[2015] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 89/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN	**THE BOARD OF MANAGEMENT OF BETHLEHEM MORAVIAN COLLEGE**	**APPELLANT**
AND	**DR PAUL THOMPSON**	**FIRST RESPONDENT**
AND	**THE TEACHERS' APPEALS TRIBUNAL**	**SECOND RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 96/2012

BETWEEN	**THE TEACHERS' APPEALS TRIBUNAL**	**APPELLANT**
AND	**DR PAUL THOMPSON**	**FIRST RESPONDENT**
AND	**THE BOARD OF MANAGEMENT OF BETHLEHEM MORAVIAN COLLEGE**	**SECOND RESPONDENT**

Patrick Foster QC instructed by Henlin Gibson Henlin for the Board of Management of the Bethlehem Moravian College

Leroy Equiano instructed by the Kingston Legal Aid Clinic for Dr Paul Thompson

Harrington McDermott instructed by the Director of State Proceedings for the Teachers' Appeals Tribunal

8, 9, 10 and 11 July 2014 and 10 July 2015

MORRISON JA (DISSENTING)

Introduction

[1] The Board of Management of Bethlehem Moravian College ('the board') is vested with the responsibility of overseeing the operations of the Bethlehem Moravian College ('Bethlehem'). At all times material to these proceedings, the board was chaired by Mr Lowel Morgan, an attorney-at-law. I will refer to Mr Morgan as 'the chairman'. Bethlehem, which is a public educational institution owned by the Moravian Church of Jamaica, is subject to the provisions of the Education Act ('the Act') and the Education Regulations, 1980 ('the regulations') (made pursuant to section 43 of the Act).

[2] Up to the date of his dismissal by the board on 12 December 2008, the first respondent ('Dr Thompson') was the principal of Bethlehem, having been appointed to that position in 2003. Dr Thompson's dismissal was the outcome of a hearing conducted by the Personnel Committee ('the committee') of the board, between September and December 2008, into allegations proffered against him by the board.

[3] Dr Thompson's subsequent appeal to the Teachers' Appeals Tribunal ('the tribunal') was dismissed by it in a report given on 1 September 2009. Dr Thompson next challenged the tribunal's decision by way of proceedings for judicial review, in which it was contended, among other things, that the decision of the committee was

tainted by bias and should therefore be set aside. In a judgment given on 25 May 2012, Daye J granted an order of certiorari quashing the decision of the board to terminate his appointment as principal of Bethlehem. The learned judge considered (at para. [63] of his judgment) that, on the basis of the material before him, "the fair-minded or informed observer having knowledge of the facts … would conclude that there was a real danger or possibility of bias in the minds of the members of the [committee] against [Dr Thompson]". Further (at para. [64]), that "the disciplinary proceedings against [Dr Thompson] as a whole was [sic] not fair".

[4] These are therefore appeals by the board and the tribunal against Daye J's order. Both Phillips JA and Lawrence-Beswick JA (Ag) have concluded that Dr Thompson has made good his contention that there was a real possibility of bias in the committee and that Daye J was therefore correct in his overall conclusion that the disciplinary proceedings against him were unfair. However, during the course of the hearing of the appeals, pursuant to an order for fresh evidence granted by the court in response to an application by the board, it emerged that a permanent appointment to the position of principal of Bethlehem had been made, with the approval of the Jamaica Teaching Council, with effect from 1 January 2012, and that a vice principal had also been appointed, with effect from 2 February 2014. A subsequent application for leave to adduce fresh evidence made on behalf of Dr Thompson during the course of the hearing further elucidated the circumstances in which the appointment of the new principal had been made. I will in due course say something on the process by which the new principal came to be appointed (see paras [60]-[72] below).

[5] Entirely on the basis of this evidence, my learned sisters have concluded that certiorari cannot lie in this matter. For the reasons given by Phillips JA (see paras [203]-[212] below), I agree with this conclusion. However, my sisters also take the view that, in the light of their conclusion that Daye J was correct in his finding that the disciplinary proceedings against Dr Thompson were tainted by bias and therefore unfair, it would be right to grant him a declaration to this effect, in lieu of certiorari. On this question of an alternate remedy, I again take no issue with the approach which has commended itself to my sisters (see the judgment of Phillips JA at paras [213]-[217] below), as it appears to me to be justified by the provisions of rule 56.15(3) of the Civil Procedure Rules, 2002 ('the CPR') and rule 2.15 of the Court of Appeal Rules, 2002. However, I do find myself in the unhappy position of dissenting entirely from my sisters' conclusions on the substantive issues raised by these appeals. In my respectful view, Daye J plainly erred in granting certiorari in this matter and I would therefore allow these appeals and set aside his judgment. In a characteristically careful judgment, Phillips JA has fully considered all the facts and the submissions of counsel and I will therefore say no more about them than may be necessary to explain my own views.

The regulatory framework

[6] It is first necessary to give some indication of the regulatory framework within which the board, the committee and the tribunal operate.The starting point is regulation 85, which deals with the establishment and composition of the committee:

> "85 - (1) The Board of Management of every public educational institution shall, for the purpose of facilitating

inquiries into allegation of breaches of discipline by or against members of staff or students appoint a personnel committee to which the Board shall refer any such allegations, and such personnel committee shall consist of-

(a) in the case of a government owned institution –

(i) the chairman of the Board;

(ii) one nominee of the Council;

(iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel;

(b) in the case of an institution owned by a denomination or Trust –

(i) the chairman of the Board;

(ii) one nominee of the denomination or Trust or the Board;

(iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel;

(c) where the accused personnel is the representative on the Board as described in sub-paragraphs (a) (iii) and (b) (iii), the category mentioned in those sub-paragraphs shall be entitled to nominate a representative for appointment to the committee.

(2) The quorum of the personnel committee shall be two, one of whom shall be the chairman or the vice chairman of the Board.

(3) Upon completion of its hearing into the alleged breach of discipline the committee shall submit a report to the Board for action."

[7] Regulation 55 lists the offences for which a teacher in a public educational institution may be disciplined:

> "(a) improper conduct while in school;
>
> (b) neglect of duty;
>
> (c) inefficiency;
>
> (d) irregular attendance;
>
> (e) persistent unpunctuality;
>
> (f) lack of discipline;
>
> (g) such other conduct as may amount to professional misconduct."

[8] Regulation 56 sets out the procedure to be followed by the board in response to a complaint as to the conduct of a teacher:

> "Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85."

[9] Regulation 57(1) sets out the procedure to be followed by the committee once it has considered such a complaint. If it finds that the complaint is trivial and that a hearing is unnecessary, the committee must "report such finding to the Board forthwith". On the other hand, if the committee finds that a hearing should be held, it must notify the complainant in writing of the date, time and place of the hearing and give not less than 14 days written notice to the person complained against of (i) the charge or charges in respect of which the hearing is proposed to be held; (ii) the date,

time and place of the hearing; (iii) the penalties that may be imposed under the regulations if the charges are proven against such person; and (iv) the right of the person complained against and a friend or his attorney to appear and make representations to the committee at the hearing.

[10] Regulation 57(5) provides that, not later than 14 days after the date of the enquiry, the committee shall report in writing to the board:

> "(a) that the allegations against the teacher have not been proved; or
>
> (b) that the charges against the teacher have been proved and may recommend -
>
> (i) that he be admonished or censured; or
>
> (ii) in the case of charges relating to a second or subsequent breach of discipline, that, subject to the approval of the Minister, a sum not exceeding fifty dollars be deducted from his salary; or
>
> (iii) that he be demoted if he holds a post of special responsibility; or
>
> (iv) that his appointment as a teacher with that public educational institution be terminated,
>
> and the Board shall act on the recommendation as received from the personnel committee, or as varied and agreed at the discretion of the Board."

[11] Regulation 57(6) provides that the board, within 14 days after it has received the report of the personnel committee, give written notice containing details of its decision

to the minister and the teacher; and regulation 61 provides that a teacher aggrieved by any action taken by the board under regulation 57(6) may appeal to the tribunal within 28 days. The tribunal is established under section 37(1) of the Act, for the purposes of, among other things, hearing appeals from disciplinary decisions by the board of any public educational institution.

[12] The general scheme of these provisions is therefore reasonably clear. Complaints of the commission of disciplinary offences are to be made in writing to the board. Upon receipt of a complaint, the board may refer the matter to the committee, of which the chairman of the board is a standing member, for consideration. If the committee considers the complaint to be trivial, it will report to the board accordingly. This provision is, as Lord Carswell observed in **Easton Wilberforce Grant v The Teacher's Appeals Tribunal and The Attorney General** [2006] UKPC 59, para. 28, "a filter mechanism … which obviates the need for the committee to spend time giving extended consideration to unfounded complaints". But, if the committee determines that a hearing should be held, it will proceed to convene one, upon notice to the person against whom the complaint has been made specifying the charge/s. At the completion of the hearing, the committee will make a written report to the board, which will, after further consideration of the matter, take a decision, which it will notify to the person complained against and the ministry. Any person aggrieved by the decision of the board may appeal to the tribunal within 28 days.

The background to the disciplinary proceedings

[13] During the course of 2007, as Daye J put it (at para. [2]), "[c]oncerns developed about [Dr Thompson's] administration of and management of the school's affairs, particularly the financial affairs". At its meeting of 27 December 2007, the board accordingly decided to send both Dr Thompson and the college's internal auditor on leave pending further investigation. The investigation was spearheaded by the chairman, who, to quote Daye J (at para. [3]) again, "was proactive in his duties to ensure the proper management, supervision and efficient operation of the institution". At the heart of these proceedings are two reports circulated to the board by the chairman in early 2008. In a finding from which there has been no appeal, Daye J held that these reports (which I will refer to individually as 'the first report' and the 'second report') constituted the written complaint to the board about the conduct of Dr Thompson, pursuant to regulation 56. The first report, undated and seven pages long, was headed, "The factors which influenced the decision to send both the Principal and Plant Manager on leave without pay". The second report, also undated, was four pages long and was headed, "Professional Misconduct – Dr. Thompson – the sequence".

[14] The effect of the first report has been adequately summarised by Phillips JA (at para.[156]), so I need not rehearse the ground which she has so admirably covered. Suffice it to say that this report focused, in the main, on various difficulties of an administrative and financial nature which, in the chairman's estimation, had beset the college during Dr Thompson's tenure as principal.

[15] The second report is quoted in its entirety by Phillips JA (at paras. [157]-[158]) and, again, there is no need for me to do so as well. But it is undoubtedly the fact, as my learned sister has indicated, that this report was "a crucial aspect of the claim in respect of bias and was the focus of the judge below". That report spoke to allegations of, among other things –

i. "inappropriate relationships" on the part of Dr Thompson with female students;
ii. "alleged immoral conduct" on the part of Dr Thompson;
iii. an alleged confrontation between a parent and Dr Thompson "after his daughter had reported receiving an inappropriate text message on her cell phone";
iv. "lewd text messages" allegedly sent by Dr Thompson to a female student;
v. the fact that, despite many rumours, there was "no written evidence of improper conduct" on Dr Thompson's part; and
vi. a concurrent sexual relationship between Dr Thompson and two students, including a Miss Andrea Meranda.

[16] Both reports were circulated and read to the board by the chairman at its meeting of 26 March 2008. In addition to the chairman, the persons present were -

Reverend Dr Paul Gardner	-	vice chairman
Reverend Dr Kofi Nkrumah-Young	-	church representative
Miss Vivienne Scott	-	church representative
Mrs Heather Murray	-	church representative/ secretary to the board
Mr Winston Ormsby	-	co-opted member

Mr Bruce Scott	-	co-opted member
Reverend Devon Anglin	-	church representative
Dr Derrick Hendricks	-	community representative
Mrs Pauline Jones	-	past students' association representative
Dr Heather Sherwood	-	acting vice principal
Mr Steve Allen	-	faculty representative
Mr Ewart Gayle	-	student body representative
Mrs Christine Brown-Findlay	-	general support staff representative
Mrs Angela Planter	-	recording secretary

[17] The meeting was also joined by the attorney-at-law appointed by the board to represent it. The minutes record that, after a full discussion, it was decided that the matter should be referred to the committee for its consideration and for a recommendation to be made to the board in accordance with the regulations. As regards the composition of the committee, the meeting was advised that, pursuant to regulation 85(1)(b), the committee should consist of the chairman, a church representative, an academic staff representative to the board and a representative nominated by the 'accused'. The chairman indicated to the meeting that he did not wish to sit on the committee, "due to his closeness to the matter and that it was likely that he would be called as a witness". It was also thought that Reverend Dr Gardner, the vice-chairman, should not sit as he too would be required as a witness. It was then agreed that Dr Gardner would resign from the board and that a new vice-chairman would be appointed in his stead. Mrs Heather Murray was accordingly nominated and approved as the new vice chairman. A discussion ensued as to whether the person nominated to be the church representative on the committee was required to be a member of the board. The meeting agreed that the board's attorney should be asked to

research and report back to the board on the question; and that, if necessary, the Moravian Church should be asked to nominate a church representative, "thereby taking away all the onus on the Board".

[18] In the end, the committee was constituted of Mrs Murray (who was selected as chairperson), Dr Kofi Nkrumah-Young, representing the Moravian Church, and Mr Steve Allen, the academic representative. All three persons were therefore members of the board.

The disciplinary proceedings

[19] In due course, having met and reviewed the reports, the committee decided that the complaint was such that a hearing should be held into the matter. By letter dated 9 July 2008, the committee advised Dr Thompson of this outcome and notified him of six formal charges, each accompanied by detailed particulars. Charge No 1 was 'Gross Inefficiency', the particulars of which related to an allegation that, in the process of entering into contracts on behalf of the college for the procurement of goods and services for the period September 2006 to December 2007, Dr Thompson breached government procurement guidelines in 10 stated respects. Charge No 2 was 'Professional Misconduct', the particulars of which related to Dr Thompson's attendance at a workshop in Saint Lucia from 26 to 30 November 2006, in connection with which he was alleged to have misconducted himself in seven stated respects (including failure to seek and obtain permission from the board and the ministry to attend the workshop, failure to provide supporting documentation for the purchase of United States dollars,

personal over-expenditure, and the like). Charge No 3 was 'Professional Misconduct', the particulars of which related to the allocation of funds by Dr Thompson for the repair of the principal's residence. Charge No 4 was 'Gross Inefficiency', the particulars of which related to an alleged overpayment by Dr Thompson to the supplier of a motor bus purchased on behalf of the college. Charge No 5 was 'Professional Misconduct', the single stated particular of which was that Dr Thompson "had sexual relationships with female students at [the college] including one Miss Andrea Meranda". And lastly, Charge No 6 was again 'Professional Misconduct', the particulars of which related to three specific allegations of gross insubordination on Dr Thompson's part.

[20] The committee heard the charges during the period September to December 2008. The board and Dr Thompson were both represented by counsel, Mr Garth McBean for the board and Miss Jacqueline Wilcott for Dr Thompson. Giving evidence on behalf of the board were the chairman, Dr Gardner and an auditor from the ministry.

[21] For reasons which will presently appear, it is only now necessary to focus on Dr Gardner's evidence before the committee. The immediate context was a meeting which took place in the board room of the Manchester Credit Union in May 2007. Present were Dr Gardner, Dr Thompson and Ms Andrea Meranda. This meeting was a sequel to an earlier meeting, at which Dr Thompson was not present, between Dr Gardner, Ms Meranda and a Miss Nicole Bramwell. The purpose of the second meeting, Dr Gardner testified in examination-in-chief, was to discuss a concern which Ms Meranda had previously raised with him. Dr Gardner stated that at the meeting Ms Meranda "raised the concern of a relationship that she was having with Dr Thompson". Asked by counsel

for the board whether Ms Meranda indicated at the meeting what type of relationship she had with Dr Thompson, Dr Gardner's response was that "Ms. Miranda [sic] spoke to me about an intimate relationship that she had … [w]ith Dr. Thompson, and that was the basis of the discussions really". The following exchanges then took place between counsel for the board and Dr Gardner:

"Q.	Let me ask this question, did Dr. Thompson say anything in response to Ms. Miranda's concerns?
A.	Having listened to Miss Miranda [sic] my question to Dr. Thompson was about how he respond [sic], how he would respond to what was being said, and what was being said is the relationship between Miranda [sic] and Thompson, and Dr. Thompson's response was simply, quote 'Guilty as charge' [sic] end quote. I can't recall who asked, but I was asked to be excused?
Q.	By who, who were you asked by?
A.	As I said, I am not sure. I can't be precise to say whether Dr. Thompson or Miss Miranda [sic].
Q.	One of them?
A.	And so I left the meeting.
Q.	Did anything take place after you left the meeting?
A.	Well, they would have been by themselves so whatever discussion outside of my presence…
Q.	But did you go back in?
A.	I went back just for a closure.

Q. Tell us what happened in terms of this closure.

A. In terms of the closure we spoke about the need for there to be an understanding in terms of how they both were being affected by what was being said, and I think we were also aware of the allegations surrounding the particular matter and we spoke about some of the things needed to be done in terms of the curtailing any semblance of relationship.

Q. Who spoke about the curtailing, about any semblance of relationship?

A. In wrapping up I spoke about it, but I think it is to be said that I don't think at that point that there was any relationship between Dr. Thompson and Ms. Miranda [sic]. I also gathered from the meeting that Miranda [sic] was very upset and …

Q. Why you say that?

MS. WILCOTT: You gathered from who?

A. Miranda [sic], that she was upset.

Q. What led you to gather that?

A. A couple things. (1) She spoke often about herfear of feeling that Dr. Thompson might not be speaking with her anymore because he might be not interested in her.

MR. WALCOT [sic]: Fear or feeling that …,

MR. MCBEAN: Dr. Thompson would not be speaking with her anymore.

A. And so she was visibly upset on that matter. She was upset also because she felt that her calls were not being received.

BY MR. MCBEAN:

Q. She expressed that?

A. Yes.

Q. Her calls not being received by whom?

A. By Dr. Thompson

Q. Tell me, I don't know if you can jog your memory a bit, you indicated that Ms. Miranda [sic] expressed concern about a relationship which she was having with Dr. Thompson and she stated the type of relationship, and she said it was a sexual relationship. You recall exactly what she said in the presence of Dr. Thompson?

A. Yes, I recall what she said.

Q. What did she say?

A. In fact, I sought clarification on the kind of relationship she was talking about.

Q. From her?

A. From her. When I asked her what's the nature of this relationship and the thing [sic] that having a relationship with Dr. Thompson was a problem, so I asked her what's the nature of the relationship and she said sexual?

BY MR. MCBEAN:

Q. Now, just to be clear, when she said that was that before Dr. Thompson said 'guilty as charged' or after?

A. After.

Q. It was after Dr. Thompson said that?

A. Yes.

Q. Before Dr. Thompson said 'guilty as charged' what if anything she said? Before I move to that, when she said the nature of the relationship, she said it was sexual, did Dr. Thompson say anything further?

A. Repeat.

Q. Did Dr. Thompson say anything when she said that?

A. No."

[22] Asked whether, apart from saying "guilty as charged", Dr Thompson said anything else during this meeting, Dr Gardner said that "Dr Thompson was really for the most part listening to what was being said".

[23] Under cross-examination by counsel for Dr Thompson, it was put to Dr Gardner that the words "guilty as charged" had been used by Dr Thompson "in answer to Ms. Miranda's [sic] jealous nature … [in that] she was jealous about the fact that Dr. Thompson was at ease with many students, not in an unprofessional manner, but in a very relaxed manner". When counsel was asked to repeat the suggestion, the following ensued:

> "Q. His relationship with his students, and I am clarifying that to say that in a professional manner he had a very open door policy and that in his talking to his students Ms. Miranda [sic] would have been – my suggestion is that she was jealous of that sort of scenario as opposed to anything else.

> MR. McBEAN: A suggestion is made. When you hear a suggestion she is putting her case, what her instructions are?
>
> A. My response would be that at that point in the discussion Miranda [sic] was talking about a relationship that she was having with Dr. Thompson, and I sought clarification on the nature of that relationship, what was that relationship, and she responded by saying that it was a sexual relationship. I then moved on to ask Dr. Thompson how he respond to what was being said, what Miranda [sic] had said. It was at that point Dr. Thompson said "guilty as charged". So I never felt that that discussion had to do with the open door policy that you spoke about, which became -- and I believe we did talk about that open door policy but not at that point.
>
> BY MS. WILCOTT:
>
> Q. It is my suggestion to you that Ms. Miranda [sic] was actually upset because Dr. Thompson was not reciprocating her desire for a relationship.
>
> A. I think that was correct. I think you are correct."

[24] At this point in the proceedings, Miss Wilcott's cross-examination of Dr Gardner was interrupted by an indication from her that she wished to submit an affidavit "in relation to this matter". This, as it turned out, was an affidavit sworn to by Ms Meranda. Miss Wilcott asked the committee for "the greatest amount of latitude and flexibility … to put this evidence forward". Mr McBean objected, on the basis that (i) the regulations, which contemplate that evidence before the committee shall be given orally, make no provision for evidence to be given on affidavit; (ii) that the requirements of the Evidence Act, which would apply in analogous proceedings in the Supreme Court, had not been met; and (iii) even where evidence is allowed on affidavit in such proceedings,

it is subject to the right of the opposing party to cross-examine the maker of the affidavit.

[25] The committee upheld Mr McBean's objection and the cross-examination of Dr Gardner continued. He agreed with the suggestion that his role in meeting with Dr Thompson and Ms Meranda had been that of counselor and that, as such, "there is an expectation of a certain amount of confidentiality". And finally, Dr Gardner's response to the suggestion that Dr Thompson had not use the words "guilty as charged" in the context of a sexual relationship was, "[t]hat was not my impression".

[26] In evidence-in-chief before the committee, Dr Thompson put the date of the meeting between Dr Gardner, Ms Meranda and himself as 18 June 2007. The purpose of the meeting, he said, was "for the three of us to have a discussion". While Dr Thompson did not deny using the words "guilty as charged" during that discussion, he located them in a wholly different context to Dr Gardner's and denied having had an inappropriate relationship, sexual or otherwise, with Ms Meranda:

> "A. Ms. Miranda [sic] expressed her anger that I was not responding to her calls, that I seemed to have been avoiding her and that she was not pleased with that, and that I was receiving e-mail messages from other students, because those that were sent to me were sent to her, were cc'd to me. She also said that students had access to my office or to me in my office, that students found me to be approachable and that I smiled too easily with students.
>
> Q. When she had made these statements, what was your response?

A. I indicated that I was guilty as charged.

Q. For clarity, you were guilty as charged in relation to what?

A. To receiving e-mail messages from students, seeing students in my office, to my office being accessible to students.

Q. What if anything did Dr. Gardner say in response to that?

A. He asked what would she suggest that I should do differently.

Q. And she responded?

A. That I should only see students in the presence of other persons, that I should smile less, and that I should not receive e-mail messages from students.

Q. When you went to this meeting, in your mind what role was Dr. Gardner in that meeting?

A. He was the counsellor to whom Ms. Miranda [sic] had gone and spoken to and who wanted to cause a meeting to take place because that was what she had requested of him.

