[2013] JMSC Civ 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04918

BETWEEN	GORSTEW LIMITED	1ST APPLICANT
AND	HON. GORDON STEWART O.J.	2ND APPLICANT
AND	THE CONTRACTOR-GENERAL	RESPONDENT

Mr. Hugh Small QC, Mr. Ransford Braham QC and Mr. Jerome Spencer instructed by Patterson Mair Hamilton for the Applicants.

Ms. Jacqueline Samuels-Brown QC and Ms. Tameka Jordan instructed by Firm Law for the Respondent

October 10 & 30, 2012; January 30, 2013.

Application for leave to apply for judicial review — Whether Contractor-General acted *ultra vires* in seeking to investigate divestment — Application for Orders of Prohibition and Certiorari and for Declarations — Whether grant of leave to operate as a stay of proceedings — If stay inappropriate should interim injunction be granted

Fraser J

THE BACKGROUND TO THE APPLICATION

[1] The Office of the Contractor-General (OCG) was established in Jamaica by The Contractor-General's Act (The Act) which came into force in 1986. The OCG is a special commission of Parliament and a dedicated anti-corruption body. It was established to monitor on behalf of Parliament, the award and implementation of government contracts to ensure those processes are impartial, based on merit, and reflect propriety. Concomitantly the OCG also carries out investigations in support of its monitoring functions. The introduction of this statute was an attempt to directly address concerns about corruption.

[2] The Urban Development Corporation (UDC) is a statutory body established by the Urban Development Act. The National Investment Bank of Jamaica (NIBJ) is a registered company in which the Accountant General and other public Officers hold shares on behalf of the Government of Jamaica. Gorstew Limited the 1st applicant is a private registered company totally owned by the 2nd applicant.

[3] In or about 1990 the government of Jamaica, via public bodies, made available to the 1st applicant by way of a lease and sale agreement, lands located at Ackendown in the parish of Westmoreland. The agreement specified that the 1st applicant was to have commenced construction of a 200-300 room hotel on the property by June 1991 to be completed by November 1992. The construction was to be at the 1st applicant's own cost. The agreement further made provision for termination, in the event that the lessee/purchaser failed to honour the terms of the agreement. The hotel was not constructed in the time stipulated.

[4] In or about 2001, the 1st applicant, the UDC and the NIBJ entered into a joint venture agreement for the construction of a 360-room hotel on

the said lands located at Ackendown in the parish of Westmoreland covered by the initial agreement between the Government of Jamaica and the 1st applicant in 1990. This new agreement provided that upon completion of construction, the hotel, to be known as Sandals Whitehouse, was to be leased to the 1st applicant for a period of 20 years and operated under the 1st applicant's Sandals brand.

[5] The property upon which the hotel was constructed was owned by Ackendown Newtown Development Company Limited (ANDCo). The ordinary shares of ANDCo were subscribed in the following proportions:

a. UDC – 861 shares or approximately 37.43% of the ordinary shares;

b. NIBJ – 689 shares or approximately 29.96% of the ordinary shares;

c. Gorstew- 750 shares or approximately 32.61% of the ordinary shares.

[6] The construction was undertaken by ANDCo. The initial costing for the construction of the hotel was projected at US$60 million and was financed largely by Government of Jamaica injected and sourced capital. The financing was apportioned as follows: US$30 million - ***external debt***, US$15 million – ***NIBJ***, US$10 million – ***UDC***, US$5 million – ***1st applicant***. However, the final cost for the construction of the hotel, completed on or about April 26, 2011, was almost double at approximately US$110 million.

[7] The construction was beset by several problems including cost overruns, delayed completion and substandard construction. As a result, the 1st applicant alleged that it sustained significant losses and commenced legal proceedings in the Supreme Court of Jamaica against ANDCo, UDC and NIBJ. These court proceedings were later discontinued and the issues in dispute referred to arbitration.

[8] Early in 2011, after the reference of the disputes between the parties to arbitration, and before the hearing of any evidence in the arbitration, the parties to the joint venture agreement, with the sanction of the Government of Jamaica, agreed to amicably resolve the issues in dispute. This resolution included an agreement between the 1st applicant and ANDCo for the 1st applicant to purchase "the Hotel" known as Sandals Whitehouse constructed on two parcels of lands, specifically "all that parcel of land part of Ackendown in the parish of Westmoreland comprised in the Certificate of Title registered at Volume 1325 Folio 14 of the Register Book of Titles and all that parcel of land part of Ackendown in the parish of Westmoreland comprised in the Certificate of Title registered at Volume 1373 Folio 429 of the Register Book of Titles.

[9] The sale of the Hotel including the land, the building, the fixtures, fittings, furniture and equipment was completed on April 26, 2011 and transferred to the 1st applicant's nominee, Sandals Whitehouse Management Limited. The sale was at a price of approximately US$40million which was financed in part by a vendor's mortgage from the Government of Jamaica. The sale therefore represented a divestment of State assets.

[10] Earlier, on or about the 19th of January 2011, the OCG had invoked its statutory powers to commence an investigation into the divestment of the said assets. Pursuant to the said investigation, several Requisitions were issued to various persons and entities by the OCG which were complied with.

[11] On or around June 20, 2012, the Contractor-General issued a Requisition by letter to the 2nd applicant containing over 30 requisitions/questions related to the 1st applicant's purchase of Sandals Whitehouse Hotel. The letter stated *inter alia*:

> **Re: Notice of Formal Requisition for Information and Documentation to be supplied under the Contractor General Act-Special Statutory Investigation- Concerning the divestment of Government of Jamaica owned assets- Allegation of secret talks for the sale of Sandals Whitehouse Hotel to Gorstew Limited**.
>
> The Office of the Contractor General ("OCG"), acting on behalf of the Contractor General is continuing its Special Investigation into, inter alia, the allegations of secret talks, discussions and/or negotiations which concern the sale of Sandals Whitehouse Hotel, which was a public majority owned asset, to Gorstew Limited….
>
> In the discharge of the mandates of the Contractor General under the Contractor General Act and in furtherance of the express powers which are reserved to him by the Act, the OCG, acting on behalf of the Contractor General, now hereby formally requires you to fully comply with the below mentioned requisitions by providing all of the information and documentation which is demanded of you and to supply same in a sealed envelope, marked "confidential" and addressed to the Contractor General."

[12] The letter continued to set out the thirty-eight (38) requisitions/questions, which include several sub-parts.

[13] The 2nd applicant initially agreed to respond to the Requisition but through his Attorneys-at-Law asked for time to do so as he needed to retrieve documents from his archives, and as he had "programmed" business trips abroad. Subsequently after receiving further legal advice, the applicants sought to obtain leave for judicial review to challenge the legality of the OCG's requisition sent to the 2nd applicant.

THE APPLICATION

[14] The applicants initially filed a Notice of Application to apply for leave to seek judicial review on September 7, 2012 supported by an affidavit of the 2nd applicant. By Amended Notice of Application filed September

26, 2012 supported by the second affidavit of the 2nd applicant, the applicants sought the following Orders:

(i) The applicants be granted leave to commence judicial review proceedings within fourteen (14) days.

(ii) The time within which to make the application for permission to commence judicial review proceedings be extended, if necessary.

(iii) The grant of permission to commence judicial review proceedings shall operate as stay of:

a) the special investigations into allegations of secret talks, discussions and or negotiations which concerned the sale of the Sandals Whitehouse Hotel pending the determination of the application for judicial review or further order;

b) the special investigations into allegations of secret talks, discussions and or negotiations which concerned the sale of the Sandals Whitehouse Hotel to include the Applicants pending the determination of the application for judicial review or further order.

(iv) Further in the alternative, an interim injunction be granted to restrain the Contractor-General, whether by himself, his servants and/or agents from:

a) requiring the Applicants to respond to the requisitions/questions contained in the letter dated June 20, 2012; and/or

b) pursuing the special investigations into allegations of secret talks, discussions and/or negotiations which concerned the sale of the Sandals Whitehouse Hotel to include the Applicants, until the determination of the application for judicial review or further order.

(v) Costs of the application to be costs in the judicial review proceedings.

[15] The Amended Application outlined the details of the relief sought as:

(i) A declaration that the letter of June 20, 2012 from the Contractor-General to the Honourable Gordon Stewart, O.J., Chairman, Gorstew Limited is illegal, void and of no effect.

(ii) A declaration that the commencement of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel is illegal, void and of no effect.

(iii) A declaration that the extension of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel to include Gorstew Limited and/or the Honourable Gordon Stewart, O.J., is illegal, void and of no effect.

(iv) An order of certiorari quashing the letter dated June 20, 2012 from the Contractor-General to Honourable Gordon Stewart, Chairman, Gorstew Limited.

(v) An order of certiorari quashing the Contractor-General's decision to commence the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

(vi) An order of prohibition prohibiting the Contractor-General from taking any steps to compel or require the Applicants to comply with and or respond to the said letter or any question or direction contained therein.

(vii) An order of prohibition prohibiting the Contractor-General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

THE TEST TO BE APPLIED ON AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[16] Counsel for the applicants Mr. Hugh Small, QC submitted that the test to be applied to determine the application is that outlined by the Judicial Committee of the Privy Council in ***Sharma v Brown-Antoine and others*** [2007] 1 WLR 780. The test as stated by Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in their joint judgment at page 787 is that, "*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".*

[17] In several cases the Jamaican courts have adopted and applied this test. Some of these cases were outlined in ***Digicel Jamaica Ltd* v. *Office of the Utilities Regulations*** [2012] JMSC Civ. 91 by Mangatal J in which the applicability of the test was further affirmed. There is also my own decision, not cited in ***Digicel Jamaica,*** of ***Danville Walker v The Contractor-General of Jamaica*** 2012 JMSC Civ 31, in which the ***Sharma*** test was also recognized and applied.

[18] Counsel for the respondent while not disputing the general applicability of the ***Sharma*** test to applications for leave, submitted that on the facts of this case the consideration should be whether or not there was a case fit for referral to a full hearing.

[19] Counsel cited ***Blackstone's Civil Practice 2005*** page 904 paragraph 74.29 where the following is stated concerning the approach the court should take:

> Traditionally the test for the grant of permission has been that a claimant must demonstrate to the Court upon a quick perusal of the papers that there is an arguable case for granting the relief…however some judges seem to apply more stringent criteria and require a claimant to demonstrate

> something approaching a reasonable prospect of success or a strong prima facie case.
>
> ...The test to be applied in deciding whether to grant permission is whether the judge is satisfied that there is a case fit for further investigation at a full with notice hearing of a substantive claim for judicial review.

[20] Counsel also cited the case of ***Mass Energy Limited v Birmingham City Council*** [1994] Env LR 298 where the English Court of Appeal formed the view that in light of a) the detailed *inter partes* arguments; b) the expense that might be involved if leave were granted and there was an appeal by either party after the full hearing; and c) the fact that all the relevant documents were before them which had been examined in detail, it was appropriate to apply a more stringent test than usual. Glidewell LJ said at page 306,

> For those reasons taken together, in my view, the proper approach of this Court, in this particular case, ought to be — and the approach I intend to adopt will be — that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed. So the question I have posed to myself is: is Mass Energy's case likely to succeed if we grant leave?

[21] Relying on ***Mass Energy*** counsel for the respondent submitted that in the instant case, as fulsome material had been tendered by both sides in relation to the preconditions for leave, the issues which a judicial review court would have to consider and the gravamen of the Applicants' complaint the court was, as a matter of law, obliged to consider whether there is a good case likely to succeed. The respondent's position being, that on the material before the court, the answer was clearly in the negative.

[22] Two other cases were advanced in support of counsel's submission that on an *inter partes* hearing for leave there is a basis for full consideration of whether or not there is a case fit for a full hearing. In

Inland Revenue Commissioners Appellants and National Federation of Self-Employed and Small Businesses Ltd (Respondents) 1981 AC 617 certain workers had been getting emoluments on which they had paid no taxes. Arrangements were made for a part of this debt to be forgiven. A federation representing other tax payers sought to have this decision reviewed. Leave was granted *ex parte* but at the *inter partes* hearing the Divisional Court held that the federation had no *locus standi*. The Court of Appeal reversed the Divisional Court and on further appeal to the House of Lords the decision of the Divisional Court at the *inter partes* hearing was restored.

[23] In ***R v Cornwall County Council, ex p. Huntington and another*** [1992] 3 All ER 566, the issue was whether or not an ouster clause was applicable. Leave was granted *ex parte* and at the *inter partes* hearing on an application by the respondent to set the grant of leave aside, leave was set as the court held that, as the statute in question had contained a standard form of preclusive clause prescribing an opportunity for challenge on specified grounds, together with the period within which that challenge could be made and proscribing any challenge outside of that period; as the specified conditions had not been met the court had no jurisdiction to grant leave.

