**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MR JUSTICE D FRASER JA**

**SUPREME COURT CIVIL APPEAL NO COA2020CV00027**

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| **BETWEEN** | **DAWKINS BROWN** | **APPELLANT** |
| **AND** | **PUBLIC ACCOUNTANCY BOARD** | **RESPONDENT** |

**Hugh Wildman and Ms Faith Gordon instructed by Hugh Wildman & Co for the appellant**

**Ms Faith Hall and Mrs Taneisha Rowe Coke instructed by the Director of State Proceedings for the respondent**

**15, 16, 18 February, 19 July 2021 and 14 March 2025**

**Civil Procedure – Fresh evidence – Disciplinary proceedings under the Public Accountancy Act – Interpretation of the Public Accountancy Act – Bias – Nullity of proceedings – Failure to gazette appointment of board members – De facto officer doctrine – Fair hearing – Right to be served witness statements or affidavit prior to disciplinary hearing notwithstanding the Public Accountancy Act not having such a requirement – Meaning of requirement to deliver decision in disciplinary proceedings in public – Constitution of Jamaica, sections 16(3), 16(4), 106 – Interpretation Act, sections 3, 31(1), 35, 39 – Public Accountancy Act (PAA), sections 3, 4(1)(d), 4(2)(d), 13(1)(c), 13(2), 14, 28, 29 – First Schedule to the PAA, paras. 1, 2, 7, 8, 10(4), 10(5), 10(7), 11(1) – Public Accountancy Regulations (under section 29 of the PAA), regulations 15, 16, 18, 20, 21, 22 - 26, 30, 32, 33(3) – Rules of Professional Conduct (under section 28 of the PAA), rules 110.1, 110.2, 110.3, 150, 150.1, 270, 270.4, 270.8**

**MCDONALD-BISHOP JA**

[1] I have read, in draft, the judgment of D Fraser JA. I agree with his reasoning and conclusion and have nothing further to add, except to join in the apology for the delay in the delivery of this judgment proffered at para. [140].

**SINCLAIR-HAYNES JA**

[2] I have read, in draft, the judgment of D Fraser JA and I concur.

**D FRASER JA**

**Introduction**

[3] The appellant, Mr Dawkins Brown, is an audit and accounting professional with numerous certifications and memberships in several professional bodies linked to the accounting profession. He is also a businessman who owns several companies, including his accounting firm Crowe Horwath Jamaica Limited ('Crowe') and UHY Dawgen Limited. Up to 18 March 2020, when the decision he has appealed was delivered by the respondent, Public Accountancy Board ('PAB'), he was a registered public accountant pursuant to section 11 of the Public Accountancy Act ('PAA').

[4] The PAB is a statutory body established under section 3 of the PAA. The mandate of the PAB includes promoting proper professional standards for registered public accountants in Jamaica. In keeping with its mandate, the PAB is empowered to pursue disciplinary actions against registered public accountants for alleged breaches of the PAA. If a breach is proven, among the sanctions the PAB may impose, are removal from the register and disqualification from practice.

[5] Between 28 January and 18 February 2020, the PAB held a disciplinary hearing to consider a complaint. On 18 March 2020, the PAB found Mr Brown guilty of professional misconduct. The PAB outlined the sanction imposed as follows:

> "DECISION
>
> The Board decided that

(i) The name of Mr. Dawkins Brown be removed from the Register of Public Accountants and that he be so advised.

(ii) Mr. Dawkins Brown pays to the Board the sum of One Million Six Hundred Thousand Dollars ($1.6million) to cover the costs and expenses of an incidental to the enquiry."

Dissatisfied with the outcome, on 30 March 2020, Mr Brown filed a notice of appeal seeking to have this court set aside the orders of the PAB.

**The complaint**

[6] The complaint, dated 26 July 2019, filed with the Registrar of the PAB, was made by Vistra IE (Bristol) Limited ('Vistra'), a company registered in England, pursuant to section 13(1)(c)(iii) of the PAA and regulation 15 of the Public Accountancy Regulations. It alleged that Mr Brown committed in the performance of his professional duties (i) an act of grave impropriety, or infamous conduct, (ii) an act of gross negligence or of gross incapacity, and/or (iii) an act which constitutes conduct discreditable to the profession.

[7] The complaint outlined that Vistra was formerly named Radius (Bristol) Limited ('Radius'), and it provides business support services for its clients. It relied on the following assertions:

A. By a letter of engagement ('LoE') dated 11 April 2017, Vistra engaged Crowe to incorporate a subsidiary in Jamaica for its client Affirmed Networks UK Limited ('ANUK'). Pursuant to the LoE, Crowe incorporated Affirmed Networks Jamaica Limited ('ANJL')

B. Crowe agreed to provide nominee director services on the incorporation of ANJL and selected Mr Brown for appointment as its first director. It was agreed that upon ANJL's incorporation, Mr Brown would be replaced as the sole director by nominees of Vistra.

C. Under the LoE, Crowe agreed to provide several services to ANJL, including:

(i) Initial payroll set up;

(ii) Payroll registration;

(iii) Bookkeeping;

(iv) Cash management;

(v) Monthly and annual payroll management;

(vi) Preparing monthly statutory and financial reports;

(vii) Preparing and filing GCT returns;

(viii) Filing annual returns;

(ix) Company secretarial services; and

(x) Registered address services.

D. Pursuant to the LoE and on Mr Brown's instructions, between November 2017 and December 2018, Vistra transferred a total of US$203,982.97 to UHY Dawgen Limited to enable Crowe to make monthly and annual payments on behalf of ANJL to Tax Administration Jamaica ('TAJ').

E. Despite receipt of the necessary funds Crowe failed to make the required payments. As a result, on 29 January 2019 TAJ issued to ANJL a demand notice for default, regarding its monthly and annual returns. The default resulted in the accrual of interest and penalty charges on the unpaid tax sums.

F. After the demand notice was issued the appellant took the following steps:

(1) He prepared and submitted to TAJ, on behalf of ANJL, an employer's annual return form ('SO2') for the year 2018 in which he falsely declared that ANJL had no employees for the return/calendar year when, in fact, ANJL had four

employees that year. He declared that the return was accurate and in keeping with the requirements of applicable laws;

(2) On 19 March 2019, by email, he informed Vistra, through its employee Curt Olsen, that Crowe was working to resolve the interest and penalties due to TAJ; and

(3) By further email dated 1 April 2019, he sought to explain Crowe's failure to make the payments to TAJ and promised to resolve the matter soonest.

G. The matter not having been resolved despite the assurances given by Mr Brown, Vistra, through its attorney-at-law, issued a demand to Mr Brown by letter dated 16 April 2019. By email of even date, Mr Brown acknowledged receipt of the demand letter. Despite a follow-up email from Vistra dated 24 April 2019, and further efforts up to the date of the complaint, Mr Brown had failed to i) correct the relevant filings with the TAJ and ii) pay all taxes, penalties and interest due to TAJ on ANJL's behalf.

**Mr Brown's response to the complaint**

[8] Mr Brown detailed his response, in an affidavit filed 30 March 2020, a summary of which is as follows:

(1) He is the sole shareholder and managing partner of Crowe. He also has extensive private company holdings including UHY Dawgen Limited.

(2) He created and is the sole shareholder of ANJL, a special purpose vehicle for the provision of technical IT services.

(3) Radius (Bristol) Limited ('Radius') is a consulting firm in the United Kingdom that provides mobility services and other things. He was introduced to Radius by one Curt Olsen whom he met on LinkedIn.

(4) About 17 July 2014, Mr Olsen approached him about possible collaborations. He informed Mr Olson that he operated non-audit services in Jamaica and the Caribbean, and if the project aligned with their long-term goals, he would develop a "Special Purpose Vehicle" for non-audit compliance. This special purpose vehicle would deal with work permits, tax planning and specialised teams. He also informed Mr Olsen about the revenue component arrangements, including consultant's costs, deemed GCT, and the percentage range of the margin, depending on what the global head contract permitted.

(5) He and Mr Olsen continued to have discussions concerning several aspects of potential projects. On 11 April 2017, by email, Mr Olson informed him that one of the leads agreed to sign with Radius and attached an LoE which outlined that Radius appointed Crowe to provide the relevant services at an agreed rate. Mr Brown, however, contended that the LoE did not capture all aspects of the project as from 2016, there was an oral agreement between Mr Olsen and him concerning the revenue share and flow of funds into ANJL for non-audit services. Appendix 1 of the LoE outlined project establishment costs for potential projects, but did not represent the entire contract as Radius was to pay sums to ANJL to cover profit share, taxes and consultants' fees, for what was a business process outsourcing enterprise. ANJL was incorporated to use for this and other similar Caribbean projects.

(6) During the contract, Radius never requested the transfer of ANJL to them.

(7) When he received the letter of complaint from Vistra, he stopped working on the project and took steps to stop filing and processing information under Affirm and to remove the employees who worked with Affirm. Thus, the filing with TAJ of a nil return on behalf of ANJL was true and correct.

(8) While Vistra stated that they sent US$203,982.97 to UHY Dawgen to make monthly and annual payments, Radius should have sent J$110,000,000.00 to

ANJL. Hence, Radius had a balance of J$84,000,000.00 to pay. Based on Radius' refusal to pay, provisional results were filed with TAJ, which is permissible under Jamaica's tax law, until matters have been resolved. They remain unresolved.

(9) The PAB has no jurisdiction in this matter as it is concerned with commercial litigation based on a breach of Radius' contract with ANJL and was not an accounting matter.

(10) He and his companies had no contractual relationship with Vistra, which made the complaint, as the contract/LoE was between Crowe and Radius. There was no contract between Crowe or ANJL and Vistra. In the absence of such privity of contract, the complaint is illegal, null and void.

**The events and proceedings below**

[9] An outline of the events and proceedings since the PAB became seised of this matter is chronicled in its written record of its decision dated 19 March 2020. It records the following. The Registrar of the PAB, having received the complaint from Vistra dated 26 July 2019, informed Mr Brown of the complaint. Mr Brown responded by letter dated 20 September 2019. After reviewing the complaint and response, the PAB determined that there was a *prima facie* case for a disciplinary enquiry. On 8 October 2019, the PAB informed Mr Brown that it would convene a hearing on 31 October 2019. By letter dated 9 October 2019, Mr Brown counter-proposed a date in late November based on his travel plans and his need to brief an attorney-at-law. On 25 November 2019, the PAB proposed 28 and 30 January 2020. Mr Wildman on behalf of Mr Brown then suggested dates in February and March 2020.

[10] The PAB, however, decided to proceed on 28 January 2020. On that date, an application for an injunction was made in the Supreme Court to prevent the commencement of the hearing. The application alleged that the PAB had failed to provide necessary disclosure to Mr Brown, thereby breaching his right to a fair hearing. The

injunction was refused on the basis that the issues raised in the application should be traversed before the PAB. The PAB proceeded with the disciplinary hearing on 28 and 30 January 2020. Final submissions were made on 18 February 2020, at the end of which the PAB reserved its decision.

[11] In his affidavit, filed 30 March 2020, Mr Brown stated that on or about 16 March 2020, he was informed by Mr Wildman that the PAB would be delivering their ruling on 18 March 2020. Mr Brown indicated that he had advised Mr Wildman that in light of the COVID-19 pandemic, a public meeting at that time was "not advised".

