BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1559 of 2015

BETWEEN:

ANTHONY KEVIN TROTMAN **CLAIMANT**

AND

THE PUBLIC SERVICE COMMISSION **FIRST DEFENDANT**

THE ATTORNEY GENERAL **SECOND DEFENDANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 23 March 2017

Ms. Liesel Weekes in association with Ms. Janaye Burgess for the Claimant.

Ms. Jennifer Small for the First and Second Defendants.

DECISION

INTRODUCTION

[1] The ***Administrative Justice Act Cap 109B*** ("***the AJA***") came into force on 7 July 1983 ushering in a statutory mechanism for judicial review of administrative acts or omissions in Barbados. Since then, a recurring

procedural issue has been the propriety of naming the Attorney-General as a party in relating proceedings. It has reared its head once more.

[2] The Attorney-General has been named as the Second Defendant in these proceedings. By an application filed on 4 April 2016 ("**the application**"), he seeks an order that he be struck out as a party. The application is expressed to be based on two grounds. These are, (i) that he is not a proper party to the proceedings; and (ii) that the claim and supporting affidavit disclose no reasonable ground or cause of action for bringing a claim against him.

[3] I heard the application on 2 March 2017 and, having reviewed it fully, I have determined that it should be refused. I set out the reasons for that decision below.

THE BASIS OF THE APPLICATION

[4] At the outset of the hearing, I sought to ascertain from Ms. Jennifer Small, Counsel for the Attorney-General what was the jurisdictional basis of the application. This was not expressed on the face of the application. She submitted that the relevant rule may have been ***Rule 26.3(3)(b)*** of ***the Supreme Court (Civil Procedure) Rules, 2008*** ("***the CPR***"). This rule enables a court to strike out a statement of case where it discloses no reasonable ground for bringing or defending a claim.

[5] Leaving aside any issue as to the applicability of that rule to judicial review proceedings, this Court is mindful that common considerations may sometimes be involved in an application to strike out a statement of case and an application to have a party removed. One application may sometimes shade into the other. However, despite the second ground of the application, the applicant has framed his application as one for his removal as a party only. That being so, even if it can be demonstrated that factors relevant to ***CPR 26.3(3)(b)*** might assist in the determination of the application, that rule cannot be identified as being the basis of the application for removal.

[6] ***CPR 19.2(4)*** is a more likely rule. ***CPR 19.1*** inadequately describes the scope of ***CPR 19*** as "the addition and substitution of parties after proceedings have been commenced". In fact, ***CPR 19*** also deals with the removal of parties. ***CPR 19.2(4)*** provides that "[t]he court may order that any person shall cease to be a party where the court considers that the inclusion of that party is not conducive to the resolution of the issues in the proceedings".

[7] ***CPR 19.3 (1)*** regulates the related procedure. It provides:

> 19.3 (1) The court may add, substitute or remove a party on or without an application.
>
> (2) An application for permission to add, substitute or remove a party may be made by
>
> (a) an existing party; or

(b) a person who wishes to become a party.

[8] However, in ***River Thames Society v First Secretary of State [2006] EWHC 2829***, a decision of the Administrative Division of the High Court of England and Wales, Underhill J, as he then was, held that ***Part 19*** of that jurisdiction's ***Civil Procedure Rules (EWCPR)*** was drafted with private civil law claims in mind and was not intended to cover public law cases. He concluded that the power to substitute parties in such cases depended on the court's inherent jurisdiction which should be exercised, as far as possible, in accordance with the principles under the EWCPR and its predecessor provisions.

[9] In ***San Vicente et al v Secretary of State for Communities and Local Government [2014] 1 WLR 966***, the Court of Appeal of England and Wales acknowledged the force of Underhill J's reasoning in the context of ***EWCPR 19***, but refused to apply it to ***EWCPR 17*** which deals with "amendments to a statement of case". At paragraph 44, the English Court of Appeal fairly summarised the basis on which Underhill J arrived at his opinion with respect to ***EWCPR 19.*** It stated:

> … in *R (River Thames Society) v. First Secretary of State* [2006] EWHC 2829 (Admin) Underhill J (as he then was) drew on the language used in Rule 19.2(4) to illustrate the difficulty of applying Part 19 to public law proceedings. He suggested that Part 19 was drafted with private law civil proceedings in mind and applies only to such proceedings. Rule 19.2 deals with the general position on adding or substituting a party. Rule 19.2(4) refers to the position where "an existing party's interest or

> liability has passed to the new party" and the very different sense in which "interest" is used in public law proceedings. Underhill J concluded that it was fairly clear "that what the draftsman had in mind was private law rights and obligations, which are indeed capable of being 'passed' by being devolved or assigned".

