JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 76 AND 87/2013

MOTION NOS 7 AND 8/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN	**VIRALEE BAILEY-LATIBEAUDIERE**	**APPLICANT**
AND	**THE MINISTER OF FINANCE AND PLANNING AND THE PUBLIC SERVICE**	**1ST RESPONDENT**
AND	**THE FINANCIAL SECRETARY**	**2ND RESPONDENT**
AND	**THE PUBLIC SERVICE COMMISSION**	**3RD RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH RESPONDENT**

CONSOLIDATED WITH

MOTION 11/2014

BETWEEN	**THE MINISTER OF FINANCE AND PLANNING AND THE PUBLIC SERVICE**	**1ST APPLICANT**
AND	**THE FINANCIAL SECRETARY**	**2ND APPLICANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**3RD APPLICANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH APPLICANT**
AND	**VIRALEE BAILEY-LATIBEAUDIERE**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman and Company for the applicant Viralee Bailey-Latibeaudiere in motion Nos 7 and 8/2014 and the respondent in motion No 11/2014

Mrs Nicole Foster-Pusey QC, Solicitor General, Miss Carlene Larmond and Miss Tamara Dickens instructed by the Director of State proceedings for the respondents in motion Nos 7 and 8/2014 and the applicants in motion No 11/2014

22, 24 July 2014 and 13 February 2015

MORRISON JA

[1] I have read in draft the reasons for judgment of my sister Phillips JA. I agree with her reasoning and conclusions and have nothing to add.

PHILLIPS JA

[2] Motion Nos 7 and 8/2014 were filed by Viralee Bailey-Latibeaudiere (Latibeaudiere) against the Minister of Finance and Planning (the Minister), the Financial Secretary (FS), the Public Service Commission (the Commission) and the Attorney General (AG). Latibeaudiere sought conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal in respect of SCCA Nos 76 and 87/2013, delivered on 30 April 2014. Motion No 11/2014 was filed by the Minister, the FS, the Commission and the AG, also seeking conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal in respect of SCCA No 87/2013 delivered on 30 April 2014. The reasons for the judgment in both appeals were delivered on 9 June 2014. The decisions are set out later in this judgment. The applications were made pursuant to either sections 110(1)(a) or 110(2)(a) or both, of

the Constitution of Jamaica. On 22 July 2014 we heard arguments on the applications and on 24 July we dismissed all three motions. We made no order as to costs and promised at the time to put brief reasons in writing in due course. These are our reasons.

Background

[3] These motions all arise from an application for leave to apply for judicial review made by Latibeaudiere, in circumstances where she had held the position of Commissioner General Tax Administration for Jamaica under a three year contract of employment, which she entered into on 7 July 2011, but which was made effective 1 May 2011. The facts herein set out are thoroughly summarized in the judgment of Skyes J and are gratefully reproduced here.

[4] Latibeaudiere had been appointed to the above post under section 125(1) of the Constitution of Jamaica by the Governor General acting on the advice of the Commission. Although there had been no allegation of impropriety against her, or any charges of incompetence or inefficiency, and although no hearing had been convened to determine whether she was suitable for the post, she contended that on 28 January 2012 the FS indicated to her that her contract would be terminated. She later received a letter informing her that she was to proceed on 10 days vacation leave and thereafter arrangements would be made for the termination of her contract of employment. She was later transferred to the post of Commissioner General Ministry of Finance and Planning and the Public Service, a post that had not existed in February 2012.

Negotiations took place. They were unsuccessful but the situation continued for 17 months, when she received a letter dated 10 July 2013, advising that the Ministry would be terminating her contract with effect from 31 July 2013.

[5] She applied for an injunction restraining the defendants from terminating her contract of employment, which was granted by Campbell J on 26 July 2013, later extended by Hibbert J, and then set down for an *inter partes* hearing with the application for leave to obtain judicial review.