Q. Did you have a sexual relationship with Andrea Miranda [sic]?

A. I did not.

Q. Did you have any inappropriate relationship with Andrea Miranda [sic]?

A. I did not."

[27] Under cross-examination, Dr Thompson stated that Dr Gardner had lied when he testified that Ms Miranda had said, in Dr Thompson's presence, that there was a sexual relationship between them. Dr Thompson said that, although he was told by Dr Gardner

before the meeting that Ms Meranda had made an allegation of sexual misconduct, which he considered to be a grave allegation, there had been no mention of sexual misconduct at the meeting itself. However, further in the cross-examination, Dr Thompson indicated that, after Dr Gardner had left the room, he had raised the allegation of a sexual relationship with Ms Meranda and told her that he was "very angry and disappointed with what she had said".

[28] In the result, the committee found Dr Thompson guilty of all the charges. In relation to charge no 5, in which it was alleged that Dr Thompson had had "intimate sexual relationships with female students … including one Miss Andrea Meranda", the committee's reasoning was as follows:

> "The committee believes that this is the most serious charge and accepts that this charge has been proven for the following reasons:
>
> a) Dr. Paul Gardner gave evidence to the effect that:
>
> (i) At the meeting with Dr. Thompson and Miss Meranda she stated that she had an intimate relationship with Dr. Thompson.
>
> (ii) After Miss Meranda clarified the type of relationship and said other things, Dr. Thompson said 'guilty as charged'.
>
> b) The responses of Dr. Thompson 'guilty as charged' is [sic] an admission or confession to the truth of what Miss Miranda said because according to Phipson on Evidence 14th Edition at paragraph 26-01.
>
> 'Statements made in the presence and hearing of a party, and documents in his possession, or to which he has access, are admissible if relevant to the issue. They are evidence against him of the truth of the

matters stated if by his answers, conduct or silence he has acquiesced in their contents. The principle is the same in criminal and in civil cases.'

c) Also paragraph 26- 04 of the Phipson on Evidence states,

'When statements made in a party's presence have been replied to, they will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth.'

Dr. Thompson response that he was 'guilty as changed' [sic] is therefore used against him.

d) During cross examination of Dr. Gardner, Counsel for Dr. Thompson never suggested to Dr. Gardner that it is not true that Miss Merenda stated in Dr. Thompson's presence that she had an intimate relationship, yet when Dr. Thompson gave evidence he denied this. What is even more surprising and significant is that at first in cross examination, he stated that question of a sexual relationship was never discussed at that meeting. However later on when he was further cross examined he stated that question of a sexual relationship was discussed with Miss Meranda when Dr. Gardner left the room leaving himself and Miss Meranda alone. This inconsistency indicates that he is not being truthful.

e) We note that Counsel for Dr. Thompson challenged Dr. Gardner on the ground that what was said to him in the meeting with Dr. Thompson and Miss Meranda was said in confidence. This supports the credibility of Dr. Gardner's evidence.

f) There was no basis to believe as Dr. Thompson contends that the meeting was to discuss only the question of e-mails and phone calls not being returned by Thompson and Dr. Thompson's open door policy to other students. Also nothing was suggested as to Miss Meranda's authority to questioning the Principal's open door policy.

g) We believe that the meeting with Miss Meranda was arranged as a follow up to the earlier meeting with Dr. Thompson and Dr Gardner when Dr. Thompson was

> informed of the allegation of inappropriate relationship with Miss Meranda.
>
> On the basis of the credibility of Dr. Gardner's evidence and the inconsistency in Dr. Thompson's evidence, we find Dr. Thompson guilty of Professional Misconduct in that he had sexual relationship with a student."

[29] Accordingly, in its report dated 12 December 2008, the committee recommended to the board that Dr Thompson's appointment as principal of the college should be terminated with immediate effect. This recommendation was promptly accepted and implemented by the board at a meeting held that same day, 12 December 2008.

[30] By notice of appeal dated 6 January 2009, Dr Thompson appealed to the tribunal on four grounds. These were later amplified into a total of seven grounds. For present purposes, it is only necessary to mention grounds three and six.

[31] Ground three complained that Dr Thompson did not receive a fair hearing, as the committee "was tainted with prejudice and bias" against him. In support of his contention that there was an appearance of bias in the committee, Dr Thompson relied on two documents. The first was the second report (see para. [15] above) and the second was an email sent on 5 December 2007 by the chairman to Dr Gardner, which was captioned, "Re: Bethlehem Moravian College – Repairs after hurricane Dean" ('the email'). The email, which was written by the chairman in response to an email from Dr Gardner, was copied to Dr Nkrumah-Young and stated as follows:

> "I have read your email and I am now even more convinced that I can be of no help to Bethlehem. I just wish to remind you all that just last year the same Principal used all the College resources to repair the said cottage which resulted in the college having to borrow money from NCB. The Board had signed off on the repairs to be done. He went further. With that background therefore, you cannot trust the Principal's judgment.
>
> It is then clearly a time for a change of the guard because I have enough evidence not to repose trust."

[32] Ground six related specifically to the charge of sexual misconduct with Ms Meranda:

> "The Personnel Committee erred when it did not allow into evidence the affidavit of Miranda [sic], the purported victim. There was no complaint to the Board and the evidence adduced should not have been allowed as it reflected the witness' interpretation of words spoken in a meeting."

[33] Although the tribunal allowed the appeal on three of the grounds, it dismissed it in relation to the other four. In the former category were the grounds relating to all the charges of gross inefficiency and financial irregularity of which Dr Thompson had been found guilty by the committee; while in the latter category were grounds three and six to which I have just referred. The upshot of the tribunal's decision was therefore that only the committee's finding that Dr Thompson was guilty of the charge of sexual misconduct remained undisturbed. However, the tribunal concluded, "it is our respectful view that the grounds of appeal allowed do not result in a cancellation of the Board's decision to terminate the appointment of [Dr Thompson] as principal".

[34] So it was that the principal complaints on the claim for judicial review before Daye J, and the two that would ultimately prevail, were that (i) in the light of the material which had been presented to it, the tribunal erred in ruling that Dr Thompson had had a fair hearing before the committee; and (ii) there was evidence to substantiate the charge of sexual misconduct. The learned judge's conclusion on these matters was that (i) the committee had been exposed to "pre-hearing prejudicial material, namely, the Chairman's Report", and one of its members, Reverend Dr Nkrumah-Young, had been exposed to "a prejudicial e-mail" about Dr Thompson; and (ii) that the committee and the tribunal erred in not allowing Ms Meranda's affidavit in evidence and thus "deprived [the principal] of the opportunity … to rely on some material to show his innocence". In the discussion which follows, I will refer to the two main issues arising from these conclusions as 'The apparent bias issue' and the 'Meranda affidavit issue', respectively.

The apparent bias issue

[35] The relevant principles are not in dispute. I take as the appropriate starting point for present purposes (although, of course, the principles have a much longer history) Lord Hope's restatement of the general rule to be applied in any case in which there is a suggestion that the judge was biased in **Porter v Magill** [2002] 1 All ER 465, para. [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[36] As Lord Kerr pointed out in **Belize Bank Ltd v Attorney General of Belize** [2011] UKPC 36, para. 36, "[t]he notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness". Lord Kerr went on to refer to Kirby J's remark in **Johnson v Johnson** (2000) 201 CLR 488, 509, that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"; and, as regards the state of knowledge that the fair-minded observer should be presumed to have, to Lord Hope's statement in **Gillies v Secretary of State for Work and Pensions (Scotland)** [2006] UKHL 2, para 17, which reads:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

[37] Memorably drawing these strands together in **Helow (AP) v Secretary of State for the Home Department (Scotland) and another** [2008] UKHL 62, Lord Hope added this (at paras 1-3):

> "1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[38] And, in the relatively recent decision of this court in **Henriques v Tyndall and Others** [2012] JMCA Civ 18, Harris JA, after a review of the modern authorities, said this (at paras [53]-[54]):

> "[53] ***Porter v Magill*** proposes that … the court should be guided by a dual step process. First, it should examine the evidentiary material on which the allegation is founded.

> Thereafter, it should determine whether, on a balance of probabilities, a fair-minded observer would conclude that there is a real possibility of bias on the part of any member of the tribunal whose right to sit on the tribunal has been challenged …
>
> [54] The test of apparent bias is an objective one. It presupposes that a decision-maker would be divorced from any semblance of partiality. The overall objective is fairness, since fairness is a highly relevant tool in the armoury of a decision-maker. Since fairness is the hallmark of the administration of justice, a duty is imposed on a decision-maker, at all times, to guard against any perceived notion of bias."

[39] These principles were considered by the Privy Council in unusual circumstances in **Holmes v Royal College of Veterinary Surgeons** [2011] UKPC 48. In that case, the disciplinary committee of the Council of the Royal College of Veterinary Surgeons ('the college') directed that, as a result of disciplinary proceedings, the name of Mr Holmes, a veterinary surgeon, should be removed from the register of veterinary surgeons. On appeal to the Privy Council, Mr Holmes argued that the college's disciplinary process was such that there was a real possibility that the disciplinary committee was biased against him. The basis of the argument was that, among other things, that process allowed for members of the disciplinary committee to be drawn from the membership of the council, in whose name the complaints against Mr Holmes were brought. This particular feature of the college's disciplinary process was in fact a requirement of the college's governing legislation.

[40] The question was therefore whether, in these circumstances, it could be said that the members of the disciplinary committee, aware that it was required to be composed of members of the council in whose name the complaints were brought, might, in the light of their membership of the council, be thereby motivated to uphold the complaints. Speaking for the Board, Lord Wilson's answer to this question (at para. 25(a)) was that "…[t]he fair-minded and informed observer would find such an argument as elusive as does the Board".

[41] It seems to me that the decision in **Holmes** forecloses any possible argument that the proceedings before the committee in this case might somehow have been flawed by virtue of the fact that all three of its members were drawn from the membership of the board. It is quite clear that this was in fact an inevitable consequence of the provisions of regulation 85 and there is absolutely no reason to think that the fact of this overlapping membership would, in itself, lead the fair-minded and informed observer to think that, by that reason alone, there was a real possibility that the committee was biased against Dr Thompson. This is particularly so in the light of the special steps quite properly taken by the board to ensure that both the chairman and the then vice-chairman (Dr Gardner) would not sit on the committee, notwithstanding that regulation 85 provided that the holder of those offices should be members.

[42] So the question in this case is whether the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility (not a

"real danger", as Daye J said at para. [49]) that the committee was biased against Dr Thompson, given that (i) all three members of the committee, as members of the board, would have been exposed to the second report presented by the chairman; and (ii) Dr Nkrumah-Young had been privy to email correspondence from the chairman in which Dr Thompson was referred to in uncomplimentary terms.

[43] In considering these questions, I think that the fair-minded and informed observer would - either immediately, or, as might be expected of such an observer, after careful thought - appreciate at least the following. Firstly, the chairman was under a clear duty to make, and all members of the board were fully entitled to receive, a report on all matters coming to his attention regarding Dr Thompson in his capacity as chairman. Secondly, the board is the body charged with the responsibility of determining whether disciplinary proceedings should be instituted in any case. Thirdly, given that members of the committee are of necessity drawn from the board, it is almost inevitable that members of the committee will be exposed to material upon which they will ultimately be called upon to adjudicate. Fourthly, given that the chairman's two reports were, as Daye J found, the complaint which triggered the disciplinary proceedings, everything contained in them was in the nature of allegations only; as such, they were in effect similar to an indictment, with stated particulars, in criminal proceedings and as such always subject to proof at the actual hearing. Fifthly, despite the breadth of the chairman's second report, the committee, as part of its preliminary screening exercise, was able, in what can only be regarded as a demonstration of independent judgment, to narrow the charges against Dr Thompson

to the six in respect of which the hearing was actually held. In other words, the committee was able, as the regulations and Lord Carswell's observation in **Grant v The Teachers Appeals Tribunal and The Attorney General** (see para. [12] above) envisaged that they should be, to separate the wheat from the chaff. Sixthly, the email to which Dr Nkrumah-Young was privy was sent in a different context well before the disciplinary proceedings commenced.

[44] I would observe in parenthesis on this last point that Daye J appeared to suggest that there was also something sinister in the fact that the email was authored by the chairman - it was, the learned judge said (at para. [47]), "… a pre-judgment by a potential witness". I am bound to say, with respect, that I am quite unable to fathom the significance of this observation to these proceedings. Save, of course, for the wholly different expectation of expert witnesses, it seems to me that the vast majority of persons who give evidence in any matter come to their task having already formed a distinct pre-judgment as to the justness of the cause in which their support as witnesses has been enlisted. So it surely must be neither here nor there that the chairman of the board, which was the complainant in the disciplinary proceedings, had formed the view from the outset of the proceedings that "you cannot trust the Principal's judgment". Nor, for the same reasons, can it be of any significance, in my view, that the direct addressee of this email was Dr Gardner, who was himself slated to be a witness before the committee.

[45] Taking all these factors into consideration, therefore, I am clearly of the view that, on a balance of probabilities, the fair-minded and informed observer, a person

neither unduly complacent, sensitive nor suspicious, would inevitably consider that neither the fact that the committee was exposed to the chairman's reports nor that Dr Nkrumah-Young may have seen the chairman's email expressing the view that Dr Thompson could not be trusted, could possibly give rise to an appearance of bias on the part of the committee.

[46] Even if I am wrong in this conclusion, I also consider that Mr Foster QC's further submission that any defect in the proceedings before the committee was cured by the subsequent full hearing before the tribunal, is well founded. The applicant in **James Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131 was a licensed race horse trainer. After a hearing before the Stewards of the Jockey Club of Jamaica, he was found guilty of corrupt practices and warned off for two years. He then appealed to the Jamaica Racing Commission ('the commission'), the statutory body empowered to entertain appeals from decisions of the Jockey Club. Among the matters complained of were beaches of natural justice in the proceedings before the Jockey Club. After a full hearing before the commission, his appeal was dismissed and the decision of the Jockey Club was confirmed.The applicant next applied for an order of certiorari, again complaining of several breaches of natural justice in the proceedings before the Jockey Club.

[47] The Full Court of the Supreme Court (Ross, Campbell and Bingham JJ) held that any defect in the application of the rules of natural justice by an inferior tribunal can be cured by a subsequent proceeding in an appellate court or tribunal which possesses a

clear power of review of the entire case or matter. Delivering the judgment of the court, Campbell J said this (at page 137):

> "In this case the appellate powers of the Commission appear extensive, including power to remit. The powers in my view are designed to ensure that in the appeal proceedings an applicant is given full hearing with opportunity to bring further evidence and have it heard. Any breach of the rules of natural justice, if such had existed in the original proceedings, would in my view be cured...
>
> In my view the applicant in this case had a full hearing both at the Jockey Club [and] before the Commission in relation to a matter of which he was fully aware, and a decision was reached against him albeit a hard one. There is no basis for his complaint..."

[48] In this case, the Act does not in terms give the tribunal the power to hear further evidence. However, section 37(4) does provide that the tribunal may "either confirm the decision appealed against or vary or quash that decision, and the Tribunal may from time to time return the proceedings to the person or authority concerned with the making of that decision for further information or for such other action as the Tribunal thinks just".

[49] At the hearing of Dr Thompson's appeal by the tribunal, the allegation of apparent bias was fully ventilated in argument by his counsel, covering much of the same ground that would later be covered before Daye J and later still before us on the hearing of this appeal. In addition, and perhaps of greater significance for present purposes, the tribunal was invited to and did go over in considerable detail the printed record of the evidence, particularly that of Dr Gardner, which the committee had heard

with regard to the allegation that Dr Thompson had had a sexual relationship with Ms Meranda. So in my view, even if it were possible to maintain that the committee's acceptance of Dr Gardner's evidence as to what took place at his all-important meeting with Dr Thompson and Ms Meranda was tainted by bias, the proceedings before the tribunal facilitated a full review of that evidence, very similar to the one which the Commission was able to undertake in **James Ziadie v Jamaica Racing Commission**. In these circumstances, I consider that, just as in that case, any deficiency in the proceedings before the committee would have been cured by the subsequent proceedings before the tribunal in respect of which no complaint of any sort has been made.

[50] For all of these reasons, I consider that the appeals by the board and the tribunal from Daye J's decision to make an order for certiorari in this case should be allowed.

The Meranda affidavit issue

[51] Daye J readily acknowledged (at para. [56]) that, in the attempt to introduce the Meranda affidavit in evidence before the committee, the conditions of admissibility laid down in section 31D and 31E of the Evidence Act had not been met. Thus, there was no proof that Ms Meranda was unavailable to give viva voce evidence for any of the reasons laid down in section 31D (for instance, that the witness was dead, absent from Jamaica, could not be found despite reasonable steps or was being kept away by threats). And because the board was given no notice of Dr Thompson's intention to put

the affidavit in evidence, the learned judge observed, "… it could not exercise the right to call the person who made the affidavit as a witness for cross-examination". As Phillips JA also acknowledges (at para. [188]), the learned judge was plainly correct in this view. This was also the basis, as the learned judge went on to point out, of the committee's ruling, with which the tribunal agreed, that the Meranda affidavit should not be allowed in evidence.

[52] And yet the learned judge felt able to adopt (at para. [58]) what appears, on the face of it anyway, to be a contradictory position on the issue of admissibility of the affidavit:

> "[58] Miss Andrea Miranda's [sic] evidence was relevant in the interest of a fair hearing on charges of sexual misconduct where she was named as a party. She was available though may be unwilling due to the personal nature of the charge. An adjournment could be taken to secure her attendance by summons and to give time to the Board who got no notice. If she fails to attend then the statement due to its vital importance should be admitted and a direction given to the tribunal how to treat and untested statement where the maker was not cross-examined. Her statement was more probative than prejudicial and should have been received looking at fairness of the proceeding as a whole. This course would not have infringed either that letter or the spirit of the law governing the rule of evidence. To allow the tribunal to be exposed to material which is more prejudicial then probative and then disallow a statement which is more probative than prejudicial breached the requirement of fairness. The Principal was deprived of the opportunity, by the exclusion of the affidavit, to rely on some material to show his innocence. The ruling of the Personal Committee and the decision by the Teacher's Appeal Tribunal cannot be sustained."

[53] The fact that a statement which it is sought to put in evidence is "more probative than prejudicial" does not provide, as far as I am aware, a stand-alone basis of the admission in evidence of a statement which is otherwise inadmissible. Indeed, the opposite proposition is the one which describes the true doctrine; that is, that a judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value (**R v Sang** [1979] 2 All ER 1222).(The principle is now also given statutory effect by section 31L of the Evidence Act.)

[54] Sections 31D and 31E of the Evidence Act provide exceptions to the rule against hearsay. So, if, as Daye J determined, the Meranda affidavit was not admissible under either of these sections, it seems to me that it was pure hearsay evidence, utterly incapable of proving the truth of anything which it contained. On this basis, it seems to me that both the committee and the tribunal were correct in their determination that the Meranda affidavit should be excluded.

[55] I accept that, as Mr Equiano urged on us, the strict rules of evidence do not have to be followed in administrative proceedings (Administrative Law, Paul Craig, 6thedn, para. 12-031). But it seems to me that in this situation it would have been important for the other side to be allowed to cross-examine on any material introduced as a result of any relaxation of the rules of evidence. The regulations give the committee no power to issue a summons to a witness and it was therefore plainly a matter for Dr Thompson and his legal representatives to take the necessary steps to secure her attendance. It is clear that even the question of an adjournment for this purpose, which Daye J

mentioned as a possibility, was not canvassed on Dr Thompson's behalf before the committee. These were all matters for the committee to consider and take into account in determining the admissibility of the Meranda affidavit and, in my view, it has not been shown that they acted on any wrong principle in determining that it should not be admitted in evidence.

[56] But, because the Meranda affidavit was produced by Dr Thompson as an exhibit to his affidavit in the court below, it is now possible to test, albeit retrospectively, the learned judge's conclusion that it may somehow have enhanced the fairness of the proceedings before the committee. In order to do this, it is necessary to reproduce the short affidavit in its entirety:

"AFFIDAVIT OF ANDREA MERANDA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION - CLAIM NO. 01117 HCV OF 2008

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2002 PART 56

AND

IN THE MATTER OF EDUCATION REGULATIONS 1980

BETWEEN DR. PAUL THOMPSON CLAIMANT/APPLICANT

AND BETHLEHEM MORAVIAN COLLEGE BOARD OF MANAGEMENT 1ST DEFENDANT

AND LOWELL MORGAN, CHAIRMAN 2ND DEFENDANT

BOARD OF MANAGEMENT,
BETHLEHEM MORAVIAN COLLEGE

AND DR. PAUL GARDNER, PRESIDENT
OF MORAVIAN CHURCH 3RD DEFENDANT

AND THE ATTORNEY GENERAL 4TH DEFENDANT

I, Andrea Meranda, do make oath and say as follows: -

1. That I am a teacher and I reside at Siloah P.O. in the parish of Saint Elizabeth.

2. That I was formerly a student at the Bethlehem Moravian College (hereinafter called "The College") from the years 2004 to 2007. And that I entered the said Bethlehem Moravian College at the age of twenty-one years (21)

3. That it has come to my attention that I am or have been involved with the Principal of the College Dr Paul Thompson. I havebeen informed by a member of the College and verily believe that I am alleged to have filed a complaint against the said Principal Dr Paul Thompson alleging a sexual relationship between the Principal and myself.

4. That I wish to state that I have never made any such allegation against Dr Paul Thompson either written or unwritten. That I wish to further state that I have never been involved in a sexual relationship with the said Principal Dr Paul Thompson.

5. That I make this statement free and clear andthat no one has forced me to make this statement.

I, certify that the facts as set out in this Affidavit are true to the best of my knowledge, information and belief.

SWORN to at Santa Cruz)
In the parish of St. Elizabeth) ANDREA MERANDA
On the day of 20/08/ 2008)

Before me:)

(SGD.)

JUSTICE OF THE PEACE FOR THE

PARISH OF"

[56A] The first thing to be observed about this affidavit is that, on its face, it was clearly not prepared for use in the proceedings before the committee. So it was in no sense an affidavit prepared as a response to Dr Gardner's evidence that, in a meeting with Ms Meranda and Dr Thompson, the latter had, as the committee found, admitted having had an inappropriate relationship with the former. Indeed, it makes no reference at all to the meeting with Dr Thompson and Dr Gardner, or to the surrounding circumstances described by Dr Gardner. In fact, as the title and the date of the affidavit show, it was filed as part of Dr Thompson's ultimately unsuccessful attempt to block the disciplinary proceedings against him. The affidavit was therefore plucked out of its original context and presented to the committee, without any accompanying explanation from Ms Meranda, or for that matter anyone else, of the part it played in those proceedings. In these circumstances, I find it difficult to discern what assistance it could possibly have given the committee in breaking the deadlock between the evidence of Dr Gardner, who insisted that Dr Thompson had made a damaging admission at the meeting, and Dr Thompson, who insisted that he did not.

[57] In his submissions before us on behalf of the tribunal, Mr McDermott made the point that, in his approach to the admissibility of the Meranda affidavit, the learned judge lost sight of Lord Mustill's salutary reminder of the limits of judicial review in **R v**

Secretary of State for theHome Department, ex parte Doody [1994] 1 AC 531, 560-561:

> "…the [claimants] acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

[58] Mr Michael Fordham QC makes a similar point in his hugely influential Judicial Review Handbook (6th edition, para. 15.1), under the pointed rubric, "Judges will not intervene as if matters for the public body's judgment were for the Court's judgment":

> "Every public body has its own proper role and has matters which it is to be entrusted to decide for itself. The Courts are careful to avoid usurping that role and interfering whenever they might disagree as to those matters. There are various ways of formulating the warning against impermissible interference. But however it is expressed, the idea of a forbidden approach is essential in understanding and applying principles of judicial review."