[12] Mr Brown further stated that he received an email on 24 March 2020 advising that the PAB had met on 18 March 2020 and delivered its decision. Attached to the email was a letter dated 20 March 2020 addressed to him and signed by the Registrar of the PAB. In that letter, Mr Brown was advised as follows:

> "At the meeting held in public on March 18, 2020, the [PAB] delivered its findings that
>
> (i) You failed to meet the requirements stipulated in Rule 270 of the [PAB] dealing with the Custody of Client Assets. In particular you failed to meet the requirement of Rule 270.4 which states that 'A registrant is strictly accountable for all clients' monies that the Registrant receives' and 270.8 which states that 'Clients' monies should be paid without delay into a bank account, separate from other accounts of the firm'.
>
> (ii) You have not conducted yourself with courtesy and consideration towards Vistra during your professional work. In particular you have not upheld Rules 150 and 150.1 dealing with Professional Behaviour.
>
> (iii) You have not behaved with integrity in all professional and business relationships with Vistra as required by Rules 110.1. 110.2 and 110.3 of the [PAB's] Rules of Professional Conduct.

In addition, the [PAB] found that

(a) You are guilty, in a professional respect of grave impropriety

(b) You are guilty of acts which constitute conduct discreditable to the profession

(c) You are guilty of infamous conduct and gross negligence.

Thereafter the [PAB] announced its decision as follows:

> Your name will be removed from the Register of Public Accountants effective immediately.
>
> You are required to pay to the [PAB] the sum of One Million Six Hundred Thousand Dollars ($1.6million) towards the costs and expenses of the Hearing of the complaint brought by Vistra. You will be allowed a period of eight months in which to make this payment."

[13] Mr Brown was then advised of his right to appeal the decision of the PAB, which he has exercised in these proceedings.

**The findings of fact of the PAB challenged**

[14] The key factual findings of the PAB challenged by Mr Brown are that:

A. There was a change of name from Radius to Vistra.

B. He as the managing partner of Crowe and a party to the LoE, failed to make payments on behalf of ANJL to TAJ, to settle statutory and other tax obligations when due, despite having received US$203,982.97 from Vistra for that purpose. This resulted in a demand notice being issued by TAJ to ANJL, a company which Vistra asked him to incorporate.

C. He knowingly and deliberately filed with TAJ a false 2018 SO2 for ANJL with zero employees and zero tax obligations, instead of filing the correct amounts

and making the required payments from the sum of US$203,982.97 received from Vistra to satisfy those specific obligations.

D. He failed to meet the requirements stipulated in rule 270 of the PAB dealing with the custody of client assets. In particular, he failed to meet the requirements of rule 270.4 which states that, "A registrant is strictly accountable for all clients' monies that the Registrant receives" and of Rule 270.8 which stipulates that, 'Clients' monies shall be paid without delay into a bank account, separate from other accounts of the firm".

E. He failed to make payments to TAJ, when due, on behalf of Vistra to settle its statutory obligations from monies received from Vistra for that purpose.

**The grounds of appeal**

[15] Mr Brown filed numerous detailed grounds of appeal which are outlined in appendix 1 to this judgment. The grounds cover five main areas of concern:

A) The PAB failed to appreciate that Mr Brown had no contractual relationship with Vistra, the company that made the complaint against him; that the complaint stemmed from a contractual dispute between Mr Brown and Radius, the company with which he and his company had contracted; and that the LoE did not permit its use to ground a disciplinary complaint (see grounds a) – g); n), o) and p) under this head);

B) The PAB acted in breach of the statute when it allowed unauthorised persons to sit on the PAB and influence the outcome of the proceedings; (see grounds k), l) and m);

C) There was no gazetted board in place for the hearing (see grounds a) – h) under this head) nor (based on the application to adduce fresh evidence heard on 19 July 2021 after the initial hearing of the appeal) were there

any gazetted rules providing the basis for the PAB to bring disciplinary proceedings against Mr Brown;

D) The decision of the PAB was vitiated by bias of the chairman against Mr Brown (see grounds A. and B. under this head); and

E) The proceedings were null and void because in breach of the Regulations Mr Brown did not receive adequate disclosure (see grounds h) – j). The hearing was also conducted in breach of [Mr Brown's] constitutional right to a fair hearing in public (see grounds a) and b) under this head).

**The application to adduce fresh evidence in support of the allegation of bias**

[16] This application was considered as a preliminary issue before the substantive appeal was heard, as its determination impacted whether the appellant could rely on his affidavit in support of the grounds of appeal that alleged the PAB was tainted by bias.

Submissions

*Mr Wildman for Mr Brown*

[17] Relying on the affidavit of Mr Brown, filed 25 June 2020 in support of his application to adduce fresh evidence, Mr Wildman referred to two unanswered allegations levelled by Mr Brown against Mr Linval Freeman, the chairman of the PAB. On the basis of these allegations, he asked the court to find that the PAB, which heard the complaint against Mr Brown, was "fatally tainted by bias". The allegations are that (i) two years prior to the hearing, Mr Freeman accused Mr Brown of taking away an auditing and accounting contract that Mr Freeman and his firm Ernst & Young had with Pan-Caribbean Sugar Company Limited and (ii) in 2006 Mr Brown and Mr Freeman had a personal dispute surrounding the acquisition of several cable companies by Columbus Communications where Mr Freeman was the advisor partner to the purchaser and Mr Brown was the advisor partner to the vendor.

[18] Mr Wildman also pointed out that, based on Mr Brown's affidavit evidence, although Mr Brown had the information at the time of the hearing, he had not disclosed it to his attorney-at-law until after his removal from the register as he was of the view that had Mr Freeman been removed the PAB would not have had a quorum. Mr Wildman advanced that as the evidence was highly credible, unchallenged and likely to influence the tribunal if admitted, the tests outlined in **Ladd v Marshall** [1954] 3 ALL ER 745, which guide the reception of fresh evidence, had been satisfied. Mr Wildman further posited that, although Mr Brown had not raised the concern before the PAB (which the court indicated raised the issue of waiver), given the history between himself and Mr Freeman, Mr Brown was deprived of his fundamental constitutional right to a fair hearing by an impartial and independent tribunal.

*Ms Hall for the PAB*

[19] Ms Hall for the PAB, submitted that, pursuant to **Ladd v Marshall**, there are three cumulative conditions that must be fulfilled before fresh evidence is admitted. She conceded that Mr Brown may have satisfied the second and third criteria as (i) if bias was established it may have influenced the case, and (ii) she had no evidence to challenge the credibility of the allegations. Ms Hall, however, maintained that Mr Brown could not succeed on the first criterion, as it was not the case that the information now placed before the court, could not by reasonable diligence have been obtained for use at the hearing. Mr Brown, on his own evidence, admitted to not raising the matter before the PAB, but rather submitted to its jurisdiction. Thus, Ms Hall agreed with the court that the issue of waiver was engaged. Accordingly, she maintained the application had to fail.

<u>The court's ruling</u>

[20] The well-known principles outlined in **Ladd v Marshall** are that for material to be admitted as fresh evidence for consideration, the following three criteria all have to be satisfied:

(1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial;

(2) the evidence must be such that if given, it would probably have had an important influence on the outcome of the case, though not necessarily decisive; and

(3) the evidence must be credible.

[21] The court found that there was no basis in law to grant the application. While the court accepts that the principles in **Ladd v Marshall** should not be applied with undue strictness, court-instituted rules governing the admissibility of fresh evidence are well settled. Further, the Charter of Fundamental Rights and Freedoms in the Constitution does not provide a gateway to the admissibility of fresh evidence given those rules.

[22] The first principle in **Ladd v Marshall** was not satisfied. The proposed evidence was available. Mr Brown knew he could have taken the point. He, however, chose to await the outcome and take the point on appeal, if necessary. The law is clear that he should have given the PAB the opportunity to consider whether Mr Freeman should recuse himself. The second principle in **Ladd v Marshall** was also not satisfied as by declining to raise the concern about bias and instead choosing to submit to the jurisdiction of the PAB, Mr Brown waived his right to challenge Mr Freeman's participation on the PAB. Consequently, the court refused his application to adduce fresh evidence filed on 25 June 2020. No order as to costs was made as no material was filed on the application by or on behalf of the PAB.

[23] The outcome of this fresh evidence application meant that there was no affidavit evidence to support the grounds of appeal alleging bias.

**The application to adduce fresh evidence on non-gazetting of the Rules**

[24] On 5 May 2021, after the hearing of the appeal was completed, Mr Wildman filed another application to adduce fresh evidence in support of Mr Brown’s notice of appeal.

The application sought to establish that (i) the Rules of Professional Conduct ('the Rules') were made pursuant to section 29 of the PAA; (ii) Mr Brown was charged and convicted under the Rules; and (iii) the Rules were null and void, as they had not been gazetted as required by section 31(1) of the Interpretation Act.

Submissions

*Mr Wildman for Mr Brown*

[25] At a further hearing on 19 July 2021, Mr Wildman submitted that the purported striking off by the PAB of Mr Brown was ineffective due to the non-gazetting of the Rules. He relied on the affidavit of Mr Brown filed 6 May 2021 and the case of **Richard Joachim and Glenford Stewart v The Attorney General and Ephraim Georges** [2006] UKPC 6.

[26] Learned counsel argued that the three criteria established under the case of **Ladd v Marshall** were satisfied as Mr Brown could not have reasonably known about the evidence at the time of the hearing to take the point; the evidence is relevant, admissible and capable of belief; and if it is admitted it is likely to affect the outcome of the matter. Mr Wildman further submitted that the case of **Rose Hall**, relied on by the PAB, was of no relevance as no sort of diligence would have put Mr Brown on notice that the Rules were not gazetted as one assumes that all rules are compliant with the law.

*Ms Hall for the PAB*

[27] Ms Hall submitted that the application had no merit and should be refused. Learned counsel argued that the PAB did not prefer charges pursuant to the Rules. Rather than being "charges", they were "disciplinary proceedings" under sections 4(1)(d) [this should be 4(2)(d)] and 13(1)(c) of the PAA and regulation 15 of the Regulations, in relation to which the complaint was made. Ms Hall further submitted that section 29 of the Act, which speaks to the Minister's power, addresses Regulations that are required to be gazetted pursuant to section 31(1) of the Interpretation Act. Ms Hall argued in contrast that section 28 of the Act does not require the Rules to be gazetted. Counsel, therefore,

maintained that as Mr Brown was found guilty under the Regulations, with the Rules outlining the nature of what would satisfy their breach, the non-gazetting of the Rules was of no moment.

[28] Ms Hall also advanced that the application failed the threshold test in **Ladd v Marshall** as the purported fresh evidence could have been obtained at the time of the hearing, and if obtained, it could not have had an effect on the hearing.

*Mr Wildman for Mr Brown in reply*

[29] In reply Mr Wildman submitted that under the Interpretation Act, "regulation" includes "rules".

The court's ruling

[30] The court permitted the admission of the fresh evidence in the form of the affidavit of Mr Dawkins Brown, sworn on 4 May 2021 and filed 6 May 2021, along with the Public Accountancy Board Rules of Professional Conduct, March 2017. All elements of the threshold test in **Ladd v Marshall** were satisfied based on the following. A respondent to a hearing was entitled to expect that the tribunal before which he appeared was properly empowered to exercise its functions. In any event, even if not "fresh" in the classic sense in which it is understood in **Ladd v Marshall**, this court will, under section 28(a) of the Judicature (Appellate Jurisdiction) Act, entertain the reception of material which goes to the jurisdiction of a tribunal. As submitted by Mr Wildman, "regulations" as defined in the Interpretation Act include rules. The letter from the "Jamaica printing [sic] Services (1992) Limited" dated 3 May 2021, exhibited to the affidavit of Mr Brown, indicated that no copy of the publication of the Rules was found. It establishes that the Rules were never gazetted. This has not been challenged. The evidence was, therefore, admitted as it is credible and may influence the outcome of the appeal.

## The powers of this court

[31] This court's authority to hear an appeal from a decision of the PAB's exercise of a disciplinary power under section 13 of the PAA is contained in section 14 of the PAA. The options for disposal of the appeal outlined in section 14(2) are that this court:

> "… may dismiss the appeal and confirm the decision appealed from, or may allow the appeal and direct that the matter the subject of the appeal be determined afresh by the [PAB], and may also make such order as to costs before the [PAB] and as to costs of the appeal as the Court shall think proper."