[6] The application for judicial review sought several declarations, and administrative orders namely: against the Minister and FS that they were not empowered to terminate her contract; against the FS that she could not lawfully transfer Latibeaudiere to any other position unless an equivalent one and for good reason; that Latibeaudiere was the only person who could lawfully exercise the powers of Commissioner of Tax Administration and all actions taken without her consent and approval would be null and void; orders for certiorari against the Minister and FS quashing the decision to terminate her contract and to transfer or reassign her from her substantive post; orders of prohibition restraining the respondents from terminating her contract without following lawful process as set out in the Public Service Regulations, and an order of mandamus compelling the Commission to act according to law, and advise the Minister and the FS as to the propriety of terminating Latibeaudiere's contract of employment and/or transferring or reassigning her to another post.

[7] The interim and interlocutory injunctions sought were against the Commission restraining it from making any recommendations to the Governor General concerning the filling of the post of Commissioner General, Tax Administration Jamaica until the issues were determined by the Supreme Court and a permanent injunction restraining the respondents from terminating Latibeaudiere's contract without following the applicable law relating to the determination of employment contracts of public officers.

[8] Those applications for injunction and for leave to proceed to judicial review, came before Sykes J on 23 August 2013 and in a typically comprehensive judgment, the learned judge dealt with the test for leave to apply for judicial review, as laid down in **Sharma v Brown-Antoine** [2006] WCPC 57; WIR 379, and the law in relation to the termination of a contract for a fixed term in respect of a public officer before the natural expiry date of the same. The learned judge also dealt with the bases for opposition to the application, namely the detriment to good administration, the availability of an alternative remedy, the question of legitimate expectation, and whether the injunction previously granted ex parte should be dissolved. Sykes J granted the application for leave to proceed to judicial review, and the application for the injunction until further order, or until the matter was heard and determined by the Supreme Court.

[9] The learned judge also ordered that the sum of $12,425,789.18 which had been paid by the Minister to Latibeaudiere representing a "buy out" of the remainder of her contract, which Latibeaudiere had objected to, was to be returned by Latibeaudiere to the Minister by way of personal cheque, and was to be accepted by him. In compliance with this order the sum was duly returned to the Minister.

[10] On 18 September 2013, 25 days after having been given leave to apply for judicial review, Latibeaudiere filed a fixed date claim form. On the following day, 19 September 2013 when the substantive matter came up for hearing before Sykes J, the Minister took the preliminary point that the fixed date claim form having not been filed within 14 days of the grant of leave as required by rule 56.4(12), the leave had lapsed, and the fixed date claim was therefore ineffectual.

[11] Sykes J did not agree with this objection. He stated that the leave to apply for judicial review having been granted on 23 August 2013 during the long vacation, the time for filing the fixed date claim form did not begin to run until 16 September 2013, when the Michaelmas Term began. He therefore held that the fixed date claim form had been filed in time and dismissed the preliminary objection. He however, granted leave to appeal.

[12] The notice of appeal in SCCA No 87/2013 filed on 22 October 2013, by the Minister, FS, the Commission, and the AG against Latibeaudiere related to the challenge against the order made by Sykes J granting leave to proceed to judicial review, and the notice of procedural appeal, in SCCA No 76/2013, filed 1 October 2013 between the same parties, related to the challenge against the order of Sykes J dismissing the preliminary objection. Morrison JA, with whom the other members of the court agreed, dealt comprehensively with the eight grounds of appeal filed in respect of SCCA No 87/2013. He referred to the threshold test required for the grant of leave for judicial review, the issue of whether certiorari lay against the Minister, questions relating to the termination of contracts of persons in public service employment, having been given

notice in keeping with the provisions of the contract, or/and with compensation to the employee in full for the entire remaining period of the contract, and or by disciplinary/hearing procedures pursuant to the public service regulations (see **McPherson v The Minister of Land and Environment** (SCCA No 85/2007, judgment delivered 18 December 2009, **R (on the application of Tucker) v Director General of the National Crime Squad** [2003] EWCA Civ 57, **Fraser v Judicial & Legal Services Commissioner and the Attorney General** [2008] UKPC 25; 73 WIR 175, **Inniss v Attorney General of Saint Christopher and Nevis** [2008] UKPC 42; (2008) 73 WIR 187, and **Thomas v Attorney-General** (1981) 32 WIR 37).

[13] Morrison JA also dealt with the issue of whether any discretionary bar arose, whether alternative remedies were available, whether the question of legitimate expectation was relevant in the circumstances of this case and finally whether injunctive relief was applicable. The court canvassed in detail the relevant applicable rules of the CPR, namely rules 56.3(1), (2), and (4); 56.4(1), (2) and (3); 56.4(12) and 56.6.

