COMMONWEALTH OF THE BAHAMAS **2022**
IN THE SUPREME COURT **No. 00015**

Public Law Side

IN THE MATTER of an application
by Yuri Starostenko for leave to Apply for Judicial Review

AND IN THE MATTER of the Application for Leave to apply for an Order of Mandamus

AND IN THE MATTER of the Securities Industry Act, 2011, as Amended

BETWEEN:

YURI STAROSTENKO

AND

IRINA TSAREVA-STAROSTENKO

Applicants

AND

THE SECURITIES COMMISSION OF THE BAHAMAS

Respondent

BEFORE: The Honorable Madam Justice Carla D. Card-Stubbs

APPEARANCES: Irina Tsareva Starostenko and Yuri Starostenko, Claimants, pro se
Gladstone Brown and Aramantha Hepburn for the Defendant

Application for leave to apply for Judicial Review – Whether Applicants have sufficient interest - Whether Applicants have arguable case- Whether alternative remedy available – Order 53 RSC

The Applicants brought an application for leave to pursue judicial review. They sought an order that the Securities Commission make available for inspection documents and information about current and former regulated persons as requested by the Applicants.

HELD: Leave refused. The court held that while the Applicants had sufficiency of interest to bring the matter, the Applicants did not have an arguable case. Further, the Applicants had failed to exhaust alternative remedies available to them.

RULING

Card-Stubbs, J:

INTRODUCTION

[1.] This is the Applicants' application for leave to apply for judicial review relating to what is said to be the failure of the Defendant to make documents or information required to be filed with the Securities Commission available for public inspection.

[2.] This court orally delivered its ruling on April 2, 2025. Application for leave is refused. That decision and the reasons therefor follow.

BACKGROUND

[3.] On June 23, 2022, the Applicants filed a "Notice of Motion in Form A (Order 53, rule 3(2)). On August 23, 2022 the Claimants filed an application for leave to apply for judicial review. On February 17, 2023, the Applicants filed an "Amended Notice of Motion in Form A (Order 53, rule 3(2))" .

[4.] The Application is supported by the Affidavits of Irina Tsareva-Starostenko filed on August 23, 2022 and of Yuri Starostenko filed on March 3, 2023.

[5.] The Defendant filed a Memorandum of Appearance on March 1, 2023. The Application for leave was resisted by the Defendant who filed Affidavits of Christina Rolle on March 2, 2023 and on March 17, 2023.

ALLEGED FACTS

[6.] The facts giving rise to this application are set out in the affidavit of August 23, 2022 of the Applicants. Irina Tsareva-Starostenko deposes that the Applicants sent a letter on 21 March 2022 to the Securities Commission of the Bahamas, for the attention of Ms. Christina R. Rolle, the Executive Director. Their letter requested "the register, containing the prescribed information required to be filed with, delivered to or provided to the Commission by or on behalf of" persons named in the letter and described as "regulated persons". The Affiant avers that the Applicants received no communication from the Securities Commission, even after sending their "letter before action" of June 2, 2022 by email. That letter was also addressed to Ms. Rolle. That letter enclosed a draft of the application for leave to apply for judicial review.

THE APPLICATION

[7.] The Application seeks "to impugn the conduct of the Securities Commission in respect of the making available documents or information required to be filed with the Commission

available for public inspection under subsection 158(2)(a) of the Securities Industry Act, 201[sic]".

[8.] The reliefs sought in that application (and as revised in the consecutive Notices of Motion) are listed as follows.

> RELIEF CLAIMED
> 1. Declaration that the Securities Commission of The Bahamas ("Securities Commission") is obliged, in the discharge of its functions under subsections 158(2)(a) and 166(1) of the Securities Industry Act, 2011, as to the public availability of all documents or information required to be filed with, delivered to or provided to the Securities Commission, to make available for inspection by any member of the general public all documents and information about current and former regulated persons required to be registered with or otherwise approved by the Securities Commission under securities laws; and
> 2. Order that the Securities Commission makes available for inspection documents and information about current and former regulated persons requested by the Appellants [sic] and
> 3. Order for costs.

[9.] The grounds on which relief is sought are set out as:

> 1) There is no alternative remedy by way of appeal or internal complaints procedure and no other equally effective and convenient remedy as judicial review in respect of the inspection requested by the Applicants and refused by the Securities Commission.
> 2) The public availability of documents and information mentioned above is a matter of general public importance which affects or concerns the public at large of which the Applicants are members.
> 3) The private right to effectuate the public inspection so granted will not be waived or withdrawn.

SUBMISSIONS OF THE PARTIES

[10.] The Applicants relied on written submissions dated February 20, 2023 and March 10, 2023. The Defendant relied on written submissions dated March 9, 2023 and March 16, 2023. The submissions were presented orally at a hearing on March17, 2023.

SUMMARY OF SUBMISSIONS OF THE APPLICANTS

[11.] The Applicants seek a declaration that the Securities Commission is obliged, under sections 158(2)(a) and 166 of the Securities Industry Act 2011, to make available for inspection by any member of the general public all documents or information required to be filed with, delivered, or provided to the Commission by or regarding both current and former regulated persons, which is or was required to be registered with or otherwise approved by the Commission.

[12.] The Applicants argue that the conduct of the Securities Commission is subject to Judicial review, that the Applicants have a sufficient interest as "public-spirited individuals such as the Applicants, who are directly affected by the action which is taken" and that "there is no alternative remedy by way of appeal or internal complaints procedure, and no other equally effective and convenient remedy as judicial review". The Applicants wish to pursue judicial review "in the interest of public law enforcement" and seek an order for inspection of the documents of the persons identified in the Application.

