authority is bound by them. In *Moore v Attorney General of Trinidad and Tobago*,[69] the applicant applied to the court for an order of *certiorari* to quash the decision of the Acting Motor Vehicle Inspector II to seize and detain the number plate of his motor car and for damages for trespass to goods. It argued that there was a breach of legitimate expectations whereby the Licensing Authority ('the Authority') changed its policy in relation to the refurbishment of vehicles, in particular with respect to locally assembled foreign used vehicles, in frustration of its legitimate expectations.[70] In its view, these expectations were encouraged, *inter alia*, by the public notice issued by the Transport Commissioner in a daily newspaper; by the re-registration of the refurbished vehicle in 1995; as well as by the inspection of February 1996. As a result of these, the applicant claimed that he was led to believe that the vehicle he presented to the Authority in May 1996 was one over which there was no difficulty concerning the validity of its registration. In relation to the notice, the court held that 'no legitimate expectations were created by the public notice, since it was not an official or authorised notice and also, when properly read, it did not indicate any change in the policy of the licensing authority'.[71] In respect of the re-registration in 1995 and the inspection in February 1996, the respondents claimed that the court should again accept the evidence of Officers Mohammed and Baptiste that the vehicle presented in May 1996 was not the same one as had been previously inspected; in any event even if Officer Baptiste had inspected this same vehicle before and had not seized and detained its number plates, 'the Authority could not be estopped from correcting such an error for to do so would mean that the Authority would be acting *ultra vires*'.[72]

The court continued that, at the date of the notice, the former Transport Commissioner was not a proper person to speak for the current official policy; and that, according to the evidence, the notice was not published in accordance with the policy of the Ministry; and that the notice itself was left with a line for the signature of the Transport Commissioner and the same was unsigned, so that no one could vouch for its authenticity or even for the allegation that it represented the views of the former Transport Commissioner.[73] Consequently, the court held that it would be wrong to conclude that the alleged notice was properly a public notice emanating from the Licensing Authority setting out the policy of the Authority. It also noted that the document was issued in April 1996, long before the applicant had allegedly refurbished his vehicle, so that, even on his own case, the public notice could not have created any expectations when he refurbished his vehicle.[74] The court was of the opinion that even if one was to assume that the vehicle presented in February 1996 to Officer Baptiste was the same one presented again on 23 May 1996, the failure to seize and detain it at the earlier date could not create any estoppel or waiver, for it would mean that the Licensing Authority would be acting *ultra vires* by purporting to forgive a tax (the Special Registration Fee introduced by the Provisional Collection of Taxes Order on 10 January 1966) when the same was not within their power.[75] It continued that there was a principle that no waiver of rights or consent or private bargain could give a public authority more power that it legitimately possesses, and to create what would be the equivalent of an estoppel or waiver the action complained of must be unfair conduct amounting to an abuse of power. On the facts, the court concluded that the action or inaction of Officer Baptiste in February 1996 was not an abuse of power since, first, it had not been established that he acted on any improper motive; and, second, there was no agreement

69 TT 1997 HC 177.
70 Ibid at 4.
71 Ibid at 7.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.

to abandon or waive any rights, and in any event he was not informed by the applicant that this was a foreign used shell so as to be in a position to have actual knowledge that he was creating any waiver or estoppel. As a result the court rejected the claim based on legitimate expectations.[76]

PROCEDURAL LEGITIMATE EXPECTATION

In the Commonwealth Caribbean the doctrine of legitimate expectations has its roots in procedural fairness. In such cases, the applicant claims an expectation that they would be heard before a benefit is taken from them or a decision made which is adverse to their interests. The court has pointed out that:

> [l]egitimate expectation is a principle of fairness in which the decision-maker should not arrive at a determination of the issue without giving the person affected the opportunity to be heard, to state his case or to be consulted. It amounts to procedural fairness. In my view, the fact that the appellant was deprived of the opportunity to be present, as an observer, at the testing by chemical analysis, of the split portion of the urine sample, is not sufficient to amount to deprivation of a legitimate expectation justifying judicial review.[77]

In these cases, the applicant argues that he has a legitimate expectation that he would be allowed a right to be heard before any changes in policy are made or before a public authority reneges on a promise previously made. The expectation here, therefore, is procedural in that the applicant simply wants an opportunity to make representations to the public authority before it changes its mind. This expectation does not risk fettering the discretion of the public authority to decide when to change its policies to suit new circumstances or to change its mind in respect of a promise previously made as long as it allows the affected applicant a right to make representations. But these representations do not bind the public authority since it is not bound to give effect to them, but it must in the interests of fairness take them into account when making its final decision. In *The Sawmillers Co-operative Society Ltd v The Director of Forestry*,[78] the applicant argued that they had a legitimate expectation of consultations before the Director of Forestry ('the Director') changed the policy in respect of forestry licences and concessions. The court noted that the argument, on the principle of legitimate expectation, focused more narrowly on the right to be consulted.[79] The appellant argued it was seeking no benefit for itself, but only a declaration to the effect that the Director acted illegally, in that there was no authority vested in him to change the policy. The court noted that it was unnecessary to review the rapidly developing jurisprudence which confirmed the existence of the concept of substantive jurisprudence as explained in *Ex p Coughlan*. It then examined *Ex p Coughlan*, a case of substantive legitimate expectation, where a promise of housing for life 'as long as she chose' was made to a tetraplegic by a local authority. It was held that the authority, as a matter of fairness, could not resile from its promise unless there was an overriding justification in the public interest to do so, and that would be for the court to decide.[80] Lord Woolf identified three categories of legitimate expectation: first, where the public authority is only required to bear in mind its

76 Ibid at 13.
77 *Porter v Jamaica Racing Commission* JM 2004 CA 11. See also *Gillette Marina v Port Authority of Trinidad and Tobago* TT 2002 HC 110; and on appeal: TT 2005 CA 35; *Spencer v Attorney General of Antigua and Barbuda* AG 2009 HC 4; *Mucklow v Minister of Home Affairs* BM 1978 CA 3; and *Mahadeo v Minister of Agriculture* TT 1986 HC 107.
78 TT 2006 CA 34.
79 Ibid at [65].
80 Ibid at [66].

previous policy or other representation, giving it the weight it thinks right, but no more before deciding whether to change course; second, where the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken, unless there is an overriding reason to resile from it; and, third, where the court considers that a promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will decide whether to frustrate the expectation is unfair.[81] Lord Woolf continued:

> The Court having decided which of the categories is appropriate, the Court's role in the case of the second and third categories is different from that in the first. In the case of the first, the Court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category, the court's task is the convention one of determining whether the decision was procedurally fair. In the case of the third, the Court has when necessary *to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised*.[82]

The court was of the opinion that, for the purposes of the appeal, the appellant's argument fell within Lord Woolf's second category.[83] It continued that the obligation to consult arose out of the past practice in that the appellant's society was represented at the monthly committee meetings held at the Forestry Division in 1998 and 1999; and that it must be remembered that the Director was under no statutory duty to consult. However, it continued that there was a practice in which the Forestry Division had been consulting with stakeholders so that, if it was embarked upon, it had to be carried out in the proper manner. In addition, the court explained that the judge held that the appellant society was indeed afforded the opportunity to make representations and that fairness did not require that the appellant society be given some special consideration apart from that which was afforded to other stakeholders.[84] As a result, it noted that the appellant society could not take refuge in the fact that no formal invitation was sent to it, when its members, including the President, participated in the discussions.[85] The court claimed that the requirement of openness referred to by Lord Mustill in *Secretary of State for the Home Department, ex p Doody*[86] applied to the appellant as well as to the respondent.[87] It also mentioned that legitimate expectations did not create binding rules of law: a decision maker could act inconsistently with a legitimate expectation he had created, provided he gave those afforded an opportunity to put their case.[88] As a result, the court concluded that the alleged breach of legitimate expectation of further consultation had not been proven.[89]

Even where the applicant has a legitimate expectation of consultation, that consultation must be adequate. In *Guana Cay Reef Association Ltd v The Queen*,[90] the applicants, residents of Guana Cay, claimed they had a right to be consulted with regard to development affecting the Cay. The Privy Council noted that it was not that the residents of the Cay had no expectation of any sort of public consultation as to the multi-million-dollar investment that was going to transform their island.[91] The Privy Council claimed that the lower courts accepted that the public had a legitimate expectation of consultation arising out of official statements recognising

81 Ibid at [67].
82 Ibid (emphasis added).
83 Ibid at [68].
84 Ibid at [70].
85 Ibid at [71].
86 [1993] 3 WLR 154 at 169.
87 TT 2006 CA 34 at [72].
88 Ibid at [73].
89 Ibid at [74].
90 BS 2009 PC 3. See also *The Queen v Minister Responsible for Crown Lands* BS 2006 SC 92.
91 BS 2009 PC 3 at [32].

the need to take account of the residents' concerns and wishes, but argued that taking their concerns and wishes into account did not mean that the plans for the development must necessarily be changed, if only because the residents' views were by no means single-minded. It continued that if there was a legitimate expectation of consultation, it must be a proper consultation;[92] and that the lower courts were of the unanimous view that there was a legitimate expectation of consultation, but it had been adequately satisfied, primarily by the two public meetings held at the schoolhouse at the Cay settlement.[93] The Privy Council claimed that the trial judge was in no doubt that the process of consultation was adequate,[94] but the President of the Court of Appeal did not deal expressly with this point, but agreed with the other members of the court; the other members of the court dealt with it expressing themselves in more measured terms than the judge, but both reaching a clear conclusion. On the facts, the Privy Council concluded that there was no doubt the process of consultation (like almost any other consultation) could have been improved on, but considered that these imperfections fell far short of what would be needed to lead them to differ from the unanimous view of the lower courts, with their experience of local conditions.[95] Where there is a legitimate expectation of consultation, the Privy Council is making it plain that there will be in inquiry of its adequacy but on the facts of the instant case, as found by the trial judge, there were two public meetings and, even though these could have been improved upon, by perhaps having more of such meetings, this was adequate in the circumstances to satisfy the requirement of consultation. As such, there was no breach of the applicant's legitimate expectations.

The next case is the leading decision in this area. In *Ex p The Jamaica Bar Association*,[96] the issue related to the hours of sittings of court and the power of the Chief Justice to make changes relating to the same; in particular, the issue was whether the Bar Association had a legitimate expectation to be consulted before any such changes were made by the Chief Justice of Jamaica. The applicant argued that, first, the Chief Justice acted unilaterally, unfairly, contrary to law and the rules of natural justice when he changed the hours of sittings of the various courts and, second, it had a legitimate expectation that it would be consulted as had been the regular practice for 15 years. The issue for Ellis J, dissenting, was whether the applicant had a legitimate expectation of being consulted prior to those changes. Ellis J held that the only interest, right, benefit or advantage which the members of the applicant had was attendance at court to prosecute and defend the cases of their clients.[97] Their interest, right, benefit or advantage had not been curtailed, impaired or withdrawn by the change of hours. As such, the judge ruled that the applicant had failed to show the withdrawal of anything which was attractive of any consultation; and that the allegation of 'procedural impropriety' was not well founded.[98] Ellis J ruled that the decision was made to enhance the proper administration of justice to the ultimate good of the general public of which the applicant was a part and that, in his view, any consultation in this case would be excessive of procedural fairness and would be an unnecessary and unwarranted intrusion into the administrative functions of the Chief Justice as head of the judiciary. As a result, he dismissed the motion and refused the remedies sought.[99]

Smith J, in the majority, noted that the Chief Justice, in his respectful opinion, did not have the power to alter the hours of opening of the courts. In relation to legitimate expectation, he

92 Ibid at [33].
93 Ibid at [35].
94 Ibid at [41].
95 Ibid at [43].
96 JM 1999 SC 15.
97 Ibid at 5.
98 Ibid at 6.
99 Ibid.

claimed that if he was right on the point that the Chief Justice had no power to alter the rules, then the issue of legitimate expectation would not arise.[100] However, he noted that if he was wrong, the following questions would be relevant: first, did the applicant have a legitimate expectation to be consulted? If yes, second, did the Chief Justice fail to consult and as a consequence breach the rules of natural justice? The question, therefore, for the court was whether or not the applicant had shown that over the years there had developed between the Chief Justice and the applicant a regular practice of consultation which would reasonably lead the members of the applicant to expect that they would have been consulted before the decision in question was made.[101] He noted that there was a history of consultation involving the Bench represented by the Chief Justice, the President of the Court of Appeal, at least one of the judges of these courts, the registrars of both courts, representatives of the Jamaican Bar Association (JAMBAR) and the Director of Public Prosecutions. He continued that, first, over the past 15 years 'a considerable range of matters' had been discussed and resolved by this means; and second, there was significant evidence to demonstrate there had been a settled practice that before any changes 'of a radical and far-reaching nature' affecting the administration of justice were made they would be discussed at the meeting of the Joint Consultative Committee.[102] Consequently, Smith J ruled the applicant had shown that they had a legitimate or reasonable expectation arising from the existence of a regular practice of consultation which they would reasonably expect to continue. He continued that the Chief Justice gave careful consideration to all the issues canvassed by JAMBAR so, although the decision was made before there was any consultation, the Chief Justice took into consideration the concerns and suggestions of JAMBAR before the order was intended to become operative.[103] Smith J held that, by so doing, he satisfied the requirement of procedural fairness and that it was clear that, in the circumstances, additional consultation would not have led to any different result. Therefore, he concluded that the legitimate or reasonable expectations of the applicant had been satisfied in that there had been adequate consultation and the procedure was demonstrably fair.

Clarke J noted that the cardinal issues to be determined were as follows: first, whether the Chief Justice had the power to alter or change the hours during which the daily sitting of the courts was conducted; and, if so, second, whether JAMBAR had a legitimate expectation that in a matter in relation to the alteration of the hours of the sitting of the courts it would be consulted before the decision was made; and, if so, third, whether in the context or circumstances of this case the duty to consult was fulfilled.[104] He held that, in relation to the courts, the Chief Justice had no inherent power to make the order under review and that the Judicature (Supreme Court) Act gave him no power to make the order in relation to the Supreme Court. He further held that the power to regulate the hours of the daily sitting of the Supreme Court was vested in the Rules Committee of the Supreme Court.[105] Clarke J held that, on the first issue, he would grant an order of *certiorari* to quash the order of the Chief Justice, but if he was wrong in holding that the Chief Justice's order was invalid as being outside his powers, he thought it was important to consider the next question, which concerned whether JAMBAR had a legitimate expectation of prior consultation. He held that it was common ground that JAMBAR did not have a legal right to prior consultation and questioned whether, on the evidence before the court, it had a legitimate expectation of prior consultation dictated by

100 Ibid at 9.
101 Ibid.
102 Ibid at 13.
103 Ibid.
104 Ibid at 17.
105 Ibid.

fairness.[106] If it had, Clarke J explained that JAMBAR could not have derived it from an express promise or representation, since, on the evidence, none had been made. He continued that JAMBAR's expectation, at best, would only flow from a generalised expectation of justice if it was not derived from a representation implied from established or regular practice of prior consultation by the decision maker in relation to matters jointly affecting Bench and Bar, which JAMBAR could reasonably expect to continue. He accepted the evidence about the formation, composition and purpose of the Joint Consultative Committee of Bench and Bar as well as the evidence that over the years a considerable range of matters of mutual interest to Bench and Bar had been discussed and resolved through that medium.[107] Clarke J also accepted that an established practice of prior consultation through the medium of the Committee was in existence; that JAMBAR reasonably expected it to continue; and that this expectation was all the more reasonable because there was then no discussion on the matter adverted to by the Chief Justice. Therefore, on that issue, he held that JAMBAR had a reasonable expectation that it would be consulted before the decision or order was made. He therefore ruled that there was no question that JAMBAR, through its president, availed itself of the opportunity to have the Chief Justice either revoke his decision or modify it by adopting its suggested trial period for the commencement of the sitting of the several courts.[108] He claimed that the President of JAMBAR wrote the Chief Justice a number of letters putting forward detailed proposals and that the matter was discussed both at a meeting of the Joint Consultative Committee of Bench and Bar, attended by the Chief Justice, and at a meeting on 10 June called by the Minister of National Security and Justice involving the Chief Justice, JAMBAR and others. As a result, Clarke J concluded that all the concerns and representations of JAMBAR were considered by the Chief Justice before his decision was due to be implemented and that, therefore, in his opinion, the duty to consult was fulfilled on the particular facts of this case and, accordingly, there had been no breach of the requirements of procedural fairness.[109]

This case accepts that, where there is an established practice of consultation with a person before a decision what affected their interest is taken, then, ordinarily, that person should be consulted and allowed to make representations beforehand. However, on the facts, the court found that JAMBAR was consulted and its president had made representations to the Chief Justice in respect of the hours of the courts. It must be noted that the issue of legitimate expectation of consultation is only *obiter* as the court, via majority, had found that the Chief Justice did not have the power to change the hours of the courts. This decision does, nonetheless, shows the approach of the courts when such expectations are claimed and it specifies the evidence necessary for the court to uphold the legitimacy of procedural legitimate expectations.

The cases of renewals of work permits are the classic cases where the applicant claims that he should be allowed a right to make representation before the Minister refuses to renew his work permit – in other words these cases are cases of procedural expectation par excellence. In *Naidike v Attorney General of Trinidad and Tobago*,[110] the appellant claimed that his legitimate expectation was breached when the Minister of Health refused to renew his work permit. The court noted that, following the Minister's refusal to renew the appellant's work permit, he was thereafter unable to continue in his employment with the Ministry of Health (or indeed in any other

106 Ibid at 22.
107 Ibid at 23.
108 Ibid.
109 Ibid.
110 TT 2004 PC 11. See also *Moonilal Ramhit and Company Limited v The Couva/Tabaquite/Talparo Regional Authority* TT 2001 HC 78; *Next Level Engineering Limited v Attorney General of Antigua and Barbuda* AG 2007 HC 26; and *Seeram Brothers Ltd v Central Tenders Board* TT 1994 HC 89.

employment in Trinidad and Tobago) for some seven years.[111] The appellant argued that he had, *inter alia*, a legitimate expectation that the Minister would not refuse to renew his work permit save for good reason and after giving him a proper opportunity to address any concerns the Minister might have. The Privy Council ruled that this argument was irresistible, noting that a series of cases, from *McInnes v Onslow-Fane*[112] onwards, clearly established that, between on the one hand extreme cases of forfeiture and on the other mere application cases, there lay an intermediate category of cases where an applicant sought the renewal or confirmation of some benefit (be it a licence or membership or whatever) which properly should not be denied him without good reason and without his having a chance to satisfy whatever concerns the decision maker might have.[113] It continued that perhaps the most authoritative statement of the position was to be found in Lord Diplock's speech in *Council of CCSU* where he spoke of some benefit or advantage which the applicant had in the past been permitted by the decision maker to enjoy and which he could legitimately expect to be permitted to continue to do until there had been communicated to him some rational grounds for withdrawing it on which he had been given an opportunity to comment. On the facts, the Board accepted that the appellant had just such a legitimate expectation.

One of the earlier Commonwealth Caribbean cases in which this was argued was *Marks v Minister of Home Affairs*,[114] where the applicant argued that he had a legitimate expectation of renewal of his application for an extension of his work permit which was refused by the Minister of Home Affairs. The court noted that it entertained no doubt that *prima facie* this was a case where the applicant would have had a legitimate expectation that his work permit would be renewed and, therefore, he was entitled to a fair opportunity for correcting or contradicting what was said against him. It continued that there could be no doubt that, having regard to the history of this case and the virtually automatic regular renewals of permission to engage in gainful occupation, the appellant had a legitimate expectation of a further renewal. The court noted that the same principles would not apply to first applications for the grant of permission or to any case in which a legitimate expectation of renewal was absent. In *Re Elder*,[115] the same issue arose as to whether the principles of natural justice apply to decisions by an immigration officer as to whether permission should be granted to a person to land and remain in the Bahamas for such period as the immigration officer may decide. The court referred to *Marks v The Minister of Home Affairs* where, as just noted, the court held that the principles of natural justice applied in a case of renewal of a permit to engage in gainful occupation. The court held that *Marks* appeared to develop the concept somewhat further in that the applicant's expectation of renewal was itself the legitimate expectation – not a course of conduct, in general, of granting to others the benefit claimed or a policy statement as to procedure. It also held that, whereas previously the English courts had placed decisions dealing with immigration in a category by themselves, the Bermuda Court of Appeal had sought to assimilate them into the general pattern of recent developments in England which insisted that the principles of natural justice should apply to renewals of licenses to carry on professional and business activities. In the instant case, however, the court held that it was not necessary for it to go that far, since it had sought to indicate that a legitimate expectation arose from the language of section 19(1)(a)–(l)

111 TT 2004 PC 11 at [22].
112 [1978] 1 WLR 1520.
113 TT 2004 PC 11 at [24]
114 BM 1984 CA 1. See also *Re Emmanuel* AI 2002 HC 5 (considering the Immigration and Passport Ordinance and the Control of Employment Ordinance and applying *Re HK (an Infant)* [1967] 2 QB 617); *All Trinidad Sugar and General Workers Trade Union v Minister of Planning and Mobilisation* TT 1990 HC 186; *Big Ben v Minister of National Security* TT 1998 HC 63 (considering section 6(2) of the Immigration Act); and *Forde v Durant* BB 1985 HC 82 (considering section 16(1) of the AJA).
115 BS 1985 SC 84.

of the Immigration Act. Therefore, it concluded that the principles of natural justice applied to decisions by an immigration officer as to whether permission should be granted to a person to land and remain in The Bahamas for such period as the immigration officer may decide. As such, the principles of legitimate expectation also applied to such cases.

SUBSTANTIVE LEGITIMATE EXPECTATION

The question of substantive legitimate expectation is a more exacting one, because unlike the case of procedural legitimate expectations, where the applicant claims a right to be heard before a benefit is taken away or a public authority resiles from a promise, the applicant in such cases argues that he is entitled to the actual benefit and that the public authority is bound by that promise or cannot change a policy. Substantive legitimate expectations are in a sense more important because they constrain, in a more intimate way, the actions of public authorities. Here, the courts could direct the public authority to give effect to a promise or representation made to a person or direct them to continue to apply an old policy in the face of their attempt to introduce a new one. Many questions arise in this context. In what circumstances is a public authority bound by a promise made to a person that is of a substantive benefit? What test should the courts apply in determining whether to allow the legitimate expectation to trump the actions of the public authority? The standard is a high one for the claimant. The court has noted that the grant of planning permission did not amount to a substantive right that could prevent the Government from subsequently compulsorily acquiring her lands for a public purpose.[116] In *Trinidad and Tobago Civil Rights Association v Manning*,[117] one of the issues the court had to consider was whether a legitimate expectation was created by the Government to the effect that it would grant leases to the former sugar workers of Caroni of one two-acre plot of agricultural land and one lot of residential land; and if yes, whether that legitimate expectation had been or was frustrated. The court held that law as to 'legitimate expectation' was well established and can be summed up thus: 'A claimant's right to legitimate expectation will only be found to be established when there is a clear and unambiguous representation made by a public authority or body upon which it was reasonable for him to rely.'[118] It was of the opinion that limiting itself at this time to the 'promise' and assuming for the time being that the Government was the promisor, it was clear from the facts that there was a clear and unambiguous 'promise and commitment' to grant to the former sugar workers leases of a two-acre agricultural plot and to those who did not own their own residences, a one-acre residential lot.[119] The court continued that the promise was made by the Government when it announced its restructuring plans for Caroni and fleshed out and reiterated over and over again by Government ministers and officials and officers of both Caroni and Estate Management and Business Development Co Ltd (EMBDC). The 'promise', in its opinion, created a legitimate expectation, in the former sugar workers, that they would receive grant of leases for these lands within a reasonable time. The court was of the view that the real question was whether the legitimate expectation of the former sugar workers had been or was being frustrated or, to use the words of the Judicial Review Act of Trinidad and Tobago (JRA), whether there had been a deprivation of the expectation. The respondent adduced evidence to show that the expectation was fulfilled, that Caroni and EMBDC were engaged in carrying out the process of distributing the agricultural plots and residential lots to the former sugar workers.[120]

116 *Wattley v Attorney General of Saint Lucia* LC 2004 HC 50.
117 TT 2007 HC 253.
118 Ibid at [56].
119 Ibid at [57].
120 Ibid at [58].

It was approximately four years from the promise and not one lease had been granted to one former sugar worker and, based on the evidence, the court could not determine when the leases would be granted.[121] It claimed that, with a sense of the urgency which this matter required and with a determined will, the Government would have been able to complete the distribution process within, at the most, a three-year period and certainly by the time that the matter came to the High Court for decision.[122] It continued that a public authority, which made a promise and thereby created a legitimate expectation, must uphold its promise and do what was necessary to ensure that its promise was kept; and, further, must do it expeditiously. On the facts, the court found that the promise to the former sugar workers had not been kept and that their legitimate expectation had been and was being frustrated by the lack of reasonably expeditious action. The court also ruled that the Government's action and/or inaction amounted to an abuse of power under the principle enunciated in *Re Preston*[123] and *Ex p Coughlan*, especially since the matter required a real sense of urgency.[124] The court was also of the opinion that persons had lost their means of livelihood and were waiting on the promised lands, especially the agricultural plots, to make a new start to get on with their lives. It continued that the Government's attitude seemed to have been 'business as usual', and it was not really concerned about the frustration that the delay in meeting its promise was causing. In addition, the court noted that there was no credible evidence as to when these former sugar workers would get their leases, without which they were disadvantaged in a substantial way. The court held that the Government's lack of the sense of urgency with this matter was, in its view, tantamount to an abuse of power.[125]

This decision makes it plain that where appropriate the court would give effect to a substantive legitimate expectation. On the facts, it found that there was a promise made that the Government would grant leases to the former sugar workers of Caroni of one two-acre plot of agricultural land and one lot of residential land. There was no dispute that this promise was in fact made. However, the court held that there was a breach of that legitimate expectation, not because the Government decided that it would proceed with the grant of the promised leases, but in light of the circumstances of the case and the urgency of the matter, since the Government delayed in giving effect to its promise. This arguably takes the scope of legitimate expectation in the correct direction, because it focuses on the action of the Government in ensuring that where it has made a promise that it will act in a particular way, then it should do so without delay, especially where that delay has negative consequences for the persons affected.

The leading decision in Barbados where the issue of legitimate expectation was given any significant amount of judicial attention was the 'celebrated' decision in *Leacock v Attorney General*.[126] In that decision, the applicant applied, in the usual way, for leave from his employer, the Royal Barbados Police Force, to attend the Hugh Wooding Law School (HWLS) after successfully completing his Bachelor of Laws (LLB) degree at the Cave Hill Campus of the University of the West Indies (UWI). It was the usual practice of the Police Force to grant study leave to police officers who applied for it. However, the Police Commissioner refused the applicant study leave and claimed to take into account the applicant's (a) poor work ethic; (b) long absence from work ostensibly on sick leave while at the same time attending UWI; and (c) uncooperative attitude and the difficulty he created for his senior officers.[127] The applicant argued

121 Ibid at [61].
122 Ibid.
123 [1985] 2 WLR 836.
124 TT 2007 HC 253 at [62].
125 Ibid.
126 (2005) 68 WIR 181. See also *Harper v Arthur* BB 2007 HC 12.
127 (2005) 68 WIR 181 at [28].

that he had a legitimate expectation that he would have been granted study leave because a practice had grown up in the Police Force over many years that officers who had successfully completed the LLB at the UWI were granted study leave to pursue the Legal Education Certificate (LEC) at HWLS. The applicant claimed that 'several members of the [Police Force] have in the recent past' applied for and been granted leave to pursue the LEC. He further claimed that while he was studying for the LLB degree he had permission or leave to attend classes at the UWI. The applicant noted that the Police Commissioner knew of his intention to read for the LEC immediately after his successful completion of the LLB. Consequently, he argued that, in those circumstances, he legitimately expected that he would have been granted study leave and the decision not to recommend him for study leave was a breach of that expectation. Sir David Simmons CJ accepted the claimant's argument that for many years a practice has been established to allow police officers to read for the LLB degree and, upon successful completion of the degree, to be granted study leave to go to the HWLS to read for the LEC.[128] After exploring the older decisions relating to legitimate expectation, he concluded as follows:

> Asking myself what could Mr Leacock have legitimately expected, I am of opinion that, based on the uncontroverted evidence of the practice which I have described, Mr Leacock had a legitimate expectation that he would have been granted study leave to go to the HWLS to read for his professional qualification as an attorney at law during the period September 2005 to June 2007 as had been the case with many others before him.[129]

He continued that the applicant had no legally enforceable right to study leave but, by virtue of the practice, he had a reasonable expectation that he would have been granted leave; that there was no overriding consideration on the evidence to justify a departure from what had been the previous practice; and that to resile from that practice now would be a breach of the applicant's legitimate expectation.[130] Sir David Simmons CJ claimed that '[t]he merits of a case will often involve policy considerations' but that such 'considerations are not for the courts'.[131]

The first thing to observe in this case is the source of the legitimate expectation itself. The court accepted that there was an 'established practice' whereby the Police Force allowed study leave to go to the HWLS to pursue the LEC to police officers who had successfully completed the LLB at the UWI. What is of interest here is that there was no policy whereby this was to be the case; the applicant had to ground his expectation on an established practice. It seems to be somewhat surreal to suggest that the mere fact that other police officers had been allowed study leave in the past meant that the applicant had a legitimate expectation that he would be granted study leave also. It flies in the face of the nature of the study leave process itself, because its viability depends on the notion that the previous successes of those police officers meant that the applicant too would get the benefit of study leave. This meant that, irrespective of the merits of his application and other relevant considerations, including the staffing needs of the Police Force at the time of the application, the applicant would have a legitimate expectation that he would be granted study leave. I am not convinced that there was in fact any 'established practice' of such a study leave being granted automatically. For that to be the case, the applicant needed to show, not only that each previous applicant was granted leave, but that there was, 'in practice', a policy of granting such leave to the police officers, irrespective of the application process. In other words, that there was, in fact, an effective *policy* of granting such leave. But there was no such extant policy.

128 Ibid at [47].
129 Ibid at [49].
130 Ibid.
131 Ibid at [51].

Alternatively, a sounder jurisprudential basis for the legitimate expectation was that the actions of the Commissioner of Police amounted to a representation to the applicant and like officers that successful completion of the LLB degree at the UWI would be sufficient indication that leave would be granted, at the appropriate time, to pursue the LEC at the HWLS. This expectation would first be grounded on the permission granted to pursue the LLB itself, whereby the Commissioner of Police would make necessary arrangements to enable the applicant to attend classes and study for examinations while pursuing his LLB degree. Second, the Police Commissioner knew that the particular applicant was pursuing the LLB and, indeed, in the circumstances it could hardly ever be the case that he would not know this. In light of these factors, it could be argued that there was an implied representation that the applicant would be granted leave to study for the LEC at the HWLS. This, however, is subject to any consideration that might militate against enforcement of that expectation, or any overriding public interest consideration. If the actions of the Police Commissioner represented to the applicant and other individuals so situated that if they successfully completed their LLB degree at UWI they would be allowed study leave to attend the HWLS to pursue the LEC, then any attempt to prevent him from so doing would frustrate that expectation. It must be noted, at this juncture, that the expectation here created was not a procedural expectation since there was no practice or promise of consultation. This case cannot be considered under the heading of the secondary case of procedural expectation, because that expectation applies only where there is no representation or established practice. In this case, as just mentioned, there was at least a representation to the applicant and other police officers pursuing the LLB degree. As a result, the case falls squarely in the category of substantive legitimate expectations.

Now that the legitimacy of the expectation has been established, the next question is whether the public authority has acted or proposes to act unlawfully in relation to its commitment. The Police Commissioner had refused to grant the applicant study leave to attend the HWLS to pursue his LEC. This action frustrated the applicant's legitimate expectation that he would be allowed study leave to attend the HWLS. As mentioned earlier, the Police Commissioner rejected the application because of the applicant's (a) poor work ethic; (b) long absence from work ostensibly on sick leave while at the same time attending UWI; and (c) uncooperative attitude and the difficulty he created for his senior officers.[132] These reasons, if substantiated, could have provided strong reasons for not granting the applicant leave, but the trial judge found that these reasons were not sufficient, and, indeed, were not operative on the mind of the Police Commissioner when he made his decision refusing the applicant study leave. The court preferred the version of the applicant on the facts. Consequently, any such evidence could not be relied on by the Police Commissioner to justify his decision. As such, the applicant could legitimately expect that he would be granted study leave to pursue the LEC at the HWLS. As noted before, the court accepted, on the evidence, that there was no sound reason for the Police Commissioner to refuse study leave. The court failed to appreciate that, in this context, the needs of the Police Force are paramount. The Police Commissioner did not seek to justify his decision on the basis that the applicant was needed because of a lack of sufficient officers to substitute for him while on study heave. Therefore, there was no discussion of the national security considerations which succeeded in defeating the legitimate expectation created in *Council of Civil Service Unions v Minister for the Civil Service*.[133] The next question is what the court should do. Since *Ex p Coughlan*, the test used by the courts in relation to substantive legitimate expectation is to ask whether to frustrate the legitimate expectation is so unfair that to take a new and different course will amount to an abuse of power. On the facts, the frustration of the

132 Ibid at [28].
133 [1985] AC 374.

applicant's legitimate expectation will be unfair because he will lose the benefit of continuing with his legal education to become an attorney-at-law. The LEC programme at the HWLS is an indispensable requirement in qualifying as an attorney-at-law in the Commonwealth Caribbean and being admitted to the Barbados Bar. If the applicant was not allowed study leave to pursue the LEC he would not, if successful, be enrolled as an attorney-at-law in Barbados. This meant that the applicant would not be able to pursue his career in his chosen field, after investing three years in reading for the LLB degree. There is no question, therefore, that any attempt by the Police Commissioner to reject the application for study leave had to be made for compelling reasons. No such reasons were forthcoming and those provided were rejected by the trial judge.

When it came to discussing remedies available to the applicant under this head of challenge, Sir David Simmons CJ reverted to a more conservative approach, notwithstanding his bold assertion that substantive legitimate expectations are protected under the common law of Barbados. He emphasised that it was no part of his function, or indeed of any court's in a judicial review application, to substitute the court's decision for that of the competent authority. But this statement really misses the point, for the very acceptance of substantive legitimate expectations means that in those very limited circumstances the courts may think it justified to interfere with the decision of the public authority, and, consequently, take a more intrusive role than they ordinarily would where there has been an abuse of power by the public authority. However, one is not surprised by this statement because Sir David Simmons CJ did not engage in any in-depth analysis of the implications of accepting substantive legitimate expectations, surprisingly citing an academic lawyer for that proposition while making passing reference to *Ex p Coughlan*, which recognised substantive expectations in English law. In another startling statement, Sir David Simmons CJ observed that in the judicial review application he was only concerned to determine whether the process by which the Police Commissioner came to his decision or recommendation accorded with notions of fairness and should be allowed to stand or not. Again, substantive legitimate expectations, by definition, dictate that it is not only the process that is looked at but the substance of the decision itself. These statements run counter to the actual reasoning of Sir David Simmons CJ in this case. When a substantive legitimate expectation is engaged, the courts are concerned with the merits of the application itself, contrary to Sir David Simmons CJ's view that he cannot declare that Mr Leacock 'is entitled to study leave', because that 'would be an intrusion into the merits of the case'. A surprising proposition indeed! Similarly, he observed that the merits of a case will often involve policy considerations and that such considerations are not for the courts, citing *Ex parte Hamble Fisheries*. Although Sir David Simmons CJ examined the concept of legitimate expectation, he did not make any declarations in relation to this. However, he first declared that, in the events which have happened, the decision, administrative act, advice or recommendation of the Commissioner of Police as the agent of the respondent that the applicant be not granted study leave to study for the LEC at the HWLS during the period September 2005 to June 2007 was an unreasonable and improper exercise of discretion and declared to be null and void; and, second, he made an order of *certiorari* quashing the said decision, administrative act, advice or recommendation of the Commissioner of Police.

The case of *Caplan v Du Boulay*[134] concerned the delineation of the Queen's Chain under the St Lucia Civil Code. The plaintiffs owned a parcel of land comprising 17 acres ('Parcel 15'). They claimed that they had rights of way over Parcel 15, which was owned by the first defendant.

134 LC 2001 HC 20. This discussion borrows heavily from E. Ventose, 'Legitimate Expectations; Governmental Policy and the Queen's Chain' (2003) 8 *Caribbean Law Bulletin* 12.

The plaintiffs claimed injunctive relief restraining the defendant from trespassing on their land and for the restoration of the destroyed driveway and excavated Queen's Chain and damages for trespass. The defendants denied the claims and argued that they were entitled as of right by virtue of a lease granted by the fifth defendant, the Government of St Lucia. In the claims against the Government, the applicants argued that the State's action in granting the lease was illegal, irrational and contrary to proper procedure. The public law action against the State was therefore of the utmost importance as the claim against the first to fourth defendants depended on the success of the claim against the Attorney General. The court noted that, in a letter to the plaintiff, the Commissioner of Crown Lands acknowledged that there existed some user rights associated with ownership of lands adjacent to the Queen's Chain but that it was 'the policy of the Crown that any active use thereof must be sanctioned by the Crown in the form of a sale, lease or other arrangement'.[135] It was also the policy of the Crown to seek the consent of the owners abutting the Queen's Chain before any grant of a lease.[136] This consent was not sought. An agreed statement of facts made it clear that it was the 'policy of [the State] to grant a proprietary or possessory right over a parcel of land of the Queen's Chain only to a person who owns or had a long lease over the hinterland abutting that parcel of land'.[137] This policy was put to practical effect as there were only few other instances where the Queen's Chain had been leased, and where this occurred, it was to persons other than the owners of the adjacent lands.

This ground of review, as accepted by the trial judge, did not depend on the alteration of legal rights enforceable in private law. It depended simply on the frustration of an expectation that arose out of the action or inaction of the State. The argument by the plaintiffs that they had a legitimate expectation was two-pronged. The first was that they should have been given priority over any lease or grant of the Queen's Chain; and the second was that they had a right to be heard before the lease was granted to a third party. The court accepted that the letter by the Commissioner on 10 June 1994 created an expectation that the plaintiffs would have been granted the lease and confirmed the existence of a policy of granting first preference to persons in the plaintiffs' position. The judge did not adequately deal with the first expectation on its merit. The expectation was deduced simply from making representations before any decision was made. It is at this juncture that the *real meaning* of having a legitimate expectation begins to bite. Protection of a legitimate expectation would depend on whether the expectation claimed was substantive or merely procedural. When the expectation is of a substantive benefit the test must be whether it was an abuse of power to have changed the policy in relation to the plaintiff, provided that there are no overriding public policy considerations. It is doubted whether the doctrine of legitimate expectation should ever be considered in this context, as the notion of fairness in administrative law is sufficient to cover cases where fairness demands that the affected party be allowed an opportunity to be heard. If the expectation was that the plaintiffs would be granted the lease, had they applied for it, then granting them the lease would be the only way to protect the expectation. That would amount to a substantive protection of their legitimate expectation. However, if the expectation was that they should be given a hearing before the lease was granted to a third party, they would simply be entitled to be heard, which would be procedural protection. The State could then simply grant the lease to a third party having fulfilled the plaintiffs' 'legitimate' expectation.

The judge did not appreciate that distinction, stating what was required '*at that particular stage*' was that the plaintiffs be allowed to participate in the decision whether or not they would be granted the lease. One is left to wonder whether there would be any other stage and whether

135 LC 2001 HC 20 at 12 (emphasis added).
136 Ibid.
137 Ibid.

the requirement would be more stringent. It is not surprising that the trial judge made such an observation having failed to appreciate the distinction between the two types of expectations being argued before him. The concept of fairness is brandished to protection this substantive expectation which was 'even more so given the arguments against them that were being made by the company, completely unbeknownst to them'.[138] The trial judge held that the plaintiff's substantive expectation of being granted the lease should not have been disappointed because fairness demanded that they 'should have at least been permitted to argue for its fulfillment'.[139] A substantive expectation was only to be protected by affording the person affected a hearing. In relation to the second expectation, the judge pointed out that not only were the expectations of the plaintiff frustrated by the actions of the Government but that the granting of the lease to the defendants was in violation of the Government's policy that the consent of the owners adjacent to the Queen's Chain would be obtained as a condition of granting any lease. It must be noted that the Government was not bound by this policy. It could renege on this policy by informing the plaintiffs of the change. What the Government could not do was act contrary to the policy while it was still in effect. The trial judge's analysis in this part of the judgment is wholly inadequate. The court stated that, to found an action based on legitimate expectation, it must be 'based on an express promise or representation or representation implied from established practice based upon past actions or settled conduct of the decision-maker'.[140] On the facts of the case, the court held it was 'satisfied that there was no express promise or representation on the part of the Government to the plaintiffs that it would not lease the Queen's Chain to other [*sic*] than the plaintiffs, as the owners of the adjoining hinterland, without giving the plaintiffs a hearing'.[141] The legitimate expectation in question was not based on any express statement made by the Government to the plaintiffs. This method of analysis is clearly erroneous. The Government's policy was directed to a class of persons who owned lands adjoining the Queen's Chain. It was not based on any express statement and could not have been based on an express statement by the Government to that effect.

It was not surprising that procedural fairness was used by the trial judge. This entails ensuring that the affected party is afforded a fair hearing when 'an exercise of power adversely affects [her] rights'.[142] This is a correct view because the underlying basis of judicial review is to ensure that fairness is achieved. It performs the same function as the recently articulated notion of abuse of power. The judge equated the possession by the plaintiffs with a licence when the Government acquiesced in their actual possession. Having equated the occupation with that of a licence then it inevitably followed that it could not be revoked without giving some notice to the licensee. Procedural fairness, in the opinion of the court, was, in fact, the legitimate expectation that the plaintiffs' occupation of the Queen's Chain would not be disturbed without providing them with an opportunity to be heard. This is indistinguishable from the judge's use of procedural fairness as a free-standing ground for reviewing the Government's decision. Based on those two grounds the trial judge held that the decision of the Government to grant the lease was a nullity.

In *Chang v Minister of Health*,[143] the issue was whether there was a legitimate expectation that either the Regional Health Authority (RHA) or Ministry of Health, or both, were to take steps to implement the Regional Health Authorities Act.[144] The court replied as follows:

138 Ibid at 14.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid at 15.
143 TT 2009 HC 309.
144 Ibid at [3].

> There was no legitimate expectation affecting the applicant which was not taken into account by any of the respondents to this action. There was no legitimate expectation to be offered employment at an RHA. The Act imposed no such duty; the Act did not mandate any such offer. This applicant's expectation was not well founded; it may have been an expectation of his, but it was not a 'legitimate' one in law.[145]

The court, citing *R v Newham London Borough Council, ex p Bibi*,[146] noted that in legitimate expectation cases three practical questions arise. The first question is: to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what should the court do?[147] The court claimed that the process adopted by the Eric Williams Medical Sciences Complex could not be regarded as a practice of the Ministry of Health affecting the applicant: it was also not a promise and it was a procedure adopted at a different institution in different circumstances. It continued that the closest thing to a representation was made in the Permanent Secretary's letter, which was labelled 'Without Prejudice'.[148] Assuming that the applicant could advance this, the court claimed that, at best, this was a general statement indicating that options would be offered to health care employees, adding that it was not a specific representation made to the applicant. In addition, the court noted that there was no suggestion that the applicant placed any reliance on this statement and acted as a result in any way to his detriment.[149] The applicant continued to act in the way he had already embarked on, as he also found no comfort in the assurances he was given. The court claimed that, while it would not always be necessary for an applicant to show reliance on an expectation or that he acted to his detriment based on what was asserted, in this case it was a relevant factor in deciding whether to grant discretionary relief. It said that there was nothing in this case that showed that any representation led the applicant to expect any particular procedural or substantive advantage.[150] The memorandum from the Permanent Secretary to the applicant, which was labelled 'Without Prejudice', stated, among other things, that: 'With an amendment to the Act, "the options as provided in law would be offered, on an individual basis, to all Civil Servants working in health care facilities" and that "Civil Servants will therefore have an opportunity to determine of their own free will what their choice(s) will be".'[151] The court was of the opinion that this statement did not amount to a representation leading to a legitimate expectation in favour of the applicant; it only set out the options under the Act; and that, at some point in time, all persons who worked in the public service would have had to avail themselves of one of the options. In its view, the memorandum did no more than try to explain why there was not a more structured process to dealing with applications and that, in any event, it could not, by a side wind, attribute legal rights contrary to the plain words of the statute.[152] In addition, it explained that even if the Permanent Secretary, by the memorandum, had articulated a position which created an expectation on the applicant's part that he would be specifically offered a position, such a representation would not be a legitimate one if it was given contrary to the dictates of the Act.[153]

145 Ibid.
146 [2001] EWCA Civ 607; [2002] 1 WLR 237.
147 Ibid.
148 TT 2009 HC 309 at 26.
149 Ibid.
150 Ibid.
151 Ibid at 10.
152 Ibid at 26.
153 Ibid.

STANDARD OF REVIEW

Introduction

There can no longer be any argument that the English common law now recognises protection for substantive legitimate expectations. Until recently,[154] there were no Commonwealth Caribbean decisions directly engaging in an analysis of the issue of the role of the courts in respect of substantive legitimate expectations. Previously in English law, where the applicant sought a substantive benefit, the court usually proceeded to protect that benefit by allowing the applicant a right to be either heard or consulted before the policy is either changed or discontinued.[155] Now that substantive expectations are protected at common law, the issue that the courts now face, and are struggling with, is the standard of review applicable in light of two competing, and often compelling, interests. Indeed, the reluctance of the common law to afford protection to substantive legitimate expectations was grounded in the belief that it would fetter the discretion of the policy maker,[156] or amount to an estoppel; and make the courts, rather than the executive, the decision maker.

The United Kingdom

The constitutional implications of allowing such a doctrine to prevail haunted the courts until finally in *R v North and East Devon Health Authority, ex p Coughlan*,[157] on the prompting by Sedley J, as he then was, in *R v Minister of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Limited*,[158] the Court of Appeal accepted that substantive legitimate expectations form part of the English common law. This approach has, however, not been followed in some Commonwealth countries – Australia, for example, has refused to recognise the doctrine;[159] whereas in Hong Kong the Final Court of Appeal in *Ng Siu Tung v Director of Immigration*[160] was confident to assert that the 'doctrine of substantive legitimate expectations forms part of the law of Hong Kong', espousing the same test articulated in *ex p Coughlan*.

In making the first, and rather bold, move in accepting and recognising substantive legitimate expectations in *Ex p Hamble Fisheries*, Sedley J was of the opinion that 'the real question is one of fairness in public administration' and that frustrating a procedural or substantive expectation usually had the same effect on the disappointed person.[161] In protecting such expectations, due regard will be paid to the 'legal and policy implications' of that expectation.[162] Since the

154 *Joseph and Boyce v Attorney General of Barbados* [2006] CCJ 3; (2006) 69 WIR 104; and *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32.

155 See *R v Inland Revenue Comrs ex p Preston* [1985] AC 835 and *R v Inland Revenue Comrs ex p Unilever plc* [1996] STC 681.

156 Lord Scarman in *Re Findlay* [1985] AC 318, 338 in relation to prisoners affected by a change of parole policy: 'But what was their legitimate expectation? . . . the most a convicted prisoner can legitimately expect is that his case will be considered individually in the light of whatever policy the Secretary of State feels fit to adopt, provided always that the adopted policy is a lawful exercise of discretion conferred on him by statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent changes of policy.'

157 [2001] QB 213.

158 [1995] 1 All ER 714.

159 *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1.

160 [2002] 1 HKLRD 561.

161 [1995] 1 All ER 714.

162 Ibid.

'birth' of the concept by Lord Denning in *Attorney General of Hong Kong v Yuen Shiu*,[163] the courts had been attempting to delineate its parameters with a reasonable degree of success. It emerged from relative obscurity in 1969 to be recognised, as early as 1982, as a free-standing ground of judicial review by the House of Lords in *Council of the Civil Service Unions v Minister for the Civil Service*.[164] At least since 1994, with the decision of Sedley J in *Ex p Hamble Fisheries*, the issues that needed resolving were, first, whether the English common law recognised substantive legitimate expectations; and, second, if it does, what is the appropriate standard of review. Sedley J answered the first in the affirmative, and, in relation to the second, claimed that the question is essentially one of fairness in administration. However, a year earlier in *R v Secretary of State for Transport, ex p Richmond-Upon-Thames LBC*,[165] Laws J answered both questions differently. He rejected the view that substantive legitimate expectations have any place in English administrative law;[166] and that *Wednesbury* unreasonableness[167] provides the correct test for such expectations. The subsequent judicial debate that followed was played out between Sedley J and Laws J, both of whom appeared as opposing counsel in the House of Lords decisions of *R v Secretary of State for the Home Department, ex p Ruddock*,[168] and *R v Secretary of State for the Home Department ex p Khan*.[169] In any event, soon thereafter, Sedley J's approach in *Ex p Hamble Fisheries* was castigated by the Court of Appeal in *R v Secretary of State for the Home Department ex p Hargreaves*[170] as 'heresy',[171] noting that: (a) on matters of 'substance (as contrasted with procedure). .. *Wednesbury* provides the correct test';[172] and (b) the test of fairness in relation to substantive legitimate expectations was 'wrong in principle'.[173] In addition, the Court of Appeal held that Sedley J's '*ratio* in so far as he propounds a balancing exercise to be undertaken by the court should . . . be overruled'.[174]

Sedley J, however, was to have the next word on the matter, because, on his elevation to the Court of Appeal (incidentally, Laws J was elevated in the same year), he, along with Lord Woolf MR and Mummery LJ, attempted, in *Ex p Coughlan*, to bring an end to the controversy by revisiting and restating the law relating to legitimate expectations, in particular, substantive legitimate expectations. So although not formally overruling *Ex p Hargreaves*, the decision of the Court of Appeal in *Ex p Coughlan* has effectively rendered it nugatory. The Court of Appeal expanded a concept used by the House of Lords in cases involving the Inland Revenue where the question was 'whether to frustrate the legitimate expectation can amount to an abuse of power'.[175] The Court of Appeal pointed out, importantly, that in relation to legitimate expectations:

> 57. There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that

163 [1983] 2 ALL ER 346.
164 [1985] AC 374.
165 [1994] 1 WLR 74.
166 Ibid at 92.
167 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
168 [1987] 1 All ER 518.
169 [1987] 1 WLR 1337.
170 [1997] 1 All ER 397.
171 Ibid at 412.
172 Ibid.
173 Ibid at 416.
174 Ibid at 412.
175 [2001] QB 213 at [61], citing *R v Inland Revenue Comrs ex p Preston* [1985] AC 835 and *R v Inland Revenue Comrs ex p Unilever plc* [1996] STC 681.

> the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.*
>
> 58. The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.[176]

That statement, particularly at (c), ended the controversy relating to substantive legitimate expectations with the court affirming its protection under the common law, and providing at the same time the appropriate test for the courts when faced with substantive legitimate expectations. The decision was bold and heralded a new era in English public law. Unsurprisingly, it created a stir both in academia and in the courts.

The ink had not yet dried on the paper on which *Ex p Coughlan* was written when the Court of Appeal had reason in *R v Secretary of State for Education and Employment ex p Begbie*[177] to revisit *Ex p Coughlan* to make some much-needed qualifications in relation to substantive legitimate expectations, in light of the sweeping statements made therein. Laws LJ, as he now is, was not to miss out on this opportunity; for both he and Sedley LJ, along with Peter Gibson LJ, were the members of that court. Laws LJ agreed that '[a]buse of power has become, or is fast becoming a root concept which governs and conditions our general principle of public law.'[178] However, he noted that the central difficulty was 'in translating this root concept or first principle into hard clear law' and 'where a breach of a legitimate expectation is established, how may the breach be justified to this court?'[179] He found no reason in principle for the tripartite categories expounded in *Ex p Coughlan*, noting that:

> the first and third category explained in the *Coughlan* case are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the court to a more or less obtrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the courts are in no better position to adjudicate save at the most on a bare *Wednesbury* basis without donning the garb of the policy-maker, which they cannot wear.[180]

Sedley LJ too was of the opinion that 'the question of mistake in relation to the abuse of power will need to be revisited' and that 'the distinction drawn in [*Ex p Coughlan*] between the first and

176 [2001] QB 213 at [57]–[58] (emphasis added).
177 [2000] 1 WLR 1115.
178 Ibid at 1129.
179 Ibid.
180 Ibid at 1130.

third categories of legitimate expectation *deserves* further examination.'[181] That chance was not far away. The Court of Appeal again revisited the issue in *R v Newham London Borough Council, ex p Bibi*[182] with Sedley LJ sitting as one of its members. Schiemann LJ, who gave the leading judgment, affirmed that reliance and detriment are factual matters, not legal, in relation to legitimate expectations.[183] He then applied the test found in *Ex p Coughlan*, noting, however, that 'without refinement, the question whether the reneging on a promise would be so unfair so as to amount to an abuse of power is an uncertain guide.'[184] Critically, it was also pointed out that even where the court finds that the applicant had a substantive legitimate expectation, it 'will not order the authority to honour its promise where to do so would assume the powers of the executive'.[185] In such cases, where the court has found abuse, 'it may ask the decision maker to take the legitimate expectation properly into account in the decision-making process.'[186] Schiemann LJ set out the approach that ought to be taken in legitimate expectations cases:

> In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.[187]

Two years later, in the Court of Appeal decision of *Rowland v Environment Agency*,[188] Peter Gibson LJ agreed with Lightman J, at first instance, that: (a) the doctrine of legitimate expectations is grounded in the 'principle of good administration' which '*prima facie* requires adherence by public authorities to their promises';[189] and (b) 'there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so.'[190] Mance LJ acknowledged that there may very well be circumstances where the court cannot give any relief 'in one of the ways indicated in *Coughlan*, and the only relief possible may be by way of the claim for compensation'.[191]

The continued interest of the Court of Appeal in delineating the boundaries of substantive legitimate expectation remains unabated, for yet again in *R v Secretary of State for the Home Department ex parte Nadarajah*[192] it sought to bring some further clarity to this area. Laws LJ, giving the unanimous judgment of the court, noted that the appeal 'requires the court to revisit the character of the legitimate expectation principle'.[193] After an examination of the recent authorities, Laws LJ stated that:

> Principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. . . . But it goes no distance to tell you, case by case, what is lawful and what is not. I accept, of course, that there is no formula which tells you that; if there were, the law would be nothing but a checklist. Legal principle lies between the overarching rubric of abuse of power and the concrete imperatives of a rule-book.[194]

181 Ibid at 1133–4 (emphasis added).
182 [2002] 1 WLR 237.
183 Ibid at [31].
184 Ibid at [34].
185 Ibid at [41].
186 Ibid.
187 Ibid at [19].
188 [2004] 3 WLR 249.
189 Ibid at [66].
190 Ibid.
191 Ibid at [135].
192 [2005] EWCA Civ 1363.
193 Ibid at [47].
194 Ibid at [67].

He then reformulated the test as follows:

> The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.

In other words, the 'principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a *proportionate* measure in the circumstances.'[195] This reasoning borrowed heavily from the constitutional principles found in the jurisprudence of the European Court of Justice relating to the European Convention on Human Rights. That approach, Laws LJ argued, 'makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of good administration.'[196] The question in either case is 'whether denial of the expectation is in the circumstances *proportionate* to a legitimate aim pursued.'[197] In Laws LJ's opinion, there 'is nothing original in my description of the operative principle as a requirement of good administration'.[198] The rationale for that novel approach was to 'conform the shape of the law of legitimate expectations with that of other [United Kingdom and European Union] constitutional principles'.[199]

Again, in *Ex p Murphy*,[200] Laws LJ, after reviewing the recent authorities, including *Ex p Coughlan* and *Ex p Nadarajah*, attempted to restate the law relating to legitimate expectations as follows:

> 50. A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.
>
> 51. To all this there are no doubt refinements and qualifications, and there may be other cases. And major questions can arise as to the circumstances in which the public interest will, in the court's view, allow the change of policy despite its unfair effects. This was the subject of some observations of mine in *Ex p Nadarajah*. It is not a topic for debate in the present case, because the question here is whether any potentially enforceable legitimate expectation has arisen at all. I would only draw from *Nadarajah* the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard

195 Ibid (emphasis added).
196 Ibid at [69].
197 Ibid.
198 [2005] EWCA Civ 1363 at [70].
199 Ibid.
200 [2008] EWCA Civ 755.

> which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality (see *Ex p Nadarajah*, paragraph 68).

The Commonwealth Caribbean

In *Joseph and Boyce*,[201] the Caribbean Court of Justice (CCJ) found four reasons why there was an express representation made by the Government to the effect that it would not execute the appellant pending the determination of their cases before the international human rights bodies. The first was ratification by the Barbados Government of the American Convention on Human Rights. The second was positive statements from the executive that they would abide by the treaty in relation to such condemned prisoners.[202] The third related to the previous practice by the Barbados Government to allow those prisoners to have their petitions heard and adjudicated upon before execution.[203] The fourth was that the action of Parliament, by amending the Constitution, impliedly recognised that it was the practice and indeed the obligation of the State to await the Commission's process, at least for some period of time.[204] As a result, the CCJ then concluded that 'the respondents had a legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the [international human rights] proceedings they had initiated.'[205]

At the commencement of its discussion of legitimate expectations the CCJ asked 'whether, and if so to what extent, the legitimate expectation of the respondent should produce a substantive benefit'.[206] Surprisingly, the court noted that the question whether a court should give effect to a substantive legitimate expectation 'is still a matter of ongoing judicial debate', citing *Ex p Hamble Fisheries*,[207] ignoring the fact that since *Ex p Coughlan* the debate relating to whether the English common law should recognise substantive legitimate expectations had ended in favour of allowing such expectations. The CCJ did not undertake a comprehensive review of the authorities relating to substantive legitimate expectations, referring to the decision of Sir David Simmons CJ in *Leacock v Attorney General*.[208] In determining whether to give effect to substantive expectations, the CCJ observed that:

> In matters such as these, *courts must carry out a balancing exercise*. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority.[209]

The CCJ had to balance two competing interests. On the one hand, the legitimate expectation of the condemned men that they 'will be permitted a reasonable time to pursue their petitions with the Commission with the consequence that any report resulting from the Inter-American

201 *Joseph and Boyce v Attorney General of Barbados* [2006] CCJ 3 (AJ); (2006) 69 WIR 104.
202 Ibid at [118].
203 Ibid.
204 Ibid at [116].
205 Ibid at [118].
206 Ibid at [119].
207 Ibid.
208 (2005) 68 WIR 181.
209 *Joseph and Boyce* at [124] (emphasis added).

process will be available for consideration by the Barbados Privy Council [BPC]';[210] and on the other hand 'whatever the State may advance as an overriding interest in refusing to await completion of the international process before carrying out the death sentence'.[211] The CCJ noted that 'apart from the time constraints of the *Pratt* time limit', the Barbados Government claimed 'no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled'.[212] It therefore concluded that:

> In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. *The substantive benefit the condemned men legitimately expect is actually as to the procedure that should be followed before their sentences are executed.* It does not extend to requiring the BPC to abide by the recommendations in the report.[213]

The CCJ accepted that the substantive legitimate expectation the condemned person had was to the procedure that they expected to be followed in their case, which would apply to all individuals on death row who had cases pending before an international human rights body. The CCJ recognised that the State had no compelling interest, apart from abiding by the *Pratt* guideline, which, it noted, was never meant to be applied as rigidly as it seems to have been applied by Caribbean courts and administrators of justice alike.[214]

Any expectation which had arisen was not without limits. Unsurprisingly, the CCJ cautioned that any '*protracted delay* on the part of the international body in disposing of the proceedings initiated before it by a condemned person, *would justify the State, notwithstanding the existence of the condemned man's legitimate expectation, proceeding to carry out an execution before completion of the international process*'.[215] The CCJ explained that this was either grounded in the legitimate expectation itself, or by 'an overriding public interest in support of which the State may justifiably modify its compliance with the treaty'.[216] Consequently, the CCJ concluded that the reading of the death warrants to the respondents breached their legitimate expectations and it also 'constituted a breach of [their] right to the protection of the law'.[217] The legitimate expectation of the condemned prisoners 'can only be defeated by some overriding interest of the State'.[218] If the State 'imposes reasonable time limits within which a condemned man' may appeal to such international bodies, then it cannot be said that in so doing the State has not shown a good faith intention to abide by its treaty obligations.[219] Even if such a right to petition such bodies exists, the State 'cannot reasonably be expected to delay indefinitely the carry out of a sentence, even a sentence of death, lawfully passed by its domestic courts pending the completion of a petition by an international body'.[220] This was stressed repeatedly by the CCJ, indicating that although its conclusion mirrors that of *Lewis*,[221] 'save that the obligation of the State to await the outcome of the international process is not in our judgment open-ended', it followed a different route.[222]

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210 Ibid at [125].
211 Ibid.
212 Ibid.
213 Ibid (emphasis added).
214 Ibid.
215 Ibid at [126] (emphasis added).
216 Ibid at [126].
217 Ibid at [128].
218 Ibid at [130].
219 Ibid.
220 Ibid.
221 *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.
222 *Joseph and Boyce* at [132].

In *Paponette v Attorney General of Trinidad and Tobago*,[223] the appellants, members of the Maxi-Taxi Association ('the Association'), argued that representations made by the Minister of Works and Transport in 1995 – namely, that (i) the Association would not be under the control or management of the Public Transport Service Corporation (PTSC); (ii) the management of Port-of-Spain Transit Centre at City Gate in South Quay ('City Gate') would be handed over to the Association within a period of three months, and at most six months; and (iii) a skywalk would be constructed to allow passengers a pathway from the city centre to the City Gate – induced them to relocate their taxi stand in Broadway to City Gate.[224] In breach of those representations: (a) the National Insurance Property Development Co Ltd (NIPDEC) managed City Gate from 1995; (b) the Government in 1997 introduced regulations which required the maxi-taxi owners and operators to apply to the PTSC for a permit to operate from City Gate; (c) the PTSC in 1998 commenced management of City Gate and in 2001 began charging the maxi-taxi owners a user fee of $1.00. In 2004, the Association filed a constitutional motion in the High Court, claiming, *inter alia*, that: (i) the actions of the State had frustrated their legitimate expectations of a substantive benefit in a way which affected their property rights protected under section 4(a) of the Constitution; and (ii) they had been treated unfavourably by the Government as compared with other maxi-taxi owners and that they had thereby suffered a breach of their right to equal treatment under section 4(d) of the Constitution.[225] In 2008, the arguments were accepted by Ibrajaim J and he granted the orders sought,[226] but his decision was reversed by the Court of Appeal in 2009.[227] The appellant appealed to the Privy Council seeking a reversal of the Court of Appeal's decision.

The critical and most important argument of the appellants was the first one: that by depriving them of their substantive legitimate expectations, the Government had infringed their right to the enjoyment of property and the right not to be deprived thereof *except by due process of law*, contrary to section 4(a) of the Constitution of Trinidad and Tobago. The Board, applying its previous decisions in *Campbell-Rodriques v Attorney-General of Jamaica*[228] and *Grape Bay Ltd v Attorney General*,[229] concluded that there was an infringement of the appellants' section 4(a) rights.[230] Having established that, the Board proceeded to consider 'what was the real focus of the argument in relation to the section 4(a) issue before us, namely whether the appellants were deprived of their right to enjoyment of property 'by due process of law'.[231] It then began its discussion of that issue under the sub-heading, '"*Except by due process of law*"*: substantive legitimate expectation*.'

Sir John Dyson SCJ, speaking for the majority of the Board, and after accepting that the representations were in fact to the appellants and that they had relied on it, noted that a 'more difficult question is whether the Government was entitled to frustrate the legitimate expectation that had been created by its representations'.[232] He continued that '[i]n recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation.'[233] Many of these decisions have already been discussed above. Sir John Dyson SCJ accepted that the applicable

223 [2010] UKPC; [2011] 3 WLR 219.
224 Ibid at [4].
225 Ibid at [12].
226 Ibid at [15]–[16].
227 Ibid at [17].
228 [2007] UKPC 65.
229 [2000] 1 WLR 574; (1999) 57 WIR 62.
230 [2010] UKPC 32 at [25].
231 Ibid at [26].
232 Ibid at [34].
233 Ibid.

test was that stated in *Ex p Coughlan*, namely whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.[234] In his view, the 'critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise'.[235] The majority continued that '[t]his raises the further question as to the burden of proof in cases of frustration of a legitimate expectation', noting that, in cases of frustration of legitimate expectation, the 'initial burden lies on an applicant to prove the legitimacy of his expectation'.[236] It continued that, first, this means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification; and, second, if he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too.[237] Once this is done, 'the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation.'[238] The role of the court then is to 'weigh the requirements of fairness against that interest'.[239] The Board explained that '[i]f the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power.'[240]

It claimed that '[h]ow an authority justifies the frustration of a promise is a separate question which is of particular significance in the present case', because the Attorney General placed no evidence before the judge or the Court of Appeal to explain why the 1997 Regulations were made.[241] The attorney for the respondents suggested to the Board that it is possible to infer from the mere fact that the 1997 Regulations were made that there had been a change of policy and that this must have been in response to some public interest which overrode the expectations generated by the representations.[242] The Board rejected the proposition that the court could (still less, should) infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. It continued that '[s]o expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding public interest.' [243] The Board explained that, first, it follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation; and second, without evidence, the court is unlikely to be willing to draw an inference in favour of the authority.[244] It continued that it was no mere technical point, observing that:

> The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the

234 Ibid at [35].
235 Ibid at [36].
236 Ibid at [37].
237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid at [38].
241 Ibid at [39].
242 Ibid at [41].
243 Ibid.
244 Ibid at [42].

> applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority.[245]

The Board also explained that, first, '[t]here may be circumstances where it is possible to identify the relevant overriding public interest from the terms of the decision which is inconsistent with an earlier promise and the context in which it is made'; and, second, '[i]n such a case, the terms of, and background to, the decision itself may provide enough material to enable the court to decide how the balance should be struck. But that is likely to be a rare case.'[246] However, it noted that '[t]he 1997 Regulations fall far short of providing such information for the purposes of the present case.'[247] In addition, the Board claimed that, first, '[t]he position is different where, properly understood, a promise is only for a limited period. If it is for a specified limited period, then once that period has expired, the promise ceases to bind'; and, second, '[t]he promise may also be subject to an implication that it is for no more than a reasonable period. In that event, once a reasonable period of time has elapsed, the promise ceases to bind'.[248] It noted that the Attorney General did not argue that the representations were for a limited period or a reasonable time which had expired, simply that, even if clear and unambiguous representations were made by the Minister in 1995, there was no unfairness amounting to an abuse of power on the part of the Government in making the 1997 Regulations.[249]

The Board also claimed that:

> Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.[250]

The Board ruled that, on the facts, the Government had singularly failed to show that it had taken into account the fact that the effect of the 1997 Regulations was to breach the earlier promises.[251] On the facts of the case, the Board accepted that, first, the representations were clear, unambiguous and devoid of relevant qualification; second, the representations were made to a defined class, namely the maxi-taxi owners and operators who used routes 2 and 3; third, the representations were relied upon by the appellant; fourth, the critical representation was that they would not be under the control and management of the PTSC.[252] These facts, the Board concluded, were 'enough to give rise to a substantive legitimate expectation that the owners and operators would be permitted to operate from City Gate and would not be under the control or management of the PTSC'; and, since the 'government has not proved that there was an overriding public interest which justified the frustration of this legitimate expectation', the Board further concluded that the appellants' case on section 4(a) of the Constitution succeeded.[253]

245 Ibid.
246 Ibid at [43].
247 Ibid.
248 Ibid at [44].
249 Ibid.
250 Ibid at [46].
251 Ibid at [47].
252 Ibid at [49].
253 Ibid.

Lord Brown, dissenting, noted that, while he could 'readily accept that the imposition of user fees deprived the Association members of their right to enjoyment of property and needed, therefore, to be effected "by due process of law", on the face of it nothing could be more clearly lawful than the charging of *ex hypothesi* "reasonable charges" for the facility here afforded, as authorised by Regulations properly made under the empowering legislation'.[254] He continued that, with the best will in the world, he could not agree with the conclusion of the majority that the assurances given to the Association in 1995 gave them a substantive legitimate expectation that no such Regulations would be made and no such charges imposed; and that this was so unfair as to amount to an abuse of power.[255] Observing that a 'dissenting opinion in the Judicial Committee is no occasion for a detailed re-examination of the law of legitimate expectation', Lord Brown claimed that he was content 'to look at this case in the round and to address the composite question: was the imposition of reasonable charges here so unfair as to amount to an abuse of power?', noting also that '[i]t seems to me unhelpful, certainly in the particular circumstances of this case, to divide this critical question into various sub-questions and allocate to these different burdens of proof.'[256]

He then questioned whether 'these assurances, then, [were] such as could be regarded as "clear, unambiguous and devoid of relevant qualification" such as to commit the Government to honour them on a lasting basis?'[257] Lord Brown, before answering this question, proceeded to ask the following questions: is it to be said, for example, that the Association could, had they wished, have enforced the construction of a skywalk (one of the assurances given)? Why, one wonders, was no complaint ever made about this? Why was no complaint made about the failure to hand over management of the facility to the Association, whether after three months, six months or at any other time? Why was no complaint made for seven years about the introduction of the 1997 Regulations? Why, indeed, was no complaint made even of the imposition of the user fee until nearly three years after it was introduced?[258] In his opinion, '[n]one of this suggest[ed] . . . that the Association regarded itself as the beneficiary of well-nigh enforceable promises, requiring a material change of circumstances rather than a mere change of policy before the government could lawfully depart from them'.[259] In addition, he pointed out that 'these representations could not be regarded as binding on the government indefinitely' and that 'realistically the long-term management of the facility by the Association itself was to be seen more as an aspiration than a guarantee'.[260] Lord Brown then asked, first, 'If the Association was not itself to manage the facility, why should it not be managed by its owner, the PTSC?' and, second, 'Given that the PTSC was providing a facility, and that inevitably this would involve them in expense, were the Association really entitled to suppose that, five years after relocation, they would remain entitled to the free use of the facility?'[261]

He then concluded that, first, 'far from it being an abuse of power to introduce reasonable charges after giving the Association five years of free use of the facility, this seems to me entirely unsurprising and properly authorised by the 1997 Regulations'; and, second, even without direct evidence, explaining why: (a) in 1997 they regarded themselves as under no continuing obligation to the Association and (b) they thought it right in the wider public interest to introduce the 1997 Regulations and authorise the PTSC to levy reasonable charges for the use of

254 Ibid at [59].
255 Ibid at [60].
256 Ibid at [61].
257 Ibid at [62].
258 Ibid.
259 Ibid.
260 Ibid.
261 Ibid.

their facility, he would 'hold that the nature of the 1995 assurances was not such as to preclude government two years later from giving effect to what was self-evidently by then its policy, namely to allow the PTSC to make a reasonable charge for the facility it was providing'.[262] Lord Brown was of the opinion that although the Government might be criticised for its conduct of this litigation, he did not think 'the evidential shortcomings here sufficient to justify so unmerited a windfall for the Association at so great a cost to the long-suffering Trinidad taxpayers'.[263]

SECONDARY CASE OF PROCEDURAL PROTECTION

Sometimes, the issue of substantive and procedural legitimate expectation is not easy to differentiate. Where consultation has been promised, and the applicant has no right to it, would the expectation be procedural since that is what he wants or would it be substantive since he is claiming the thing he was promised – consultation? Where there was no promise or established practice of consultation, and a public authority proposes to renege from a promise made or to depart from an existing policy, in what circumstances would the court find that an affected person had a right to be heard before the benefit of both the promise of the policy was taken away? These issues were explored in *Commonwealth Trust Ltd v Financial Services Commission*,[264] where one of the issues the court considered was whether the Financial Services Commission (FSC) was obliged to give prior notice to the applicant (CTL) of its intention to issue a second directive and, in particular, whether the CTL had a legitimate expectation that such a notice would have been given. The second directive required CTL and its subsidiaries to forthwith cease and desist from entering into any new contracts for trust business or company management business until such time as CTL had complied with the first directive and had completed the corrective action specified in the second report to the satisfaction of the FSC. The applicant conceded that the FSC had not made any express representations or promises to it that it would give CTL prior notice of its intention to issue a second directive.[265] However, the applicant argued that a legitimate expectation arose having regard to the course of dealings between the parties in that they had been in dialogue since the issue of the first directive and that this of itself gave rise to a legitimate expectation that the CTL would notify CTL prior to the issue of a second directive. The court held that the law on legitimate expectation was now well settled: CTL must show a course of conduct or a promise made by the FSC on which it relied to his or her prejudice.[266] The court then quoted from the decision of the Privy Council in *Cabinet of Antigua v HMB Holdings* where Lord Hope of Craighead stated that, first, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal right, provided they have some reasonable basis; second, if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there; and, third, the action complained of cannot be said to have been contrary to what the public body could reasonably have been expected to do in the circumstances.[267]

262 Ibid at [63].
263 Ibid.
264 VG 2008 HC 20. See also *Cortina International Ltd v Planning Appeals Tribunal* KY 2000 GC 55, citing de Smith's *Judicial Review of Administrative Action* at paras 8-046–8-047, at 421; and *Temple of Light Church of Religious Science of Kingston Jamaica Ltd v Minister of the Environment* JM 2002 CA 40.
265 VG 2008 HC 20 at [29].
266 Ibid at [30].
267 Ibid.

On the facts, the court held that CTL could point to no promise or undertaking given to it by the FSC that it would not issue a directive without notice to it.[268] In addition, it claimed that CTL could not point to any course of dealings with the FSC from which the inference could be drawn that FSC would not issue a second directive without notice to CTL. The court was of the opinion that the fact that the FSC was in communication with CTL about the measures CTL was taking consequent on the first directive could not raise any reasonable basis for saying that this gave rise to a legitimate expectation that the FSC would notify CTL of its intention to issue a second directive. It continued that, if the court were to hold otherwise, it would mean the mere fact that the FSC was in communication with a company about compliance issues would curtail the FSC's rights to act in accordance with its mandate. The court explained that, ironically, the FSC had been criticised for not responding to letters but the fact that it responded to some was held up as a ground for saying that, by so doing, it led CTL to expect that it would be notified if the FSC decided to issue a second directive. The court claimed that if this argument were successful, it would be putting the FSC in a bind; between the devil and the deep blue sea, so to speak. In respect of the second argument, that the FSC was obliged in law to give notice to CTL before it issued the second directive, the court noted that a directive was a creature of the Financial Services Commission Act 2001 (FSCA) and section 40(1) provided that the FSC must be entitled to take enforcement action under section 37(1) before it can issue a directive, but the FSCA makes no provision for prior notice to be given.[269] The court was of the opinion that it was not disputed by CTL that the FSC was entitled to take enforcement action as CTL admitted that it failed to comply with the first directive and one of the grounds for entitlement to take enforcement action was that a licensee has failed to comply with a directive under section 37(1)(v). It continued that Parliament did not provide for notice to be given and, when one looked at the scheme of the FSCA, it would defeat the purpose if the court were to graft onto that a requirement that the FSC had to give prior notice to a licensee of its intention to issue a directive.[270] As a result, it rejected that basis of challenge. In other words, on the facts, fairness did not demand that CLT be given notice of any enforcement action that the FSC proposed to take.

There might, however, be circumstances where the court finds in fairness that the public authority should provide the affected persons with a right to make representation or consultation. It all depends on the circumstances of each case. In *Elcock v Attorney General of Trinidad and Tobago*,[271] the issue for the court, therefore, was whether in its adoption and implementation of the new policy, the Cabinet's decision not to recommend the applicant for appointment as President of the Industrial Court was procedurally improper, as having breached the applicant's legitimate expectation.[272] It continued that the instant case provided a classic example of a legitimate expectation which arose by virtue of the existence of a long-standing practice, as the applicant had provided uncontradicted evidence that throughout his fourteen and a half years' tenure, age had never been an issue. Therefore, in its view, a member, recommended by the President of the Industrial Court, would expect re-appointment. The court continued that there was no question that Cabinet was entitled to depart from the long-standing practice.[273] However, it held that fairness required that, prior to departing from the long-standing practice, Cabinet, through the Attorney General, had an obligation to notify the applicant of its intention to depart from the existing policy and to give the applicant an opportunity to be heard in opposition to its intention. In failing to notify the applicant of its intention to depart from the

268 Ibid at [31].
269 Ibid at [32].
270 Ibid at [33].
271 TT 2008 HC 53.
272 Ibid at [49].
273 Ibid at [50].

old policy and in failing to invite and to hear the applicant's representations, the court ruled that the defendant acted with procedural impropriety and in breach of the rules of natural justice.[274] The defendant argued that the applicant should be entitled to an order granting him the substantive benefit in respect of which the applicant held a legitimate expectation.[275] The court also ruled that, in deciding the issue, it would follow the very clear guidance provided by the President of the CCJ in *Attorney General of Barbados v Boyce and Joseph* and, in applying those principles, the court was required to conduct a balancing exercise between the interest of the applicant, whose legitimate expectation was frustrated, and the Government, which sought to pursue its policy by formulating and implementing a new policy in relation to the re-appointment of members of the Industrial Court.[276] It continued that, in considering the interest of the applicant, it was, in its view, useful to contrast the applicant's case with the facts of *Ex p Coughlan*, which was one of the first cases in which the court awarded the substantive benefit to which the applicant held a legitimate expectation.[277] The court distinguished *Ex p Coughlan* on the basis that the legitimate expectation in that case arose not by the existence of a regular practice but was rooted in an express promise repeatedly made to a select, identifiable group of persons so as to impose on it the character of a contract. However, in the instant case, the court noted that there was no character of a contractual agreement between the applicant and the executive: the applicant, though eligible for re-appointment, had no legal basis to insist on being re-appointed.

The court was of the opinion that the applicant's legitimate expectation could have been no higher than an expectation that he would be treated in accordance with the prevailing policy and that if the Government wished to depart from it, it would, first, observe the dictates of natural justice by: (a) notifying him of their intention to replace the existing policy sufficiently in advance of implementing the change, so as to enable him to prepare representations which he wished to make in order to persuade them against implementing the change; and (b) hearing his representations before implementing their decision.[278] In the court's view, the adherence to the requirements of natural justice would have satisfied the requirements of fairness in the instant case. So although there was no previous practice of consultation, and the applicant had argued for his substantive benefit of actual appointment, the court was of the view that fairness demanded only that the Government inform him of its intention to replace the existing policy and of hearing any representation that he had in relation to the same. His legitimate expectation of a substantive benefit was protected procedurally where there was no previous practice of consultations. There could not be any in light of the change of policy in question.

Nonetheless, the court was not convinced it should direct that the applicant be re-appointed for the following reason: the President of Trinidad and Tobago (acting on the advice of Cabinet) had the statutory responsibility for determining how many persons should hold office as members of the Industrial Court.[279] It was of the opinion that it fell to the President to determine who should be appointed and who should be re-appointed, and that decision (acting on the advice of Cabinet) would be informed by myriad policy considerations, not known to the court. As a result, the court ruled that a direction of the kind sought would constitute an unwarranted intrusion into the exercise of the powers conferred on the executive by Parliament.[280]

274 Ibid at [51].
275 Ibid at [52].
276 Ibid.
277 Ibid at [53].
278 Ibid at [54].
279 Ibid at [55].
280 Ibid.

RENEWAL OF EMPLOYMENT CONTRACTS OF MAGISTRATES

The removal of a magistrate from office would occur in any circumstance where he is removed before the natural expiry of the contract of employment.[281] Magistrates in the Eastern Caribbean are usually employed on yearly contracts which are renewable. Surely, for the duration of that period the usual constitutional protections would apply. However, where the executive retains the power to renew or not renew the contract of a magistrate, would this not water down the constitutional protection that *Fraser*[282] and *Inniss*[283] claimed applied to such contracts? Therefore, rather than give a magistrate a contract for three or five years, the government usually gives the magistrates one-year contracts. In this way, they would reserve the power of non-renewal without having to justify not doing so; whereas a magistrate on a three- or five-year contract could only be removed for reasonable cause. The provisions of the successive contracts, arguably, drive a coach and horses through the constitutional protections afforded to the magistracy. In *Magloire v The Judicial and Legal Services Commission*,[284] Magloire was employed as a magistrate for four successive contractual periods of one year each, from 4 January 2000 to May 2004; his last one-year contract having run from January 2003 to January 2004. A month-to-month contract for a period of four months from January 2004 was approved by the Judicial and Legal Services Commission (JLSC) on recommendation by the Ministry of Justice.[285] In a letter addressed to the Senior Magistrate from the JLSC, the Attorney General was directed not to renew the applicant's contract of employment. Magloire commenced proceedings in the High Court against the JLSC and the Attorney General for the manner in which his contract was not renewed. The contracts of magistrates are for fixed terms. Their continued employment as magistrates depends on the renewal of their contracts by the government at the expiration of each contractual period in a particular set of circumstances.[286] The government's existing practice usually permits the preparation and execution of a magistrate's current contract to take place during that current contractual period.[287] The magistrate usually remains in office and continues to perform his/her magisterial duties after the expiration of a contractual period, until re-appointment and the renewal of the contract.[288] Where there is no renewal of the contract the magistrate quits office or his/her services are terminated at the end of the contractual period or thereafter.[289]

The issues for the court were as follows: first, what was the nature of any legitimate expectations that Magloire may have had, based on this practice of the government and his employment as magistrate from 4 January 2000 to 3 January 2004; second, did the JLSC act unconstitutionally in relation to Mr Magloire; and, third, to what declarations and relief, if any, was Mr Magloire entitled?[290] In relation to the first issue, the court was of the opinion that Magloire was 'entitled to have a legitimate expectation, that his contract would be renewed for one year', because there was undisputed evidence of the established practice of re-appointing Magistrates in St Lucia long after their period of engagement had expired by effluxion of time, and long after they have continued in office upon the expiration of their fixed contractual

281 This section borrows heavily from: E. Ventose, 'Public Law aspects of Employment of Magistrates in the Commonwealth Caribbean' (2011) *Commonwealth Law Bulletin* 52.
282 *Fraser v Judicial Legal Services Commission* [2008] UKPC 25. See also E. Ventose, 'Constitutional Protection for Magistrates in the Commonwealth Caribbean' (2009) PL 431.
283 *Inniss v Attorney General of Saint Christopher and Nevis* [2008] UKPC 42.
284 LC 2007 HC 1.
285 Ibid at [9].
286 Ibid at [5].
287 Ibid at [6].
288 Ibid at [7].
289 Ibid at [8].
290 Ibid at [25].

term.[291] At issue, therefore, was the nature of the legitimate expectation claimed by the applicant.[292] He claimed the expectation was that the JLSC would re-appoint him as a magistrate for one year in the exercise of its mandate under section 91(2) and (3) of the Constitution of St Lucia.[293] The applicant also argued that he had a legitimate expectation that he would have been allowed a hearing or given an opportunity to make representations before the JLSC reached a decision that deprived him of his financial proprietary interest.[294] The court agreed with counsel for the defendant that, even if Magloire had a legitimate expectation that his employment would be renewed on the same terms as his prior engagements, it was the government and not the JLSC that was empowered by clause 2 of his contract of employment to decide whether to renew it. In other words, it was the government and not the JLSC that would negotiate the terms and conditions under which he would be re-engaged.[295] The court also agreed that, first, this meant that it was the government that was obliged to give Magloire a fair hearing in relation to the terms of his employment, and that should afford him the opportunity to make representations on matters which might have influenced the decision in regard to those terms;[296] and, second, the JLSC had no contractual relationship with Magloire and, therefore, could not set the terms of his engagement. Consequently, the only expectation he could have concerning the terms under which he was to be re-engaged by the government was an expectation as to how the government would exercise its contractual rights under clause 2 of the employment contract.[297]

The court then considered the question of whether the JLSC acted unconstitutionally where it confirmed the decision of the Ministry of Justice regarding Magloire's re-appointment when section 91(2) vests the power of decision making solely in the hands of the JLSC. The court held that section 91(2) empowers the JLSC, not only to recommend appointments, but also to confirm appointments.[298] This suggests there will be instances where the JLSC acts on the recommendation of other persons for the appointment of officers within section 91(1). In such cases, the role of the JLSC will merely be confirming such appointments or it will 'approve of the appointment' as it did in its letter dated 6 April 2004. The court felt bound to follow the decisions of the Court of Appeal in *Attorney General of St Christopher and Nevis v Inniss*[299] and *Judicial and Legal Services Commission v Fraser*,[300] holding that the claimant had not discharged his burden of proving that section 91(2) and (3) of the Constitution had been contravened by the JLSC.[301]

In *Panday*, the Board stated that the 'availability of judicial review in a case of non-renewal of a fixed term without a proper procedure or proper grounds was not in issue in those cases, and is not a matter which the Board needs to address in this case'.[302] It continued, citing *Hinds* and *Fraser*, that:

> [t]he Constitution of Mauritius (in contrast to the constitution in issue in [*Fraser*]) expressly extends the role of the Commission to non-renewal as well as termination of an appointment: s 116(1). That being so, Mr Panday had the assurance, under the language of the Constitution

291 Ibid at [29].
292 Ibid at [31].
293 Ibid.
294 Ibid at [36].
295 Ibid at [38].
296 Ibid at [41].
297 Ibid at [42].
298 Ibid at [55].
299 KN 2002 CA 1.
300 LC 2005 CA 8.
301 *Magloire* at [55].
302 *Panday v The Judicial and Legal Service Commission* [2008] UKPC 52 at [20].