## The issues

[32] From the multiple grounds filed, the application to adduce fresh evidence heard on 19 July 2021 and the submissions, the following five issues and sub-issues have been distilled:

A. (1) Was the PAB improperly constituted due to:

(i) The omission to gazette the members of the PAB; and/or

(ii) The participation of two consultants during the proceedings?

If so, what was the effect of the improper constitution?

(See grounds a) to h) under the head dealing with gazetting and grounds k), l), and m) in relation to the participation of consultants)

(2) Did the fact that the PAB's Rules of Professional Conduct were not gazetted render the charging of Mr Brown and the resultant disciplinary hearing outside the jurisdiction of the PAB, and, therefore, null and void?

B. Was there a contractual relationship between Mr Brown and Vistra, the company that made the complaint against him?

(1) Was Vistra bound by the agreement which allegedly existed between Mr Brown (through his company Crowe) and Radius prior to Radius changing

the company's name to Vistra or Radius' acquisition by Vistra, in light of the allegation that Mr Brown was merely a nominee director and shareholder of ANJL and he was to transfer ownership of ANJL to nominees of Vistra after incorporation (see grounds a), to e), g), i) and p));

(2) Did the agreement and any debt arising from it affect any obligation of Mr Brown to file tax returns to TAJ on behalf of ANJL? (see ground f));

(3) Did the non-disclosure clause in the LoE preclude the complaint being brought to the PAB? (grounds n) and o));

C. Whether based on non-disclosure, there was a breach of Mr Brown's right to a fair hearing? (see grounds e), h), i), j))

D. Was the hearing conducted in breach of Mr Brown's constitutional right to a fair hearing in public?

(1) Was the invitation to a member of the public to sit in the hearing enough to satisfy the requirement under regulation 33(3) of the Regulations for the decision to be handed down in public?

(2) If not, what effect did non-compliance have on the proceedings? Did it render it a nullity or irregularity?

(See grounds a) and b) under this head)

E. Was the decision of the PAB vitiated by bias of the chairman against Mr Brown?

(See grounds a) and b) under this head)

**Issue A (1): Was the PAB improperly constituted due to:**

(i) **The omission to gazette the members of the PAB; and/or**

(ii) **The participation of two consultants during the proceedings?**

**If not, what was the effect of the improper constitution?**

## (i) The omission to gazette the members of the PAB

Submissions

*Mr Wildman for Mr Brown*

[33] Learned counsel commenced with a ground which he maintained would be determinative of the appeal in Mr Brown's favour. He submitted that at the time of the hearing conducted by the PAB, it did not exist in law, as it had not been constituted in accordance with paras. 2 and 8 of the First Schedule to the PAA and section 31 of the Interpretation Act. In particular, the appointment of the members of the PAB that existed at the time of the appellant's disciplinary hearing had not been published in the *Gazette* as required by para. 8. He further asserted that section 31 of the Interpretation Act makes it clear that if a body comes into being on gazetting of the law which establishes it, failure to gazette the body means that any order that the body makes is a nullity.

[34] Mr Wildman pointed out that the last gazetted appointment was 20 September 2016, which lasted for three years. He acknowledged that, on 23 April 2018, the Minister of Finance, Dr Nigel Clarke, had written a letter purporting to extend the tenure "until further advised". Counsel, however, argued that after his assumption of the post of Minister, the Minister, by that letter, permitted the PAB to continue in office up to the end of the term to which they had been appointed by his predecessor, which expired in September 2019. Therefore, in the absence of any subsequent appointment being published in the *Gazette*, the PAB was improperly constituted at the time of the hearing in 2020, and their decision was therefore "illegal, null and void and of no effect". Mr Wildman further advanced that this court must have regard to whether there was the required *Gazette* when determining whether a body has been properly constituted and had the jurisdiction to make the orders that it did.

[35] He submitted that the PAB's jurisdiction is based on statute and is not like the Supreme Court "at large"; thus, a failure to comply with the PAB's enabling statute renders its actions null and void. Hence, reliance on the letter of the Minister of Finance

and the *de facto* officer principle advanced by the respondent, could not validate the proceedings. In those circumstances, Mr Wildman asserted that the PAB's decision must be set aside *ex debito justitiae*.

[36] Learned counsel relied on the cases of **National Transport Co-operative Society Limited v The Attorney General of Jamaica** [2009] UKPC 48; **Leyman Strachan v The Gleaner Company Limited and Stokes** 66 WIR 268; **National Housing Trust v Treebros Holdings Limited** [2018] JMCA App 21; **Benjamin Leonard Macfoy v United Africa Co Ltd** [1961] 3 WLR 1405; and **Joachim and Another v Attorney General and Another** (2007) 69 WIR 286.

[37] Mr Wildman also contended that the PAB's reliance on section 10(7) of the PAA was misconceived, as that section was predicated on the assumption there was a gazetted board in place.

*Ms Hall for the PAB*

[38] Learned counsel conceded that the appointment of the members of the PAB, which heard the complaint against Mr Brown, had not been published in the *Gazette*. She submitted, however, that as the April 2018 letters of the Minister of Finance predated the expiration of the tenure of the members of the PAB, the Minister's letter validly extended their tenure. In these circumstances, Ms Hall argued that those members were the *de facto* officers of the PAB. She relied on section 106 of the Constitution, sections 35 and 39 of the Interpretation Act and the case of **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others** [2018] JMCA App 7. Thus, she contended, despite the absence of the *Gazette*, the decision of the PAB is valid.

[39] Ms Hall also relied on the authority of **R v Sonjeji** [2005] UKHL 49 for the position that non-compliance with a statutory requirement does not render any proceedings flowing from the statute a nullity but "a mere irregularity"; and the purpose of the relevant statute ought to be discerned to determine the validity of any irregular proceedings conducted thereunder. The case of **Joachim and Another v Attorney General and**

**Another**, was contrasted to the instant matter to support the argument that the statutory non-compliance did not invalidate the entire proceedings and the decision of the PAB, since the phrase "and shall take effect from the date of such publication" was not present in para. 8 of the First Schedule of the PAA.

[40] Further, Ms Hall relied on the fact that para. 10(7) of the First Schedule of the PAA preserved the validity of any proceedings notwithstanding any "defect in the appointment of a member".

[41] Ms Hall highlighted that Mr Wildman did not raise the issue regarding the PAB's constitution at the disciplinary hearing, where all parties proceeded on the basis that the PAB was validly constituted.

Discussion and analysis

[42] Section 3(1) of the PAA provides for the establishment of the PAB. Then subsection 2 outlines that the First Schedule governs the constitution and proceedings of the PAB.

[43] Para. 1 of the First Schedule of the PAA indicates that the PAB consists of 10 members appointed by the Minister. Para. 2 regulates the tenure of members of the PAB. It reads:

> "The appointment of a member of the Board shall, subject to the provisions of this Schedule, be for a period not exceeding three years, and every member shall be eligible for reappointment."

[44] Para. 8 states:

> "The names of all members of the Board as first constituted and every change in the membership thereof **shall be** published in the *Gazette*." (Emphasis supplied, italics as in original)

[45] Para. 10(4) states:

> "A quorum of the [PAB] shall be five."

[46] Para. 10(5) provides that:

> "The decision of the [PAB] shall be by a majority of votes and, in addition to an original vote, the person presiding at a meeting shall have a casting vote in any case in which the voting is equal:
>
> Provided that no decision of the [PAB] relating to the exercise of any of the disciplinary powers mentioned in section 13 shall be valid unless approved by the votes of at least two-thirds of such number of the members of the [PAB] as are present."

[47] Para. 10(7) states:

> "The validity of the proceedings of the Board shall not be affected by any vacancy amongst the members thereof or by any defect in the appointment of a member thereof."

[48] Section 31 of the Interpretation Act provides that:

> "31. - (1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.
>
> (2) The production of a copy of the *Gazette* containing any regulations shall be *prima facie* evidence in all courts and for all purposes of the due making and tenor of such regulations." (Italics as in the original)

[49] Section 35 of the Interpretation Act states:

> "Where by or under any Act a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power."

[50] Section 39 of the Interpretation Act states:

> "Where by or under any Act, the … Minister … is empowered to appoint or name a person to be a member of any board, tribunal, commission, committee or similar body, or to have and exercise any powers or perform any duties, … the Minister … may either appoint a person by name or direct the person for the time being holding the office designated by … the Minister … to be a member of such board, tribunal, commission, committee, or similar body, or to have and exercise such powers and perform such duties; and thereupon, or from the date specified by the … Minister … the person appointed by name or the person for the time being holding such office shall be a member of such board, tribunal, commission, committee, or similar body, or shall have and may exercise such powers and perform such duties accordingly."

[51] There is no issue with the appointment of the PAB commencing 2 May 2016 for three years, ending on 1 May 2019. This was reflected in the *Gazette* dated 20 September 2016. This was in keeping with para. 2 of the First Schedule of the PAA and fully in line with the Minister's powers adumbrated in section 39 of the Interpretation Act. By letter dated 23 April 2018, before the expiration of their appointment, the Minister extended the tenure of the members of the PAB. This was in accordance with his powers under section 35 of the Interpretation Act. There was, however, no publication in the Gazette. Was such publication required and if so for what purpose?

[52] Mr Brown's arguments under this issue have been anchored on section 31(1) of the Interpretation Act, which states that "[a]ll regulations…having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication". Thus, as confirmed by the case of **National Housing Trust v Treebros Holdings Limited**, if regulations are not published in accordance with section 31(1) of the Interpretation Act, they do not become law. However, the Minister's power to constitute the PAB and the requirement that the members of the PAB should be published in the *Gazette* are not contained in regulations. Those powers are contained in paras. 2 and 8 of the First Schedule to the PAA.

"Regulations" are defined in the Interpretation Act as, "includ[ing] rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms;". That definition does not contemplate parent legislation of which the First Schedule is a part.

[53] Further, the wording of para. 8 does not indicate that publication in the *Gazette* is required to make the appointments effective. It is therefore correct, as submitted by Ms Hall for the PAB, that the case of **Joachim and Another v Attorney General and Another** can be distinguished in support of the position that any statutory non-compliance in the instant matter did not invalidate the entire proceedings and the decision of the PAB. This is because the phrase "and shall take effect from the date of such publication", which was pivotal in that case, is absent from para. 8. That is why in respect of the unchallenged appointment of the members of the PAB, effective 2 May 2016, the *Gazette* dated 20 September 2016 was by way of notification that the appointments had been made as of that date to 1 May 2019. Also of significant import is the fact that para. 8 only requires publication of the members of the PAB in the *Gazette* on its first constitution and thereafter whenever there is a change in membership. With the Minister requesting the members of the PAB to remain in place "until further advised", there was no change in membership. Whether that was sufficient to validate the membership of the PAB beyond 1 May 2019, in light of section 35 of the Interpretation Act that gave the Minister power to reappoint persons, has to be determined.

[54] However, what seems clear is that (1) changes in appointments by the Minister are to be reflected in, though not effected by the *Gazette,* and (2) up to the time of the disciplinary hearing, there had been no change in the membership by way of the addition of different persons. As indicated by Mr Compton Rodney, Registrar of the PAB, in his affidavit filed 13 May 2020, there had, however, been changes by way of departures through resignations and death. This meant at the time of the hearing, only five of the initial 10 members of the PAB appointed 2 May 2016 remained. Five members were, however, sufficient to make the PAB quorate, as outlined in para. 10(4) of the Regulations. The respondent relies on para. 10(7) as preserving the validity of the

proceedings of the PAB despite the vacancies and the challenge to the continued effective appointment of the members of the PAB after 2 May 2019.