[10] ***CPR 19.2(5)*** is identical to ***EWCPR 19.2(4)*** and the force of Underhill J's reasoning applies equally here. It may well be then that ***CPR 19*** does not apply to judicial review proceedings and that if an order is to be made removing the Attorney-General as a party in judicial review proceedings it must be done pursuant to the Court's inherent powers. The idea that such a power exists with respect to joinder issues was not questioned by the court in ***San Vicente*** and was expressly acknowledged at paragraph 63 in ***Family Food Court (a firm) v Seah Boon Lock et al [2008] 4 SLR 272***.

[11] Generally, section 7(1) of ***the AJA*** provides for the making of an interlocutory application in judicial review proceedings and empowers the Court to make any interlocutory order it thinks fit. As stated by Mummery J (P) in ***Perera v White et al EAT/377/93 (date of decision, 28 February 1996)*** a decision of the Employment Appeal Tribunal of England and Wales, "[a]n order striking out or adding parties is an interlocutory order".

THE JUDICIAL REVIEW APPLICATION

[12] Some narrative of the past is required to contextualise the present. On 5 November 2015, the claimant ("**Mr. Trotman**") commenced these

proceedings against the Public Service Commission ("**the PSC**") and the Attorney-General by means of a fixed date claim form and an affidavit in support. He tells his story in the particulars of facts set out in the claim form and repeats it in his affidavit.

[13] Mr. Trotman asserts that by letter dated 11 November 2011, he was suspended from his duties as a Temporary Business Development Officer in the Ministry of International Business and International Transport. He states further that he was subsequently notified that disciplinary charges had been brought against him and that he was interdicted on half-pay. He posits that statutory timelines were not observed by the functionaries responsible for suspending or instituting disciplinary charges against him; and that his interdiction on half-pay stretched beyond the permissible statutory period.

[14] The matters of which Mr. Trotman complains are regulated by the ***Public Service Act, Cap. 29 ("the PSA"***) and, in particular, the ***Code of Discipline*** ("***the Code of Discipline***") which comprises the Third Schedule to ***the PSA***. On the basis of alleged breaches of ***section 4(2)*** of ***the PSA***, and ***paragraphs 4(6)*** and ***4(8)*** of the ***Code of Discipline***, he seeks declaratory orders that his suspension and the disciplinary proceedings, inclusive of the related preparatory steps, are unlawful. He also seeks an order quashing the

suspension and interdiction; as well as others to secure his re-instatement and injunct ***the PSC*** from proceeding with the disciplinary proceedings.

[15] Mr. Trotman exhibits a number of letters to his affidavit. I will particularise three of them. The first is dated 11 November 2011, addressed to him, and purportedly signed by Gabrielle A. Springer, Acting Permanent Secretary. The first paragraph states that Mr. Trotman is suspended from the performance of his duties in accordance with section 4(2) of the Public Service (Amendment) Act, 2010-1.

[16] The second letter is dated 29 July 2014. Mr. Trotman deposes that he received it on 9 September 2014. It is purportedly signed by K. Clarke for the Chief Personnel Officer. Its opening paragraph states that the author is directed to inform Mr. Trotman that the PSC has advised that disciplinary action should be instituted against him, and that he should be notified of the charges laid against him. It goes on to enumerate a number of charges.

[17] The third letter is dated 1 September 2014 and purportedly signed by one R. Hoyte for the Chief Personnel Officer. The second paragraph of that letter reads:

> I am directed to inform you that the Governor-General, acting on the advice of the Public Service Commission, has interdicted you from the performance of your duties on half pay with effect from 2014-09-02, pending the outcome of the charges brought against you, in accordance with paragraph 4(8) of the Code of Discipline as set out in the Third Schedule to the Public Service Act Cap. 29.

THE AJA, THE CPA AND THE CPR

[18] Before outlining the submissions made for and against the application, I will set out the statutory provisions to which both sides referred. This will make their submissions more easily comprehensible. The main provisions involved are contained in ***the AJA***, the ***Crown Proceedings Act, Cap. 197*** ("***the CPA***") and ***the CPR***.

(i) the AJA

[19] The scope of judicial review proceedings is delimited by ***section 3(1)*** of ***the AJA***. That section provides:

> An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court.

[20] The terms "act" and "administrative act or omission" are defined in section 2. The relevant parts of that section reads:

> In this Act,
>
> "act" includes any decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment;
>
> "administrative act or omission" means an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment.
>
> ….

(ii) The CPA

[21] Modelled after the ***Crown Proceedings Act, 1947*** of the ***United Kingdom***, ***the CPA***'s purpose as reflected in its long title was, in part, "to amend the law relating to the civil liabilities and rights of the Crown …". The Act came into force on 23 February 1955. The right to sue the Crown is contained in section 3 which reads:

> Where any person has a claim against the Crown and, where, before the 23rd February, 1955 the claim might have been enforced, subject to the grant of the Governor's *fiat*, by petition of right or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to this Act, the claim may be enforced as of right and without the *fiat* of the Governor-General by proceedings taken against the Crown for that purpose in accordance with this Act.