> itself, that his appointment would continue, unless the independent Commission, after following appropriate procedures, came to the view that there was reasonable cause not to do so. The Board found it difficult in these circumstances to see any basis for a conclusion that Mr Panday's temporary appointment as a magistrate was as such unconstitutional. It is true that the senior judiciary enjoy greater security of tenure, but that is a feature of Westminster style constitutions.[303]

In *Panday*, the Board is making it clear that the Constitution of Mauritius has a role for the JLSC in relation to non-renewal which is notably absent in the constitutions of Commonwealth Caribbean countries. A similar issue arose in *Richardson v Attorney General of Anguilla*,[304] where the applicant, *inter alia*, claimed a declaration that, first, he had a legitimate expectation that the Governor would have renewed his contract of employment with the Government of Anguilla and in accordance with Section 68 of the Constitution; and, second, the action of the Governor in regard to the non-renewal or temporary extension of the claimant's contract of employment was unilateral, capricious and unconstitutional.[305] The court ruled that it could not go behind these provisions in section 28(3)[306] of the Constitution of Anguilla to inquire into the exercise of the Governor's wide powers of discretion unless there is a manifest, glaring and capricious abuse of the exercise of that discretion.[307] In particular, the court held that, since there was nothing pertaining to procedural impropriety because the procedural requirements were in fact observed by the Governor General, there was no need to delve into the actions of the Governor and that the court was ousted from enquiring into the actions of the Governor in accordance with section 28(3). Therefore, the question of whether the applicant had a legitimate expectation was not examined at all.

In *R v Newham London Borough Council, ex p Bibi*,[308] Schiemann LJ set out the approach that ought to be taken in legitimate expectations cases: first, 'to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do'.[309] In cases of non-renewal of employment contracts of magistrates, it is arguable that there might be an argument for breach of legitimate expectations on the basis of the practice of successive renewals over a period of time. The rationale for this is 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public'.[310] This would fall within 'the secondary case of procedural expectation' articulated by Laws LJ in *Ex p Murphy*,[311] where he stated that: 'If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change.'[312] The test to be applied would be 'whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power'.[313] In an appropriate case, there should be little hesitation by the courts to apply applicable public law principles to the employment contract of magistrates ensuring that, first,

303 Ibid.
304 AI 2006 HC 6.
305 Ibid at [1].
306 'Where the Governor is directed by this Constitution to exercise any function in accordance with the advice of or after consultation with any person or authority, the question whether he has so exercised that function shall not be inquired into in any Court.'
307 *Richardson* at [12].
308 [2002] 1 WLR 237.
309 Ibid at [19].
310 *R v Secretary of State for the Home Department ex parte Nadarajah* [2005] EWCA Civ 1363.
311 [2008] EWCA Civ 755.
312 Ibid at [50].
313 *Ex p Coughlan* [2001] QB 213.

the executive does not whittle away the constitutional protection by simply awarding successive annual contracts; and second, ensuring that the executive deals consistently and fairly with magistrates outside the context of the constitution. This way, applicable public law principles would constrain the ability of the executive to deal with magistrates in ways that limit the protections that they are afforded under the constitution.

EXCEPTIONS

Since the basis of the principle of legitimate expectation is good public administration, it cannot mean that it leaves no exceptions. In some cases, public policy might dictate that the applicant cannot be allowed a legitimate expectation – procedural or substantive. In *Mohammed v Commissioner of Prisons*,[314] the applicant applied for judicial review of decisions or failures of the defendant in not providing opportunities for 'airing', special diet and family prescriptions for him in prison. The court noted that, in respect of the complaint concerning the decision to deny the applicant the receipt of items under a family prescription issued by the Prison Medical Officer, the applicant argued that that decision constituted a denial of a legitimate expectation which arose from a settled practice over the past 23 years by the Commissioner of Prisons. The court held that, if the respondent had a legitimate expectation to benefit from the facility of family prescription, his legitimate expectation was not, in fact, an unqualified one, being an expectation that he could benefit from the facility of family prescription once such facility was not deemed to be a risk to the interest of security and good order in the prisons. In addition, the court found no error occurred in not allowing the applicant an opportunity to be heard before the facility was withdrawn. It held that this was one of those circumstances where the right to be heard was not necessary.[315] This was because the court found that the settled practice itself was not a blanket facility but a facility which was subject always to the overriding discretion of the prison authorities to withdraw it, if circumstances dictated. The Prison Rules, in the court's opinion, did not suggest that a prison was intended to be operated as a democracy, and the consensus of prisoners was not required for its administration.[316]

314 TT 2008 HC 74.
315 Ibid.
316 Ibid.

CHAPTER 10

STANDARD OF REVIEW

INTRODUCTION

Although the grounds for review examined in the previous chapters of this book are usually armour for the courts in finding that actions by public authorities are unlawful, there still remain some actions that may not fall within an established ground of review. The courts have been able to fashion a broad ground of review which has become known as *Wednesbury* unreasonableness that they have used to find unlawful actions of public authorities.[1] However, *Wednesbury* unreasonableness has, seemingly, become overworked over the years and, increasingly, it is being used in areas in which it is manifestly unsuited. It provides a high standard for the applicant to prove before executive authority can be declared unlawful. This means that it protects many actions by public authorities that come under scrutiny by the courts. With these deficiencies in mind, and its inability to cater to the multitude of 'degrees' of lawfulness, other standards of review have been developed by the courts to replace *Wednesbury* unreasonableness as a ground of judicial review, the seminal one of which is proportionality. *Wednesbury* unreasonableness is the often-cited ground of review which could embrace many of the grounds covered in the previous chapters. However, where these fail, *Wednesbury* unreasonableness is intended to provide a measure of protection for the applicant. It has been used and abused so often that it is necessary to determine what it really means, and whether its deference to decision makers, in light of the continued infringements of the rights of citizens, is appropriate.

WEDNESBURY UNREASONABLENESS

The court has noted that the classic definition of *Wednesbury*[2] unreasonableness was further developed in *Council of Civil Service Unions v Minister for the Civil Service*[3] (*CCSU*), where Lord Diplock defined irrationality as applying to a decision so outrageous in its defiance of logic and accepted moral standards that no sensible person who directed his mind to the question could have arrived at it.[4] The court in *Adams v Commissioner of Police*[5] stated that '[t]he formula test for unreasonableness on the part of decision-makers is often as expressed in *Wednesbury*, that is, whether the decision is so unreasonable that no reasonable decision-maker could come to it.'[6] The court claimed that, on this ground of review, it was concerned with whether the power under which the decision maker acted had been improperly exercised or insufficiently justified. In considering unreasonableness, the court was not confined to simply examining the process

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1 *Coxon v Minister of Finance* BM 2007 CA 8; *Kiss Baking Company Limited v National Insurance Board of Trinidad and Tobago* TT 2008 HC 148. See also *King v Director of Public Prosecutions* BB 1988 HC 91; *Mahabir v Director of Land Administration* TT 2009 HC 75 at [4.7]; *Marks v Minister of Home Affairs* BM 1984 CA 2; *Maharaj v Teaching Service Commission* TT 1994 HC 100; *Morraine v Commissioner of Prisons* TT 2008 HC 74; *Joseph v Minister of Works and Infrastructure* TT 1990 HC 58; *Joseph v Saint Lucia Air And Sea Ports Authority* LC 2007 HC 9; and *Superharm Limited v Council of the Pharmacy Board of Trinidad and Tobago* TT 2005 HC 75.

2 *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223.

3 [1985] 1 AC 374.

4 *Maharaj v Statutory Authorities Service Commission* TT 2005 HC 7. See also *National Lotteries Control Board v Statutory Authorities Service Commission* TT 2006 HC 46.

5 AI 2009 HC 19.

6 Ibid at [44].

by which the decision maker arrived at its decision, but must consider the substance of the decision itself to see whether the criticism of it was justified.[7] The court must still, however, be careful not to substitute its own exercise of discretion for that which was exercised by the decision maker and the test was whether the decision was such that it fell within the range of reasonable views open to the decision maker. The court then quoted from *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[8] for the view that '[t]he very concept of administrative discretion involves a right to choose between more than one possible courses of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.'[9] In other cases, the court had claimed that:

> [t]he question to be determined here is whether the decision of the Panel that TSTT [Telecommunications Services of Trinidad and Tobago Limited] was not prevented by the relevant provisions from insisting on rates based on reciprocity as the basis of interconnection charges was a decision 'so outrageous in its defiance of logic that no sensible person applying its mind to the question would have arrived at the same conclusion': *per* Lord Diplock in *CCSU*.[10]

It continued that one must not 'extract portions of the decision in an attempt to show irrationality or unreasonableness is not appropriate' and that '[t]his is particularly so in this case where it is clear, and the Panel admits, that it went on to consider other issues not strictly relevant to its determination, but which it considered useful in the circumstances. In my view the reasons given by a decision-maker ought to be considered as a whole.'[11]

In the main, the courts have treated *Wednesbury* unreasonableness as a part of illegality. It will be remembered that, in *Wednesbury*, a local authority allowed the plaintiffs to have Sunday performances under the condition that children under fifteen years of age should not be admitted with or without an adult. Lord Greene MR, in examining the meaning of 'unreasonable', claimed that it meant 'there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority'. This has come to be known as '*Wednesbur*y unreasonable' and is a ground on which a court may declare an act of a public authority to be unlawful. In other words, it is one of the grounds on which a court could impugn a decision if it falls outside of the scope of lawfulness. This begs the question for it is the application of that principle that itself determines whether the decision is lawful or not. In *Virgin Islands Environmental Council v Attorney General of the British Virgin Islands*,[12] the applicant argued that the decision to grant planning approval for Hans Creek, a fisheries protected area, was void for illegality and was *Wednesbury* unreasonable. In particular, it argued that no minister, properly directing himself as to the relevant law, taking into account all relevant considerations, excluding all irrelevant considerations and ensuring procedural fairness, could have concluded that it was appropriate to grant planning permission.[13] The respondents argued that the process of reaching the decision was legally and procedurally correct, proper and fair and it was a rational and reasonable one in the *Wednesbury* sense.[14] In addition, it claimed that the decision was also within the ambit of ministerial and governmental discretion and policy making and it ought to be upheld by the court.[15] In the court's opinion, the issue was whether the decision

7 Ibid.
8 [1997] AC 1014 at 1064.
9 Ibid.
10 *Digicel (Trinidad & Tobago) Ltd v MacMillan* TT 2007 HC 183 at 31.
11 AI 2009 HC 19 at 31–2.
12 VG 2009 HC 17.
13 Ibid at [156].
14 Ibid at [157].
15 Ibid.

made by the Minister was so outrageous that it defied logic or accepted moral standards and that no reasonable authority could have arrived at that decision.[16] The claimant asserted that, since Hans Creek was a fisheries protected area and there was an absolute prohibition to carry out development activity that might or was likely to have an adverse impact on a protected area, it made the decision an irrational one and the Minister acted unreasonably in the *Wednesbury* sense in granting the approval.[17] In other words, they claimed that because the decision was illegal, it was also irrational. However, the court opined that while irrationality overlaps illegality, there was a stark difference between the two. If they were the same, it questioned why the tests were different. Unreasonableness, in the *Wednesbury* sense, required overwhelming evidence.[18] Consequently, the court held it was necessary for it to look at the evidence when considering the reasonableness or rationality of the decision[19] and, after a full and proper consideration of the evidence, found that the process employed was both open and fair and the decision was reasonable in the *Wednesbury* sense.[20] It also noted that, in order to prove *Wednesbury* unreasonableness, something overwhelming was required and, in the instant case, the facts did not come anywhere near anything of that kind.[21] Such was the nature of the test, as just noted, that it required something overwhelming before the court could find that the public authority had acted unlawfully. This meant that the standard of review called *Wednesbury* unreasonableness offered little to claimants as they had a heavy burden to prove unlawfulness. As such, the court paid deference to the decisions of public authorities and only where a particular decision is outside the scope of decisions that a reasonable decision maker, properly guided, would make, would the court find that a particular public authority had acted unlawfully. The end result is that it leaves a lot of actions of public authorities unchecked by the courts irrespective of the impact that these actions may have on persons affected. A more rigorous standard was clearly needed; in particular, one that was more engaging especially where fundamental rights and freedoms of persons were concerned.

Where a public authority exercises a discretion in making a decision, it must do so in accordance with law and must not act unreasonably. One of the areas in which the courts have applied the doctrine of reasonableness or *Wednesbury* reasonableness is where a public authority exercises a discretion under statute. In *Benjamin v Attorney General of Antigua and Barbuda*,[22] the court had to consider whether the Planning Authority acted unreasonably in refusing to grant planning permission to the applicant. The court noted that the evidence before it did not suggest that the Authority exercised its discretion granted by section 23(2) of the Physical Planning Act.[23] It continued that, given the three basic grounds for judicial review, the question was whether the Authority was reasonable or unreasonable (rational or irrational) in its failure to exercise its discretion one way or the other. After quoting from the *Wednesbury* case, it continued that, in recent times, the doctrine of reasonableness or *Wednesbury* reasonableness had sustained very severe body blows on the basis that the test was too narrow, which translated to mean that only an extreme action or situation would be caught by the test laid down by Lord Greene.[24] It continued that it had now reached the point where in *R (Daly) v SOS for the Home Department*,[25] Lord Cooke of Thornton claimed:

16 Ibid at [163].
17 Ibid at [164].
18 Ibid at [165].
19 Ibid at [166].
20 Ibid at [170].
21 Ibid at [173].
22 AG 2007 HC 54.
23 Ibid at [201].
24 Ibid at [203].
25 [2002] 1 AC 532.

> that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it is suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.[26]

As a result, the court noted that '[e]nter the influence of "Community law" and attempts to infuse proportionality into the test of reasonableness and herein lies the reason for the severity of the comments.'[27] This aspect of the case and the role of proportionality as a standard of review will be explored in the next section.

In *Fortis Fund Services (Bahamas) Ltd v Bar Council of the Commonwealth of The Bahamas*,[28] the applicant sought a declaration that the refusal of the Bar Council ('the Council') to make a determination in accordance with the Legal Profession Act in respect of its application was unlawful, *certiorari* to quash the refusal and *mandamus* to compel the Council to make a determination in favour of the applicant. The court said that the Council was a statutory tribunal that must act rationally and reasonably, could not arrive at its decisions arbitrarily and it should give reasons for its decisions. The court asked whether the restriction placed on Mr Potts' appearance as counsel in the litigation was reasonable and noted that the applicant's attorneys were not present when Mr Brian Simms mooted the restriction on 1 October when he suggested that the application to appear should be refused outright for interlocutory proceedings.[29] In addition, they were unaware that the Council was considering a distinction between interlocutory proceedings and the trial. The Council met again and decided to reaffirm its earlier decision without allowing counsel for Mr Potts an opportunity to address the distinction between interlocutory and trial proceedings. The court noted that the Council gave no reasons for restricting Mr Potts' admission to the trial and expressly excluding his appearance in the interlocutory applications.[30] The court claimed that the distinction that was drawn between interlocutory applications and trial proceedings was not logical. It is not reasonable because it: (a) lumped all interlocutory applications together, including routine and complex ones like the strike-out applications; (b) failed to take account of the fact that the interlocutory applications that were pending in the three actions could, like a trial, end in the termination of the litigation; (c) took no account of the fact that once the Council accepted that the interests of justice required that Mr Potts should be specially admitted to lead the defendant's case at the trial, it was illogical that he should be excluded from participating at earlier stages that could have important effects on the trial strategy; and (d) deprived Mr Potts of the opportunity to become familiar with the practices and procedures of the court in which he would ultimately have responsibility for leading the defendant's case.[31] It continued that the distinction introduced a differentiation in respect to proceedings before the courts that was not expressly provided for by Parliament in the Legal Profession Act. As a result, the court concluded that, for these reasons, the decision to prevent Mr Potts from appearing in interlocutory proceedings was unreasonable in the *Wednesbury* sense.[32]

26 Ibid at 548–9.
27 AG 2007 HC 54 at [204].
28 BS 2001 SC 79.
29 Ibid at 19.
30 Ibid at 20.
31 Ibid at 21.
32 Ibid.

As judicial review is not limited to public authorities, *Wednesbur*y unreasonableness has also been used to challenge decisions of Coroner's courts. In *Bishop v HM Coroner*,[33] the applicant challenged the decision of the Coroner that the deceased's death was due to natural causes and that the death was contributed to by self-neglect, and claimed, also, that the decision was *Wednesbury* unreasonable. The court noted that it had to consider whether the Coroner acted unreasonably (in the *Wednesbury* sense) in finding that the deceased's action (or lack thereof) constituted self-neglect which contributed to his death.[34] It claimed that it was important to bear in mind the terms of the Coroner's finding of fact contained in his report: first was the deceased's decision not to be admitted to hospital; and second was the deceased's decision not to return to the Emergency Department of the hospital for care. As a result, the court was of the view that 'it could not reasonably be said that the deceased was guilty of "a gross failure to obtain basic medical attention" after his visit to Dr Hoefert on 9 April'.[35] This, however, was not the same after that visit when he put himself at risk by failing to take action which another physician had recommended. It continued that, in these circumstances, it could not be said that the Coroner was unreasonable, in the *Wednesbury* sense, in reaching the conclusion which he did, and adding the rider in relation to the contributory effect of self-neglect in his conclusion, accepting also that it was not open to it to interfere with the Coroner's finding.[36]

However, the Commonwealth Caribbean courts have become increasingly agitated with the use of *Wednesbury* as a ground of review, and have been questioning the continued use of the standard of review in judicial review applications. In *British Virgin Islands Electricity Corporation v Virgin Islands Electricity Corporation*,[37] the court referred to *CCSU*, where Lord Diplock said the cases that might be impeached under the doctrine of *Wednesbury* fell into his category of 'illegality'. He categorised as decisions that may be impugned for irrationality, decisions which, although not made *ultra vires* their enabling power, may be impugned for unreasonableness in the *Wednesbury* sense.[38] It continued that unreasonableness or Lord Diplock's 'irrationality' in public law had often been used to cover a wide category of legal infringements that might in some instances amount to arbitrariness and *mala fides*.[39] The court claimed that, in its true terms, it might be seen in the terms that emerge from the *locus classicus* on modern public law unreasonableness. It noted that this was within the statement by Lord Greene MR in *Wednesbury* where he accepted that a decision was unreasonable when it was so absurd that no sensible person could ever dream that the decision lay within the power of the authority; and within the statement by Lord Diplock in *CCSU* where he said that the standard for unreasonableness or irrationality was where the decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.[40]

This uneasiness continued unabated and climaxed with the decision of *Charles v Jones*,[41] where the Ministry of Education (MoE) accused the applicant of cheating in her examination and, therefore, did not recommend her for the Scotia Bank Scholarship. One of the questions for the court was whether the decision of the Ministry was '*Wednesbury*' unreasonable. The court claimed it was now clear that the techniques developed by the courts to review executive action

33 BM 2009 SC 40. See also *Re Lalla* TT 1996 HC 35.
34 BM 2009 SC 40 at [19].
35 Ibid.
36 Ibid at [21].
37 VG 2003 HC 5.
38 Ibid at [18].
39 Ibid at [19].
40 Ibid.
41 JM 2008 SC 47.

have been greatly refined since the decision of Lord Greene MR in *Wednesbury*, where he held that a court could only set aside the decision of the decision maker if it could be shown that his decision was so unreasonable that no reasonable decision maker could have come to the conclusion at which the decision maker arrived.[42] From this, the court continued, the expression '*Wednesbury* unreasonableness' was born.[43] Sykes J claimed that the clear implication of this reasoning was summarised and rejected by Lord Cooke in *Ex p Daley*.

Sykes J questioned whether, 'to put it bluntly, could it be seriously contended today, that a decision maker can be as irrational as he wants but as long as he does not reach the level of irrationality contemplated by Lord Greene he is immune from challenge?'[44] He reasoned that, if Lord Greene was really to be understood as saying that a challenge can only succeed if there is something so irrational that no reasonable decision maker could have come to that particular conclusion, then what he is really saying is that flawed logic, inaccurate information and any other thing that may have distorted the decision in the particular case is all right as long as when one steps back and looks at the decision itself one is able to conclude that a reasonable decision maker (a class to which the particular decision maker may not belong) could have come to the same conclusion.[45] Sykes J confessed that he had great difficulty with this proposition,[46] continuing that, fortunately, Lord Greene's prescription, which in its purest form can become a source of unfairness, had been circumvented. He claimed that Lord Woolf MR led the way in two decisions that have not quite received the recognition they deserve in Jamaica, and by extension the Commonwealth Caribbean, as in *R v Lord Saville of Newdigate*, which states:

> 32. [I]t is as well to start by remembering that the reason for the usual *Wednesbury* standard (see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223) being applied is because the body whose activities are being reviewed has the responsibility of making the decision and not the courts. In addition that body in the majority of situations is going to be better qualified to make decisions than the courts. It is only where the decision is unlawful in the broadest sense that the courts can intervene. The courts have the final responsibility of deciding (whether a decision is unlawful) and not the body being reviewed. The courts therefore can and do intervene when unlawfulness is established. This can be because a body such as a tribunal has misdirected itself in law, has not taken into account a consideration it is required to take into account or taken into account a consideration which it is not entitled to take into account when exercising its discretion. A court can also decide a decision was unlawful because it was reached in an unfair or unjust manner.
>
> 33. However, there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.[47]

42 Ibid at [51].
43 Ibid.
44 Ibid at [53].
45 Ibid.
46 Ibid.
47 [2001] WLR 1855.

Sykes J claimed that one of the notable things about this passage was Lord Woolf's reference to the court being able to examine the material on which the decision was based.[48] He continued that 'His Lordship conceives of the possibility that a decision-maker may not be perverse or unreasonable in the *Wednesbury* sense, but may still be subject to challenge by way of judicial review if the material before him does not support the decision he made.'[49] He further claimed that the second important decision was *R v North and East Devon Health Authority ex p Coughlan*,[50] where Lord Woolf was in no doubt that a decision reached by a lawful process might be successfully challenged if it was unfair because it unfairly frustrated the legitimate expectation of the applicant. Sykes J is attempting to examine the decisions that have rejected foundations that have continued to hold the *Wednesbury* unreasonableness as the standard of review in administrative law. This was to show that the common law was changing and that Commonwealth Caribbean courts, too, should move beyond that narrow doctrine.

Sykes J claimed that there has been another development in judicial review that has cut a path around *Wednesbury*.[51] This, in his view, was the error of precedent fact principle, claiming that, 'briefly stated, the principle is that where certain facts must be found to exist before a power can be exercised by the decision maker then the courts can look to see if those facts are present' and that, '[i]f they are not, then the decision of the functionary based on nonexistent facts will be vulnerable to challenge'.[52] He continued that there could not be any doubt that judicial review was available where it could be shown that a decision maker acted when the condition precedent to taking the decision to act did not, in fact, exist.[53] Sykes J claimed that, first, this was not substituting the court's view for that of the decision maker as no decision maker had the authority to act on facts which had not been established; second, if the facts exist then it was the decision maker, not the courts, who was to decide on the course of action in light of those facts, but facts there must be, not suspicion; and third, even without reference to any of the cases on the precedent fact principle the Court of Appeal of Jamaica had accepted this principle as being applicable to Jamaica.[54] He held that, at this stage, if anything was left of *Wednesbury*, it was really that part of the decision which made the important point that a decision maker must take into account only relevant matters and exclude irrelevant matters from his consideration.[55] He therefore accepted that this was how the court in the *Jamaica Civil Service Association* case treated *Wednesbury*.[56] On the facts of the case, Sykes J held that, even if it could be said that the MoE was not unreasonable in the *Wednesbury* sense, clearly, it acted unfairly.[57] First, it did not conduct a proper investigation, noting that, when the conduct of the MoE was examined, it was apparent that the MoE did not conduct the 'full investigation' it said it would. Second, it was not for the courts to tell the MoE how to investigate these matters; the role of the court was to look at what was done and decide whether it was adequate in the circumstances of the case. In addition, Sykes J concluded that the MoE did not establish any fact that tended to show that Kristi Charles had benefited from prior exposure.[58]

Notwithstanding the concerns of Sykes J, *Wednesbury* unreasonableness continues to be used as a ground of review in applications for judicial review. The courts have not sought to limit its

48 JM 2008 SC 47 at [55].
49 Ibid.
50 [2000] QB 213.
51 JM 2008 SC 47 at [56].
52 Ibid.
53 Ibid at [59].
54 See *Attorney General of Jamaica v The Jamaica Civil Service Association* JM 2003 CA 58 at 11–13.
55 JM 2008 SC 47 at [60].
56 Ibid.
57 Ibid at [61].
58 Ibid at [62].

scope or to properly explain the cases in which it should be applied. In *Delphina Funeral Home Limited v Minister of Local Government and the Environment*,[59] the court had to consider whether the decision of the Minister of Local Government and the Environment to have ordered cessation of the development at Lot #48, Burnt Ground, Hanover, was irrational and unreasonable as it took into account irrelevant or immaterial considerations, and/or failed to take into account relevant and material considerations.[60] The court quoted from Lord Roskill in *CCSU*, who summarised the three broad grounds upon which an administrative decision may be impugned, and 'specifically mentioned the second where a public authority exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, *Wednesbury* principles'. The court claimed that, in *R v Lord Saville of Newdigate, ex p A*,[61] Lord Woolf made the important point that the justification which would be necessary to avoid a decision by a public authority being considered by the courts to be irrational would depend upon the possible consequences of the decision.[62] In *Digicel (Trinidad & Tobago) Limited v MacMillan*,[63] the court noted that, in the context of judicial review proceedings, the standard of review must be seen in the light of '*Wednesbury* unreasonableness' – a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, citing *CCSU*.[64] The court had to consider the admissibility of certain evidence noting that, in order to be admissible, the disputed evidence must pass the relevance test. In other words, the evidence must be relevant to the issues to be determined and, in the instant case, the relevance was to be determined by reference to the grounds upon which the relief was sought. It claimed that it was against this standard that the relevance of the evidence was to be tested.[65] The court continued that it must be borne in mind that the question of the unreasonableness of the decision was a question for the judge hearing the application for judicial review and no other; it was not a conclusion to be made by a witness, however expert.[66] It explained that the conclusions of a witness would not only be irrelevant but its intention could only be to usurp the role of the court. The court then claimed that courts have accepted that irrationality as '*Wednesbury* unreasonableness', noting that it applied to a decision which was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.[67] In addition, it claimed that a decision was irrational in the strict sense of that term if it was unreasoned; if it was lacking in ostensible logic or comprehensible justification; and that instances of irrational decisions included those made in an arbitrary fashion that might be described as 'absurd' or perverse.[68]

The court in *Fortune v Public Service Commission*[69] considered whether the charges brought against the applicant as a result of insufficient investigation were *Wednesbury* unreasonable. The applicant sought a declaration that the Public Service Commission ('the Commission') had acted unreasonably in preferring charges against him, because there was a botched investigation.[70] The court considered it an example of an irrational decision, a decision in which the

59 JM 2008 SC 72.
60 Ibid at [59].
61 [2000] 1 WLR 1855.
62 JM 2008 SC 72 at [66].
63 TT 2007 HC 73.
64 Ibid at 7.
65 Ibid.
66 Ibid at 8.
67 Ibid.
68 *Fishermen and Friends of the Sea v The Environment Management Authority* TT 2004 HC 113.
69 TT 2006 HC 147. See also *Polo v Public Service Commission* TT 2003 HC 32; *Re Galbaransingh* TT 1997 HC 158; and *Williams v Police Service Commission* DM 2001 HC 1.
70 TT 2006 HC 147 at [11].

reasons displayed no adequate justification.[71] The court agreed that the decision to send the trainees to the police station might have been harsh but the applicant, at best, might have been guilty of an error of judgement.[72] It explained that the decision reflected a need for counselling or closer supervision of the applicant rather than the bringing of disciplinary proceedings. The court continued that there was nothing in the evidence on behalf of the Commission to explain the reasons for its decision; and, in these circumstances, it concluded that the Commission simply adopted the irrational recommendations of the investigating officer and the legal department and that, as a result, its decision was tainted by irrationality.[73] In addition, the court claimed that the applicant had been subjected to the oppression of a disciplinary charge without the benefit of a fair and thorough investigation.[74] As a result, the court concluded that the Commission's decision to prefer the charge in light of the improper, and incomplete, investigation was unreasonable.[75] *PPC Ltd v Governor (Turks and Caicos Islands)*[76] concerned the refusal of an application by the applicant for grant of a licence under the Electricity Ordinance. The applicant claimed that the decision was unreasonable in the legal sense. Under the ground of review, namely irrationality or illogicality, the court noted that the basic principle was that courts were not policy-making bodies, and they would only interfere with a decision of an administrative authority on the grounds of unreasonableness if it was such that no reasonable decision maker could have arrived at that decision.[77] The court was of the opinion that it did not consider that the decision under review was unreasonable in the legal sense.[78] The claimant argued that they should have been awarded the licence, because, first, they had the infrastructure in place; second, their supply was likely to be less ecologically risky, in that it would be by means of an existing cable rather than by transhipment of fuel oil; and third, the impact of their proposed rates would be trivial in relation to the overall room rate to be charged by the hotel. However, the court ruled that these were all policy questions of the type that elected governments were uniquely equipped to decide and courts were not.[79] It therefore held that there was nothing about the decision which suggested it was unreasonable in the legal sense.[80] This was a clear example of the application of the *Wednesbury* principle. The decision was not unreasonable in a *Wednesbury* sense because the nature of the decision was such that greater deference should be given to the elected government, and not on the proper inquiry of whether the public authority acted unlawfully. On appeal,[81] the appellant argued that the threshold for intervention by the court was more than reached, requiring the points for and against a decision to be evaluated to ascertain unreasonableness.[82] The Court of Appeal claimed that the Chief Justice considered this ground within the context of all the other reasons asserted by PPC Ltd why it should have been granted the licence and not Caicos Utilities Limited.[83] Applying the *Wednesbury* principle, the Chief Justice was not persuaded that the authorities cited by counsel for the appellant had modified this principle by showing the court to be more proactive by way of judicial intervention in correcting unfairness. After citing Sykes J in *Northern Jamaica Conservation Association v Natural Resources Conservation Authority and National Environment Planning*

71 Ibid at [14].
72 Ibid at [15].
73 Ibid at [16].
74 Ibid at [18].
75 Ibid.
76 TC 1999 SC 6.
77 Ibid at [36].
78 Ibid at [42].
79 Ibid.
80 Ibid at [57].
81 TC 2000 CA 2.
82 Ibid at [29].
83 Ibid at [30].

Agency, the court, in *People United Respecting the Environment v Environmental Management Authority*,[84] claimed that, in Trinidad and Tobago, the narrow *Wednesbury* test had not as yet received the mortal blow; and that the Court of Appeal of Trinidad and Tobago in *NH International v Urban Development Corporation* regarded as correct the application of the test of irrationality as expounded by Lord Diplock in *CCSU*. The court concluded that it was bound by this very clear statement of the law by the Court of Appeal and that the test of irrationality continued to be that a decision was reviewable on the ground it is 'so outrageous in its defence of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[85]

The applicant in *Moore v Attorney General of Trinidad and Tobago*[86] sought an order of *certiorari* to quash the decision of the Acting Motor Vehicle Inspector II to seize and detain the number plate of the applicant's motor car, and damages for trespass to goods on the basis that the decision to do so was unreasonable. The court noted that, as for the reasonableness of the decision, this ultimately was based upon the reasonableness of the policy of the Licensing Authority in using the chassis number of a vehicle for the purposes of determining what vehicle was to bear what registration number; because if this policy was reasonable, then the decision to seize the number plate for what was, presumably, a breach of this policy, whereby a vehicle's chassis number was not the one with which it was originally registered, was also reasonable.[87] The court claimed that there was no contradiction to the argument, that, for the purposes of judicial review, the test of reasonableness was as stated in *Wednesbury* and that, to be unreasonable, a policy or decision must be one to which no reasonable body or person could come: the court was not to be a policy maker. The continued assertion that *Wednesbury* unreasonableness is the test to be applied is inexplicable, and perhaps is grounded in the conservative nature of Commonwealth Caribbean judges.[88] It is also highlighted in the statement of the court that it was not to be the policy maker. However, this misses the crucial point about the role of the courts in judicial review applications. Of course, it is no function of the court to determine policy or make policy, but surely it is its function to determine whether a policy is lawful or not. And, in doing so, it may very well have to determine in some cases not only whether a policy is one among many that a decision maker, taking into account all the circumstances, might lawfully make; but also, importantly, whether that policy was a proportionate response in respect of the issue in question. In the instant case, the court continued that the uncontroverted evidence of the Acting Commissioner was that the chassis number was what the Licensing Authority used as the identity mark of a vehicle since this could not readily be changed, unlike registration plates.[89] The court claimed that, because of the apparent indelibility of the chassis number, it was also a crucial element in detecting schemes and devices to avoid or evade the provisions of the Motor Vehicles and Road Traffic Act and other statutes that were becoming increasingly frequent. It concluded that there was nothing, in its view, to displace the apparent reasonableness of the policy decision and bearing in mind the facts surrounding the actual seizure of the number plates in this matter, the *bona fides* of which had not, in its view, been negated, it held that the challenge to the decision on the grounds of unreasonableness failed.

Decisions of public officers too are not outside the purview of the law and *Wednesbury* unreasonableness has also been used to argue that decisions made by senior public officers and

84 TT 2009 HC 134.
85 Ibid.
86 TT 1997 HC 177. See *Moore Air Express Services Ltd v The Postmaster General* JM 2004 SC 13.
87 TT 1997 HC 177.
88 Ibid.
89 Ibid.

various service commissions are unlawful. In *Francis v Public Service Commission*,[90] the court considered whether the decision of the Chief Fire Officer not to assign the applicants their regular fire-fighting duties was unreasonable. The court noted that the issue in the *Wednesbury* case was not whether the authority had the power to impose conditions but whether the conditions imposed were so unreasonable that they were *ultra vires* the authority.[91] It also claimed that the question arose as to whether, in posting the applicants to another fire station, the Chief Fire Officer had acted so unreasonably, in taking into consideration matters which he should not have taken into account or refusing to take into account matters which he should have taken into account, that it could come to a conclusion that such a decision was so unreasonable or so irrational that no reasonable authority could come to it.[92] The court explained that the onus was on the applicants to prove such unreasonableness or irrationality. It continued that, on the facts, there was no such evidence before it, holding that it could not conclude that the decisions made were in order to discipline the applicants or that the decisions were so unreasonable or 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it'.[93] In *James v Attorney General of Trinidad and Tobago*,[94] the claimant, who was found guilty but insane on a murder charge and detained at Her Majesty's Pleasure, sought judicial review of the decision of the defendant advising the Governor General that he was not suitable to be released from prison on the basis that, since the claimant did not take recommendations from doctors and general workers, his decision should be quashed for being irrational. The court claimed that the definition of the unreasonable decision continued to be the classic *Wednesbury* definition that an unreasonable decision was one which no reasonable decision maker would make.[95] It continued that, in *CCSU*, Lord Diplock defined an irrational decision as one which was so 'outrageous in its defiance of logic' and accepted moral standards that no sensible person who had applied his mind to it could have arrived at it. The court accepted that the *CCSU* test had been applied in recent cases of high authority[96] and was, therefore, the appropriate test to be applied in considering the ground of irrationality.[97] It continued that irrationality as a ground has been notoriously difficult to establish and that the decision must amount to one which was perverse or that the decision maker, in making the irrational decision, took leave of his senses.[98] The court claimed that, in the instant case, the source of the defendant's decision-making power was, quite unusually, a court order – the varied Order of Ibrahim J in a constitutional motion brought by the claimant in 2003.[99] The court was of the view that the overwhelming expert view (medical and psychiatric) that the claimant should have been released should have given pause to the defendant as decision maker.[100] It continued that, in such event, no reasonable decision maker would have perfunctorily cast the expert views away with a summary refusal to recommend the claimant's release, without even recommending that further information be obtained.[101] The court claimed that no rational decision maker would have lost sight of the fact that he had no expertise to contradict the recommendations of the psychiatric and medical

90 TT 2006 HC 97. See also *Gumbs v Attorney General of St Christopher and Nevis* KN 2003 HC 13.
91 TT 2006 HC 97 at 19.
92 Ibid at [20].
93 Ibid.
94 TT 2009 HC 16.
95 Ibid, Reasoning and Decision at [2].
96 *HMB Holdings Ltd v Cabinet of Antigua and Barbuda* [2007] UKPC 37.
97 TT 2009 HC 16, Reasoning and Decision at [3].
98 Ibid at [4].
99 Ibid at [5].
100 Ibid at [15].
101 Ibid.

practitioners.[102] It continued that no reasonable decision maker would have ignored the factor present in the reports that the claimant had been incarcerated since 1971 and no rational decision maker would have overlooked the fact that the separate independent reports recommended the claimant's release.[103] In the context of these two considerations, the court ruled that, in its view, it would have been callous for a decision maker summarily to refuse to recommend the claimant's release and that it was this callousness which rendered the decision outrageous in its defiance of logic and of accepted moral standards and, therefore, irrational.[104]

The court continued that, even if the defendant was dissatisfied with the contents of the reports, it was open to him to return to court, as he had done through his attorneys on two earlier occasions; and, in this way, he could have alerted the court that further information was needed.[105] It noted that the effect of the impugned decision was to re-sentence the claimant without any indication as to whether or when his detention would be reviewed. The court claimed the effect of the impugned decision was to place the claimant in virtual limbo where he could have no recourse to either the Cabinet Minute or the Constitutional Motion, which had been determined without objections in his favour.[106] Additionally, it was of the opinion that it was this careless disregard for the claimant's position that placed the defendant in the *CCSU* definition of irrationality. Accordingly, the court ruled that the defendant acted as no reasonable decision maker would have acted and quashed the decision on the ground that it was irrational and remitted the case for reconsideration by the Attorney General.[107] The court stated that the remaining grounds that the decision constituted an abuse of power were not supported by the evidence. It continued that, at highest, the defendant might be accused of careless disregard and that was no basis on which to hold that he abused his power or acted in *mala fides*.[108]

In *Leacock v Attorney General of Barbados*,[109] the court considered whether the Police Commissioner acted unreasonably in denying the applicant, a police officer, study leave of two years to read for the Legal Education Certificate (LEC) at the Hugh Wooding Law School (HWLS). The court claimed that unreasonable decisions by government officials are unlawful and that one of the grounds upon which the High Court may grant relief by way of the remedies of declaration or *certiorari, inter alia*, was set out in section 4(e) of the Administrative Justice Act of Barbados (AJA), namely, for unreasonable or irregular or improper exercise of discretion.[110] The court noted that Lord Diplock's use of the word 'irrationality' in *CCSU* was not meant to impugn the mental capacity of the decision maker, but his explanation was useful to the extent that it recognised that courts could and often would resort to logic in their evaluation of the facts leading to the decision.[111] It continued that, despite the interchangeability of vocabulary, 'unreasonableness' and 'irrationality' implied an improper exercise of power including factors taken into account in reaching a decision or the way in which the decision was sought to be justified or reasoned.[112] The court claimed that the categories of unreasonableness were not closed and an unfair action could seldom be a reasonable one,[113] nor was there a

102 Ibid at [16].
103 Ibid.
104 Ibid.
105 Ibid at [17].
106 Ibid.
107 Ibid.
108 Ibid.
109 BB 2005 HC 24.
110 Ibid at [21].
111 Ibid at [24].
112 Ibid.
113 Ibid at [25].

universal rule as to the principles on which the exercise of a discretion might be reviewed. It continued that, while claiming no authority to dictate the decision that should have been made in the exercise of the discretion in the instant case, the court was duty bound to declare invalid a purported exercise of such a discretion where the proper limits had not been observed.[114] The court ruled that a discretion must be exercised according to reason, justice and the law and it must never be exercised whimsically or capriciously but within those limits to which a reasonable person performing a public duty should confine himself. It explained that the supervisory jurisdiction of the High Court existed to ensure that the process by which the decision was reached was fair and proper and that it was not for the courts to say how the discretion should have been exercised; to do so would effectively transfer the decision-making power from officials to the courts.[115] The court claimed that unreasonable or improper exercise of discretion was a ground upon which evidence was particularly relevant and facts, rather than legal principles, tend to predominate in the court's evaluation of a case.[116] The court claimed that it was not satisfied, on a balance of probabilities, that the evidence filed on behalf of the Commissioner was preferable to that of the applicant.[117] When dealing with a decision said to be unreasonable or irrational, the court reasoned that the assessment of a court was directed to the motives underlying or supporting the decision; and to the factors taken into account on the way to reaching the decision or upon the way the decision was justified or reasoned. It explained that the case seemed to be in the category of irrationality in the sense that the decision of the Commissioner was not properly reasoned.[118] The facts, taken as a whole, were not, in the court's view, reasonably capable of supporting the Commissioner's decision. In addition, the court held that the Commissioner's discretion was improperly exercised because, upon an evaluation of the evidence on behalf of the Commissioner, there was an absence of a logical connection between the evidence and the ostensible reasons for the decision.[119]

In *Jones v Attorney General of St Christopher and Nevis*,[120] a male student was suspended from school for wearing his hair too long. The court had to consider whether the Acting Principal failed to follow the statutory procedures provided under the Education Act for suspending students; and whether the Principal had power to suspend in the circumstances. The claimant argued that the school's rule was unreasonable, arbitrary and was applied inflexibly.[121] He continued that the authorities had failed to take into consideration relevant matters and had taken irrelevant matters into account. In rejecting the application, the court held that it, however, would not have considered the rule to be *Wednesbury* unreasonable or to have been applied inflexibly. In *Joseph v Commissioner of Police*,[122] the applicant suffered an injury on the job which prevented her participation in an induction training course. When she returned to work her employment was terminated. One of the issues for the court was whether the decision to terminate her employment was illegal and irrational. The court claimed that the issue to be resolved was whether it was irrational for the respondent to refuse to allow the applicant the opportunity to undergo induction training and the prescribed tests, in a situation in which the last induction exercise had been completed by the time of her resumption of service in Trinidad and in which the Police Service Commission had by then advised, without regard to the wider

114 Ibid.
115 Ibid.
116 Ibid at [27].
117 Ibid at [29].
118 Ibid.
119 Ibid at [30].
120 KN 2003 HC 37. See also *Riley v Board of York Castle High School* JM 2008 SC 113.
121 KN 2003 HC 37 at [44].
122 TT 2003 HC 71.

public interest, that there would no longer be any absorption of special reserve police officers.[123] The court noted that the applicant's medical condition was such that it became necessary for her to stay in Canada over an extended period of time; she never lost her interest in the absorption exercise, and in the face of being informed that, unless she was in the country by a specific date she would not be considered for training, she still maintained a desire to be absorbed once recovered from her injuries.[124] It stated that, having not heard anything on her return to Trinidad, after she had been declared medically fit shortly after her resumption of duty, she caused her attorney to make enquiries. The court was of the opinion that it was not a case of the applicant failing to pass the necessary evaluations that would have ensured her ultimate absorption into the police service.[125] It observed that, rather, the applicant, because of injuries sustained while on duty, had to take protracted leave which led her to lose out on the opportunity to participate in one of the sets of evaluation and training. The court claimed that a failure to meet the specified criteria and a failure to have the opportunity to be tested and evaluated in order to determine whether the specified criteria had been met, moreover because of overriding circumstances, were entirely different things. In this regard, it claimed that the respondent's argument that there was no distinction between these two sets of circumstances was palpably flawed.[126]

The court concluded that the decision of the respondent not to afford the applicant the opportunity to undergo the prescribed tests and to participate in an induction training programme after her resumption of duties in Trinidad was, in all the circumstances and history of her case, an irrational decision.[127] It explained that the decision was irrational in so far as the respondent attached manifestly disproportionate weight to the memorandum from the Director of Personnel Administration (the conditional injunction against further absorption of special reserve police officers) and failed to accord appropriate weight to the applicant's particular position in not being able to undergo the prescribed tests and participate in the induction training course because of her extended sick leave abroad, a matter beyond her control.[128] The court, in this decision, applied *Wednesbury* unreasonableness but in a very wide sense by alluding to notions of proportionality in relation to the response of the respondent to the circumstances of the applicant. In its view, the decision of the respondent not to afford the applicant the opportunity to undergo the prescribed tests and to participate in an induction training programme after her resumption of duties in Trinidad was not proportionate having regard to her circumstances and her continued willingness to undertake the necessary training. Additionally, the court reasoned that the respondent failed to address the possibility of an arrangement for the testing and training for the applicant alone. The court claimed, in this regard, that it was worth repeating that it was not part of the respondent's case that the arrangements for the testing of an individual officer and the training of an individual officer were impossible, difficult or impractical.[129] As a result, the court granted the order of *certiorari* to quash the decision of the respondent not to afford the applicant the opportunity to undergo the prescribed tests and to participate in an induction training programme. The matter was then remitted to the respondent to reconsider whether the applicant should be allowed the opportunity to undergo an induction training programme and to undergo the prescribed medical, psychological and drug tests.

123 Ibid at 17.
124 Ibid at 18.
125 Ibid.
126 Ibid.
127 Ibid at 19.
128 Ibid at 20.
129 Ibid.

The issue of *Wednesbury* unreasonableness also arises in the context of criminal law. In *Musa v Jones*,[130] the defendant decided to commit the applicant to stand trial on a charge of theft. The question for the court was whether the defendant's committal of the claimant was unreasonable while discharging Mr Fonseca later on the same charge and evidence. The claimant argued that his committal by the defendant was unreasonable and perverse because, on the same charge of theft and evidence laid and used in the preliminary investigation of Mr Fonseca before the defendant, he discharged Mr Fonseca.[131] As a result, he argued that the defendant's decision to commit him for trial was perverse, irrational and unreasonable, and so manifestly prejudicial that it should be quashed.[132] The court noted that one was left to wonder why, on the charge and the evidence proffered in this case, the claimant and Mr Fonseca were not charged together and one preliminary inquiry held at the same time.[133] It claimed that although this was a matter wholly for the prosecution to decide, it could not be unmindful of the savings in the court's time that would be achieved; but the different outcome of the preliminary inquiries on different days had given cause to the claimant's complaint that his committal by the defendant, in the circumstance, was perverse, irrational and unreasonable and manifestly prejudicial to him.[134] The court was of the opinion that it was, therefore, reasonable to conclude that in respect of the claimant, the defendant might have been influenced by considerations of *respondeat superior*. The court was of the view that the principle of reasonableness actuated and guided courts, especially in the field of judicial review.[135] It continued that it was part of the mete by which courts assess or determine the reasonableness or fairness of an administrative decision or action.[136] The court was of the view that the *Wednesbury* principle was more readily and easily applicable in the general field of administration in contradistinction to the judicial field, such as a determination by a court of law, whether inferior or superior.[137] It claimed that the more usual and convenient remedy in the case of the latter was through the appellate process, noting that this was not to say that judicial review could not lie against a Magistrates' Court determination.[138] The court explained that the present proceedings proved that judicial review could, in appropriate cases, be available, but it was rare and exceptional, accepting that the *Wednesbury* ground to challenge a Magistrates' Court decision, therefore, was even rarer and more exceptional.[139] The court continued that, to her credit, the Director of Public Prosecutions conceded, though somewhat grudgingly, during the hearing that it was unreasonable for the defendant to have committed the claimant and then discharged Mr Fonseca on the same charge and on the same evidence.[140] However, she urged that the claimant's committal should be left undisturbed as the defendant was entitled to commit him. The court decided, in light of its findings and conclusions on the other issues in the case, not to determine the issue of the unreasonableness or otherwise of the defendant's decision in relation to his committal of the claimant and the discharge of Mr Fonseca.[141] It therefore concluded that it would rather that the *Wednesbury* principle of unreasonableness be left in the sphere of administrative law, where it thought it properly belonged.

130 BZ 2009 SC 5.
131 Ibid at [100].
132 Ibid at [102].
133 Ibid at [105].
134 Ibid.
135 Ibid at [106].
136 Ibid at [107].
137 Ibid at [108].
138 Ibid.
139 Ibid.
140 Ibid at [109].
141 Ibid at [110].

PROPORTIONALITY

The standard of review of proportionality has its roots in European human rights law and it has made its way to the Commonwealth Caribbean.[142] In *Benjamin v Minister of Information and Broadcasting*,[143] the court had to consider whether it was unconstitutional for the Minister of Information to suspend a radio programme. Saunders J held that the European courts have developed the principle of proportionality in relation to the review of action by the state that abridges human rights. He noted that the principle was very much in use in Canada and in African states with constitutions similar to those in the Commonwealth Caribbean and that the principle was also relevant here.[144] The Cabinet must show it had reasonable grounds on which to decide matters that come before it.[145] As mentioned above, in *Benjamin v Attorney General of Antigua*,[146] the court noted that, in recent times, the doctrine of reasonableness or *Wednesbury*[147] reasonableness had sustained very severe body blows on the basis that the test was too narrow, which translated to mean that only an extreme action or situation would be caught by the test laid down by Lord Greene.[148] It continued that the *Wednesbury* principle had been influenced by 'Community law', which attempted to infuse proportionality into the test of reasonableness, and this was the reason for the severity of the comments.[149] The court continued that closing the door on proportionality,[150] as perceived by Wade and Forsyth in 1994,[151] did not last very long since, in *R (Alconbury Development Ltd) v SOS for the Environment, Transport and The Regions*, Lord Slynn came to the conclusion that the time had come when English courts should accept that the principle of proportionality was part of English law and should be applied subject to domestic law. His Lordship further observed that 'trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing'.[152] In addition, the court continued that Fiadjoe, in *Commonwealth Caribbean Public Law*, was also in the debate on the issue, noting that:

> [i]t is accepted by all sides that as a general principle of Community law, proportionality is already an integral part of judicial review. That being the case, it is only a matter of time before the incoming tide of European law would impact directly on UK developments in this area of the law. No doubt, the adoption of proportionality would be blessed under the chapeau of the ever-changing and evolving common law. Like all grounds of judicial review, it cannot be mechanically applied. Its application requires judgment in the light of the circumstances of the particular case.[153]

The court claimed that it was not persuaded by the movement of the law in the English jurisdiction to fuse proportionality and reasonableness or render a broad approach to the *Wednesbury* reasonableness doctrine.[154] It continued that its approach was based on two observations: first, the movement of the law in England was heavily influenced by Community law, which might

142 *Northern Construction Limited v Attorney General of Trinidad and Tobago* TT 2002 HC 104.
143 AI 1998 HC 3.
144 Ibid at 26.
145 *Anthony v Attorney General of Saint Lucia* LC 2009 HC 12.
146 AG 2007 HC 54.
147 *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223.
148 AG 2007 HC 54 at [203].
149 Ibid at [204].
150 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.
151 Wade and Forsyth, *Administrative Law* (7th edn), 1994, Oxford: Oxford University Press, 380–1.
152 [2003] 2 AC 295, 321.
153 AG 2007 HC 54 at [206].
154 *Northern Jamaica Conservation Association v Natural Resources Conservation Authority* JM 2006 SC 65; and *Northern Jamaica Conservation Association v Natural Resources Conservation* JM 2006 SC 49 fully embraced the movement in the law respecting 'reasonableness' but softened its stance on the application to vary its order.

not be in *pari materia* with the laws of Antigua and Barbuda; and, second, in the Caribbean public law, the courts have, in some instances, applied the *Wednesbury* doctrine with an element of proportionality to decide cases other than the extreme cases which were held to be reasonable or unreasonable, as the case required. In its view, it all depended on the particulars of the circumstances.[155] The court, therefore, is rejecting the argument that the *Wednesbury* doctrine is too narrow and might result in injustice by claiming that, when applied in practice, Commonwealth Caribbean courts have adopted a much broader notion of *Wednesbury* that comes close to (if not the same as) that achieved with the new doctrine of proportionality. The actual decided cases, however, do not show that statement to be true and, in fact, Commonwealth Caribbean courts have readily embraced *Wednesbury* even when faced with the alternative and more rigorous standard of review that proportionality provides.

In *Commonwealth Trust Limited v Financial Services Commission*,[156] the court claimed that one of the issues for consideration was whether the second directive issued by the defendant, the Financial Service Commission (FSC), to the claimant was unreasonable or irrational and, additionally, whether proportionality formed part of the law of the British Virgin Islands (BVI). The applicant claimed that the decision to issue a directive was discretionary, that the discretion must be properly exercised, and that the FSC's action in issuing the directive and later in refusing to amend it was irrational and/or disproportionate having regard to the evidence.[157] The applicant argued, first, that the FSC was not entitled to take into account the events occurring prior to the issue of the first directive in arriving at its decision; and, second, that they relied on the well-established principles on which administrative actions were subject to review by the courts and to a wealth of authorities, including *CCSU*. It continued that, in addition, the FSC had a duty to act fairly, proportionately and not irrationally, and that, although proportionality was not a free-standing ground of review, it was an aspect of review on grounds of irrationality and it required that the decision be proportionate to the aim it sought to achieve and that a penalty was proportionate to the wrong to which it related. In other words, it explained that the directive was disproportionate as it had the effect of putting the applicant out of business for a breach which could not justify such a penalty. The court noted that the law was not in dispute save whether proportionality could give rise to a distinct ground for review.[158] However, it claimed that proportionality was not a free-standing ground of review in the BVI but an adjunct to the issue of irrationality. The claimant argued that the decision was irrational because: (i) it was made six months after the 2007 inspection in July 2007 without regard to the position that existed as at the date of its issue; (2) it was made without consideration of Commonwealth Trust Limited's (CTL) letter of 16 March 2007; (3) no advance notice was given; and (4) there was no assessment of the directive's effect on CTL. It was claimed by CTL that the effect was to put it out of business.[159] In addition to rejecting the last ground, the court ruled that the penalty imposed by the FSC in the 2008 Directive was not disproportionate to the aim that the FSC was seeking to achieve. In addition, the court noted that if the FSC wanted to put the claimant out of business it had the power to do so under section 6 of the Financial Services Commission Act 2001 by revoking its licence but it did not do so.[160] Again, the court is using language reminiscent of proportionality in arriving at its decisions in some administrative law cases. However, it does not go on to provide the full rigour of the analysis required when the standard in relation to proportionality is engaged.

155 AG 2007 HC 54 at [207].
156 VG 2008 HC 20.
157 Ibid at [37].
158 Ibid at [38].
159 Ibid at [39].
160 *Streeter v Immigration Board* KY 1998 GC 32.

Most courts continued to identify with and explain decisions using *Wednesbury* unreasonableness even though they might have hinted at some level of scrutiny akin to proportionality. However, in the later cases, the courts became more inquisitive of the scope of proportionality and indeed whether it was a ground of review accepted under the common law. In *Moores Express Service Ltd v The Postmaster General*,[161] the court noted that, having identified those three grounds of review, namely illegality, irrationality and procedural impropriety, Lord Diplock in *CCSU* intimated that further development was likely on a case-by-case basis and highlighted the European administrative law principle of 'proportionality' as being a likely addition to the grounds enumerated.[162] The claimants stated that their case was an appropriate one for the application of the principle of proportionality.[163] The court continued that, although, in *CCSU*, Lord Diplock intimated that proportionality, as a principle, might, at some time in the future, be introduced into the common law, Lord Lowry, in the decision of the House of Lords in *Ex p Brind*, was emphatic that the concept of proportionality was still not a part of the common law. It observed that there was no authority for saying, in the sense that the appellants have used it, that proportionality is part of the English common law; and there was a great deal of authority the other way. In *R.A. (A Juror)*,[164] the court considered whether it could bar a female juror from being allowed to sit on the jury because she was wearing a burqa which covered her face except for her eyes. The court claimed that the principle of proportionality required that a reasonable relationship be maintained between the means employed and the ends to be achieved, so that a fair balance was struck between the rights of the community and the detriment that might be caused to an individual. It also stated that it was necessary to ensure that no other less intrusive means might have achieved the same result.[165] The court held that it had no jurisdiction or authority, of its own motion or upon any other basis, to disqualify a person from serving as a juror on the sole basis that the individual was wearing a burqa.[166]

Indeed, in some decisions, the courts seem quite hostile to the idea that proportionality might be used as a ground of review, asserting that it had been rejected as part of the common law in England and, therefore, it must also be rejected in the Commonwealth Caribbean. This approach is not, however, surprising since, in the main, Commonwealth Caribbean courts have sat idly while they merely import developments of the common law in England. There is hardly an attempt to develop a Commonwealth Caribbean common law, which takes into account our unique circumstances, history and conditions. In *Seereeram Bros Ltd v Central Tenders Board*,[167] the court claimed that the submissions of attorneys for the defendant came close to an attempt to introduce into the law of Trinidad and Tobago the principle of proportionality which had been rejected as being part of the law of England. It continued that, as in the law of England, the doctrine of proportionality had no place in the law of Trinidad and Tobago and it would decline any invitation to introduce it.[168] The court, however, provided no reasoned basis on which it rejected the doctrine of proportionality, merely asserting that, since it was not part of the law of England, it is consequently not part of the law of Trinidad and Tobago. Surely, more by way of rigorous analysis was required before the court could reject outright a standard of review which seems to provide more intensive scrutiny of government action. In *Streeter v Immigration Board*,[169] the court commented on proportionality, which was the further ground

161 JM 2004 SC 13.
162 Ibid at 6–7.
163 Ibid at 14.
164 TT 2010 HC 46.
165 Ibid at 24.
166 Ibid at 25.
167 TT 1994 HC 89.
168 Ibid at 30.
169 KY 1998 GC 32.

relied upon by the applicants in claiming that the revocation of their work permits was unlawful.[170] The court claimed that, as a result of two conflicting *obiter dicta* of the House of Lords, it was, at best, now moot whether the principle of proportionality was to be regarded at English common law as a separate and distinct ground upon which a decision might be attacked by judicial review.[171] The court continued that even if the lack of proportionality was to be an acceptable basis for quashing a decision (recognising the inherent difficulties, as that inevitably involved the weighing of the merits as to what would be 'proportionate'), it was of the opinion that it was not necessary to seek to apply the principle in this case. It claimed that it would leave the question open to be addressed, if necessary, in a more appropriate case.[172] This approach is a more positive development because in that decision the court was actually engaging in some discussion of the merits of proportionality, but took the view that on the facts it was unnecessary for it to do so because the issue was not properly before it and that it should be left to be decided in a more appropriate case. The court in *Taylor v Attorney General of Jamaica*,[173] however, took a different approach and noted that the concept of proportionality had been affirmed in the constitutional and administrative law of Westminster constitutions which have entrenched provisions for fundamental rights and freedoms. It claimed that it seemed to be a wider concept than *Wednesbury* unreasonableness, which was described as irrationality by Lord Diplock in *CCSU*. In *Vhandel v Board of Management of Guys Hill High School*,[174] the appellant appealed the order of the trial court that the respondent board had not acted with illegality or impropriety in terminating his employment and refusing his application for *certiorari* and *mandamus*. One of the questions for the court was whether the punishment by dismissal could be challenged on the ground of proportionality. The court noted that Lord Diplock in *CCSU* also envisaged that proportionality might become one of the features of judicial review and his judgment on this issue had been correct.[175] But, although the court alluded to this, it did not seek to properly apply the doctrine of proportionality to the facts of the case to determine whether the board acted proportionately in terminating the applicant's employment.

In *Northern Jamaica Conservation Association v Natural Resources Conservation*,[176] the applicant sought judicial review of the decision of the respondent to grant a permit to a company to build a hotel in a bio-diverse area of Jamaica on the basis that it failed to consult relevant government department and agencies before granting the permit, and had failed to circulate a marine ecology report. Sykes J noted that the applicants raised the issue of whether the respondents made a decision that was so unreasonable that no reasonable decision maker could have made it, which he claimed immediately introduced what was now referred to as *Wednesbury* unreasonableness.[177] After citing from the *Wednesbury* case, Sykes J proffered his observations as follows: first, the court was not to substitute itself for the decision maker, noting that where Parliament, by legislation, had entrusted the decision making on a particular issue to a functionary, it is for that functionary alone to make the decision; second, where the statute stated or implied the criteria that must be used to make the decision, then the decision maker must consider those matters, which was the broad definition of unreasonableness; and third, Lord Greene went on to speak of unreasonableness in a more narrow and specific sense, that is, a decision that was so absurd that no reasonable person could ever dream that it lay within the powers of the decision maker. In this narrow sense the successful challenger must prove

170 Ibid at 20.
171 Ibid.
172 Ibid at 21.
173 JM 1999 CA 32.
174 JM 2001 CA 26.
175 Ibid at 10.
176 JM 2006 SC 49.
177 Ibid at [16].

'something overwhelming'. Sykes J claimed that it was not enough to assert that the decision maker made an unreasonable decision; the decision must be so unreasonable that it was irrational. He claimed that, when put like this, it was not surprising that the claimant in *Wednesbury* failed in his challenge. Sykes J also noted that this formulation of the narrow *Wednesbury* unreasonableness suggested that there were degrees of unreasonableness, noting that Lord Greene's use of the words 'something overwhelming', in his view, made it clear that he had in mind unreasonableness that defied comprehension; and that it was only this kind of unreasonableness that would suffice for Lord Greene.[178]

He continued that the difficulties with narrow *Wednesbury* were not readily apparent unless one begins to ask the following questions: how was the condition imposed on the licence determined?[179] What informed the decision? These questions go past the actual decision to look at process. How was the decision made? How then does a claimant establish unreasonableness in the narrow sense, given the absence of a general duty on the part of the decision maker to give reasons?[180] Sykes J claimed that, often, the applicant would only have the decision to point to and would ask the court to look at the power given to the functionary and examine the decision in light of this power and, during all this, the applicant might not know much about the actual process of making the decision.[181] In such cases, he continued, the applicant relied on an inference to be drawn from the fact of the decision that was made, claiming that no wonder Lord Greene required something overwhelming.[182] He was of the opinion that, in reality, this was a very extreme form of unreasonableness; it was really saying that the decision maker was capricious or whimsical or even quirky; that he gave no thought to the matter at all; and that the decision maker indulged in an unrefined, uncultured exercise of power without even a veneer of cerebral activity. Sykes J then asked: what of broad *Wednesbury*, responding that, at times, this might not prove beyond the reach of applicant for judicial review because the statute itself may state the matter to be considered and that, at other times, the relevant considerations were implied and were not hard to discover.[183] He continued that the doctrine of legitimate expectation was developed by the courts to circumvent narrow *Wednesbury*,[184] adding that since *Ridge v Baldwin*[185] and *CCSU*, administrative law has not only been marching but hurtling along in the search for more refined techniques of judicial review.[186] Sykes J claimed that the law was now at the stage where it was safe to say that the intensity or stringency of the review varied according to the importance of the subject matter[187] and that, in his view, '[h]uman rights issues therefore attract a very stringent review with lesser rights (I am not devaluing their significance) attracting a lower level of stringency'.[188]

He claimed that Lord Greene's approach was not very helpful when one is dealing with a first generation right such as some of those enshrined in Chapter 3 of the Constitution of Jamaica[189] and neither was it very helpful when dealing with whether an environmental management agency acted fairly and properly in making its decisions.[190] Sykes J claimed that it must now be recognised that *Wednesbury* unreasonableness, in either the narrow or broad sense,

178 Ibid at [17].
179 Ibid at [18].
180 Ibid.
181 Ibid.
182 Ibid.
183 Ibid at [19].
184 Ibid at [20].
185 [1963] 2 All ER 66.
186 JM 2006 SC 49 at [20].
187 Ibid at [21].
188 Ibid.
189 Ibid at [22].
190 Ibid.

needed further refinement, adding that the law had matured enough to conclude that the process of decision making was just as important as the decision itself and might be, depending on the subject matter, even more important than the decision.[191] He claimed that the law was long past the climate of Lord Greene's era and that there was what might be described as a 'rights culture' where, increasingly, a number of 'rights' were being recognised and conferred on citizens and strangers.[192] He claimed that this way of looking at the matter benefited the citizen or stranger, who would know that he was not subject to whimsical and irrational decisions. In his view, this was not encroaching on the domain of the executive but merely about ensuring that executive power was used in accordance with the law.[193] Sykes J explained that it enhanced the rule of law and did not derogate from it which, in turn, could only enhance the quality of life of the citizenry; and that this was one of the natural outcomes of a constitutional democracy built on the rule of law.[194] He continued that the virtue of the proportionality approach was that, first, it focuses the mind of decision maker;[195] second, it enhances protection for the citizen and stranger without stymieing the executive; and, third, it places the burden on the executive to justify its actions rather than the citizen to show that the executive had acted improperly once the citizen had established a case which, if unrebutted, would lead to the conclusion that the executive had acted improperly.[196] Sykes J reasoned that if *Wednesbury* were to occur today, it might be that the courts would not visit the condition with a high degree of scrutiny because no right or important interest was at stake. He was of the view that the case demonstrated that traditional narrow *Wednesbury* was not very helpful when the complaint was that the decision was arrived at by a flawed process: merely to say that the decision was one that a reasonable decision maker could make was not a sufficient rejoinder to the challenges raised in the instant case.[197] Sykes J reasoned that narrow *Wednesbury*, while not dead, had been mortally wounded; it had served its purpose and worked well in its time. In his view, administrative law has moved on and the courts should embrace the views of recent UK decisions that have taken us to the door of proportionality, claiming that we should now open the door to see the dawning of a new day.[198]

The *locus classicus* of proportionality is the Commonwealth Caribbean decision of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing*,[199] where the Privy Council, in the context of a case dealing with the infringement of fundamental rights and freedoms, after reviewing decisions from South Africa, Canada and Zimbabwe, outlined the questions the courts must generally ask when determining whether a measure is proportionate, namely: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'[200] This decision has been cited and applied in many Commonwealth decisions, including decisions of the House of Lords. However, it was later realised that one element of that test was missing, which was corrected in *Huang v Secretary of State for the Home Department*[201] where the House of Lords, applying *R v Oakes*,[202] accepted that 'the need to balance the interests

191 Ibid at [25].
192 Ibid.
193 Ibid.
194 Ibid.
195 Ibid at [37].
196 Ibid.
197 Ibid at [122].
198 Ibid.
199 [1999] 1 AC 69.
200 Ibid at 80.
201 [2007] 2 AC 167.
202 [1986] 1 SCR 103.

of society with those of individuals and groups'[203] was 'an aspect which should never be overlooked or discounted'.[204] The *de Freitas* questions show clearly that the level of scrutiny is more intensive that that of *Wednesbury* unreasonableness, which only applies where a decision maker has made an absurd decision, and in fact gives undue deference to public authorities to the detriment of affected persons, particularly when fundamental rights and freedoms are implicated. What then of proportionality in the Commonwealth Caribbean? The last word must go to Sykes J, who speaks with impeccable clarity on the way forward for Caribbean judges.

Sykes J returned to the theme in *Northern Jamaica Conservation Association v Natural Resources Conservation Authority*,[205] where he had to consider the deceptively simple question of whether proportionality was part of the law of Jamaica in judicial review proceedings. He claimed that this case was not the first time proportionality was applied to judicial review proceedings in Jamaica. Sykes J asserted that:

> unless precluded by the Court of Appeal or a decision of the Privy Council on appeal from Jamaica any sensible development in the law should be considered and if found to be useful, applied. We do not live in a closed intellectual universe and it is certainly appropriate to look at other common law jurisdictions to see the developments there and if on examination those developments are sound and can be applied in Jamaica then there is no good reason not to do so. The point I made in my previous judgment was that it was becoming increasingly difficult to distinguish between the traditional grounds of judicial review and proportionality. Proportionality is a more refined technique of judicial review that enables the Court to examine executive action in a more comprehensive manner without trespassing on the domain of the executive. I would have thought that was a good thing. In any event I applied proportionality principles as well as the 'normal' administrative law principles.[206]

203 Ibid at 139.
204 *Huang* at [19].
205 JM 2006 SC 65.
206 Ibid.

CHAPTER 11

HUMAN RIGHTS AND ADMINISTRATIVE LAW

INTRODUCTION

The main focus of this chapter is an exploration of the confluence of human rights norms and administrative law. In other words, to what extent has the law relating to human rights and constitutional law influenced administrative law principles, and what is the extent to which administrative law principles are being used to bolster claims for breaches of the fundamental rights and freedoms found in Commonwealth Caribbean constitutions? Most, if not all, of these constitutions contain a due process or protection of the law clause. This chapter, therefore, will not consider all the fundamental rights and freedoms under the constitutions of Commonwealth Caribbean countries. Its focus is to examine the issues relating to human rights law that have arisen in the context of administrative law and how that might provide better protection for the citizenry against arbitrary state action.

LOCUS STANDI IN CONSTITUTIONAL AND HUMAN RIGHTS LAW

In *Payne v Attorney General of St Christopher and Nevis and Anguilla*,[1] the court noted that it was appropriate to determine, at the very beginning, whether the applicant had a relevant interest to enable him to apply to the High Court for a declaration and for relief under section 98(5) of the Constitution of St Kitts and Nevis.[2] It continued that, under that section, a person shall be regarded as having a relevant interest for the purpose of an application under that section only if the contravention of the Constitution alleged by him was such as to affect his interests.[3] The court was of the opinion that that element in section 98(1) indicated that a person who was a foreigner, non-resident or merely passing through the State could claim the use of the provisions of section 98 of the Constitution as a right to which he was entitled and that, on the evidence presented, the applicant satisfied that element and, therefore, it found that he belonged to and was ordinarily resident in St Christopher, Nevis and Anguilla.[4] In addition, the court stated that, as a member of the House of Assembly, the applicant was an integral part of the Legislature and an integral part of the legislative process of St Christopher, Nevis and Anguilla.[5] Therefore, it continued that his functions as a member of the House of Assembly and his interests and his right as a member of the House of Assembly were inextricably bound up with the passage and legality of every Bill in the House of Assembly and would reflect the relevant interest which he had and which flowed from his right and responsibility as a member of the House of Assembly under the Constitution.[6] As a result, the court held that the applicant 'had a right, duty, a responsibility and a relevant interest to see that the Bills mentioned in his affidavit passed through the House of Assembly and were passed by the House of Assembly with the enacting clause which the law required and in accordance with the law of the State'.[7] It

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1 KN 1981 HC 2. See also *Richards v Attorney General of St Vincent and the Grenadines* VC 1990 HC 1.
2 KN 1981 HC 2 at 12.
3 Ibid at 13.
4 Ibid.
5 Ibid at 14.
6 Ibid at 15.
7 Ibid at 16.

therefore concluded that, based on the evidence and the law applicable to that evidence, the applicant had the relevant interest to apply to the High Court for a declaration and for relief under section 98 of the Constitution on the basis of the allegation that a certain provision of the Constitution as reflected in the Bills 'has been or is being contravened. In the particular circumstances of this case as a member of the House of Assembly, [the applicant's] relevant interest is protected and fortified by his right as a member of the House of Assembly.'[8]

It continued that, first, '[n]ot all interests are protected by rights. All rights are based on interests but not all interests give rise to rights. It is only protected interests that constitute rights'; and, second, 'it does not matter whether the interest is moral, religious or otherwise once it is ascertainable and in the words of the definition "not too remote" and of course if it is too remote then it may not be relevant for the purposes of section 98 of the Constitution'.[9] The court explained that, first, the 'interest may be a social interest as embracing the efficient working of the legal order in the society, national security, the economic prosperity of society, the protection of religious, moral, humanitarian and intellectual values or it may be a private interest which is a personal interest, or a family interest or an economic interest or a political interest and that list is not complete'; and second, '[i]t is my view that any one of those interests once it is supported by acceptable evidence to satisfy the court that it exists, can sustain an application to the High Court under the special jurisdiction conferred on the Court by section 98 of the Constitution of St Christopher, Nevis and Anguilla.'[10] It noted that section 98(1) of the Constitution was concerned with the 'relevant interest' of any person and, under that section, the person who made the allegation was not required to satisfy it (on a balance of probability) that any right of his under the Constitution had been or was being contravened. It continued that, in order to satisfy that requirement, all the person had to do was to make the allegation that any provision of the Constitution had been or was being contravened and he grounded that allegation on the basis of fact that he had a relevant interest (not a right). The court claimed that the following would then apply: first, he would be entitled to be heard by the High Court. Second, having heard him initially the court then would have to determine whether he had a 'relevant interest' as a prerequisite to determining whether the allegation of contravention of a provision of the Constitution (other than a provision in Chapter 1) could be sustained or not. Third, the court would do so as a finding of fact, on the balance of probability, on the basis of the evidence submitted and also in accordance with section 98(5) of the Constitution. Fourth, while the 'relevant interest' under section 98 of the Constitution 'may be of the nature of a pecuniary or a proprietary interest', as Bishop J stated in *Gordon v Minister of Finance*,[11] it must not necessarily be of that nature before that interest could ground an application under section 98 of the Constitution. The court explained that it could be in the nature of any other interest which was not remote. Fifth, as the question of fact to be determined by the court on the basis of evidence submitted for its consideration, each case in which the issue of 'relevant interest' arose would have to be considered on its merits or demerits as the case may be and the element of 'relevant interest' determined accordingly.[12]

In *Belize Telecommunications Ltd v Attorney General of Belize*,[13] the court explained that it was important not to lose sight of the fact that the claimants' case was based on alleged violations of the Constitution of Belize. As a result, it claimed that the legal standing or *locus standi* of the claimants must be determined in the light of the relevant provisions of the Constitution, as well

8 Ibid at 19.
9 Ibid at 22.
10 Ibid at 23.
11 (1968) 12 WIR 416.
12 KN 1981 HC 2 at 24.
13 BZ 2007 SC 35.

as on the general legal principles relating to standing in public law litigation.[14] It continued that when one looked at the orders sought by the claimants in the main claim, it seemed clear that they were challenging the constitutionality of the Vesting Act 2007 on two fronts. The first allegation was that the Vesting Act was in breach of the Constitution of Belize because it violated the claimants' rights protected under the Constitution, and, in particular, their rights under sections 3, 13 and 17 of the Constitution. The second was that the Vesting Act violated the constitutional principle of separation of powers and was, therefore, *ultra vires* the Constitution of Belize.[15] In relation to the first limb, the court stated that, first, for a claimant to have legal standing to bring a claim based on any provisions of sections 3 to 19 of the Constitution, he must show that the alleged contravention was 'in relation to him' with the exception only when the alleged contravention or likely contravention was in relation to a person detained; and, second, in the case of a detainee, the person making the allegation of contravention on behalf of the detainee has standing to bring an action to enforce breaches of any of the provisions of sections 3 to 19 of the Constitution.[16] It continued that, first, '[t]he test of standing that each of the claimants must satisfy to claim redress for breaches of any of the provisions mentioned, is that the contravention must be "in relation to him" ' and, second, '[a]part from the permitted exception already mentioned, no representative action can be brought to enforce the rights protected in sections 3 to 19 of the Constitution.'[17] The court ruled that, on the facts of the instant case, the first claimant satisfied the test of standing under section 20 since the alleged contravention directly affected it as the holder of the shares which had been vested in Belize Telemedia Limited (BTML); and that, in so far as the second and third claimants were concerned, their rights and interest in Belize Telecommunications Limited (BTL) depended on the first claimant.[18] Therefore, the court also ruled that the second and third claimants did not satisfy the test set out in section 20 of the Constitution, because they could not show that the alleged contravention of sections 3, 13 and 17 were in relation to each of them personally, which meant they did not have the standing to bring their claim under Part II of the Constitution.[19] In respect of the fourth and fifth claimants, the court accepted that they were the holders of the 567,666 ordinary shares in BTL, and now in BTML, and would be the persons in relation to whom contraventions might be alleged under sections 3 to 19 of the Constitution. However, the court reasoned that there was no evidence before it that either the fourth or fifth claimant 'allege[d]' a contravention of any of the provisions of sections 3 to 19 of the Constitution; they only claimed that the new Articles of Association of BTML operated against their interests. In the result, the court was of the opinion that they would have had to do more than that to bring a claim based on an alleged contravention of any of the provisions of sections 3 to 19 of the Constitution.[20]

In relation to the second limb, namely the validity of the Vesting Act and the resultant dispossession of the claimants of their shares, rights and interest in BTL, the court questioned whether it could be argued that the five claimants had standing to challenge the validity of the law which took away their shares, rights and interest in BTL.[21] It explained that the test for standing to bring an action challenging the validity of a law had been described in many ways by both case law authorities and statutes, depending on the nature of the claims and remedies sought. The court also stated that, in a private law claim, the test of standing was sometimes pitched against an

14 Ibid at 20.
15 Ibid.
16 Ibid at 21–2.
17 Ibid at 22.
18 Ibid at 24.
19 Ibid at 25.
20 Ibid.
21 Ibid at 26.

'aggrieved person' or 'a person who is affected' by the act complained of or that the applicant must show he was a 'person aggrieved', that is, a person whose legal right or interest has been affected. It argued that the courts have moved on and so have propounded the test of 'sufficient interest' or *locus standi* or legal standing in later cases.[22] On the facts, the court concluded that those whose interest had been adversely affected by the actions of the defendant were the five claimants who alleged that, by virtue of the Vesting Act, the first, second and third claimants were dispossessed of their shares, rights and interest, including directorship and non-executive chairmanship in BTL, while the fourth and fifth claimants stood to be adversely affected by the new Articles of BTML, in particular Article 26B, which had the effect of forcing the minority shareholders to sell their shares at the behest of the majority shareholders.[23] In addition, the appellants claimed that the Vesting Act effectively decided the Privy Council Appeal No. 19/2006 and the appeal before the Court of Appeal No. 7 of 2007 in favour of the defendant. That, in the court's opinion, was a serious issue of public importance, much more so for the five claimants, as it went to the very fabric of the principle of separation of powers entrenched in the Constitution of Belize. As a result, the court ruled that the 'five claimants here, must surely, in my judgment, have "sufficient interest" to come to this court and ask to be heard on this issue, even if they are not able to invoke the jurisdiction of the court through the Part II "gateway" of the Constitution.'[24]

In *Benjamin v Minister of Information and Broadcasting*, the court stated that the receipt of ideas via the mass media necessarily had a social character attached to it. It claimed that, if there was any interference by the State with the conveyance of such ideas, there was no reason why an affected individual should be left without a remedy merely because hundreds or thousands of fellow citizens were simultaneously hindered in their enjoyment of that right. In such circumstances, the court continued, '[a]ny such citizen may come to the court to have his or her rights vindicated.'[25] In *Blake v Byron*, the court stated that '[i]n so far as the appellant's application is for an order of *mandamus* in public law, the appellant is required to show that he has a sufficient interest in the *mandamus*'; second, '[i]n so far as the application is for a declaration or other relief in private law or based on the appellant's fundamental rights and freedoms, the appellant is required by section 96 of the Constitution to show that he has a relevant interest in the declaration or other relief'; and, third, '[h]aving elected to decide this appeal on the merits of the application and on the conclusion, that the application itself is unmeritorious, it is unnecessary to decide whether the appellant has *locus standi* either by way of a sufficient interest or by way of a relevant interest in the subject matter of the application.'[26] In *Spencer v Attorney General of Antigua and Barbuda*,[27] the court noted the framers of the Constitution intended that some means should be available to the court, at the suit of persons with a relevant interest, to determine constitutional validity in cases outside the ambit of Chapter 2. It continued that *Gordon* was too constrictive and that the court should not, on the sole ground of lack of *locus standi*, refuse to adjudicate upon a complaint, made in good faith by a citizen, that there had been a serious breach of the Constitution where that complaint appeared to have some merit. The court continued that, first, 'a litigant invoking the provisions of section 119 should show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted. The allegations grounding this violation must be serious' and, second, '[t]he trial judge must then assess, whether in light of the allegations made and the degree to which they affect the litigant,

22 Ibid at 27.
23 Ibid at 33.
24 Ibid.
25 AI 1998 HC 3.
26 KN 1994 CA 6 at 10.
27 AG 1997 HC 46.

whether personally or as a mere member of the general public, *locus standi* should be accorded.'[28] The court, although cognisant that its reasoning would mean that *locus standi* under section 119 could only rarely (if at all) be determined strictly as a preliminary issue, could not find anything wrong with such an approach, claiming that there was good authority for it. It referred to *Attorney General of St Christopher Nevis and Anguilla v Payne*,[29] a decision of the Court of Appeal binding on it, where Robotham JA, interpreting a provision of the St Kitts and Nevis Constitution similar to section 119, claimed that '[w]hether or not a person has a relevant interest can only be determined after the facts have been heard, and not as a preliminary issue. On the conclusion, it then becomes a matter for the judge to decide whether a relevant interest has been established or not, in granting or refusing the applicant.'[30]

The court was of the opinion that, pursuant to sections 18 and 119 of the Constitution, a person who alleges a contravention of the Constitution is entitled to seek redress by approaching the High Court for relief; and it was only pursuant to either of these sections that constitutional redress could be sought.[31] It claimed that it was the examination of the scope and content of these sections that determine who could approach the court and in what circumstances, and that the right given by section 18 was restricted to alleged infringements of Chapter 2 which protected the fundamental rights and freedoms of the individual; and that it specifically required that a plaintiff should establish that a provision of the Constitution 'has been, is being or is likely to be contravened in relation to him'. In other words, the court reasoned that:

> the fundamental rights of the particular plaintiff must be personally affected before that person has the requisite standing to approach the High Court. It is no use coming to Court to complain that the fundamental rights of another are being contravened. An exception is made in cases where the alleged contravention is in respect of a detained person.[32]

Section 119, it continued, gave an applicant the right to complain to the High Court in respect of the breach of a constitutional provision other than a provision of Chapter 2. In this case, the court explained that not any and everyone was permitted to approach the court, but only persons who had 'a relevant interest'. In determining what was a relevant interest, the court stated that sub-section 5 offered only a little assistance, as it only provided that a person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of the Constitution alleged by him was such as to affect his interests.[33]

When proceeding under section 119, the court reasoned that it had to determine what did or did not affect the interests of an applicant; it was not a matter of pure discretion on the part of a judge; and that the matter was one for decision, a mixed decision of fact and law, which the court must decide on legal principles. On the facts of the instant case, the court held that it was clear that Spencer had no *locus standi* under section 18, claiming that neither he nor his party members were being discriminated against on the ground of 'race, place of origin, political opinions or affiliations, colour, creed or sex'. In addition, it also held that no property in which he, or his party members, had 'an interest in or right to or over' had been acquired or taken possession of by the Government. As a result, the court concluded that the applicant was foreclosed from complaining about a violation of a provision in Chapter 2 and his only method of approaching the court to seek constitutional redress must be pursuant to section 119. Under

28 Ibid.
29 (1982) 30 WIR 88.
30 Ibid at 99.
31 Ibid.
32 Ibid.
33 Ibid.

that section, the applicant could only allege a violation of a provision other than one contained in Chapter 2.[34] The court then concluded that 'the Leader of the Opposition had *locus standi* under section 119 to complain about alleged violations of the Constitution outside the range of Chapter 2' and that '[i]f he has no relevant interest in seeing to it that the executive and the legislative branches operate within the confines of the Constitution, then, who else in Antigua and Barbuda has such an interest?'[35] On Appeal,[36] the Court of Appeal noted that '[t]he approach which our Courts have adopted has recognised the principle that in these public law cases, the Court first determines the nature of the alleged violation of the Constitution', and 'only if there is a sustainable allegation of such a violation does it consider whether the applicant has a relevant interest'.[37] It continued that, first, '[i]n my view the common premise on which all these decisions seem to have been based was that before any question of *locus standi* can arise, there must be a sustainable allegation that a provision of the Constitution has or is being contravened, and that the alleged contravention affects the interests of the applicant'; second, '[o]n my reading of section 119(5) it says exactly the same thing'; third, '[t]he limitation contained therein effectively makes *locus standi* a question of statutory interpretation'; and fourth, '[i]n my view it is essential that the requirements of the alleged contravention of the Constitution and a resultant affect on the interest of the applicant must both exist.'[38] The court was of the opinion that the 'finding of the learned trial judge was that there was no allegation of any infringement of any provision of the Constitution of which Court could take cognisance is conclusive', meaning that the 'appellant therefore failed the test established by section 119(5) of the Constitution', so the 'trial judge was wrong to find that the appellant had *locus standi*'.[39]

In *The Chief Immigration Officer v Burnett*,[40] the Court of Appeal noted that '[t]here is no doubt that the High Court has an inherent jurisdiction (either by way of judicial review or otherwise) to supervise and judicially control certain decisions and actions of public authorities constituted by law to make those decisions or to take those actions.'[41] It continued that, subject to the formalities prescribed by rules of court, the jurisdiction was exercisable whenever a public authority (purporting to exercise a constitutional, statutory or prerogative power) has made or taken or intends to make or take a justiciable, judicial, quasi-judicial or administrative decision or action which affects or will affect a complainant who has *locus standi* by way of a relevant or sufficient interest in the decision or action, and who alleges and proves that the decision or action is or will be illegal, irrational or procedurally improper. In such cases, the court claimed that the High Court may make such appropriate prerogative or other order as may be necessary to protect the complainant from the illegality, irrationality or procedural impropriety of the decision or action.[42] The Court of Appeal also pointed out 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

34 Ibid.
35 Ibid.
36 AG 1998 CA 3.
37 Ibid.
38 Ibid.
39 Ibid.
40 VG 1995 CA 3.
41 Ibid.
42 Ibid.

> 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.[43]

In *Attorney General v Alli*,[44] the appellant argued that the parties were not properly before the court, in that the application did not concern fundamental rights.[45] The court noted that Art 153 of the Constitution of Guyana makes provisions for any person to approach the High Court if any of the provisions of Arts 138 to 151 is being contravened or is likely to be contravened in relation to him. It continued that the impugned Act sought to amend Art 142(3) of the Constitution and that, from the affidavit of the respondents, the Labour (Amendment) Act 1984 (L(A)A) was likely to deprive them of property already acquired without the payment of compensation.[46] The court, therefore, ruled that they were entitled to seek redress from the court and the first question for its consideration was whether the respondents had approached the court in the right way by an originating motion. It claimed that Art 153(6) of the Constitution empowered Parliament to make provisions for the procedure to be adopted by the courts in the constitutional matters but that no such provisions were made. The court explained that a similar situation arose in *Jaundoo v Attorney General of Guyana*,[47] where the court claimed that '[t]he clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule making authority to make specific provision as to how that access is to be gained.'[48] As a result, the court concluded that a citizen whose constitutional rights are allegedly trampled upon must not be turned away from the court by procedural hiccups.[49] It continued that once the complaint was arguable a way must be found to accommodate the applicant so that other citizens become knowledgeable of their rights, holding that the parties were properly before the court.[50]

AMENABILITY TO CONSTITUTIONAL REDRESS

The rules relating to who are the appropriate defendants in constitutional and human rights cases have been addressed by the courts. They have noted that it was clear, therefore, that 'the fact that the offending act is done by a private entity . . . does not in and of itself confer, as it were, some kind of talismanic immunity from constitutional challenge as being in breach of a guaranteed right, and therefore susceptible to judicial oversight or control.'[51] The cases concerning this make it plain that the courts have considered different factors in determining whether an authority is amenable to judicial review and constitutional redress and that there is 'no one single factor or test for determining whether an entity or body is amenable to judicial review',[52] citing *Ex p Datafin* and *L.J. Williams v Smith and Attorney General of Trinidad and Tobago*.[53] After emphasising the requirements

43 Ibid.
44 GY 1987 CA 6.
45 Ibid at 25–6.
46 Ibid at 26.
47 (1971) 16 WIR 141.
48 Ibid at 146.
49 Ibid at 147.
50 Ibid.
51 *Bedco Limited v Attorney General of Belize* BZ 2008 SC 2 at [34].
52 Ibid.
53 (1980) 32 WIR 395. He also pointed out that 'Professor Fiadjoe's comment that the "emphasis on endowment with coercive powers" is wholly unnecessary and can be misleading' was also made in the context of a discussion of the kinds of authorities amenable to judicial review (though, even in that context, the comment seems slightly misplaced as a criticism of Bernard J's statement of the position in *L.J. Williams v Smith and Attorney General*, which was, as I have pointed out, in fact a constitutional, rather than a judicial review case, with the result that the statement was completely unexceptionable; see Albert Fiadjoe, *Commonwealth Caribbean Public Law*, 3rd edition, page 85' at [131].

stated by learned authors,[54] Conteh CJ in *Bedeco Limited v Attorney General of Belize* stated that this approach was the 'more preferable formula and does not emphasise the element of a body being "endowed with coercive power" in order to be held a public body for the purposes of redress' and that 'the absence or presence of "coercive power", whatever this may mean, is not necessarily determinative of the issue whether the body or authority in question is amenable to public law'.[55] In that decision, it was argued that, because the defendant was a private company, it was not, therefore, susceptible to constitutional redress. The court was of the opinion that since the private company was designated as the 'sole port of entry and exit for cruise ship passengers it has both a statutory and governmental underpinning, such as to make it amenable to public law challenge'.[56] It also pointed out that 'even though it is a private entity, the fifth defendant is, in my view, by virtue of its role and function as a port of entry, and a port facility operator, clothed with public power, that makes it amenable to public law'.[57]

On appeal, the Court of Appeal was of the opinion that '[n]either of the cases cited by [the Chief Justice] are of particular assistance in providing a solution to the matter at issue in the instant case'.[58] Carey JA disagreed with Conteh CJ, claiming that 'the question at issue in this case was not concerned with judicial oversight or control, in the sense of reviewability', but 'related to constitutional liability by an entity, that was neither the state or an arm of the state or a public authority endowed by law with coercive powers'.[59] He continued that, although Conteh CJ accepted Fiadjoe's view that the phrase 'endowed with coercive power' was wholly unnecessary and could be misleading, he continued, despite his misgivings as to its meaning, by saying that 'it was not necessarily determinative of the issue whether the body or authority is amenable to public law'.[60] He said that:

> It is a short step to conclude that as such it would be endowed by law with coercive powers. In order to arrive at that answer, there would seem little need to undertake an analysis on whether a private entity has some talismanic immunity from constitutional challenge.[61]

Carey JA noted that the leading authorities of *Thornhill v Attorney General of Trinidad and Tobago*[62] and *Maharaj v Attorney General Trinidad and Tobago (No. 2)*[63] 'show that what is redressible under the Constitution, are contraventions of the rights and freedoms guaranteed under the Constitution, by the state or some other public authority endowed by law with coercive powers' and that they 'have neither been overruled, doubted, except by an academic, nor modified'; therefore, the Court of Appeal 'as part of the curial hierarchy, [was] obliged loyally to follow and give effect to them on the principle of *stare decisis*'.[64] He then claimed that the 'question which must now be answered is whether the appellant had "any statutory and governmental underpinning", so as to make it endowed by law with coercive powers'.[65] Carey JA argued that Conteh CJ's view,

54 'I therefore adopt with respect, in this regard, the statement by the learned author of *Judicial Review Handbook*, by Michael Fordham, 4th ed. 2004 at para. 34.2 at p. 673: "the Principles of reviewability. The mass of case-law can be seen to provide a host of working examples applying a series of interrelated principles regarding reviewability, with perhaps these main lessons: (1) treat no single factor as determinative, but (2) focus particularly on (a) statutory or governmental underpinning and (b) the substances and effects of the functions being discharged".'
55 BZ 2008 SC 2 at [34].
56 Ibid at [35].
57 Ibid at [36].
58 *Fort Street Tourism Village v Attorney General of Belize* BZ 2008 CA 26.
59 Ibid at [70].
60 Ibid.
61 Ibid.
62 [1980] 2 WLR 510.
63 [1979] AC 385.
64 BZ 2008 CA 26 at [71].
65 Ibid at [72].

which could be found in the 'statutory and governmental underpinning on the basis of the designation "sole port of entry" status conferred on it', 'begs the question for it assumes what is sought to be proved'.[66] On the facts, Carey JA held that the appellant was the corporate entity that managed the port, provided the facilities of a port, usually docking, cranes, lifts, stevedores, warehouses for storage of goods in bond, and offices for customs and immigration. Although the appellant must comply with the Port Facility Security Regulations, he stated that this was not 'capable of converting "a port" into a body, despite the statutory underpinnings', identified by Conteh CJ, endowed by law with coercive powers.[67] He therefore concluded that, in his 'judgment, the appellant was not therefore a body endowed by law with coercive powers which made it liable in the circumstances of this case to constitutional action'.[68]

Morrison JA agreed with the appellant that Conteh CJ 'failed to distinguish amenability to constitutional redress from amenability to judicial review'.[69] He claimed that *Smith v L.J. Williams Ltd* was 'a straightforward application of *Maharaj* and *Thornhill*, in that it was accepted that for the purposes of constitutional relief the Chief Immigration Officer of Trinidad and Tobago was a public authority endowed 'with functions, duties and powers of a public nature and for the application of the law was clothed with coercive powers'.'[70] Also, that *Ex p Datafin* 'was emphatically a judicial review case'.[71] Morrison JA claimed that:

> So that while it may be that the Chief Justice was correct in thinking that the absence or presence of 'coercive powers' is not necessarily determinative of the issue whether the body or authority in question is amenable to judicial review, it remains the position on a long and unbroken line of authority that for that body to be amenable to constitutional redress it must be a body endowed with functions, duties and powers of a public nature and clothed for the purpose of carrying out those functions with coercive powers.[72]

He claimed that the appellant's facility was never lawfully designated a port facility and the uncontroverted evidence was that the immigration and customs functions continued at all times to be exercised by the appropriate national authorities.[73] Consequently, he held that the appellant was not a public authority amenable to constitutional redress in accordance with the principles from *Thornhill* and *Maharaj*.