[59] These authoritative statements embody the wider principle that, as Lord Lowry put it in **R v Secretary of State for the Home Department, ex parte Brind** [1991] 1 AC 696, 767, "judicial review of administrative action is a supervisory and not anappellate jurisdiction". It seems to me that, in his approach to the issue of the admissibility of the Meranda affidavit and, indeed, to the wider question of whether the committee's findings against Dr Thompson should be disturbed, Daye J lost sight of the

judicial restraint which the principle enjoins. The regulations, though not perfect, were obviously carefully crafted to secure the goal of fairness in disciplinary proceedings. It is clear that the chairman and the board were also fully alive to their responsibility and took steps to ensure that, whatever may have been the chairman's own views, the proceedings were fair. The committee's approach to the formulation of the charges and to the hearing of the evidence, which has not been the subject of any general challenge, suggests that they placed a premium on fairness. Hardly surprisingly, no criticism has been made of the full appellate review carried out by the tribunal, the outcome of which was actually favourable to Dr Thompson in a number of respects. In these circumstances, it is, in my respectful view, not open to the judicial review court – or to this court – to second guess the committee's findings that (i) taken in its context, Dr Thompson's admitted use of the words "guilty as charged" was an acceptanceof the truth of Ms Meranda's allegation of a sexual relationship between them; (ii) Dr Gardner was a credible witness; and (iii) Dr Thompson was not. Naturally, as is always the case in any kind of trial process, there may have been other possibilities, but the decision which to accept in this case was entirely one for the committee, not the court.

The effect of the fresh evidence

[60] In the light of the conclusion to which my learned sisters have come, this issue is now largely academic. But, since it did give rise during the hearing to a discussion on the conduct of the board, I will nevertheless venture a comment on it. Among the matters urged on us in this regard was rule 56.4(9) of the CPR, which provides that, upon an application for an order of prohibition or certiorari, "the judge must direct

whether or not the grant of leave operates as a stay of the proceedings". Thus, it was argued, no such direction having been sought or made in this case, there was nothing to prevent the board appointing a new principal in the aftermath of the tribunal's decision to uphold the decision to dismiss Dr Thompson.

[61] This argument appeared to me initially to provide a conclusive answer, in the board's favour, to the question whether the appointment of a new principal while the judicial review proceedings were before the courts was permissible. But I have since been given pause by a review of the decision of the Privy Council on appeal from this court in the well-known case of **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd** [1991] 1 WLR 550. That case was concerned with section 564B(4) of the now repealed Judicature (Civil Procedure Code) Act ('the CPC'), which provided, in terms not dissimilar to rule 56.4(9), that the grant of leave to apply for an order of prohibition or certiorari should, "if the judge so directs, operate as a stay of the proceedings in question" until the determination of the application or until further order. In the exercise of statutory powers, the minister had instructed the sole specified importer of approved motor vehicles to order certain vehicles for importation into Jamaica and to distribute them to motor dealers in accordance with the minister's allocation. The dealers applied for leave to apply for an order of certiorari to quash the minister's allocation, or an order prohibiting him from implementing it. A stay of the minister's allocation, which was granted ex parte, was later set aside by another judge and the Privy Council held that there was no basis for interfering with this exercise of his discretion.

[62] But the Privy Council went on to question whether, as a matter of law, a stay would have been appropriate in any event. Lord Oliver thought not (at page 556):

> "It seems in fact to have been based upon a fundamental misunderstanding of the nature of a stay of proceedings. A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective …"

[63] Lord Oliver then referred to section 564B(4) of the CPC and continued:

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

> injunction cannot be granted, as it were, by a side-wind and if that was the judge's intention it should have been effected by an order specifying in terms what acts were prohibited or commanded. As it was there were no 'proceedings' in being upon which the 'stay' could take effect."

[64] To somewhat different effect is the decision of the Court of Appeal of England and Wales in **R v Secretary of State for Education and Science, ex parte Avon** [1991] 1 QB 558, in which it was held that the phrase "the proceedings" in RSC Ord 53 r 3(10)(a) (upon which section 564B(4) of the CPC appears to have been loosely based) should be construed widely. Accordingly, the court considered it apt to embrace not only judicial proceedings, but also administrative decisions "and the process of arriving at such decisions" (per Glidewell LJ, at page 561).

[65] To the extent that these two decisions may be in conflict (and see **R (H) v Ashworth Hospital Authority and Ors** [2002] EWCA Civ 923, para. 38, where Dyson LJ considered that they were), this court is plainly bound to follow the decision of the Privy Council in the **Vehicles and Supplies Ltd** case. Therefore, on Lord Oliver's analysis, it seems to me to be impossible to say that in this case, the tribunal having given its decision, there were any proceedings capable of being stayed by a direction under rule 56.4(9). If at any stage after that it was sought to prevent the appointment of a new principal pending the completion of the judicial review proceedings, the appropriate course for Dr Thompson to have taken would therefore have been by way of an application for an injunction. In my view, therefore, no such application having

been made, it was fully within the power of the board to appoint a new principal with effect from 1 January 2012.

[66] So, albeit by a different route, I am in complete agreement with Lawrence-Beswick JA (Ag)'s conclusion (at para. [227]) that "… legally, the position of Principal would have been vacant" at the time of the appointment of the new principal in 2012. But I must say something further on Mr Equiano's submission (which has apparently found favour with my learned sister) that, in making the new appointment, the board acted in bad faith and in disregard of the ongoing court proceedings.

[67] In the first place, it is clear that both (i) the power to direct a stay of proceedings given by rule 56.4(9); and (ii) the wider jurisdiction conferred by section 49(h) of the Judicature (Supreme Court) Act on a judge of the Supreme Court to grant an interlocutory injunction in all cases in which it appears to be "just and convenient" to do so, exist precisely for the purpose of enabling a party to litigation to seek the court's aid in preserving the status quo pending a final determination of his or her rights. It is common ground that Dr Thompson availed himself of neither step in this case.

[68] Secondly, and of equal importance for this point, it is important to note that, by virtue of regulation 43, the power of the board of a public educational institution to appoint a principal is expressly made subject to confirmation by the Minister of Education. It is clear from the evidence that the board at all times acted in accordance with the advice which it either sought or was given by the Ministry of Education ('the

ministry') and, ultimately, the Attorney General. Thus, by letter dated 5 May 2009, the ministry advised the board, in response to the latter's intimation that it intended to commence the process of finding a new principal, that since the tribunal was scheduled to hear Dr Thompson's appeal on 1 and 2 June 2009, it would not be appropriate for the board to start advertising before the decision of the tribunal was known and that to do so "would amount to pre-empting the [tribunal's] decision". There is absolutely no evidence that the board did anything to flaunt this advice. Indeed, the unchallenged evidence was that in the ensuing period the operations of Bethlehem were overseen by two acting principals in succession.

[69] The tribunal handed down its decision in the board's favour on 1 September 2010. On 14 December 2010, Dr Thompson obtained leave to apply for judicial review of that decision (without any stipulation as to a stay or otherwise). By letter dated 21 April 2010, again in response to the board's enquiry, the ministry's legal department advised that, in the light of the fact that no application had been made to the court upon the grant of leave for a stay pursuant to rule 56.4(9), "the [board] is not fettered, relative to its desire to advertise the post of Principal of the College".

[70] Thereafter, by a series of advertisements placed in the Sunday newspapers during the month of May 2010, the board invited applications for the post of principal of Bethlehem. A total of 13 applications were received and five persons were shortlisted. The persons shortlisted were interviewed and Mrs Yvonne Clarke was identified as the preferred candidate. The board advised the ministry of these developments by letter

dated 13 July 2010. By letter dated 16 November 2010, Dr Winsome Gordon, in her capacity as head of the Jamaica Teaching Council, signing for the permanent secretary in the ministry, notified the board that approval had been granted for the provisional approval of Mrs Clarke as principal of Bethlehem, with effect from 1 January 2012. Dr Gordon's letter reminded the board that, under the provisions of regulation 43 and schedule A to the regulations, a provisional appointment should not exceed three school terms and that it was therefore necessary "to ensure that Mrs. Clarke's performance is evaluated and a recommendation for appointment or otherwise, made by the end of her first year in office". It is true that the minutes of a meeting of the Teachers' Service Commission held on 24 February 2011 recorded that the commission had decided to defer consideration of the board's recommendation "for the provisional appointment of a principal" until the determination of the Supreme Court proceedings. However, nothing appears to have come of this, since, by letter dated 10 May 2012 (that is, two weeks before Daye J's decision), the board was advised by Dr Gordon, again signing for the permanent secretary, that approval had been granted for the permanent appointment of Mrs Clarke as principal, with effect from 1 January 2012.

[71] It therefore seems clear that, although the process of appointing a new principal was set in motion from 2009, that process was put on hold by the board, acting in accordance with the ministry's advice, pending completion of Dr Thompson's appeal to the tribunal. After the report of the tribunal was issued on 1 September 2010, the process was only restarted in 2011 with the specific approval of the ministry, acting on the advice of the Attorney General. The board's justification for seeking the

appointment of a new principal was fully explained by the chairman on behalf of the board in an affidavit sworn to in related proceedings on 23 December 2013, which was also admitted as fresh evidence at the hearing before us:

> "14. In embarking on the process to fill the vacancy [the board] was guided by the administrative challenges being experienced at the institution. Two of the three senior administrators were acting appointments and they were afraid to take decisions for the proper management and administration of the institution. These included long term planning decisions for the strategic management of the institution. The appointment was therefore made to alleviate the hardship being experienced by the institution in terms of these future and strategic planning decisions."

[72] In all these circumstances, therefore, I am clearly of the view that the charge of bad faith made against the board cannot be sustained. I do not think that the board can at all be blamed for taking steps to secure the proper administration of Bethlehem by appointing a new principal, in circumstances in which it was under no restraint from the court and had in fact been advised by the ministry that it was free to do so.

Conclusion

[73] As I have already indicated, therefore, I would allow the appeals on the basis that Daye J fell into error in concluding that a fair-minded and informed observer would find that the committee's decision was tainted by bias.

[74] As regards the matter of costs, rule 15.15(5) of the CPR provides that the general rule is that no order for costs should be made against an applicant for an administrative order unless the court thinks that the applicant has acted unreasonably in making the

application or in the conduct of the application. Whilst this rule does not, strictly speaking, apply to matters heard by this court, I would nevertheless, as this court did in **Jamaicans for Justice v Police Service Commission and Attorney General** [2015] JMCA Civ 12, para. [139], apply the spirit of the rule and make no order as to the costs of the appeal.

PHILLIPS JA

[75] These appeals are against the decision of Daye J contained in his judgment dated 25 May 2012, wherein he granted an order of certiorari and quashed the decision of the Board of Management of Bethlehem Moravian College ('the Board') to dismiss the first respondent Dr Paul Thompson. In SCCA No 89/2012, the Board filed amended notice and grounds of appeal stating seven grounds of appeal, whereas in SCCA No 96/2012, the Teachers' Appeals Tribunal (the Tribunal) filed notice of appeal stating two grounds of appeal. On 12 March 2013, Brooks JA made an order consolidating both appeals.

[76] The matter has its genesis in the meeting of the Board of 26 March 2008, when certain information was submitted to the Board by the Chairman. This resulted in a decision to submit the same to the Personnel Committee ('the Committee'), which comprised a few members of the Board, to decide whether any charges should be laid against the first respondent. The Board decided in the affirmative, the Committee laid the charges, there was a hearing over several days commencing on 17 September 2008 and the first respondent was found guilty of all the charges on 12 December 2008. The

Board, on the said day, dismissed the first respondent from the college. His dismissal was recommended by the Committee. The first respondent appealed to the Tribunal against those findings. Although the Tribunal did not uphold all of the Committee's findings, it did not interfere with the recommendation of the Committee to the Board to dismiss the first respondent and so indicated on 1 September 2009. Thereafter the first respondent filed an application for leave to proceed to judicial review of that decision. Leave having been granted, a fixed date claim form was duly filed on 9 July 2010, and subsequently heard by Daye J on 10 and 11 March 2011. By an order made on 25 May 2012, the learned judge quashed the decision to dismiss the first respondent, which forms the subject of these appeals. The charges, the hearings and the findings of the Committee, the Tribunal, and the learned trial judge will be set out in more detail later in this judgment.

[77] The grounds of appeal in the Board's amended notice and grounds of appeal in SCCA No 89/2012 are as follows:

> "(a) The learned Judge erred when he found that the Committee hearing the complaint against Dr Paul Thompson was exposed to pre-hearing prejudicial material, namely the Chairman's report, given the Chairman's report was a part of the written complaint against the Claimant referred to the Personnel Committee pursuant to Regulation 56 of the Education Regulations
>
> (b) The learned judge erred when he found that the statement of Miss Andrea Miranda [sic][sic] was more probative than prejudicial and should have been received into evidence.

(c) The learned judge erred when he found that the Principal was deprived of the opportunity of putting the evidence of Miss Andrea Miranda [sic] to the Committee [sic] on the vital issue of credibility, given the evidence that the Principal was seeking to adduce in the Affidavit of Andrea Miranda [sic] was inadmissible.

(d) The learned judge erred when he found that there was a real danger or possible danger of bias in the minds of the members of the Personnel Committee against the principal Dr Paul Thompson.

(e) The learned judge misapplied the test of bias to the evidence adduced before him, as on the proper application of the test, no fair minded reasonable observer would have concluded that there was a real danger or possibility of danger of bias in the minds of the members of the Personnel Committee against the principal Dr Paul Thompson.

(f) The Learned judge erred in entertaining an allegation of bias and finding that there was bias in the minds of the members of the Personnel Committee when the issue of bias was not raised at the disciplinary hearing before members of the Personnel Committee.

(g) The Learned judge erred when he found that there was no evidence that the criminal standard of proof was applied by the Committee and that this was [sic] omission was material."

The grounds of appeal in SCCA No 96/2012 are set out below:

"(1) The learned Judge erred when he failed to apply the correct approach to a judicial review, by attempting to determine the merits of the case rather than determining whether the process that brought about the decision was according to law.

(2) The learned Judge erred by failing to consider the decision of the Teachers' Appeal Tribunal in its proper context and applicability." (This ground was later abandoned so nothing need be said on it.)

[78] In my view, taking the grounds cumulatively, the issues in this consolidated appeal are as follows:

(a) Could the report of the Chairman of the Board be considered pre-hearing prejudicial material when the report was the written complaint laid before the Committee?

(b) Could there be a real danger of bias in the circumstances of this case in respect of:

(i) the composition of members of the Committee;

(ii) the exposure of the damaging prejudicial material to the members of the Committee prior to the hearing [before] the Committee;

(iii) the fact that the issue of bias was not raised at the hearing before the Committee; and

(iv) the proper legal interpretation of the test of bias.

(c) What is the effect of the ruling of the Committee that the Meranda affidavit was inadmissible?

(d) What is the proper standard of proof applicable in the proceedings before the Committee - was that standard applied and was it disclosed that it had been applied?

(e) Did the learned trial judge apply the correct approach to judicial review proceedings?

[79] Based on the settled principle of law enunciated in **James Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131, a case out of this court which I will deal with in greater detail, that a court ought to consider the entirety of the proceedings which took place both at the original and the appellate tribunals before making a pronouncement as to whether or not there had been a breach of the rules of natural justice in the matter under consideration, it is necessary to, and I will now give a summary of the proceedings which took place before the Committee, the Tribunal, and the court below, in order to assess whether the court below complied with that settled principle of law.

The proceedings before the Committee

[80] There were six charges laid before the Committee:

(1) Gross inefficiency - it was alleged that during the period September 2006 - December 2007, the first respondent entered into certain contracts which were in breach of the government procurement guidelines: for instance, there

were no widely publicized invitation to tender; that he failed to obtain competitive pricing or to ensure that the suppliers were on the National Contracts Commission's list and had valid tax compliance certificates; that mobilization costs were within the approved 10% rate; he failed to obtain bills of costs, and to ensure that the variation of contracts were within the Government's 15% limit of original price; he also failed to obtain detailed invoices or to obtain approval from the Ministry of Education in respect of the monitoring of the projects; and he failed to have the work measured and assessed by the quantity surveyor.

(2) Professional misconduct - in respect of the first respondent's attendance at a workshop in Saint Lucia during the period 26 - 30 November 2007, wherein it was alleged that the first respondent had failed to obtain the ministry's approval in relation to his attendance at the workshop; he had failed to submit bills to substantiate his expenses while there; he had failed to provide supporting documentation for the purchase of United States dollars: he had stayed an extra day thereby incurring additional expenses without explanation in the amount of $76,740.00; he had spent in excess of the approved rate for accommodations,

transportation and other incidentals; and he had failed to submit to the Board an official report of his attendance at the workshop.

(3) Professional misconduct - in relation to the allocation of funds for the repair of the principal's residence, in that, he failed to follow the directive of the Board that with regard to funds made available from the Ministry of Education to assist with the repairs occasioned by Hurricane Dean, the repairs were to be conducted by way of priority to the classrooms and administrative building; he also failed to ensure that the cost of repairs did not exceed income; and, the wrongful allocation of funds caused great inconvenience to both administrative and academic staff.

(4) Gross inefficiency - in respect of a 2006 Yasuki Coaster bus purchased for the college in 2006 from a company in Japan, for which funds were paid in advance which were in excess of the purchase price of the motor vehicle.

(5) Professional misconduct - in that the first respondent had engaged in intimate relationships with female students of the college, including one Miss Andrea Meranda.

(6) Professional Misconduct - in respect of gross insubordination, in that, the first respondent refused to halt the repair work being conducted on the principal's house when instructed to do so by the chairman of the Board; he also refused to obtain the advice of Miss Scott re the repairs on the said house when requested to do so by the management team of the college; and rebuked Mrs Planter when she advised that the first respondent should seek advice from Dr Nkrumah-Young on financial matters.

[81] The chairman Mr Lowel Morgan, Mrs Karen Marie Watson, a chartered accountant, and Dr Paul Gardner, a member of the Board, gave evidence on behalf of the Board. The chairman dealt specifically with the financial challenges facing the Board, particularly in respect of the significant damage to the buildings of the college caused by Hurricanes Ivan and Dean. He deposed that the administrative building had experienced the most significant damage and that he and the management team had discussed the repairs with the first respondent, and it had been agreed that the principal's cottage would not be a priority in terms of the repairs to be effected, especially as alternative accommodation had been arranged for the principal. He gave evidence of the over expenditure, the imminent deficit in funds, and the recalcitrance of the principal in complying with the priority in the conduct of the repairs. He was also concerned that he had been unable to obtain the contracts between the college and contractors and others when requested either from the principal who said they were in

the custody of the plant manager, or from the plant manager, as the documentation was not necessarily available on the college compound. The contracts, he said, were eventually produced.

[82] He referred to the fact that there were some inadequate accounting systems in place which required the commissioning of a firm of accountants, Strachan & Thorpe, to put a proper accounting system in place, whilst updating the financial accounts for the years 2000-2007. It was his evidence that under the stewardship of the first respondent the college had run out of money, on more than one occasion, and funds had to be borrowed to meet expenses. Based on the financial situation, the ministry took a decision to conduct an audit of the finances of the college. As a result of that decision, and the other matters mentioned, the Board took the decision to send both the plant manager and the principal on paid leave pending receipt of the audit from the ministry, which decision was implemented immediately. The audit was eventually finalized by the ministry.

[83] Mr Morgan was challenged in cross-examination with regard to the alleged agreement and or decision communicated to the principal concerning how the priority of repairs were to be effected to the buildings. The minutes of the Board meeting of 12 September 2007 were tendered into evidence as exhibit two and the arrangement referred to by him was not disclosed therein, and although Mr Morgan insisted that there was such an agreement, he agreed that the minutes did not disclose it. There was much evidence relating to exchanged e-mail messages between the principal and the chairman and whether in the final analysis the principal had eventually stopped the

construction of his house, but only after a meeting of management and a specific directive had been given to him. It was Mr Morgan's evidence in re-examination that in his capacity as chairman of the Board of the college, he had spoken to the principal on three occasions directing that he halt the construction of the principal's house and those instructions had been ignored by him.

[84] Mrs Watson gave evidence that in January - February 2008, she was assigned to the college to conduct an audit of the financial and operational accounts of the accounting and other records. This required her to examine all the bank books, cash books, supporting vouchers, receipts and authorities for payment, for the period September 2006 - December 2007. She was assisted in this exercise by the bursar of the college, Mrs Planter and her staff. In pursuance of that endeavour she said that she had received supplier contracts. At the end of the work undertaken by her, she produced an audit report which was tendered into evidence as exhibit one. She stated that she observed deficiencies in the accounting system and noted them in her report, which she maintained was a true and accurate reflection of what she had examined. She stated that she had practiced in the accounting field for over 29 years and had been an auditor for 11 years.

[85] She gave evidence that the publicized invitation to tender in respect of the repairs to the damaged buildings was not wide enough although adjustments to that process could be made in emergencies, such as the situation which obtained after the ravages of hurricanes. She observed that in certain instances the payment vouchers

were not attached to payments made, which was, she said, the responsibility of the plant manager and the principal. She noted that the payments to contractors in respect of mobilization fees were above the 10% approved by the government. She did not accept that price gouging could account for variations in the contract mobilization fees paid. In any event, she testified that the ministry was unaware of the repairs that had been carried out at the college.

[86] It was her further evidence that there was nothing on file to indicate that there should have been an advance payment made on account of the purchase of the coaster bus. Indeed the file did not indicate that two buses were to be purchased. She had only seen an invoice on file in respect of one bus. She was also unaware of the purchase price of the buses and their respective shipping costs.

[87] She testified that the principal had attended a workshop in Saint Lucia without obtaining the approval of the ministry. She was unable to state which regulation had been breached in that regard, but insisted that in any event, the principal reported to the "Board and the Ministry". She referred to an excess of per diem allowances paid to the principal in respect of the workshop. She complained that there was a lack of supporting documentation in respect of invoices. She testified that the first respondent had stayed an extra day in Saint Lucia, on the occasion of his attendance at the workshop there, and was not aware that there had been any difficulties experienced in obtaining connecting flights out of Saint Lucia to return to Jamaica.

[88] There was a notation in the report stating that a directive with regard to priority in the conduct of repairs to the damaged buildings had been given to the principal and had been ignored, but she also stated that she had not had sight of any written directive. It was her evidence that she had not had discussions with the principal subsequent to the production of her report although it was customary to do so, but he had been on leave at the time, so the report had been submitted to the Board without any comment from him. Mrs Watson confirmed to the panel that she was sure that there was some statutory obligation imposed on the college in respect of keeping proper records, especially accounting records.

[89] Dr Gardner testified that he was a minister of religion, and the president of the Provincial Elders Conference, the executive body of the Moravian Church in Jamaica and the Cayman Islands. He stated that the Moravian Church is the owner of the college. He confirmed that he was a member of the Board. He gave evidence that he had attended a meeting in May 2007 with one "Miss Miranda [sic]" a student of the college, and the first respondent.