[24] I agree with counsel for the applicants in response that none of the cases cited undermine the authority of ***Sharma*** as containing the operative test which binds this court. ***Sharma*** is a decision of the Judicial Committee of the Privy Council and also later in time than all the cases cited. Additionally the cited cases themselves can also be distinguished from the instant case which this court has to consider. While it is true as in the ***Mass Energy*** case the matter at hand has been extensively argued it should be noted that the stage at which the matter was being considered in ***Mass Energy*** was the Court of Appeal as opposed to this being the leave stage in the instant application. The court in ***Mass Energy*** was also careful to indicate that

it took that approach on the particular facts of that case. Concerning ***The Inland Revenue Commissioners*** case it was resolved around the issue of *locus standi.* If there is a finding that there is no *locus standi* then clearly leave should not be granted. In the instant case there is no contest that the applicants have *locus standi.* The main issue is was the respondent acting *ultra vires*. Finally, in ***Cornwall County Council,*** the method of approaching the court as provided by the statute having not crystallised, it was inappropriate for leave to have been granted. This fact was only revealed at the *inter partes* hearing.

[25] There is therefore no sustainable challenge to the court holding that the ***Sharma*** test is that which should guide the courts determination of this application. It should nevertheless be acknowledged that the ***Sharma*** test though simple to state is not necessarily the easiest to apply. After outlining the test Lords Bingham and Walker continued in their judgment in ***Sharma*** at page 787 to indicate that:

> …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) [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.

[26] Based on the existing test, the applicants to be successful in their application for leave are therefore required to establish that they have an arguable ground for judicial review, that has a realistic prospect of success, and which is not subject to any discretionary bar such as delay or an alternative remedy.

THE ISSUES RAISED IN THE AMENDED APPLICATION

[27] ***Jurisdictional Issues***

(i) Is the action and/or inaction of the Contractor-General amenable to judicial review?

(ii) Pursuant to the Civil Procedure Rules (CPR) rule 56.2 (1), do the applicants have sufficient interest in the subject matter of the application?

Procedural Issues

(iii) Have the applicants applied within time? If not should the applicants be granted an extension of time?

(iv) Do the applicants have an adequate alternative means of redress?

Substantive Issues

(v) Is there an arguable case with a reasonable prospect of success that the action of the respondent in issuing the Letter of Requisition dated June 20, 2012 to the 1st applicant was *ultra vires* the power of the respondent and hence unlawful?

(vi) If leave is granted should the court order that the grant of leave operates as a stay of proceedings, or in the alternative if a stay is inappropriate, should an interim injunction be granted to maintain the status quo pending the outcome of the judicial review hearing?

THE UNCONTESTED JURISDICTIONAL ISSUES

[28] In respect of the jurisdictional issues, counsel for the applicants Mr. Small, QC, submitted that the action or inaction of the respondent was amenable to judicial review and that the applicants had a sufficient interest in the subject matter of the application, therefore vesting them with *locus standi* before the court.

[29] In relation to the first issue, counsel noted that the courts had advanced two broad tests concerning whether an action/inaction is susceptible to judicial review. The first test stipulates that if the source of the power of the authority whose decision is being challenged is derived from statute then that decision is amenable to judicial review. (See *De Smith's* ***Judicial Review****, para 3-030 page 124).* The source of the Contractor-General's power to monitor and his jurisdiction to investigate are derived from sections 4(1) and 15 respectively of the Contractor-General's Act (the Act). It was therefore submitted that the first test was satisfied and the actions of the Contractor-General would accordingly be amenable to judicial review.

[30] Concerning the second test counsel advanced that in cases where the statutory source test does not provide an answer, judicial review would be available if the body whose decision is subject to challenge is carrying out a public function. (See *De Smith's* ***Judicial Review****, para 3-043*). As the Contractor-General carries out a public function, it was submitted that his decisions are amenable to judicial review on this ground as well. No challenge to these submissions was raised by counsel for the respondent.

[31] In relation to the question of *locus standi* counsel for the applicants adverted to CPR rule 56.2 (1) which provides that *"An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application."* It was argued that the case of the applicants fell within CPR rule 56.2 (1) (a) which

stipulates that a person with sufficient interest includes, *"any person who has been adversely affected by a decision which is the subject of the application."*

[32] Counsel argued that at the leave stage the emphasis was on the exclusion of busybodies and cranks. (See ***R v Monopolies and Mergers Commission, Ex parte Argyll Group Plc.*** [1986] 1 WLR 763/773 and *De Smith's* ***Judicial Review*** para 2-017 and 2-018). After adverting to aspects of the background previously outlined, counsel specifically pointed to the fact that the Requisition referenced section 29 of the Act which would render the applicants liable to criminal prosecution should they fail to comply with its requirements. The possibility of criminal prosecution, it was advanced, indicated a sufficient interest in the applicants.

[33] Further, counsel referred to section 28 of the Act which requires the Contractor-General to report to Parliament on the subject of investigations. Such a report concerning the sale to the 1st applicant of the Sandals Whitehouse hotel, counsel submitted, could result in adverse comment being made about the applicants leaving them open to reputational damage. Counsel cited the case of ***Tyndall et al v Carey et al*** Claim No. 2010 HCV 00474 (12/2/10) in which Mangatal J held that the prospect of reputations being adversely affected created a sufficient interest to permit judicial review proceedings. On this additional basis therefore, counsel maintained that the applicants had a bona fide concern and were adversely affected by the action of the Contractor-General thereby giving them sufficient interest to make the application.

[34] In her written and oral submissions in response, Mrs. Jacqueline Samuels-Brown counsel for the respondent stated candidly that there was *"no contest relative to the Applicants' locus standi".*

THE SUBSTANTIVE ISSUES

[35] In some applications for leave to apply for judicial review it is more appropriate to address the procedural bars of delay and the existence of an alternative remedy, prior to treating with the substantive issue of whether or not the applicants have an arguable ground for judicial review that has a realistic prospect of success. In fact, that was the order in which counsel for the respondent advanced her submissions. On occasion the decision on the procedural bars obviates the need to consider the substantive issue.

[36] The facts of this application however dictate that in this instance the substantive issue be addressed first. This is so as, should the court find there is an arguable ground with a realistic prospect of success, if it is then determined that there has been undue delay, the question of the public interest in having that ground judicially determined, will be a relevant factor for the court to consider in deciding whether or not time should be extended to allow the application to proceed. Of course, if the court finds there is no such arguable ground with a realistic prospect of success, there will be no need for a consideration of any procedural bars.

The Submissions of Counsel for the Applicants

[37] For the general legal position underpinning his submissions, counsel for the applicants Mr. Hugh Small Q.C. relied on De Smith's ***Judicial Review*** 6th Edition at paragraphs 5 -002 — 5-003 pages 225-6. Those sections discuss administrative decisions which are challenged as illegal. They read:

> 5-002 An administrative decision is flawed if it is illegal. A decision is illegal if it:
>
> (a) contravenes or exceeds the terms of the power which authorises the making of the decision;

(b) pursues an objective other than that for which the power to make the decision was conferred;

(c) is not authorised by any power;

(d) contravenes or fails to implement a public duty.

5–003 The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other ‘‘common law’’ power. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

[38] In applying those principles to the instant case, counsel built his submissions on the central pillar that the Contractor-General was not authorized to conduct the special investigations concerning the sale of the Sandals White house hotel. As will be seen in the outline of his argument, this central pillar was composed of several interlocking columns drawn from particular interpretations of the Act, which the court was invited to embrace.

[39] After noting that the Contractor-General as a Commission of Parliament derives all his powers and authority from the Act, counsel submitted that The Contractor-General has two principal functions, namely:

a) To monitor the award and implementation of Government contracts (Section 4); and

b) The carrying out of investigations in certain specific circumstances (Section 15).

[40] In relation to the Contractor-General's function of monitoring, Section 4(1) states:

> Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament-
>
> (a) to monitor the award and the implementation of government contracts with a view to ensuring that-
>
> (i) such contracts are awarded impartially and on merit;
>
> (ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity;
>
> (iii) without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof; and
>
> (b) to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof.

[41] It was submitted that in order for the Contractor-General to carry out his monitoring functions, there must be:

i. A Government Contract; and

ii. The award of such Government Contract.

[42] Counsel argued that to properly understand the monitoring functions of the Contractor-General one had to look not only at Section 15 which deals with the scope of investigations, but also to the amendments made in 1999 incorporating sections 23A - J of the Act which deal with the National Contracts Commission (NCC). Those sections establish a statutory structure where Government contracts are defined; there exists a list of persons qualified as Government contractors; there is an established machinery outlining the tendering process and provisions

that oblige the NCC to ensure that there is fair treatment in relation to the tendering process for Government contracts; and that reasonable notification is given of the proposed award of any government contract.

[43] Counsel submitted that the NCC structure was carefully established and the language Parliament used in defining "government contract" significant. It would therefore be inconsistent with the rest of the Act for it to be contended that a contractor was anybody other than a person performing and carrying out any building or other works, or supplying of any goods and services, or a person who does work for the government or a public body pursuant to a licence, permit or other concession that has been subject to the bidding and tendering processes, and all the different steps provided for in the functions of the NCC.

[44] Concerning the investigatory powers granted by the Act, counsel maintained that the Contractor-General, in his discretion, is entitled to conduct investigations into matters listed in Section 15(1) which provides that:

> Subject to subsection (2), a Contractor-General may, if he considers it necessary or desirable, conduct an investigation into any or all of the following matters-
>
> (a) the registration of contractors;
>
> (b) tender procedures relating to contracts awarded by public bodies;
>
> (c) the award of any government contract;
>
> (d) the implementation of the terms of any government contract;
>
> (e) the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence;

(f) the practice and procedures relating to the grant, issue suspension or revocation of prescribed licences.

[45] Counsel submitted that the Contractor-General has no jurisdiction or authority to investigate any activity which falls outside of the six areas listed under Section 15 (1).

[46] In further developing the argument on behalf of the applicants, counsel contended that Section 15 (1) must be construed in the context of the following definitions in Section 2:

(i) ""government contract" includes any licence, permit, or other concession or authority issued by a public body or any agreement entered into by a public body for the carrying out of building or other works or for the supply of any goods or services".

(ii) ""contractor" means any person, firm or entity with whom a public body enters into any agreement for the carrying out of any building or other works or for the supply of any goods or services and includes a person who carries out such works or supplies such goods or services for or on behalf of any public body pursuant to a licence, permit or other concession or authority issued or granted to that person by a public body"

(iii) ""public body" means—

(a) a Ministry, department or agency of government;

(b) a statutory body or authority;

(c) any company registered under the Companies Act, being a company in which the Government or an agency of the Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company".

[47] Counsel indicated the applicants accepted that ANDCo was a "public body" for the purpose of the Act since the majority of the shares of ANDCo were controlled by two (2) government entities, namely the UDC and NIBJ.

[48] Counsel continued that the definition of "government contract" and the definition of "contractors" made it abundantly clear that a government contract is limited to an agreement for the carrying out of any building or other works or for the supply of any goods or services. Therefore the argument was made, that when the definitions given to the terms "government contract" and "contractor", are taken into account, it was clear that Parliament intended government contracts to be awarded to contractors who must be those persons defined as such in the Act. A person was only a contractor under and covered by the Act if he was carrying on the relevant contractual activity as defined under the Act.

[49] In making these submissions counsel contended that the guiding principle which had to be accepted was that the Act being construed should be construed as a whole and interpreted so that it was coherent and self-consistent. In that regard counsel noted that also in Section 2, "functions" was defined as "functions includes powers and duties". The critical functions of the Contractor-General under analysis were his monitoring functions as outlined under section 4. It was also reiterated that the definition of "government contract" also uses the word "includes" rather than "means".

[50] Counsel submitted that in respect of both the definitions of "functions" and of "government contract" in keeping with the interpretation of the Act that he had advanced, the word "includes" should be read to mean "means". It was, he maintained, critical to the coherence of the Act that it be accepted that the use of the word "includes" did not expand the meaning of "government contract". It was contended that the Contractor-General assumed that he had powers to investigate all government contracts including divestments, but that such an

assumption was misplaced as it exceeded the scope of the power granted in the Act.

[51] Counsel pointed to a number of instances in which what he termed this misplaced assumption operated. These were:

(i) Letter from the Contractor-General to Hon. Prime Minister Golding and Ms. Miller, Permanent Secretary in the Office of the Prime Minister in which the Contractor-General gave formal notice of his commencement of a Special Statutory Investigation concerning the divestment and sale of the Sandals Whitehouse Hotel to Gorstew Ltd. Counsel submitted this letter assumed the Contractor-General had power to intervene in the divestment based on plenipotentiary anti-corruption powers;

(ii) Reference in the Media Release from the Office of the Contractor-General dated September 10, 2012 to an Expert Legal Opinion from Dr. the Hon. Lloyd Barnett, OJ obtained in January 2000 that stated that a Contractor-General does have jurisdiction under the Act to monitor and investigate divestments by the State;

(iii) A media release dated May 30, 2008 in which the OCG spoke to conclusion of investigations concerning divestment of shares of Petrojam Limited;

(iv) A media release dated June 1, 2010 in which the OCG noted that the Contractor-General had launched a Special Statutory Investigation into the Government's proposed divestment of its 45% stake in Jamalco. In respect of this divestment there was a letter also dated June 1, 2010 sent to the Hon Prime Minster Golding MP, Hon Minster of Mining and Energy Robertson MP and Mrs, Alexander JP, Permanent Secretary in the Ministry of Mining and Energy;

(v) Statement to Parliament by Prime Minister RT Hon Patterson PC, QC, MP February 22, 1994 on divestment of government

lands in which he indicated divestments by private treaty would be brought to the attention of the Contractor-General for his prior guidance *(Referred to by Mr. Craig Beresford in his affidavit);*

(vi) Invitation by letter dated May 13, 2003 from the Permanent Secretary of the Ministry of Land and Environment on May 13, 2003 to the then Contractor-General Mr. Derrick McKoy, to nominate two officers to sit on the National Land Divestment Committee.

