

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA  
THE HON MR JUSTICE D FRASER JA  
THE HON MRS JUSTICE G FRASER JA (AG)**

**SUPREME COURT CIVIL APPEAL NO COA2021CV00040**

**MOTION NO COA2024MT00001**

**BETWEEN CENITECH ENGINEERING SOLUTIONS LTD APPLICANT**

**AND PUBLIC PROCUREMENT COMMISSION RESPONDENT  
(formerly National Contracts Commission)**

**Ransford Braham KC and Neco Pagan instructed by Dabdoub, Dabdoub & Co  
for the applicant**

**Ms Annaliesa Lindsay and Josemar Belnavis instructed by Lindsay Law  
Chambers for the respondent**

**29, 31 July and 4 October 2024**

**Motion for leave to appeal to His Majesty in Council - Conditional leave -  
Whether the proposed appeal is as of right - Whether the proposed appeal  
involves a question of interpretation of the Constitution -Whether the  
proposed appeal involves a question of great general or public importance or  
otherwise - Constitution of Jamaica, sections 110(1)(a) and (c) and section  
(110(2)(a))**

**P WILLIAMS JA**

[1] This is a notice of motion for conditional leave to appeal to His Majesty in Council pursuant to section 110 of the Constitution of Jamaica ('the Constitution') against the decision and orders of this Court in a written judgment cited as **The Attorney-General v Cenitech Engineering Solutions Limited et al consolidated with National Contracts Commission v Cenitech Engineering Solutions Limited et al** [2023]

JMCA Civ 52 ('the judgment'). In the judgment, this court allowed the appeal against the order made by the Full Court against the Public Procurement Commission (then known as the National Contracts Commission ('the NCC')) ('the respondent') that damages were to be assessed in favour of Cenitech ('the applicant') and other consequential orders.

[2] After hearing and considering the helpful submissions from Mr Ransford Braham KC on behalf of the applicant and Ms Annaliesa Lindsay on behalf of the respondent, on 31 July 2024 we refused the applicant's amended notice of motion seeking conditional leave to appeal. In doing so, we made the following orders:

- "(1) The notice of motion for conditional leave to appeal to His Majesty in Council from the decision of this court delivered on 20 December 2023, is refused.
- (2) Costs to the respondent to be taxed if not agreed."

We promised then that brief written reasons for our decision would follow. This judgment is a fulfilment of that promise.

## **Background**

[3] A synopsis of the relevant facts sufficient for a background to this matter, gleaned from the judgment, is that over the course of 2012 and 2013, the applicant applied for and obtained a certificate of registration from the respondent as a government contractor. In September 2013, the Ministry of Agriculture and Fisheries ('the Ministry') invited tenders from registered government contractors for a project that involved the construction of houses in the parishes of Clarendon and Saint Thomas. The applicant was one of the successful bidders for the project. On 2 December 2013, the Cabinet approved the recommendation of the Ministry for the relevant contracts to be awarded to the applicant. Following this approval, on 3 December 2013, the Contractor-General wrote to the respondent, raising concerns about the applicant's registration with the respondent. Acting on the concerns raised, the respondent wrote to the applicant by letter dated 12 December 2013, revoking its registration with immediate effect. This decision to revoke the registration was made without advising the applicant of the alleged

misrepresentations that had formed the basis for the revocation. The applicant was also not afforded an opportunity to make representations in response to the allegations before the revocation. The Cabinet subsequently revoked its approval of awarding the contracts to the applicant and the contracts were awarded to other bidders.