[90] The meeting, he said, took place at the board room of Manchester Credit Union, commenced about mid-morning, and lasted about one and a half hours, during which he said that the first respondent said very little. He was, he said, for the most part listening to what was being said. Dr Gardner also testified that he had first had a meeting with Miss Meranda and her colleague Miss Bramwell, then he had a meeting with the first respondent, where he indicated that Miss Meranda had expressed a

desire to have a meeting with him (the first respondent) and he had agreed to do so. The meeting was then held with Miss Meranda, the first respondent and himself.

[91] The meeting, he said, was being held to discuss certain concerns that Miss Meranda had previously raised with him (Dr Gardner). At the meeting, she also raised a number of other concerns, mainly the relationship that she was having with the first respondent, which Dr Gardner said, Miss Meranda said was an intimate one. Dr Gardner stated that the first respondent's response "was simply quote "Guilty as charged" end quote". He said that he had been asked by one of the parties (he could not remember which) to leave the meeting, which he had done. He returned later, "just for closure", he said, and indicated that the discussion concerned how each party was being affected by what had been said. He stated that he had spoken about "certain things" which needed to be done in respect of "curtailing any semblance of relationship". He said that he was of the view, that there was no relationship existing between Miss Meranda and the first respondent at that time. Miss Meranda, he said, was very upset about "a couple of things", namely "her fear or feeling that [the first respondent] might not be speaking with her anymore because he might not be interested in her anymore". And, also because, "she felt that her calls were not being received by [the first respondent]". Her concerns related to the fact that she had a suspicion that she was no longer receiving any attention from the first respondent, as "there might be someone else". The first respondent did not respond to these concerns, although these were stated before he made the statement "guilty as charged". Dr Gardner stated that he had asked Miss Meranda what type of relationship

she had been having with the first respondent, to which she had stated that there was a problem and he said, that she said, that it was "sexual". He stated that the first respondent's statement "guilty as charged" was made before that allegation had been made in the meeting. He said that when Miss Meranda made that allegation, the first respondent made no response.

[92] Dr Gardner, also stated in his testimony, that Miss Meranda was upset because the first respondent was not reciprocating her desire for a relationship, but also stated contrary to what he had said before, that his statement "guilty as charged" was made after Miss Meranda's allegation of the relationship being a sexual one. Dr Gardner also deposed that in the meeting that he had with the first respondent alone, although he could not recall him referring to Miss Meranda as a "loose canon" or a "dangerous person", he did recall discussing her being "very jealous". When it was finally suggested to him that the words "guilty as charged" were not in response to the allegation of Miss Meranda, that her relationship with the first respondent was a sexual one, Dr Gardner responded, "that was not my impression".

[93] In response to questions posed to him from a member of the Committee, he indicated that as the president of the executive of the Moravian Church, his interest as well as that of the executive, in the proceedings before the Committee, was to try to ensure that they were conducted fairly as a matter of justice. He stated that his involvement in the matter came about surprisingly, and he had subsequently made every effort to distance himself from the proceedings as much as possible.

[94] The first respondent at the time he gave evidence, stated that he had been principal of the college since September 2003. He testified that in the month of August 2007, Hurricane Dean struck the island and caused significant damage to a number of buildings at the college [and several were destroyed]. There was a management team which met regularly, comprising the administrators of the college, the principal, vice principals, the bursar, heads of education and the departments relating to catering and household services. That team decided that funds would have been made available from school fees to repair certain buildings which would have started in late August 2007, and external funds would also be sourced from the ministry to repair others, all in an effort to try and get the college prepared for classes in the Christmas term. The first respondent submitted a report in respect of the schedule of repairs. There were no priorities, save and except the focus on commencement of classes. There were also no regulations, he said, which had to be followed. He explained that the buildings were repaired utilizing the local funds (school fees) and then only four buildings remained that is, the administrative building, the principal's cottage, the sick bay and the library flat. National Commercial Bank (NCB) foundation provided $250,000.00 to repair the sick bay. These funds did not go directly to the school but to the contractor on a percentage basis as completed and verified by the plant manager and the NCB representative. Once that was repaired, it was agreed that the persons who occupied the administrative building could have moved there. He explained how persons would have been/were accommodated during the disruption of the repairs and the plans for reinstatement of the buildings. The ministry provided $4,000,000.00 for

the reconstruction, $250,000.00 of which was to be allocated to the library flat, $1,600,000.00 for the principal's cottage, and the remaining amount was sufficient to repair the administrative building. He stated that there was a procurement committee which was responsible for obtaining three estimates per building, and he had regular discussions with Ms Vivienne Scott, the chairperson of the infrastructure committee, who was given all the information on the estimates for the repair of the buildings. He was unaware of a directive having been given with regard to any priority in respect of the order of repairs to the building. He said that outside of the management and procurement committees he had only had discussions with Dr Gardner in respect of the reason for the sequencing of the repairs and only became aware that there was a problem with the same when Mr Morgan told him to stop the repairs in November 2007.

[95] He testified that he had kept Mr Morgan informed of the repairs being effected and the procurement process, and that the contracts had already been signed and the work had started when Mr Morgan sent him an e-mail, on 3 December 2007, telling him to stop the repairs. The e-mail referred to the construction of the principal's cottage and the library flat. Prior to that e-mail he said that he had not received any other such directive. He had not had any discussion with regard to the priority of repairs, although he had discussed the areas that had been damaged, the repairs required, the substitute offices to be created, and the alternative accommodation which would have to be arranged. The only guideline that he said that he was aware of was that three estimates should be obtained in respect of each contract, and a

report submitted once the work had been completed. He said that he only knew of one variation to a contract which was in respect of the "D lab" relating to obtaining increased plyboard for the chalk board used in the classroom. He stated that he had not adhered to the directive given by Mr Morgan to stop the construction as it would have been a violation of the contracts already signed with the contractors.

[96] With regard to the National Contracts Commission (NCC) approved list, he said that there was only a question in relation to one contractor but he had done work on the "Smart Classroom" for the college earlier in the year in the amount of $1,000,000.00, which had been approved by the finance and infrastructural committees, so he had thought that that contractor would not have been disqualified. He said that no quantity surveyor had been used in the construction repairs as the college could not afford the services of one. He was therefore of the view that the infrastructure committee would have inspected and approved the repairs. He also indicated that the guidelines used for the entire works were those relating to emergency contracting, which permits, he stated, a limited tender methodology. He said that these guidelines had been issued by the government over the signature of Miss Shirley Tyndall.

[97] He testified in relation to the lease of the property which had been obtained for his temporary accommodation while the principal's cottage was being repaired, and stated that although it had been signed for a period of only six months, he remained

there for a further period of six months, the lease having been extended twice for a period of three months.

[98] He gave evidence in relation to the acquisition of the coaster bus. He stated that he became aware from the records of the college that a bus was desired for some time. A bus acquisition committee was established and there were several fund raising efforts undertaken to obtain funds to purchase the same. Contributions were also obtained from entities such as the Pastors' Association in Kingston and Mandeville. The decision was taken after discussion with faculty members to buy two buses (one coaster size, valued at US$20,000.00 with shipping costs of US$6,000.00, and one small unit) instead of one, as the cost of one bus from Toyota Jamaica was prohibitive, and even with the shipping costs, the two buses would be less expensive if obtained from a company in Japan, which company had been introduced to the college by two members of the faculty. The issue, he said, was discussed extensively with the chairman who advised positively on the same. Having decided that the company in Japan was bona fide, he said that they agreed to purchase the buses and the contract required that 50% of the CIF value be paid, which amounted to US$23,000.00, the balance being payable when the buses were ready for shipping. He said that he submitted a report to the Board indicating that the buses should be available at the end of the month of March 2006. That however did not occur, as there were difficulties experienced by the Japanese company in obtaining a right hand drive bus in respect of the smaller unit ordered, and he indicated that the bus acquisition committee thought that a left hand drive bus would not be safe. He said the company was asked to ship

the coaster bus only, and set off the funds paid in respect of the smaller 15 seater bus against the purchase price of the coaster bus. That having been settled, a further difficulty arose as the tax compliance certificate for the college had lapsed, and therefore taxes had to be paid in order that a current certificate could be issued. That, he said, took some time. Additionally, the documents originally sent with the vehicle were in Japanese, and were insufficient, which had to be addressed. Eventually, the bus was cleared from the wharf and the college took possession of it, but unfortunately the bus was of inferior quality, and within three months started to leak oil. It was discovered, he indicated, that the unit was not new but reconditioned, and the seats, carriers and DVD players had shaken loose. In an effort to obtain redress from the Japanese company, the first respondent said that they got assistance from the Japanese Ambassador to Jamaica, and eventually settled for a payment of US$10,000.00, but within days of that agreement, the bus was unfortunately destroyed by fire.

[99] With regard to the meeting with Dr Gardner and Miss Meranda, the first respondent testified that the meeting took place on 18 June 2007 and he attended as Dr Gardner had invited him to the meeting for the three of them to have a discussion. This is what he said was discussed at the meeting and the responses given (page 354 of the transcript of the notes of evidence of the hearing of the Committee):

> "A. Ms Miranda [sic] expressed her anger that I was not responding to her calls, that I seemed to have been avoiding her and that she was not pleased with that, and that I was receiving e-mail messages from other students, because those that were sent to me were sent

to her, were cc'd to me. She also said that students had access to my office or to me in my office, that students found me to be approachable and that I smiled too easily with students.

Q. When she had made these statements, what was your response?

A. I indicated that I was guilty as charged.

Q. For clarity, you were guilty as charged in relation to what?

A. To receiving e-mail messages from students,seeing students in my office, to my office being accessible to students.

Q. What if anything did Dr Gardner say in response to that?

A. He asked what would she suggest that I should do differently?

Q. And she responded?

A. That I should only see students in the presence of other persons, that I should smile less, and that I should not receive e-mail messages from students……"

When asked pointedly, "Did you have a sexual relationship with Andrea Miranda [sic]?", the first respondent responded, "I did not."

And when further questioned:

> "Did you have any inappropriate relationship with Andrea Meranda?", he responded, "I did not."

[100] The first respondent testified that he had attended the CKLN workshop which was, he said, a CARICOM initiative seeking to connect the institutions in the Caribbean

through broadband internet facility. A number of sessions had previously been held in Jamaica. He deposed that a vice principal of the college had accompanied him, and the vice principals of the college were aware of his proposed attendance at the workshop as they had discussed arrangements for the administration of the college during his absence. He had not informed the Board, prior to his attendance at the workshop, nor had he advised the Ministry of Education of his attendance there, as he was unaware that it was necessary to inform the ministry. He endeavoured to ascertain the amount that he ought to receive per diem and the US$300.00 that he utilized was through information he obtained from the bursary, which was approved by the bursar, with annotation on the requisition form that it was subject to further verification. He stated that he was unaware that there had been an over payment in respect of his per diem, until he saw the charges laid before the Committee. He said that he would have refunded any overpayments had he been told that that was the case, after verification of the authorized per diems. He indicated that with regard to the workshop, he had stayed the extra day in Saint Lucia as he had been advised by his travel agent that attempting to travel from Saint Lucia on the Friday to get a connecting flight to Jamaica was traditionally problematic. So, he had followed that advice and travelled on the following day. He said that he had submitted a report in respect of the workshop to the Board.

[101] In cross-examination the first respondent said that he had not heard Miss Meranda say in the meeting on 18 June 2007 that their relationship was a sexual one. He also said that he did not recall anyone suggesting to Dr Gardner that that statement

had not been made. He said that Dr Gardner had lied when he said that Miss Meranda had stated that their relationship was a sexual one. He stated that Dr Gardner had indicated prior to the meeting on 18 June 2007, in his meeting with him on 13 June 2007, that there had been allegations of a sexual relationship between him and Miss Meranda, but he did not understand that the meeting had been called to discuss those allegations. He indicated that Dr Gardner had stated in the meeting of 13 June 2007 that Miss Meranda was "a loose cannon who was jealous and dangerous". The meeting, he said, of 18 June 2007, was arranged as Miss Meranda was angry that he had not been accepting her calls. He stated that he had not used the meeting as an opportunity to confront her with regard to her allegations of having a sexual relationship with him. He said that he did not think that it would have been appropriate to do so, as she was seeking an opportunity to have a conversation with him, and he was not prepared to have that conversation with her, as, in his view, she was "seeking attention". He denied saying "guilty as charged" after Miss Meranda had stated that the nature of her relationship with him was sexual. He stated that the first time he had heard of the allegation that his relationship with Miss Meranda was sexual, was in the meeting with Dr Gardner. On 13 June 2007, he said that he had done nothing with regard to that allegation except maintaining his innocence. He indicated that he had discussed the situation with his wife.

[102] The first respondent stated that while Dr Gardner was out of the room he had discussed the allegations made by Miss Meranda with her (contrary to what he had stated before). He endeavoured to explain that the discussion was not a confrontation,

and that the allegation was not discussed when Dr Gardner returned to the room, because, he stated, Miss Meranda did not want him to be a part of what had been discussed, as she did not want Dr Gardner "to hear her saying what she had said to him before was not so".

[103] He stated that he had a lot of trust and faith in Dr Gardner, but he did not have sufficient faith to raise the question of the allegations of the sexual relationship with Miss Meranda with him, in the meeting, since he knew that Miss Meranda had not been telling the truth. He stated that he had driven Miss Meranda in his car before on two occasions. There were, he said, two other students present. He stated that he knew a student with the name of "Aida" and also a student named Nicole Bramwell. The latter he came to know through her being registered as a student at the college.

[104] The first respondent stated that if he had responded "guilty as charged" after Miss Meranda had clarified that the relationship was sexual that would "be a grave position" and he also agreed that if he admitted that type of relationship it would have been a "grave admission". He said that he was shocked that Dr Gardner had stated that Miss Meranda had said in his presence that they had had a sexual relationship. He also said that he had not heard anyone say that Dr Gardner had lied when he posited that Miss Meranda had made that statement in his (the first respondent's) presence.

[105] The first respondent testified further that US$26,000.00 had been paid in respect of the two buses and accepted that he had paid US$23,500.00 by letter in January 2006. He stated that the additional $2,500.00 had been paid. He said that all

the information in relation to the transaction, including the pro forma invoice, was on the file at the college with the bursar.

[106] He testified further that with regard to the exchange of e-mail messages with the chairman relative to stopping the work on the principal's cottage, he had not stated in any of the e-mail messages that he could not do so because of contractual obligations. But the provisions were in the contract, he maintained. He indicated that he was aware that, pursuant to the Education Regulations, with particular reference to the duties and responsibilities of the principal, any direction that he gave with regard to expenditure of the funds of the college would have to be within the policy of the Board. He said that when the chairman made the request, there had not been a Board meeting on that matter and so the chairman would not have been speaking froma board decision. He agreed that he had halted the repairs inspite of the significance of the contractual provisions. He said that his understanding was that the directive to halt the repairs was based on the Board wishing to review the contracts and also on the priority of expenditure, but not to facilitate the opening of the school as the school had already opened. He stated that in issuing that directive, he was of the view that the chairman was making that statement personally and not as a statement from the Board. He did not accept that it would have been prudent to give priority to any other buildings including his residence, even though he had been comfortably housed elsewhere as he had been told by the agent that the premises were required by the end of February. He indicated that he was aware of the limited funds that were available for the repairs, but was not aware that if the repairs continued at that time, the college would be in deficit.

He was of the view, as stated in an e-mail to the chairman, that, for the work to be halted to enable the Board to ascertain if the contracts had been properly entered into, suggested that the persons responsible for ensuring that was done, were not able to do so.

[107] In respect of the trip to Saint Lucia, he stated that he had submitted a report to the Board and additionally he had also submitted invoices and bills inrelation to his expenses overseas. They were on the file at the college. He stated that he had not kept any copies. He said that he was aware that the auditor's report said that there was no supporting documentation in relation to the purchase of United States dollars and his time spent in Saint Lucia, but he maintained that all the documentation remained on the file. He had not requested any of the documentation from the college, as in his view, he had left them at the college. He said that he did not think that it was necessary to inform the Board or the ministry that he was attending the workshop prior to doing so. Additionally, there was no board in place at the time of his trip and the chairman was then in England. He confirmed that he was aware of NCC's guidelines and that he had complied with them. He indicated that there were instances in which the contractors had been paid above the 10% mobilization rate, but explained that this was done in an effort to get the job done quickly, so that classes could have started in September. He said that it was necessary therefore for the contractors to bring more material on site at the outset. He stated that it was the policy of the Board to always abide by the procurement guidelines. He indicated that he had not advised the Board or the chairman of his intention to go beyond the guidelines. He was aware that there

were officers at the building unit of the ministry, but he had not consulted with them before undertaking the repairs. It was his understanding, he said,that once the funds were disbursed, the officers would make contact with the college. He had not contacted them.

[108] He stated that he had thought that the contractors were on the NCC's approved list before engaging them, save the one contractor which he had indicated had been previously engaged by the Board. He had not consulted the Board or the chairman in respect of engaging this particular contractor who was not on the approved list. He admitted that there had been a variation in the value of the work to be executed in a particular contract which was in excess of the 15% guidelines, and he had not consulted the Board or any ministry official inrespect of the variation before it had been carried out. He confirmed that he had invited tenders in respect of the job, at least three per job, and that all the documentation in relation thereto was on the file at the college. He said that as principal of the institution, he was fairly familiar with the procurement guidelines.

The report and findings of the Committee

[109] The Committee in its report referred to the fact that the Board had received a written complaint against the first respondent and had, pursuant to section 56 of the Education Regulations 1960, referred the matter to the Committee, which having heard the evidence, in respect of the charges, on 17 September, 20 November, 3,4, and 8 December 2008, submitted its findings as follows:

Re Charge No 1

The Committee noted that the first respondent had admitted that although aware of the procurement guidelines, he had utilized at least one contractor not on the NCC's approved list; he had exceeded the mobilization rate of 10%; there had been at least one variation in the contract price above the approval amount of 15%; and he had not contacted the officers of the building unit of the ministry to obtain their approval recommendations and monitoring of the project. Also, the work had not been measured and assessed by a quantity surveyor. Additionally, the Committee found that there was no plausible explanation to rebut the evidence in the auditor's report showing that there had not been wide publicizing of tenders from suppliers of goods, or competitive quotations from at least three suppliers or that relevant suppliers had tax compliance certificates, or that bills of quantities had been obtained, or invoices for the work to be done. The Committee found that the audit report had stated that the relevant documents to show the above had not been on file, and the fact that the first respondent had not asked for them suggested that he had no belief that they were on the file.

He was therefore found guilty of gross inefficiency.

Re Charge No 2

The Committee referred to the fact that the first respondent had admitted that he had not obtained the approval or permission of the Board or the Ministry of Education, to attend the workshop in Saint Lucia, and stated that there was no supporting

documentation in relation thereto in respect of his expenses and the purchase of the United States dollars as found by the audit report. Also, since he had not advised the Board or the ministry that he would be staying an extra day at the workshop, of which he knew before he left Jamaica, and also that he had failed to obtain the correct daily rate in respect of the per diem allowances which he could have obtained from the ministry, he was guilty of professional misconduct. The recommendation was that he should repay the amount of $76,740.00, which had been overspent.

Re Charge No 3

The Committee found that the first respondent was aware of the duties and responsibilities laid down in paragraph 4 (f) of schedule D of the Education Regulations, and as such, any expenditures by the principal are subject to the policy of the Board and the budget. Mr Morgan said that at a board meeting in September 2007 it had been agreed that the principal's residence would not be given priority (although the committee stated that the first respondent did not agree with this, it found Mr Morgan's evidence to be credible) and coupled with the obligation under the regulation mentioned above, the committee found that he had a duty not to give priority to other buildings within the policy. The committee also found the first respondent guilty of professional misconduct, in that, he misallocated the funds of the institution in the post Hurricane Dean repairs.

Re Charge No 4

The Committee noted that there was no documentary evidence on the file, as stated by the auditor, for the 50% deposit on the two buses. The first respondent said that US$6,000.00 for the shipping costs and then US$2,500.00 was paid at a later date, which was also not supported by any documentary evidence. What the auditors found was a final invoice of 10 May 2006, in the sum of US$20,000.00 for cost, insurance and freight (CIF). The first respondent was found guilty of gross inefficiency in the purchase of the coaster bus on behalf of the college and the Committee recommended that he should repay the sum of US$3,500.00, the amount above the invoice sum.

Re Charge No 5

The Committee found that this was the most serious charge. The Committee accepted Dr Gardner's evidence that at the meeting with the first respondent and Miss Meranda she had stated that she had an intimate relationship with the first respondent, and after she had said that the first respondent said "guilty as charged". They found the first respondent untruthful with regard to his statement that he had not discussed the question of the sexual relationship with Miss Meranda at the meeting, yet subsequently said that he had done so with her in the absence of Dr Gardner. They did not accept that the meeting was only to discuss her other complaints,and there was no explanation from him as to Miss Meranda's authority to question him in respect of his open door policy. The Committee accepted the law as set out in Phipson on Evidence and found that the words "guilty as charged" amounted to a confession. The

Committee found on the basis of Dr Gardner's credible evidence and the inconsistency in the evidence of the first respondent that he was guilty of professional misconduct in that he had sexual relationship with a student.

Re Charge No 6

The Committee found that the first respondent had received an e-mail from the chairman requesting that he halt the repairs to the principal's cottage. He had not complied with that request claiming that contractual provisions prevented him from doing so, yet he eventually halted the construction, and the contractor "did not use such a clause against the institution". The first respondent's statement that Mr Morgan was not acting as the chairman when he gave the directive was untenable as there was no evidence that he was acting in any other capacity. The Committee found that there was no plausible and acceptable reason for refusing to halt the repairs which amounted to gross insubordination.

The Committee was guided by the Education Regulations and referred in particular to section 55 which speaks to disciplinary offences that can be taken against a teacher in a public education institution. The Regulations stipulated that charges 1 and 4 fell in category C – inefficiency; and charges 2, 3, 5, and 6 fell to be considered under category G – "such other conduct as may amount to professional misconduct". The committee also considered schedule D, section (f) which addresses the duties responsibilities of a principal of a public education institution and the responsibility to the board for any failure to use the institution's funds properly.

[110] The Committee concluded and recommended as follows:

> "The gravity of the offences committed clearly indicates that Dr Thompson is unsuitable to lead the institution. It is expected by the Board of Management of Bethlehem Moravian College that the person who serves in the capacity of Principal will do so efficiently and with high moral standards. Dr. Thompson's level of inefficiency and degree of professional misconduct are contrary to the Ministry of Education's regulations and the standards of the Moravian Church. As such in accordance with section 57 5b iv, the Personnel Committee recommends to the Board of Management that Dr. Thompson's appointment as Principal of Bethlehem Moravian College be terminated with immediate effect."

[111] On 6 January 2009, the first respondent appealed to the Tribunal pursuant to the Education Act and section 61 of the Education Regulations 1980, by filing notice of appeal. There were three grounds of appeal, initially stated therein, but these were later revised as can be seen from the findings of the Tribunal.

Report and findings of the Tribunal

> Re ground one - No complaint was made to the Board in writing as is required by regulation 56 of the Education regulations 1980.