[55] In my view, it is arguable that the Minister's extension letters of April 2018, section 35 of the Interpretation Act and para. 10(7) of the First Schedule, taken together, validated the proceedings and the decision of the PAB. If that is the case, then the authorities of **National Transport Co-operative Society Limited v The Attorney General of Jamaica, Benjamin Leonard Macfoy v United Africa Co. Ltd** and **Leyman Strachan v The Gleaner Company Limited and Stokes**, which deal variously with the effect of the failure to comply with or act within legislated power, or court rules, as well as the scope of the jurisdiction of a puisne judge, are necessarily unhelpful.

[56] There, however, may well be lingering uncertainty, in particular, over the appointment process in light of the absence of a formal re-appointment process and the absence of any *Gazette* reflecting such an appointment. In fact, Ms Hall for the PAB conceded that, in her view, there was no formal re-appointment and, by extension, no publication in the *Gazette*. The PAB thus also relies on the *de facto* officer doctrine.

[57] In **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others**, one of the issues which this court had to decide was whether section 106(3) of the Constitution or the common law *de facto* officer doctrine operated to clothe with validity, a judgment issued by judges of appeal who had all retired before the delivery of the judgment, without having been granted an extension under section 106(2) of the Constitution. Central to the decision was the interpretation of the relevant subsections of section 106 of the Constitution applied to the factual situation.

[58] The relevant provisions of section 106 state:

> "(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Court of Appeal shall hold office until he attains the age of seventy years: Provided that he may at any time resign his office.

> (2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
>
> (3) Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office."

[59] A major consideration was whether section 106(3) was a mere codification of the common law *de facto* officer doctrine, which could operate to validate the judgment. The court explored in detail several cases on the operation of this doctrine, then considered whether it applied in the context of the particular constitutional provisions and facts of the case. With some reluctance, especially on the part of Morrison P and Phillips JA, the court, which also comprised Brooks JA (as he then was), unanimously held that the judgment delivered was invalid. This was on two bases. Firstly, per Morrison P and Brooks JA, because subsection 3 does not operate independently, and had to be construed in the context of surrounding provisions. It only makes clear that where section 106(2) has been complied with, or where perhaps there was minor non-compliance with section 106(2), judgments of the judge of appeal, delivered after the attainment of his or her retirement age, were valid. Phillips JA was inclined to the view that section 106(3) could operate independently but, despite her reservations, ultimately yielded to the majority view. Secondly, as the judges of appeal had retired, had not remained in office after retirement, and their positions had been filled after their retirement (and, per Phillips JA, were likely receiving pension), those facts did not permit the successful invocation of the *de facto* officer doctrine at common law.

[60] A useful summary of the *de facto* officer doctrine is contained in Wade & Forsyth Administrative Law, 8th edition, pages 291-292, as follows:

> "The acts of an officer or judge may be held to be valid in law even though his own appointment may be invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so."

[61] In **Norton v Shelby County** 118 US 425, the principle was stated in this way:

> "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions … The official acts of such persons are recognised as valid on grounds of public policy, and for the protection of those having official business to transact."

[62] In considering whether the acts of a judge who was not validly appointed were a nullity, Lord Denning MR in the case of **Re James (an Insolvent) (The Attorney General Intervening)** [1977] 1 All ER 364, described circumstances in which the doctrine would apply. In his inimitable style, he stated at page 373:

> "He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But still he holds the office of a judge. It is the office that matters not the incumbent … So long as the man holds the office, and exercises it duly and in accordance with the law, his orders are not a nullity…"

[63] Though Lord Denning MR ended up in the minority in the outcome of the case, based on a disagreement in the interpretation of what amounted to a "British Court", Scarman LJ, who wrote for the majority, professed that he largely agreed with Lord Denning MR in his thinking on the *de facto* doctrine. He stated at page 377:

> "I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government."

[64] In **R v Myers**, a Supreme Court judge in Belize continued to sit, hear and determine cases after attaining the constitutionally mandated retirement age. When the validity of his decisions, taken after he passed the retirement age, was challenged, the *de facto* officer doctrine was held to apply preserving their validity. Mottley P, after reviewing a number of authorities, concluded:

> "From the cases it is clear that for the de facto doctrine to apply, the judge must have a colourable title or authority. In addition, the judge must have acted in good faith and must have been believed by himself to have the necessary authority to act and has been treated by litigants as having such authority. The doctrine cannot be invoked by a person who knows that he has no authority to sit as a judge but none the less usurps the function of a judge. The rationale for the de facto doctrine is that the logic of annulling the decision of the de facto judge must yield to the need to protect the reputation of the law and the public confidence in it as well the interest of the parties who acted on the assumption that the trial was being properly conducted. There is no evidence to show that at the time of the trial the appellant questioned the competency of the judge to preside over the trial. Both the prosecution and defence proceeded on the basis that the judge was qualified to preside."

[65] It is clear, therefore, that the successful operation of the doctrine is dependent on there being, at the time jurisdiction was assumed, no question in the officer's mind that he or she has authority, and no expressed reservation about the officer's authority, by those who subjected themselves to its exercise.

[66] What are the facts in the instant case? First, there was the initial appointment of the members of the PAB, which was gazetted in May 2016, in respect of which no one has taken issue. Second, by letters dated 23 April 2018, Dr Nigel Clarke, the new Minister, informed all members of the PAB that they should continue "until further advised". Third, at the time of the hearing: (a) the members of the PAB thought they had jurisdiction to hear and determine the complaint; and (b) the appellant did not challenge the jurisdiction of the PAB on the basis that there was a defect in the members' appointment. Rather, the appellant subjected himself to the PAB's jurisdiction. Therefore, as submitted by Ms

Hall for the PAB as, "the office existed under law, the [PAB] members were clothed with the insignia of the office and exercised the powers and functions of the office accordingly, the official acts of the [PAB] members should be recognised as valid on the grounds of public policy".

[67] This situation is wholly distinguishable from that which existed in **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others**, where the president and judges of appeal had retired, had not remained in office thereafter and the positions they had held were now filled by others. The circumstances of the instant case commend the application of the *de facto* officer doctrine to validate the actions of the PAB, despite the fact that there was no formal re-appointment of the PAB and by extension no publication in the *Gazette*.

[68] Considering, therefore, the Minister's extension letters of April 2018, section 35 of the Interpretation Act, para. 10(7) of the First Schedule, along with the operation of the *de facto* officer doctrine, I hold that the proceedings and decision of the PAB were valid. The grounds associated with this issue, therefore, fail.

**(ii) The participation of two consultants in and the effect on the proceedings**

Submissions

*Mr Wildman for Mr Brown*

[69] Mr Wildman submitted that two persons who were not qualified to sit, the Honourable Mr Justice Ian Forte (retired President of the Court of Appeal) and Ms Annaliesia Lindsay, attorney-at-law, presided at and actively participated in the hearing, influencing its outcome. Their participation, learned counsel asserted, was a breach of the PAA that rendered the decision of the PAB "illegal, null and void and of no effect". He further submitted that the PAB's statutory remit did not include powers to delegate its authority to these two persons. He contended that para. 11(1) of the First Schedule to the PAA makes three provisions for delegation only in a strict and narrow sense which does not include the exercise of any disciplinary powers. He contended that Ms Hall's

reliance on section 5 of the PAA, in response to this ground, was an inadequate answer, as the challenge was to the composition of the PAB, which is only addressed in the First Schedule. Section 5, he argued, addresses the appointment of officers to conduct administrative functions. He relied on the authority of **McKane v Parnell** (1956) 7 JLR 32.

*Ms Hall for the PAB*

[70] Ms Hall acknowledged that the PAB sought the assistance of two consultants to provide guidance on legal issues. However, she maintained that this was only on procedural matters, which section 5 of the PAA entitled them to do. Learned counsel submitted that the consultants only gave advice and did not wear the cloak of member of the PAB. She insisted that their participation was limited as they did not engage in any deliberations with the PAB, nor were they in attendance when the PAB made its decision. She contended, therefore, that their presence did not render the proceedings null and void.

Discussion and analysis

[71] Section 5(1) of the PAA provides in part that:

> "The Board may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a Registrar and such other officers, agents and servants as it thinks necessary for the proper carrying out of its functions under this Act: …"

[72] Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition, Second Supplement December 2023, at chapter 23.1, explains that:

> "A word or phrase in an enactment must always be construed in the light of the surrounding text. As Lord Simmonds said in *A-G v HRH Prince Ernest Augustus of Hanover*, '[ [1957] AQC 436 at 461] words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context'." (Italics as in original)

[73] It is, therefore, significant that the PAA specifically distinguishes the "Registrar" from the subsequently stated "such other officers, agents and servants" whom the Board is authorised to "appoint and employ". The plain and ordinary meaning of the word "other" indicates that a different type of employee or appointee from the "Registrar" is envisaged. Thus, the PAB may also engage employees who carry out different roles from the Registrar that are "necessary for the proper carrying out of its function", under the PAA. No qualifying or limiting words were inserted. The PAB is empowered to engage the Registrar and these other functionaries, "at such remuneration and on such terms and conditions as it thinks fit". Thus, the PAB has broad discretion on the mode of engagement, whether as public officers through the public sector permanent employment process or otherwise, such as on contract.

[74] Therefore, while the composition of the PAB is limited to those who are appointed pursuant to section 3(2) of the PAA and consequently paras. 1, 7 and 8 of the First Schedule, the PAB has the power to employ personnel apart from the Registrar to assist with the proper discharge of its functions.

[75] Having perused the record in this matter, I note that Miss Annaliesia Lindsay indicated that she was PAB's attorney-at-law. Her contributions during the proceedings in the form of comments and questions were limited to providing guidance on legal procedures and the relevant law. Mr Justice Ian Forte also made his role clear. In the proceedings on Thursday, 30 January 2020 recorded at page 219 of the record of appeal, he stated that: "I am merely a consultant to the [PAB]. I take no part in the findings of facts in this matter, and I only advise, perhaps in procedural matters". At the conclusion of evidence and submissions on Tuesday, 18 February 2020, the Registrar of the PAB outlined that after the PAB had considered the matter, another date would be set to announce the decision of the PAB. At that point, Mr Justice Forte stated, "[a]nd I will take no part in those deliberations". This is recorded at page 510 of the record of appeal. Neither Ms Lindsay nor Mr Justice Forte was present at the hearing held on 18 March 2020 to announce the PAB's decision in the matter.

[76] Based on the record of proceedings, Ms Lindsay and Mr Justice Forte were present at the appellant's disciplinary hearing only in advisory capacities to assist the PAB to efficiently conduct its duties. Neither was a part of the PAB, nor did either perform a function, such as fact-finding or participation in deliberations, which was reserved solely for members of the PAB. This situation is, therefore, wholly distinguishable from that which obtained in **McKane v Parnell**, relied on by Mr Brown. In that case, a Clerk of the Courts, acting on the direction of the Resident Magistrate, signed and issued a warrant. It was held that the Clerk of the Courts acted entirely without jurisdiction as he was not empowered by the Justices of the Peace Jurisdiction Law or the Judicature (Resident Magistrate's) Act to sign or issue warrants on behalf of the court. In the instant case, neither Ms Lindsay nor Mr Justice Forte performed a function reserved only to the PAB. Accordingly, the nature of their participation was not a breach of the PAA and does not, in any way, compromise the validity of the decision of the PAB.