[14] The learned Solicitor General argued specifically in the appeal, in respect of the "buy out" of the employment contract, and submitted that there was a distinction to be drawn in the cases where the contract was terminated pursuant to the notice clause, as against when it was terminated by way of a "buy out" that is, by paying up in full the entire entitlement to the employee under the contract. It was submitted that, to the extent that the public service regulations were designed to protect a public servant

from economic disadvantage in the event of arbitrary termination, in the instant case, Latibeaudiere had been fully protected from such disadvantage, having been paid up in full. Morrison JA in disposing of that contention said this:

> "it seems to me to be strongly arguable that this is a distinction without a difference: whether it is sought to achieve it by notice pursuant to the contract (as in **McPherson**) or by a payment of the employee's full entitlement under the contract (as in this case), the desired outcome at the end of the day is the removal of the public officer from the position to which he/she has been appointed by the Governor-General, prior to the natural expiry date of the contract under which he/she holds office. In these circumstances, the constitutional protections designed to insulate public servants from removal from office otherwise than in accordance with the established procedures under the PSR [public service regulations] appear to me to be as apt to vindicate a public servant's reputation, as they are to protect her economic interests. It is therefore difficult to see why a different rule should apply in the case of a "buy out" of the contract, once it has the effect of removing the officer from her position before its natural expiry date." (paragraph [53])

[15] The court ultimately found that in the light of all the decisions mentioned and canvassed in the judgment, the learned judge in the court below, was clearly correct in determining that Latibeaudiere had demonstrated a reasonable prospect of succeeding on her substantive judicial review application. The court also found however that the learned judge was wrong in concluding, as there was no evidence to support it, that Latibeaudiere had a legitimate expectation that her contract would have been renewed and therefore leave ought not to have been granted on that ground. The court also held that the question of delay did not arise in this case.

[16] Morrison JA therefore concluded, and the court agreed, that the appeal against the decision of Sykes J to grant leave to Latibeaudiere to apply for judicial review of the decision communicated to her by the Solicitor General's letter dated 10 July 2013 to terminate the contract by way of a "buy out" should be dismissed, and endorsed the injunction granted until the hearing of the application for judicial review, but ordered that the injunction should have been discharged at the hearing of the said application for judicial review on 19 September 2013.

[17] The appeal in SCCA No 76/2013, as indicated, related to the late filing of the fixed date claim form, after the leave to do so had lapsed, thereby making the same invalid. That particular provision in the CPR, namely rule 56.4(12), has been the subject of several decisions in this court, namely **Golding and The Attorney General of Jamaica v Simpson Miller** (SCCA No 3/2008, judgment delivered 11 April 2008), **Andrew Willis v The Commissioner of Taxpayer Audit and Assessment Department/Commissioner of Inland Revenue** (App No 190/2009, judgment delivered 19 January 2010) and **Lafette Edgehill**, **Dwight Reid and Donnette Spence v Greg Christie and the Attorney General of Jamaica** [2012] JMCA Civ 16. In all these cases, Morrison JA opined, it has been established that under the CPR judicial review proceedings are subject to specified procedures which must be adhered to and leave to apply for judicial review is conditional on a claim for judicial review being filed within 14 days of the grant of leave and if this condition is not satisfied, the leave lapses, and any claim filed outside of that period is invalid.

[18] Morrison JA also dealt with the submission made on behalf of Latibeaudiere that the fixed date claim form was not filed late as time did not run in the long vacation. He reviewed the scope and objective of part 56 of the rules which deals with applications for administrative orders, which he stated, requires the applicants to proceed with due diligence and dispatch, and found that rule 3.5 of the CPR, dealing with the running of time in the long vacation would not override rule 56.4(12). However, and in any event, Morrison JA pointed out that the amendment to rule 3.5 now makes it clear that the long vacation does not affect any time prescribed for the filing of a claim form or the particulars of claim contained in or served with the claim form. As this court stated, Sykes J had proceeded on a mistaken premise, (being unaware of the amendment to the rule, which previously had stated that time for filing and serving any statement of case did not run in the long vacation). This court therefore ruled that the preliminary objection ought to have succeeded. The court also concluded that the position taken by counsel for Latibeaudiere was plainly unsustainable, and the appeal was allowed.

The Motions - 7 and 8/2014

[19] Latibeaudiere's Motion No 7/2014 (dealing with SCCA No 87/2013) merely asked the court to grant conditional leave to appeal to "Her Most Excellent Majesty in Council" from the decision of this court delivered on 30 April 2014. The application prayed for the usual conditions as set out in section 4 of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962, which addresses the applicant entering into good and sufficient security for the due prosecution of the appeal and taking steps for the preparation of the record and its dispatch to England. The motion

is stated to be made pursuant to section 110(1)(a) of the Constitution on the grounds that the matters in dispute on appeal to her Majesty in Council are: (a) of the value of $1,000.00 and upwards, and (b) in respect of a final decision in civil proceedings. The application was also made in the alternative, under section 110(2)(a) of the Constitution, on the basis that the questions involved in the appeal by reason of their great general and public importance or otherwise ought to be submitted to Her Majesty in Council. However, no questions were stated in the motion.

[20] The affidavit of Latibeaudiere in support of this motion stated that the leave was being requested in respect of the discharge of the injunction, and that the matters in dispute were of a value in excess of $1,000.00 and upwards, and were in respect of a final decision in civil proceedings. The matters of importance which represented good arguable grounds of appeal were stated as follows:

> "(a) the proper interpretation of the [sic] Section 125 of the Constitution of Jamaica and in particular questions surrounding the termination of employment of a Public Officer who has been appointed by the Governor General pursuant to a fixed term contract which the Respondents seeks [sic] to terminate prior to its natural expiration date.
>
> (b) the proper interpretation of the contract of employment under which the Applicant was employed in light of the Respondents attempt to terminate the said contract before its natural expiration date."

[21] Counsel for Latibeaudiere submitted that Motion 7/2014 related to the premature termination of Latibeaudiere's contract of employment. She had not, he asserted, been permitted to obtain the benefit of clause 5 of the contract which entitled her to 60 days

notice prior to the expiry of the contract. She had also been denied the protection of section 125 of the Constitution which addresses the appointment, removal of, and disciplinary control over public officers, a power vested in the Governor General acting on the advice of the Commission. Latibeaudiere was kept in the employ of the Government by judicial intervention and that had been taken away by the decision of this court by the discharge of the injunction and that decision deserved, he submitted, the review of the Judicial Committee of the Privy Council.

[22] Counsel referred to the Latibeaudiere affidavit stating that the matter was a final decision and concerned a dispute over the value of $1,000.00, and submitted that based on the true and proper construction of section 110(1)(a) of the Constitution, Latibeaudiere had a *right* to obtain conditional leave to appeal to Her Majesty in Council. Alternately, counsel argued, she was entitled to conditional leave to argue certain questions which he posed thus:

> "1. Whether a person appointed under the constitution, particularly pursuant to section 125 thereof, albeit in pursuance of a contract, such person's employment could be terminated by the process of a 'buy out' of the contract by the State against the person's will?"

The court felt impelled through Morrison JA (presiding) to inquire of counsel whether any such ruling had been made by the court? Indeed, this court informed counsel, that what this court had ruled, was that Sykes J had granted leave to argue that point in the judicial review application, and this court had upheld that decision.

Counsel framed the second question in this way:

"2. Whether such a termination is purely one of a private law nature or purely a matter of public law?"

[23] Motion No 8/2014 requested leave to appeal to her "Most Excellent Majesty in Council" from the decision of this court delivered on 30 April 2014 that the injunction granted by Campbell J, and extended by Hibbert J and continued by Sykes J be discharged, on the conditions as set out in the aforesaid 1962 Order. The application was said to be made pursuant to section 110(1)(a) of the Constitution on the same grounds as Motion No 7/2014. The application was also pursued in the alternative under section 110(2)(a) of the Constitution, on the basis that the appeal involved questions of great general and public importance which ought to be placed before Her Majesty in Council, but again none were stated.

[24] The affidavit of Latibeaudiere in support of the motion set out the history of the matter before Sykes J and the ruling in this court, as previously stated. At the time of deposing to the affidavit, the reasons for the decision of this court had not yet been delivered and the applicant was awaiting the formal certificate of result from the court. Latibeaudiere however indicated that at the time of the delivery of the judgment of this court, her counsel had requested an extension of time for the filing of the fixed date claim form, but stated that the application had been refused. She deposed further that she had a good arguable appeal on several issues including but not limited to the following:

"(a) the proper interpretation of the scope of the Civil Procedure Rules (as amended) in so far as they relate to

time running during the long vacation and in particular whether the amendment by the Rules Committee to the effect that time does not [sic] run during the vacation is *ultra vires* the Judicature (Supreme Court) Act; and

(b) the failure of this Honourable Court to exercise its discretion to extend the time for leave to challenge by way of judicial review the actions of the Respondents despite the ruling of the judge at first instance in my favour [sic] that there was no need to extend time and the fact that in any event the applicant was only 2 days outside the required 14 day period."

[25] Counsel submitted that the appeal had been determined by rules that were never extant in law, and he submitted that the entire body of rules which comprised the CPR 2002, having not been duly gazetted as required by law were null and void and had been so for a period of over 12 years.

[26] Counsel referred to a further affidavit of Latibeaudiere sworn to and filed on the 21 July 2014. On this occasion she deposed to, and exhibited, certain correspondence which had passed between her counsel and the learned Chief justice wherein he indicated that he had not had sight of any proper publication of the rules. Indeed, counsel had stated, she deposed, that he had been informed by the Government Printing Office, that the CPR had been published by a private publisher, namely Caribbean Law Publishing Company and had never been gazetted by the Government Printing Office, which, he indicated, would have significant bearing on matters where the Rules of Court had been relied on by parties. She referred to a letter dated 18 July 2014, from the learned Chief Justice, wherein the Chief Justice had confirmed that during her tenure as Chairman of the Rules Committee since June 2007, when she took

office, all amendments to the rules had been duly gazetted and circulated. She stated that she had no personal knowledge of the assertions made by Latibeaudiere's counsel. Counsel felt therefore emboldened to submit that no evidence having been produced that there had been any compliance with section 31 of the Interpretation Act, no publication in the Gazette having been shown, the rules would not yet have taken effect. Accordingly, counsel asserted rule 3.5 on which the court relied would not be applicable to the appeal and the fixed date claim form would be valid.

[27] In response to Motion No 7/2014, counsel for the respondents submitted that the questions outlined by Latibeaudiere in her affidavit were too vague. Also, Latibeaudiere's fixed term contract had expired at the time that the injunction had been discharged by this court, and there had been many cases out of the Privy Council which made it clear that fixed term contracts can properly be determined in that way. There was therefore no basis on which the injunction could have been extended.

[28] In respect of Motion No 8/2014, counsel submitted that the decision in question is not one involving a dispute of a value of $1,000.00 and upwards. Additionally, counsel said that the question posed in relation to the ultra vires of the CPR, did not arise out of the judgment of the Court of Appeal. The issue also with regard to the extension of time to file the fixed date claim form once the leave granted to do so had lapsed, was not a question of any great general and public importance, and in any event it is a settled issue. The courts, counsel said, have determined that there is no discretion in the matter.

The Motion – 11/2014

[29] The Minister in Motion No 11/2014, asked for an order granting conditional leave to appeal to Her Majesty in Council, as previously indicated from the decision of this court in SCCA No 87/2013 delivered on 30 April, with reasons delivered on 9 June 2014. The Motion was filed pursuant to section 110(2)(a) of the Constitution and the relevant questions said to be of great general or public importance are set out below:

I. Whether the 2nd Respondent's decision is amenable to judicial review in circumstances where:

   (a) it is clear that the Financial Secretary, are instructed by the Public Service Commission, "buying out" the contract of the Respondent was not exercising a statutory power;

   (b) the Financial Secretary was exercising an option that is contract based, is available where services are required for a fixed period and is exercised when they are no longer required;

   (c) the Financial Secretary was not performing a public duty owed to the respondent in the particular circumstances under consideration in that the decision was operational and not disciplinary;

II. Whether the respondent's contract of employment can properly be terminated either before its natural expiry date or at all, by means of an accelerated payment in full to her of all her entitlements under the contract without following the procedure laid down in section 125(1) and the regulations.

III. Whether termination prior to the natural expiry date of the contract by accelerated payment can be deemed unlawful

> and in contravention of section 125(1) of the Constitution in circumstances where termination is not being effected pursuant to the notice clause of the contract.

[30] Hazel Edwards, an attorney-at-law in the office of the Director of State Proceedings, swore to an affidavit in support of the motion stating that the questions were of great general or public importance "having regard to the preponderance of fixed term contracts within the public sector, and the functions to be carried out by the Public Service Commission, in particular in relation to the tenure of persons engaged pursuant to such contracts."

Analysis

[31] These motions will be determined based on the true and proper interpretation of sections 110(1)(a) and 110(2)(a) of the Constitution. These provisions have been reviewed and discussed in several cases in this court. I will set out the provisions below for convenience.

> "110 (1) An appeal shall lie from decisions of the Court of Appeal to her Majesty in Council as of right in the following cases –
>
> > (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;…
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-

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

[32] With regard to section 110(1)(a) the main question appears to be whether the matters in dispute on appeal or the questions on appeal are in respect of final decisions in civil proceedings. It is well accepted that the approach to be adopted in determining whether an order/decision is interlocutory or final is the application approach. That approach was applied by this court in **JPS v Rose Marie Samuels** [2010] JMCA App 23 and more recently endorsed in **George Ranglin and others v Fitzroy Henry** [2014] JMCA App 34. In the latter case I referred to the dictum of Morrison JA in **JPS v Samuels** which was dealing with an order made on a summary judgment application and in deciding whether the order was interlocutory or final, in which he adopted the ruling of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 approving the application approach stated by Lord Esher in **Salaman v Warner and others** [1891] 1 QB 734, that is, that the nature of the application to the court, and not the nature of the order which is made, determines whether the matter is interlocutory, or final. In **Salter Rex**, the order being appealed was an order for a new trial, and Lord Denning in applying the application test stated that if the application for the trial were granted, it would have been interlocutory and so equally if it had been refused, it would have been interlocutory. In **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** SCCA No 54/1997, delivered 18 December 1998, this court in adopting the application approach stated the test as

established in **Salaman Warner**, namely, that, if the decision being appealed, "whichever way it is given will, if it stands finally dispose of the matter in dispute it is final, however, if on the one hand, if it is given one way, it will finally dispose of the matters in dispute, but if given the other way, the action will continue, then it is interlocutory". Applying that approach Morrison JA held that an application for summary judgment if refused, the order would be interlocutory and so equally where it is granted, the judge's order remains interlocutory.

[33] In the instant case, the court held that the application for the grant of leave was well founded in respect of the claim for administrative orders. The application for leave having been granted, the hearing of the judicial review application would have proceeded, so the order would be interlocutory, equally if the application had been refused the order would remain interlocutory. The preliminary objection was upheld. However, had it been refused, then the application for judicial review would have proceeded, so equally the order remains interlocutory. The matters in dispute therefore, were not final decisions in civil proceedings, and none of the motions fell to be considered under section 110(1)(a) of the Constitution. This principle would have been applicable to all the motions filed for leave to appeal to Her Majesty in Council.

[34] The question as to the true and proper interpretation to be given to section 110(2)(a) of the Constitution, has also been the subject of review in this court. In **Georgette Scott v The General Legal Council** SCCA No 118/2008, Motion No

15/2009, delivered 18 December 2009, I set out, on behalf of the court, at page 9 three steps that ought to be used in construing this section namely:

> "… Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general of public importance."

It is clear therefore that before granting leave the court must be satisfied that the proposed appeal raises questions which arise from the decision of the Court of Appeal, are determinative of the substantive issues, on the merits of the appeal, and are by their nature of great general or public importance to justify being considered by Her Majesty in Council.

[35] There have been other pronouncements made in several decisions of this court. In **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106 at 109, MacGregor J in delivering the judgment of the court, and interpreting rule 2 (b) of the Privy Council Rules made by Order in Council dated 15 February 1909, and which were stated by Rowe P in **Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79 to be substantially the same as section 110(2)(a) of the Constitution stated that:

> "It was not enough that a difficult question of law arose, it must be an important question of law. Further the question

> must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations."

And in quoting Lord Fitzgerald in **Prince v Gagnon** (1882) 8 AC 103 at page 105, MacGregor J reiterated that:

> "There is no grave question of law or of public interest involved in its decision that carries with it any after consequences, nor is it clear that beyond the litigants there are any parties interested in it."

[36] In **Verne Granburg v Elinor Inglis** (1990) 27 JLR 53 at page 55 Rowe P having found that no great conflict of law arose to warrant the court granting an applicant leave to appeal to Her Majesty in Council, said:

> "We do not think that merely to take a matter to the Privy Council to see if it is going to agree with us, is a matter on which the Court ought to grant leave."

[37] The questions posed by Latibeaudiere in respect of Motion 7/2014 all related to the proper interpretation to be given to section 125 of the Constitution with particular regard to whether a fixed term contract of employment of a public officer could be "bought out" before its natural expiration date and against the officer's will? As indicated in paragraph [20] herein, it was necessary to point out to counsel for Latibeaudiere that there has not been a decision in this case construing the interpretation and the applicability of section 125 of the Constitution to the facts of this case. There is no doubt however that the court canvassed and commented on relevant decisions addressing the termination of fixed term contracts of public servants, particularly, as stated previously, the decisions of the Privy Council in

Thomas v Attorney General, **Fraser,** and in this court in **McPherson.** The issue in **Thomas** was whether a police officer, as a public servant, was dismissible at pleasure from the police force of Trinidad & Tobago. Lord Diplock in delivering the judgment of the Privy Council said that he was not. In **Fraser,** a case from Saint Lucia, which related to the purported dismissal of a magistrate before the expiry of the fixed term contract under which he held office, Lord Mance in upholding the contention of the magistrate stated inter alia that:

> "…The constitutional protection therefore operates over and above any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date."

In **McPherson,** the appellant had been appointed under a three year contract to the position of Director, Land Titles in the National Land Agency which was also underpinned by a public service appointment, by the Governor General, as Registrar of Titles. The appellant successfully challenged a decision to recommend to the Governor General the revocation of his public service appointment, some six months prior to its natural expiry date on the ground of non-compliance with section 125 of the Constitution and the public service regulations.

[38] As previously indicated this court held that Latibeaudiere had passed the **Sharma** threshold test as the application had "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". It is therefore somewhat puzzling as to why there were any arguments from counsel on behalf of Latibeaudiere on this point at all. There

was no decision in relation to the attempted "buy out" and early termination of her contract, but the application for leave to proceed to judicial review, which had been granted in the court below was approved on appeal. However, be that as it may, as indicated, from a review of the cases undertaken by this court in the appeal SCCA No 87/2013, the issues seem fairly settled from the Privy Council authorities from this court, on fairly similar facts as exist in this case. So, there does not seem to be any proposed appeal in this motion, relating to questions arising from a decision of this court (as the matter is only at the stage of having been granted leave to apply for judicial review) and the issues clearly relate only to these particular litigants. The matter does not appear to be worthy of consideration by the Privy Council and is not therefore of any great general or public importance.

[39] The questions posed by Latibeaudiere in respect of Motion No 8/2014 relate to the issue of whether time runs in the long vacation in respect of statements of case, particularly as in this case, the fixed date claim form and whether the court could properly extend the time for the filing of the form.

Rule 3.5(1) of the CPR as amended reads as follows:

> "Part 3.5(1) During the long vacation, the time prescribed for filing and serving any statement of case other than the claim form, or the particulars of claim contained in or served with the claim form, does not run."

The rule is very clear and it is necessary to give it its natural and ordinary meaning. Time runs in the long vacation for the filing of the fixed date claim form. In this case,

as the grant of leave to apply for judicial review was granted in the long vacation the 14 days that the rules allow for the filing of the fixed date claim form would have commenced running on the day after the grant of leave and for 14 clear days following in the long vacation. Thereafter the leave lapsed (rule 56.4 (12)). The fixed date claim form having not been filed was out of time and invalid. The leave having lapsed no extension of time for the filing of the claim form could be given. There is no question that this court has made several pronouncements on these particular rules and these specific issues (**Miller v Golding**). There are no issues/matters therefore worthy of debate to be submitted to the Privy Council.

[40] But even more importantly, the submission made by counsel on behalf of Latibeaudiere, with regard to the invalidity of the CPR, on the basis that they had not been gazetted, was never a point argued in the Court of Appeal, and therefore does not arise from a decision of this court and cannot form the basis of any questions for the Privy Council. In any event, the court was provided with a copy of "The Jamaica Gazette Supplement" proclamations, rules and regulations, published on Wednesday 1 January 2003. The publication reads as follows:

> "In exercise of the powers conferred upon the Rules Committee of the Supreme Court by section 4 of the Judicature (Rules of Court) Act, the following Rules are hereby made:-
>
> 1. These Rules may be cited as the Court of Appeal Rules, 2002, and shall come into operation, subject to the transitional provisions contained in rule 1.17, on January 1, 2003

2. The Court of Appeal Rules, 1962 and the Court of Appeal (Attorneys-at-Law's Costs) Rules, 2000 are hereby revoked.

Copies of the Court of Appeal Rules, 2002 can be purchased through the Ministry of Justice, 2 Oxford Road, North Tower, Kingston 5.

Dated September 16, 2002."

"In exercise of the powers conferred upon the Rules Committee of the Supreme Court by section 4 of the Judicature (Rules of Court) Act, the following Rules are hereby made for the purposes of the Judicature (Civil Procedure Code) Law and the Judicature (Appellate Jurisdiction) Act:-

1. These Rules may be cited as the Civil Procedure Rules, 2002, and shall come into operation, subject to the transitional provisions contained in part 73, on January 1, 2003.

2. Sections 2 to 687 of the Judicature (Civil Procedure Code) Law and all forms made thereunder are hereby repealed, and all Rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy) and matrimonial proceedings, are hereby revoked.

Copies of the Civil Procedure Rules, 2002 can be purchased through the Ministry of Justice, 2 Oxford Road, North Tower, Kingston 5.

Dated September 16, 2002."

The CPR 2002 were obviously duly gazetted as required by law.

[41] The arguments in relation to this aspect of the matter are therefore wholly unsustainable and not really worthy of counsel. Counsel appeared to make this last-ditch effort to attack the rules in order to formulate an argument that the amendment

to rule 3.5 of the rules as set out above was invalid due to the lack of publication in the Jamaica Gazette, and would therefore underpin the contention that the fixed date claim form was yet valid. The amendment as set out above was also duly published in the Jamaica Gazette Extraordinary on 16 November 2012, which makes that contention equally unsustainable.

[42] The questions posed by the Minister in Motion 11/2014 related to whether the decision of the FS was subject to judicial review, once it was accepted that the "buy out" of the contract was the exercise of a statutory power, and that in making that decision, the FS was not performing a duty owed to Latibeaudiere as the decision was operational and not disciplinary; and whether Latibeaudiere's contract of employment could be properly terminated by the accelerated payment in full in respect of all entitlements due under the contract without following the procedure laid down in section 125 of the Constitution.

[43] These questions do not satisfy the criteria as set out in the abovementioned authorities, nor do they qualify as being of great general or public importance as outlined in paragraph [36]. There has been no decision by this court in respect of this matter on the issue of the validity of the Minister "buying out" a fixed term contract of employment of a public officer by paying the entire balance of what was remaining in the contract period. The substantive application for judicial review not yet having been heard, the questions posed by the Minister, do not arise from the decision of the Court

of Appeal and therefore do not justify consideration by the Judicial Committee of the Privy Council.

Conclusion

[44] In the light of all of the above, none of the matters in dispute concerned final decisions in civil proceedings and, in the opinion of the court, none of the questions in the proposed appeals posited by the respective applicants in the motions before the court were of any great general or public importance or otherwise worthy of consideration before Her Majesty in Council, and thus did not fall within the provisions of section 110(1)(a) and 110(2)(a) of the Constitution. For these reasons, we dismissed all three Motions Nos 7, 8 and 11/2014 as indicated in paragraph [2] herein, and made no order as to costs.

MANGATAL JA (AG)

[45] I have read the reasons and conclusions and agree. There is nothing that I can usefully add.