[112] The Tribunal dismissed this ground on the basis of having no merit as the material presented to the Board showed that a complaint had been filed.

> Re ground two - The proceeding was not completed in the time stipulated by regulation 58 of the Education Regulations 1980.

[113] This ground was dismissed on the basis that the complaint made against the first respondent was considered at the Board meeting of 26 March 2008 and a decision taken to refer the complaint to the Committee which met on the same date and decided to lay charges against the first respondent. The decision of the Committee and the Board to terminate the services of the first respondent were both made on 12 December 2008 within the nine months required by regulation 58.

> Re ground three - The first respondent had not received a fair hearing as the committee was tainted with prejudice and bias against the appellant. There was a breach of the laws of natural justice.

[114] This ground was dismissed on the basis that having perused the documents which had been presented to the Committee, namely the report from the chairman and his email to the Board and having heard the submissions of counsel, they were not of the view that there was any bias on the part of the committee and thus there had been no breach of the principles of natural justice.

> Re ground four - The evidence adduced to support charges 1, 2, and 4 was grossly insufficient and did not support the conclusions made. The evidence adduced from the auditors reflected that their findings were based on material provided tothem without the first respondent's input and as such should not have been relied on.

[115] This ground was allowed on the basis that the Tribunal found that the challenge to the Committee's findings of gross inefficiency (charge 1), professional misconduct

(charge 2- re trip to Saint Lucia) and professional misconduct (charge 3 - repairs to the principal's cottage) had merit.

> Re ground five- The evidence adduced in respect of charge 3, was totally unfounded and does not support any misbehaviour, negligence or professional misconduct or inefficiency on the part of the first respondent.

[116] This ground was allowed on the basis that the Tribunal found that the challenge to the charge in relation to the allocation of funds for the repairs to the principal's residence due to a failure to follow the Board's directives, and failing to implement a system of budgetary control had merit, having considered, in particular, the periods when the board was appointed and functioning.

> Re ground six - The Committee erred when it did not allow into evidence the affidavit of Miss Meranda, the purported victim. There was no complaint to the Board and the evidence adduced should not have been allowed as it reflected the witness' interpretation of words spoken in a meeting.

[117] This ground, which related to charge no 5 was dismissed. The Tribunal found that there was no basis to interfere with the committee's decision not to allow the affidavit of Miss Meranda as there had been no proper notice of intention to use it and there had been no indication that the affiant Miss Meranda could not be produced to give evidence. The Tribunal found that there was no dispute that the words "guilty as charged" had been stated, and the interpretation to be placed on these words was not necessarily Dr Gardner's but the Committee's having regard to the context in which the

words were said and the demeanour of the witnesses which unlike the Tribunal, members of the Committee had the opportunity of seeing and assessing.

The Tribunal was also not pleased with the first respondent's challenge as to whether it had been proved that Miss Meranda was a student as there had not been any formal ground filed before the Tribunal to that effect and it appeared not to have been a challenge in the hearing before the Committee. Therefore to permit such a challenge before the Tribunal seemed unfair, as the Board could possibly have produced evidence in support of her alleged status as a student.

> Re ground 7 - The evidence adduced did not amount to professional misconduct. The Committee failed to appreciate that the principal was the chief executive officer of the institution, and he took directions from the Board and not the chairman in person.

This ground was allowed. The Tribunal having heard the evidence and considered the material submitted and the submissions made by both sides, thought that the first responsibility argument had merit.

[118] The Tribunal summarized its findings in this way:

> "The summary of our decisions is that grounds of appeal one, two, three and six are dismissed while grounds of appeal four, five and seven are allowed. In the totality of the circumstances, it is our respectful view that the grounds of appeal allowed do not result in a cancellation of the Board's decision to terminate the appointment of the Appellant as principal."

[119] As grounds one and two before the Tribunal were not before the Committee, in essence, the Tribunal had ruled against all the findings of the Committee save one, namely ground six relating to charge no 5 which is, the allegation of professional misconduct in relation to the principal's intimate relationships with female students. Based on the evidence adduced, his sexual relationship with one female student, namely Andrea Meranda.

[120] The first respondent clearly displeased with the Tribunal's approach, given its overall findings, filed a fixed date claim form in December 2009, against the Tribunal and the Board, which was later amended and filed in July 2010.

The proceedings in the court below

[121] The fixed date claim form sought an order of certiorari to quash the decision of the Tribunal upholding the decision of the Board to terminate the services of the first respondent on the following bases:

> "1. The Teachers' Appeal Tribunal erred in law, when it ruled, that a report to the Board of Management, justifying a decision, could be construed as a formal report as required by the Regulations
>
> 2. The Teachers' Appeal Tribunal erred, by deciding that there was no breach by the Board of Management of Regulations 58 of the Education Regulations 1980
>
> 3. The Teachers' Appeal Tribunal erred when it ruled that the Applicant had a fair hearing and that material presented to the tribunal before the hearing was not prejudicial and would not have caused the Personnel Committee hearing the complaints against the Applicant to discriminate against him unfairly.

4. The Teachers' Appeal Tribunal erred in law in its ruling that there was evidence to substantiate the charge of sexual misconduct.

5. The decision of the Teachers' Appeal Tribunal be set aside and by extension the decision of the Board of Management of the Bethlehem Moravian College to terminate the employment of Paul Thompson as principal of the college."

[122] The first respondent deposed to an affidavit in support of the claim. He set out the chronology of events. He stated that at a Board meeting in December 2007, allegations based on certain concerns of the chairman of the board had been made against him in respect of his management of the institution. A decision was taken for the ministry to be asked to conduct an audit of the institution. He was informed by letter dated 27 December 2007 that he was being suspended by the Board (the letter stated that he was being sent on paid leave for one term effective immediately). The letter also raised the issue of inappropriate relationships with students which were being investigated. By letter dated 27 March, 2008, he was informed that the Board had received a written complaint against him and that disciplinary action would be taken. The letter indicated that he was being suspended from May 2008 until the matter had been determined. He averred that he had never received any complaint against him until after the hearing before the Committee, in the appeal process.

[123] He stated that six charges had been laid against him by the Committee and that he had been found guilty of all charges. That the Committee had recommended to the Board that his services with the college should be terminated, and the Board had

decided to do so. He appealed that decision and the Tribunal heard the appeal. He challenged the decision of the Committee on the basis that he had not had a fair hearing as the Committee was biased. The Tribunal, he said, made certain findings but decided to uphold the decision of the Board. He strongly contended that there had been no written complaint before the Committee as the report of the chairman could not be construed as a complaint against him. The report by the chairman, he said, had some very prejudicial comments against him and it was his contention that there was never any intention to prove any of the information contained therein. As a consequence, he said that he could never have received a fair trial. He also referred to certain e-mail documentation, which he said was prejudicial, which he had not seen before the hearing of the Committee and which would have resulted in him not having received a fair hearing.

[124] He maintained that the evidence of bias could be seen from the fact that the Committee had found him guilty in circumstances where there was no evidence to substantiate the charges. The Tribunal he said, had failed to appreciate the full effect of the damaging and discriminating material, which had been submitted to the Committee. He strongly challenged the finding of sexual misconduct, stating that the charge had not been proven and that the evidence adduced in relation thereto was insufficient and inadmissible. The correspondence, the report and e-mail from the chairman, the notice of appeal to the Tribunal and the findings of the Tribunal were all attached to the affidavit as exhibits.

[125] Wesley Barrett, Chairman of the Tribunal deposed to an affidavit in response to the fixed date claim form confirming the hearings and stating that the Tribunal had given due consideration to the matter before it. Heather Murray, a member of the Board and the chairman of the Committee also gave evidence. She confirmed the chronology of events and explained the composition of the Committee, particularly why the chairman had declined to be a member.

The findings of the learned judge in the court below

[126] The learned trial judge having set out the chronology of events recognized that the first respondent in filing the application for judicial review was invoking the inherent supervisory jurisdiction of the court. He made it clear that the court was not to determine whether the Committee came to the right decision. The function of the court was to determine whether the Board and the Committee adopted and followed the proper procedures at common law and the Education Regulations to afford the first respondent a fair hearing. He referred to and relied on the principles set out in the House of Lords case **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147.

[127] He dealt with certain complaints, namely that the Board had failed to comply with a particular time period set out in sections 56 and 58 of the regulations, in that, the Board had failed to hand down its decision within nine months of the lodging of the complaint, that the two reports submitted by the chairman were not written complaints as required by the regulations and that the first respondent had not had notice of the

charges against him before the hearing of the Committee. The court found that the time frame had been duly met, the reports submitted constituted written complaints, and the first respondent was aware of the charges that he was required to defend. These findings have not been challenged on appeal and I will make no further comment on them.

[128] The judge set out the test of apparent bias as laid down in **R v Gough** [1993] AC 646, and stated that it was pointed out in **George Meerabux v The Attorney General of Belize** [2009] UKPC 12 that the Gough test was adjusted in **re Medicaments and Related Classes of Goods (No2)** [2001] 1 WLR 700 which he said, laid the basis for the final stage in the formulation of the objective test which is set out in **Porter v Magill** [2001] UKHL 67, namely, "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". He stated that the characteristics of the fair minded and informed observer had been described and referred to in **Joseph Lennox Holmes v Royal College of Veterinary Surgeons** [2011] UKPC 48 and **Helow v Secretary of State for the Home Department and Anor** [2008] UKHL 62, which he endorsed and set out in detail. The court reviewed and analysed the principles to be distilled from the cases.

[129] The learned judge assessed the situation with regard to the composition of the Committee, in that, the reports were submitted to the Board and the Committee, pursuant to the regulations, is comprised of members of the Board. He noted that the chairman and the vice chairman had recused themselves from the Committee as they

were potential witnesses and he accepted that some effort had been made to address the issue of apparent bias. He stated however that the structure of the regulations and or the protocol and convention which obtained in this case did not prevent and or preclude the Committee from being tainted with apparent bias.

[130] The learned judge found that the pre-hearing statements that the Committee was exposed to contained more prejudicial than probative matters. One of the reports, he said, contained graphic details of alleged sexual impropriety and the other, certain details of allegations of alleged financial irregularity against the first respondent. At the end of the day, the learned judge noted that none of the charges of financial irregularity were found proved and only the charge relating to sexual misconduct was found proved. In fact, it was his opinion and he stated in paragraph [40] of the judgment that "[p]rejudicial pretrial statement and information can lead to bias in the minds of a decision-maker on a decision-making tribunal. Any decision which flows from such a person or tribunal would not be fair to an affected person".

[131] The learned judge commented that being exposed to information through any source outside of the hearing could cause contamination and bias, and the Committee members should have been warned to disregard the same, which he said had not occurred in this case. He referred to other relevant cases dealing with this aspect of the law namely **John Paul Thomas and Others** [1991] Cr AR 239 and **Ramachandran Subramanian v The General Medical Council** [2002] UKPC 64. The learned trial judge said that the e-mail submitted from the chairman to Dr Nkrumah Young, a member of the Board and of the Committee, concluded that the first respondent's

judgment could not be trusted. It was a pre-judgment from a potential witness, and was made in the context concerning questions relating to financial and administrative decisions about the priority of repairs to damaged buildings, post Hurricane Dean in August 2007. He recognized that it had been sent before the disciplinary hearing, but it was of significance. He said that the e-mail related to five of the six charges laid by the Committee. It was therefore a matter of credibility and this was crucial when dealing with the charge of sexual misconduct, which the learned judge noted was the only charge proved and "left standing at the end of The Appeal Tribunal Hearing". The learned judge viewed this as very relevant when viewed within the framework of the test of the real danger of bias.

[132] The learned judge dealt with the Committee's ruling that the affidavit of Andrea Meranda was inadmissible. He examined the contents of the affidavit, the evidence of Dr Gardner and the first respondent and the damning and impugned words, "guilty as charged", the circumstances in which they were alleged to have been spoken and concluded that credibility had been a live issue in the case, as was the reliability of the matters discussed at the meeting with Dr Gardner. He accepted that the affidavit did not meet any of the criteria conditions of the Evidence Act, Miss Meranda not attending to give evidence. However, he found that the evidence was "relevant in the interest of a fair hearing on charges of sexual misconduct where she was named as a party". He said though she was unwilling to attend to be cross-examined, the hearing could have been adjourned, she could have been summoned, and if unwilling to attend, then the

Committee could have been warned how to treat with an untested statement. He concluded thus:

> "Her statement was more probative that prejudicial and should have been received looking at fairness of the proceeding as a whole. This course would not have infringed either that letter or the spirit of the law governing the rule of evidence. To allow the tribunal to be exposed to material which is more prejudicial than probative and then disallow a statement which is more probative than prejudicial breached the requirement of fairness. The Principal was deprived of the opportunity, by the exclusion of the affidavit, to rely on some material to show his innocence."

He found that the decision of the Committee and the Tribunal could not be sustained.

[133] The learned judge also stated that it had been agreed by all parties that the charge of sexual misconduct was a serious charge. In his opinion, in those circumstances, in keeping with the principles enunciated in **Wilston Campbell v Davida Hamlet (as executrix of Simon Alexander)** [2005] UKPC 19, the Tribunal ought to have applied the criminal standard of proof and as there was no indication on the record that it had been done, the first respondent had thus been denied a fair hearing.

[134] Having set out the facts that the fair minded informed observer would have had in his contemplation, which included the fact that the Education Regulations mandate the Committee to hear disciplinary charges against a teacher; and that the relationship between the Board and the Committee could expose the Committee to prejudicial material; that steps could be taken to avoid members of the Committee who have

been exposed to such material, from sitting on the Committee, as was done in the case of the Chairman and the vice chairman; that prejudicial reports were presented to the Committee and no direction was given to the members as to how to treat with the material, in circumstances where one of the members of the Committee was exposed to a further prejudicial e-mail, and took part in the hearings of the Committee; that the first respondent was deprived of the opportunity of putting the evidence of Miss Meranda to the Committee on the vital issue of credibility; the learned judge concluded that there was a real danger or possibility of bias in the minds of the Committee against the first respondent.

[135] He found that the disciplinary proceedings were not fair and the order of certiorari quashing the decision to terminate the appointment of the first respondent as principal was granted.

Submissions

On behalf of the Board

Ground one

[136] Counsel submitted that the learned judge erred when, having accepted that the report from the chairman to the Board could be and did constitute the written complaint under the regulations, did not also accept that the Board merely operates as a filter mechanism, and that it was the duty of the Committee to firstly, determine whether there should be a hearing, the charges that should be laid, whether to consider the same on the evidence adduced before it, and to decide the matter accordingly. Counsel

referred to the Privy Council case of **Easton Wilberforce Grant v The Teacher's Appeals Tribunal and The Attorney General** [2006] UKPC 59, for guidance on the functions of the Committee. Counsel submitted that efforts had been undertaken to insulate the proceedings from prejudice and or bias, as the chairman and the deputy chairman did not sit on the Committee. Counsel submitted that the facts in the **Grant** case were apposite and instructive, as in that case, there was an issue as to whether a position hastily and previously taken could be reconsidered afresh on the case being represented, and the decision then made be fair and valid.

[137] Counsel contended that the learned judge's reliance on the **Holmes** case was misplaced. In the instant case the Board had no adjudicating function whatsoever, it played only a peripheral role. The Committee was the entity that decided if a complaint should be laid and then heard the complaint. It was difficult to change the composition of the Committee, and as indicated, efforts had been made to do so which the learned judge acknowledged, yet the judge unreasonably expected that more should have been done. Also, the fact that the members of the Committee are drawn from the Board pursuant to the regulations, does not mean that information provided to them will prejudice or jeopardize the hearing. The Board, the Committee and the Tribunal are all subject to a statutory scheme, and as such, counsel further contended, there was no danger of bias. Being in receipt of the complaint before the hearing does not connote a real danger of bias. The issue therefore was whether the first respondent's right to a fair hearing had been compromised, particularly since the proceedings were subsequently reheard before the independent Tribunal. Counsel also complained that

the issue of bias ought to have been raised before the Committee, as it is that body that must determine its own jurisdiction. The judge also erred, it was suggested, in not taking into account the entirety of the proceedings.

Grounds two and three

[138] Counsel submitted that the affidavit of Miss Meranda was inadmissible pursuant to the Evidence Act as accepted by the learned judge. In addition, the Committee had no power to summon witnesses, no adjournment had been asked for and, in any event, time was of the essence as there was a limited time frame within which the decision of the Committee ought to have been made. There was no basis therefore for the Committee to have accepted the affidavit and the judge erred in finding that its probative value outweighed its prejudicial effect.

Grounds four and five

[139] With regard to the e-mail sent to Dr Nkrumah, counsel submitted that there was no real danger of bias by the Committee. Dr Nkrumah had not responded to the e-mail, had made no statement with regard to it, and had not conducted himself in any manner by which one could conclude that there was any bias or danger of bias on his part against the first respondent. Counsel submitted that although the judge opined that a warning ought to have been given to the members of the Committee, counsel referred to the decision of this court in **Henriques v Tyndall and Others** [2012] JMCA Civ 18 to state that the learned judge had misapplied the test of bias. Counsel referred to the judge's comment that the e-mail was a pre-judgment by a witness, but as this was not

from a decision maker there was nothing to suggest that there was any predetermined view taken of the credibility of the first respondent, in respect of the hearing by the Committee. Thus counsel submitted, the fair minded informed observer could not have concluded any possibility of bias. Additionally, there was no evidence to suggest that Dr Nkrumah had shared any views of this alleged pre-judgment.

Ground six

[140] Counsel submitted that the issue of pre-judgment on the part of Dr Nkrumah was not raised at the hearing of the Committee, which was not fair to him as he would have had an opportunity to answer to the issue, or to have recused himself from the Committee as the case may be. Also, as the issue of bias goes to jurisdiction it ought to have been raised at the earliest possible opportunity. The learned judge ought not therefore to have entertained this ground of appeal at all, submitted counsel.

Ground seven

[141] In its written submissions, it was counsel's contention that although there was no express statement made by the Committee that the criminal standard of proof had been applied, there was also no express statement that this standard had not been applied. In its oral submission, counsel argued that in any event, relying on the principles laid down in **R v Hampshire County Council**, **ex parte Ellerton** [1985] 1 All ER 599, and **Saeed v Greater London Council Inner London Education Authority** [1986] IRLR 23, the criminal standard of proof was inapplicable as the

matter at bar related to the termination of employment of a teacher, and as a consequence, the civil standard of proof obtained.

[142] Additionally, it was further contended that a reasonable tribunal properly directed could have come to a similar conclusion. Counsel relied on the evidence adduced in respect of the meeting between Dr Gardner, the first respondent and Miss Meranda, and submitted that the words "guilty as charged" amounted to an admission. Counsel also referred to the particular statement of the Tribunal that the interpretation to be given to those words, was not necessarily that of Dr Gardner, but of the Committee as they had heard the words in their context, seen the demeanour of the witnesses and so had the opportunity to assess them. It was counsel's submission that the evidence of the admission by the first respondent was capable of meeting the criminal standard of proof.

On behalf of the Tribunal

Ground one

[143] Counsel's main contention was that it is trite law that the judicial review process does not seek to determine the merits of the case, rather it seeks to determine whether the decision-maker arrived at the decision by the process outlined by law which, counsel submitted, the learned judge failed to do in the instant case. In fact, he submitted, the learned judge was in error, embarked on a trial of the issues, or what could be described as the "substitutionary approach" which he was not entitled to do in the judicial review process, and as a result, arrived at a false conclusion. Counsel

referred to and relied on an excerpt from the Judicial Review Handbook, 6th edition, Michael Fordham QC where the learned author recognized the principle that:

> "Every public body has its own proper role and has matters which it is to be trusted to decide for itself. The Courts are careful to avoid usurping that role and interfering whenever they might disagree as to those matters."

[144] Counsel specifically addressed the judge's approach and ruling with regard to the admissibility of the Meranda affidavit. Counsel submitted that the learned judge having accepted that it was admissible in evidence what a person says in response to the allegation of another, and the fact that the affidavit did not meet any of the conditions under section 31E of the Evidence Act, appeared unable to accept that the Committee having followed the rules of evidence and the law, would have acted lawfully and would therefore have been fair to the first respondent. Counsel submitted that in keeping with the words of Lord Mustill in **R v Secretary of State for the Home Department ex parte Doody** [1994] 1 AC 531, it was incumbent on the first respondent to persuade the court not only that the procedure adopted by the Committee could have been better or more fair, but that what had been adopted was unfair. Counsel reminded the court that Parliament had entrusted the Committee with the obligation to make the decision and also the choice as to how the decision was to be made. Counsel then submitted that the learned judge in the instant case had not shown proper "cognizance of this principle".

[145] Counsel further submitted that the learned judge had concluded that Miss Meranda was available to give evidence without any evidence to support that conclusion. Also, that he had indicated that she could have been summoned, an adjournment could have been granted to secure her attendance, and that if she failed to attend the Committee could have been warned about the admission into evidence of an "untested statement". It was submitted that based on those findings, the learned judge had usurped and trespassed upon the proper role of the actual decision makers; the Committee and the Tribunal.

[146] On a final note of some significance, counsel pointed out to the court that the learned judge did not appreciate that it was really the decision of the Tribunal that was under review, and although the Tribunal had given reasons for its decision, the learned judge did not consider the reasons in his deliberations.

Response to SCCA No 89/2012

The issue of bias

[147] Counsel referred to the dicta in **Patrick Tibbetts v Attorney General of the Cayman Islands** [2010] UKPC 8, **Porter v Magill**, and **Belize Bank Limited v The Attorney General of Belize & Others** [2011] UKPC 36, in support of the submission that the informed fair minded observer is "neither unduly complacent, naïve nor unduly cynical or suspicious". Counsel argued that for the determination of the issue as to whether the decision of the Committee was clouded with apparent bias, the court must approach the matter in two stages. First, the court must find the facts on a balance of

probabilities, then on the facts proved decide whether on a balance of probabilities, with the knowledge of the facts so found, the putative observer would conclude that the Committee was influenced by the prejudicial material submitted and, secondly, that their findings resulted from bias and were therefore unfair.

[148] Counsel argued that the learned judge in his deliberations failed to show that he properly understood that the material submitted by the chairman constituted the written report and that the material would have been perused by the Board and the Committee and there could therefore be no bias in circumstances where the Committee would be privy to allegations against the first respondent due to the statutory structure of the Board and the scheme of the regulations.

[149] In the circumstances, counsel submitted, the judge erred. There was no prejudice whatsoever in the hearings conducted by the Committee and the Tribunal.

On behalf of the first respondent

Grounds one, four, five and six

[150] These grounds, counsel submitted, relate to the issue of fairness and bias. He contended that the learned judge was correct in his conclusion that the first respondent had not received a fair trial. He submitted that the Education Regulations did not preclude the members of the Committee from being excluded from any discussion in respect of which the Board intends to take disciplinary action. The chairman would have known the date of the meeting at which the report was to be discussed. The real concern, counsel maintained, was not the fact of exposure to the material, but the

effect the exposure to the material would have had on the decision making process. The structure of the Committee was therefore not the main complaint, but whether the proceedings in the circumstances were fair. Would the fair minded observer, notwithstanding the statutory composition of the Board and the Committee conclude, having perused the prejudicial material, that there was a real danger of bias.