[22] Section 14(2) provides that "[c]ivil proceedings against the Crown shall be instituted against the Attorney-General." The term "civil proceedings" is defined in section 2(1) in this way:

> "civil proceedings" includes proceedings in the Supreme Court or a magistrate's court sitting in the exercise of its civil jurisdiction for the recovery of fines or penalties but shall not include proceedings in Barbados corresponding to proceedings on the Crown side of the Queens's Bench Division in the United Kingdom.

(iii) the CPR

[23] The references to ***the CPR*** were confined to ***CPR 2.2(2)***; the definition of the term "party" in ***CPR 2.3***; and ***CPR 56.4*** which deals, or purports to deal, with

service of applications for judicial review. I will reproduce enough of ***CPR 2.2*** to put ***CPR 2.2(2)*** in its proper context.

[24] The relevant parts of ***CPR 2.2*** provide:

> **2.2** (1) Subject to sub-rule (3), these Rules apply to all civil proceedings in the Supreme Court.
>
> (2) In these Rules "civil proceedings' include Judicial Review.
>
> (3) These Rules do not apply to the following proceedings:
>
> ...
>
> (e) any other proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings; …

[25] ***CPR 2.3*** provides:

> **2.3** In these Rules,
>
> **…**
>
> "party" includes every person served with notice of or attending any proceeding, although not named on the record.

[26] ***CPR 56.4*** provides:

> **56.4** (1) The applicant must serve a certified copy of the application on every person who is a respondent not later than 14 days before the date fixed for hearing.
>
> (2) A copy of the application must also be served on the Attorney-General within 7 days of its filing.

> (3) The applicant must file at the Registry not later than 3 days before the date fixed for hearing an affidavit of service which
>
> (a) states the date and place of service of each respondent served;
>
> (b) the date on which the Attorney-General was served;
>
> and
>
> (c) if any respondent has not been served, states that fact and the reason for it.
>
> (4) Where the judge considers that any person who should have been served has not been served, the judge may adjourn the hearing and give such directions as are considered just.

THE SUBMISSIONS

[27] I come now to the submissions. I had the benefit of written and oral submissions from Ms. Small on behalf of the Attorney-General. Ms. Liesel Weekes filed written submissions on behalf of Mr. Trotman for whom she appeared in association with Ms. Janaye Burgess. Ms. Burgess made oral submissions at the hearing.

[28] Summarised, Ms. Small's submissions were that (i) an application for judicial review is one for relief against an administrative act or omission; (ii) Mr. Trotman makes no allegations of any act or omission, and seeks no relief, against the Attorney-General who was not involved in the process under review; (iii) nothing in ***the CPA*** requires that the Attorney-General be named

as a respondent; hence, (iv) the action is not maintainable against the Attorney-General.

[29] In support of her submissions, Counsel highlighted the definition of "act" and "administrative act or omission" in ***section 2*** of ***the AJA*** and ***section 3*** of the ***AJA*** in outlining the scope of judicial review. She meticulously took me through ***sections 2***, ***3***, and ***14*** of ***the CPA*** in demonstrating the non-applicability of that statute and referred me to a passage found at paragraph 111 of ***Halsbury's Laws of England 4th edition, Vol. 12(1)*** for assistance with ***section 3***. In general support of her submissions, Ms. Small cited ***I.D.M. Direct marketing Corporation v The Attorney-General et al High Court Suit No. 1188 of 1996 (date of decision 19 November 1997)*** and ***Straughn v Judicial and Legal Services Commission et al High Court Suit No. 1640 of 2014***, and ***Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union et al [2011] UKPC 4.***

[30] Mr. Trotman opposed the application on three bases. In her written submissions, Ms. Weekes urged that the combined effects of ***section 14*** of ***the CPA*** and the definition of "civil proceedings" in ***CPR 2.2(2)*** renders the Attorney-General a compulsory party in judicial review proceedings. Secondly, she submitted that compliance with the obligation contained in ***CPR 56.4(2)*** makes the Attorney-General a party by virtue of the definition

of that term contained in ***CPR 2.3***. Ms. Burgess introduced the third limb of resistance at the oral hearing. She submitted that the applicant was challenging a decision of the Governor-General and that there is a settled practice that, in such a case, the Attorney-General should be named as a respondent.

[31] That latter submission proved to be formidable and decisive. In support of the latter part of it, Ms. Burgess cited a number of cases. These included ***Hochoy v Nuge (1964) 1 WIR 174, C.O. Williams Construction Ltd. v Blackman et. al. (1989) 41 WIR 31, Lloyd v. The Attorney-General***, ***High Court Suit No. 979 of 1996, date of decision 30 April 1998***, and ***Leacock v The Attorney-General High Court Suit No. 2251 of 2007, date of decision 6 October 2014***, in which Cornelius J provided a comprehensive and helpful review of relevant local and commonwealth authorities.