[4] The applicant applied for and was granted leave to apply for judicial review of (i) the revocation of its registration, (ii) Cabinet's subsequent decision to revoke the award of the contracts, (iii) the award of the said contracts to other contractors, and (iv) the hearing that had been conducted by the Contractor-General after its registration was revoked. The application for judicial review was filed by fixed date claim form on 12 February 2014, with the respondent, the Contractor-General, the Minister of Agriculture and Fisheries ('the Minister'), and the Attorney General of Jamaica ('the AG') all named as respondents. The applicant claimed damages, compensation, declarations, and administrative orders of certiorari, prohibition, and mandamus. The damages sought were in the sum of \$350,517,209.63 for loss of profit and/or any sum determined by the court to be due as a direct result of the respondent's decision to revoke its registration acting on the decision of the Contractor-General that misrepresentations had been uncovered on its application during an investigation. The applicant asserted that as a result of this revocation of the registration, the Minister refused, failed or neglected to execute contracts with the applicant who was the successful bidder and who was ready, willing, and able to perform.

[5] At the commencement of the hearing, the Full Court (Batts, Stamp, and Palmer Hamilton JJ) granted an application for the name of the Contractor-General to be changed to the Integrity Commission, reflecting "a change in the name of the institution brought about by the passage of the Integrity [Commission] Act".

[6] The Full Court heard the application on divers days between June 2019 and November 2020, and on 26 March 2021 gave its decision in a written judgment with neutral citation [2021] JMSC Full 2. The Full Court issued a declaration that the respondent had acted in breach of the principles of natural justice when it revoked and/or

cancelled the applicant's registration and issued an order of certiorari to quash the decision to revoke the applicant's registration. The Full Court, having found the applicant liable, stated that the AG would "be liable vicariously for the acts and/or omissions of the respondent, or as the Crown's representative". The Full Court ordered that damages be assessed in favour of the applicant against the respondent and the AG. It also ordered that a case management conference be listed by the Registrar of the Supreme Court at which directions with regard to the assessment of damages were to be given. The Full Court found that the Contractor-General could not be faulted for the failures of the applicant and was, therefore, not liable for breach of any duty owed to the applicant. Similarly, the Full Court found that the Minister could not be faulted for not awarding the contract to the applicant after the respondent revoked the applicant's registration. It was also determined that since no contract had been signed between the Government and the applicant, there was no viable cause of action for breach of contract against the Minister. Finally, regarding costs, the Full Court found that the respondent and the Minister were liable to pay the applicant's costs. Further, it was ordered that the respondent and the AG pay the costs of the Minister and the Integrity Commission.

[7] The AG and the respondent filed separate appeals against the Full Court's orders. This court identified four broad issues for determination, which were as follows, in so far as is immediately relevant:

- "(1) Whether the Full Court erred in ordering that damages be assessed against the Attorney-General on the basis that he was vicariously liable, or liable as the Crown's representative, for the acts and omissions of the NCC...
- (2) Whether the Full Court erred in ordering damages to be assessed against the NCC and the Attorney General in the absence of a claim for breach of the Constitution and a cause of action in private law...
- (3) Whether the Full Court erred in ordering damages to be assessed in the absence of findings and a decision as to the cause of action for which liability arises and the basis on which damages are to be assessed...

- (4) Whether the Full Court erred in ordering the Attorney General to pay the costs of the Integrity Commission (formerly the Contractor-General) and the Minister...”

[8] After considering the submissions and conducting an analysis and a discussion based on the relevant law and the evidence adduced before the Full Court, this court concluded that the Full Court erred in law in making an order that damages be assessed against the AG and the respondent since there was no legal basis on which the order could have been made in judicial proceedings, in the absence of a pleaded and proven cause of action in private law; or liability under the Constitution, and in the absence of a judgment or order establishing such liability and corresponding relief. On the respondent’s appeal, this court allowed the appeal and set aside the orders that had been made by the Full Court. The AG’s appeal was also allowed and the orders made against it were set aside. Further, it was found that the claim ought to have been dismissed against the AG and the Integrity Commission.

[9] It must be noted that this court acknowledged that over the course of 2018 and 2019, the Integrity Commission Act, the National Contracts Commission (Validity and Indemnity) Act, and the Public Procurement Act replaced the NCC with the Public Procurement Commission. However, it was not deemed necessary to substitute the NCC as a party to the appeal, given the extended validation in the relevant legislation. However, the applicant’s notice of application for conditional leave to appeal to His Majesty in Council, filed on 8 January 2024, referenced the change. Also to be noted is that the AG was named as 2<sup>nd</sup> respondent in this notice of motion, and was accordingly advised by the registry of this court of the date of hearing to which a representative attended. However, at the commencement of the hearing, Mr Braham indicated that there was no intention for the AG to be a party to this motion. Accordingly, the AG was removed as 2<sup>nd</sup> respondent.

[10] In this notice of motion, the applicant contended that it has an appeal as of right pursuant to section 110(1) of the Constitution as the matter in dispute on the appeal to His Majesty in Council is of a value of \$1,000.00 or upwards and is a final decision on

liability in civil proceedings; and involves questions as to the interpretation of the Constitution and is a final decision on liability in civil proceedings. Alternatively, it is contended that this court ought to grant leave to appeal to His Majesty in Council pursuant to section 110(2) of the Constitution as the proposed appeal involves a decision of this court where the questions involved are ones that by reason of their great general or public importance or otherwise ought to be submitted to His Majesty in Council. The questions identified are:

“i. Whether the law in the United Kingdom pursuant to their Supreme Court Act 1981 which places a restriction on the availability of damages in judicial review proceedings to the effect that damages may be awarded by the court hearing administrative law proceedings only where there is a pleaded and proven recognised private law cause of action, can be translated to our jurisdiction in light of the fact that: -

- a. Jamaica has a written Constitution,
- b. the expansive wording of Part 56 of our Civil Procedure Rules (CPR),
- c. the difference between the UK CPR and Part 56 of our CPR, and
- d. the absence of similar legislation in our jurisdiction to that of the Supreme Court Act 1981 on which the restriction of damages in administrative law proceedings is premised?

ii. Whether on a proper interpretation of CPR rule 56.10, the Full Court can award damages to a claimant on a claim for judicial review where,

- a. the facts set out in the claimant’s affidavit or statement of case justify the granting of such remedy, and
- b. the court is satisfied that, at the time when the application was made the claimant **could have issued a claim** for such remedy,

without the need to expressly plead and prove a private law cause of action?

iii. Is a court in judicial review proceedings pursuant to Part 56 of the CPR prevented from making a finding that there exists a real prospect of a claim for cause of action which give [sic] rise to damages as arising from the public authority's own admission in its statement of case and evidence in defence consistent with its duty of candour, although such cause of action was not expressly pleaded by the claimant.

iv. Is it a prerequisite [sic] to the award of damages in judicial review proceedings pursuant to Part 56 of the CPR that the court must grant judgment either for breach of the Constitution or private law cause of action (such as negligence) to which the award of damages could relate?

v. The Full Court having directed that damages ought to be assessed for breach of the Constitution by reason of the breach of the claimant's right to a fair hearing and natural justice as set out in its written reasons, whether in those circumstances the Court of Appeal could properly find that the Full Court did not make a decision that there is a breach of the Constitution?

vi. Whether [the] court has the power to grant 'such other relief' (including a breach of the Constitution), in the absence of an express claim for such relief, having regard to sections 28 and 48(g) of the Judicature (Supreme Court) Act, section 4(2)(a) of the Judicature (Rules of Court) Act, CPR Part 56, and Judicature (Constitutional Redress) Rules, 2000 rule 3(2) and having regard to the parties' statements of case, the evidence before the court and a finding of the court that the remedy of certiorari will not be meaningless where damages are available."(Emphasis as in the original)

[11] To my mind, three issues arise on the motion, namely:

1. Does the applicant have an appeal as of right to His Majesty in Council pursuant to section 110(1)(a) of the Constitution as a final decision of the court involving a matter in dispute which is of the value of \$1,000.00 or upwards; or the appeal

involves directly or indirectly a claim or question respecting or a right of the value of \$1,000.00 or upwards?

2. Whether the final decision of the court involves a question as to the interpretation of the Constitution so that an appeal lies to His Majesty in Council as of right.
3. Whether the questions identified by the applicant as arising from the judgment have satisfied the criterion of being “of great general or public importance or otherwise” for conditional leave to be granted for an appeal to be made to His Majesty in Council.

### **Issue 1**

[12] In relation to the issue of whether this was an appeal as of right pursuant to section 110(1)(a) of the Constitution, it was submitted that the threshold value was met given the fact that the applicant had pleaded and sought money from the outset. King’s Counsel Mr Braham submitted that the value of a right to a licence had been denied making the value of the “licence lost” the measure of the value of the right to a fair hearing. It was noted that the value lost amounted to \$350,517,209.63 which was the amount of damages claimed. Further, it was submitted that in any event, since damages were to be assessed, the matter in dispute on the appeal ought to be viewed as being above the threshold value. Mr Braham contended that although, in the judgment, this court was not satisfied that the basis for such an assessment was properly before the court, this did not disentitle the applicant to the award and did not change the fact that the issue or matter dealt with a claim of the value of \$1,000.00 or upwards.

[13] In response, Ms Lindsay submitted that for the consideration of whether the application fell within the scope of section (110)(a) of the Constitution, there ought to be an examination of the questions or issues that were before this court in the appeal. She relied on **Michael Levy v The Attorney General of Jamaica and The Jamaican**



**Redevelopment Foundation Inc ('Michael Levy')** [2013] JMCA App 11 in support of this submission.

[14] Ms Lindsay contended that the registration of the applicant by the respondent was necessary to allow the applicant to participate in the tender process or to participate in public procurement. The registration, while permitting the applicant to participate in the process, was no guarantee of any contract being awarded to it. This registration was valid for one year, thus she pointed out, at the time of the proceedings before the Full Court the registration had expired. She submitted that, in the circumstances, the applicant was understandably successful in obtaining the order of certiorari quashing the decision to cancel or revoke the registration but this did not entitle it to any damages. Counsel contended that on appeal, the question for this court was whether Part 56 of the Civil Procedure Rules ('the CPR'), was capable of supporting an award for damages in circumstances where they did not flow from the prerogative remedies sought. She submitted that at its highest the registration of the applicant without more cannot be said to be property or a right which is of a value of more than \$1,000.00.

[15] Ms Lindsay considered the possibility of the applicant seeking to rely on the quantum of damages to which it believed it may be entitled. She noted that the Full Court made no finding on the basis on which an assessment of damages was to proceed, and that fact was recognised by this court in the judgment. Further, this court was emphatic in finding that there was no cause of action claimed in support of the order for assessment of damages. She submitted that the order for assessment, without more, and particularly without an indication of the basis for such an assessment, falls short of the constitutional requirements for the applicant to establish that it was entitled to appeal to His Majesty in Council as of right.

#### Analysis and disposal

[16] The relevant provision of the Constitution, section 110(1)(a), provides:

“110. – (1) An appeal shall lie from decisions of the Court of Appeal to His Majesty in Council as of right in the following cases –

- (a) where the matter in dispute on the appeal to His Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;...”

[17] It is accepted that this proposed appeal is from a final decision in civil proceedings. It is settled that this court retains limited but significant jurisdiction to determine whether to grant leave to appeal to His Majesty in Council in circumstances where it is claimed to be as of right. In **Alleynes-Forte (Learie) v The Attorney General of Trinidad and Tobago and Another** [1997] UKPC 49, their Lordships stated:

“An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case...”

[18] In **Meyer v Baynes** [2019] UKPC 3, the Board of the Privy Council was invited to address the question of whether the Court of Appeal of Antigua and Barbuda retained any control over a further appeal in circumstances where the Constitution of that country provides that an appeal shall lie to the Judicial Committee of the Privy Council as of right against final decisions in cases concerning a claim which has a value in excess of a prescribed threshold. Lord Kitchin, writing on behalf of the Board, referred to the decision of **A v R (Guernsey)** [2018] UKPC 4 where Lord Hodge, on behalf of the Board, explained that an “appellant’s appeal as of right does not mean that the Court of Appeal has no control over the appeal”, but the court has the power to ensure that “there is a genuinely disputable issue within the category of cases which are given leave to appeal as of right”. Lord Kitchin in **Meyer v Baynes** concluded that “the Court of Appeal has a right to police applications of this kind and to consider whether any proposed appeal raises a genuinely disputable issue”. The reasoning and dictum in **A v R (Guernsey)**

have been held to apply to appeals to the Privy Council from Jamaica (see **Patrick Allen v Theresa Allen** [2019] JMCA App 5).

[19] The primary issue between the applicant and the respondent was the correctness and the manner of the revocation of the registration. The applicant, in its fixed date claim, detailed the claim and relief sought against the respondent: for declarations relative to how the registration was revoked; orders of certiorari quashing the decision to revoke as well as the letter informing the applicant of the decision; an order for reinstatement of the registration; and damages. The amount claimed as damages was the same against all the parties named as respondents and was on the same basis (as set out in para. [4] above).

[20] Importantly, the revocation of the registration meant that the applicant was unable to participate in the public procurement process. The remedy for the finding that the applicant had been denied a fair hearing, in accordance with the principles of natural justice before the revocation of the registration, was properly the declaration that the respondent had acted in breach of those principles and the order of certiorari quashing the revocation. The judgment confirmed that the Full Court was correct in making such a declaration. The matter in dispute before this court was the correctness of the Full Court's decision in making an award of damages against the respondent in the manner it did. This was a matter that could not properly be said to have been of any monetary value.

[21] Mr Braham pointed out that this appeal was from a claim for a specific sum or for damages to be assessed. I am of the view that the Full Court, in ordering damages to be assessed, rejected the appropriateness of the specific sum being awarded to the applicant. Equally indisputable is that the Full Court failed in its order to state the basis for such an assessment. The underlying question for this court was whether such an award ought to have been made. This meant that the appeal was not concerned with quantum, that is what sum was or could have been claimed as damages. Thus, although the appeal arose from a claim in which there was a specified sum being sought, the

appeal itself was not concerned with any property or right that was of any monetary value. Ultimately, the appeal did not involve directly or indirectly a claim to or question respecting property or a right of the value of \$1,000.00 or otherwise.

[22] In these circumstances, the applicant failed to satisfy the requirements under to section 110(1)(a) of the Constitution. Accordingly, I was satisfied that there was no appeal as of right from the decision of this court to His Majesty in Council pursuant to that section.

## **Issue 2**

[23] Regarding the question of whether the appeal involves the question of the interpretation of the Constitution thus entitling the applicant to an appeal as of right pursuant to section 110(1)(c) of the Constitution, Mr Braham commenced his submissions by directing the court to sections in the judgment where this court highlighted the submissions that the applicant made in the appeal. It was acknowledged that the applicant had argued that one of the provisions that enabled the Full Court to award damages to the applicant was section 19 of the Constitution. Several paragraphs of the judgment were identified as demonstrative of this court's analysis of the applicant's submission that there should be an award of damages for the breach of the right to a fair hearing or purely administrative wrongs, in the absence of some other cause of action.

[24] It was contended that this court utilised rule 56.9 of the CPR and section 48(g) of the Judicature (Supreme Court) Act ('the Act') to place a restrictive approach on the interpretation of section 19 of the Constitution to require that there be an express pleading of a constitutional breach of a charter right to enable the court to grant constitutional relief. It was submitted that the questions of interpretation of the Constitution, which arose for discussion, were, firstly, whether section 48(g) of the Act and rule 56.9 of the CPR should have been applied to limit the exercise of the court's jurisdiction under section 19 of the Charter? That is, in the absence of a claim "properly brought forward", is the court precluded from applying section 19(3) of the Charter, which allows the court to make orders, issue such writs and give directions as it may consider

appropriate for the purpose of enforcing or securing the enforcement of, any of the provisions of this Charter? Another question that counsel argued arose was whether this approach to the interpretation of section 19 of the Charter conflicts with the line of authorities calling for a generous and purposive interpretation to give effect to constitutional rights? It was further argued that there were questions as to whether this approach conflicts with section 2 of the Constitution, the supremacy clause, and what is the implication of section 19(6) of the Constitution in respect of the court granting relief under section 19 of the Constitution?

### Analysis and disposal

[25] The relevant provision of the Constitution, section 110(1)(c), provides:

“110. –(1) An appeal shall lie from decisions of the Court of Appeal to His Majesty in Council as of right in the following cases–

...

(c) final decisions in any civil, criminal, or other proceedings as to the interpretation of this Constitution; ...”

[26] In **Eric Frater v The Queen** [1981] UKPC 35, the Board urged that appellate courts be vigilant in protecting the process of appeals to it from being debased by frivolous applications by ensuring that “claims made by the appellants to be entitled to an appeal as of right under section 110(1)(c) are not granted unless they do involve a genuinely disputable question of interpretation of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to [His] Majesty in Council...”.

[27] In exercising that vigilance in this matter, it is useful to first note that this court referenced section 19 of the Constitution when discussing the issue of whether the Full Court erred in ordering that damages be assessed against the respondent and the AG in the absence of a claim for breach of the Constitution (paras. 84 -103). Before so doing

McDonald-Bishop JA (as she then was), writing on behalf of the court, recognised that rules 56.1 and 56.2 of the CPR establish the types of applications that fall within Part 56, which are labelled “application for an administrative order”. She also recognised that constitutional relief is not a form of “other relief” that the court may consider or grant within the ambit of rule 56.10, which applies to such a joinder, if not expressly claimed.

[28] In referencing section 19 of the Constitution, McDonald-Bishop JA stated the following at para. [86]:

“Section 19 of the Constitution enables a person who alleges that any of his fundamental rights and freedoms has been, is being, or is likely to be contravened, in relation to him, to apply to the Supreme Court for redress. The Supreme Court is empowered by the same section to give such directions and make such orders as it may consider appropriate for the enforcement of the right to which the person is entitled. The section does not provide the procedure for the making of such applications.”

The only suggestion of any interpretation of the section was in the statement that the section does not provide for the making of such applications. It was, therefore, noted that it is in Part 56 of the CPR that the procedure for the making of such applications is found.

[29] This court considered and highlighted the applicability of Part 56 of the CPR to the making of an application for relief under the Constitution. It was noted that the applicant’s fixed date claim failed to comply with the procedural requirements set out in rules 56.9(1)(b) and 56.9(3)(c) of the CPR. Further, it was noted that nothing in the fixed date claim form or the affidavits in support disclosed that the applicant’s claim was alleging or establishing a breach of any provision of the Constitution and it sought no relief for any such breach, be it in the form of damages or otherwise.

[30] The question this court went on to consider was whether the Full Court could have granted a remedy of its own motion in the absence of such a claim for redress. It was against that backdrop that this court considered the statute from which the Supreme

Court derives its jurisdiction, namely the Act. In particular, section 48(g) of the Act provides:

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

[31] McDonald-Bishop JA explained that this section meant that for the court to grant relief not expressly sought, the claim must be properly brought forward by the relevant party to whom the relief is being given in that cause or matter. If the section is not satisfied the CPR cannot assist since it only makes provision for how the court’s jurisdiction should be exercised. Thus McDonald-Bishop JA concluded:

“...it is quite obvious that [the applicant] did not bring itself within section 48(g) of the Judicature (Supreme Court) Act for constitutional relief to be granted, especially in the form of damages because it failed to comply with the procedural requirements prescribed by the CPR for the bringing of such a claim.”

[32] Notably, McDonald-Bishop JA went on to recognise that rule 56.10(1) expressly states that an applicant may include, in an application for an administrative order, a claim for any other relief or remedy that arises out of or is related or connected to the subject matter of an application for an administrative order. She noted that the applicant did not include in its fixed date claim form or supporting evidence any claim for relief or remedy under the Constitution, even if that could have been classified as “other relief”.

[33] Ultimately, this court found that having regard to section 19 of the Constitution, section 48(g) of the Act, Part 56 of the CPR, and relevant case law, there was no basis in law for the Full Court to grant any relief under the Constitution. This court’s reference to and consideration of section 19 of the Constitution, in the circumstances, did not

demonstrably involve a genuinely disputable question of interpretation of any provision of the Constitution which entitled the applicant to the right to appeal to His Majesty in Council.

### **Issue 3**

[34] In relation to the alternative contention that this court should exercise its power to grant conditional leave under section 110(2), the principles as distilled by this court in **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causewell** [2017] JMCA App 16 were relied on.

[35] The primary thrust of the submissions from Mr Braham was that the Full Court was correct in finding that the applicant had presented enough facts to justify the relief they had not expressly sought but could have. There were, in his estimation, sufficient facts on its claim and on the evidence to establish a breach of the applicant's constitutional rights and negligence for an award of damages although neither had formed a basis of the applicant's claim. King's Counsel urged that, in any event, the issue of awarding damages for administrative wrongs is one that needed to be revisited and reviewed. He complained that this court applied English authorities to our position in accepting as a general rule that there is no right to an award of damages in judicial review proceedings. Thus, all the questions proposed by the applicant were premised on the issues of whether there needs to be a pleaded and proven claim for a breach of a constitutional right, a cause of action in private law, or a finding and a decision as to the cause of action for which liability arises, before an award of damages on those bases can be made.

[36] In response, Ms Lindsay submitted, firstly, that the proposed questions (i), (iii), (iv) (v), and (vi) did not satisfy the requirement that they would be determinative of the appeal or be raised in the appeal. The remaining question, she contended, was a matter of settled law and did not raise a question of any great general or public importance or otherwise that necessitated debate before His Majesty in Council. She submitted that pursuant to section 48(g) of the Act, it was trite law that for a court to grant relief not



expressly sought, the claim must be properly brought forward by the party who is seeking relief in that cause or matter. The provisions of the CPR are incapable of changing, amending, or expanding this criterion without legislation to that effect. Further for private law relief to be granted, the cause or matter must be properly brought forward as well. Thus, Ms Lindsay submitted that the extensive treatment of the issues by this court, which are supported by prior decisions of the court and emphatic pronouncements of the limited scope within which the CPR operates, made by our courts, including the Privy Council, confirmed that the proposed questions are matters of settled law.

[37] Further, it was contended by Ms Lindsay that it was the substantive and settled principle of law that a claimant must not only plead and prove his case but that the case must be set out in its pleadings. She submitted that it necessarily followed that a party that failed to plead its case cannot thereafter seek or be granted an award or remedy when the other party had not been given sufficient notice of his claim, as should be indicated in the pleadings. Reliance was placed on **Barclays Bank Plc v Boulter and another** [1999] 1 WLR 1919.

#### Discussion and analysis

[38] Section 110(2)(a) of the Constitution provides:

“(2) An appeal shall lie from decisions of the Court of Appeal to His Majesty in Council with the leave of the Court of Appeal in the following cases –

- (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; ....”

[39] The requirements that must be satisfied for leave to appeal to His Majesty in Council, pursuant to section 110(2)(a), have been considered and set out in several decisions from this court. The questions identified for consideration must arise from the decision of this court and the answers to the questions must be determinative of the

appeal. It is for the applicant to persuade the court that the questions are of great general or public importance or otherwise. The questions must raise an issue that requires serious debate before His Majesty in Council. It is not enough for the questions to give rise to a difficult question of law; it must be an important question or involve a serious issue of law. The questions must go beyond the rights of the particular litigants and would be apt to guide and bind others in their commercial, domestic, and other relations. The questions should be of general importance to some aspect of the practice, procedure, or administration of the law and the public interest. Leave ought not to be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with this court. Neither should a case be referred if the Board has previously given its opinion on that question (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009, **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, **Michael Levy and The General Legal Council v Michael Lorne** [2022] JMCA App 12).

[40] It is well settled that the addition of the phrase 'or otherwise' serves to enlarge the discretion of this court to refer matters that are not necessarily of great general or public importance, but which in the opinion of the court might require some guidance or definitive statement of the law from the apex court of the land (see **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470 and **Paul Chen-Young and Others v Eagle Commercial Bank Limited and another** [2018] JMCA App 31).

[41] In my view, it was first necessary to note the significance of the indisputable fact that the Full Court's order was simply that damages were to be assessed in favour of the applicant. It was in its reasoning that the Full Court identified the possible basis on which the award was made. Batts J, writing on behalf of the Full Court, stated that the applicant had a remedy at law for breach of its constitutional right to a fair hearing and that it was

the respondent's own "implicit admission of an administrative failure" that gave "rise to the real prospect of a claim in negligence".

[42] As was already noted, the applicant had not set out any claim for or alleged any breach of a constitutional right. Although, the Full Court found that there was a breach of natural justice, which contributed to the revocation of the registration, using relevant authorities from the Privy Council, McDonald-Bishop JA demonstrated that it is not in all cases that a breach of natural justice will automatically give rise to a claim or the grant of relief under the Constitution. The Full Court's indication that it was on the respondent's case that the real prospect of a claim in negligence arose, tacitly recognised that the applicant had nothing in its case establishing a cause of action in negligence. So, it was on the respondent's own case that the Full Court opined that liability could be established on the respondent such that an award of damages was considered appropriate against it.

[43] In effect, the judgment of the Full Court awarded damages to the applicant despite the applicant not having specifically claimed, pleaded, or proven the causes of action the Full Court said it could have. The respondent did not get an opportunity to respond to or challenge liability, before being ordered to pay damages and without the court explicitly stating what causes of action the award was related to. Clearly, this would result in a significant departure from established law and rules of practice and procedure. In my view, questions (ii), (iii), (iv), (v), and (vi) which, in effect, are seeking to query whether this manner of awarding damages to a litigant was proper and just, can hardly be considered worthy of serious debate.

[44] The proposed question (i) is premised on the assertion that the law in the United Kingdom pursuant to their Supreme Court Act "to the effect that damages may be awarded by the court hearing administrative law proceedings only where there is a pleaded and proven recognised private law cause of action...was translated to our jurisdiction". Whilst this court acknowledged the position as well as the law as it exists in the United Kingdom, it was on the consideration of rule 56.10 of the CPR that it came to

the conclusion it did. Further, it was decisions from this court that were relied on for the consideration of the meaning and effect of the rule, namely, **Michael Levy** and **The Attorney General of Jamaica and The Commissioner of Police v Machel Smith** [2020] JMCA Civ 67. Thus, to my mind, this proposed question does not properly arise from the decision of this court.

### **Conclusion**

[45] It was for these reasons that I concurred in the decision of the court that the motion for conditional leave to appeal to His Majesty in Council should be refused, as detailed at para.[2] above. I found that the applicant had failed to make out its case for an appeal to His Majesty in Council, as of right, pursuant to either section 110(1)(a) or 110(1)(c) of the Constitution and has also failed to satisfy the court that the proposed questions are of, great general or public importance or otherwise, to be submitted to His Majesty in Council for consideration pursuant to section 110(2) of the Constitution.

### **D FRASER JA**

[46] I have read in draft the reasons for judgment of my sister, P Williams JA. I agree with her reasoning and conclusion, and I have nothing useful to add.

### **G FRASER JA (AG)**

[47] I, too, have read in draft the reasons for judgment of my sister, P Williams JA. I agree with her reasoning and conclusion, and I have nothing to add.