**Issue A (2): Did the fact that the PAB's Rules of Professional Conduct were not gazetted render the charging of Mr Brown and resultant disciplinary hearing outside the jurisdiction of the PAB, and therefore null and void?**

Submissions of counsel

[77] The arguments of both Mr Wildman and Ms Hall regarding this issue were already outlined under the second application for the reception of fresh evidence. In summary, Mr Wildman for Mr Brown submitted that the purported striking off by the PAB of Mr Brown was ineffective due to the non-gazetting of the Rules, especially as under the Interpretation Act, "regulations" includes "rules". He relied on the affidavit of Mr Brown, the case of **Richard Joachim and Glenford Stewart v The Attorney General and Ephraim Georges**, and the Interpretation Act. Ms Hall for the PAB, in response, contended that the non-gazetting of the Rules was of no moment as (i) the disciplinary proceedings were held pursuant to sections 4(1)(d) (it should be 4(2)(d) and 13(1)(c) of the PAA and regulation 15 of the Regulations; (ii) only the regulations made pursuant to section 29 of the PAA were required to be gazetted; (iii) rules made under section 28 of the PAA were not required to be gazetted; and (iv) Mr Brown was found guilty under the

Regulations (which were gazetted) with the Rules only outlining the nature of what would satisfy their breach.

Discussion and analysis

[78] Section 4(1) of the PAA outlines the functions of the PAB. It provides:

> "The functions of the [PAB] shall be, generally, to promote, in the public interest, acceptable standards of professional conduct among registered public accountants in Jamaica, and, in particular (but without prejudice to the generality of the foregoing) to perform the functions assigned to the [PAB] by the other provisions of this Act."

[79] Section 4(2)(d) outlines the PAB's disciplinary role. It states in part:

> "(2) The [PAB] shall—
>
> (a) ….
>
> (d) take disciplinary action against registered public accountants for breach of any provision of **this Act or any regulation** made hereunder; …" (Emphasis added)

[80] Sections 13(1)(c) and 13(2) of the PAA deal with the breaches of the PAA that registered public accountants may be found liable for and the disciplinary powers the PAB may exercise where breaches have been established. The parts of those sections relevant to this matter provide:

> "13.—(1) If any person registered under this Act as a public accountant—
>
> (a) …
>
> (c) is found, upon enquiry by the [PAB] made in accordance with the regulations—
>
> (i)…
>
> (iii) to have been guilty, in a professional respect, of grave impropriety or infamous conduct, or to have been guilty, in the performance of his professional

duties, of gross negligence or gross incapacity, or to have been guilty of any act, default or conduct discreditable to the profession,

the [PAB] may, if it thinks fit, exercise in respect of that person all or any of the disciplinary powers conferred on the [PAB] by subsection (2)

(2) The disciplinary powers which the [PAB] may exercise as aforesaid in respect of any such person are as follows—

(a) The [PAB] may cause the name of such person to be removed from the register;

(b) …

(d) The [PAB] may order such person to pay to the [PAB] such sum as the [PAB] thinks fit in respect of the costs and expenses of and incidental to the enquiry."

[81] Section 28 of the PAA outlines the power of the PAB, with the approval of the Minister, to make rules in the public interest. It states:

"The [PAB] may with the approval of the Minister, make rules in relation to the promotion by the [PAB], in the public interest, of acceptable standards of professional conduct among registered public accountants and (without prejudice to the generality of the foregoing) such rules may prescribe a code of professional conduct to be observed by all registered public accountants and may make provision with respect to any other matter or thing prescribed by the regulations for the purposes of this section."

[82] Section 29 stipulates the power of the Minister to make regulations. So far as relevant to this matter, it provides:

"The Minister may, after consulting with the [PAB], make regulations generally for giving effect to the purposes and provisions of this Act and in particular (but without prejudice to the generality of the foregoing) may make regulations in relation to all or any of the following matters—

(a) …;

(b) the making of complaints against registered public accountants
(c) the procedure to be followed in respect of disciplinary inquiries held by the [PAB]
(d) …"

[83] Regulation 15 outlines the initial procedure that the Registrar should follow where there is a written allegation of the commission by a registered public accountant of any act listed under section 13(1(c) of the PAA. It provides:

> "Where a complaint in writing, or information in writing, is received by the Registrar from any person or body who alleges that a registered public accountant has committed in the performance of his professional duties-
>
> (a) an act of professional misconduct, or of grave impropriety, or infamous conduct; or
> (b) an act of gross negligence or of gross incapacity; or
> (c) an act which constitutes conduct discreditable to the profession,
>
> the Registrar, after making such further enquiries relative thereto as he thinks necessary, shall report the matter to the [PAB]"

[84] Where charges have flowed from a complaint or information, and disciplinary proceedings pursued, regulation 32 outlines the powers of the PAB at the conclusion of those proceedings. As relevant to this matter, it states:

> "32.—(1) On the conclusion of the proceedings the [PAB] shall consider and determine as respects each charge which, if any, of the facts alleged in the charge have been proved to its satisfaction.
>
> (2) …
>
> (3) If the [PAB] determines in respect of any charge that the facts or some of the facts alleged in the charge have been proved to its satisfaction and that the facts so proved are sufficient to constitute professional misconduct, the [PAB] shall record a finding that the registered public accountant is guilty of professional misconduct."

[85] The Rules made by the PAB under section 28 of the PAA, referred to by the PAB in its ruling (dealing with integrity, professional behaviour, clients' monies and clients' accounts), are set out below:

> "110.1 The principle of integrity imposes an obligation on all Registrants to be straightforward and honest in all professional and business relationships. Integrity also implies fair dealing and truthfulness. Integrity requires a Registrant to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personally gain an advantage. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle.
>
> 110.2 Integrity is an element of character fundamental to professional recognition. It is the quality from which the public trust derives and the benchmark against which a registrant must ultimately test all decisions.
>
> 110.3 A Registrant shall not knowingly be associated with reports, returns, communications or other information where the Registrant believes that the information:
>
> (a) Contains a materially false or misleading statement;
> (b) Contains a statement or information furnished recklessly; or
> (c) Omits or obscures information required to be included where such omission or obscurity would be misleading."
>
> **"SECTION 150: PROFESSIONAL BEHAVIOUR**
>
> ***The Fundamental Principles of Professional Behaviour***
>
> ***Registrants must conduct themselves with courtesy and consideration towards all they come into contact with during their professional work, including clients, other Registrants, staff, third parties and the general public.***
>
> 150.1 The principle of professional behaviour imposes an obligation on all Registrants to comply with relevant laws

> and regulations and avoid any action or omission that the Registrant knows or should know may discredit the profession. This includes actions or omissions that a reasonable and informed third party, weighing all the specific facts and circumstances available to the Registrant at that time, would be likely to conclude adversely affects the good reputation of the profession."
>
> **"SECTION 270: CUSTODY OF CLIENT ASSETS"**
>
> "270.4 A Registrant is strictly accountable for all clients' monies that the Registrant receives."
>
> "270.8 Clients' monies shall be paid without delay into a bank account, separate from other accounts of the firm." (Bold type and caps as in original)

[86] The first thing to note is that it is section 13(1)(c)(iii) of the PAA that outlines the breaches for which a registered public accountant may be held liable. Regulation 15 outlines the procedure to be followed once there is a written allegation that such a breach has been committed. It must be emphasised that regulation 15 does not create the charges. It outlines the procedure when there is a written allegation that may warrant the pursuit of charges contained in section 13(1)(c) of the PAA. It is significant that while section 4(2)(d) of the PAA vests power in the PAB to take disciplinary action against registered public accountants for breaches against the PAA or the Regulations, on perusal of the Regulations, it does not appear to contain any provisions that establish charges. The Regulations, however, among other things, deal extensively with disciplinary matters (including the steps to be taken once a complaint in writing against a registered public accountant is filed) and proceedings at a disciplinary enquiry (including date fixing, service of notice of charges, representation of parties, documentation to be relied on at the hearing, adducing of evidence, addresses at the conclusion of evidence, notes of the proceedings, pronouncement of findings, notification of the registered public accountant of the decision of the PAB and the right to appeal against the findings of the PAB).

[87] While section 13(1)(c)(iii) of the PAA creates the charges, and the Regulations address the ensuing procedure once there is a filed written allegation that one or more of those charges may be engaged, the Rules fulfil a different role. They outline the standard of conduct expected of registered public accountants. They speak to particular principles that should define the character and guide, or be manifested in, the professional behaviour and conduct of a registered public accountant.

[88] In the decision handed down by the PAB, it observed that Mr Brown had, "failed to meet requirements stipulated" in rules 270, 270.4 and 270.8; "not conducted [him]self with courtesy and consideration" and in particular "had not upheld" rules 150 and 150.1; and "had not behaved with integrity as required" by rules 110.1, 110.2 and 110.3. In each case, the PAB gave the particulars of conduct which failed to meet the required standard. It then went on to actually find Mr Brown guilty of the charges outlined under section 13(1)(c)(iii) of the PAA. The complaint laid by Vistra expressly stated that it was being made "pursuant to section 13(1)(c)(iii) of the PAA and [sic] Rule 15 of the [Regulations]". It is in relation to that complaint that the PAB found that Mr Brown, in the performance of his professional duties, was guilty of "grave impropriety", "conduct discreditable to the profession", "infamous conduct" and "gross negligence". Mr Brown is, therefore, not correct that he was charged under the Rules. The rules referred to by the PAB facilitated the particularisation of the conduct complained of, but were not the source of the charges.

[89] It is against that background, I consider whether it was necessary for the Rules to have been gazetted, and if so, the effect of the failure to do so. Mr Wildman for Mr Brown relies on the fact that in the Interpretation Act "regulations" is defined to include "rules". Therefore, counsel reasoned, the Rules were caught by the requirement under section 31(1) of that Act to be gazetted to have legislative effect.

[90] It is noted that under section 29 of the PAA, the Minister may make regulations after consulting with the PAB and under section 28 of the PAA, the PAB may make rules with the approval of the Minister. Both, therefore, involve the Minister and the PAB though

the Regulations emanate from the Minster and the Rules (which where necessary to complement the Regulations) from the PAB. In the face of the broad definition of "regulations" in the Interpretation Act, it may be that the Rules are required by that Act to be gazetted to have legal effect. Assuming, without deciding that is the case, what is the effect of the non-gazetting of the Rules? Guided by **R v Soneji**, discussed in **Richard Joachim and Glenford Stewart v The Attorney General and Ephraim Georges**, can it be said that the clear intention of Parliament regarding the effect of non-compliance was that the "consequence of non-publication" was "total ineffectiveness"? Even if that were the case, and I am not saying that is so, how would that affect Mr Brown? Would the charges be null and void? Would he have been prejudiced in any way?

[91] I find that the answer to the latter two questions is no. The fact is, the charges were created under the PAA, and the procedure to be adopted to adjudicate on whether those charges were proven, is outlined under the Regulations. Even if the particular rules, which Mr Brown was found not to have observed did not have legal standing, the fact is Mr Brown was advised of the particular conduct, which ultimately satisfied the charges under the PAA and grounded his liability. That was conduct which had been disclosed in the complaint filed. Therefore, the charges and resultant disciplinary hearing conducted by the PAB do not fall outside the jurisdiction of the PAB and are not null and void as contended by Mr Brown. Accordingly, I find there is no basis to hold that the status of the Rules has any bearing on the validity of the decision arrived at by the PAB.

**Issue B: Was there a contractual relationship between Mr Brown and Vistra, the company that made the complaint against him?**

**(1) Was Vistra bound by the agreement which allegedly existed between Mr Brown (through his company Crowe) and Radius prior to Radius changing the company's name to Vistra or Radius' acquisition by Vistra; in light of the allegation that Mr Brown was merely a nominee director and shareholder of ANJL and he was to transfer ownership of ANJL to nominees of Vistra after incorporation (grounds a), to e), g), i) and p));**

**(2) Did the agreement and any debt arising from it affect any obligation of Mr Brown to file tax returns to TAJ on behalf of ANJL? (ground f));**

**(3) Did the non-disclosure clause in the LoE preclude the complaint being brought to the PAB? (grounds n) and o));**

Submissions

*Mr Wildman for Mr Brown*

[92] Mr Wildman submitted that, even if the PAB was properly constituted, it still did not have the jurisdiction to hear the complaint made by Vistra, as there was no privity of contract between Vistra and Mr Brown. This is because at all material times, the contract was between Mr Brown and Radius. Further, he complained that Mr Brown negotiated with Mr Olson but was never informed, prior to the hearing, that Mr Olson had died. He contended that Vistra acquired Radius through a buyout, and it was not merely a name change. Therefore, Vistra was a stranger to the contract and had no competence to assume the contract and bring a complaint under the PAA. He maintained that Mr Brown was ambushed at the hearing as he did not know the nature of the allegations and of the complainant who accused him of professional misconduct.

[93] Learned counsel advanced that Radius breached the contract and owed Mr Brown J$84,000,000.00. He argued the LoE stipulated that disputes were a matter for the courts (in accordance with the laws of England), precluded its disclosure to third parties, which included the PAB, and in any event, the PAB was not equipped to deal with a commercial dispute. Reliance was placed on the case of **Commissioner of the Independent Commission of Investigations v Police Federation and Others, Dave Lewin v Albert Diah** [2020] UKPC 11 to support the point that the non-disclosure clause in the LoE clearly meant the PAB was not to engage in any disciplinary matter as the LoE, being the subject of the complaint, amounted to a breach of the LoE. He further submitted that Vistra's pursuit of an unless order from the PAB to compel Mr Brown to turn over ANJL, failing which he would be visited with punitive sanctions, underscored the fact that the PAB was being improperly used instead of the appropriate forum of the courts. Mr

Wildman stridently contended that ANJL was Mr Brown's company and that, the LoE did not clearly outline that he should transfer it to anyone. He added that the transfer would require the payment of stamp duty and transfer tax and neither was done. Hence any purported transfer must be void. He relied on sections 36 and 37 of the Stamp Duty Act.

*Ms Hall for the PAB*

[94] Ms Hall submitted that the LoE was signed by Mr Brown on behalf of Crowe and Mr Olson on behalf of Radius. Appendix 1, she noted, clearly outlined the scope of services. She advanced that, as Radius changed its name to Vistra on 29 March 2019, evidenced by the certificate of change of name, the PAB was correct in its determination that Radius and Vistra are the same company. Thus, she argued, despite the name change, there was no change to the powers, rights and obligations of Radius under the LoE. Hence, the issue of privity of contract was moot since Radius and Vistra are the same. She relied on section 81 of the United Kingdom's Companies Act, 2006, while, noting that a similar provision is found in the Companies Act of Jamaica. Thus, Ms Hall submitted, as Vistra was not a stranger to the contract, the PAB was at liberty to consider the complaint. Further, counsel advanced that, in any event, the PAB is tasked with the duty of promoting proper standards of professional conduct among the nation's registered public accountants. That is why regulations 15 and 16 of the Regulations provide that where a complaint is made about the conduct of a registered public accountant, the Registrar must make further inquiries, then inform the PAB before a disciplinary hearing is held. She asserted that the procedure was followed in this case.

[95] Ms Hall also contended that Mr Brown did not provide any evidence supporting the existence of an oral agreement between ANJL and Vistra (which was denied by Vistra) or that Vistra owed the sum of J$80,000,000.00 pursuant to the LoE, which stated that it was the "entire agreement" between the parties. In contrast, she advanced that there was evidence showing that Radius made payments pursuant to the LoE, but Mr Brown failed to make the required payments to the TAJ. Ms Hall highlighted that Mr Brown, by

his own admission, filed false tax returns for 2018 and stated that his decision to do so was based on an alleged undocumented dispute he had with Vistra.

[96] Learned counsel asserted that based on the evidence, the PAB held the view that Mr Brown did not own ANJL, and at best, he only had a non-beneficial interest as nominee director and shareholder of ANUK.

[97] Ms Hall submitted that Mr Wildman's interpretation of the confidentiality clause of the LoE is misconceived. She asserted that the clause provided that if the parties received information under the agreement, they cannot disclose it. However, that did not mean a complaint could not be made to the PAB, if Mr Brown did not uphold the standards of professional conduct required of a professional accountant.

Discussion and analysis

*Sub-issue (1) Was Vistra bound by the agreement which allegedly existed between Mr Brown (through his company Crowe) and Radius prior to Radius changing the company's name to Vistra or Radius' acquisition by Vistra; in light of the allegation that Mr Brown was merely a nominee director and shareholder of ANJL and he was to transfer ownership of ANJL to nominees of Vistra after incorporation (see grounds a, to e, g, i and p);*

[98] At the hearing on 28 January 2020 (see page 161 of the record of appeal), the PAB rightly preliminarily found that any change of the company's name did not affect its composition; it remained the same company. The receipt into evidence of the certificate of change of name, which showed that on 29 March 2019, Radius changed its name to Vistra, supports the ultimate determination of the PAB that Vistra was the same legal entity with which Mr Brown had contracted. Hence there was no issue of there being an absence of privity of contract. Further, section 81(2) and (3) of The Companies Act, 2006 (UK), confirms that in such a situation, the change does not affect the legal rights and obligations of the entity. It states in part:

> "(2) The change does not affect any rights or obligations of the company or render defective any legal proceedings by or against it. (3) Any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

[99] In any event, even if there was a "buy out" and Radius' shares had been purchased by Vistra, then any obligation owed by or to Radius would be assumed by Vistra. Notably, Vistra has not sought to resile from any proven obligation which Radius was bound to or which was owed to it by virtue of any name change or acquisition.

[100] There was no dispute concerning the validity of the LoE signed by Mr Brown and the company, then named Radius. It outlined that "nominee director services" were included in the services Mr Brown contracted to provide through his company Crowe. The Appendix of the LoE indicated that ANJL was to be the company for which these nominee director services should be provided. It was also revealed in evidence that Mr Brown charged Vistra for nominee director services in an email in which he acknowledged that he was appointed as nominee director and would resign after ANJL was incorporated. Up to the time of the disciplinary proceedings, his resignation was outstanding (see pages 174, 178, 179 and 182 of the record of appeal). Mr Brown maintained that there was an oral agreement that supplemented the LoE. However, that was denied by Vistra and was not accepted by the PAB. This, in a context where the LoE specifically included a clause which states:

> "This LoE constitutes the entire agreement between the parties concerning its subject-matter and supercedes any previous accord, understanding or agreement, express or implied.
>
> This LoE shall not be amended, modified, varied or supplemented except in writing signed by an authorised representative of each of the parties."

[101] It is also critical to note that the pronouncements made by the PAB were in relation to Mr Brown's professional conduct, in his capacity as a registered public accountant, and it did not decide on any contractual or other dispute that may exist between Vistra and Mr Brown or any of his companies. The PAB made no unless order in its ruling.

[102] The complaint of Mr Brown in respect of the issues identified has no merit.

*Sub issue (2) Did the agreement and any debt arising from it affect any obligation of Mr Brown to file tax returns to TAJ on behalf of ANJL? (see ground f));*

[103] The LoE clearly required Mr Brown to file certain tax returns. Among the findings of the PAB was that Mr Brown failed in his capacity as managing partner to have Crowe account to Vistra for funds received to make tax payments due to TAJ from ANJL (see page 182 of the record of appeal). The PAB also found that Mr Brown failed to honour his promise to Vistra to make good ANJL's tax payments, inclusive of interest and penalties, incurred on account of Crowe's failure to make the necessary tax payments out of funds received from Vistra for that purpose. Having made those findings, the PAB did not make any determination concerning Mr Brown's contention that a debt was owed to him by Radius and that he applied funds received from Vistra to offset some of that debt. That is a matter for determination in separate civil court proceedings, if the parties so desire. However, the PAB's finding that he made a promise to make good outstanding tax payments necessarily means that he acknowledged his obligation to make those payments, which he failed to do, thus making him guilty of the charges indicated.

*Sub issue (3) Did the non-disclosure clause in the LoE preclude the complaint being brought to the PAB? (grounds n) and o));*

[104] The contention of Mr Wildman under these grounds is misconceived. The clause in question reads:

> "Neither party will disclose to any third party without prior written consent of the other party any proprietary or confidential information relating to this LOE [sic], the other party or RADIUS's customer. Both RADIUS and the Affiliate further agree that any confidential information received from the other party shall be used only for the purpose of providing or receiving the services outlined in the Appendices under this or any other LoE between the parties RADIUS and the Affiliate."

[105] This appears to be a fairly standard clause meant to protect proprietary or confidential information held between or obtained by parties under the LoE from unauthorised disclosure that could expose a party to commercial loss or other unwelcome

implications. Such a clause, however, cannot provide a safe harbour precluding complaints of professional misconduct. There is also no indication of any specific proprietary or confidential information that was improperly disclosed in the disciplinary process. The support by analogy for Mr Brown's position sought from the case of **Commissioner of the Independent Commission of Investigations v Police Federation and Others, Dave Lewin v Albert Diah** is not forthcoming. In that matter, the Judicial Committee of the Privy Council held that as the powers granted under the relevant act were investigative and not prosecutorial, and there was an express provision that prohibited the Commissioner and the Commissioner's staff from relying on material obtained in investigations, the Commission did not have the power to prosecute, except for private prosecutions for certain offences. This case does not assist, as in the instant matter, there is no statutory prohibition that precludes the use of the LoE in making a complaint to the PAB. Further, it would be absolutely remarkable if such a clause in a private agreement could prevent a public body, created by statute and mandated to maintain proper standards in the accounting profession, from carrying out disciplinary processes in pursuance of that mandate. This challenge fails.

**Issue C: Whether based on non-disclosure, there was a breach of Mr Brown's right to a fair hearing?**

Submissions

*Mr Wildman for Mr Brown*

[106] Mr Wildman submitted that, regulation 16 of the Regulations requires the PAB to ensure the disclosure of affidavits and other documents to subjects of complaints, so they can be aware of the case against them and be afforded a fair hearing. He contended that the PAB breached this statutory obligation, resulting in the hearing being an ambush, as Mr Brown was unable to prepare his defence. He argued that there were numerous instances of non-disclosure, two critical ones being the failure to communicate that Mr Olson, who was pivotal in the agreement between Mr Brown and Radius, had died, and that Vistra could file the complaint against Mr Brown because it had purchased Radius.

[107] This breach of Mr Brown's right to disclosure, Mr Wildman argued, was fatal. He relied on section 16(2) of the Constitution and the cases of **B Surinder Singh Kanda v Government of the Federation of Malaya** [1962] AC 322 and **Ridge v Baldwin** [1963] 2 All ER 66.

*Ms Hall for the PAB*

[108] Ms Hall submitted that there was full compliance with regulation 16 of the Regulations as all pertinent information regarding the complaint made under regulation 15 was provided to Mr Brown in the form of letters dated 5 September and 8 October 2019. They outlined, among other things, details of the complaints received against Mr Brown and the documents being relied on, except the certificate of change of name. Learned counsel also noted that Mr Brown availed himself of the opportunity to provide an explanation, which he did, in detail, by letter with several email attachments and an outline of his version of events, dated 20 September 2019. Ms Hall also pointed out that there was ongoing correspondence between the PAB and Mr Wildman for Mr Brown to organise a hearing date.

[109] Ms Hall argued that while it was true that Mr Brown only became aware of the death of Mr Olsen at the hearing, his death was not relevant information which needed to be disclosed, as the LoE was not with Mr Olsen directly but with Radius. Further, based on the emails that were disclosed, Mr Brown also engaged with Mr Nathan Jones and Ms Christie Brown from the company.

Discussion and analysis

[110] Section 16(2) of the Constitution guarantees a person the right to a fair hearing within a reasonable time by an independent and impartial court established by law, in legal proceedings which may result in a decision adverse to his interests.

[111] In the case of **B Surinder Singh Kanda v Government of the Federation of Malaya**, where Mr Kanda, an inspector of police challenged his dismissal, so far as relevant to the instant matter, it was held that the failure to supply Mr Kanda with a copy

of the report of the board of inquiry, which contained information highly prejudicial to him and which had been sent to and read by the adjudicating officer, before he sat to inquire into the charge, amounted to a failure to afford Mr Kanda "a reasonable opportunity of being heard in answer to the charge" within the meaning of article 135(2) of the Constitution of the Federation of Malaya and a denial of natural justice.

[112] The case of **Ridge v Baldwin** established the importance of the observance of the principles of natural justice in the conduct of proceedings which may result in a decision adverse to the interests of an individual. Those principles dictate that the individual in jeopardy should be informed of the grounds on which it was proposed to proceed against him and had to be given a proper opportunity to present his defence.

[113] The main complaint of Mr Brown under this issue is that affidavit evidence and statements were not prepared and shared with him prior to any witness being called, thus compromising his ability to prepare his defence. He was, he contended, ambushed.

[114] The Regulations go into detail outlining the procedure to be adopted once a complaint or information in writing, alleging improper professional conduct, in respect of a registered public accountant, is received by the Registrar. The procedure relevant to this case, prior to the start of any enquiry, in summary, is:

(1) The Registrar writes to the accountant:

i. notifying him of the complaint indicating the matters alleging professional misconduct;

ii. forwarding a copy of "any affidavit or other document" relating to the allegation;

iii. inviting the accountant to submit to the PAB any explanation;

iv. informing the accountant of the date the PAB will meet to consider his explanation, if any.

(2) The documents including any explanation are referred to the PAB at that meeting (for (1) and (2) see regulation 16).

(3) If the PAB, having met and considered the allegation and any explanation, thinks a *prima facie* case is evident, the PAB fixes a date to hold an enquiry (see regulation 18).

(4) When the PAB has fixed the date for the hearing, the Registrar shall forthwith serve a notice in writing on the accountant:

i. specifying the nature and particulars of any charge against him; and

ii. stating the date time and place the inquiry will be held (see regulation 20).

(5) Any party to the enquiry may be represented by counsel (see regulation 21).

(6) Not less than 14 days before the hearing, the parties to the hearing must share with the Registrar a list of all documents on which they propose to rely (see regulation 22).

[115] As submitted by Ms Hall for the PAB, it appears that regulation 16 was complied with as Mr Brown was supplied with the details of the complaint and supporting documentation in letters from the Registrar dated 5 September and 8 October 2019, excepting the certificate proving change of the company's name. While regulation 16 mentions "affidavit" it also speaks to "other document". Thus, the Regulations contemplate that allegations may be validly made without being couched in the form of an affidavit or even a formal witness statement. It is also true that Mr Brown responded to the allegations and provided documents in support of his account. Also, the PAB in discharging its responsibility to fix a date for the hearing (regulation 20), corresponded with Mr Wildman on behalf of Mr Brown.

[116] It is important to set out verbatim regulation 22. It states:

> "22. (1) The complainant and the registered public accountant shall furnish to the Registrar and to each other not less than fourteen days before the day of the **hearing a list of all documents on which they respectively propose to rely.**
>
> (2) Either **party may inspect the documents included in the list furnished by the other; and a copy of any document mentioned in the list of either party shall, on the application and at the expense of the party requiring it, be furnished to that party by the other** within three days after the receipt of the application." (Emphasis added)

[117] Regulation 22 makes it clear that each party should provide a list of the documents on which they intend to rely and that it is incumbent on the party wishing to inspect any document to take the initiative and make the necessary arrangements so to do. Mr Wildman admitted in the proceedings that he was provided with a list of the documents (see pages 186 and 195 of the record of appeal). He also did not demur when Mrs Sandra Minott-Phillips, King's Counsel for Vistra, stated that all documents to which she was referring were annexed to the complaint (see page 187 of the record of appeal). However, Mr Wildman's contention, reflected in his submission at the hearing, was that "…a letter of complaint and a letter in response would not suffice to satisfy the requirements of a fair hearing in proceedings like these" (see page 166 of the record of appeal). However, it is to be noted that in light of regulation 22, when recourse was sought to a document that had not been on the list disclosed to Mr Brown, the chairman of the PAB did not allow its admission into evidence (see page 215 of the record of appeal).

[118] The procedure at the hearing is governed by regulations 26 to 30 of the Regulations. They provide:

> "26. At the hearing, the complainant or his representative shall first state to the [PAB] the charge alleged against the registered public accountant and shall submit the evidence in support of the charge **and may call witnesses**; and **the registered public accountant or his representative**

**shall be entitled to cross-examine any witnesses appearing against him** on matters relevant to the charge.

27. When the statement of the charge and the evidence in support thereof are concluded, the registered public accountant or his representative **shall be invited by the President to adduce evidence in answer to the charge and to call witnesses**, and the complainant or his representative **shall be entitled to cross-examine any witnesses giving evidence for the registered public accountant** on matters relevant to the charge.

28. Whether the registered public accountant adduces evidence in answer to the charge or not, he or his representative may address the [PAB] and, where evidence is adduced, such address may be made either before or after such evidence.

29. At the close of the case for the registered public accountant the complainant or his representative may, with the leave of the [PAB], adduce evidence to rebut any evidence adduced by the registered public accountant; and, if he does so, the registered public accountant or his representative may again address the [PAB].

30. The complainant or his representative may reply upon the whole case:

(a) if oral evidence (not being evidence as to character) other than that of the registered public accountant himself has been given on such registered public accountant's behalf; or

(b) with the leave of the [PAB], where no such evidence has been given." (Emphasis added)

[119] These regulations provide an adequate opportunity for a registered public accountant charged to challenge the evidence called against him and to adduce his own evidence in rebuttal of that charge. Mr Brown, in this case, utilised those opportunities.

[120] The upshot is that Mr Brown was notified of the complaint and provided with documentary evidence in support. He responded, providing his own account and supporting documentation. Hearing dates to ventilate the complaint were set with some

consultation with his counsel, Mr Wildman. He was served with a list of documents on which the complainant intended to rely, documents which were annexed to the complaint with which he had already been served, and to which he had responded. He made no application to obtain a copy of the listed documents. At the hearing, the witnesses for the complainant were cross-examined by Mr Wildman. Mr Wildman assisted him to adduce his own evidence, and made a closing statement on his behalf.

[121] The two important pieces of information of which Mr Brown was unaware prior to the hearing, were the name change from Radius to Vistra and the death of Mr Olsen. From the details of the complaint and his response, it is clear Mr Brown must have realised that the complaint related to matters under the LoE his company had signed with Radius. Had Mr Brown been seriously prejudiced by the timing of the production of the certificate evidencing the change of name, or his notification that Mr Olsen had died, or even the full contents of the evidence of the witnesses, as he did not have the benefit of any affidavits or statements, he could have requested an adjournment to prepare for their cross-examination or to adduce his own witnesses. However, there is no indication from the record that such an application was ever made or refused. As noted in the case of **Debayo Ayodele Adedipe v Kemisha Gregory Ex parte General Legal Council** [2020] JMCA App 19, at para. [38]:

> "[I]t is clear that when assessing whether there has been a breach of the principles of natural justice, it is important to examine the nature of the case, the kind of inquiry, and the purpose of the rules under which the domestic tribunal is operating. Each case is different…the principles do not…have universal application."

[122] The purposes of the Regulations promulgated under section 29 of the PAA, include to guide the making of complaints against registered public accountants and the procedure to be followed in disciplinary inquiries held by the PAB. These Regulations were made in 1970. It may be that they could benefit from an update regarding more modern practices on disclosure, such as the formal serving of the proposed evidence as opposed to a list of documents to be relied on. However, from the review conducted, it is clear

that Mr Brown at the time of the hearing knew the nature of the complaint, and the charges, and the documents that would be relied on in support. In any event, it does not appear that the material he did not have before was material to the resolution of the charges against him, and no adjournment was sought to enable him to address or better address that information. Assisted by his counsel, he fully contested the case against him. Therefore, in all the circumstances, I am of the view that Mr Brown was not denied a fair hearing on the basis of non-disclosure. This challenge also fails.

**Issue D: Was the hearing conducted in breach of Mr Brown's constitutional right to a fair hearing in public?**

Submissions

*Mr Wildman for Mr Brown*

[123] Mr Wildman submitted that regulation 33(3) of the Regulations breached section 16(3) of the Constitution which requires proceedings to be held in public, unless there is a valid exception. He also contended that in breach of regulation 33(3), the PAB failed to announce its decision in public. Mr Wildman cited section 16(3) of the Constitution in support of the general public nature of civil hearings, including for announcement of the decisions arrived at. He contended that the presence of one member of the public at the time the decision was handed down did not amount to a public announcement. Further, Mr Wildman argued that pursuant to section 3 of the Interpretation Act, notice to the public required notice of the scheduled handing down of the decision to have been placed in the *Gazette*. The failure to give notice to the public in that manner, he contended, made the PAB's decision null, void and of no effect. The authority of **Musselwhite and Another v C H Musselwhite & Son Ltd and Other** [1960] M No 172 [1962] Ch 964 was referred to in support of counsel's argument that a failure to give notice to the public in the *Gazette*, similar to a failure to give notice of a meeting in breach of the Companies Act, renders the proceedings a nullity.

*Ms Hall for the PAB*

[124] In response, Ms Hall for the PAB submitted that inviting Mr Denzil Wilks to sit in on the delivery of the decision satisfied the requirements under regulation 33(3). She noted that the usual practice was to allow members of the public to be present for the decision, and, thereafter, the decision was published in the *Gazette*. In this case, the decision was published on 14 April 2020. She further relied on the case of **B v United Kingdom; P v United Kingdom** [2001] 2 FLR 261 in support of her argument that, in each case, the form of publicity given to a judgment must be assessed in light of the special features of the relevant proceedings, and the approach adopted in this case was in keeping with the object and purpose of the PAA.

[125] In the alternative, Ms Hall argued that in the event the court found that regulation 33(3) had not been fully complied with, that amounted to a mere irregularity, which did not render the entire proceedings a nullity. She relied on the case of **R v Soneji**, which indicates the intention of Parliament regarding the effect of any non-compliance had to be considered, especially as she contended that Mr Brown was not prejudiced and received a fair hearing, even if there had been a breach.

Discussion and analysis

[126] Regulation 33(3) of the Regulations provides: "[t]he [PAB] shall hold all disciplinary enquiries in private, but shall pronounce its findings and decisions in public".

[127] It is important to point out from the outset that on its face what regulation 33(3) requires is that the decision be pronounced in public. There is no obligation to give notice to the public that the decision is to be announced. Therefore, section 3 of the Interpretation Act under which a general notice is defined as one made by or with the authority of the Government in the *Gazette* and the case of **Musselwhite and Another v C H Musselwhite & Son Ltd and Other**, which deals with the consequences of the failure to give notice of an annual general meeting to shareholders, in breach of the Companies Act, are, with respect, not relevant.

[128] Section 16(3) of the Constitution states:

> "All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

[129] It is the case, as submitted by Mr Wildman, that generally proceedings to determine a person's civil rights or obligations are public in nature, including the announcement of the decisions arrived at. It is also noted that being disciplinary proceedings, they were by nature quasi-criminal. The general rule is, however, subject to exceptions. In fact, in section 16(4) of the Constitution, it is recognised that despite the general public nature of such proceedings, the public can be excluded in particular types of court matters and where the interests of justice or other public interest listed in that sub-section, including to protect the private lives of persons in the proceedings, apply. The nature of what is considered "public" may also vary depending on the type of matter and other relevant circumstances. Given the reputational damage to registered public accountants and disclosure of sensitive information that could occur if such proceedings were generally held in public, it appears to me regulation 33(3) is contemplated by section 16(4) of the Constitution.

[130] In the case of **B v United Kingdom; P v United Kingdom**, so far as relevant to the instant matter, the European Court of Human Rights was asked to pronounce on whether the English courts, refusing public hearing or public pronouncement of judgment in respect of residence applications by fathers, breached article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). Article 6(1) provides, so far as relevant, that:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial … where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the

> court in special circumstances where publicity would prejudice the interests of justice."

[131] The court held, by a majority of 5:2, that given the type of issues that had to be examined in cases concerning the residence of children, the domestic authorities were justified in conducting these proceedings in chambers in order to protect the privacy of the children and the parties and to avoid prejudicing the interests of justice. Further, to pronounce the judgment in public would, to a large extent, frustrate these aims. At para. [45] the court recalled its "long-standing case-law that the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Art 6(1)". It referred to some of the reasoning in the case of **Sutter v Switzerland** (1984) 6 EHRR 272, ECHR.

[132] In **Sutter v Switzerland**, the applicant complained that the Military Court of Cassation had dismissed his appeal without previously holding a public hearing and had not pronounced its judgment publicly. It had, however, been served on him in writing. The rationale for article 6 prescribing public proceedings was outlined. At para. 26, the court stated:

> "The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention…"

[133] The court also noted that although all member States of the Council of Europe accepted this principle of publicity, there was diversity in the scope and manner of its implementation, both in the holding of hearings and the "pronouncement" of judgments.

[134] Ultimately, the court decided that as anyone establishing an interest could access the full judgments of the Military Court of Cassation, and cases like that one would be subsequently published in an official collection, its jurisprudence was to a certain extent open to public scrutiny. The court, accordingly, found that the ECHR did not require the judgment delivered to be read out aloud at the final stage of the proceedings.

[135] Accepting the jurisprudence from the European Court of Human Rights as persuasive authority, the purpose for regulation 33(3) of the Regulations is to open the disciplinary process of the PAB to public scrutiny, which supports the aim of ensuring that persons subject to that process receive a fair trial.

[136] Regulation 33(3) does not state what the pronouncement by the PAB of its findings and decisions in public entails. It should also be noted that the provision does not stipulate "in a public place" but "in public." In the absence of clear specifications, it is for the PAB, in regulating its internal procedures, to determine an appropriate means. It chose to do so by having a member of the public present, who was not a part of the PAB or the proceedings and had no interest in the matter, when its findings and decision were handed down. In my view, that was a pronouncement in public. It achieved the purpose of opening the proceedings to public scrutiny. Significantly also, the opportunity for such scrutiny was supported by the subsequent publication of the decision in the *Gazette* on 14 April 2020 (as indicated in the jurisprudence from the European Court of Human Rights). There was, accordingly, no breach of regulation 33(3) that could vitiate the PAB's decision.

[137] In the event I am wrong in that analysis, I agree with the submission of Ms Hall for the PAB that in keeping with the reasoning in **R v Soneji**, if regulation 33(3) has not been fully complied with, "the court should not restrict itself to the use of rigid legal classifications of mandatory or directory requirements" in determining the effect of that breach. Rather, the consideration should be whether Parliament intended that its breach should invalidate the entire proceedings? Having regard to the purpose of the Regulations, in particular the provisions which guide the disciplinary process, the vital

question is ultimately, was Mr Brown afforded a fair trial despite the breach? Given that (i) Mr Brown has provided no evidence of prejudice occasioned by the arrangements made for the delivery of the decision, (ii) he was notified in writing of the PAB's decision along with his right to appeal, which he has exercised, and (iii) the decision was shortly thereafter published in the *Gazette* for all the public to access, I hold that if there was any defect in the process, it was a mere irregularity which did not affect Mr Brown's fair trial rights. Accordingly, Mr Brown's challenge in respect of this issue fails.

**Issue E: Was the decision of the PAB vitiated by bias of the chairman against Mr Brown?**

[138] In the light of this court's refusal of the application to adduce fresh evidence in support of this issue, there is no evidence in support of these grounds of appeal. In any event, as was noted, by his deliberate failure to raise the issue of bias and his submission to the jurisdiction of the PAB, Mr Brown waived his right to subsequently make this complaint. These grounds, therefore, fail.

**Conclusion**

[139] Mr Brown has failed in his challenges to the composition of the PAB, the authority under which the PAB proceeded, and the procedure adopted by the PAB before and during the hearing. I have found that the Minister's letters, section 35 of the Interpretation Act, para. 10(7) of the First Schedule of the PAA, together with the operation of the *de facto* officer doctrine, clothed the members of the PAB with validity, even though they were not formally reappointed with associated publication in the *Gazette.* I have also determined that there was no need for the Rules promulgated by the PAB to be gazetted to provide authority for the charges laid against Mr Brown, as those charges find their source in the PAA, while the procedure for their determination was guided by the Regulations, which was appropriately gazetted. Additionally, I concluded that the disclosure afforded Mr Brown was adequate in keeping with the Regulations and that the method of delivery of the findings and decision of the PAB amounted to a pronouncement in public as required by the Regulations. Finally, there is

no evidence before the court to substantiate the complaint that the chairman of the PAB was biased, and thus the decision of the PAB cannot be impugned on that basis.

[140] Before recommending the order that should be pronounced it remains for me to proffer my sincerest apologies to the parties for the significant delay in the delivery of this decision.

[141] I would dismiss the appeal and affirm the orders of the PAB.

[142] Concerning the issue of costs, the general rule is that costs follow the event. In this case, the PAB is the successful party. None of the exceptions for the court to disallow costs or a portion of the costs to the successful party arises. Therefore, I propose that costs of the appeal be awarded to the PAB to be agreed or taxed.

**MCDONALD-BISHOP JA**

**ORDER**

1. The appeal is dismissed.

2. The order of the Public Accountancy Board, made on 18 March 2020, is affirmed.

3. Costs of the appeal to the Public Accountancy Board to be agreed or taxed.

## Appendix 1

Grounds of Appeal

"a) That the [PAB] failed to appreciate that [Mr Brown] had no contractual relationship with the entity Vistra, the company that made the complaint against [Mr Brown].

It is submitted that this is a grave error of law as it forms the hub of the complaint against [Mr Brown].

b) The [PAB] failed to appreciate that in the absence of privity of contract between [Mr Brown] and the entity Vistra that made the complaint, the complaint in question is illegal, null and void and of no effect.

c) The [PAB] failed to appreciate that there was a fee dispute between [Mr Brown], [Mr Brown's] company, [ANJL] and Radius, the contracting party with whom [Mr Brown] and his companies had a contract with [sic] and Vistra failed to acknowledge the contract when it brought out the shares of Radius unknown to [Mr Brown].

d) The [PAB] failed to appreciate that the funds remitted to [Mr Brown] by Radius, represent part payment of sums due to [Mr Brown] by Radius for work done by [Mr Brown] and his company [ANJL].

e) The [PAB] failed to appreciate the evidence which disclosed that Radius was indebted to [Mr Brown] and his company [ANJL], in excess of J$80 Million dollars which Vistra tried to avoid when they bought out Radius, unknown to [Mr Brown].

f) The [PAB] failed to appreciate from the evidence that Radius being indebted to [Mr Brown] and his company [ANJL], in excess of J$80 Million dollars, nullifies all position [sic] in the form of workers assigned by [Mr Brown] to the project on behalf of Radius. Therefore, the filing to TAJ by [Mr Brown] of a nil return on behalf of [ANJL], was true and correct, and not false as asserted by the [PAB].

g) The [PAB] failed to appreciate from the evidence that the contract between [Mr Brown] and his company [ANJL] and Radius was entered into for [Mr Brown] and [ANJL] to provide services to Radius for the project in Jamaica, and the contract was negotiated on behalf of Radius by one Curt Olson, whose death was not disclosed to [Mr Brown] until [Mr Brown's] Attorney-at-Law cross examined and elicited that information, which further demonstrated that Vistra was unable to speak to the terms and conditions of the contract.

h) The [PAB] failed to carry out its statutory obligation by providing [Mr Brown] with Affidavit evidence substantiating the nature of the allegations against [Mr Brown] in order for [Mr Brown] to be afforded the opportunity to respond to the allegations.

i) The [PAB] failed to appreciate that Vistra bought out Rdius [sic] unknown to [Mr Brown] and that the assertion by the [PAB] that there was a mere change of name of Radius to Vistra, is not correct and also not supported by the evidence.

j) The failure of the [PAB] to comply with Regulation 16 of the Regulations renders the proceedings conducted against [Mr Brown] null and void and of no effect.

k) The [PAB] acted in breach of the statute when it allowed persons not recognized by the statute to sit on the Board and influence the outcome of the proceedings.

l) It is submitted that this was an egregious breach of the statute as nowhere in the statute does it provide for the [PAB] to engage a consultant or Attorney-at-Law to sit on the Board and influence the outcome of the proceedings.

m) It is submitted that the inclusion of the consultant and the Attorney-at-Law in the hearing against [Mr Brown], renders the proceedings null and void and of no effect.

n) The [PAB] failed to appreciate that the terms of the [LoE] between [Mr Brown] and Radius prevent the [LoE] from being disclosed to any third party, including the [PAB]. Therefore, the [PAB] could not rely on the [LoE] to embark on disciplinary proceedings against [Mr Brown].

o) The [PAB] failed to appreciate that the dispute was a purely commercial matter between the Applicant [sic] and the contracting firm, Radius and did not warrant that intervention of the [PAB] by way of disciplinary proceedings.

p) The [PAB] failed to appreciate that the terms of the [LoE] did not provide for [Mr Brown] to transfer his company, [ANJL] to anyone.

BIAS

A. The [PAB's] decision is vitiated by bias on the basis, that the Chairman of the [PAB], Mr. Linval Freeman, had a personal dispute with [Mr Brown], in which some 2 years ago, the Chairman accused [Mr Brown] of taking away on auditing and accounting contract with Pan Caribbean Sugar Company Limited, that he Linval Freeman and his firm Ernst & Young, previously had with Pan Caribbean Sugar Company Limited.

B. Further, in 2006, [Mr Brown] and the said Chairman of the [PAB] Mr. Linval Freeman, had a personal dispute surrounding the acquisition of several communication Cable companies by Columbus Communications, of which Mr. Freeman was the advisory partner to the seller.

MEMBERS OF THE [PAB] MUST BE GAZETTED

a) There was no [PAB] in place when the proceedings that were convened on January 28, January 30 and February 18, 2020 to hear the complaint laid by Vistra against [Mr Brown].

b) There was no [PAB] in place when the [PAB] herein convened on March 18, 2020 to deliver its decision that [Mr Brown] be removed from the Register of Public Accountants.

c) Paragraph 8 of the First Schedule of the **Public Accountancy Act** states that the names of all members of the [PAB] as first constituted and every change in the membership thereof shall be published in the Gazette.

d) The tenure of the [PAB] herein expired May 2019.

e) The Minister empowered to act under the Act has not appointed a new [PAB] and/or caused any change in the membership of the [PAB] to be gazetted since the last appointment to the [PAB] in 2016.

f) Section 31 of the **Interpretation Act** makes it clear that their appointment as members of the [PAB] takes effect from the moment it is published in the Jamaica Gazette.

g) At the time the decision was taken to convene disciplinary proceedings to hear the complaint laid by Vistra against [Mr Brown], there was no [PAB] in place.

h) Further, at the time the decision was taken to remove [Mr Brown] from the Register of Public Accountants, there was not [sic] [PAB] in place.

BREACH OF CONSTITUTIONAL RIGHT

a) The hearing that was convened by the [PAB] on January 28, January 30 and February 18, 2020 to hear the complaint laid by Vistra against [Mr Brown] breached [Mr Brown's] constitution [sic] right to [sic] fair hearing in public.

b) Pursuant to section 16(3) of the Charter of Fundamental Rights and Freedoms of the Jamaica [sic] Constitution, all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, shall be held in public." (Bold font in original)