[2024] JMSC Civ. 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU2024CV 03844

BETWEEN	**ANDREW HOLNESS**	**1st APPLICANT**
AND	**IMPERIUM INVESTMENT HOLDINGS LIMITED**	**2nd APPLICANT**
AND	**POSITIVE MEDIA SOLUTIONS LIMITED**	**3rd APPLICANT**
AND	**POSITIVE JAMAICA FOUNDATION LIMITED**	**4th APPLICANT**
AND	**CRAIG BERESFORD**	**1st RESPONDENT**
AND	**KEVON STEPHENSON**	**2nd RESPONDENT**
AND	**THE INTEGRITY COMMISSION**	**3rd RESPONDENT**

Mr Ransford Braham KC, Mrs Georgia Gibson Henlin KC, Mr Seyon Hanson, Miss Stephanie Williams, Mr Lemar Neale and Mr Vasheney Headlam instructed by Henlin Gibson Henlin for the applicants

Mr Michael Hylton KC, Mr Kevin Powell, Mr Sundiata Gibbs and Ms Annay Wheatle instructed by Hylton Powell for the respondents

Heard: November 7 and 8, 2024 and December 6, 2024.

Leave for judicial review - whether threshold test for leave met - Whether Special Report of the Integrity Commission amenable to judicial review- Whether orders of mandamus can lie - The Integrity Commission Act – The Corruption Prevention Act

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] The primary question before the court is whether the applicants should be granted leave to bring a judicial review claim against the respondents, to challenge the following reports: -

a) "**Investigation Report into the Statutory Declarations submitted by the Most Honourable Mr. Andrew Holness, Prime Minister for the years 2019-2022, in respect of concerns that he owns assets disproportionate to his lawful earnings, and that he made false statements in his Statutory Declarations, by way of omissions, contrary to law**", dated August 30, 2024, and **"Addendum"** dated September 9, 2024.

b) "**Special Report**": **"Submitted by the Integrity Commission under Section 36(3) of the Integrity Commission Act in the matter of an Investigation Report of an Investigation Conducted into the Statutory Declarations submitted by The Most Honourable Mr. Andrew Holness, Prime Minister for the years 2019-2022 in respect of concerns that he owns assets disproportionate to his lawful earnings and that he made false statements in his Statutory Declarations by way of omissions contrary to law**", dated September 5, 2024.

[2] The judicial review remedies for which the applicants seek leave are orders of certiorari to quash the aforementioned reports; orders of mandamus compelling the 1st respondent to examine the 2022 and 2023 statutory declarations of the 1st applicant, as provided by sections 32 and 42(1) of the Integrity Commission Act (ICA); to comply with sections 32 and 42(1) of the ICA in relation to the 1st

applicant's statutory declarations for 2021 and 2022 and; compelling the 2nd respondent to recommend to the 3rd respondent that the 1st applicant be exonerated in relation to his 2021 and 2022 statutory declarations, in such a manner as the 3rd respondent deems fit, in accordance with section 54(5) of the ICA. There are, however, several other remedies being sought by the applicants which are not judicial review remedies and therefore do not require the leave of the court to bring a claim. I will come to these later in this judgment.

[3] The 1st applicant, Andrew Holness, is the Prime Minister of Jamaica (the PM). The 2nd applicant, Imperium Investments Holdings Limited (IIHL), is a limited liability company registered in Jamaica, of which the PM is the sole director and shareholder. The 3rd applicant, Positive Media Solutions Limited (PMSL), is also a limited liability company, of which, the PM is one of two shareholders; and the 4th applicant, Positive Jamaica Foundation Limited (PJFL) is a company limited by guarantee, incorporated by the PM. On the respondents' side, the 1st respondent, Craig Beresford, is the Director of Information and Complaints (DIC) at the Integrity Commission (IC). The IC is the 3rd respondent; and the 2nd respondent, Kevon Stephenson, is the Director of Investigation (DI) at the IC.

[4] I am aware that given the issues raised in the impugned reports, the remedies sought in the application, and the parties involved; this matter has attracted tremendous public interest and attention. In this judgment therefore, I believe it is important to first examine judicial review and to explain what this very nuanced but extremely important public law proceeding is, and what it is not.

The Law

[5] Simply put, judicial review is the process by which the Supreme Court, exercises its supervisory jurisdiction over the 'decisions' of public bodies, inferior tribunals and public officers. In exercising its jurisdiction however, the court is not concerned about the merits of the decision, or whether it is correct, but whether it is legal and

the decision-making process fair.[1] In performing its role, the court cannot usurp the decision-making power granted to the public body, tribunal or officer by parliament through legislation. Put another way, it is not for the court to make the decisions which the public body, tribunal or officer alone is empowered to make within the parameters of the legislation from which a power or a discretion is given. It will be immediately clear therefore, that judicial review is not an appeal from the decision of a public body, tribunal or officer.

[6] Brooks JA (as he then was) captured the distinction well in **Industrial Disputes Tribunal v University of Technology and the University and Allied Workers Union,** consolidated with **University and Allied Workers Union v The University of Technology and the Industrial Disputes Tribunal. SCCA Nos 71 & 72 /2010 delivered October 12, 2012,** at paragraph 24 of his judgment:

> "A basic but accurate distinction has been set out in The Caribbean Civil Court Practice 2011. The learned editors, at page 431 state :
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> > 'Judicial review of an administrative act is distinct from an appeal. The former is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision maker and the fairness of the decision-making process rather than its correctness'.
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> In Administrative Law 10th edition, Wade and Forsythe state the principles a little differently, but with no less merit, at pages 28-29 of their work:
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> > 'The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an

[1] Lord Hoffman **in Kemper Reinsurance Co. v Minister of Finance and Others** (1998) 53 WIR 109, at page 119

> appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

[7] The scope of judicial review was set out in **Council of Civil Service Unions v Minister of Civil Service [1985] AC 374.** Lord Roskill in dealing with its evolution said at page 414, that:

> "…executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its actions as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (see **Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223**). The third is where it has acted contrary to what are often called "principles of natural justice."

[8] Lord Diplock, in that same decision, classified the heads of judicial review as illegality, irrationality and procedural impropriety. In respect of 'irrationality" he said at page 410 that:

> "By 'irrationality' I mean what can by now be succinctly referred to as "Wednesbury unreasonableness'… It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Our Court of Appeal in **Office of Utilities Regulations v Minister of Industry Commerce and Technology SCCA Nos 4 & 5/04 decided May 30, 2007,** said that the courts will not usually regard a decision of a public body as so unreasonable requiring quashing unless the decision is regarded as reaching the level of absurdity.

The need for leave

[9] Judicial review is a two-staged process which requires an applicant to first get the court's leave or permission to bring a judicial review claim. Mangatal J (as she then was) in **Hon. Shirley Tyndall OJ, Patrick Hylton, Omar Davies, Jamaica Redevelopment Foundation Inc. v Hon. Justice Boyd Carey (Ret'd), Charles Ross and Worrick Bogle, unreported Supreme Court decision , delivered February 12, 2010** , addressed the need for the court's leave at paragraph 8:-

> "Unlike public law remedies, there was and is no requirement generally for persons pursing private law rights against other parties to obtain the leave of the court before starting a claim in court. It is difficult to improve on the description of the purpose of the requirement of leave set out in the well-known decision of the English House of Lords in **Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited [1981] 2 All E.R 93,** where at pages 12-13 Lord Wilberforce stated:-
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>> "The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainly in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

The test for leave

[10] There is however a threshold test to obtain leave, which every applicant must meet. The burden is that of the applicant to show that he, she or it, has an arguable case with a realistic prospect of success. Referring to this test Mangatal J at paragraph 10 of her judgment in **Hon. Shirley Tyndall OJ** quoted from the dictum of Lord Bingham of Cornhill and Lord Walker of Westinghope in **Sharma v Brown Antoine (2006) WIR 379** (an appeal to the Privy Council from the Trinidad and Tobago Court of Appeal) and said: -

> "In **Sharma** v **Brown Antoine (2006) 69 WIR 379,** a decision of the Judicial Committee of the Privy Council in relation to our Caribbean neighbour Trinidad and Tobago, at page 387 Lord Bingham of Cornhill and Lord Walker of Westinghope , indicated:
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>> '…The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin L.R. 623 and 628, and Fordham, Judicial Review Handbook (4th Edn 2004), p.426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.'"

[11] Continuing at paragraph 11, Mangatal J said: -

> "It is to be noted that an arguable ground with a realistic prospect of success, is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The court is not required to

go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."

[12] In arguments before me, it was submitted by Mr Ransford Braham KC, counsel for the applicants, that the modern approach to the test now includes taking into consideration the public interest; the court will generally grant leave where the case raises questions of public interest; and that in this case I ought to do just that. For this proposition, King's Counsel relied on the Privy Council decision of **Attorney General of Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44;** and the English Court of Appeal decision in **R (Gentle & Anor) v Prime Minister & Ors [2007] 2 WLR 195.** After reviewing these two decisions, I am not persuaded that they reflect a modern approach to the test for leave for judicial review and that if a case raises questions of public interest, leave should be granted on this basis alone.

[13] **Attorney General of Trinidad and Tobago v Ayers-Caesar** concerned an appeal by the President of Trinidad and Tobago, from the decision of the Court of Appeal, in which the majority refused his appeal from the first instance court's grant of leave to a High Court Judge to bring a judicial review claim against him, for his refusal to set aside her resignation and to reinstate her. The respondent's case was that her resignation had been procured by unlawful pressure and duress placed on her by the Chief Justice, and therefore section 142 of the Trinidad and Tobago constitution dealing with resignations from office, did not apply. In refusing the appeal, the majority of the Court of Appeal found that it was arguable, that section 142 of the constitution does not apply to an invalid resignation. They also considered that it was in the public interest to allow a judicial review claim against the President, since the issues raised affected not only the parties, but the general public.

[14] When the matter came before the Privy Council, Lord Sales, writing for the majority, cited the Board's earlier decision in **Sharma** and stated unequivocally at paragraph 2 that: -

> "The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review which has a realistic prospect of success. Wider questions of public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage."

I understand this dictum to mean that the threshold test for leave is as expressed in **Sharma**, and that while questions of public interest may have some effect on whether leave should be granted, if the threshold test is not met, the usual and appropriate course is for the court to refuse to grant leave.

[15] Ultimately, the Board did not consider, that at the leave stage, the President's legal position and role with respect to the respondent's resignation, were sufficiently clear. It determined therefore, that the majority of the Court of Appeal were right to find that the respondent's case met the threshold test for leave and were entitled to find that it would be in the public interest for the issues raised in the case to be authoritatively decided by the courts after a substantive hearing on the merits.

[16] Turning now to **R (Gentle & Anor).** In that case**,** the English Court of Appeal had before it, a claim for judicial review of the government of England's refusal to hold an independent inquiry into the circumstances which led to the invasion of Iraq. The appellants were parents of service men who had died during the Iraq war. The first instance judge had refused leave to bring the judicial review claim and had also refused leave to appeal his decision. The application for leave to appeal was renewed at the Court of Appeal, where that court decided to grant leave for judicial review instead of leave to appeal, pursuant to CPR 52.15 (3) (UK). CPR 52.15(1) (UK) allowed an applicant to apply to the court of appeal for permission to appeal where permission to apply for judicial review has been refused; and CPR 52.15(3),

provided that on an application under CPR 52.15(1), the court may instead of giving permission to appeal, give permission to apply for judicial review. Under CPR 52.3(6) (UK), there are two grounds on which the Court of Appeal can grant permission to appeal, either a), that the appeal has a real prospect of success or b), there is a compelling reason why the appeal should be heard. The court, interestingly, decided that it should give permission to appeal on the basis that the appeal raised important issues around which there was uncertainty, and that this was a compelling reason for the appeal to be heard. However, it then decided that instead of granting leave to appeal, it would grant leave for judicial review on the same basis on which it granted leave to appeal. It then proceeded, pursuant to CPR 52.15(4) (UK) to hear the judicial review claim itself.

[17] It is therefore in the context of the English rules of court as they then stood, that Sir Anthony Clarke MR, said the following at the start of the court's judgment at paragraph 1: -

> "This is an application for judicial review of the refusal of the Government to hold an independent inquiry into the circumstances which led to the invasion of Iraq. The application for permission to proceed was originally heard by Collins J, who refused it on 20 December 2005. He also refused permission to appeal but the application was renewed to this court and adjourned by Lord Phillips of Worth Matravers CJ to be heard on notice to the defendants. We heard the application and on 26 July 2006, decided that this was a proper case in which to grant permission, not on the basis that we had concluded that the application for judicial review had a real prospect of success within the meaning of CPR r 52.3(6), but on the basis that, because of the importance of the issues, there was a compelling reason why an appeal should be heard: see **[2006] EWCA Civ 1078**. We then considered whether, instead of giving permission to appeal, we should give permission to apply for judicial review under CPR r 52.15(3) and, if so, whether this court should consider the application under CPR 52 .15(4). We answered

both questions in the affirmative and reserved the application to the same constitution [of the Court of Appeal]."

[18] It seems to me, that the English Court of Appeal's decision to hear the claim for judicial review was not based on a modified threshold test which required regard to the public interest. Instead, it was the English rules of court which allowed the court to grant leave for judicial review instead of leave to appeal, and in granting leave for judicial review, it did so for the same reason it decided that the appeal should be heard.

The application

[19] By **Amended Notice of Application for Court Orders for Permission to apply for Judicial Review**, filed on October 17, 2024, the applicants seek the following 28 remedies: -

a) **An order of certiorari** quashing the report and the findings and recommendations of the 2nd and/or 3rd Respondents as being inconsistent with the provisions and procedures contemplated by the ICA.

b) **An order of certiorari** to quash the said findings, conclusions and/or recommendations made in relation to the Applicants by the 2nd Respondent the Director of Investigation, which are contained in an Investigation Report dated August 30, 2024, and the 3rd Respondent's special report dated the 5th September 2024 except the matters that were dismissed by the Director of Corruption Prevention.

c) **An order of certiorari** quashing the Investigation Report dated August 30, 2024, and the 3rd Respondent's special report dated the 5th September 2024 and the findings and recommendations of the 2nd and/or 3rd Respondent as being an improper use of and/or abuse of the

powers and discretion conferred on the Respondents under the ICA and the Corruption Prevention Act.

d) **An order of mandamus** compelling the 1st Respondent to examine the 1st Applicant's 2022 and 2023 Statutory Declarations as provided for by section 32 and 42(1) of the ICA.

e) **An order of mandamus** compelling the 1st and/or 3rd Respondents to comply with sections 32 and 42(1) of the ICA in relation to the 1st Applicants declarations for 2021 and 2022.

f) **An order of mandamus** compelling the 2nd Respondent to recommend to the 3rd Respondent that the Applicant be exonerated of culpability in relation to the 2021 and 2022 statutory declarations, in such manner as the 3rd Respondent deems fit and in accordance with section 54(5) of the ICA.

g) **A Declaration** that the submission of the Reports to Parliament, save for the matters referring to the four (4) accounts, for Tabling was unlawful and/or illegal having regard to the full terms and effects of section 54 of the ICA.

h) **A Declaration** that having regard to the fact that there was no or no statement of reasonable suspicion of corruption in relation to the matters referred to Parliament in the Reports of the 30th August 2024 and the Special Report of the 5th September 2024 and there being no reference to the Director of Corruption Prosecution, the 3rd Respondent was wrong to submit these Reports to Parliament for tabling.

i) **A Declaration** that section 14(5) of the Corruption Prevention Act, is unconstitutional and should be struck down insofar as it breaches the

presumption of innocence, and the right to life, liberty and security of the person as guaranteed by section 13(3)(a) of the Charter of Fundamental Rights and Freedoms by the imposition of the reverse onus requiring the 1st Applicant to prove an essential element of the offence of illicit enrichment.

j) **A Declaration** that section 14(5) of the Corruption Prevention Act, is unconstitutional and should be struck down insofar as it breaches the Applicants' due process rights as guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedoms by the imposition of the reverse onus requiring the Applicant to prove an essential element of the offence of Illicit enrichment at the investigative stage which same material provides the basis for the trial of the offence of illicit enrichment and the imposition of penalties under section 15 of the Corruption Prevention Act.

k) **A Declaration** that section 14(5) of the Corruption Prevention Act, is unconstitutional and should be struck down insofar as it breaches the 1st Applicant's due process rights as guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedoms insofar as the role of the investigator and that of the prosecutor have not been decoupled.

l) **A Declaration** that the Respondents infringed the Applicant's right to fair procedures or natural justice at common law and due process under section 16(2) of the Charter of Fundamental Rights and Freedoms due to the impermissible intermingling of or the lack of fairness, impartiality and independence of the functions of the 1st Respondent, the Director of Information and Complaints, the 2nd Respondent, the Director of Investigation and the 3rd Respondent the Commission.

m) **A Declaration** that the 2nd and 3rd Respondents acted *ultra vires* the Integrity Commission Act in referring or purporting to refer the matter of the 2nd and 3rd Applicants for investigation to the Financial Investigations Division.

n) **A Declaration** or Order that by disclosing the contents or subject matter of its investigation including the Applicants' private information and the fact of its referral or intended referral of the investigation to the Financial Investigations Division the 2nd and 3rd Respondents breached the Applicants' reasonable expectation of privacy as guaranteed by section 13(3)(j)(ii) and 13(3)(j)(iii) of the Charter of Fundamental rights and Freedoms.

o) **A Declaration** that the Applicants were entitled to notice of the decision or to a hearing by the 3rd Respondent at common law and/or Section 16(2) of the Charter of Fundamental Rights & Freedoms prior to accepting the 2nd Respondent's recommendations including whether to send the Report or any part thereof for the consideration of the Director of Corruption Prosecution and/or to Parliament, Tax Administration Jamaica and the Financial Investigations Division.

p) **A Declaration** that the 2nd and 3rd Respondents acted in breach of natural justice and/or section 16(2) of the Charter of Fundamental Rights & Freedoms as the Applicants were entitled to a hearing at common law and/or Section 16(2) of the Charter of Fundamental Rights & Freedoms prior to making recommendations adverse to their rights and interests.

q) **An Order** that the investigation by any competent authority should end and/or that it would be unfair to continue the investigation in all the circumstances of this case.

r) **An Order** striking down the provisions of the ICA given the lack of fairness, impartiality and independence in the exercise of the functions of the Divisions and the Commission as presently structured.

s) **A Declaration and/or order** setting aside the Report of the 30th August 2024 and the Special Report dated the 5th September 2024 on the basis that the 2nd and 3rd Respondents usurped the functions of the Court by unlawfully and/or illegally piercing the corporate veil.

t) **A Declaration** that the process utilized by the 2nd Respondent in conducting his investigation, which resulted in his findings, conclusions and/or recommendations made in relation to the Applicant, which are contained in an Investigation Report dated the 30th August 2024, was unfair, unreasonable and irrational.

u) **A Declaration** that the 1st Applicant's legitimate expectations that the 2nd Respondent, the Director of Investigation would have observed the principles of natural justice and procedural fairness, in conducting its investigation, was breached.

v) **A Declaration** that the investigation, findings, conclusions and/or recommendations made in relation to the Applicants by the 2nd Respondent which are contained in an Investigation Report dated the 30th August 2024 were made in breach of the principles of natural justice and procedural fairness.

w) Damages for Breach of Privacy including stigma damages.

x) Damages For Negligent Investigation.

y) Aggravated Damages.

z) Vindicatory Damages.

aa) Damages

bb) Costs.

[20] There are 69 grounds in the application. I do not intend to reproduce all of them verbatim in this judgement but will provide the following summary. They have been categorised by the applicants under the following heads: a) **Breach of natural justice and procedural fairness**, in that the process of the investigation conducted by the 2nd respondent was procedurally unfair, and breached the applicants' right to a fair hearing at common law and under section 16(2) of the Constitution; b), **Constitutional breaches**, in that section 14(5) of the Corruption Prevention Act (CPA), breaches the right to life, liberty and security of the person enshrined in section 13(3)(a) of the Constitution; section 14(5) of the CPA is unconstitutional as it breaches the due process guarantees under section 16(2) of the Constitution; the disclosure that the applicants are the subject of an investigation and /or reported to the Financial Investigation Division (FID) breached their rights to privacy under sections 13(3)(j)(ii) and 13(3)(j)(iii) of the Constitution; the respondents breached the applicants' right to equality before the law guaranteed by section 13(3)(g) of the Constitution and the right under section 13(3)(h) of the Constitution to equitable and humane treatment by a public authority in the exercise of any function; c) **Irrationality and unreasonableness** in that the findings , conclusions and recommendations made in the reports were unfair, unreasonable and irrational. Under this head, are also grounds which allege that : i) there was a breach of the PM's legitimate expectation that the investigation into his 2021 statutory declaration would be conducted independently, impartially, fairly and in the public interest; ii) based on the true construction of section 14(5) of the CPA the PM would be provided with the "wealth element", and would be

given the background to the alleged irregularities being investigated; iii) the respondents acted ultra vires, illegally and abused their power and discretion in that they prepared a report for tabling in Parliament with extraneous material; iv) the tabling was in breach of section 54 of the ICA; v) the respondent's failed to perform their statutory duty; vi) the referral of the August 30, 2024 report to the FID and Tax Administration Division (TAJ) circumvents the statutory procedure ; vii) the DI having not made a finding of corruption, failed to recommend to the IC that the PM be publicly exonerated; viii) the tabling of the August 30, 2024 report was intended to embarrass and cause harm to the applicants; ix) the DI illegally assumed jurisdiction over the PM's 2022 and 2023 statutory declarations given that the allegation of disproportionate assets to lawful income was limited to December 31 2021; x) the DI and the IC improperly lifted the corporate veil and improperly failed to give the PM an opportunity to provide an explanation for the alleged disproportionate asset/net worth of $1,930,000.00.

[21] With respect to the **Special Report**, there are grounds which contend that the statement in that report that: "… there can be no finality in the matter until the FID has completed its work" is contrary to the statutory regime of the ICA, and is therefore ultra vires, and illegal. The further statement that there can be no: "certification of a statutory declaration until the Commission's Director of Information and Complaints is satisfied that the statutory declaration has been duly completed", is based upon an unlawful foundation as it presumes that the DIC's satisfaction is based on the work of the FID and there is no statutory basis for this.

The evidence in support of the application

[22] The evidence in support of the application is that of the PM contained in an affidavit filed by him on September 30, 2024, and a Further Affidavit filed on October 17, 2024. The latter affidavit merely exhibits copies of entire documents which were only partially exhibited in the first affidavit. The report dated August 30, 2024, and the Special Report dated September 5, 2024, are both exhibited to the PM's first affidavit. An affidavit of Vasheney Headlam filed on November 7, 2024, exhibits an

Addendum to the August 30, 2024, report dated September 9, 2024. The Addendum only includes a witness statement received from a third party after the August 30, 2024, report was tabled in Parliament.

The report dated August 30, 2024

[23] The DI made several findings and conclusions in the August 30, 2024, report. The following is an abstract of some of them: -

a) The PM filed statutory declarations for the periods in question but failed to include in them four bank accounts jointly held by him, contrary to the ICA and the Parliament (Integrity of Members) Act.

b) The PM has or had financial interest in three companies: IIHL, PMSL and Estatebridge Limited. He has sole ownership of IIHL and retains control over its finances.

c) Based on the analysis of the information available with respect to the PM personally, there was negative net worth for the period 2021, but the DI did not have his personal expenses over the relevant period to determine whether there was illicit enrichment based on the *Source and Application* method, as the PM did not provide a schedule of his personal expenses. On the analysis done, there does not appear to be any unexplained growth in net worth for 2021.

d) Combining the PM's assets and liabilities with those of the companies he is associated with was warranted because it was impossible to distinguish the PM's assets and liabilities from those of these companies.

e) On combining the PM's assets and liabilities with those of the companies he is associated with, the DI found what appeared to be unexplained growth in the PM's net worth of just over $1,930,000.00 for 2022. On the evidence available to the DI (including explanations

provided), the increase observed in the PM's asset or net worth cannot be justified, without more, by his known income and liabilities. However, the DI was hindered in his attempts to resolve this issue due to the PM's refusal to provide a breakdown of his expenses for the period under investigation. The DI therefore is not able to determine what portion of the PM's income was used for living expenses and not available for asset acquisition.

f) Before the DI can make a final conclusion on the question of illicit enrichment, the use of funds by PJFL to partly purchase a bond worth USD$94,000.00 and the operation of companies with which the PM is, or was associated, and which he named as his source of funds to acquire particular assets, would need to be resolved by the relevant entities. Significant financial transactions (deposits of over JMD $473,000,000.00 and withdrawals of over JMD $ 427,000,000.00) were seen among three of the referenced companies (IIHL, PMSL: and Estatebridge Limited) between 2020 and June 2023.

g) Only USD$ 61,892.98 was funded by the PM to purchase bond of USD$ 94,000.00. The remaining amount of USD$32,109.02 was apparently taken from funds belonging to a registered charity PJFL, of which the PM was at the material time a director. Questions therefore arise as to whether the PM's alleged use of funds from PJFL to purchase a personal asset amount to misappropriation.

h) The PM's indication on July 16, 2024, that the full portion of the Bond (USD $94,000.00) was erroneously attributed to him is misleading and unsupported by the evidence.

i) The funding of PMSL, in which IIHL was a majority shareholder before being replaced in 2022 by the PM's son, raises concerns

about the true nature of the company. This is based on the PM's explanation that PMSL is funded by IIHL, but the evidence obtained by the DI suggests that it is PMSL which is funding IIHL. Over $70,000,000.00 was transferred from PMSL to IIHL and over $50,000,000 .00 from IIHL to PMSL during the relevant period.

j) IIHL, PMSL and Estatebridge Limited filed nil tax returns for 2021 and 2022, when these companies reported income and other business activities in their audited financial statements. This raises tax compliance concerns. The question is whether these companies had any income and expenses over the relevant period which were not disclosed in their returns to the TAJ.

[24] Summarized below, are some of the recommendations made by the DI: -

a) The report be referred to the Director of Corruption Prosecution (DCP) for consideration whether the offence of making a false statement in a statutory declaration and /or whether any other offences have been committed.

b) A copy of the report be referred to the Commissioner General, TAJ in relation to the nil income tax returns of IIHL, PMSL, Estatebridge Limited and Greenemerald Limited.

c) A copy of the report be sent to the FID for the necessary investigation to be conducted, given questions surrounding the funding and operations of PMSL, PJFL and Greenemerald Limited. The findings of the investigation raise significant questions around these companies' income generating capacity relative to the funds which have been identified in their accounts. The DI's powers, limited resources and exigencies relating to remit and time, do not allow for sufficient ventilation of this issue.

The Special Report

[25] The Special Report is a one-page document. It reads as follows: -

> **"Special Report**
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> Submitted by the Integrity Commission under Section 36(3) of the Integrity Commission Act in the matter of an Investigation Report of an Investigation Conducted into the Statutory Declarations submitted by the Most Honourable Mr. Andrew Holness, Prime Minister, for the years 2019-2022, in respect of concerns that he owns assets disproportionate to his lawful earnings, and that he made false statements in his Statutory Declarations, by way of omissions, contrary to law.
>
> The Integrity Commission has taken note of the recommendation of its Director of Investigation, made in paragraph 6.2.3 of the captioned Investigation Report, that a copy of it be referred to the Financial Investigation Division (FID), a law enforcement agency of the Government of Jamaica.
>
> The referenced Report of Investigation was formally submitted to the Parliament, today, September 5, 2024.
>
> The Integrity Commission is hereby urging the Parliament to support this referral of its Director of Investigation, as there can be no finality in the matter until the FID has completed its work.
>
> The Commission reminds Parliament that, in keeping with the provisions of the Integrity Commission Act, there can be no certification of a statutory declaration until the Commission's Director of Information and Complaints is "satisfied that the statutory declaration has been duly completed." Once he is so satisfied, he will inform the Commission.
>
> The Commission is also respectfully urging the Parliament to develop a policy, and legislation, if thought necessary, to deal with the commercial and corporate activities of Ministers of Government and the likelihood of conflicts of interest arising therefrom.
>
> ______________________________
>
> The Hon. Mr. Justice Seymour Panton OJ, CD
> Chairman, Integrity Commission
> **For and on behalf of the Integrity Commission.**

September 5, 2024"

The PM's evidence

[26] According to the PM, he is the sole director and sole shareholder in IIHL. He is one of two directors in PMSL, a company he uses to manage his intellectual property and image rights, and it also rents media equipment. He says that PJFL is a company limited by guarantee and is not actively engaged in business. He uses it to make grants and donations, or to provide assistance to persons who seek his help. It is not a registered charity. The allegation that he misappropriated funds from a registered charity is false and irresponsible.

[27] During the investigation, the allegation of misappropriation of bond proceeds was not put to him by the DI and he was therefore not given an opportunity to respond to this allegation which would have clarified the issue. He also complains that the forensic report relied on by the DI was not put to him for him to comment. It is after he received the reports that he was first made aware that the following was referred to the DI for investigation: -

> "The Declarant's net worth was calculated based on information that was included on the Statutory Declaration for year ended 2021 and additional information provided by the declarant:
>
> - Net worth grew by $ 51,555,076.22 over the five (5) year period that ended 31/12/2021. This calculation includes the conversion of income and net worth from US to JA dollars.
> - Unexplained changes in the net worth was [SIC] calculated as $ 4,491,798.43 (net effect) for the year ended 31/12/2021.
> - Although the declarant's net worth appeared to align with income for some years, the growth of Net Assets for

> companies for which the declarant and close family members are majority shareholders and the actual contributions of the minority shareholders need to be further examined."

[28] According to the PM, he was asked questions, "over his objections", about the matters in the above referenced second bullet point. But he was not asked questions about matters in the first and third[2] bullet points. He says that the statement that he refused to provide the DI with a breakdown of his expenses for the period under investigation is false as; a) he was not asked to provide any income and expense statement for 2019 and 2020; b) he was not referred for financial investigation pursuant to section 47 of the ICA; c) only the 2021 declaration was referred to the DI for investigation; d) the report shows that the DI had already arrived at a negative net worth for him, for 2021 and 2022, which would not necessitate an inquiry into his income and expenses; and e) it was only after the improper combination of his and IIHL's assets, that the DI arrived at the sum of JMD$ 1,930,420.00 , besides, he has been informed by his attorneys-at-law that this sum would not trigger an explanation under section 14(5) of the CPA.

[29] He believes, based on advice from his attorneys-at-law, that the DI collected evidence, analysed it and made findings while combining the roles of investigator, prosecutor and judge. The section of the CPA by which the DI purportedly proceeded, places a burden on him to prove an essential element of illicit enrichment. Furthermore, the DI already had the sum that he was required to explain but failed to disclose this to him, to enable him to provide an explanation. He says the report disclosed his personal and private information as well as that of IIHL, PMSL and PJFL in breach of Jamaica's privacy and data protection laws. The objections he raised were improperly dismissed without a hearing. The reports

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[2] The affidavit says second, but I take this to be a typographical error.

are tainted and ought to be struck down because: the DI and the IC acted illegally and unfairly in carrying out their statutory duties.

[30] The PM says further that he has complied with the requirement that he as a parliamentarian must file an annual declaration by March 31, for the prior year. He has complied with this requirement in relation to the subject matter of the application, having filed declarations for 2021 on March 29, 2022. Over the period 1997 to 2020, his statutory declarations have been certified and/or published as required. In relation to his 2021 declaration, he submitted it on time. He was called in and met with the DI and asked to submit an amended declaration. As he understands it, the investigation was closed on February 19, 2023, but nothing was published exonerating him and he was not asked to exercise his right to refuse publication. He was told in a letter from the DIC dated April 26, 2023, that the IC had examined his 2021 declaration as well as other information provided, and that the matter would be escalated. He was surprised by this as he had responded to all enquiries and was not asked for any clarification.

[31] A letter dated May 5, 2023, was received from the DI who advised that the DIC had referred to him the 2021 declaration, on behalf of the IC. By a letter dated May 26, 2023, from the DI, he was advised that new matters had arisen. He has, to date, not been advised what these new matters are, despite a letter from his attorney-at-law to the IC. He later received a letter from the DI, dated July 19, 2023, suggesting a date to meet to conduct an interview. His attorneys advised him that on August 18, 2023, they received by email a Notice of Interview, Judge's Rules, a document entitled "Areas for interview" and an appendix with his bank and investment statements. It was when he received these documents that he realised that the investigation was being treated as one for illicit enrichment. He was told that the IC would not be limited to the areas / questions in the appendix.

[32] His concerns in relation to; a) the scope of the investigation; b) the error in the conflation of corporate and personal assets; c) the absence of a clear statement for the conclusion that his assets were disproportionate to his lawful income as

required by section 14(5)(a) of the CPA ; d) the absence of a statement of the assets owned by him by classification or value ; and e) the failure to provide him with the precise terms, nature and basis for the allegations and the statement that he was being treated as a suspect, were communicated by his attorneys-at-law to the DI. On August 31, 2023, he attended a meeting with the DI and his team at the Office of the Prime Minister. He was accompanied by his attorneys-at-law. The meeting formally commenced the investigation. It was earlier agreed that he would not answer any questions as all the questions would be put in writing. The questions when they came, included a period beyond 2021 and by correspondence the DI confirmed that he was looking into his dealings with IIHL, PMSL, Estatebridge Development Limited/Estatebridge Limited.

[33] His attorneys-at-law continued to write to the DI, raising his objections to the subject matter of the investigation or the failure to provide the disproportionate figure he was required to explain. Notwithstanding his objections however, without prejudice to his rights, the answers to the questions were provided by letter dated September 27, 2023, but they were limited to the 2021 period under review. Additional questions were later received by letter dated October 25, 2023, which expanded the period covered by the questions to the 2022 and 2023 period. This was of concern, as his 2023 statutory declaration was not yet due. By letter dated December 4, 2023, his attorneys-at-law objected to the procedure and stated that the questions were out of scope. His without prejudice responses were sent to the DI. The DI responded in a letter dated December 17, 2023, and said that illicit enrichment cannot be limited to a particular year. His attorneys again wrote to the DI on January 3, 2024, repeating his objections and expressing concern about the delay in dealing with the matter.

[34] In a meeting with his attorneys-at-law on February 2, 2024, the DI explained that the cause of the delay related to requests made of third parties and his failure to respond to the questions related to 2022 and 2023. In that meeting, his attorneys-at-law expressed concern that his 2022 declaration was not referred for investigation. Nevertheless, they requested that the questions be put in writing so

that a decision could be made on whether he would respond. By letter dated February 8, 2024, the DI sent questions for the period prior to 2021 and up to 2022. In a response to a query from his attorneys-at-law, as to whether the DIC had started to examine the 2022 declaration, the DIC responded by email of February 16, 2024, that he had not done so because he was awaiting the outcome of the investigation into the 2021 declaration.

[35] Further questions came from the DI by letter dated May 27, 2024. These requested for the first time his income and expenditure statement for the period December 2021 and 2022, information in relation to the USD Bond, and properties owned by Estatebridge Limited. He was of the view that the investigation was near an end and was advised by his attorneys-at-law that the request for his income and expenditure statements at this stage was irregular, unfair and unreasonable especially in light of his several objections. His attorneys-at-law therefore responded by letter dated July 16, 2024 reiterating his objections that ; a) his 2022 declaration had not been examined by the DIC and so it was improper and contrary to the ICA for the DI to examine the 2022 declaration; b) due process was not being complied with; c) there was delay in the investigation that caused him to suffer injustice and ignominy ; d) he was investigated without regard to the conditions precedent in section 14(5) of the CPA; and e) he will not provide the requested income and expenditure statements because it is not required.

[36] He expected a response from the DI to the letter of July 16, 2024, however instead, the report was sent to the DCP on July 19, 2024. The only matters referred were the 4 bank accounts relating to the offence of making a false declaration. He became aware that in a letter dated September 5, 2024, signed by the Executive Director of the IC, on the IC's behalf, the August 30, 2024, report and the Special Report were submitted for tabling in Parliament.

The evidence in response

[37] The respondents' response to the application is contained in three affidavits: the Affidavit of Craig Beresford, the Affidavit of Kevon Stephenson, and the Affidavit of Seymore Panton. They were all filed on November 1, 2024.

The DIC's evidence

[38] In the Affidavit of Craig Beresford, Craig Beresford says he is the DIC and was appointed to this position on July 14, 2020. According to him, he carried out all his duties in relation to the PM's statutory declarations, in good faith and in accordance with the ICA. He recommended the PM's statutory declarations for 2019 and 2020 for certification. There is no witch hunt or intention to embarrass the PM, and his only interest is to faithfully discharge the mandate of the IC.

[39] The DIC says that as part of the process of examining statutory declarations, information may be requested from declarants and third parties. To determine both the net worth of a declarant as well as the changes to it, all the declarant's assets, liabilities and income must be declared or identified. What must also be identified or provided by the declarant or third parties, is the source of funds. If any of this information is omitted, the result is an incorrect calculation of a declarant's net worth and his inability to accurately determine whether there is growth or decline, warranting explanation. In essence, the statutory declaration would be false, and omissions would have an impact on calculations for past and future net worth. A financial analysis is done once all the information is received, and a meeting held with the Information and Complaints Committee (ICC) to decide whether to make a recommendation for certification or submit a report of the findings to the IC. He says that the ICC was established pursuant to section 25 of the ICA, and he reports to them subject to section 30(3).

[40] During the examination of the PM's 2021 statutory declaration which began in August 2022, third party checks were done to determine the accuracy of the information provided in the declaration. After conducting the financial analysis of the 2021 declaration, it was learnt that the PM did not disclose all his assets and

liabilities. He submitted a referral report to the DI, who concluded that the omission was not deliberate. The PM was invited to amend the declaration, and this he did.

[41] He resumed his examination of the 2021 declaration in February 2023. Later that month, the initial findings were discussed at a meeting of the ICC. It was based on those findings and after receiving additional information from the PM and third parties that the ICC agreed to convene a special meeting with the Commissioners. The meeting with the Commissioners was held on April 21, 2023, at which time he made a presentation of the findings of the financial analysis and particularly information concerning IIHL, PMSL and PJFL. After the presentation, he and the Commissioners decided that the matter should be referred to the DI for further and necessary action. The PM was advised of this by letter dated April 26, 2023.

[42] On May 2, 2023, the matter was referred to the DI to undertake a financial investigation. This referral is an internal matter and is consistent with the treatment of all other declarants. The PM was not provided with a copy of the referral. He was given several opportunities to correct his declarations when omissions were identified. The matter relating to the source of funds concerning IIHL, PMSL and PJFL remains outstanding. The examination of the PM's 2021 declaration will be concluded once he confirms the source of funds.

[43] Prior to his appointment as DIC, there have been issues and challenges relating to the PM's statutory declarations, which led to a **"Report in Relation to the Statutory Declaration of The Most Honourable Andrew Holness"** in 2019 by the then DI and DIC. The PM's statutory declarations for 2022 and 2023 were received by the IC on March 29, 2023, and March 27, 2024, respectively. He has since examined these reports in accordance with the ICA but is not able to recommend to the IC that they should be certified, because until the PM's 2021 statutory declaration is finalised and certified, he would not be able to accurately determine whether there is growth or decline in his net worth in subsequent periods, which will require an explanation. According to the DIC, any omission from

the 2021 declaration would have an impact on future calculations of the PM's net worth.

The DI's evidence

[44] In his affidavit, Kevon Stephenson says he is the DI and that he was appointed as such on May 18, 2020. He says that all the duties he has carried out in relation to the PM's statutory declarations were undertaken professionally and in good faith in accordance with the ICA. According to him, his involvement in relation to the PM's 2021 statutory declaration began with a referral from the DIC. This was in September 2022 and related to the omission by the PM of certain bank accounts from his declaration. After his investigation, he concluded that the omission was not deliberate. This investigation and his recommendations were not made public.

[45] In May 2023, the Commissioners referred the PM's 2021 statutory declaration to him for investigation pursuant to section 43(2) of the ICA and 14(5) of the CPA. He produced the August 30, 2024, report after extensive investigations, during which, he took statements from the shareholders of IIHL and PMSL and held a hearing with their company secretary. He was unable to determine the PM's net worth because the PM did not provide critical information, particularly his expenses, to complete the necessary mathematical calculation. Because of this, he could not arrive at a sum which would have allowed him to determine whether the PM needed to provide an explanation in respect of an assertion of illicit enrichment.

[46] While PJFL may not be a registered charity, its core activity stated in its incorporation documents is "charitable services". As to the allegations of misappropriation of bond proceeds, the evidence given by the PM was totally opposed and not supported by the evidence he received from National Commercial Bank Capital Markets. He refers to and incorporates into his affidavit, that aspect of the report which deals with this issue. The referral to him by the Commissioners was by way of an internal memorandum dated May 2, 2023. Referrals are not usually shared with declarants and consequently declarants would not know the

details of them. The information in a referral is for internal purposes and is not a product of an investigation. As DI, his responsibility is to carry out investigations to determine the veracity of the information, allegations or concerns in a referral. He requested information from the PM relating to the source of funds used to make specific deposits and in relation to specific assets. The PM was given the opportunity to provide the information requested.

[47] The PM was not exonerated. Accounts were omitted by him from his 2021 statutory declaration rendering it inaccurate and incomplete. While there was no referral made for him to be prosecuted, the PM could not be said to have been in full compliance with the requirements under the ICA. This was not publicly disclosed at the time. The PM refused to comply with his request for the PM to provide his income and expenditure statements for the year 2021 and 2022, to enable the completion of the investigation.

The chairman of the IC's evidence

[48] Seymour Panton, the chairman of the IC, is a retired President of the Court of Appeal. He says in his affidavit that the respondents first became aware of this application when it was widely reported in the media. They were only served with the documents on October 8, 2024. According to him, the Commissioners did not author and were not involved in the findings and conclusions outlined in the August 30, 2024, report, however they supported the recommendations contained in it.

Analysis and discussion

[49] The respondents have indicated in their written submissions that while they do not consider that the proposed claim will likely succeed, the only orders sought in the application, which they oppose, are the orders of certiorari in respect to the IC, all the orders for mandamus, the declaratory remedies, and the orders seeking damages and cost. This posture basically means that the respondents are not opposing leave being granted to bring a judicial review claim seeking orders of certiorari quashing the findings conclusions and recommendations in the August

30, 2024, report. I accept the respondents' non-objection, as it seems to me, based on the evidence currently before the court, that the threshold test for leave has been met. I will consequently say nothing further in relation to them, save to say this: -

(a) if the DI has no legal authority under the ICA to conflate the income , assets and liabilities of limited liability companies controlled or used by the PM, with the PM's personal income and assets to determine whether there are unexplained changes in his net worth , there is an arguable case with a realistic prospect of success that in doing so, the DI acted irrationally and ultra vires the ICA;

(b) if the PM was not informed of the new matters that had arisen which caused the referral to the DI, and was not informed of the "wealth element" that was considered disproportionate to his lawful earnings, so that he could provide the DI with a response, it is arguable, with a realistic prospect of success that he was not afforded a fair hearing;

(c) if on a true construction of the ICA, there is no authority to make a referral to the FID or the TAJ, it is arguable with a realistic prospect of success that the DI acted ultra vires when he recommended such referrals.

[50] This then leaves the orders of certiorari in relation to the IC's Special Report, the orders for mandamus, the declaratory remedies, the orders seeking an end to the investigation, the striking down of the ICA, damages and costs. I will start with those that are not contentious and in relation to which there is concession by the applicants. These are the declarations and the orders seeking an end to the investigation, the striking down of the ICA, damages and costs. Because of the applicants' concession, I heard no oral submissions on the point. However, I believe it is important to say why the concession was, in my view, sensibly made,

and why I would have refused leave in relation to those remedies had it not been made. The hope is that this will provide some guidance for future applicants.

Declarations

[51] In short, no leave is required to seek a public law declaration. The court's leave is only required for orders of certiorari, mandamus and prohibition which were formerly known as 'prerogative' orders. They were so known because they are discretionary in nature. In England, they were rights or privileges used by the Crown to control public officials and public bodies. D Fraser J (as he then was) in **OUR v Contractor General [2016] JMSC Civ 27** and earlier in **Audrey Bernard – Kilbourne v Board of Management of Maldon Primary School [2015] JMSC Civ 170** had before him, the question whether in our jurisdiction, leave was required for a public law declaration. He determined in both cases that it was not. Without apology, I quote extensively from paragraphs 13-22 of the learned judge's decision **Audrey Bernard – Kilbourne: -**

> "[13] At the time of the decision of ***O'Reilly v Mackman*** Order 53 Rules of the Supreme Court was in force in England. It has now been replaced by Order 54. Paragraphs 1 and 2 of Order 53 provided as follows:
>
> > (1) An application for-
> >
> > (a) an order of mandamus, prohibition or certiorari, or (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act,
> >
> > shall be made by way of an application for judicial review in accordance with the provisions of this Order.
> >
> > (2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application a judge

may grant the declaration or injunction claimed if he considers that, having regard to-

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

[14] In outlining how Order 53 should be interpreted Lord Diplock who gave the judgment of the court had this to say at pages 284 – 285:

"My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case-to-case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those

> disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under 0.53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.
>
> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

[15] Lord Diplock was commenting on the effect of the new Order 53. Prior to its implementation, under the old Order 53 discovery could not have been obtained on an application for certiorari. Further leave to allow cross-examination of deponents to affidavits was almost invariably refused. To circumvent those strictures litigants instead applied for a declaration of nullity of the impugned decision along with an injunction to prevent the challenged authority from acting on the decision. The courts "turned a blind eye" to the practice to avoid injustice. However with those impediments removed Lord Diplock indicated it was inappropriate to still proceed for a

declaration against a public authority depriving the authority of the safeguards of judicial review in a context where the handicaps to a fair procedure had been removed.

[16] The current Part 54 of the Civil Procedure Rules in England appears to preserve the Order 53 position by providing that the judicial review procedure ***may*** be used for an application for a declaration or an injunction. It however goes one step further to provide that where an applicant is seeking a declaration or injunction in addition to a mandatory, prohibitory, or quashing order or an injunction under section 30 of the Supreme Court Act 1981 the judicial review procedure ***must*** be used.

[17] Therein lies the crucial difference in the Civil Procedure Rules of Jamaica and England in this area. Currently in England a declaration being sought in a public law context is addressed under the Part dealing with Judicial Review and Statutory Review. In Jamaica the applicable Part 56 of our Civil Procedure Rules treats declarations where one party is *"the State, a court, a tribunal or any other public body"*, as a separate administrative order. Essentially it is a public law declaration. Nowhere in the Jamaican rules is this type of declaration mentioned as needing to come under the aegis of judicial review. It is not even stated as in Part 54 of the United Kingdom Rules that where declarations are being sought in conjunction with the former prerogative orders the procedure must be by way of judicial review.

[18] I have come to this conclusion though mindful of the Court of Appeal decision of ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty.*** In that case the appellants sought inter alia to have portions of the respondent's claim struck out. These portions were where she: 1) sought a declaration that she was dismissed in breach of the Education Regulations 1980 and 2) sought damages for unfair dismissal. The application was refused in the Supreme Court and on appeal

the issue in relation to point 1 was whether the aspects concerning the Education Regulations properly fell under the auspices of public law and therefore, to institute them in a private law claim is an abuse of the process of the court.

[19] In the Court of Appeal, Brooks JA cited with approval the general rule in ***O'Reilly v Mackman*** relied on by the defendant Board in the instant case. He also referred to the rule in ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 All E R 705. This case provides an exception to the general rule stated in ***O'Reilly v Mackman.*** That exception provides that a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action, by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. The exception was however unable to assist the respondent as relief for unfair dismissal is available only from the Industrial Disputes Tribunal. Her claim was accordingly struck out.

[20] It is noteworthy however that the attention of the Court of Appeal in ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty*** was not adverted to CPR 56.1 (1) (c) as this court's attention has been. It does appear to this court that the Rules Committee of the Supreme Court in Jamaica though clearly aware of the decision in ***O'Reilly v Mackman*** has chosen a liberal approach. Our CPR therefore provides that a declaration against a public body can be obtained under CPR r. 56.1 1 (c) in the absence of an application for judicial review. This "public law" declaration is in contrast to the declaratory judgment obtainable under CPR r. 8.6 which provides, *"A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be obtained."* Rule 8.6 provides for declaratory judgments in a context where no limitation is imposed on the nature of a party that must be involved. It is the provision under which

declarations in private law matters not involving administrative law are pursued.

[21] My conclusion is supported by what transpired in the unreported case of Claim No. 2009 HCV 00660 ***Legal Officers Staff Association (L.O.S.A) v. AG and Minister of Finance*****.** In the paper **Judicial Review – Holding the State Accountable** presented at the Jamaican Bar Association Continuing Legal Education Seminar February 18, 2012, at paragraph 31 Mangatal J. in outlining what happened in the case stated that:

> ‘An application for a declaration pursuant to Part 56 is separate from an application for judicial review and no leave is required in order to apply for a declaration. In this case, King J. had granted the applicants leave to apply for judicial review but his decision is on appeal. I accepted the submission made on behalf of L.O.S.A that as they were separate matters, a hearing for the Declarations could be set down notwithstanding that the issue of the grant of leave was on appeal. On appeal from my procedural decision, Norma McIntosh J.A. agreed with the proposition that they were indeed separate and that at a case management conference the court may direct that parts of a claim be dealt with separately. However, McIntosh J.A. ruled that since the Declarations being sought dealt with issues with which the leave application heard by King J. was also concerned, it was not desirable that the matters should proceed separately as both courts could potentially arrive at conflicting decisions. She therefore granted an application made by the Attorneys appearing for the Respondents staying the declarations hearing until the determination of the appeal.

[22] It should also be stated that in this new dispensation the concerns of potential abuse that were uppermost in Lord Diplock’s mind in ***O’Reilly v Mackman*** are adequately addressed in Part 56 of our CPR. Detailed rules

outline how an application for an administrative order should be made (CPR r. 56.9). The court has wide powers at the first hearing to provide for the expeditious and just hearing of the claim, including powers to provide for service of statements or affidavits, disclosure of documents and cross-examination of witnesses (CPR r. 56.13). CPR r. 56.13 also specifically imports the extensive general case management powers under Parts 25 to 27 of the CPR, which contain within them all the necessary tools with which the court can prevent and punish abuse of its process. The only safeguard that is peculiar to judicial review is the need for leave".

Orders seeking to end the investigation, to strike down the ICA, damages and costs

[52] I understand the order seeking to end the investigation to be a request for a mandatory injunction against the DI. No leave is required to seek such a remedy. The same thing applies to the order seeking to strike down the ICA, the order for damages and costs. These are not judicial review remedies and therefore they do not require the leave of the court to seek them in a claim.

Certiorari in relation to the IC's Special Report

[53] The applicants are seeking leave to have the court quash the Special Report's findings and recommendations as being an improper use and abuse of the powers conferred on the IC under the ICA and the CPA. As observed earlier, the applicants contend that the statement in this report that: "…there can be no finality in the matter until the FID has completed its work", is ultra vires, and illegal; and the statement that there can be no: "certification of a statutory declaration until the 1st Respondent is satisfied that the statutory declaration has been duly completed", presumes that the DIC's satisfaction is based on the work of the FID, and there is no statutory basis for this.

[54] Mr Braham argues that the August 30, 2024, report and the Special Report are so inextricably linked that with the non-objection to leave being granted in relation to the former, it follows that leave ought to be granted in relation to the latter. As I

understand King's Counsel's submission, if there is an acceptance that the threshold test has been met in relation to the August 30, 2024, report and it is reviewable, then there must be an acceptance that the Special Report has also met the test, and it too is reviewable. The argument is that the DI had no authority under the ICA to make any referral to the FID and in supporting that recommendation as is reflected in both the affidavit of the chairman as well in the Special Report itself, the IC was demonstrably wrong in law.

[55] King's Counsel further argued that the IC was wrong in law to take the view that there can be no finality until the FID has completed its work. He says that it is for the DI to utilise the provisions of the ICA which includes sections 43(1)(b) and 43(2) which allow him to act in the face of a recalcitrant declarant. Section 43(1)(b) makes failing to provide information to the DIC an offence punishable on conviction to a fine or a term of imprisonment, and the Parish Court may order that the recalcitrant person, comply with the requirement in respect of which the offence was committed.

[56] According to Mr Braham, there was formerly a strict approach taken by the court, where it was doubted whether recommendations, inferences and conclusions were judicially reviewable. He argued however that the recent Privy Council decision in **Coomaravel Pyaneandee v Paul Lamm Shang Leen and 6 Others [2024] UKPC 27** reflects a broader approach**.** This was an appeal from the Supreme Court of Mauritius, in which the Board said , in relation to impugned passages in a commission of inquiry report, that whether described as findings, observations, comments or recital of evidence, if a fair minded , detached and objective reader would conclude that they either form a component part of an adverse finding affecting an individual, or adversely affect an individual's reputation, judicial review will lie if the commission acted ultra vires, or otherwise irrationally or breached the principles of natural justice. The Supreme Court of Mauritius had earlier found that the inquiry report contained no findings about the appellant but contained comments and observations which were not amenable to judicial review.

[57] On the other hand, King's Counsel Mr Michael Hylton submitted that to the extent that it is argued that **Coomaravel** is new law, it is not, as recommendations have always been subject to judicial review. But, according to him, the question in each case, is the nature of the recommendation and its consequences. The decisions of Sykes J (as he then was) in **Dale Austin v The Solicitor General and another [2018] JSMC Civ.1**, and Shelly Williams J, in **Mr. Ian Hayles and another v The Contractor General and others [2022] JSMC Civ. 229,** were cited for the proposition that for the recommendation to be reviewable, it must affect the rights of the person seeking to impugn it. He argued that in the present case, all the IC did in its Special Report was to: a) urge Parliament to support the referral as there can be no finality until the FID completes its work; b) remind Parliament that in keeping with the provisions of the ICA, there can be no certification until the DIC is satisfied that the statutory declaration has been duly completed and once he is so satisfied, he will inform the IC and, c) proposed that a policy or legislative framework be created to govern Ministers' commercial and corporate activities. As to (b), Mr Hylton submitted that it cannot be objectionable as all it does is to state what the law is. In relation to c), he said that all the IC did was to perform one of the functions given to it under section 6 of the ICA, which is recommend revisions to practices and procedures to deal with the commercial and corporate activities of Ministers of Government , that may reduce the likelihood or occurrence of acts of corruption. He argued that there is nothing in the Special Report which affects the rights of the PM; the August 30, 2024, report and the Special Report are two separate reports and are not linked. All the IC did in relation to the DI's recommendation, submitted Mr Hylton, was to support or adopt it.

[58] I agree that **Coomaravel** has not established a new approach to determining judicial reviewability, and that whether any comments, findings, conclusions or recommendations are susceptible to judicial review depends on whether it adversely affects rights. To borrow from the language of the Board, the question

is also whether it has the "necessary quality of finality"[3]. It is important then, to look very closely at the Special Report.

[59] The Special Report is made under section 36(3) of the ICA. That section provides that: "The Commission may at any time, submit a report relating to any particular matter which, in the opinion of the Commission, requires the special attention of Parliament." It is plain on the face of the Special Report, that its subject matter is the August 30, 2024, report. The chairman of the IC has said that the Commissioners (who, under the ICA, constitute the IC) support the DI's recommendations. It is recalled that the DI recommended that a copy of the August 30, 2024, report be referred to the FID, and says he is unable to complete his investigation into any possible illicit enrichment on the part of the PM for the year 2021, because he was not provided with critical information he needed. The evidence of the DIC is that he will conclude the examination of the PM's 2021 declaration when the PM confirms the source of funds. He says he is unable to recommend to the IC that the 2022 and 2023 declarations be certified until the 2021 declaration is finalised and certified.

[60] It seems to me, that the DI's referral recommendation in the August 30, 2024, report has the practical adverse effect on the PM, in that his statutory declarations for 2021, 2022, and 2023, will not be finalised until the FID conducts and completes its own investigation. To my mind the recommendation has the "necessary element of finality". The IC's acceptance of it, and the IC's own urgings (or strong encouragement) to the Parliament to do likewise, as: "there can be no finality in the matter until the FID has completed its work", also has, in my view, the same practical adverse effect as the August 30, 2024, report. I am of the settled view that although the August 30, 2024, report and the Special Report are two separate reports, they are undoubtedly connected. Any other interpretation would, in my judgment, be artificial and too narrow. There is significant force in Mr Braham's

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[3] Ibid paragraph 57

submission, that to concede that the August 30, 2024, report is reviewable must lead to a concession that the Special Report is also reviewable.

[61] **Dale Austin** and **Mr. Ian Hayles** are distinguishable. In **Dale Austin**, the Solicitor General's recommendation to the Permanent Secretary (the PS) in the Ministry of Justice, that the applicant, a public officer, be transferred from one department of government to another was clearly one that did not adversely affect the officer's rights. That recommendation in and of itself had no finality to it until acted upon by the PS. It therefore could not be said that the public officer was adversely affected by the recommendation. In **Mr. Ian Hayles,** what was in issue was the decision of the Contractor General to refer the applicants, Ian and Charlotte Alexander Hayles, to the Commissioner of Police for a further investigation into what the Contractor General found to be a prima facie case of forgery as well as conspiracy to defraud. The court found that the Contractor General's conclusions and referrals did not lead automatically to charges being laid against the applicants, would not be determinate, and therefore judicial review did not lie in relation to them.

[62] As to the recommendation in the last paragraph of the Special Report that Parliament develop a policy and legislation to deal with the corporate activities of Minsters of Government, I agree with Mr Hylton, that it does not have any adverse effect on any rights and is therefore not amendable to judicial review. The position then is that save for this recommendation, the Special Report is judicially reviewable. The question now is whether the threshold test for leave has been met in relation to it.

[63] I discern from the application that the order for certiorari being sought in relation to the Special Report is premised on the allegation of an improper use and/or abuse of the powers and discretions under the ICA and the CPA. One of the grounds relied on is that the statement that there can be no finality in the matter until the FID completes its work is ultra vires the ICA. I agree with Mr Braham that section 43 of the ICA makes provision for, as he put it, the "recalcitrant declarant" and that there is no express provision in the ICA which empowers the DI to make a referral

to the FID, and for the FID to complete its work before the DI can complete his investigation. Having carefully reviewed the ICA I am of the view and accordingly find that this ground is arguable with a realistic prospect of success

[64] Another ground relied on is that the decisions, findings, recommendations and conclusions in the Special Report are unreasonable and irrational as no body or official mindful of its/his functions, would have arrived at them. While there are no findings or conclusions in the Special Report, the IC says in it, that it has accepted the DI's recommendations. This includes the FID referral recommendation. If this recommendation was ultra vires the ICA, and therefore illegal, then it seems to me that the IC's acceptance of it, would also be tainted by the same illegality. Consequently, it is arguable, with a realistic prospect of success that by accepting the DI's recommendation and urging Parliament to also accept it, the IC acted ultra vires the ICA.

[65] In coming to this view, I find the decision of McDonald-Bishop J, (as she then was) in **Aston Reddie v The Firearm Licensing Authority, the Minister of National Security and the Attorney General, Claim No HCV1681 of 2010**, delivered November 24, 2011, to be helpful, albeit factual dissimilar. In that case, the learned judge was dealing with the statutory scheme under the then Firearms Act, for the revocation of a firearm holder's licence. The legislation provided for the Minister to receive findings and recommendations of a Review Board and to then decide on them. The claimant contended that the process leading to the revocation of his firearm licence was procedurally flawed as he was not afforded a hearing. McDonald-Bishop J, in finding that the process engaged by the Review Board was indeed procedurally flawed, held that the Minister's decision to act on the Review Board's findings and recommendations (which were flawed based on a legally flawed process), was also intrinsically tainted by the illegality and procedural impropriety of the Review Board's decision-making process.

[66] In the circumstances, therefore, save for the recommendation contained in the last paragraph of the Special Report, leave to bring a claim seeking an order of certiorari quashing the Special Report ought to be granted.

Mandamus

[67] Before me are three orders of mandamus, for which the applicants seek leave. All three are opposed by the respondents. I will deal with each one in turn, but before doing so, I believe an examination of this often-misunderstood remedy is warranted.

[68] An order of mandamus compels a public body or public officer to perform a statutory duty. However, the court in the exercise of its supervisory jurisdiction, cannot usurp the decision-making powers of public officers and public bodies who are given these powers by Parliament. The judicial review court, therefore, cannot substitute its own views for that of the decision maker. Put another way, it cannot tell the decision maker what decision to make.

[69] In **Reid v Secretary of State for Scotland [1992] 2 A.C 512,541F to 542A**, Lord Clyde put it this way: -

> "[J]udicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself, it may be found to be perverse, or irrational …or the decision may be found to be erroneous in respect of a legal deficiency, as for example through the absence of evidence or of sufficient evidence , to support it, or through account being

taken of irrelevant matter, or through a failure for any reasons to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own view of the evidence".

[70] Lord Brightman in **Chief Constable of the North Wales Police v Evans [1982]1 WLR 1155 at 1173,** cited by Mr Hylton, expressed the same view this way: -

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

[71] In our jurisdiction, there is the decision of **Regina (ex parte Ira Raphington) v The Commissioner of Police and The Attorney General Unreported Supreme Court decision delivered October 25, 2007.** This is a case in which the claimant, a detective corporal, sought, among his remedies, an order that the Commissioner of Police restore his promotion which had been cancelled. Brooks J (as he then was) in refusing to grant the order, considered the decision of the Full Court in **R. v Commissioner of Police Exparte Keith A. Pickering (1995) 32 J.L.R 123,** in which an order of mandamus compelling the Commissioner of Police to reinstate immigration officers was sought. At page 12, he said this: -

> "I have also considered the case of **R v Commissioner of Police, Ex parte Keith A Pickering (1995) 32 J.L.R. 123.** There, the Full Court, although granting an order of certiorari against the Commissioner of Police, refused to grant an order of mandamus. The reasoning of the court was that it was "concerned not with the decision but the decision-making process". It was therefore "content

> with quashing the decision" whereby the Commissioner of Police had deprived immigration officers of their offices. The court held however that to reinstate the applicants in their positions …would usurp the function of the Commissioner of Police".

An order of mandamus to compel the DIC to examine the PM's2022 and 2023 statutory declarations as provided for in sections 32 and 42(1) of the ICA.

[72] Mr Braham relies on several email correspondences, over the period February 12, 2024, to September 30, 2024, between King's Counsel Mrs Gibson Henlin, the DIC and the DI, to make the point that the DIC has failed to examine the PM's statutory declarations for 2022 and 2023. All these correspondences are exhibited to the further affidavit of the PM. They begin with Mrs Gibson Henlin asking the DIC about the status of the certification of the PM's 2022 statutory declaration and whether it is being considered under any referral made by him, in an email dated February 12, 2024. In a response from the DIC dated February 16, 2024, he said that the examination of the 2022 declaration has not commenced, since the 2021 declaration was referred to the DI. He said further that information provided on the 2021 declaration will have implications for the examination of the 2022 statutory declaration. In an email dated September 6, 2024, Mrs Gibson Henlin again enquired whether the DIC had commenced his examination of the 2022 declaration. In an email dated September 9, 2024, the DIC said that based on the "stage of the matter", he is unable to comment any further, and in a further email dated September 10, 2024, he essentially repeats his previous response. In her email to the DIC dated September 27, 2024, Mrs Gibson Henlin demanded that he examine the PM's statutory declarations for 2022 and 2023. The DIC responded by email of September 30, 2024, simply saying: "Your email is noted with thanks."

[73] As earlier observed, the DIC in his affidavit filed on November 1, 2024, in response to the application, says that he received the PM's 2022 and 2023 statutory declarations on March 29, 2023, and March 27, 2024, respectively, and since them he has examined them in accordance with the ICA. He says however that he is

unable to recommend to the IC that they be certified because until the 2021 statutory declaration is finalised and certified, he cannot accurately determine whether there is any growth or decline in the PM's net worth in subsequent periods which will require an explanation. Mr Braham submitted that given the DIC's email correspondences referred to above, there is a live issue requiring "interrogation" at a trial, as to whether and when the DIC in fact examined the PM's 2022 and 2023 statutory declarations. I disagree.

[74] Despite the submissions of Mr Braham, there is no evidence in response from the applicants which challenges the evidence of the DIC. The DIC has said in his affidavit filed on November 1, 2024, and now before the court, that he has examined the PM's 2022 and 2023 declarations. Mr Hylton is right to argue that this evidence does not contradict the email correspondences relied on by the PM. Section 42(1) imposes on the DIC a duty to examine every statutory declaration submitted to ensure that they comply with the requirements of the ICA. As to section 32, it outlines the functions of the DIC and includes among them in section 32(1)(a) and (b), receiving, recording and examining statutory declarations filed with the ICA, and making such enquiries he considers necessary in order to certify or determine their accuracy. None of the other functions under section 32 is relevant or seem to be in issue.

[75] The order of mandamus being sought is requiring the DIC to examine the PM's 2022 and 2023 statutory declarations. The DIC's evidence before the court is that he has examined these declarations, but he is unable to recommend certification to the IC because until the PM's 2021 declaration is finalised and certified, he cannot accurately determine whether there is growth or decline in the PM's net worth which may require explanation. He also points out that any omissions in the 2021 declaration will impact further calculations of the PM's net worth.

[76] It seems to me, on the DIC's unchallenged evidence, that with respect to the duty to examine declarations imposed on him by virtue of sections 32 and 42(1), he has done what these provisions require him to do. The court does not act in vain, and

in my view, it would be an exercise in futility to order the DIC to do what, on his unchallenged evidence, he has already done. Leave to seek this order must consequently be refused.

An order of mandamus compelling the DIC and/or the IC to comply with sections 32 and 42(1) of the ICA in relation to the PM's declarations for 2021 and 2022.

[77] The difference between this order of mandamus and the previous one, is that it adds the IC, and instead of the PM's 2023 statutory declaration, it includes his 2021 statutory declaration and asks that the DIC and the IC be compelled to "comply" with sections 32 and 42(1) of the ICA. At the close of her response to the authorities relied on by the respondents, Mrs Gibson Henlin made an oral application to amend the application to delete the reference in this order to section 42 (1), and to replace it with section 42. Mr Hylton objected. I refused the application. Coming at a time when the parties had completed their substantive submissions, the oral application was clearly inappropriate and obviously prejudicial to the respondents whose submissions in opposition to this order were made based on section 42(1). Furthermore, the application for leave was first filed on September 30, 2024, and the two orders of mandamus then sought in it, did not include a reference to section 42 or 42(1). It was in the amended application filed on October 17, 2024, that section 42(1) first appeared in the order for mandamus for which leave is being sought. In the circumstances I find it alarming that the further amendment was sought on an oral application at the close of submissions.

[78] I have already said why an order of mandamus directing the DIC to examine the PM's 2022 and 2023 statutory declarations would not succeed. With respect to the 2021 declaration, the DIC's evidence is that he began the examination in August 2022 and undertook third party checks. Because of omissions discovered, the PM was invited to amend the declaration, which he did. This led to a resumption of the examination in February 2023. It was agreed with the Commissioners in a meeting held on April 21, 2023, that the declaration be referred to the DI for further necessary action. He says that on May 2, 2023, he referred the declaration to the

DI for a financial investigation. The DI's evidence is that he produced the August 30, 2024, report, but he cannot complete his investigation because the PM has refused to comply with his request to provide his income and expenditure statements for 2021 and 2022.

[79] It is clear on the evidence that the DIC has examined the PM's 2021 statutory declaration, made third party enquires and with the agreement of the IC, the declaration was referred to the DI for investigation. Under the ICA, the DIC is required to examine statutory declarations to determine compliance with the ICA[4] and upon examination, he may, among other things, determine that more information is required from the declarant [5] or if he is of the opinion that an investigation is necessary he may refer the matter to the IC for further action[6]. It is accordingly my view, that the DIC has in fact performed the duties placed on him by sections 32 (1)(a), 32(1)(b) and 42 (1) of the ICA. The short answer in relation to the IC, is that neither section 32 nor section 42(1) imposes any statutory duty on it. Leave to seek this order of mandamus must accordingly be refused.

An order of mandamus compelling the DI to recommend to the IC that the PM be exonerated of culpability in relation to the 2021 and 2022 statutory declarations, in such a manner as the IC deems fit in accordance with section 54(5) of the ICA.

[80] Section 54(5) of the ICA provides as follows: -

> "Where the Director of Investigations finds that the matter which gave rise to the investigation does not constitute an act of corruption or any wrong-doing, he shall recommend to the Commission that the person who was the subject of the investigation be publicly exonerated of culpability in such manner as the Commission deems fit, and the Commission may do so,

[4] Section 42(1)
[5] Section 42 (2)
[6] Section 42(4)

unless the person concerned has requested the Commission in writing not to do so."

[81] It is obvious, that before the mandatory requirement to recommend exoneration is made to the IC by the DI, the DI must first find that the matter referred to him for investigation does not constitute an act of corruption or any wrongdoing. The DI's evidence and his August 30, 2024, report indicate that he has not been able to complete his investigation and make a definitive finding in relation to illicit enrichment, because the PM did not provide him with critical information (particularly his expenses) needed for the necessary mathematical calculation. The PM's position is that he had raised a legal objection to being required to provide the information.

[82] In urging me to grant leave in relation to this order, Mrs Gibson Henlin argued that, if at trial, the judicial review court strikes down the DI's August 30, 2024, report, it is open to the court to make orders directing the DIC and the DI to proceed on the correct basis without the need for further application to the court. Mr Lemar Neal submitted that given the provisions of section 54 (5) of the ICA, it is only the matter of the four accounts omitted from the PM's 2021 declaration which could have been sent to Parliament, as there was no finding of corruption by the DI. In these circumstances, he said that the DI has a mandatory duty under the section to recommend the PM's exoneration to the IC.

[83] Mr Hylton on the other hand argued that the order sought cannot be granted as to do so, the court would be usurping the decision-making powers of the DI. I agree with him. The decisions I earlier referred to in paragraphs 69 through to 71 of this judgment support this position.

[84] **CPR 56 .16 (2)** does give the court the power, if it decides to quash a decision by granting an order of certiorari, to remit the matter to the decision maker with a direction to reconsider it in accordance with the court's findings. If this is the power Mrs Gibson Henlin is alluding to, she is correct. However, what the court cannot

do is to direct the decision maker to make a particular decision. It seems to me that the order for mandamus which the PM seeks would have the court do the impermissible. If the judicial review court quashes the DI's August 30, 2024, report and finds that the referral recommendation to the FID is ultra vires the ICA, it is, for example, open to the court to give the DI directions in terms of engaging the provisions in section 43 of the ICA to obtain the information he seeks from the PM and to complete his investigation. That process need not lead inexorably to the DI making a finding that the matter which gave rise to the investigation does not constitute an act of corruption or any wrongdoing. Under section 54(4) of the ICA, it is only when the DI makes such a finding, that he is mandated to recommend to the IC that the PM be publicly exonerated. Were the court to grant the order sought by the applicants, it would be usurping the decision-making powers of the DI. The authorities make it pellucid and beyond question that the court cannot and will not do that. I am satisfied that the order of mandamus being sought cannot lie. Leave to seek it must therefore be refused.

Summary of findings and conclusion

[85] The respondent's non-objection to the orders of certiorari in relation to the findings, conclusions and recommendations of the 2nd respondent is accepted. I agree that the threshold test for leave to bring a judicial review claim has been met in relation to those orders. I find that save for the recommendation to Parliament to implement legislation and a policy with respect to the commercial and corporate affairs of Ministers of Government and the likelihood of conflicts of interest arising therefrom, the Special Report is judicially reviewable. I find that it has a practical adverse effect on the PM's rights, in that in accepting the DI's referral recommendation and urging Parliament to also accept it as there will be no finality in the matter until the FID completes its work, the PM's statutory declarations for 2021, 2022, and 2023, will not be finalised until the FID conducts and completes its own investigation.

[86] I find that the Special Report also meets the threshold test for leave for judicial review, as it is so connected to the August 30, 2024, report that it too is tainted with any illegality that the latter report may have.

[87] In relation to the orders of mandamus, I find that none of them can lie. The DIC's unchallenged evidence is that he has examined the PM's statutory declarations for 2021, 2022 and 2023. The court does not act in vain and therefore will not direct the DIC to do that which he has already done. I find that the DIC has performed the duties imposed on him by sections 32 and 42(1) of the ICA. As to the orders seeking mandamus for the IC to perform its duties under sections 32 and 42(1) of the ICA, there are no duties that the IC is required to perform under any of these two provisions.

[88] Finally, the court cannot and will not usurp the decision-making powers of public bodies and public officers, and therefore the order of mandamus compelling the DI to recommend to the IC that the PM be exonerated of culpability in relation to the 2021 and 2022 statutory declarations cannot lie.

Orders

[89] In the circumstances therefore, I make the following orders: -

1. Leave is granted to the applicants to bring a judicial review claim against the 2nd and 3rd respondents seeking the following orders: -

    I. **An order of certiorari** quashing the August 30, 2024, report.

    II. **An order of certiorari** quashing the Special Report save for the paragraph which reads: "The Commission is also respectfully urging the Parliament to develop a policy, and legislation, if thought necessary, to deal with the commercial and corporate activities of

Ministers of Government and the likelihood of conflicts of interest arising therefrom".

2. Leave to bring a judicial review claim seeking **an order of mandamus** compelling the 1st respondent to examine the 1st applicant's 2022 and 2023 statutory declarations as provided for by sections 32 and 42(1) of the Integrity Commission Act; **an order of mandamus** compelling the 1st respondent and/or the 3rd respondent to comply with sections 32 and 42(1) of the Integrity Commission Act in relation to the 1st applicant's declarations for 2021 and 2022 ; and an **order of mandamus** compelling the 2nd respondent to recommend to the 3rd respondent that the 1st applicant be exonerated of culpability in relation to the 2021 and 2022 statutory declarations in such manner as the 3rd respondent deems fit and in accordance with section 54(5) of the Integrity Commission Act, is refused.

3. The 1st hearing of the Fixed Date Claim Form will be on **January 7, 2025, at 10am for 2 hours.**

4. Cost are costs in the claim.

5. Leave to appeal requested by the applicants is refused.

A Jarrett
Puisne Judge