JUDICIAL REVIEW AS AN ALTERNATIVE REMEDY

The issue of alternative remedies in the context of constitutional and human rights adjudication continues unabated in the Commonwealth Caribbean.[74] In *Johnatty v Attorney General*,[75] Lord Hope reiterated that the 'fact that these alternative remedies were available is fatal to the appellant's argument that he ought to have been allowed to seek a constitutional remedy', citing

66 Ibid.
67 Ibid.
68 Ibid at [73].
69 Ibid at [128].
70 Ibid at [129].
71 Ibid at [130].
72 Ibid at [132].
73 Ibid at [135].
74 This section borrows heavily from E. Ventose, 'Collateral Relief and Alternative Remedies in Constitutional Litigation in the Commonwealth Caribbean' (2011) *Commonwealth Law Bulletin* 91.
75 [2008] UKPC 55.

Harrikissoon,[76] *Hinds*[77] and *Jaroo*.[78] After examining the learning in these decisions, the Board concluded that at the time of making his constitutional motion, the appellant was in possession of all the facts, because he had the respondent's affidavits before him before he proceeded.[79] The Board went on to point out that, in any event, *Jaroo* makes it clear that if it becomes evident after the motion has been filed that the use of the procedure is not appropriate, steps should be taken to withdraw the motion as its use in such circumstances will be an abuse.[80] It was pointed out that the suspension of the appellant pending disciplinary proceedings was exactly the kind of administrative decision that may be subjected to judicial review – consequently the alternative remedy by way of judicial review was always available to the appellant.[81] The appellant could not, therefore, point to any feature of his claim which made it appropriate to seek constitutional relief.[82] In *Durity v Attorney General*,[83] there was a five-year delay by the appellant, a magistrate, in seeking constitutional relief for his suspension from office by the Judicial and Legal Services Commission (JLSC) of Trinidad and Tobago. Moreover, there was a continuation of the suspension for 33 months before the charges against him were investigated, contrary to section 90 of the Public Service Regulations. The question for the Board was whether either of those facts precluded the appellant from bringing constitutional proceedings on the basis that there was an adequate alternative remedy in line with the *Harrikissoon*,[84] *Jaroo*[85] and *Ramanoop*[86] decisions. Lord Hope was not convinced that the appellant was deprived of the protection of the law when he was suspended by the JLSC, because it 'was open to him to challenge the legality of the decision immediately by means of judicial review'.[87] Consequently, the Board held that this complaint did not amount to an infringement of the appellant's constitutional rights. The Board concluded that because the 'remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the Commission's decision to suspend him'.[88]

In relation to the delay by the JLSC in appointing an investigating officer, the Board claimed that this was 'a separate and distinct matter'.[89] Lord Hope stated that the responsibility for appointing an investigating officer forthwith lay entirely with the JLSC, not with the appellant; the standard that must be adhered to is found in regulation 90 and it was not for the appellant to take the initiative.[90] He continued that:

> The procedural safeguard against undue delay to which the appellant was entitled lay in the Commission's adherence to that standard. The constitutional right which the appellant invokes entitled him to expect that the standard would be adhered to. The process of judicial review is in any event, in cases of delay, an uncertain remedy. As the Board said on the previous occasion, it must be open to question whether it could have afforded adequate relief for a past and irreversible event such as the allegedly unlawful continuation of a suspension: [2003] 1 AC 405, para 39.[91]

76 *Harrikissoon v Attorney General* [1980] AC 265.
77 *Hinds v Attorney General* [2001] UKPC 56; [2002] 1 AC 854.
78 *Jaroo v Attorney General* [2002] UKPC 5; [2002] 1 AC 871; [2003] 2 WLR 420; [2008] UKPC 55 at [22].
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid at [21].
83 [2008] UKPC 59.
84 *Harrikissoon v Attorney General* [1980] AC 265.
85 *Jaroo v Attorney General* [2002] UKPC 5; [2002] 1 AC 87; [2003] 2 WLR 420.
86 *Ramanoop v Attorney General* [2005] UKPC 15; [2006] 1 AC 328; [2005] 2 WLR 1324 at [23].
87 [2008] UKPC 59 at [28].
88 Ibid.
89 Ibid at [29], citing *Durity v Attorney-General of Trinidad and Tobago* (2002) 60 WIR 448; [2003] 1 AC 405.
90 [2008] UKPC 59 at [31].
91 Ibid.

Lord Hope claimed that the *Harrikissoon* principle only applies to defeat the appellant's constitutional motion if there was another procedure for obtaining a sufficient judicial remedy for the unlawful administrative action complained of.[92] Consequently, he reasoned that the appellant should not 'be criticised for not resorting to the uncertain procedure of judicial review as a means of enforcing the Commission's obligation to deal with his case promptly', stating that it 'was for the Commission to ensure that it adhered to that standard, not for the appellant to prompt it to do so'.[93] In conclusion, the Board accepted that 'there was a breach of [the appellant's] constitutional right to due process – the essence of his right to the protection of the law under the procedure that regulation 90 lays down – and that he is entitled to relief against it by invoking the constitutional remedy'.[94] Consequently, the Board held that the *Harrikissoon* principle could not be invoked to defeat the appellant's claim.[95]

Harrikissoon was distinguished in *Attorney General v Lake*[96] where the Board had to consider the argument of counsel for the respondent, in an action for redress for constitutional infringements relating to the removal of the appellant from the public service, that the appellant was not entitled to constitutional relief because he could have received adequate redress by remedies under the common law.[97] Lord Hutton stated that *Harrikissoon* 'is distinguishable from the present case because in it the Board was considering a claim by a teacher that his transfer from one school to another constituted a breach of his fundamental rights in the Constitution'.[98] He continued that, as Lord Diplock stated, it was manifest that such a right was not included among the human rights and fundamental freedoms specified in the Constitution of Trinidad and Tobago, 'whereas in the present case the applicant claims a breach of a specific provision in Chapter VII of the Constitution of Antigua and Barbuda designed to protect those who, like him, were appointed to public office, and having regard to the facts alleged by the applicant there can be no substance in an argument that his claim for constitutional relief is frivolous or vexatious or an abuse of the process of the court'.[99]

Similarly too in *Bhagwandeen v Attorney General*[100] counsel for the respondent submitted, as a preliminary argument, that the appellant was not entitled to a constitutional remedy, since he had sufficient redress through resort to the ordinary law of judicial review, citing *Harrikissoon*.[101] Counsel for the appellant replied that, first, the invocation of his constitutional rights was the only way to surmount the obstacle placed in the way of the appellant's reinstatement constituted by the failure of the court to give judgment on his application for judicial review of the Commissioner's decision to relay the criminal charges in 2000 and, secondly, that this was the only avenue by which he could advance a claim to damages.[102] Lord Carswell pointed out that 'there may be substance in the appellant's second argument', stating that:

> If the appellant is not entitled to claim damages on an application for judicial review which involves a claim that a public authority has deprived him of a constitutional right, then there is a viable argument that he was justified in bringing a constitutional motion in order to advance that

92 Ibid at [32].
93 Ibid.
94 Ibid.
95 These issues were already canvassed but not decided on when the Privy Council gave its first judgment: *Durity v Attorney-General of Trinidad and Tobago* (2002) 60 WIR 448; [2003] 1 AC 405 at [34]–[36].
96 [1999] 1 WLR 68.
97 Ibid at 80.
98 Ibid at 81.
99 Ibid at 81–2.
100 [2004] UKPC 21.
101 Ibid at [15].
102 Ibid at [16].

> claim, which should not be regarded as frivolous, vexatious or an abuse of the process of the court.[103]

Consequently, he reasoned that this 'would constitute a valid ground of distinction from the decision in *Jaroo* . . . [where] the appellant had a sufficient claim in detinue'.[104] Lord Carswell claimed that the case constituted a bona fide resort to rights under the Constitution, which ought not to be discouraged.[105] Consequently, he concluded that the Board was 'willing, without deciding the point finally, to proceed on the assumption that the appellant is entitled to advance his claim for damages by way of the constitutional motion the subject of the appeal'.[106]

WEDNESBURY UNREASONABLENESS

The applicability of *Wednesbury* unreasonableness is also seen in the context of human rights. It would seem strange that a standard of review that gives deference to decision makers would have any leading role to play when fundamental rights and freedoms were engaged. Notwithstanding this, it was applied in *Mohammed v Moraine*,[107] where the Principal and the Board of Management of the Holy Name Convent School refused to allow a student to attend school wearing a hijab. In addition to answering the question of whether the decision contravened her rights under the Constitution of Trinidad and Tobago, the court also considered whether the decision was reasonable. In reply to the question of whether a reasonable tribunal, seized of all the facts, would have reached the decision communicated to the applicant, the court answered in the negative.[108] It continued that the Principal and the Board, in arriving at their decision, did not reasonably exercise their powers under the Education Act. On appeal, the Court of Appeal noted that it did not think it could seriously be disputed that the basis of the judge's decision was that the appellants were wrong in their decision to apply homogeneously the school regulations, particularly those that related to school uniform.[109] It continued that the decision was, undoubtedly, founded upon a contravention of the *Wednesbury* principle; and that inherent in such a finding was that the appellants, in arriving at their decision, erroneously took into consideration matters which they should not have so taken, or did not take into consideration matters which they should have taken.[110] As was seen in Chapter 10, the courts are increasingly using proportionality as the standard of review in the human rights context – and rightfully so in order to give full measure to the protections guaranteed to the citizen under the chapter of the various Commonwealth Caribbean constitutions dealing with protecting their fundamental rights and freedoms.

LEGITIMATE EXPECTATIONS AND DUE PROCESS

The issue of whether legitimate expectations form part of the constitutional matrix and the chapter on the fundamental rights and freedoms has been considered by Caribbean courts,[111]

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103 Ibid at [17].
104 Ibid.
105 Ibid, citing Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 307.
106 [2004] UKPC 21 at [17].
107 TT 1995 HC 12.
108 Ibid at 46.
109 TT 1995 CA 2 at 10.
110 Ibid.
111 See *Brandt v Attorney General of Guyana* GY 1971 CA 2 (considering the Expulsion of Undesirables (Amendment) Ordinance 1967 and the Immigration Ordinance) and *Kent Garment Factory v Attorney General of Guyana* GY 1991 CA 8.

in particular the Caribbean Court of Justice (CCJ). The decision of the CCJ in *Attorney General v Joseph and Boyce*[112] has been hailed as revolutionary by legal practitioners and academic lawyers. And, in many respects, it is. It has clearly given public lawyers much food for thought and it will take some time before the full ramifications for constitutional, human rights and administrative law areas are fully explored. Notwithstanding that the discussion of legitimate expectations was *obiter*, the decision still indicates the approach the CCJ might take if the issue arises directly for consideration in the near future. Although the CCJ did not engage in any rigorous analysis of the issues that lie at the heart of legal protection for substantive legitimate expectations, its approach seems to be in accordance with the evolving approach to legitimate expectations in England and elsewhere. Further, even if it is accepted that the boundaries of substantive legitimate expectations are still being drawn, as was seen in Chapter 9, the CCJ's approach is forward thinking since it anticipated subsequent developments in England. The focus of this section is an examination of the treatment by the CCJ of the doctrine of legitimate expectations, in particular the standard of review the courts must deploy when faced with a substantive, as opposed to a procedural, legitimate expectation. It delineated its view on the role of legitimate expectations and unincorporated treaties, accepting that such treaties do create legitimate expectations – a notion that has been rejected in most Commonwealth countries. In any event, the result in the decision is almost inevitable, in light of the issues that the court dealt with. This section attempts to examine critically the standard of review articulated by the CCJ in *Joseph and Boyce* to determine when a legitimate expectation could prevail over any compelling State interest advanced. I will also outline the central arguments accepted by the CCJ in relation to unincorporated treaties and legitimate expectations and consider how the administrative law concept of legitimate expectation has seemingly been given constitutional status under the due process or protection of the law clause under Commonwealth Caribbean constitutions.

In recent years, the issue of whether a State had to await the decision of any international human rights body before it could lawfully execute a condemned prisoner was one that has been explored by the Privy Council in a myriad of decisions. The law was in a state of confusion and has only recently given a hint of certainty by some rather dubious legal reasoning. In light of the subject matter at issue – the lawfulness of the execution of the condemned person – it is hardly surprising that the CCJ in *Joseph and Boyce* came to the conclusion that it did. It traversed the much-trodden terrain of decisions of the Privy Council relating to the question of whether the State must await the conclusion of any relevant international proceedings before it could lawfully execute the condemned man.[113] Commonwealth Caribbean law was in a complete state of disarray, with both appellants and states seeking to advance their arguments before differently constituted boards more sympathetic to their points of view. The dissents of yesterday became the majority decisions of today – a concept that cannot but bring a high degree of uncertainty to Commonwealth Caribbean constitutional and human rights law. It was against this tumultuous background that the decision of the CCJ in *Attorney General v Joseph and Boyce* came to be decided. Chief Justice de la Bastide and Justice Saunders gave the leading judgment of the court.[114] They accepted that the law in this area is unsettled and still evolving,[115] and that there is a huge divergence of opinion and approach between different courts, but also

112 [2006] CCJ 3; (2006) 69 WIR 104.
113 *Fisher v Minister of Public Safety and Immigration (No. 2)* (1998) 52 WIR 27; *Thomas v Baptiste* (1998) 54 WIR 387; *Minister for Immigration and Ethnic Affairs v Teoh* 183 CLR 273; *Briggs v Baptiste* (1999) 55 WIR 460; *Higgs and Mitchell v Minister of National Security* (1999) 55 WIR 10; and *Lewis v Attorney General* [2001] 2 AC 50; [2000] 3 WLR 1785; (2000) 57 WIR 275.
114 The joint judgment was the longest, running to some 144 paragraphs.
115 *Joseph and Boyce* at [103].

between judges of the same court.[116] Punishment by death, we are told, it is 'punishment in a class of its own, warranting special procedures before it is carried out'.[117] The court alluded to four approaches represented in the case law: the first, as espoused by the House of Lords in *Ex p Brind*, was that such conventions do not create binding rules of law.[118] Second, execution of the condemned person before exhaustion of his international petitions was 'cruel and inhumane punishment'.[119] Third, the approach adopted by *Thomas* and *Lewis*, with which, the CCJ made clear, 'we have expressed our disagreement'.[120] The fourth one, relating to the use of legitimate expectations, clearly piqued the interest of Chief Justice de la Bastide and Justice Saunders.[121]

Commonwealth Caribbean courts have not grappled with the central issues which lie at the heart of legitimate expectations, in particular legal protection for substantive legitimate expectations.[122] However, it has raised its ugly head in the context of death penalty litigation in the Commonwealth Caribbean, and there has been a dearth of decisions by the Privy Council making reference to this public law concept to give life to the appellants' argument that the State is obliged to await the conclusion of the international legal process they had initiated before it can lawfully execute them. These decisions have not dealt with the issue of: first, the method by which such legitimate expectations are actually created; second, where they are created, whether they lead to only procedural as opposed to substantive legitimate expectations; and, third, what test should the courts use in determining whether to give effect to a substantive legitimate expectation. These issues will be dealt with *seriatim*. It is against this background that the decision in *Joseph and Boyce* will be analysed to also understand whether, first, the CCJ was at all cognisant of the implications of its recognition of substantive legitimate expectations without any rigorous analysis; and, second, the test used by the CCJ was one which could properly guide the courts going forward in relation to substantive legitimate expectations. For present purposes, we have put aside the conceptual difficulty raised by the subject matter of the legitimate expectation in *Joseph and Boyce* – an unincorporated treaty – and focus on the aspects of the decision that will have far-reaching implications for Commonwealth Caribbean public law.

It is not surprising that the CCJ found that a legitimate expectation existed on the facts, as presented to them. The case for such a finding was *a fortiori*. First, there was ratification by the Barbados Government of the American Convention on Human Rights. This was not, however, enough to found a legitimate expectation, in my view. More was needed. The CCJ cited the decision of the Australian High Court in *Teoh*, but it did not opine on the question of whether ratification alone could give rise to a legitimate expectation, and, given the nature of the reasoning of the CCJ, it did not rely on that case for its decision in relation to legitimate expectations. Second, there were positive statements from the executive that they would abide by the treaty in relation to such condemned prisoners.[123] Third, there existed previous practice by the Barbados Government to allow those prisoners to have their petitions heard and adjudicated upon before execution.[124] Fourth, Parliament, in amending the Constitution, impliedly recognised that it was the practice and indeed the obligation of the State to await the Commission's

116 Ibid.
117 Ibid at [108].
118 Ibid at [111].
119 Ibid at [112].
120 Ibid at [113].
121 Ibid at [114].
122 A clear example of this is the Barbados case of *Leacock v Attorney General* (2005) 68 WIR 181.
123 *Joseph and Boyce* at [118].
124 Ibid.

process, at least for some period of time.[125] Therefore, the conclusion that 'the respondents had a legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the [international human rights] proceedings they had initiated'[126] seems irresistible.

One of the major criticisms that could be made of this aspect of the decision was that the CCJ did not hear any arguments from either side on the use of legitimate expectations in this context. If that had been done, the arguments for and against such an approach might have been canvassed before the court. Indeed, the conceptual difficulty noted below would have been fully argued to assist the CCJ in making its decision. However, we are left in the dark as to how to interpret and make sense of the decision. Importantly, the fundamental issues concerning the application of legitimate expectations – in particular, substantive legitimate expectations – in this context were simply not addressed. The CCJ merely relied on the reasoning in decisions relating to substantive legitimate expectations in England as the basis upon which to found the legitimate expectation in its decision. That, in my view, is entirely sensible but these decisions, for example *Ex p Hamble Fisheries*[127] and *Ex p Coughlan*,[128] can only go so far, because the central issue raised in *Joseph and Boyce* was simply not addressed by the courts in those cases – indeed, they could not have been, in light of the nature of the expectations created therein. In particular, the CCJ itself noted that it was 'not specifically directed to the *evidence* on which any such expectation might be grounded. Nor were we addressed on the principles that would govern it.'[129] This is quite a startling admission. There is no question, in light of the subject matter at issue, the fundamental questions raised, and the fact that a decision on this point was not necessary, that the CCJ ought to have exercised judicial restraint and should not have addressed this issue as comprehensively as it did in its judgment. But it did, and we are left to make sense of the decision and its far-reaching implications.

I have little difficulty with the conclusion of the CCJ in *Joseph and Boyce* for the following reasons: first, the class of individuals affected by that decision is a narrow one indeed – condemned prisoners – and there was no intention on the part of the CCJ to extend that principle beyond the parameters of the decision. Second, the conclusion does not involve important policy-making decisions. In other words, it does not risk assuming the mantle of the executive or the legislator. Third, the conclusion of the CCJ was simply that the condemned prisoners had a legitimate expectation that the State would wait for a reasonable period for completion of the international proceedings before it could lawfully execute them. Fourth, the court did not conclude that the content of the international rights instruments could *generally* form part of domestic law – this was not *as such* the subject matter of the legitimate expectation, for if it were, and the court had held that the international treaty was incorporated into domestic law for all and sundry, via the legitimate expectation route, then, I would imagine, the decision would, of course, be quite problematic. In other words, the effect of the decision is simply that *in relation to the appellants*, the content of the international treaty must have some force in domestic law via the legitimate expectation which had arisen. Since the decision of the CCJ rests solely on timing (that is, the substantive expectation to the procedure under the relevant treaty), little can be extrapolated from the decision, even if the CCJ might have endorsed decisions such as *Teoh* where the legitimate expectation was only of a procedural benefit. In *Joseph and Boyce*, the legitimate expectation was 'procedural' (in the sense outlined above) and, as such, could hardly be said to involve macro-political considerations, on which the courts should properly avoid

125 Ibid at [116].
126 Ibid at [118].
127 [1995] 2 All ER 714.
128 [2001] QB 213.
129 *Joseph and Boyce* at [77] (emphasis added).

adjudicating. Therefore, the decision is almost an inevitable one where the subject matter of the expectation and the consequences for the condemned prisoner is concerned. So far, the result seems unassailable, if it is accepted that it does not create any general binding principle of law, but is clearly a result driven solely by the facts presented.

Legitimate expectations can arise in a myriad of circumstances. In particular, the three classes identified by the recent decision of the Court of Appeal in *Ex p Murphy*,[130] namely: first, if the public authority has distinctly promised to consult those affected or potentially affected, then, ordinarily, it must consult (the paradigm case of procedural expectation). Second, if the public authority has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). Third, if, without any promise, the public authority has established a policy distinctly and substantially affecting a specific person or group who, in the circumstances, was in reason entitled to rely on its continuance and did so, then, ordinarily, it must consult before effecting any change (the secondary case of procedural expectation). The first point to note about legitimate expectations is that they give legal force to what are 'non-rights', if I may use that phrase. Therefore, a 'change in policy' or an 'express promise to preserve an existing policy' falls into that category. They are transformed into a legally enforceable right if they give rise to a legitimate expectation, which occurs broadly where the authority has 'distinctly promised to consult' or 'distinctly promised to preserve existing policy' in relation to those affected (or those potentially or substantially affected) or has 'established a policy distinctly and substantially affecting a specific person or group'. Hence, in *Joseph and Boyce*, there was a clear promise to preserve an existing policy, and a potential change in policy by the executive, to a 'specific group or person' – the condemned men. The case for finding a legitimate expectation on the facts was a compelling one. It could not be correct to suggest that a legitimate expectation cannot arise in relation to a process which originates from an international treaty. Before the court pronounces on the 'change in policy' or the 'express promise made', the applicant has no legal right. The legitimate expectation is the route by which the 'non-right' is clothed with legality. When that is accomplished – by establishing that a legitimate expectation has arisen – then that 'non-right' becomes a 'legal right' which the court will give effect to. In this case it is the legitimate expectation that gives the international process legal validity in domestic law *in relation to the appellants* – for if it were already 'recognised by law' or a 'process recognised by law' then surely there would be no need to have recourse to legitimate expectations!

It is a constitutional principle that unincorporated treaties have no binding force in domestic law unless they are incorporated into domestic law through legislation. Constitutional principles do not exist in a vacuum – so any attempt at delineating the boundaries of a principle without regard to the basis for that principle is bound to be problematic. In *Ex parte Brind*, it was noted that:

> it is a *constitutional principle* that a treaty obligation, undertaken by the Crown as a matter of prerogative power, can only be woven into the domestic law if Parliament so decrees. It follows that the court cannot itself purport to incorporate an *obligation* since it would be arrogating to itself the exercise of an authority only vested in the legislature.[131]

It must be emphasised that the limitation on the court's power is in relation to obligation, but legitimate expectations are clearly recognised principles of domestic public law. That their content in the exceptional case is derived in part from a treaty obligation is beside the point. As a result, the constitutional principle enunciated above cannot, and should not, be applied

130 [2008] EWCA Civ 755.
131 [1991] AC 696 at 709 (emphasis added).

without exception, for it would be contrary to the rule of law that the executive can act arbitrarily or abuse its powers, while the courts remain powerless. The question of what process can be recognised as legal in any legal system is a question of national law. One cannot but agree that, under our constitutions, law is defined as common law and statute. So, if the courts say that a particular international process has domestic effect (by whatever means), it makes that process part of the common law of that jurisdiction. The courts are very cognisant of their role under the Constitution and that only Parliament has the power to legislate, but, when faced with deliberate and calculated actions by the executive to frustrate the legitimate expectations of a specific group of persons, should the courts be impotent to act to ensure that there is no abuse of power? Surely not! The concept of substantive legitimate expectations was born out of the struggle the courts had in deciding the circumstances in which a public authority should be bound by its promise made to, or previous practice in relation to, a specific group or persons. The courts are now unanimous in their view that that would be where reneging on that promise or changing the policy by the public authority amounts to an abuse of power.[132] If the courts were able to overcome arguments that accepting substantive legitimate expectations amounted to usurping the executive function, why should they shirk when the argument is made that it would be assuming the legislative function? We all now know that executive power is subject to judicial review, not only administrative powers.[133] The separation of powers doctrine requires the courts to be restrained, but, when confronted with such a blatant abuse of power by the executive, it should not allow the executive to simply hide behind the curtain of parliamentary sovereignty! Given the narrow nature of the doctrine, the same way that substantive legitimate expectations do not run the risk that the court is assuming the role of the decision-maker, its application to international treaties (in the *specific* manner outlined above) would hardly generally result in the court assuming the role of the legislator. As a result of the decision of the CCJ in *Joseph and Boyce*, the constitutional principle relating to the effect of international treaties and domestic law must yield to any *legitimate* expectation found to exist. It cannot be emphasised enough that proving such an expectation is not as easy as it might appear.

To reiterate, the CCJ in *Joseph and Boyce* noted the following factors which contributed to the establishment of the legitimate expectation: (a) ratification (which clearly was not of itself sufficient to found a legitimate expectation – properly understood); (b) positive statements by the State to abide by the Convention; (c) an established practice by the State of allowing the petitions of condemned persons to be processed before execution; and (d) Parliament in making that amendment impliedly recognised that it was the practice and indeed the obligation of the State to await the Commission's process, at least for some period of time. In this respect, the question always is 'to what has the public authority, whether by practice or by promise, committed itself' (*ex p Bibi*[134])? The Government of Barbados specifically committed itself not to execute the condemned men before the final determination of their cases before international bodies. Therefore, the substantive legitimate expectation was to the procedure that ought to be followed in the case of the condemned persons, viz. the State having to await the completion of the international processes before it could lawfully execute them. This meant that, in relation to those condemned persons, the treaty must have legal effect in domestic law for, clearly, the process that the State must await completion originates from the treaty obligation. For the following reasons, the decision of the CCJ in *Joseph and Boyce* will not result in the 'wholesale enforcement of unincorporated treaties': (a) the need to find, *inter alia*, a 'distinct promise to consult' or 'distinct promise to preserve existing policy' or 'established policy' in

132 *Ex p Coughlan* [2001] QB 213.
133 *C.O. Williams Construction Ltd v Blackman* [1995] 1 WLR 102.
134 [2002] 1 WLR 237.

order to establish the legitimacy of the expectation; and (b) that expectation must be made specifically to those affected (or those potentially or substantially affected) or a distinct group of persons. These factors narrow the scope of the doctrine, as it necessarily should be – in this case, to the treaty obligations in relation to the condemned prisoners, and in circumstances in which the expectations that arose were quite limited. The CCJ also referred to other reasons, including: (a) the desirability of giving the condemned person every opportunity to secure the commutation of his sentence; (b) the direct access which the treaty affords him to the international law process; (c) the disproportion between giving effect to the State's interest in avoiding delay even for a limited period in the carrying out of a death sentence; and (d) the finality of an execution.

The CCJ began its discussion of legal protection for the legitimate expectations by asking 'whether, and if so to what extent, the legitimate expectation of the respondent should produce a substantive benefit'.[135] The issue of whether the court should give effect to a substantive legitimate expectation, the court observed, 'is still a matter of ongoing judicial debate', citing *Ex p Hamble Fisheries*.[136] If that issue was discussed in the context of the approaches of final courts of different jurisdictions, then that remark would be unassailable, but it is clearly understood that ever since *Ex p Coughlan* the debate relating to whether the English common law should recognise substantive legitimate expectations had ended in favour of allowing such expectations. The CCJ correctly referenced *Ex p Coughlan*, noting that the legitimate expectation therein was 'rooted in an express promise, repeatedly made to a select, identifiable group of persons, that had the character of a contract' and that 'unwarranted frustration of the legitimate expectation [was equated] with an abuse of power and the case was treated almost like an estoppel in private law, justifying a standard of review by the courts that was higher than would normally be the case'.[137]

The review of the authorities dealing with the question of the standard of review was scant indeed, with the court referring to only two other decisions, one being that of Chief Justice Simmons in *Leacock v Attorney General*.[138] There was no question that the decision of the CCJ was rooted in substantive legitimate expectations contrary to the view that '[t]he CCJ perhaps confused the question of whether such an expectation was substantive or procedural, yet this does not take away from the essence of the argument.'[139] The issue raised in this decision concerned whether the appellants had a substantive right that the State would not execute them pending the determination of their petitions before the international human rights bodies. This clearly is a substantive legitimate expectation. It was not rooted in any expectation that they would be allowed a right to be heard or make representations before they were executed. The CCJ can be faulted for not being as rigorous as one might have expected, since the court was accepting that substantive legitimate expectations form part of Barbados law. However, the court was very cognisant of its role in relation to substantive legitimate expectations and how it was to resolve legal and policy implications of accepting that doctrine.

Lord Bingham in *Ex p Coughlan* observed that 'the courts' role in relation to the third category is *still controversial*; but, as we hope to show, it is now clarified by authority'.[140] Notwithstanding the CCJ's very limited review of the case law relating to substantive legitimate expectations, it was able confidently to assert that:

135 *Joseph and Boyce* at [119].
136 Ibid.
137 Ibid.
138 (2005) 68 WIR 181.
139 R-M. Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn), 2008, London: Routledge-Cavendish, 224 at fn 96.
140 *Ex p Coughlan* at [59] (emphasis added).

> In matters such as these, *courts must carry out a balancing exercise*. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority.[141]

The CCJ then proceeded to apply that test to the factual matrix before it. It noted that, on the one hand, there was the legitimate expectation of the condemned men that they 'will be permitted a reasonable time to pursue their petitions with the Commission with the consequence that any report resulting from the Inter-American process will be available for consideration by the Barbados Privy Council';[142] whereas, on the other, 'there is whatever the State may advance as an overriding interest in refusing to await completion of the international process before carrying out the death sentence.'[143] The CCJ noted that, 'apart from the time constraints of the *Pratt* time limit', the Barbados Government claimed 'no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled'.[144] It therefore concluded that:

> In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. *The substantive benefit the condemned men legitimately expect is actually as to the procedure that should be followed before their sentences are executed*. It does not extend to requiring the BPC [Barbados Privy Council] to abide by the recommendations in the report.[145]

The CCJ agreed that the substantive legitimate expectation that the condemned person had was to the procedure that they expected to be followed in their case, and presumably for all persons on death row whose cases were before an international body. The CCJ recognised that the State had no compelling interest, apart from abiding by the *Pratt* guideline, which, it noted, was never meant to be applied as rigidly as it seems to have been applied by Caribbean courts and administrators of justice alike.[146] Since the legitimate expectation was to a substantive right (although, exceptionally, it was to a procedure under the relevant treaty) where broader political issues and considerations would hardly militate against giving effect to it, the decision of the CCJ in *Joseph and Boyce* does not risk fettering the discretion of the executive or assuming the mantle of the decision maker.

The CCJ anticipated some of the arguments that might be made against the use of legitimate expectations in this context. As a result, it cautioned that any '*protracted delay* on the part of the international body in disposing of the proceedings initiated before it by a condemned person, *would justify the State, notwithstanding the existence of the condemned man's legitimate expectation, proceeding to carry out an execution before completion of the international process*'.[147] In light of the agenda of these human rights bodies to abolish the death penalty throughout their member states, they could very well conceivably, in light of the CCJ's judgment, prolong their processes to extend the period of the condemned person on death row, with the result that the *Pratt* time limit would be breached, resulting in commutation of the death sentence to life imprisonment.

141 *Joseph and Boyce* at [124] (emphasis added).
142 Ibid at [125].
143 Ibid.
144 Ibid.
145 Ibid (emphasis added).
146 Ibid.
147 Ibid at [126] (emphasis added).

This qualification by the CCJ preserves the right of the State to act as it so desires, despite the legitimate expectation, when there is an inexcusable and protracted delay in determining such cases before those international bodies. The rationale for this, the CCJ noted, was grounded in either the legitimate expectation itself, meaning that it would last so long as there was no undue delay from the international bodies, or that the legitimate expectation may properly be thwarted by 'an overriding public interest in support of which the State may justifiably modify its compliance with the treaty'.[148]

The CCJ, therefore, concluded that the reading of the death warrants to the respondents breached their legitimate expectations and it also 'constituted a breach of [their] right to the protection of the law'.[149] In one sentence, the CCJ has unwittingly given constitutional status to a concept that has only just breathed life less than eight years ago, and whose boundaries are still being delineated. That newly found constitutional principle 'can only be defeated by some overriding interest of the State'.[150] If the State 'imposes reasonable time limits within which a condemned man' may appeal to such international bodies, then it cannot be said that, in so doing, the State has not shown a good faith intention to abide by its treaty obligations.[151] Even if such a right to petition such bodies exist, the State 'cannot reasonably be expected to delay indefinitely the carrying out of a sentence, even a sentence of death, lawfully passed by its domestic courts pending the completion of a petition by an international body'.[152] This was stressed repeatedly by the CCJ, indicating that, although its conclusion mirrors that of *Lewis*, 'save that the obligation of the State to await the outcome of the international process is not in our judgment open-ended', it followed a different route.[153]

The CCJ's decision in *Joseph and Boyce* attempted to emancipate Commonwealth Caribbean jurisprudence from the strained legal analysis of the Council in *Thomas* and *Lewis*. The CCJ jettisoned the notion that the due process clause or the protection of the law clause applied to any legal process, including rights under international human rights treaties, thereby extending the criminal justice system of Commonwealth Caribbean States to the effect that a condemned prisoner would not be executed until the completion of all these processes. The route by which the CCJ achieved this death-knell is troublesome, for it seemingly runs counter to the constitutional principle that international treaties do not form part of the domestic legal process until they have been incorporated by the legislature. This was the same objection that plagued the reasoning of the Privy Council in *Thomas* and *Lewis* – although not the only one. As argued above, the rule of law dictates that the courts, as guardians of the Constitution and the rights of citizens, should not be impotent to provide a remedy where there has been an abuse of power by the executive. Where the executive has distinctly promised to preserve existing policy (that condemned prisoners will not be executed before the final determination of the international process) for a specific person or group (condemned prisoners) who would be substantially affected by the change (suffer death), then, ordinarily, it must keep its promise. This is the substantive legitimate expectation – to frustrate that expectation where there is no significant public interest consideration militating against it is an abuse of power. The CCJ's decision in *Joseph and Boyce* clearly shows that the courts will not countenance such, and, where appropriate, will not hesitate to act.

148 Ibid at [126].
149 Ibid at [128].
150 Ibid at [130].
151 Ibid.
152 Ibid.
153 Ibid at [132].

RIGHT TO PROPERTY AND DUE PROCESS

The recently accepted concept of legitimate expectations by English courts – in particular, substantive legitimate expectations – has not been fully explored by the courts in the Commonwealth Caribbean.[154] They are usually content to follow the lead of the English courts: *Leacock v Attorney General of Barbados*. However, the CCJ in its decision in *Joseph and Boyce v Attorney General of Barbados*, as noted above, made an interesting link between the legitimate expectations and due process in Commonwealth Caribbean constitutions. In the process of articulating the requirements for substantive legitimate expectations in Commonwealth Caribbean public law, the Judicial Committee of the Privy Council ('Privy Council') in its decision in *Paponette v Attorney General of Trinidad and Tobago*[155] has also referred to that link without much articulation. What then does the ancient concept of due process, which has its roots in the Magna Carta,[156] add to our understanding of the common law concept of legitimate expectation. If the reasoning in these two cases is correct, it would revolutionise constitutional thinking in Commonwealth Caribbean public law jurisprudence. Now that arguably the concept of legitimate expectations is firmly rooted in English public law, the issues that now arise are on the boundaries, and focus on the reach of the concept. In its latest instalment of relating to substantive legitimate expectations, the English Court of Appeal, speaking through Laws LJ, in *R (Bhatt Murphy (a firm) and others) v Independent Assessor; R (Niazi and others) v Secretary of State for the Home Department*[157] accepted that a substantive expectation would arise where the authority has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, and ordinarily it must keep its promise.[158] Where this is established, the test to be applied if the public authority reneges on its promise is that set out in *Ex p Coughlan*, namely, '*whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power*. Here, once the legitimacy of the expectation is established, *the court will have the task of weighing the requirements of fairness against any overriding interest* relied upon for the change of policy.'[159] This test has been applied, albeit reluctantly, in numerous leading Court of Appeal decisions.[160] Even if Lord Hoffman in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council*[161] accepted the test in *Ex p Coughlan* as correct, Lord Carswell in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* opined that he 'would therefore prefer not to express a concluded opinion on the limits of the concept [of substantive legitimate expectations]'.[162]

In *Paponette*, the appellants, members of the Maxi-Taxi Association ('the Association'), argued that representations made by the Minister of Works and Transport in 1995 induced them to relocate their taxi stand in Broadway to City Gate but these representations were later breached. As mentioned in Chapter 9, in 2004 the Association filed a constitutional motion in the High Court, claiming, *inter alia*, that: (i) the actions of the State had frustrated their legitimate expectations of a substantive benefit in a way which affected their property rights protected under section 4(a) of the Constitution; and (ii) they had been treated unfavourably by

154 This section borrows heavily from E. Ventose, 'Legitimate Expectations and Due Process of Law in Commonwealth Caribbean Public Law' (2011) *Law Quarterly Review* 34.
155 [2010] UKPC 32.
156 *Thomas v Baptiste* [2000] 2 AC 1 at 32.
157 [2008] EWCA Civ 755.
158 Ibid at [50].
159 *Ex p Coughlan* at [57] (emphasis added).
160 Namely: *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115; *R v Newham London Borough Council, ex p Bibi* [2002] 1 WLR 237; *Rowland v Environment Agency* [2004] 3 WLR 249; and *R v Secretary of State for the Home Department, ex p Abdi and Nadarajah* [2005] EWCA Civ 1363.
161 [2003] 1 WLR 348 at [34].
162 [2008] UKHL 61; [2009] 1 AC 453 at [133].

the Government as compared with other maxi-taxi owners and that they had thereby suffered a breach of their right to equal treatment under section 4(d) of the Constitution. In 2008, the arguments were accepted by Ibrajaim J and he granted the orders sought, but his decision was reversed by the Court of Appeal in 2009. The appellant appealed to the Privy Council seeking a reversal of the Court of Appeal's decision.

The critical and most important argument of the appellants was the first one: that by depriving them of their substantive legitimate expectations, the Government had infringed their right to the enjoyment of property and the right not to be deprived thereof *except by due process of law*, contrary to section 4(a) of the Constitution of Trinidad and Tobago. The Board, applying its previous decisions in *Campbell-Rodriques v Attorney-General of Jamaica*[163] and *Grape Bay Ltd v Attorney General*[164] concluded that there was an infringement of the appellants' section 4(a) rights.[165] Having established that, the Board proceeded to consider 'what was the real focus of the argument in relation to the section 4(a) issue before us, namely whether the appellants were deprived of their right to enjoyment of property "by due process of law" '.[166] It then began its discussion of that issue under the sub-heading, '*"Except by due process of law": substantive legitimate expectation*'. Sir John Dyson SCJ, speaking for the majority of the Board, applying the applicable principles from *Ex p Bancoult, Ex p Coughlan, Ex p Nadarajah* and *Ex p Bibi*, accepted that there was a breach of the applicants' substantive legitimate expectation, concluding that, first, the representations were clear, unambiguous and devoid of relevant qualification; second, the representations were made to a defined class, namely the maxi-taxi owners and operators who used routes 2 and 3; third, the representations were relied upon by the appellant; fourth, the critical representation was that they would not be under the control and management of the PTSC.[167] These facts, the Board concluded, were 'enough to give rise to a substantive legitimate expectation that the owners and operators would be permitted to operate from City Gate and would not be under the control or management of the PTSC'; and, since the 'government has not proved that there was an overriding public interest which justified the frustration of this legitimate expectation', the Board further concluded that the appellants' case on section 4(a) of the Constitution succeeded.[168]

This decision makes it clear that the regulations which imposed the user fee did not *per se* amount to an interference with appellants' property rights contrary to section 4(a) of the Constitution, but any such deprivation must be done by due process of law. Therefore, by importing the concept of legitimate expectations into the constitutional notion of due process, it is arguable the Board was perhaps, by the back door, providing some constitutional status to legitimate expectations. We have seen this before. In *Joseph and Boyce*, the CCJ held that the following factors contributed to the appellants' legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the proceedings they had initiated under the American Convention on Human Rights (ACHR) by petition to the Commission: (a) ratification of the ACHR; (b) positive statements by the State to abide by its commitments under the ACHR; (c) an established practice by the State of allowing condemned persons to allow their petitions to be processed before execution; and (d) Parliament in making a constitutional amendment impliedly recognised that it was the practice and indeed the obligation of the State to await the Inter-American Commission's process, at least for some

163 [2007] UKPC 65.
164 [2000] 1 WLR 574; (1999) 57 WIR 62.
165 [2010] UKPC 32 at [25].
166 Ibid at [26].
167 Ibid at [49].
168 Ibid.

period of time.[169] Section 11(c) of the Constitution of Barbados provides for a fundamental right to 'the protection of the law'. In *Lewis v Attorney General of Jamaica* the Board noted that it was not right to distinguish between a Constitution which does not have a reference to 'due process of law', for example, the Constitution of Trinidad and Tobago,[170] but does have a reference to 'the protection of the law', for example, those of Jamaica and Barbados. Chief Justice de la Bastide and Justice Saunders, giving the leading judgment of the CCJ, noted that: 'Procedural fairness is an elementary principle permeating both concepts and therefore, pursuant to section 11, a condemned man has a constitutional right to *procedural fairness* as part of his right to protection of the law.'[171] The Justices were 'prepared to ground [their] opinion on a breach of the right to the protection of the law as distinct from a breach of the right to life' under the Constitution of Barbados.[172] Since the Barbados Government claimed no overriding interest which could defeat the appellants' legitimate expectation, the Justices claimed that the appellants should be allowed a reasonable time to complete the processing of their petitions.[173]

Although both cases use the concept of legitimate expectations to ground a constitutional challenge, there is a slight difference between the two. In *Joseph and Boyce*, the CCJ seemingly accepted that the protection of the law clause found in section 11(c) of the Constitution of Barbados covered legitimate expectations, thereby arguably making it a free-standing constitutional ground on which to challenge government action. In *Paponette*, the argument was more nuanced – the challenge was not that frustration of the legitimate expectation could form the basis of review, but that its frustration meant that the deprivation of property by the Government was *not* done by due process of law. In *Thomas*, the Privy Council claimed that '[t]he due process of law provision fulfils the basic function of preventing the arbitrary exercise of executive power and places the exercise of that power under the control of the judicature.'[174] The Board had explained in *Boodram v Attorney General of Trinidad and Tobago* that the concept has two further elements: first, the right to protection against the abuse of power; and second, that State powers, when exercised against individuals, must be exercised lawfully and not arbitrarily.[175] If one accepts the statement by Laws LJ in *Ex p Abdi and Nadarajah* that the principle of legitimate expectation is grounded, not only in preventing abuse of power, but in the 'requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public',[176] it is clear that legitimate expectations, whether procedural or substantive, would fall under the rubric of 'due process of law' or 'protection of the law', as found in most constitutions of Commonwealth Caribbean countries.

Since the due process and protection of the law clauses found in section 4 of the Constitution of Trinidad and Tobago are 'in the nature of a preamble',[177] the Board in *Grape Bay* held that they were not separately enforceable. However, the Board arrived at the opposite conclusion in *Lewis* and *Thomas*. The CCJ in *Joseph and Boyce* has accepted the latter approach. That debate aside, the Board in *Paponette* has seemingly endorsed the approach taken by the CCJ in *Joseph and Boyce* and has put the concept of legitimate expectations right at the heart of the due process and protection of the law clauses in Commonwealth Caribbean constitutions.

169 Ibid at [118].
170 See *Thomas v Baptiste* [2000] 2 AC 1; [1999] 3 WLR 249.
171 *Joseph and Boyce* at [64] (emphasis added).
172 Ibid at [129].
173 Ibid at [128].
174 *Thomas* at [33].
175 [1996] AC 842 at 854.
176 *Abdi and Nadarajah* at [67] and [68].
177 *Joseph and Boyce* at [58].

NATURAL JUSTICE

The influence of constitutional and human rights law is also seen in decisions relating to breach of natural justice. In *Rees v Crane*,[178] the applicant applied to the High Court, *inter alia*, for: (a) an order of *certiorari* to quash a decision of the Chief Justice that the applicant should cease to preside in court; (b) an order of *mandamus* to compel the Chief Justice to do such administrative acts as necessary to permit the applicant to perform his functions as a judge of the High Court of Trinidad and Tobago; and (c) an order of prohibition restraining the Judicial and Legal Services Commission (JLSC) from representing to the President under section 137 of the Constitution that the question ought to be investigated.[179] Three main issues arose for consideration: first, whether principles of natural justice and/or fairness had been violated; second, whether the decision of the Chief Justice and JLSC were *ultra vires* and biased; third, whether the JLSC should have notified the applicant of the charges against him and given him a fair opportunity of responding. The Privy Council noted that the respondent argued that the decision of the JLSC to represent to the President that the question of removing him from his office should be investigated, and the consequent appointment of the members of the Tribunal was based, firstly, under the constitutional motion on the alleged breach of section 4 (a), (b), 5(2) (e) and (h) of the Constitution, and, secondly, on the application for judicial review, on the basis that the JLSC acted unfairly and in breach of the principles of fundamental justice.[180] The respondent claimed that the appellants did not notify him that the question of removing him was being considered, nor did they give him any notice of the complaints made against him, nor did they give him any chance to reply to them. The Board questioned whether section 5(2) of the Constitution was relevant at all and was doubtful since it imposed a prohibition only on the Parliament of Trinidad and Tobago, but the 'protection of the law' referred to in section 4(b) of the Constitution would include the right to natural justice. In its view, a claim under the constitutional motion and on the application for judicial review thus, in substance, raised the same issue.[181] With that alone, the Privy Council has 'constitutionalised' the rules relating to natural justice. This much has not been appreciated by many of the courts in the Commonwealth Caribbean for not many have made that direct claim for breach of the due process or protection of the law clause where there has been a breach of natural justice. The Board claimed that section 137(3) of the Constitution envisaged three stages, before the JLSC, the Tribunal and the Judicial Committee of the Privy Council (JCPC), and, indeed, there might be a prior stage since it was likely that complaints would have originated with or been channelled through the Chief Justice.[182] The Board noted that, in a number of cases, it had been decided that in certain preliminary or initiating procedures there was no right on the part of an individual to know of complaints or to be allowed to answer them. It explained that the right might arise at a later stage and the appellants accepted that a judge being investigated had a right to know of complaints, and to have an opportunity to deal with them, before the tribunal and before the JCPC.[183] As a result, the Board claimed that the question which fell to be decided was whether, in this case, the right to be informed and to reply at a later stage dispensed with the obligation or duty to inform at the JLSC stage.

The Board claimed it was clear from the English and Commonwealth decisions that there were many situations in which natural justice did not require that a person must be told of the

178 TT 1994 PC 1.
179 Ibid at 2.
180 Ibid at 11.
181 Ibid.
182 Ibid at 12.
183 Ibid.

complaints made against him and given a chance to answer them at the particular stage in question.[184] It continued that the essential features leading the courts to this conclusion included the fact that the investigation was purely preliminary; that there will be a full chance adequately to deal with the complaints later; that the making of the enquiry without observing the *audi alteram partem* maxim was justified by urgency or administrative necessity; that no penalty or serious damage to reputation was inflicted by proceeding to the next stage without such preliminary notice; and the statutory scheme properly construed excluded such a right to know and to reply at the earlier stage.[185] The Board noted that, plainly, in the present case, there would have been an opportunity for the respondent to answer the complaint at a later stage before the tribunal and before the JCPC.[186] Observing that this was a pointer in favour of the general practice but it was not conclusive, it claimed that section 137, which set up the three-tier process, was silent as to the procedure to be followed at each stage and, as a matter of interpretation, was not to be construed as necessarily excluding a right to be informed and heard at the first stage. On the contrary, the Board held that its silence on procedures in the absence of other factors indicated, or at least left open the possibility, that there might well be circumstances in which fairness required that the party whose case is to be referred should be told and given a chance to comment.[187] It claimed that it was not *a priori* sufficient to say, as the appellants in effect did, that it was accepted that the rules of natural justice applied to the procedure as a whole but they did not have to be followed in any individual stage. In the Board's view, the question remained whether fairness required that the *audi alteram partem rule* be applied at the JLSC stage.[188]

The Board claimed that one thing was abundantly plain in this case, namely that the appellants could not rely on urgency or administrative necessity to justify not telling the respondent what was being complained of.[189] In addition, the Board was of the view that the JLSC was not intended simply to be a conduit by which complaints were passed on by way of representation. The Privy Council stated that, first, the JLSC, before it represents, must thus be satisfied that the complaint has *prima facie* sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings; [190] and, second, the JLSC must act fairly both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President. It claimed that it was not correct to say that the JLSC's action was analogous to the decision of a police officer to charge a defendant in a criminal process, claiming that the composition of the JLSC and the nature of the process made what happened in the instant case more akin to a quasi-judicial decision.[191] The Board claimed that the nature of the broad categories of complaint made in this case was also a relevant factor in deciding what fairness demanded and that the JLSC represented that the question of removal arose from the judge's 'inability to perform the functions of his office', which itself derived 'from infirmity of body and/or misbehaviour'.[192] It claimed that these were both serious charges and that they might, in whole or in part, have been capable of rebuttal if the respondent had known what the precise complaints were.[193] The Board continued that it was true that a decision to make a representation was not itself a punishment or penalty and

184 Ibid at 15.
185 Ibid.
186 Ibid at 16.
187 Ibid.
188 Ibid.
189 Ibid.
190 Ibid.
191 Ibid at 17.
192 Ibid at 18.
193 Ibid.

that the eventual dismissal required two further investigations but this was too simplistic an approach in resolving the issues in the case.[194] It continued that, if the respondent had had a chance to reply to such charges and had been given the opportunity to do so before the representation was made, this suspicion and damage to his reputation might have been avoided; and that if he gave no adequate reply then the matter could have gone forward without justifiable complaint on his part.[195]

The Board claimed that, moreover, even in the absence of bias, the fact that the complaints were being made by a member of the JLSC itself required that particular attention should be paid to the need for fairness.[196] As a result, the Board noted that the consideration of these factors and its conclusion on them were not based specifically on the nature of the judicial function or the fact that the respondent was a judge.[197] It was of the view that a similar approach would apply *mutatis mutandis* to other persons who could rely on the same considerations, noting that, however, a judge, though by no means uniquely, was in a particularly vulnerable position, both for the present and for the future, if suspicion of the kind referred to is raised without foundation. The Board claimed that fairness, if it could be achieved without interference with the due administration of the courts, required that the person complained of should know at an early stage what is alleged so that, if he has an answer, he could give it.[198] It explained that if natural justice required that he be given notice of the complaints before the JLSC and an opportunity to deal with them, the way in which these various incidents were dealt with was not in compliance with that obligation.[199] The Board concluded that, in all the circumstances, the respondent was not treated fairly: he ought to have been told of the allegations made to the JLSC and given a chance to deal with them, not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply.[200]

In *Rowley v The Integrity Commission*,[201] the Integrity Commission took the decision to publish a report forwarded to the Director of Public Prosecutions (DPP) relating to the appellant, a Member of Parliament. The appellant applied for judicial review of that decision, claiming that he was not afforded an opportunity to be heard on allegations made against him. The court noted that, compared to the United Kingdom, which did not have such a challenge, in Trinidad and Tobago the written Constitution protected and guaranteed fundamental human rights and freedoms, including the right of the individual to the protection of the law and the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.[202] The court continued that these rights had been interpreted to include the right of the individual to be informed of the specific allegations made against him and the right to be given an opportunity to deal with them in the circumstances set out in the case of *Rees v Crane*,[203] where it was pointed out that the protection of the law referred to in section 4 (b) of the Constitution would include the right to natural justice. It further noted that the right to be informed of the specific allegations made against an individual and the right to be heard on those allegations have been codified in several enactments in Trinidad and Tobago, including section 38 of the Integrity in Public Life Act. The court ruled that, where there was a breach of an individual's fundamental right to be informed of the specific

194 Ibid.
195 Ibid.
196 Ibid.
197 Ibid at 19.
198 Ibid.
199 Ibid at 21.
200 Ibid.
201 TT 2009 HC 22.
202 Ibid at [53].
203 (1994) 43 WIR 444.

allegations made against him and a breach of the right to be afforded an opportunity to be heard on those allegations, and where the Constitution of Trinidad and Tobago guaranteed those rights, there was no need to establish proof of actual damage for the purpose of the tort of misfeasance in public office.[204]

Ramadhar v Attorney General of Trinidad and Tobago[205] concerned the suspension of the applicant's driver's permit, which he argued infringed his right to a fair hearing and his right to equality of treatment under the Constitution because the permit was suspended without a hearing. The court noted that the applicant did not dispute the fact that the Licensing Authority was empowered under section 61 of the Motor Vehicles and Road Traffic Ordinance to suspend his driving permit. The applicant contested the manner of suspension – that is, without giving him the opportunity to be heard before doing so – which he argued was not in accordance with 'due process of law' as enshrined in the Constitution. The court cited *Abbott v Attorney General of Trinidad and Tobago*, where Lord Diplock stated that:

> 'due process of law' means procedures for the determination of an individual's rights and obligations '*vis a vis*' the State and other public authorities, which conform to the standards of administration of justice in Trinidad and Tobago prior to 1st August 1976 and are described in greater detail though not necessarily exhaustively in section 5(2).[206]

The applicant also argued that the failure by the Licensing Authority to give him an opportunity to be heard before suspending the permit infringed his rights under section 5(2)(e) of the Constitution.[207] The court claimed that the concept of natural justice, generally, required that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position to make representations on their behalf, or to appear at a hearing or enquiry (if one is to be held); and, effectively, to prepare their own case and to answer the case (if any) they have to meet.[208] The court also noted that whether the Licensing Authority was performing a purely administrative function and had a wide discretion, or the Ordinance imposed no procedural requirement, or the applicant had only a privilege and not a right to the permit, were of little consequence, because it was of the view that whatever interest the applicant had in the permit was elevated into a fundamental right by section 4 of the Constitution.[209] In its view, the rights there stated with particular reference to 'security of the person and enjoyment of property and the right not to be deprived thereof except by due process of laws' have been secured since 1962 to the citizens of Trinidad and Tobago by the Constitution then in force. The court ruled there was no dispute that the suspension of the applicant's driving permit deprived him of the use and enjoyment of his motor vehicle. The court concluded the public authorities must adhere to the procedures which are expressed in section 4, of which the right to a fair hearing was one, in accordance with the principles of fundamental justice.

REMEDIES

The courts have considered whether, in an application for judicial review, an applicant could also claim damages for breach of any human rights that might have occurred. In *Bhagwandeen v*

204 TT 2009 HC 22 at [54].
205 TT 1980 HC 50. See also *Hutchinson v Commissioner of Police* (1970) 16 WIR 96.
206 TT 1980 HC 50.
207 Ibid at 4.
208 Ibid at 4–5.
209 Ibid at 8.

Attorney General of Trinidad and Tobago,[210] the Privy Council noted that, if the appellant was not entitled to claim damages on an application for judicial review which involved a claim that a public authority had deprived him of a constitutional right, then there was a viable argument that he was justified in bringing a constitutional motion in order to advance that claim, which should not be regarded as frivolous, vexatious or an abuse of the process of the court.[211] It continued that this would constitute a valid ground of distinction from the decision in *Jaroo v Attorney General of Trinidad and Tobago*,[212] in which the appellant had a sufficient claim in detinue. The Board claimed that it could be said to constitute a bona fide resort to rights under the Constitution, which ought not to be discouraged.[213] It claimed that it was willing, without deciding the point finally, to proceed on the assumption that the appellant was entitled to advance his claim for damages by way of the constitutional motion, the subject of the appeal.[214]

There have been other cases where the issue of the appropriate damages should be awarded in circumstances where the applicant had also claimed, in his judicial review application, a breach of his fundamental rights and freedoms. *Ramjohn v Permanent Secretary in the Ministry of Foreign Affairs*[215] concerned the revocation of the applicant's transfer to the High Commission in London. After noting section 8(4) of the Judicial Review Act of Trinidad and Tobago (JRA), the court observed that there was no such claim for damages as contended by the applicant.[216] The respondent argued that no damages should be awarded as the applicant's transfer was subject to her medical fitness and, at the time of the revocation, the applicant had not yet completed her medical and psychiatric evaluations. The applicant, on the other hand, claimed that while she would have received the same salary on her transfer she would have been entitled to receive additional allowances.[217] The court noted that, in *Rees v Crane*,[218] the Privy Council held that the JLSC had acted in breach of the principles of natural justice and had thereby contravened the respondent's right to the protection of the law, including the right to natural justice, afforded by section 4(b) of the Constitution. The respondent had sought judicial review and redress for an alleged claim for infringement of his constitutional right but had not included a claim for damages. The Privy Council upheld the majority decision of the Court of Appeal to accept the respondent's claim in damages and ruled that the respondent was entitled to damages to be assessed by the High Court. The court claimed that, since the decision in *Rees v Crane*, the JRA came into force and section 8(4) provides that a court may award damages if the applicant included such a claim in his application for judicial review and if the court was satisfied that had the claim had been made in an action begun by the applicant at the same time, the applicant could have been awarded damages. The court reasoned that, applying the decision in *Rees v Crane*, the applicant could have been awarded damages for a breach of her right to the protection of the law contained in section 4(b) of the Constitution. Accordingly, provided that the applicant can establish that a claim for damages had been made in the application, the court claimed that it would make an order that the applicant was entitled to damages to be assessed.

This issue was also considered in *Elcock v Attorney General of Trinidad and Tobago*[219] where the applicant sought an order for compensation. The court claimed that the law, in this regard, was clear that, under section 8(4) of the JRA, an applicant was entitled to recover damages in

210 TT 2004 PC 7.
211 Ibid at [17].
212 [2002] 1 AC 871.
213 TT 2004 PC 7 at [17].
214 Ibid.
215 TT 2007 HC 96.
216 Ibid at [91].
217 Ibid.
218 (1994) 43 WIR 444.
219 TT 2008 HC 53.

judicial review proceedings if damages could have been awarded in an application begun by the applicant at the time of making the application for judicial review.[220] In other words, the court claimed that this meant that damages could only be awarded if there was a right to damages in private law.[221] It noted that, in the Privy Council decision in *Rees v Crane*,[222] the meaning of protection of the law in section 4(b) of the Constitution was interpreted as including the right to natural justice and that contravention of the principles of natural justice constituted a breach of the applicant's constitutional right to the protection of the law. In the instant matter, the court held that the refusal to re-appoint the applicant was procedurally improper in breach of his legitimate expectation, which amounted to a breach of natural justice and would have attracted compensation in the context of a constitutional motion. The courts have stated that 'damages may only be awarded in judicial review proceedings if the court is satisfied that, if the claim had been bought in a private law action begun at the time of making his application, he could or would have been awarded damages'.[223]

220 Ibid at [56].
221 *Maharaj v Statutory Authorities Service Commission* TT 2008 CA 11.
222 [1994] 2 AC 173.
223 *Robinson v Minister of Health and Family Services* BM 2008 SC 11.

CHAPTER 12

REGIONAL ORGANISATIONS, CARIBBEAN COMMUNITY LAW AND INTERNATIONAL LAW

INTRODUCTION

It was only a matter of time before matters relating to Caribbean Community (CARICOM or Community) law would be heard in domestic courts and finally there are quite a few decisions of the Caribbean Court of Justice (CCJ) relating to its original jurisdiction where it has made pronouncements on the legality of actions of member states and CARICOM organs. This chapter focuses on the core principles of CARICOM law and will examine the jurisprudence of the CCJ to determine how it has had to deal with the various issues that have come before it. In addition, this chapter will also consider how issues relating to CARICOM law are dealt with by various courts. It will also examine issues relating to regional institutions and international law matters that have come before the courts for adjudication. The CCJ has noted that, by signing and ratifying the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (CSME) (Revised Treaty or RTC) and thereby conferring on the CCJ *ipso facto* a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law.[1] In its view, a challenge by a private party to decisions of the Community is therefore not only not precluded, but is a manifestation of such a system.

CARICOM LAW AND DOMESTIC LAW

In *Linton v Attorney General of Antigua and Barbuda*,[2] the court had to address the question of whether any issue which required the interpretation or application of the Revised Treaty of Chaguaramas arose on the facts before it. In the instant case, the appellant was deported from Antigua and filed judicial review proceedings seeking an order of *certiorari* to quash the decision to revoke his permission to stay in Antigua on the basis that his expulsion was unlawful. He also complained that this was in breach of his constitutional rights and violated the provisions of the Caribbean Community Skilled Nationals Act 1997, the Caribbean Community Act 2004 and the Immigration and Passport Act ('IP Act').[3] The court explained that it was obvious several of the matters before it were among those which, on the face of it, touched and concerned the interpretation and application of the Revised Treaty.[4] It continued that, in the normal course of events, the court would, therefore, have been obliged, in accordance with Article 214 of the RTC, to refer these matters to the CCJ for a determination before delivering judgment. The court noted that it should be borne in mind that Article 214 was to the following effect:

> When a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or

1 *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ) at [32].
2 AG 2009 HC 23.
3 Ibid at [7].
4 Ibid at [74].

> tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.

This same provision is also found in Article XIV of the the Agreement Establishing the Caribbean Court of Justice (CCJ Agreement). The court then considered whether the referral obligation was binding on it, and in determining this, it further noted that it was important to first determine whether the RTC was part of the domestic law of Antigua and Barbuda.[5] It continued that, in order for the RTC to have the force of law, it required a Notice to that effect to be published; and that it was not provided with any evidential basis to establish that this had been done. The court explained that the onus was on Mr Linton to bring the publication of such a Notice to the court's attention, as section 1 of the IP Act stated that it shall come into operation on such date as the Minister may, by Notice published in the Gazette, appoint. The court noted that it was cognisant of the fact that it could take judicial Notice of legislation but was unable to locate the publication of any Notice which brought the IP Act into operation. As a result, the court ruled that it was, therefore, 'ineluctably driven to accept the proposition urged by the learned Deputy Solicitor General that the Notice has not been published'.[6] Consequently, the court was of the opinion that it is the law that a treaty does not create municipal rights but, rather, operates at the level of international law except in so far as it is incorporated by an Act of Parliament into the national law.[7] It continued that the Ratification of Treaty Act in Antigua and Barbuda clearly put the matter beyond doubt, if there was any; and that it was clear that, in so far as it had not been established that the Caribbean Community Act has been brought into force, there was no basis for the court to hold that the RTC was part of the national law.[8]

The court continued that, under the doctrine of legitimate expectation, as recently accepted by the CCJ in *Attorney General of Barbados v Joyce and Boyce*,[9] a litigant may be able to prove that the action of the State in accepting a treaty and developing the implementing legislation or in making certain public statements creates a legitimate expectation that the Government intended to abide by its treaty obligations. It claimed that, as a general rule, a litigant in domestic courts could not rely upon an international treaty that has been accepted by the State but which has not been incorporated into domestic law by way of legislation.[10] The court noted that, first, an unincorporated treaty had no effect on judicial decisions; second, in order for the national court to be able to exercise its referral power, it was essential that the RTC be incorporated into national law; third, incorporation, as Professor Anderson pointed out, must include the bringing into force of the incorporating legislation as part of domestic law. The court agreed that unless the RTC has been incorporated into national law, it had no effect in relation to the rights of Mr Linton to litigate matters in the local court. As a result, the court concluded that, first, there was no question of the interpretation or application of the RTC which could be argued before it;[11] and second, the RTC was not part of the local law of Antigua and Barbuda and, therefore, the referral obligation did not arise as a matter of statutory provision.[12]

In *Re Chandrash*,[13] the applicant sought judicial review of the decision of the Chief Justice of Trinidad and Tobago to swear in and/or appoint members of the Regional Judicial and

5 Ibid at [75].
6 Ibid at [76].
7 Ibid.
8 Ibid.
9 [2006] CCJ 3, (2006) 69 WIR 104.
10 AG 2009 HC 23 at [79].
11 Ibid at [80].
12 Ibid at [81].
13 TT 2003 HC 118. See also TT 2003 HC 104 for a summary of the reasons provided in that decision.

Legal Service Commission (RJLSC) in accordance with Article V of the CCJ Agreement. The court noted that:

> [i]t is the duty of the Court on an application for leave to apply for judicial review to function as a filtering mechanism; and, second, [a]s such the Court has a discretion to refuse leave, usually determined after considering the following factors, [*inter alia*], whether the applicant has demonstrated that there is an arguable case (on the merits) that a ground for seeking judicial review exists.[14]

It continued that 'the purpose for the requirement of leave (*ex parte*) is to eliminate frivolous, vexatious or hopeless applications and to ensure that only cases fit for further investigation at a full *inter partes* hearing are allowed to proceed'.[15] The court further stated that, first, 'where a judge is initially uncertain as to whether there is or is not a case fit for further investigation, the putative respondent(s) should be invited to attend the hearing of the leave application and to make representations on the question whether leave should be granted'; and second, '[a]t that *inter partes* hearing, the approach should be to take account of brief arguments on either side and if the Court is satisfied that there is a case fit for further consideration, then leave should be granted . . . if it is not, leave could be refused'.[16] In addition, the court claimed that 'for reasons of delay, want of jurisdiction, lack of evidence and absence of an arguable case on the merits, leave was refused as it was considered that there was no case fit for further investigation at a substantive hearing'. In its view, the 'test applied [was] to determine whether or not there was an arguable case, as was recently restated by the Privy Council in *Emtel Ltd v Ministry of Telecommunication*[17] that is, whether or not there is a case "capable and worthy of argument".'[18]

In respect of the merits of the application, the court noted that the real question concerned whether the Chief Justice was acting as a functionary of the executive; in other words, did he either assume functions properly within the province of the executive or were any such functions delegated to him? Or, did the Chief Justice encroach on a function that was properly to be discharged by the executive? Or, did the Chief Justice engage in action that was properly to be undertaken and executed by the executive?[19] It responded by noting that in its opinion these questions must be answered in the negative, accepting that there was no arguable case that the Chief Justice made a decision or acted such as could amount to a reviewable breach of the separation of powers as it exists and ought to exist between the executive and the judiciary in Trinidad and Tobago, or such as could be perceived reasonably as undermining the independence of the judiciary in Trinidad and Tobago. In the court's view, '[t]he unequivocal facts are, that it was the function of the Heads of Judiciary to appoint these first members of the [RJLSC] and that the Chief Justice in performing the challenged action, did so on the behest of the Heads of Judiciary'.[20] The court then concluded that it was not arguable that the decision and/or action of the Chief Justice of Trinidad and Tobago, to mark the appointment of the members of the RJLSC by a purely ceremonial installation accompanied by swearing in, taken on behalf of the Heads of Judiciary, could be reviewable as being *ultra vires* the powers of the Chief Justice or unconstitutional by reason of offending the doctrine of the separation of powers or capable of undermining the independence of the Judiciary.[21] Consequently, it rejected the application for leave to apply for judicial review.

14 TT 2003 HC 118 at 4.
15 Ibid.
16 Ibid at 5.
17 [2001] 1 LRC 522 at 534.
18 TT 2003 HC 118 at 5.
19 Ibid at 12–13.
20 Ibid at 13.
21 Ibid.

IRRELEVANT CONSIDERATIONS

It is well known that an irrelevant consideration is one of the grounds on which an applicant might bring a claim for judicial review. Commonwealth Caribbean countries operate on the dualist system – which means that international law has no effect on the domestic level unless and until it is incorporated into domestic law through legislation. Where a government or public authority seeks to rely on aspects of an unincorporated treaty in making decisions domestically, the courts have held this to be unlawful, because such considerations are not relevant in determining the scope of domestic law. In *J Astaphan and Co (1970) Ltd v Attorney General of Dominica*,[22] the applicant applied to the court for a declaration that the subsidiary legislation made by the Minister pursuant to section 4(1)(b) of the Supplies Control Act (SCA) was unreasonable and/or *ultra vires* the powers of the Minister and, therefore, null and void. That legislation[23] placed cereal flour of wheat on the negative list of imports. As a result, the plaintiff was required to get an import licence, which was sometimes denied him, in order to import flour from Trinidad and Tobago.[24] The claimant alleged that the reason for the refusal of his application for a licence was that flour must be sourced from within the Organisation of Eastern Caribbean States (OECS) sub-region and reliance was usually placed on Article 56 of the Revised Treaty. Article 56 of the Revised Treaty relates to the agricultural policy and provides that the goal of the Community Agricultural Policy shall be: (a) the fundamental transformation of the agricultural sector towards market-oriented, internationally competitive and environmentally sound production of agricultural products; (b) improved income and employment opportunities, food and nutrition security, and poverty alleviation in the Community; (c) the efficient cultivation and production of traditional and non-traditional primary agricultural products; (d) increased production and diversification of processed agricultural products; (e) an enlarged share of world markets for primary and processed agricultural products; and (f) the efficient management and sustainable exploitation of the Region's natural resources, including its forests and the living resources of the exclusive economic zone, bearing in mind the differences in resource endowment and economic development of the Member States.

At first instance, the trial judge held there was no evidence before it that the Minister had taken into account any resolution made by the Council of Ministers or any provisions of the Articles of the Revised Treaty or any other treaty in making the relevant orders.[25] The applicant argued that a proper construction of the SCA supported the conclusion that the Revised Treaty, and the resolution of the Council of Ministers, were not policies or objects of the SCA, nor were they relevant considerations to be taken into consideration either by the Controller of Supplies or by the Minister.[26] Additionally, it further argued that as the resolutions and Revised Treaty have not been incorporated or enacted in law they could not alter any of the provisions of the SCA and, therefore, could not lawfully be considered by the Minister or the Controller of Supplies.[27] On appeal, the Court of Appeal agreed that 'if the minister in exercising his discretion under s 4 of [the SCA] were to take into consideration the resolutions of the Council of Ministers or the Revised Treaty he would be taking into consideration irrelevant matters'.[28] It continued that it was quite clear from the evidence

22 DM 1997 CA 1.
23 SRO 33 of 1987, 21 of 1988 and 20 of 1990.
24 DM 1997 HC 7 at 4.
25 Ibid.
26 DM 1997 CA 1 at 8.
27 Ibid.
28 Ibid at 9.

that the Minister in exercising his discretion under the SCA took into consideration the Revised Treaty and the resolutions of the Council of Ministers. As a result, the Court of Appeal concluded that he therefore took into consideration irrelevant considerations in making the impugned orders.[29]

REGIONAL ORGANISATIONS

Treaty making is one of the prerogative powers that the courts have accepted is still not subject to judicial review.[30] Only the executive can enter into treaties, so the courts have been reluctant to question that power, or aspects in relation to it. In *Re Holder*,[31] the applicants were given leave by Ramlogan J to apply for judicial review of the decision of the Council of Legal Education (CLE) at its special meeting that twenty of the University of Guyana (UG) LLB 1996 graduates should be admitted to the Hugh Wooding Law School (HWLS) and that the Government of Guyana, after consultation with the UG, would submit to the HWLS the names of the twenty graduates to be admitted.[32] The applicants argued that the decision of the CLE was unlawful because the CLE had no authority to admit the twenty students while, at the same time, refusing admission to the applicants given that they were all holders of UG LLB degrees and, further, that the CLE acted *ultra vires* the CLE Treaty in delegating to the Government of Guyana, after consultation with the UG, the decision as to which of the graduates of UG should be submitted for admission to the HWLS. The applicants also argued that the decision of the CLE was taken in breach of their legitimate expectation and also in breach of the principles of natural justice in that the CLE gave no reasons for its decision. The respondent argued that the decision of the CLE was not justiciable in the courts of Trinidad and Tobago and that the question of legitimate expectation was not sustainable since there was no evidence of a promise or unambiguous representation made by the CLE to the applicants. The court argued that, since these proceedings arose from the decision of the CLE and the manner of implementation of that decision, the question of justiciability must first be determined.[33] The court continued that Article 3 of the CLE was not one of the Articles mentioned in section 3 of the Council of Legal Education Act (CLE Act) as having the force of Law in Trinidad and Tobago. The respondent claimed that the decision complained of was made pursuant to an article in the CLE Treaty that was not part of the law of Trinidad and Tobago – an article which was not included while other articles were included in the domestic law of Trinidad and Tobago – and, consequently, the decision was an act of the CLE in performance of its obligations under the CLE Treaty.[34]

The court noted that, in relation to justiciability, it could find nothing in the instant case to persuade it away from the accepted authorities that a treaty was not part of the municipal law of Trinidad and Tobago, unless so incorporated by Parliament, and noted that *Teoh's case*[35] seemed to be an attractive exception which it believed could be distinguished from the instant case. The court ruled that there was nothing ambiguous or difficult in construing the provisions of the CLE Act and that the CLE Act, in clear and unambiguous language, included certain articles of the CLE Treaty into the municipal law of Trinidad and Tobago and Article 3 was not one of them. The court was at pains to point out that, in declaring Article 3 not justiciable,

29 Ibid at 12.
30 *Civil Service Unions v Minister for Civil Service* [19851 AC 374 at 407.
31 TT 1997 HC 157.
32 Ibid at 1.
33 Ibid at 7.
34 Ibid at 8.
35 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

it did not mean that the CLE was above the law. It claimed that the CLE, by section 4 of the CLE Act, was an established body corporate enjoying all legal powers and was subject to the same legal obligations as other juridical persons. However, the court was satisfied that it was not the intention of Parliament to make admission to the law schools, as provided for in Article 3, amenable to the courts; if it were otherwise, Article 3 would have been given the force of law as, for example, was Article 5. As a result, the court concluded that it was reluctant to construe an exclusion of Article 3 from the municipal law as a specific inclusion, which was what it would be doing if the CLE's decision were to be enquired into and adjudicated on by the court.[36]

Treaties operate in international law so the courts would not entertain a question about the scope of the treaty obligations of the State since this would impinge on the State's treaty-making power. In *Re Chandrash*,[37] the applicant, a member of Parliament in the Republic of Trinidad and Tobago, brought judicial review proceedings to challenge: (a) the alleged unlawful and/or illegal appointment and/or swearing in of the first members of the RJLSC; and (b) the illegal and/or unlawful decision to swear in and/or action of swearing in and/or administering of oath by the Chief Justice of Trinidad and Tobago to the members of the RJLSC pursuant to and/or in furtherance of the implementation of the CCJ Agreement. The RJLSC was created to appoint judges to the new CCJ pursuant to the CCJ Agreement.[38] The court noted that some of the relief claimed related to matters which were in the province of international law and which were within the legitimate ambit of the State in the exercise of its executive treaty-making power. The court continued that '[t]hese matters, which are matters arising out of Trinidad and Tobago's entry into an international treaty under the CCJ Agreement and the consequential protocols thereto, are matters which are outside the jurisdiction of this Court, they having not been incorporated by Act of Parliament into the domestic law of Trinidad and Tobago.'[39] It was of the opinion that the 'reliefs claimed with respect to these matters are therefore not justiciable before this Court'.[40]

JURISDICTION: DISPUTES OF FACT

A decision made that is not supported by fact is an unlawful decision. This arose directly for consideration in *Re Chandrash*,[41] where the court noted that some of the grounds alleged by the applicant were totally unsupported by any factual evidence and that the obligation and onus is on the applicant to 'verify the facts relied on fully, clearly and carefully'. The court explained that, for example, the applicant alleged that the Chief Justice of Trinidad and Tobago purported to 'appoint members of the [RJLSC] in accordance with Article V of the CCJ Agreement', but there was absolutely no evidence that the Chief Justice sought to appoint any members of the RJLSC.[42] It claimed that, in fact, the evidence was that the Chief Justice, acting 'on behalf of the Conference of Heads of Judiciary of the Member States of the Caribbean Community', issued an invitation 'to witness the installation of the Members of the [RJLSC]'; and that, in any event, nothing that was done, on the occasion of the installation of the members of the RJLSC by the Chief Justice, could have been done pursuant to Article V of the CCJ Agreement.

36 TT 1997 HC 157 at 11–12.
37 TT 2003 HC 118.
38 Ibid at 1.
39 Ibid at 2.
40 Ibid.
41 TT 2003 HC 118.
42 Ibid.

The court accepted that the members of the RJLSC could only have been appointed under Article VI of the CCJ Agreement and that there was no factual evidence the executive instructed the Chief Justice of Trinidad and Tobago to perform duties pursuant to the CCJ Agreement.[43] It continued that the only evidence suggested that the Chief Justice made a decision and acted pursuant to a request from the Heads of Judiciary of member States of CARICOM when he participated in the installation and swearing in ceremony of members of the RJLSC. The court was of the view that the evidence also suggested that the administrative institution that was responsible for this occasion was the CARICOM Secretariat and again there was no evidence to suggest that the Executive of Trinidad and Tobago was in any way actively involved in this occasion. In addition, the court held there was no conceivable argument that the Chief Justice of Trinidad and Tobago did or could have assumed any powers or duties imposed by the CCJ Agreement, as that agreement did not create or confer any such powers in or duties on the Chief Justice as alleged by the applicant.[44] In the court's opinion, there was and is no treaty requirement or regulation subsisting in international law that required any 'swearing in' of the first members of the RJLSC to make their appointment valid or effective; and that there was and is no power, responsibility or duty in or on the Chief Justice of Trinidad and Tobago imposed by the CCJ Agreement, to swear in these members of the RJLSC. As a result, the court rejected the application.

THE UNIVERSITY OF THE WEST INDIES

The University of the West Indies (UWI), the region's leading university, too, is not immune from judicial review. In *Mason v University of the West Indies*,[45] the court had to consider the question of whether the University was subject to judicial review. The defendant argued that the claimant should not be allowed to bring the actions against the University because the Charter of the UWI provided for resolution of disputes between or among members of the UWI by the Visitor, as provided for by the Charter. Accordingly, the jurisdiction of the court was excluded in matters of this kind involving the UWI's domestic matters.[46] The defendant opposed the attempt by the claimant to seek judicial review of the decision to terminate her accommodation or the processes by which any such decision had been arrived at. It submitted that the claimant's cause of action, first, 'does not concern the disciplinary process embarked upon by the defendant, or the status of such matters, or whether they are subjected to the court's power to look at those issues upon an application for judicial review'; second, 'does not rely on the status of the disciplinary process as a basis for terminating the contract'; and, third 'rests on whether the letter of December 5, 2008, can terminate the contract and nothing more'.[47] The defendant further submitted that the relationship between the claimant and the defendant, though contractual, involved, as well, a further contract governing her residence in the Mary Seacole Hall. The court claimed that her contract of residence incorporated its own binding procedures for discipline and dispute resolution. It continued that, first, the resolution of the dispute between the claimant and the defendant was a domestic matter falling within the internal management of the defendant; and second, the provision of a hall of residence on the defendant's campus was a university activity, as much as examination and courses of learning are

43 Ibid at 7.
44 Ibid at 8.
45 JM 2009 SC 5.
46 Ibid at 3.
47 Ibid at 4.

university activities. As a result, the court concluded that it must decline to hear the matter.[48] The court cited, with approval, the statement of Brooks J in *Myrie v University of the West Indies*[49] where he stated that the:

> visitor has untrammelled power to investigate and right wrongs done in the administration of the internal laws of the foundation. A dispute as to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances falls within the jurisdiction of the visitor subject to the supervisory jurisdiction of the High Court and therefore the court usually lacks jurisdiction in the first instance to intervene. However, a decision of the university visitor may be amenable to judicial review.[50]

The court noted that, having considered the leading authorities,[51] the defendant should succeed on the preliminary objection.