DISCUSSION

[32] I will now consider the above submissions under the captions (i) "the applicability of ***the CPA***"; (ii) "does ***the CPR*** render the Attorney-General a party?" and (iii) "the scope of ***the AJA***", in that order.

(i) The applicability of the CPA?

[33] Ms. Weekes' submission in relation to ***the CPA*** is not sustainable. Her acknowledgement that ***section 14*** provides that civil proceedings are to be

instituted against the Crown is undoubtedly correct. However, Counsel goes on to adopt the definition of "civil proceedings" from ***CPR 2.2(2)*** which provides that the term includes judicial review proceedings, in order to conclude that ***the CPA*** applied to such proceedings. In attempting this interpretative feat, Counsel disregarded the opening words of ***CPR 2.2(2)*** which state expressly that the extended definition applies "[i]n these Rules".

[34] Additionally, Ms. Weekes failed to appreciate that ***the CPA*** contains in ***section 2(1)*** a definition of the term "civil proceedings" which is applicable for the purposes of that statute. In her oral submissions, Ms. Small demonstrated why that definition must be construed to exclude judicial review proceedings and provided a masterful analysis of section 3 to buttress her contention that ***the CPA*** does not contemplate judicial review proceedings.

[35] I need not subject Ms. Small's exposition to my own review since the methodology she employed and the conclusions she arrived at have already met with the highest judicial approval. With respect to section 3 and the general scope of ***the CPA***, Counsel's account is akin to that articulated by Lord Nicholls in ***Durity v The Attorney-General of Trinidad and Tobago [2003] 1 AC 405***. Commenting on Trinidadian legislation modelled after the ***Crown Proceedings Act, 1947*** of the ***United Kingdom***, he stated, ***at paragraph 18***:

> The State Liability and Proceedings Act, originally known as the Crown Liability and Proceedings Act, was modelled closely on the (United Kingdom) Crown Proceedings Act 1947. Its purpose was broadly similar. Primarily, its purpose was to modernise the law in two related fields: the substantive law relating to the civil liabilities and rights of the state, and the procedural law relating to bringing civil proceedings by and against the state. Thus, as a matter of *substantive* law, claims formerly brought against the State with the fiat of the President, in future could be enforced as of right: section 3. These claims consisted principally of claims relating to land or goods in the hands of the Crown, and claims for payments due under contracts or for damages for breach of contract. Again, and this was a radical change in the law, in prescribed respects the state was to become subject to the same liabilities in tort as those to which it would be subject if it were an individual: section 4.

[36] This determination is entirely consistent with the learning contained in the extract from ***Halsbury*** to which Ms. Small referred me. Her submission, which I accept, is that public law proceedings were not included in the type of cases contemplated by section 3.

[37] Turning to the definition of "civil proceedings" in ***section 2(1)*** of ***the CPA***, the definition opens in general terms by including "proceedings in the Supreme Court". However, as Ms. Small submitted the effect of the exclusionary words: "but shall not include proceedings in Barbados corresponding to proceedings on the Crown side of the Queens's Bench Division in the United Kingdom" is that the term "civil proceedings" as used in ***the CPA*** excludes applications for judicial review under ***the AJA***.

[38] There is an abundance of authority in support of this interpretation. In ***C. O. Williams Construction Limited***, Williams CJ articulated the position at page 39, letters e to f in this way:

> Proceedings on the Crown side of the Queen's Bench Division are those by means of which the Queen's Bench Division exercises its ancient jurisdiction of supervising inferior courts and public authorities. This jurisdiction used to be exercised principally by the prerogative writs of *habeas corpus*, *certiorari*, *mandamus* and prohibition. In Barbados it is now so exercised by the prerogative writ of *habeas corpus* and by orders of *certiorari*, *mandamus* and prohibition under Order 53 and by the powers of judicial review under the Administrative Justice Act, (which powers include the grant of orders of certiorari, mandamus and prohibition).

[39] This interpretation was referred to approvingly by the Court of Appeal in ***Lloyd v The Attorney General Civ App No. 9 of 1998, date of decision 2 May 2000***. The revocation of the ***Rules of the Supreme Court, 1982***, of which ***Order 53*** formed part by ***CPR 74.2,*** requires that it be read with some modification but the conclusion as it relates to ***AJA*** applications remains a firm one. It is entirely consistent with the earlier opinion of the ***Privy Council*** in ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd [1991] 1 WLR 550*** rendered with respect to similar legislative provisions in Jamaica.