[52] Counsel submitted that neither the Contractor-General's belief nor the belief of others that the OCG had power to oversee divestments could create that power, which counsel submitted was not granted by the Act. Counsel specifically noted that there was no reference in the Act to either "divestment" or to "corruption".

[53] Returning to the interpretation of the definition section advanced, counsel contended that in interpreting "government contract" it was imperative to examine the meaning given to "contractor" by the Act. There was he submitted no inconsistency if the approach was adopted that "includes" always means "means". He argued that in normal circumstances a licence was not a contract but a permission to do something authorised by the licensing authority. Permits or concessions were therefore not generally speaking contracts but facilities within the power of government that affected the carrying out of works. Therefore in all the instances where the Act brings licences or permits within the purview of its provisions, that goes beyond the ordinary meaning of contract, which was why the definition used the word "includes".

[54] Counsel added another layer to the submission by contending that the use of the word "award" in Section 4(1) whereby the Contractor-General was entitled to monitor the "award" and implementation of government contracts further limited the Contractor-General's remit.

Counsel submitted that the use of "award" in this context contemplated a situation of tender and an award of contract that flowed from a tender. In the instant case, the sale of the Hotel was achieved by negotiations between the parties and therefore it was submitted, as a matter of law, it could not be said that there was an "award" of contract.

[55] Further the contract of sale had been completed and the Hotel transferred; there was therefore no question of the Contractor-General monitoring the contract. Monitoring a contract was relevant in situations where performance of the contract was ongoing, for example, the construction of a housing development or a road, which would take several months to be concluded.

[56] Counsel contended that the word "award" as used in sections 4 and 15 of the Act ought to bear its technical meaning as used in the process of the tender of contracts and award of contracts. The text ***Tendering For Public Contracts: A Guide to Small Business***, 4th edn., (a publication of the Office of Government Commerce UK) at pages 10 – 11, was cited, where the authors state that the bidding process involved:

(i) Defining the procurement strategy;

(ii) Pre-Qualification;

(iii) Inviting Tenders;

(iv) Evaluation and refining tenders;

(v) Awarding the Contract;

(vi) Putting the contract in place;

(vii) Contract terms and conditions;

(viii) Managing the contract;

(ix) Reviewing and testing;

(x) Feedback.

[57] Also at page 11 under the heading, “Awarding the Contract” the following is stated:

> The public sector organization then states who it intends to award the contract to. This will be the supplier whose bid offers the best value for money. There will then follow a standstill period where suppliers can ask for feedback on the award decision and finally, the contract is awarded to the supplier whose bid offered the best value for money.

[58] Additionally the website *www.businessdictionary.com* was cited. It defines contract award to be the:

> project’s owner’s notice to a bidding contractor of the acceptance of the submitted bid. Also called award of contract.

[59] Counsel further relied on two authorities to support the contention that the Act read in its context required that the word “award” should be given the technical meaning advanced by the applicants. Firstly, in ***Unwin v Hanson*** [1891] 2 KB 115 at page119, Lord Esher stated:

> [I]f the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in common and ordinary usage of the language. If the Act is one passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or that transaction knows and understands to have a particular meaning then the words are to be construed as having that particular meaning though it may differ from the common or ordinary meaning of the words.

[60] Counsel submitted this principle of interpretation was applied in the second case he relied on, ***Fisher v Bell*** [1961] 1 QB 394. In that case the issue concerned the meaning of the phrase:

> offer for sale or lends or gives to another person
>
> a. any knife which has a blade which opens automatically

b. ….,

A shopkeeper having displayed a knife in his shop window the issue was whether or not the knife was being "offered for sale". The court limited the meaning of an offer for sale to that applicable in the law of contract where items placed in a shop window are considered to be an "invitation to treat" and not an "offer of sale".

[61] Counsel therefore submitted that there was support for the word "award" to be construed in the manner advanced by the applicants. If that construction was upheld, the respondent would have no authority to pursue the investigation in relation to the sale of the Hotel as the sale was not by virtue of a bidding process or through an award of contract; the processes over which it was being contended the Contractor-General was granted jurisdiction.

[62] Returning to the question of the Contractor-General's investigation under Section 15, it was submitted that the sale of the Hotel did not fall under any of the categories listed at a-f of Section 15 (1) of the Act. There was no issue of the registration of contractors; there was no issue of any tender procedures being carried out; there was no issue of any award of a contract which would naturally flow from such tender proceedings and there was in fact, no government contract, as defined under the Act. In the instance of the sale of the public interest in the Hotel there was no issue of any grant, issue, use, suspension or revocation of any licence. It therefore followed, counsel contended, that the Act was wholly inapplicable to the sale of the Hotel and as a consequence, the Contractor-General was not entitled to carry out any investigations relating thereto. Counsel intimated that even though it may be thought that it would be useful or even highly desirable for matters such the sale of the Hotel to be subject to the purview of the OCG, the issue at present was, "what did the Act actually authorize?"

[63] Counsel received support for these latter and earlier submissions, in the judgment of Wolfe J (as he then was) in ***Ashton George Wright vs. Telecommunications of Jamaica Limited*** [1989] 26 JLR 411. The relevant facts of that case were that (TOJ) purchased two (2) parcels of land for a price of $49,189,200.00 from Development Properties Limited, a company controlled by the Chairman of TOJ. The then Contractor-General (Mr. Ashton Wright) sought to investigate the contract. TOJ refused to provide any information, and asserted that the Contractor-General, Mr. Wright, did not have the requisite authority to investigate the contract. The Contractor-General applied by Originating Summons to the Supreme Court to have certain questions determined, namely: (a) Whether TOJ was a public body; (b) Whether the agreement by TOJ for the purchase of the two (2) parcels of land was a government contract within the purview of the Contractor-General's Act; (c) Whether the Contractor-General had jurisdiction in relation to the contract pursuant to the Contractor-General's Act.

[64] Wolfe J found that TOJ was in fact a public body. On the issue as to whether the contract to purchase the two (2) parcels of land was a government contract, Wolfe J held that it was not. The learned judge found that the statutory definition of the term "government contract" created a distinction between the contracts entered by government *per se* and contracts entered into by public bodies being organs of government. His Lordship concluded:

> Not only has Parliament created a distinction between government per se and public body, but it has limited the agreements entered into by "public body" which may be regarded as a "government contract" by adding the words "for the carrying out of building or other works or for the supply of any goods or services.

[65] Further in considering the investigative powers of the Contractor-General under Section 15 of the Act, at page 414 letter H – I Wolfe J concluded that:

> A careful examination of Section 15 reveals that the Section is designed to deal with contracts which are in the nature of public works. Firstly, it speaks of the registration of contractor, then it speaks of the tender procedures relating to the award of contracts, then it refers to the actual award of government contracts, and finally of the implementation of the terms of any government contracts which are awarded.
>
> In particular, contracts between [TOJ] and [the seller] none of the elements referred to in paragraph 15 (1) (a)-(f) inclusive is present. Section 15 (1) (a)-(f) describes and limits the areas which are subject to investigation by the Contractor General.

[66] Counsel concluded that ***Wright's*** case clearly supported the applicants' contention.

[67] Accordingly, based on all the analysis outlined, counsel submitted that the Contractor-General:

(i) was not empowered under the Act to carry out any investigation in relation to the purchase and/or sale of land which is owned by the Government of Jamaica, or public bodies or entities or any agency of the Government.

(ii) was not entitled to carry out or to take any action pursuant to the Act in relation to the sale of the Hotel; (the Hotel having been owned by ANDCo, a public body or entity as outlined in the background)

(iii) was not entitled to carry out or continue any "special investigations into, inter alia, the allegations of secret talks, discussions and/or negotiations which concern the sale of the Sandals Whitehouse Hotel …"; and

(iv) was not entitled to issue the letter dated June 20, 2012 which sought to obtain information which touches and concerns the sale of the said Hotel.

[68] In the premises it was therefore submitted that the applicants had arguable grounds for judicial review, which have a realistic prospect of success and that there was no discretionary bar preventing leave being granted.

The Submissions of Counsel for the Respondent

[69] Mrs. Jacqueline Samuels-Brown QC, counsel for the respondent, in opposing the application submitted that the applicants did not have a case fit for further consideration on a full hearing or which was likely to succeed.

[70] In respect of the definition of "government contract" being defined to "include" certain contracts specified therein, counsel submitted that it is trite law that where a definition sets out what may be included in the definition; it does not thereby purport to be exhaustive. The word was to be given its natural meaning with such additions or extensions of that meaning as were incorporated by the specific inclusion.

[71] Counsel cited ***George Robinson v The Local Board for the District of Barton Eccles et. al. (1883) 8 AC 798*** in support of the proposition that an interpretation clause that extends the meaning of a word does not take away its ordinary meaning. At page 801 Lord Selbourne said: *"An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular and natural sense, whenever that will be properly applicable but to enable the word as used in the Act... to be applied to some things to which it would not ordinary be applicable".*

[72] Counsel continued that the effect of the inclusion of specific concepts or things was not, as said by Lord Coleridge in ***London School Board***

v. Jackson (1881) 7 QB 502 at 504, so as *"to prevent the operation of the word in its primary and obvious sense"*. Further in ***Nutter v Accrington Local Board (1879) 4 QBD 375*** where the court had to consider an interpretation which provided that *"street"* shall apply to and *"include any highway not being a turnpike road."* the Court held that the effect of the inclusion was to enlarge and not to restrict the meaning of *"street."* Therefore as Cotton LJ said at page 385, *"that which in ordinary language is properly a street does not cease to be so because it is part of a turnpike."*

[73] Applying those principles to the instant case counsel noted that the Act may incorporate into the meaning of the word, "contract" arrangements for which the exchange of "consideration" do not arise. For example, it may incorporate entirely gratuitous gifts, permits, concessions or other "arrangements" for the supply of goods and services which were not *stricto sensu* contractual.

[74] Counsel noted that this principle was acknowledged in the ***Wright*** case where Wolfe J after referring to the case of ***Ex parte Ferguson (1871) LR 6 QBD 280*** which was approved by the Privy Council in the case of the ***Guantlett (1872) LR 4 PC 184*** stated: *"Acting upon the aforesaid principle of interpretation* ***all contracts*** *entered by Government would be caught by the definition of government contract."* (counsel's emphasis).

[75] Counsel found it inexplicably that having accepted that principle and adopted that definition, Wolfe J went on to find that in the particular context of that case, the particular contracts under consideration whereby the Government was buying land from the defendant did not fall within the ambit of a government contract. Counsel therefore submitted, with respect, that the conclusion reached by Wolfe J was against the very principle which he had embraced and ought not to be followed by a court of concurrent jurisdiction.

[76] Concerning the meaning and application of Section 15 which gives the Contractor-General power to investigate, counsel submitted that Wolfe J fell into error because he failed to recognise that the powers granted to the Contractor-General by virtue of Section 15 of the Act are disjunctive, discreetly separate and not contingent on each other. Hence, counsel argued Section 15 (1) (d), which empowers the Contractor-General to investigate "the implementation of the terms of any government contract", stands on its own.

[77] It was noted that in delivering his judgment at page 414 Wolfe J stated:

> A careful examination of Section 15 reveals that the Section is designed to deal with contracts which are in the nature of public works. Firstly, it speaks of the registration of contractor, then it speaks of the tender procedures relating to the award of contracts, then it refers to the actual award of government contracts, and finally of the implementation of terms of any government contracts which are awarded. (Counsel's emphasis).

[78] Counsel highlighted that the words underlined do not form part of Section 15 (1) (d) and submitted, with respect, therein lay Wolfe J's error. The court was urged to restrict the decision to its own facts and the specific question raised there, or else disregard the case as an incorrect interpretation of the Act.

[79] Counsel pointed out that the cases of ***Unwin v Hanson*** and ***Fisher v Bell*****,** relied on by the applicants, establish the principle that, in interpreting a statute, words used must be interpreted having regard to the aim of the statute and the area of law with which it is concerned. Adopting that principle, it was submitted that the Act, being designed to ensure good governance, probity and to guard against corruption by and of public bodies, a restrictive meaning of "government contracts" would not be in keeping with those aims and considerations. Further, the incorporation of the word "include", was to ensure that it served its

expansive purpose rather than be restricted to contracts in a technical sense.

[80] Counsel further advanced that the case of ***Fisher v Bell*** was instructive as it made a distinction between an "invitation to treat" and a "tender" which is an offer as understood in the general law of contract, and not restricted to business contracts as the applicants contend. Counsel relied on **Stroud's Judicial Dictionary** *(7th edition) London Sweet & Maxwell 2006 Vol.3 at page 2733* where it is stated that *"on a sale by tender, 'a tender ought to be something which takes effect of itself and binds the tenderer in any event.' "*

[81] Turning to the **text, Tendering For Public Contracts: A Guide to Small Business *(4th edition)*** relied on by counsel for the applicants, counsel submitted that it defines and refers to terms in the specific context of business arrangements. That reference is therefore not helpful as, without more, it must be taken to refer to particular contractual arrangements whereby the ultimate contract which the parties decide on is the product of the listed predetermined competitive processes as at (i) to (iv as listed in paragraph 56 supra.