The court ruled that there was a procedure which was to be adopted in cases where there was a complaint by a student about his/her treatment by the UWI, and that process, if not concluded to the satisfaction of the student, would entitle him/her, ultimately, to appeal to the Visitor. It continued that the Visitor was a domestic forum appointed by the UWI for the purpose of regulating its domestic affairs in accordance with its statutes, including determination of domestic disputes. The court claimed that the fact that investigations were still pending and the broad scope of the visitatorial authority were, together – or might be even individually – sufficient to dispose of the claimant's argument that sought to restrict the scope of the Visitor's jurisdiction. The court agreed with Brooks J, in *Myrie v University of the West Indies*, that there was nothing in the line of authorities in this area which would allow for a restrictive view of the common law role of the Visitor. Therefore, it held that a dispute relating to the provision of accommodation by the UWI was clearly a matter which would appropriately be within the Visitor's jurisdiction. As a result, the courts could intervene. In addition, the court approved the dictum in *Wadinambiaratchi v Ahmad*,[52] where the Trinidad and Tobago Court of Appeal stated:[53]

> It seems clear to me that the basic principle is that matters relating to the internal management of the university such as the admission to courses, the holding of exams . . . and such like matters fall outside the jurisdiction of the court once there is a visitor thereto endowed with visitorial jurisdiction. Such matters are classified as purely domestic matters falling within the exclusive province of the visitor or his delegate, whose decisions on such matters are regarded as final and conclusive. . . . I take the view that having regard to the broad terms of section 6 of the charter, Her Majesty's appointment was not ceremonial but one of general visitorial jurisdiction.

The court adopted the *dicta* and reasoning and ruled that the defendant should succeed on the preliminary point.[54]

On appeal,[55] the Court of Appeal of Jamaica noted that '[i]t would seem incontestable that visitorial capacity embraces every aspect in respect of the governance of all the activities within the purview of the University. Further the University administers and governs the halls of residence.'[56] It noted that '[t]he essence of the complaint of the appellant is that the University

48 Ibid at 6.
49 JM 2008 SC 2. See also *Wadinambiaratchi v Ahmad* (1985) 35 WIR 325.
50 JM 2008 SC 2.
51 *Patel v University of Bradford Senate* [1978] 3 All ER 841; [1978] 1 WLR 1488; *Hines v Birkbeck College* [1985] 3 All ER 156; and *Thomas v University of Bradford* [1987] 1 All ER 834.
52 (1985) 35 WIR 325.
53 Ibid at 346. This statement was also approved in *Myrie v University of the West Indies* JM 2008 SC 2 at 9.
54 JM 2009 SC 5 at 13.
55 JM 2009 CA 56.
56 Ibid at [9].

contravened its internal laws. This being so the ineluctable conclusion is that in the appellant's dispute with the University, the visitor has exclusive jurisdiction.'[57] The court accepted that the:

> jurisdictional authority of the visitor is derived from the power to administer the domestic laws of a University. All members of the University are subject to the domestic laws. The visitor is empowered to interpret that law and apply them and by extension, determine questions of fact arising under those laws. [T]he scope of the visitor's powers within the parameters of the domestic laws of a University includes the right to resolve disputes among members.[58]

It continued that, in the instant case, the claim by the appellant against the respondent was for specific performance of the contract to provide her with accommodation, and for damages for breach of the contract.[59] The court claimed that the appellant, being a member of the UWI, was subject to its charter, statutes, ordinances and regulations. It explained that the dispute between the respondent and herself arose out of a contractual licence which she enjoyed in acquiring residence in the Mary Seacole Hall and the relief she sought was the restoration of her licence in order for her to continue in occupation of the hall of residence and for damages for the unlawful deprivation of the use of accommodation therein.[60] As a result, the Court of Appeal held that the nature of the appellant's complaint was that the respondent had misconstrued or misinterpreted or misapplied the terms of contract between the respondent and herself. Since the complaint was grounded in the domestic laws of the respondent, namely its charter, statutes, regulations and ordinances, it ruled that it fell completely within the province of the Visitor.[61] Consequently, the Court of Appeal concluded that the appellant was bound to submit to the jurisdiction of the Visitor and that the relief that the appellant sought ought to be resolved by her seeking to employ the relevant process for its determination by the Visitor.[62]

CARICOM LAW

Locus standi of companies

In *Trinidad Cement Limited v Co-operative Republic of Guyana*,[63] the Guyanese government suspended the Common External Tariff (CET) on cement imported into Guyana under the Revised Treaty ('the Treaty'), requiring the Government of Guyana to seek permission to alter or suspend the CET. The CCJ had to consider an application by Trinidad Cement Limited (TCL) and TCL Guyana Incorporated (TGI) for special leave to appear as parties before the court in proceedings filed by those two entities against the State of Guyana.[64] The applicants sought special leave to appear as parties for the purpose of filing an originating application claiming compensation from and/or injunctive relief against the State of Guyana.[65] They claimed a breach by Guyana of the provisions of Article 82 of the Revised Treaty, which obliged Guyana to establish and maintain a CET on cement imported into that State from third states,

57 Ibid at [11].
58 Ibid at [39].
59 Ibid at [50].
60 Ibid.
61 Ibid.
62 Ibid.
63 GY 2008 CCJ 9.
64 Ibid at [3].
65 Ibid at [7].

i.e. countries outside the Caribbean Community.[66] The CCJ noted that Guyana and Trinidad and Tobago were parties both to the Revised Treaty and to the CCJ Agreement and each of them had ratified and implemented these instruments which conferred on the CCJ compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty.[67] The respondent claimed that the applicant had no standing, and consequently the CCJ had no jurisdiction to entertain the application for special leave, because the applicants were not nationals within the meaning of Article 32(5) of the Treaty and that TGI was not entitled to institute proceedings against the State of Guyana.[68]

The CCJ was of the clear opinion that applicants for special leave were required to bring themselves within the meaning of 'persons' set out in the *chapeau* of Article 222 of the Revised Treaty. This reads as follows: '*Locus Standi* of Private Entities, Persons, natural or juridical, of a Contracting Party may, with the special leave of the court, be allowed to appear as parties in proceedings before the Court where: (a) the court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and (b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and (c) the Contracting Party entitled to espouse the claim in proceedings before the court has: (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and (d) the court has found that the interest of justice requires that the persons be allowed to espouse the claim.' The CCJ claimed that the two questions that arose for consideration were: first, whether for the purposes of Article 222 it was sufficient for a company to be incorporated or registered under the domestic legislation of a Contracting Party; and second, whether Article 222 of the Treaty accords to one who was held to be a person, natural or juridical, of a Contracting Party the right to sue that Contracting Party.[69] In its view, the resolution of these issues went to the jurisdiction of the CCJ and given their importance for the determination of the rights and obligations of the Contracting Parties as well as private entities in their jurisdictions, it would wish to afford the Community and the Member States Parties to the Revised Treaty the opportunity to make written legal submissions on these issues before making a determination on the application for special leave.[70] As a result, the CCJ reserved its decision on the application for special leave to appear by the applicants.[71]

In its decision on the merits of those two issues, the CCJ noted that answering these two questions required it to consider the following relevant issues, namely the context, object and purpose of the RTC; the status and role of private entities accorded by the Revised Treaty; the intention of the States Parties to the RTC; the ordinary meaning to be attributed to the language of the text of the Treaty, and the subsequent conduct of the States Parties establishing their understanding of the instrument.[72] The CCJ, after examining the preamble of the Revised Treaty, claimed that the Contracting Parties were intent on transforming the CARICOM subregion into a viable collectivity of States for the sustainable economic and social development of their peoples; that the CSME is regarded as an appropriate framework or vehicle for achieving this end and that private entities, 'and in particular the social partners', are to play a

66 Ibid at [8].
67 Ibid at [20].
68 Ibid at [21].
69 Ibid at [23].
70 Ibid at [24].
71 Ibid at [25].
72 [2009] CCJ 1 (OJ) at [10]. This was applied in *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ) at [24].

major role in fulfilling the object and goals of the RTC. Noting that the CSME is intended to be private sector driven, it questioned the manner in which the RTC proposes to accommodate private entities. The CCJ continued that, given the important role envisaged for private economic entities in achieving the objectives of the CSME, the Contracting Parties clearly intended that such entities should be important actors in the regime created by the RTC; that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane.[73]

It claimed that this conclusion was borne out by Article 211 that confers jurisdiction on the CCJ in contentious proceedings which states: '1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including: (a) disputes between Member States parties to the Agreement; (b) disputes between the Member States parties to the Agreement and the Community; (c) referrals from national courts of the Member States parties to the Agreement; (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.' The CCJ explained that:

> [i]t is to be noted that in Article 211, the right to approach the Court directly is vested in the Community, in Member States and in 'persons in accordance with Article 222'. Thus, a private entity's access to the Court is not expressly linked to a State's right to espouse a claim before the Court. Article 211 gives to 'persons in accordance with Article 222', in their own right, qualified access to the Court. One must now turn to Article 222 to see how this right may be exercised.[74]

In relation to the first issue, the CCJ ruled that 'for a company to fall within the meaning of the phrase "persons, natural or juridical, of a Contracting Party", it is sufficient for such an entity to be incorporated or registered in a Contracting Party'.[75] By accepting this, it rejected the argument of Guyana that the expression 'persons, natural or juridical, of a Contracting Party' as employed in Article 222 means nationals of a Contracting Party as defined in Article 32(5)(a) of the RTC.[76] Since both TCI and TGI were incorporated companies in Trinidad and Tobago and Guyana, respectively, the CCJ held that the applicants had established that each of them fell within the expression in Article 222 'persons, natural or juridical, of a Contracting Party'.[77]

The CCJ claimed that '[i]n order to institute a claim before the Court, applicants – or "persons" as Article 222 refers to them – must satisfy two conditions', namely, first, 'that the Treaty intended 'that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly' [Article 222(a)]' and, second, that 'the 'persons have been prejudiced in respect of the enjoyment of the right or benefit' [Article 222(a)]'.[78] It continued that 'at this stage, it is sufficient for the applicant merely to make out an arguable case that each of these two conditions can or will be satisfied since they are substantive requirements an applicant must in any event fully satisfy in order ultimately to obtain relief'.[79] In addition to the private entity satisfying the conditions laid down in Article 222(a) and (b), it must further be established that 'the Contracting Party entitled to espouse the claim in proceedings before the Court has (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled . . .'. The question for the CCJ was whether, in circumstances where the person bringing

73 [2009] CCJ 1 (OJ) at [18].
74 Ibid at [20].
75 Ibid at [28].
76 Ibid.
77 Ibid at [29].
78 Ibid at [33].
79 Ibid.

the action was a national of the State concerned, that State should have the option of first bringing the proceedings, as Guyana argued.[80] The CCJ concluded that it was not the intention of the Member States to prohibit a private entity from bringing proceedings against its own State, observing that there were three important reasons justifying this conclusion.[81]

It claimed that: firstly, any such prohibition would frustrate the achievement of the goals of the RTC. It would impact negatively not only on nationals within the meaning of Article 32(5) but also on companies owned by non-nationals (including nationals of other States of the Community) who chose to incorporate in an allegedly delinquent State. The latter, in the CCJ's opinion, could be encouraged to violate the RTC with impunity in circumstances where such persons were the only ones who suffered prejudice; and that, conversely, such persons would have imposed upon them a serious fetter on the vindication of rights enuring to them pursuant to Article 222(a).[82] Secondly, the CCJ observed that nothing in the RTC precluded a private entity that 'has a substantial interest of a legal nature which may be affected by a decision of the Court', as stated in Article XVIII(1) of the RTC, from applying to intervene in a matter in which its own State is the defendant. It explained that, subject to its decision, such a private entity was clearly entitled to appear on the opposite side of its State of nationality when intervening in proceedings before the CCJ.[83] Thirdly, the CCJ continued that, if Guyana's contentions on this issue were to prevail, then private entities could suffer a severe disadvantage 'on grounds of nationality only', as found in Article 7 of the RTC. Equal access to justice, a fundamental principle of law subscribed to by all the Contracting Parties, in its view, would be compromised.

Locus standi of individuals

The CCJ also had to consider whether an individual has *locus standi* to challenge a decision before it under the RTC. In *Doreen v Caribbean Centre for Development Administration*,[84] the applicant sought special leave to proceed against the Caribbean Centre for Development Administration (CARICAD), claiming *inter alia* abuse of power, wrongful dismissal, violation of the labour laws of Barbados, breach of contract, and breach of the Constitution of Barbados. In addition, she also claimed that she had been discriminated against on grounds of nationality, because employees who were Barbados nationals were not afforded the pension rights conferred upon employees who were nationals of other countries.[85] For the CCJ, the proceedings raised two important questions: first, whether CARICAD could be sued in the CCJ; and second, whether any of the complaints made in these proceedings were justiciable by the CCJ. It noted that, if the answer to the first issue was in the negative, then there would be no need to consider the second issue.[86] The applicant argued that the CCJ had jurisdiction to hear and determine her claims because, first, CARICAD is listed in Article 21 of the Revised Treaty as one of the Institutions of the Community; and, second, consequently, CARICAD's legal personality and capacity to be sued are derived from Article 228 of the Revised Treaty which accords the Community full juridical personality.[87] The CCJ noted that, first, CARICAD is named as an

80 Ibid at [37].
81 Ibid at [40].
82 Ibid.
83 Ibid at [41].
84 [2009] CCJ 3 (OJ).
85 Ibid at [3].
86 Ibid at [4].
87 Ibid at [6].

Institution of the Community in Article 21, being one of the entities established by or under its auspices, and is a sub-centre of the Latin American Centre for Development Administration; second, it has a Board of Directors which is the governing body charged with general responsibility for its operations; third, the general objective of the Centre is to render assistance to countries of the Caribbean for the purpose of improving their administrative capabilities; fourth, membership is open to those Caribbean countries which signed and ratified the Agreement establishing it on 13 March 1979; and, fifth, most of the Member States of the Community signed and ratified the Agreement, but some did not.[88]

The CCJ stated that Article 10 of the Revised Treaty provides that the principal Organs of the Community are the Conference of Heads of Government and the Community Council of Ministers.[89] It continued that in performance of their functions the principal organs are assisted by the following organs: the Council for Finance and Planning (COFAP), the Council for Trade and Economic Development (COTED), the Council for Foreign and Community Relations (COFCOR) and the Council for Human and Social Development (COHSOD). Subsequent articles of the Revised Treaty delineate the composition and functions of these organs. The CCJ pointed out that Article 23 provides for the Secretariat to be the principal administrative organ of the Community with subsequent articles delineating the functions of the Secretariat and the Secretary General.[90] In addition, it noted that Article 18 establishes Bodies of the Community, these being the Legal Affairs Committee, the Budget Committee, and the Committee of Central Bank Governors; in like manner their composition and functions are expressly delineated.[91] The CCJ claimed that, significantly, the language used in Articles 10, 23 and 18 in establishment of the organs and bodies of the Community is positive and forthright: 'The principal Organs of the Community are' (Article 10); 'the Secretariat shall be the principal administrative Organ' (Article 23); and 'There are hereby established as Bodies of the Community' (Article 18).[92] It then noted that, when contrasted with the language used in Article 21 in connection with the Institutions of the Community, one can clearly discern that the Institutions, although within the Community System, were not intended to be an integral part of the Community. Article 21 is worded in the following way: 'The following entities established by or under the auspices of the Community shall be recognised as Institutions of the Community.' The CCJ also noted that Article 22 provides for certain entities with which the Community enjoys important functional relationships which contribute to the achievement of the objectives of the Community to be recognised as Associate Institutions of the Community.[93]

The CCJ noted that no reference was made in any of the articles of the Revised Treaty to any role to be played by the Institutions or Associate Institutions in implementing the Revised Treaty, noting that Article 21 was the only article where reference was made to Institutions.[94] In its view, this led inevitably to the conclusion that the Institutions of the Community did not enjoy the same degree of identification with the Community as do the organs and bodies; adding that, first, the policies and work of the Community are effected through the organs and bodies of the Community; second, the organs and bodies reflect the will of the Community; and, third, the Institutions and Associate Institutions on the other hand are merely entities that have some connection with the Community.[95] The CCJ claimed that, although recognised as

88 Ibid at [7].
89 Ibid at [8].
90 Ibid at [9].
91 Ibid at [10].
92 Ibid at [11].
93 Ibid.
94 Ibid at [14].
95 Ibid.

entities working within the CARICOM system, such Institutions and Associated Institutions have no power actual or ostensible to bind or represent the Community; and that their acts and omissions are not necessarily attributable to the Community as are the acts and omissions of the organs and bodies. As a result, the CCJ ruled that CARICAD, an Institution of the Community, could not be sued in proceedings before it and that, even if CARICAD were an Organ of the Community, it could not be made a defendant in proceedings commenced in the CCJ as proceedings in respect of its acts or omissions would have to be brought against the Community itself.[96] It also noted that Article 222 is concerned with specifying the circumstances in which a person can bring a claim before the CCJ; and it does not speak to the question of who may be a competent defendant and it is therefore not relevant to the issue whether CARICAD can be sued in the CCJ.[97]

Judicial review of decisions of Community organs

In *Trinidad Cement Limited v The Caribbean Community*,[98] the CCJ had to answer the direct question concerning the scope of judicial review of Organs of the Community. The applicant, Trinidad Cement Limited (TCL), a private entity, sought to obtain special leave pursuant to Article 222 of the Revised Treaty to file an originating application. TCL sought: (1) declarations that (i) the Council for Trade and Economic Development (COTED) suspension of the Common External Tariff (CET) on cement in respect of Antigua and Barbuda, Dominica, Grenada, St Lucia, St Kitts and Nevis and St Vincent ('the six OECS states') and Suriname and (ii) the Secretary General's suspension of the CET on cement in respect of Jamaica were irrational or unreasonable, illegal and null and void; (2) orders setting aside or quashing these suspensions; (3) a restraining order against the Community; and (4) a mandatory injunction against the Community to revoke the suspensions and notify those affected. The CCJ noted that TCL claimed that each of the two decisions to authorise suspensions of the CET – i.e. the one by the Secretary General and the one by COTED – was *ultra vires*, irrational and/or illegal and/or unreasonable, null and void and of no effect and should be quashed or revoked.[99] In support of these claims, TCL argued that it was in a position to satisfy more than 75 per cent of the regional demand for cement and that according to the applicable rules there was no basis for either the Secretary General or COTED to authorise a suspension of the tariff. The CCJ claimed that, before it could consider the challenge made by TCL to the two decisions, it was necessary for it to address briefly the issue of the scope of the judicial review which it might conduct and the remedies it was entitled to give.

The CCJ claimed that the RTC represented a transformation of the CSME 'into a rule-based system, thus creating and accepting a regional system under the rule of law'.[100] It continued that this necessarily meant that the CCJ has the power to scrutinise the acts of the Member States and the Community to determine whether they were in accordance with the rule of law, which was a fundamental principle accepted by all the Member States of the Community.[101] The CCJ was of the opinion that it would be almost impossible to interpret the RTC and apply it to concrete facts unless the power of judicial review was implicit in that mandate; and that the impugned decisions to authorise suspensions

96 Ibid at [15].
97 Ibid at [16].
98 [2009] CCJ 2 (OJ) (leave); [2009] CCJ 4 (OJ) (merits).
99 [2009] CCJ 4 (OJ) at [10].
100 Ibid at [38], quoting *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) at [32].
101 [2009] CCJ 4 (OJ) at [38].

in this case were subject to judicial review.[102] It claimed that in carrying out such review the CCJ must strike a balance. First, it had to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community.[103] Second, the decisions of such bodies would invariably be guided by an assessment of economic facts, trends and situations for which no firm standards existed; and only to a limited extent were such assessments susceptible of legal analysis and normative assessment by the CCJ. Third, and equally, the Community must be accountable and it must operate within the rule of law.[104] Fourth, it must not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so required, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable, it should not disappoint legitimate expectations that it had created.

In addition, the CCJ noted that it must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the less developed countries) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.[105] It also claimed that it was not its role to attempt to re-evaluate matters which were properly placed before a competent policy-making organ for a decision.[106] The CCJ accepted that the power to review the decisions of COTED was limited in circumstances where COTED had exercised a discretion.[107] It was of the view that the ability to authorise suspension of the CET was inherently a power to cater to the kind of flexibility that is required in the carrying out of policy. However, the CCJ cautioned that applications for suspensions must be dealt with in a principled, procedurally appropriate manner, noting that the occasion for suspension might only lawfully arise if one of the conditions laid out for it in the RTC was present and suspension should not be sought or granted for improper purposes.[108]

The CCJ held that, on balance, it could not make a finding that TCL's letter of 22 September 2008 was in fact received by the Secretary General before he issued his authorisation.[109] However, it considered that while the Secretary General had no duty to solicit the provision of information by private entities, if information came to his attention from a private entity that contradicted or cast a different light on the submission received from a relevant Competent Authority then the Secretary General had a responsibility to ascertain from the relevant Competent Authority whether there had been the requisite level of consultation between the Competent Authority and all relevant producers of the commodity in question.[110] In the CCJ's opinion, there might be serious implications if there was a failure of the duty to consult. It also ruled that the practice by the Secretary General of accepting as a sufficient answer to his inquiry as to a Member State's ability to supply the needs of another Member State which was seeking permission to suspend CET, the response that the first Member State had 'no objections' was wrong and must cease.[111] To guide the parties to the dispute the CCJ

102 Ibid.
103 Ibid at [39].
104 Ibid.
105 Ibid at [40].
106 Ibid at [41].
107 Ibid.
108 Ibid.
109 Ibid at [71].
110 Ibid.
111 Ibid at [74].

stated as follows: first, the Secretary General, before authorising a suspension, must satisfy himself that he had received from Competent Authorities, in response to the inquiry which he was required to pose to them, specific answers that would allow him to determine whether the quantity of the product being produced in the Community could satisfy the demand of the requesting State; second, the best way of ensuring this was for the Secretariat to have a form drawn up and provided to Competent Authorities for them to complete and submit to it; and, third, this form should require the Authority to disclose, *inter alia*, what entities, if any, a Competent Authority had consulted and whether there was a local producer able and willing to satisfy the demand on a timely basis of the Member State requesting permission to suspend.[112]

In relation to the CET suspensions by COTED, the CCJ claimed that, notwithstanding the concerns expressed about TCL's prices and the irrelevance of those concerns in the making of a decision as to the suspension of the CET, all the facts relating to supply and demand for cement, and the Audit Report in particular, were before COTED when it made the decisions to suspend the CET.[113] It noted that the dominant and operative consideration was that Member States were not prepared to treat the Audit Report supply forecast as guaranteeing them actual on time deliveries in view of their past experiences with the TCL Group. The CCJ claimed that it was unable to say that COTED, in the exercise of its discretion to authorise the suspension, could not rationally rely on its past supply experience and use that as a basis for being sceptical about the actual delivery of supplies of cement in a timely manner.[114] In its view, the amount of cement in respect of which the suspensions were given and the fact that the suspensions were only for a one-year duration, although suspension for two years was sought, indicated an observance of the *principle of proportionality* which must at all times be adhered to by COTED. The CCJ also claimed that, first, in reviewing COTED's discretion, it was not entitled to substitute its own judgment for that of COTED; and, second, if COTED's decision was so *wholly disproportionate* as to be unconnected with the facts, the decision might be set aside and the application for the suspension remitted to COTED for fresh consideration.[115] In addition, the CCJ also provided some guidance for COTED: first, like the Secretary General, COTED too must be supplied with accurate, relevant and timely information when it met to consider a suspension of the tariff. In this regard also appropriate forms must be devised for importers at the domestic level as well as for Competent Authorities; and, second, the importer should provide evidence of unfulfilled orders; evidence of the response of the regional producer including transportation logistics (*force majeure* excepted); and information showing what efforts they had made to obtain regional supplies.[116]

State liability for breaches of the revised treaty

In *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana*,[117] the CCJ had to consider the question of whether Guyana was liable in damages to TCL and TGI for the suspension of the CET without approval from either the Secretary General or COTED. In particular, the applicants argued that the removal of the CET by Guyana without

112 Ibid at [76].
113 Ibid at [78].
114 Ibid.
115 Ibid.
116 Ibid at [80].
117 [2009] CCJ 5 (OJ).

the authorisation of COTED was a breach of the RTC.[118] Therefore, they claimed: (a) a declaration as to breach of the RTC and violation of their entitlement to the protection of the provisions violated; (b) a mandatory order directing the government of Guyana to reinstate the CET on cement; and (c) damages. In addition, TGI claimed damages for lost profits allegedly suffered by it as a result of the unlawful removal of the CET from January 2007;[119] and TCL claimed for consequential loss, including loss of income in its capacity as a major shareholder in TGI.[120] Both TCL and TGI also sought an award of exemplary damages. Most of the claims were abandoned at oral argument so the CCJ was only required to adjudicate on the claims for damages in respect of TGI's claim for lost profits and the claim of both TCL and TGI for exemplary damages.[121] Guyana argued that, first, since TCL and TGI were claiming pure economic loss they were required to prove the right and the breach with sufficient particularity and they had not done so; and second, the quantification of the losses was based on speculative assumptions and expectations as to the size of the market in Guyana and the quantities of cement imported from non-CARICOM sources.[122]

The CCJ explained that the RTC contained no specific provisions dealing with sanctions for breaching its provisions.[123] Applying the reasoning of the European Court of Justice (ECJ) in *C-6 and 9/90 Francovich v Italy* that ruled that the principle of State liability was inherent in the new legal system created by the EEC Treaty,[124] it held that, first, a similar principle applied under the RTC and that the new Single Market based on the rule of law implied the remedy of compensation where rights which enure to individuals and private entities under the Revised Treaty were infringed by a Member State; and, second, State liability in damages was not automatic: a party would have to demonstrate that the provision alleged to be breached was intended to benefit that person, that such breach was serious, that there was substantial loss and that there was a causal link between the breach by the State and the loss or damage to that person.[125] The CCJ continued that the reason for laying down conditions as to liability in damages was to prevent States from being harassed by claims for technical breaches or minor procedural defects. It continued that, first, the range of potential breaches by a Member State might extend from minor breaches to flagrant and contumacious abuses of State power; second, the threshold for eligibility for damages was therefore a high one; third, it was not every infringement that would attract damages; fourth, the CCJ might not consider making a monetary award for minor breaches of the RTC; and, fifth, the breach must be sufficiently serious to warrant the award of damages.[126]

The CCJ was of the opinion that in considering State liability for damages it might have regard to any excuses or justification advanced by the State.[127] It therefore ruled that it had little difficulty in concluding that Guyana's breach in this case was sufficiently serious to warrant the award of damages. In addition, the CCJ also ruled that, provided that TGI could satisfy the other conditions for being awarded damages, this was a case that warranted the award of damages.[128] It explained that, since the right or benefit conferred on a Contracting Party by the

118 Ibid at [11].
119 Ibid.
120 Ibid at [12].
121 Ibid at [13].
122 Ibid at [15].
123 Ibid at [24].
124 [1991] ECR-1-5357.
125 [2009] CCJ 5 (OJ) at [27].
126 Ibid at [28].
127 Ibid at [29].
128 Ibid at [31].

imposition of the CET under Articles 82 and 83 of the Revised Treaty clearly enured directly to the benefit of persons who were producers of the commodity in respect of which the CET was imposed, it was easier for such entities successfully to claim damages for a breach of Articles 82 or 83.[129] The CCJ stated that what was not so clear was whether claims for damages might in special circumstances be made successfully by other persons such as importers of the commodity in question and, if so, what precisely those circumstances might be. However, it thought that it was unnecessary for it to explore that issue, stating simply that it was sufficient to state that, on the facts, no special circumstances had been proved which would serve to establish the requisite degree of proximity between Guyana's breach of the Revised Treaty and such loss as TGI claimed to have suffered as a result.[130] Also, the CCJ was not persuaded that exemplary damages might be awarded by it and in this case decided not to award any such damages.[131]

Enforcement of the CCJ's orders

The effectiveness of the CCJ in performing its function under the Revised Treaty depends, to a large extent, on whether its orders are complied with by Member States. If there is non-compliance with its orders, then the whole intricate system set up under the Revised Treaty for the move towards greater economic co-operation will be greatly hampered. It is, therefore, imperative that not only do Member States comply with orders of the court but equally there are important mechanisms to ensure compliance with such orders. In *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*,[132] the CCJ ordered Guyana to, 'within 28 days of the date of this order, implement and thereafter maintain the CET in respect of cement from non-CARICOM sources'. However, Guyana did not comply with the order of the CCJ. Therefore, in *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana*,[133] the CCJ had to consider the range of options available to it in the face of such non-compliance. The applicant claimed, first, an order compelling the Honourable Attorney General of Guyana to attend court and show cause why he should not be held to be in contempt of court for failing to implement and give effect to the Order; second, a declaration that such failure constituted a contempt of court; and, third, a declaration that Guyana was in breach of Article 215 of the Revised Treaty.[134] The CCJ was of the opinion that it had to decide the following issues: 1. Was the Court's Order so unclear as to be unenforceable by a coercive order? 2. If the Order was clear, was there a breach of Article 215 of the Revised Treaty? 3. If the Court has jurisdiction to make orders for civil contempt, could it on the evidence in this case make an order summoning the Honourable Attorney General to show cause why he should not be held in contempt and/or make a finding of civil contempt against him?[135] Article 215 of the Revised Treaty, under the heading 'Compliance with Judgments of the Court', provides that 'The Member States, Organs, Bodies of the Community, entities or persons to whom a judgment of the Court applies, shall comply with that judgment promptly.' Although noting that these questions could be rendered otiose by a protocol amending the Revised Treaty to make clear what forms of contempt it could deal with and what sanctions it could impose on those whom it holds in contempt, the

129 Ibid at [34].
130 Ibid.
131 Ibid at [40].
132 [2009] CCJ 5 (OJ).
133 [2010] CCJ 1 (OJ).
134 Ibid at [2].
135 Ibid at [15].

CCJ nonetheless proceeded to express provisional views on these matters in the hope that the difficulties of interpretation which emerge will be eliminated by an appropriate protocol to the Revised Treaty.[136]

In respect of the first question, the CCJ noted that its emphasis was on cement imported and CET collected since 17 September 2009.[137] As a result, it held that counsel for Guyana clearly understood that in ordering the reinstatement of the CET on cement imported from non-CARICOM sources the CCJ had made no distinction as to the date on which imported cement was ordered. Consequently, it held that there was no ambiguity in the Order and that the breach of it was unlawful.[138] The CCJ explained that there was ample evidence that Guyana did not comply promptly, noting that Guyana's application for an extension of time for compliance with the CCJ's Order was an admission that it had not so complied.[139] It also rejected the notion advanced by Guyana that compliance with the Order on 8 January 2010, nearly four months after the time fixed by the Order for re-imposition of the CET had passed, rendered academic an inquiry into whether Guyana had complied with the Order promptly. The CCJ held that past acts of disobedience constituted a breach of its Order and consequently a breach of Guyana's obligation to obey the Order promptly.[140] As a result, the CCJ held that Guyana failed to comply promptly with the Order and so was in breach of Article 215 of the Revised Treaty.[141] In answering the second question, the CCJ dismissed the claims for orders relating to civil contempt against the Honourable Attorney General for the following reasons. First, it accepted that a 'show cause' order could not properly be made against the Attorney General of Guyana; he could only be summoned to show cause if there was a likelihood that an order for contempt could be made against him.[142] Second, a coercive order should not be made against someone who was not a party to the proceedings – there was no evidence that the Attorney General was personally responsible for breach of the Order, or that the Attorney General, as a non-party, was responsible, in his official capacity, for the reinstatement and maintenance of the CET on cement from non-CARICOM sources.[143]

After explaining the concept of contempt at common law, the CCJ noted that it was concerned only with civil contempt of court in the sense of disobedience of an order of court.[144] In its view, since the concept of civil contempt (disobedience of court orders) as an affront to the court was not known in the civil law, the question for it was whether civil contempt existed in international law. After examining Article XXVI (b), relating to enforcement orders of the CCJ, the CCJ ruled that it did not confer an express power on it to enforce its orders by contempt proceedings.[145] It then proceeded to determine whether it had an implied power, noting that the *chapeau* of Article XXVI to the States Parties to enact legislation to ensure that the CCJ has power to make orders for 'the investigation and punishment of any contempt of court that any superior court of a Contracting Party has power to make as respects the area within its jurisdiction' assumes the existence on the international plane of a power to make civil contempt orders and by necessary implication evidences an intention that the CCJ shall have such a power.[146] The CCJ clarified, however, that the superior courts of a Contracting Party

136 Ibid at [16].
137 Ibid at [17].
138 Ibid.
139 Ibid at [22].
140 Ibid at [24].
141 Ibid at [25].
142 Ibid at [28].
143 Ibid at [29].
144 Ibid at [32].
145 Ibid at [33].
146 Ibid at [34].

with a civil law system have no competence to punish civil contempt, so the ambit of the phrase 'contempt of court' in the second part of Article XXVI is not clear.[147] It continued that if a power to entertain contempt proceedings could be implied from the second part of Article XXVI, it could not be said with any certainty that the phrase 'contempt of court' in the CCJ Agreement included civil contempt, or what forms of contempt were covered by that expression.[148]

The applicants argued that as an international court applying the rules and principles of international law and the decisions of international tribunals, the CCJ had an inherent jurisdiction to deal with complaints of contempt of court.[149] The CCJ then rejected the decisions cited to it by the applicants on the basis that they were not authority for the existence of an inherent power in an international court to punish disobedience of a final order in non-criminal cases, adding that it expressed no opinion as to whether the principle asserted by the UN ad hoc international criminal tribunals of inherent powers to punish contempt of court extended to disobedience of a final order of court in a non-criminal case.[150] The CCJ also examined the practical considerations which militated against the view that it could punish for contempt: first, in non-criminal cases the common law sanctions for contempt of court – i.e. (1) imprisonment, (2) sequestration and (3) fines – might have to be adapted to take account of the fact that states are the defendants and could not be imprisoned, and that regional international courts, such as the CCJ, have no tipstaff or gaols except where treaties so provide.[151] Second, committal was not available as a means of enforcement; nor was sequestration since the writ of sequestration did not run in the international arena. Third, fines were originally considered inappropriate in cases of civil contempt since remedies for civil contempt were 'primarily coercive or remedial rather than punitive'; and despite the trend in municipal cases to punitive sanctions, in the absence of enforcement machinery of its own, the CCJ would refrain from imposing fines at the supranational level.[152] Fourth, in the context of a multilateral regional agreement it would be sufficient to make a declaration finding a Contracting Party in contempt of court and to leave to the other Contracting Parties the consequences of that finding, whether the sanctions be economic or political or of some other kind.[153]

As a result, the CCJ ruled that when one transplants civil contempt of court into the international arena among nation states, the primary sanction was a declaratory finding of contempt or non-compliance with its order.[154] It then summarised its holdings as follows: first, no express power to entertain contempt proceedings was granted in Article XXVI. Second, it was by no means clear that one could extrapolate from the ad hoc international criminal tribunal cases that international courts have an inherent jurisdiction in civil contempt in non-criminal cases; and no clear authority had been cited to it in this regard. Third, an argument for an implied power to deal with civil contempt might be based on the second part of Article XXVI of the CCJ Agreement; but there were countervailing arguments against this view. Fourth, the problems associated with such a ruling and the lack of any practical value in a finding of civil contempt on the international plane in the context of the Revised Treaty and the CCJ Agreement might suggest that no such power was intended.[155]

147 Ibid at [35].
148 Ibid at [36].
149 Ibid at [37].
150 Ibid at [38].
151 Ibid at [40].
152 Ibid at [42].
153 Ibid at [43].
154 Ibid.
155 Ibid at [44].

STANDARD OF REVIEW IN DOMESTIC LAW

In time, issues relating to the CARICOM treaty will arise a lot more in the domestic courts of Member States. This is already beginning to happen as some of the cases below indicate. In *DS Maharaj Furniture and Appliances Ltd v Comptroller of Customs and Excise*,[156] the appellant, a retailer, *inter alia*, of household appliances, imported 54 refrigerators from Grenada. On their arrival in Trinidad and Tobago, the appellant sought to have the refrigerators cleared as goods originating from a CARICOM country and, therefore, free from customs duty under the Revised Treaty. The customs officer, however, refused to accord the goods such treatment on the ground that they were not manufactured in the CARICOM region. The customs officer further required that, as a condition of their being delivered to the appellant, the appellant should pay a deposit equivalent to the full amount of the duty and taxes demanded, which was almost $250,000. The appellant was unwilling, and claimed to be unable, to pay this deposit. The refrigerators, therefore, remained in the custody of the customs officials. The appellant sought judicial review of the decision of the customs officer. The court considered whether the decision of the customs officer should be quashed in judicial review proceedings on the ground that it was unreasonable to make it without first pursuing an obvious line of inquiry capable of producing relevant information to satisfy him that the goods originated from a CARICOM country. The court claimed that it did not consider that it would have been irrational or unreasonable for someone, who was required to make a decision on the basis of the information which was before the customs officer, to refuse to accept the 54 refrigerators as eligible for CARICOM treatment, having regard to the information contained in a fax, namely neither the make nor the model numbers of the refrigerators.[157]

The court noted that what it found unreasonable, however, was that the customs officer made a firm and final determination of the eligibility of the shipment for CARICOM treatment without further investigation by the Grenadian Customs. The court questioned whether the decision should be quashed in judicial review proceedings on the ground that it was unreasonable to make it without first pursuing an obvious line of inquiry that was capable of producing relevant information.[158] It continued that it had no authority which recognised this as a ground for quashing an administrative decision, but that, on the authority of Lord Diplock in *CSSU*, the grounds on which administrative action may be subject to control by judicial review might be added to on a case-by-case basis.[159] The court continued that there was growing support from textbook writers, and judicially, for recognising as a ground on which an administrative decision may be quashed not only the absence, but also the insufficiency, of evidence to support a finding of fact on which such decision was based. It queried that, if an administrative decision could be quashed on the basis that it was founded on a factual premise which was patently flawed, what about the unreasonable failure of the decision maker to provide himself by inquiry with a proper basis of fact for his decision?[160] The court claimed that it was 'a legitimate extension of *Wednesbury* unreasonableness to strike down a decision on the ground that no reasonable person would have taken it without first making some further inquiry', noting that one might 'describe this as "procedural unreasonableness", or simply, without a tag, as a form of procedural impropriety'.[161] The court continued that it should not matter whether the

156 TT 2002 CA 11. See *DaCosta v Minister of National Security* BS 1986 SC 16.
157 TT 2002 CA 11 at 16.
158 Ibid.
159 Ibid at 16–17.
160 Ibid at 17.
161 Ibid.

irrationality of the decision maker was to be found in the substance of his decision or in making it at all at the time when he did.[162] In addition, it noted that the court, which admittedly had the power to strike down his decision in the first case, ought arguably to have it in the second. The court, therefore, concluded that, to justify its interference on the ground that a decision was prematurely made, the lack of prudence displayed by the decision maker in rushing to judgment must be so extreme as to amount to 'irrationality'.[163]

The court held that the customs officer's decision could be regarded as 'irrational'. It was of the opinion that there was a procedure prescribed by Regulation 15 of the Customs (Caribbean Common Market) (Origin of Goods) Regulations which the Comptroller could have used, and was, in fact, used, after the customs officer's decision was made, to ascertain the true facts on which the eligibility of the refrigerators for CARICOM treatment depended. The court claimed that it was, in its view, clearly contrary to the policy of the Regulations that a final decision as to the status of the shipment was made before, and not after, the initiation and completion of the verification process which the Comptroller invoked pursuant to Regulation 15(3).[164] This, it opined, clinched the argument that it was unreasonable for the customs officer to have made a final decision when he did, and that that decision could and should be quashed on the ground of unreasonableness as well.[165]

REMEDIES

At domestic level, what remedies are available to an applicant who argues that the State breached his or her rights under CARICOM law? This was considered in *Linton v Attorney General of Antigua and Barbuda*,[166] where the applicant claimed that there was a breach of his rights as a CARICOM national and skilled worker under the freedom of movement provisions of the CSME when he was unlawfully removed from Antigua. The court noted that in determining to what remedies, if any, the applicant was entitled, it must be mindful that any order it made should do justice to the applicant's case while at the same time being cognisant of the need to ensure that public administration and the executive's discretion was not improperly impacted.[167] In its opinion, it had to ensure that the reliefs granted served some useful purpose. The appellant argued that he should be compensated for his unlawful removal from Antigua, and the public humiliation and embarrassment that he experienced.[168] The court, although noting that the applicant had not sought to quantify the loss, noted that it had no doubt that the court was clothed with the jurisdiction to grant damages in matters of judicial review. Part 56(1)(c)(d) and (4) of the CPR 2000 state: '56.1 (1) This Part deals with applications – (c) for judicial review; and (d) where the court has power by virtue of any enactment or at common law to quash any order of a Minister or Government Department or any action on part of a Minister or Government Department. (4) In addition to or instead of an administrative order the court may without requiring the issue of any further proceeding, grant (c) restitution or damages'.

The court held that it was satisfied that it should grant Mr Linton damages for breach of his opportunity to seek employment in Antigua and Barbuda for a period of approximately two months and that he was also entitled to be compensated for his wrongful arrest and

162 Ibid.
163 Ibid.
164 Ibid at 17–18.
165 Ibid at 18.
166 AG 2009 HC 23.
167 Ibid at [128].
168 Ibid at [131].

expulsion.[169] The court reasoned that it had no doubt that the applicant had satisfied it that, at the time when the administrative claim was filed, he could have issued a claim against the defendant for a recognised cause of action.[170] It continued that, in awarding damages, it was evident that the applicant must also be compensated for the embarrassment and humiliation that he suffered as a consequence of his unlawful removal from Antigua and Barbuda. The court claimed that, since the applicant was unlawfully removed from Antigua and Barbuda approximately two months before his permission had expired, he was, therefore, deprived of his right to seek employment within that period.[171] This meant that he must be adequately compensated for the loss of the opportunity to seek employment in Antigua and Barbuda for two months, which must be weighed against the fact that he was in Antigua and Barbuda for nearly four months and was unable to obtain employment during that time. The court claimed that it had also to determine what was a reasonable and just sum to award him as damages.[172] Since the court received no assistance in relation to this aspect of the case, it was of the view that the sum of $5,000 was an adequate award, in all of the circumstances. In relation to the level of compensation to which the applicant was entitled for having been unlawfully removed from Antigua and Barbuda, the court noted that it must take into account factors such as his status as a well-known media personality; he was forced to leave his wife and children behind, he was unceremoniously taken from his home, and there was the public embarrassment that he suffered in circumstances where he had a right to remain in Antigua and Barbuda for a further period of two months.[173] The court awarded the sum of $15,000 as fair compensation.

169 Ibid at [132].
170 Ibid at [134].
171 Ibid at [135].
172 Ibid.
173 Ibid at [136].

CHAPTER 13

PROCEDURAL FAIRNESS

INTRODUCTION

The question of what constitutes the elements of procedural fairness is one that, unsurprisingly, the courts also have to deal with. What does the requirement of procedural fairness entail? It has been pointed out that procedural fairness requires that the person be given a fair hearing, which will dictate that he should be informed of the allegations against him, be given an opportunity to meet the allegations, and, if there is a hearing, he should be informed, *inter alia*, of his right to be assisted by legal counsel.[1] It also includes a right to a fair hearing[2] and also arises in the context of immigration.[3] Essentially, procedural fairness involves elementary principles that ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called fair play in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged. The constituent elements of what constitutes procedural faireness will be examined in this chapter.

ADEQUATE DISCLOSURE

Introduction

The right to be heard is an important aspect of natural justice; it applies equally to administrators, and it is particularly critical that it is observed, especially in the criminal field.[4] Natural justice is particularly important in the context of public service employment[5] and it also applies in seizure cases.[6] It is not, however, without its limits – the courts have held that a Local

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1 *Adams v Commissioner of Police* AI 2009 HC 19 at [23]. See *Bahamas Air Traffic Controllers Union v Government of the Commonwealth of the Bahamas* BS 2001 SC 23; and *Bahamas Industrial Manufacturers and Allied Workers Union v The Industrial Tribunal* BS 2005 SC 14.

2 *Bermuda Telephone Company Limited v Minister of Telecommunications and E-Commerce* BM 2008 SC 52; and *British Virgin Islands Electricity Corporation v British Virgin Islands Electricity Corporation Appeal Tribunal* VG 2003 HC 5.

3 *Ex p Schaper* BZ 1995 SC 2.

4 *Attorney General of Trinidad and Tobago v Mohammed* TT 1985 CA 56, where the court had to consider the question whether a person discharged by a magistrate, at the conclusion of a preliminary enquiry into an indictable offence, is entitled to be heard before a warrant of commitment for his trial, on application by Director of Public Prosecutions is issued by High Court judge.

5 *Mullings v Public Service Commission* JM 2009 CA 6; *Raj-Kumar v Medical Board of Trinidad and* Tobago TT 2005 HC 79; *Ramnanan v Agricultural Development Bank of Trinidad and Tobago* TT 1997 CA; *Ramnath v Public Service Commission* TT 2008 HC 125; *Re Mitchell* TT 2003 HC 85; *Re Pickering* JM 1995 SC 21; *Riley v Board of York Castle High School* JM 2008 SC 113; *Roach v Attorney General of the British Virgin Islands* VG 2002 HC 2; *Roopnarine v Attorney General of Trinidad and Tobago* TT 2009 HC 275; *Segree v Police Service Commission* JM 2005 CA 8; *Selgado v Attorney General of Belize* BZ 2004 SC 7; *Steele v Jones* TT 1987 HC 75; *Trinidad and Tobago Unified Teachers Association v Wilson* TT 1989 HC 75; *Vhandel v Board of Management of Guys Hill High School* JM 2001 CA 26; *Wallace v Judicial and Legal Service Commission* TT 2008 CA 20; *Wildman v Judicial and Legal Services Commission* GD 2007 CA 2; and *Wilson v Board of Management of Maldon High School* JM 2007 SC 85.

6 *Stennet v Attorney General of Jamaica* JM 2005 SC 100; and *Tamash Enterprises Limited v Comptroller of Customs and Excise* TT 2009 HC 267.

Government Board, before taking over the power of a local authority, was not obliged to observe the rules of natural justice and allow the councillors a right to be heard.[7] In *Shazar Distributors v Attorney General of Barbados*,[8] the Comptroller of Customs decided to not deliver three vehicles imported into Barbados to the plaintiff, because the plaintiff had not submitted the required documentation. An investigation was launched to determine the truth and accuracy of the declaration of value on the vehicle by the plaintiff. While the investigation was pending, the Comptroller of Customs decided to delay the delivery of the vehicles to the plaintiff until the completion of the investigation. The question for the court was whether the Comptroller of Customs failed to observe the procedures under the Customs Act and whether there was a breach of natural justice by failing to inform the plaintiff of the concerns of the Comptroller of Customs and affording him an opportunity to be heard. The court, agreeing with the plaintiff, accepted that there was a breach of the principles of natural justice in so far as the Comptroller of Customs failed or refused to inform the applicant of his concerns relating to the truth and accuracy of the declaration and to afford him an opportunity to be heard on those concerns as he was bound to do.[9] The court observed that the Comptroller claimed that the GATT (General Agreement on Tariffs and Trade) Agreement required consultation between Customs and the importer, generally, depending on the circumstances; that such consultation would be required if a 'person' was making a declaration that was true, but if the Comptroller had reason to doubt the declaration as accurate, the principle of consultation would not necessarily hold; that when additional information was sought where, for example, fraud was suspected, he did not consider that consultation with the importer for the purposes of the GATT Agreement was necessary.[10] The court held, contrary to the view of the Comptroller, that such consultation was especially required where fraud was suspected as it may assist in allaying or dispelling the suspicions of Customs and lead to a speedy resolution of the issue.[11]

The professions

In disciplinary proceedings, generally, and particularly in relation to those of members of professions, it is important that, before any punishment is made, the person affected is allowed a right to answer the charges and, importantly, to be told beforehand of the specific charges to enable him to properly answer them. In *Re Errol Niles (No. 2)*,[12] the court considered the issue of whether the disciplinary committee of the Barbados Bar Association should have formulated charges in writing outlining the specific breaches of the Code of Ethics committed by the applicant. The applicant relied on *Maharaj v Attorney General for Trinidad and Tobago*,[13] where the Privy Council held that where a person was charged with contempt of court, particulars of the specific nature of the contempt had usually to be made plain to the alleged contemnor by the judge before he could be properly convicted and punished. It continued that, in *Maharaj*, where the judge had failed to explain to the alleged contemnor that the contempt with which he intended to charge him was 'a vicious attack on the integrity of the Court', that failure vitiated a committal for contempt since the attorney-at-law had not been offered the opportunity to explain what he had meant by 'unjudicial conduct'. The court then rejected the submission on

7 *The Village Council of Craig Village District v Local Government Board* GY 1969 CA 12.
8 BB 2006 HC 13.
9 Ibid at [64].
10 Ibid at [65].
11 Ibid at [66].
12 BB 2003 CA 16.
13 [1977] 1 All ER 411.

the basis that, at the hearing before the original Court of Appeal, the applicant had every opportunity to proffer that argument. It continued that, if he chose not to do so then, it was now too late for him to seek to re-open it.[14] In addition, the court held that the statutory procedure, relating to such disciplinary proceedings, provided an ample opportunity for an attorney-at-law to know the case which he had to meet. The court then cited *Rees v Crane*[15] for the view that '[f]airness . . . requires that the person complained of should know at an early stage what is alleged so that, if he has an answer, he can give it'.[16] The court was of the opinion that the case against the applicant consisted of allegations set out in the affidavit of the complainant and it doubted whether a committee of attorneys-at-law would have denied a request for particulars of the allegations if they were considered vague. It continued that the applicant at no time requested particulars and, in fact, did not even respond until the very last minute to the correspondence sent by the committee in which were included the allegations of the complainant, and so it must be assumed that he was satisfied with the adequacy of the allegations being made against him. The court distinguished *Maharaj* on the basis that it was a case of a criminal proceeding and, although it agreed that the effect of disbarment of an attorney-at-law from legal practice might be as traumatic as a penal sanction, it hesitated to accept that technical points applicable in the field of criminal law and practice had an equal place in judicial review.[17] The court claimed that, when a similar argument was raised in the earlier case of *Re Asquith Jules*, the court noted that section 19(1) of the Legal Profession Act contemplated that the committee would require attorneys-at-law to answer allegations contained in affidavits made by their clients, and the scheduled rules did not require clients to make or frame precise charges for breaches of specific rules. It claimed that the statute made provision for complaints by clients of unprofessional conduct by attorneys-at-law, not for complaints by clients of specific breaches of the Code of Ethics.[18] And it was also pointed out that the statutory procedure for making complaints against attorneys-at-law was simple to invoke; and to require specific charges for breaches of the Code of Ethics to be lodged by complainants could only mean that prospective complainants would need to retain other attorneys-at-law to assist them in making their complaints, thereby leading to greater expense.[19]

The court was of the opinion that it was unnecessary (having regard to the concise and clear allegations made by the client) that charges be drafted by the committee, since it would be a dangerous action and could lead to an accusation that the committee acted as both prosecutor and decision maker.[20] The court explained that the legislative scheme required the complainant to set out allegations in the affidavit prescribed in Form 1 and to set out the ground(s) of complaint in Form 2. Under section 21, 'where the Committee decides after hearing an application, that a case of professional misconduct has been made out against an attorney-at-law', it was then mandated to forward its report to the Chief Justice. The court claimed it was apparent that the committee was not to come to any conclusion or make any determination of professional misconduct until after it had heard the complaint following a preliminary finding that a *prima facie* case was initially shown. In its view, it was at the stage, after a full hearing, that the committee must then look to the Code of Ethics to determine whether the facts adduced in evidence amounted to a breach of any of the rules of the Code; and that it was

14 BB 2003 CA 16 at [62].
15 (1994) 43 WIR 444 at 460.
16 BB 2003 CA 16 at [62].
17 Ibid at [63].
18 Ibid at [64].
19 Ibid at [65].
20 Ibid at [66].

open to the committee to find that the conduct breached one or more of the rules and to identify them in its report. The court then concluded that, when the matter was heard by the Court of Appeal, the attorney-at-law was then perfectly entitled to contest the findings of the committee.[21]

Immigration

Against the move towards economic integration in the Caribbean Community (CARICOM), with one of its pillars being the free movement of persons throughout the Community, there are still many decisions in the Commonwealth Caribbean concerning the status of Caribbean nationals in other Caribbean territories. In *Sparman v Greaves*,[22] the court noted that it was not in dispute that the applicant was not given an opportunity to be heard before the decision to revoke his permission to work in Barbados was made.[23] The respondent argued that there was no obligation on the part of the Chief Immigration Officer to allow the applicant to make any representation to him before the decision was made to revoke the permission.[24] It acknowledged the *audi alteram partem rule* ('hear the other side') but submitted that immigration cases fell into a category where the right to be heard may be abridged and that the present case was one such case.[25] For this submission, the respondent relied on *Commonwealth Caribbean Public Law*, where Professor Fiadjoe dealt with the exceptions to the right to be heard and stated that 'the right to be heard is not absolute. It may . . . be excluded for good reason'.[26] The court noted that among the exceptions pointed out by Fiadjoe are circumstances where there are national security considerations and in immigration cases.[27] On the facts, it also noted there was no allegation that the applicant in any way posed a threat to national security; and it was not advanced in the affidavit of the Chief Immigration Officer filed in opposition to the application. The court claimed that the respondents conceded that he did not have any instructions which specifically addressed national security.[28] The applicant argued that there was a two-stage process: the first before the Chief Immigration Officer and the second before the Immigration Review Committee.[29] The court stated that the fallacy in that argument lay in the fact that the letter of revocation was final; there was nothing done in the nature of a preliminary investigation by the Chief Immigration Officer.[30] It continued that he had made up his mind and called upon the applicant 'to cease employment in Barbados immediately' and advised that he would be allowed two weeks to wind up his affairs. In those circumstances, the court held, any review by the Committee could not have formed part of any two-stage process leading to a final decision by the Chief Immigration Officer.[31] In rejecting the applicant's argument that there was a process involved in the present case,[32] the court ruled that when the Chief Immigration Officer made the decision in question, he was operating squarely within the provisions of the Immigration Act and had not recognised that under section 16 of the Administrative Justice Act of Barbados (AJA), he was required to apply the principles of natural justice when

21 *Bosfield v The Professional Architects Board* BS 2003 SC 71.
22 BB 2004 HC 21.
23 Ibid at [82].
24 Ibid at [83].
25 Ibid at [84].
26 Ibid at [85]. Fiadjoe, *Commonwealth Caribbean Public Law* (3rd edn), 2008, London: Cavendish at 2.
27 BB 2004 HC 21 at [86].
28 Ibid at [91].
29 Ibid at [105].
30 Ibid at [106].
31 Ibid.
32 Ibid at [107].

making a decision to revoke the permission earlier granted to the applicant.[33] As a result, the court concluded that there was a breach of the principles of natural justice.[34]

Public Service Commission

Under Commonwealth Caribbean constitutions, generally, the Public Service Commission (PSC) is given the power to appoint, discipline and remove public officers from office. In the discharge of their functions, it is clear that the principles of natural justice must be observed. In *Public Service Commission v Public Services Board of Appeal*,[35] a public servant was dismissed by the PSC for leaving the island without permission while he was on sick leave and another was dismissed for going overseas with permission but overstaying his time. On appeal, both applicants were reinstated by the Public Service Board of Appeal (PSBA). The questions which arose for consideration by the court were: first, whether the PSBA was bound to confirm the decisions of the PSC; and, second, whether the applicants were entitled to be heard by the PSC before being dismissed. The court noted that much of the argument centred on whether or not a person subject to summary dismissal was entitled to be heard before the power was exercised. The court claimed that, posed in such broad terms, the question may well defy answer since the category of persons subject to summary dismissal was usually placed separate and apart from and often in contradistinction to the category of persons who could only be dismissed after enquiry. After citing *Ridge v Baldwin*,[36] the court held, in that case, that no question arose of hearing the other side. As a result, it further held that it could not accept the broad rule, for which the appellant argued, that, in the case of all public officers, the constituent element of natural justice was that a person must be heard before action prejudicial to his interest was taken. It claimed that the problem in this case was that the concept of summary dismissal had been introduced by the Public Service Regulations and was exercisable only if the public officer is actually absent from the State without leave at the time of its exercise. The court was of the view that, first, in such a case, no question of hearing him would arise as he would at that time be out of the State without permission; and, second, if, however, the power was not exercised while the officer was away and he was back in the State when the decision to dismiss was taken, then, the normal procedure under regulation 53 for investigating a complaint which could lead to dismissal should be followed.

Many of the decisions involving the public service are cases where persons were discharged or dismissed from the public service without being told of the nature of the charge or allowed a hearing at which they could put their side of the story. In *Easton v Attorney General of Guyana*,[37] the appellant was discharged from the police force by the Commissioner of Police under section 35(1) of the Police Act. The court noted that, while it is always possible for hearings to be excluded by the scheme of the legislation, the law leans heavily in favour of a hearing where the grant of a fair hearing is consistent with the exercise of legal power. The court continued that the common law presumption of a right to be heard was not to be excluded

33 Ibid at [112].
34 Ibid at [115]. See also *Small v Belgrave* BB 2000 HC 14 (section 23 of the Commissions of Inquiry Act); *Shazar Distributors Inc v Attorney General of Barbados* BB 2006 HC 13; and *Sargent v Knowles* BS 1994 SC 40.
35 VC 1977 HC 11. See also *Adams v Commissioner of Police* AI 2009 HC 19; *Clarke v Commissioner of Police* JM 1996 CA 4; *Re Galbaransingh* TT 1997 HC 158; *Braynen v Attorney General of the Bahamas* BS 1995 SC 40 (where the police officer was discharged after being charged with two offences of soliciting, contrary to sections 3(2) A and 10B of the Prevention of Bribery Act); and *Bertrand v Public Service Commission* DM 2000 CA 1.
36 [1964] AC 40.
37 GY 2001 CA 10.

by the mere silence of a statute. Nor, in its opinion, was this presumption to be excluded merely for the sake of administrative convenience.[38] The court emphasised that, while the content of natural justice may vary from case to case, this was ground for saying that it applied even though all or any of its rules might not be applicable in the particular circumstances of a specific case, and that the limited application or non-application of its rules should not conduce to an error of statutory interpretation that it was excluded in every case. In the instant case, the court claimed that it was clear that the exercise of the statutory discretion of the Commissioner to discharge a subordinate officer or constable under section 35(1) of the Police Act deprived the subordinate officer or constable not only of his public office and his means of livelihood, but also, possibly, his pension benefits.[39] It questioned whether Parliament intended that a subordinate officer or constable could be so deprived by the exercise of the Commissioner's discretionary power without him having a right to be heard as to why his discharge from the police force would not be in the public interest.[40] The court responded that there was nothing in the scheme of the Police Act to lead it to conclude that the common law presumption of a right to be heard was excluded by necessary implication; and noted that, on the contrary, it would not be fair and in accordance with natural justice to serve public interest at the expense of the office and means of livelihood (and, possibly, pension benefits) of the subordinate officer or constable without affording him a right to be heard in circumstances where a hearing could be afforded.[41]

The court claimed that it could envisage a situation where circumstances may render the rules of natural justice inapplicable. It explained that if a subordinate officer or constable was involved in an accident which, unfortunately, rendered him a vegetable, his usefulness to the police force would end. In such a case, the court continued, there was no doubt that the rules of natural justice would not apply to the exercise of the Commissioner's discretion to discharge him under section 35(1) of the Police Act. However, in such a case the right to be heard was not excluded by Parliament but was rendered inapplicable by the particular circumstances of the case.[42] The court claimed that one must distinguish between exclusion by the scheme of the Act and inapplicability by the circumstances of the case, noting that the right to be heard may not be excluded by Parliament but may be inapplicable by the circumstances of the case. The court noted that it was significant that, under section 35(1) of the Police Act, the Commissioner is mandated to consider not merely the conditions of the police force and the usefulness of the subordinate officer or constable but also 'any other relevant circumstance'.[43] It explained that there may be 'a relevant circumstance' which was disputed by the subordinate officer or constable or 'a relevant circumstance' which is unknown to the Commissioner but known to the subordinate officer or constable. It continued that, without affording the subordinate officer or constable a hearing, the Commissioner may well exercise his statutory discretionary power to the prejudice of the subordinate officer or constable by taking into consideration a non-existent circumstance or by failing to take into consideration an unknown relevant circumstance.[44] For this reason also, the court was of the view that the scheme of the Police Act did not exclude the common law right to be heard.[45]

38 Ibid at 11.
39 Ibid.
40 Ibid at 11–12.
41 Ibid at 12.
42 Ibid.
43 Ibid.
44 Ibid at 12–13.
45 Ibid at 13.

The court also held that a subordinate officer or constable always had a right to be heard before he could be discharged from the Force under section 35(1) of the Police Act.[46] It continued that, where the grant of the hearing was consistent with the exercise of the legal power, the law leans in its favour. In the instant case, the court found nothing in the scheme of the legislation to come to the conclusion that the conferment of a right of appeal necessarily implied that the appeal was the only opportunity of a hearing. In other words, it found nothing in the Police Act which could lead to the conclusion that the right of appeal conferred by section 35(2) necessarily excluded a right to be heard which was not inconsistent with the exercise of the legal power of the Commissioner under section 35(1).[47] The court continued that it must be mentioned, *per curiam*, that it did not accept the contention that the statutory conferment of a right of appeal to an administrative body or tribunal was, per se, indicative of a right to be heard at the initial decision-making stage. On the contrary, it was of the view that it was arguable that the existence of a full right of appeal on the merits may be taken into account in holding that the scheme of the Police Act did not require a hearing at the initial decision-making stage.[48] The court also explained that a right of appeal itself involved an opportunity to be heard and might be sufficient to ensure fairness in the decision maker, but that if it was insufficient to ensure fairness in the decision maker, then there would be strong ground for holding that a right to be heard was implied at the initial decision-making stage. It noted that, first, the scheme of an Act may imply a right to be heard at the initial decision-making stage and yet expressly confer a right of appeal; second, in such a case where there was a failure of natural justice at the initial decision-making stage, a sufficiency of natural justice at the appellate stage provided no cure; third, the decision of the decision-making body was void *ab initio* not voidable.[49] Consequently, the court concluded that, since the appellant was not afforded an opportunity to be heard by the Commissioner before he made any decision to discharge him from the police force, there was a failure of natural justice and the decision of the PSC was *ultra vires*, null and void – even if it was the intention of the Commissioner to discharge the appellant in the public interest.

Educational institutions

The right to be heard applies where any right, privilege or other benefit is to be taken from a person; in such cases they should be told of the nature of the charge and be allowed an opportunity to be heard in response to the charges. But, importantly, this 'right' only applies where there is actually something on which the applicant should be heard; it is not to be divorced from the context in which the applicant alleges a breach of natural justice. *Archibald v Council of Legal Education*[50] concerned the award of a failing grade to a student who claimed that, first, the grade was unreasonable; and, second, the Council of Legal Education (CLE) had failed to give him a fair hearing. He further claimed that there was a breach of the *audi alteram partem* rule, in that the CLE did not give him an opportunity to challenge any untruth which may or may not have been spoken about him or any inaccuracy that may have been put forward by the administrators of the Norman Manley Law School (NMLS). The applicant argued that he was not saying that the CLE was obliged to grant him an opportunity to make an oral presentation but that what was required was a fair hearing. In these circumstances, he continued, a fair hearing

46 Ibid at 14.
47 Ibid at 15.
48 Ibid.
49 Ibid.
50 JM 2009 SC 7.

meant that the CLE ought to have given him the opportunity to respond to the information which the CLE had gleaned from the Chairman of the CLE's 'enquiries' and 'discussions with senior administrators'. The respondents argued, citing *Auburn Court Limited v The Kingston and Saint Andrew Corporation*,[51] where the Privy Council implicitly confirmed that the opportunity to be heard did not require an oral hearing, that the guiding principle was that the procedure should be fair and that even if an applicant had produced a written application, he should be given an opportunity to respond to any objection to that application. The Board claimed that 'the principle [of acting fairly] requires that, if an objector is to be heard by the committee, the committee ought to give the applicant an opportunity of being heard also. In a contest of that kind, one side cannot properly be heard without hearing the other.'[52]

On the question of whether an opportunity to respond had been granted to the applicant, the court noted that the nature of the proceedings was important.[53] It continued that in order to determine whether fairness required giving Mr Archibald an opportunity to respond to the information which the Chairman had secured, the court should consider what was being requested of the CLE. The applicant had requested that his final grade be changed, claiming that the award of a final grade of 'D' from 2 'D's and an 'A' was mathematically flawed; that if it was based on different weights being given to the various assignments, that that was manifestly unfair, as no prior indication had been given to the students to that effect.[54] The court continued that it was not known what information the Chairman of the CLE had secured, or, indeed, if there was any objection raised to the application and that, in his letter, the Chairman gave the impression that there was no formal hearing. It continued that the fact that there was not a formal hearing was not, by itself, definitive but did merit consideration in determining the nature of the exercise conducted by the Chairman. The court claimed the crux of that issue was whether, under the NMLS's system, two 'D's and one 'A' ought to result in a final grade of 'D'. It noted that, in conducting that exercise, there was no room for 'objection' to the Chairman's appeal. The court explained that the administrators of the various law schools would have provided the Chairman with information as to the system in operation but, in its view, there was nothing to which the Chairman would have needed the applicant to respond. As a result, the court found there was no breach of the requirement of fairness.

Permits and licences

One of the areas where many of the leading cases on natural justice originate is in cases relating to permits and licences, namely a deprivation or suspension of a driver's permit, liquor licence or gun licence. In *Bahadur v Attorney General of Trinidad and Tobago*,[55] the applicant sought a declaration that the decision of the Transport Commissioner to detain his driving permit was null and void. The applicant's permit was suspended after he was charged with manslaughter and dangerous driving but he was subsequently acquitted. The question arose whether the appellant should have been given the opportunity to be heard prior to revocation of his permit in circumstances where the Licensing Authority detained his driving permit longer than 14 days

51 (2004) 64 WIR 210.
52 Ibid.
53 Ibid at 7.
54 Ibid at 8.
55 TT 1988 CA 17. See also *Gumbs v Attorney General of St Kitts and Nevis* KN 2003 HC 13 (considering section 67 of the Vehicles and Road Traffic Act, which provides the Licensing Authority with a discretion as to whether or not to suspend a driver's licence); *Mosca v Trinidad and Tobago Racing Authority* TT 1989 HC 90; *Jaglal v Attorney General of Trinidad and Tobago* TT 2004 HC; and *Luxam Industries Ltd v Ministry of Industry, Enterprise and Tourism* TT 1989 HC 123.

after the appellant was freed of the charges.[56] The court asked whether the exercise by the Licensing Authority of its power to suspend a driving permit under the provisions of section 87(1) of the Motor Vehicle and Road Traffic Ordinance was validly carried out if the Licensing Authority did not allow the holder of the permit first to be heard. This question, the court continued, involved the consideration of the *audi alteram partem* rule which, it claimed, had a chequered history, from the time of its inception.[57] In its view, there was a presumption that the rule applied to judicial proceedings as distinct from administrative acts or proceedings' and that it was to be expected, therefore, that if a person appeared before a court, his driving permit might not be suspended or revoked without giving him the opportunity of putting forward his case. The court continued that the question which needed to be answered was whether it was necessary for the Licensing Authority to hold an enquiry or give an opportunity to the appellant to be heard before it came to the decision to suspend the appellant's driving permit.[58] It explained that the appellant could not invoke the exception in this case, noting that it was true that, on the suspension of his driving permit, he was deprived of the use and enjoyment of his vehicle but he could have appealed against the Licensing Authority's decision almost immediately. The court noted that provision is made in the Ordinance at section 3(3) for the Trinidad and Tobago Transport Board ('the Board') to hear and determine any appeal submitted by an aggrieved person against any order or decision of the Licensing Authority.[59] It was of the opinion that, having regard to the composition of the Board, of persons having a wide range of interest, it must be presumed that Parliament intended in the specified cases where the Licensing Authority suspends a person's driving permit, that the latter would have recourse to a competent tribunal which is more capable and better suited to hold enquiries and to arrive at decisions than the Licensing Authority whose function, in this respect, appeared to be purely an executive one. The court then stated that it would seem, however, in the interests of fairness, though it was not obligatory, that notice of suspension of a driving permit should contain the information that an appeal would lie to the Board under the provisions of section 3(3) of the Act. In the instant case, it claimed that the omission of this information had not in any way affected the appellant.[60] As a result, the court held that the appellant had no right to be heard before the Licensing Authority suspended his driving permit.

In *Naraynsingh v Commissioner of Police*,[61] the appellant's firearms licence was revoked by the respondent Commissioner of Police pursuant to section 21 of the Firearms Act 1970. Section 21(d) provides that: '21. The Commissioner of Police (the Commissioner) may revoke any licence, certificate or permit – (d) in any other case, if he thinks fit.' The Privy Council noted that the question for its determination was whether the Commissioner acted fairly in those circumstances in reaching his conclusion that the appellant's licence should be revoked.[62] In other words, could he properly 'think [it] fit' to revoke the licence without making any further enquiry into the matter and without giving the appellant any further or better opportunity of contesting the allegation that a second firearm had indeed been found at his house rather than, as he himself was alleging, been planted there? The Board explained that, clearly, the Commissioner was required to act fairly in the exercise of the administrative power conferred on him by section 21.[63] The appellant claimed that the Commissioner had no alternative but to

56 TT 1988 CA 17 at 3.
57 Ibid at 4.
58 Ibid at 6.
59 Ibid at 9.
60 Ibid.
61 TT 2004 PC 6. See also *Globe Detective and Protective Agency Limited v Commissioner of Police* TT 1997 HC 113.
62 TT 2004 PC 6 at [16].
63 Ibid at [17].

hold some form of inquiry, an oral hearing at which the appellant could have confronted the alleged finder of the second firearm, in particular, given that this opportunity had been lost to him by the prosecution's non-attendance before the magistrate.[64] The Board claimed that, notwithstanding the absence of any right of appeal from the Commissioner's decision, it would unhesitatingly reject that submission and would accept in this regard the correctness of two earlier decisions of the Courts of Trinidad and Tobago, namely *Burroughs v Katwaroo* and *Globe Detective and Protective Agency Ltd v Commissioner of Police*, concerning the exercise of this section 21(d) power of revocation of a firearm user's licence.[65] The Board continued that the Commissioner, in short, was not required to convene an oral hearing before exercising this power: he could adopt an exclusively written procedure. It was of the opinion that this was not to say, however, that the procedure adopted in the present case, and in particular the perfunctory nature of the Commissioner's own inquiry into the facts, satisfied the requirements of fairness.[66] The Board claimed that it was suggested, on the material before him, the Commissioner could not logically conclude that the unlicensed weapon was found rather than planted on the appellant's premises but the Court of Appeal, not surprisingly, rejected that argument.

The Board questioned whether the Commissioner was entitled to reject the appellant's allegation of a 'plant', without more, simply on the basis of the material before him.[67] It responded that he was not claiming that substantially more in the way of investigation was required than was undertaken here. The Board explained that all that was known was the unlicensed items were presented to the appellant by PC Legendre outside the premises and the appellant immediately denied all knowledge of them: further inquiries plainly could and should have been made. The Board continued that it would not always be necessary for the Commissioner to ascertain more about the circumstances of whatever it was which inclined him to revoke a licence than was ascertained in the instant case.[68] Sometimes, in its opinion, further information may simply not be available, or the facts may be plain enough. On the facts, the Board held that further information obviously was available, and where there are a number of puzzling features of the case (not least why so many people should have attended the appellant's home to enforce a small debt), then a fair procedure demanded that further inquiries be made, particularly having regard to the abandonment of the criminal prosecution. As a result, the Board quashed the Commissioner's decision to revoke the appellant's licence.[69]

Planning decisions

The State can exercise a considerable amount of power in the area of town and country planning. Under statute, it is given the right to make decisions relating to matters such as the use of public land or the nationalisation of private property for public use. Where such decisions are made it is imperative that the affected persons be allowed a right to be heard in opposition to these plans where these may materially affect their neighbourhood; and where that does not take place, the court should not hesitate to declare any decision made by the public authority unlawful for breaching the rules relating to natural justice. In *Blakes Estate Limited v Attorney General of Montserrat*,[70] the Government of Montserrat decided to acquire some of the claimant's land

64 Ibid at [18].
65 Ibid at [19].
66 Ibid at [20].
67 Ibid at [21].
68 Ibid at [23].
69 Ibid at [24].
70 MS 2002 HC 2.

for a public purpose, namely the location of a public cemetery. However, the claimant was not given the opportunity to be heard as required by section 16 of the Physical Planning Act (PPA) and the approved Physical Development plan for North Montserrat, 2000–2009. The applicant argued that section 16 of the PPA gives the claimant an express statutory right to be heard before an application for development permission is determined.[71] The court noted that the principles of natural justice dictate that when any domestic, administrative or judicial body has to make a decision which will affect the rights of an individual, that individual has the right to be informed of the case to be met, to reasonable time to prepare a response and then to be heard.[72] The court noted that, while it was cognisant of the urgent need for a public cemetery in Montserrat, it could not ignore the clearly defined procedures established in section 16 of the PPA for the granting of planning permission by the Planning Authority ('the Authority').[73] It continued that the Authority was entrusted with the power to grant planning permission in order to protect public interest and to further the objectives and aims of the PPA which were recited in the preamble: '[a]n Act to make provision for the orderly and progressive development of land, for acquisition; preservation and management of Historic Sites'.[74] The court claimed that it was undisputed that the claimant's proprietary and financial interest might be affected by the placement of a public cemetery on the site. It continued that it did not believe that the claimant's right to procedural fairness, in the circumstances, inhibited in any way the proper exercise of the Authority's power which the legislature had entrusted to it, since the legislature had enacted the section 16 provisions.[75] The court explained that it was obvious that the statutory scheme of the PPA displayed the legislature's intention that the rules of natural justice should apply to the decision-making powers when considering whether or not to grant planning permission under the PPA: (a) section 16(1) and 16(2) provide for the claimant's right to be informed, to be notified; (b) section 16(3) provides for the claimant's right to reasonable time to prepare and forward a response; and (c) section 16(4) provides for the claimant's right to be heard. As a result, the court held it had no doubt that section 16 of the PPA attracted the rules of natural justice and the claimant's right to procedural fairness ought not to be sacrificed because of the urgent need for a public cemetery.[76]

The defendant argued that the Chief Physical Planner's and other government officials' discussions and communications with the claimant concerning the choice of the public cemetery site and the compulsory acquisition of the three acres at Blakes Estate should be construed as adequate compliance by the Authority with the provisions of section 16 of the PPA. The court agreed with the claimant that the discussions with Mr Greenaway, in his capacity as Chief Physical Planner and the Authorised Officer under the Land Acquisition Act, prior to the Ministry of Health's Application for Planning Permission, could not constitute compliance with the procedural requirements under section 16, by the Authority, which comprised ten members.[77] It continued that the appreciation of the Authority's duty under section 16 was apparently blurred because, but for two of its members, the Authority comprised persons who, in their capacity as public servants, might have been actively or otherwise involved in choosing the public cemetery site. As a result, the court found for the claimant.[78]

71 Ibid at [77].
72 Ibid at [82].
73 Ibid at [85].
74 Ibid.
75 Ibid.
76 Ibid.
77 Ibid at [87].
78 Ibid at [88].

In *National Trust for the Cayman Islands v Planning Appeal Tribunal*,[79] the court considered what the requirements of fairness entailed when the Central Planning Authority ('the Authority') made decisions with respect to a proposed development, namely the development of a golf course in the wetlands by the Ritz Carlton, without first letting the applicant make comments or representations. The first applicant claimed that they were kept in the dark by the defendant and were not told what was being proposed, discussed or considered and that information was being provided to and comments were being sought from others but not them.[80] They further claimed that the very issues on which they had expressed concern were being decided without them being given any chance of knowing what was being proposed and discussed, or a chance to comment on those issues. The defendant argued that both appellants were given an opportunity to be heard, because the notice of the proposed development was published and well known.[81] It claimed that the first applicant, on his own behalf and on behalf of the National Trust, appeared before the Authority at its only public hearing and addressed the Authority on their concerns regarding the environment. The respondent claimed that, as a result of the concerns raised by the first applicant, the Authority ordered that the mangrove buffer be preserved; investigated some specific environmental concerns; and ordered that a full environmental assessment report be prepared.[82] In addition, it argued that, while the appellants were entitled to be heard, they were not required to be involved in every aspect of the decision-making process, nor to receive all documentation and technical reports that were given to the Authority. The respondent said the Authority gave the appellants a fair hearing, considered their objections, and based its decision in part on those objections.[83]

The court questioned what was required, in this case, to constitute a fair hearing in accordance with the principles of natural justice. It agreed that it was not appropriate to lay down a complete code as to what constituted natural justice before the Authority, but for this particular application there were three requirements that had to be satisfied for natural justice to be achieved: first, the parties affected must have the opportunity to understand what was the nature and content of the application for planning permission (in other words, they must know the case they have to meet); second, the objector must be given a reasonable opportunity to put his objections before the Authority; and, third, the objection must be considered by the Authority, who will determine what weight is to be attached to any particular objection.[84] As a result, the court concluded that the appellants had not been given a fair hearing in accordance with the principles of natural justice because there was a failure to meet the first and second requirements.[85] The court claimed that, while the appellants had notice of what was proposed in the granting of permission, they did not have notice of the issues, submissions or proposed environmental measures that were being put forward and discussed after that. In addition, the court claimed that the concerns of the Department of Environment, the proposals of the Ritz Carlton, the revised plan, the proposed contents of the environmental assessment report and the comments of the Department of Environment were all matters that went to the heart of the appellants' objections and concerns.[86] The court wondered how it could be said that the appellants were given the opportunity to put their position before the Authority when they were never told of the proposed environmental measures. The appellants were simply told that the

79 KY 2000 GC 75.
80 Ibid at 3.
81 Ibid.
82 Ibid at 8.
83 Ibid.
84 Ibid at 22.
85 Ibid at 23.
86 Ibid.

Ritz Carlton was seeking to develop a golf course in the wetlands and they were given and exercised their rights to object.[87] The court explained that, if the Authority had granted permission to develop the golf course in its 17 December 1997 meeting, the appellants would probably have had little ground to complain about the lack of a fair hearing. However, it continued that the Authority deferred that decision and, thereafter, it received revised submissions from the developer, submissions on environmental impact and proposed studies and comments from the Department of Environment.[88] In the court's opinion, the issues that were key to the appellants were obviously important to the Authority and they were being widely discussed and revised without any notice to, or input from, the two main objectors. Having decided to accept a revised plan and a proposal to deal with these key environmental issues, it ruled that a fair hearing in accordance with the principles of natural justice required, in this case, that the objectors be made aware of what had been filed and be given a reasonable opportunity to comment, either orally or in writing, as the Authority considered appropriate.[89]

The respondents argued that to do so would wreak administrative havoc in these islands, that it would not be possible to notify everyone at every stage and that, if the appeal were allowed on these grounds, the Authority would no longer be able to function. The court rejected these arguments, claiming that what had to be done was that the two appellants be told of what had been filed, and be given the opportunity to look at and respond to it.[90] It stated that it would then have been up to the Authority to consider their views and make its decision as it saw fit. The court rejected the argument that, in other cases, involving hundreds of objectors, it would be impractical to keep them informed and give them an opportunity to be heard.[91] It claimed that, should it be necessary in order to achieve a fair hearing, then, administratively, it was not difficult to advise objectors, either by mail or publication, that there was new material to examine and that they would have a further hearing or opportunity to respond in writing. This process, in the court's view, would not unduly restrict or impair the planning process. The court therefore concluded that the failure to meet the requirements of giving a fair hearing in accordance with the principles of natural justice had, in this case, resulted in a real risk of prejudice.[92]

HEARINGS

Adjournment

Once it has been decided that the requirements of fairness or statute require that an applicant be heard, it then becomes necessary, in some cases, to have a hearing for this to occur. When a hearing is called for, the tribunal must continue to observe the principles of fairness to ensure that the applicant is given the best chance to put forward his case before the tribunal. Sometimes therefore the applicant might need an adjournment in order to enable him to better prepare his case. This would be especially necessary where the applicant first hears of the specific charges at the hearing itself. It would be obvious, therefore, that an adjournment would be necessary to enable him to answer the charge or even to instruct counsel to assist him in his defence. This right, however, must be balanced with the need to ensure that the process of the tribunal is not

87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid at 24.
91 Ibid.
92 Ibid.

frustrated by attempts by applicants to use such adjournments in order to delay or otherwise interfere with the proceedings. The courts have made it clear that an adjournment, although a necessary component of natural justice, would not be allowed simply because counsel in a judicial review application was busy.[93] In *Ali v Attorney General of Trinidad and Tobago*,[94] the court had to consider whether a judge had the power to issue a prohibition temporarily forbidding the publication of any report of comments on, or reference to, certain matters which transpired in open court. The appellants also argued that the judge's refusal of an adjournment was unreasonable and in breach of the appellants' right to due process. The court then considered the effect on the conviction of the refusal of an adjournment by the trial judge. The court explained that the appellants, Ali and Baboolal, were required to attend court and did so with their attorney and were served with the notices issued by the Assistant Registrar some 15 minutes before the court sat at 2.00 p.m.[95] It stated that the attorney made repeated applications for an adjournment to be made on their behalf but these applications were refused, and the judge stood the matter down for short periods on three occasions. The court noted that the judge did not give reasons for his refusal of an adjournment at that time or subsequently.[96] The court claimed that it could not see how the deterrent effect of the contempt proceedings against the appellants would have been weakened by their being granted a short adjournment.

The court accepted that it was especially important, in the case of contempt of court, for the punishment to follow swiftly upon the crime and that the grant or refusal of an adjournment involves the exercise of a discretion by the trial court with which an appellate court would not ordinarily interfere.[97] The court noted that if, however, the refusal of an adjournment effectively negated the right of a person to be heard, then that was one of the rare cases in which it was the duty of an appellate court to intervene. It noted that there were two features of the right to be heard which were relevant in the context of the instant case.[98] The first was that the right to be heard included the right to have a reasonable opportunity to prepare one's case. The court explained that another feature of the right to be heard was that a decision, without hearing a person who was entitled to be heard, could not be saved on the ground that the result would have been the same even if the person who was denied a hearing had been heard. On the facts of the case, the court noted that a suggestion that there was a proper opportunity for the defence to prepare its case was untenable.[99] It continued that getting instructions from Ali and Baboolal might not have taken very long, but a careful analysis would have had to be made of the three articles which were the subject of the charge.[100] This, in the court's view, would have taken some time; as it was, Mr Maharaj did not even have the opportunity of reading them. It claimed that what would have taken even more time was researching the law of contempt, particularly in relation to 'no publication' orders.[101] Noting that the complexities of that law were explored before the court in argument that stretched over four days, the court claimed that it was clear that they had not had a proper opportunity to prepare their case and that, if that situation existed, then the matter could not proceed, whatever the consequences. It claimed that, in any event, there was no compelling reason for disposing of the matter on that day, but even if there was, that could not have justified denying the appellant's attorneys a

93 *Cable and Wireless (West Indies) Ltd v The National Telecommunication Regulatory Commission* VC 2003 HC 11.
94 TT 2002 CA 47.
95 Ibid at 33.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid at 35.
100 Ibid at 35–6.
101 Ibid at 36.

proper opportunity to prepare their case.[102] The court held that observance of the rules of natural justice was especially important when the liberty of the subject was at stake, as it is in contempt proceedings. In its view, to relax those rules on the ground of some perceived need to deal expeditiously with the contempt or because the contempt appears to be obvious, or to 'speak for itself', was to take the first step down a very slippery slope.[103] It continued that the protection which the rules of natural justice afforded would become illusory if the court allowed them to be applied on a selective basis, observing that those rules were not observed when the judge insisted on the matter proceeding to completion on the afternoon of the 14 June 1996. Accordingly, the court claimed it had no option but to quash the convictions of the appellants on the basis of breach of natural justice when the applicaton for an adjournment was refused by the trial judge.

In *Re Langhorne*,[104] the court noted that there could be little doubt that the Public Service Commission was, at common law, enjoined to act judicially.[105] It questioned whether it failed in that duty in not ensuring that the appellant had the benefit of whatever documentary evidence there was at the time the charges were preferred against him, instead of at the very commencement of the enquiry. The court continued that the appellant had counsel in attendance at the enquiry, and that no application was made for an adjournment.[106] If any prejudice could or might arise from not disclosing the documents before the actual day of the enquiry, in such circumstances it questioned whether it was not incumbent on counsel who appeared at the enquiry to have asked for an adjournment. The court asked: when none was asked for and the enquiry proceeded, is it not to be inferred that no necessity existed or arose for an adjournment? It continued that, even if an adjournment was asked for and refused, could it be said that any prejudice could have arisen when the enquiry lasted for four days, which gave the appellant adequate time to make full use of what he was made aware of on the day of the enquiry? The court therefore rejected the argument that there was a breach of natural justice because of any alleged failure to allow an adjournment.