[40] More recently, the Court of Appeal of Trinidad and Tobago echoed an identical conclusion in ***SS v H. W. Mag. Ayers-Caesar et al Civ App No S 244 of 2015, Court of Appeal of Trinidad and Tobago, date of decision 28***

April 2016. Having considered section 2 of the ***State Liability Proceedings Act*** of ***Trinidad and Tobago*** which defines "civil proceedings" as excluding "proceedings analogous to proceedings on the Crown side of the Queen's Bench Division in England", the court stated at paragraph 32 that the provision was intended to exclude public law administrative actions. Its terse conclusion at paragraph 34 that the Act "was simply never intended to apply to public law matters", applies with equal validity to ***the CPA***.

[41] Thus, Ms. Small is right on this point. The ***CPA*** does not apply to judicial review proceedings.

(ii) Does *the CPR* make the Attorney-General a party?

[42] I turn now to Ms. Weekes' ***CPR***-related submission. It was based on ***CPR 56.4(2)*** and the definition of "party" in ***CPR 2.3***. I have reproduced those provisions at paragraphs 26 and 25 respectively. ***CPR 56.4(2)*** requires an applicant in judicial review proceedings to serve a copy of the application on the Attorney-General within 7 days of its filing. ***CPR 2.3*** defines the word "party" to include persons served with notice of or attending any proceedings. Having referred to those provisions, the written submissions continue in this way:

> In circumstances where the Attorney-General must be served with a copy of the Application for Judicial Review and the definition of a "party" includes every person served with notice of proceedings, it is respectfully submitted … that the Attorney-General satisfies the

> conditions as outlined by the CPR and is a proper party to the proceedings.

[43] Undoubtedly, the Attorney-General is a party to the proceedings by virtue of his having been named as the second defendant on the record. In this respect, he is a formal party. He acquired that status when the proceedings started. ***CPR 2.3*** defines a "defendant" as "a person against whom a claim is made…" ***CPR 56*** uses the nomenclature of "respondent" but the point remains.

[44] I should add that ***the CPR*** definition of "defendant" differs from that contained in ***the Supreme Court of Judicature Act Cap. 117A*** ("***the SCOJA***"). In section 2, ***the SCOJA*** defines the term "defendant" as including "any person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings." ***Section 2*** of the ***SCOJA*** also defines the term "party" and does so in a manner identical to ***the CPR***.

[45] Mr. Trotman filed an affidavit of service on 13 November 2015 in which Ms. Petra Gooding deposed that she served the Attorney-General with a certified copy of the claim form and the supporting affidavit on 5 November 2015. At that date, the Attorney-General was a formal party to the proceedings. However, in this context, I understand Counsel's submission to be that he cannot be removed as a party because, even if he was not so named, he becomes a party by virtue of the ***CPR 56.4(2)*** requirement for service of the application on him and compliance by Mr. Trotman in that respect.

[46] In her oral submissions, Ms. Small analysed ***CPR 56.4*** in an effort to demonstrate that ***the CPR*** does not contemplate that the Attorney-General must be a party to judicial review proceedings. She observed that ***CPR 56.4(1)*** provides for service of the application on "every person who is a respondent" while ***CPR 56.4(2)*** requires that a copy of the application be served on the Attorney-General within the time stipulated. She submitted that it is clear from the separate provision for service on the Attorney-General that the Rules do not contemplate that the Attorney-General would necessarily be a respondent to judicial review proceedings.

[47] That submission is an attractive one and the force of Ms. Small's contention may be bolstered by the argument that had the legislature intended to make the Attorney-General a mandatory respondent in such proceedings, it could have stated so expressly in ***the AJA***, or by direct amendment to ***the CPA***. It did not do so.

[48] However, this leaves untouched the question as to the effect of the definition of "party" as contained in ***CPR 2.3***. Counsel cited no authorities with respect to this rule and a pronouncement on it is not necessary for my decision. It seems to me though, that there is a distinction to be drawn between a formal party who is named on the record and a person who becomes a party by virtue of him or her having been served with notice of proceedings.

[49] ***CPR 2.3*** is a definitional provision. Thus, unless the context suggests otherwise, for the purposes of ***the CPR***, the word "party" is to be defined to include persons who are not formally named in the proceedings as a party but on whom a notice of the proceedings have been served. It does not appear that a person who becomes a party by virtue of ***CPR 2.3*** is to be treated as a formal party for all purposes. One obvious example is the requirement to file statements of case. In ***the CPR***, that requirement is only imposed on named parties and ***CPR 19*** makes provision for the addition of parties and consequential directions for the filing of pleadings.

[50] The authorities I have surveyed demonstrate that parties by notification, as I shall refer to them, may enjoy particular rights or be subject to particular obligations or liabilities in the litigation process but that that they are not parties with the full package of litigation incidents that attend formal parties.