[151] Counsel submitted that the e-mail of the chairman addressed to both the first respondent and Dr Nkrumah-Young would likely have the effect of negatively affecting the first respondent. The report relating to the professional misconduct of the first respondent, he said, comprised four pages (18 paragraphs) of negative, prejudicial and defamatory material, submitted by the chairman, who though the author of the material, would have known that he was not in a position to substantiate the allegations. The statements he argued "were of such a nature that they would immediately have a negative effect on the recipient that would be difficult to alter in the future". That, he submitted, would clearly unfairly prejudice the first respondent. Counsel referred to several cases in support of his submissions on bias and prejudice, for instance: that the bias has been defined as an operative prejudice, whether conscious or unconscious, and the decision maker should be disqualified where there is a personal connection or predisposition which raises real doubts about the decision maker's impartiality or where the institutional setting throws doubts upon its independency (**Gilles v Secretary of States for Work and Pensions** [2006] UKHL 2); or where knowledge of prejudicial material may disqualify a decision-maker depending on the circumstances, (**Dr Subramanian v The General Medical**

Council). Counsel submitted in detail on the test in law to be applied in respect of whether there is apparent bias. Counsel canvassed the reasons for judgment and submitted that the judge having perused the prejudicial material and applied the law to the facts concluded that in spite of the membership of the Board and the Committee, the fair minded and informed observer having knowledge of the facts would conclude that there was a real danger of bias and submitted that the judge's decision cannot be faulted.

Grounds two and three

[152] Counsel submitted that the learned judge had the full transcript of the hearing before the Committee and would have observed that there was evidence that other material had been adduced into evidence without the maker being in attendance. Further, he would have noted when the words "guilty as charged" were stated. Additionally, the Meranda affidavit was material to the proceedings, as she stated in the affidavit that she had never been in a sexual relationship with the first respondent. The affidavit, he argued, would not have been hearsay if admitted to prove that she had said something contrary on another occasion, and not as to the truth of its contents. The statement therefore ought to have been admitted into evidence as the learned judge found, as it was probative, and relevant "looking at the proceedings as a whole".

Ground seven

[153] Counsel relied on the conclusion of the learned judge that there was no indication that the applicable standard had been applied, and stated that the first

respondent could not have received a fair hearing in respect of a trial dealing with the serious charge of professional misconduct unless that had been clearly shown.

Response to SCCA No 96/2012

[154] Counsel submitted that the learned judge not only proceeded correctly but had demonstrated that he had done so. His reference in the reasons for judgment to **Anisminic** supported that position. He continued that the learned judge had first to review the facts in the case, establish those facts and then ascertain whether erroneous conclusions had been drawn from primary facts. If that were the case, the outcome would be regarded as wrong in law and could be overturned accordingly. The judge, he submitted, recognized that he was not trying the case but applying the law to the particular facts. Counsel submitted therefore that this ground in the Tribunal's appeal was baseless. In the light of all of the above, it was his contention that the appeal should be dismissed.

Discussion and analysis

Issues (a) and (b)

(a) Could the report of the Committee of the Board be considered pre hearing prejudicial material when the report was the written complaint laid before the Committee?

(b) Could there be a real danger of bias in the circumstances of the case in respect of:

- **(i) the composition of members of the Committee;**
- **(ii) the exposure of damaging prejudicial material to the members of the Committee before the hearing of the Committee;**
- **(iii) the fact that the issue of bias was not raised at the hearing of the Committee; and**

(iv) On the proper legal interpretation of the test of bias.

[155] The report of the meeting of the Committee of 26 March 2008 sets out the documentation that was considered by the Committee before arriving at its decision to lay charges against the first respondent. Those were:

- The preliminary report (delivered orally) to the Board by the internal auditors of the Ministry of Education.
- The chairman's report of the sequence of events of alleged professional misconduct by the principal. (copy attached to the report)
- The report of the factors that influenced the Board's decision to send the principal on leave pending the review of the auditors from the Ministry of Education. (copy attached to the report)

[156] The report detailing the factors which influenced the Board to send the first respondent on leave, sets out the history of the chairman's understanding of the financial difficulties which the college had experienced commencing with his association with the college as a member of the Board in 1996 and later as its chairman in 2004. He addressed all the issues which later became the subject of the charges laid by the Committee against the first respondent namely, repairs to the damaged buildings as a result of the hurricane, the irregularities in the accounts, the contracts to effect the repairs, and the purchase of the bus. The chairman claimed that there had been irregular payments to persons who had relationships with the first respondent, in that,

there were persons who had been encouraged to give excessive invoices which suggested kickbacks; there was a request for the plant manager to sign checks which had been refused as there appeared to have been efforts made for that person to usurp the role of the vice principal.

[157] The chairman's report of the alleged professional misconduct is set out in its entirety below because it forms such a crucial aspect of the claim in respect of bias and was the focus of the learned judge below:

> "1. On my appointment as Chairman of the Board of Management in November 2004, Mr Vivian White, Dr. Kofi Nkrumah-Young and I met with Dr. Thompson at 6A Holborn Road. The purpose of the meeting was for the Moravian male members of the Board to have a talk (man to man) with Dr. Thompson prior to the first meeting of the new Board. The meeting was recommended because of reports received about Dr. Thompson's inappropriate relationships with female students. When the issue was raised with Dr. Thompson his response to us was "*where is the evidence of that*."
>
> 2. A review of Dr. Thompson's performance as Provisional Principal was conducted by the Ministry of education. The rating was poor. One of the reasons for the poor rating was Dr. Thompson's alleged immoral conduct. This was expressed to me in a meeting with the Ministry of Education representatives, Mr. Philbert Dhyll and Mrs. Viris Clarke-Ellis on January 25, 2005.
>
> 3. The Board, at its first meeting, set up a committee to review the Principal's performance with a view to making a recommendation to the Board as to whether or not Dr. Thompson who was then the Provisional Principal should be appointed Principal. The committee comprised, Mr. Vivian White, Dr. Nkrumah-Young, Miss Vivienne Scott, the Academic representative at the time Mr. Richard Harry, Revd Devon Anglin and myself. The committee had various meetings at the College

including, Heads of Department, Student Council etc. The issue of Dr. Thompson's inappropriate relationship with female students was raised at a number of these meetings. One such report revealed that a parent had confronted Dr. Thompson after his daughter had reported receiving an inappropriate text message on her cell phone.

4. In meetings with the Vice principals, during that period, concerns were also raised, in particular the negative impact it was having on their relationship with Dr. Thompson as well as with the other senior persons at the College and the Malvern community in general.

5. Some members of the Board were also apprised of an embarrassing development at the College in which the boyfriend of a female student had visited the College to accost the Principal for attempting to have a relationship with his girl friend [sic]. The boyfriend had seen lewd text messages sent by Dr. Thompson to his girl friend [sic]. The issue was pacified by the administrators.

6. As Chairman of the Board, on many occasions I received reports about his inappropriate relationships and on every occasion, I would request something in writing. At one point, it was reported that Ms. Winifred Foster was prepared to speak with me about a relationship that Dr. Thompson was having at her house in Malvern with a student who was her tenant. She had to ask the tenant to vacate the premises because of the conduct. She did not however come forward.

7. In a final bid to put the matter to rest, the Review Committee mandated me to hold a frank and personal discussion with Dr. Thompson and to advise him that if there were any truth to the allegations he should desist forthwith. I travelled to Malvern very early one morning in July 2005 and met with Dr. Thompson. I raised the various allegations with him. His response "*Mr Morgan, where is the proof, where is the proof*."

8. In my report to the Board at a meeting on July 28, 2005, I reported as follows, *"the issue of the Principal's moral conduct usually raises its ugly head. There have been many rumours but no one has been bold enough to put anything in writing. In other words, there is no written evidence of improper conduct*." Thereafter, the Board by a majority decision recommended that appointment of Dr. Thompson as Principal.

9. Since his appointment, I have on numerous occasions received reports about Dr. Thompson's inappropriate relationships with students and staff from various quarters. No one was however prepared to come forward with a signed statement.

10. In or about February 2007 while at the Moravian church office, Revd. Germaine Lovelace visited. He reported to me and the President that a member of his congregation, who was also a student at Bethlehem, together with another student had reported certain things to him regarding an inappropriate relationship Dr. Thompson was having with the said student. I asked and encouraged Revd. Lovelace to have the young lady contact me.

11. In May 2007, on my way to Bethlehem, for a long service awards function, I received a telephone call, from a source which will for the time being remain nameless, enquiring, "*Mr. Chairman, how come you have the Principal screwing off the students at Bethlehem*."

12. The Board in a letter of December 27, 2007 advised Dr. Thompson that allegations about his inappropriate relationships with female students would be investigated. The investigator was directed to Revd. Lovelace and the complainant who I subsequently learnt was Miss Andrea Meranda. The investigator has reported that Revd. Lovelace has advised that "he has nothing to contribute." I further understand from another source that will remain unnamed that Revd Lovelace has said that he and Dr Thompson are friends and as such he did not wish to say anything.

He also stated that Miss Nicole Bramwell had telephoned him in December/January and said that the Principal had "this coming a long time." Revd. Lovelace therefore felt that Miss Bramwell was likely to speak with the investigator.

13. I learnt that Miss Nicole Bramwell was the friend of the student who had a relationship with Dr. Thompson and that she was now a teacher at the Bethabara Primary and Junior High School.

14. I spoke with Miss Bramwell on Friday, February 29, 2008 at 3:00p.m. London time. She advised me as follows:

    a. She was a recent graduate of Bethlehem.

    b. She was happy and over-joyed to be out of Bethlehem.

    c. She was embarrassed to be a Moravian while at Bethlehem.

    d. The reason for the above was because of the Principal's conduct as a Minister of the Moravian Church and as leader for the College.

    e. She reported being friends with Andrea Meranda and Maureen Grant.

    f. That Dr. Thompson had a sexual relationship with both of them. In fact that he was having relationships with both at the same time until Miss Grant found out about his relationship with Miss Meranda and left him. This created a crisis at the College.

    g. That the relationship with Dr. Thompson and Miss Meranda lasted throughout their second and third years at college. That Miss Meranda had an abortion in April 2007 after being pregnant for Dr. Thompson.

h. That Miss Meranda had a CD with photos of Dr. Thompson in the nude and in various sexual positions. She had also placed same on her computer.

i. That she was present at a meeting with Revd. Lovelace and Miss Meranda initiated by her.

j. That she was also present at a meeting at Bloomfield Great house in Mandeville with Dr. Gardner and Miss Meranda in May 2007 in which Miss Meranda gave full and specific details of the nature of her relationship with Dr. Thompson.

k. That she Miss Bramwell was very hurt and destroyed based on what she knew and she needed healing and was anxious to speak up so that she herself could be healed and also in the interest of the Moravian Church and Bethlehem Moravian College.

l. That she would be prepared to give a full and detailed statement on all that she knew to the investigator.

m. That her friendship and her relationship with both Miss Grant and Miss Meranda were destroyed because of Dr. Thompson.

n. That Dr. Thompson was leaving Miss Meranda for another student Ava Gaye and this had upset Miss Meranda.

15. Immediately after my telephone conversation with Miss Bramwell, I contacted the investigator and gave him Miss Bramwell's details. He telephoned me on Monday, March 3, 2008 and advised that he had a meeting with Miss Bramwell scheduled for 3:00p.m. the said day but that Miss Bramwell wanted to speak with me again before their interview.

16. I spoke with Miss Bramwell again on Monday, March 3, 2008 at 12.00 noon London time. She confirmed that the investigator had contacted her and that she

was scheduled to meet with him at 3.00p.m. the same day. She reported that she was having second thoughts about giving a statement to the investigator. She believes that the matter is going to go very far and didn't want to be too involved. She stated that whatever she knows both Dr. Gardner and Revd. Lovelace also knew and that as leaders of the Moravian Church she felt that they ought to come forward. She however promised to sendme an email to me [sic] with whatever she knew. She also advised that out of the blue, she received a telephone call from Miss Meranda on Sunday, March 2, 2008 but she did not discuss the issue with her. Miss Bramwell was expecting to hear again from Miss Meranda.

17. I met with Miss Nicole Bramwell on Thursday, March 20, 2008. She reiterated what she previously told me in our 2 telephone conferences and added the following;

    a. Dr. Thompson was responsible for the purchase of a motor car, laptop computer, furniture, and school supplies especially for teaching practice, text books and clothing all for Miss Meranda. He had also carried out repairs on her mother's house in St. Elizabeth.

    b. That Miss Meranda's mother was aware of their relationship as he had slept at their house on a number of occasions.

    c. That Miss Meranda had recorded several lewd text messages from Dr. Thompson and she was shown some by Miss Meranda and had read some of them.

    d. That sometime in May 2007 Miss Meranda was very upset with Dr. Thompson and threatened to expose him by putting on the internet the photographs taken of him in the nude. Miss Bramwell reported that she begged her not to do it because of the embarrassment that could befall the Moravian Church in Jamaica.

e. Miss Bramwell attended the Moravian Synod 2003 as a delegate of the Fairfield congregation.

18. Miss Bramwell has supplied more information relating to the nature of the relationship which demonstrates the negative impact it has had on the student body and the Institution in general. For example it is a major contributor to students boycotting Chapel. The information confirms inappropriate relationships with female students and the information is such that I would only disclose for the purposes of a Tribunal or a Court of Law because of its lewd and sexually explicit nature.

[158] There is no question that the reports submitted by the chairman were damning and prejudicial. The question then is whether having been exposed to the reports, a real danger or possibility of bias existed which would make the decision of the Committee unfair, as found by the learned judge. This leads me to the test of bias. Several cases were submitted, but I hope I do no injustice to the written and oral submissions if I only refer to a few which resonated with me, in respect of the main issues to be decided in this important part of the case.

[159] The Privy Council case, from the Court of Appeal of Jamaica, **Grant v The Teacher's Appeals Tribunal and Anor** concerned the termination of employment of a teacher at the Montego Bay Community College. The allegations were that he had been guilty of insubordination and indiscipline. He had, in correspondence to the principal, accused her of "indiscretion, unprofessional behaviour, despotic behaviour, coercion and intimidation". The clear tension between him and the principal had come to a head in a staff meeting when he had been clearly aggressive and rude. He went

so far as to inform the meeting that the board was only a "paper Board" and that he had no intention of attending any more meetings with the principal or anyone, to discuss low pass results in subjects that he taught.

[160] The specific issues in this case relevant to the case at bar, was that a personnel committee was convened at the behest of the Board to hear the complaint against Mr Grant. At the completion of the hearing, when both the principal and Mr Grant had given evidence, one member of the committee made the comment that Mr Grant deserved the "ultimate penalty". Subsequent to that statement but before the personnel committee had reported to the Board, as required by regulation 85 of the Education Regulations, it was discovered that the term of the appointment of the Board members had expired and accordingly, neither the Board nor the personnel committee had authority to act. As a consequence, the investigation of the charges was "reinvestigated", the same members of the personnel committee were reappointed and the matter set down to be heard de novo. Mr Grant did not participate. He felt that the proceedings were unfair, and he walked out of them. The committee found him guilty of unprofessional conduct, neglect of duty and insubordination, and recommended the termination of his employment. He appealed to the teacher's tribunal, which dismissed his appeal, as did the first instance court on judicial review, and then the Court of Appeal. He appealed to the Privy Council, with leave of the Court of Appeal. The position in respect of his claims changed slightly on each hearing, but ultimately the Privy Council held that the principal's original complaint had not been validly made as the Board at the time was no longer in existence. Their Lordships

further held that there had not been a breach of section 57(1) of the Education Regulations as although there had not been a preliminary consideration of the complaint, the committee, acting as a filter mechanism had shown that the complaint was not trivial and had proceeded to hear it. Additionally, there had not been a breach of the principles of natural justice even though the same members of the personnel committee who had heard the matter on the second occasion had also heard the previous complaint. The Privy Council stated that:

> "Much may depend on the facts of individual cases, but their Lordships do not consider that a hearing will necessarily be unfair if a committee or other body has heard a complaint before and proceeds to rehear it before reaching a final decision. The rehearing may still be fair and valid even if the committee has earlier reached a conclusion on the subject matter, provided it gives genuine and fair consideration to the case and any further facts or arguments put before it on the second occasion."

Their Lordships endorsed the statement of Lord Reid in **Ridge v Baldwin** [1964] AC 40 at 79 as being applicable and appropriate to the case under review, namely:

> "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."

[161] In this case, their Lordships were of the view, and stated, that the minutes disclosed that the personnel committee had considered the matter afresh in proper fashion and that no unfairness was caused to the appellant by reason of the fact that the same persons made up the committee on the second hearing. The Board was also not troubled by the remark made by the member of the personnel committee after the

hearing as all the evidence and arguments had been heard by the committee who were therefore at a point to reach their individual positions on the case. They could have changed that position after hearing the evidence at the second hearing. However, they were expected to give proper consideration at the rehearing and could have reached a different conclusion after hearing the evidence and further material or arguments put before them.

[162] There were two other issues raised in the case, one in relation to a vote taken from a member by way of proxy, which the regulations do not permit, but which the Board said would not have affected the outcome of the vote which was five to none. Secondly, the question of bias in relation to the judge who heard the application for judicial review; whose family had known the chairman for several years. Their Lordships did not think that in the circumstances of this case, bearing in mind the statement from the judge that the chairman had been known to his family for over 40 years, there was any special relationship and since he personally had not encountered him more than 10 times in 20 years, there could not have been any real risk or danger of bias in that regard.

[163] I have spent some time on this case for two reasons; which are, it is a Privy Council decision out of this jurisdiction dealing with the termination of employment of a teacher from a college and that some of the same regulations applicable to the instant case were reviewed namely, regulations 56, 57, 61 and 85 (which I will refer to later). However, each case must be dealt with on its own facts and I accept that there are no

specific statements in the regulations indicating that one could replace one member of the Committee with another. In fact, the structure of the Committee, is as stated; a statutory scheme but in the **Grant** case, the personnel committee heard his evidence and that of the principal and others. The second hearing was the same. The difficulty in the instant case is that although evidence was taken, there was all this very detrimental, adverse material put before the Board and thus the Committee, in respect of which there was, in the first instance, no supporting information and in the other, no evidence whatsoever. The person about whom the allegations focused did not give any evidence at all. So the issue was therefore not a question of the same persons hearing the matter afresh and listening to evidence and giving it further consideration, but was instead one of hearing the matter against a backdrop of rumours and negative information, which was unsupported at the end of the case, and which was prejudicial, with potential to affect and influence the view of the character and credibility of the first respondent who was on trial before them for serious offences. The question of bias therefore in my opinion, loomed large in this case.

[164] **Holmes v Royal College of Veterinary Surgeons** concerned the professional misconduct of Holmes, a veterinary surgeon whose name was struck from the register due to the disciplinary committee's findings that he was guilty of disgraceful conduct in his treatment of certain animals belonging to the complainants. The issues in this case relevant to the instant case related mainly to the composition of the council, the preliminary investigation committee (PIC) and the disciplinary committee (DC) as to whether there could be an independent impartial consideration

of the complaint by the disciplinary committee, given the statutory scheme and the composition of these respective bodies. In fact, the PIC consisted of at least three council members, and the DC, which comprised the chairman and 11 members, were all council members, yet the PIC decided whether there was a realistic prospect that the surgeon would be found guilty of "disgraceful conduct in any professional respect", and if that were found to be so, then the matter was referred to the DC which must accept that decision and determine the case. So, the issue was whether in those circumstances his right to a fair hearing was breached.

[165] The Privy Council was of the view that many safeguards had been put in place by convention, for example, there were term limits and persons did not serve on the PIC and DC simultaneously. Lord Wilson speaking on behalf of the Board, referred to and endorsed the oft cited speech of Lord Hope in **Helow v Secretary of State** (which will be set out later in this judgment) and stated that the fact that the complaints were laid in the name of the council and the DC comprised of members of the council, was insufficient to say that a fair minded observer would conclude that by that fact alone the DC would be motivated to uphold the complaints. That argument, Lord Wilson described as "elusive". It was also "fanciful" said Lord Wilson, to think that because of her service on the PIC, a member would recall matters that were before her that were adverse to Holmes in 2006, many years ago, which were not visible in the papers made available to the DC in 2006, but before the DC in the instant proceedings under consideration. In any event, Lord Wilson made the point that any complaint of apparent bias in respect of the PIC in the case, was "water under the

bridge" and "falls away", the matter having been determined by the DC. Additionally, the fact that one of the members of the DC had held a different public position on a very controversial issue namely, "docking a dog's tail" which was the subject of reform and which had been strongly opposed by Holmes, did not suggest any apparent bias and in any event had Holmes any difficulty with anyone on the DC who held opposing views, he should have voiced that objection at the outset of the hearing. Lord Wilson canvassed each complaint and indicated why the finding of the DC could be supported by the evidence, was reasonable in all the circumstances and warranted the dismissal of the appeal.

[166] I am in agreement with the dictum above that it could be considered "fanciful" and "elusive" to conclude that if the Board had taken a decision for the Committee to decide if charges were to be laid and the Committee being members of the Board heard and determined those charges, that alone could not per se preclude a fair hearing of the complaint (I will later in this judgment, deal in detail with the composition of the Board and its Committee as part of the statutory scheme). The issue, to my mind, in the instant case, is, would a fair minded and informed observer think that the prejudicial written material constituting the complaint have influenced the minds of the Committee, particularly with regard to his character and credibility as stated previously, so that he could not have received a fair hearing. There was so much information provided in the written complaint for which there was no evidence. The first respondent could not have made any complaint before the Committee at the outset of the hearing to strike out information contained therein or to remove the

same from the records before the Committee, as the first respondent's complaint is that the material was not provided to him at the time of the hearing before the Committee but only at the hearing of the Tribunal. This was confirmed in the verbatim transcript of the hearing before the Tribunal. Counsel for the first respondent is shown to be arguing vigorously and complaining bitterly before the Tribunal on this point. However, in spite of all that, the Tribunal did not find that the material submitted would result in any real risk or danger of bias and that there had been any breach of the principles of natural justice (paragraph [39]). Unfortunately, no reasons were given.

[167] Also, additional to the reports, there was an email from the chairman to Dr Gardner and copied to Dr Nkrumah Young, which is also the subject of much complaint. It is very short, so I set it out below. It reads:

> "Current Folder: INBOX
>
> **Subject:** Re: Bethlehem Moravian College – Repairs after hurricane Dean
> **From:** Lowel Morgan <lowel.morgan@ucl.ac.uk
> **Date:** Wed, December 5, 2007 11:39am
> **To:** "Gardner, Paul <pgardner@cwjamaica.com
> **Cc:** "Nkrumah-Young, Dr Kofi" <kofi@utech.edu.jm
> **Priority:** Normal
> **Read receipt:** sent
>
> Bro. President
>
> I have read your email and I am now even more convinced that I can be of no help to Bethlehem. I just wish to remind you all that just last year the same Principal used all the College resources to repair the said cottage which resulted in

> the college having to borrow money from NCB. The Board had signed off on the repairs to be done. He went further. With that back ground therefore, you cannot trust the Principal's judgment.
> It is clearly a time for a change of the guard because I have enough evidence not to re-pose trust.
> We shall speak.
>
> Lowel
> Sent from my BlackBerry® wireless device"

[168] On a literal interpretation, it would appear that the chairman was saying that the first respondent had used up the resources of the college against the position taken by the Board. It resulted in the college having to borrow funds. He could not be trusted. The chairman no longer reposed any trust in him. This email was sent in December 2007, before the meeting of the Board in March 2008 to decide whether to send the matter to the Committee. It was sent to two members of the Board one of whom later became a member of the Committee and the other gave evidence on behalf of the Board. The question must arise, did this communique influence those two persons (especially Dr Nkrunah-Young), who subsequently had their part to play in the hearing of the Committee.

[169] In **Helow,** a Palestinian refugee living in Lebanon, arrived in the United Kingdom and claimed asylum there. Her petition was refused by the Secretary of State for the Home Department and leave to appeal by the Immigration Appeal Tribunal was also refused. The decision of the interlocutor of the Lord Ordinary, Lady Cosgrove dismissing her application was upheld by the Extra Division of the Inner House of the Court of Session (Lord Nimmo Smith, Lord Kingarth and Lord Kirkwood). She appealed

to the House of Lords. It was her case that having been a victim of an attack on a Sabra/Shatila refugee camp in 1982, she had publicly on television blamed the Lebanese and Israeli authorities for the ensuing massacre. She claimed that she had assisted in obtaining evidence to prosecute the Israeli defence minister. Subsequent to the dismissal of her appeals she discovered that the Lord Ordinary, Lady Cosgrove was a member of the International Association of Jewish lawyers and jurists, whose magazine the "Justice" circulated to all members, had carried a number of extensive pro-Israeli articles and pronouncements and in particular, by its president.

[170] The issue was whether a fair minded informed observer could have concluded that there was a real possibility that Lady Cosgrove was biased by reason of her membership in the association. The appeal was dismissed based on the true test of bias. Would the fair minded informed observer have concluded that by reason of her association, that she approved and endorsed all the material that was published by the association, which she may not have even read? The aims and objectives of the association were unobjectionable. Additionally, Lady Cosgrove had taken a judicial oath to do right by all manner of people "without fear or favour, affection or ill will", and also having been judicially trained and by virtue of her office, would have been assumed to be intelligent and well able to form her own views about anything that she had read, and to be able to detach her own mind from things that they contain, which she does not agree with. In any event, the publication was issued intermittently. The court found readily that she could not be said to have adopted whole sale the views of the organisation, even those stridently expressed publicly by the president. There was

no evidence that she had taken a particular position on any of the articles published, and the statements made by the organization. If that were the case, then no doubt the fair minded informed observer would not have said that she should have been excluded from hearing the petition of Ms Helow due to apparent bias. Had it been otherwise they no doubt, would have done so.

[171] Lord Hope took the opportunity to restate that the legal test of bias to be applied in a case of apparent bias was to be found in his speech in **Porter v Magill,** that is "the question is whether the fair minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased". He reminded that it is equally well established that the fair-minded observer is not "unduly sensitive or suspicious" as stated by Kirby J in **Johnson v Johnson** (2000) 201 CLR 488. Lord Hope set out a further clarification of the fair minded informed observer. He stated:

> "[1] …the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively…
>
> [2] The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious… Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires

> that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> [3] Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[172] In the context of the instant case the members of the Committee are not legally trained much less judicial officers. It is true though that as Lord Mance said, "even lay people acting as jurors are expected to put aside any prejudices they may have", and it is also true that there was no evidence that any of the members of the Committee had formed an opinion based on the prejudicial written material before them. However, the written material was not material published in articles disseminated intermittently which they may not have read. This was material allegedly relevant to the matter on which they were expected to adjudicate forthwith, having direct association with the substance of the charges before them. If considered adverse, but then not substantiated, the fair minded informed observer, not being sensitive nor suspicious, but being objective and giving a balanced approach, would consider all of that before concluding on the issue of apparent bias.

[173] In the Privy Council a case relied on by the first respondent, **Dr Ramachandran Subramanian v The General Medical Council**, the appellant appealed against the order of the council directing that his name be removed from the medical register. The issue of apparent bias in this matter arose in this way. Dr Subramanian ('Dr S') had been consulted by the mother of a young girl aged five during a session at the Health call Ltd. She was suffering from fever, vomiting and abdominal pain and exhibiting a purple rash on her collarbone. Dr S diagnosed viral fever, not requiring hospital admission. The mother wished the child to be taken to the hospital for a second opinion. Dr S agreed although he refused to authorize an ambulance, so the child was sent to the hospital unaccompanied by a qualified person. She was attended on arrival, diagnosed with meningococcal septicaemia and admitted into the hospital, but unfortunately died eight hours later. Although it was accepted that Dr S's conduct would not have affected the unfortunate death of the child, his treatment of her, and the post death report obligations undertaken by him, were put before the disciplinary committee. Unfortunately, the information that he had been before the committee 20 years previously was inadvertently (the General Medical Council had not intended to put the information before the committee) published in the media and one of the members of the committee saw the article and shared the information with other members of the committee.

[174] The appellant, in arguments before the Privy Council, submitted that in keeping with the principles laid down in **Taylor v Lawrence** [2002] EWCA Civ 90, the court

ought to ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and then ask whether in those circumstances, the fair-minded informed observer would conclude that there was a real possibility or danger that the tribunal was biased. It was suggested in the circumstances of that case, that the General Medical Council, being responsible for the publication, "encouraged an act which prejudiced the fair trial".

[175] It was held that the charge of apparent bias failed as their Lordships were of the view that there was no danger of any prejudice to the doctor as the disciplinary body:

> "was a well established quasi-professional tribunal which had been directed in plain terms to pay no attention to the previous conviction because it would give them no assistance, a direction reinforced by the fact that it dealt with events more than 20 years before. The experience their Lordships have of the jury system is that juries are faithful to their oath and abide by the instruction they are given."

[176] With regard to the instant case, of course the prejudicial material was not of aged vintage, but submitted to the Board the same day that the Committee decided to lay the charges, although the information related to earlier times and the matter was not heard until some months later. There was no direction from the chairman of the Committee to her colleagues to ignore the salacious unsupported material and focus only on the evidence adduced before the Committee. But this too was a quasi-professional body and there was no evidence that any member had paid any attention

to the inadmissible evidence, so as to be influenced by it, so that there was a real possibility or danger of bias in the determination of the matter.

[177] In **Gillies v Secretary of State for Work and Pensions**, it was alleged that there was a reasonable apprehension that a medical member of a disability appeal tribunal was biased. The adjudication officer had made the decision that the appellant was not entitled to a disability living allowance. The disability appeal tribunal refused his appeal. The Social Security Commission allowing the appeal, found that Mrs Armstrong, the tribunal member was biased. The First Division of the Court of Session restored the decision of the disability appeal tribunal and that was upheld by the House of Lords. The central issue in the case was "whether the fair-minded and informed observer would conclude having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as examining medical practitioners (EMP's) objectively and impartially against the other evidence".

[178] Dr Armstrong was the medical member on the tribunal and also provided reports for the Benefits Agency as an examining medical practitioner. So the question arose whether Dr Armstrong could be equally impartial when carrying out examinations and proving reports for the Benefits Agency, as when performing as a member of the tribunal assessing and making reports in respect of the entitlement to living disability allowances. Lord Hope of Craighead delivering the judgment on behalf of the House referred to and relied on Kirby J in **Johnson v Johnson**, not only for the statement

that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at, but that it was also to be assumed that the observer would be able to distinguish what was relevant and what was irrelevant. Also, that when he was exercising his judgment he would be able to give what weight should be given to the facts that are relevant. He stated further that Dr Armstrong was to be seen on the facts with regard to her relationship to the Benefits Agency as an independent expert adviser. Her advice had been sought because of her experience and good professional judgment.

[179] It was stated that a fair minded informed observer would have been able to appreciate her professional detachment and her ability to be able to exercise her own independent judgment dealing with medical issues for the agency, and she would be just as capable exercising those qualities sitting as a medical member on the disability appeals tribunal. There was no basis therefore for a reasonable apprehension of bias on the basis that she had a "predisposition to favour the interests of the Benefit Agency". Nothing had been said to cast doubt on her impartiality and her integrity.

[180] The difficulty, in my view, between the facts of this case and the instant case is that there is very little or no evidence to underpin the belief in the impartiality of the Committee, although I accept that there was also no evidence from any of the members to suggest that they had taken a particular position against the first respondent, having been influenced by the prejudicial material. The further difficulty is that the learned judge had made the point that at the end of the hearing of the

Tribunal, there was only "one ground left standing" which was allegedly based on a confession. All the other matters had been found to be without merit and those charges were based on "facts" that had been the subject of the first document submitted to the Committee by the chairman. In at least two of those charges the Committee had recommended that the first respondent repay the college substantial funds. The other document is the very graphic report on professional misconduct. It therefore became of some significance for the learned judge, against that backdrop, to review the proceedings before the Committee in order to assess whether there was a basis to conclude that they had acted impartially and independently as is required, performing their functions "without prejudice and pre-conceived ideas".

[181] In reviewing that issue, it was important to examine the regulations with particular reference to the composition of the Board and its Committee. Regulation 56 of the Education Regulations, 1980 (ER) states that where the Board of an educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is such that disciplinary action ought to be taken against the teacher, it ought, as soon as possible, to refer the matter to its personnel committee for its consideration, pursuant to regulation 85. The Committee shall consider the complaint referred to it and if it so finds, decide that a hearing should be held, notify the complainant and the person against whom the complaint has been made of the charges, hear the complaint, (through representations, witnesses, submission of documents) and arrive at a decision as to whether the charges have been proved. It should advise the Board within 14 days

after the inquiry of the same and the Board shall within 14 days of receiving the report, give written notice to the minister and the teacher (regulation 57).

[182] By regulation 85, the Board refers any allegations against a teacher to its personnel committee, which shall, in the case of an institution owned by a denomination or Trust (as in the instant case) consist of:

(i) the chairman of the Board;

(ii) one nominee of the denomination or Trust or the Board;

(iii) the representative on the Board of the category of accused personnel; unless that person is the representative on the Board, in which case, the accused shall nominate a representative to be appointed on the Committee. The quorum of the Committee shall be two, one of whom should be the chairman or the vice chairman of the Board. There was no information before the Committee, the Tribunal or the court, with regard to how the categories of persons were represented on the Board in the instant case.

[183] The Tribunal was established pursuant to section 37 of the Education Act, (the Act) for the purpose of hearing appeals from disciplinary decisions by a Board of management of any public educational institution. The constitution of the Tribunal is set out in the fourth schedule to the Act. A teacher who is aggrieved by any action taken by the Board under regulation 57, may appeal within 28 days after the date of the action giving rise to the appeal (regulation 61).

[184] It is clear therefore, though an issue in the court below, it was not an issue on any appeal, that the reports submitted by the chairman to the Board and the Committee constituted the "written report" as envisaged under regulation 56. I agree with counsel for the first respondent however that the fact of the exposure was of less significance than the effect the exposure would have had on the decision making process. The reports have already been set out in great detail so, I only wish at this point, to deal with the composition of the Committee in this case. On 26 March 2008, as can be seen from the minutes of the Committee, the members of the Committee were convened, as requested by the Board, comprising, Mrs Heather Murray, vice chairman of the Board, and chair of the Committee, Dr Kofi Nkrumah-Young, church representative and Mr Steve Allen, academic staff representative/principal's nominee. At the meeting of the Board earlier in the day, the chairman had indicated that he did not wish to sit on the Committee due to his closeness to the matter and as he was likely to be a witness in the matter. It was further suggested that Dr Gardner, the vice chairman of the Board step down as vice chairman as he would also be required as a witness. Mrs Murray was then appointed as the vice chairman of the Board. This, it was said, was done in order for the Committee to be properly constituted and so that the decision of the Committee would not be nullified. It was noted that there were 15 persons in attendance at the meeting. A vote was taken with regard to whether the matter should be referred to the Committee and 11 persons voted in favour of the referral, four persons being asked not to vote, as one was the recording secretary, who was not a member of the Board, another was acting for a member, and two others

were mere co-opted members, whose membership had not yet been approved. The court was told that the Board comprised 15 members. The regulations stated that the composition of the Board could not be more than 19 persons and that the quorum of the Board was seven, which shall include the chairman or the vice chairman.

[185] The composition and the category of persons to be appointed by the minister, to the Board, is set out in detail in regulation 70 of the Education Regulations, and shall be no more than 19 members. They are as follows - seven members including the chairman nominated by the denomination; the principal of the institution; one member nominated by the council; four members - one each nominated by the academic staff, the administrative and clerical staff, the ancillary staff, and the student council; three members - one each nominated by the students' association, if one exists, the parent teachers' association if one exists, and a recognised local community group; and finally three members nominated by the Board for their particular expertise. There was no evidence as to the particular composition of the Board in the instant case.

[186] The learned judge did not appear to come to any particular conclusion on whether the meeting of the Board on 26 March 2008 could have been so arranged to exclude any potential member of the Committee from its deliberations on the decision whether to pursue disciplinary proceedings against the first respondent. He however referred to the dictum in **Holmes** for his discussion on the point. Bearing in mind the statutory scheme of the Act and the regulations, the Committee consists of at least two members of the Board, and so as such, unless otherwise directed, in my view, they would have been expected to receive, as members of the Board, any written

reports/complaints for consideration, although potentially to be appointed members of the Committee, if the decision is taken by the Board, that disciplinary action ought to be pursued. I do not therefore see any real danger of bias, per se, in the structural machinery of the Board. I am fortified in this conclusion having regard to the principles enunciated in **Grant v The Teachers Appeal Tribunal** and **Holmes v Royal College of Veterinary Surgeons**, the facts of which have already been dealt with in this judgment.

[187] Despite this finding however, in respect of the composition of the Committee, in the light of the position I have taken in paragraphs [159] – [176] of this judgment, it is my view that it is not therefore surprising that the learned judge concluded that the fair-minded and informed observer would have found as set out in paragraph [130] herein, and that there was a real possibility or danger of bias in the minds of the Committee members against the first respondent. I must say, although with some difficulty, I find that I agree with him. It is unfortunate that the issue of bias was not raised at the outset of the proceedings before the Committee but as indicated that could not have occurred in this case as the documents were not in the possession of the first respondent at that time.

Issue (c) What is the effect of the ruling of the Committee that the Meranda affidavit was inadmissible?

[188] There is no doubt, and it was agreed on both sides and accepted by the learned judge, that pursuant to the provisions of the Evidence Act (section 31E), Miss Meranda would have been required to attend the hearing of the Committee to give

evidence, as none of the exceptions set out in the statute would have been applicable to her, so as to permit the statement to have been used in her absence. Additionally, it is a fundamental rule of the common law that hearsay evidence is inadmissible and any former statement of any person, whether or not as a witness in the proceedings, may not be given in evidence if the purpose is to tender the statement as evidence of the truth of the matters asserted in them. This is equally applicable to civil and criminal proceedings.

[189] So, that is not the issue in the case. It is the learned judge who has outlined the problems with some clarity. He stated that the statement was more probative than prejudicial. There were unsubstantiated allegations in the written material relating to Miss Meranda. There was disputed evidence of the alleged confession of the first respondent. There was the equivocal comment by Dr Gardner at the hearing as to the time in the meeting that the words "guilty as charged" were spoken, and with reference to which allegations. The only evidence against the first respondent at the hearing in respect of the professional misconduct was those words, and the adverse finding could only relate to when the words were actually stated. In the light of the charge and the history of the first respondent's constant denial of the acts complained of, one must ask the question whether it was likely that the first respondent would have made an outright confession to the charge in those circumstances. It is also true that the rules of evidence are somewhat more relaxed in hearings before inferior tribunals which apply their own rules of procedure. The refusal of the admission of the affidavit, for the sole purpose of showing that she had stated to the contrary, on the

said matter, on another occasion, would have therefore, in all the circumstances, as the learned judge found, "breached the requirement of fairness", particularly, in circumstances where as indicated and I am of the view, there was a real possibility or danger of bias in the minds of the members of the Committee. The affidavit which is rather short is reproduced here for convenience.

"AFFIDAVIT OF ANDREA MERANDA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION – CLAIM NO. 01117 HCV OF 2008

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2002 PART 56

AND

IN THE MATTER OF EDUCATION REGULATIONS 1980

BETWEEN	**DR. PAUL THOMPSON**	**CLAIMANT/APPLICANT**
AND	**BETHLEHEM MORAVIAN COLLEGE BOARD OF MANAGEMENT**	**1ST DEFENDANT**
AND	**LOWELL MORGAN, CHAIRMAN BOARD OF MANAGEMENT, BETHLEHEM MORAVIAN COLLEGE**	**2ND DEFENDANT**
AND	**DR. PAUL GARDNER, PRESIDENT OF MORAVIAN CHURCH**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**4TH DEFENDANT**

I, Andrea Meranda, do make oath and say as follows:-

1. That I am a teacher and I reside at Siloah P.O. in the parish of Saint Elizabeth.

2. That I was formerly a student at the Bethlehem Moravian College (hereinafter called "The College") from the years 2004 to 2007. And that I entered the said Bethlehem Moravian College at the age of twenty-one years (21)

3. That it has come to my attention that I am or have been involved with the Principal of the College Dr Paul Thompson. I have been informed by a member of the College and verily believe that I am alleged to have filed a complaint against the said Principal Dr Paul Thompson alleging a sexual relationship between the Principal and myself.

4. That I wish to state that I have never made any such allegation against Dr Paul Thompson either written or unwritten. That I wish to further state that I have never been involved in a sexual relationship with the said Principal Dr Paul Thompson.

5. That I make this statement free and clear and that no one has forced me to make this statement

I, certify that the facts as set out in this Affidavit are true to the best of my knowledge, information and belief."

Issue (d) What is the proper standard of proof applicable in the proceedings before the Committee; was that standard applied and was it disclosed that it had been applied?

[190] There is no dispute and Lord Brown of Eaton-under-Heywood, delivering the judgment on behalf of the Board, has stated with some force in the Privy Council case of **Wilston Campbell v Davida Hamlet**, that he entertained no doubt, that the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession. Lord Brown referred to **Bhandari v Advocates Committee** [1956] 3 All ER 742 and stated that if that case may have

been thought to have applied some lesser standard then that decision ought not to be followed. In that case, Lord Tucker had referred to a statement by the Court of Appeal which he said was an adequate description of the duty. The Court of Appeal had said that:

> "We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities…"

Lord Brown pointed out at paragraph 17 of the judgment that:

> "It has, of course, been long established that there is a flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters..."

[191] Lord Brown in fact, referring to a decision of Lord Bingham of Cornhill CJ who made the point in **B v Chief Constable of Avon and Somerset Constabulary** [2001] 1 WLR 340 at page 353-4, went on to state as follows:

> "In a serious case such as the present [concerning the making of a sex offender order] the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition… is fulfilled, a Magistrates Court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard."

Lord Brown also referred to the statement of Lord Phillips of Worth Matravers MR in **Gough v Chief Constable of the Derbyshire Constabulary** [2002] QB 1213,

relating to the serious consequences of making a banning order under the Football Spectators Act 1989, indicating at paragraph 90 that:

> "This should lead the Justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard."

He also mentioned Lord Steyn's agreement in the House of Lords, in **R v (McCann) v Crown Court at Manchester** [2003] 1 AC 787, paragraph 37 with Lord Bingham's in **B** about "the heightened civil standard and the criminal standard [being] virtually indistinguishable".

[192] In spite of these pronouncements however, there have also been clear statements that in certain circumstances, even in disciplinary hearings, it is the civil standard per se that is applicable. In **R v Hampshire County Council**, **ex parte Ellerton** [1985] 1 All ER 599, referred to the court by counsel for the Board, it was held that:

> "(1) A disciplinary tribunal which had a procedure for adjudicating on issues which arose from the contractual relationship of employer and employee was by its nature a tribunal concerned with civil and criminal matters and the appropriate standard of proof was therefore the civil standard, although the discharge of that burden varied according to the nature and seriousness of the allegation in issue."

This case concerned the behaviour of a divisional officer employed to the Hampshire Fire Brigade. He was found guilty of using the fire brigade vehicle to move a load of tree cuttings from his home to the local authority dump. His penalty was £40 stoppage of pay. The court found that although the language of the regulations referred to charges and penalties, nonetheless the provisions related to the employee's terms of

employment, and so in the absence of express provisions in the regulations, the appropriate standard of proof was the civil standard. O'Connor LJ canvassed several authorities on the point and referred in particular to Denning LJ in **Hornal v Neuberger Products Ltd** [1956] 3 All ER 970, where he stated:

> "[The judge] reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law."

He also referred to Lord Scarman's judgment in **Khawaja v Secretary of State for the Home Department** [1983] 1 All ER 765, by quoting the following statement, at page 763, which he said gave valuable guidance on how to approach this aspect of the law. He stated:

> "… I have come to the conclusion that the choice between the two standards is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula used for the guidance of juries in criminal cases. The civil standard as interpreted and applied by the civil courts will meet the ends of justice."

In that case also the House of Lords was considering the standard of proof in proceedings for judicial review. The court stated that proceedings under the Fire Services (Discipline) Regulations 1948 were not criminal proceedings. The disciplinary tribunal and the fire authority were domestic tribunals, which was why in the absence of any express provisions, the civil standard of proof was applicable.

[193] The case of **Saeed v Greater London Council (Inner London Education Authority)**, also referred to the court by counsel for the Board, does not take the matter any further, particularly since, in that case, the real issue was whether a person who had been acquitted of a criminal offence can be subjected to disciplinary proceedings, whether by a professional or non-professional body in respect of precisely the same charge. The court found that he could be and that, inter alia, the principle of double jeopardy did not arise, as the disciplinary body was not a court of competent jurisdiction and it applied a different standard of proof. It also did not apply as between criminal and civil proceedings. The court made it clear that it could only apply where the offence for which the plaintiff was subsequently charged in a criminal court was precisely the same as that which he was acquitted or convicted in the previous criminal court. The court referred to and relied on the judgment of O'Connor LJ in **R v Hampshire County Council**, Scarman LJ and Denning LJ in **Khawaja v Secretary of State** and **Hornal v Neuberger**, respectively.

[194] In **Re B (children) sexual abuse: standard of proof**) [2008] UKHL 35, Baroness Hale of Richmond in an utmost endeavour to dispose of the confusion that she said had crept into the law with regard to the understanding of a high standard of civil proof and also a heightened standard of the same, (although dealing with matters under the English Children Act 1989, and care orders issued thereunder) endorsed the principle in relation to the civil standard, that there was one standard of proof, namely the balance of probabilities.

[195] In commenting on the stance posited that the more serious the allegation, the stronger should be the evidence, Baroness Hale stated that that does not mean that when a serious allegation is in issue that the standard of proof required is higher. She stated clearly, that "[i]t means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur…". Baroness Hale endorsed how Ungoed-Thomas J expressed it in **Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research** [1964] 1 All ER 771 at773 where he stated:

> "The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

[196] She however ultimately clarified, also accepting the statement made by Dame Elizabeth Butler-Sloss P in **R v Cannings** [2004] EWCA Crim 1, and relating to the Children Act cases, that the arguments suggesting that the difference between the two standards of proof were "largely illusory" were mistaken. Thus, although there may be some proceedings, which though in civil form their nature is such that it was appropriate to apply the criminal standard, care proceedings under the Children Act were not of that nature, the consequences of breach were not penal in nature, and the standard of proof in finding the facts necessary to establish the threshold in the provisions of the Act was "the simple balance of probabilities, neither more nor less". Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the

facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'.'

[197] In the light of all of the above, it is clear that the Committee and the Tribunal are both domestic tribunals and in the absence of any express provisions in the Education Regulations, and there are none, that would suggest that the civil standard of proof would be applicable. I must mention that both counsel had submitted before Daye J that the criminal standard of proof was applicable and that there was no indication that it had been applied. On behalf of the Board, it was argued that nonetheless the evidence adduced before the Committee justified the findings and on behalf of the first respondent, it was argued that in circumstances where there was apparent bias, it was even more important that the inferior tribunal had indicated that it had endeavoured to act accordingly. In the application for the stay of execution of the judgment of Daye J, before me in chambers, the parties adopted similar respective stances. So, it was only when the matter came before this court that the Board took the position that the civil standard of proof was the applicable standard. I must state that I am of the view that the civil standard of proof is the appropriate standard of proof, that is, the simple balance of probabilities, neither more nor less.

[198] However, although as indicated, no higher standard of proof is required, as the charge outstanding against the first respondent was professional misconduct (inappropriate sexual conduct with students). Given the gravity of that issue, which become a part of the circumstances the Committee would have had to have taken into

consideration when deciding whether the burden of proof had been discharged in that, it was a serious allegation, the more cogent ought to have been the evidence required to overcome the unlikelihood of whether what had been alleged to have occurred had happened and also proven (see also Halsbury's Laws of England 5th edition, Vol 11, para 775). This therefore called for close scrutiny by the learned judge and although he relied on the Committee having to apply the criminal standard of proof in the circumstances of this case, I do not think that should affect the outcome of this matter, given that the learned judge found that the Committee was affected, by prejudicial material containing unsupported allegations and suspicions, which were never particularly addressed or disposed of. It is true that the Tribunal did not find that there was any bias, but in respect of that "only charge left standing", the Tribunal stated that they would not interfere with the position taken by the Committee, as it was the Committee which had the opportunity of observing the witnesses; an opportunity not afforded to the Tribunal. So given all the circumstances, it would appear that the crucial matters may not yet have been taken into account and not examined on appeal. So the real questions would be: has there yet been any effort to find where the truth lay and in these circumstances could the first respondent have received a fair hearing?

Issue (e) Did the learned trial judge apply the correct approach to judicial review proceedings?

[199] In **Gillies**, the court found that the issues as to whether the commission was properly constituted and/or were acting in breach of the principles of natural justice

was a question of law and therefore a matter properly before the court for judicial review. In the instant case, the question arising was whether the Committee was properly constituted, bearing in mind the disclosure of the written material from the chairman of the Board and whether on the basis of the disclosure of the email correspondence to a member of the Committee from the chairman of the Board, there was a real danger or likelihood of bias on the part of the Committee all of which was, in my view, a matter of law and properly before the court for judicial review.

[200] In my opinion, therefore, Daye J was not being asked to decide the facts of whether the first respondent was guilty of sexual professional misconduct, but whether as a matter of law, the principles of natural justice had been breached by the Committee in arriving at their verdicts.

[201] In **James Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131, a licensed race horse trainer, a member of the Jockey Club was put before the Jockey Club by way of a complaint alleging that he had falsely entered his horse for a race by shodding some with "racing plates" instead of the approved plates for the race and in the absence of any permission to do so. He was found guilty by the Stewards Jockey Club, which was upheld by the Racing Commission and then by the court on an application for judicial review (Ross, Campbell, Bingham JJ). The applicant claimed several breaches of the principles of natural justice, inter alia, that he had not been given "proper or distinct charges upon which he could prepare and put forward his defence". The court held that the applicant, by virtue of his membership and

knowledge of the club, knew what was being alleged against him and also that he had had sufficient time to properly defend himself, and had not asked for any extension of time within which to do so. However, of greater relevance to this case was the finding of the court that any defect in the rules of natural justice by an inferior tribunal, can be cured by a subsequent proceeding in an appellate tribunal hearing the appeal, particularly if it possesses a clear power of review of the entire case and matter. The court also held, that it is a settled principle of law that a court ought to consider the entirety of the proceedings which took place both at the original and the appellate tribunals before making a pronouncement as to whether or not there had been a breach of the principles of natural justice.

[202] In my opinion the submission that the court ought only to review the decision of the Tribunal is flawed. Also, in the instant case, I do not find that the learned judge deployed "the substitutionary approach". It was important that the learned judge reviewed the entirety of the proceedings which took place in the inferior tribunals, which he did. He found that the fair minded informed observer would have considered that there was a real danger or likelihood that the Committee was biased. As indicated, that was a matter of law and he applied the relevant principles in arriving at his decision, which, as also indicated previously, I agree with. Once the Committee's decision could have arisen from a biased perspective, it would be unlawful. The decision of the Tribunal failing to recognise that would equally be flawed. The hearing before the Tribunal in this case, would not have cured that, particularly since it was only a review hearing with no further evidence having been taken. It was therefore

necessary to remove the proceedings of both inferior tribunals to the court in order for the court to decide whether the principles of natural justice had been beached and if so, to quash the decision.

[203] Having reviewed all the submissions and the material submitted, it would appear that certiorari would lie. However, at the hearing of the appeal, the Board raised an issue requiring the court to permit fresh evidence to be adduced. The documentation was accepted by the court into evidence, but as the first respondent was taken somewhat by surprise and vigorously opposed the position taken by the Board, counsel requested an opportunity to adduce fresh evidence of his own. We permitted evidence by affidavit and submissions on paper.

[204] In essence, the first respondent's position was that the Board had acted in bad faith and with ulterior motives in appointing permanently a new principal in lieu of the first respondent, and a vice principal at the college, while the legal proceedings were in train. In support of the application for fresh evidence, the first respondent deponed to an affidavit sworn to on 24 July 2014 exhibiting: a letter dated 5 May 2009, from Mrs Audrey Sewell, permanent secretary in the Ministry of Education, in response to a letter dated 20 April 2009, from the chairman of the college as well as minutes of the Teachers Services Commission dated 24 February 2011. In her letter, Mrs Sewell confirmed that as a right of appeal existed to the Tribunal against adverse decisions of the Board and the first respondent had appealed the same, it would not be appropriate to start advertising in the newspaper the post of principal before the Tribunal had

made its decision as it would amount to pre-empting the Tribunal's decision. Mrs Sewell also noted that the decision of the Tribunal may not be the final decision as the first respondent may have decided to seek judicial review depending on the outcome of the decision. She advised that the Board should take no steps to advertise the post of principal at that time but should await the position of the Tribunal. The minutes of the Teachers Services Commission disclosed that the commission had received the nomination of the Board for the provisional appointment of principal but having heard that the "former principal had appealed his case to the Supreme Court", it had decided to defer consideration of that issue "until the appeal was decided". It was therefore the first respondent's position that the Board had acted in bad faith always being cognizant that the appointment of the new principal would prejudice his position and that that appointment would be used as a justification by the Board for him not to resume the position of principal.

[205] On the other hand, the Board maintained with conviction that, in spite of the first respondent deponing in his affidavit sworn to on 10 July 2012, that there had been an understanding with the attorney for the Board that neither side would take action to prejudice the other while awaiting the decision of the court, there was never any such understanding.

[206] Mr Morgan deponed that he was of the view that the college was being affected by the absence of an appointed principal therefore, by letter dated 11 December 2009, in his capacity as chairman, he revisited the issue by writing to the

Ministry of Education. By letter dated 21 April 2010, Miss Haydee Gordon, legal counsel for the permanent secretary responded indicating that the ministry received advice from the Attorney General's Chambers, that as the first respondent had the opportunity to ask for an order as to whether the grant of leave for judicial review should operate as a stay of proceedings and had not done so, the decision of the Tribunal had not been stayed. As a consequence, the Board was not fettered in its desire to advertise the post of principal of the college. Miss Gordon indicated that the ministry offered no objection to the Board proceeding to advertise and fill the post of principal. Mr Morgan deponed that on behalf of the Board, he proceeded to advertise the post of principal which resulted in Mrs Yvonne Clarke's appointment as permanent principal with effect from 1 January 2011. He further deponed that the process was commenced in 2009 and delayed by the application for judicial review and it was guided by the serious administrative challenges being experienced by the institution.

[207] The Board's contention was that the permanent appointment of the new principal prevented the court from granting the first respondent an order of certiorari as that remedy was a discretionary one and the permanent appointment of the new principal having been made, three and a half years previously, would act as a discretionary bar preventing such an order, as the court ought never to act in vain.

[208] It is well-accepted that the remedies available in judicial review proceedings are discretionary. The learned authors of Judicial Review Proceedings: A Practitioner's Text, in considering this aspect of judicial review proceedings state (at page 236,

para7.1) that "even where one or more grounds of challenge may be made out, relief may be refused at the discretion of the court". In **Neill v North Antrim Magistrate's Court** [1992] 1 WLR 1220, the House of Lords in considering an appeal from the review of a decision of magistrates in committal proceedings to admit hearsay evidence, held that committal proceedings may be the subject of judicial review proceedings and that the evidence was inadmissible. However, on the question of the possible remedies to be granted, Lord Mustill said:

> "It is however one thing to hold that it is for the magistrates to rule on non inadmissibility … so that a decision on the issue must in principle be reviewable, and quite another to say that the grant of relief should follow as a matter of course."

[209] Similarly, in **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155, the House of Lords had to consider an appeal concerning whether the decision of the chief constable to force a young constable (who was a probationary member of the police force) to resign instead of being dismissed, was unlawful. Having decided that the decision was unlawful, their Lordships were faced with what they regarded as the difficult task of deciding whether to grant the main remedy sought which was mandamus to compel his reinstatement. Their Lordships recognized that this may not have been the most appropriate remedy in the circumstances. Lord Bridge of Harwich recognized that "great practical problems would arise", particularly in relation to the constable's training and "perhaps other matters from the fact that his service ha[d] been interrupted for nearly four years". Lord Brightman in his judgment remarked that even though the constable had been "wronged in a matter so vital to his

life", in the circumstances, it was inappropriate to grant the mandamus as it bordered on a usurpation of the power of the chief constable.

[210] It should appear from the above that there are many factors to be considered by the court in exercising its discretion whether to grant the relief sought. These include whether the grant of the remedy would be detrimental to good administration; whether there was an alternative remedy available, or whether the grant of the remedy appears futile, academic or otherwise unnecessary. One of the most difficult issues in judicial review is how to treat with the consequences of an unlawful decision.

[211] In this case, the crucial issue would be whether the Board had the legal power to validly appoint Mrs Clarke as the permanent principal, notwithstanding the determination of the first respondent's appointment as principal being invalid. Lord Browne-Wilkinson in **Boddington v British Transport Police** [1999] 2 AC 143, HL, observed (page 164B-C):

> "I am far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people would have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity."

[212] In the final analysis, in the instant case, after much consideration of the authorities and the submissions, I find that the decision of the Board to terminate the first respondent's appointment as principal of the college having been made, nearly four

years ago, as the saying goes, "the moving finger writes; and, having writ, moves on". Thus, actions would have been taken in between that decision and my decision holding the termination to be invalid, on the faith of the previous decision being valid on the recommendation of the Committee and having been upheld by the Tribunal. I accept therefore that I cannot rewrite history and that the court must not grant remedies that are futile. I am therefore constrained to find, regrettably, that in the circumstances of this case, certiorari cannot lie.

[213] The first respondent has not asked for a declaration and/or consequential order for damages or such further and other relief. Thus, the question arises as to whether the court can grant relief to him that he had not sought. In England, rule 16.2(5) of the CPR provides that the court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form. This rule has been applied in a number of English cases which include **Ajou v Stern and others** [2001] All ER D 132 (Feb).

[214] In this jurisdiction, rule 56.3 of the CPR states that a person wishing to apply for judicial review must first obtain leave to apply for the same. Rule 56.3(3)(b) states that this application must state the relief sought. Rules 56.9(1) and 56.9(3)(b) of the CPR state that a judicial review application, a declaration or some other administrative order must specify and identify the nature of the relief sought. However, rule 56.10(2) states that the court may award damages, restitution or an order for return of property or for relief under the constitution if the claimant asked for such a remedy in his claim form, or the facts justify the grant of such a remedy, and the court is satisfied that at

the time of making such an application the claimant would be entitled to such a remedy. Rule 56.15(3) of the CPR states that the court may grant any relief sought if it is justified by the facts of the case proved before the court whether or not the relief was sought by application for an administrative order. Rule 2.15 of the Court of Appeal Rules (CAR) gives this court all the powers and duties of the Supreme Court, and also the power to give any judgment or make any order which, in its opinion, ought to have been made by the court below. The court may in its inherent jurisdiction grant orders that it may deem fit in the circumstances. In light of the provisions in the CPR and the CAR it would seem, that this court may grant a remedy to the applicant that was not sought if it is justified by the facts of the claim.

[215] The next issue is what would be the appropriate remedy in light of the prejudice that the first respondent has suffered. I am confident that had Daye J known that his order could be ineffectual he would have granted other orders. The matter was adjourned *cur adversary vult* on 11 March 2011 and he delivered his judgment on 25 May 2012, during which time a new principal was appointed with effect from 01 January 2012. It was the appellant's action during the adjournment that rendered the courts order fruitless and as a result, I find that a declaration would be appropriate in the circumstances.

[216] In **Millicent Forbes v The Attorney General of Jamaica** SCCA No 29/2005, delivered 20 December 2006 at page 19, this court ruled that "[c]ertiorari 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". The court also stated that a declaration, a discretionary remedy, could not be granted to 'quash' a decision of any court. To the extent that this court may have stated that the court had no power to grant a declaratory order by way of judicial review or as an administrative order, I would comment that the issues in that case were wholly different from the issues raised in this case and in my view the statements would not be applicable to the order I propose to make. Also, on appeal to the Judicial Committee of the Privy Council, the merits of this issue had not been assessed. Rules 56.1(1)(c), 56.9(1) and 56.10(1) of the CPR make it clear that a declaratory order is an administrative order that can be joined in a claim. Rule 56.1(3) states that judicial review includes certiorari, prohibition and mandamus but does not exclude declarations.

[217] The learned authors of Halsbury's Laws of England, volume 61 (2010) at paragraph 719, have recognized that a declaratory remedy may be used to vindicate the rule of law and confirm a breach of relevant principles of law. It may also be used, as was found in the case at bar, where the grant of another prerogative remedy would cause substantial hardship to third parties or would be unduly detrimental to good administration. In **R (on the application of Gavin) v Haringey London Borough Council and another** [2003] All ER (D) 57 (Nov); [2003] EWHC 2591 (Admin) planning permission had been given to the defendant for redevelopment without the relevant notices and advertisements being published and distributed in the relevant area. Development began in the area without the claimants' knowledge and 32 months after planning permission had been given, the claimant applied for judicial review

seeking to quash the order granting planning permission or declaratory relief. The court refused to quash the order for the planning permission because such an action would result in substantial hardship to third parties, who had relied upon it to their detriment, and would be harmful to good administration. However, Richards J at paragraph 20 granted declaratory relief in the alternative because he said that it:

> "might therefore provide a basis for a claim in damages and would provide the claimant with some satisfaction."

[218] In light of the foregoing, I find that the first respondent is entitled to a declaration as follows:

> **The disciplinary proceedings conducted in this matter were unfair because there was a real possibility that the members of the Committee were tainted with bias.**

[219] I would therefore in the circumstances allow the appeals in part, grant the declaratory relief in substitution of certiorari on the basis of the reasons advanced herein, and I would also make no order as to costs.

LAWRENCE-BESWICK JA (AG)

[220] I have had the privilege of reading the draft judgments of the learned Judges of Appeal, Morrison and Phillips. I agree with Phillips JA's decision to allow the appeals in part and I wish to add a few comments.

[221] The facts which form the substratum of this appeal are detailed in that comprehensive judgment. I therefore highlight only a few areas material to my comments and decision.

Background

[222] On 12 December 2008, the Board of Management of the Bethlehem Moravian College ('the Board') received a recommendation from its Personnel Committee ('the Committee'), that the principal of the college, Dr Paul Thompson, ('the first respondent') should be dismissed. This was based on several findings of the Committee after it had held a hearing into complaints about his conduct. He was dismissed that day.

[223] The first respondent appealed that decision to the Teachers' Appeal Tribunal ('the Tribunal') which ruled against all the findings of the Committee, save one. It upheld the finding which concerned professional misconduct by the first respondent in the form of intimate and sexual relationships with students, based on an alleged confession. The Tribunal therefore determined on 1 September 2009, that it would not interfere with the recommendation of the Board for his dismissal.

[224] Subsequently, on 10 March 2011, a judicial review of that decision commenced and was concluded on 25 May 2012. There the learned trial judge granted the relief sought for certiorari and quashed the decision of the Board to dismiss the first respondent as principal of the college. It would follow then that he would continue as principal. It is that decision which is the subject of this appeal.

Discussion

[225] I agree with the learned Judge of Appeal Phillips' reasoning and her conclusion that the trial judge was correct in finding that:

> 1) there was a real possibility or danger of bias in the minds of the Committee members against the first respondent (par. 187); and that
>
> 2) the exclusion of the Meranda affidavit breached the requirement of fairness (par. 189).

The Meranda affidavit had sought to introduce evidence denying the truth of some of the allegations of sexual relationships of the first respondent.

I also agree with her that a review of all the submissions and material reveals that it would appear that certiorari would lie (par. 203).

[226] However, fresh evidence before this court showed that while the proceedings were in progress, another person was appointed as principal.

[227] There was an omission procedurally in the judicial review process. Rule 56.4(9) of the Civil Procedure Rules provides:

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

There was no such order made. Neither is there any evidence that it was sought. The proceedings consequently were not ordered to be stayed. Legally therefore, whilst the

judicial review process was in progress, the decision of the Tribunal to not interfere with the recommendation of the Committee to dismiss the first respondent, stood. As far as the Board was concerned, and indeed legally, the position of principal would have been vacant.

[228] The issues wended their way through the court for the purpose of determining if the recommendation of the Committee should be reversed. The parties were aware that the process was ongoing but nonetheless the Board filled the position of principal. In so doing, the Board did not fall foul of the law. It had sought and received the advice of the legal counsel for the Permanent Secretary in the Ministry of Education (the ministry). There was no objection to the Board filling the post.

[229] However, in my view, though the Board's actions, were in accordance with the letter of the law, the Board exhibited bad faith. The Board showed blatant disregard and disrespect for the procedures being pursued in the court.

Evidence of bad faith

[230] The evidence supporting my view is detailed in the erudite judgment of the learned Judge of Appeal Phillips at paragraph [204]. For ease of reference I summarise that evidence here.

A) The ministry's permanent secretary herself, in a letter to the Board dated 5 May 2009, responded to an enquiry from the chairman and confirmed that -

a) there is a right of appeal to the Tribunal against adverse decisions of the Board;

b) Dr Thompson had appealed to the Tribunal;

c) it would not be appropriate to start advertising the post of principal before the Tribunal had made its decision;

d) any such advertising would amount to pre-empting the Tribunal's decision; and

e) Dr Thompson would still have the option to seek judicial review of the decision of the Tribunal, if necessary.

The Permanent Secretary's advice therefore was that the Board should take no steps to advertise the post of Principal at that time whilst the first respondent was exercising his right to appeal to the Tribunal and whilst he retained the option to seek judicial review. The Board should await the result of the appeal.

B) Despite this exhortation the Chairman of the Board wrote on 11 December 2009, concerning the issue to the ministry because he held the view that the absence of an appointed principal would have a negative effect on the school. He believed that an appointment was necessary because of administrative problems in the college.

C) The Chairman deponed that the process of advertising commenced in 2009 and was delayed by the application for judicial review. Leave to apply for judicial review was granted on 14 December 2009.

D) Legal counsel for the permanent secretary of the ministry on 21 April 2010, after receiving advice from the Attorney-General's Chambers advised that the ministry did not object to the Board advertising to fill the post because Dr Thompson had not asked for a stay of proceedings.

E) The minutes dated 24 February 2011 of the Teachers' Services Commission revealed that the Board had sent to the Teachers' Services Commission a nomination for the provisional appointment of principal. The commission had deferred consideration of that nomination "until the appeal was decided". This was a reference to an "appeal" to the Supreme Court in the form of the judicial review process.

In a letter dated 11 November 2011 from the Teachers' Council, the Board received provisional approval for the appointment of a new Principal.

F) A new principal was appointed effective 1 January 2012. A letter dated 10 May 2012 from the Teachers' Council approved that permanent appointment.

This evidence shows what may be described as a determination by the Board to explore the possibility of legally circumventing the clear advice of the permanent secretary. It had received that advice from 2009.

Appointment of new principal

[231] The first respondent asserted that there was an understanding with the attorney for the Board that neither side would take action to prejudice the other while awaiting the decision of the court. The attorneys for the Board deny that there was any such understanding.

[232] The circumstances, in my judgment, show that the Board was alert to the possibility that the existing court proceedings could be continued and that they were in fact continuing. The Board would also recognise that the first respondent was striving

to be re-instated as principal by seeking a reversal of the Committee's recommendation to dismiss him as principal. By appointing someone in the post, the Board was, in my view, doing an act which would lead to the impossibility of the first respondent obtaining the redress which he sought through the legal proceedings, that is, his re-instatement.

Proper administration of the college

[233] I am mindful of the concerns of the chairman as to the proper administration of the college. His view was that without an appointed principal the affairs of the college were being affected.

[234] However, there is no indication that any effort was made to identify a suitable candidate to fill the post in a temporary appointment. Such a temporary appointment would have shown some respect for the possible orders of the court whilst at the same time allowing the business of the college to be addressed properly.

[235] There has been no reason presented for any apprehension that a candidate found worthy of filling a temporary position would possess qualities which would cause him/her to approach the responsibility of being principal of the college in a less conscientious and dedicated manner than if the appointment were permanent. A person assessed to be fit enough to hold that position should have sufficient regard for the rule of law to understand that the substantive holder of the position should be allowed to seek remedies in accordance with the law, for a perceived or actual wrong.

Conclusion

[236] I therefore agree that certiorari would lie but upholding the learned trial judge's decision in that regard would now be an exercise in futility as the principal's position has already been filled. It was a procedural oversight which made it possible for that appointment to be made before the conclusion of these proceedings. Were it not for that appointment I would have dismissed this appeal.

[237] The actions of the Board showed blatant disrespect for the ongoing court proceedings. Its actions, though within the letter of the law, successfully prejudiced the possibility of the first respondent obtaining the relief he sought to resume the principal's position.

[238] In light of the above, I agree with my learned sister, that the court should grant declaratory relief in the terms stated in paragraph [218]. As a consequence, I would allow the appeals in part, grant the declaration in substitution of certiorari and make no order as to costs.

MORRISON JA

ORDER

1. By a majority (Morrison JA dissenting), the appeals are allowed in part. The order of certiorari granted by Daye J is set aside and a declaration in the following terms is substituted therefor:

The disciplinary proceedings conducted in this matter were unfair because there was a real possibility that the members of the Committee were tainted with bias.

2. No order as to costs.