In *Clifford v Graham*,[107] the applicant brought an originating motion, claiming an order of *certiorari* to quash an order of the magistrate declaring the applicant the father of the child born to 'RH' and ordering him to pay maintenance for that child. One of the questions for the court was whether the magistrate's refusal to allow the applicant to submit to the court medical evidence of his incapacity to be a father, and whether to grant the applicant an opportunity to have legal representation, contravened the applicant's right to a fair trial and to a proper and fair determination of his case.[108] The court noted that when the matter first came before the magistrate it was adjourned for more than two months for the purpose of enabling the applicant to obtain the DNA test. The applicant had taken no steps to that end by the first adjourned date.[109] As a result, the court explained that, first, the case was again adjourned for a week, where the magistrate then heard the application and adjudged the applicant as the father of the infant child and made an order against him for maintenance of the child; and second, after a period of two and a half months, the applicant offered the magistrate no explanation for his delay in taking steps towards obtaining the DNA test. In addition, it stated that before and even up to the time that the judicial review application was heard, there was no evidence that the

102 Ibid.
103 Ibid.
104 GY 1969 CA 25. See also *Re Errol Niles* (No. 2) BB 2003 CA 16.
105 GY 1969 CA 25 at 7.
106 Ibid.
107 BB 2002 HC 8.
108 Ibid at 5.
109 Ibid.

applicant had ever attempted to obtain a DNA test.[110] The court claimed that the only evidence offered by him was the medical report. Consequently, the court concluded that the applicant had had ample time to take steps towards obtaining the test and, in the circumstances, the refusal of a third adjournment by the magistrate was not unreasonable.[111]

In *Dios Mar Limited v Planning Appeals Tribunal*,[112] the court noted that when a corporation, such as the applicant, chose to be represented before the Planning Appeals Tribunal ('the Tribunal') by a lay person rather than by legal counsel, it necessarily assumed the risk that points of law would arise with which its representative was ill-equipped to deal.[113] The court continued that, in some circumstances, such a litigant would be entitled to an adjournment to retain counsel where that was requested.[114] The court claimed that there might also be cases where procedural fairness could be satisfied only by the Tribunal offering an adjournment for that purpose. In addition, it claimed that no hard and fast rule could be laid down; and that each case must depend upon its own individual facts.[115] On the facts of their case, the court was satisfied that the Tribunal did not, by failing to offer an adjournment where none had been requested, breach its duty to act fairly. The court explained that the need for the Central Planning Authority to obtain the Development Advisory Board's recommendation before giving a decision was plain and obvious.[116] It continued that Ms Turner, the lay person appointed by the applicant, who was a sophisticated business person with extensive experience in planning applications in the Cayman Islands, probably recognised that. The court ruled that there was no evidence before it that she did not and it inferred, from the record, that Ms Turner attempted to address the jurisdictional point and then made a conscious decision not to delay her company's application any further by requesting an adjournment. Consequently, the court concluded there had been no breach of the duty to act fairly.[117]

The right to cross-examine

In order to test the credibility of a witness who provides evidence during a hearing, the applicant is allowed a right to cross-examine that witness if he so requests. In *Attorney General of Trinidad and Tobago v KC Confectionery*,[118] the applicant challenged the alleged refusal by the Minister of Industry and Commerce (Minister) to approve the respondent's application to have the confectionery of the type they were manufacturing entered on the negative list. There was no statutory provision for applications to be made for negative listing of products. The court noted that justice required that the appellant be afforded an opportunity to test the reliability of such serious allegations by cross-examination of the proponents thereof before any adverse findings are made against the appellant.[119] It claimed that, first, where there was conflicting evidence, perhaps cross-examination ought to have been ordered;[120] and, second, where there was no cross-examination on the affidavits, the court was in the same position as the trial judge

110 Ibid at 7.
111 Ibid.
112 KY 2000 GC 58. See also *Cortina International Limited v Planning Appeals Tribunal* KY 1998 GC 25; and *Cortina International Ltd v Planning Appeals Tribunal* KY 2000 GC 55.
113 KY 2000 GC 58 at 7.
114 Ibid at 7–8.
115 Ibid at 8.
116 Ibid.
117 Ibid.
118 TT 1985 CA 6.
119 Ibid at 7.
120 See also *Auburn Court Limited v Kingston and St. Andrew Corporation* JM 2001 CA 38.

to come to its own conclusions.[121] The court in *Mootoo v Attorney General of Trinidad and Tobago*[122] noted that '[a]s may be expected no evidence was presented on behalf of the Attorney General. Affidavits were however filed on behalf of the claimant and the Commission. It is important to note that there was no cross-examination of any of the deponents.'[123] It adopted the principle expressed in *R v Reigate Justices, ex p Curl*[124] that 'in the absence of cross-examination where there is a dispute of fact on the affidavit evidence the court ought to proceed on the basis of the affidavit evidence of the person who does not have the onus of proof'.[125] The court then held that, in the instant case, the onus of proof was on the claimant and 'where there was a dispute of fact between the evidence of the claimant and the evidence presented by the Commission [it] resolved that dispute in favour of the Commission'.[126] In *Crane v Bernard*,[127] the court noted that the appellant was not cross-examined on any of the matters and facts which arose in the affidavits and that the consequences of the failure of a litigant to respond to allegations made against such litigant were well known.[128] The court then cited *Herrington v British Railways Board*, where it was stated that:

> [t]he appellants, who are a public corporation, elected to call no witnesses thus depriving the Court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he, or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the Court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.[129]

In *Ganga v Commissioner of Police*,[130] the court considered the issues relating to the claimant's application to cross-examine and noted that, previously, the trial court, at a case management conference, heard the claimants' application to cross-examine a witness.[131] The claimant argued that the court should permit cross-examination of a witness in order to resolve an important issue of fact.[132] The respondents argued against the grant of leave on the ground that cross-examination should only be permitted if it was necessary for the court to determine a particular issue before it.[133] They claimed that what was being challenged was the decision or the decision-making process and the dispute of fact concerned what the witness was alleged to have said after the decision was made; and that was irrelevant to the court's determination of the issues before it.[134] The court claimed that it was a well-accepted principle that cross-examination in proceedings for judicial review was extremely rare and that it was clear that cross-examination may be allowed if there was a dispute on a critical factual issue and it was necessary to resolve that issue by cross-examination.[135] It continued that the Court of Appeal of Trinidad and Tobago had, in *Manning the Prime Minister v the Honourable Satnarine Sharma the Chief Justice*,[136] succinctly set out the

121 *Bansraj v Attorney General of Trinidad and Tobago* TT 1985 CA 84.
122 TT 2009 HC 15.
123 Ibid at [25].
124 (1991) COD 66.
125 Ibid.
126 TT 2009 HC 15 at [25].
127 TT 1992 CA 24.
128 Ibid at 10.
129 [1972] AC 877 at 930.
130 TT 2007 HC 240.
131 Ibid at [6].
132 Ibid at [8].
133 Ibid at [9].
134 Ibid.
135 Ibid at [10].
136 TT CA (unreported).

law as to when cross-examination was permitted in judicial review proceedings.[137] The court was of the opinion that, first, cross-examination in judicial review proceedings was only permissible when it was relevant to an impugned decision, and it was linked to a ground of challenge of procedural impropriety, but a prior consideration was that the affidavits either contained conflicts of facts central to a material issue in the case or infringed the duty of full and frank disclosure; and second, it was for this reason that cross-examination in judicial review proceedings was understandably rare. The court stated that, on the test laid down by the Court of Appeal, the claimants' application for leave to cross-examine must fail because, first, the conflict of fact was not central to any material issue;[138] and, second, no duty of full and frank disclosure had been infringed. In addition, the court claimed the issue was irrelevant to the impugned decision so it refused leave to the claimants to cross-examine the witness.[139]

The courts have noted that the right of a claimant to cross-examine a witness would not arise automatically; it depends on whether, in the circumstances, it would be unfair not to let the person who wishes to do so cross-examine the witness; and that it was normally granted on request.[140] There may be cross-examination in the matter since critical facts are very much in dispute.[141] This is particularly the case where there are allegations of bad faith.[142] In *Johnson v Registrar of Insurance*,[143] the applicant applied for *certiorari* to quash the decision of the Registrar of Insurance to not register him as an insurance agent and *mandamus* to compel the Registrar to reconsider the application. The questions the court had to consider were whether natural justice required the plaintiff to meet and cross-examine his accusers and whether the right to cross-examine applied to a case where the onus was on the applicant to satisfy the administrative body of his good character. The court noted that, based on the evidence, it found it difficult to conceive what grievance the plaintiff could possibly have, except that he was not given the opportunity to face his accusers and possibly cross-examine them.[144] It continued that he was advised of the Registrar's concerns in clear and precise terms and was afforded ample opportunity to reply by letter. The court continued that his replies were considered, no doubt, and he was given the opportunity to again answer the allegations in a meeting with the Registrar and Deputy Registrar.[145] In other words, he was given the opportunity to 'clear the air'. It claimed that, after this meeting, he was given an opportunity to respond further by providing documentary materials to meet the allegations and, importantly, to meet with one of his accusers in an attempt to sort out their differences.[146] The court held that the plaintiff was given sufficient knowledge of what was said against him[147] and claimed that the only area of possible concern was whether or not the circumstances of this case, as they relate to natural justice, required giving the plaintiff an opportunity to meet his accusers and cross-examine them.[148] It claimed that the leading authorities recognised that a person should be given every opportunity to meet the case against him, including, if necessary and appropriate, the right to cross-examine witnesses on relevant issues. Thus the standard to be met, it claimed, was that the party

137 TT 2007 HC 240 at 11.
138 Ibid at [12].
139 Ibid at [13].
140 *Garcia v Hulse* BZ 2008 SC 15.
141 *Graham v Commisioner of Police* TT 2006 CA 33 at [48].
142 *Moore v Attorney General of Trinidad and Tobago* TT 1997 HC 177.
143 BS 2003 SC 57.
144 Ibid at [24].
145 Ibid.
146 Ibid.
147 Ibid at [26].
148 Ibid at [27].

concerned be given the opportunity to cross-examine on relevant issues.[149] The court continued by noting that the other question posed was whether the right to cross-examine applied to a case where the onus was on the applicant to satisfy the administrative body of certain things.[150] It claimed that the Board in *University of Ceylon v Fernando*[151] pointed out that it was not that there was a right to cross-examine an accuser; that may or may not depend on the nature of the process under review; it was more that if the opportunity to cross-examine was requested, but was refused by the tribunal, then it could be successfully argued that there has been a denial of natural justice.[152] In the instant case, the applicant's argument failed as he had made no such request. As a result, the court ruled that it was not for the tribunal to tender a witness for 'unasked for cross-examination', but it was for the aggrieved party to make such a request.[153] The court held that the plaintiff's position, in the instant case, was considerably weaker than that of the applicant in *Fernando* and, as counsel for the defendants quite correctly said, the defendants offered the plaintiff the opportunity to meet his accusers.[154]

In *Mahabir v Director of Land Administration*,[155] one of the issues that arose for consideration by the court was the failure to cross-examine one of the witnesses. The court found that there was no actual dispute which would have necessitated cross-examination to sort out factual matters which the court needed to consider as a matter of relevancy.[156] It continued that, in any event, cross-examination in judicial review was extremely rare and was not, in the court's view, required in the instant case.[157] In *McNicolls v Judicial and Legal Services Commission*,[158] the court noted that the purpose of cross-examination was to 'elicit new evidence' and to 'destroy', 'weaken' and 'undermine' the opponent's case; and that the opportunity to confront and probe had the distinct advantage of 'changing the complexion' of the opponent's case. It continued that there were, of course, legal limits set by the laws of evidence.[159] It then quoted from *The Technique of Advocacy*[160] where it was stated that:

> [t]esting the evidence is therefore the keynote of cross-examination: and it will be realised that, quite apart from assisting the party who is conducting the cross-examination, the subjection of evidence to such a test enables the judge to assess its value, and so serves an important public purpose in the administration of justice.

In *Narsham Insurance (B'ds) Ltd v Supervisor of Insurance*,[161] the applicant sought judicial review of the decision of the Supervisor of Insurance to refuse its application to conduct insurance business, although the application was subsequently and conditionally approved. The conditions were varied and the applicant failed to comply with the conditions and it requested of the Supervisor of Insurance an extension of time for filing, which was granted.[162] The applicant failed also to comply with conditions and the Supervisor of Insurance sought reasons from the applicant as to non-compliance so that an investigation could not be commenced, but the

149 Ibid.
150 Ibid at [28].
151 [1960] 1 All ER 631.
152 BS 2003 SC 57 at [31].
153 Ibid.
154 Ibid at [32].
155 TT 2009 HC 75.
156 Ibid at 4.81.
157 Ibid at 4.8.2.
158 TT 2008 CA 35. See also *Mitchel v Georges* VC 2007 HC 38.
159 TT 2008 CA 35 at [47].
160 Munkman, *The Technique of Advocacy*, 1991, London: Sweet & Maxwell, 51.
161 BB 1996 HC 14.
162 Ibid at 17.

company sought a further extension of time for filing.[163] The Supervisor of Insurance decided to begin an investigation into the affairs of the company. The applicant claimed that the respondent Supervisor proceeded with the investigation without giving it an opportunity to be heard or to cross-examine witnesses or to answer the alleged findings communicated in his decision.[164] The respondent argued that there was no duty on the part of the investigators to allow witnesses to be cross-examined during the process of investigation; that there was no impropriety either by the Supervisor or by the persons appointed by him to investigate the affairs of the applicant company; and that the investigation was in no way flawed in that it was conducted in accordance with the provisions of the Insurance Act and the principles of natural justice.[165] The applicant argued that, during the process of investigation, witnesses were examined under oath without the applicant having an opportunity to cross-examine them and that by taking evidence on oath, the inspectors 'judicialised' the proceedings, which meant that the applicant, therefore, was entitled to cross-examine the witness.[166] The applicant referred to the following from de Smith and Woolf and Jowell:

> Refusal to permit cross-examination of witnesses may amount to procedural unfairness, especially if a witness has testified orally and a party requests leave to confront and cross-examine him. The fact that the proceedings may be inquisitorial and informal is inconclusive. As with the entitlement to legal representation, the matter is one for the discretion of the Tribunal. However, where a 'judicialised' procedure has been adopted and witnesses are called to give evidence, then the Courts will be very ready, in the absence of strong reasons to the contrary, to find unfairness where a tribunal declines to allow those witnesses to be tested in cross-examination.[167]

The court held that if, indeed, the inspectors did examine persons on oath during the conduct of the investigation, it did not accept that they adopted a 'judicialised' procedure. In addition, the court held that there was no basis for holding that there was unfairness in the course of the investigation because the persons examined were not tested by cross-examination on behalf of the applicant.[168]

Selgado v Attorney General of Belize[169] concerned the retirement of a public servant 'in public interest'. The applicant sought *certiorari* to quash the decision of the Security Services Commission (Commission) to retire him 'in public interest' and for orders for reinstatement and promotion.[170] One of the issues for the court was whether the decision not to allow cross-examination was unlawful. The court noted that there was merit to this argument on the ground that the trial was unfair because the applicant was not allowed to cross-examine his accusers.[171] The court explained that, in the first step of the proceeding, the Commission notified the applicant in writing that witnesses would not be called for oral hearing but statements recorded from them would be considered; and the statements were sent to the applicant. The court noted the following: first, the applicant asked that there be oral hearing of the witnesses and that he be heard orally and be allowed to cross-examine certain witnesses, which he was allowed; and second, his attorney was present, and conducted his case but the Commission

163 Ibid.
164 Ibid at 18.
165 Ibid at 19.
166 Ibid.
167 de Smith, SA, Woolf, H and Jowell, J, *Judicial Review of Administrative Action* (5th edn), 1995, London: Sweet & Maxwell, para 9035.
168 BB 1996 HC 14 at 20.
169 BZ 2004 SC 7. See also *Supersad v Teaching Service Commission* TT 2003 HC 145.
170 BZ 2004 SC 7 at [2].
171 Ibid at [36].

declined to call the relevant witnesses whose statements had been given to the applicant.[172] As a result, those witnesses could not be cross-examined. The respondents argued that the Commission was entitled to decline the request because under section 48 of the Interpretation Act, the Commission had power to 'regulate its own procedure', and that, under regulation 31 of the Services Commissions Regulations, the Commission could 'inform itself in such manner as it thinks fit, without regard to the rules of evidence or to other legal technicalities and form'.[173]

The court claimed that the real issue was a duty to act fairly and that the question was whether the Commission acted fairly in all the circumstances when it declined the request of the applicant to have an opportunity to cross-examine witnesses; or, put another way, whether the applicant, in the circumstances which obtained when he was denied cross-examination of the witnesses, had a fair opportunity to contradict the witnesses and put his own case.[174] In other words, whether the Commission acted fairly in all the circumstances when it declined the applicant's request to cross-examine the witnesses.[175] The court was of the opinion that there were no hard and fast rules; and that, for a hearing by an administrative tribunal to be fair, cross-examination must be afforded, or that whenever a party requests cross-examination it must be allowed. However, the court noted that, in earlier cases, strong views had been expressed that, generally, cross-examination should not be refused if requested.[176] In its view, a certain guide was whether denial of cross-examination in the circumstances of the case would render the decision unfair. The court then outlined the salient facts of the case as follows: (a) the applicant faced serious allegations of homosexual harassment of soldiers in his charge; and (b) it was made clear to him that if the charges were proved, he would be retired in the public interest, which was changed to that he would be dismissed and lose his job, which was a very severe penalty.[177] The court noted that three of the soldiers from whom statements had been obtained did not give dates for their allegations and one gave a date prior to an earlier trial. The applicant had made it known that his defence would be that the incidents never took place and that he had faced the same accusations before and had been exonerated on appeal.[178] The court continued that the applicant specifically requested cross-examination. It wondered whether a denial of cross-examination would mean a denial of opportunity to correct or contradict his accusers and effectively put his side of the case.[179] The court claimed that one had to be a stranger to liberty and justice to fail to see it as a denial of crucial opportunities to contradict or correct the witnesses' statements, and, therefore, a denial of a fair hearing. As a result, the court held that there had been procedural impropriety during the hearing at the Commission because of the denial of the request to cross-examine witnesses.[180]

In *Western Broadcasting Services v Seaga*,[181] the appellants argued that in determining the point before her on affidavit evidence alone, where there were significant factual conflicts, and declining to hear oral evidence, the trial judge went outside the ambit of her authorised powers and was guilty of an abuse of those powers.[182] In addition, it argued that, given the divergence between the affidavit evidence filed on each side, it was unfair and prejudicial to the appellant

172 Ibid.
173 Ibid.
174 Ibid at [37].
175 Ibid at [40].
176 Ibid.
177 Ibid at [41].
178 Ibid.
179 Ibid.
180 Ibid.
181 [2008] UKPC 19.
182 Ibid at [17].

for the judge to proceed to decide the matter on affidavit, while declining to receive oral evidence.[183] The Board claimed that that refusal did not appear to it 'to betoken a proper willingness to permit cross-examination of the deponents', and was 'unable to agree with the view expressed by the Court of Appeal that there was "ample opportunity" for the attorneys to cross-examine'.[184] It continued that, first, it accepted the correctness of the appellant's submission that the procedure adopted was unfair and went outside the ambit of the judge's power of case management; second, the Court of Appeal was wrong to uphold the judge's factual conclusion, given the unresolved conflicts of evidence; and third, in the absence of cross-examination it was in no better position than the judge to assess the credibility of the respective deponents, citing *Chin v Chin*.[185]

Oral hearing

An oral hearing may or may not be necessary to allow an affected person to put his or her case to a public authority which had laid charges against him or her. The crucial aspect is that the person be allowed to make representations and the question sometimes arises as to whether these representations are best made orally or whether they could be made in writing. Regulations may provide for an oral hearing where the affected parties can put their case;[186] to answer what is alleged against them,[187] or is provided for under legislation.[188] In *Public Disclosure Commission v Isaacs*,[189] the court agreed with:

> Georges CJ that if the Commission were provisionally minded to find a complaint frivolous, vexatious or groundless and, in so reporting to the Attorney-General under section 8(3), to expose the complainant to the risk of prosecution for an offence under section 13, they would have to indicate to the complainant the reasons for their provisional view and give him a fair opportunity, at an oral hearing if he so wished, to demonstrate that their provisional view was unfounded and that he had at least good ground for making the complaint. But such a question would ordinarily arise before the Commission ever called on the declarant to meet or answer the complaint and in any event does not arise in this case.[190]

The court has made it clear that the word 'hearing' does not necessarily in all circumstances involve an oral hearing.[191] In *Rees v Crane*,[192] the Privy Council was of the view that having considered all the points raised by counsel for both sides and the judgments and writings referred to therein, it was satisfied that in all the circumstances the respondent was not treated

183 Ibid.
184 Ibid.
185 [2001] UKPC 7.
186 *Cable and Wireless (Barbados) Limited v Fair Trading Commission* BB 2003 HC 21. Utilities Regulation (Procedural) Rules 2003 ('the Procedural Rules') rule 39(1) empowers the Commission to hold an oral hearing or part of an oral hearing in the absence of the public where the Commission is of the opinion that (a) the circumstances so warrant; (b) matters involving public security may be disclosed; or (c) trade secrets, financial, commercial, scientific, technical or personal matters may be disclosed at the hearing of such a nature and that the desirability of avoiding disclosure in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.
187 *Re Galabaransingh* TT 1997 HC 158; and Re Isaacs BS 1985 SC 76.
188 The terms of section 4(4) show that under the Securities Act in certain circumstances natural justice suggests, and in fact demands, the right to an oral hearing even before we get to natural justice protection in the form of an appeal from a decision by the Commission to issue a Cease and Desist Order: *Olint Corporation Limited v Financial Services Commission* JM 2006 SC 103.
189 BS 1988 CA 2.
190 Ibid.
191 *Redoy v Teaching Service Commission* TT 1994 HC 116.
192 TT 1994 PC 1.

fairly. It was of the view that he should have been told of the allegations made to the Public Service Commission and given a chance to deal with them, not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply.[193] In *Commissioner of Police v Police Service Commission*,[194] the court noted that it wished to make two observations. Firstly, the applicant feared that the Police Service Commission (PSC) might proceed to determine the matter on the written submissions made without an oral hearing.[195] Without wishing to prejudge how the PSC might approach that task (since it was a very responsible body and it was expected to act responsibly) the court noted that, unless there were clear words excluding the right to an oral hearing (and there were none), it would expect that the PSC would afford the applicant an oral hearing before so serious a matter was determined. In its view, to do otherwise would be to act unfairly towards him.[196]

In *Trinidad and Tobago National Petroleum Marketing Company v Registration, Recognition and Certification Board*,[197] the court considered the issue of whether the failure of the Recognition Board to afford the National Petroleum Marketing Company (National Petroleum) an oral hearing was in breach of the principles of natural justice.[198] It claimed that it was persuaded that the failure of the respondent to afford the applicant an oral hearing did not constitute a breach of the principles of natural justice and that there was no evidence that the invariable practice of the Recognition Board was to have an oral hearing.[199] The court claimed that section 23(2) to (5) of the Industrial Relations Act (IRA) gives the Recognition Board the status of a quasi-judicial tribunal.[200] It explained that the Recognition Board, first, was free to decide whether there would or would not be an oral hearing; second, where there was an oral hearing, every party to the matter before it was entitled to appear and be represented by counsel or someone else, duly authorised;[201] third, it determined and alloted the periods necessary for a fair and adequate presentation of the material by the parties involved; fourth, it might require those matters to be presented within the time allotted; and, fifth, it was also within its powers to request evidence and arguments be presented in writing and to decide the matters upon which it would hear oral evidence and arguments.[202] It continued that all determinations with respect to applications for certification or recognition and questions as to the appropriateness of bargaining units and matters referred to it by the Minister were made by a majority of its members sitting in accordance with the IRA, regulations and any rules made by it under the relevant provision of the IRA. The court claimed that this broad context made it clear that the Recognition Board was the master of its own procedure and was the specialist tribunal designated to resolve matters from time to time.[203] It claimed that the IRA made clear the Recognition Board had a broad discretion whether and when to hold an oral hearing. In this regard, the court explained that it had a discretion to have a full oral hearing, a summary oral hearing or to make a determination 'off the file'.[204] As a result, the court noted that, while it should be reluctant to impose stringent procedural requirements on the Recognition Board, if it had been clear that the circumstances required an oral hearing, it would have been open to it to impugn

193 Ibid.
194 TT 1993 CA 18.
195 Ibid.
196 Ibid.
197 TT 2008 HC 177.
198 Ibid at [77].
199 Ibid at [78].
200 Ibid at [81].
201 Ibid.
202 Ibid.
203 Ibid at [82].
204 Ibid.

the failure to have one as a breach of the principles of natural justice because that was what supervisory superior courts of record do.[205] However, in the circumstances of the case, the court was of the opinion that the decision of the Recognition Board in its discretion not to have an oral hearing did not involve a breach of the principle of natural justice because, first, the written submissions were very full and complete (National Petroleum presented a statement of case with supporting evidence);[206] and second, it was clear from the contents of the Recognition Board's letter to National Petroleum there existed the distinct possibility the Recognition Board would decide the matter on documents only, without an oral hearing.[207] The court claimed that, even with this indication, National Petroleum said nothing to the Recognition Board to suggest it wished to be heard orally.[208] The court ruled that, where it must be clear to a party to this type of enquiry (noting that this was not a formal court process) that the tribunal concerned may or may not, in its proper discretion, decide a matter without an oral hearing, and the party said nothing to indicate the desire to have an oral hearing, it did not lie in that party's mouth to complain if no oral hearing was convened.[209] *A fortiori*, when the particular party produced a written case with supporting documents entirely consistent with an understanding the tribunal might well decide on documents only.

In *Naraynsingh v Commissioner of Police*,[210] the appellant argued that, in the circumstances of the present case, the Commissioner of Police had no alternative but to hold some form of inquiry, an oral hearing at which the appellant could have confronted the alleged finder of the second firearm, in particular, given that this opportunity had been lost to him by the prosecution's non-attendance before the magistrate.[211] The Privy Council noted that, notwithstanding the absence of any right of appeal from the Commissioner's decision, it would unhesitatingly reject that submission, concluding that the Commissioner was not required to convene an oral hearing before exercising this power: he could adopt an exclusively written procedure.[212] In *Commissioner of Police v Mitchel*[213] the court noted that:

> [i]t is well established that it is not essential in every case that a person should be given an oral hearing. It depends on the circumstances of each case. In the circumstances of this case, for reasons which will become clearer, an oral hearing was not, in my view, essential. So that by giving the respondent an opportunity to make representations in writing, the Commissioner did satisfy the requirements of natural justice.[214]

In *Archibald v Council of Legal Education*,[215] the applicant argued that there was a breach of the *audi alteram partem* rule in that the CLE did not give the applicant an opportunity to challenge any untruth which may or may not have been spoken about him, or any inaccuracy that may have been put forward by the administrators of the NMLS. The applicant made it clear that he was not submitting that the CLE was obliged to grant him an opportunity to make an oral presentation.[216]

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205 Ibid at [83].
206 Ibid at [84].
207 Ibid at [85].
208 Ibid at [86].
209 Ibid at [87].
210 TT 2004 PC 6. See also *Globe Detective and Agency Limited v Commissioner of Police* TT 1997 HC 113; and *Joseph and Boyce v Attorney General of Barbados* BB 2005 CA 6.
211 TT 2004 PC 6 at [18].
212 Ibid at [19].
213 TT 1996 CA 44. See also *Daniel v Police Service Commission* TT 2007 HC 108; *Pierre-Brookes v Public Service Commission* TT 2008 HC 104; and *Vhandel v Board of Management Guys Hill High School* JM 2001 CA 26.
214 TT 1996 CA 44.
215 JM 2009 SC 7.
216 Ibid at 6.

The court claimed that support for the principle that a physical appearance before the tribunal was not critical to ensuring a fair hearing can be found in the case of *Nyoka Segree v Police Service Commission*,[217] where it was noted that the court 'has said on several occasions . . . that the right to be heard is not confined or restricted to a *viva voce* hearing. The management of public affairs in this regard would be too hamstrung if all proceedings of this nature had to be *viva voce*'.[218] The applicant also cited the decision of the Privy Council in the case of *Auburn Court Limited v The Kingston and Saint Andrew Corporation*,[219] where the Board implicitly confirmed that the opportunity to be heard did not require an oral hearing. The guiding principle, they stated, was that the procedure should be fair; and that even if an applicant had produced a written application, he should be given an opportunity to respond to any objection to that application. The Board also stated that it was 'obvious that the principle [of acting fairly] requires that, if an objector is to be heard by the committee, the committee ought to give the applicant an opportunity of being heard also. In a contest of that kind, one side cannot properly be heard without hearing the other'.[220] In *Brandt v Attorney General of Guyana*,[221] the court noted that, first, '[t]he submission that the appellant was entitled to an oral hearing as in his representations in writing he had asked for one, must be rejected in the circumstances of this case'; and second, '[a] party is not entitled to an oral hearing so long as he has an adequate opportunity to present his case, and *a fortiori* he is not entitled to a hearing by the person who actually makes the decision.'[222] The court claimed that section 6 of the Expulsion of Undesirables Ordinance laid down the procedure to be followed, and gave the alien an adequate opportunity of presenting his case where, of course, the grounds for his expulsion were supplied to him; and, where the procedure was laid down by the statute, the authority was bound to follow that procedure. It continued that, in those cases where the courts have held that an oral hearing was required, no procedure was laid down by the statute, and in that situation if the authority was left without express guidance it must still act honestly and by honest means.[223] The court therefore concluded that, in its opinion, the procedure laid down under section 6 was sufficient to achieve justice without supplementing the necessity for an oral hearing, emphasising that the character of the proceeding and its purpose did not suggest that an oral hearing was at all necessary.

EXCEPTIONS

Need for urgent action

Natural justice – in particular, the requirement to provide the affected person a right to be heard – is not applicable where the public authority needs to act urgently to protect the rights or interests of the public authority or those of third parties. In *Century National Merchant Bank Ltd v Davies*,[224] the Minister of Finance ('the Minister'), purporting to act under the provisions of the Banking Act, the Financial Institution Act and the Bank of Jamaica (Building Societies) Regulations, 1995 served notices, under paragraph 1(1) of Part D of the Second Schedule in the Banking Act, upon the Century National Bank (CNB), the Century National Merchant

217 JM 2005 CA 8.
218 Ibid.
219 (2004) 64 WIR 210 on appeal from the Court of Appeal: JM 2001 CA 38.
220 (2004) 64 WIR 210 at [47].
221 GY 1971 CA 2.
222 Ibid at 23.
223 Ibid.
224 JM 1997 CA 21.

Bank (CNMB) and Century National Building Society (CNBS) of his intention to assume the temporary management of those institutions. The question for the court was whether the wording of paragraph 1(1) of Part D of the Schedule implied that the Minister ought to have given prior notice before assuming temporary management of the Century financial institutions.[225] The applicant argued that the Minister ought to have given prior notice before assuming temporary management of the institutions. The applicants also argued that, if this was correct, then the notice would be invalid, and therefore all actions that followed from that would be in breach of the section.[226] In addition, the claimants claimed that the absence of prior notice – that is, the immediate assumption of temporary management – deprived the Century financial institutions of their common law right of natural justice, as they had no chance to be heard before the action was taken by the Minister.

The court claimed that paragraph 1(1) of Part D of the Second Schedule did not, unlike other sections, specify that the notice given should give any time within which the action will be taken.[227] It continued that, insofar as the Century financial institutions' rights to be heard were concerned, it appeared on the face of the statute that that right existed in their exercise of the provisions of paragraph 2 of Part D, which gave them the right to appeal to the Court of Appeal within ten days of the notice, or within any other time granted by that court. The applicants claimed that to make the statutory scheme function, by necessary implication, the Minister should give a bank and the public sufficient notice to make representations to him, and to enable the bank to appeal to the Court of Appeal, if necessary, before assuming powers of temporary management.[228] The court replied that, although, generally, such a contention was acceptable, the nature of the matter being dealt with and the circumstances that called for the Minister's action would by necessity require that his action be taken quickly without leaving any opportunity in time to cause an adverse economic situation to develop, for example 'a run on the bank'. In addition, the court claimed that the scheme of the Acts envisaged such a situation by specifically omitting to put any requirement on the Minister to give prior notice, as indeed they did in dealing with other actions which the Minister could take; for example, the cease and desist order; and even so, when the situation provides for urgency, it allowed the Minister to act immediately.[229] The court continued that this type of provision is not a stranger to the law, citing de Smith, Woolf and Jowell for the view that:

> [d]esirable though it may be to allow a hearing or an opportunity to make representations, or simply to give prior notice, before a decision was taken which interferes with a person's rights or interest, summary action may be alleged to be justifiable when an urgent need for protecting the interest of other persons arises. For example, the purpose of giving the executive powers to detain security suspects in war time or grave emergency could be frustrated if the suspects were entitled to prior notice of its intentions. The interest of public safety and public health had been made for justification for the summary interferences with property (or other) rights.[230]

and that:

> [u]rgency may warrant relaxing the requirements of fairness even where there is no statute or regulation by which this is expressly permitted . . . Similarly where a self regulating organization, the Life Assurance Unit Trust Regulatory Organization, acted urgently with the object of

225 Ibid at 3.
226 Ibid.
227 Ibid at 8.
228 Ibid.
229 Ibid.
230 de Smith, SA, Woolf, H and Jowell, J, *Judicial Review of Administrative Action* (5th edn), 1995, London: Sweet & Maxwell, para 10 012 at p 482.

> protecting investors, it was not required to consider whether there was sufficient time to receive representations. In general, whether the need for urgent action outweighs the importance of notifying or consulting an affected party depends on an assessment of the circumstances of each case on which opinions can differ.[231]

The court continued that 'the basic principle which underlines the rule of natural justice is that a person who is the subject of an adverse ruling must have been treated fairly'.[232] It claimed that the question, therefore, was not necessarily whether the person adversely affected by the ruling had a prior hearing, but whether, in all the circumstances, he had been treated fairly. The court held that the whole regime and scheme of the Acts and the Regulations suggested that, in circumstances where delay in assuming temporary management of the Century financial institutions would result in chaos and adversely affect the depositors and the economy of the country, action should be taken as quickly as possible so as to avoid those consequences.[233] As a result, it held that there was no breach of the rule of natural justice, as, based on 'fair play', the Century financial institutions had the safeguard which was built into each of the Acts giving them an opportunity to challenge the Minister's action in the Court of Appeal. The court claimed that, as a result, it was not prepared, for those reasons, to read into the Act or the Regulations any requirement to give to the Century financial institutions any prior notice before the Minister's exercise of the relevant powers.[234] Consequently, it concluded that there was no possibility of a successful argument to the contrary; that is, that the Minister ought to have given prior notice, and that he breached the rules of natural justice.

Preliminary hearings

The other major exception to the rules of natural justice is where the person affected has a right to be heard later in the investigation or proceedings. Although, as a general principle, this holds, the Privy Council held in *Rees v Crane*, as was noted in Chapter 11, that it was not a principle without exception. *Nelson v Mayor and Citizens of Castries*[235] concerned the suspension of the applicant with full pay from his employment as Town Clerk of the Castries City Council (CCC). One of the questions which arose for consideration was whether the applicant was entitled to be heard at a preliminary hearing. The court noted:

> the questions of interest as to (i) whether the applicant could have been suspended with full pay pending the findings of an investigation into alleged mismanagement by him of the respondent's Corporation (ii) whether the respondent violated the principles of natural justice in not giving Mr Nelson an opportunity to be heard and to make representations when the decision was taken to suspend him and (iii) whether the respondent was biased.[236]

The applicant claimed that he should have been given prior notice, and an opportunity to be heard, before the decision was taken to suspend him.[237] He also argued that the failure of the respondent to give him an opportunity of commenting on the very serious allegations levied against him was unfair and contrary to the principles of natural justice in accordance with the approach set out in *Rees v Crane*.[238] The respondent claimed that it acted in accordance with the

231 Ibid at para 10 015 at p 485.
232 JM 1997 CA 21 at 18.
233 Ibid.
234 Ibid.
235 LC 2005 HC 1.
236 Ibid.
237 Ibid at [17].
238 Ibid.

law and observed the rules of natural justice in taking the decision whether to suspend Mr Nelson from his employment in that, first, the applicant was given notice of the complaints against him; second, he was given notice of a hearing at which he was to answer to these complaints; and third, he was given an opportunity at the hearing and subsequent adjournments, at his request, to answer the complaints against him.[239] The respondent also claimed that it was under no further duty to the applicant in that it was under no legal duty to inform him of a meeting of the CCC where the initial decision was taken to suspend him, with full pay, pending an inquiry into his management of the CCC.[240]

The court noted that the question whether natural justice applied to preliminary investigations when the person concerned would be entitled to be represented and heard at later stages was considered in *Rees v Crane*. It was held that, although in preliminary or initiating proceedings the person concerned generally had no right to be heard, particularly if he was entitled to be heard at a later stage, that was not a rigid rule and a tribunal had a duty to act fairly in deciding whether a complaint had *prima facie* sufficient basis in fact and, when allegations were sufficiently serious, the rules of natural justice applied.[241] The court continued that the Privy Council in *Rees v Crane* also held that the Judicial and Legal Service Commission of Trinidad and Tobago acted unfairly in failing to give a High Court judge notice that they were considering making an application to the President to appoint a tribunal to investigate whether the judge should be removed from office.[242] The respondent argued that the instant case was exactly the sort of case which fell within the class of cases recognised by the Board in *Rees v Crane* where the right to be heard in preliminary proceedings was not necessary,[243] noting that, at this stage, the rules of natural justice did not apply and that the suspension was not invalid for that reason only. The court explained that the same question whether natural justice applies to preliminary investigations was argued in *Narsham Insurance (Barbados) Limited v The Supervisor of Insurance*,[244] where the applicant sought judicial review of a decision by the Supervisor of Insurance to revoke its operating licence for alleged breaches of the Insurance Act and accused the Supervisor of Insurance of conducting his investigations without offering the applicant an opportunity to be heard. Chase J stated that:

> depending on the circumstances, fairness is not limited to the person who alleges unfairness in the decision making process, but where the public interest is affected, fairness extends to the community at large. . . . To my mind, fairness may also include the existence of a just system to ensure that the ends of justice are met.[245]

As a result, the court claimed that, based on the numerous authorities cited, the applicant had no right to be given notice of the initial meeting, nor was it necessary to hear him on the issues before the decision was taken to suspend him.[246] It continued that the purpose of the suspension was to give the applicant an opportunity to be heard before a decision was taken whether to dismiss him. The suspension was one of administrative necessity and sound management practice, especially since many serious charges, including financial impropriety, were levelled against him. The court noted that it would have been wrong for the applicant to return to work and carry on business as usual, while at the same time the respondent carried out investigations into alleged mismanagement by him.[247] The only proper thing to do, in its opinion, and which was

239 Ibid at [18].
240 Ibid at [19].
241 Ibid at [21].
242 Ibid at [22].
243 Ibid at [24].
244 Ibid at [31].
245 *Narsham Insurance (Barbados) Ltd v Supervisor of Insurance* BB 1996 HC 14 at 16.
246 LC 2005 HC 1 at [32].
247 Ibid.

done, was for the applicant to continue his vacation leave until the allegations surrounding his mismanagement were thoroughly investigated. As a result, the court held that the suspension was necessary and justified in the circumstances, and the rules of natural justice did not apply.[248]

The respondent in *Nelson* claimed that, in an effort to be fair and to observe the rules of natural justice, the CCC informed him of the reason why he was not to return to work and told him that he would be given an opportunity to answer allegations made against him and that, if he so desired, he could also bring his adviser.[249] The applicant claimed that, when considerable nationwide publicity accompanies a decision, this was bound to raise suspicion or conviction that the respondent was satisfied that the charges were made out, citing the view in *Rees* that '[i]f the respondent had had a chance to reply to charges before the representation was made this suspicion and damage to his reputation might have been avoided'.[250] The court claimed that, although the same principles apply, the facts of *Rees* were clearly distinguishable from the instant case.[251] It continued that, in the instant case, the first step taken by the new CCC, after it was discovered that the applicant was implicated in those irregularities, was to invite him to answer to those discrepancies; and that, at the time, the applicant was due to return to work and the CCC acted as swiftly as it could have.[252] The court explained that it was obvious that the applicant's resumption of his duties would be inimical both to his discharge of them, as the discrepancies were in relation to the discharge of his duties, and to the CCC's investigations. The court therefore ruled that this was not the case in *Rees*.[253] As a result, it concluded that the applicant was treated fairly: the decision to suspend him was purely preliminary.[254]

248 Ibid.
249 Ibid at [33].
250 Ibid at [34].
251 Ibid at [35].
252 Ibid.
253 Ibid.
254 Ibid at [37].

CHAPTER 14

THE RIGHT TO REASONS

INTRODUCTION

The debate as to whether the common law should provide a general right to reasons is also raging in the Commonwealth Caribbean. The UK courts have remained adamant that there is no such general right at common law for administrators to provide reasons for their decisions. The Commonwealth Caribbean courts have followed suit and have similarly held that no such right exists at common law. The courts have, nonetheless, approached the issue on a case-by-case basis and have avoided articulating principles that would lead to a general duty to state reasons. However, the legislatures did not feel impotent to act in this regard, and both the Administrative Justice Act of Barbados (AJA) and the Judicial Review Act of Trinidad and Tobago (JRA) have modified the common law positions in respect of Barbados and Trinidad and Tobago, respectively, to provide a statutory right for reasons within a stipulated timeframe by administrators. Where the statute gives the public authority the discretion to decide whether or not to assign a reason for this refusal, the absence of reasons might lead the court to draw unfavourable inferences.[1] In *Attorney General of Trinidad and Tobago v KC Confectionery*,[2] the court noted that there was no obligation to give reasons for a decision where there were no statutory or contractual requirements but a simple discretion vested in the licensing body. The court, in *Air Caribbean Ltd v Air Transport Licensing Authority*,[3] claimed that the law did not recognise any general duty that compelled decision makers to give reasons for their decisions. In *Alexander v Land Surveyors Board of Jamaica*,[4] the applicant, a land surveyor, challenged the decision of the Disciplinary Committee ('the Committee') to suspend him. The issue arose as to whether the Committee had failed to give adequate reasons for its decision. The court claimed that there was no statutory requirement for the Committee or the Land Surveyors Board of Jamaica ('the Board') to give reasons for their decision.[5] It noted that, at common law, there seemed to be no general duty to give reasons for administrative or quasi-judicial decisions and the mere fact that a decision-making process was held to be subject to the requirements of fairness did not automatically or naturally lead to the further conclusion that reasons must be given.[6] The court claimed that fairness might require that a person aggrieved by a decision and who had a right of appeal from that decision be provided with reasons for the decision. In such a case, a failure to give reasons might provide a basis for challenging an administrative decision. However, the court held that it was not necessary to pronounce on this because both the Committee and the Board provided the appellant with sufficient reasons for their decisions.[7] It continued that the Committee's reasons were contained in its report to the Board and a copy of this report was sent to the appellant.[8] The court pointed out that the report set out its findings of fact, its reasons for finding the appellant guilty of professional misconduct and negligence and its

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1 *Joseph v Saint Lucia Air and Sea Ports Authority* LC 2007 HC 9. See *Matthew v The Dental Council* BB 1996 HC 1.
2 TT 1985 CA 6. See also *Bermuda Telephone Company Limited v Minister of Telecommunications and E-Commerce* BM 2008 SC 52.
3 TT 1998 HC 84.
4 JM 2009 CA 54.
5 Ibid at [24].
6 Ibid.
7 Ibid.
8 Ibid at [25].

reasons for recommending that he be suspended and the Board provided its reasons for its decision in a letter dated 30 January 2008.[9]

COMMON LAW

The public service

The various service commissions established by the constitutions of Commonwealth Caribbean countries give them the power to appoint, discipline and remove public officers from office. In the exercise of these powers, the question has arisen from time to time as to whether the Public Service Commission should provide reasons for its decisions affecting the livelihood of public officers. In *Williams v Public Service Commission*,[10] the applicant sought a declaration that the appointment of another person to the post of Inspector of Police was void, and sought *certiorari* to quash the appointment. One of the questions which arose for the court's consideration was whether natural justice, in the circumstances, required that the applicant be given reasons as to why he was not appointed. The court noted that not only did the Police Service Commission ('the Commission') not appoint the applicant, the Commission also ignored the alternate person recommended and proceeded to appoint another person.[11] Since there was no appeal against the decision of the Commission, the court claimed that the applicant sought, by letter through his counsel, an explanation or reasons why he was not appointed but no explanation or reasons were advanced by the Commission.[12] The court noted that, in the absence of compelling grounds for not giving reasons, the Commission would be expected to give a reasonable explanation for not appointing the applicant.[13] In the absence of such an explanation or reasons, the court held that the decision was both surprising and inexplicable and certainly irrational. In considering the question of whether the Commission had the duty to provide reasons for its decision, the court noted that, although there was no general rule of law requiring the giving of reasons, an administrative or quasi-judicial authority might be unable to show that it acted lawfully unless it explained itself. In other words, if the authority provided no reasons, even when asked, the court might infer that no lawful reason existed.[14]

After considering the leading UK decisions relating to reasons, the court concluded that, in the particular circumstances of the case, fairness and openness demanded that reasons should be given to the applicant as to why he was not appointed to the post of Inspector,[15] since, firstly, the decision of the Commission was not open to appeal but was susceptible to judicial review; second, the decision appeared arbitrary, aberrant and irrational; third, the decision was of special interest to the applicant as he had acted in the position for almost two years without any adverse report or criticism; fourth, the Commissioner of Police had recommended the applicant for the post and it was not clear why his recommendation was rejected; fifth, in the annual staff report, which was the basis for eligibility for recommending promotion, the applicant obtained a number one grading; and sixth, in exercising its function, the Commission was performing a quasi-judicial function where the giving of reasons would be expected. In addition, the court claimed that, even if an administrative function were being performed, it did not

9 Ibid.
10 DM 2001 HC 1.
11 Ibid at 7.
12 Ibid at 7–8.
13 Ibid at 8.
14 Ibid at 9.
15 Ibid at 11.

exclude the possibility that reasons might be required to be given for a decision.[16] The court claimed that the circumstances, indeed, made this a special case in which natural justice required reasons to be given to the applicant as to why he was not appointed and that, consequently, the failure of the Commission to give reasons, in the circumstances of the case, rendered the decision a nullity. In addition, the court concluded that, in the special circumstances of the particular case and in the absence of compelling grounds for not giving reasons, fairness, openness, good administration and the justice of the common law imposed a duty upon the Commission to give reasons, and demanded that the Commission give reasons for its decision. Consequently, the court held that the failure so to do rendered the decision a nullity.[17]

In *Elwin v Public Service Commission*,[18] the applicant applied for *certiorari* to quash the decision of the Public Service Commission (PSC) to appoint a more junior civil servant to the post of Principal Nursing Tutor for which the applicant was eligible. The applicant also argued that, having acted in the post on several occasions, he should have been told why he was not appointed to the substantive post. In addition, the applicant claimed that the following were the exceptional circumstances which required reasons to be given in the instant case: (a) the decision was not open to appeal but was susceptible to judicial review; (b) the decision appeared aberrant; (c) the decision was of special interest to the applicant; (d) there was no other way in which an interested party would know whether there had been compliance with the regulations; (e) the applicant had requested an explanation but none was given; (f) failure to give reasons was unreasonable and may be a finding of irrationality; (g) the Permanent Secretary had himself recommended the applicant and it was not clear why his recommendation was rejected; (h) it appeared that the last performance appraisal might not have been before the PSC; and that, if so, this would have been a prejudicial omission and the applicant was entitled to know why this had occurred; and (i) the applicant would be left with a justifiable 'burning sense of grievance' and a 'real feeling of injustice'.[19] The court noted that of the three names submitted to the PSC, the applicant, although not the most senior, was senior to Angela Lawrence, was not less qualified than her, had acted in the post on more occasions before it became vacant, and had acted in the post after it became vacant and up to the time when the PSC made its decision to appoint Angela Lawrence.[20] It also noted that, further, the applicant had been recommended by the Permanent Secretary to be appointed to the post. In spite of that, the court observed she was overlooked and Angela Lawrence was appointed. It claimed that, obviously, the applicant must be left with a 'burning sense of grievance and a real feeling of injustice'[21] and that, having regard to the facts and the law, the applicant's entitlement to appointment was far superior to that of the appointee.[22] It also concluded that the decision taken by the PSC to appoint Angela Lawrence to the post over the applicant, in light of all the circumstances, was so aberrant as to compel the inference that it must have been procedurally wrong and grossly unfair.[23] In relation to the right to reasons, the court, after reviewing the leading authorities, held that the circumstances made this case a special case in which natural justice required reasons to be given and that, consequently, the PSC should give reasons to the applicant, even succinct reasons, if only to put her mind at rest.[24]

16 Ibid.
17 Ibid.
18 DM 2000 HC 6.
19 Ibid.
20 Ibid at [40].
21 Ibid.
22 Ibid at [42].
23 Ibid at [45].
24 Ibid at [55].

In *Ex p Robinson*,[25] in respect of the decision of the Permanent Secretary to direct the applicant to go on leave, the question arose as to whether reasons for such action should have been provided. In relation to this issue, the court claimed that at common law there was no duty on decision makers to give reasons for their decisions,[26] citing Lord Mustill in *Ex p Doody* where he indicated that:

> I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied. . . . The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the reverse. This being so, I would ask simply: Is refusal to give reasons fair?[27]

The applicant claimed that fairness demanded that the PSC should give reasons for its decision in this case where the applicant's future, livelihood and reputation had been prejudiced by the decision of the PSC.[28] In addition, he argued that the PSC had acted improperly by not advising the applicant of the reasons for its decision to retire him prematurely. The court concluded that, in this case, there was no statutory requirement for reasons to be given,[29] accepting also that where fairness demands it and the decision maker failed to supply reasons for a decision this would not automatically make the decision itself void or open to challenge as an error on the face of the record. The court claimed that the absence of reasons might, however, lead it to infer that the decision was irrational and, on that basis, quash the decision in question.[30] On the facts, the court accepted that the 19 October memorandum with its attachments indicated the basis on which the PSC recommended the retirement of the applicant and that this would have been communicated to the applicant.[31] There was, therefore, no further obligation for the PSC to provide him with reasons which would have already been communicated to him.

In *Wildman v Judicial and Legal Services Commission*,[32] in respect of a challenge by the applicant of the decision of the Judicial and Legal Services Commission (JLSC) not to recommend him for the position of Attorney General, the court quoted *R v Civil Service Board, ex p Cunningham* where Lord Donaldson of Lymington MR said that:

> [t]he principles of public law will require that those affected by decisions are given reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is.[33]

The court was of the view that 'the particular circumstances of this case were not so extraordinary as to cause the [JLSC] to depart from a practice of over 35 years and give reasons for its decision. However, once the matter became the subject matter of litigation, the [JLSC] was bound to disclose their reasons for the decision it took. This they did.'[34] After considering the reasons for the decision of the JLSC, the court ruled that it was of the clear view that the

25 JM 2007 SC 84.
26 Ibid at [122].
27 [1993] 3 WLR 154 at 172.
28 JM 2007 SC 84 at [123].
29 Ibid at [124].
30 Ibid.
31 Ibid.
32 GD 2007 CA 2. See also *Ramnath v Public Service Commission* TT 2008 HC 125; and *Ramrattan v Police Service Commission* TT 2004 HC 75.
33 [1991] 4 All ER 310 at 316.
34 GD 2007 CA 2 at [24].

decision of the JLSC was in no sense aberrant; it was clearly a decision that *a* JLSC faced with the information with which *the* JLSC was faced could come to. It reminded itself that the function of the court in judicial review was not to act as an appellate forum from the body whose decision was being challenged, noting that, if the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.[35]

Nature of the duty

Decisions that affect the livelihood of persons are usually decisions which might call out for reasons to be provided, especially where the person might have been used to making successful applications for the licence or thing in question. In such cases, the courts might accept that fairness, taking into account all the circumstances of the case, demands that reasons be provided for the decision not to grant the licence to the applicant. It is important to stress that the courts have not singled out or stated that such cases will necessarily call out for reasons, because, if this were accepted, it would turn the principle, that generally administrators are not under a duty to provide reasons for decisions, on its head. In *Stennet v Attorney General of Jamaica*,[36] the applicant applied for an order of *certiorari* to quash the decision of the Minister of Finance and Planning ('the Minister') to revoke a concession to the applicant to pay 20 per cent of the duty due on imported motor vehicle, on the basis that he had breached one of the conditions. The Minister did not indicate the nature of the condition and did not particularise the breach complained of. The applicant claimed that there has been a trend towards giving reasons for decisions if fairness demanded it. However, he relied on the approach in *Ex p Linton Simpson*,[37] a duty concession case, where Cooke J said that a concession was a privilege and that the Minister in fairness was 'not obliged to give any reasons for his inevitable decision'.[38] The court claimed that '[n]o doubt it would have been useful to have sight of the Minister's reasons for his decision to revoke the concession. Although a request was made of the Minister to give reasons for his decision, he failed so to do.'[39] It further noted that there was no obligation on the Minister to give reasons for his decision. However, it reasoned that, on the facts, the Minister did not give the reasons for his decision to the applicant, or to the court, and did not provide the details of the information on which he acted. The court ruled that, since the applicant was entitled to the concession by virtue of her job, if the concession was being taken away, reasons should be given.[40]

The court held that natural justice cried out for the applicant (a) to be informed as to what information and law were being considered; and (b) to be given an opportunity to prove the information wrong and comment on the law.[41] In *Saga Trading Limited v The Comptroller of Customs and Excise*,[42] the applicant argued that the decision of the Comptroller of Customs, in refusing to allow the applicant to take delivery of its goods despite the assessment and payment of duties and taxes, was unlawful. The court noted that section 22 of the Customs Act imposed no duty on the Comptroller to give reasons and that it contemplated an appeal process, at which stage, presumably, the merits of the opposing arguments would be laid out.[43] It continued that the fact that explanations were not given did not necessarily mean that the decision was invalid. The

35 Ibid at [31].
36 JM 2005 SC 100.
37 *Director of the Revenue Protection Division, ex p Linton Simpson* JM 2000 SC 9.
38 Ibid.
39 JM 2005 SC 100 at 13.
40 Ibid.
41 Ibid at 19.
42 TT 1998 HC 132.
43 Ibid at 16.

court, citing *R v Trade and Industry Secretary, ex p Lonrho plc*, claimed that the significance of a failure to give reasons was succinctly stated by Lord Keith of Kinkel:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the Court draws the inference that he had no rational reason for his decision.[44]

In the instant case, the court claimed that it might draw such inferences as appeared from the affidavit evidence before it, noting that, if the Comptroller declined to give further reasons, then that was a risk he assumed.[45]

In *Re Errol Niles (No. 2)*,[46] the court considered whether the reasons provided by the Disciplinary Committee of the Barbados Bar Association ('the Committee') were adequate when it recommended that the appellant's name be removed from the roll of attorneys-at-law. The court claimed that section 21 of the Legal Profession Act suggested that the Committee was mandated to give reasons for its decisions.[47] The appellant argued that the reasons given by the Committee for its decision or recommendations were inadequate. The court claimed that this argument should have been properly addressed to the original Court of Appeal, continuing that it was unarguable that if there was a statutory duty to give reasons, they must satisfy a minimum standard of clarity and explanation. In its view, Parliament, in this case, provided that reasons should be given and it seemed to the court that that must mean that proper, intelligible and adequate reasons were to be given.[48] The court claimed it should have thought it almost axiomatic that, on receipt of the report of the Committee, the applicant and his advisers would have subjected the reasons of the Committee to the most careful scrutiny and analysis to see if they attained the standard of propriety, intelligibility and adequacy.[49] The court continued that the report containing the reasons of the Committee was the key document before the original Court of Appeal and if the reasons were not challenged then, they could not now be resurrected for attack.[50] In *Furlonge-Kelly v Firearms Appeal Board*,[51] the court noted that, on the issue of the failure of the Firearms Appeal Board to provide reasons initially for its decision, the applicant conceded that there was no general duty upon government or state bodies to give reasons for their decisions; however, where the decision involved imputations of misconduct or bad character, reasons should be given. *Burroughes v Katwaroo*[52] related to the revocation by the Commissioner of Police of the respondent's firearm licence but no reasons were given for the revocation. The Court of Appeal of Trinidad and Tobago noted that at no time were any reasons for the revocation given. Katwaroo had sought to ascertain the reasons for the cancellation after he had made earlier representations to the Commissioner for reconsideration. Despite this, the Commissioner refused to give any reason for the revocation except to say that he was still not prepared to vary his decision.[53] The court claimed that, in light of all the circumstances, it was reasonable and proper to infer that the Commissioner had no valid reasons to proffer for his action. The court was of the opinion that it was true to say that there was no general rule of English law that

44 [1989] 1 WLR 525 at 539H–540A.
45 TT 1998 HC 132 at 17.
46 BB 2003 CA 16.
47 Ibid at [67].
48 Ibid.
49 Ibid at [68].
50 Ibid.
51 TT 2000 HC 121.
52 TT 1985 CA 76.
53 Ibid at 22.

reasons must be given for administrative decisions.[54] However, it claimed that the failure or refusal to advance reasons for an administrative decision by a person endowed with statutory powers might, in public law, give rise to the inference that that person had exercised his powers in relation thereto otherwise than in good faith.[55] The court continued that there was no general obligation to give reasons for a decision and that, in an application case where there were no statutes or contractual requirements but a simple discretion in the licensing body, there was no obligation on that body to give their reasons.[56] The court claimed that the Commissioner should have given the applicant some reason for the revocation of the licence; if he could not or did not, the only proper and reasonable inference must be that the Commissioner had no valid reason for the revocation.[57] It continued that he must tell the applicant why he thought it fit to cancel his licence. As a result, the court declared that the Commissioner should state the reason or reasons for the revocation by him of the applicant's licence within 15 days. If he failed so to do, the court claimed that it would presume that he had no valid reason to withhold or, for that matter, to have revoked the applicant's licence.[58]

Courts and tribunals

In addition to making it clear that, in some limited circumstances, administrators might have a duty to provide reasons for decisions, the courts have also made it clear that the first instance tribunals and courts should generally provide adequate reasons for their decisions. In *James v Attorney General of Trinidad and Tobago*,[59] the sole issue was whether the trial judge wrongly exercised his discretion not to award damages to the appellant for the breach of his constitutional right to equality before the law and protection of the law under section 4(b) of the Constitution and also for the breach of his right to equality of treatment from a public authority under section 4(d) of the Constitution.[60] However, the Court of Appeal claimed that the decision in the appeal was made unduly difficult by the lack of sufficient reasons from the judge for the manner in which he exercised his discretion to only grant the declarations which he did.[61] The court noted that the trial judge said that he was satisfied that this relief was sufficient and would not make any further award of damages. It continued that it might be that the judge found that on the evidence there was no loss incurred as a result of the breaches of the appellant's rights; or it might be that the manner in which the case was argued before him suggested that the appellant would have been satisfied only with the declarations granted. The Court of Appeal claimed that if 'either or both of these were his reasons, he was obliged to say so, to inform the parties of his reasons and to allow the Court of Appeal to review his discretion in the event of an appeal'.[62] It continued that the judge's lack of reasons as to why he was of the view that the grant of the declarations was sufficient was regrettable.

The Court of Appeal claimed that, where no reasons or no sufficient reasons were given by a judge exercising a discretion, upon appeal, it was entitled to look at the matter afresh and come to its own conclusion as to how the discretion should have been exercised.[63] It explained that, as was well known, this was not the usual way in which the Court of Appeal reviewed the

54 Ibid.
55 Ibid at 23.
56 Ibid at 29.
57 Ibid at 30.
58 Ibid at 31.
59 TT 2009 CA 9.
60 Ibid at [1].
61 Ibid at [4].
62 Ibid.
63 Ibid at [5].

exercise of a discretion of a first instance judge; and that the test applied by the Court of Appeal was whether it could be said that the exercise of the discretion was 'plainly wrong'.[64] The court, citing the decision of the Privy Council in *Inniss v The Attorney General of St Christopher and Nevis*, dealing with an appeal of an award of damages for a constitutional breach, said that:

> [j]udges who award damages at first instance should bear in mind that their awards are open to appeal and that an appeal court will be at a disadvantage in reviewing the award if the basis for it is not explained. . . . As the assistance that ought to have been given is lacking in this case their Lordships must make their own assessment of the sums due to the appellant for each element of her claim.[65]

Therefore, the Court of Appeal reasoned that where the basis of the exercise of a discretion by a judge was not stated, it was entitled to look at the matter afresh.[66] The court emphasised the importance of the provision of reasons by judicial officers to the maintenance of judicial transparency and the creation of public confidence in the administration of justice.[67] It then quoted *Flannery v Halifax Estate Agencies Ltd*,[68] where it was pointed out that the duty is a function of due process, and, therefore, of justice, and its rationale has two principal aspects. The first, it claimed, was that fairness required that the parties, especially the losing party, should be left in no doubt why they had won or lost.[69] The court also claimed this was especially so since, without reasons, the losing party would not know whether the court had misdirected itself and, thus, whether he might have an available appeal on the substance of the case. The second, in its view, was that a requirement to give reasons concentrated the mind; if it was fulfilled, the resulting decision was much more likely to be soundly based on the evidence than if it was not.[70] The court also explained that the first of these aspects implied that want of reasons might be a good self-standing ground of appeal.[71] It claimed that where no reasons were given it was impossible to tell whether the judge had gone wrong on the law or the facts and the losing party would be altogether deprived of his chance of an appeal unless the court entertained an appeal based on the lack of reasons itself. The court pointed out that the extent of the duty, or rather the reach of what was required to fulfil it, depended on the subject matter.[72] Additionally, it was of the opinion that the judge must explain why he had reached his decision and the question was always, what was required of the judge to do so; and that would differ from case to case. In the court's view, transparency should be the watchword.

In Alexander v Williams,[73] the court had to consider whether the applicant was denied the right to a fair trial because of the presiding magistrate's failure to give reasons for his decision and the resultant delay in hearing of the appeal. The applicant argued that the failure on the part of the magistrate to submit his reasons after such a long period and, moreover, despite numerous appeals to him to do so, inevitably gave rise to one of the following presumptions: (a) the magistrate was incapable of furnishing for scrutiny by the court any cogent reasons to support the conviction; or (b) the magistrate was aware that the reasons which he had formulated to justify the conviction could not in law support it; or (c) there was not a proper

64 Ibid.
65 [2008] UKPC 42 at [16].
66 TT 2009 CA 9 at [6].
67 Ibid at [7].
68 [2000] 1 All ER 373.
69 TT 2009 CA 9 at [7].
70 Ibid.
71 TT 2009 CA 9 at 12.
72 Ibid.
73 TT 1984 CA 33. See also *Christopher v Attorney General of Trinidad and Tobago* TT 2002 HC 94; *Forbes v Attorney General of Trinidad and Tobago* TT 1998 HC 155; and *Linton v Hyman* AG 2006 HC 10.

adjudication of the matter by him.[74] The claimant also argued that there was no statutory requirement that a magistrate must furnish reasons for any criminal conviction which he had imposed upon an accused person and against which an appeal had been formally lodged. Further, he argued that in Trinidad and Tobago a long line of cases and authorities has been established, all of which had held that the furnishing of reasons by a magistrate in a criminal matter on appeal was an indispensable requirement to the proper administration of justice. The court noted that it had both a duty and the power to ensure that its processes were not abused.[75] It continued that any deliberate flouting or negation of its legal machinery, at whatever source, would undermine and jeopardise the confidence and respect which the subject was expected to hold for the authority and majesty of the law and its institutions in a democratic society, and that this was particularly so in matters involving the subject and the State without which the whole moral fabric of that society could be threatened with erosion.[76]

The court claimed that, in *Aqui v Pooran*,[77] after reviewing the earlier local cases, and having regard to the earlier pronouncements in these earlier cases which spanned well over fourteen years, the necessity for a magistrate to furnish the reason for his decision was now a part of the law of Trinidad and Tobago. It reiterated the view that the furnishing of reasons by a magistrate in all cases on appeal was an imperative today. The court then referred to *Nelson v Superville*,[78] where the court stated that a magistrate must 'when required record intelligently the reasons for his decision'.[79] The court claimed that, long before the former Constitution, it was always settled practice in Trinidad and Tobago that magistrates should give reasons for their decisions and that it was now to be regarded as a rule of law.[80] Following *Maharaj v Attorney General of Trinidad and Tobago*,[81] the court claimed that a like view should equally be taken, in a proper case, of an omission by a magistrate to furnish reasons for a conviction; more particularly, one involving peremptory imprisonment. In addition, it claimed that a proper case for the application of the constitutional provisions would be where, on an appeal, a magistrate was requested to furnish his reasons for the conviction, and there was no hindrance or impediment for compliance, he refused or neglected, without good cause, to do so. The court claimed that a convicted person was entitled to know the basis upon which a magistrate had arrived at the conclusion that the case against him had been proven and that he should be deprived of his liberty.[82] In addition, the court claimed that the failure on the part of a magistrate to supply the reasons for his decision which was on appeal could, in a proper case, constitute a deprivation of a right to a fair trial in accordance with the principles of fundamental justice.[83] The court claimed that it was not unmindful of the fact that, in the field of administrative law, an administrative tribunal was not expressly obliged to give reasons for its decision; and that, as a general rule, the court had no inherent power at common law to compel that tribunal to give reasons although it could order it to do so in other respects.[84] The court explained that there were statements in the books that there was no general rule that reasons must be given for judicial decisions, citing, *inter alia*, *R v Gaming Board for Great Britain, ex p Benaim and Khaida*.[85] The court

74 TT 1984 CA 33.
75 Ibid at 11.
76 Ibid at 12.
77 Magisterial Appeal No. 52 of 1982.
78 (1971) 19 WIR 491.
79 Ibid at 492.
80 TT 1984 CA 33 at 13.
81 [1979] AC 385.
82 TT 1984 CA 33 at 15–16.
83 Ibid at 16.
84 Ibid at 17.
85 [1970] 2 QB 417.

claimed that where Parliament had given a right of appeal that right must be intended to be effective.[86] Therefore, a failure to state reasons might render it impossible for an appellate court to review the findings of fact or the determination of law which had led to the decision. In other words, a verdict or decision was only a lawful verdict or decision if the process by which it was reached was also lawful: where no reasons are given it was not possible to predicate the requisite quality of the decision. The court concluded by stating that, while admittedly a magistrate was not required by legislation to state the reasons for his decision, nevertheless the practice of so doing in matters of appeal had so grown up and been adhered to over the years and had become so rooted in the system of justice in Trinidad and Tobago that it could now be regarded as a rule of law.[87]

In *Coard v Attorney General of Grenada*,[88] the applicants claimed that, following the dismissal of their appeals and the affirmation of their convictions and sentences, no written judgments and/or copies of proceedings had been issued despite repeated requests.[89] The court claimed it was not for it to speculate upon the circumstances resulting in this unfortunate state of affairs and it reminded itself of the essential duty for reasons to accompany a judgment and quoted the following from *Flannery v Halifax Estate Agencies Ltd*: 'We make the following general comments on the duty to give reasons: (1) The duty is a function of due process, and therefore of justice; the general rule that there is a duty to give reasons for decision.'[90] The court claimed that this argument was grounded upon section 8(3) of the Constitution, which provides that when a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.[91] In addition, it pointed out that it was convinced that the State continued to be in breach of section 8(3) twelve years after the judgments were delivered and no explanation had been offered.[92] The respondent claimed that the Court of Appeal delivered its judgment orally in the presence of the applicants and that it had been judicially decided that there was no further right of appeal.[93] The applicants responded, claiming that they were entitled to written reasons as part of the proceedings and that such reasons would provide the documentary record necessary to lay a petition before an international body. The applicants argued that the remedy under section 16 of the Constitution for the breach of the duty to provide reasons for the decision was that he be released from detention.[94] The court claimed that section 8(3) was an entrenched provision included among the fundamental rights provisions of the Constitution and that it fell to the High Court to enforce any contravention of sections 2 to 15 of the Constitution.[95] It continued that the lack of a further right of appeal must weigh heavily against the immediate release of the applicants.[96] The court claimed that the contravention was a fit case for compensation to be assessed by a judge of the High Court and paid by the State and that the applicants were entitled to a declaration under section 5(2) of the Constitution in respect of the sentence of death imposed at their trial. It further declared that the failure by the respondent to provide the

86 TT 1984 CA 33 at 21.
87 Ibid at 6.
88 GD 2004 HC 9.
89 Ibid at [79].
90 [2000] 1 All ER 373 at 377.
91 GD 2004 HC 9 at [80].
92 Ibid.
93 Ibid at [81].
94 Ibid at [82].
95 Ibid at [83].
96 Ibid at [84].

applicants with the written reasons which were used to justify the dismissal of the applicants' appeal against conviction was unconstitutional and illegal.[97]

The professions

In *Re Hanoman*,[98] the Medical Association submitted names of nominees for appointment to the Medical Council to the Minister of Health ('the Minister'), who rejected the two names submitted and substituted two others. The Minister provided no reasons for the rejection and substitution of the names. The Medical Association sought an order from the High Court for *certiorari, mandamus* and prohibition in respect of the decision of the Minister.[99] The respondent argued that there was no statutory requirement for the Minister to give reasons for his choice of persons or rejection of any names submitted by the Medical Association, and the court agreed. It claimed that only a few statutes expressly provided for public authorities or functionaries to give reasons for their decisions, and that the courts have been reluctant to impose a duty for them to do so.[100] The court claimed that there was no definitive position on the question of need for reasons, and opinions differed depending on the particular case and circumstances. Citing *Ex p Institute of Dental Surgery*,[101] it held that there was no duty on administrative bodies to give reasons for their decisions either on general grounds of fairness, or simply to enable any grounds for judicial review of a decision to be exposed.[102] However, the court held that, as the law stood, whether such a duty existed depended on where, in the particular circumstances, the decision fell in the spectrum between decisions which obviously demanded reasons and decisions where reasons were entirely inapposite. The court claimed that, in the absence of specific legislation obligating a public functionary to give reasons for a decision, many cases indicated that the modern trend was towards openness, fairness and transparency regardless of the right that was infringed: personal, vested, public or rights acquired under schemes or plans.[103] In its view, the overall objective was fairness based on the long-established principle of natural justice. The court also made reference to *Ex p Doody*, where Lord Mustill, while accepting that the law at present did not recognise a general duty to give reasons for an administrative decision, expressed the opinion that fairness would very often require that a person who might be adversely affected by a decision should have an opportunity to make representations, either before the decision was taken, with a view to producing a favourable result, or after it was taken, with a view to procuring its modification.[104] The court claimed that Lord Mustill also commented on the perceptible trend in the recent cases on judicial review towards an insistence on greater openness and transparency in the making of administrative decisions.

The court then considered the Caribbean position on the giving of reasons, citing *R v Licensing Authority for the Western Area ex p L.S. Panton Ltd*,[105] where the court lamented the absence of reasons in writing and felt compelled to make a recommendation that, having regard to the proliferation of statutory bodies and other tribunals which were given power to hear and determine causes affecting the rights of citizens, Parliament should require that these tribunals give reasons for any order or judgment made by them.[106] The court claimed that public officials who

97 Ibid at [85].
98 GY 1999 HC 1.
99 Ibid at 4.
100 Ibid.
101 [1994] 1 All ER 651.
102 GY 1999 HC 1 at 5.
103 Ibid.
104 Ibid.
105 (1970) 15 WIR 390.
106 GY 1999 HC 1 at 8.

were charged with the responsibility of making decisions, particularly those which involve the exercise of a discretion whether by acting on advice or consulting, must do so with fairness and give reasons for the exercise of the discretion in a particular way so that it could be ascertained whether the discretion was exercised reasonably. On the facts, the court noted that the Medical Association's request from the respondent the reasons for his rejection of two of their nominees and the process used at arriving at his decision in order that the membership could be informed; but no response was forthcoming.[107] It further held that, in the light of previous discussions with the respondent, fairness and reasonable expectations dictated that the members of the Medical Association be informed and, if necessary, be given an opportunity to express their views on the rejection with a view to persuading the respondent to change his mind. The court also claimed that there was a trend towards greater openness and transparency in the making of administrative decisions – attributes which the government espouses and which must be reflected in decisions of public functionaries.[108]

In *Blaize v Architect's Registration Board*,[109] in respect of the question of whether the applicants were entitled to be registered as architects, the court claimed that the defendant was not an educational institution and had no obligation to provide the claimant with preparatory material of any sort including sample examination questions.[110] In addition, the court accepted that the defendant had neither erred in law nor rendered an unreasonable decision not to register the claimants without subjecting them to a written examination and in not providing them with sample questions in preparation for the examination. The court claimed that the provisions of the Architects (Registration) Act were self-explanatory and there was no need for the defendant to give reasons for requiring the claimants to sit a written examination.[111] In any event, the court noted that the defendant did more than it was obliged to do by providing the claimants with good and sufficient reasons for a written examination. The court questioned the extent of the defendant's obligation to provide reasons to each of the claimants as to why he/she was required to take an examination as a prerequisite for registration.[112]

It also questioned whether the Board had to justify or give reasons for its decision to conduct an investigation into the experience of the applicants.[113] The defendant argued that there was no such obligation, citing *Ex p Institute of Dental Surgery*, where the court stated that:

> There is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. One such class is where the subject matter is an interest so highly regarded by the law, for example personal liberty fairness requires that reasons, at least for particular decisions, be given as of right. Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent. It follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision. But just as it is outwith this Court's powers to judge degree of excellence in clinical dentistry research, or for that matter the wisdom of a body's administrative arrangements, so it is not open to this Court to require the communication of reasons even where such reasons must necessarily exist, in the current absence of a legal basis for the requirement.[114]

107 Ibid.
108 Ibid at 11.
109 AG 2007 HC 20.
110 Ibid at [51].
111 Ibid.
112 Ibid at [52].
113 Ibid at [53].
114 [1994] 1 All ER 651 at 671–2.

The respondent claimed that the applicants did not make any request for justification of the examination as a prerequisite until after the date for the examination had passed.[115] Further, they claimed that the only earlier challenge to the examination came less than two days before its scheduled date and the objections raised by them at that time were with regard to the form of the examination, the perceived lack of preparatory material, the procedure for challenging the results and the perceived potential conflict of interest by the Board members as examiners. That earlier challenge contained no request for justification of the examination as a prerequisite per se. As such, the court held that the Board was first requested to give such justification only some two months after the scheduled examination date in response to a letter from the applicant's attorney.[116] The respondent claimed that they provided the applicant with good and sufficient reasons for the examination, in particular for the purpose of establishing compliance with the requirements of section 5 of the Architects (Registration) Act. The court claimed that the fact that the Board might have, on occasion, made reference to other concerns did not detract from the applicants' obligations to comply with the law.[117]

Planning decisions

In *Hamilton v Attorney General of Belize*,[118] the claimants argued that administrative fairness would warrant that the Registrar of Lands inform them beforehand in putting cautions on their lands and tell them the reasons for doing so.[119] The court claimed that the ever-increasing situations requiring, in fairness, reasons to be given for a decision were dependent on the nature of the decision and the process by which it was reached.[120] The court held that, from a reading of statutory provisions on cautions, it was satisfied that there was no duty incumbent on the Registrar of Lands to state or give reasons to the person (the proprietor) affected before putting a caution on the land.[121] In addition, the court claimed that it was also clear that the Registrar was moved to put the caution by any person who satisfied the requirements of the Registered Land Act; in which case the person was the cautioner and he lodged the caution with the Registrar. In the court's opinion, there was no duty on the Registrar to state the reasons for the caution at the lodgement stage; all that was required was that the caution should state the interest claimed by the cautioner.[122] However, once the caution was in place, the court held that the Registrar was under a duty to give notice in writing of the caution to the person (the proprietor) whose land, lease or charge was affected by it. It continued that, from the evidence in this case, it could not be argued or sustained that the Registrar did not write to the claimants informing them of the cautions that had been lodged against their parcels of lands.[123]

The court was of the opinion that the letter from the Acting Registrar of Lands to the applicant informing him that a caution had been lodged in favour of the Government of Belize against his property needed no elaboration: it clearly satisfied the requirements of section 131(1) of the Registered Land Act (RLA).[124] The claimants complained that they were not given any reasons for the cautions against their lands and that this was a misconception of the notice in

115 AG 2007 HC 20 at [54].
116 Ibid.
117 Ibid.
118 BZ 2008 SC 4.
119 Ibid at [23].
120 Ibid at [24].
121 Ibid at [25].
122 Ibid.
123 Ibid at [26].
124 Ibid at [27].

writing of the caution and the caution itself. In their view, the latter should be in the prescribed form and should state the interest claimed by the cautioner, which the Registrar may require to be supported by a statutory declaration.[125] They claimed that the former was just notice of the latter and must be in writing addressed to the person (the proprietor) against whose land the latter has been lodged informing him of the fact. As a result, the court concluded that, from the evidence, the reasons for the cautions or the interest claim for them were always present in the Land Registry.[126] The court noted that the notice in writing of the caution from the Registrar to the person whose land was affected by the caution, as was required by section 131(1) of the RLA, need not strictly state the reasons for the caution or the interest claimed by the cautioner.[127] However, it claimed that it was the caution itself which should be in the prescribed form that stated the interest claimed by the cautioner – hence the reasons for the caution.[128] In the court's view, in such a case, all an affected person needed to do was, on receipt of the notice of the caution, go to the Land Registry and examine the relevant entry. However, the court ruled that, in line with the requirements of fairness, it would be the best practice for the notice in writing to the person affected by the caution to state, if only briefly, the interest claimed by the cautioner; that is, the reason for the caution.[129] On the facts, the court held that the claimants could not legitimately or properly complain of lack of knowledge of the reasons for the cautions against their parcels of land.[130] It ruled that it was satisfied as well that the statutory provisions on cautions, in particular on their removal contained in section 132(2) of RLA, secure to the claimants their entitlement to natural justice.

The court accepted the respondents' view that the person against whose land a caution was to be put should not, beforehand, be informed of this and be given the reasons for the caution, because that person could simply dispose of it before the caution was in place, thereby stultifying the very *raison d'être* of a caution as stated in section 131(2) of the RLA.[131] As a result, the court concluded that the claimants were entitled to know the reasons for the cautions on their parcels of lands but that, on the facts, they were not denied or refused the reasons for the cautions.[132] In its view, the cautions clearly stated that the Commissioner of Lands claimed an 'equitable interest' in the parcels of lands in question as per the attached memo. The court opined that the applicant could simply learn the reasons for the caution by examining the cautions in the Land Registry.[133] Therefore, the court concluded that, first, the claimants were not entitled to be informed before the cautions were put against their parcels of lands and they could simply have learnt the reasons for the cautions by inspecting the land register; second, the assertion by the claimants that they only learnt of the reasons for the cautions from the affidavit evidence filed in this case was unsustainable and unavailing; and third, in the circumstances of this case, the placing of the cautions on the claimants' parcels of land did not violate any principle of natural justice for failure to give them reasons for the caution: the claimants on the receipt of the statutory notice of the cautions could have availed themselves of the opportunity to inspect the land register, where they would have seen the cautions and the accompanying memorandum stating the reasons for them.[134]

125 Ibid.
126 Ibid.
127 Ibid at [29].
128 Ibid.
129 Ibid.
130 Ibid at [30].
131 Ibid at [31].
132 Ibid at [32].
133 Ibid.
134 Ibid at [34].

In *Virgin Island Environmental Council v Attorney General of the British Virgin Islands*,[135] the court had to consider the failure of the Minister of Planning ('the Minister') to give reasons for granting planning approval in an environmentally important area. The court noted that section 38(5) of the Planning Act permits the Minister, in his discretion, to provide reasons for any decision on an application for planning permission referred to him.[136] The section states that '[a] determination of the Minister under this section shall be on such terms and conditions as the Minister may determine and may be accompanied by a written statement of the reasons for the determination of the application.'[137] The applicant claimed that the approval letter failed to give any reasons for granting planning permission for the proposed development. He asserted that, as a matter of fairness and natural justice and as acknowledged by the common law, the circumstances of the present case – for example, the nature and scale of the proposed development, its complex and controversial nature, the potential for detrimental environmental impact and the impact of the proposal on an area designated under the Fisheries Act and Regulations as a Protected Area – demanded that the Minister provide reasons for the decision.[138]

The court claimed that a failure to give reasons for a decision might be a good ground for judicial review, adding that, where reasons should be given, they need to be stated in sufficient detail to enable the claimant to know what conclusion the decision maker had reached on the principal important controversial issues.[139] The reasons must be adequate and intelligible and must enable the reader to understand what conclusions were reached on the principal issues relevant to the determination.[140] The court continued that not every decision maker was required to give reasons,[141] citing *R v Civil Service Appeal Board, ex p Cunningham*,[142] where the UK Court of Appeal found a body discharging a judicial function was required to give reasons for its decision in respect of such disputes, and that the award made by the tribunal was incompatible with awards in similar matters by the industrial tribunals, which rendered giving reasons for its decision necessary. The court noted that *Ex p Cunningham* was distinguishable, because, in that case, the Minister was not carrying out a judicial or quasi-judicial function and the enabling statute did not require him to give reasons for his decision.[143] In addition, the court ruled that a challenge based upon failure to give reasons would only succeed if the party aggrieved could satisfy the court that they had genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision. The court claimed that there was no evidence to demonstrate that the applicant was prejudiced in any way by the lack of reasons of the Minister for his decision and, further, there was no evidence that the applicant, the Planning Committee or anyone else had requested the Minister to provide any reasons and he had refused to do so.[144] As a result, the court concluded that the Minister's failure to provide reasons for the decision did not make the decision-making process unfair or improper.[145] Accordingly, it held that that ground of challenge had no merit. In addition, the court held that the case of *Re Hanoman (Carl)*[146] was not helpful because, in that case, Bernard CJ considered the duty to give reasons in the absence of statutory requirement in Commonwealth Caribbean law, which was not the same in the BVI.

135 VG 2009 HC 17.
136 Ibid at [113].
137 Ibid.
138 Ibid at [114].
139 Ibid at [115].
140 Ibid.
141 Ibid at [116].
142 [1991] 4 All ER 310.
143 VG 2009 HC 17 at [117].
144 Ibid.
145 Ibid at [118].
146 (1999) 65 WIR 157.

Financial institutions

In *Re Clegghorn*,[147] the applicant sought a declaration that the Bank Undertaking Vesting Order of the Minister of Finance made purportedly in pursuance of an agreement was null and void, and an order of *certiorari* to quash the Vesting Order. The Vesting Order permitted the transfer of the entire undertaking of the Workers Bank of Trinidad and Tobago to the Workers Bank 1989 Ltd.[148] The applicants complained that the obligations owed to them were not transferred. The question arose as to whether the Central Bank was under a duty to give reasons for its decisions.[149] The applicants claimed that the respondents had not provided any reasons for the denial of their rights. The court claimed that, if a statute imposed a duty to provide reasons, then these reasons must be clear and must deal with all the material matters raised.[150] On the other hand, if the statute did not so provide, the common law may, in order to satisfy the requirement of procedural fairness, impose such a duty. However, the court held that the common law did not recognise a general duty on decision makers to give reasons for their decisions and that the only challenge to the decision was on the basis of fraud, and that had not been proven.[151] As a result, the court held that the Central Bank was not under a duty to give reasons.

Ministry of Education

In *Caribbean Book Distributors (1996) Ltd v Ministry of Education*,[152] the plaintiff sought an order of *certiorari* to quash the decision of the defendants to publish a list of the textbooks for use in schools for the 1997/98 academic year. One of the questions for the court was whether the process adopted by the Ministry of Education and the Principals' Association, in arriving at the final booklist, was fair and whether the Ministry had a duty to provide reasons for its change in the booklist for that academic year.[153] The applicant argued that, although there was no general obligation on the part of the respondents to give reasons, the respondents should have supplied him or, more particularly, the Ministry of Education should have supplied him, with the data showing why his set of books was left out of the final list.[154] The respondents claimed that the Ministry was under no obligation to provide that data for many reasons, including security and confidentiality, and that, moreover, the applicant never asked for that information and only did so at the eleventh hour at the hearing.[155] They further argued that the applicant would only be entitled to reasons if it could be shown that the result of the process was so aberrant as in itself to call for an explanation, relying on *Ex p Institute of Dental Surgery*. In addition, they argued that where specialists are involved in arriving at a decision the respondents could not be asked to give reasons.[156] The applicant responded that specialists were not required in the application of the 10 per cent formula recommended by the Principals' Association and, therefore, reasons should be given – the reasons being data in the possession of the Ministry which would show why the applicant's books were omitted. The court noted that, while it was desirable that reasons should be given in the interest of good administration and good management, if it were the general

147 TT 1996 HC 137.
148 Ibid at 11.
149 Ibid.
150 Ibid.
151 Ibid.
152 TT 1997 HC 175.
153 Ibid at 5.
154 Ibid.
155 Ibid at 7.
156 Ibid.

rule that the administrators should give reasons for everything that they did to all those who might be affected by their decision, administration would come to a standstill.[157] It continued that the applicant must show that, in the circumstances, there was a duty to give reasons to him and that duty would arise if there were special circumstances.[158] However, the applicant had shown none and no authority had been produced to support the contention that confidential data should be given to him. As a result, the court rejected that ground of challenge.

Immigration and national security

The courts have made it clear that reasons should be provided for the detention of a person before deportation.[159] In *Burnett v Chief Immigration Officer*,[160] the Court of Appeal of the Eastern Caribbean States held that there was no obligation under the Immigration and Passport Ordinance for an immigration officer to give reasons for refusing permission to the applicant to enter the Territory of the British Virgin Islands. It continued that there was no requirement to afford an applicant a hearing but that the Court of Appeal of Trinidad and Tobago, in *Katwaroo*, claimed that failure to state reasons for a decision in such circumstances might well give rise to an inference that the decision had been taken otherwise than in good faith, or arbitrarily. In *Big Ben v Minister of National Security*,[161] the applicant sought an order of *certiorari* to quash a decision of the Minister of National Security ('the Minister') to refuse the applicant's application for permanent resident status. One of the issues that arose was whether the Minister needed to give reasons for his decision under section 6 of the Immigration Act. The applicant claimed that the Minister, in failing to provide him with proper reasons for the refusal of his application for permanent residence, acted in breach the principles of fair procedure for it deprived the applicant of making representations in response to those reasons.[162] In addition, he claimed that, since no reason was given, the only proper inference was that the Minister had no valid reason for the refusal and, accordingly, the decision and the failure to give reasons were to be construed as acts of unreasonableness. The respondent argued, first and foremost, that there was no obligation on the Minister to give reasons for the refusal. The issues that arose for consideration included, first, whether the Minister was obliged to give the applicant reasons for the refusal of the grant of resident status; and second, whether the Minister's decision and/or the failure of the Minister to provide reasons to the applicant was unreasonable.[163] The applicant claimed there was a common law duty to give reasons and that if the applicant met the criteria set out in the Immigration Act and he was not granted permanent resident status, then it was patently unfair if he was not told why. He relied on *Burroughs v Katwaroo* where it was stated:

> Like the trial judge, for my part I think that the commissioner should have given Katwaroo some reason for the revocation of the licence. If he cannot or does not, then (to my mind) the only proper and reasonable inference must (or, if not, ought to) be that the commissioner has no valid reason for the revocation. To my mind there can be no fairness if, as he did, Katwaroo sought of the commissioner . . . and got none. . . . He [the commissioner] must in the circumstances of this case tell Katwaroo why he has thought it fit to cancel his licence.[164]

157 Ibid at 7–8.
158 Ibid at 8.
159 *Hernandez v Attorney General of Jamaica* JM 2006 SC 87.
160 VG 1994 HC 3.
161 TT 1998 HC 63.
162 Ibid at 6.
163 Ibid.
164 [1985] 40 WIR 287 at 309.