[51] The right of parties by notification to be heard was acknowledged in ***Harricrete Ltd v Anti-Dumping Authority et al No. 12 of 2008, High Court of Trinidad and Tobago*** and ***D. B. v The Minister for Health and Children No 322 of 2002, Supreme Court of Ireland, date of decision 31 July 2002***. In ***The Master, Officer and Crew on Board Motor Vessel "Hamilton K" v The Owners of the Motor vessel "Hamilton K", High Court Suit No. 94 of 1995, High Court of Trinidad and Tobago, date of decision 8 August 1995***

the court recognised the entitlement of such a party to be served with a document, where the procedural rule under consideration required that documents be served on all parties.

[52] A party by notification may also benefit from a costs order as in ***Indosuez v Owners of the Ship "European Vision" Civ App No. 19 of 2004, date of decision 13 June 2008***, or be made to assume liability under such an order. This was acknowledged in ***Phoenix Global Fund Ltd et al v Citigroup Fund Services Bermuda Ltd et al [2007] Bda L. R. 61*** at ***paragraph 50***, ***Majuro Investment Corporation v Vasile Timis et al Suit No. 16 of 2015, decision of the Supreme Court of Bermuda, Commercial Court, date of decision 10 March, 2016*** at ***paragraph 19*** and ***Harricrete Ltd***, at ***paragraph 26.***

[53] In ***Engal v Ireland Ltd [2010] NIQB* 87**, Tracey J held that a party by notification was not subject to a discovery order pursuant to the particular procedural rule under his consideration. Importantly, he made a general reference to the distinction between formal parties and parties by notification. He opined at paragraph 9, that a party by notification was not a "party with all of the rights, obligations and potential exposure that such a designation might entail".

[54] It appears, therefore, that a party by notification is not for all purposes equated with a party named on the record. Hence, it seems to me that where the

Attorney-General is not named as a respondent but is served with a copy of an application for judicial review, he becomes a party by virtue of the ***CPR 2.3*** definition but in that limited sense only. It may well be that a court in the exercise of its general powers of case management or on the application of a party could be called upon to determine the role, if any, to be played by a party by notification, though it is difficult to perceive of a situation in which the Attorney-General would be excluded from judicial review proceedings entirely. However, this is all conjecture as I am satisfied as to the propriety of naming the Attorney-General as a formal party in these proceedings.

The CPR or the Judicial Review (Application) Rules, 1983?

[55] Before leaving this issue, I must comment on the existing rules relating to service and the giving of notice with respect to judicial review applications. Early in the life of the application, I had indicated to Counsel that they might have addressed me on the applicability of ***the CPR*** to judicial review proceedings but they did not. The issue, as I see it, comes about because of the existence of two sets of procedural rules relating to judicial review proceedings, namely ***the CPR*** and the ***Judicial Review (Application) Rules, 1983 ("the JRAR")***.

[56] ***The JRAR*** regulate, or purport to regulate specific aspects of the judicial review process as does ***CPR 56***. ***CPR 56.1*** provides that ***CPR 56*** applies to

applications for judicial review under ***the AJA*** (***CPR 56.1 (1)(a)***); those in which a declaration is sought against the Crown or a public body (***CPR 56.1 (1)(b)***); and where the court has statutory power to quash an order, scheme, certificate, plan, amendment or approval to a plan, or a decision or action of a minister or ministerial department (***CPR 56.1 (1)(c)***).

[57] The areas covered by these two procedural regimes overlap and, in some respects, conflict with each other. Both codes contain provisions requiring service of some form of notice of an application on the Attorney-General but the provisions are not uniform. That is not the extent of the incongruity. ***JRAR 2(1)*** prescribes that applications for judicial review are to be made by originating motion, or originating summons during periods of vacation. ***JRAR 2(2)*** prescribes that the application must be supported by a statement setting out various things and an affidavit "verifying the facts relied on".

[58] ***CPR 56.3(2)*** requires a person seeking judicial review to file "an application" but it is silent on the form of application. However, ***CPR 56.3(3)*** prescribes that the application must contain information largely though not entirely resembling that required by ***JRAR 2.2*** on the supporting statement. ***CPR 56.3(4)*** requires that the application be supported by an affidavit which must include "a short statement of the facts and matters relied on" and "verify the contents of the application".

[59] The respective service-related rules are contained in ***JRAR 2(3)*** and ***CPR 56.4***. The former requires the applicant to give notice of the application to the Attorney-General "not later than the day before the application is made" and furnish him with copies of the statement and each supporting affidavit. In ***I.D.M. Direct Marketing Corporation v The Attorney-General of Barbados et al Civ. App. No. 4 of 1998, date of decision 16 November 1998***, Williams JA opined at page 5, that "it seems … that it can be forcibly argued that 'making the application' refers to the time when the application comes before the Court not the time when the application is filed". By contrast, ***CPR 56.4(2)*** provides that a copy of the application must be served on the Attorney-General within 7 days of filing.