[82] Counsel noted that interestingly, "evaluation and refining of tenders" the process listed at "(iv)" in paragraph 56 would involve some negotiations. Further, proof that the reference was to an award or a decision to enter into a contract based on a competitive tender process was borne out by the extract from page 11 of the text.

[83] Turning to **Jowitt's Dictionary of English Law,** *2nd Edition, London Sweet & Maxwell 1977 Vol.1*, *pages 169-170* counsel noted that in defining "*award",* it states, among other things, *"an award is accordingly in the first place the taking a matter into consideration and awarding judgment on it".* It further provides that*, "any words expressive of a decision, are an award."* The historical origin and devolution of the meaning of the word are traced in **Jowitt's** from

provençal French where it meant; *"to inspect goods, and then to pronounce them good and marketable";* then to, its application to an arbitrators decision; through to its modern day extension, to include *"any words expressive of a decision."*

[84] In the **Webster's College Dictionary**, *2001 Revised Edition*, *Random House New York page 94* counsel noted "award" is defined as follows;

> (1) to give as due or merited; assign or bestow: to award prizes. (2) to bestow or assign by judicial decree: the plaintiff was awarded damages of $100,000.-n. (3) something awarded, as a payment or medal. (4)(a) a judicial decision or sentence (b) the decision of arbitrators on a matter submitted to them.

[85] In addressing the submissions in relation to the NCC and the extracts from their website relied on by the applicants, counsel submitted it should be noted that the NCC deals with a particular process for entering into governmental arrangements, which process does not cover all types of arrangements expressly set out in the definition of contract.

[86] Counsel then broadened her submissions by further submitting that in any event the transaction being investigated by the OCG was not limited to the sale and purchase of land, but, as noted in the Agreement for Sale, includes ***"FF & E"*** which is defined as *"means all furniture, fixtures, fittings, plant and equipment of whatsoever nature belonging to the Vendor and used in connection with the Hotel, whether on the Hotel site or temporarily removed for repair or other works to be undertaken thereon."* Counsel submitted that as it includes or extends to goods as contemplated by Section 2 of the Act and extends beyond realty — the subject matter of the transaction in ***Wright's*** case — there should be no doubt that the Contractor-General would have jurisdiction.

[87] Counsel further contended that the sale having already taken place, what the applicant was seeking leave to have reviewed by the court was the Contractor-General's investigation into, among other things, the implementation of the terms of a government contract which clearly fell within Section 15 of the Act.

[88] Based on her arguments counsel for the respondent submitted that the applicants did not have a case fit for further consideration on a full hearing or which was likely to succeed and so there was no basis for the grant of leave.

The Submissions of Counsel for the Applicants in Response

[89] In response Mr. Small QC submitted that the case of ***Wright*** had stood for twenty-three years and should not be lightly disagreed with. The respondent himself having at various times indicated he was bound by it and at other times seeking clarification from Parliament as to the true scope of his powers given the decision in ***Wright,*** it was appropriate for a full bench to pronounce on the interpretation given in ***Wright*** rather than a single judge at the preliminary leave stage.

[90] Mr. Ransford Braham QC in addressing the cases cited by counsel for the respondent concerning the interpretation of the word "include" in the definition section of the Act, accepted that generally when the word is used it expands the meaning of the word or phrase defined, but that whether in fact it was expansive depended on the interpretation of the particular statute. Therefore as contended in this case, application of the general rule may be restricted by the very statute being interpreted.

[91] In this case he submitted that when considering the meaning of "contractor" it was impossible to divorce the concept of an award of contract from the implementation of a contract and further submitted that an award could only come at the end of a tendering process as reflected in Section 23H of the Act. Additionally he submitted that

based on the definition of contractor, goods and services were expected to flow from the contractor to the Government and not from the Government to the contractor, therefore the argument that the Contractor-General would have jurisdiction because the Agreement for Sale spoke to "FF & E" was unmeritorious.

[92] Concerning the dictionary definitions of "award" counsel argued that the definition in **Jowitt's** spoke to an award in the context of a decision of a tribunal or some quasi–judicial decision which was not the meaning contemplated by the Act and therefore it did not assist.

[93] In respect of **Stroud's**, counsel contended that the Act does not deal with a tender in that respect and in relation to **Webster's,** "award" was not used in the Act in the context used in that dictionary and therefore it too could not assist.

The Analysis

[94] The central question which divides the applicants and the respondent is the scope of the authority granted to the respondent. Is it as the applicants maintain that the respondent has strayed into an area outside of his statutory reach? Do the applicants have a good arguable case with a realistic prospect of success? Or is the respondent correct that, given the aim of the Act, it is inconceivable that an area as critical as divestment of government owned land could fail to be caught by the legislation?

[95] It is perhaps best to start with ***Wright's*** case. Counsel for the respondent submitted that Wolfe J made two fundamental errors that led to a decision which should not be followed. Firstly that he erred in holding that "government contract" did not include a contract for the sale of land. The reasoning employed by Wolfe J on this point has to be carefully analysed. While accepting that the use of the word "include" would ordinarily have the effect of extending the meaning of

the phrase “government contract” to cover all contracts entered into by the Government, Wolfe J found when the full definition was considered, that was in fact not so. He instead held at page 414 that:

> [I] take the view that the introduction of the words 'public body' into the definition of 'Government contract' indicates that parliament intended to create adistinction between contracts entered into by Government per se and contracts entered into by organs which are not purely Government and which are designated 'public body' i.e. organs which do not come within the ordinary and established meaning of Government, but which perform public functions. If this were not so then the words 'or agreement entered into by a 'public body' for the carrying out of the building or other works or for the supply of any goods or services would be superfluous. **Not only has Parliament created a distinction between Government per se and "public body" but it has limited the agreements entered into by a "public body" which may be regarded as "Government contract” by adding the words "for the carrying out of building or other works or for the supply of any goods or services". These words, clearly, do not include a contract for the sale of land.** (My emphasis).

[96] The effect of the ruling of Wolfe J on this point is that, though there is the usually expansive word “includes” in the definition of government contract the other words in the definition that speak to the purpose of government contracts actually have a contrary limiting effect. That type of analysis is reflected in the submissions of counsel for the applicants who advanced the position that in this particular Act, in the definitions which employ the use of the word “includes” it should be read as “means”. At first consideration such a submission would seem to be bold, even novel especially since there was no authority cited where such an interpretation was upheld and particularly since there are some definitions in the Act which use “means” and others which use “includes”. In and of itself that would seem to suggest that Parliament intended some definitions to be expansive and others to be restrictive. Contemplating the purpose of the Act, the submission of counsel for the respondent that expansive definitions were intended when the word includes was used does appear attractive.

[97] On the other hand there are competing considerations which blunt that submission's appeal. The definition of contractor is limited to those who carry out building or other works or supply goods and services. If the definition of "government contract" is meant to be wider than and not to correspond to and be necessarily linked with "contractor", that means there would be contractors caught by the Act who were not defined as such under the Act.

[98] Further it is noticeable and conspicuous that while nowhere in the Act is there any mention of divestment or contracts for the sale or purchase of land involving government or public bodies, an elaborate regime is outlined to identify contractors and to guide step by step the process for the engagement in contractual relations between government or public bodies and prospective contractors, where public works and the supply of goods and services are concerned. This fact did not escape Wolfe J in ***Wright*** and no doubt influenced his findings concerning the scope of the Act. At the end of his judgment at pages 414-415 Wolfe J stated:

> En passant I wish to observe that a keen reading of the Act clearly indicates that Parliament in promulgating this Act has only addressed the question of contracts which are in the nature of public works e.g. building contracts and the supply of goods and services to Government. It might very well be that Parliament intended otherwise but I make bold to say that if this was the intention it has not been achieved by the present legislation.
>
> The public interest demands that contracts such as the instant one should come within the ambit of the Contractor-General Act.

[99] The decision of Wolfe J cannot therefore on this first point be said to have been arrived at without any discernible basis in fact or law. This view is expressed while the court remains very aware of the contrary

view that nothing specific would need to be said about transactions that fall within the natural meaning of contract.

[100] The second point on which counsel for the respondent intimated that the learned judge fell into error was in holding that the investigation of the implementation of the terms of any Government contracts was limited to those which had been "awarded". The necessary implication of the submission of counsel for the respondent is that, as the different investigative actions under section 15 were disjunctive, the question of an award was not necessarily linked to contracts the implementation of which were sought to be investigated.

[101] Based on Wolfe J's interpretation of the Act however, in his view Section 15, (certainly (a) – (d) based on the processes he mentioned), was designed to deal with contracts in the nature of public works. If that interpretation was and is correct, then indeed it would be expected that an award process would have taken place. This would also be in keeping with the learned Judges' overall interpretation of the scope of the Act earlier referred to.

[102] If that approach is correct the various submissions on the meaning of the word "award" would seem to be moot. Counsel for the applicants sought to suggest that it had to be given a technical meaning in keeping with the process of tender and the award of a contract as the outcome of that process. Conversely, counsel for the respondent sought to show that the word should be understood in a less technical sense to include a decision arrived at during a negotiated sale such as occurred in the instant case. If the Act were to be held to cover all government contracts then of necessity "award" would have to be understood in the broader context as suggested by counsel for the respondent. If as submitted by the applicants the Act is restricted in its scope as held by Wolfe J then the narrower technical meaning would be indicated. In this instance the meaning of the word does not assist to define the scope of the Act. Rather it is a definition of the scope of

the Act, the entire Act having been considered, including the way in which the word award is used and the need for internal consistency in the legislation, that will yield the true meaning to be ascribed to "award."

[103] There are a number of other considerations. It would in the view of this court be highly artificial to seek to distinguish and confine ***Wright*** to its own facts on the ground that Wright concerned the **purchase** of land while in the instant case the transaction was a **divestment** or **sale** of land. The court however recognises that just such a strict approach has been relied on by the Contractor-General to ground his jurisdiction in the matter. That this is the approach embraced by the OCG is revealed by a media release dated November 11, 2008[1] in which the OCG advised that it was legally impeded by the decision in ***Wright*** from investigating the purchase of Ferry lands by the UDC. That release however went on to state at page 2 that:

> The decision in ***Wright*** has prevented the OCG, since 1989, from ensuring probity, transparency and accountability in transactions which involve the purchase of land by Public Bodies. Further, although the case did not concern the divestment of State assets a number of attempts have been made, over the years, to expand the purview of the decision in an effort to obstruct the OCG from monitoring and investigating such transactions. However based upon a strict interpretation of the decision in ***Wright***, the OCG has strenuously and consistently resisted all such attempts. (Emphasis added).

[104] Notwithstanding the adoption of that position the respondent has recognised that that approach is not without its difficulties. In the Contractor-General's Annual Report for 2006[2] tabled in the Houses of Parliament, the respondent acknowledged that the question whether or

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[1] Please see ***Legal Impediments Prohibits Contractor General From Conducting Investigation Into Purchase of Ferry, St. Catherine Lands by the Urban Development Corporation*** available at www.cg.gov.jm/website_files/media_releases_issued/media66.pdf.
[2] Available at www.ocg.gov.jm/website_files/annual_reports/annual_report_2006.pdf.

not the sale or divestment of land by a government body is a "government contract" was, not free from doubt. At pages 19-20 the respondent said:

> …there is one issue which has been impeding the work of the OC-G as it pertains to ensuring scrutiny, transparency, probity and value for money in Government land transaction matters.
>
> In the 1989 case of Wright v Telecommunications of Jamaica, Mr. Justice Wolfe (as he was then) found that a contract for the purchase of private lands by a Public Body was not covered by the Contractor General Act. It is however instructive to note that Mr. Justice Wolfe himself in the same case opined that the public interest demands that contracts such as the instant one should come within the ambit of the Contractor General Act."
>
> Be that as it may, and although Wright did not involve the sale or divestment of publicly owned lands, the decision has however raised the question as to whether Government land or asset divestment transactions were intended by the legislature to fall within the purview of the Contractor General Act…
>
> The situation which has created somewhat of a dilemma for the OC-G was highlighted in the OC-G'S 2004 Annual report and was accompanied by an urgent plea for the cabinet and the legislature to remedy the problem. The obvious solution is to remove the supposed anomaly from the Act. However, to date, no action has been taken…

[105] Despite the acknowledgment of some doubt concerning the scope of the Act, in an open letter to the Prime Minister, The Most Hon. Portia Simpson-Miller, MP, ON and the Leader of the Opposition, The Hon. Andrew Holness, MP dated September 12, 2012[3], the OCG revealed that it had been emboldened to adopt the view that the Contractor-General possesses jurisdiction to monitor divestments by virtue of a legal opinion received in 2000. In that letter in which the respondent also repeated his invitation for there to be legislative intervention to remove all doubts concerning *inter alia* whether contracts for the divestment of land by government bodies fall within the respondent's purview, it was stated:

[3] Available at www.cg.gov.jm/website_files/media_releases_issued/media275.pdf

> …The monitoring and investigation of the State's divestment of assets has been an extremely critical area of the OCG's work for the past several years, and has been certainly so prior to my own appointment, in December 2005, as the incumbent Contractor General. Indeed, it was during the currency of a previous Contractor General, that the OCG had, in January 2000, secured a written Legal Opinion from one of Jamaica's most respected Attorneys, Dr. the Hon. Lloyd Barnett, which held that the OCG does in fact have the referenced jurisdiction.
>
> The need for the Legal Opinion had arisen, at the time, because the OCG's oversight of the State's then ongoing divestment of the Donald Sangster International Airport, by National Investment Bank of Jamaica (NIBJ), had been called into question…
>
> …the overarching question is … (b) whether it is your desire that the OCG should possess the lawful authority, under the Contractor General Act, to independently monitor and investigate the pre-contract phases of Government contract awards, and/or the divestment of State assets, without hindrance or obstruction.
>
> Irrespective of what your decision is, I would respectfully submit that the Government and the Parliament should forthwith take the requisite steps to effect the necessary amendments to the Contractor General Act, to lucidly and unequivocally reflect that decision.