The respondent argued that there was no common law duty to give reasons and the Immigration Act did not impose a duty on the Minister to do so on an application under section 6 and that there was no warrant or necessity to imply such a duty in the instant case.[165] In addition, the respondent argued that a duty on the part of the Minister to give reasons should not be inferred in relation to exercise of his powers under section 6 for the following reasons: (a) an examination of the statutory scheme in question and an appreciation of the power being exercised showed that it would be undesirable, unnecessary and impracticable for the Minister to give reasons; and (b) the decision was to be taken on the broad grounds of suitability and, as such, no reasons or detailed reasons were to be expected.[166]

They were also of the opinion that this case was merely an initial application case where a discretion was to be exercised and hence there could be no requirement to furnish reasons. The court claimed that there was no express obligation upon the Minister to give reasons for his decision and disagreed with the applicant that there existed a common law duty on the decision maker to give reasons.[167] The court stated that natural justice or fairness might itself require, in certain circumstances, that reasons be given and that, in the circumstances of this case, the Minister was obliged to provide the applicant with reasons for the decision not to grant resident status and that the reasons provided before were inadequate. It continued that, even though there might have been no right, the thing applied for, if a refusal of it affected some other right indirectly or collaterally, would found a 'sufficient' ground for reasons to be given.[168] The court claimed that, additionally, the more profound and far-reaching the consequences of the decision for the individual the greater should be the onus on the decision maker to give reasons. It claimed that it did not think that pleas of impracticality should override the duty to give reasons in the circumstances envisaged nor that good administration was necessarily hampered.[169] The court explained that bureaucratic indolence was not synonymous with good administration and good administration was likely to be enhanced by providing reasons. It also added that, where the disclosure of reasons might affect national security, the Minister might decline, under well-settled principles, to do so!

Director of Public Prosecutions

Inextricably linked with the exercise of the discretion of the Director of Public Prosecutions (DPP) in exercising his constitutional powers is the reasons he may give for exercising them in one way or the other. In *Tappin v Lucas*, where the DPP gave no reasons for his decision to discontinue proceedings, Bollers CA, speaking for the Court of Appeal of Guyana, noted that '[u]nder the Constitution [the DPP] is not required to give any reasons for his decision, nor is he required to hear any representations made to him by a person who has instituted a private prosecution.'[170] In *Re King's Application*, the DPP advised the police that there was no sufficient and reliable evidence to provide a foundation for a charge of murder, and, consequently, decided not to prosecute the sergeant. Sir Denys Williams CJ, having considered the evidence, found that the decisions was not unreasonable, improper or irregular within the *Wednesbury* principles.[171] In *Mohit*, where the DPP gave written reasons for his decision for discontinuing

165 TT 1998 HC 63 at 7.
166 Ibid.
167 Ibid.
168 Ibid.
169 Ibid.
170 (1973) 20 WIR 229 at 236.
171 (1988) 40 WIR 15 at 36.

proceedings once, but did not provide reasons on the other three occasions, the Privy Council cited *Gouriet v Union of Post Office Workers*,[172] where Viscount Dilhorne accepted that the Attorney General in England 'need not give any reasons' for his decision to discontinue a prosecution.[173] However, in remitting the case back to the Supreme Court, the Board was mindful to say that in making its assessment of all the evidence the Supreme Court should consider all the evidence, including 'any reasons the DPP may choose to give'.[174] However, the Board cautioned that 'it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be', noting that 'there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content'.[175] The Board continued that this was 'a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given'.[176]

In *Marshall v The Director of Public Prosecutions*,[177] the appellant sought judicial review of the decision of the DPP not to bring any prosecution for the death of her son. The DPP's decision was based on his examination of the material available to him, which led him to conclude that no prosecution should be brought against anyone, on the ground of insufficient evidence on which to base a charge.[178] Her application was refused by the High Court and upheld by the Court of Appeal of Jamaica. The appellant also sought judicial review of the DPP's decision not to disclose any further reasons for not instituting proceedings against the officers but this ground was not pursued before the Privy Council. The Full Court judges considered that the DPP was not required to give reasons.[179] In the Court of Appeal, Forte P and McCalla JA were of the opinion that the DPP should have given further and more detailed reasons, particularly after leave was given to apply for judicial review, but Smith JA regarded the reasons which he gave as sufficient.[180] Forte P considered that judicial review would lie in respect of the absence of reasons, but that in light of the insufficiency of evidence to ground a prosecution he would not grant the orders sought. Before the Board, the question of sufficiency of reasons of the DPP was raised by counsel for the appellant who argued that, without proper reasons, the court's task was impossible and that its proper functioning was frustrated by the absence of reasons for or explanation of the decision not to prosecute.[181] The Board was of the opinion that if the appeal turned on this issue, it 'would have some difficulty in accepting either that the DPP was bound to give reasons at all or that the reasons when given were insufficient in the circumstances'.[182] The Privy Council observed that, 'since the DPP did state in his affidavit that he decided that there was not sufficient evidence in law to charge anyone', it was not 'convinced that further elaboration was required'.[183] This, it argued, might have been necessary if the DPP's decision 'had turned on a factor such as the public interest in a case where there was a plain *prima facie* case on the evidence'.[184] The Board continued that if it appeared that the DPP had 'misapprehended or left out of account an important piece of evidence some explanation could have been required'.[185] The Board concluded that:

172 [1978] AC 435.
173 *Mohit v The Director of Public Prosecutions of Mauritius* [2005] UKPC 20 [2006] 1 WLR 3343 at [14].
174 Ibid at [22].
175 Ibid.
176 Ibid.
177 [2007] UKPC 4.
178 Ibid at [7].
179 Ibid at [13].
180 Ibid at [14].
181 Ibid at [15].
182 Ibid.
183 Ibid.
184 Ibid.
185 Ibid.

> [a]gain, if his decision had been inexplicable and aberrant, it is possible that intelligible reasons might have been required to explain it (cf. *Re Adams' Application for Judicial Review* [2001] NI 1) though their Lordships would reserve their view on whether the DPP would even in such a case be required in law to give reasons, however advisable it might be that he should do so as a matter of good practice. The point does not arise in the present case, since for the reasons which they will give, their Lordships consider that he had very solid grounds for deciding against a prosecution.[186]

The Board emphasised that the sufficiency of reasons was not determinative of this appeal, but that if 'they should be regarded as deficient, the court can and should, as McCalla JA held, weigh up the evidence for itself and ascertain whether the DPP could sensibly decide as he did on that evidence'.[187]

In *Andrews v The Director of Public Prosecutions*,[188] the applicant argued that the DPP, in his reasons for his decisions to take over and discontinue the criminal proceedings brought by the applicant, had misdirected himself and taken into account irrelevant considerations. In rejecting the argument of counsel for the respondent that the question of whether there was sufficient evidence to bring a prosecution was a matter for the DPP and not the court, Thom J, at first instance, asserted that while 'there are no constitutional or statutory requirements for the [DPP] to give reasons for his decisions made pursuant to Section 64 of the Constitution, when reasons are given these reasons could be challenged'.[189] Having considered the evidence, the judge disagreed with counsel for the applicant that the DPP applied the wrong evidential test in finding that there was not sufficient evidence to establish the offences of rape and indecent assault.[190] Indeed, the Jamaican court in *Tapper v Director of Public Prosecutions*[191] accepted that in any review of the decision of the DPP to discontinue proceedings, the court was obliged to consider his reasons if he had disclosed them. In *Re Genius*,[192] the Court of Appeal of Jamaica held that the DPP was not obliged to give reasons for declining to embark on a prosecution. For the court to so require would not harmonise with the provisions of section 94 of the Constitution. It also noted that:

> [r]ecent cases on judicial review have shown that a trend has developed towards an increasing insistence on greater openness in matters of government and administration. However, I disagree with Mr Small when he stated that it was open to the DPP to explain his decision for the benefit of this Court. To hold so would create a general duty to give reasons in the face of a common law principle which establishes that there is no such general duty. I am further of the view that the Judicial Review itself cannot create the need for reasons. On the other hand, it is for the Court to determine whether or not reasons ought to be given.[193]

A STATUTORY RIGHT TO REASONS

Administrative Justice Act of Barbados

Section 13(1) of the AJA provides that it is the duty of any person or body making a decision to which that section applies, if requested in accordance with section 14 by any person adversely

186 Ibid.
187 Ibid at [16].
188 VC 2008 HC 13.
189 Ibid at [55].
190 Ibid at [56].
191 JM 1999 SC 4.
192 JM 2003 SC 20.
193 Ibid at 27.

affected thereby, to supply that person a statement of the reason for the decision. Section 13(2) provides that this section applies to any decisions that are required by law (including any enactment) or by contract to be made in accordance with the principles of natural justice or in a fair manner with the exception of (a) any decision for which by express provision of any enactment reasons are not required to be provided; (b) any such decision as is specified in the First Schedule. The First Schedule refers to (a) any decision other than a decision relating to a disciplinary matter made by (i) the Judicial and Legal Service Commission; (ii) the Public Service Commission; (iii) the Police Service Commission; (iv) the Statutory Board Service Commission; and the Defence Board or other authority under the Defence Act; (b) any decision of the Minister or of a government official under the Immigration Act; and (c) any decision relating to an order made under the Expulsion of Undesirables Act. Section 14(1) provides that a request for reasons under section 13 must be made on or before the date of giving or notification of the decision or within 14 days after that date. Section 14(2) states that the request must be made in writing, except that where an oral hearing is held, the request may be made orally before the conclusion of the oral proceedings. And section 14(3) provides that in the case of postal communications, a request for reasons shall be deemed to be made at the time when it is posted and a notification of a decision at the time when it reached the addressee. Section 15 provides that a statement of reasons required under section 13: (a) must be in writing, except where the person requesting it agrees that it may be made orally; (b) must be supplied within a reasonable manner; and (c) shall be deemed to be part of the decision and to be incorporated in the record.

In *Sparman v Greaves*,[194] the applicant was refused a licence to practise as a cardiologist. The court noted that under section 13(1) of the AJA, a decision-making person or body was required to provide reasons for its decision if requested by the person affected by that decision.[195] However, it noted that section 13(2) exempted from the requirement to provide reasons for any such decision a decision specified in the First Schedule, and one such specified decision was any decision of the Minister or a government official under the Immigration Act.[196] The court ruled that this exemption was particularly instructive as it demonstrated that Parliament was not unmindful of the provisions of section 23 of the Immigration Act (which purported to oust the jurisdiction of the court) when it enacted the AJA, which required all decision-making bodies to observe the principles of natural justice but, at the same time, specifically, exempted the Minister or a government official under the Immigration Act from the duty to provide such reasons.[197]

Judicial Review Act of Trinidad and Tobago

Section 16 of the JRA provides the statutory basis for reasons to be provided by administrators in Trinidad and Tobago. This section was the subject of consideration in *Polo v Public Service Commission*,[198] where the applicant sought judicial review of a decision of the defendant authority to terminate his employment. The court noted that the applicant sought a declaration that he was entitled to be supplied with reasons, relying on section 16 of the JRA.[199] The court

194 BB 2004 HC 21.
195 Ibid at [48].
196 Ibid at [49].
197 Ibid at [50].
198 TT 2003 HC 32.
199 Ibid at [36].

claimed that section 16(1) of the JRA entitled the applicant to apply for reasons within 28 days of notification of the decision by which he had been aggrieved.[200] It provided that, where a person was adversely affected by a decision to which the JRA applied, he may request from the decision maker a statement of the reasons for the decision. In addition section 16(2) provides that where a person makes a request under subsection (1), he shall make the request: (a) on the date of the giving of the decision or of the notification to him thereof; or (b) within 28 clear days after that date, whichever is later, and in writing. Section 16(3) states that where the decision maker fails to comply with a request under subsection (1), the court may, upon granting leave under section 5 or 6, make an order to compel such compliance upon such terms and conditions as it thinks just.[201] The court concluded that, in respect of the issue of the giving of reasons, it had not been disputed that the applicant never received the letter dated 12 September 2002.[202] Additionally, it noted that there was no suggestion, for example, that the applicant had been required to sign as having received the letter or that the Permanent Secretary through whom the letter was sent was willing to depose that the letter was given to the applicant. Therefore, the court claimed that it must be taken that the first sight the applicant had of the letter was when the affidavit of the Director of Public Administration was served on him, presumably in October 2002. In this factual context, the court claimed it must consider whether the supply of reasons at that stage satisfied the requirements of section 16, which was silent as to the time within which reasons should be provided, but required them to be provided within a reasonable time.

The court claimed that an aggrieved subject of a decision was assisted in determining whether or not to apply for judicial review by being provided with reasons at an early stage.[203] For this reason, it continued, the applicant might seek to enforce the provision of reasons at the application for leave to apply for judicial review. The court claimed that the provision of reasons, when the applicant has already obtained leave to apply for judicial review and the application for judicial review has already been made, was to defeat the spirit and intention of section 16.[204] In addition, the court felt reluctant to grant the declaration sought by the applicant because to do so, in its view, would now be artificial since the applicant had seen the reasons as an annexure to the affidavit of the Director of Public Administration.[205] However, the court would grant a declaration that the Public Service Commission failed to provide reasons in accordance with section 16 of the JRA.

Conclusion

Under both the JRA and the AJA, the applicant must make the request for reasons within a stipulated period of time. In both pieces of legislation, the requirement that public authorities provide reasons for decisions means that the applicant is provided with a free-standing right, irrespective of the circumstances of his case. The only limitation is that of time. The common law, therefore, is modified in that where the applicant makes a request in the prescribed manner, the public authority must comply and provide reasons. Both sections uses the term 'adversely affected', which means that the applicant who can satisfy the requirements for *locus standi* would usually be able to make an application for reasons for a decision. Section 14 of the AJA does

200 Ibid at [37].
201 Ibid.
202 Ibid at [41.5].
203 Ibid at [41.6].
204 Ibid.
205 Ibid at [41.7].

not provide what should happen if the decision maker fails to comply with a request for reasons. This is an important oversight as there are no sanctions on public authorites or remedies to the applicant for such non-compliance. The relevant section in the JRA is section 16(3), which provides that, where a decision maker fails to comply with a request for reasons for a decision, the Court may, upon granting leave to the applicant to apply for judicial review, make an order to compel such compliance upon such terms and conditions as it thinks just.

What happens, then, where the applicant fails to make a request for reasons within the 14-day period as stipulated by section 14(1) of the AJA or the 28-day period as required by 16(2)(b) of the JRA? These sections were intended to provide for a general right to reasons for administrative decisions. The common law, as was noted in the previous sections, did not provide for a general duty on administrators to provide reasons for their decisions, and one of the main reasons for rejecting this duty was the administrative burden that would be placed on decision makers as a result. The legislators, in drafting the statutory provisions, were also cognisant of this and ensured that this right to request reasons could only be made within specific time periods, ensuring that public authorities were not burdened indefinitely with such requests on a day-to-day basis. Where, however, the time limit has expired, it is suggested that the applicant should have to resort to the common law position, namely that there is no general duty to provide reasons and that such a duty can only arise if it is dictated by the special circumstances of the particular case. In other words, where the statute does not apply, the common law exceptions would. The applicant must satisfy the court that the circumstances made his case a special one in which natural justice required reasons to be given for a particular decision.

CHAPTER 15

THE RULE AGAINST BIAS

INTRODUCTION

It has often been said that the public perception of fairness is key, and in no other area in administrative law does this principle have more significance than in the rule against bias. The test is an objective one: whether right-thinking members of the public, apprised of all the facts and circumstances, would conclude that the particular tribunal, body or person was biased. This relates to apparent bias, and the test applicable to that form of bias has been the subject of judicial determination over the years.[1] The other forms of bias include automatic disqualification, where a person or body is automatically disqualified from participating in a decision in which he or she has a financial or proprietary interest in the outcome. That latter form of bias has been subject to further consideration by the courts where they have expanded it to cover the situation where a person's interest extends to the promotion of the cause of the body in question. However, the courts are beginning to recognise that this might have been an unfortunate step in the common law although they have not expressly rejected that approach. Actual bias is hard to prove so there are few, if any, decisions where this was expressly considered. This chapter attempts to explore the law relating to bias from a Commonwealth Caribbean perspective. The courts have followed closely the developments in the United Kingdom so the developments are similar in most of the cases considered. However, not all Commonwealth Caribbean courts have followed the United Kingdom approach, in particular as it relates to the new test for apparent bias; some have rejected it as being based solely on a European approach which is not applicable to the Commonwealth Caribbean context.

AUTOMATIC DISQUALIFICATION

Automatic disqualification applies where the person or body has a pecuniary or proprietary interest in the outcome of the subject matter of the decision. If that interest exists, that person cannot participate or in any way attempt to influence the actual decision made. Moreover, even if there is no actual influence, the law presumes bias in such cases, and that person is automatically disqualified because of the existence of that interest. There is no need to show that the person or decision-making body is actually biased. In *Ex p Robinson*,[2] the Permanent Secretary directed the applicant to go on leave and recommended his early retirement. The court noted that, as a general rule, where judicial or quasi-judicial proceedings had been tainted by bias or there was an appearance of bias the court would interfere and set aside the proceedings.[3] The court cited *R v Gough*[4] for the test of whether there was a 'real danger of bias on the part of a relevant member of the tribunal in questioning the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under construction by him' and *Porter v Magill*[5] for the modified the test for apparent bias 'whether the fair-minded

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1 *Melnyk v Barbados Turf Club* BB 2007 HC 22.
2 JM 2007 SC 84.
3 Ibid at [117].
4 [1993] AC 646.
5 [2001] UKHL 67. See also *HN International (Caribbean) Limited v Commission of Enquiry* TT 2007 HC 155; and *HN International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago* TT 2005 HC 37.

and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased', accepting that the rule against bias applied to administrative decisions.[6] The applicant claimed that the Public Service Commission (PSC) had an interest in the outcome of the application and had shown bias in relation to the issues for the following reasons. First, the members of the PSC were parties to the first case brought by the applicant which was before the Privy Council. Second, at issue in that case was the behaviour of the PSC and the Solicitor General. Third, the PSC secured the applicant's retirement from the Public Service even though the appeal process had not yet come to an end.[7] The court claimed that where the facts justified a finding that the rule against bias had been breached the ground of challenge would fail where it was necessary for the decision maker to act.[8] In other words, the court claimed that the doctrine of necessity created an exception. The court agreed with the respondents that, although the PSC were the defendants in an action filed by the applicant, there was no other body with the constitutional authority to make the decision to retire the applicant.[9] The PSC was the only body that was empowered to recommend the early retirement of an officer under the Constitution and the Public Service Regulations. The court then referred to *Meerabux v Attorney General of Belize*,[10] where Lord Hope, in relation to a similar situation, said that the principle of automatic disqualification did not apply.[11] It then held that the PSC was the only body authorised to exercise powers related to appointments, discipline and terminations of public officers under the Constitution of Jamaica.[12] The court continued that, based on the authorities and the reasons found therein, the respondents had established that the exceptional grounds of necessity existed so there could be no bias in the PSC.[13]

In *Meerabux v Attorney General of Belize*,[14] the appellant, a former judge of the Supreme Court of Belize, was the subject of complaints from the Bar Association alleging that he had misbehaved in office. The Governor General referred the matter to the Belize Advisory Council (BAC) pursuant to the Belize Constitution. By section 51 of the Belize Constitution, the Chairman of the BAC was required to preside at meetings. The appellant objected to the presence of the Chairman and another member of the Bar Association on the basis that the Chairman was automatically disqualified by reason of his membership of the Bar Association or alternatively that a fair-minded informed observer would have concluded that there was a real possibility that the Chairman was biased. In relation to the first argument, the appellant argued that the Chairman was automatically disqualified on the ground of apparent bias because he was a member of the Belize Bar Association, relying on the way the principle of automatic disqualification was applied to the facts described in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)*.[15] Lord Hope claimed that the decision of the House of Lords in *Pinochet (No. 2)* to apply the rule which automatically disqualifies a judge from sitting in a case in which he has an interest to the situation in which Lord Hoffmann found himself appeared, in retrospect, to have been a highly technical one.[16] He continued that there

6 JM 2007 SC 84 at [117].
7 Ibid at [118].
8 Ibid at [119].
9 Ibid.
10 (2005) 66 WIR 113. See also *Bahamian Outdoor Adventurer Tours v R* BS 2000 SC 13; *Attorney General of Trinidad and Tobago v Caribbean Communications Network Limited* TT 2001 CA 58; and *Austin v Durant* BB 1986 HC 77.
11 JM 2007 SC 84.
12 Ibid at [120].
13 Ibid at [121].
14 [2005] UKPC 12.
15 [2000] 1 AC 119.
16 [2005] UKPC 12 at [21].

was, of course, ample precedent for the proposition that the rule that no one may be a judge in his own cause was not confined to cases where the judge was a party to the proceedings; noting that it extended to cases where it could be demonstrated that he had a personal or pecuniary interest in the outcome, however small: *Dimes v Proprietors of Grand Junction Canal*.[17] Lord Hope stated that the extension of the rule was taken one step further when Lord Hoffmann in *Pinochet (No. 2)* was held to have been disqualified automatically by reason of his directorship of a charitable company, although the company was not a party to the appeal, nor had it done anything to associate itself with those proceedings. He explained that the company of which he was a director was controlled by Amnesty International, which was a party and which was actively seeking to promote the case for the extradition and trial of Senator Pinochet on charges of torture. In that decision, he continued, Lord Browne-Wilkinson said that there was no room for fine distinctions in this area of the law if the absolute impartiality of the judiciary was to be maintained. Lord Hope noted that one of the undercurrents in *Pinochet (No. 2)* was whether the test of apparent bias laid down in *R v Gough*[18] needed to be reviewed in the light of subsequent decisions in the Commonwealth to bring it into line with the test which, following earlier English authority, had been applied in Scotland.[19] He claimed that the House found it unnecessary to conduct this review in *Pinochet (No. 2)*, as it felt able to apply the automatic disqualification rule to its circumstances which were acknowledged as striking and unusual. He concluded that had the House of Lords felt able to apply an objective test in *Porter v Magill*, namely, whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased, in *Pinochet (No. 2)*, it was unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule.[20]

On the facts, Lord Hope noted that, first, it had not been suggested that Mr Arnold (the Chairman) had any personal or pecuniary interest in the outcome of these proceedings; second, he was not a member of the Bar Committee of the Bar Association on whose initiative the complaints in the name of the Bar Association had been brought to the attention of the Governor General; third, he did not attend any of the meetings in which the complaints were discussed and resolutions passed which led to this action being taken; and, fourth, he was a member of the Bar Association simply because, as he was an attorney-at-law, membership of the Association was in his case compulsory.[21] He continued that the question was whether it could be said, simply because of his membership of the Bar Association, that Mr Arnold could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause.[22] Lord Hope observed that only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified, but that the Board was not persuaded that the facts led to this conclusion. He claimed that, leaving the bare fact of his membership on one side, first, it was clear that Mr Arnold's detachment from the cause that the Bar Association was seeking to promote was complete; second, he had taken no part in the decisions which had led to the making of the complaints; and, third, he had no power to influence the decision either way as to whether or not they should be brought.[23] Lord Hope

17 (1852) 3 HL Cas 759.
18 [1993] AC 646.
19 [2005] UKPC 12 at [22].
20 Ibid.
21 Ibid at [23].
22 Ibid at [24].
23 Ibid.

therefore concluded that, in that situation, his membership of the Bar Association was in reality of no consequence, as it did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. He therefore held that the principle of automatic disqualification did not apply.

APPARENT BIAS

Officers of the court

In *Pettiman v Benjamin*,[24] the question for the court was whether the Director of Public Prosecutions (DPP) or his officers could appear for the prosecution at a court martial. In other words, the question was whether a member of staff of the DPP's Department could be Judge Advocate while other members of that staff were prosecutors and still performing their duties in the DPP's Department. The applicants argued that it was contrary to the rules of natural justice that the Judge Advocate should be a member of the Department of the DPP, while the prosecuting counsel were also members of the same department and that at times, when the court martial was not in session between the first sitting of the court martial and the last sitting before the High Court proceedings, they would attend, just as the Judge Advocate did, at the offices of the DPP and perform duties.[25] The applicant claimed that they were all responsible to the DPP but the court replied that, although this was so in respect of their ordinary duties, the officers were in no way answerable to the DPP in respect of professional work done at the court martial.[26] The applicant also claimed that there was, in the circumstances, a real likelihood of bias on the part of the Judge Advocate and that the public could have no confidence in a conviction by a court martial where there was this relationship between the Judge Advocate and the prosecuting counsel. Consequently, the situation was described as a naked violation of the right to a fair trial. The Department of the DPP, it was submitted, was involved in the prosecution and in performing the role of Judge Advocate.[27] In other words, the appellants argued that once a reasonable man would suspect bias from the outward appearance, that was enough to vitiate the proceedings.[28] The respondents argued that, in order to succeed, the appellants had to show not merely that there could have been a remote suspicion of bias, but that there was a real likelihood of bias. They continued that, first, it had not been shown that the Judge Advocate had any interest in the proceedings; and, second, neither the DPP nor prosecuting counsel had instituted the proceedings; so that neither was a party and it could not be held that there was a professional relationship between the Judge Advocate in his substantive office and the party bringing the case.[29] The court was of the opinion that it was settled law too that where persons having a direct interest in the subject matter of proceedings before an inferior court take part in adjudicating upon it, the tribunal was improperly constituted and the court would grant an order of prohibition to prevent it from adjudicating.[30] It continued that, while disqualification was more readily incurred when an adjudicator had a direct pecuniary interest, it might also be incurred where his interest was not pecuniary but was such as might lead to an appearance or

24 TT 1984 CA 14. See also *Pettiman v Benjamin* TT 1985 HC 143.
25 TT 1984 CA 14 at 8–9.
26 Ibid at 9.
27 Ibid.
28 Ibid at 9–10.
29 Ibid at 10.
30 Ibid at 10–11.

likelihood of bias on his part.[31] The court claimed that the test of bias was not a subjective one and that the court would not seek to discover whether the mind of the person whom it was sought to disqualify was in fact affected by bias. The respondents conceded that it might be undesirable for an officer of the DPP to sit as Judge Advocate when his colleague in that department appeared as prosecuting counsel, but nevertheless argued that the facts disclosed here established no real likelihood of bias.[32]

The court claimed that, in the instant case, the judge at first instance approached the matter from the angle of a presumption of rectitude on the part of lawyers entrusted with judicial functions and considered that the test was whether there was in fact a likelihood of bias as distinct from an outward appearance of that likelihood to the eyes of the reasonable spectator.[33] The court held that, applying the rule in *R v Liverpool Justices*[34] – namely, would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible – it was unnecessary for the judge to presume or find professional impropriety on the part of the Judge Advocate and the prosecutors before he could hold that there was a breach of natural justice.[35] It continued that what he had to do was to decide whether the ordinary spectator, being aware of the facts: (a) that the Judge Advocate and prosecutor were still together officers of the Department of the DPP; and (b) that the ties of the Judge Advocate with the Department of the DPP had not been even temporarily severed, would entertain a reasonable suspicion that the persons charged were not having or not likely to have a fair trial. The court continued that the question of the likelihood that the office of the DPP might have given advice on the sufficiency of evidence could also have crossed the mind of the ordinary spectator; it was the effect of this awareness and the effect of this question on the mind of the ordinary spectator that the judge had to find.[36] It continued that he did not have to enquire whether the Judge Advocate was in fact biased but whether the ordinary spectator on the material available would reasonably suspect him of being biased. The court was of the opinion that, since the judge applied the wrong test, it was for it to see whether the circumstances were such that it could arrive at its own conclusion: was there a real likelihood that a reasonable man, with no inside knowledge, would think that there might well be bias on the part of the Judge Advocate or, in other words, that he might favour the prosecution unfairly?[37] It claimed that it would be going too far to attribute knowledge of this to the ordinary spectator sitting in at the hearing of the court martial and that the reasonable man for the purposes of the case was the ordinary listener sitting at Chaguaramas and following the proceedings of the court martial. The court held that it was satisfied that the reasonable man, asked if he thought that the Judge Advocate might be biased, would have answered: 'I am not sure that he is biased but he may very well be.'[38] It continued that one could not reasonably attribute to the ordinary spectator at court martial proceedings the degree of acquaintance with and built-in confidence in normal judicial attitudes which one will find in a trained lawyer. In addition, the court claimed that a finding that the ordinary spectator would have felt that the Judge Advocate was biased was by no means a finding that he was in fact biased.[39] The trial judge had claimed that a barrister, newly appointed as a judge, need not disqualify himself from matters with which other persons in the same chambers

31 Ibid at 11.
32 Ibid at 12.
33 Ibid at 13.
34 [1983] 1 All ER 490.
35 TT 1984 CA 14 at 14.
36 Ibid.
37 Ibid.
38 Ibid at 15.
39 Ibid.

were concerned while he was still attached there, so long as he himself had nothing to do with these matters. The court agreed that this would not be material for a reasonable suspicion of bias and would take a similar view in the case of a person appointed to act as a judge.[40] It explained that the basic difference between the situation in the instant case and the example given above was that, in the instant case, the Judge Advocate continued to hold, and function otherwise in, his position as an officer of the Department of the DPP and to be entitled to so function. The court then referred to *Joseph v R*,[41] where it was held that the magistrate who, earlier as Legal Assistant to the Attorney General, had given advice relating to the prosecution of the accused on a charge of murder, was not disqualified from sitting as examining magistrate at the preliminary enquiry into the charge. The court distinguished that decision on the basis that the Legal Assistant who had advised on the prosecution and later sat as Magistrate at the preliminary enquiry was presiding over a part of the proceedings in which no final order could be made; whereas the Judge Advocate in this case was functioning at a trial at which guilt or innocence was to be determined and the persons charged could be sentenced to terms of imprisonment.[42]

The respondent argued that the duties of the Judge Advocate at a court martial were not such as could justify an allegation of bias, which would render the proceedings a nullity. However, the court claimed that the duty of the Judge Advocate to sum up the evidence and advise the court on the law relating to the case was one of crucial importance.[43] It also claimed that, while the Judge Advocate did not preside over the court martial and did not himself have to determine the issue of guilt or innocence, nevertheless his duty to advise the court on legal and procedural matters and to sum up the evidence was of such importance that his approach could affect the fairness of the trial.[44] The court stated that, considering the impression which knowledge that the Judge Advocate and prosecuting counsel were officers of the same Department and all continued to attend and perform duties there, and that the charges might have been advised by that Department would leave on the reasonable onlooker, and considering the role which a Judge Advocate played in a court martial, it would hold that the proceedings were in breach of the rules of natural justice and were, therefore, a nullity.[45]

In *Linton v Hyman*,[46] the court considered the issue of whether or not it should prohibit the Acting Chief Magistrate from the further hearing of the complaints at issue.[47] The court claimed that it had always intervened to grant relief to parties on the basis that there was a real likelihood of bias and that decisions had been quashed by the court on the basis that there was a likelihood of bias.[48] It claimed that there was no doubt that bias or potentially biased decisions were reviewable by the courts, noting that, as a general rule, the court would not hesitate to review decisions in which there were allegations of bias or if there was bias.[49] The court claimed that this usually occurred in one of three ways, namely: (a) a disqualified person participated in the decision; (b) where the case was prejudged; or (c) where an interested party had private access to the adjudicator. The court also pointed out that a disqualified person was someone who had a direct pecuniary interest in the subject matter or who was biased in favour of one side or the other.[50] However, it explained that courts had been slow to stop a prosecution of a

40 Ibid at 16.
41 (1952) 1 WIR 365.
42 TT 1984 CA 14 at 16.
43 Ibid.
44 Ibid at 17.
45 Ibid.
46 AG 2006 HC 10.
47 Ibid at [73].
48 Ibid at [77].
49 Ibid at [82].
50 Ibid at [83].

case save in the most exceptional circumstances.[51] It accepted that the court might stop a prosecution if there had been an abuse of process and that an abuse of process usually occurred if the prosecution had manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or on the balance of probability, the defendant had been, or would be, prejudiced in the preparation of the conduct of his defence; or there had been delay on the part of the prosecution which was unjustifiable.[52] The court was of the opinion that it was not convinced that the then Acting DPP in instituting the complaints against Mr Linton was motivated by bias and that there was any real likelihood that the then Acting DPP was motivated by bias when he instituted the charges against the applicant.[53] As a result, the court concluded there was no danger of bias.[54]

Coroners

In *Re Israel*,[55] the issue arose as to whether the Coroner, who presided at an inquest into the death of Israel, should recuse himself from proceedings on the ground of apparent bias. The court noted that it would adopt the definition of bias found in *Re Medicaments and Related Class of Goods (No. 2)*,[56] where bias was said to describe an attitude of the mind which prevents an objective determination of the issues to be resolved:

> A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.

The court claimed that the concept of bias could, therefore, refer to a decision maker's predisposition to decide an issue such that his or her mind was closed to persuasion to the contrary view based on evidence adduced and/or submissions made in a specific case.[57] The court explained that 'actual bias' referred to the situation where a decision maker had been influenced by partiality or prejudice in reaching his decision and that it could also refer to a situation where it had been demonstrated that a decision maker was actually prejudiced in favour of or against a party. It claimed that no accusation of actual bias had been made on behalf of the applicant against the Coroner involved in the instant case.[58] The court also claimed that 'apparent bias' described the situation where circumstances existed which gave rise to a reasonable apprehension that a decision maker might have been, or may be, predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue to be determined.[59] The court noted that the entitlement to be judged by an independent and impartial tribunal was fundamental to the Trinidad and Tobago judicial system.[60] It continued that

51 Ibid at [84].
52 Ibid.
53 Ibid at [86].
54 Ibid at [87].
55 TT 2009 HC 101.
56 [2001] 1 WLR 700.
57 TT 2009 HC 101 at 5.
58 Ibid.
59 Ibid.
60 Ibid at 6.

the notion of the entitlement to be judged by an independent and impartial tribunal in turn reflected a concern with the need to maintain public confidence in the administration of justice. This concern, it explained, was expressed in the cognate principle that not only must justice be done but it must also be seen to be done. In other words, the appearance of just court proceedings was as important as its actuality.[61]

The court accepted that it was common ground that the obligation to accord procedural fairness by avoiding the appearance of bias has been held to apply to Coroners' decisions.[62] The court explained that the test to be applied was that accepted by Archie CJ in *Panday v Virgil*,[63] where he stated that '[t]he duty of the Court when investigating an allegation of apparent bias is to place itself in the shoes of a hypothetical observer who is both "fair minded" and "informed". If such an observer would conclude that there is a real possibility that the tribunal was biased, the system has failed and the proceedings are vitiated.' It continued that since *Porter v Magill* the courts had finally laid to rest the test in *R v Gough*, which was the 'real danger of bias' test, by endorsing (with some degree of modification) the formulation adopted by the Court of Appeal in *Re Medicaments and Related Class of Goods (No. 2)*. As a result, the court stated that, from now on, the question was 'whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.[64] In answering the question of who was to judge whether an appearance of bias existed, the court replied that the court must be the judge, citing *Prince Jefri Bolkiah v State of Brunei Darussalam*.[65] The court was to do so by having ascertained all the circumstances which bore on the suggestion that the tribunal was (or would be) biased; then it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias.[66]

The court was of the opinion that, in determining whether the fair-minded and informed observer would conclude that there was a real possibility of bias by its actions in the inquest, certain factors had to be taken into account. On the facts, the relevant circumstances that the fair-minded and informed observer had to consider included: (a) classifying and referring to the applicant as the subject matter of the inquest; (b) advising the applicant of the Coroner's powers of arrest and that he should consider retaining counsel to appear at this inquest; and (c) issuing a witness summons in favour of the applicant for him to appear in this inquest. In addition, the court claimed that it was also guided by the principle that disqualification was the automatic consequence should the fair-minded and informed observer conclude that there was a real possibility of bias; and that it was not a matter of weighing the factors and exercising a discretion.[67] The court then considered whether a fair-minded and informed observer would conclude that a real possibility of bias arose from the Coroner's actions in the instant case.[68] It claimed that, having ascertained the relevant circumstances on the issue of apparent bias, it would now consider of the characteristics of the fair-minded observer. The court explained that some of the specific characteristics of the fair-minded informed observer were as follows: (a) working knowledge of the law; (b) an awareness of the legal culture; and (c) knowledge of the procedures and practices of the court.[69] In respect of what the fair-minded informed observer would make

61 Ibid.
62 Ibid.
63 TT 2007 CA 13.
64 TT 2009 HC 101 at 12.
65 [2007] UKPC 62.
66 TT 2009 HC 101 at 13.
67 Ibid at 14.
68 Ibid at 15.
69 Ibid at 35.

of the circumstances surrounding the allegations of apparent bias in the inquest, the court claimed as follows. First, having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerned the labelling of the applicant as the subject matter of the inquest, the fair-minded informed observer would not conclude that there was a real possibility that the Coroner was biased.[70] Second, having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerned the advising of the applicant of the Coroner's powers of arrest as well as the prudence in retaining counsel, the fair-minded informed observer would not conclude that there was a real possibility that he was biased.[71] Third, having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerned the issuing of a witness summons for the applicant, the fair-minded informed observer would not conclude that there was a real possibility that the Coroner was biased. The court therefore concluded that it looked at the matters canvassed by counsel through the lens of the fair-minded and informed observer and was convinced that they did not give rise to a reasonable apprehension of bias.[72]

Judges

In *Save Guana Cay Reef Association Ltd v The Queen*[73] one of the issues that arose for consideration by the court was whether Carroll J (Acting) constituted 'an independent and impartial' tribunal. The court claimed that, although no imputation of actual bias was made against him, it was said that he was an acting judge appointed on a temporary basis (on a six-month renewable contract) and that the Government of the Bahamas was at the time in default in failing to review judges' salaries.[74] The appellant argued that the acting judge had been a senator in the governing party, and that the judicial review proceedings were of particular political sensitivity. The court claimed that the test for apparent bias had been laid down by the House of Lords in *Porter v Magill*, where it was invited to accept a 'modest adjustment' in the formulation of the English principle, so as to bring it fully into alignment with Strasbourg jurisprudence, in terms set out in *In re Medicaments and Related Classes of Goods (No. 2)*: namely, 'The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased' and it 'must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility [or a real danger, the two being the same] that the tribunal was biased'.[75] The Board claimed that both before and since *Porter v Magill* there have been cases considering whether the fact that a judge has no long-term security of tenure would lead a fair-minded and informed observer to conclude that there was a real possibility of bias, because of the temporary judge's inclination to be over-deferential to those who had power to terminate or renew his appointment.[76] It continued that section 95 of the Constitution of the Bahamas made express provision for the appointment of an acting Justice of the Supreme Court, adding that his or her appointment may be either for a fixed period or until revoked by the Governor General acting on the advice of the Judicial and Legal Service Commission, which was established under section 116 of the Constitution.[77] The court noted

70 Ibid at 42.
71 Ibid at 43.
72 Ibid at 49.
73 BS 2009 PC 3.
74 Ibid at [49].
75 Ibid at [50].
76 Ibid at [51].
77 Ibid at [52].

that, in this case, the acting judge was appointed for a fixed period of six months and during that period he had the same security as a permanent judge in that he could be removed only for inability to discharge his functions, or for misbehaviour, in accordance with sections 96(4) and (5) of the Constitution. It continued that neither the fact that he had been a senator, nor the fact that judges' salaries were at the time perceived as less than generous, was relevant; not relevant too was the fact that the case might have been perceived as controversial. As a result, the Board rejected the assertion of apparent bias.[78]

The judge can sometimes make the decision to recuse himself or herself on her own account in light of relevant facts. For example, in *Delta Properties Ltd v Ministry of Housing and National Insurance*,[79] the judge was related to the civil service head of the main defendant. The judge noted that she recused from further hearing the case after learning that one of her sisters was about to be appointed acting Permanent Secretary in the Ministry of Housing, the second defendant in the action. The court claimed that as a result of that appointment there might be grounds for allegations of bias to be made by reason of the kinship of the judge and the civil service head of the main defendant, especially if any question of credibility were to arise. In *Fraser v Judicial and Legal Service Commission*,[80] in respect of a claim for defamation against the Chief Justice of the Eastern Caribbean Supreme Court, the issue arose as to whether the trial judge should recuse himself due to the third defendant being the Chief Justice and evidence of close relationship between judges. In addition, the claimant applied for an order that the entire Eastern Caribbean Supreme Court recuse itself from sitting on the claim on the ground of bias and prejudice; he also asked that a list of outside judges should be provided from which he could choose one who would be specially appointed to deal with the case.[81] The court was of the opinion that it did not have power to order that other judges of the court recuse themselves from hearing a case or to order the Chief Justice (or the acting Chief Justice) or the Judicial and Legal Services Commission (JLSC) to appoint a judge to hear the claimant's case. As a result, it treated the application as one to recuse himself and claimed that, if he were to recuse himself, similar reasons for doing so would apply in the case of other judges of the court.[82] The court claimed that, but for the applicant's approach in judicial review proceedings, he would have felt constrained to recuse himself from the case.[83] It continued that the claimant's approach to the judicial review proceedings seemed to it to make a very material difference. The court noted that the claimant had made it quite clear that he did not object to it or any other judge dealing with the judicial review proceedings.[84] It continued that those proceedings were against the same defendants (as well as the Attorney General) and they arose out of the same matters and that, consequently, unless there was some material difference between the two sets of proceedings, the claimant's position in relation to the judicial review must amount to a waiver of any objection in the instant proceedings and/or must demonstrate that there was in fact no real danger of bias. In addition, the court claimed that, given the Chief Justice's position as head of the judiciary and his relationship with him, there would be a real risk of bias if he were to have to decide a (genuine) issue of fact which was to turn on his credibility or a (genuine) issue as to his good faith.[85] It continued that the same would go for the other Justices of Appeal who were

78 Ibid.
79 BS 1994 SC 30.
80 LC 2005 HC 10.
81 Ibid at [5].
82 Ibid at [6].
83 Ibid at [15].
84 Ibid at [16].
85 Ibid at [18].

currently members of the JLSC and, if such issues were to arise, the court therefore believed that it would feel obliged to recuse itself. The judge argued that this conclusion also accorded with its subjective assessment of the situation, in that it considered that it would have no problem deciding any issue of fact or law adverse to the defendants unless they turned on Sir Dennis's credibility or good faith, in which case he would feel personally embarrassed in making any decision.[86]

In *Neymour v Attorney General of the Bahamas*,[87] the applicant applied to the judge to recuse himself on the grounds of a perceived bias. The applicant argued that if the McWeeney Commission report was acted on and increases in salaries were given to the judges, it might well be that the provisions of the Judges' Emoluments and Pensions Act might not have been complied with.[88] In addition, he argued that this would be tantamount to giving judges a financial benefit, which was not done according to law. The applicant claimed that judges hearing matters in which the Attorney General was a party should also recuse themselves. He said that the Attorney General had taken a significant part in promoting the McWeeney Commission Report, and if judges were given a financial benefit resulting from the McWeeney Commission Report, then the perception would be that the Attorney General was offering judges a financial incentive that had not been granted according to law.[89] He argued that the Attorney General, inadvertently or otherwise, would be seen to be creating a position where the judges were compromised, so all judges should, until the situation was remedied, refuse to hear cases involving the Attorney General; and this, of course, would include all criminal prosecutions. The court noted that one of the essential criteria to be observed when protecting the independence of the judiciary was in relation to the judges' salaries and conditions; the salaries and conditions need to be set at a proper level.[90] It referred to Article 88(2) of the 1963 Constitution, which provides that 'The salary of a judge of the Supreme Court and his conditions of service other than allowances shall not be altered to his disadvantage during his continuance in office.'[91] It continued that these constitutional provisions were sensibly put there for the protection of the independence of the judiciary.[92] The court claimed that they existed to make sure that adequate provision was made for the salary of judges and to ensure that the legislature or the executive were not tempted to use variations in salary, certainly downward variations, as a control mechanism over judges.[93] The applicant argued that, if the House of Assembly were to proceed and make any approval for any increase on a commission report that was not properly constituted or appointed, it would compromise the judiciary.[94] He further argued that this gave rise to a cause of action by the judges against the government, of which the Attorney General was representative.[95] The court agreed with him, stating that the cause of action was judicial review and that while such an action was available to judges individually in the Bahamas, they did not have a judicial association in the Bahamas as they have in Canada. It continued that the protocol then, so as to avoid any unpleasantness or repercussions, was that the head of the judiciary took the action on behalf of the judges.[96] By saying this, the court claimed that it was actually putting the cart before the horse because such action would only become necessary if

86 Ibid at [19].
87 BS 2006 SC 43.
88 Ibid at [11].
89 Ibid at [13].
90 Ibid at [18].
91 Ibid at [19].
92 Ibid at [20].
93 Ibid.
94 Ibid at [51].
95 Ibid.
96 Ibid.

there were problems with the McWeeney Commission as were relevant to the Judges' Emoluments and Pensions Act, and these were not remedied before the report was put before the House and any action passed into law.[97] In light of this, the court held that it was not necessary to recuse itself and that it did not think the matter had reached the stage, if indeed it ever would, that judges have been compromised.[98]

Judicial and Legal Service Commission

In *Rees v Crane*,[99] the appellant appealed against the majority decision of the Court of Appeal not to quash the judge's suspension and to uphold the respondent's submission that the Chief Justice and the JLSC were biased in their decision to suspend him. The respondent argued that there was actual bias on the part of the Chief Justice and that the JLSC was biased in considering whether the question of his removal from office should be represented to the President for investigation.[100] In the Court of Appeal, Davis JA accepted that there was bias which vitiated the decision; Sharma JA roundly rejected that contention; and Ibrahim JA found it unnecessary to decide the question. The appellant claimed that there was personal animosity on the part of the Chief Justice which predisposed him against the respondent.[101] On appeal to the Privy Council, the Board claimed that it was unsatisfactory that the respondent was not told by the Chief Justice of his decision to suspend him and to raise with the JLSC the question of referring the matter to a tribunal; and that it was also curious, to say the least, that the respondent on his return had such difficulty in seeing the Chief Justice. In addition, the appellant also claimed that the JLSC was biased in considering whether there should be a representation to the President, first, because of the presence of the Chief Justice at their meeting; and, second, because when the members of the JLSC came to consider whether there should be such a representation to the President, their minds were affected by the fact that they had already approved or authorised the suspension of the respondent from sitting in court, so that in effect they had prejudged the issue.[102] The Board claimed that the Chief Justice was *ex officio* a member of the JLSC and that, if complaints were made about a judge by others, it was not surprising or unusual that the Chief Justice should be the conduit for the transmission of these complaints to the JLSC. It continued that even though the respondent should have been given the chance to deal with this material and to show his 'ability' to perform the functions of his office it did not follow that there was bias.[103] The Board claimed that the professional backgrounds of the Chief Justice and the JLSC were such that an assumption of bias should not lightly be made, and the fact that they had agreed to the suspension did not mean that, on an investigation of fuller material, they were not capable of looking at the question of a representation afresh and fairly. In addition, the Board claimed that it should not be assumed that the Chief Justice unduly influenced them, even though his view must have had considerable weight.[104] The Board was of the view that, in the absence of personal malice on his part, there was no real evidence that they were improperly influenced.

97 Ibid at [52].
98 Ibid at [55].
99 TT 1994 PC 1. See also *Crane v Rees* TT 1991 HC 82; TT 1992 CA 24; and *Rees v Crane* TT 1997 HC 172 (damages).
100 TT 1994 PC 1 at 16.
101 Ibid.
102 Ibid at 17.
103 Ibid.
104 Ibid.

Magistrates

In *Panday v Virgil*,[105] the Court of Appeal of Trinidad and Tobago had to consider whether the Magistrate, who had convicted the appellant and sentenced him to two years' imprisonment with hard labour on each offence and fined him $20,000 on each offence, in default of which three years' imprisonment on each offence, was guilty of bias because he had discussions about the case with the Attorney General and the Chief Justice prior to rendering his decision. Warner JA was of the opinion that the fundamental legal principles upon which the law now rested were not in dispute and that the relevant test for determining apparent bias was clarified by the House of Lords in *Porter v Magill*, namely, whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[106] She continued that an allegation of apparent bias did not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath.[107] It involved, in her opinion, a finding that circumstances existed from which a reasonable and informed observer might conclude that there was bias in the conduct of the proceedings. She continued that, except where actual bias was alleged, it was not useful to investigate the individual's state of mind, noting that the courts had recognised that bias operated in such an insidious manner that the person alleged to be biased may be unconscious of the effect.[108] Warner JA claimed that it was trite law that if a reasonable apprehension of bias arises, the whole proceeding became infected and that credibility issues no longer arose; the reasonable apprehension of bias remained and the proceedings could not be saved.

Warner JA claimed that, pursuant to the Judicial and Legal Service Act, the Chief Magistrate was required to make an oath or affirmation to discharge his functions conscientiously and impartially.[109] In addition, she pointed out that confidence in the judicial system was maintained when the highest standards are imposed on judicial officers.[110] The fundamental principle, Warner JA accepted, was that no judge ought to entertain private communication from any person with the intention of influencing the outcome of a case he had to decide. She continued that the grievance which arose from non-disclosure stemmed from the fact that the appellant could not know to what extent the alleged intervention influenced the decision maker.[111] In her opinion, the thrust of the attack in this case, therefore, was whether there was a reasonable cause for apprehension that the intervention served to blur the Chief Magistrate's objectivity. Warner JA then summarised the applicable principles as follows: (i) ill-founded challenges to the bench were not to be entertained; (ii) courts must be assiduous in upholding the impartiality of judges; the onus of establishing bias lay with the appellant; (iii) the impartiality of the decision maker, the Chief Magistrate, was to be presumed, but this presumption could be dislodged by cogent evidence; (iv) the material facts were not limited to those which were apparent to the applicant; they also included those facts which were ascertained upon investigation by the court; (v) an important consideration in making an objective appraisal of the facts was the desirability that the public should remain confident in the administration of justice; it was the appearance that these facts give rise to, not what was in the mind of the decision maker; (vi) fairness, although governed by separate considerations, should be considered in the context of all the relevant circumstances and not as an isolated principle; (vii) the question in this case

105 TT 2007 CA 13.
106 Ibid at [12].
107 Ibid at [26].
108 Ibid.
109 Ibid at [46].
110 Ibid at [48].
111 Ibid at [51].

was whether the conduct of the Chief Magistrate and the extraneous information might appear to the hypothetical observer to have diverted the Chief Magistrate from deciding the case on its merits; (viii) the court had to decide whether, on an objective appraisal, the material facts gave rise to a legitimate fear that the Chief Magistrate might not have been impartial; and that, if they did, the decision of the Chief Magistrate had to be set aside.[112]

Warner JA claimed that the first stage was to ascertain all the circumstances which had a bearing on the allegation of bias by making an objective and impartial appraisal of the evidence.[113] She also claimed that it was important to identify with precision those facts on which the suggestion of bias could be based and that, in answering the question of who was the fair-minded and informed observer, in general terms, the individual was someone who was not a party, but who recognised and understood all the relevant circumstances and, as a result, was able to conclude whether or not the public would perceive the possibility of bias, including unconscious bias. In addition, she claimed that the fair-minded and informed observer would be a person who espoused human rights values so that fairness would be his or her primary concern[114] and she would approach the task with caution and would begin by placing great weight on the judicial oath of office.[115] As a result, Warner JA held that the failure to disclose the cheque to counsel and the Magistrate's unwillingness to testify would have led the fair-minded and informed observer to conclude that there was a real possibility of bias.[116]

Archie JA claimed that if the integrity of the judicial system and public confidence in the administration of justice was to be maintained, then fairness and impartiality must both be subjectively present and objectively demonstrated to the informed and reasonable observer.[117] The duty of the court, he claimed, when investigating an allegation of apparent bias, was to place itself in the shoes of a hypothetical observer, who was both 'fair minded' and 'informed'. Archie JA noted that if such an observer would conclude that there was a *real possibility* that the tribunal was biased, the system had failed and the proceedings were vitiated. However, he went on to say that, when considering the question of apparent bias, the court does not look at the mind of the decision maker; it looks at the impression that would be given to an objective observer.[118] Therefore, he added that, although the judicial officer might have been as impartial as could be, if right-thinking persons would think that, in the circumstances, there was a *real likelihood of bias*, then that was sufficient. Archie JA claimed that the informed and fair-minded person had the following characteristics: (a) the fair-minded observer was neither complacent nor unduly sensitive or suspicious when he examined the facts that he could look at;[119] (b) the fair-minded observer was not an insider (that is, another member of the same tribunal system);[120] (c) the informed observer was a member of the community in which the case arose and would possess an awareness of local issues gained from the experience of having lived in that society;[121] (d) the informed observer, if he was also fair minded, would choose his sources of information with care;[122] and (e) would also make use of all the available and relevant information.[123] He continued that the common law and constitutional causes of action were opposite sides of the

112 Ibid at [59].
113 Ibid at [60].
114 Ibid at [88].
115 Ibid.
116 Ibid at [113].
117 Ibid at [5].
118 Ibid at [6].
119 Ibid at [9].
120 Ibid at [10].
121 Ibid at [11].
122 Ibid at [12].
123 Ibid at [13].

same coin.[124] Archie JA claimed that the relevance of disclosure was only in respect of the doctrine of waiver and the availability of a remedy. He added that, first, where there were circumstances that required a judge to make disclosure to the parties, and the party whose interests might be potentially and adversely affected invited the court to proceed, he could hardly claim to have been denied due process even if the hypothetical observer might have perceived a real possibility of bias; and second, if there was a duty to disclose and the decision maker failed to do so, then, if real or apparent bias was found, there would also be a valid claim for breach of constitutional rights based on the facts that gave rise to the apprehension of bias.[125]

Archie JA continued that Trinidad and Tobago was a small society with complex interrelationships, and judicial officers and litigants did not enjoy the degree of anonymity that may be normal in larger communities.[126] He continued that, even though most officers will take steps to limit their social interactions, judicial officers may from time to time be subjected to unsolicited approaches or comments; they can be expected to stoutly resist overtures that might be made from time to time to influence them; and they have a duty to terminate any conversation that strayed beyond legitimate boundaries and to disabuse their minds of the fact that an improper approach had been made. He explained that the judicial officer must make an honest assessment of whether his mind was so affected by the approach that he could no longer assess the matter before him impartially.[127] Archie JA claimed that, if it was so affected, then he must recuse; if not, then he must go on to consider the impact on the hypothetical observer and the earlier analysis applied. He then stated that the Chief Justice exercises administrative control over the Chief Magistrate and chairs the JLSC, which had control over disciplinary and promotional matters concerning him. In this case, he continued, it would be difficult to persuade the hypothetical observer that a Chief Magistrate had completely dismissed the Chief Justice's alleged approach from his mind in making his decision, particularly in view of subsequent events and the comment in the Chief Magistrate's judgment.[128]

He then came to the inescapable conclusion that a fair-minded and well-informed observer would conclude that there was a real possibility that, when the Chief Magistrate decided the appellant's case, his mind was affected by unconscious bias.[129] This was because of the following reasons: (a) the Chief Magistrate clearly had a suspicion that the $400,000 cheque was in some way connected to the evidence of Mr Duprey, who a witness for the defence; (b) that clearly had the potential of impacting negatively on his assessment of Mr Duprey's evidence, if only by way of a subconscious desire to demonstrate that he was not influenced by the receipt of the cheque; (c) at the same time he was subject, according to him, to improper pressure being exerted by the Chief Justice, who was his administrative superior and chairman of the JLSC, which exercises disciplinary control over him; (d) when delivering his judgment, he was sufficiently mindful of one or both matters to consider it necessary to mention that his judgment was not affected. The obvious question that would be asked by a fair-minded observer was: why mention matters which have occurred without saying what they were if one has dismissed them from one's mind?; (e) an informed observer would be aware of the political sensitivity of the matter. Indeed the Attorney General alluded to it in his press statement. He would also be aware that there had been an attempt to launch section 137 proceedings in another matter involving the Attorney General; (f) the Chief Magistrate's ongoing resolve to ensure that his

124 Ibid at [22].
125 Ibid.
126 Ibid at [53].
127 Ibid at [55].
128 Ibid.
129 Ibid at [60].

complaint was treated in a certain manner when combined with his linkage of it with the land transaction raises the question whether he would not have been preoccupied about his own image or credibility when considering the present matter; (g) the fair-minded and informed observer might conclude that there would be at least a subconscious desire to do what he perceived might please the current political directorate; and (h) that impression is reinforced by the Attorney General's willingness to become personally involved in both matters.[130]

In *Panday v Espinet*,[131] the appellant argued that the decision of the magistrate not to recuse herself from conducting a preliminary inquiry was unlawful and was biased. The court claimed that, although impartiality did not require that the judge was devoid of sympathies or opinions, it required that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[132] It continued that it was, therefore, a feature of the adjudicative process that the persons chosen to adjudicate have their own experiences outside the law but in the exercise of one's impartiality they were called upon to put those experiences aside.[133] The court claimed that bias was the opposite of this notion; it connoted the closing of one's mind, being affixed to preconceived views and remaining inflexible in the face of argument.[134] It continued that it was the perceptions of such unfairness, which was an insidious cancer on the system of justice, that was difficult, if not impossible, to surgically detach from proceedings; at the other end of the spectrum, the concept of judicial independence connoted a freedom to adjudicate in a process where, in discharging the functions as a magistrate or judge, one was subject to nothing save the law and the command of one's conscience.[135] The court claimed that the ability to be impartial was to adjudicate with an open mind, regardless of the prejudices acquired through the incidence of ordinary living and features of one's humanity; and that, in the quest to free oneself of partiality or a propensity to prejudge, the judge was enjoined in a duty to ensure that the process was not tainted with a sense of injustice which arose with a perception of unequal treatment.[136] It continued that justice could only be done if there was in fact no bias; and that it could only be seen to be done if there was no appearance of bias; and that justice must be rooted in confidence; and confidence was destroyed when right-minded people go away thinking the judge was biased.[137] The court explained that, for this reason, Codes of Judicial Conduct had recognised the impartiality of the judge as a valuable asset in the administration of justice.[138] It noted that an examination of the formal codes which had been been promulgated in some territories demonstrated the delicate balance that must be maintained between the perception of bias and the duty to perform one's judicial functions in deciding the matters in controversy before one.[139] The court continued that it was equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualifications of a judge, they would have their case tried by someone thought to be more likely to decide the case in their favour. In its view, to do otherwise would make the judicial system vulnerable to manoeuvring by parties and encourage 'judge shopping'.[140]

130 Ibid at [61].
131 TT 2009 HC 260. See also *Panday v Espinet* TT 2009 HC 292; *Panday v Espinet* TT 2009 HC 81; *Baksh v Espinet* TT 2009 HC 132; and *Re Maharaj* TT 1986 HC 134.
132 TT 2009 HC 260 at [2.3].
133 Ibid at [2.4].
134 Ibid at [2.5].
135 Ibid at [2.6].
136 Ibid at [2.7].
137 Ibid at [2.9].
138 Ibid at [2.10].
139 Ibid.
140 Ibid at [2.11].

The court claimed that the bias rule was part of the broader rules of natural justice or procedural fairness. Section 20 of the Judicial Review Act of Trinidad and Tobago (JRA) required an inferior court, tribunal, public body, public authority or a person acting in the exercise of public duty or function to act in accordance with the principles of natural justice or in a fair manner.[141] The court explained that, if there was apparent bias of the learned magistrate, it constituted a breach of natural justice. It continued that proceedings that were affected by bias were also a breach of the constitutional right to a fair trial guaranteed by section 5(2)(e), (f) (ii) of the Constitution of Trinidad and Tobago.[142] The court also explained that since *Lawal v Northern Spirit Ltd*[143] there was now no difference between the common law test of bias and the requirement under Article 6 of the European Convention of an independent and impartial tribunal. The court explained that Archie JA in *Panday v Virgil* opined that 'the common law and constitutional causes of action are opposite sides of the same coin' and that, if there was a legitimate claim that there was apparent bias, the claimant had been denied due process. It continued that the test to determine whether the learned magistrate was affected by apparent bias had been developed consistently with the concept of maintaining the integrity of the judicial system by balancing the public interests of the appearance that justice was being done with the requirement of the judge to sit and not lightly abdicate his judicial oath.[144] The court claimed that the '*Porter v Magill* test' was applied by the Court of Appeal of Trinidad and Tobago in *Panday v Virgil*, where Mendonca JA stated that '[i]t is well settled that the test of bias is whether a fair-minded and informed observer knowing all the facts would conclude that there was a real possibility of bias.'[145] The court claimed that the quest to keep the streams of justice pure did not give a licence to engage in judge shopping or to easily concede challenges to the impartiality of the judge, continuing that this aspect of apparent bias placed judges in difficult positions as to whether they should disclose personal information even when in his/her own mind the matters that might give rise to a perception of bias did not affect his/her impartiality.[146] It continued that a failure to disclose was not of itself evidence of bias and that a duty to disclose could only arise where there was something that could give rise to an apprehension of bias.[147] The court explained that whether the learned magistrate was required to disclose her association's hinged on whether the fair-minded observer could reasonably find that there was a real possibility of bias.[148]

In respect of the characteristics of the fair-minded observer, the court stated that the allegation that the learned magistrate was biased on the ground that she was associated with the claimants' political enemy resonated in the real world of politics.[149] It was of the view that disqualification was required if the fair-minded observer would entertain reasonable questions about the judge's impartiality. In addition, the court claimed that it could characterise the informed fair-minded observer, generally as one exemplifying balance, intelligence and restraint.[150] It claimed that the informed fair-minded observer would have the following traits: (a) *character*: he or she is the sort of person who will always reserve judgement on every point until he or she has seen and fully understood both sides of the argument. He or she was therefore not unduly sensitive or suspicious. The well-informed observer was not blinded by political affiliations. He or she was not complacent and he or she knows that fairness required that a

141 Ibid at [3.1].
142 Ibid at [3.2].
143 [2003] UKHL 35.
144 TT 2009 HC 260 at [4.2].
145 Ibid at [4.3].
146 Ibid at [5.1].
147 Ibid at [5.2].
148 Ibid.
149 Ibid at [6.1].
150 Ibid at [6.2].

judge must be and must be seen to be unbiased; (b) *knowledge*: being well informed meant essentially that he or she must be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances; (c) *special knowledge*: while he or she could not be attributed with a detailed knowledge of the law, he or she would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias; (d) *assumptions*: the fair-minded observer would assume that a judge by virtue of his or her office was intelligent and well able to form his or her own views and be capable of detaching his or her own mind from things that he or she did not agree with; (e) *awareness*: as a member of the community in which the case arose he or she would possess an awareness of local issues gained from his or her experience of having lived in that society, and so be aware of the social and political reality that formed the backdrop to the case.[151]

The court explained that there were some relationships or associations with members of the community which spoke for themselves as disqualifying a judge on the ground of apparent bias, such as a judge presiding over a matter concerning his spouse or child, or an attorney appearing before a judge who was his spouse or a member of his immediate family.[152] However, it continued that, apart from special relationships, there must be cogent and rational links between the association and its capacity to influence the decision to be made in the particular case before a well-informed observer could draw a conclusion that there was bias. The court explained that it was the capacity to influence the decision rather than the association as such that was disqualifying. In the instant case, the applicant claimed that the magistrate was connected to a charitable organisation which was controlled by the People's National Movement (PNM) seeking to promote the conviction of the accused.[153] The court, however, observed that it was for the well-informed observer to consider all the facts and to put the association with the organisation in its proper context; but there must be a reasonable conclusion drawn by the informed observer of a connectivity of views before a recusal was necessary.[154] It stated that only then could one truly say that he was perceived to be a judge in his own cause; mere association without a connection to the issues that were to be tried was not enough and it would be unsound in law to develop a general principle that would warrant automatic disqualification on that basis in this type of case.[155]

The court then claimed that the enquiry to determine whether apparent bias had infected the proceedings was a two-stage one: (a) to determine the facts and circumstances which give rise to the allegation that the magistrate might not be impartial; and (b) to determine whether the well-informed observer would conclude that the magistrate was biased.[156] It continued that the first step called for an intense focus on the essential facts of the particular case, to establish the actual circumstances which had a direct bearing on the suggestion that the learned magistrate might be seen to be biased.[157] The court noted that this was an area of the law where the context and the particular circumstances were of supreme importance. In its view, the second step required the court to examine these facts through the lens or window of the well-informed observer.[158] The court then considered the treatment of the application to recuse by the magistrate and the refusal to disclose information which was readily available from the

151 Ibid.
152 Ibid at [7.1].
153 Ibid at [7.6].
154 Ibid.
155 Ibid.
156 Ibid at [13.1].
157 Ibid at [13.2].
158 Ibid at [13.3].

magistrate herself.[159] The claimants argued that the failure of the magistrate: (a) to disclose her involvements with the Morris Marshall Development Foundation and her biological parent at the very outset; or (b) to disclose those facts when called upon to do so by the claimant, further demonstrated that the magistrate was biased. They argued that the practice normally would be to disclose these associations prior to the commencement of the proceedings. The court was of the opinion that magistrates and judges must be robust in their dealings with applications for recusals but at the same time they must exercise a degree of care and caution so that their handling of the application did not give rise to further suspicion of an inability to bring an impartial mind to bear on the issues in the substantive matter.[160]

The court noted that, during the course of dealing with the recusal, the magistrate dealt with matters of evidence, giving the impression that it was not true when they fell clearly within her ambit of knowledge.[161] The court claimed that there was no evidence of an association with the PNM by the chairmanship;[162] the inference of it being a church-run organisation was in her view an inference which the objective observer, not the judge, might draw. It continued that, having come to the conclusion that the well-informed fair-minded observer would not have concluded that there was a likelihood of bias by the magistrate, based on the facts of the case, there was no legal duty to disclose any connection to the Morris Marshall Development Foundation or her biological father.[163] The court then asked what should be the best practice in dealing with the sensitive matter of recusals? It replied that adjudicators might declare to litigants, as a matter of practice, personal connections to matters that might relate to the case that fell for determination.[164] The court claimed that this was usually done in clear cases and that this was far removed from saying it should do so in all cases pursuant to a legal obligation for disclosure.[165] The court claimed that best practice might well call for the introduction of a code of ethics that sets out guidelines for the conduct of judges with a useful checklist which could assist in doubtful cases rather than to have recourse to hypothetical assessments of a legal persona constructed by the court.[166] In conclusion, the court noted that, in Trinidad and Tobago, there was a tendency for persons to draw conclusions without ascertaining all the facts, or parrot beliefs without ascertaining the accuracy of their origins; and sentimentality might sweep aside logic when the political drum was beating.[167] It noted that the well-informed observer constructed by law required it not to be those persons in assessing our adjudicative process; and that it called upon the fair-minded observer when judging the judicial system to be fair, to calmly weigh in the balance the beliefs in the judicial officers to adjudicate faithfully in accordance with their oath of office with the apprehension of bias based on objectively justified criteria and evidence. It continued that, on the facts, the balance between confidence in the judiciary and the perception of a fair trial would meet its Waterloo if the well-informed observer was hasty in his deliberations.[168] The court claimed that a civilised society must not be quick to draw irrational or hasty conclusions – restraint rather than swift condemnation was the hallmark of mature deliberation – adding that educated conclusions and not rumour-mongering must continue to be the feature of a democratic society. Therefore, it dismissed the application and removed the stay on the criminal proceedings.[169]

159 Ibid at [21.1].
160 Ibid at [21.2].
161 Ibid at [21.3].
162 Ibid at [21.4].
163 Ibid at [21.5].
164 Ibid at [21.6].
165 Ibid.
166 Ibid at [21.8].
167 Ibid at [22.1].
168 Ibid at [22.2].
169 Ibid at [22.3].

The applicable test

In *Curry v Attorney General of the Bahamas*,[170] the issue was whether a reasonable apprehension of bias was demonstrated through the magistrate's behaviour. In respect of the test to be applied, the applicant argued that the correct test was that accepted in *Porter v Magill*.[171] The respondent, on the other hand, argued that the Court of Appeal of the Bahamas in *Attorney General of the Bahamas v Miller*[172] adopted and applied the test set out in *R v Gough* and *Lockabail (UK) Ltd*.[173] It was also argued that *Porter v Magill* was based on Strasbourg jurisprudence and as such was not applicable in the Bahamas.[174] The respondents also argued that, unlike the case of *Porter v Magill*, which was of persuasive authority in the Bahamas, *Attorney General of the Bahamas v Miller* was binding on the court.[175] The court claimed that, having considered the submissions made by counsel for both parties and having reviewed the cases cited, it agreed with the views of counsel for the respondent and found that the new test, as formulated in *Porter v Magill*, came about to accommodate the Strasbourg jurisprudence which had no application in the Bahamas.[176] The court agreed that, in keeping with the doctrine of *stare decisis*, it was bound by the decision in *Attorney General of the Bahamas v Miller*. The court ruled that decisions made by the Court of Appeal of the Bahamas were binding on it and, therefore, it was bound by *Attorney General of the Bahamas v Miller* unless the facts or circumstances were determined to be so compelling that they fell into the category of 'urgent and exceptional'.[177] It continued that, having regard to the nature of the charges levied against the applicant and the evidence presented in support or in opposition, it was of the view that the facts and issues in the instant case were neither urgent nor exceptional.[178] In the circumstances the court found that the applicable test was that approved in the case of *R v Gough* and *Locabail (UK) Ltd v Bayfield Properties Ltd* as adopted by the Bahamas Court of Appeal in *Attorney General of the Bahamas v Miller*.

In *Meerabux v Attorney General of Belize*,[179] the Board accepted that now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there was no suggestion that there was a personal or pecuniary interest, was to apply the *Porter v Magill* test.[180] The question was, therefore, what the fair-minded and informed observer would think. Lord Hope claimed that the observer would of course consider all the facts which put Mr Arnold's membership of the Bar Association into its proper context. He continued that the facts which he would take into account go further than those described earlier and would include, first, the nature and composition of the tribunal; second, the qualifications which a person must possess to be appointed Chairman; third, the fact that the first proviso to section 54(11) of the Constitution directed the Chairman to preside where the BAC was convened to discharge its duties under section 98; and fourth, the fact that this direction was subject only to the special provision which the second proviso makes for what was to happen if the BAC was convened to consider the Chairman's removal.[181] The Board therefore ruled that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr Arnold

170 BS 2006 SC 86. See also *Lamsee v Forde-John* TT 2002 HC 50; and *Re Mathurin* LC 1988 HC 1.
171 BS 2006 SC 86 at [29].
172 BS 2006 CA 129.
173 BS 2006 SC 86 at [34].
174 Ibid.
175 Ibid at [33].
176 Ibid at [54].
177 Ibid at [55].
178 Ibid at [56].
179 [2005] UKPC 12.
180 Ibid at [25].
181 Ibid.

was biased. In addition, the Board also agreed with the Court of Appeal that there was another answer to this complaint.[182] The defendant argued that the answer could be found in the doctrine of necessity,[183] because the first proviso to section 54(11) left the Chairman with no alternative but to sit and to preside in a case where the BAC was convened to discharge its duties under section 98. This meant that there could be no circumstances whatever in which the Chairman could recuse himself except where the BAC had convened to consider his removal as provided for in the second proviso. Lord Hope noted that section 54(1) provides that the Chairman of the BAC must hold, or have held, or be qualified to hold, office as a judge of a superior court of record. Section 95(3) provides that the Supreme Court of Belize is a superior court of record, and section 97(3) provides that a person shall not be qualified to be appointed as a justice of the Supreme Court unless he is qualified to practise as an attorney-at-law in a court in Belize or as an advocate in a court in any other part of the Commonwealth having unlimited jurisdiction either in civil or in criminal causes or matters[184]. He continued that, in the case of persons qualified to practise as an attorney-at-law in Belize, membership of the Bar Association was compulsory.

Lord Hope explained that these provisions indicated that it must be taken to have been within the contemplation of the framers of the Constitution that the Chairman who was directed by the first proviso to section 54(11) to preside over an inquiry into the question whether a judge of the Supreme Court should be removed for inability or misbehaviour would be a member of the Bar Association.[185] He continued that since section 40(3) of the Legal Profession Act provides that the objects of the Bar Association include representing the Bar in matters concerning the profession in relation to the courts and promoting the proper administration of justice (paragraphs (d) and (e)), it must also have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal that was convened to inquire into the matter under section 98(5)(b).[186] In his view, therefore, that was a powerful, and a conclusive, indication that in this context mere membership of the Association was not to be taken, in itself, as a ground of disqualification in the case of the Chairman. However, Lord Hope opined that it was not necessary to go so far as to say that it was impossible to envisage an extreme case falling within the jurisdiction of the BAC where it could truly be said that the Chairman was being required to act as a judge in his own cause.[187] He noted that the Board thought that, if that event were to arise, the answer to the problem would be found in the proposition that Parliament could not have contemplated that a Chairman who, according to the well-established principles, would be automatically disqualified, should sit in such circumstances, and that his place should be taken by some other person appointed in the manner described in the second proviso to section 54(11).[188] Since this was not the case, he ruled that it was not necessary for the Board to express a concluded view on this point.

182 Ibid.
183 Ibid at [26].
184 Ibid at [27].
185 Ibid at [28].
186 Ibid.
187 Ibid at [29].
188 Ibid.

CHAPTER 16

TRIBUNALS AND INQUIRIES

INTRODUCTION

With the increasing complexity of the State and the issues for which resolution must be achieved, the use of ad hoc inquiries to determine matters of general public importance has been one of the ways in which such issues have been dealt with by the State. In most of the cases where these Commissions of Inquiry have been held, it has been in relation to political matters, provision of medical benefits, telecommunications and media, transhipment of a consignment of guns, police brutality and the like. In addition to these, there are more permanent tribunals which are specialised bodies that deal with matters such as telecommunications, employment and other matters. They have specialist knowledge about the areas in which they fall, but their decisions, as will be seen below, are subject to judicial review. The courts have always made it clear that they have authority and the power to review decisions of tribunals if they act unlawfully.

INQUIRIES

Introduction

Most Commonwealth Caribbean Countries have legislation relating to Commissions of Inquiry.[1] In *George v McIntyre*,[2] the court noted that the exceptional inquisitorial powers conferred upon a Commission necessarily exposes the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of baseless allegations made against him, causing distress and injury to reputation.[3] For this reason, it continued, the inquisitorial machinery set up under the Commissions of Inquiries Act is never to be used for matters of local or minor public importance, but always confined to matters of vital public importance concerning which there is something in the nature of a nationwide crisis of confidence; and that in such cases no other method of investigation would be adequate.[4] The court continued that, first, normally, persons cannot be brought before a tribunal and questioned except in civil or criminal proceedings; second, such proceedings are hedged about by long-standing and effective safeguards to protect the individual; third, an inquisitorial procedure is

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1 Antigua and Barbuda (Commissions of Inquiry Act, Chapter 91); The Bahamas (Commissions of Inquiry Chapter 184); Barbados (Commissions of Inquiry, Chapter 112); Bermuda (Commissions of Enquiry Act, 1035); Belize (Commissions of Inquiry Act, Chapter 127 Revised Edition 2000); British Virgin Islands (BVI) (Commissions of Inquiry Act Cap 237 Revised 1991); Cayman Islands (Commissions of Inquiry Act G11/1997); Dominica (Commissions of Inquiry Act, Chapter 19:01); Grenada (Commissions of Inquiry Act, Chapter 58); Guyana (Commissions of Inquiry Act, Chapter 19:03); Jamaica (Commissions of Inquiry Act, 1973 Revised); Montserrat (Commissions of Inquiry Ordinance, Chapter 2:04 Revised Edition 2002); St Kitts and Nevis (Commissions of Inquiry Act, Chapter 3:03); St Lucia (Commissions of Inquiry Act, Chapter 17:03); St Vincent and the Grenadines Commissions of Inquiry Act, Chapter 14 1990 Revised); Trinidad and Tobago (Commissions of Enquiry Act, Chapter 19:01); and Turks and Caicos (Commissions of Inquiry Ordinance, Chapter 21, Revised Edition 1998).

2 AG 2003 HC 10.

3 Ibid at [15].

4 Ibid.

alien to the concept of justice generally accepted in the Commonwealth Caribbean; fourth, there are, however, exceptional cases in which such procedures must be used to protect the purity and integrity of public life without which a successful democracy is impossible; fifth, it is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance to the prevalent rumours and suspicions by which they have been disturbed; and, seventh, this would be difficult if not impossible without public investigation by an inquisitorial tribunal possessing the powers given to it by the Commissions of Inquiry Act.[5] The court also noted that, first, the High Court has no jurisdiction to adjudicate on any factual questions which were committed to the Commissioners for inquiry and report; second, this is not an appeal against the conclusions reached – there is no right of appeal against reports of Commissions of Inquiry; third, nevertheless, Commissions may greatly influence public and government opinion and have a devastating effect on personal reputations; fourth, that is why in appropriate proceedings the courts must be ready if necessary in relation to Commissions of Inquiry just as to public bodies and officials to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice.[6]

Appointment of Commissions of Inquiry

Section 3(1) of the Barbados Commission of Inquiry Act provides that the Governor General may, whenever he deems it expedient in the public interest, appoint one or more Commissioners to be a Commission of Inquiry as either (a) an advisory commission, to inquire into and advise and to report upon a matter connected with the good Government of Barbados; or (b) an investigatory commission, to investigate and report on a matter which the Governor General deems to be of special public importance.[7] In *Tudor v Forde*,[8] the Court of Appeal held that where a warrant of appointment of a Commission of Inquiry was not designated either (a) an advisory commission or (b) an investigatory commission, the requirements of section 3 of the Act were not complied with, with the result that the warrant of appointment was and is void for uncertainty. In *Bermuda Light and Power Company Limited v Hewlett*,[9] the claimants argued that 'the effect of the inquiry is to empower the defendants to investigate and inquire into the internal or private affairs of the company and that [section 2 of] the Commissions of Inquiry Act does not authorise the issue of such a commission.' Section 2, in relevant part, provides that:

> It shall be lawful for the Administrator whenever he shall deem it advisable to issue a commission appointing one or more commissioners, and authorising such commissioners or any quorum of them therein mentioned, to inquire into the conduct or management of any department of the public service in the colony, or of any public officer of the Colony, or of any parish or district thereof, or into any matter in which an inquiry would, in the opinion of the Administrator, be for the public welfare. Each such commission shall specify the subject of inquiry.

The Court of Appeal noted that, first, participation between government and private enterprise in order to provide for the efficient production and supply of public utilities and other resources deemed necessary for the economic development of the community is a feature of modern life;

5 Ibid at [16].
6 Ibid at [34]. See *Mitchel v Georges* VC 2007 HC 38; and *Murray v Attorney General of the Bahamas* BS 1996 SC 39.
7 See *Bethel v Douglas* BS 1993 SC 133 and on appeal to the Court of Appeal: BS 1994 CA 1 and the Privy Council: BS 1995 PC 3.
8 BB 1997 CA 10.
9 AG 1972 CA 3.

second, where such participation is effected by the investment of public funds in a company, that company cannot claim that its affairs are private and are to be shielded from the scrutiny of public enquiry; third, the public funds which are provided by government are inextricably mingled with the funds provided from private sources, and it is not practical or feasible to hold that a commission may enquire into the financial affairs and conduct of the company only in so far as these relate to public funds; and fourth, the objects for which the company was formed and which were the motive for government participation, and the methods of its financing, constitute all its affairs, including its so-called domestic affairs and conduct, are a matter of public concern into which the Governor may reasonably deem an enquiry to be in the public welfare.[10] The court further noted that the provision of electricity for Barbuda must be a matter of public concern and, since the project was financed, in part at least, with public funds, the manner in which the company conducted its business and the reason for the failure of the project were not merely the private concern of the company but matters in which the public had a vital interest. As a result, the court held that the financial activities and conduct of the appellant company were matters of public concern and fall within the purview of section 2 of the Commissions of Inquiry Act.[11]

In *Bethel v Douglas*,[12] the Privy Council claimed that *Ratnagopal*[13] is authority for the proposition that, in appointing a commission under statutory powers such as were contained in section 2 of the Ceylon Commissions of Inquiry Act and in section 2 of the Act of 1911, the Governor General must specify the matters to be inquired into and was not entitled to leave it to the commission to determine what those matters are to be. It continued that, in the present case, the Governor General did exactly that by confining the matters to those arising out of or in connection with the affairs of three named companies.[14] In *Tudor v Forde*,[15] the court claimed that the Commissions of Inquiry Act provides *inter alia* for the appointment, functions and powers of a Commission of Inquiry and it also provides safeguards to protect the rights of persons whose interests may be adversely affected by allegations of misconduct made in the course of the hearings before an investigatory commission. Two safeguards were noted: first, a person who has a sufficient interest in the subject matter of the inquiry should be afforded an opportunity to appear before the Commission and be heard concerning any matter raised at the hearing that may adversely affect the person's interest; and second, a statutory bar to any findings by an investigatory commission of misconduct on the part of a person, unless the allegations of misconduct are disclosed to the person concerned and he or she is given a reasonable opportunity to contest those allegations by calling evidence in rebuttal or by cross-examination.[16] The court also noted that, to facilitate the work of an investigatory Commission, the Act sought to ensure that a witness before such a Commission enjoyed the same protection from civil liabilities as witnesses enjoyed before the High Court. In addition, it pointed out that no Commission in Barbados may properly refuse the right of a person to be represented by counsel, or to appear in person and be heard on a matter raised at a hearing that may adversely affect his or her interest; and second, a person against whom allegations of a grave character are made at a public inquiry must therefore be afforded an opportunity to appear and call evidence, to elicit facts by way of examination and cross-examination of witnesses so that a complete picture of the subject matter being inquired into is unveiled before the Commission for its consideration.[17]

10 BS 1995 PC 3.
11 Ibid.
12 *Bethel v Douglas* BS 1995 PC 3.
13 *Ratnagopal v Attorney General* [1970] AC 974.
14 BS 1995 PC 3 at 13.
15 BB 1995 HC 30.
16 Ibid at 9.
17 Ibid.

Representation by counsel

In *Prince v de la Bastide*,[18] the question for the court was whether the plaintiff was entitled to be represented by counsel at the Commission of Inquiry and whether there was a legal duty on the Commission to invite or summon the plaintiff to attend from the outset of the proceedings of the Commission. The applicant argued that if he was a person who was implicated or concerned with the subject of the inquiry it was imperative that he have prior notice of those proceedings.[19] More specifically, he argued that, first, 'there was a duty on the defendants to give adequate disclosure of the allegations which would implicate him with the matters under inquiry' and 'they failed in that duty of adequate disclosure'; and second, 'the defendants have never set out what allegations would be made in the course of the inquiry which would implicate and concern him in the matters under inquiry.' The court held that, although the hearing before the Commission did not finally determine the rights of the plaintiff, he was entitled to declaratory relief if it agreed with the submissions that the defendants did not observe their statutory duties, or violated the principles of natural justice and section 8(2) of the Constitution.[20] The applicant argued that a report by the Commission might have a substantially adverse effect upon his interest. He also argued that this might result in the deprivation of or encroachment upon his legally recognised interests if that report and the findings included some reference to alleged misconduct or incompetence on his part, or involved making an accusation against him, or otherwise cast aspersions on his reputation, or exposed him to legal hazard. After examining the evidence, the court claimed that the plaintiff seemed, first, to regard himself as being in the position of an accused person or defendant, and, as a result, he wanted the Commissioners to provide him with definite formulated charges or with particulars of material facts, as might be done in a criminal case or in a civil action; and, second, to regard the Commissioners, appointed under the Commissions of Inquiry Act, as oscillating between being parties brought before it, and of whom he was one.[21] In other words, it noted that sometimes the Commissioners were prosecutor or plaintiffs (with Prince as accused or defendant), and sometimes they were judges presiding at a trial.

Evidence

A failure to abide by the procedures of the Commission might mean that the Commissioner can lawfully hold a person in contempt. In *Attorney General v Bannister*,[22] the question for the court was whether the Commissioner was correct in holding the respondent in contempt of the Inquiry where he was in attendance as a witness before the Commission and when requested to do so he refused to take the oath. Section 10(1) of the Commissions of Inquiry Act of The Bahamas, as amended, empowers the Commission to examine persons appearing before them on oath. Section 13(1)(b) provides that if any person, being in attendance as a witness, refuses to take an oath, legally required by the Commission to be taken, the President of the Commission may certify the offence of that person under his hand to the Supreme Court and the court may thereupon inquire into the alleged offence, and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that

18 AG 1976 HC 7. See also *Pindling v Attorney General of the Bahamas* BS 1994 SC 45.
19 AG 1976 HC 7 at 13.
20 Ibid.
21 Ibid.
22 BS 1984 SC 34.

person in like manner as if he had been guilty of contempt in the court. The court found that the respondent was guilty of contempt and took into account the fact that he went before the Commission and was examined by the Commission. It therefore rejected the argument for imprisonment for contempt and only fined him.[23] Statements by persons who appear before a Commission of Inquiry cannot be used in subsequent criminal or civil proceedings.[24]

Cross-examination

In *NH International (Caribbean) Limited v Commission of Inquiry*,[25] the court had to consider the issue of whether there was a failure to allow the applicant to call a witness and to further cross-examine another one. The applicant claimed that the Commissioners' conduct, in denying its request for a further opportunity to cross-examine one witness on the basis that he had already had an opportunity to cross-examine that witness and that his further cross-examination did not arise from evidence elicited in the further cross-examination by other counsel, demonstrated apparent bias.[26] It claimed that this was based on the fact that other counsel were afforded this opportunity. The respondent argued that whether the Commissioners were incorrect to do so was an issue for the court to determine, and that the applicant's request for further cross-examination arose out of another witness's cross-examination, which challenged another witness's position as a subcontractor on the project.[27] The applicant's attorney was not allowed to ask further questions on the scope of the subcontract since his questions went beyond that and, further, he had had the opportunity to address these issues when he initially cross-examined the witness. The court claimed the issue that arose for its consideration was whether the process utilised by the Commission to disallow the applicant's further questions, in the form that he proposed, was fair.[28] It continued that a Commission of Inquiry may adopt any procedure or code of procedure necessary for the efficient and effective discharge of its functions as defined by the terms of reference.[29] The court held that, in an enquiry involving specific allegations or investigations into individual conduct, cross-examination procedures needed to be designed to maximise their effectiveness in uncovering the relevant facts and ensuring procedural fairness. The court held that there was nothing on the facts which showed that the respondent was treated less favourably than the counsel at the hearing. As a result, it held that this ground was unfounded.