[60] ***The JRAR*** were made on 14 June, 1983 by the Judicial Advisory Council, as it was then called, pursuant to ***section 12*** of ***the AJA***. The latter provides for the making of "rules generally for the purposes" of Part 1 of ***the AJA*** which deals, among other things, with applications for judicial review. ***The CPR*** came into force on 1 October 2009. They were made by the Rules Committee of the Supreme Court pursuant to powers conferred on it by ***section 82*** of the ***SCOJA***. ***Section 82(1)(a)*** empowers the Rules Committee to make rules with respect to, among other things, "the pleading, practice and procedure in or

affecting, and the forms used in connection with, any proceedings before the High Court …"

[61] ***CPR 2.2*** deals with the application of ***the CPR***. I have reproduced the relevant portions of that provision at paragraph 24. The effect of ***CPR 2.2(1)***, ***2.2(2)*** and ***2.2(3)(c)*** seems to be that ***the CPR*** applies to judicial review proceedings but only in so far as those proceedings are not regulated by the ***JRAR***. Simply put, those rules collectively suggest that ***the CPR*** only takes effect with respect to judicial review proceedings where ***the JRAR*** are silent.

[62] What then is the position where there is a duplication of ground in ***the CPR*** with that covered in ***the JRAR*** and some conflict in the relevant provisions? I consider it imprudent to seek to determine such a fundamental question without having had the benefit of the considered submissions of Counsel, where I am not required to do so. The requirement for service on the Attorney-General exists under both procedural regimes so the non-application of one or the other would not blunt the force of Mr. Trotman's Counsels' argument. Furthermore, I have determined that for the reasons which I will next discuss, the Attorney-General is a proper party. Nonetheless, this untidy state of affairs must ultimately be rectified, be it by judicial clarification or legislative action.

(iii) the scope of judicial review

[63] I come finally to the submissions relating to the scope of judicial review. I agree entirely with Ms. Small that the scope of judicial review proceedings under ***the AJA*** is measured by ***sections 2*** and ***3(1)*** of the legislation. ***Section 3(1)*** limits applications to those for relief against an "administrative act or omission". The definitional exercise is competed by application of the interpretation assigned by section 2 to the word "act" and the term "administrative act or omission". In effect, those definitions limit the scope of the proceedings to acts, decisions, determinations, advice, recommendations or omissions of any Government authority exercising, purporting to exercise or failing to exercise a power or duty conferred or imposed by an enactment or the Constitution. It is within this legislative context that she contended that the joinder of the Attorney-General ought not to be allowed where there is no complaint about, or challenge to, any act or omission attributed to him.

[64] Ms. Small is correct that Mr. Trotman makes no complaints about the Attorney-General. As exemplified by the authorities which she cited, her argument does not lack judicial support. In ***I.D.M. Direct Marketing Corporation v The Attorney-General et al High Court Suit No. 1188 of 1996, date of decision 19 November 1997***, one of the cases to which Counsel referred me, Moore J considered the legislative scope of judicial review; the

constitutional provision from which the Attorney-General derives his authority; and the statutory provision he regarded as relevant to the exercise of the act under review in that case. Having determined that no act of the Attorney-General had been implicated by the application; accepting that ***the CPA*** was not applicable; and reasoning that if the proceedings were continued against him they would fail, he concluded that the Attorney-General was not a proper party to the proceedings.

[65] Prior to the decision of Moore J in ***I.D.M. Direct Marketing Corporation***, King J had employed a similar methodology to the same effect in ***Scotland District Assoc. Inc. et al v Thompson as Minister Responsible for Health et al., High Court Suit No 19 of 1996, date of decision 29 August 1996***, as did Worrell J, subsequently, in ***Straughn***, another case to which Ms. Small referred me. Ms. Small rested on paragraphs 35 and 36 of the judgment of the Privy Council in ***Bahamas Hotel Maintenance & Allied Workers Union*** which seems in many ways to capture the essence of her submissions with respect to the application. Those paragraphs read:

> 35. Judicial review is directed to official decision-making, and the official who took the relevant decision is the natural respondent to such proceedings. The Registrar … would have been the proper Respondent to a challenge to any decision of his in the exercise of his statutory powers … . The Minister was the proper Respondent to any challenge to his decision, in exercise of his statutory powers, … .

> 36. The Attorney-General was therefore correct in submitting to the Board … that he should not be made a party. The President was in error in referring to section 12 of the Crown Proceedings Act, Ch 68, since proceedings by way of judicial review are not "civil proceedings" within the meaning of section 12 …. The Attorney-General would therefore only very rarely be a proper respondent to judicial proceedings, since most decisions taken by the Attorney-General himself are not amenable to judicial review. … .