[13.] The Applicants submit that the Defendant is amenable to judicial review proceedings per **Bethel v. Bahamas (Commission of inquiry into the Conduct and Operation of Bahamasair Holdings Ltd**. [1996] BHS J No.8 and that they, the Applicants, have "the necessary interest" to bring the application per **West Bay Management Ltd. (trading as Sandals Royal Bahamian Resort) v. The Registrar of Trade Unions and another** [2016] 2 BHS No. 148, **Pindling v Bahamas Electric Corporation** BS 1996 SC 44 and **Callenders & Co. (a firm) v The Comptroller of HM Customs** [2014] 1 BHS J No. 45

[14.] The Applicants submit that their claim is "not unarguable, doomed to fail or subject to some legal or discretionary bar" per **Rosetta Foster and another v The Attorney General et al** [2020] 1 BHS J No. 80 and that they have an arguable case "on a quick perusal of the material" per **IRC v National Federation of Self Employed and Small Businesses** [1982] AC 617.

SUMMARY OF SUBMISSIONS OF THE DEFENDANT

[15.] The Defendant submits that the onus is in the Applicants to establish their case as per **Council of Civil Service Unions v Minister of the Civil Service** [1984] All 395, **Paponette and Others v Attorney General of Trinidad and Tobago** [2010] UKPC 32 and **The Queen and The Most Hon. Hubert A. Minnis (In his Capacity as Prime Minister of The Commonwealth of The Bahamas; and the Competent Authority) and The Hon. Carl W. Bethel Q.C (In his capacity as the Attorney General of the Commonwealth of The Bahamas), Ex Parte Dwight Armbrister - 2020/PUB/jrv/00024 ('Ex parte Dwight Ambrister')**.

[16.] The Defendant argued that the Applicants have not demonstrated sufficient interest in the matter per **The matter of Mintbroker International Ltd. (formerly Swiss America Securities Ltd) T/A Sure Trader** 2019/Pub/jrv/00024 and **IRC v National Federation of Self Employed and Small Businesses** [1981] 2 ALL ER 93 and **Callenders & Co. (a firm) v The Comptroller of HM Customs** [2014] 1 BHS J No. 45.

[17.] The Defendant also submitted that the Applicants do not have an arguable case per **Rosetta Foster and another v The Attorney General et al** [2020] 1 BHS J No. 80.

[18.] The Defendant further argues that the Applicants' request is a fishing expedition "lacking clarity on the relevance, purpose, and objective of the requested information". The Defendant submits that it is not reasonable to exercise its discretion to disclose information in favor of the Applicants without a clear and legitimate purpose. Much of the Defendant's submissions were on the mandate and scope and duty of the Defendant as a regulator.

[19.] The Defendants submit that the Applicants failed to make full and frank disclosure of all the material facts and that on such ground the application ought to be dismissed. They relied on the cases of **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 135 and **The Bahamas Bar Council v Shavon Bethel** SCCiv App. No. 326 of 2013 for this proposition.

[20.] The Defendant also submitted that the Applicant's Amended Notice for leave was defective and that the applicants were attempting a relitigation of a closed matter. The Defendant in this case has attempted to show that the request emanates from a desire of the Applicants to find evidence for court matters that have already been determined. The Defendant equates that to *res judicata*. The Applicants are not, by this application, bringing matters against the parties, or in relation to the subject matters, noted by the Defendant in its affidavits. For that reason, I consider that principle inapplicable here.

[21.] The Defendant submits that there is an available alternative remedy and that the Applicants failed to exhaust available statutory remedies before seeking judicial review.

[22.] The Defendant argues that it acted within its statutory duties and that the disclosure of documents is discretionary. The Defendant asserts that it is mandated to safeguard all information received in the course of its duties from improper disclosure, as outlined in the Securities Industry Act, 2011 and that the Commission can only disclose information if it is in the public interest and does not contravene confidentiality obligations.

LAW AND ANALYSIS

JURISDICTION FOR JUDICIAL REVIEW

[23.] The application for leave was made under Order 53, Rules of the Supreme Court, 1978, as amended ('RSC').

[24.] Order 53, rule 3, makes provision for the grant of leave to apply for judicial review. It provides:

> 3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.
>
> (2). An application for leave shall be made *ex parte*

to a judge by filing in the Registry —

(a) a notice in Form A in the Schedule to this Order containing a statement of —

(i) the name and description of the applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the applicant's counsel and attorney (if any); and

(iv) the applicant's address for service; and

(b) an affidavit which verifies the facts relied on.

(3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court and in any case, the Registry shall serve a copy of the judge's order on the applicant:

Provided that in no case shall leave be refused without giving the applicant a hearing.

(4) Where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying —

(a) in any criminal cause or matter, to the Court of Appeal;

(b) in any other case, to a single judge sitting in open Court:

Provided that no application for leave may be renewed in any non-criminal cause or matter in which the judge has refused leave under paragraph (3) after a hearing.

(5) In order to renew his application for leave the applicant shall, within 10 days of being served with notice of the judge's refusal, lodge in the Registry notice of his intention in Form B in the Schedule to this Order.

(6) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit.

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(8) Where leave is sought to apply for an order of *certiorari* to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(9) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

(10) Where leave to apply for judicial review is granted, then —

(a) if the relief sought is an order of prohibition or *certiorari* and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

(11) Where leave is granted, the magistrates court or tribunal shall transmit a record of the proceeding to the Registrar within 21 days after receiving a copy of the order granting leave.

[25.] Judicial Review is invoked to test the legality of a decision rather than its merits. No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with that rule and a Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

NATURE OF JUDICIAL REVIEW

[26.] The Defendant relied on the case of **The Queen and The Most Hon. Hubert A. Minnis (In his Capacity as Prime Minister of The Commonwealth of The Bahamas; and the Competent Authority) and The Hon. Carl W. Bethel Q.C (In his capacity as the Attorney General of the Commonwealth of The Bahamas), Ex Parte Dwight Armbrister - 2020/PUB/jrv/00024 ('Ex parte Dwight Ambrister')**. In that case, the learned Justice Charles, as she then was, considered the purpose and scope of judicial review applications. On review of several decisions in this area, she made the following observations at paragraphs 12 to 17:

> [12] In **Brian R. Christie v The Civil Aviation Authority (Bahamas Air Navigation Services Division)** [2017/PUB/jrv/00010], this Court, at para 16 of that Judgment set out the role of the Court in judicial review matters and stated:
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> > **"Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties."**
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> [13] In **Kemper Reinsurance Company v Minister of Finance and others (Bermuda)** Privy Council App. No. 67 of 1997 at para 18, Lord Hoffman described the judicial review process in this way:
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> > **"In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final."**
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> [14] Judicial review is only available against decisions of public bodies exercising public functions. Purchas L.J. in **Regina v East Berkshire Health Authority ex parte Walsh** (1965) 1GB 152 and quoted at para 27 of **Bain (Re)** [1993] BHS J. No. 16 emphasised the importance of demonstrating that the decision was public:
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> > **"Finally, at page 181 Purchas L.J. posed the very question which, mutatis mutandis, I must address in the instant case: "did the remedies sought by the applicant arise solely out of a private right**

and contract between him and the authority or upon some breach of public duty placed upon that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public?"

[15] Generally-speaking, there are three well-established heads upon which judicial review may be brought by which an applicant with a caveat for further development on a case by case basis which may add further grounds such as the principle of "proportionality. In the landmark case of **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "*Wednesbury unreasonableness*" and procedural impropriety. He explained the three well- established heads in this fashion:

> **"By "illegality, as a ground for judicial review I mean that the decision- maker must understand correctly the law that regulates his decision- making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
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> **By irrationality, I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). 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. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…"**
> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".**

[16] Judicial prudence also dictates that the Court, in exercising this power, must however be careful not to overstep its supervisory role. It must not interfere with a decision that a public authority has reached that was not irrational, illegal or procedurally unfair.

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[17] **I**n **Bethell v. Barnett and Others** [2011] 1 BHS No. 30, a judicial review proceeding which involved a decision by the Judicial and Legal Services Commission, Isaacs Sr. J. (as he then was), at para [85] described the court's role in judicial review proceedings as follows:

> **"I must caution myself that this is a judicial review and not an appeal. Thus, the only questions I must answer are: was the decision of the JLSC to appoint the Applicant as the DLRRC irrational; and was the Applicant treated unfairly. I remind myself of the manner in which Gordon, JA put the position in *Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States*, Civil Appeal No. 9 of 2006 at paragraph 31. He opined:**
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> > **"I remind myself that the function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.""**

LEGAL TEST ON AN APPLICATION FOR LEAVE

[27.] The Applicants rely on **Rosetta Foster and another v The Attorney General et al** [2020] 1 BHS J No. 80. In that case, the learned Justice Klein considered the test for the grant of leave under Order 53. At paragraphs 9 to 13, he opined:

> [9] *Order 53, rule 3(1)* provides that no application for judicial review shall be granted unless the leave of the Court has been obtained. The permission stage in judicial review is to filter out challenges where the applicant either does not have the necessary interest to maintain the challenge, or in which the claim is unarguable, doomed to fail or subject to some legal or discretionary bar.
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> [10] The traditional statement of the test for the grant of leave has been that an applicant for judicial review had to make out what has been variously stated as a *prima facie* or arguable case on one or more of the traditional heads of judicial review such as illegality, irrationality, procedural impropriety (and now legitimate expectation). In *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 W.L.R. 477, Lord Donaldson, MR, said (at pg. 482, f-g):
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> > "If the applicant were to obtain leave, he had at least to satisfy the court that he had an arguable case for judicial review upon the grounds of illegality, "irrationality," (i.e., *Wednesbury* unreasonableness: see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223), or procedural impropriety: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410."
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> [11] To similar effect, in *R v Civil Service Appeal Board, ex parte Cunningham* [1992] I.C.R. 310, Lord Donaldson made the following observations (at pg. 823):
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> > "Those of us with experience of judicial review are very much aware that the scope of the authority of decision-makers can vary very widely and so long as that authority is not exceeded, it is not for the courts to intervene. They and not the courts are the decision-makers in terms of policy. They and not the courts are the judges in the case

> of judicial or quasi-judicial decisions which are lawful. The public law jurisdiction of the courts is supervisory and not appellate in character. All this is very much present in the minds of judges who are asked to give leave to apply for judicial review. *Such leave will only be granted if the applicant makes out a prima facie case that something has gone wrong of a nature and extent which might call for the exercise of the judicial review jurisdiction*." [Emphasis Supplied.]

[12] However, while the initial threshold for leave was rather low and thought necessary mainly to weed out "busybodies with misguided or trivial complaints of administrative error" (per Lord Diplock in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617, pp. 642-643) the test has evolved over time and as now applied by the UK Courts and adopted by our apex court is somewhat more stringent. In *Sharma v Browne Antoine* [2007] 1 WLR 780 (at 787), the Privy Council formulated the test as follows (para. 14, pg. 787):

> "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 alternative remedy*". […] It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'. " [Emphasis supplied.]

[13] These principles have been applied by the Supreme Court of the Bahamas recently in *The Queen v. The Attorney-General and Ors., ex parte Andre Rollins and Anor.* (2017/PUB/jrv/0003), where Winder J., following an *inter partes* hearing, refused to grant the applicants leave to challenge the report of the Constituency Commission of The Bahamas on the grounds, *inter alia*, that it was produced out of time. Winder J. said: (para. 30):

> "I remind myself that this is a leave application and that it is the duty of the applicants to satisfy me that there are arguable grounds with realistic prospects of success. The position is not as simple as counsel for the applicants have stated in his presentation, that he merely has to get past this filtering process and develop his case thereafter."

SUFFICIENCY OF INTEREST

[28.] While the supervisory jurisdiction exercised by the court serves as a check on the exercise of the functions of a public law decision-maker, the rules expressly provide that any applicant seeking to move the court to exercise its jurisdiction must demonstrate "a sufficient interest in the matter to which the application relates". To my mind, this requirement serves several useful purposes. Firstly, it allows for the decision-maker to continue to act without impediment by those unaffected by its decision. Secondly, it prevents the undue interference with a decision that has taken effect from persons who do

not rely on the decision. Thirdly, it serves to weed out "busy bodies" and others with agendas other than testing the legality of the decision-maker's actions.

[29.] Sufficiency of interest has been on occasion referred to as "standing". The question of standing is a question of law and fact and is to be determined on a case-by-case basis. An applicant must show that some tangible right has been affected by the decision made or by the decision-making process. This principle may be widely-construed in some instances and so, for example, an applicant composed of a group of special interests may be deemed to have sufficient standing if the matter is of public importance and is being brought in the public interest.

[30.] In **West Bay Management Ltd. (trading as Sandals Royal Bahamian Resort) v. The Registrar of Trade Unions and another**, a decision by the Court of Appeal of The Bahamas, *President Dame Anita Allen* delivered the judgment of the court. In that case, the court, by a majority decision, found that the appellant had standing to challenge the determination of the Registrar of Trade Unions as it affected a Union which represented many of its employees. *Dame Anita Allen* wrote at paragraphs 40 – 46:

> 40 DeSmith, Woolf and Jowell's Judicial Review of Administrative Action, 5th edn, provides the following at paragraph 2-006:
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> > "There are substantial arguments in favour of adopting a generous approach to standing. This is particularly true in judicial review proceedings since here it is frequently important, in the interests of the public generally, that the law should be enforced. The policy should therefore be to encourage and not discourage public-spirited individuals and groups, even though they are not directly affected by the action which is taken, to challenge the unlawful administrative action. Other safeguards, besides restrictive rules to standing, exist to protect the courts and administrators from unmeritorious challenges. (In the case of judicial review there is the requirement of leave...)...Where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action of obvious illegality or questionable legality. It is hardly desirable that a situation should exist where because all the public are equally affected no one is in a position to bring proceedings. The fears that are sometimes voiced of the courts being overwhelmed by a flood of frivolous actions are unsupported by any evidence of this happening in practice. The costs of litigation are now so heavy that it is only the most determined vexatious litigant who will indulge in legal proceedings which are without merit. The arguments in favour of a restrictive approach to standing nearly always confuse the question of the merits of the litigation with the question of who should be entitled to bring the proceedings. If there is a satisfactory mechanism for dealing with unmeritorious or frivolous claims most of the arguments for a restrictive approach fall away."
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> 41 The authors continue at paragraphs 2-023 to 2-024 in the following manner:
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> > "... Rule 3(7)...only [applies] expressly to the grant of leave. [It does] not address the question as to whether standing can play any and if so what part in determining if the applicant should be granted a remedy at the hearing. It is clear that the term 'sufficient interest' is being given a generous interpretation by the courts. They will assess the extent of the applicant's interest against all the factual and legal circumstances of the application.

If the administrative action which the applicant wishes to challenge interferes directly with the applicant's personal or public rights or has adverse financial consequences for him then this will be an obvious case in which he will have standing. The statute which governs the administrative action which is the subject of the application may expressly or impliedly indicate that the applicant has an interest in the subject matter of the application. Thus if the statue gives the applicant the right to make representations before the decision is reached this will be a strong indication that he has standing to challenge the decision when it is made. There are however many less obvious situations where an applicant can qualify as having sufficient interest. In fact the range of situations in which an applicant will have the necessary interest are so vast it is impossible to list them all. However, by way of example...members of a union can challenge a directive to their employers..."

42 Lord Fraser of Tullybelton, in the case of **Inland Revenue Commissioners (IRC) v National Federation of Self-Employed and Small Businesses Ltd.** [1982] A.C. 617at page 646, attempts to provide some guidance on the phrase 'sufficiency of interest'. He states:

"On what principle, then, is the sufficiency of interest to be judged? All are agreed that a direct financial or legal interest is not now required, and that the requirement of a legal specific interest laid down in *Reg. v. Lewisham Union Guardians* [1897] 1 Q.B. 488 is no longer applicable. There is also general agreement that a mere busybody does not have a sufficient interest. The difficulty is, in between those extremes, to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates..."

43 Lord Diplock in **IRC** stated:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped...It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

44 A review of the learning revealed that when assessing whether or not an applicant has a sufficient interest in applying for leave to bring an application for judicial review the courts ought to interpret that interest broadly and with the goal of upholding the rule of law.

45 Bearing in mind that West Bay was the employer of all those represented by the Union and the other party to the negotiation of an industrial agreement; and also, that following those negotiations West Bay would be required to enter into an industrial agreement with the union. Could it be said, in these circumstances, that West Bay did not have an interest in the compliance of the Union with the laws of the land and in the Registrar's decision not to cancel its registration pursuant to section 15 of the IRA? Could the courts require West Bay to turn a blind eye to the possible patent illegality and to negotiate with a union which possibly should not legally exist?

> 46 In our view, the Chief Justice erred by not considering what role, if any, the above mentioned factors played in the determination of the sufficiency of interest of West Bay.

[31.] In the current case, the Applicants argue that they are "public-spirited individuals" who are "directly affected by the action which is taken, to challenge the conduct and decisions of the Securities Commission".

[32.] The Defendant submits that "the Applicants possess the information they request, hence there is no sufficient interest".

[33.] The complaint in the application is that the Applicant made a request to inspect the register maintained by the Defendant and that that request was never answered. The complaint is made in reliance on sections 158 (2) and 166 of the Securities Industry Act, 2011.

[34.] The Defendant is a statutory body (s. 10) and its functions (s.12) and powers (s. 13) were defined in that statute. The Commission is responsible for the administration of the Securities Industry Act.

[35.] The Act provides that certain information ought to be made available to members of the public (sections 158 and 166). The facts alleged is that a request was made and that the information sought was not provided.

[36.] By way of answer to the Applicant's complaint, the Defendant makes a substantive response explaining the course of action taken in the face of the letter of request made by the Applicants. In the circumstances, this amounts to a concession that a determination was made pursuant to the Act to treat with the letter of request in a certain way.

[37.] In those circumstances, the conduct of the Defendant and its determination as to how to treat with the request of the Applicant directly impacts the exercise of the right of the Applicants accorded to them, as members of the public, under the Act.

[38.] In the circumstances, I find that the Applicants have a "sufficient interest in the matter to which the application relates".

ARGUABLE CASE

[39.] As a general principle of law, the Applicant must establish an arguable case for leave to be granted.

[40.] A court must consider whether there is an arguable case for granting the relief sought by the Applicant. This serves to filter out claims that are hopeless or vexatious. Permission ought only to be granted when the court considers that there is an arguable case. An arguable case is one that has a realistic prospect of success and is to be determined bearing in mind the nature and gravity of the issue in the claim. In assessing whether there

is an arguable case, a court ought to be satisfied that the grounds, as identified by the Applicant in its application, in fact merit consideration and ought to be pursued at a substantive hearing.

[41.] I return to the guidance given by the Privy Council in **Sharma v Browne Antoine** and cited with approval by *Justice Klein* in **Rosetta Foster and another v The Attorney General et al**.

[42.] At paragraph 14 in **Sharma v Browne Antoine,** *Lord Bingham of Cornhill* and *Lord Walker of Gestingthorpe* opined:

> (4) 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 LR 623 at 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. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:
>
> > '… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'
>
> It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733.

[43.] The essence of the Applicant's complaint in this case is the alleged failure of the Defendant, the Securities Commission, to exercise its statutory duty to provide information to the public, including the Applicants.

[44.] The Applicants must prove that they have an arguable case that the failure of the Securities Commission to respond to their request in the manner requested is either illegal or Wednesbury unreasonable or irrational or procedurally improper. In this case, the Applicant's case is premised on the Defendant's statutory duty and so they will be required to prove a breach of that statutory duty if they are to have a realistic prospect of success in their claim.

[45.] Section 158 of the Securities Industry Act 2011 deals with the public availability of documents and information required to be filed with the Defendant. Section 158 provides:

158. Filing of documents and public availability.

1) All documents or information required to be filed with, delivered to or provided to the Commission shall be submitted to the Commission in the prescribed manner.

2) Subject to subsection (3), the Commission-
   a) shall make all documents or information required to be filed with it available for public inspection; and
   b) May make all documents or information filed with it available to the public by posting such documents to the Internet website of the Commission.

3) The Commission may hold in confidence all or part of a document or information referred to in subsection (1) if it considers that -
   a) a person whose information appears in the document or information would be unduly prejudiced by disclosure of the information; and
   b) the person's privacy interest outweighs the public's interest in having the information disclosed.

4) Where a document or information is not expressly required to be filed but is required to be delivered or provided to the Commission by securities laws, the document or information shall not be disclosed under subsections (2) unless the Commission determines that such disclosure is in the public interest.

[46.] Section 166 mandates the Defendant to maintain a register which it "may make" available to the public on prescribed terms. That section provides:

166. Commission to keep register.

1) The Commission shall maintain a register that shall contain the prescribed information about current and former regulated persons, public issuers and any other person required to be registered with or otherwise approved by the Commission under securities laws.
2) The Commission may make the register available to the public on the prescribed terms.

[47.] On review of the sections, the Commission is to make all documents or information "required to be filed with it" available for public inspection subject to its determination and discretion to hold such documents and information in confidence where (1) a person whose information appears in the document or information would be unduly prejudiced by disclosure of the information; and (2) the person's privacy interest outweighs the public's interest in having the information disclosed. Those are two categories of documents and information that it is permissible for the Defendant to not make available to the public. There is a

third category as provided for under section 158(4) - such document or information not expressly required to be filed but otherwise required to be delivered or provided to the Commission by securities laws. This third category will not be made available to the public unless the Commission decides to do so in the public interest.

[48.] I turn now to consider the facts before me in order to determine whether the Applicants have an arguable case.