In *Seaga v Isaac*,[30] the applicants sought leave to apply for judicial review arising out of a ruling made by the Chairman of a Commission of Inquiry, appointed by the Governor General, to enquire into certain events which took place in West Kingston. The court claimed that the mere refusal to permit cross-examination of witnesses in a Commission of Inquiry was not per se unfair or in breach of the rules of natural justice. The court then cited *Ng Tang Chi v Tan Sri Datuk Chang Min Tat*,[31] where the Malaysian High Court held that the Chairman of the

23 Ibid at 7.
24 See section 13 of the Commission of Inquiries Act of Dominica and *Blanchard v Richards* DM 2001 HC 18 and on appeal: DM 2003 CA 1; and *Halstead v Commissioner of Police* AG 1978 CA 1; and *Humphreys v Attorney General* AG 2004 HC 15.
25 TT 2007 HC 155. See also *Prince v de la Bastide* AG 1976 HC 7; *Ex p Knox Educational Services Ltd* JM 1982 SC 20; *Ramjohn v Permanent Secretary of Ministry of Foreign Affairs* TT 2007 HC 96; *Re Mahabir* TT 1999 HC 67; *Sampson v National Housing Authority* TT 2003 HC 91; *Saroop v Government of the USA* TT 1994 HC 48; *Saroop v Maharaj* TT 1995 CA 29; and *Scantlebury v Attorney General of Barbados* BB 2009 CA 11.
26 TT 2007 HC 155 at [102].
27 Ibid at [103].
28 Ibid at [106].
29 Ibid at [107].
30 JM 2001 SC 49. See also *Tudor v Forde* BB 1995 HC 30.
31 [1999] 1 MLJ 485 HC.

Commission had acted within his jurisdiction in refusing to supply counsel representing a party to the Inquiry with reports and plans beforehand and also in refusing counsel permission to cross-examine witnesses; and *Bushell v Secretary of State for the Environment*,[32] where the House of Lords held that an inspector's refusal to allow cross-examination of the department's witness on the methodology contained in the Red Book was not a denial of natural justice because an inquiry was quite unlike civil litigation.[33] The court held that the ruling of the Commissioner was not per se unfair and that what the Commissioners were in fact endeavouring to do was to ensure that where the testimony of a witness did not materially affect a party the counsel appearing for such a party would not be permitted to cross-examine such a witness.[34] The court was of the view that cross-examination could have the effect of unearthing damaging evidence against a party who was not implicated by the examination in chief. The court held that, based on the authorities and the academic learning on the matter, there was clearly no automatic right of cross-examination of witnesses at a Commission of Inquiry and that the matter of cross-examination was within the discretion of the Commissioners.[35] It explained that wanting to cross-examine a witness and not being allowed to do so was not per se a breach of the duty to act fairly.

Standard of review

In *Brancker v Thompson*,[36] one of the respondents, the Commission of Inquiry, after commencing public hearings, issued notices of allegations to the applicants accompanied by a resumé of the evidence to support certain allegations made against them. The applicants sought an order of *certiorari* to quash the decision of the Commission, prohibition forbidding the respondents from proceeding with hearing of the allegations contained in notices, and a declaration that the decision of the Commission to give the applicants notices and to hear evidence in respect of such allegations against the applicant was null and void.[37] They also argued that the allegations were unreasonable in the *Wednesbury* sense and in excess of the Commission's jurisdiction. The court was of the view that there was no evidence provided on which the allegations could reasonably be brought and that the allegations were unreasonable in the *Wednesbury* sense and, therefore, in excess of the Commission's jurisdiction.[38] As a result, the court granted the order of *certiorari* to quash the decision or act of the Commission issuing the notice of allegations.

Natural justice

In *George v McIntyre*,[39] the court noted that the Salmon Report sets out, at paragraph 32, the six cardinal principles that must be followed if the rules of natural justice are to be followed when a Commission of Inquiry is being conducted, namely: (1) Before any person becomes involved in an inquiry, the Commission must be satisfied that there are circumstances which affect him and which the Commission proposes to investigate; (2) Before any person who is involved in an

32 [1980] 2 All ER 608.
33 JM 2001 SC 49 at 6.
34 Ibid at 7.
35 Ibid at 8.
36 BB 2001 HC 10 and on appeal: *Thompson v Branker* BB 2004 CA 20. See also *Murray v Attorney General of the Commonwealth of The Bahamas* BS 1996 SC 39.
37 BB 2004 CA 20 at 22.
38 Ibid at 23.
39 AG 2003 HC 10. See also *Novelo v Hulse* BZ 2007 SC 20.

inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them; (3) He should be given an adequate opportunity of preparing his case and of being assisted by an attorney-at-law; (4) He should have the opportunity of being examined by his own attorney and of stating his case in public at the inquiry; (5) Any material witnesses he wishes to be called at the inquiry should, if reasonably practical, be heard; and (6) He should have the opportunity of testing by cross-examination conducted by his own attorney any evidence which may affect him.[40]

Small v Belgrave[41] concerned the setting up of a Commission of Inquiry into the escape of a prisoner. The question for the court was whether the giving of notice by the Commissioner of Police to the prison wardens was a breach of the principles of natural justice.[42] The court ruled that, on the evidence, and on a consideration of the notices with the accompanying summary of evidence and transcripts sent to the applicants, it was of the view that the Commissioner acted within the terms of section 23 of the Commissions of Inquiry Act in issuing the notices to the applicants. In addition, the court held there was no breach of the rules of natural justice in that each notice was accompanied by a detailed summary of the evidence presented at the Commission; and that evidence reflected on the respective applicant, and, thereby, enabled him to respond fully to the allegations of misconduct.[43] The court noted that although certain statements made in the summaries attached to the notices were unfortunate, the applicant was afforded an opportunity to rebut the allegation of failure to show initiative.

The rule against bias

In *Lionel v Attorney General of St Lucia*,[44] the applicant alleged that one of the Commissioners of a Commission of Inquiry was a close friend of one of the persons implicated in alleged misappropriation of funds and that a possibility of bias existed. The applicant argued that the question was not whether or not the person would be biased (the law did not require that); but it was whether their applicant was of reasonable apprehension of bias.[45] The defendant argued that there were two basic issues in the case: (a) whether the Commissioners were validly appointed pursuant to the Constitution and the Commissions of Inquiry Ordinance; and (b) whether the stated close relationship as colleagues between Sir Fred Phillips and the Right Honourable Prime Minister per se was sufficient to give rise to bias so as to disqualify Sir Fred from sitting as a Commissioner. He referred to the two applicable tests for bias as being: (i) the real likelihood of bias test; and (ii) the reasonable suspicion of bias test.[46] He stated that the court was not concerned with actual bias but should look at the circumstances; and that, in this case, there was only a line in a book that was the subject of the challenge. In addition, he continued that life would be totally impossible if colleagues were going to challenge one another or be challenged if one was sitting as an arbitrator and the other as a litigant.[47] The respondent submitted that a reasonable man, having seen what Sir Fred said in his book, could not come to the conclusion that he could not be impartial.

40 AG 2003 HC 10 at [17].
41 BB 2000 HC 14.
42 Ibid at 5.
43 Ibid.
44 LC 1995 HC 4. See also *Mitchel v Georges* VC 2007 HC 38; *HN International (Caribbean) Limited v Commission of Enquiry* TT 2007 HC 155; *Small v Belgrave* BB 2000 HC 14 and BB 2001 CA 3; and *Bethel v Commission of Inquiry* BS 1996 SC 38.
45 LC 1995 HC 4 at 2.
46 Ibid.
47 Ibid.

The court looked at the circumstances under which Sir Fred wrote, at page 196 of his book, with reference to Prime Minister John Compton.[48] It noted that, in the particular chapter, the author was reminiscing about what he described as his public service in the private sector and was referring to his service as Chief Legal Adviser of Cable and Wireless in the Caribbean. The court claimed that, in the paragraph under review, he began speaking about his relationship with three heads of government in Tortola and then the heads of government in Montserrat, Antigua and Dominica.[49] Then he grouped the heads of government of St Lucia, St Vincent and Grenada in one sentence, namely: 'John Compton, Son Mitchell and Herbert Blaze, Prime Ministers respectively of St Lucia, St Vincent and Grenada were also close long time colleagues with whom it was always a pleasure to work.' The court accepted that it was clear from the passage and the general context that Sir Fred Phillips was referring to his association with Prime Minister Compton in a working relationship; and that he said that it was a pleasure to work with the Prime Minister.[50] In addition, the court held that when one read the passage more carefully and with the knowledge of some of the personalities mentioned, Sir Fred was giving an account of a relationship with heads of government of different political persuasions; and that Sir Fred Phillips seemed to be advocating that he was a friend of all and enemy of none. As a result, the court concluded that, in the circumstances of this case, it was not possible for it to say that a reasonable person would believe that a real likelihood of bias existed if Sir Fred Phillips acted as Chairman of the Commission of Inquiry.[51] The court also noted that it appeared to it that the nature of the applicant's concern would more aptly be described as a mere vague suspicion of a whimsical, capricious and unreasonable kind. It therefore held that the printed matter in Sir Fred's book did not, and could not, have any effect on the mind of the applicant.[52]

In *Joahim v Attorney General of St Vincent and the Grenadines*,[53] the applicant sought leave to apply for judicial review of the decision of Commissioner Ephraim Georges in which he stated that the letter sent to him created no real possibility of bias in respect of Richard Joachim. The court noted that a Salmon letter was a required part of a fair procedure of a Commission. Lord Salmon, in his report *Royal Commission on Tribunals of Inquiry 1966* laid down six cardinal principles (as mentioned above).[54] The court claimed that the purpose of those principles was for Tribunals of Inquiry to set out the allegations or provisional findings made against a witness, so as to put the intended witness on notice. It continued that the substance of the evidence must also be told to the witness in the Salmon letter and that, in its opinion, the question then arose as to what form and manner the letter was to take. The court replied that the form and manner was entirely within the discretion of the Commission.[55] In addition, the court claimed there was another purpose of a Salmon letter, and that was to advise the witness that he was required to give evidence or rebut the allegations or provisional findings set out in the letter, failing which adverse findings or conclusions might be made against him. It claimed that it stood to reason therefore that, by its very nature and purpose, it would be inevitable that a Salmon letter would contain allegations, provisional findings and material, and criticisms adverse to the witness.[56] The court stated this was why there was a need to issue a Salmon letter – so that the Tribunal

48 Ibid at 5.
49 Ibid at 6.
50 Ibid.
51 Ibid at 7.
52 Ibid.
53 VC 2004 HC 22. See also *Joseph v McIntyre* AG 2002 HC 23.
54 VC 2004 HC 22 at 8.
55 Ibid.
56 Ibid.

of Inquiry was seen to be fair by putting the claimant on notice in accordance with the principles of fairness. After reviewing the letter sent to the applicant, and authorities in the Commonwealth Caribbean, the court held that every Salmon letter was peculiar to its own circumstance and the nature of the enquiry it emanated from.[57] It continued that the principles require as a matter of procedural fairness that a witness be put on notice of all the evidence both documentary and oral that had been placed before the Commission which a witness was expected to refute, before definite findings are made.[58] The court claimed that it could not see how any allegation of bias real or imagined could be sustained and there was no serious question of bias to be tried and it had no real chance of succeeding if leave was granted. The court was of the view that the letter should be looked at in its entirety and not fragmented with the sole aim of lifting out statements or paragraphs which when read out of context with the whole created an illusion of conclusiveness and definite findings.[59] It continued that no allegation of bias could seriously emanate from the Salmon letter and it saw no danger of bias or a real likelihood of bias in the Salmon letter.

In *Joahim v Attorney General of St Vincent and the Grenadines*,[60] the claimants alleged that the following facts gave rise to a real likelihood of bias in the second defendant: (1) on 2 August 2002 a newspaper report quoted the Prime Minister as saying that a counsel to the Commission of Inquiry had already been contacted; (2) counsel to the Commission was appointed by the first defendant; (3) counsel to the Commission represented the sole Commissioner in Claim 241 of 2004; and (4) counsel to the Commissioner represented the Prime Minster in Claim 406 of 2002, a defamation action.[61] They also claimed that the combined effect of these four facts was likely to create a real danger of bias and/or introduce an element of unfairness into the Commission of Inquiry. In addition, the claimants urged the court not to strike out the claim at this stage as the evidence to be led by the witnesses would change the complexion of the claim.[62] The court claimed that it was not concerned with the evidence at this stage and that its function was to examine the pleadings to see whether they disclosed grounds for bringing the claim. It asked whether, taking the averments of the claimants as proved, the question was whether they disclosed reasonable grounds.[63]

The court claimed that, first, no complaint was made of the sole Commissioner and the newspaper report did not identify the counsel whom the Prime Minister had contacted. As a result, it failed to see how that fact provided any basis for saying that there was any real likelihood of bias in the sole Commissioner.[64] Secondly, the court disagreed with the claimant that the fact that counsel to the Commissioner were appointed by the Attorney General gave any reasonable grounds for apprehending a likelihood of bias in the second defendant.[65] Third, the court noted that in Claim 241 of 2004 the first claimant brought an action against the second defendant in his capacity as sole Commissioner and was represented by counsel for the Commission; and that no issue was taken that his appearance for the second defendant was in any way unfair or improper. Fourth, the claimants argued that the fact that a respected Senior Counsel had acted in the past for the Prime Minister in an unrelated defamation action and now appeared as counsel to the Commissioner would in some inexplicable fashion contaminate

57 Ibid at 9.
58 Ibid.
59 Ibid at 10.
60 VC 2004 HC 32.
61 Ibid at 8.
62 Ibid.
63 Ibid.
64 Ibid at 8.
65 Ibid at 8–9.

the Commissioner with bias, but did not provide particulars to support this speculation. As a result, the court claimed that it did not consider that these factors were sufficient to provide reasonable grounds to permit this claim for bias to be litigated.[66]

In *Bank of Bermuda v Minister of Community Affairs and Sport*,[67] in relation to allegations of bias of a board of inquiry set up by the Minister of Community Affairs and Sport, the court, after reviewing the recent authorities of *Porter v Magill, In re Medicaments & Related Classes of Goods (No. 2)*, claimed that the test was whether a fair-minded and well-informed observer might conclude from all the circumstances that there was a 'real possibility' that the tribunal was biased.[68] The court was of the opinion that the Minister's role in the statutory scheme was clearly stated in section 18(1) of the Human Rights Act. It noted that, in the stated circumstances, the Human Rights Commission 'shall' refer the complaint to him, and he 'may, in his discretion' refer it to a board of inquiry which he appoints under section 18(2).[69] It continued that the extent of the discretion which the Minister was required to exercise can be defined, in part, in negative terms.[70] The court noted that he did not perform an adjudicative role; the purpose of the reference was to enable a board of inquiry to decide on the merits of a complaint which the Commission has been unable to settle (and in which no criminal proceedings have been instituted). Additionally, the court noted that, first, he must be entitled to consider, at least, whether the statutory scheme has been complied with and the complaint had been properly referred to him;[71] and, second he must also be entitled, indeed must be required, to take the 'public interest' into account.

The court had to then consider whether the Minister, by receiving the telephone conversation and subsequent letter from Mr Darrell, and accepting a visit from him subsequently, gave the appearance of bias in relation to the decision which he was later required to make when the Commission referred the matter to him.[72] In other words, in the court's opinion: would a fair-minded and well-informed observer conclude that there was a real possibility that the Minister was biased when he came to make his decision under section 18(1)? Alternatively, did the Minister treat the Bank unfairly by failing to inform the Bank of the letter he had received and of the meeting, if one took place?[73] The court claimed that it was relevant for the Minister, if he was fully acquainted with the circumstances of the complaint, to take account of the facts that the Bank had declined to take part in the Commission's proceedings, both in November 2000 and again in May 2001, and that by November 2001 it had not applied to the court for a variation of the Consent Order which required the Commission to proceed.[74] It continued that Mr Darrell's purpose in writing the letter was clear.[75] The court noted that he intended that the Minister should move the Commission proceedings forward, and although he had previously been told that he should approach the Commission direct, by November 2001 he had brought court proceedings against the Commission, and it was understandable why he might have felt that a direct approach in the circumstances was justified.[76] It claimed that it did not consider that the Minister did anything to give an appearance of bias, or to disqualify himself from

66 Ibid at 9.
67 BM 2005 CA 23.
68 Ibid at [68].
69 Ibid at [70].
70 Ibid at [71].
71 Ibid.
72 Ibid at [72].
73 Ibid.
74 Ibid at [73].
75 Ibid at [74].
76 Ibid.

performing his statutory role when, later, the Commission did refer the matter to him, nor in the circumstances did he act unfairly towards the Bank by failing to involve them at that stage.

In *Compton v Attorney General of Saint Lucia*,[77] the appellant appealed against the decision of the first instance judge who refused the appellant's application for a writ of *certiorari* to quash the appointment by the Governor General of the second named respondent, Justice Monica Joseph, as Commissioner of the Commission of Inquiry on the basis that there was a suspicion or real danger of bias. The Court of Appeal claimed that, first, there was direct involvement by the appellant in the refusal of the second respondent's application for extension of her tenure of service as a judge; and, second, he was a member of the Organisation of Eastern Caribbean States (OECS) Authority and there was no admissible evidence how he voted; and, third, the Commissioner ruled that the conduct of the appellant, Sir John Compton, was not being investigated.[78] The court claimed that it was at a loss to understand why the Commissioner made such a statement that Sir John Compton was not under investigation. It continued that, apart from naming the appellant, he was the holder of the office of Minister of Finance at the relevant period under investigation by the Commissioner and, having regard to the terms of reference of the Commission of Inquiry, it had difficulty in understanding the Commissioner's statement.[79] The court was of the opinion that, certainly, if he was not investigated his office was, and that there could be no difference between the two. It disagreed that, the Commissioner having made that statement and having regard to her background (a High Court Judge with vast experience), it was difficult for her to write anything adverse against the appellant.[80] The court was of the view that it was still faced with one difficulty having regard to the terms of reference of the Commission of Inquiry: how could such a statement be made which would restrict her from inquiring into all the references which are placed before her? Additionally, the court claimed that this did not accord with what the Commissioner said, namely, 'Sir John's conduct is not the subject of the Inquiry and he is not entitled to be represented.'[81] In the court's opinion, this clearly demonstrated that there was a real possibility that adverse findings could be and might be made against the appellant and that he did not have to wait until these findings were made to say that he was a person identified as being probably culpable. As a result, the court concluded that the appellant was the subject of the inquiry and, if the inquiry went ahead against him as presently constituted, there was a real danger of bias.[82]

Public hearings

Commissions of Inquiry are meant to be public and attendance by the public is part of the openness of the process. The question which arose in *Burroughs v Attorney General of Trinidad and Tobago*[83] was whether the holding of proceedings of a Commission of Inquiry in private made its subsequent report null and void as a result. In that case, the Commission of Inquiry was appointed by the President, pursuant to the provisions of the Commissions of Enquiry Act, to inquire into the extent of the problem of drug abuse in Trinidad and Tobago.[84] The court was of the opinion that, since the Commission decided to hold its meetings in secret, then if any

77 LC 1998 CA 1. See also *Lewis v Attorney General of Saint Lucia* LC 1998 CA 3.
78 LC 1998 CA 1 at 2.
79 Ibid.
80 Ibid at 6.
81 Ibid at 7.
82 Ibid.
83 TT 1990 HC 51.
84 Ibid at 17.

person is implicated or concerned in the matter, it is the duty of the Commission to duly notify such person, thereby allowing such person the opportunity to exercise the rights contained in section 10 of the Act.[85] It continued that it could not be left to the person so implicated to volunteer to make an application to be represented because such person would not be aware of what was being alleged against him, since the evidence was being taken in secret and the witnesses were strongly warned to be silent about having given evidence. As a result, it held that the procedures adopted by the Commission breached all the rules – common law, statutory and constitutional – in relation to the plaintiff.[86] The court also held that common law rules of natural justice played no part in the procedures which governed the proceedings before the Commission of Inquiry. The Commission, it noted, was obliged to respect and give effect to the common law rules of natural justice, the express statutory provisions of section 10 of the Act and the substantive provisions of section 4(b) of the Constitution which provides, *inter alia*, for the right of the law, and the particulars contained in section 5(2)(h) of the Constitution, which provides that Parliament may not deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.[87] The court continued that, while the Report of the Commission of Inquiry was to be legally considered null and void as against the plaintiff and against all these persons who are named in the report, nevertheless it contained references, conclusions and findings of the utmost gravity and severity against the plaintiff.[88]

A similar issue arose in *Tudor v Forde*,[89] where the court had to consider whether it was lawful for the Commission of Inquiry not to have public hearings. It noted that its interpretation of the effect of the provisions of section 20 of the Commission of Inquiries Act was that they are concerned with the second stage of an inquiry, i.e. the hearing stage in public session, when the information collected during the preliminary work of the Commission would have been collated for use in leading the evidence in the strict sense, that is judicial evidence, of the witnesses summoned in the prescribed manner to appear before the Commission at the hearing of the matter referred for their investigation and report.[90] As a result, the court was of the view that section 20(2) contemplates a fact situation that relates to the reception of evidence at the hearing, at which stage the sensitivity of some aspect of the evidence to be adduced may require the Commission to exercise its discretion to receive that evidence during an in camera hearing. In its view, what was envisaged, in other words, was that the 'official hearing' must have been commenced in public before it is open to the Commission to determine whether the balance of advantage is in favour of receiving the evidence in closed session.[91]

Standing of a Commission of Inquiry

The circumstances in which a Commission of Inquiry would be a claimant in a judicial review case are certainly rare, but it occurred in *The Commission of Inquiry into the Operation of the Development Finance Corporation v Development Finance Corporation*.[92] Unsurprisingly, the first and perhaps the only main issue for the court was whether the Commission had *locus standi* to bring the judicial review

85 Ibid at 19.
86 Ibid.
87 Ibid at 21–2.
88 Ibid at 22.
89 BB 1995 HC 30.
90 Ibid.
91 Ibid.
92 BZ 2005 SC 24.

claim. The defendant argued that the Commission was not a legal person and, therefore, its application should not be entertained by the court and must be dismissed.[93] The court accepted that, since the Commission was set up by the Prime Minister pursuant to section 2 of the Commission of Inquiry Act, its creation was an exercise in executive power granted by statute to the Prime Minister.[94] As such, the court held that the Commission was properly amenable to the supervisory jurisdiction of the courts to ensure that it keeps within the bounds of the law and does not transgress, for example, the individual's protected constitutional rights.[95] The issue, ultimately, was whether the Commission had legal persona to initiate and prosecute legal proceedings.[96] It noted that it was unarguable that an action could lie against the Commission *qua* Commission by a person affected on the ground that the Commission is transgressing its terms of reference or offending some constitutional right or other of that person.[97] Such a claim might be brought by way of judicial review, seeking an appropriate order or a declaration and even an injunction from the court, and the proper party in that case would be the person affected as claimant and the Attorney General on behalf of the Commission as provided for in section 42 of the Constitution of Belize – that the Attorney General shall in cases relating to civil proceedings be the respondent or claimant on behalf of the Government.[98]

The court claimed that what the Commission really wanted was an advisory opinion as to the effect of the seeming conflict between sections 9 and 10 of the Commission of Inquiries Act on its powers to summon witnesses and order production of books etc. and section 18 of the Development Finance Corporation Act, dealing with the confidentiality and secrecy of matters relating to the affairs of the respondent Development Finance Corporation and the immunity from production in court of its books and documents, except on the direction of the court.[99] The court held that the Commission of Inquiry could not call for an opinion as to the legal obligation of a person and that a person must resist that legal obligation by recourse to court, noting that it was at that point that there would be an issue in dispute upon which the court could pronounce.[100] As a result, it concluded that, first, the declaration sought was moot as no factual assertion of power had been taken by the Commission which could be adjudicated upon by the court; second, it was for the person or persons or entity affected by the assertions of the statutory powers of the Commission to resist, if they can, by coming to court; and, third, it was therefore not for the Commission to come to court, because the issue of the very legal persona of the Commission itself was not clear, being, as it was, an emanation of an exercise of executive power by the Prime Minister who set it up.[101]

Mandatory or directory

Joachim v Attorney General of Saint Vincent and the Grenadines[102] raises interesting questions concerning procedural irregularities which go to the heart of jurisdiction and those that do not. In respect of those that do not, it was necessary to determine whether they were mandatory or directory in order to assess the consequences of non-compliance. The facts, as outlined in the decision of

93 Ibid at [2].
94 Ibid at [5].
95 Ibid at [6].
96 Ibid at [8].
97 Ibid at [10].
98 Ibid.
99 Ibid at [11].
100 Ibid.
101 Ibid at [18].
102 [2007] UKPC 6. See High Court decision: VC 2004 HC 32 and Court of Appeal: VC 2004 CA 20.

Master Cottle, were as follows: on 10 March 2003, the Governor General appointed Georges JA (Acting) as the Sole Commissioner to enquire into certain facts and circumstances relating to the Ottley Hall Project (the 'First Instrument'). The First Instrument was published in the Official Gazette on 10 March 2003. The Commissioner was expressed to have been appointed by the Governor General pursuant to the repealed section 2 of the Commissions of Inquiry Act 1990. This seems inescapable since the first paragraph of the First Instrument quoted the repealed section, and in the second paragraph the appointment was specifically made for a purpose which was derived from the repealed section. Several errors made it expedient that an Erratum be published in the Official Gazette on 28 April 2003. Significantly, one such error related to the section pursuant to which the Commission was established on 10 March 2003. The effect of that relevant paragraph was to substitute the amended section 2(1) of the Commission of Inquiry Act by, first, stating that it was amended by the Commissions of Inquiry (Amendment) Act, No. 14 of 2002; second, by quoting that new section rather than the repealed section and, third, by deleting the words 'for the public welfare' and substituting 'of sufficient public importance' in the second paragraph of the First Instrument. On 28 April 2003, therefore, the Governor General issued a second Commission pursuant to the new section of the Commissions of Inquiry Act, as amended (the 'Second Instrument'). This new Commission had the same terms of reference as the first but contained the various corrections that were identified in the Erratum. However, it was not published in the Gazette as required by section 16 of the Commissions of Inquiry Act.

The Board noted that section 16 of the 1990 Act requires that all Commissions be published in the Gazette and provide in terms that they 'shall take effect from the date of such publication'. It noted that, in these circumstances, 'it is well-nigh impossible to argue that the Second Instrument, never having been published in the Gazette, has ever taken effect.'[103] The Board explained that the approach to be taken to this question was that now established by the House of Lords in *Soneji*[104] and that, essentially, the question to be asked was whether Parliament could not fairly be taken to have intended the consequences of non-compliance to be total invalidity (or, in the present case, total ineffectiveness, since the appellants rightly recognised that the second respondent's appointment under the Second Instrument was valid and would immediately take effect if ever the Instrument comes to be published in the Gazette). In answering that question, it claimed that Parliament must, indeed, be taken to have intended the consequence of non-publication of the commission to be total ineffectiveness and that intention was as plain as can be from the last ten words of section 16: 'and shall take effect from the date of such publication'.[105] The Board continued, '[b]y the same token that this conclusion rules out the Second Instrument as the legal basis for the second respondent's powers under the commission, so too it rules out one of the appellants' arguments as to the validity of the First Instrument, the argument that the Second Instrument impliedly revoked the First Instrument.'[106] It claimed it was 'nothing to the point that the Second Instrument is valid' and that the 'plain fact is that it is ineffective, no more effective to effect the revocation of an earlier appointment than to confer powers on the commissioner under a new Instrument of appointment'.[107]

The Board explained that there are two independent reasons why the Erratum could not validate the First Instrument if it were otherwise invalid: first, because the mistake made (or reflected) in the recitals, if sufficiently material to invalidate the First Instrument, could possibly

103 [2007] UKPC 6 at [12].
104 *R v Soneji* [2006] 1 AC 340.
105 [2007] UKPC 6 at [12].
106 Ibid at [13].
107 Ibid.

be characterised merely as 'grammatical [or] typographical'; second, because the First Instrument does not, in any event, fall within the definition of 'any written law'.[108] The Board was not convinced that, although the expression was defined widely in section 3(1) of the Interpretation Act, it was not wide enough to include an executive act rather than a 'legislative provision'.[109] The court claimed that it followed, therefore, that the critical issue was whether the second respondent's appointment under the First Instrument is valid and effective, an issue which in turn raises the central question: in setting up the Commission of Inquiry 'on the advice of the Cabinet' did the Governor General (and/or the Cabinet) materially misdirect himself (themselves) as to the approach to be taken in deciding whether or not to issue the Commission?[110] It continued that the fact that the 'Governor General acted upon the advice of the Cabinet is plain from the face of the First Instrument: the second recital says so in terms'.[111] The Board claimed it was plain too from the face of both recitals to the First Instrument that in deciding to appoint a Commission of Inquiry the Governor General directed himself by reference to section 2(1) of the 1990 Act in its unamended, instead of its amended, form and that this constituted a clear misdirection.[112] It continued that it was 'nothing to the point to say, as the respondents do, that the recitals are "mere surplusage" and need never have been included in the Instrument in the first place'.[113] The Board clarified that the 'point is that they reveal (adventitiously though it may be) the approach in fact taken in the decision-making process, namely that the decision was arrived at by reference to the considerations set out in the unamended instead of the amended section 2(1)'.[114]

In addition, the Board pointed out that '[t]he all important question is, therefore, does this matter? Was it material?'[115] It replied that it was of the clear view that it was not material and that the short answer to this challenge was that any Governor General deciding to set up a Commission of Inquiry as being advisable 'for the public welfare', must, inevitably, have regarded the matter also as 'of sufficient public importance'.[116] The Board explained that the 'phrase "public welfare" in the unamended section, taking its colour from the other main limb of the provision (the appointment of a commission to inquire into the conduct of this, that or the other public body), clearly connotes the public good'.[117] In addition, it stated that nobody would regard an inquiry into any particular matter as being for the public good unless the matter was also of sufficient public importance to justify holding an inquiry. It is as simple as that.[118] The court then concluded that the First Instrument was valid and (because published in the Gazette) effective to empower the second respondent to hold the inquiry upon which he had already embarked before this challenge, and that the Instrument could not be impugned because of its inappropriate recitals.[119] It noted that, since the existence of the Governor General's power to set up this inquiry has never been doubted or disputed, it would hold that the immaterial misdirection did not render its exercise unlawful.[120]

108 Ibid at [14].
109 Ibid.
110 Ibid at [16].
111 Ibid at [17].
112 Ibid at [18].
113 Ibid.
114 Ibid.
115 Ibid at [19].
116 Ibid.
117 Ibid at [20].
118 Ibid.
119 Ibid at [22].
120 Ibid.

TRIBUNALS

Locus standi

In *Minister of Home Affairs, Labour and Housing v Permanent Police Tribunal*,[121] the applicant sought judicial review of a decision of the Permanent Police Tribunal that the 'Combined Allowance' should be regarded as part of the salary of police officers.[122] The court stated that, at a directions hearing, it ordered, on its own motion, that the applicant's standing to seek judicial review should be determined as a preliminary issue because an application for judicial review by a Minister on behalf of the Crown appeared to it to be unprecedented.[123] It continued that 'in what appears to be the first case in Bermuda of judicial review being sought by a Government Minister against a public body, it is important to clarify who the proper applicant is for both practical and theoretical reasons which only became clearly apparent once the scope of the present application was narrowed, focusing attention on the Combined Allowance issue. Hopefully, rather than serving as a bridge to nowhere, the preliminary issue hearing will serve to avoid the possibility of points being raised at trial resulting in avoidable delays and wasted costs in this matter'.[124] The court observed that '[a]lthough there appears to be no direct local precedent for the Crown or a Government Minister seeking judicial review, and few prominent English precedents, it is in fact clear that such applicants do possess the standing to do so'.[125] The court noted that '[t]he crucial question is whether the Minister for Home Affairs is the appropriate legal person to be named as applicant in respect of the matters complained of herein, it being accepted that if he is not, the appropriate legal person may be substituted in his place.'[126]

It continued that, although the Crown Causes Act 1951 and the Crown Proceedings Act 1966 did not apply to judicial review proceedings, the underlying principle should be one of general application, namely that the Government collectively, and ministers individually, are as much officers of the Crown under Bermuda's Constitution as they are under the British Constitution.[127] The court therefore reasoned that the respondent was correct in pointing out that the applicant was not the other party to the proceedings before the Permanent Police Tribunal, and that the other party was clearly the Government under the scheme of the Police Act. This fact alone, in the court's opinion, did not lead inevitably to the conclusion that the Minister lacked sufficient interest to apply in the public interest for judicial review in respect of proceedings in which he was not directly involved; his role in setting the terms of reference for the Tribunal, and circulating the decision to the parties after the hearing, were consistent with the obvious fact that the Minister was politically responsible for overseeing police matters generally.[128] The court accepted that, in general terms, the Minister had sufficient interest in the Tribunal's decisions under the Police Act to qualify as an applicant with sufficient interest, even if, invariably, he was not the most interested potential applicant on behalf of the Crown.[129] After considering the facts, the court concluded, first, that the Minister lacked sufficient interest to make the *specific* application sought and that the Crown was at liberty to apply to

121 BM 2008 SC 62.
122 Ibid at [1].
123 Ibid at [3].
124 Ibid at [5].
125 Ibid at [10].
126 Ibid at [13].
127 Ibid at [14].
128 Ibid.
129 Ibid at [15].

amend to substitute another applicant. The court suggested that an appropriate substitute applicant would appear to be either 'the Attorney General' or 'Regina'.[130] Second, that while it could be argued that the Government or, perhaps, the Minister of Finance had stronger interests, no substantial objection to the right of the Minister to pursue this complaint truly arose.[131]

In *British Virgin Islands Electricity Corporation v Virgin Island Electricity Corporation Appeals Tribunal*,[132] the court noted that whether the application was correctly brought under Part 56 was not in issue and that neither was *locus standi* at issue.[133] It claimed that Mr Turnbull was the person who instituted the appeal against the decision of the British Virgin Islands Electricity Corporation ('the Corporation'); he was the person whom that decision adversely affected; the decision of the Virgin Islands Electricity Corporation Appeals Tribunal ('the Tribunal') was made in his favour; and the decision of the Corporation was thereby overruled to his benefit. The court continued that the Corporation, a public body and a creature of statute, stood to be adversely affected by the decision of the Tribunal.[134] It claimed that the decision was of a public nature and the Corporation had the required nexus for the purposes of *locus standi* under Part 56.2. As a result, the court concluded that, first, the Corporation was a body that had sufficient interest in the subject matter of the application for judicial review under Part 56.2(2)(e); and second, it is a statutory body within whose statutory remit the subject matter of the case fell.

Error of law

Most public authorities and their decisions are subject to judicial review and the courts have made it clear that it has jurisdiction over inferior tribunals and courts. In *Linton v Hyman*,[135] the applicant sought judicial review to quash the decision of the Acting Chief Magistrate and to prohibit her from the further hearing of a matter on the basis that she gave no reasons for her ruling on a preliminary point. The court noted that the ambit of review was wider, encompassing, also, errors of law which did not appear on the face of the record but which were material to the decision.[136] It was stated that, first, no court or tribunal had any jurisdiction to make an error of law on which its decisions of the case depended and that if it made such an error it went outside its jurisdiction.[137] The court continued that it was:

> not of the opinion that the failure to produce a copy of the record is fatal to a claim for judicial review without more. As a general rule, the courts have wide powers to review proceedings of tribunals. *Certiorari* lies to quash a decision that is made by public bodies, including magistrates, where the decision is *ultra vires* or where there is an error of law whether or not it appears on the face of the record.[138]

It also stated that, first, 'the plethora of case law has established that the Court will grant *certiorari* if there is either an error of law or excess of jurisdiction'; and second, '[t]he law has evolved and it is now clear that any error of law will render a decision susceptible to review if such error

130 Ibid at [23].
131 Ibid at [24].
132 VG 2003 HC 5.
133 Ibid at [14].
134 Ibid.
135 AG 2006 HC 10. See also *Re Dubay* TT 1995 HC 35.
136 AG 2006 HC 10 at [59].
137 Ibid at [56].
138 Ibid at [60].

affects the decision.'[139] After reviewing the submissions, the court concluded that there was no 'misapprehension of the law by the Acting Chief Magistrate' and she had no 'duty to provide reasons for ruling on the preliminary issue'.[140] In *Jamaica Public Service Company Ltd v Industrial Disputes Tribunal*,[141] the issue was whether the Industrial Disputes Tribunal's award might be quashed by virtue of an error of fact on its face, because it called for the implementation of the established compensation policy/philosophy agreed by the parties in the 1990/1991 Heads of Agreement, when there was, in fact, no such agreement was embodied in the Heads of Agreement or any subsequent Heads of Agreement.[142] After considering the evidence, the court was of the opinion that '[a] perusal of the award in its entirety demonstrates that the award was not based on the 1990/91 Heads of Agreement but rather on what was regarded as the Tribunal's understanding of the underlying mutual acceptance of the policy which should inform wage negotiations.'[143]

In *Bermuda Industrial Union v Bas-Serco Limited*,[144] the trial judge declared that the decision of the majority of the Tribunal appointed to determine the bargaining unit of firefighters ('the Tribunal') was made in excess of jurisdiction and was wrong in law and was null and void. The appellant appealed, arguing, *inter alia*, that (1) the judge erred in law by failing to find that he had no jurisdiction to entertain either Bas-Serco Limited's ('Serco') originating or Bermuda Industrial Union's (BIU) first originating summons and, therefore, had no jurisdiction to make the declaration which was the subject matter of the appeal; and (2) further or in the alternative to ground (1), the judge erred in law in holding that the majority decision of the Tribunal was made in excess of jurisdiction and was wrong in law and therefore null and void.[145] The Court of Appeal stated that the first ground was 'concerned with the question whether the Court was entitled to embark at all on the supervision of the Tribunal's determination'.[146] After considering the leading authorities, such as *Anisminic Ltd v Foreign Compensation Commission*[147] and *R v Lord President of the Privy Council, ex p Page*,[148] the court noted that 'in general any error of law made by an administrative tribunal or inferior Court in reaching its decision can be quashed for error of law'.[149] Since the ouster clause in section 30P(4) of the Trade Union Amendment Act 1998 (TUAA) provided that the Tribunal's determination was not to be subject to any appeal, the court 'can only exercise a jurisdiction of supervision directed to ensuring due compliance with the law by the Tribunal'.[150] It noted that the majority of the Tribunal fell into fundamental error of law. The two factors identified as the basis for the Chairman's conclusion were that (1) all the non-unionised workers in the existing unit were calling for cancellation of BIU's certification; and (2) BIU was disclaiming any interest in bargaining on behalf of the non-union workers in the unit.[151] The court then concluded that '[i]n all the circumstances the determination of the majority of the Tribunal was redolent of errors of law and the judge was therefore right to declare it null and void.'[152]

139 Ibid at [61].
140 Ibid at [64].
141 JM 2007 CA 4.
142 Ibid at [4].
143 Ibid at [12].
144 BM 2003 CA 12.
145 Ibid at [72].
146 Ibid at [73].
147 [1969] 2 AC 147.
148 [1993] AC 682.
149 BM 2003 CA 12 at [76].
150 Ibid at [77].
151 Ibid at [90].
152 Ibid at [99].

In *Ex p LS Panton Ltd*,[153] the court pointed out that:

> [a]n inferior tribunal should be kept within its accredited authority. It cannot be allowed to disregard the law and regulations under which it operates. If, as in this case, it is shown that the licensing authority has committed an error of law which error has deprived the applicant of the hearing to which it is entitled, the judges of the Supreme Court must intervene as we have done by granting an order to quash the decision based on the palpable error.[154]

It reiterated that 'if [the inferior tribunal] commits an error of law on the face of the record which has deprived a citizen of a right to which he is entitled or if an error of principle is disclosed which may have affected the decision',[155] then *certiorari* will lie. The court then concluded that it was satisfied that the error of law which the licensing authority made was due to a mistake made by the chairman in considering the form and its contents embodying the application.[156] In *Reid v City of Kingston Co-operative Credit Union Limited*,[157] the appellant argued that the trial judge erred in law when he treated the award under review for an error of law as the Arbitrator's Award, thereby allowing the applicant for judicial review to make a fresh challenge to the Arbitrator's Award which was never made to the Registrar on appeal; namely, the applicant for review had neither placed causation before the Registrar on appeal as an issue of law for his consideration nor raised any complaint before the Registrar that the Arbitrator had made an error of law in applying any principle of law relating to causation.[158] One of two issues considered by the Court of Appeal was whether or not the trial judge was correct in finding that there was an error of law on the face of the award.[159] The court concluded that the trial judge was correct in holding that there was an error of law on the face of the award. It stated that the 'Award' in this case included not only the Registrar's Award but also the Arbitrator's Award since the former confirmed the latter on appeal. The court explained that the Arbitrator, in his written Award, incorporated the evidence that was put before him and gave the reasons for his decision.[160] After citing *Ex p Page*, the court ruled that '[i]t is now reasonably clear that, generally, any decision affected by an error of law made by an administrative tribunal or an inferior court can be quashed for error of law'.[161]

The rule against bias

In *Grant v Teacher's Appeal Tribunal*,[162] the claimant argued that the trial judge, first, did not listen to all the grounds of his application; and second, was incompetent and biased.[163] The appellant alleged that the Chairman of the Board of the Montego Bay Community College, from which his employment had been terminated, had close ties with the trial judge's family, thus raising the issue as to whether the learned judge was obliged to disqualify himself from hearing the

153 JM 1970 SC 4. See also *Moore v Attorney General of Trinidad and Tobago* TT 1997 HC 177.
154 JM 1970 SC 4.
155 Ibid.
156 Ibid.
157 JM 2008 CA 71.
158 Ibid at 13.
159 Ibid at 14.
160 Ibid at 18.
161 Ibid at 27.
162 JM 2006 PC 13; JM 2005 CA 2. See also *Gibbons v Packer* BB 1999 CA 18 and *Jamaat Al Muslimeen v Commissioner of Police* TT 1990 HC 109; *McNicholls v Judicial and Legal Service Commission* TT 2007 HC 216; *Robertson v Dennie* VC 1989 CA 1; *Attorney General of Belize v Belize Food and Transportation Ltd* BZ 2004 CA 7; *Wildman v Alleyne* GD 2001 HC 38; *Des Vignes v Medical Board of Trinidad and Tobago* TT 1999 HC 116; and *Sandiford v Thompson* BB 1999 HC 2.
163 JM 2006 PC 13 at 21.

matter.[164] The Court of Appeal claimed that, given the fact that the allegations of bias surfaced for the first time in these proceedings, there was no valid claim that it affected in any way the outcome of the proceedings before the learned trial judge.[165] It continued that there was in effect no real likelihood or possibility of bias to have affected in any manner the decision arrived at by the learned judge. The Court of Appeal argued that there was no merit in the complaint that the learned trial judge was incompetent and biased, noting that the judge dealt with the issues properly and was at pains to ensure that the appellant was afforded a fair hearing.[166] On the facts presented, there was no real danger that the learned trial judge was unable to adjudicate fairly in the matter before him. On appeal to the Privy Council, the Board claimed that no question had been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge and that the complaint was rather of what one might term apparent or perceived bias.[167] It continued that this was based upon the proposition that, because of his friendship with the family of the Chairman of the Board, there was a real possibility that the fair-minded and informed observer would conclude that the judge was biased.[168] The Board referred to *Locabail (UK) Ltd v Bayfield Properties Ltd*,[169] which gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. The Board claimed that, in that decision, the court pointed out that it would be dangerous and futile to attempt to define or list the factors which might or might not give rise to a real danger of bias, as everything would depend on the facts, which would include the nature of the issue to be decided.[170] It continued that the court did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection and that, among the latter, the court enumerated personal friendship between the judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case.

The Board explained that these remarks were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist.[171] It continued that the facts of each case are of prime importance, as the court pointed out. The Board claimed that it was mindful of the problems which might face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. It continued that, in such communities, it was commonly found that many of the parties and witnesses who were concerned in cases in the courts were known, and not infrequently well known, to the judge assigned to sit.[172] The Board explained that it was incumbent on the judge to apply a careful and sensitive judgement to the question whether he was a close enough friend of the person concerned to make it undesirable for him to sit on the case; and that, if he errs on the side of caution by too much, he might make it impracticable for him to carry out his judicial duties as effectively as he should. It continued that if, on the other hand, he was not ready enough to recuse himself, however unbiased and impartial his approach might in fact be, he would leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality.[173] The Board claimed that, in this connection, it was relevant to take into account the issues in the proceedings; and that, as was pointed out

164 Ibid at 23.
165 Ibid at 24.
166 Ibid.
167 Ibid.
168 Ibid at 21.
169 [2000] QB 451.
170 JM 2006 PC 13 at 21.
171 Ibid at 21–2.
172 Ibid.
173 Ibid at 23.

in the *Locabail* case, if the credibility of the judge's friend or acquaintance was an issue to be decided by him, he should be readier to recuse himself. The Privy Council continued that if the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist.[174] It noted that the judge had stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he 'may have encountered him no more than ten times over the last twenty years'. The Board claimed that the issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired.[175] As a result, it did not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias.

Abdication

In *National Trust for the Cayman Islands v Planning Appeals Tribunal*,[176] the question for the court was whether the Central Planning Authority (CPA) had unlawfully delegated its discretion to the Department of Environment and Planning Department (DE&DP). The appellants argued that Condition 1 of their planning approval amounted to a delegation of the decision-making process from the CPA to the DE&DP.[177] That approval was subject to, *inter alia*, the submission of a final comprehensive environmental assessment report which must be to the satisfaction of the DE&DP. The appellant submitted that an administrative body could not abdicate its statutory duty to make the decision to approve or reject an application, relying on *Ebanks v Central Planning Authority* where Hercules CJ (Ag) held that:

> [a]ny decision made by [the CPA] must be its own independent decision uninfluenced by any outside influence whatsoever. There can be no abdication of its authority. If outside influences are brought to bear upon any of its deliberations, then any decision arrived at in such circumstances would certainly not be in keeping with what must have been the spirit and intendment of the legislature, and would be a travesty of justice. This august body, like any similar body performing a judicial or quasi-judicial function, must carry out its functions by conferring only amongst its members and making decisions without external influence or pressure. The decision must be the authority's decision. Anything done to the contrary is to my mind illegal and cannot be sustained. I have searched the Development and Planning Law, albeit without any success whatever, to find whether there is any section in it giving authority to the [CPA] to abdicate its statutory rights to any other authority or any other body.[178]

The applicant also argued that the power to make the decision was vested in the CPA and, in this case, it was delegated to or abrogated by the DE&DP. The respondents' countered that it was the CPA that made the decision to allow the development to proceed; and that it considered the environmental concerns as well as the benefits of the development and decided that the development should proceed, with the environmental details to be dealt with by the DE&DP.[179]

174 Ibid.
175 Ibid.
176 KY 2000 GC 75. See also *Maharaj v Statutory Authorities Service Commission* TT 2005 HC 7 and *Marcano v Attorney General of Trinidad and Tobago* TT 1985 HC 63.
177 KY 2000 GC 75 at 12.
178 [1980–83] CILR 207 at 211.
179 KY 2000 GC 75 at 13.

The respondents claimed that the CPA granted permission to develop the land, subject to certain conditions, which it was entitled to do. In the court's opinion, the important questions were: What exactly did the CPA decide; and what did it direct the DE&DP to decide, if anything?

The court was of the opinion that it was clear that many parties, including the Department of Environment (DE), were concerned about the environmental impact of the proposed development and raised specific concerns and also requested an environmental impact assessment report.[180] However, the final comprehensive environmental assessment report was to be prepared in the future, but, since it was not prepared, it could not be said that there had been a final assessment of what the environmental impact would be, or what steps could be taken to reduce or minimise that impact. The court continued that the function of the CPA was to consider, within the scope of the Development Plan, all of the long-term and short-term effects that a proposed development could have on the residents of the islands.[181] It must first consider such things as noise, congestion, appearance, disruption, inconvenience, additional jobs, economic growth, tourism and all other factors which it believed would affect all those who lived, worked and visited there; second, exercise its best judgement to determine if there were environmental impacts and, if so, how significant they were and whether they could be minimised or reduced in some way; and third, consider what environmental impact was justified given the advantages or benefits of the proposed development. In other words, the CPA's function was to decide what was in the public's best interest, given the particular circumstances of each case.[182] The question for the court was whether the CPA delegated that decision-making authority. In the court's view, the CPA delegated the decision-making authority that it was required to exercise and, accordingly, its decision must be set aside.[183] It noted that the CPA ruled that it would grant development permission to the Ritz Carlton *subject* to the submission of a final comprehensive environmental assessment report, the contents of same to be 'to the satisfaction of the [DE&DP]'. The court explained that, *de facto*, it was the DE and not the CPA which had to be satisfied that the environmental impact was not too severe or could be sufficiently ameliorated.[184] It continued that, if the DE were not satisfied, it could refuse and the development could stop. In the instant case, the DE was asked to perform the function of determining if any potential negative impact on the environment was justified, considering the potential benefits of the development, which the court held was not its function.[185]

The court explained that, if the CPA had ruled that it would grant permission, subject to *its* being satisfied with the final environmental report, that would not have been a delegation of its authority as *it* would have retained its duty to consider the relevant factors and base its reasoned decision upon them.[186] It explained that, in addition, even if the CPA had ordered that the planning permission would be granted, subject to the environmental assessment report being to the satisfaction of the DE but with the final approval or decision regarding the report to be by the CPA, that would still have left the final decision for permission with the CPA.[187] The court claimed that it was not correct to say that the CPA made its decision after considering the environmental issues, because those issues had not been finally identified: what the CPA did was decide that the development could proceed *only if someone else was satisfied* with the environmental impact.[188] It

180 Ibid at 14.
181 Ibid at 15.
182 Ibid.
183 Ibid at 16.
184 Ibid.
185 Ibid at 19.
186 Ibid.
187 Ibid.
188 Ibid at 20.

continued that the determination of whether there had been a delegation of the decision-making process, or, rather, a direction for administrative supervision of a decision, was difficult as it involved shades of grey and would depend on the particular circumstances of the case. On the facts, the court noted that it was satisfied that the environmental impact and resolution of these matters was a fundamentally important issue.[189] The CPA, it ruled, could have examined the environmental issues and made a determination that the development could proceed only if certain stated environmental issues or concerns were addressed; and then received such a proposal, and decided that it would grant permission only on the condition that the DE was satisfied that the developer had actually complied with the approved proposal or its directions. In such a case, the CPA would have made the essential decision and not left it to someone else.[190] The court therefore held that what the CPA had done was to give someone else the responsibility for ensuring administratively that its decision was being complied with. This, in the court's opinion, it could not lawfully do.[191]

Irrelevant considerations

Taking into account irrelevant considerations, as a ground of judicial review, is not only relevant in respect of decisions by public authorities. It also applies where a tribunal takes into account matters that are irrelevant in arriving at its decisions either on the substantive matter before it or in respect of the remedies it is to grant. *British Virgin Islands Electricity Corporation v Virgin Islands Electricity Corporation*[192] concerned an appeal by Mr Turnbull of a decision of the British Virgin Islands Electricity Corporation ('the Corporation') Appeal Tribunal ('the Tribunal') to award him a compensatory payment in the amount of $75,000 as unpaid salary. The question for the court was whether the Tribunal acted on irrelevant considerations and therefore acted illegally or irrationally.[193] The claimant argued that the Tribunal took into account irrelevant considerations and acted irrationally in determining the amount of compensation that it awarded to Mr Turnbull. The court noted that irrelevant considerations was a ground upon which a public decision of a public authority may be impugned under the *ultra vires* doctrine. The court explained that it was clear that the Tribunal acted on irrelevant considerations when it took into account the hurt feelings and humiliation which, in its view, Mr Turnbull sustained as a result of the decision of the Corporation.[194] These considerations, in the court's opinion, were referable to the sphere of private law; they did not fall, however, within the purview of compensatory relief in the instant case.[195] The court held that Mr Turnbull was properly appointed to act as the General Manager of the Corporation for the period of one year; his acting appointment was terminated at the end of that period when he reverted to his substantive post as Deputy General Manager. As a result, the court held that he was not 'dismissed' from the post of General Manager, adding that he held the post in an acting capacity for a definite period.[196] The court reasoned that compensation should have been strictly in terms of emoluments that he might have lost had he not been paid as acting General Manager for the duration of that appointment.[197] However, the court held that this did not mean that the decision of the Tribunal

189 Ibid.
190 Ibid at 22.
191 Ibid.
192 VG 2003 HC 5. See also *Canserve Caribbean Ltd v Comptroller of Customs and Excise* TT 2010 HC 41.
193 VG 2003 HC 5 at [17].
194 Ibid at [20].
195 Ibid.
196 Ibid.
197 Ibid at [21].

was in any way reflective of bad faith or improper motive.[198] The reasons provided by the Tribunal for its decision, in the court's opinion, were tainted with illegality because they were irrelevant considerations for the purposes of public law.[199]

Right to a fair hearing

In *Cortina International Limited v Planning Appeals Tribunal*,[200] the question arose as to whether the Central Planning Authority should have disclosed, in advance, evidence prejudicial to the applicant's case and allowed adjournment for consideration if there had been late disclosure. The applicant claimed that it was not given a fair hearing in accordance with the principles of natural justice because the Authority relied upon the Governor's Harbour Study Area, Apartment Policy Paper and further letters of objection, without giving it the opportunity of responding to those documents. The court explained that the applicant was made aware that some of the objectors were relying on this report in support of their submissions. The court claimed, therefore, that it was known to the applicant that at least two objectors were relying on this policy statement. The applicant was given notice of this and the opportunity to respond but there was no evidence that it did so. The court explained that the applicant might have considered the reference to this policy as minor or insignificant or not one for which a reply was warranted, but it was given notice that certain objectors were going to rely on it and it was given an opportunity to respond. In these circumstances, the court concluded, therefore, that there had been no breach of the duty to act fairly.

198 Ibid at [22].
199 Ibid.
200 KY 2000 GC 55.

CHAPTER 17

PUBLIC LAW REMEDIES

INTRODUCTION

In judicial review proceedings, the claimant always approaches the court requesting a remedy. It is that remedy that determines almost everything else. It is only if the applicant has made out that he has *locus standi*; that the defendant or decision is one that is subject to judicial review; and, importantly, that one of the many grounds of judicial review could be made out, that he would be entitled to one or more of the available remedies. The remedies previously available to applicants in judicial review applications were the traditional public law remedies, namely *mandamus, certiorari* and prohibition; however, increasingly, the courts, and judicial review legislation, have added a range of private law remedies, including damages, injunction (interim and mandatory), declaration, restitution and return of money, to those available to applicants. These private law remedies will be considered in the next chapter.

CERTIORARI

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. In *Ajit v Sankar*,[1] the court noted that the writ of *certiorari*, one of the three prerogative writs – *certiorari*, prohibition and *mandamus* – is the process by action which the King's (now Queen's) Bench Division of the High Court of Justice in England, in the exercise of its superintending power over inferior jurisdictions, required the judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the court below.[2] In *Re Bowe*,[3] it was claimed that the procedure by way of *certiorari* and *mandamus* was radically different from the system of appeals. In the case of the latter, the court was concerned with the merits of the appeal, while in the case of the former, the court was concerned with legality. This difference, the court noted, manifested itself in the substitution by the appeal court of its own decision for that of some other body when an appeal was allowed, whereas in *certiorari* proceedings the court was concerned with the question whether an order under attack should be allowed to stand or not; and that at the heart of *certiorari* proceedings was maintenance of the rule of law. In *Boyce v Beckles*,[4] the court noted that an order of *certiorari* was a discretionary remedy which, on an application for judicial review, a superior court issues to quash the decision of an inferior tribunal or authority, if it finds that the inferior body had not exercised its power according to law, and it thought that it should have exercised its discretion in favour of the applicant.[5] It continued that, given the discretionary nature of the remedy, there was no guarantee that a court, on a consideration of all the issues, would issue the order *certiorari* sought. The court then quoted the following passage from Wade and Forsyth:

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1 GY 1969 CA 9.
2 Ibid at 4–5.
3 BS 1986 SC 9.
4 BB 2004 HC 2.
5 Ibid at [8].

> *Certiorari* thus performs a function not unlike that of a declaratory judgment: by quashing the Court declares that some purported decision or determination is irregular or futile and therefore of no effect in law. The question at issue has not been lawfully determined, and the responsible authority must start again and determine it properly.[6]

The court explained that, in *certiorari* proceedings, its role was to ensure that the inferior court or tribunal was possessed of jurisdiction or had not exceeded its jurisdiction or wrongfully exercised its jurisdiction; and that in the majority of cases the party adversely affected by the order of the *inferior* court will seek to have it quashed whilst the other party would contend that it should stand.

In *Ex p Schaper*,[7] the applicant sought *certiorari* to quash the decision to revoke his permit to visit Belize. The court noted that one of the main grounds under which an order of *certiorari* would issue was to quash a decision made in breach of the rules of natural justice. It continued that generally, however, *certiorari* would not issue to quash decisions of a legislative character and that its history indicated that it had been used to control all kinds of administrative as well as judicial actions. In *Gegg v Marin*,[8] the court noted that in deciding whether to grant *certiorari* the court would take account of the conduct of the claimant and consider whether it had not been such as to disentitle him to relief, particularly where such conduct was unreasonable and where the claimant had acquiesced in the irregularity complained of or conducted himself in such a way as to waive his right to object.[9] In addition, in *HMB Holdings v Cabinet of Antigua and Barbuda*,[10] the respondents argued that *certiorari* was not available in matters of the exercise of sovereign or prerogative powers which concern or related to the public interest or to issues involving socio-economic issues and decisions.[11] They continued that it was for the Cabinet and Parliament to decide what was in the public interest, and whether it was necessary to acquire a person's property for public purposes under the Land Acquisition Act (LAA); and that the court was not in a position to substitute its judgment for that of the Cabinet and Parliament of Antigua and Barbuda. They continued that *certiorari* was not available when a decision was made or acts were done in accordance with the express provisions of an Act of Parliament.[12] The LAA, the respondents claimed, gave statutory force to the Government's right of eminent domain, so if the acquisition was made in accordance with the provisions of section 3 of the LAA, there could be no basis for an order of *certiorari*. In addition, they claimed that *certiorari* was only available in respect of a final decision that affects the legal rights or legitimate expectations of a person.[13] The respondents further argued that the 'decisions' impugned were not in the nature of final decisions; and the final act of acquisition was the publication of the Declarations in the Official Gazette. The LAA, they claimed, provided for a right to be heard only in respect of matters arising after the acquisition and particularly in relation to compensation. The respondents also argued that *certiorari* was not available if the statute under which a decision was made provided a remedy; in this case, the LAA provided the remedy of compensation.[14]

The court ruled that the claimant's argument was, first, that the Crown gave an undertaking and entered in a consent order in the Court of Appeal to hold off the acquisition for a

6 Wade and Forsyth, *Administrative Law* (8th edn), 2000, Oxford: Oxford University Press, 600.
7 BZ 1995 SC 2.
8 BZ 2008 SC 27.
9 Ibid at [72].
10 AG 2002 HC 19.
11 Ibid at 19.
12 Ibid.
13 Ibid.
14 Ibid.

period of six months to permit the claimant to take certain steps; second, that the claimant, relying on that undertaking, took steps and spent large sums of money, and was entitled to consider that it was performing as it had agreed to, and a legitimate expectation was thereby created; third, that the respondents were under an obligation to give the claimant notice of their reliance on the effluxion of time, and their failure to give such notice was so unfair as to amount to an abuse of power and a breach of natural justice; and fourth, that for the respondents to have proceeded with the compulsory acquisition in those circumstances amounted to an illegality, an abuse of power in disregard of their duties to treat with the claimant fairly and reasonably.[15] The court accepted the arguments advanced by the claimant and not those of the respondents.[16] It claimed that *certiorari* was never available in land acquisition matters; or that if the court were to grant the relief sought by the claimant the court would necessarily be substituting its judgement for that of the Cabinet; or that the remedy of compensation provided by the LAA rendered *certiorari* unavailable; or that the Attorney General could not by an undertaking, especially one embodied in a consent order made in the Court of Appeal, fetter the exercise of Cabinet's discretion to acquire lands for a public purpose; or that the allegations of abuse of process in this case were not supported by particulars.[17] The court therefore ruled that the issues raised by the claimant would be contested by the defendants and it would be for the court, having heard the evidence and the argument, to determine the validity of the claim; but the claim passed the test of a 'scintilla of a cause of action'.

Public authorities must not exceed their jurisdiction; if they do so, *certiorari* will lie to quash a decision made in excess of jurisdiction. In *Jackman v Superintendent of Prisons*,[18] the court noted that the writ of *certiorari* was a very old and high prerogative writ drawn up for the purpose of enabling the court to control the action of inferior courts and tribunals and to make it certain that they did not exceed their jurisdiction; and therefore the writ of *certiorari* was intended to bring into the Supreme Court the decision of the inferior tribunal, in order that the court may be satisfied whether the decision was within the jurisdiction of the inferior court. In *In Paharsingh*,[19] the applicant sought *certiorari* to quash revocation of the applicant's permit to reside in Belize. The revocation was made under the Immigration Ordinance. The court noted that, in order to determine whether *certiorari* lay, it was necessary to determine the legal conditions that were necessary for the issue of that order from the court.

It continued that the present day scope of *certiorari* was clearly stated by Lord Parker CJ, in *R v Criminal Injuries Compensation Board, ex p Lain*:[20]

> [t]he position as I see it is that the exact limits of the ancient remedy by way of *certiorari* have never been and ought not to be specifically defined. They have varied from time to time, being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no file in the strict sense of the word, but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty . . . Finally, it is to be observed that the remedy by order of *certiorari* has now been extended to cases in which the decision of an administrative officer is arrived at only after an inquiry or process of a judicial or quasi-judicial character. In such a case this Court has jurisdiction to supervise that process.[21]

15 Ibid at 33.
16 Ibid.
17 Ibid at 34.
18 BS 2006 SC 48.
19 BZ 1988 SC 8.
20 [1967] 2 All ER 77.
21 Ibid at 78.

These public law remedies are always discretionary, so the courts would necessarily weigh various factors to determine whether they should lie in any particular case. In *Re Aubrey Norton*,[22] the court noted that the discretionary remedies of *certiorari* and prohibition were employed primarily for the control of inferior courts, tribunals and administrative or other public authorities.[23] It continued that it was a form of judicial review whereby the acts of these courts, tribunals or public authorities could be quashed if it was found that they had acted outside of their mandate or unfairly even within their mandate or jurisdiction. The court was of the opinion that, over the years, judicial review had undergone tremendous changes, particularly in England, where nearly every tribunal or authority which exercised administrative functions in one form or another was subject to judicial review.[24] It noted that these functions were no longer confined to judicial or quasi-judicial functions, and the decisions of ministers had often been brought before the courts to be quashed. The court explained that the courts in Guyana were lagging far behind in this branch of administrative law because the English Rules of Court expressly provided for judicial review, and laid down the procedure to be followed.[25] It continued that the writs of *certiorari* and prohibition in their old forms were still available in the Guyanese legal system. In addition, it was pointed out that *certiorari* was used to bring before the High Court the decision of some inferior court or tribunal in order that it might be investigated.[26] In *Re Branch*,[27] the court noted that the applicant sought an order of *certiorari* to quash two convictions, namely one for the offence of driving a tour coach without being the holder of the appropriate driving licence contrary to section 61(1) of the Road Traffic Act (RTA) and the other for driving the tour coach when it was not insured in respect of third party risks contrary to section 37 of the RTA. The court claimed that there had clearly been a miscarriage of justice and the question for its consideration was whether *certiorari* should issue against the magistrate for the purpose of having the conviction orders and sentences quashed.[28] The court held that on the evidence it was satisfied that the applicant was misled and that the question should be answered in the affirmative and that he entered the pleas of guilty because he was so misled.[29] The magistrate gave the applicant the impression that she had accepted the word of the prosecutor and had not looked at the documents which would have satisfied her that the applicant was not guilty. However, she proceeded to tell the applicant that the prosecutor was not satisfied with his documents and that the charges would not be withdrawn.[30] The court claimed that the attitude of the magistrate, in not examining the documents, when taken in conjunction with what she told the applicant, was capable of creating in the mind of the applicant and created in his mind the impression that what the prosecutor said was true, and the applicant acted to his detriment by pleading guilty when he was clearly not guilty. The court concluded that the magistrate erred and in so doing the applicant was not afforded a fair trial in that he was convicted for two offences which he did not commit.[31] It explained that this case came fairly and squarely within the category of cases which justify the grant of an application for *certiorari* to quash the convictions and sentences.[32]

22 GY 1998 HC 1.
23 Ibid at 6.
24 Ibid.
25 Ibid.
26 Ibid.
27 BB 1992 HC 9.
28 Ibid at 8–9.
29 Ibid at 11.
30 Ibid.
31 Ibid at 12.
32 Ibid.

In *Re Linerero*,[33] the applicant applied for an order of *certiorari* to quash the decision by a magistrate who rejected certain persons as sureties for the purposes of granting bail to the applicant. The question for the court was whether the appropriate remedy was *certiorari* or *mandamus*.[34] The court noted that in the course of the argument the application was treated as one for *certiorari* – though it was not so entitled. It claimed that it might well be that the draftsman used a precedent intended for use in England under the law as it was where the prerogative writs had been abolished and application was made for an all-embracing remedy of judicial review.[35] The court claimed that this was not the situation in the Bahamas and that the application was treated as an application for *certiorari*. It continued that, to a large extent, the distinction between the remedies, assuming they might, in many circumstances, be interchangeably available, would rest in the purpose to be achieved.[36] The court noted that *certiorari* would lie to quash the determination. However, it explained that where, as in the instant case, the decision was negative in effect – that is, a refusal to accept the sureties as bail – quashing altered nothing and thus had no effect. The court claimed it would be different if the determination required some action or terminated some right that had been enjoyed by the applicant.[37] It explained that the effect of quashing would then be to relieve the applicant from being compelled to act or to restore the right and that, against that background, *mandamus* requiring the magistrate to act seemed the more effective remedy. However, the court nonetheless held that the remedy of *certiorari* appeared legally appropriate in the circumstances of this case and accordingly it issued the writ to quash the decision challenged.[38]

MANDAMUS

Another of the public law remedies is that of *mandamus*, which is used to compel the performance of a public duty. In *Belize Institute for Environment Law v Chief Environmental Officer*,[39] the claimant sought orders of *mandamus* directed against the defendant and a declaration that it was unlawful for the defendant to refuse to monitor and enforce the Environmental Compliance Plan for Chalillo Dam.[40] The court claimed that there should be no doubt about the power of the High Court, in an appropriate case, to issue an order of *mandamus*.[41] It then quoted from Wade and Forsyth in *Administrative Law*, who, in discussing the nature of *mandamus* as a public law remedy, stated, first, '[t]he commonest employment of *mandamus* is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him . . . *mandamus* deals with wrongful inaction'; and second, '[t]he essence of *mandamus* is that it is a . . . command . . . ordering the performance of a public legal duty. It is a discretionary remedy and the court has full discretion to withhold it in unsuitable cases.'[42] The court noted that Order 56, rule 1(3) provides that 'judicial review' includes the remedies 'whether by way of a writ or order (c) *Mandamus*, for requiring performance of a public duty . . .'. It continued that the discretionary nature of the remedy should equally not be in doubt and the court would only order it in a clear

33 BS 1985 SC 26. See also *Re Serran* GY 1969 CA 8.
34 BS 1985 SC 26 at 7.
35 Ibid.
36 Ibid at 8.
37 Ibid.
38 Ibid.
39 BZ 2008 SC 13.
40 Ibid at [73].
41 Ibid at [74].
42 9th edn at 615 and 616.

and appropriate case.[43] In *Re Belize Telecommunications Ltd*,[44] leave was granted to the applicant to apply for *mandamus* to require the Director of Telecommunications ('the Director') to keep a register. The court noted that with regard to leave to pursue the order of *mandamus* regarding the keeping of a register of telecommunications licences and allowing access by the Director, it thought that, clearly, the applicant had an arguable case on this as well as a legitimate interest, because it was a licensed telecommunications operator. The court stated that the Director was under a statutory duty by the provisions of section 14 of the Telecommunications Act (TA) to keep a register of telecommunications licences and orders issued or made under the TA.[45] That section provides that the register shall be open to the public for inspection during such hours and on the payment of such fee as the Minister may prescribe; and that any person, on payment of any prescribed fee, was entitled to a copy of or extract from any part of the register, which shall be certified as a true copy or extract.

The court explained that the applicant asked the Director to allow it to inspect the Register of Licences, but no response was forthcoming from the Director.[46] It noted that the Director's statutory duty to keep a register of licences was a continuing one; and a failure or neglect to perform could be raised at any time. As a result, the court held that the applicant was entitled to leave to pursue the remedy of *mandamus* it sought and granted leave to the applicant to have judicial review of the Director's action or inaction, in relation to the duties imposed on him by section 24 of the Act.[47] The court claimed that, historically, *mandamus* was a writ of grace as part of the prerogative writs: it alleged a neglect of a public duty.[48] On the facts, it observed that this was of especial relevance in Belize where, although the old prerogative writs of *mandamus*, prohibition and *certiorari* were no longer issued by the court, it had, nonetheless, statutory power to grant *mandamus* in all cases where it appeared to the court to be just or convenient to do so; and that the former prerogative writs are now available as orders of *mandamus*, prohibition and *certiorari*. The court continued that their availability as remedies were, however, subject to rules of court which, since there were none in Belize, have to be extrapolated from the practice and procedure of the High Court of England and Wales as permitted by section 60 of the Supreme Court of Judicature Act.[49]

Mandamus also lies against officers of the court. In *Boon v Matadial*,[50] the issue for the court was whether *mandamus* could lie against the Registrar of the High Court to direct him to grant letters of administration of the estate of the deceased to the applicants. The respondent submitted that *mandamus* could not issue against an officer of the court.[51] The court claimed that there was no doubt that both the Comptroller of Inland Revenue and the respondent Registrar had misconstrued the relevant provisions of the Stamp Act and, had they not done so, letters of administration of the estate of the deceased would, in its opinion, have been granted to the applicants several months previously. In *Smith v Statutory Authorities Services Commission*,[52] the respondent claimed that the *mandamus* sought in the first application would have been exposed to strong resistance because the applicant did not assert her rights prior to invoking the court's jurisdiction.[53] The

43 BZ 2008 SC 13 at [76].
44 BZ 2002 SC 1.
45 Ibid at [32].
46 Ibid at [33].
47 Ibid at [34].
48 Ibid.
49 Ibid.
50 KN 1971 HC 4.
51 Ibid at 4.
52 TT 2007 HC 52.
53 Ibid at [6.15].

court claimed that, as it transpired, the order of *mandamus* was not pursued by the applicant at the trial but the submission was no less unhelpful. The court then quoted Wade and Forsyth for 'an "imperative rule" that an applicant for *mandamus* must have first made an express demand to the defaulting authority, calling upon it to perform its duty and that the authority must have refused'.[54]

In *Charles v Jones*,[55] Sykes J claimed that the applicant asked for *mandamus* to compel the Ministry of Education (MoE) to advise Scotiabank Jamaica Foundation ('the Foundation') that she was the top-performing female student for the 2007 GSAT examinations.[56] The respondent claimed that because a court in judicial review proceedings was concerned with process rather than outcome the court would not compel a public authority to exercise its discretion in any particular way.[57] This, it noted, was in keeping with the principle that the exercise of the power was vested in the decision maker and not the courts. The respondent continued by saying that the MoE had already exercised its discretion not to notify the Foundation that Kristi received the highest score for female students;[58] that it was not established that the MoE failed to exercise its discretion according to law; and that the best that the court could do was to order the MoE to exercise its discretion according to law.[59]

Sykes J claimed that if the MoE did not have any evidence on which it could have decided that Kristi was the beneficiary of examination fraud then it must necessarily follow that it failed to exercise properly any discretion that it had.[60] He continued that once it was accepted that Kristi was the top female student there was really no discretion (other than a possible discretion to supply the information or not) to exercise because the sole basis for the award of the Foundation scholarship was best grades for female candidates. He claimed that the only discretion that can properly exist was whether to supply the information or not but the discretion could not include power to supply incorrect information.[61] The respondent claimed that *mandamus* should not be given because there was no evidence of a demand and a refusal.[62] Sykes J said that that proposition was not as wide as it appeared, and the requirement that before the court would issue a *mandamus* there must be a demand to perform the act sought to be enforced and a refusal to perform it was a very useful one, but it could not be applicable in all possible cases. He continued that one writer has said that the public body was likely to be aware of the need to act, from the conduct of the parties, and the circumstances of the case, rather than from a formal demand and refusal.[63] Sykes J claimed that Wade and Forsyth have also suggested that this rule, in some instances, does not apply with full rigour and that the demand and refusal principle is based on the idea that the 'the party alleged to be in fault [needs to know] distinctly what he was required to do, so as to exercise an option whether he would do it or not'.[64] On the facts of the case, Sykes J held that the MoE knew what it was required to do, thus a demand and refusal would be unnecessary in this context.[65] He explained that this was borne out by the fact that the MoE supplied the name of another female candidate and that the true reason for

54 Wade and Forsyth, *Administrative Law* (9th edn), 2004, Oxford: Oxford University Press, 626.
55 JM 2008 SC 47.
56 Ibid at [65].
57 Ibid at [66].
58 Ibid.
59 Ibid.
60 Ibid at [67].
61 Ibid.
62 Ibid at [68].
63 Ibid at [69], citing from C. Lewis, *Judicial Remedies in Public Law* (3rd edn), 2004, London: Sweet & Maxwell, ch 06–065.
64 JM 2008 SC 47 at [70], citing from *Administrative Law* (9th edn), op. cit., at 626.
65 JM 2008 SC 47 at [71].

mandamus not to issue in this case was that there was no evidence before him that the MoE was under a statutory duty, as distinct from a private law obligation, to inform the Foundation of who was the top-performing female student.[66] Sykes J claimed that the applicant was not able to point to any specific statute or regulation that imposed the duty in respect of which Kristi was seeking *mandamus*; consequently, he refused to grant that remedy.

Director of Personnel Administration v Cooper[67] concerned the legality of the appointment by the Cabinet of the Public Services Examination Board to regulate examinations throughout the public service in Trinidad and Tobago. The Court of Appeal considered that, although there was no need to discuss the judge's discretion to order *mandamus*, it would nonetheless make a few observations.[68] It noted that under the Rules of the Supreme Court order 53 as well as the Judicial Review Act of Trinidad and Tobago (JRA) a judge could make an order of *mandamus* requiring a person, corporation or tribunal to perform a specified public duty relating to its responsibilities.[69] It continued that, although the judge had discretion to make these orders there were certain limits to this discretion – the order must command the party to do no more than it was legally bound to perform. The court claimed that the judge ordered restrictions on the Public Service Commission (PSC) regarding further promotions in the Police Service. It noted that the PSC was not legally bound to stop promotions or to restrict promotions in any way. Additionally, the court noted that, under Chapter III of the PSC Regulations, the role of the PSC dealt with appointments, promotions and transfers and therefore any restrictions imposed on promotions where a party had followed the necessary avenues for promotion might lead to allegations of prejudice and unfairness. It continued that the Cabinet-appointed Board did not violate any principle of the Constitution.[70] As a result, the court held that the judge was not justified in restricting further promotions in the Police Service; and neither was he justified in imposing time limits since the PSC was not the body responsible for appointing the Board.

The court has noted that, although prohibition lay to prevent a public body acting without jurisdiction or contrary to the rules of natural justice, *mandamus* commands such a body to perform a public duty, judicial or otherwise, imposed on it by law.[71] In *Estwick v St Lucia Cooperative Bank Ltd*,[72] the applicant sought leave to appeal the trial judge's decision to refuse an application by the applicant for the issuance of an order of *mandamus* against the respondent. The trial judge refused the applicant's application and his subsequent application for leave to appeal against that refusal of the order of *mandamus* on the ground that both applications were an abuse of the process of the court.[73] The court noted that in his *mandamus* proceedings the applicant sought an order to compel the respondent to restore title to a certain property to him on the ground that the respondent had granted the applicant a total release and discharge of a certain hypothecary obligation that had attached itself to the property. The court claimed that the record showed that the very issue involved in those *mandamus* proceedings was the issue in a civil suit brought by the applicant against the respondent and which suit was awaiting a hearing date from the court.[74] The court claimed that for it to grant that application, the applicant must show an arguable ground of appeal. The respondent claimed that there could not be any arguable ground of appeal because the institution by the applicant of *mandamus* proceedings in the

66 Ibid.
67 TT 2005 CA 5.
68 Ibid at [58].
69 Ibid at [59].
70 Ibid at [61].
71 *Re Arlington Edwards* BB 1978 HC 16 at 15.
72 LC 1994 CA 2.
73 Ibid at 11.
74 Ibid.

circumstances of the applicant's alleged grievance was a misconception by the applicant of the law relating to judicial review proceedings.[75] The respondent argued that because it was not an inferior court, tribunal or body or a person carrying out quasi-judicial functions or charged with the performance of public acts and duties, the court had no jurisdiction to issue an order of *mandamus* against it. The court noted that an application for an order of *mandamus* was by way of judicial review stating that the nature of judicial review was explained as the process by which the High Court exercised its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carried out quasi-judicial functions or who were charged with the performance of public acts and duties.[76] It continued, quoting *National Federation of Self Employed and Small Business Ltd*,[77] that *mandamus* was only granted to compel performance of duties of a public nature; and that it would, therefore, accordingly not issue for private purpose, that was, for the enforcement of a merely private right. The court claimed that what the applicant was seeking to enforce in these proceedings was purely a private right against a private body that was not charged with the performance of public acts.[78] *Mandamus*, it held, could not therefore lie in these circumstances and, as a result, the applicant had no arguable ground of appeal.

In *Francis v Public Utilities Authority*,[79] the applicant sought *mandamus* to compel the Public Utilities Authority to provide it with electricity. The court noted that it was well settled that the court has the power to compel an authority to exercise its functions/powers properly.[80] The court claimed that it should never shirk from its responsibility to ensure that public bodies and functionaries act within the letter of the law; similarly where there are allegations that public bodies have refused and/or neglected to perform their public functions the court has also recognised its power to command that public functionary to perform the requisite function; and originally this was achieved by the person aggrieved applying to the court for a prerogative writ of *mandamus*. It continued that, under the new dispensation, the court in judicial review could properly grant deserving applicants, in a properly made-out case, an order of *mandamus*.[81] In *National Contractors Limited v National Development Corporation*,[82] the court noted that the order of *mandamus* was, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and was in the nature of a public duty.[83] In *Re Foulkes*,[84] the applicant laid a complaint before the learned magistrate in the form of a private prosecution but the magistrate refused to draw up and sign a formal charge as required under the Criminal Procedure Code Act ('CPC Act'). The applicant sought an order of *mandamus* requiring the magistrate to hear and determine the complaint laid pursuant to sections 54(2) and (4) of the CPC Act. The applicant claimed that the failure of the magistrate to perform his duty under section 54 violated the rights of the applicant, who sought an order of *mandamus*, having made the required demand on the magistrate to perform the duty prescribed.[85] The applicant argued that every citizen had a right to have every complaint ventilated and the court

75 Ibid.
76 Ibid.
77 *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.
78 LC 1994 CA 2.
79 AG 2007 HC 12.
80 Ibid at [44].
81 Ibid.
82 LC 2000 HC 10.
83 Ibid at [7].
84 BS 1991 SC 25.
85 Ibid at 6.

could not consider extraneous matters, such as the large number of cases already in the 'pipeline' and the delay that new and apparently less weighty cases would occasion.[86] He continued that each citizen had the right to bring complaints in the manner prescribed by law and, in this case, in support of the complaint the applicant had tendered to the magistrate a body of evidence. The applicant conceded that, as *mandamus* was a discretionary remedy, the court could look at whether the complaint was vexatious, notwithstanding that it found that the magistrate's consideration was premature. The applicant claimed that the magistrate conflated the process before him so that he decided that the complaint was 'frivolous or vexatious or otherwise an abuse of the process of the court' before a formal charge was drawn up.[87] The court noted that, had a formal charge been drawn up, it could have reviewed the findings on the substance of the complaint upon the applicant's obtaining the certificate of refusal from the magistrate. The court then quoted from de Smith for the view that:

> [i]n some cases the Courts have refused applications for *mandamus* to restore to office persons who have been irregularly removed, on the ground that the remedy might be of no use to the applicant, because it would still be open to the competent authority to remove him by the proper procedure. There are also decisions in licensing cases to like effect. Generally, however, apprehension of the probability (as distinct from the certainty) that the applicant will ultimately fail to obtain the objective at which he aims has not been regarded as a sufficient reason for the Court to exercise its discretion against him. This is clearly the sounder approach.[88]

On the facts, the court held that it was clear that the magistrate had refused to carry out his duty under section 54(4) and the applicant sought an order of *mandamus* requiring him to do so.[89] The court adopted the view of de Smith and would not presume that, at the proper stage, the magistrate would come to the same conclusion that he did on the substance of the complaint and that, in any event, were he to do so, the applicant had the right to approach this court again under the provisions of section 55(2).[90] As result, the court held that it should act to ensure strict compliance with the provisions of the CPC Act and therefore granted the relief of *mandamus* sought by the applicant.

In *Re Joseph Claude*,[91] the court noted that the order of *mandamus* was available to compel the person to whom it was directed to carry out some public or quasi-public duty which by law he was required to perform but which he had refused to perform and the performance of which could not be enforced by any other adequate legal remedy. It continued that it would not be used to enforce the general law of the country which could be enforced by action; nor would it be used to enforce the performance of a ministerial act by a servant of the State unless it clearly appeared that the enactment imposing the obligation created a duty towards the applicant for the order of *mandamus*. In addition, the court would not grant *mandamus* where it would not serve the public interest.[92] In *Re Elliot Mottley*,[93] the court noted that it was not at all unusual in the Commonwealth of the Bahamas to include a prayer for both orders of *certiorari* and *mandamus* in the same originating motion.[94] It claimed that it could see no reason, in principle, which prevented this, nor had any been advanced to it. The court claimed that the issue of an order of *mandamus* in such cases would not arise unless a decision to grant an order of *certiorari*

86 Ibid at 10.
87 Ibid at 12.
88 de Smith, SA, *Judicial Review of Administrative Action* (3rd edn), 1973, London: Stevens, 501.
89 BS 1991 SC 25 at 13–14.
90 Ibid at 14.
91 TT 1978 HC 1.
92 *Re Mahabir* TT 1999 HC 67.
93 BS 1987 SC 116.
94 Ibid at 7.

was made. In addition, it noted that the law in relation to orders of *mandamus* would have to be separately considered and it should not be assumed that the order of *mandamus* would automatically follow upon the grant of the order of *certiorari*.

PROHIBITION

Although *certiorari* quashes a decision of a public authority after it has acted unlawfully, an order of prohibition prevents the public authority from acting in a way that is unlawful. This order is usually granted before the public authority has acted unlawfully. In *Bazie v Attorney General of Trinidad and Tobago*,[95] the court noted that an order of prohibition may be granted to restrain an inferior court, such as a court martial, if it failed in its duty to act in good faith, and to listen to both sides, and to give a fair opportunity to the parties in the controversy adequately to present their case and to contradict any relevant statement prejudicial to their view. The court noted that for purposes of prohibition, the jurisdiction of an inferior court might be impugned where there was or was likely to be a breach of fundamental or natural justice.[96] As a result, it claimed that it follows, therefore, that in *ex parte* proceedings for an order of prohibition, where an allegation pointing to a breach of fundamental or natural justice impugns the jurisdiction of the court, the proceedings should be subject to the provisions of section 13 of the Supreme Court of Judicature Act on the ground that the applicant was being deprived of the protection of the law. Accordingly, the question to be determined by the court was whether the appellant impliedly alleged (a) the likelihood of his being deprived of his life, liberty, or security of his person otherwise than by due process of law; or (b) that what was likely to take place before the court martial was a matter so vicious in quality that it violated a fundamental principle of justice and might result in the appellant being deprived of the protection of the law.[97] The court explained that the writ of prohibition was a judicial writ calculated to prevent an inferior court from usurping a jurisdiction not legally vested in it.[98] It then quoted Short and Mellor for the view that '[i]t is wholly collateral to the original proceedings, and is in no sense a part of the action prohibited, its object being merely to keep inferior Courts within the limits of their own jurisdiction.'[99]

The order of prohibition is usually requested with an order of *certiorari*. In *Linton v Hyman*,[100] the court also considered, on an application to quash the decision of the Acting Chief Magistrate and prohibit the Acting Chief Magistrate from further hearing of the matter, whether it should prohibit the Acting Chief Magistrate from hearing further any of the complaints.[101] The court noted that prohibition was used to prohibit the future performance of an unlawful act by a public authority and that it was also used to prevent a respondent from acting or continuing to act in such a way to abuse jurisdiction or offend against the principles of natural justice.[102] Since the court ruled that the Acting Chief Magistrate acted lawfully and within her jurisdiction it refused to grant the application for prohibition, as requested.[103] In *Paradise Island Ltd v Knowles*,[104]

95 TT 1971 CA 7.
96 Ibid at 8.
97 Ibid at 9.
98 Ibid at 5.
99 Short and Mellor, *The Practice of the Crown Office* (2nd edn), 1908, London: Stevens & Haynes, 252.
100 AG 2006 HC 10. See also *Ex p Stephenson* JM 1980 SC 45 and *Re Maharaj* TT 1986 HC 134.
101 AG 2006 HC 10 at [73].
102 Ibid at [74].
103 Ibid at [76].
104 BS 1994 SC 63.

the applicant sought an order of prohibition directed to the first respondent to prevent it from proceeding to entertain and/or approve applications made by the third respondent for the grant of a hotel licence and a restaurant liquor licence. The court claimed that, having found that the Licensing Authority's decision on the applications was null and void, it followed that an order of prohibition should issue to prevent the Licensing Authority from proceeding to hear and determine the application otherwise than in accordance with the law.[105] The court claimed that the law was that an applicant for an order of prohibition or *certiorari* did not need to show that some legal right of his was at stake.[106] It noted that if the action complained of was in excess of, or an abuse of power, the court would quash it at the instance of a mere stranger although it retained a discretion to refuse to do so if it thought that no good would be done to the public. The court held that in the instant case, as the applicant was alleged to be the developer of the sub-division, it was not a mere stranger and therefore had *locus standi* to make the application.[107] It therefore ruled that an order of prohibition should issue to the Licensing Authority.

