[2025] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00011

BETWEEN	**LYNDEN SIMPSON**	**1ST APPELLANT**
AND	**JAMAICA CIVIL SERVICE ASSOCIATION**	**2ND APPELLANT**
AND	**PERMANENT SECRETARY MINISTRY OF TRANSPORT & MINING**	**1ST RESPONDENT**
AND	**HUGH M SALMON**	**2ND RESPONDENT**
AND	**MARY CRESSER**	**3RD RESPONDENT**
AND	**LORAINE ROBINSON (ALL MEMBERS OF THE COMMITTEE OF ENQUIRY)**	**4TH RESPONDENT**

Mrs Sashawah D Newby for the appellants

Ms Faith Hall instructed by the Director of State Proceedings for the respondents

1, 2, 3 May 2023 and 20 June 2025

Civil practice and procedure – Judicial review – Application for extension of time to apply for judicial review – Factors to consider – Rule 56.6 of the Civil Procedure Rules, 2002

Civil law – Judicial review – Application for permission to apply for judicial review – Whether there is an arguable ground with a realistic prospect of success – Whether there is a discretionary bar of delay or an alternative remedy – Acquittal of criminal charges – Disciplinary charges – Whether the disciplinary charges are substantially the same as the criminal charges – The doctrine of autrefois acquit – Regulation 34 of the Public Service

Regulations – Sections 14(1)(a) and (3) of the Corruption Prevention Act – Order 4.2.9(i)(d) of the Staff Orders for the Public Service

F WILLIAMS JA

[1] I have read, in draft, the judgment of V Harris JA. I agree with her reasoning and conclusion and have nothing further to add.

V HARRIS JA

[2] The 1st appellant, Mr Lynden Simpson, was a senior motor vehicle inspector employed by the Ministry of Transport, Works and Housing (which was subsequently renamed the Ministry of Transport and Mining and is now the Ministry of Science, Energy, Telecommunications and Transport) ('the Ministry'). The 2nd appellant, the Jamaica Civil Service Association ('JCSA'), represents the collective rights of civil servants in the public sector. The 1st respondent is the Permanent Secretary of the Ministry ('the Permanent Secretary'), and the 2nd, 3rd and 4th respondents are the panellists of the Ministry's Committee of Enquiry ('the Committee').

[3] Further to the appellants' application for leave to apply for judicial review and for an extension of time within which to file that application, on 17 January 2019, Palmer-Hamilton J ('the learned judge') refused both applications. This is an appeal from that decision.

Background

[4] On 18 October 2012, following an operation conducted by the Anti-Corruption Branch of the Jamaica Constabulary Force at the Morant Bay Motor Vehicle Examination Depot in the parish of Saint Thomas, Mr Simpson was arrested and charged with breaching the Corruption (Prevention) Act, 2000 ('CPA'). By way of two informations, Mr Simpson's charges were particularised as follows ('the criminal charges'):

> "You being a public servant to wit, a member of the Island Traffic Authority on the 18th day of October 2012 did corruptly accept the sum of three thousand dollars ($3,000.00) for his [sic] personal gain

> by omitting [to] do an act in the performance of your public function. Contrary to Section 14(1)(a) of the Corruption Prevention Act 2000."
>
> "Conspired and committed an act to corruptly solicit and accept four thousand dollars ($4,000.00) for your personal benefit. Contrary to Section 14(3) of the Corruption Prevention Act of 2000."

[5] It was alleged that he accepted money to facilitate the issuing of a certificate of fitness without examining the motor vehicle in accordance with his duties. As a result, he was notified, by letter dated 23 October 2012, that the Permanent Secretary had approved, in accordance with the powers delegated to her by the Governor-General, for him to be placed on interdiction from duty on a quarter of his salary effective 18 October 2012 (in keeping with regulation 32 of the Public Service Regulations, 1961 ('PSR')), pending the outcome of the criminal proceedings.

[6] On 2 July 2015, Her Honour Miss Calys Wiltshire (as she then was) ('the learned judge of the Parish Court'), sitting in the Saint Thomas Resident Magistrate's Court (now Parish Court), held at Morant Bay, dismissed the criminal proceedings for want of prosecution. A certificate of dismissal was issued to Mr Simpson, certifying that the charges against him for breaching the CPA were dismissed. Mr Simpson submitted the certificate of dismissal to the Ministry. He was subsequently advised, by letter dated 7 September 2015, that disciplinary proceedings would be instituted against him with a view to dismissal under regulation 37 of the PSR and in accordance with the powers delegated by the Governor General to the Permanent Secretary. This position was supported by a subsequent letter from the Office of the Services Commissions dated 28 October 2015.

[7] On 9 December 2015, Mr Simpson received another letter from the Permanent Secretary informing him that approval had been given for two charges to be preferred against him with a view to his dismissal pursuant to regulation 43 of the PSR (which sets out the procedure for dismissal proceedings). The charges were for misconduct contrary to section 14(1)(a) of the CPA and misconduct contrary to Staff Order 4.2.9(i)(d) of the Staff Orders for the Public Service, 2004 ('the staff orders').

[8] Those charges were subsequently amended and, by letter dated 19 January 2016 (which was said to supersede the letter of 9 December 2015), the Ministry advised Mr Simpson of the amended charges and the next steps. The amended disciplinary charges ('the disciplinary charges') read:

> " **CHARGE 1**
>
> Misconduct contrary to Staff Order 4.2.9(i)(d) of the Staff Orders for the Public Service 2004 'Lynden Simpson, on or around the October 18, 2012 in the parish of Saint Thomas, being a public servant, engaged in a conflict of interest by directly or indirectly accepting the payment of money, to wit, $3,000.00 relating to the performance of an official duty, to wit, issuing Certificate of Fitness number 6456501 dated 18th October 2012 for 1992 Toyota Corolla Sedan licenced 5662FN contrary to Staff Order 4.2.9(i)(d) of the Staff Orders For the Public Service, 2004;'
>
> **CHARGE 2**
>
> Misconduct contrary to Staff Order 4.2.9(i)(d) of the Staff Orders for the Public Service 2004 'Lynden Simpson, on dates between January 1, 2012 and October 18, 2012 in the parish of Saint Thomas, being a public servant, engaged in conflict of interest by directly or indirectly accepting the payment of money and/or any other consideration relating to the performance of his official duties, to wit, issuing Certificates of Fitness for motor vehicles contrary to Staff Order 4.2.9(i)(d) of the Staff Orders For the Public Service, 2004.' "
> (Underlining as in the original)

[9] Mr Simpson made a personal objection, and the JCSA, the Public Defender, and Mr Simpson's former attorneys-at-law also registered several objections to this course of action on his behalf.

[10] On 7 September 2016, Mr Simpson returned to the Parish Court at Morant Bay for the trial of the criminal charges. At the trial, the prosecution offered no evidence on both charges, and the learned judge of the Parish Court entered verdicts of not guilty and issued a certificate of acquittal. The certificate of acquittal, dated 16 September 2016, certified that Mr Simpson, who was charged with two counts of breaching the CPA, received a verdict of not guilty after the prosecution offered no evidence on both counts.

[11] The respondents commenced a disciplinary hearing into the allegations against Mr Simpson on 30 November 2016. Mr Simpson presented the Committee with the certificate of acquittal, and his attorneys-at-law (at that time) made a preliminary objection. It was submitted that the Committee had "… no jurisdiction to embark on a trial of the charges preferred on the basis that the disciplinary hearing convened contravened Regulation 34 of the Public Service Regulations … as the charges preffered [sic] against [Mr Simpson] were substantially the same as the charges for which [he] had been acquitted".

[12] Notwithstanding the preliminary objection, on 19 April 2017, the Committee ruled that the charges were not substantially the same and, as such, the disciplinary hearing should proceed.

The proceedings in the court below

[13] On 18 October 2017, the appellants filed an application for leave to apply for judicial review of the Committee's decision as well as for an extension of time for the filing of that application ('the application'). The application was supported by two affidavits filed on the same day, one deponed by Mr Simpson and the other by Mrs Tifonie Powell-Williams, the general secretary of the JCSA. They sought to challenge the decision of the Committee and/or the Permanent Secretary to proceed with the disciplinary proceedings. The application outlined 14 grounds in support of the numerous orders being sought by the appellants. Mindful of the nexus between the application and this appeal, I will set out the orders sought and grounds relied on in full for a better appreciation of the submissions and the issues before us:

> "[The appellants sought the following orders:]
>
> 1. That the time for filing an Application for Leave to Apply for Judicial Review be extended to the 18th day of October, 2017 and that the instant Application for Leave to Apply for Judicial Review filed herein stand as filed in good stead;
>
> 2. That the Applicants be granted leave to apply for Judicial Review for an order of prohibition preventing the continuation of the hearing into the disciplinary charges preferred against [Mr Simpson];

3. Further that the Applicants be granted leave to apply for Judicial Review for an order of certiorari to quash the decision of the Committee of Enquiry to continue with the disciplinary hearing into the charges preferred against [Mr Simpson];

4. Further that the Applicants be granted leave to apply for Judicial Review for an order of mandamus to compel the Respondents to reinstate [Mr Simpson] into his substantive post in the Public Service;

5. Further or alternatively, a Declaration that the decision of the 1st Respondent not to reinstate [Mr Simpson] is *ultra vires* and has thereby been rendered null and void;

6. Further or alternatively, a Declaration that the charges preferred against [Mr Simpson] in letter dated the 19th day of January, 2015 are the same, or alternatively are substantially the same as the charges in respect of which [Mr Simpson] has been acquitted;

7. Further or alternatively, a Declaration that the mandatory procedural requirements of the Public Services Regulations, 1961 were not followed and that consequently the Committee of Enquiry appointed were not properly constituted and/or duly appointed and had no jurisdiction to enquire into disciplinary charges against [Mr Simpson];

8. Further or alternatively, a Declaration that the decision of the Committee of Enquiry to continue with the disciplinary hearing into the charges preferred against [Mr Simpson] by the 1st Respondent is in breach of Regulation 34 of the Public Service Regulations, 1961, is unlawful and an error of law;

9. Further or alternatively, a Declaration that the decision of the Committee of Enquiry to continue with the disciplinary hearing into the charges preferred against [Mr Simpson] by the 1st Respondent is a breach of the principles of natural justice;

10. Further or alternatively, a Declaration that the decision of the Committee of Enquiry to continue with the disciplinary hearing into the charges preferred against [Mr Simpson] is unreasonable, irrational and an abuse of power;

11. Further or alternatively, a Declaration that the decision of the Committee of Enquiry to continue with the disciplinary hearing into the charges preferred against [Mr Simpson] is an abuse of power and a breach of the legitimate expectations of [Mr Simpson].

12. That there be a stay of the disciplinary proceedings pending the hearing and determination of the instant Application for Leave to Apply for Judicial Review;

13. That the grant of leave shall operate as a stay of the proceedings of the Committee of Enquiry until the Application for Judicial Review is heard and determined;

14. That such consequential directions may be given as may be deemed appropriate on the grant of Leave to apply for Judicial Review.

15. Costs;

16. That there be liberty to apply, and

17. That there be such further or other relief as this Honorable [sic] Court deems just."

The grounds on which the Applicant sought the orders are as follows:-

1. That pursuant to the inherent jurisdiction of the court and to Part 56 of the Civil Procedure Rules, 2002 as amended ('CPR') the court may grant orders for judicial review;

2. Pursuant to Rule 56.2(2) (a) of the CPR, [Mr Simpson] is a person adversely affected by the decision of the Committee of Enquiry appointed to enquire into the disciplinary charges preferred by the Permanent Secretary of the Ministry of Transport and Works (now Transport & Mining) and as such has sufficient interest in the subject matter of the application for judicial review;

3. Pursuant to Rule 56.2(2) (b) and (c) of the CPR, the 2nd Applicant is a body or group acting at the request of [Mr Simpson] who is entitled to apply for the orders herein and/or, is also a body or group that that [sic] represents the views of its member who may have been adversely affected by the decision which is the subject of the application;

4. The decision to proceed with the disciplinary hearing on the basis of charges which are the same, or alternatively, substantially the same as the charges in respect of which [Mr Simpson] has been acquitted is in breach of Regulation 34 of the Public Service Regulations, 1961, unlawful and an error of law.

5. Further, the decision to proceed with the disciplinary hearing on the basis of charges which are the same, or alternatively, substantially the same as the charges in respect of which [Mr Simpson] has been acquitted is in the circumstances unreasonable, irrational and an abuse of power;

6. Further, in coming to its decision to proceed with the disciplinary hearing on the basis of the charges which are the same, or alternatively, substantially the same as the charges in respect of which [Mr Simpson] has been acquitted the Committee of Enquiry took into account irrelevant considerations and/or alternatively failed to take into account relevant and material considerations in making its decision.

7. The decision to proceed with the disciplinary hearing on the basis of charges which are the same, or alternatively, substantially the same as the charges in respect of which [Mr Simpson] has been acquitted is an abuse of power, a breach of natural justice and a breach of the legitimate expectations of [Mr Simpson].

8. There are no alternative remedies available, alternatively, all alternative remedies have been exhausted by [Mr Simpson];

9. [Mr Simpson] by way of preliminary objection submitted to the Committee of Enquiry *inter alia*, that it had no jurisdiction to embark on a trial of the charges preferred on the basis that the disciplinary hearing convened contravened Regulation 34 of the Public Service Regulations and the Committee of Enquiry in Decision dated the 19th day of April, 2017 improperly rejected [Mr Simpson's] preliminary objection;

10. The time-limit for making an application for leave to apply for judicial review has been exceeded as, among other things, [Mr Simpson] is impecunious and was not able to obtain financial assistance within the three month [sic] period prescribed by the CPR;

11. There are good reasons for extending the time for the Applicants to apply for leave to apply for judicial review.

12. That granting an extension of time would not cause substantial hardship or be substantially prejudicial to the rights of any person or to good administration.

13. That it is in the interest of justice and furtherance of the overriding objective for the Court to grant the said Order, and

14. That unless the relief claimed is granted the Applicants will suffer undue prejudice and tremendous hardship."

[14] On 17 January 2019, following the hearing of the matter in the court below, the learned judge refused the application and ordered as follows:

"1. The Application for the extension of time for filing an Application for Leave to Apply for Judicial Review is refused.

2. The Application for Leave to Apply for Judicial Review is refused.

3. No Order as to costs of this Application.

4. Permission for leave to appeal granted."

The appeal

[15] Dissatisfied with the learned judge's adjudication of the matter, the appellants filed their notice and grounds of appeal on 31 January 2019. On 2 April 2019, a single judge of this court granted a stay of the disciplinary proceedings convened against Mr Simpson pending the hearing and determination of this appeal.

[16] The grounds of appeal relied on are:

"(a) The learned judge erred in law and exercised her discretion improperly when she refused to grant the Appellants'/Applicants' Application for an Extension of Time to File an Application for Judicial Review and for Leave to Apply for Judicial Review;

(b) The learned judge erred in law when she concluded at paragraph 51 of Judgment delivered on 17 January 2019 that the disciplinary charges proffered against [Mr Simpson] are not substantially the same as the corruption charges for which he was acquitted in the Saint Thomas Parish Court;

(c) The learned judge did not consider sufficiently, or at all or have sufficient regard for the principles outlined in *DeWayne Williams v R* [2011] JMCA Crim 17 as a result of which she misinterpreted section 14(1)(a) of the Corruption (Prevention) Act;

(d) The learned judge failed to appreciate that as a result of the fact that [Mr Simpson] was acquitted of corruption charges in the St. Thomas Parish Court, the attempts by the 1st Respondent to bring

fresh charges by way of disciplinary proceedings arising out of the same or substantially the same set of allegations amount to an abuse of process and provides a legitimate basis for the Supreme Court to grant leave for judicial review in its supervisory jurisdiction to prevent such an abuse;

(e) The learned judge failed to appreciate and/or to give sufficient weight to the principle of abuse of process as encapsulated at common law and in Regulation 34 of the Public Service Regulations which protects public officers against oppressive prosecution;

(f) The learned judge failed to apply the applicable test for leave to apply for judicial review;

(g) The learned judge was plainly wrong when at the leave stage she drew conclusions and made findings of fact and/or law instead of determining whether there was evidence or material on which a tribunal could find that the criminal and disciplinary charges were arguably substantially the same;

(h) The learned judge was plainly wrong when she substituted her view and interpretation of the application of Regulation 34 of the Public Service Regulations as if she was the tribunal conducting the judicial review hearing instead of examining the material before her to assess the decision-making process undertaken by the Permanent Secretary and/or the Disciplinary Tribunal to determine whether there were arguable grounds for judicial review with realistic prospects of success;

(i) The learned judge erred when she concluded that [Mr Simpson] had an alternative means of redress in relation to his preliminary objection against the continuation of the disciplinary hearing in Section 125 of the Constitution of Jamaica.

(j) The learned judge misunderstood the law and was plainly wrong when she found that both charges were different and distinct.

(k) The learned judge was plainly wrong when she found at the leave stage that the submission that the Respondent acted in breach of [Mr Simpson's] legitimate expectation is not proven.

(l) The learned judge was plainly wrong when she found at the leave stage that the allegation that the Respondents acted *ultra vires* and breached natural justice is unsupported by the evidence."

[17] If successful, the appellants have sought orders for, among other things, the learned judge's order dated 17 January 2019 to be set aside, the time for filing the application to be extended, the application to stand as being properly filed, and the application to be granted.

Issues

[18] At this juncture, I wish to thank counsel for the parties for their helpful submissions in this matter and their meticulous attention to the relevant authorities. Also, I wish to indicate that the delay in delivering this judgment is regretted.

[19] Having considered the grounds and submissions before us, I am of the view that the overlapping issues raised by the grounds of appeal can appropriately be condensed into three questions:

> 1. Did the learned judge err in her approach to the application at the leave stage? (Grounds f, g, h, k, and l)
>
> 2. Did the learned judge err in her determination that there was no arguable ground with a realistic prospect of success? (Grounds b, c, d, e, and j)
>
> 3. Did the learned judge err in her findings concerning the discretionary bars of delay and alternative remedy? (Grounds a and i)

Discussion

<u>1. Did the learned judge err in her approach to the application at the leave stage? (Grounds f, g, h, k, and l)</u>

[20] In challenging the learned judge's decision to refuse the application, the appellants sought to undermine her treatment of the application at the leave stage. In her judgment, the learned judge agreed that the Committee was entitled to explore whether Mr Simpson's behaviour justified disciplinary proceedings with a view to dismissal. Having found that his conduct ran contrary to the staff orders, she found that the respondents exercised their administrative functions (pursuant to regulation 37 of the PSR and in

accordance with the powers delegated by the Governor-General) by carrying out disciplinary proceedings against him. Additionally, she was of the view that the respondents acted in accordance with regulation 43 of the PSR, which provides the mechanism for dismissal proceedings against a public officer.

[21] The learned judge held that the allegation that the respondents acted *ultra vires* and breached the principles of natural justice was unsupported by the evidence. She also found that the appellants failed to prove their argument that Mr Simpson was being treated differently and unfairly and that the decision to continue with the disciplinary hearing breached his legitimate expectation of being reinstated. She further noted that there was no evidence before the court regarding the reasons for the alleged reinstatements of other officers. The learned judge applied the test in **Sharma v Browne Antoine and others** [2006] UKPC 57 ('**Sharma v Browne Antoine**') and ultimately held that the appellants did not have an arguable case with a realistic prospect of success, and so it was not an appropriate case to proceed to a full hearing.

[22] Despite finding that the appellants had not satisfied the test for leave to apply for judicial review, the learned judge also considered the procedural bars of delay and alternative remedy. In relation to delay, she considered rule 56.6(1) and (5) of the Civil Procedure Rules, 2002 ('the CPR'). Concerning the availability of an alternative remedy, the learned judge referred to section 125(3) of the Jamaica (Constitution) Order in Council, 1962 ('the Constitution'). She concluded that section 125(3) of the Constitution provided Mr Simpson with an alternative remedy to judicial review, which he failed to engage before making the application.

The appellants' submissions

[23] Counsel Mrs Sashawah Newby, on behalf of the appellants, submitted that the learned judge misinterpreted the quote she cited from Lord Hailsham of St Marylebone LC in the case of **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141 when she stated that "…the purpose of judicial review is to safeguard against unmeritorious attacks upon the validity of decisions made by public authorities" (para.

[58] of her judgment). Counsel argued instead that Lord Hailsham explained that the purpose of judicial review is to ensure fair treatment, not to ensure that the decision-making authority arrives at a conclusion that is correct in the eyes of the court.

[24] The learned judge also failed to apply or properly apply the applicable test for leave to apply for judicial review as set out in **Sharma v Brown Antoine**, counsel contended. She was not tasked with resolving disputes of fact or law but to assess the grounds advanced by the appellants regarding the Committee's decision-making process to determine whether they satisfied the test, that is, whether they were frivolous or fanciful.

[25] Judicial review, counsel argued, is not an appeal from the decision but rather a review of the manner in which the decision was made. Therefore, the court is not called upon to substitute its own view for that of the decision-maker or consider whether the decision was right or wrong. The issue is whether the decision-making process was lawful and fair. Reliance was placed on **Chief Constable of the North Wales Police v Evans** for this proposition. In settling that issue, the court must consider whether the decision-maker exceeded or abused its powers, committed an error of law, breached the rules of natural justice, or was irrational (**Council of Civil Service Unions v Minister for the Civil Service** [1985] 1 AC 374 was cited as the relevant authority). Counsel submitted that the question the learned judge should have answered at this stage was "whether there is material that could lead a tribunal to find an arguable ground with a realistic prospect of success". Instead, she embarked on an independent assessment to arrive at her own conclusion.

[26] At the leave stage, counsel further argued, the court's role is to act as a filter to sift out claims that have no arguable grounds which demonstrate a realistic prospect of success, which is quite different from when the substantive application (at which time all the evidence is before the court) for judicial review is heard. The cases of **Hon Shirley Tyndall OJ et al v Hon Justice Boyd Carey (ret'd) et al** (unreported), Supreme Court, Jamaica, Claim No HCV 474 of 2010, judgment delivered 12 February 2010, and

Padfield and others v Minister of Agriculture, Fisheries and Food and others [1968] AC 997 ('**Padfield v Minister of Agriculture**') were the cited authorities to support this argument.

[27] Mrs Newby contended further that the learned judge failed to consider several of the appellants' complaints regarding the Committee's decision-making process. Had she done so, she argued, it would have been revealed that the Committee incorrectly interpreted and applied the law regarding, among other things, regulation 34 and the principles in **Connelly v Director of Public Prosecutions** [1964] AC 1254 ('**Connelly v DPP**'), **DeWayne Williams v R** [2011] JMCA Crim 17 and **Norbert Fred Schlenker and others v Christine Torgrimson and George Ehring** [2013] BCCA 9 ('**Schlenker v Torgrimson**'). The Committee, she contended, also took into account irrelevant considerations, such as the principle of *autrefois acquit*, as well as the penalties, standard and burden of proof in civil and criminal matters, but failed to take into account relevant considerations, including the substance of the charges. Instead, the Committee erroneously limited its analysis to the names and types of the charges and the associated penalties.

[28] Additionally, Mrs Newby posited that the learned judge did not assess the Committee's decision, which set out reasons for concluding that the criminal and disciplinary charges were not substantially the same. She argued that the respondents were entitled to consider whether Mr Simpson behaved in a way that warranted discipline and dismissal, but were prohibited from charging him with an offence that was the same or substantially the same as the criminal charges for which he had been acquitted. By doing so, the Committee abused its power by failing to exercise its authority to further the statutory purpose for which its powers were conferred (**Padfield v Minister of Agriculture** was cited for this point).

[29] It was the appellants' overarching contention that while the learned judge acknowledged the test, as well as the fact that her discretion at the leave stage was not the same as at the hearing stage, she failed to apply that awareness. If she had done so,

then she would not have concluded, as she did, that the grounds relied on by the appellants were fanciful or frivolous. By omitting to consider all the grounds, the learned judge's conclusion that the appellants did not have an arguable case with a realistic prospect of success was rendered "patently wrong". Her approach was also fundamentally flawed since instead of assessing the Committee's decision-making process, the learned judge substituted her own view of the interpretation of regulation 34, and that error further undermined her decision.

The respondents' submissions

[30] Counsel for the respondents, Ms Faith Hall, submitted that at the leave stage, the judge is concerned with whether the application and evidence before her disclose an arguable ground for judicial review having a realistic prospect of success and whether there is any discretionary bar such as delay or an alternative remedy (**Sharma v Browne Antoine**). It was clear, counsel contended, that the learned judge considered and appreciated the applicable test and the court's role at the leave stage. Leave will only be granted if there is material available to support a finding that the case is fit for further investigation at a full hearing of the substantive claim for judicial review, that is, whether there is an arguable case for granting the relief sought.

[31] The learned judge was not tasked with comparing the criminal and disciplinary charges to see if they were the same or substantially the same since judicial review is concerned with the manner in which the decisions of the public authority are made. The court, counsel argued, will look at the decision-making process to determine "whether the authority exceeded its powers, committed an error of law, breached the principles of natural justice and/or reached a decision irrationally or unreasonably". The judge's role is to determine whether the Committee acted illegally, irrationally, or with procedural impropriety in the conduct of the disciplinary proceedings. Contrary to the appellants' submissions, the learned judge considered the material before her and did not substitute her interpretation of the application of regulation 34 or make any findings of fact. She considered whether the grounds and evidence exhibited a realistic prospect of success

without delving into great depth in examining the evidence before her. Furthermore, she considered the transcript from the Committee's hearing, so it could not be said that she did not assess the decision or the decision-making process.

[32] Accordingly, the appellants failed to prove that the learned judge did anything demonstrably wrong in law or fact aside from arriving at a conclusion that differs from their own.

Analysis

[33] Four critical underlying principles will be referenced to commence the discussion. Firstly, it is widely accepted that the Privy Council decision of **Sharma v Browne Antoine** sets out the threshold an applicant should meet to be granted leave to apply for judicial review (at page 7), which is:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R(N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:
>
> > '… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

> It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733."

[34] Further, concerning the test to be applied in granting leave, both at first instance and on appeal, in the more recent case of **Attorney General of Trinidad and Tobago v Ayers-Caesar** [2019] UKPC 44, Lord Sales, writing for the majority of the Board, stated at para. 2:

> "2. The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether [the applicant for judicial review] has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage."

Lord Sales also indicated that the primary purpose for an application for leave was to filter and exclude unarguable cases.

[35] Secondly, in the recent decision of **National Bank of Anguilla (Private Banking and Trust) Ltd (in Administration) and another (Appellants) v Chief Minister of Anguilla and 3 others (Respondents) (Anguilla)** [2025] UKPC 14 ('**National Bank of Anguilla v Chief Minister of Anguilla**'), Lord Reed, writing for the Board, opined that the decision of whether there is an arguable ground for judicial review is not an exercise of discretion. The learned Law Lord stated the remit of an appellate tribunal in proceedings such as these at para. 84 of the judgment:

> "84. Deciding whether there is an arguable ground for judicial review is not an exercise of discretion. Accordingly, when the judge in the present proceedings refused leave to apply for judicial review on the

> ground that there was no arguable ground for judicial review with a realistic prospect of success…, he was not exercising a discretion. It follows that, on the appeal against his decision, the Court of Appeal was not reviewing an exercise of discretion. It should not, therefore, have confined itself to the limited grounds on which the exercise of discretion might be reviewed on appeal, but should have considered whether the judge had erred in concluding that there was no arguable ground for judicial review. If it concluded that he had, it should then have re-considered the matter for itself. In approaching the appeal as a review of the exercise of discretion, the Court of Appeal accordingly erred in law. It is therefore necessary for the Board to consider the question anew."

This approach will, therefore, be adopted when considering the learned judge's decision that the appellants did not have an arguable case with a realistic prospect of success.

[36] Thirdly, where the discretionary bars of delay or an alternative remedy are relevant matters for consideration, these elements would raise issues involving the exercise of discretion as stated in the excerpt referred to above (at para. [32]) in **Sharma v Brown Antoine**. It is now well settled that where a judge, at first instance, is exercising a discretion, this court will not lightly disturb that discretion simply because it would have come to a different decision. To succeed, the appellant bears the burden of demonstrating that the exercise of the discretion was "based on a misunderstanding by the judge of the law or of the evidence before [her], or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it' " (per Morrison JA (as he then was) at para. [20] in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 applying **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042).

[37] It is also pellucid from rule 56.6(1) of the CPR that an application for judicial review must be made promptly (within three months of the date on which the grounds first arose). The court is empowered to enlarge that time "if good reason for doing so is shown" (rule 56.6(2)). The CPR is silent regarding the factors to be considered in

determining "good reason". Therefore, as F Williams JA observed in **Randean Raymond v The Principal Ruel Reid and anor** [2015] JMCA Civ 59, "…[t]he statement of this requirement by itself, standing alone and with no connected governing principles, guidelines or ground rules, presages the conclusion…, that the matter is entirely discretionary" (see para. [33] of that judgment). However, the court is required to consider whether the grant or refusal of an extension of time to apply for leave would likely cause substantial hardship or prejudice to the rights of any person or negatively impact good administration (rule 56.6(5)(a) and (b)).

[38] Finally, the purpose of judicial review was succinctly and clearly articulated by Lord Hailsham of St Marylebone LC in **Chief Constable of the North Wales Police v Evans** at page 143h-144a of the judgment:

> "…the purpose of [judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. … The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

[39] Lord Brightman, at page 154d, added:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

[40] Similarly, Dunbar-Green JA (Ag) (as she then was), in the case of **Private Power Operators Ltd v Industrial Disputes Tribunal et al** [2021] JMCA Civ 18, opined that the judge is to focus on the lawfulness or unlawfulness of the jurisdiction and procedure relative to the decision to determine if it was based on errors of law. That assessment

would concern issues of fairness of the tribunal's processes, reasonableness of its decision in the Wednesbury sense (see **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680) and adherence to the rules of natural justice.

[41] The Board also recently emphasised in **National Bank of Anguilla v Chief Minister of Anguilla** at para. 89:

> "Judicial review proceedings are not conducted in the same way as ordinary disputes between private parties concerned to protect their competing interests. The supervisory jurisdiction is designed to protect the public interest in the lawful use of the powers conferred under public law, as well as the private interests of those who may be affected by the abuse of those powers. It is intended to secure the constitutional value of the rule of law, to which public authorities, and the other parties to judicial review proceedings, are or should be committed."

[42] Turning to the learned judge's approach to the application (which the appellants have faulted), she first determined that the appellants had the required legal standing to apply for judicial review. This finding has not been challenged. She then outlined how she would address the issues before her at paras. [35] – [37] of the judgment:

> "[35] In some applications, it is more appropriate to address the discretionary bars to judicial review such as delay and alternative remedy before addressing the core issue of arguable ground.
>
> [36] However, I am of the view that the circumstances of this application direct that the substantive issue be addressed first. This is so as, should I find that there is an arguable ground with a realistic prospect of success then the discretionary or procedural bars will be a relevant factor for me to consider in deciding whether or not time should be extended and leave to proceed be granted. If I find on the contrary that there is no arguable ground with a realistic prospect of success, there will be no need for a consideration of the discretionary bars.

> [37] The core question involved in this application is whether the Applicants have met the threshold or test for leave to apply for judicial review."

[43] Before commencing her analysis, the learned judge referred to **Sharma v Brown Antoine** as setting out the "operative test" that the court should have in mind when assessing the application and indicated that in carrying out that assessment, the court was not required to go into the matter in great depth but still had an obligation to determine whether the grounds and evidence demonstrate a real prospect of success (paras. [48] – [50] of the judgment). Thereafter, she considered the evidence, relevant law, and submissions of counsel for the parties and concluded that the appellants did not have an arguable ground for judicial review with a realistic prospect of success (paras. [51] – [65] of the judgment).

[44] Notwithstanding her prior statement on how she would approach the application, the learned judge, having found that there was no arguable ground for judicial review with a realistic prospect of success, proceeded to consider the discretionary bars of delay and alternative remedy. The issue of delay stemmed from the appellants' failure to apply for leave within three months of the Committee's decision to proceed with the disciplinary proceedings against Mr Simpson. That decision was made on 19 April 2017, and the application for leave was made six months later, on 18 October 2017. The learned judge found that the appellant's reliance on impecuniosity as the cause for the delay while "satisfactory" did not amount to good reason being shown to extend time (applying the case of **Alcron Development Limited v Port Authority of Jamaica** [2014] JMCA App 4 ('**Alcron Development**')) and that to enlarge time would be detrimental to good administration since the appellants had failed to establish that they had "arguable grounds with realistic prospect of success".

[45] Concerning the availability of an alternative remedy, the learned judge found that should the appellants be aggrieved with the final decision of the Committee, an alternative remedy was available by way of an appeal via section 125(3) of the Constitution. She also indicated that this remedy should be pursued "before the application for judicial

review is made by virtue of the fact that the [appellants] did not meet the threshold for judicial review".

[46] I believe the criticisms levied at the learned judge's approach to the application are devoid of merit. Her indication that the resolution of the issue of arguability, subject to her contemplation of the discretionary bars, would be determinative of "whether or not time should be extended and leave to proceed be granted" foreshadowed her decision to first consider the substantive issue of arguability before determining the application for an extension of time to apply for leave for judicial review. That approach is supported by judicial authority emanating from this court.

[47] In the case of **Garbage Disposal & Sanitation Systems Ltd v Noel Green & others** [2017] JMCA App 2 ('**Garbage Disposal v Noel Green**'), F Williams JA stated:

> "[17] In relation to addressing the question of what approach the court should adopt when hearing both these types of application together [an application for an extension of time within which to apply for leave to appeal and an application for leave to appeal], I am not without guidance. As recognised by Smith JA in the case of **Evanscourt Estate Company Limited v National Commercial Bank** [(unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008]if permission to appeal ought not to be given, it would be futile to enlarge the time within which to apply for permission. This, then, will be the primary rule that will guide the resolution of the application of the orders. …"

[48] Although in **Garbage Disposal v Noel Green**, this court was considering an application for extension of time to apply for leave to appeal together with an application for leave to appeal, in my view, the above-stated principle would be equally applicable when a judge is considering an application to extend the time within which to apply for leave for judicial review along with an application for leave to apply for judicial review (as in the present case). This is so since, practically, it would be "futile" to enlarge time unless it is established that the applicant's case meets the required threshold of arguability. Therefore, in this regard, the learned judge's methodology is unassailable.

[49] Additionally, as shown above, she amply demonstrated that she understood the court's role at the leave stage and applied the correct test in arriving at her decision. However, whether the learned judge was correct in concluding that the appellants did not have an arguable ground for judicial review with a realistic prospect of success and her treatment of the discretionary bars of delay, as well as the identified alternative remedy, will be explored later in the judgment.

2. Did the learned judge err in her determination that there was no arguable ground with a realistic prospect of success? (Grounds b, c, d, e, and j)

[50] The criminal charges laid against Mr Simpson were pursuant to section 14(1)(a) and (3) of the CPA, whereas the disciplinary charges alleged misconduct for engaging in a conflict of interest contrary to staff order 4.2.9(i)d.

[51] Sections 14(1)(a) and 14(3) of the CPA provide:

> "14. - (1) A public servant commits an act of corruption if he –
>
> (a) corruptly solicits or accepts, whether directly or indirectly, any article or money or other benefit, being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in the performance of his public functions;
>
> ...
>
> (3) A person commits an act of corruption if he instigates, aids, abets or is an accessory after the fact or participates in whatsoever manner in the commission or attempted commission of or conspires to commit any act of corruption referred to in subsection (1) or (2)."

[52] Staff order 4.2.9(i) of the staff orders provides:

> "**4. CODE OF CONDUCT**
>
> ...
>
> **4.2 BEHAVIOUR EXPECTATIONS**

…

4.2.9 Conflict of Interest

i) A conflict of interest may be deemed to exist under any of the following circumstances:

…

d) Soliciting and/or accepting payment and/or any other consideration relating to the performance of or neglect of official duties; …" (Bold as in original)

[53] Before the Committee, an objection was raised on Mr Simpson's behalf to the disciplinary charges in the light of his acquittal of the criminal charges. Reliance was placed on regulation 34 of the PSR, which provides:

> "An officer acquitted in any court of a criminal charge shall not be dismissed or otherwise punished in respect of **any charge** of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of **any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted**." (Emphasis added)

[54] The Committee recognised that Mr Simpson's counsel sought to invoke the doctrine of *autrefois acquit* as it was contended that the disciplinary charges are the same or substantially the same as the criminal charges. Ultimately, the Committee disagreed with that assertion and ruled that the disciplinary hearing should proceed.

[55] In reviewing that decision, the learned judge considered the relevant law and the parties' submissions and agreed with the respondents that the disciplinary charges were not the same or substantially the same as the criminal charges for which Mr Simpson was acquitted. She found that the main distinction between the two sets of charges was that the element of corruption in the criminal charges qualified the soliciting or accepting of any article, money, or other benefit under the CPA. In the absence of the CPA defining "corrupt" or "corruption", the learned judge referred to their ordinary meanings and observed that staff order 4.2.9(i)d does not require "corruption" to be proved.

[56] The learned judge also considered the impact of regulation 34 and found that it "does not give an automatic bar to other charges or punishment to be levied against a public officer arising from the charges for which the same officer was acquitted". She concluded that "…the administrative charge limits soliciting or accepting to payment and or any other consideration … [while] [t]he judicial charge extends the soliciting or accepting to any article, money or other benefit, being a gift, favour, promise or advantage. I therefore find that both charges are different and distinct" (para.[56] of her judgment).

[57] Additionally, she considered and dismissed the appellants' allegations that the Committee acted *ultra vires* and in breach of the principles of natural justice on the basis that they were unsupported by the evidence before her. She also found that the evidence presented by the appellants was insufficient to establish that Mr Simpson was being treated differently and unfairly, in breach of his legitimate expectation to be reinstated following his acquittal of the corruption charges because other inspectors of motor vehicles in similar circumstances were reinstated upon being acquitted. The learned judge indicated that the evidence before her did not reveal the basis on which they were reinstated (paras. [62] – [64] of the judgment).

[58] For those reasons, she determined that the appellants did not have an arguable case with a realistic prospect of success.

The appellants' submissions

[59] Mrs Newby asserted that the Permanent Secretary elected to bring criminal proceedings against Mr Simpson instead of disciplinary charges at the outset, and over the three years (from the time the criminal charges were laid), the Permanent Secretary had "the full opportunity" to prosecute Mr Simpson. However, the Crown offered no evidence at the trial, and he was acquitted. It was counsel's understanding that regulation 34 created a statutory embargo preventing a public officer who has been acquitted of a criminal charge from being dismissed or punished in relation to a disciplinary charge that is the same or substantially the same. She relied on a decision from this court, **Dennis**

Thelwell v The Director of Public Prosecutions & anor (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/1998, judgment delivered 26 March 1999, to make the point that once an accused person is placed in jeopardy of being convicted of charges and is acquitted, he cannot face those charges again.

[60] Counsel also took issue with the learned judge's consideration of the common law principle of *autrefois acquit.* She submitted that the appellants did not raise it, although the respondents addressed it. She argued that when a person is prosecuted for an offence arising out of the same or substantially the same facts as a previous prosecution, it is not an example of *autrefois acquit* but may constitute an abuse of process. Also, the principle of *autrefois acquit* is reserved for criminal charges, unlike regulation 34. It was counsel's contention that the learned judge failed to appreciate the distinction between *autrefois acquit* and abuse of process, as demonstrated by her reference to the former in her judgment.

[61] Mrs Newby argued that there is no tangible difference or distinction between the criminal and disciplinary charges. It was further contended that the use of the word "charge" in regulation 34 does not limit its application solely to criminal charges. Counsel asserted that implicit in the express reference to "criminal charges" and the latter broad reference to "charges", is a recognition of different types of charges, which include disciplinary charges. This is qualified by the words "must not be dismissed or otherwise punished", which indicate that those latter "charges" are not restricted to criminal charges. Since the elements of the disciplinary charges under the staff orders are the "constituent elements" of the criminal charges, for which Mr Simpson was acquitted, there was a legal bar to the disciplinary charges against him. The respondents are, therefore, estopped from "seeking to resurrect the allegations raised in the criminal proceedings" before a differently constituted tribunal in disciplinary proceedings.

[62] It was the appellants' position that the learned judge failed to appreciate that on account of Mr Simpson's acquittal for the criminal charges, the attempts by the respondents to bring fresh charges by way of disciplinary proceedings arising out of the

same or substantially the same set of allegations would amount to an abuse of process (**Connelly v DPP** and **R v Beedie** [1997] 3 WLR 758 were cited in support of this argument). By focusing her analysis on whether the disciplinary and criminal charges were "different and distinct", the learned judge asked herself the wrong question in law, it was submitted. Regulation 34 required her to consider whether those charges were the same or substantially the same, not whether they were different and distinct. The ordinary meaning of the word "substantially" includes "to a great or significant extent" or "for the most part", and so once the disciplinary charges are similar "to a significant extent" or "for the most part" to the criminal charges, the embargo in regulation 34 applies.

[63] It was further submitted that the learned judge also placed too much weight on the term "corruptly" as opposed to assessing the substance of the charges. Contrary to her findings, the term "corruptly" does not create a sufficient distinction to take the disciplinary charges outside the category of "substantially similar". Additionally, the term "corruptly" does not require an additional element of corruption to be proven. Once a public officer deliberately does what section 14(1)(a) and (3) forbids, the act of corruption is committed, and the offence is made out. Counsel sought guidance for the interpretation of that section from the case of **DeWayne Williams v R**. She referred to the definition of "corruptly" in that case and contended that had the learned judge sufficiently regarded those principles, she would not have erroneously interpreted the section and concluded that it requires an element of corruption to be proved.

[64] Counsel also argued that the learned judge failed to have sufficient regard for and/or misunderstood Mr Simpson's affidavit evidence regarding the "established past practice" where other inspectors of motor vehicles were similarly charged but acquitted of corruption offences and were reinstated by the Ministry. It was submitted that this demonstrated "different and unfair treatment", tantamount to an abuse of power since, based on the undisputed evidence, the practice has been that once a matter of this nature is disposed of in an inspector's favour, the inspector is reinstated. The learned judge,

however, failed to appreciate that this was an arguable ground, and so she was plainly wrong when she ruled that the Committee's decision to continue with the disciplinary hearing did not breach Mr Simpson's legitimate expectation.

[65] It was the appellants' position, therefore, that the learned judge's assessment was based on "grave misunderstandings of law and of the wording of the two sets of charges", and so she was plainly wrong when she concluded that the disciplinary charges were not the same or substantially the same as the criminal charges. Furthermore, despite the appellants' extensive submissions on the common law principles and the issue of abuse of process, counsel was of the view that the learned judge erred in failing to address them. Having regard to all of the above, the appellants contended that there was a legitimate basis for the learned judge to grant the appellants' application in order to prevent such an abuse.

The respondents' submissions

[66] It was the respondents' position, as contended by counsel, Ms Hall, that the learned judge did not misunderstand or misinterpret the law. She submitted that the learned judge, having properly apprised herself of the law, correctly concluded that the criminal charges and the disciplinary charges were not the same or substantially the same. Counsel also disagreed that the proper construction of regulation 34 meant the learned judge was to determine whether the elements of each offence were the same or substantially the same.

[67] Ms Hall also asserted that the appellants raised the issue of *autrefois acquit* by arguing that Mr Simpson's acquittal of the criminal charges meant that he should not be dismissed or punished for the disciplinary charges because they were the same or substantially the same. For the doctrine of *autrefois acquit* to apply, the offence must be precisely the same in law, so the critical question, in the respondents' minds, is whether, at the time of trial, Mr Simpson would have been in peril of conviction for the same charge he is now facing.

[68] The issue in this case, counsel submitted, does not concern the evidence but whether the charges were the same or substantially the same. The charges for conflict of interest are wholly different from the charges for corruptly accepting, soliciting, or conspiracy to do either of those acts. Relying on **Schlenker v Torgrimson**, she argued that the proceedings seek to address different issues and that the disciplinary proceedings are primarily concerned with maintaining standards of professional conduct and protecting the public from dishonesty in public office.

[69] In the light of the evidence against Mr Simpson, the Committee is entitled to consider whether his behaviour warrants discipline with a view to dismissal. Counsel challenged the submission that the learned judge was misguided in her examination of the charges and in highlighting that the word "corrupt" formed part of the criminal charges and was absent from the disciplinary charges. She argued that the element of corruption is critical and distinguishes the charges. Having found the charges to be distinct and not substantially similar, the learned judge correctly found that this was sufficient to ground her decision to refuse leave on the basis that the appellants had not met the threshold of **Sharma v Browne Antoine** as there was no arguable ground with a realistic prospect of success.

Analysis

[70] It is not disputed that while regulation 34 of the PSR prohibits the dismissal or punishment of a public officer in respect of any criminal charge of which he or she has been acquitted, it further provides for the dismissal or punishment of the public officer in relation to any other charge arising out of his conduct in the criminal matter, provided that the disciplinary charge is not substantially the same as the criminal charge. Therefore, in determining whether leave to apply for judicial review should be granted, the learned judge was required to consider whether the appellants' contention that the Committee's decision (to proceed with the disciplinary charges against Mr Simpson, for the reason that they were neither the same nor substantially the same as the criminal charges), was *ultra vires*, unlawful, an abuse of power, an abuse of process, a breach of

natural justice, and procedurally unfair raised an arguable ground for judicial review with a real prospect of success.

[71] The main reason given by the learned judge for refusing leave, as previously expressed, was that there was a distinction between the criminal and disciplinary proceedings, as there is a requirement to prove corruption in the criminal charges, and this qualified the soliciting or accepting of any article, money, or other benefit under the CPA. However, there is no such requirement in relation to conflict of interest as defined in staff order 4.2.9(i)d. Accordingly, she concluded that both charges were "distinct".

[72] The appellants have argued that the learned judge's use of the term "different and distinct" is flawed. The proper consideration and engagement of the judge's mind was not whether the disciplinary charges were "different and distinct" from the criminal charges but instead, whether they were "the same or substantially the same". However, an examination of the context in which the phrase "distinct" was used will show that this reproval of the learned judge is entirely without merit.

[73] Having correctly identified what she termed "[t]he gravamen of the [appellants'] contention" as being that the disciplinary charges against Mr Simpson were substantially the same as charges for which he had been acquitted (para. [39]), the learned judge continued:

> "[51] Considering the evidence before me, I agree with the submissions of the Respondents and I do not find that the charges proferred against [Mr Simpson] are substantially the same as the corruption charges…
>
> [52] In examining the substance of both charges, it is quite clear that the charges are distinct…"

[74] Against this background, it is evident that the learned judge's use of the word distinct, in those circumstances, was, in my view, simply to emphasise that the disciplinary charges were different from and not substantially the same as the criminal charges and not demonstrative of an improper consideration by her.

[75] Before the Committee and the learned judge, it was argued, on Mr Simpson's behalf, that the disciplinary charges should not be pursued because the principle of *autrefois acquit* was embodied in regulation 34. As such, the Committee's decision to proceed with the disciplinary charges, which were the same or substantially the same as the criminal charges, was unlawful and an abuse of process.

[76] Before us, counsel for the appellants questioned the learned judge's consideration of this doctrine on the basis that the appellants did not raise it, although the respondents addressed it. In response, counsel for the respondents pointed out the contrary, and I agree. Firstly, it cannot be seriously challenged that Mr Simpson introduced and argued the plea of *autrefois acquit* before the Committee as the main reason the disciplinary proceedings against him should not proceed. On this basis alone, the learned judge was required to consider it within the parameters of its application to regulation 34 and, ultimately, whether the Committee's decision to proceed with the disciplinary charges was erroneous, unlawful and an abuse of process, as the appellants proposed. Secondly, it was also argued before the learned judge during the application (para. [39] of the judgment).

[77] Turning now to the doctrine of *autrefois* (also commonly referred to as "double jeopardy"), this legal principle is rooted in the common law and prohibits a person from being tried again for the same offence after being acquitted or convicted (the pleas of *autrefois acquit* and *autrefois convict*, respectively). Its primary purpose is to protect individuals from the potential oppression of facing multiple prosecutions for the same crime. In Jamaica, the pleas have been codified in the Constitution (see section 16(9)).

[78] One of the leading authorities on *autrefois* is **Connelly v DPP** (relied on by the appellants). In that case, the appellant, Connelly, was initially charged with murder (which was committed during a robbery) but was acquitted of that charge. At the time of his trial for murder, the practice was to not join other counts or offences to an indictment for murder, so a count for robbery was not included in the initial indictment. The appellant was later charged with robbery based on the same facts. He argued that the second

charge of robbery was an abuse of process and violated the principles of *autrefois acquit*. The two main issues that the House of Lords had to determine were whether the principle of *autrefois* applied and whether the court had the power to stay the prosecution for robbery as an abuse of process.

[79] The majority of the House of Lords identified a narrow principle of *autrefois*, applicable only where the same offence is alleged in the second indictment. Lord Devlin opined that for the doctrine to succeed, "it must be same offence both in fact and law" (see page 1339 of that judgment). He also rejected the proposition that *autrefois* is applicable where an accused has been prosecuted on substantially the same facts (at page 1340). Lord Pearce and Lord Reid agreed with Lord Devlin's opinion.

[80] Ultimately, the House of Lords unanimously decided that the appellant could be tried for robbery and dismissed the appeal. However, Lord Morris of Borth-y-Gest and Lord Devlin's opinions contained differing views on the scope of *autrefois*. The majority agreed that *autrefois acquit* applies only to the same offence and not different offences that arose from the same facts. Therefore, since murder and robbery were distinct crimes, the appellant's second trial could proceed, although there was an overlap of facts between the two offences (murder and robbery). This was primarily on the basis that all the ingredients of the offence of murder were not part of the ingredients of the offence of robbery. It was also emphasised that the court had a discretion to intervene to prevent an abuse of process in circumstances where the prosecution of an individual would be unjust or oppressive.

[81] Lord Morris of Borth-y-Gest (pages 1305-1306) stated:

> "…In my view, both principle and authority establish: (1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has

been convicted; (4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty; (5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assaulted person later dies; (6) that on a plea of autrefois acquit or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted; (7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings; (8) that, apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies; (9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime."

[82] At page 1309, he pronounced:

> "My Lords, the law of England was, therefore, clearly stated. It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction. …"

[83] Lord Devlin's view was that the principle of *autrefois* should be narrowly confined. He stated at pages 1339 -1340:

> "…For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. …
>
> I would add one further comment. [Lord Morris of Borth-y-Gest] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with [Lord Morris of Borth-y-Gest] that these dicta refer to the legal characteristics of an offence and not the facts on which it is based: see *Rex v. Kendrick and Smith* [(1931) 23 Cr App R 1]. I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of autrefois was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise." (Italics as in the original)

[84] As can be seen, the *ratio decidendi* (the reason for the court's decision) in **Connelly v DPP** is not easily discernible. However, it appears that the majority decision is found in Lord Devlin's opinion (since both Lords Reid and Pearce agreed with him at pages 1295-1296 and 1361-1368, respectively). It follows from this decision that the ambit of *autrefois* is relatively narrow in the sense that the offence and the facts must be the same for the plea to be applicable.

[85] **R v Beedie** (another authority relied on by the appellant) provides further insight into the application of the *autrefois* doctrine and its limitations, as discussed in **Connelly v DPP**, as well as the staying of criminal proceedings consequent on a determination of an abuse of process. Following the discussion above, it is noted that Rose LJ, writing for

the England and Wales Court of Appeal, also concluded that the *ratio* in **Connelly v DPP** on the scope of *autrefois* was to be found in the judgment of Lord Devlin.

[86] The relevant facts, in that case, are that the appellant, Mr Beedie, was initially prosecuted and convicted for breaches of the Health and Safety at Work Act ('the Act') following an incident involving the use of a defective gas fire in his premises, which resulted in the death of his tenant from carbon monoxide poisoning. The appellant, as landlord, had a duty under the Act to ensure that the appliance was maintained and repaired. He pleaded guilty to offences under the Act and other legislation. He was subsequently prosecuted for manslaughter based on the same facts. He pleaded guilty and was given a suspended sentence. He later appealed.

[87] The main questions raised on the appeal were whether the trial judge was correct in rejecting the appellant's plea of *autrefois convict* and refusing to stay the proceedings for manslaughter. The trial judge was of the view that the plea of *autrefois convict* could only be successful if the legal characteristics of both offences were the same. The appellant's position was that it was sufficient for the plea to succeed if he established that the evidence necessary to support the indictment for manslaughter, or the facts constituting manslaughter, would have been sufficient to obtain a conviction under the Act.

[88] While the court rejected the position that *autrefois* was applicable, it allowed the appeal on the basis that the second prosecution for manslaughter constituted an abuse of process, as in the absence of special circumstances, a person should not be tried for a more serious offence (an offence "on an ascending scale of gravity") after having already been prosecuted for a lesser offence arising from the same or substantially the same set of facts. The court found that the trial judge erred when he failed to stay the manslaughter proceedings because "…the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions [under the Act], and gave rise to a prosecution for an offence of greater gravity, no new facts having occurred, in breach of the [**R v Elrington**] principle" (per Rose LJ at page 767).

[89] In **R v Elrington** [1861] 1 B & S 688, approved in **Connelly v DPP** (but treated as a decision that grounded the court's inherent powers to prevent abuse rather than the application of *autrefois*), Cockburn CJ stated the following principle at page 696 of the decision:

> "… [W]hether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

In summary, the **R v Elrington** principle prevents an individual from being prosecuted for a more serious offence after being convicted or acquitted of a minor offence based on the same facts.

[90] A comparison of the doctrine of *autrefois* with the plain and ordinary language of regulation 34, therefore, leads to the inescapable conclusion, as agreed by both counsel for the parties, that the protection provided under regulation 34 is much wider than that provided by the doctrine of *autrefois*. As counsel for the respondents puts it, "[r]egulation 34 softens the approach somewhat from the subsequent offence being 'exactly the same in law' to 'substantially the same'".

[91] Applying the authorities discussed above to the present case, it seems plain to me that the doctrine of *autrefois acquit* would be inapplicable to the disciplinary charges of misconduct arising from a conflict of interest since those charges and the criminal charges are not the same. The disciplinary charges do not exist in the criminal law. So, the evidence relied upon to establish the corruption charges was incapable (or impossible) of supporting a criminal charge of misconduct based on a conflict of interest because no such charge exists. Put succinctly, Mr Simpson was never in any peril of being convicted for the disciplinary charges, whether at his trial for the criminal charges or in any subsequent criminal proceedings.

[92] The appellants' complaint that the learned judge failed to appreciate the distinction between *autrefois acquit* and abuse of process, as demonstrated by her reference to the former in her judgment (and not the latter), is answered by the application of the

principles in **R v Beedie** and **R v Elrington**. For the reasons already discussed, the disciplinary charges are not offences that could be considered of "greater gravity" arising from the same or substantially the same facts as the criminal charges. Also, the logical implication of the learned judge's endorsement of the Committee's decision that the disciplinary and criminal charges are not substantially the same and that the disciplinary hearing is to proceed is that this ruling by the Committee was not an error of law, *ultra vires* or an abuse of process.

[93] The question of whether the the learned judge made an error of law in her finding that the charges are not substantially the same will now be addressed.

[94] I accept Ms Hall's submission that a purposive approach should be taken to analyse the elements of the criminal and disciplinary charges in making this determination. It is clear that while the disciplinary charges flowed from the same facts or substantially the same facts as the criminal charges, it is unarguable, in my judgment, that the disciplinary charges of misconduct arising from a conflict of interest are substantially the same as the criminal charges of corruption. I am inclined to this view because the ingredients or elements of both charges are not the same or substantially the same. In short, what must be established to prove the offence of corruption is not the same or substantially the same as what is required to substantiate the disciplinary charges grounded in conflict of interest. Put another way, while there is an overlap of the facts, all the ingredients of the corruption charge are not part of the ingredients of the disciplinary charges.

[95] The criminal and disciplinary charges arose from Mr Simpson's alleged acceptance of a cash payment to issue a certificate of fitness for a motor vehicle, which he did not examine. The particulars or ingredients of the disciplinary charges are that Mr Simpson "engaged in a conflict of interest" by directly or indirectly accepting the payment of money in relation to the performance of his official duty by issuing a certificate of fitness, contrary to staff order 4.2.9(i)(d). The particulars or ingredients of the offence of corruption charged on the first information against Mr Simpson was that he corruptly accepted the sum of $3,000.00 for his personal gain "by omitting" to do an act in the performance of

his public function contrary to section 14(1)(a) of the CPA. The second charge alleged that he "conspired and committed an act to corruptly solicit and accept four thousand dollars ($4000.00)" for his personal benefit contrary to section 14(3) of the CPA.

[96] The case of **DeWayne Williams v R** provides helpful guidance on the definition of the word "corruptly" and what is required to successfully prosecute a public servant for the offence of corruption under section 14 of the CPA. The facts, in brief, are that Mr Williams was a former member of the Jamaica Constabulary Force assigned to the traffic division. He was charged with two offences under the CPA for corruptly soliciting and accepting $2,000.00 from the complainant so as not to prosecute him for a breach of the Road Traffic Act in the performance of his public function. The Crown offered no evidence on the latter charge. He was, however, found guilty of committing an act of corruption by corruptly soliciting the sum of $2,000.00 contrary to section 14(1)(a) of the CPA.

[97] In that case, Phillips JA referred to **R v Wellburn, Nurdin and Randel** (1979) 69 Cr App Rep 254 in which Lawton LJ approved the following direction given by the Recorder in that case, adopted from the words of Willes J in **Cooper v Slade** (1858) 6 HL Cas 746 and Lord Parker CJ in **R v Smith** [1960] 2 QB 423:

> "Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word it means purposefully doing an act which the law forbids as tending to corrupt."

[98] She also considered Lord Parker CJ's definition of the term "corruptly" in **R v Smith**, that it "…denotes that the person making the offer [of a bribe] does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain" (see para. [38] of **DeWayne Williams v R**). It follows naturally, to me, that the corrupt bargain is finalised once the bribe is accepted, and it is at that point that the offence of corruption is committed.

[99] After completing her review of the relevant authorities, Phillips JA concluded:

> "[40] On a review of the above authorities and on an examination of the specific section of the Act, it is clear that the words ['corruptly' and 'corruption'] connote an offence once a public servant purposely does an act which the law forbids such as directly or indirectly requesting money or a benefit, such as a promise for himself or another to do or refrain from doing any act in the performance of his public functions. In our view, the offence is made out, and the act of corruption occurs if the public servant only solicits the article, etc., for himself and to his advantage, to do some act in connection with the performance of his public functions, which in this case was the prosecution of the traffic offence.
>
> [41] What can also be gleaned from the authorities is that the offence [of corruption] is committed once the apparent purpose of the transaction was to affect the conduct of the complainant [or public servant] corruptly. …"

[100] So, although the learned judge relied on the ordinary meaning of the words "corrupt" and "corruption" by referring to the Concise Oxford English Dictionary and Black's Law Dictionary (paras. [54] – [55]), the preceding analysis highlights that she did not commit an error of law when she found that, while staff order 4.2.9(i)d contains the same terms of "soliciting and/or accepting payment and/or any other consideration relating to the performance of or neglect of official duties", the requirement to prove that this was an act of corruption (that is, carried out as a result of a corrupt bargain between Mr Simpson and the person or persons to whom he issued the certificate(s) of fitness) is noticeably absent from the disciplinary charges.

[101] Also of importance to the consideration of whether the disciplinary charges are substantially the same as the criminal charges is that, as discussed above, while the prosecution is required to prove that Mr Simpson had the requisite state of mind (*mens rea*) at the time he committed the alleged act of corruption, this is not necessary in the case of the conflict of interest charge. Notably, as can be seen from the language used in staff order 4.2.9, "[a] conflict of interest **may be deemed** to exist under any of the following circumstances…" (emphasis added), it is the Committee that might deem that a conflict of interest exists based on Mr Simpson's overall conduct regardless of his state

of mind at the time he allegedly accepted the payment of money in the performance of his official duties.

[102] Further, when the concept of conflict of interest is closely examined, the glaring dissimilarities between the charges are significantly heightened. Conflicts of interest primarily arise in the areas of legal ethics and professional responsibility (and not the criminal law as previously indicated). A broad definition of this phrase refers to an individual, typically an attorney-at-law, a judicial officer, a corporate officer or director, or a public official, who has competing personal, financial, or other interests that could improperly influence their decisions or actions. Common examples include a lawyer who represents two clients with opposing interests in the same matter; a judge who has a personal relationship with a party involved in a case before him or her; a director having interests that conflict with those of the company or shareholders; and a public official whose interests inappropriately influence the execution of his or her official duties and responsibilities.

[103] The decision of the Court of Appeal of British Columbia in **Schlenker v Torgrimson** (an authority relied on by the respondents) provides a helpful illustration of what conflict of interest means and how this is generally managed. At para. [40] of the judgment, Justice Donald, writing for the court, said:

> "[40] In *Old St. Boniface Residents Assn. Inc. v Winnipeg (City),* [1990] 3 S.C.R. 1170, Sopinka J. commented on conflict of interest legislation for local government at 1196-97:
>
> > I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. <u>It is not part of the job description that municipal councillors be</u>

> personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369]; and *Valente v. The Queen*, [1985] 2 S.C.R. 673." (Italics and emphasis as in the original)

[104] Ms Hall, in her oral and written submissions, emphasised that the crux of the disciplinary charges is the allegation that Mr Simpson was "actively engaged in other business from which he was personally benefitting whilst on the compound of the Morant Bay Motor Vehicle Examination Depot". In other words, as I understand it, while carrying out his official duties at his workplace, Mr Simpson used his public office to improperly obtain financial benefits. Therefore, in those circumstances, the argument continued, the Committee is entitled to pursue the disciplinary charges, which are aimed at maintaining standards of professional conduct and protecting the public from dishonesty in public office. They are not substantially the same as the criminal charges and, consequently, not in breach of regulation 34. In the result, the appellants would be hard-pressed to establish on an application for judicial review that the Committee's decision is *ultra vires*, an error of law or an abuse of power or process. Accordingly, the learned judge was correct to conclude that the appellants did not have an arguable ground for judicial review with a reasonable prospect of success.

[105] As the authorities show, the learned judge cannot be faulted for concluding, as the Committee did, that the disciplinary and criminal charges are not substantially the same. The notion that if the same or substantially the same evidence that is required to prove criminal charges is utilised to bring disciplinary charges under the PSR, this would, without more, amount to a violation of regulation 34 is misconceived. The clear wording of regulation 34 is unsupportive of that stance since disciplinary charges, with a view to

dismissal or punishment, may be proffered against a public servant arising from his or her conduct in the criminal matter, provided those charges are not substantially the same as the criminal charges. Conduct, in this context, more likely than not, will include similar facts as those alleged in the criminal charges.

[106] The required approach in this context, as discussed, entails the review judge conducting the appropriate examination of the disciplinary charges themselves, their ingredients or elements (what is necessary to prove them satisfactorily), along with a similar analysis of the criminal offences and their particulars to determine whether they are substantially the same. This exercise was required to be conducted by the learned judge for her to decide whether it could be reasonably argued, with a realistic prospect of success, that the Committee's decision to proceed with the disciplinary charges is *ultra vires*, unlawful, an abuse of process, a breach of natural justice, or procedurally unfair. On a broad view of the learned judge's approach, she correctly engaged this procedure.

[107] Mrs Newby, referring to correspondence between the Ministry and Mr Simpson, also sought to raise the issue of natural justice, arguing that the Ministry's reason for refusing to reinstate Mr Simpson was based on its determination that regulation 34 did not apply because the certificate of dismissal was not akin to an acquittal. She argued that the Ministry made an implied representation that if he were acquitted of the charges, he would not be dismissed or otherwise punished and would be reinstated since regulation 34 would apply. However, he was not reinstated when he presented the Committee with a certificate of acquittal. This, she argued, unfairly disregarded his legitimate expectation, especially since other inspectors who were similarly charged and acquitted of criminal charges were later reinstated. I am in agreement with the learned judge that this allegation is not supported by evidence, save for Mr Simpson's affidavit, which itself is bereft of sufficient details upon which any real consideration of this concern could be based.

[108] Consequently, the learned judge did not err when she found that the appellants' case did not meet the required threshold for judicial review. Her finding that the

appellants had failed to establish that they had an arguable ground for judicial review with a realistic prospect of success for the reason that the Committee's decision was *ultra vires*, unlawful, an abuse of power, an abuse of process, a breach of natural justice, and procedurally unfair, having regard to the express clear and unambiguous wording of regulation 34, cannot be impugned.

[109] The grounds under this issue, therefore, fail.

3. Did the learned judge err in her findings concerning the discretionary bars of delay and alternative remedy? (Grounds a and i)

A. Delay

The appellants' submissions

[110] It was Mrs Newby's brief contention that the learned judge erred in law and improperly exercised her discretion when she refused to grant an extension of time for the appellants to apply for leave to seek judicial review of the Committee's decision.

The respondents' submissions

[111] Ms Hall argued that the learned judge correctly refused the application for an extension of time to apply for leave for judicial review. The appellants filed the application more than six months after the Committee's decision to continue with the disciplinary hearing. Counsel argued that it is well established that where there has been an inordinate delay by the applicant in applying for leave to apply for judicial review and there are no good reasons for extending time, leave should not be granted. Counsel submitted that rule 56.6(1) of the CPR makes it clear that such an application must be made promptly and, in any event, within three months of the date on which the grounds first arose, that is, the date of the decision. The authorities also make it clear, posited counsel, that the test is one of promptness, and so there can be delay even when the application is made within the three months (**R v Stratford on Avon District Council, ex parte Jackson** [1985] 3 All ER 769).

[112] The respondents agreed with the learned judge's conclusion that the grounds relied on by the appellants did not disclose any good reasons for the court to exercise its power to extend the time within which to file the application.

Analysis

[113] The starting point for the analyses of the discretionary bars is the observation that, as the learned judge initially correctly stated, once she found that the appellants' case did not disclose an arguable ground for judicial review with a realistic prospect of success, it would be needless for her to explore them. Therefore, Miss Hall's contention that the learned judge's pronouncements on these issues are *obiter* (an incidental remark or comment made by a judge that does not resolve the issues in the case) is correct. Nonetheless, it bears pointing out that even if the learned judge incorrectly exercised her discretion in her consideration of the discretionary bars, this will not advance the appeal in the appellants' favour in any way in the light of the decision on the core issue of arguability.

[114] I wish to observe, however, that the learned judge's assessment in relation to the delay had a dual objective: to determine the application for an extension of time and as a discretionary bar to the application for leave. Once the application for an extension of time was refused, there was no valid application for leave before the court. Nevertheless, issue was not taken with the form of the learned judge's order, which refused both the application for an extension of time and the application for leave. Given my determination of the issues above, which are dispositive of this appeal, the substance of her decision on which she refused the application for extension of time based on the issue of arguability would prevail.

B. Alternative remedy

[115] Although it was unnecessary for the learned judge to consider the availability of an alternative remedy as a discretionary bar in determining the application for an

extension of time, I find it necessary to say a few words about what is found to be her erroneous treatment of section 125(3) of the Constitution.

[116] The learned judge briefly considered whether the appellants had an alternative remedy available to them. Having assessed the relevant law, she concluded as follows:

> "[82] If it is that the [appellants] are aggrieved with the final decision of the Respondents, they have an alternative remedy by way of an appeal codified in section 125 (3) of the **Jamaica Constitution** (supra). This remedy affords the [appellants] the right to apply for the reference of their case to the Privy Council. This alternative procedure can sensibly resolve the issues in this application and there is no evidence before the Court that the [appellants] pursued this remedy. Therefore, in my judgment, this remedy should be exhausted before the application for judicial review is made by virtue of the fact that the [appellants] did not meet the threshold for judicial review." (Bold as in original)

[117] Section 125(3) of the Constitution provides:

> "Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:
>
> Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council."

The appellants' submissions

[118] Mrs Newby submitted that the learned judge erred when she concluded that section 125(3) of the Constitution provided Mr Simpson with an alternative means of redress in relation to his preliminary objection against the continuation of the disciplinary hearing. Counsel contended that section 125(3) is neither an adequate nor suitable alternative remedy to provide redress for Mr Simpson because the appeal process it

provides would not be relevant until the disciplinary proceedings were at a point where the Governor-General is advised that the public officer should be removed or punished. Accordingly, the procedure in section 125(3) would not be available to Mr Simpson until a determination has been made that he should be dismissed or punished.

[119] Furthermore, the seminal issue is the interpretation and application of regulation 34, and such matters of statutory interpretation are for the court. It was submitted that even if Mr Simpson were to appeal to the Privy Council, upon being notified of the advice to the Governor-General, that procedure would not be suitable or convenient to determine the issue of whether the disciplinary hearing should continue in light of the interpretation and application of regulation 34. In any event, the section does not expressly or impliedly require that an application should be made to the Privy Council as a precondition to challenging the administrative decisions. The learned judge was, therefore, wrong to conclude that section 125(3) of the Constitution provides an alternative remedy at this stage.

[120] Additionally, counsel submitted that the mere existence of an alternative remedy does not oust the jurisdiction of the court to provide relief by way of judicial review. There are no express words in section 125(3) precluding the public officer's right to seek judicial review, and it cannot be done by implication (**Re Gilmore's Application** [1957] 1 All ER 796 was the cited authority for this point). The question for the learned judge was "whether in the context of the Privy Council Appeal, the real issues to be determined can sensibly be determined by that means". Counsel concluded that the learned judge failed to assess the "mechanism" in section 125(3).

The respondents' submissions

[121] Ms Hall asserted that this issue did not form part of the learned judge's *ratio decidendi*. The learned judge, she submitted, had already concluded that the application should fail because there were no grounds with a reasonable prospect of success. Accordingly, the pronouncements on the procedural bars to leave were *obiter*.

Analysis

[122] The appellants are correct that, properly construed, section 125(3) of the Constitution does not provide Mr Simpson with an alternative means of redress with respect to his preliminary objection against the continuation of the disciplinary hearing. It is also clear that section 125(3) is an appeal process that would become available to Mr Simpson following the disciplinary proceedings and when the Governor-General is advised that he is to be dismissed or punished. This provision, therefore, does not provide Mr Simpson with an alternative remedy to the application for leave that the learned judge was considering.

[123] This decision makes exploring the second limb of the appellants' submission unnecessary. However, I am inclined to agree with their position, supported by the authority of **Re Gilmore's Application**, that, by itself, "the mere existence of an alternative remedy does not oust the jurisdiction of the court to provide relief by way of judicial review".

[124] In principle, therefore, the learned judge committed an error of law in concluding that section 125(3) of the Constitution provides an alternative remedy to judicial review, which Mr Simpson did not utilise before seeking leave. The appellants have, accordingly, succeeded on ground i under this issue. However, given the court's finding on the subject of arguability, this finding is of no assistance to the appellants in the appeal.

Conclusion

[125] In light of the discussion above, I cannot agree with the appellants' contention that the learned judge's refusal to grant their application was due to a patent misunderstanding, misinterpretation, or misapplication of regulation 34, and her improper exercise of discretion during the leave stage of judicial review proceedings.

[126] The learned judge correctly refused the application for an extension of time to apply for leave to apply for judicial review for the reasons that the appellant did not have an arguable ground for judicial review with a realistic prospect of success and the delay

in bringing the application. While the appellants have succeeded on the issue regarding the availability of an alternative remedy, as stated before, this cannot advance the appeal in their favour in any manner, given the respondents' success on the crucial issue of arguability. I would, therefore, propose that the appeal be dismissed and that there be no order as to costs. However, for clarity, the court would vary the order made by the learned judge and set aside order 2 refusing the application for leave to apply for judicial review on the basis that once the application for extension of time was refused, there would have been no application for leave to apply for judicial review upon which an order could lawfully have been made.

DUNBAR-GREEN JA

[127] I, too, have read the draft judgment of V Harris JA and agree with her reasoning and conclusion.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The orders of Palmer-Hamilton J made on 17 January 2019 are affirmed save and except for order 2 refusing the application for leave to apply for judicial review.

3. Order 2 of the said orders of Palmer-Hamilton J is set aside.

4. No order as to costs of the appeal.