[66] Ms. Burgess did not question the correctness of these decisions. However, the authorities to which she referred me support her submission that where the applicant is complaining about an act of the Governor-General, it is proper practice to name the Attorney-General as the respondent. These authorities have accepted the wisdom in the footnoted recommendation of Wooding CJ in ***Hochoy v Nuge (1964) 1 WIR 181***, supported in that case by Hyatali JA, that "the practice be followed of naming the Attorney General whenever the validity of any act of state by the Governor General is being called into question". Beyond that, it is fair to say that the authorities have elevated that recommendation to a principle of procedural law that holds that it is permissible and desirable to name the Attorney-General as a respondent where an act of the Governor-General is under review.

[67] ***C.O. Williams Construction Ltd. v Blackman et. al. (1989) 41 WIR 31*** was the earliest of the authorities which Ms. Burgess cited. In that case, Williams CJ stated, at page 47 letter b that he could see no resultant prejudice from

adopting the procedure recommended in ***Hochoy***. A decade later in ***Lloyd v The Attorney General High Court Suit No. High Court Suit No. 979 of 1996, date of decision 30 April 1998***, Moore J accepted the practice in holding that the Attorney-General was a proper respondent where the act complained of was that of the Governor-General on the advice of the PSC. He stated affirmatively, at page 5 that the "practice so well put in Hochoy" commended itself to him. In ***Leacock***, Cornelius J developed a statutory chain of responsibility to the Governor-General for the act complained of, before invoking ***Hochoy*** to conclude that the Attorney-General had been properly added to the action.

[68] Appellate endorsement of this approach preceded the decision of Moore J in ***Lloyd***. It found favour with Husbands JA in ***The Attorney-General v C.O. Williams Construction, Civ App No 6 of 1989, date of decision 3 February 1993***. In a dissenting judgment in which he considered the Cabinet decision to be reviewable, at page 16, he expressed preparedness to adopt "the sentiments expressed in Hochoy". More authoritative appellate approval followed in ***Lloyd v The Attorney-General Civ. App. No. 9 of 1998, date of decision 2 May 2000***. At page 6, that Court accepted the reasoning of Moore J at first instance.

[69] Ms. Burgess pointed to parallels between those decisions and this case. She carefully took me through the claim form and the affidavit to highlight the acts of which Mr. Trotman complains, the remedies he seeks, and the functionaries said to be responsible for those acts. His assertions and evidence are that the suspension was done by the Permanent Secretary in the Ministry of International Business; the commencement of the disciplinary proceedings by the PSC; and the interdiction by the Governor-General on the recommendation of the PSC. She also pointed to the provisions of the ***Code of Discipline*** to demonstrate that the functionaries identified are designated corresponding roles in the disciplinary process. Significantly, ***paragraph 4(8)*** of the ***Code of Discipline*** provides that an officer who faces disciplinary proceedings "may be interdicted from duty by the Governor-General on the recommendation of the Commission".

[70] Ms. Burgess submitted that not only was the interdiction attributable to the Governor-General but also the prior acts leading up to the interdiction. She urged that by interdicting an individual the Governor-General would have acquiesced in or approved of the preceding steps and, thus, be responsible for them. Counsel cited no authority in support of this submission and I am inclined to dismiss it as fanciful. The statutory roles of the various functionaries involved in the disciplinary process are clearly defined in ***the***

PSA. I do not follow how the prior acts can be said to be those of the Governor-General.

[71] In her final rebuttal, Ms. Small emphasised that interdiction is done by the Governor-General on the advice of the PSC and therefore, that any act of interdiction would practically be that of the PSC. It seems that in making this submission, Counsel might have been influenced by the fact that in ***Straughn*** in which it was held that the Attorney-General was not a property party, Worrell J acknowledged a similar qualification on the exercise of the power of the Governor-General to appoint persons with legal qualifications to the Public Service. In that case, the power was exercisable on the advice of the Judicial and Legal Services Commission ("**the JLSC**"). However, that was not the basis of the decision. The decisive factor was the absence of any evidence that the Governor-General had failed to accept a recommendation of the JLSC in relation to the applicant. Indeed, Worrell J formed the view that no such recommendation could have been made.

[72] Hence, ***Straughn*** does not assist Ms. Small. The position in this case is radically different. The assertions and the evidence is that the Governor-General interdicted Mr. Trotman. There is a clear administrative act on the part of His Excellency that is under challenge. His inclusion is conducive to the resolution of the issues in this case to which he is a necessary party but

our law accepts that the Attorney-General may be named as a respondent instead.

CONCLUSION

[73] Thus, I have reasoned that neither ***the CPA*** nor any procedural rules require the naming in these proceedings of the Attorney-General as a defendant; but it is acceptable that he be named as such, given that the claimant's case necessarily involves the Governor-General in the proceedings by challenging an act purportedly made by His Excellency pursuant to a statutory power. It follows that the application must be refused.

[74] I will hear the parties as to costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT