REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-00876

IN THE MATTER OF THE INTEGRITY IN PUBLIC LIFE ACT, 2000 AS AMENDED BY THE INTEGRITY IN PUBLIC LIFE (AMENDMENT) ACT 2000

BETWEEN

GLADYS GAFOOR

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

AND

THE INTEGRITY COMMISSSION

Defendants

Before the Honourable Mr. Justice Vasheist Kokaram

Appearances:

Mr. Clive Phelps instructed by Ms. Nicole De Verteuil-Milne for the Claimant
Ms. Deborah Peake S.C. leading Mr. R. Nanga instructed by Marcelle Ferdinand, J D Sellier and Company for the Defendant

JUDGMENT-PROCEDURAL APPLICATION-PERMISSION TO AMEND

1. This claim for judicial review of the decision of the Integrity Commission[1], is set for hearing for the afternoon of 18th, 20th and 21st June 2012. It is being heard together with CV2012-0876 filed by the

[1] The decision is that made by the Commission that the Claimant be rescued from participating in an investigation of Mr. J Jeremie SC

Claimant seeking constitutional relief in relation to the establishment of a disciplinary tribunal to hear several charges of misconduct stemming from circumstances surrounding that said decision. Both matters raise issues as to the management of the affairs of the Integrity Commission and the procedures to be adopted in handling internal disputes. The Integrity Commission itself being clothed with constitutional status, the claims raise important issues in public law. The Tribunal hearings are effectively waiting in the wings until the conclusion of the constitutional law proceedings. An expeditious determination of both these claims is therefore a priority and it was my intention to hold the reins tightly on both public law claims as they proceeded along the case management tracks towards a final disposition. Tight deadlines were set and counsel for both sides are to be commended in maintaining these deadlines and where needed appropriate consensus with the Court's intervention was obtained to vary the timetable.

2. There were some "speed bumps" on these case management tracks. At the pre trial review in both proceedings applications were made by the parties to strike out evidence and to amend proceedings. Added to this the parties voluntarily participated in a judicial settlement conference before the Hon Madam Justice Pemberton. Due to late service of some of the applications the timetable for the hearing of the pre trial review was shifted and so were the original trial dates. The procedural applications in the constitutional motion was disposed of on 24th May 2012. The effect of those decisions did not disrupt the trial of that matter scheduled for 18th June 2012.

3. At the hearing on 29th May 2012, I heard the Claimant's application to amend her claim for judicial review and I reserved judgment. Unlike the constitutional law proceedings, granting an amendment at this stage in the judicial review proceedings may disrupt the trial dates and there is a risk that of the two public law claims which have so far been kept in

check this procedural "speed bump" may derail this claim for judicial review and its final disposition may gallop off to a later date. Whereas I have given primacy to an expeditious resolution of this claim, it cannot be at the sacrifice of a just result. Expedition and justice must be finely balanced by the case managing judge[2] to ensure that all the public law issues that can be justly and effectively raised are dealt with. In case managing this claim I am cognizant that in dealing with cases justly the economical disposition of cases is balanced with the principle of equality and proportionality.

4. For the reasons set out in this judgment, I have granted permission to the Claimant to amend her claim for judicial review. The extent of the amendment is limited and I have given consequential directions for the use of evidence in support of the amendment having regard to the nature of the application, the limited amendment allowed and the time frame within which the claim is to be determined.

5. The Claimant's application was premised upon the recent disclosure of three letters. It was made promptly after their disclosure. In my view had the new grounds been made initially at the application for leave I would have granted leave based upon those grounds. There is no prejudice to the Integrity Commission in addressing this new ground. The only constraint at this time is the question of maintaining the trial date. This really comes down therefore to the proper allocation of the parties' and Court's resources. I already have the constitutional motion ready to begin on 18th June 2012. At least two of the three days will be used in hearing that matter. This judicial review claim can realistically be heard in July 2012 if not sooner. I see no difficulty in rescheduling the trial dates in this matter and place the constitutional motion first in line for determination. Ultimately had these letters been disclosed

[2] Rule 56.12 CPR mandates: "At the case management conference the judge must give any directions that may be required to ensure the expeditious and just trial of the claim..."

much earlier by the Integrity Commission this could have been avoided.

Procedural history:

6. It is necessary to set out briefly the procedural history of the claim to appreciate the context of the Claimant's application to amend her claim and the limited amendment permitted. On 29th March 2012 leave was granted to the Claimant to apply for judicial review of the decision of the Integrity Commission, that the Claimant be rescued or precluded from deliberating or hearing or participating in an investigation of Mr. J Jeremie SC which is currently pending before the Defendant. Rather than await the filing of the claim and a subsequent case management conference all parties agreed that directions for a speedy trial can be given right away. Directions were therefore also given for the filing of affidavits and procedural applications. A trial date was set for 24th and 29th May 2012 with a pre trial review on 21st May 2012.

7. The deadline dates for filing affidavits were varied. The pre trial review of 21st May 2012 was adjourned to be dealt with on 24th and 29th May 2012 due to the late service of some of the procedural applications. As I expressed to the parties at that stage I had no difficulty using the trial dates to deal with these procedural applications. At the leave stage no party could reasonably have been in a position to predict the nature of the evidence or procedural applications that may be filed subsequently. In any event a trial could be accommodated before the end of this term.

8. The parties agreed to attend a judicial settlement conference before the Hon Madam Justice Pemberton for the purpose of making efforts to resolve the claim on 21st May 2012. The judicial settlement conference is a private and confidential conference before another judge who facilitates discussions between both parties with a view of arriving at

an amicable resolution of the dispute and may give a non binding opinion on the matter. Nothing at that conference is communicated to the docketed judge except whether or not the matter has been settled and the terms of settlement. The claim was not settled at the JSC and I proceeded to deal with the procedural applications on 24th and 29th May 2012.

9. Both in the Claimant's application for leave to apply for judicial review and in her affidavits filed in reply to the Integrity Commission's affidavit she complained that she had not seen letters written by the Chairman Kenneth Gordon and members Neil Rolingson and Ann Marie Bissessar to His Excellency the President ("the said letters"). The President had explained to her the gist of those letters which were complaints about her. She responded in writing to the President by letter dated 30th January 2012 and the Tribunal was subsequently established. From her said letter of 30th January 2012, it is clear that the Claimant was aware that allegations were made against her by members of the Integrity Commission. However in her affidavits she indicated that those letters were never made available to her for her inspection or for the purpose of taking legal advice. In her application for leave for judicial review she had sought as a relief against the Integrity Commission disclosure of those letters.

10. At paragraph 9 of her affidavit, filed on 2nd March 2012, she said that "on 26th January 2012 I was called by His Excellency the President and informed by him that he was in possession of three letters emanating from the Chairman and two members of the Commission." In paragraphs 21, 31 and 32 of the said affidavit, the Claimant set out her efforts to obtain these letters from the Registrar of the Commission and His Excellency the President. On 1st March 2012, His Excellency directed her to the attorney-at-law for the Tribunal Mr. Neil Bisnath. In paragraph 32 of her affidavit she stated that "These letters are not only

relevant but as well necessary for defending myself against the allegations and complaints made against me."

11. At the hearing of the application for leave, although I made no formal order, I held the view that the disclosure of the said letters by the Commission would have been consistent with the Commission's obligations to disclose relevant documents to the Claimant. In the Claimant's affidavit in reply filed on 4th May 2012, the Claimant set out in detail her efforts made to obtain copies of those letters. In a letter dated 4th April 2012 referred to in paragraph 6 of the Claimant's affidavit in reply attorney for the Commission stated that:

> "We have no recollection of Mrs. Deborah Peake SC advising the Court or promising that copies of any letters would be made available to attorney for the claimant. What was said was that there was no objection to the letters written to His Excellency being produced. No reference was made to secret letters. Please be advised that production by the Integrity Commission of documents including the letters will be by way of filing and service in accordance with the directions given by the learned Judge on 29th March 2012 and when relevant to the proceedings."

12. In a subsequent letter dated 3rd May 2012 attorney for the Integrity Commission indicated that the letters will be disclosed when it is relevant to the constitutional motion and in accordance with the directions of the Court.

13. Further the Claimant telegraphed her intention to amend her grounds of her application for judicial review when she obtained copies of those letters. At paragraph 13 of her affidavit in reply she stated:

" I reserve my legal right to add new grounds or amend the grounds in my judicial review claim and originating motion should new material come to light from the said letters.."

14. It is not in dispute that the Claimant only obtained copies of those letters when they were eventually disclosed by the Defendants in the claim for constitutional relief on Monday 14th May 2012. By Friday 18th May 2012, within the time limited by my directions for the making of procedural applications in this claim, the Claimant made her application to amend her claim. She also filed an affidavit of 18th May 2012, without the Court's permission, exhibiting inter alia copies of the letters.

15. I cannot imagine why, if the Integrity Commission had the said letters in its possession, it would wait until 14th May 2012 to disclose them.

The application to amend:

16. The Claimant's application to amend her claim sought the Court's permission to add the following grounds to her claim:

"32. Bias against the Claimant by the Chairman of the Commission and members Mr. Rolingson and Mrs. Bissessar as evidenced inter alia by three letters written by them dated 23rd January 2012 and 20th January, 2012 respectively, to His Excellency the President complaining about the Claimant in relation to the business of the Commission.

PARTICULARS:

a. The Chairman stated at paragraph 6 of his letter dated 23rd January, 2012:

"There has been a pattern of leaks to the media which could only have emanated from one or other of the Commissioners. The Deputy Chairman has been involved on each occasion. In one instance she was the only person other than the Registrar and the Chairman to have had knowledge that a certain attorney had been invited to a very sensitive meeting of the Commission. On reflection the Chairman cancelled the invitation to the attorney. The following day another "leaked" story appeared in the media announcing that the attorney would be present at the meeting of the Commission with relevant details."

b. Mr. Rolingson stated at paragraph 3 of his letter dated 22nd January, 2012:

"Although there is no conclusive evidence as to the source of the 'leaks', it is indicative that their sudden appearance in the national media is tied to a breakdown in the relationship between our Deputy Chairman, Mrs. Gladys Gafoor and our Chairman."

AND at paragraph 5:

"in one case confidential information which was known to only the Chair, The Deputy Chair and the Registrar was leaked ad verbatim to the media, this meeting was held and a resolution to that effect was subsequently taken."

AND AT PARAGRAPH 8 THE Professor implicitly and clearly states in her opinion:

> ***"there is no way in which the Commission can proceed with the business of the Commission if Mrs. Gafoor continues to serve as a sitting member of the Commission".***

d. This trio exhibited bias against the Deputy Chairman but nevertheless sat in judgment on her on 21st December, 2011 and voted her out of participating in the Jeremie investigation.

33. *The Chairman and members Mr. Rolingson and Mrs. Bissessar acted in bad faith towards the Deputy Chairman by writing the said letters referred to in ground 1 above, to His Excellency The President behind her back in breach of the requirements of fairness. This trio did not provide her with copies of their letters before forwarding same to His Excellency the President thereby denying her the opportunity to correct or contradict the allegations made against her and the existence of these letters were not mentioned in the Response letter dated 27th January, 2012 to the Pre-action Protocol letter dated 13th January, 2012 to the Commission.*

34. *The Commission took into account irrelevant considerations such as leaks to the media, disagreements about the agenda for the meeting, disagreements about the meaning and intent of letters passing between the Chairman and Deputy Chairman as well as Bissessar and Rolingson as to interpretation and understanding of correspondence, whether the Chairman should suspend meetings of the Commission because of the leaks, whether an audience*

should be sought with the president, whether members should periodically retake the oath of office, the Chairman expressing that he would communicate with the Commission of Police, whether any visit to the President would be for the entire Commission to resign as evidenced in the Minutes of the said Meeting of 21st December, 2011.

35. Breach of legitimate expectation that the Claimant will be given a fair hearing before an impartial Integrity Commission to correct, contradict, answer and rebut and meet the three allegations contained in the complaint."

17. This application was resisted by the Defendant principally on two main limbs: (a) the application was procedurally irregular or that no proper application was before the Court and (b) the Court ought not to grant permission pursuant to rule 20.3 CPR as amended, for the reason that the failure to plead the new grounds is entirely due to the fault of the Claimant and her attorney. She was well aware of the gist of the letters and could have pleaded this at the outset. Further, to now raise those allegations will cause prejudice to the Defendant who will now have to prepare an affidavit in response and which will jeopardize the trial date. See rule 20.3A (a) (b) (e) and (f) CPR.

18. The Claimant's contentions in support of its application can be summarized briefly as follows. The Court has an inherent jurisdiction to grant the amendment sought. The amendment is being sought as a result of the disclosure of the three "secret letters" which were previously in the possession of the Commission. The Defendant cannot complain about the application to amend as it is as a result of the Defendant's failure to produce documents which it was obliged to

disclose in the discharge of its obligation of candour to the Court[3]. Further, the Court should not be unduly obsessed by mundane matters of procedure which if given unfair preference will override substantive justice in this case.

19. I begin with three observations. Firstly the Claimant's application to amend is procedurally defective. The actual grounds of the application are in fact the very same terms of the proposed amendment. The notice of application was filed without an affidavit in support. The Claimant sought to rely instead on her affidavit filed on 18th May 2012 which on its face is an affidavit in response to an affidavit of 11th May 2012 filed in the constitutional motion. There is nothing on its face which remotely suggests that it is an affidavit being used in support of an application to amend the claim. This affidavit was filed outside the time limited by my order for the filing of affidavits in these proceedings. The Claimant however seeks the Court's leave to delete the first two paragraphs of that affidavit and that should cure any procedural irregularity. I will return to that suggestion later in this judgment. For the moment it is sufficient to say that I will disregard that affidavit for the purpose of this application.

20. The second observation is that the relevant rule governing an application to amend the grounds of a claim in judicial review is rule 56.12 (2) CPR and not Part 20. Rule 56.12(2) CPR provides as follows:

> "The judge may allow the claimant to amend any claim for an administrative order or to substitute another form of application for that originally made."

[3] See "duty of candour" Judicial Review Handbook, Michael Fordham

21. Rule 54 deals with the Court's powers at the case management conference stage. However conceptually as the Court exercises the powers of case management at the pre trial review stage there should be no difference in approach at the pre trial review stage. Indeed in **Digicel (Trinidad and Tobago) Limited v Macmillan** CV2006-03320, Jones J was prepared to hold the view that at a pre trial review stage the court had the discretion to permit an amendment of the judicial review application. This discretion to grant an amendment must be exercised having regard to the desire to deal with the case justly and as Jones J observed in **Digicel** the following considerations come into play:

> **"Part 56.13(2) of the Civil Proceedings Act 1998 as amended ("the CPR")** under the rubric Case Management Conference states the Judge may allow the Claimant to amend any claim for an administrative order. This, I interpret, gives the court the discretion to allow an amendment to an application for judicial review at a case management conference in an appropriate case. Despite the fact that the parties were at the pre-trial review stage I have no doubt that the Judge has the discretion, in an appropriate case, to grant an amendment at this stage. The exercise of this discretion is guided by the substantive law and the overriding objective of the CPR.
>
> **Part 1 of the CPR** requires the Court to deal with each case justly. **Part 1.1 lists** some guidelines that a court ought to consider when exercising its discretion under the CPR. Included in these guidelines, and to my mind relevant to the application, are: the need to ensure that the case is dealt with expeditiously**, Part1.1 (d);** and the need to allot to it an appropriate share of the court's resources, **Part1.1 (e).**"

See also a similar approach adopted by the Court of Appeal in **Dennis Graham v Police Service Commission** CA 143 of 2006 per Mendonca JA.

22. Both parties submitted that rule 20.3 CPR is the relevant rule. When I brought this to the parties' attention the Defendant submitted that rule 20.3 CPR is an extension of rule 56.12 CPR. The Claimant was content to rely on rule 20.3 CPR. For the purposes of this decision the distinction between the two rules is of no moment as it does not affect the ultimate result granting permission and a determination of the relevant test does not arise. In my view however rule 56.12 CPR is a free standing rule contained in Part 56 dealing specifically with amendments to claims for administrative orders. There are no strictures to the exercise of the Court's discretion in granting amendments after the first case management conference as set out in Rule 20.3.

23. Part 20 deals with changes to a "Statement of Case". As a statement of case includes a claim the parties rely on this rule as the applicable rule governing changes to the grounds for judicial review. Part 20.3 CPR sets out the guide for the Court in exercising its discretion to allow an amendment to a claim after the first case management conference. Firstly the Claimant must satisfy a threshold test of promptness and demonstrating a good reason for not making the application prior to the first case management conference. Second having crossed that threshold the Court in considering whether to grant permission shall have regard to a number of factors spelt out in rules 20.3 A (a) to (f). A consideration of these 20.3A CPR factors are cumulative and no one factor will outweigh the other. They must all be considered in the round.

24. Having said that however, there is considerable merit in setting out clear guidelines for the exercise of the Court's discretion in the rules themselves. This promotes a degree of certainty and clarity in the exercise of the Court's discretion. Perhaps it is this desired approach for certainty and clarity in exercising a discretion which made Part 20.3 more appealing to the parties as the appropriate rule.

25. The procedures in Part 56 deal specifically with claims in administrative law. The framers of the CPR have carefully carved out the procedures to be adopted in relation to public law matters with careful consideration for the provisions of the Constitution and the Judicial Review Act. It sets out unique modifications to several aspects of general procedure which are provided for elsewhere under the CPR and which are specifically designed for public law matters. Such modifications include aspects of joinder, service, the reception of evidence, the conduct of case management conferences and the making of applications.

26. Notably rule 56.12 (2) CPR makes no express reference whatsoever to Part 20 CPR. By comparison rule 56.14 CPR in dealing with costs makes reference to Part 66 CPR. Similarly rule 56.10 CPR in relation to service reference is made to Part 5. The analysis of Stollmeyer J as he then was on the special nature of costs in judicial review matters as expressly dealt with under Part 56 took it out of the regular Part 67 regime of costs is particularly instructive. It reinforces the view that Part 56 are specialist rules created to deal with aspects of procedure in public law. See **NIB v National Insurance Appeals Tribunal** CV 2005-00748.

27. Further the general discretion to grant amendments as set out in Rule 54.12 CPR is consistent with section 5(4) of the Judicial Review Act:

"(4) An applicant is not limited to the grounds set out in the application for judicial review but if the applicant wishes to rely on any other ground not so set out, the Court may, on such terms as it thinks fit, direct that the application be amended to specify such other ground."

28. In exercising a discretion under rule 54.12(2) the Court must therefore give effect to the overriding objective and ensure that it deals justly with the case by maintaining the parties' "equality of arms" in the litigation, arrive at a result that is economical and proportionate. Further the Court must be satisfied that the amendment is an arguable ground for judicial review. In this regard the same test as that applied at the leave stage would be applicable. See **Dennis Graham.**

29. My third observation is that there is some merit in the Claimant's submissions that in public law the Court would eschew procedural niceties. A classic example arises in this case where after leave was granted to file a claim for judicial review, the parties agreed to proceed without the need for a case management conference. Further the Claimant has simply filed a fixed date claim form without an accompanying affidavit. It is understood by the parties without the Claimant expressly stating so that she is relying upon her original affidavit filed at the leave stage, the affidavits filed on 3rd March 2012 (which predate the claim form). The Defendant has not taken any objection to this defect in procedure. This view of eschewing procedural technicalities lest it becomes a stumbling block to determining public law rights has been seen in similar instances of saving proceedings at the expense of procedural flaws. See Michael Fordham **Judicial Review Handbook**, 4th ed p 95. In Michael Supperstone's**, Judicial Review**, , it was conceded that procedure is a speed bump to determining public law applications:

> "Procedure is the ugly duckling of administrative law. In many respects and despite the existence of CPR pt 54…the Administrative Court is the High court jurisdiction that is least enslaved to the speed bumps of procedural rules. Many hearings appear to pass by without any thought to any point of procedure or should any such point arise it is dealt with wholly pragmatically depending on specific circumstances in hand"

30. However the desire to be practical and the adoption of a pragmatic approach to dealing with procedural issues cannot dispense with the procedural discipline to litigation which is one of the cornerstones of the CPR. Although a flexible approach is to be commended the Court cannot permit its elasticity to stretch beyond the limits of proportionality, economy and equality, the principles which underpin the Courts duty to deal with cases justly. In **R v Secretary of State for Trade and Industry ex p Greenpeace Limited** [1998] Env. L R 415 Law J stated:

> "the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adapt a flexible by principled approach to its own jurisdiction. Its decision will constrain the actions of elected government, sometimes bring potential uncertainty and added cost to good administration. And from time to time its judgment may impose heavy burdens on their parties. This is a procedure which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion-whether so directed by rules of court ……. will impose a strict discipline in proceedings before it."

31. Indeed good case management is premised upon a duty to deal with cases justly and give effect to the overriding objective. Defects in procedure in public law therefore which do not maintain the equality of arms in civil litigation, which may increase costs and where rectifying defects may be disproportional to the advantage to be gained in the timely disposition of the claim will not be cured for the sake of substantive justice.

32. Appeals therefore to the Court's inherent jurisdiction or to the overriding objective cannot be the balm to every sore of an applicant. An applicant simply cannot pull an amendment out of a hat and magically create new grounds to impugn administrative decisions or to create cases for Claimant's for the sake of doing justice to the case. A court must be wary to cure proceedings lest it encourages a laissez faire attitude to the preparation of one's case especially in the arena of public law litigation. As the Privy Council observed in **Seebalack v Charmaine Bernard** [2010] UKPC 15

> "But under the CPR it is no longer right to say that the Court's function is to do substantive justice and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources."

33. Nothing in this judgment is to be interpreted as derogating from the salutary principle of maintaining discipline in civil litigation as espoused in **Schnake v Trincan** Oil CA 123/210.

Applying the relevant principles:

34. The application was premised upon the recent disclosure of the said three letters. Insofar as the argument was made by the Defendant that the Claimant was well aware of the gist of the letters and so could have advanced this new plea a long time ago, I will not pre judge that issue

of whether the Claimant knew the gist of the letters as such a finding even on a preliminary ruling will impact upon the substantive proceedings. The fact remains which is not in dispute, the Claimant did not have copies of these letters until 14th May 2012.

35. I will grant the Claimant permission to make a limited amendment to its claim. I will give the Claimant permission to amend its claim to add only the following paragraph, which I will conveniently refer to as "the new paragraph 32":

"32. Bias against the Claimant by the Chairman of the Commission and members Mr. Rolingson and Mrs. Bissessar as evidenced inter alia by three letters written by them dated 23rd January 2012 and 20th January, 2012 respectively, to His Excellency the President complaining about the Claimant in relation to the business of the Commission.

36. PARTICULARS:

a. The Chairman stated at paragraph 6 of his letter dated 23rd January, 2012:

"There has been a pattern of leaks to the media which could only have emanated from one or other of the Commissioners. The Deputy Chairman has been involved on each occasion. In one instance she was the only person other than the Registrar and the Chairman to have had knowledge that a certain attorney had been invited to a very sensitive meeting of the Commission. On reflection the Chairman cancelled the invitation to the attorney. The following day another "leaked" story appeared in the media announcing that the attorney would be present at the meeting of the Commission with relevant details."

b. Mr. Rolingson stated at paragraph 3 of his letter dated 22nd January, 2012:

"Although there is no conclusive evidence as to the source of the 'leaks', it is indicative that their sudden appearance in the national media is tied to a breakdown in the relationship between our Deputy Chairman, Mrs. Gladys Gafoor and our Chairman."

AND at paragraph 5:

*"**in one case confidential information which was known to only the Chair, The Deputy Chair and the Registrar was leaked ad verbatim to the media, this meeting was held and a resolution to that effect was subsequently taken."***

AND AT PARAGRAPH 8 THE Professor implicitly and clearly states in her opinion:

"there is no way in which the Commission can proceed with the business of the Commission if Mrs. Gafoor continues to serve as a sitting member of the Commission".

d. This trio exhibited bias against the Deputy Chairman but nevertheless sat in judgment on her on 21st December, 2011 and voted her out of participating in the Jeremie investigation."

I have granted this application both on an application of Part 20 and Rule 56. In deference to the parties I deal first with Part 20.

The threshold:

37. I am satisfied that the Claimant has crossed the threshold test set out in rule 20.3 (1) CPR. Firstly, in relation to whether this change could have been made prior to the first case management conference there are several answers to this. The application was premised upon the disclosure of the letters. It is not in dispute that the letters were disclosed to the Claimant on 14th May 2012. The application could only have been made at the pre trial review.

38. Technically there has been no case management conference in this matter. At the leave stage directions were given to prepare for a trial with the next date of hearing being at a pre trial review. If the hearing at which I gave directions is to be treated as a case management conference, which it could not, then obviously she could only have made the application after that hearing when she obtained the letters. In any event I hold the view that these letters should have been disclosed since the hearing of the application for leave. I cannot see how these letters could be irrelevant to these proceedings having regard to what was set out in the affidavit of the Claimant. At no stage did the Commission say that these documents or copies of the documents were not in their possession. The Commission had a duty to disclose at the very least that they are in possession of copies of the documents and make them available for inspection. Such a duty is also consistent with the philosophy of conducting litigation with a cards face up approach. Having regard to the meandering route by which these letters eventually was disclosed I conclude that the Defendants have been playing their cards close to their chests which is not in keeping with the Defendant's duty to co-operate with the Court in dealing with a case justly.

39. Second in relation to acting promptly. There can be no question that the Claimant acted promptly in making the application after receiving the letters. The application was made 4 days after the said letters were obtained.

The discretionary factors:

40. The first consideration is the administration of justice. In the interests of the administration of justice therefore only those amendments that are strictly necessary will be allowed. I consider not only the question of the timely disposition of cases but also the substantive law in judicial review. I have applied the arguability test to determine whether there is an arguable ground of bias on the basis of the new grounds as proposed. See **Digicel v Macmillan.** It will not be in the interest of the administration of justice to permit the amendment of a new ground which cannot advance an arguable case with a realistic prospect of success.

41. I understand the grounds in the new paragraph 32 to mean that the Commission was biased in making its decision because those persons who voted for the recusal of the Claimant from the Jeremie investigation were pre disposed to making that determination because they held the view that (a) she leaked confidential information (b) she was boorish (c) made personal attacks against other members. This allegation is being made based upon the contents of the letters alone. Further those letters must be properly examined to determine whether and to what extent it refers to matters which pre date the decision of the Commission on 21st December 2011 which is under challenge. Any other complaint about the actions of the Claimant occurring after that date is simply irrelevant to this dispute. Moreover the letters as I understand them are being used as indicative of the mind of the

decision makers where relevant at the date when the decision was made.

42. This proposed amendment therefore just passes the threshold test. In the interests of justice I will err on the side of caution of allowing this amendment rather than shutting it out. I emphasise however that (a) actual bias is a very difficult claim to make out and an inference of apparent bias is not lightly to be drawn[4] (b) there is no actual declaration being sought that the Commission was biased. There is an allegation that the Commission acted in a procedural improper manner (c) it is a limited allegation of bias restricted to the particulars pleaded and not on the entirety of the contents of the letters. Indeed it could not, as the said letters refer to a wide range of matters which occurred after the challenged decision was made.

43. Whereas the new paragraph 32 fairly arises as a result of the contents of the disclosed letters, the other amended grounds do not. Paragraphs 33 goes off into an area which is not the subject of the dispute that is whether the Claimant should have been given a fair hearing to deal with the allegations in those letters. Those letters were written after the decision under challenge was made. A fair hearing to deal with the letters is irrelevant. Paragraphs 33 and 34 do not arise out of the letters at all. They deal with minutes and the letters of complaint respectively. They are also matters which could have been dealt with at the original application for leave and there is absolutely no reason advanced as to why it is now being made at this stage.

[4] See **Arab Monetary Fund v Hashim** (1994) 6 Admin LR 348 355 D-F per Sir Thomas Bingham

Fault of the party or attorney at law:

44. I cannot hold the party or her attorney at law at fault for making this application to amend the claim form in the terms of the new paragraph 32. It is true that a day before the application for leave was filed she was told to direct her enquiry for the letters to the attorney for the Tribunal. However at the end of the hearing for the application for leave even I had the impression that the letters will be forthcoming as a matter of course from the Integrity Commission. It only turned out subsequently in the exchange of correspondence that the Integrity Commission was adopting the attitude of playing their cards close to their chest. I cannot fault the Claimant for re-launching another chain of correspondence to the attorney for the Integrity Commission to obtain these letters. It was not unreasonable to wait for the Defendants to file their affidavits rather than bear the cost of filing an application for disclosure. Indeed it appeared from the correspondence that the letters would emerge in an affidavit.

Factual inconsistency

45. There is no factual inconsistency.

Circumstances after the first CMC

46. The letters were only disclosed on 14th May 2012 and the application could not have been made before that date.

The trial date

47. Consideration of this factor meant that I could not arrive at this decision to grant permission to amend lightly. I am mindful that the amendment may affect the trial date. However it does not translate to a total waste of the Court's resources: (a) the trial dates are not being vacated but

are being utilized to give priority to the constitutional law claim (b) the trial of this claim can be accommodated in July 2012 (c) had the Defendant disclosed these letters since the application for leave we would not have been in this difficulty of shifting trial dates.

Prejudice

48. There is no prejudice to the Defendant. The Defendant contends that the trial date will be compromised and I have dealt with that above. In any event the amendment is a limited one and I cannot see how it will prejudice the Defendant. Further I have proceeded to give directions below as to the evidence which the Claimant will be permitted to use in support of the amendment and this will counterbalance any possible prejudice to the Defendant in meeting this new ground. On the other hand it is the Claimant who will be prejudiced if she is unable to advance this grounds at this stage due to no fault of her own and it is not for the Integrity Commission to cry prejudice when this amendment could have been made a long time ago had these letters been disclosed to the Claimant at an earlier stage.

Rule 56.12

49. Even if the discretion to be exercised to allow an amendment to the claim is a free standing one as submitted above, the Claimant would still have been allowed to amend her claim in the limited fashion as described above. Such a result is proportional, maintains the equality of arms and would lead to an economical disposition of the dispute. It is only fair for the Claimant to advance this claim now being armed for the first time with the letters. It is a ground which the Defendant should be in a position to answer by filing the relevant evidence if necessary. It should not take them by surprise since they have been in possession

of the documents from inception. The reliance on the letters to establish bias is a focused one limited to the decision under challenge.

Irregularities

50. The Claimant should have filed a proper application. I have made this decision however based upon the record as it presently exists and the undisputed facts surrounding the disclosure of the letters. The foundational fact for this application is that these letters were produced on 14th May 2012. That is not in dispute. The Court on its own motion could have called for the production of the letters themselves and examine them. In my view, it would be taking too pedantic an approach to say "yes the letters were produced at the last minute", "yes there is something here that deserves investigation", "yes the Defendant had these letters all along and did not produce it to you", "yes you had to take a circuitous route to eventually obtain it", but because the Claimant did not file a proper affidavit in support of her application to amend exhibiting the letters I must shut my eyes to those letters and chuck her application out and say "too bad for you". It may be an expeditious solution but I do not think this represents a just result. Both expedition and justice must be kept hand in hand by the case managing judge.

51. In **Teddy Rampaul v Chavez Industrial Maintenance Limited** CA 35 of 2012, the Court of Appeal dealt with a deficiency in the evidence in the Claimant's application to amend his statement of case. The issue was whether the Appellant had crossed the threshold in his application to amend his statement of case by placing before the Master evidence as to whether the application was made promptly and there was a good reason why the application was not made before the first case management conference. The Court of Appeal dealt with the absence of this evidence in the application to amend by reliance on the record.

One could say the Court of Appeal cured the deficiency by taking a pragmatic approach. Kangaloo JA stated:

> "It would have been better for the appellant to specifically say that the reason he had not filed this application to amend earlier was as a result of the pending negotiations, however, notwithstanding he not having done so, a perusal of the record in this matter makes than an obvious inference. It therefore would only have increased costs in the matter if an earlier application were made and it may have even turned out otiose if a settlement was arrived at. This does not appear in the Masters reason and to the extent that the Master looked at the affidavit and the application narrowly without taking this into consideration it is on our view that she erred."

52. Evidence of these negotiations was reflected on the court's record and not in the Claimant's affidavit. The Court of Appeal was therefore eschewing some of the procedural speed bumps and recommending an approach which is practical and not stymied by technicalities. The note of caution expressed in the dissenting judgment of Stollmeyer JA also deserves mention:

> ""The claimant put no evidence before her at all upon which she could exercise discretion in his favour and while I agree that the record can be used by the court in certain circumstances it should be done with caution and should not of itself be the evidential platform for justifying delay or lack of timeliness as was the position here."

53. I do not think the Court of Appeal is recommending the abandonment of proper applications to amend or to blindly circumvent the CPR. To the contrary Kangaloo JA emphasizes that applicants should place their evidence before the Court in their application. However the record

can be relied upon if there are obvious inferences to be drawn. The decision emphasizes that there are those deserving cases, such as this one, where an insistence of the rigidity of procedure may lead to an injustice when proper and obvious inferences can be drawn from taking a practical approach to the application. Agreed facts between the parties can also be the basis for obvious inferences. It is an approach which should be made cautiously. In my view this is such a case not only because the foundational fact for the application is not in dispute but also because we are dealing with a public law matter where a degree of pragmatism is required in dealing with these cases both expeditiously and justly for both parties.

The evidence to be used in support of the amended Claim:

54. Finally, so that we may cross this procedural speed bump I propose to deal with the evidence in support of the amended Claim. The Claimant did not file a proper application to amend the claim. She did however file an affidavit exhibiting the letters and attorney for the Claimant indicated that it is being relied upon in support of the application to amend. The affidavit relates only to the letters. The new paragraph 32 sets out in a limited form, the matters in the letters which is being relied upon to assert a case of bias.

55. I wish therefore to adopt an unusual by practical approach in relation to this affidavit and I do so for the sake of moving this matter forward and to focus the attention of the parties to the relevancy of the evidence that will be permitted at this hearing to the new ground. In granting the Claimant's permission to amend to ensure that parties are on an equal footing I will permit the Claimant to use and rely upon this affidavit in support of her amended claim.

56. However there are several aspects of her evidence in this affidavit which in my view is not necessary to support the new paragraph 32 of

the amended claim. Those paragraphs are 2, 3, 7, 8, 23, 24, 26, and 29 in their entirety. With regard to paragraph 9 the words “and set out in the affidavit” and “have acted in bad faith”. With regard to paragraph 13 from the words “who by the way” to the end of the paragraph. With regard to paragraph 15 the words “whatever is meant by that terminology by the author”. With regard to paragraph 16 from the words “as I constantly” to “because”. Paragraph 17 the last sentence. Paragraph 21 the first two sentences and the last sentence of that paragraph. Paragraph 22 from the words “I observed” to the end of the paragraph. Paragraph 27 from the second sentence to the end of that paragraph.

57. These paragraphs can be struck out on the basis of irrelevance or hearsay. However because both parties were not given the opportunity to address me on the use of this affidavit in support of the amended claim I propose to make the order permitting the Claimant use of this affidavit but for the parties to indicate to me in writing on or before 18th June 2012 why those or any other paragraphs ought or ought not to be struck out. I shall make my final order in relation to those paragraphs after reading those submission and hearing the parties if necessary.

58. Costs reserved.

Dated 6th June, 2012.

Vasheist Kokaram

Judge