[106] Regrettably this court has not had the benefit of viewing the opinion referred to. However in the view of this court, in any event, it would be highly undesirable for a definitive statement on the correctness or otherwise of the decision in ***Wright*** to be made at this the leave stage. The arguments of counsel and the above analysis reveal contentions of some merit on both sides of the divide. For whatever reason, the decision was not appealed. Parliament has also in its wisdom, despite the clear recommendation in the judgment and the repeated entreaties of the Contractor-General, declined or omitted to revisit the legislation to enlarge its scope or clarify its intention regarding that scope.

[107] The upshot is that at the time of writing ***Wright*** is still good law and has been for the last 24 years. Further as this court has indicated if the analysis in ***Wright*** is correct this court is of the view that the decision would necessarily also prohibit investigations by the OCG into divestments of State assets. Counsel for the applicants noted in his submissions, and this court agrees, that there may be very good reasons in the public interest for such transactions to be captured by the Act. Counsel however submitted they were not so included. This court at this the leave stage finds that there remains doubt concerning whether or not they were included.

[108] The fact that the Agreement for Sale also dealt with FF & E was relied on by counsel for the respondent as grounding the investigations separately from the contract for the sale of land. Therefore it was submitted on behalf of the respondent that even if the sale of the land was not captured the sale of the FF & E was clearly subject to the jurisdiction of the Contractor-General. It is manifest however that the two go together and that there would have been no sale of FF & E if there had been no sale of the Hotel. The investigations into the sale of the FF & E would be inextricably intertwined with the investigations into the sale of the Hotel. Further the view of the legislation advanced by counsel for the applicants is that the scheme contemplated by the Act is for goods and services to flow to the government from contractors and not for the government to be supplying those to contractors. The interpretation of the Act again is critical here. If the submission of counsel for the applicants is correct, and it is by no means pellucidly clear that it is manifestly incorrect, even the sale of the FF & E on its own would not be caught by the Act.

[109] There is therefore on several levels, clear uncertainty as to the scope of the Act. The interpretation of the Act in ***Wright*** and what this court finds would be the extension of the decision by necessary implication to divestments, are not without some plausible foundation. The contrary view especially from a public interest purposive interpretation

standpoint also enjoys some currency. I agree with counsel for the applicants that at this stage what is required is not a final determination of the issues. That is not the duty of a court at the leave stage where this level of uncertainty exists. In any event attempts at finality at this point would be undesirable especially if the correctness of ***Wright*** decided in open court, were to be doubted at the leave stage in chambers, in a context where another court of concurrent jurisdiction could equally disagree with this court.

[110] This is a matter which a full bench should pronounce on. It is an appropriate case to go forward for a full hearing. Given its high public importance, such a full hearing should be afforded priority on the courts hearing list. On this critical matter of public interest, I therefore hold, applying the test in ***Sharma,*** that the applicants have a good arguable case with a realistic prospect of success.

THE CONTESTED PROCEDURAL ISSUES

Was the application made within time? If not should the applicants be granted an extension of time?

The Submissions of Counsel for the Applicants

[111] The submissions on behalf of the applicants on the issue of the timing of the application were advanced by Mr. Ransford Braham QC. He acknowledged that CPR rule 56.3 (3) (f) requires the applicant to state whether any time limit for the bringing of the application has been exceeded and if so, why. CPR rule 56.6(1) requires an application for leave to be made promptly and in any event, within three (3) months "from the date when grounds for the application first arose".

[112] In relation to the letter dated June 20, 2012 which required the applicants to respond to requisitions/questions under the threat of prosecution, counsel submitted that the Notice of Application and

supporting affidavit having been filed on 7 September 2012 the application had been made within time. This based on the applicants contention that the letter dated June 20, 2012 was capable of being the subject of judicial review (see **Judicial Review Handbook** *Fordham 5th Edition (2008) page 45 para. 5.1)*.

[113] Counsel however further acknowledged that it could be argued that although the application relating to the letter was made within three months, the application was however not made promptly. Counsel submitted that the court ought not prevent the applicants from proceeding on this ground, because there was no evidence to show that, even if the applicants did not act promptly (within the three months), that the Contractor-General or any person would suffer any hardship or prejudice consequent on the applicants' failure to act sooner and assuming the applicants would succeed at a full hearing. Counsel cited Wade & Forsythe the learned authors of **Administrative Law** *(9th Edition*) pages 658-660 as follows:

> The claim must be made "promptly" which means that in appropriate cases there may be "undue delay" even when brought within the three-month limit. These cases are, primarily, in where a successful claim would cause "substantial hardship" or "prejudice the rights of any person" or "would be detrimental to good administration". But the House of Lords has said that the possibility of "undue delay" within the three-month limit may be productive of unnecessary uncertainty and practical difficulty.
>
> Success in resisting a claim on this ground is likely to be rare.

[114] Counsel submitted that in the context of this case the application was made promptly as, having received the letter, the applicants at first indicated that they were minded to cooperate and requested extra time, given the fact that the 2nd applicant had a programmed trip. The second affidavit of the 2nd applicant further outlined that, for a part of the time he was away, it was for surgery. Having returned, the 2nd

applicant spoke to some persons concerning the issue of whether or not the respondent had jurisdiction to issue the letter of requisition and having sought legal advice on that matter, commenced the application on September 7, 2012.

[115] Counsel however acknowledged that the applicants were aware that, the Contractor-General in his letter dated 20th June 2012 indicated that by letter dated 13th December 2010 he requested information from the Cabinet Secretary. That could raise the inference that the special investigation commenced on or around December 2010. However, counsel went on to point out that the first paragraph of the letter of June 20, 2012 from the OCG indicated that:

> *The Office of the Contractor General (OCG), acting on behalf of the Contractor General, is continuing its Special Investigation into, inter alia, the allegations of secret talks, discussions and/or negotiations which concerned the sale of the Sandals Whitehouse Hotel, which was a public majority owned asset, to Gorstew Limited.*

[116] At paragraph 9 the letter continued in these terms, *"As we will require your assistance and full cooperation to successfully prosecute this investigation…"* The letter went on to outline the relevant sections of the Contractor-General's Act and then to list the requisitions for response.

[117] Those excerpts and other language used in the letter showed, counsel submitted, that the special investigation was a continuing one that had been extended to include the applicants. Counsel argued the OCG's letter dated June 20, 2012 demonstrated that the special investigation did not initially include the applicants. It was therefore pursuant to this letter that the applicants were brought within the purview of the special investigations. Consequently, counsel maintained the letter of June 20, 2012 represented a new decision that could be made the subject of judicial review.

[118] Counsel also referred to paragraphs 27 and 29 of the Affidavit of Craig Beresford which was filed on behalf of the respondent in response to

the two affidavits of the 2nd applicant in support of the contention that the investigation was an ongoing one. The paragraphs are reproduced below:

> 27. In relation to paragraph 10 of the 1st Affidavit, it is to be noted that because an investigation is an ongoing process, whereby material and information is revealed or comes to the investigators' attention over time, the need to include different parties or take into account additional factors is a dynamic one.
>
> 29 The failure or the delay of the 2nd Applicant in responding to our Requisition is likely to result in the investigation not being completed. The process of investigation is that we assess each response to the Requisitions in order to clarify issues, among other things. Several persons who have been issued Requisitions have made reference to the 2nd Applicant and, therefore, it is imperative that we have a response from him to the Requisition. Based upon his response, we will be able to correlate the information, determine if anyone has mislead us and then prepare our report and recommendation and submit same to the Parliament of Jamaica.

[119] Counsel submitted that precisely because of the continuing nature of the special investigations and its extension to the applicants, the applicants had applied for an order of prohibition in the following terms:

> *5.* An order of prohibition prohibiting the Contractor General from taking any steps to compel or require the Applicants to comply with and/or respond to the said letter or any question or direction contained therein…
>
> 7. An order of prohibition prohibiting the Contractor General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

[120] Having regard to the continuing nature of the special investigation, its extension to include the applicants and the application for an order of

prohibition, it was submitted that the court should therefore not rule that the application was out of time. Counsel relied on ***DYC Fishing Ltd v Minister of Agriculture*** [2003] 67 WIR 154. In that case the appellants alleged that licences under the Aquaculture Act were issued in contravention of that law. The Court of Appeal in reversing the decision of the Supreme Court held that, as the licenses in question were issued on an annual basis and were coming up for renewal the appellant was not out of time, even though the application was made more than one year after the initial grant of the disputed licenses. As Smith JA noted at page 198, *"Certiorari is available to quash an "act" already done. However, prohibition is available to prevent future unlawful acts or to stop a continuing unlawful act. Thus, as counsel for the appellant submitted, prohibition may go to prevent the imminent renewal of licences which would stop the continuing unauthorized issue of export health certificates and certification of products for export."*

[121] Also of note is that in interpreting section 546D (1) of the Civil Procedure Code, which was in largely the same terms as its replacement CPR rule 56.6(1) the court held that judicial review is a constitutional right linked to fundamental rights by reason of the relationship of Section 1 (9) of the Constitution of Jamaica to s. 20 (2) [now s16(2)][4] of the Constitution; accordingly, s 546D (1) in dealing with the time within which applications for judicial review must be made, must be read in conformity with the requirement of reasonable time specified in s 20(2) [s 16(2)].

[122] Counsel also cited the **Judicial Review Handbook** page 276 para. 26.2.7 where numerous cases are noted which hold that the continuing nature of disputed acts would often operate to justify a finding that leave should not be refused on the ground of undue delay.

[123] Counsel supplemented his submissions on this issue with another arrow from his quiver. In the alternative, in the event the court were to

[4] This is the new section in the amended Constitution that incorporates the Charter of Rights which came into force April 8, 2011.

hold that the time limited for applying for judicial review had expired, counsel submitted that an extension of time ought to be granted.

[124] Counsel noted that CPR rule 56.6(5) provides that:

> When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -
>
> (a) cause substantial hardship to or substantially prejudice the rights of any person; or
> (b) be detrimental to good administration.

[125] Counsel cited **Judicial Review Handbook** page 278 para.26.3.2 where the basis for the grant of an extension of time as declared by Kay J in ***R v Secretary of State for Trade & Industry ex p. Greenpeace*** [2000] Env. LR 221 at 261-264 is summarized as follows:

> "(i) Is there a reasonable objective excuse for applying late?; (ii) What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?; (iii) In any event, does the public interest require that the application should be permitted to proceed?"); R v Warwickshire Country Council, ex p Collymore [1995] ELR 217, 228F-G ("it is … for the [claimant] to establish that there is good reason for time to be extended"); R (Rayner) v Secretary of State for the Home Department [2007] EWHC 1028 (Admin) [2007] 1 WLR 2239 (Admin CT) at [90] ("once there has been appreciable delay, for instance in obtaining public funding, then a litigant and/or his lawyers must act with particular promptitude thereafter").

[126] Counsel submitted there were good reasons for the applicants to be acting at this stage which included the fact that:

a. The special investigations did not include the applicants initially and hence the applicants were not required to take any action prior to the OCG's letter dated June 20, 2012.

b. The applicants initially decided to comply with the investigation because neither was of the view that they had done anything improper or unlawful in relation to the sale of the Sandals

Whitehouse Hotel. Additionally, the applicants had no reason to believe that the respondent did not have the jurisdiction to investigate that sale. In order to facilitate the process, the applicants sought an extension of time to comply with the requisitions, and while in the process of taking steps to comply with the requisitions, the view came to the applicants' attention that the respondent did not have the power to issue the requisitions or continue the special investigations. This prompted the 2nd applicant to seek legal advice firstly from Mr. Trevor Patterson and then from Messrs. Hugh Small, QC and Ransford Braham, QC. It is for these reasons that the application for permission to commence judicial review proceedings was filed on September 7, 2012.

[127] Further counsel submitted that an extension of time would not cause any hardship or prejudice to the Contractor-General or any other person. There was, counsel argued, also no evidence of any detriment to good administration which would be occasioned by the grant of an extension of time if necessary.