Like the order of *certiorari*, an order for prohibition will lie if the public authority proposes to act in a way that is in excess of its jurisdiction. In *Re Claude*,[108] the court noted that the order of prohibition might be granted to restrain a person or body exercising judicial or quasi-judicial functions if he or it failed in its duty to act in good faith and to listen fairly to both sides and to give fair opportunity to the parties in the controversy adequately to present their case and to correct or contradict any statement prejudicial to their view. However, it noted that prohibition did not lie to correct the course, practice or procedure of an inferior or a wrong decision on the merits of proceedings. In *Johnson v Bahamas Princess Resort and Casino*,[109] the issue arose as to whether the order of prohibition lay where a minister was acting administratively, namely where a trade dispute was brought to the Minister of Labour by the respondent under the Industrial Relations Act but the Minister attempted to bring an end to the dispute by conciliation (Notice of Conciliation). The court noted that leave was granted by a judge to the applicant to apply for an order of prohibition. The applicant sought, *inter alia*, an order prohibiting the Minister of Labour (whether by himself, his deputy or appointee) from acting or purporting to act on the report of a trade dispute made against the applicant pursuant to section 67 of the Industrial Relations Act (IRA), by ordering: (1) the conciliation of the alleged trade dispute pursuant to the provisions of the IRA and from further proceeding with the hearing thereof; (2) that interim relief be granted, namely an injunction restraining the Minister from prosecuting the applicant for not complying with the Notice of Conciliation purportedly given pursuant to section 68 A(1) of the IRA; and (3) that all proceedings on the Report be stayed until after the hearing of the Originating Notice of Motion and for leave to apply for an order of prohibition. The respondents argued that the application was in substance an attempt to obtain a ruling by the Supreme Court on an issue which must be determined by an arbitration tribunal before that tribunal had an opportunity to consider the issue.[110] They also argued that the order of prohibition was being sought against a Minister who was no longer functioning; and that the remedy of an injunction was not available to restrain a prosecution, because, if a prosecution was instituted, it would be on the direction of the Attorney General and not the Minister and the court could not restrain the Attorney General from prosecuting.[111] The court noted that the

105 Ibid at 20.
106 Ibid at 22.
107 Ibid.
108 TT 1978 HC 1.
109 BS 1985 SC 30. This was applied in *Re Harvey* BS 1985 SC 40.
110 BS 1985 SC 30 at 2.
111 Ibid.

questions on which it invited the submissions of counsel were whether, first, prohibition lay where a minister was acting administratively; and second, could an injunction be granted in the absence of a writ or counter claim where the injunction did not arise out of the claim?[112]

The court noted that prohibition more usually lay to prohibit a tribunal from doing an act in excess of jurisdiction, as prohibition was directed at jurisdiction.[113] *Certiorari*, in its view, on the other hand usually required more than a bare decision as, without that, there would be nothing to quash. That distinction, the court noted, if of any relevance, was relevant to this extent only: first, it indicated in relation to the stage reached in proceedings before a tribunal whether prohibition or *certiorari* was the appropriate remedy; and second, it was not a consideration which affected the broader question of whether the court should interfere. It noted that this question was determined by considerations that did not vary because the application was for prohibition or for *certiorari* or both.[114] The court then quoted from *R v Electricity Commissioners* where Atkin LJ said:

> I can see no difference in principle between *certiorari* and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on *certiorari*, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.[115]

The court explained that, in the present case, the Minister, by ordering that the parties attend a meeting in an endeavour to conciliate their differences, was not determining questions affecting the rights of either party.[116] It claimed that his acceptance of the respondent's complaint as a trade dispute did set in motion a process which, if it reached an arbitration tribunal, might result in a decision affecting the rights of the parties, but the final stage of the process was not, as in *R v Electricity Commissioners*, a resolution of Parliament which was not subject to judicial review but was the decision of a tribunal which was amenable not only to appeal but to *certiorari*. The court observed that it would be open to the respondent to seek a ruling from the tribunal before it dealt with the merits and if that ruling was unfavourable, to challenge it by applying for an order of prohibition.[117] In addition, it noted that, if the applicant chose to ignore the Minister's Notice of Conciliation and risk prosecution, it could seemingly raise at the prosecution proceedings the point which it sought to raise by its motion. Noting that it was also open to question that the Minister was an 'integral' part of the process, the court opined that the issue was whether the Minister's decision to issue a Notice of Conciliation was of a nature that could attract judicial review.[118] The court held that the decision of the Minister in this instance was, of course, important to the applicant, but it exercised no power over him so as to affect rights beyond occasioning him inconvenience and possibly putting him to some expense.[119] It continued that, since the applicant would have had one or more opportunities to raise the objection he raised before his rights could be affected, the court considered that the circumstances did not justify judicial interference and, accordingly, it held that the applicant could not be entitled to an order of prohibition in the present circumstances.[120] As a result, it

112 Ibid.
113 Ibid at 6.
114 Ibid.
115 [1924] 1 KB 171.
116 BS 1985 SC 30 at 11.
117 Ibid.
118 Ibid at 12.
119 Ibid at 13.
120 Ibid at 13–14.

further held that there was no right in the applicant to an injunction, which was sought as an adjunct to the principal application.[121] The court explained that it would be a contradiction in terms to hold that the applicant could not stop the Minister in his continuing attempt at conciliation and yet could have an injunction to restrain a prosecution because of his refusal to attend the conciliation meeting. As a result, the application was struck out.

121 Ibid at 14.

CHAPTER 18

PRIVATE LAW REMEDIES

INTRODUCTION

In the last chapter, the traditional public law remedies, namely *mandamus*, *certiorari* and prohibition, were examined. In this one, the private law remedies, including damages, injunction (interim and mandatory), declaration, account of profits and return of money or property, available to applicants are covered. Over time, it soon became clear that those public law remedies were insufficient to meet the demands of justice in particular cases, and most of the civil procedure rules made provision for the use of private law remedies. The courts too had already begun allowing applicants to claim private law remedies in claims for judicial review. There can be no quarrel with this development as it does not in any way compromise the rationale of judicial review which is to permit the citizen to obtain redress for the unlawful activities of public authorities. These developments are not surprising and even the Administrative Justice Act of Barbados (AJA) and the Judicial Review Act of Trinidad and Tobago (JRA) have moved forward, in this regard, with the provision of private law remedies for use by applicants in judicial review litigation.

DAMAGES

Administrative Justice Act of Barbados

The question of what reliefs generally are available under the AJA, and in particular damages, was considered by the Privy Council in the following case. In *C.O. Williams Construction Limited v Attorney General of Barbados*,[1] the Board claimed that the question of whether the appellant had any prospect of obtaining effective relief in the proceedings was the most difficult question which arose, although it was not canvassed in the courts below. It continued that it was obviously impossible now, when Rayside had finished or nearly finished the contract works, to put the clock back and reverse the effect of the Cabinet's decision.[2] The Board explained that relief claimed by the appellant was a declaration that the Cabinet's decision was invalid and damages. In addition, it noted that the Attorney General argued, first, that the possible grant of a declaration alone would be academic and of no value to the appellant and could not justify the continuation of the proceedings; second, that the appellant, even if successful in striking down the Cabinet's decision, had no remedy in damages at common law; and third, that section 5(2)(f) of the AJA, on its true construction, was only intended to authorise the recovery in judicial review proceedings of damages otherwise recoverable at common law, not to create an independent cause of action for damages sustained in consequence of an administrative malfeasance under section 4.[3] The Board held that it appreciated the force of these arguments and would be inclined to accede to the first and second. However, it held that the interpretation of section 5 of the AJA raised a question of difficulty and importance which it would be quite

1 BB 1994 PC 2.
2 Ibid at 27.
3 Ibid.

inappropriate for it to determine without the benefit of any opinion expressed by the courts in Barbados and on an application to strike out.[4]

The court discussed the award of damages under the AJA and under the common law in *Cools v The Medical Council of Barbados*,[5] where the applicant sought relief against the decision of the Medical Council ('the Council') in refusing to register him as a medical practitioner and the delay of approximately six years in registering him. The court noted that section 5(2)(d) of the AJA provides that the court may grant in addition or alternatively restitution or damages in money. The respondent argued that the issue of the assessment of damages under the AJA had not engaged the court's attention in such an involved manner on a previous occasion.[6] It continued that public law attracted a special regime for the assessment of damages; and that administrative law fell squarely within public law, which could be described as the constitutional law and the administrative law areas. In addition, it was argued that most of the delay in the instant case could not reasonably be attributed to the Council.[7] The applicant claimed that *certiorari* and damages were all part of the same proceedings and that delay should not prohibit the applicant from getting damages for the wrong which the respondent had committed against the applicant.[8] She also argued that, since the respondent had forced her to come to court to vindicate her rights, the length of time it took for proceedings to come to a determination must be part of the process for which the applicant could recover damages. The court noted that, on the issue of the measure of damages, the applicant agreed that the assessment of damages in charter damage claims and the assessment of damages in administrative law claims were not very much different because they were both public law issues dealing invariably with the same kind of damages, wrongdoing which resulted from the breach of constitutional rights or the breach of administrative law rights.[9]

Since there was no track record of the actual earnings of the applicant in private practice in Barbados from which the court could determine actual loss which the applicant would have incurred as a result of the administrative wrongdoing of the respondent, the applicant suggested that the decision of the court in this regard had to be, to some extent, fairly arbitrary.[10] The court accepted that the amount of a compensatory award was to be determined according to the circumstances of the particular case and that, after carefully considering the evidence, it found that the respondent Council had wronged the applicant.[11] It continued that the Council deprived her of practising her profession as a doctor from July 1991 (90 days after her application of March 1991) until December 1996; and that this wrongdoing caused the applicant to delay the starting of her practice for some considerable time; and that, as a result of the respondent's decision, the applicant suffered great embarrassment, disappointment and humiliation.[12] The court noted that since the applicant had no track record of earnings simply because she had never worked and earned as a medical practitioner in Barbados, to as a large extent the evidence in support of the loss of income on the part of the applicant and her accountant was speculative. It continued that there was a great disparity between the evidence of both parties in this regard, ruling that, although the applicant was not a beginner in medicine, she was not likely to have made money in her first year of practice.[13] The court was of the view that she was

4 Ibid.
5 BB 2000 HC 16.
6 Ibid at 9.
7 Ibid.
8 Ibid at 11.
9 Ibid.
10 Ibid.
11 Ibid at 12.
12 Ibid.
13 Ibid.

likely to have made a profit of $20,000 in her second year of practice, $40,000 in the third year, $50,000 in the fourth year and $75,000 in the fifth year. As a result, in all the circumstances, the court assessed the applicant's compensatory award at $185,000.[14] It was clear that damages awarded to the applicant in this case were compensatory in nature; that is, to compensate her for the loss she suffered as a result of the unlawful action of the respondent.

In *Franklyn v Permanent Secretary*,[15] the court had to consider whether the applicant was entitled to damages over and above his particularised financial loss because of the seizure of his motor vehicle on the order of the defendant. The applicant claimed to have experienced inconvenience, hardship and loss. The respondents conceded that the order of the Permanent Secretary to the Chief Marshal to seize the vehicle on the authority of the Bill of Sale was unlawful in view of the fact that the Bill of Sale was void for non-renewal, contrary to the provisions of section 11 of the Bill of Sale Act.[16] The parties agreed the payment of damages totalling $6,397.34 comprising: (a) car rental for four weeks; (b) towing of the vehicle from the Court yard to Nassco; (c) checking the steering alignment; (d) checking the gas pedal and reconnecting same; (e) removal of scratches on the door; and (e) mechanical assessment comprising the replacement of shocks and the stabilising bar. However, the applicant argued that this amount was insufficient and urged the court to make the declarations sought and provide compensatory damages in respect of the wrongful and unfair acts of the respondents.[17] He argued that there was sufficient evidence of bad faith on the part of the Permanent Secretary to warrant an award by the court for (a) exemplary or punitive damages and (b) aggravated damages. He continued that where damages were at large the court was entitled to take into account the motives and conduct of the respondents; and where that conduct aggravated injury to the applicant, then damages in money accorded to the applicant would correspondingly increase.[18] Since the applicant could not prove, on a balance of probability, bad faith the court rejected his claim for an award of exemplary or punitive damages.[19] The court also rejected it because it was not pleaded by the applicant and the provisions of Order 18, rule 8(3) were clear: 'A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.'

In the court's opinion, the sole issue for determination was whether the applicant was entitled to damages over and above his particularised financial loss, namely, in the words of the applicant's attorney, compensatory damages in money.[20] The respondent argued that the applicant could claim damages for provable financial loss only, and that payment of the agreed sum of $6,397.34 was the extent of his entitlement to 'damages in money'.[21] He also argued, in the alternative, that the measure of damages should be the same as damages for trespass to a chattel in torts, which was for loss of use and damage to the chattel only. The court explained that the Caribbean was developing its own jurisprudence in this area and the English authorities were not analogous; and that, at common law, damages or compensatory damages, as presently claimed for the applicant, were not awarded by the court as the prerogative writs were only intended to quash or correct state action, rather than compensate the victim.[22] It continued that, in Barbados, the enactment of the AJA provided that in addition to the traditional

14 Ibid at 13.
15 BB 2003 HC 10.
16 Ibid at [10].
17 Ibid at [11].
18 Ibid.
19 Ibid at [12].
20 Ibid at [14].
21 Ibid at [15].
22 Ibid at [16].

remedies of *certiorari*, prohibition and *mandamus* the court may grant (f) restitution or damages in money. This, the court held, had, in effect, imported into the public law one of the private law remedies. The court was of the opinion that there were several examples of an award of damages by the Barbadian courts under the AJA.[23] It noted that in *Bolden v Attorney General of Barbados*, the plaintiff claimed and was awarded damages for his particularised and proven financial loss caused as a result of the unlawful act of the respondent; pointing out that it was significant that financial loss only was particularised and claimed.[24] It continued that this was similarly claimed and found in *Bovell v Commissioner of Police*,[25] where the applicant, a police officer, was awarded the full amount of salary which he would have received had he not been improperly suspended. The court continued that subsequent cases have challenged the argument for the respondents that the measure of damages was only provable financial loss.[26] In *Brathwaite v Forde*,[27] on a finding that the applicant suffered embarrassment, distress and inconvenience as a result of the incident, the court awarded him $5,000, which it held fair and reasonable.[28] In *Abed v Attorney General of Barbados*,[29] it was found on the evidence that the applicant must have suffered embarrassment and humiliation as a result of his detention and search, so that an award of $9,000 in damages was fair and reasonable.[30] In *Sandiford v Public Service Commission*,[31] the court accepted that the applicants suffered significant public humiliation and embarrassment caused by the acts of the respondents and awarded them about $45,000 each. It continued that the applicant's claim related primarily to inconvenience, hardship and loss occasioned by the loss of use of his vehicle and he had been compensated by agreed damages of $6,397.34 inclusive of reimbursement of four weeks' car rental.[32] The court explained that the applicant's circumstances were in no way comparable to the circumstances of the *Sandiford* case and certainly less significant than the circumstances of *Abed v Attorney General* and *Brathwaite v Forde*. The court therefore ruled that, for his inconvenience and embarrassment, it was appropriate that he be awarded of damages of $5,000, which it held was fair and reasonable in addition to the agreed amounts with respect to provable financial loss.

In *Pilgrim v Nurse*,[33] the question arose as to whether the applicants were entitled to damages under the AJA as a result of the decision of the Public Service Commission (PSC) to interdict them from performance of their duties. The question for the court was whether section 5 of the AJA contemplated recovery of damages independent of any right which might exist at common law.[34] The court noted that the AJA was passed 'to provide for the improvement of administrative justice in Barbados and for related matters' and that it was inconceivable that when Parliament enacted this innovative legislation and made specific provision for 'damages in money' that it would have contemplated only such damages as could be obtained at common law before the passing of the AJA.[35] It continued that it was not unreasonable to expect that the AJA, which was designed to give greater protection to the citizen against bureaucratic inefficiency or abuse of power, would create new remedies as part of the relief granted to those who

23 BB 2003 HC 10 at [17].
24 BB 1990 HC 4.
25 BB 1995 HC 19.
26 BB 2003 HC 10 at [18].
27 BB 1993 HC 51.
28 BB 2003 HC 10 at [18].
29 BB 1999 HC 3.
30 BB 2003 HC 10 at [18].
31 BB 1998 HC 7.
32 Ibid at [21].
33 BB 2002 HC 34.
34 Ibid at [34].
35 Ibid at [62].

suffer as a result of wrongful administrative action.[36] The court claimed that not in every case, however, in which there was procedural irregularity and the applicant succeeded, would he be entitled to damages[37] and that such damages should be awarded only in those cases where deliberate or malicious abuse of power could be shown.[38] It stated that the Canadian case of *Roncarelli v Duplessis*[39] may be a useful guide on the question of the award of damages for the unlawful acts of public officers in circumstances where the applicant would have no remedy in damages at common law.[40]

The court continued that Waterman J must have come to the conclusion in *Sandiford v Public Service Commission* that the applicants, who were all senior public officers, were unceremoniously removed from their office in circumstances which went beyond mere procedural error. After reviewing the various decisions mentioned above, the court noted that it would have been most unlikely that the applicants in *Sandiford* could have functioned effectively in the future as managers in the public service; thus, they were entitled to compensation for the public humiliation, embarrassment and considerable damage to their reputation.[41] The court claimed that the circumstances of the instant case were different, as the applicants had been suspended on half pay.[42] In light of the finding that the interdiction was invalid, it claimed that the applicant was entitled to receive the difference between their substantive salary and the amount they actually received, thus they would have suffered no pecuniary loss. It continued that all the applicants claimed that they suffered public humiliation, embarrassment and considerable damage to their reputation but provided no details of this.[43] In the court's opinion, the administrative irregularity in this case did not rise to the level of deliberate or malicious abuse such as to merit an award of damages, noting that the declarations and orders made should meet the justice of the case.[44]

Judicial Review Act of Trinidad and Tobago

Like Barbados, Trinidad and Tobago has specific legislation in relation to judicial review, in particular damages for unlawful administrative action. In *Gooding v Public Service Commission*,[45] the court noted that section 8(4) of the JRA provides that on an application for judicial review, the court may award damages to the applicant if (a) the applicant has included in the application a claim for damages arising from any matter to which the application relates; and (b) the court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages.[46] The claimant argued that as a result of the amendment of the date of his promotion he had moved to a lower position on the seniority list and his acting appointment as Assistant Commissioner of Inland Revenue was terminated.[47] Although the claimant provided details of his projected loss of

36 Ibid at [63].
37 Ibid at [64].
38 Ibid at [65].
39 [1950] 16 DLR (2d) 689.
40 BB 2002 HC 34 at [65].
41 Ibid at [73].
42 Ibid at [74].
43 Ibid at [75].
44 Ibid.
45 TT 2009 HC 262. See also *Globe Detective and Protective Agency Limited v Commissioner of Police* TT 1997 HC 113; *Gulf Insurance Limited v Central Bank of Trinidad and Tobago* TT 2002 CA 35; *Jaglal v Lakhan* TT 2003 HC 12; *Sagram v Caesar* TT 1999 HC 98; and *Samaroo v Principal of Point Fortin Junior Secondary School* TT 2001 HC 60.
46 TT 2009 HC 262 at [45].
47 Ibid at [46].

remuneration of $181,214 as well as loss of pension benefits, the court noted that neither side dealt with the claim for damages in their respective submissions. As a result, it concluded that the claimant had not established a cause of action which would entitle him to damages, thereby not meeting the requirements of section 8(4)(b) of the JRA.

It was therefore surprising, in light of section 8 of the JRA, that the issue in *Ramsaran v Comptroller of Customs and Excise*[48] was whether damages were payable on an application for judicial review. In other words, whether the appellant was entitled to damages in this judicial review application on the ground that damages would have been awarded in an action at common law, either for breach of statutory duty or negligence, based on the same factual scenario that gave rise to the judicial review application.[49] The appellant, an importer of containers for the packaging of his fruit and milk products, was entitled to import these containers duty free, once the Comptroller of Customs ('the Comptroller') was satisfied that there were no locally manufactured containers available for the packaging of the appellant's products.[50] The Comptroller required proof of the unavailability of locally manufactured containers from the appellant in the form of a 'letter of unavailability' from the Trinidad and Tobago Manufacturers Association (T&TMA) but the T&TMA was willing to provide the letter on payment of the sum of $230. The appellant successfully challenged this requirement in his judicial review application in the High Court but the trial judge, who granted the declarations sought, refused to order damages in addition.[51] On appeal, the issue for the Court of Appeal was whether this gave rise to a cause of action in law for breach of statutory duty.[52] It held that the only statutory duty owed to the appellant was to grant the exemption after the Comptroller had successfully completed the first duty, which itself was not owed directly to the appellant.[53] The Court of Appeal noted that, at best, what the trial judge was saying was that the Comptroller, by employing unreasonable, unlawful or illegal means of being satisfied about the unavailability of locally manufactured containers, erred. However, in its view, that was only a first step towards performing the only duty owed to the appellant, the grant of the exemption once the condition of satisfaction was met. In other words, the duty of being satisfied about the unavailability of locally manufactured containers was not a duty owed to the appellant so as to give rise to a private law action.[54] As a result, the Court of Appeal held that the statutory duty owed to the appellant had not yet been breached, as there was no determination by the Comptroller that he was satisfied about the unavailability of locally manufactured containers because that process had been interrupted.[55] As a result, the court held that there could be no damages for breach of statutory duty.

The court claimed that, if it was wrong, the duty imposed on the Comptroller to satisfy himself of the unavailability of locally manufactured containers was one which was owed to the appellant and which was breached by the imposition of the letter of unavailability from the T&TMA. The question, then, was whether damages were available for breach of this statutory duty.[56] The court explained that, applying this test of legislative intention, it would be seen that although section 10(a) of the Second Schedule to the Customs Act could be argued to confer a benefit on importers of containers, to determine whether Parliament intended to confer private law rights to them one had to look at the entire legislation.[57] In its view, this legislation was the

48 TT 2006 CA 8.
49 Ibid at [1].
50 Ibid at [2].
51 Ibid.
52 Ibid at [3].
53 Ibid at [9].
54 Ibid.
55 Ibid at [10].
56 Ibid at [14].
57 Ibid at [15].

Customs Act, the primary purpose of which was to legislate how and in what circumstances the State was to recover revenue from the importation and exportation into and from Trinidad and Tobago. As a result, it ruled that it could hardly be said that the general purpose of the legislation was to confer benefits on that class of individuals to which the appellant belongs, i.e. importers of containers.[58] Therefore, the court held that no private law action for damages for breach of statutory duty was available on the facts of this case.[59]

Old rules of court

In countries where there is no statutory provision relating to judicial review which provides for an award of damages, the court must resort to the rules of court and the common law to determine whether damages are payable to applicants in judicial review proceedings. In *Callenders v The Queen*,[60] the court noted that 'as a general rule damages are only granted in judicial review if it appears they would be so granted had they been able to take an appropriate action if commenced by writ'.[61] Where the Public Service Commission acted without authority when it purported to retire the plaintiff, a public officer, from his post of Assistant Secretary in the public interest, the court would assess damages based on the salary of the post of Assistant Secretary which was the post to which the plaintiff was transferred.[62] A claimant is only entitled to claim damages in relation to the judicial review claim brought; so where a claim for damages for damage to an applicant's character and reputation did not arise from the same matter to which the application for judicial review related, the court held that the applicant was not entitled to an order for damages in these proceedings.[63] In *Saga Trading Limited v Comptroller of Customs and Excise*,[64] the applicant argued that the decision of the Comptroller of Customs, in refusing to allow it to take delivery of its goods, despite the assessment and payment of duties and taxes, was illegal. The court noted that the question of whether damages were available in the action, since they were not available in an appeal to the Tax Appeal Board ('the Board'), must be considered for two reasons.[65] First, it was a factor, if they were available, in the exercise of the court's discretion to grant judicial review. Second, if the Comptroller's decision was quashed it did not necessarily follow that the applicant was entitled to all the reliefs claimed. The respondent argued that in so far as LN 27/83[66] purported to empower the court to award damages on an application for judicial review it could not confer any jurisdiction not previously held by the court.

The court claimed that LN 27/83 brought into effect a new Order 53, rule 7 (in similar terms to the English counterpart), which reads as follows:

> 7(1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if – (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and (b) the Court is satisfied that if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages. (2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

58 Ibid.
59 Ibid at [16].
60 BS 1999 SC 72. See also *Caplan v Du Boulay* LC 2001 HC 20.
61 BS 1999 SC 72.
62 *Da Silva v Attorney General of St. Vincent and the Grenadines* VC 1997 HC 23.
63 *Johnson v Commissioner of Prisons* TT 2000 HC 142.
64 TT 1998 HC 132.
65 Ibid at 36.
66 Legal Notice No. 27 of 1983.

The court explained that, in the United Kingdom, the substantive law was specifically amended by section 31(4) of the United Kingdom Supreme Court of Judicature Act in order to confer the power to award damages on the High Court on an application for judicial review.[67] It noted that there was no such provision in the law of Trinidad and Tobago and that it was clear that the Rules Committee, which was constituted under section 78 of the Supreme Court of Judicature Act of Trinidad and Tobago, could only regulate procedure and practice; rules made under the enabling provisions cannot alter substantive law or extend the jurisdiction of the courts.[68] The judge continued that the court had no jurisdiction to award damages and that, even if it did, the applicant would have to surmount other hurdles.[69] The court noted that a claim for damages on an application for judicial review was not a new head of damages but must be one which could have been made in an action commenced by writ.[70] It continued that it was not apparent under what equivalent private law cause of action and head of damages he might have claimed.[71] In addition, the court observed that Order 53, rule 7(1) was expressly made subject to Order 18, rule 12 which required the applicant to provide particulars of any special damages, which he had not done.

The courts have also made clear that an applicant must have suffered loss to claim damages.[72] Not all losses are recoverable in a claim for damages in judicial review proceedings. In *Kennedy v Latchman*,[73] the court considered the issue of whether the applicant was entitled to compensation or damages for pecuniary loss suffered when the Justice of the Peace allowed proceedings to be instituted by the complainant involving more than one offence contrary to section 39(4) of the Summary Courts Act. The court ruled that the applicant did not adduce any evidence to justify an award of damages or compensation and that it was inconceivable that the applicant suffered any damages as a result of the unlawful action of the Justice of the Peace in accepting the complaint in the form that he did.[74] The court claimed that by virtue of Order 53, rule 7, three conditions must be satisfied before an award of damages in judicial review proceedings is considered, namely: (1) there must be a claim for damages included in the statement; (2) the claim for damages must arise from the same matter that forms the basis for the application for judicial review; and (3) if the applicant had brought an action for damages at the time when he made his application for judicial review, he could have been awarded damages.[75] The court continued that while it was true that the applicant might have satisfied the first two requirements it had very serious doubts as to whether condition 3 was satisfied by the applicant. In its view, the applicant's claim for damages was for the pecuniary losses he suffered as a result of the unlawful action of the Justice of the Peace. On the facts of the case, the court held that it could not see a right of action in damages accruing to the applicant for breach of the provisions of the Summary Courts Act, neither was there a cause of action in tort against the Justice of the Peace.[76]

The court has made it clear that the loss of an opportunity to gain promotion was not being actionable and does not sound in damages.[77] In *Millette v McNicholls*,[78] the appellant stood bail

67 Ibid at 37.
68 Ibid at 37–8.
69 Ibid at 38.
70 *Luxam Industries Limited v Minister of Industry, Enterprise and Tourism* TT 1989 HC 123.
71 Ibid.
72 *Attorney General of St Kitts and Nevis v Phillips* KN 2005 CA 4 at [8].
73 TT 2003 HC 113.
74 Ibid at 13.
75 Ibid at 14.
76 Ibid.
77 *Maharaj v Public Service Commission* TT 2009 HC 188.
78 TT 2000 CA 37. See first instance decision: TT 1995 HC 111.

for her son who was on two charges of being in possession of prohibited drugs, but she failed to appear and the appellant failed to show cause why her recognisance should not be forfeited. The magistrate ordered her to pay a substantial fine or serve a term of imprisonment in default.[79] She was subsequently arrested and imprisoned in default of payment and sought judicial review of her detention. The question which arose for the Court of Appeal of Trinidad and Tobago was whether she was entitled to damages and the basis on which it should be calculated.[80] The court rejected as absurd a mathematical computation of damages.[81] It was of the view that one of the factors – and a very important one to be considered in assessing damages for wrongful imprisonment – was the length of the imprisonment.[82] The Court of Appeal emphasised that it was important that judges approach the assessment of damages in such cases in the round and that it was wrong to divide the award strictly into different compartments, one for initial shock, another for the length of the imprisonment and so on.[83] It continued that all the factors have to be taken into account and an appropriate figure arrived at. A public servant who claims damages in a judicial review action must ensure that he or she brings the action against the relevant Public Service Commission (PSC) because it was the PSC that had the power to dismiss and discipline public officers. Therefore, any award of damages would be made against the PSC and not the Permanent Secretary.[84]

In some cases, the courts have read the old rules restrictively, finding that they do not allow for damages to be claimed in judicial review proceedings. In *Re Sookdeo*,[85] the applicant had been ordered by the Hospital Manager II to pay for the month of May for alleged absence without leave but the applicant had applied for extended sick leave. The respondent argued that the applicant was not entitled to damages in judicial review proceedings and that Order 53, rule 7 of the rules of the Supreme Court and the rules of Court could not confer a substantive right; and damages was a substantive right.[86] The respondent argued that no new remedy or right to damages was introduced by the rules and that they simply provided that a claim for private law damages might be included in an application for judicial review. In addition, the respondent claimed that if a claim had been brought in private law by an ordinary action and not judicial review, and damages were included in the judicial review matter and damages in the private law action was made out, then damages might be awarded even if they have been brought in a judicial review application and not a writ of action.[87] The respondent also argued that the provision did not create any new substantive right to damages but it was a procedural provision only and that the applicant's private law claim could have been damages for breach of contract and he was entitled to damages for the breach. The applicant claimed that damages in a judicial review action could be claimed in the statement, provided a court was satisfied the applicant could have brought a writ claiming breach of contract and that such damages for the breach could be awarded.[88] The court replied that it had no difficulty in finding that the applicant could have pursued by writ a claim for damages for breach of contract and those damages would have been awarded to him. The court ruled that Parliament would have to introduce legislation in accordance with the Supreme Court Act 1981 and in particular in regard to

79 TT 2000 CA 37 at 3.
80 Ibid.
81 Ibid at 5–6.
82 Ibid at 6.
83 Ibid at 8.
84 TT 2009 HC 18. See *Perry v Guyana National Engineering Corporation* GY 1991 CA 5.
85 TT 1995 HC 134. See also *Re Frank* TT 1996 HC 7.
86 TT 1995 HC 134 at 6.
87 Ibid at 7.
88 Ibid.

damages in judicial review proceedings, holding that the applicant was not entitled to damages as claimed in his statement in this case.[89]

However, an applicant would not be entitled to damages if he could not identify and particularise his losses to enable the court to calculate exactly what damages he should be paid. In *Edoo's Drug Limted v Pharmacy Board of Trinidad and Tobago*,[90] the court considered whether the applicant was entitled to damages because of the restriction on his hours of operation instituted by the defendant. The court ruled that the applicant was not entitled to an award of damages.[91] The court noted that his working hours were voluntarily supplied. This showed his non-availability after 10.00 p.m., which strongly suggested that the pharmacy would not have been open for business after that hour, as no responsible pharmacist was on duty. It explained that the applicant could have supplied the name of a relief pharmacist and remained open for business for 24 hours. The court questioned how the applicant could claim damages for losses during periods when its only pharmacist would not have been – or would not likely have been – available. It explained that, while it was true that the damages that flow from an illegal or improper act could, in public law, as elsewhere, be recovered, it was still the duty of the applicant to set out sufficient particulars of its claim in the pleadings, which – in this case – was the Order 53 statement, and to bring evidence of his loss of profits.[92] The court questioned whether the claim was quantifiable; whether it was a claim in general damages or special damages; how many customers came to the pharmacy late at night; whether the applicant provided sufficient evidence for it to quantify an award; or whether the applicant wanted the court to refer the assessment of general damages to the Master in chambers. It explained that none of these questions were satisfactorily answered, adding that a trial judge should be told whether a claim for damages was being pursued in every case – including those in public law – and either that he would be asked to assess the damages or that it would be referred to the Master in chambers.[93] The court explained that, in the absence of such a referral, it would assume that the damages were meant to be assessed by it, and that, on the facts, there was insufficient evidence for it to make an award. In addition, it explained that there was no mystique about damages in suits for judicial review – as in all actions, a claim for damages was a relief like any other, and litigants who sought this relief must set it out in their pleadings and bring sufficient evidence in support before they became entitled to it. The court claimed that in judicial review the pleadings were constituted in the Order 53 statement and the evidence in support was contained in the affidavits.[94]

In *Gulf Insurance Limited v Central Bank of Trinidad and Tobago*,[95] the Privy Council claimed that the main additional remedy sought by the respondent was damages.[96] The Board noted that the fact that the proceedings were for judicial review was not in itself an obstacle to an award of damages, noting that Order 53, rule 7(1) provides: 'On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if – (a) he has included in the statement support of his application for leave under rule 3, a claim for damages arising in any matter to which the application relates, and (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have

89 Ibid.
90 TT 2007 HC 207.
91 Ibid at [36].
92 Ibid at [37].
93 Ibid.
94 Ibid.
95 TT 2005 PC 7.
96 On appeal from the Court of Appeal of Trinidad and Tobago: *Gulf Insurance Limited v Central Bank of Trinidad and Tobago* TT 2002 CA 35.

been awarded damages.' The Board claimed that the application for leave included a claim for damages and that rule 7(2) provides that a defendant shall be entitled to particulars of the damages claimed, but no such particulars were requested.[97] It continued that, in the Court of Appeal, Nelson JA expressed a tentative view that the claim for damages was inadequately pleaded, but the Board was of the view that, in the present case, in which it was clear that the complaint was that the Central Bank had unlawfully disposed of the assets and undertaking of the company, the reference to a claim for damages was sufficient. The Board claimed that the more serious difficulty was the requirement in rule 7(1)(b) that the applicant should have been entitled to bring an ordinary action for damages.[98] It noted that the applicant complained of a conversion of the assets and undertaking of Trinidad Co-operative Bank Limited (TCB), a claim for which TCB was the only proper plaintiff.[99] The Board explained that the individual shareholder was not entitled to bring separate proceedings in his own name for a diminution in the value of shares which would be made good by damages awarded to the company.[100] However, it noted that, exceptionally, a shareholder was entitled to bring a derivative action on behalf of the company when it was controlled by persons alleged to have injured the company who refused to allow the company to sue.[101] In the present case, the Board ruled that these conditions were satisfied, because Gulf Insurance Limited (Gulf) asked TCB for permission to use its name and they received no reply, which meant they were entitled to sue in the name of TCB. The Board claimed that the question was whether TCB was entitled to damages at all, noting that, prima facie, the unlawful disposal of its assets by the Central Bank was a conversion. However, it continued that the question was whether the Central Bank was, as the judge and the Court of Appeal thought, immunised from liability by section 44H, which applied to acts done 'in the performance, or in connection with the performance of functions conferred on the Bank under this Part'.[102]

The Board considered that the judge and the Court of Appeal gave it too wide a construction in applying it also to acts which purported to be in performance of functions conferred by the Central Bank Act but which were in fact outside the powers which it conferred. This, it continued, was particularly true when the acts in question deprived TCB of its property.[103] Noting that the provisions of this nature should be restrictively construed, the Board claimed that they should not be treated as a licence for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence. As a result, the Board therefore ruled that Gulf was entitled to an order that Central Bank pay to TCB damages to be assessed, representing what would have been a fair valuation of its assets on 12 September 1993, less the value of the liabilities transferred to First Citizens Bank Limited, with interest.[104] It noted that it was very conscious of the fact that in the opinion of Ernst & Young and Mr Jeffers, such an assessment would produce a negative figure, but they were in no position to say whether these opinions were correct or not. The Board explained that it would not be easy to establish what the true value of TCB's business had been more than 12 years ago, so that it would, therefore, be greatly in the interests of all parties if valuers from both sides could agree upon a figure, positive or negative, which would resolve the matter without the need for a judge to adjudicate between competing valuations.[105] The Board explained that if the matter did have

97 TT 2005 PC 7.
98 Ibid.
99 Ibid, citing *Foss v Harbottle* (1843) 2 Hare 461; and *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204.
100 TT 2005 PC 7.
101 Ibid citing *Wallersteiner v Moir* [1974] 1 WLR 991.
102 TT 2005 PC 7 at 19.
103 Ibid.
104 Ibid at 20.
105 Ibid.

to proceed to a formal assessment of damages, Gulf would have to amend the claim, pursuant to the leave granted by it, to join TCB as a party and to claim damages in the name of TCB. It noted that, as a condition of such leave, Gulf would have to give an undertaking to apply to restore TCB to the register if it had been struck off and in any event to apply for TCB to be wound up so that any damages were paid into the hands of an independent liquidator for distribution to all shareholders.[106] It continued that, subject to these amendments, it would allow the appeal and make an order for the payment to TCB of damages to be assessed.

New Civil Procedure Rules

Under the new Civil Procedure Rules (CPR), the court still has to determine whether damages are payable in respect of particular claims in judicial review cases. These new rules cover judicial review applications and outline the range of remedies available to the courts, including damages. In *Cabey v The Governor*,[107] the claimant's computer was seized by police as part of a criminal investigation and she sought compensation for the lost income resulting from the loss of the use of her computer data and also in respect of the value of her CPU.[108] The applicant claimed that she earned professional income of $500 per week from the use of her computer documents, and that the depreciated value of the computer at the time of seizure was $3,300, having bought it in December 2000 and applying a 20 per cent depreciation rate per annum. However, she produced no documentary proof of these amounts and these were not challenged by the defendants.[109] The court claimed that it had the power under Part 56.8 (2) of CPR 2000 to award damages on a claim for judicial review or constitutional relief which in essence provided that an award for damages might be made if the facts set out in the claimant's affidavit justified the granting of such remedy and the court was satisfied that at the time when application was made the claimant could have issued a claim for such remedy.[110] The court was satisfied that the claimant's loss had been sufficiently particularised in her affidavits, which were unchallenged.[111] Accordingly, it awarded damages to the claimant for: (a) loss of income at the rate of $500 per week as from 18 April 2003 to 14 August 2003; and (b) the value of claimant's computer in the sum of $3,300.

In *Belize Food and Transportation Limited v Attorney General of Belize*,[112] the applicant sought judicial review of the decision to ban its exportation of bread which led to loss of profits. In respect of quantum, the applicant claimed damages principally for (i) loss of profit and (ii) other expenses it incurred which included costs of dismantling the factory (bakery), notice pay to 12 employees and contract payment to Mexican engineers for dismantling equipment and plant.[113] The court claimed that, after careful consideration of the facts and the arguments and submissions of the attorneys for the parties, it was convinced and satisfied that the claimant was entitled to compensation by way of damages in respect of the loss it suffered as a result of the ban on its exportation of bread from the free zone.[114] The court rejected the argument of the defendant that the appellant's claim for damages was parasitic on the claim for judicial review

106 Ibid.
107 MS 2004 HC 1.
108 Ibid at [30].
109 Ibid.
110 Ibid at [31].
111 Ibid at [32].
112 BZ 2008 SC 32. See also *Chawla v Attorney General of Belize* BZ 2010 SC 19; and *Saldivar v Belize City Council* BZ 2009 SC 12.
113 BZ 2008 SC 32 at [21].
114 Ibid at [22].

by way of a declaration.[115] It ruled that it was satisfied that damages might be awarded in judicial review proceedings and that, despite reservations in the past on the availability of damages in judicial review proceedings, the matter was now beyond argument. The court then referred to Order 56.1(4)(b) of the Supreme Court Rules 2005; and the old English Order 53 on which, it claimed, was piggybacked application for judicial review applications in Belize, which clearly provided in its Rule 7(2) for the award of damages.[116] It continued that, in claims for damages, whether special or general, it was for the claimant to prove its claim and convince the court that it was entitled to damages because of the defendant's wrongful action, and to prove the particulars of damage claimed.[117] The court found that there was sufficient evidence that, as a result of the ban by the Cabinet on the exportation of bread from the free zone, the claimant suffered loss.[118] However, the court was not satisfied or convinced that the claimant was entitled to be compensated in damages for all the loss it claimed to have sustained as a result of the unlawful ban by the Cabinet on its exportation of bread from the free zone.[119] The court therefore awarded the applicant the following sums as damages flowing from the closure of the claimant's bakery as a result of the ban by the Cabinet of the exportation of its bread into the national customs territory: (i) $1,576,400 for loss of future profit; (ii) $23,600 for contract payment to Mexican engineers; (iii) $40,000 for the cost of dismantling the claimant's plant; and (iv) $3,600 representing notice pay to employees of the claimant.[120] The total sum awarded to the claimant was, therefore, $1,642,600[121] with interest at 3 per cent from 3 December, 2002 when permission was originally granted to the claimant to seek judicial review of the Cabinet decision to ban the exportation of bread by the claimant into the national customs territory to 25 April 2004, when the hearing of application concluded.[122]

One of the leading cases under the new rules is *Charles v Jones*,[123] where the court considered whether to allow the claimant an amendment to claim damages in judicial review proceedings against the Ministry of Education, which accused the applicant of examination cheating. The court noted that CPR 56.1(4) states that, in addition to or instead of any administrative order the court may without requiring the issue of any further proceedings grant (a) an injunction; (b) restitution or damages; or (c) an order for the return of any property, real or personal.[124] The defendant argued that damages were only awarded where there was a cause of action or breach of statutory duty and, if damages were to be awarded in this case, there needed to be specific statutory authorisation.[125] The court was of the opinion that the argument did not sufficiently recognise the effect of the Judicature (Supreme Court) Act (the JSCA), which combined, in one court, all previous courts that existed in Jamaica.[126] It claimed that there was a fusion of the administration of common law and equity; and that, traditionally, the common law courts awarded damages while declarations and injunctions were features of the courts of equity. The court claimed that, by the time of the passage of the JSCA, judicial review was an established jurisdiction of the Supreme Court of Jamaica.[127] In addition, it noted that section 52 of the

115 Ibid at [24].
116 Ibid.
117 Ibid at [25].
118 Ibid at [26].
119 Ibid at [27].
120 Ibid at [36].
121 There was an error in the judgment: the individual awards actually come to a total of $1,643,600.
122 Ibid at [37].
123 JM 2008 SC 47.
124 Ibid at [76].
125 Ibid at [77].
126 Ibid at [78].
127 Ibid.

JSCA was drafted on the basis that the court already had the power to issue writs of prohibition, *mandamus* and *certiorari*.

Sykes J continued that, when the administration of the courts became fused, it necessarily followed that there was no longer any need to have different procedural codes for each of the separate jurisdictions as was the case before the JSCA.[128] He claimed that, generally speaking (very generally speaking), once there was only one court then the remedies available in common law courts became available in suits in equity and vice versa.[129] He explained that section 48(g) empowered the Supreme Court to grant all such remedies as the parties appear to be entitled to so that so far as possible all matters of controversy between them can be settled in one claim.[130] Sykes J claimed that all the remedies listed in CPR 56.1(4) could have been granted by the courts that existed before the JSCA; so there was no need to file several claims seeking equitable or common law relief. He explained that the legal foundation for claiming damages in judicial review proceedings was in place and that once this was appreciated then the rules of court could regulate how the remedies could be claimed.[131] Sykes J noted that if statutory authorisation were needed to empower the courts to award damages in judicial review then section 48(g) provided that authority. In addition, he also noted that, in 2002, the Civil Procedure Code was swept away and replaced by the CPR, which was a new procedural code for the Supreme Court which still retained the jurisdiction it had when the JSCA was enacted.[132] He continued that the CPR was simply saying that damages which could have been awarded in common law actions were now to be awarded in judicial review proceedings and it was simply completing the logic of what had been started over 100 years ago. As a result, he ruled that damages could be awarded in judicial review proceedings and Part 56 of the CPR had widened the options of the court on judicial review.[133] Sykes J claimed that, first, judicial review as initially developed was a demonstration of the theory that the sovereign was the ultimate source of temporal justice and so she had the authority to correct any maladministration by inferior courts and tribunals; and second, since it was the sovereign exercising the prerogative power to correct maladministration of inferior courts and tribunals, the common law baulked at the idea of the citizen recovering damages arising from any misuse of power. He was of the opinion that it was not that the citizen did not suffer damage but policy weighed against the award of damages and, as a result, no great leap of imagination was required to see that maladministration might result in damage to the citizen.[134] He explained that the framers of CPR 56.4(4) gave the courts more flexibility in crafting remedies to meet the justice of the case; noting, however, that it did not follow that each instance of maladministration translated *eo instanti* into a claim for damages.[135] Sykes J claimed that the courts had developed principles relating to the award of damages in other areas where the legislature did not provide any guidance.[136] Noting that personal injury assessments were an example of this, he claimed that it could not be seriously argued that this new responsibility was beyond the judges of today. He then concluded by stating: 'Let us, with confidence, embrace the new power conferred on the court in judicial review and begin the development of principles applicable to this area of law.'[137]

128 Ibid at [79].
129 Ibid.
130 Ibid at [80].
131 Ibid.
132 Ibid.
133 Ibid at [81].
134 Ibid at [83].
135 Ibid at [86].
136 Ibid at [87].
137 Ibid.

In *Robinson v Coke*,[138] the applicant challenged the decision of the Permanent Secretary to direct him to go on leave. In relation to damages, the court claimed that there was no right to damages as a result of public law breaches but that rule 56.10 of the CPR 2002 provided that a claim for damages or restitution could be made where it 'arises out of or is related to or connected to the subject matter of the application'.[139] It also noted that the applicant must include the claim for damages either in the claim form, the statement of case or his affidavit to justify granting the relief. In the instant case, the applicant had claimed loss of salary, allowances and benefits from the date of his retirement; and he also claimed payment for leave entitlement, damages, interest and costs.[140] The respondents argued that the applicant's grounds did not reveal a separate cause of action against the Public Service Commission and, therefore, general damages and interest should not be awarded. The court accepted that the applicant was without a doubt entitled to an amount equivalent to the diminution in his salary and allowances from the date of his retirement to the date of the judgment.[141]

INJUNCTION

The applicant might also be interested in stopping the unlawful action from continuing before his judicial review application is determined on the merits. In such cases, he would seek an interlocutory injunction to refrain the defendant from continuing to engage in the unlawful activity pending the final determination of the judicial review application. An application of the relevant principles in relation to such applications is to be found in the decision of *Blakes Estate Limited v Attorney General of Montserrat*,[142] where the applicant sought an interim injunction to stay work on land designated for a public cemetery until the hearing of a claim for judicial review. The court noted that the application for interim relief, in substance, requested that no further work be done on the land designated for the public cemetery until the hearing of the claim for judicial review.[143] The court noted that both sides and itself agreed that the guiding principles to be followed when deciding whether or not a court should grant an interlocutory injunction was reflected in the judgment of Lord Diplock in *American Cyanamid Co v Ethicon Ltd*.[144] The principles to be applied are: (a) whether there is a serious or real issue to be tried; (b) the adequacy of damages to the applicant; (c) the undertaking in damages by the applicant and whether this undertaking was an adequate protection for the defendant; (d) the balance of convenience including preserving the status quo; (e) the merits of the claim otherwise stated: if the incompensable damage to claimant and defendant did not differ widely; then as a last resort the court should look at the relative strength of the claimant and defendant's case on the affidavit evidence (if this evidence was credible and not in dispute) in deciding the balance of convenience.[145] The court also noted that interlocutory injunctions were discretionary, there were no fixed rules for granting them, and that the court should not attempt to resolve complex issues of disputed facts or law.[146] The applicant claimed that the court should grant the interim injunction restraining the respondent's use of the land for a public cemetery until the claim had been heard.[147] The claimants also argued that if this was not done, and the

138 JM 2007 SC 84.
139 Ibid at [126].
140 Ibid at [127].
141 Ibid at [128].
142 MS 2002 HC 1.
143 Ibid at [5].
144 [1975] 1 All ER 504.
145 MS 2002 HC 1 at [6].
146 Ibid at [7].
147 Ibid at [15].

respondents were allowed to begin burying people in that ground, given regulation 8 of The Burial Ground Regulations, no grave could be re-opened until ten years had elapsed. In such circumstances, therefore, it argued that damages could not be an adequate remedy, because if one person was buried there the damage would be irreparable.[148] In addition, the applicant claimed that the balance of convenience should be in favour of the applicant and the interim injunction should be granted to preserve the status quo, bearing in mind that section 65 of the Physical Planning Act states that this Act binds the Crown.[149] The respondents argued that the remedy of an interim injunction was not available to the applicant since section 16(1)(a) of the Crown Proceedings Act clearly stated that an injunction could not be granted against the Crown.[150] The respondent also argued that if, as the applicant argued, building a burial ground on the proposed site would negatively affect the value of the surrounding lands, then the remedy available to them was in damages.[151] It was also argued that damages, therefore, was the most appropriate remedy, and on all the facts the balance of convenience weighed strongly for the respondent and the remedy of an interim injunction should not be granted to the applicant.[152]

After considering the hardships that each party would encounter and, in particular, whether an award of damages would adequately compensate the applicant for any injury he might sustain if burials were done on the land designated as a public cemetery before the judicial review claim was tried, the court doubted whether damages would be adequate in these circumstances.[153] The court claimed that the question was whether the status quo should be preserved, noting that, since an interim injunction would probably serve only to postpone the date at which the defendant was able to commence using the relevant land as a public burial cemetery, the balance of convenience was much greater to the applicant.[154] The court concluded that it was just and convenient, therefore, to grant the interim injunction to the applicant.[155]

In *Cariaccess Communications (St Lucia) Ltd v Cable and Wireless (West Indies) Limited*,[156] the claimant applied for an injunction to restrain the first defendant whether by itself, its licensees, subsidiaries, affiliates or howsoever from connecting new customers for internet services in St Lucia until it had interconnected the claimant to its network or until further order of the court.[157] In considering whether there was a right to injunctive relief, the court noted that the grant of an interlocutory injunction was a remedy that was both temporary and discretionary.[158] It noted that Part 17.2(3) of the CPR 2000 provided that the court may grant an interim remedy only if (a) the matter is urgent; or (b) it is otherwise necessary to do so in the interests of justice.[159] The defendant claimed that if the matter were considered to be urgent by the claimant, it was expected that there would have been a response to the first defendant's latest proposal of rates in January 2006 or that there would have been a more timely application.[160]

148 Ibid.
149 Ibid at [16].
150 Ibid at [18]. Section 16(1)(a) provides: '. . . where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of Injunction or Specific Performance, the Court shall not grant an Injunction or make an Order for Specific Performance but may in lieu thereof make an order declaratory of the rights of the parties . . .'
151 MS 2002 HC 1 at [22].
152 Ibid at [24].
153 Ibid at [26].
154 Ibid at [27].
155 Ibid at [37].
156 LC 2006 HC 12. See *Caribbean Communication Cable (Nevis) Limited v Nevis Island Administration* KN 2009 HC 22; and *Grenville Radio Station Limited v Public Utilities Authority* AG 2005 HC 1.
157 LC 2006 HC 12 at [11].
158 Ibid at [94].
159 Ibid at [95].
160 Ibid at [96].

The defendants argued that the claimant's behaviour amounted to acquiescence which undermined the claimant's application for an injunction. The court stated that, without delving into the facts contained in the affidavits, it was of the opinion that the matter was of crucial importance to the operation of the claimant's activities, that the delay in bringing this action was inexcusable and it could not be said that the matter was urgent.[161] It continued that, since there was no urgency being displayed by the claimant, it remained to be determined whether it would be in the interests of justice to grant an injunction to restrain the defendant in its future activities.[162] This, it noted, would be done in keeping with the guidelines as set out in *American Cyanamid Co v Ethicon Ltd.*[163] In respect of whether there was a serious issue to be tried, the court claimed that it needed only to investigate the merits of the case to a limited extent.[164]

Noting that all that was needed to be shown was that the claimant's cause of action had substance and reality, the court claimed that, beyond that, it did not matter as to what would be the claimant's chance of success. The court also claimed that it was of the view that the issue of whether or not the claimant was a licensee, whether there was a breach of statutory duties under the Telecommunications Act, whether there was overpricing by the first defendant, whether the first defendant was in a dominant position as regards the provision of telecommunications services, and whether the first defendant had obstructed the claimant from interconnecting to the first defendant's network, were all serious issues to be tried.[165] The court then claimed that it must also consider the question of whether the claimant could be adequately compensated by an award of damages.[166] The court, after considering the arguments of the parties, noted that it was satisfied that neither party could properly quantify any damages that would be suffered or state whether, in fact, an award of damages would be adequate, and 'it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises'.[167] It then observed that each of the parties suggested that the balance of convenience lay in its favour.[168] The defendants argued that the unavoidable inconvenience to the public was only heightened by the fact that the first defendant was currently the only provider of retail internet services in St Lucia and to grant an injunction would impact negatively on the public by depriving any person who currently did not have the service from obtaining access.[169] The claimant argued that the injunctive relief sought was narrow in that it did not encroach upon or interfere with the extensive internet subscribers to the first defendant and that the population of St Lucia was and had been prejudiced in that they had not been able to benefit from the competition provided for by the Telecommunications Act.[170]

The court, quoting from Lord Diplock in *American Cyanamid Co v Ethicon Ltd* that to the extent that 'the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case', found itself persuaded by the argument that it would be preferable to maintain the status quo.[171] It claimed that Lord Diplock commented that, in order to determine where the balance of convenience lay, a number of factors should be considered and it had to determine what weight

161 Ibid at [98].
162 Ibid at [99].
163 Ibid at [100].
164 Ibid at [101].
165 Ibid at [104].
166 Ibid at [105].
167 Ibid at [112].
168 Ibid at [113].
169 Ibid at [114].
170 Ibid at [115].
171 Ibid at [116].

should be attached to these factors.[172] It continued that, in the instant case, there were factors to be weighed such as the need for competition as provided for by the Telecommunications Act; the economic benefit to the claimant; the constraints to the business of the first defendant; the interests of the public and the benefits to the public.[173] In addition, the court was of the view that to interrupt the first defendant at this stage would be of a much greater inconvenience to the public of St Lucia, no matter how narrow as suggested by the claimant or how short the duration of such an injunction would be.[174] The court also claimed that of greater significance, and a factor to be taken into account, was that the claimant had yet to be issued with its licence; and notwithstanding the assurance that the prescribed fee could be immediately paid, there still needed to be considered the practicalities in the issuing of the licence.[175] It also took into account that the claimant had yet to lodge its complaint with the second defendant and the resolution of any subsequent dispute regarding overpricing as alleged by the claimant, noting also that the time factor involved had to be measured against the consequential inconvenience to the general public in these circumstances. The court also agreed with the defendant that the grant of an injunction at this stage would deprive any person in St Lucia who did not currently have internet access from obtaining such services and the effects of such an injunction could materially hamper the personal as well as the commercial lives of the general public.[176] As a result, the court refused the application by the claimant for the grant of the injunction.[177]

In *Marshall v Deputy Governor of the Islands*,[178] the plaintiff applied to the court for interlocutory injunctions restraining the defendants and each of them from: (a) further threatening to arrest and/or detain any of the plaintiffs; (b) arresting and/or detaining any of the plaintiffs; and/or (c) calling up any of the plaintiffs to perform mandatory military service in the Bermuda regiment or to perform any other non-voluntary service in any organisation or institution until after the trial of this action or further order.[179] The court noted that it was trite law that the issue of court proceedings itself does not prohibit anyone from doing anything.[180] In its view, this was because anyone can issue proceedings on any grounds, good or bad, and there was no vetting process at the time of issue, and no permission was required. The court, however, claimed that there was an important exception to that in public law cases, which was that they required permission, but the plaintiffs did not seek or obtain it. The court explained that, in order to prohibit someone from doing something while the proceedings run their course, it was necessary to make an application to the court for an interlocutory injunction.[181] The proper approach of the court on such an application, it continued, was set out in the well-known case of *American Cyanamid Co. v Ethicon Ltd*. In very brief summary, the court claimed that it should not be attempting to try the action or resolve conflicts of evidence at an interlocutory stage. Instead it should apply a two-stage approach, in which it asked itself the following questions: (i) is there a serious question to be tried, in the sense that the claim is not frivolous or vexatious; and (ii) only if there is a serious issue to be tried, then the court asks itself whether damages would be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction. If not, where does the balance of convenience lie?[182]

172 Ibid at [117].
173 Ibid.
174 Ibid at [119].
175 Ibid at [120].
176 Ibid at [121].
177 Ibid at [122].
178 BM 2007 SC 9.
179 Ibid at [1].
180 Ibid at [6].
181 Ibid at [7].
182 Ibid.

The court claimed that, as to the first step in the *American Cyanamid* process, namely whether there was a serious question to be tried, it was quite clear that service in the regiment was regarded as employment for these purposes.[183] The defendants argued that excluding females from the ballot was not discrimination against those males included in the ballot. It claimed that it might be discrimination against the excluded females, but they did not complain in this action, and only a person discriminated against could bring a claim under the Human Rights Act.[184] The court countered that the Act defined discrimination as including deliberately treating a person differently to another person on the grounds of sex (section 2(2)(a)). Section 6(1)(a) prohibited discrimination by 'refusing . . . to recruit any person or class of persons . . . for employment'. It claimed it was not, in other words, limited to refusing to recruit the person discriminated against; and that it could be argued that, if that was what the Act meant, section 6(1)(a) would have referred to 'refusing to recruit that person . . .'.[185] As a result, the court held that the plaintiffs had a sufficient argument to get them across the first hurdle. In relation to the next question of whether damages were an adequate remedy, the court explained that the application of this question to cases in which a public authority was seeking to enforce the law against some person was examined in *R v Secretary of State for Transport, ex p Factortame Ltd (No. 2)*.[186] The court noted that the plaintiffs might not have a remedy in damages in any event, but even if they did it might be hard to compensate them adequately if they were imprisoned for failing to report. On the other hand, the court explained that the defendants could not be protected by a remedy in damages if an injunction were wrongly granted, because they would have suffered none. After considering the statements made by Lord Goff in *Ex p Factortame Ltd (No. 2)*, the court noted that they required it to consider the strength of the plaintiffs' case, not just at the first threshold level where the question was 'is there a serious question to be tried', but again on the balance of convenience.[187] The question, in its opinion, then became whether the challenge to the validity of the law was so firmly based as to justify so exceptional a course as to restrain its enforcement. The court claimed that all citizens were obliged to obey the law unless and until it was set aside or declared invalid, and there was a strong public policy in enforcing that which outweighed individual concerns.[188]

Where such an injunction has been granted by a first instance judge, the appellate court will be very hesitant to interfere. In *Belize Water Services Limited v Attorney General of Belize*,[189] the Government of Belize privatised the supply of water and provision of sewerage and that business was undertaken by Belize Water Services (BWS). A share purchase agreement was executed whereby Cascal BV was incorporated in the Netherlands, having the majority shareholding. After a dispute, BWS initiated a judicial review of the implementation of bylaws fixing tariffs for water supply. Both Cascal BV and BWS proceeded to arbitration in the United States pursuant to the arbitration clause in the agreement. However, the Attorney General applied for an interlocutory injunction restraining the appellant from proceeding with the arbitration proceedings. The court had to consider the principles on which it should grant such injunctions in judicial review proceedings. Morrison JA stated that both Mottley P and Carey JA had cited the case of *Hadmor Productions v Hamilton*[190] and the now well-known statement by Lord Diplock of the basis on which an appellate court might be at liberty to interfere with a judge's exercise

183 Ibid at [13].
184 Ibid.
185 Ibid.
186 [1991] 1 AC 603.
187 BM 2007 SC 9 at [14].
188 Ibid at [20].
189 BZ 2005 CA 20. See *Francis v Cochraine* AG 2004 HC 53.
190 [1983] 1 AC 191.

of his discretion to grant an interlocutory injunction.[191] He continued that it was made clear that the appellate court was not permitted to substitute its own view of the facts for those of the judge who made the order; indeed, the appellate court was required to defer to the judge's exercise of his discretion and to interfere only where it can be demonstrated that he proceeded on 'a misunderstanding of the law or the evidence before him' or where his decision to grant or refuse the injunction was 'so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached' the conclusion that he did.[192] Morrison JA explained that an appellant, upon the grant of an interlocutory injunction, therefore bore a potentially onerous burden, bearing in mind that the threshold for the making of such an order was no higher than that the applicant must show that there was a serious issue to be tried. He continued, however, that onerous as that burden might be he was clearly of the view that the appellants had easily discharged it in a number of respects in the instant case.

Applicants may also claim a mandatory injunction which would compel the defendant to act in a particular way. This was at issue in *Mason v The University of the West Indies*[193] where one of the issues considered was whether the court had the jurisdiction to prevent a student from being expelled from the University's Halls of Residence. The court held that, if it was wrong on the preliminary point, it would hold that he claimant was, in any event, not entitled to an injunction, because, first, the effect of granting an injunction to the claimant in the terms in which it was sought would be to grant a mandatory injunction.[194] It continued that the injunction, if granted, would mandate the University to re-admit her to the hall. The court claimed that it was trite law that the standard which an applicant for a mandatory injunction must reach should be that the court should feel a high degree of the assurance that the grant of an interim mandatory injunction would be approved at the trial.[195] The court referred to Megarry J in *Shepherd Homes v Sandham*,[196] where he stated that '[t]he case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought to enforce a contractual obligation.'[197] The court held that the factual basis of the claimant's claim was far from being 'unusually strong and clear', which, it claimed, represented a compelling reason to refuse to grant the application for the injunction. Also, the court pointed out that the effect of granting the injunction, as sought, would be to give specific performance of the contract and specific performance was one of the remedies sought by the claimant.[198] The court stated that, importantly, it was a central tenet of *American Cyanamid* that where damages would be an adequate remedy, no injunction should lie. It accepted without reservation the submission by counsel for the University on this point that damages would be easily quantifiable by reference to a determination of the cost of alternative accommodation for the claimant and, even if the accommodation was inconvenient in that it required travelling from farther distances, the cost of that travelling would also form a part of the damages.[199] As a result, the court denied the claimant's application for a mandatory injunction.

In *Sweeting v Darville*,[200] the applicant sought an interlocutory injunction to restrain the third respondent from operating a restaurant and bar and to stop playing loud music. The court

191 BZ 2005 CA 20 at [4].
192 Ibid.
193 JM 2009 SC 5. See on appeal: JM 2009 CA 56. See also *Michael v Attorney General of Antigua and Barbuda* AG 2009 CA 1; *Public Service Commission v Minister of Health* TT 2000 HC 83; and *Sharma v Brown-Antoine* TT 2006 HC 63.
194 JM 2009 SC 5 at 23.
195 Ibid.
196 [1970] 3 All ER 402.
197 Ibid at 423.
198 JM 2009 SC 5 at 24.
199 Ibid.
200 BS 2008 SC 77. See also *Trinidad and Tobago Civil Rights Association v Manning* TT 2005 HC 23.

noted that if the injunction was granted it would, in effect, give the applicant the relief sought on the substantive application, namely preventing the third respondent from operating any business at Nirvana and from playing loud music for commercial purposes.[201] The issue for the court was whether it was appropriate to grant an injunction pending a full hearing of the judicial review application. The court noted that the leading authority pertaining to the grant of interim injunctions is *American Cyanamid Co. v Ethicon Ltd*, which set out the guiding principles on which a court's discretion of whether or not the grant of an injunction was appropriate in any particular case should be based.[202] It continued that it had resorted to the judgment of Lord Diplock in *American Cyanamid* to ground its decision inasmuch as that judgment provided a comprehensive – although not exhaustive – approach to the matters a court must put in the scales when seeking to balance the competing interests of the parties. On the evidence, the court ruled that it did not consider that the applicant's material 'fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial'.[203] It then considered where the balance of convenience lay. The applicant claimed that her well-being was adversely impacted by the music and noise coming from Nirvana; and the third respondent alleged he would suffer a financial loss if the court granted an injunction.[204] The court noted that contrasting features in the competing camps suggested physical discomfort as opposed to financial loss. In those circumstances, it claimed that the balance of convenience lay in favour of the applicant.[205] The court reasoned that, notwithstanding the length of time the complaint had subsisted and the ongoing business enterprise of the third respondent, the applicant was entitled to the relief she sought because it was of the view that she could not, unlike the third respondent, be adequately compensated in damages should her application for judicial review succeed. It claimed that an undertaking by the applicant to pay damages to the third respondent was adequate in these circumstances should her application for judicial review fail.[206] As a result, the court granted the injunction to restrain the third respondent by himself or his servants or agents or otherwise howsoever, from carrying on, or permitting to be carried on, the trade or business of hotel operator, bar and restaurant proprietor or any other trade or business, and from using the premises otherwise than as a residential home and to cease from playing loud music on lots 20 and 21 of Love Estates Sub-division called and known as Nirvana so as not to disturb the quiet of the neighbourhood.

In *Waugh v St Andrew School Limited*,[207] students, who were expelled from school after a fight, sought a mandatory interlocutory injunction to be re-enrolled at the school. The court noted that under the general guidelines established in *American Cyanamid Co. v Ethicon Ltd*, on an application for interlocutory injunctive relief the plaintiffs must show first that there was a serious issue to be tried, and second that damages were not an adequate remedy.[208] The specific guideline for interlocutory mandatory injunctions, it continued, however, required a case to be unusually strong and clear before one was granted – an obviously higher standard of probability of success than required for securing a prohibitory injunction. The court continued that, considering the first of the *American Cyanamid* guidelines, the affidavit evidence in support of the application confirmed what happened. Apart from those facts, it explained that both plaintiffs denied being involved in the incident, and both opined that the punishment was too severe

201 BS 2008 SC 77 at 6.
202 Ibid.
203 Ibid at 8.
204 Ibid.
205 Ibid.
206 Ibid at 11.
207 BS 2007 SC 1.
208 Ibid at 3.

given their respective academic and disciplinary records and the stage of their education.[209] The court claimed that the first guideline to show that there was a serious issue to be tried was a difficult one, because there was nothing pleaded nor contained in the affidavit evidence adduced on behalf of the plaintiffs that showed precisely what contractual provisions were alleged to have been breached.[210] It continued that the plaintiffs would meet even greater difficulty to show that their case was unusually strong and clear, the higher standard applicable to secure a mandatory interlocutory injunction. The court noted, first, that the application was an interlocutory process for a mandatory injunction, which, given the material before the court, did not lend itself to a compelling argument that there was a serious issue to be tried and much less so that the case was unusually strong and clear; and second, the plaintiffs, in order to succeed on such an application, and given the position they had taken, must show that the rules of natural justice had been breached, in so far as inadequate notice of the grounds for the expulsion was given, and that the parents were not given an opportunity to make representations on the merits of the expulsion.[211] It continued that neither of these things had been demonstrated convincingly if at all. The court then quoted Megarry J in *Shepherd Homes Ltd v Sandham*,[212] where he stated that: 'at an interlocutory stage, when the final result of a case cannot be known and the Court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.'

The court held that the material before it did not show, nor did it attempt to show, that the school had no power to expel a student, or that the school could not expel a student for taking part in a fight, or the filming, editing and publishing of that fight.[213] In addition, it held that neither did it disclose an 'unusually strong and clear case' that there had been a breach of natural justice, and thereby a breach of contract, committed by the school in so far as that the school failed to give adequate notice of the grounds for expulsion, or failed to give the parents an opportunity to be heard on the merits of the expulsion. As a result, the court ruled that the plaintiffs had not satisfied the first guideline of *American Cyanamid*, namely that there was a serious issue to be tried, and certainly not the higher standard relevant to mandatory interlocutory injunctions that the case was unusually strong and clear.[214] In relation to the second guideline of *American Cyanamid* – that damages were not an adequate remedy – the court claimed that it logically followed that the court would only exercise its discretion to grant the relief sought on a balance of convenience if the plaintiffs had first satisfied the court that they had an unusually strong and clear case, and, further, that damages was not an adequate remedy.[215] In its view, had the plaintiffs satisfied the first guideline, determining the balance of convenience in their favour would still present a difficulty for the court for the following reasons.[216] First, *Gianfresco v The Junior Academy*[217] demonstrated that damages could be awarded in circumstances where a student was expelled from school without due process, and damages was precisely what the plaintiffs had claimed in the alternative in their writ. Secondly, the plaintiffs' efforts to complete their secondary education at St Andrew's by their assertions that they would be a year behind in another school, and that St Andrew's was the only school available to them that could meet

209 Ibid.
210 Ibid at 4.
211 Ibid.
212 [1970] 3 All ER 402
213 BS 2007 SC 1 at 4.
214 Ibid.
215 Ibid at 5.
216 Ibid at 5–6.
217 (2001) 106 ACWS (3d) 458.

their educational expectations, was not enough on which to determine the balance of convenience in their favour, as these assertions had not been proven.[218] Thirdly, the argument that the reputations of the plaintiffs would be tarnished by the expulsion could not avail the plaintiffs. The court continued that it was common ground between the parties that the other four students expelled had secured enrolment in other schools and, further, there was no evidence that any applications to other schools by the plaintiffs had been rejected.[219] It claimed that to accept that argument would in effect remove the right of the school to expel students for cause. The court noted that, finally, granting the interlocutory relief sought, considering the process alleged to have been used to expel the plaintiffs, would provide the plaintiffs with the substantive relief sought, even if only for the period leading up to judgment; and that this should be approached with caution and the relief granted only in a clear case.[220] The court therefore concluded that its discretion could not be exercised in favour of the plaintiffs and dismissed the application for an interlocutory mandatory injunction.[221]

RESTITUTION

The application of principles of unjust enrichment to judicial review applications is of recent vintage. Indeed the common law action was only first recognised by the House of Lords 20 years ago,[222] even though 20 years earlier, in 1970, it was accepted by the Court of Appeal of Guyana at a time when the English common law scoffed at the idea.[223] The AJA of Barbados and the JRA of Trinidad and Tobago provide restitution as a remedy in judicial review applications and the new Civil Procedure Rules similarly contain such a remedy. The question arose as to whether, in the absence of these, the common law action was available to applicants in judicial review proceedings. This was decided in *Travellers Rest Lodge Belize Ltd v Haylock*,[224] where the second defendant decided that patrons had to pay a fee to access a cave. The question was whether the contract entered into by the second defendant and interested parties granting certain rights to operate tourist facilities was unlawful. The court noted that:

> there are legal consequences flowing from the declaration of an Archaeological Reserve: section 67 of the National Institute of Culture and History Act enables the Minister, after consultation with the Director of Archaeology, to specify in an Order published in the Gazette, the Archaeological Reserve or any parts of it which shall by the Order be entrusted to the care and control of the Minister responsible for tourism for the purpose of having such reserves visited by the public.[225]

The Minister of Tourism, the court noted, was given power under section 68 to make rules governing the reserves entrusted to him in respect of when and under what conditions as to charges or otherwise they shall be open to the public; and he may also make regulations relating to sanitation and safety measures, the appointment and duties of wardens and caretakers. The court held that no such order declaring No Hoc Chen an Archaeological Reserve had been made or at least put in evidence;[226] and nor was there in evidence an order entrusting it to the Ministry

218 BS 2007 SC 1 at 4.
219 Ibid.
220 Ibid.
221 Ibid at 5.
222 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
223 *Persaud v Plantation Versailles & Schoon Ordinance Ltd* (1970) 17 WIR 107.
224 BZ 2009 SC 8.
225 Ibid at [56].
226 Ibid at [57].

of Tourism or that any regulations as to access or charges in respect of it had been made. As a result, the court ruled that, consequently, there could be no basis in law for the charge for entrance fees collected from patrons of the claimant's resort.[227] In its view, the evidence was clearly that the payment was in respect of visits to 'Cave Branch Archaeological Reserve'.

The court, from its analysis of the statutory scheme relating to Archaeological Reserves and Ancient Monuments and Antiquities, concluded that the receipt (or demand as the claimants argued) of $10 per person from the claimants' guests at the National Institute of Culture and History's (NICH) to go cave tubing in the No Hoc Chen Cave was not justified as payment for visit to an Archaeological Reserve. It also added that No Hoc Chen was clearly not a declared Reserve and no regulations had been made by the responsible Minister in respect of when and under what conditions as to charges, or otherwise, it should be open to the public.[228] As a result, the court held that there was no basis in law for the charge of $10 per person for admission to No Hoc Chen, whether as an Ancient Monument or an Archaeological Reserve.[229] In answering the question of whether the claimants were entitled to a refund, the court claimed that the issue of refund of money paid by a citizen to a public authority, when there was no legal basis for the demand or payment in the first place, was now part of the wider law of restitution.[230] It continued that the facts of this case, and the relief of refund sought by the claimants, raised the question of whether the payments, over a period of time, made by the claimants to NICH for admission to No Hoc Chen should be refunded.[231] The court claimed that the principle that a citizen was entitled to a refund where the public authority had in law no right to demand or receive the payment was now established, although the parameters of this principle were not very clearly marked out or settled.[232]

The claimants argued that the principle had been affirmed by the courts as the *Woolwich* principle after the name of the case in which the principle was restated and reaffirmed by *Woolwich Building Society v Inland Revenue Commissioners (No. 2)*.[233] The court continued that, in that case, the House of Lords held that money paid by a subject to a public authority in the form of taxes or other levies pursuant to an *ultra vires* demand by the authority was *prima facie* recoverable by the subject as of right at common law together with interest. This operated regardless of the circumstances in which the tax was paid, since common justice required that any tax or duty paid by the citizen pursuant to an unlawful demand be repaid, unless special circumstances or some principle of policy required otherwise.[234] The court continued that in *Woolwich* the appellant, Woolwich Building Society, had paid, following a demand by the Revenue, tax on interest and dividends pursuant to regulations which the appellant successfully challenged on judicial review. It was eventually held by the House of Lords that Woolwich was entitled to a repayment plus interest on the sum it had paid on the impugned regulations.[235] The claimant, in the court's opinion, placed much emphasis on this principle in urging it to order a refund of the monies paid by the claimants to NICH but the defendant objected, arguing that *Woolwich* was a case of tax or other levy, whereas in the instant case the payment was in respect of cave tubing in No Hoc Chen Cave.[236]

227 Ibid at [58].
228 Ibid at [59].
229 Ibid at [61].
230 Ibid at [62].
231 Ibid at [63].
232 Ibid at [64].
233 [1992] 3 All ER 737, [1993] AC 70; (1992) 3 WLR 366.
234 BZ 2009 SC 8 at [65].
235 Ibid.
236 Ibid at [66].

The court claimed that it did not accept that the *Woolwich* principle was limited only to cases of tax or levy, but that the principle was applicable to other cases where a public authority demanded or received an *ultra vires* payment. It was only then that common justice would require and ensure that any payment by a citizen pursuant to an *ultra vires* demand or receipt by a public authority should be repaid, unless special circumstances or principle of policy required otherwise.[237] It then claimed that in a later case, *Kleinwort Benson Ltd v Lincoln City Council*,[238] the House of Lords abolished the distinction between mistake of fact and law. The court continued that before *Kleinwort Benson* recovery or refund of money paid under a mistake of law was problematic if not impossible. The court noted that *Kleinwort Benson* held, among other things, that, first, it was no defence to a claim for the restitution of money paid or property transferred under a mistake of law; and second, where the defendant honestly believed when he received the money or learnt of the transfer, that he was entitled to retain the money or the property.[239] The court claimed that, although on the *Woolwich* principle as reiterated in *Kleinwort Benson* the claimants were entitled to a refund of the payments NICH received in respect of the claimants' guests who went cave tubing in No Hoc Chen Cave, there being no legally justifiable basis to ground such payments, the court was unable to order such a refund[240] because, first, the claimants did not quantify the amount they wanted refunded and it would have been necessary to state beforehand the exact sum being sought as a refund of payment for admission.[241] Second, the claim for a refund of payments made seemed to have been arrived at as an afterthought, because the original objective of the claimants when they launched proceedings by seeking permission for judicial review was to impugn the contract between NICH and the interested party.[242] Third, there was no doubt that NICH had improved the access road in the locale; and it was reasonable to infer that NICH had contributed to or paid for this improvement, probably with some of the monies collected from the claimants' guests.[243] In addition, the court ruled that it was not convinced or satisfied from the evidence that, athough the claimants paid the $10 per person entrance fee to NICH in respect of their guests, these monies came from the claimants' own pocket. It continued that, even though there was evidence of payments by the claimants to NICH, they would have included these payments in the prices their guests had to pay. In other words, they would have passed on the entrance fees to their patrons.[244] As a result, the court concluded that it was not convinced that this was a proper case in which it should exercise its discretion to order a refund of any sum to the claimants in respect of payments they claimed to have made to NICH on behalf of their guests who went cave tubing.[245]

DECLARATION

The court usually makes a declaration that a public authority has acted unlawfully. In some cases, that is the only remedy that it could award, but in others the declaration is granted in addition to the other public and private law remedies. In *Francois v Attorney General of Saint*

237 Ibid at [67].
238 [1998] 4 All ER 513; [1998] WLR 1095.
239 BZ 2009 SC 8 at [67].
240 Ibid at [69].
241 Ibid at [70].
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid at [71].

Lucia,[246] Rawlins JA, as he then was, in dealing with the question of *locus standi* for declaratory relief claimed that 'a person who applies for a declaration must have a personal legal right or interest which the alleged illegal action or decision infringes or threatens to infringe' and the 'rationale for this is in the private nature of declaratory relief'.[247] He then cited *Gouriet v Union of Post Office Workers*[248] for the view that 'the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.'[249] Rawlins JA continued that it was this that explained the difference in the approach of the courts to standing in cases involving declaratory and injunctive relief, and cases that involve the strict prerogative remedies of prohibition, *certiorari* and *mandamus*. He was of the opinion that it was obvious that the Eastern Caribbean Supreme Court (ECSC) CPR kept the distinction as it related to declarations.[250] Rawlins JA reasoned as follows: first, Part 56.1(7) of the Rules requires an applicant for an administrative order to state whether he or she is applying for a declaration, judicial review and relief under the Constitution or some other order; second, under Part 56.3 of the Rules, a person who applies for judicial review must first obtain leave. Part 56.1(3) defines 'judicial review' to include the prerogative remedies, *certiorari, mandamus* and prohibition; and, third, obviously, this would only include other remedies in the nature of the prerogatives; the relator action, for example. He therefore concluded that it certainly did not include the declaration in the light of Part 56.1(7) of the CPR.[251]

In *City Markets Limited v Bahamas Commercial Stores*,[252] the plaintiff applied for the following declarations: (i) that the Minister erred by not reflecting the first defendant's claim as a trade union to be registered as a bargaining agent; and (ii) that a determination made by the Minister was not a lawful determination within the meaning of the Industrial Relations Act (IRA). The first defendant applied to the court to strike out or dismiss the action of the plaintiff in accordance with Order 18, rule 19 on the basis that the application was (i) vexatious or an abuse of the court process; or (ii) prejudicial to the defendant due to delay in proceeding – the other defendants also applied to have the action dismissed or struck out. The court noted that the plaintiff claimed a declaration that the Minister of State for the Public Service and Labour should have rejected the first defendant's claim (i.e. the trade union) to be recognised as bargaining agent upon its referral to him by the trade union.[253] The plaintiff, *inter alia*, claimed a declaration that the determination made by the Minister and evidenced or reflected in the certificate or document dated 19 July 1996 was not a lawful determination within the meaning of that term as contained in the IRA. In short, the court continued, the plaintiff challenged the validity of the determination made by the Minister in the execution of the duty vested in him as such under the provisions of the IRA.[254] The court stated that the definition of 'Officer', under the provisions of the Crown Proceedings Act, in relation to the Crown, includes a Minister of the Crown in Her Majesty's Government of the Bahamas. It continued that the action was based on the Minister's action as such in the course of his duty as a Minister of the Crown in Her Majesty's Government of the Bahamas.

246 LC 2004 CA 3.
247 Ibid at [147].
248 [1978] AC 435.
249 Ibid at 501.
250 LC 2004 CA 3 at [149].
251 Ibid.
252 BS 2001 CA 5. See first instance decision: BS 2000 SC 21.
253 BS 2001 CA 5 at 3.
254 Ibid.

The court claimed that the first declaration erroneously clothed the Minster with a discretion, but took this to mean that the determination was either unlawful or unreasonable.[255] The fifth declaration, in its opinion, was similarly ambiguous, but probably had the same intention as the first: these could only be obtained if the pleadings disclosed that the Minister was somehow acting unlawfully or irrationally in coming to his decision.[256] The second and third declarations, the court explained, rested on a misunderstanding of the law; and the fourth, which was concerned with bias, was of no relevance, since the process was not in the nature of a *lis inter partes*. The court noted that, even though there were *dicta* to the effect that there was no limit to the powers of the court to grant declarations, the decisions of the House of Lords have not gone that far. It continued that in the original or substantive jurisdiction of the court, within which fell the writ in the present proceedings, the power of the court, until recent times, was confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation and not those of anyone else.[257] The court noted that the cases also show that the rights which were to be the subject of declaratory relief were to be considered in a broad sense and might include obligations and be the subject of negative declarations.[258] The court held that there could be no doubt, therefore, that the present appellants had *locus standi* to institute these proceedings for the sound reason that their civil right not to recognise the union, or treat with it pursuant to the statutory provisions, could be made the subject matter of declaratory relief, if it could be established that the determination of the Minister was contrary to law. It continued that, as the cases showed, it was not in any way necessary for them to establish a cause of action and, to the extent, therefore, that the learned judge ruled that to be a requirement, he fell into error.[259]

In *Forbes v Attorney General of Jamaica*,[260] the court noted that declarations may be granted against the Crown and the declaratory judgment merely pronounced the specific legal right or position and that it had no coercive force or any power of enforcement.[261] However, it noted that the public authority concerned usually respected any declaration granted by the court. The court continued that the declaration, though utilised in public law, was essentially a private law remedy and that in Part 8 of the CPR, in rule 8.6, it reads: 'A party may seek a declaratory judgment and the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed.' The court continued that, in so far as the claimant sought a declaration, against 'The Attorney General of Jamaica', the latter was a proper party to the proceedings. However, it questioned whether the declaration was properly included as a claim.[262] It noted that judicial review is defined in Rule 56.1 (3) to include the remedies of: (a) *certiorari*, for quashing unlawful acts; (b) prohibition, for prohibiting unlawful acts; and (c) *mandamus*, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.' Rule 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave. The court also noted Rule 56.9(1), that an application for an administrative order must be made by a fixed date claim form, stating specifically whether the application is for: (a) judicial review; (b) relief under the Constitution; (c) declaration or; (d) some other administrative order.[263] It explained that, under the rules, the

255 Ibid at 11.
256 Ibid.
257 Ibid at 14.
258 Ibid at 15.
259 Ibid.
260 JM 2006 CA 78.
261 Ibid at 17–18.
262 Ibid at 18.
263 Ibid at 19.

declaration was not subject to the procedure that governed judicial review and should not have been joined as a claim. This reasoning is in line with that of Rawlins JA in *Francois*.

The court noted that section 31 of the Supreme Court Act in the United Kingdom permitted an application to be made for *mandamus*, prohibition and *certiorari* or for a declaration or injunction in respect of public law rights by way of an application to the High Court for judicial review, sparing the applicant the expense of two distinct sets of proceedings. The court explained that there was no such corresponding statutory provision in Jamaica.[264] It claimed that, in the instant case, the proceedings as filed were misconceived, noting that *certiorari* may not be granted by way of subjecting a decision of a circuit court to judicial review by a full court, which was of equal jurisdiction; nor may a declaration, a discretionary remedy, be granted 'to quash the verdict'. The court noted that the declaration has no coercive force and, therefore, could not 'quash' a decision of any court.[265] The court agreed with one of the trial judges, Jones J, dissenting, where he said that 'there is no other effective remedy other than this application for declaratory relief to quash the verdict of not guilty as a nullity'. It continued that, taken together, this was sufficient for it to grant leave to apply for a declaration that the trial of Rohan Allen at the Portland Circuit be declared a nullity based on a fraud perpetrated on the court.[266] The court continued that he was equally in error to order 'Leave granted to the claimant to apply for an administrative order as set out in paragraph 2 of Fixed Date Claim Form dated June 14, 2004', because no such power was granted in relation to the declaration.[267]

264 Ibid.
265 Ibid.
266 Ibid at 20.
267 Ibid.

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