[128] Counsel went further to advance the contention that in any event even if the applicants' explanation was unacceptable, an extension of time ought to be granted because the issues raised in the application are matters of general public importance. Reliance was placed on the case of ***R v Home Secretary, Ex p. Ruddock*** [1987] 1 WLR 1482 where leave was sought for judicial review to obtain a declaration that a warrant to intercept the communications of the applicant had been improperly obtained in December 1983. The applicant's suspicion that his phone had been tapped would have been expected to have arisen in March 1985 after certain disclosures made on a television programme by M a former MI5 officer. His application was however not made until July 29, 1985, after the three month period prescribed for making such application. The application was made after M had sworn an affidavit in July 1985 in which it was alleged the warrant had not been issued pursuant to established criteria. The delay in M swearing

her affidavit was due in part to her having undertaken some retraining for a new occupation, having left her former employment, and her stated desire to be cautious in the drafting of the affidavit. On the issue of delay at page 1485 the court stated that:

> Clearly, before the television programme, the applicant had and could have had no suspicion that a warrant to tap his phone might have been signed in 1983. I therefore think it is plain that on the question of delay, there was good reason for no application being made before March 1985. However, proceedings were not brought until 29 July 1985, so the further delay is in itself well over the three months maximum prescribed in R.S.C., Ord. 53 R 4. 4. It is said to be due to Miss Massiter's involvement in retraining as a gardener and her anxiety to be cautious in the drafting of her affidavit, which was not sworn until 12 July 1985. I have seriously considered what effect I should give to this further delay. I am unimpressed by the reasons for it. But I have concluded that since the matters raised are of general importance, it would be a wrong exercise of my discretion to reject the application on grounds of delay, thereby leaving the substantive issues unresolved. I therefore extend time to allow the applicant to proceed.

[129] Applying ***Ex p Ruddock*** to the facts of the instant case counsel submitted that, if necessary, time should be extended to allow the application to proceed as the matters raised are of general public importance. He noted that the present case concerns the interpretation of the Contractor-General's Act, and specifically whether a contract for the sale of land by a government body is a "government contract" for the purposes of the Act. It was contended that in view of his recent public statements the respondent had seemingly accepted that there was uncertainty as to the scope of his Commission in relation to this issue. Counsel pointed to the three published statements previously referred to during the analysis of the substantive issues conducted earlier in this judgment.

[130] Counsel submitted that the respondent's own media releases and Report to Parliament revealed the public importance in having a judicial determination of whether a contract for the sale of land by a government body is a "government contract" particularly in the

continued absence of the legislative intervention recommended by the respondent. If such a matter of public interest and controversy which was of concern to the Contractor-General was left unresolved that would be to the detriment of good public administration and the applicants.

[131] Accordingly, counsel submitted, the issues of law that have arisen require final determination and therefore the court ought to grant an extension of time if thought necessary. (See **Judicial Review** *De Smith para 16-054*.)

The Submissions of Counsel for the Respondent

Delay

[132] Counsel submitted that the applicants had not acted promptly and were not entitled to the grant of leave. Counsel noted that the applicants had acknowledged that pursuant to CPR rule 56.6(1) though three months was the cut off time, filing an application within three months did not provide a panacea or cure all for failing to act promptly. Counsel submitted that despite the concern that a finding that there was a lack of promptness where an application was filed within three months would cause difficulty and uncertainty that was the law which had to be applied if the circumstances so warranted.

[133] Counsel cited ***R. v. Independent Television Commission, Ex Parte TV NI Ltd and Another (1991) The Times 30 December*** which surrounded the refusal by the Independent Television Commission to grant a licence to the applicants. Other companies were granted the licence, and this was announced on the 16th October 1991. The applicants did not seek leave until the 4th December 1991. They operated under the belief that they were (a) awaiting reasons for the refusal (b) the fact that another company was refused leave and (c) uncertainty in the matter. Lord Donaldson of Lymington MR in refusing leave stated "*it had been stated in the press that all applicants had*

three months in which to apply for leave to move for judicial review. That was not correct. In such matters which could affect good administration, had to act with utmost promptitude since many third parties were affected. The present applicants had not done so".

[134] Counsel thus submitted that the applicants herein were required to act as soon as they became aware of the investigations in January 2011 and were not at liberty to wait until they received the Requisition. This especially as they were aware of the respondents prior investigations into the "joint venture" agreement in relation to the construction of the Hotel. The applicants it was contended had not acted promptly having only sought leave to apply for judicial review some two months and 3 weeks after the Requisition and some one year and nine months after first becoming aware of the investigations.

[135] Counsel pointed out that the issue of delay on the part of the applicants was raised by Hibbert J when the matter was first scheduled for hearing on the September 11, 2012, which led the 2nd applicant to file a second affidavit seeking to explain that delay. It was argued that the explanation proffered was inadequate. In summary that explanation was that the 2nd Applicant had stated that on his return to Jamaica after a visit to the United States of America for surgery he spoke to two other persons who had received Requisitions and they indicated that they were voluntarily responding to same even though they were advised by their Attorney-at-law that the Contractor-General was acting ultra vires his powers.

[136] Counsel continued that it was clear on the evidence that even prior to the Requisition being issued, the applicants had the benefit and the availability of advice from Patterson Mair Hamilton, Attorneys-at-Law who represented them i) in the negotiation and sale of the Hotel, ii) at the time of their press release welcoming the investigations and iii) at the time the Requisition was issued. Counsel indicated that while the affidavit evidence is that the 2nd applicant sought the advice of his Attorney at-Law who then sought the opinion of Messrs. Hugh Small

QC and Ransford Braham QC, but, significantly, omitted to give the dates when these attorneys were consulted and therefore had failed to provide the court with material to justify the delay.

[137] Counsel maintained that the concern of the applicants regarding whether the Contractor General had the power to issue the Requisition in relation to the sale was the very reason they ought to have acted with promptitude.

[138] Counsel submitted that the conduct of the applicants had resulted in a delay in completing the OCG's investigations; further, that if the application for leave was granted, it would likely stymie or prevent the investigations from being completed which would be detrimental to good governance and administration. Counsel cited in support ***The Queen (Catt) v. Brighton and Hove City Council, Brighton and Hove Albion Football Club [2007] EWCA Civ 298*** concerning how delay can affect good administration and visit hardship and prejudice on a respondent or third parties. Phil LJ stated that in assessing delay, the court will look beyond the time or the date when the decision being challenged was given where there is evidence of prior knowledge of relevant facts on the part of the Applicant. Further, a delay post decision which is likely to be detrimental to good administration will adversely affect the applicant's chances of success.

[139] Accordingly, it was submitted that the applicants had not acted with promptitude and had failed to provide the court with any good reason for their delay. In summary counsel submitted this was manifest as:

(i) The applicants were alerted to the Contractor-General's investigation even before the Requisitions were directed to them. As far back as January 2011, they would, to a probability, have been aware that there conduct in relation to the purchase was under scrutiny and their reputations thereby potentially affected.

(ii) The applicants had had the benefit of legal representation from the outset.

(iii) The applicants made a calculated and conscious decision not to comply with the Requisition.

(iv) When offered a further opportunity to explain their delay the applicants failed to provide timelines, dates and particulars that could assist the court in a clinical and objective assessment.

(v) The applicants had offered up reasons for the delay which were not entirely in harmony with each other.

Extension of time

[140] On the question of an extension of time in the event it was found that the applicants were out of time it was submitted that for the reasons that their delay was unjustified, an extension of time would not be appropriate and ought not to be granted.

[141] Further counsel pointed out that CPR rule 56.6(5) states: "*when considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to-(a) cause substantial hardship to or substantially prejudice the rights of any person; or (b) be detrimental to good administration.*

[142] Counsel argued that on the face of it, the answers to the Requisitions would assist and guide further investigations and enquiries. Delaying the investigations would therefore cause substantial hardship negatively impacting the role of the OCG as an anti-corruption body and compromising good administration, as the findings would likely have implications for government policy relative to similar and related transactions.

Uberrimae Fides

[143] Counsel further submitted that the applicants had breached the rule that an applicant for leave to apply for judicial review must give full and frank disclosure and not be elusive or evasive. Counsel cited ***The Queen on the Application of I v Secretary of State for the Home Department*** 2007 WL 4176289 and ***O'Reilly and Others (A.P) v Mackman and others*** [1983] 2 AC 237. In the first case the applicant sought judicial review of the decisions of the Secretary of State refusing to treat certain representations as fresh asylum and human rights claims. The applicant initially failed to place before the court his full immigration history including adverse findings of the Asylum and Immigration Tribunal. In refusing permission Collins J noted at paragraph 10 of the judgment that there was ample authority that whether or not there was an arguable claim, a failure to act with candour could result in refusal of permission.

[144] In ***O' Reilly's*** case before the House of Lords Lord Diplock in setting out general principles of law relative to judicial review opined at page 6 of the judgment that parties should avoid knowingly setting out false statements of facts.

[145] Counsel submitted that in breach of the requirement of candor several unanswered questions arose on the application and the reasons put forward for the delay were not entirely consistent with each other. For instance:

(i) Why was the 2nd applicant unable to give instructions to his Attorney-at-Law in a timely manner?

(ii) Was it due to his programmed business trips or his surgery abroad?

(iii) Who were the advisors referred to?

(iv) Who are the mysterious persons to whom he spoke and who raised the issue of the legal limits of the OCG's powers?

(v) When did he speak to these persons?

(vi) When did the applicants happen upon the "adverse position" taken by the respondent relative to previous and related investigations?

(vii) Being aware of the prior investigations, the adverse position taken by the respondent and the findings in relation thereto, why did the applicants not address this concern with the respondent from the outset?

(viii) How is it that on the one hand the applicants were concerned that their reputations could be adversely affected but, on the other hand, took no action until nine months later?

(ix) If their concern was to protect their reputations, would not the Requisitions in fact, give them the opportunity to protect these reputations against adverse inferences and/or conclusions possibly arising from the investigations?

[146] Considering all these factors counsel submitted that there was delay that had not been satisfactorily explained and no extension of time should be given to the applicants to make the application.

The Analysis

[147] It is common ground that the rules governing the application for leave to apply for judicial review require that the application must be made promptly and in any event within three months from the date when the grounds for the application first arose (See CPR rule 56.6(1)). It is also accepted by both sides that acting within three months does not automatically mean that the requirement of promptitude has been met, though the applicants hold the view that it will only be rarely that if action is taken within three months that it will be held not to be prompt. (See **Administrative Law** *(9th Edition) Wade & Forsythe* pages 658-660 previously cited.)

[148] The main bone of contention concerns when the grounds for the application first arose. Were the applicants required to act based on their awareness of and welcoming of the investigations having commenced, both of which occurred by January 2011? Even if the letter on June 20, 2012 was a separate decision, was waiting two months and three weeks after the Requisition to act demonstrative of the applicants acting promptly in all the circumstances?

[149] In relation to the commencement of the investigations in January 2011 and even up to July 4, 2012 when Mr. Trevor Patterson counsel for the applicants wrote to the OCG requesting an extension of time to September 11, 2012 to comply with the Requisition, it is clear on the applicants evidence that they had no intention of challenging the investigations. However, if the applicants are correct that the action of the OCG in investigating the sale of the Hotel is *ultra vires* the power of the Contractor-General, the right to mount the challenge they now do would have crystallized when they first became aware of the investigations. This in particular based on the reputational risk the applicants fear they could suffer based on any report that would be submitted to Parliament arising from the investigations. (See ***Tyndall*** referred to supra). Obviously however no action would have been taken if the applicants did not believe they had either a need or a right to do so.

[150] In the circumstances therefore the applicants have sought to anchor their challenge to the investigations of the OCG on the Requisition sent to the 2nd applicant dated June 20, 2012. This court is attracted by the reasoning in ***DYC Fishing Ltd*** and in the extract from ***Judicial Review Handbook*** page 276 para. 26.2.7, the effect of which is that, where a continuing action amenable to judicial review is alleged to be *ultra vires,* the continuing nature of the action would operate to ensure that the application for leave to apply for judicial review even if made outside three months after the commencement of the action, would still be within time. It should also be borne in mind that while prior to the receipt of the Requisition the applicants would have been exposed to

reputational risk, having received the Requisition the jeopardy increased to the possibility of criminal sanctions for failure to comply. This factor would provide a new and additional basis grounding their application for leave to apply for judicial review.

[151] Counsel for the respondent took issue with the reasons given for the delay submitting that they were inadequate and insufficient especially in light of the fact that the grant of leave at this stage in the investigations, after many persons had already complied with requisitions, would be contrary to good administration. The cases of ***R v Independent Television Commission, Ex Parte TV NI Ltd*** and ***R (on the application of Catt) v Brighton and Hove City Council*** were relied on by counsel for the respondent to show that delay would defeat an application for leave to apply for judicial review where such delay would affect good administration and adversely affect third party rights. However both cases can be distinguished from the instant case on these points. In the ***Independent Television Commission*** case other broadcasters had obtained licences and would have been adversely affected if leave had been granted despite the delay. In the case of ***Catt*** which concerned a challenge to planning permission it was noted at paragraph [52] of the judgment of Pill LJ that *"even when a decision to proceed with a development has been taken at a time when challenge is possible, and work has proceeded, subsequent delay remains capable of causing prejudice to the developer and detriment to good administration"*. In both cases cited, granting leave after a period of undue delay would have prejudiced the interests of third parties and proved detrimental to good administration. It is also accepted as advanced by counsel for the applicants in reply, that in cases involving planning permission such as ***Catt*** courts are particularly sensitive to delay as third parties would usually have already altered their positions in reliance on the permission granted and would be adversely affected if that permission were subsequently held to have been improperly obtained.

[152] On the question of good administration the nature of the challenge has to be considered. No third party rights are affected in the instant case. Rather the challenge concerns the nature and scope of the investigative powers granted to the respondent in an area of vital national concern. In that regard the court is persuaded that even if the finding that there was no delay is wrong, in accordance with the tests laid down in ***ex p. Greenpeace*** and ***ex. p. Ruddock*** time should be extended to permit the application to proceed.

[153] In ***ex p. Greenpeace*** as summarized in **Judicial Review Handbook**, the test for the grant of extension of time was outlined as:

> "(i) Is there a reasonable objective excuse for applying late?; (ii) What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?; (iii) In any event, does the public interest require that the application should be permitted to proceed?") (Emphasis added)

[154] The applicants reasons for not filing an application prior to September 7, 2012 have been fully set out and in summary include an initial willingness to comply but needing more time, scheduled travel for business and surgery in respect of the 2nd applicant and then the taking of advice once it became apparent to them that the respondent may have been acting in excess of his authority. Those reasons appear to this court to satisfy the test of a "reasonable objective excuse for applying late". This court has already opined that third party rights are not affected. However counsel for the respondent submitted that the grant of leave would stymie an important ongoing investigation and hence that would be contrary to good administration. This concern should be considered in light of the third part of the test outlined in ***ex. p Greenpeace*** and highlighted above, which appears to be the overarching consideration, — *"In any event, does the public interest require that the application should be permitted to proceed?"* In the circumstances of this case it would appear that "good administration"

and the "public interest" substantially coincide and overlap. It is undoubtedly in the public interest for there to be clarity concerning the remit, if any, of the investigatory powers of the Contractor-General in as sensitive and critical an area of national life as the divestment of State assets. Equally, good administration requires that public officials act within the four corners of the authority granted to them. Therefore it is also in keeping with good administration that the controversy concerning the extent of the Contractor-General's powers in this area be definitively clarified for the guidance of the Contractor-General and those whose activities may fall within the remit of his powers. ***Ex p Ruddock*** supports the conclusion arrived at by the court.

[155] On the issue of *uberrimae fides* where counsel for the respondent contended the reasons given by the applicants for the delay in seeking leave were less than full and frank, I agree with the way in which counsel for the applicants in reply distinguished the cases cited by counsel for the respondent on this point. In relation to ***The Queen on the Application of I*** Mr. Small QC pointed out that the immigration history which was withheld went to the very heart of the matter that was to be decided. In the instant case the questions raised do not go to the heart of the matter concerning whether the actions of the Contractor-General were *ultra vires* the Act and the court finds that the omitted information was not essential for the court to make a determination on the exercise of the courts discretion in deciding whether or not to grant the application for leave.

[156] Regarding ***O'Reilly's*** case Mr Braham QC also pointed out that the case suggested that the issue of *uberrimae fides* had to do with the question of a lack of candour in relation to substantive matters that went to the issue to be decided rather than procedural issues. That may however be too broad a statement as if an applicant seeks to mislead, either actively by statements or passively by omissions concerning the true reasons for delay that would be a factor the court would have to consider in determining whether or not to exercise the discretion in the applicant's favour.

[157] The Court however finds that the analysis in ***Ex p Ruddock*** also addresses the challenge raised by counsel for the respondent that the applicants failed to act with *uberrimae fides.* In ***ex p Ruddock*** at page 1485 Taylor J stated that:

> I have seriously considered what effect I should give to this further delay. I am unimpressed by the reasons for it. But I have concluded that since the matters raised are of general importance, it would be a wrong exercise of my discretion to reject the application on grounds of delay, thereby leaving the substantive issues unresolved. I therefore extend time to allow the applicant to proceed.

[158] If therefore there is need for an extension of time I would grant that extension it being in my view the appropriate exercise of discretion to enable the important substantive issues raised in this matter to be resolved.

Is there adequate alternative means of redress?

[159] Counsel for the respondent submitted that as the applicants essentially seek an interpretation of sections of the Act the most appropriate route would have been by way of invoking the court's powers to make interpretative declarations rather than proceed by way of judicial review. That approach counsel submitted would also have made it more appropriate for applicants to obtain the stay or injunction that is sought.

[160] This court is however not persuaded by that submission. As submitted by counsel for the applicant's prior to the receipt of the Requisition the applicants would not likely have been clothed with *locus standi*. They having received the Requisition which exposed them to potential criminal penalties the appropriate course was this application for leave to seek judicial review

[161] The court also notes in passing that in the case of ***Wright***, it was actually the then Contractor-General who sought interpretive

declarations on the Act. That course was also open to the Contractor-General in this case but it appears that course was not thought necessary.

[162] I therefore find that there is no adequate alternative remedy and the appropriate approach to the court was by this application for leave to seek judicial review.

Should the court order that the grant of leave operates as a stay of proceedings, or in the alternative if a stay is inappropriate, should an interim injunction be granted to maintain the status quo pending the outcome of the judicial review hearing?

The Application for a Stay

[163] The court having decided to grant leave, the applicants seek in the first instance a stay of the special investigations generally and as it includes them pending the determination of the judicial review proceedings. Without a stay, they fear the respondent will forge ahead with the investigations even though the issue of his authority so to do is *sub judice*.

[164] Counsel for the respondent contended that the applicants are not entitled to a stay as this court was bound by the decision of the Judicial Committee of the Privy Council in ***Ministry of Foreign Affairs, Trade & Industry v. Vehicles & Supplies*** [1991] 4 AER 65 which seemed to limit the granting of a stay in judicial review proceedings to situations where there was a proceeding in existence before an inferior court or tribunal. Lord Oliver, in addressing this issue stated at pages 71C – 72A (71c – 72a):

> This by itself is sufficient to dispose of the appeal but it has to be remarked that, quite apart from the factual material adduced in support of the appellant's application for the variation of the order, and regardless of any question whether the evidence adduced in support of the respondents' application to Clarke J provided even prima facie ground for the grant of the leave sought, there was every ground for challenging the order for a stay as a matter of law. It seems in

fact to have been based upon a fundamental misunderstanding of the nature of a stay of proceedings. A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled (see *La Grange v McAndrew* (1879) 4 QBD 210). Section 564B(4) of the Civil Procedure Code provides:

> '… the grant of leave under this section to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.'

This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made. In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless. If it was desired to inhibit JCTC from implementing the allocation which had been made and communicated to it or to compel the appellant, assuming this were possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved only by an injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made. The appellant's apprehension that that was what was intended by the order is readily understandable, but if that was what the judge intended by ordering a stay, it was an entirely inappropriate way of setting about it.

[165] Counsel for the applicants on the other hand argued that courts have moved away from the strict position outlined in ***Vehicles & Supplies*** to a broader definition of "proceedings and further submitted that in any event the situation in the instant case is distinguishable from that in ***Vehicles & Supplies.***

[166] Counsel cited ***R (on the application of Ashworth Hospital) v. Mental Health Review Tribunal for West Midlands and Northwest Region*** [2003] 1 WLR 127 on the expanded view of "proceedings". At paragraph 42 Dyson LJ stated:

> The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Avon, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicle and Supplies would…indeed be regrettable, and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review. As I have said, this extreme position is not contended for by Mr Pleming. Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision, but the decision itself. The Administrative Court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect. A good example is where a planning authority grants planning permission, and an objector seeks permission to apply for judicial review. It is not, I believe, controversial that, if the court grants permission, it may order a stay of the carrying into effect of the planning permission.

[167] Counsel for the respondent however countered that the court was bound by ***Vehicles & Supplies*** and also submitted that the case was

of little value as the point was not argued given that the other side did not oppose the argument for an extension of the application of stays to executive action.

[168] To arrive at a decision on the application for a stay there has to be a close and careful consideration of what the court apprehends to be the true ratio in ***Vehicles & Supplies.*** It also has to be determined whether the changes brought about by the CPR could affect the way ***Vehicles & Supplies*** is viewed, given that it was decided on the Civil Procedure Code which preceded the CPR. The discussion conducted by Mangatal J at paragraphs 86-87 of ***Digicel Jamaica Limited v. Office of Utilities Regulations*** [2012] JMSC Civ 91 before arriving at her decision on the question of an application for a stay in that case clearly sets out the competing considerations. In addressing whether or not ***Vehicles & Supplies*** held that a stay could only ever apply to proceedings in an inferior court or tribunal Mangatal J stated:

> [86] The position is really not very clear. It is true, that as Mr. Hylton submits, the CPR, unlike s, 564B of the CPC, does mandate the Court to on every occasion when an application is made for leave to apply for an order of certiorari or mandamus, direct whether or not the grant of leave shall operate as a stay of proceedings. It is also true that unlike the CPC, the CPR, specifically Rule 56.4(10), (read in conjunction with Rule 17.1), expressly allows a Court to grant injunctive relief in judicial review matters.
>
> [87] However, I do not really think that in discussing the nature of a "stay" in **Vehicles & Supplies** the Privy Council's decision turned on the interpretation of the particular rule s. 564B of the CPC, anymore than in discussing the nature of interim injunctions in **NCB v. Olint** Lord Hoffman was interpreting rules in Part 17 of the CPR. The wording of Rule 564B and the wording of Rule 56.4(9) are not in any event sufficiently dissimilar to support the distinction contended for by Digicel's Counsel. I agree with Mr. Hylton that the language of CPR 56.4(9) could suggest that a "stay of proceedings" was meant to include a decision of an administrative body such as the OUR, by virtue of the fact that a judge must direct in all applications for leave to apply for certiorari whether or not the leave is to operate as a stay. I can see the force of arguing that implicit in this wording is a premise that all decisions that

> are subject to certiorari are capable of being stayed. This is because it could be argued that all decisions are therefore considered to take place in the context of what may be termed "proceedings". However, that is not the only reasonable interpretation that can be placed on the Rule. It may also mean that although the judge must make a direction whenever there is an application for leave to apply for certiorari as to whether the grant of leave is to operate as a stay of the proceedings, the judge must order that there is no stay where there are no proceedings in being upon which the stay can take effect, meaning that there are no proceedings going on before an inferior court or tribunal.

[169] The reasoning in ***Mental Health Review Tribunal*** was however found to be attractive by Mangatal J, though the learned judge ultimately did not grant a stay, leave for judicial not having been given and with the learned judge holding that in any event she would have been bound by ***Vehicles & Supplies*** given its similarities to the case she was determining.

[170] At paragraphs 88-89 Mangatal J had this to say:

> [88] It is with some regret that I have come to the conclusion that I am bound to hold that the reasoning in **Vehicles & Supplies applies** to the instant case. In **Vehicles & Supplies,** the Privy Council considered that a stay has no application to a factual situation where it is to prevent a decision which has already been made but not yet implemented or fully implemented, from taking effect, such as the allocation of quotas for the importation of motor vehicles. It does not appear to me that the factual situation here can be readily distinguished, given that the OUR's Determination decision has already been made, even if not yet implemented, it is scheduled to come into effect on July 15 2012, and there are no "proceedings" in relation to the Determination ongoing before the OUR.
>
> [89] I say that it is with regret that I have come to that view because I think that there is much to be said for the fact that a stay in relation to judicial review proceedings is really for the purpose of enhancing and facilitating the court's review of the challenged proceedings and that the phrase "stay of proceedings" ought to be given a wide interpretation. It is not really

there for the parties as such, as I indicated, was my view in **Tyndall**. I can see the merit in preserving the status quo and that this may in many instances make the judicial review process more effective. A stay can ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the benefit of his success. In that regard, it may well be more comparable to a stay of execution, rather than an injunction. I can also conceive of a situation where a gap in the armoury of judicial review powers may exist if a stay is not given a wider interpretation. A stay is an order directed to the decision-making body and unlike an injunction, it is not directed to a party. Judicial review by way of an application for certiorari is a challenge to the way in which a decision is arrived at, and the decision maker is not an opposing party anymore than an inferior court whose decision is challenged is an opposing party. An order therefore that a decision of a person or body whose decisions are open to judicial review shall not take effect until the final determination of the challenge does in my view fit more readily under the label of a "stay" rather than an "injunction" as opined in the **Avon** decision. I do not think that it does any real violence to the notion to treat proceedings as being capable of meaning administrative proceedings, or of "proceedings" meaning "the process", including the decision itself. In **NCB v. Olint**, the Privy Council there criticized the "box-ticking approach" to the question of whether an interlocutory injunction ought to be granted, i.e. by first deciding whether the injunction is mandatory or prohibitory. I can't help but wonder whether in the arena of applications for leave to apply for judicial review, in some instances arguments over whether an order preventing the implementation of a decision, or the process of arriving at those decisions, is to be classified as a stay or an injunction are not also barren. This is particularly so since the underlying theme, whether of an interim injunction, or a stay is to take the course that is likely to cause the least irremediable harm or prejudice at a time when the Court is uncertain as to the final outcome.

[171] Further at paragraph 91 in considering whether there had been a true application for a stay if leave had been granted Mangatal J continued:

> [O]n the facts of this case it does not appear to me that it would be necessary for a Court to order a stay in order to effectively carry out the review process; there would be no need for a pause. The failure to grant a stay would not render the outcome of the review in favour of Digicel ultimately quashing the Determination nugatory. Nor would the implementation of the Determination affect the Court's ability to carry out its review process.

[172] In submissions that have persuaded this court Mr. Braham QC contended that the situation that faces this court is distinguishable from those faced in ***Vehicles & Supplies*** and in ***Digicel v OUR*** in two key ways. ***Firstly*** in both of those cases the decisions had been taken and implemented and hence it could not be said in either that "proceedings" were in being. In the instant case however the special investigations are continuing. The ongoing nature of the investigations being carried on by the Contractor-General this court finds are "proceedings" which would enable the court to grant a stay bringing them to a halt, pending the determination of the judicial review.

[173] I have come to this conclusion as despite the seemingly absolute statement by the Privy Council in ***Vehicles & Supplies*** that stays are only available to halt proceedings in inferior courts or tribunals, on the facts in that case, it appears the ultimate decision of the Privy Council was that a stay could have no possible application to *"an executive decision which has already been made"*. Apart from the distinction which has already been highlighted that in the instant case investigations and hence I find "proceedings" are ongoing, the special nature of the Contractor-General also has to be considered. The Contractor-General is a Commission of Parliament (section 3 of the Act) and for the purposes of an investigation under the Act may request persons to furnish information or produce documents or things (section 18(1)), conduct judicial proceedings (section 18 (2)) and has the same powers as a Judge of the Supreme Court in respect of the attendance of witnesses and the production of documents (section 18 (3)). In some respects therefore investigations carried out by the Contractor-General are not just in the category of administrative decisions, but are clothed

with some of the aspects of at least a quasi-judicial process which would likely satisfy even a narrow interpretation of "proceedings" based on ***Vehicles & Supplies.*** Further this quasi-judicial investigative process if not complied with, may expose the defaulting party to criminal sanctions.

[174] That leads to the ***second*** of the two key points. While in the ***Digicel v OUR*** case Mangatal J concluded that had leave been granted, based on the nature of the case a stay would not be necessary because there was *"no need for pause",* I agree with Mr Braham QC that in the instant case the opposite is true. On September 21, 2012 the respondent wrote to the applicants insisting on compliance with the requisition by October 10, 2012 at 3:00 pm despite the application for leave, and with October 10 being the date that application was scheduled to (and did) commence. While it is true that within the period the application was part-heard and during the time the court's ruling on the application has been reserved the respondent has "stayed his hand", the respondent opposed the application for a stay and has not given any guarantee he would not seek to pursue the investigations if leave was granted. In those circumstances the applicants stated fear that unless there is some form of interim restraint in place pending the determination of judicial review proceedings, the respondent will take steps to compel compliance with the requisitions dated June 20, 2012 and pursue criminal proceedings in the event of default is neither unreasonable nor fanciful. A stay would therefore in the adapted terminology of Dyson LJ in the ***Mental Health Review Tribunal*** case ensure, so far as possible, that, if the applicants are ultimately successful in their challenge, they will not be denied the full benefit of their success.

The Application for an Injunction in the Alternative

[175] In the event I am wrong in my conclusion that I have the jurisdiction to grant a stay I will go on to consider whether, had I concluded I could not grant a stay, it would have been appropriate to grant an injunction to restrain the Contractor-General or others on his behalf from pursuing

the investigations both generally as well as specifically against them, pending the determination of the judicial review hearing.

[176] Counsel for the applicants pointed to CPR 56.4 (10) which permits the judge at the leave stage to "grant such interim relief as appears just" and CPR 17.1(1) which states, "The court may grant interim remedies including – (a) an interim injunction; …" as grounding the court's jurisdiction to grant an injunction.

[177] Counsel for the respondent opposed the application and relied on the decision in ***Vehicles and Supplies*** at the Court of Appeal Stage for the proposition that an injunction being a prerogative remedy did not lie against the Crown as defined in the Crown Proceedings Act. Further counsel submitted that i) the remedies set out in CPR 56 sub-rule 4 are not available at the leave stage but may only be obtained after leave is granted and upon a full judicial review hearing ii) sub-rule (4), on a literal interpretation contains non-prerogative remedies available in addition to judicial review remedies, the caveat being they must arise where there is a cause of action and where the rule of law allows for them to be obtained.

[178] Counsel for the applicant's Mr. Braham QC countered this submission with the argument that injunctive relief was indeed available against the respondent because authorities had well established that proceedings by way of judicial review were not civil proceedings within the contemplation of the Crown Proceedings Act. Accordingly injunctive relief could be obtained against an officer of the Crown in such proceedings. Further, counsel submitted that in any event the respondent was not an officer of the Crown.

[179] Counsel pointed out that in ***Vehicles and Supplies*** at the Privy Council stage it was held that proceedings for certiorari and prohibition were not civil proceedings within the meaning of the Crown Proceedings Act and accordingly injunctive relief could have

been granted if an application had been made by Vehicles and Supplies Limited (See pages 555 C and 557A).

[180] Counsel also cited ***Brady & Chen Limited v Devon House Development Company Limited***, [2010] JMCA Civ 33 in which our Court of Appeal was required to consider whether an injunction had been properly granted against the Devon House Development Company in proceedings otherwise than for judicial review. It was held that the injunction should not have been granted because injunctive relief could not be granted against the Crown or officer of the Crown in proceedings which were not for judicial review in view of the provision of section 16(2) of the CPA. Smith JA at paragraph 22 of the judgment said:

> I should mention here that section 16(2) does not prohibit the court from granting injunctive relief against an officer of the Crown in judicial review proceedings. This is so because by virtue of section 2 (2), the phrase "civil proceedings" does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division. And, of course, proceedings for the prerogative orders (which have been replaced by proceedings for judicial review), were brought on the Crown side.

[181] On these authorities the court is satisfied that in judicial review proceedings the court can indeed grant injunctive relief against an officer of the crown. That issue however only arises if the Contractor-General is an officer of the crown.

[182] Under the Crown Proceedings Act the Crown is defined in section 1 as, "*Her Majesty in Right of Her Government in the Island".* Mr. Braham QC submitted that this definition of Crown in the CPA is a reference to the exercise of executive powers by central government, ministries and government departments.

[183] Counsel further submitted that the determination of whether a statutory body is a servant or agent of the Crown depends on the nature and degree of control exerted over it by the Crown; the greater the level of

independence conferred on the body is the less likely it will be found to be a servant or agent of the Crown.

[184] In ***Metropolitan Meat Board v Sheedy*** [1927] 1 AC 899, relied on by the applicants, the Privy Council held that a debt due to the Metropolitan Meat Board, a body constituted by statute, was not a debt owed to the Crown and therefore could not be claimed in priority to other unsecured debts. Viscount Haldane, who delivered the judgment said at page 905:

> Their Lordships agree with the view taken by the learned judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.

[185] Accordingly, I agree with Mr. Braham QC, counsel for the applicants that the definition of the Crown under the Crown Proceedings Act is a reference to the exercise of executive powers by central government, ministries and government departments, categories to which the respondent does not belong. It should also be recalled as noted earlier in the judgment that the respondent is a Commission of Parliament. That fact also bolsters the conclusion arrived at, as the Act expressly states that "*In the exercise of the powers conferred upon him by this Act, a Contractor-General shall not be subject to the direction or control of any person or authority"* (see section 5(1)).

[186] Therefore, in respect of the first challenge raised by counsel for the respondent there would therefore be no bar to the granting of an

injunction against the respondent in these proceedings in the appropriate circumstances.

[187] The second challenge mounted by counsel for the respondent that CPR rule 56.4 contains non-prerogative remedies in addition to judicial review remedies which can only be obtained at the hearing and not the leave stage, can be shortly disposed of. While orders for the prerogative remedies of certiorari and prohibition may only be obtained at the hearing after leave is granted CPR rule 56.4 (10) speaks to the fact that the judge may at the leave stage grant such interim relief as appears just. Of necessity the relief must be interim as the result of the full hearing will determine whether that relief should be made permanent. By virtue of CPR rule 2.2 (2) "civil proceedings" are defined to "include Judicial Review and applications to the court under the Constitution under Part 56". Judicial review being civil proceedings empowers the court to look to Part 17 of the CPR which deals with Interim Remedies. The first remedy listed in CPR 17.1(1) (a) that the court may grant is an interim injunction, a prerogative remedy. I therefore find it is beyond doubt that the court is empowered in an application for leave to apply for judicial review to grant and injunction should the circumstances prove appropriate.

[188] Are the circumstances in this case appropriate such that had the court not found it possible to grant a stay the court would have granted the injunction applied for in the alternative?

[189] I accept as submitted by Mr. Braham, QC, counsel for the applicant that on an application for an interim injunction in public law proceedings, the approach set out in ***American Cyanamid Co v Ethicon Ltd.*** [1975] AC 396, and subsequently refined by the Judicial Committee of the Privy Council in ***National Commercial Bank Jamaica Limited*** **v** ***Olint Corp. Limited***, [2009] 5 LRC 370 is applicable with the necessary modifications to reflect the public law nature of the proceedings (see ***Belize Alliance of Conservation Non-***

Governmental Organisations v. ***Department of the Environment of Belize and another (Practice Note)*** [2003] UKPC 63).

[190] In the ***Olint*** case, the Judicial Committee of the Privy Council reiterated that the purpose of an interim injunction was to increase the chances of the trial court doing justice between the parties after a determination of the merits of the case at trial. The role of the court in considering whether or not to grant an interim injunction is therefore to assess whether a just result will be achieved by granting or refusing the injunction, with the crucial determination being which course (granting or refusing the injunction) is likely to cause the least irremediable prejudice (See Lord Hoffman writing for the Board at paragraphs 16-18).

[191] There are clearly serious issues to be tried regarding the power of the Contractor-General generally to conduct a special investigation into the purchase of the Hotel, as well as specifically his power to issue the Requisition dated June 20, 2012.

[192] In considering the balance of convenience, the following factors would support the grant of the injunction sought:

a. The applicants may face criminal prosecution unless they answer the requisitions issued by the Contractor-General.
b. The applicants may sustain adverse public comments that could damage their reputations and business prospects in ways that cannot be easily quantified.

[193] On the other hand, the Contractor-General would be unlikely to sustain any hardship or prejudice if the interim injunction sought was granted as there is no financial exposure at stake though there would be the inconvenience of the delay in the completion of the special investigations. However the fact of there being an issue concerning whether those investigations are permissible the Contractor-General and the nation will benefit from clarification of the interpretation of the Act. In the circumstances, the respondent being a party to this action,

this is an appropriate case where I would have granted an interim injunction on the terms sought by the applicants had I not earlier found that a stay was possible and appropriate.

[194] Concerning the issue of an undertaking as to damages, had the court granted the injunction, CPR rule 17.4(2) gives the court a discretion whether or not to require such an undertaking. As submitted by counsel for the applicants, the principal consideration for the court is whether an undertaking as to damages would produce a just result (see paragraphs 37 – 39 of the judgment of Lord Hope of Gestingthorpe in ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and another***.)

[195] As the present case concerns the interpretation of the Act in circumstances where neither the Contractor-General nor any third party would be likely sustain any financial prejudice or hardship if the interim injunction sought was granted this would have been an appropriate case for dispensing with the requirement of an undertaking as to damages.

DISPOSITION

[196] The applicants are granted leave to commence judicial review proceedings within fourteen (14) days of today January 30, 2013 to obtain the following relief:

(i) A declaration that the letter of June 20, 2012 from the Contractor-General to the Honourable Gordon Stewart, O.J., Chairman, Gorstew Limited is illegal, void and of no effect.

(ii) A declaration that the commencement of the special investigation into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel is illegal, void and of no effect.

(iii) A declaration that the extension of the special investigation into the alleged secret talks, discussions and

or negotiations concerning the sale of the Sandals Whitehouse Hotel to include Gorstew Limited and/or the Honourable Gordon Stewart, O.J., is illegal, void and of no effect.

(iv) An order of certiorari quashing the letter dated June 20, 2012 from the Contractor-General to Honourable Gordon Stewart, Chairman, Gorstew Limited.

(v) An order of certiorari quashing the Contractor-General's decision to commence the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

(vi) An order of prohibition prohibiting the Contractor-General from taking any steps to compel or require the Applicants to comply with and or respond to the said letter or any question or direction contained therein.

(vii) An order of prohibition prohibiting the Contractor-General from continuing the special investigations into the alleged secret talks, discussions and or negotiations concerning the sale of the Sandals Whitehouse Hotel.

[197] The grant of leave shall operate as stay of:

a) the special investigations into allegations of secret talks, discussions and or negotiations which concerned the sale of the Sandals Whitehouse Hotel pending the determination of the application for judicial review or further order; and

b) the special investigations into allegations of secret talks, discussions and or negotiations which concerned the sale of the Sandals Whitehouse Hotel to include the Applicants pending the determination of the application for judicial review or further order.

[198] Costs of the application to be costs in the judicial review proceedings.

[199] As the matter is urgent and of significant public importance, I direct that the full hearing before a Full Court be given an expedited date to be fixed at the first hearing. The first hearing is set for the 21st day of March 2013 at 2 p.m. for one hour.