First Affidavit of Applicants

[49.] Irina Tsareva-Starostenko avers in her affidavit sworn and filed on August 23, 2022 that on 21 March 2022, the Applicants, by email, sent to the Securities Commission of the Bahamas, for attention of Ms. Christina R. Rolle, the Executive Director, their Letter of Request asking to make available to them the register, containing the prescribed information required to be filed with, delivered to or provided to the Commission by or on behalf of the following regulated persons. Those referenced persons are named in the letter. That letter is exhibited to the Affidavit. The subject of the letter is "REQUEST FOR INFORMATION FROM REGISTER".

[50.] The last paragraph of the letter reads,

> "The reason for this request is that the required information is not posted to the Internet website of the Commission, which does not contain the dates of registration and information about further regulated persons".

The allegation in the letter is that the information of "dates of registration" and "information" about "further regulated persons" are not on the website. The "information" referred to is unspecified. Notably this allegation does not appear in the filed Notice of Motion (or subsequent iterations thereof) nor does it appear in the filed Notice of Application for leave.

[51.] The Applicants further depose that "on 2 June 2022, the Applicants, by email, sent to the Securities Commission of the Bahamas, for attention of Ms. Christina R. Rolle, the Executive Director**,** their Letter before Action, together with Draft of Application for Leave to Apply for Judicial Review". A copy of that email and its attachment is exhibited to the affidavit.

[52.] By paragraph 3, the Affiant's evidence is that "No answer or other communication was received by the Applicants from on the behalf of the Commission on the date of this Affidavit."

[53.] Therefore, the representation on the affidavit verifying the facts in the Application is that up until August 23, 2022, no response had been received from the Defendant in relation to their request. The inference is that they have not been provided with the information sought or with an answer in relation to the information sought. This indeed seems to be the thrust of the application which "seeks to impugn the conduct of the

Securities Commission in respect of the making available documents or information required to be filed with the Commission available for public inspection …".

First Affidavit of Defendant

[54.] The Defendant responded by way of affidavit ('the first Rolle affidavit') to the averments made by the Applicants in their August 23, 2022 affidavit. Christina Rolle, described as Executive Director of the Securities Commission of The Bahamas, swore an affidavit on March 1, 2023. That affidavit was filed on March 2, 2023. In that affidavit, she avers that the Applicants "have not provided the court full and frank disclosure". She relates a history of legal matters involving the Applicants and past registrants and former regulated persons.

[55.] The Affidavit further reads:

> 16. The Commission advises received UBS Ltd surrender of its registration on January 26 2016. Now shown to me is a true copy of UBS surrender of license documents marked and exhibited as "CRR4".
>
> 17. The Commission notes that from about 18th October 2018, through the 13th March 2019, the Applicants sent emails to the Commission making similar requests concerning the said UBS and its employees, trying to ascertain their regulatory status. The Commission responded to those emails as far as it was able, providing the Applicants with information that can lawfully be provided without contravening the confidentiality provisions pursuant to section 28 of the SIA. Now shown to me is a true copy of the said email thread marked and exhibited as "CRR 5a-c".
>
> 18. As indicated above, the Commission previously advised the Applicants of the public's access to the readily available information on the Commission's website. Accordingly, the Commission is satisfying its circumscribed obligation to maintain a register and exercises its discretion by making such information available to the public, per section 158 (2)(b) and section 166 of the SIA.
>
> 19. With respect to the Application filed herein, the Commission does not admit to any allegation made in the Verifying Affidavit filed August 23, 2022, and here clarifies that no formal request for information was received, further noting as follows:-
>
> a) Regarding paragraph 1.3 of the Application, the Commission as indicated above, advised and gave guidance on
>
> i. accessing the Commission's public register via its website to retrieve publicly posted information
>
> ii. Information on past registrants or former regulated persons.
>
> 20. The Commission advises that section 158 of the SIA does not accommodate the Applicants attempt to obtain non-public information. Additionally, any permissible disclosure, under section 158, is only relative to documents filed with, delivered or provided to the Commission and is discretionary. Consequently, other

information sought, if not filed, cannot be made available by the Commission unless it is in the public interest.

21. In the final analysis, the Commission was satisfied that the Applicants' request was vexatious, having already complied with similar requests and the information existed already in the public domain via the Commission's website.
22. This state of affairs is unacceptable to the Commission and contrary to the industry practice and the Applicants have no right, entitlement, legal claim, or basis that rationalizes giving any information that is not posted on the Commission's website.
23. The Commission, as regulator, is most concerned about the potential of the risk and exposure of the Commission in providing the Applicants with non-public information that are in circumstances not in the public interest. Unauthorized disclosure of any confidential information would not only potentially expose registrants and licensees, and The Bahamas' financial sector, but also expose the Commission to criminal sanctions for disclosing the affairs of market participants and regulated persons.

[56.] Exhibited to that affidavit is email correspondence between persons representing the Securities Commission and the Applicants, all predating the 2022 request.

[57.] There is exhibited an email thread with the caption "FAO The Enforcement Department Securities Commission of The Bahamas" stemming, it appears, from an email request from Yuri Starostenko. In one such email from Yuri Starostenko, it reads in part,

> "By way of informing the Securities Commission of The Bahamas "the Commission"), we used as evidence supporting complaints lodged with the authorities competent for the prevention, detection, investigation or prosecution of financial crime the answers contained in email messages received from You in response to our First and Second queries…
>
> For example, please see First report and First Affidavit of Yuri Staroskeno lodged on 14th November 2018 with the Anti-Corruption and financial crime [sic] of the Royal Bahamas Police Force, copies of which are attached to this message."

[58.] Also exhibited is an email thread with the caption "Junkanoo Estates Ltd. et al v. UBS Bahamas Ltd. (in voluntary liquidation, Action 01620 of 2014/01451. In an email dated October 11, 2018 from Yuri Starostenko, it communicates:

> Following as it was agreed during our meeting at the Securities Commission, with the present, I ask you to provide information in respect of license granted to UBS (Bahamas) Ltd by the Security Commission, including details of authorized activities and authorized persons who may carry on these activities.
>
> As I explained, UBS (Bahamas) Ltd (in voluntary liquidation) failed and continue to fail to provide that and other information related to their services of dealing in securities provided between 12 June 2013 and 10 October 2013.
>
> Please find attached copies of 6 documents (filed with the Supreme Court) requesting disclosures in respect of financial services as aforesaid.

Concerning email and other correspondence between us and UBS (Bahamas) Ltd, I am going to send to you copies of messages and letters tomorrow.

This message is also notice of service of the request for information in respect of license of UBS (Bahamas) Ltd in 2013 on the Securities Commission of the Bahamas.

Please acknowledge safe receipt by return.

[59.] That email was acknowledged by the Commission on October 12, 2018. And Yuri Starostenko responded on the same day. There appears to be no further response when an email dated October 18, 2018 from Yuri and Irina Starostenko is sent to the Commission and communicates:

Following as it was agreed during our meeting at the Securities Commission, with the present, I ask you to provide information in respect of license granted to UBS (Bahamas) Ltd by the Security Commission, including details of authorized activities and authorized persons who may carry on these activities.

As I explained, UBS (Bahamas) Ltd (in voluntary liquidation) failed and continue to fail to provide that and other information related to their services of dealing in securities provide between 12 June 2013 and 10 October 2013.

Please find attached copies of 6 documents (filed with the Supreme Court) requesting disclosures in respect of financial services as aforesaid.

Concerning email and other correspondence between us and UBS (Bahamas) Ltd, I am going to send to you copies of messages and letters tomorrow.

This message is also notice of service of the request for information in respect of license of UBS (Bahamas) Ltd in 2013 on the Securities Commission of the Bahamas.

This message is also a reminder of a statement of provisions in the Securities Industry Act, 2011, Statute Law of The Bahamas, referred to in the Section 116 of this Act which reads:

166. Commission to keep register.

1. The Commission shall maintain a register that shall contain the prescribed information about current and former regulated persons, public issuers and any other person required to be registered with or otherwise approved by the Commission under securities laws.
2. The Commission may make the register available to the public on the prescribed terms.

The aforesaid statement of the obvious and this is the Plaintiffs' in the above-mentioned action in the Supreme Court last opportunity, being members of the public, to have and rely properly on evidence which is, on any showing, must fairly be available to them.

[60.] That email is followed by a response from the Commission on October 19, 2018, which communicates:

Dear Mr. Starostenko,

Just further to your query below per the subject, note that since the coming into force of the Securities Industry Act, 2011, the Securities Commission of The Bahamas (the Commission) ceased the practice of issuing hardcopy documents to evidence a firm's registration. However, the Commission continued the practice of making registrants' and

licensees' authority to conduct business publicly available on its website, showing only registrants and licensees current as at the date of viewing.
Therefore, information on past registrants would have been publicly available as at the date of the validity of the registration in question and, upon the list being updated, would since have been removed where the registration was relinquished for whatever reason.
With the above in mind, the Commission confirms that for the year 2013, UBS Bahamas Ltd. (In Voluntary liquidation) was registered with the Commission to conduct securities business as regards dealing in securities, managing securities, arranging deals in securities and advising on securities.
We trust that this answers your query.
Sincerely,

[61.] The thrust of that Affidavit is that the Applicants had sought similar information before, that the Defendant provided information to the Applicants, that the Defendant had indicated to the Applicants that there was information that it could/would not provide and that the Defendant referred the Applicants to its website where information on registered and regulated persons was made available.

[62.] The exhibited email threads show the prior communication between the Applicants and the Defendant and some of the uses to which the Applicants had put information previously provided to them.

Second Affidavit of Applicants

[63.] By way of response to the first Rolle affidavit, the Applicants filed the affidavit of Staroskeno (Affidavit II verifying facts) sworn and filed on March 3, 2023. That affidavit sets out the names of several persons, including information about their relationship with UBS and with the Applicants as well as licenses and approvals held by them. The averments are supported by exhibits. The details are not necessary for this ruling and will not be captured here given that the information concerns persons not parties to this matter.

[64.] The affidavit ends with the following paragraphs:

14. On 21 March 2022, Irina Tsareva, by email, sent to the Securities Commission a Letter of Request asking to make available to Yuri Starostenko and Irina Tsareva the documents and the prescribed information required to be filed with, delivered to or provided to the Securities Commission by or on behalf of certain regulated persons.
15. On 2 June 2022, Irina Tsareva, by email, sent to the Securities Commission a Letter before Action, together with a Draft of Application for Leave to Apply for Judicial Review.
16. On 20 December 2022, Yuri Starostenko and Irina Tsareva wrote to the Chief Magistrate a letter asking for a written certificate of refusal to issue summonses on their Complaints for civil penalties under SIA 1999 and SIA 2011 against Credit Suisse, UBS Bahamas, certain individuals employed by

them and UBS AG (A Swiss Bank). A copy of the letter is now produced and shown to me marked as 'Exhibit MR'.

17. No answer or other communication was received by Yuri Starostenko or Irina Tsareva from or on the behalf of either the Commission or the Chief Magistrate on the date of this Affidavit.

I truly believe that, in the above circumstances, there is no alternative remedy by way of appeal or internal complaints procedure and there is no other body which has exclusive jurisdiction in respect of the inspection requested by the Applicants, in the circumstances, there is no alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' and 'no other equally effective and convenient remedy as judicial review.

[65.] The second Affidavit of the Applicants purports to provide information on persons of interest to the Applicants. This information includes details of licences and certificates issued to such persons.

[66.] The Affidavit details civil suits and criminal complaints against some of those persons as brought by the Applicants. It recounts the last request made of the Defendant.

Second Affidavit of Defendant

[67.] The Defendant then responded with another affidavit of Christian Rolle ('the second Rolle affidavit'). The pertinent paragraphs read:

4. The Commission notes the contents of the Applicants' Affidavit, specifically the exhibited registration and related information which appears to be correspondence between the Commission and UBS (Bahamas) Ltd, a former registrant. The information appears to be confidential in nature and the Commission notes the same for the Applicants' exhibits as regards the Central Bank of The Bahamas.

5. For clarity, the Commission did not produce, disclose and/or provide the Applicants with any of the aforementioned exhibited documents and information in their Affidavit which is now before the court.

6. The Commission queries the basis, purpose and the applicability of the information and/or the exhibits within the Applicants' Affidavit, especially when presumably seeking to compel the Commission to consider providing non-public information, which is the nature of most of what is exhibited in the Applicants' Affidavit. The Commission notes from the mentioned exhibits, that much of the information sought by the Applicant appears to already be in their possession.

7. The Commission further notes that the Applicants have once again failed to provide this Honourable Court with any reasons and or the purpose(s) for these exhibits.

8. The Commission similarly notes that the Applicants, being in possession of non-public information not provided by the Commission, have not indicated how they obtained the mentioned exhibited documents and the Commission is unaware of the source of those documents.

9. The Commission further advises that the Commission is unaware of any extant court actions commenced for, on behalf of, or against the Applicants.

10. Given that the Applicants are already in possession of the aforementioned non-public confidential information, the Applicants' Affidavit coupled with this application make it somewhat apparent that they are seeking to further re-litigate and circumvent the Court's judgments in their various court matters involving UBS (Bahamas) Ltd, a former registrant. These court matters are all *res judicata,* as indicated in my prior Affidavit.

11. In addition and/or alternatively, in the absence of information otherwise, it appears that the Applicants are seeking to launch a fishing expedition in an apparent bid to either bolster an attempt at re-litigating an already litigated matter, or use the information in an action that is yet to be commenced by the Applicants.

12. The Commission urges that in light of the foregoing, the process of the Court should not be used to facilitate the Applicants' disingenuous approach to obtaining non-public information from the Commission's register. This is not appropriate and leave should not be granted as this is a clear abuse of the court's process.

[68.] The thrust of the Defendant's response that the Applicants are in possession of information on regulated persons, which information includes non-public information and that the information was not provided by the Defendant.

[69.] I have had regard to the content of the affidavits of the Applicants and the nature of the current application.

[70.] The Applicants did not allege that the failure of the Defendant is a decision not to supply them with the information and that such decision is illegal, irrational or procedurally unfair. There is no such, or similar, ground set out in the grounds for relief.

[71.] One may surmise, and one ought generally not to surmise, that the case of these pro se litigants is that the determination not to supply them with the information required to be kept under sections 158 and 166 of the Securities Industry Act is illegal. However, the

established case at its highest, does not demonstrate that what is sought is in fact public information per the statute AND that such information has not been made available online. The Applicants have not shown, by virtue of their application, what information they deem missing in relation to the information required to be kept by the Commission. The mere failure of the Defendant to respond to a letter of request, one of several such exchanges, cannot be treated as equivalent to a dereliction of duty under section 158.

[72.] It may be said that there is a minimum compliance expected by the Defendant which is to make available to the public "all documents or information required to be filed with it" per section 158 2(a). However, that very section, viz section 158 (20(b), permits the Commission to make those documents and information available by its website. The Defendant's case is that it has done so. The Applicants have not demonstrated that such information is not available by the website. Despite the allegation in their letter of request, no such ground is set out in their Application for leave to pursue judicial review. In oral submission, the Applicants indicated that they had had difficulties accessing the website. Even if that were so, it seems to me that that condition may be peculiar to the Applicants and cannot amount to a breach of duty by the Defendant.

[73.] In this application, the Applicants have not identified the information as concerned each named person which is (1) required to be supplied under sections 158 and 166Act and (2) which did not appear on the Defendant's website.

[74.] The Defendant submits that this is a fishing expedition, and I am inclined to agree. I have regard to the tenor of the email communication, the subject matter and the contents of same. The request for information appears broad-reaching and it seems to me that the pursuit of judicial review is being launched as a collateral means of obtaining information not merely on registered persons in general but in relation to specific persons for litigation and related-purposes. However, I note and caution that unless the Commission is acting under a statutory duty or statutory discretion to withhold the information to be supplied under section 158 then that information ought to be made available to the public.

[75.] The Applicants, by way of their second affidavit, provided information on some of the named persons. The Applicants do not indicate, in the affidavit, why it was necessary to reproduce the information. However, it does beg the question as to the nature of the information being sought by the Applicants.

[76.] The Defendant has categorized some of the information appearing in the second affidavit of the Applicants as non-public information and has sought to make it clear that such non-public information did not emanate from them.

[77.] While it is unclear what the non-public information is, I remind myself that this is the Applicants' case and theirs is the burden of proving that the information sought by their letter of request is (1) within the category of all documents or information required to be filed with the Defendant and (2) that category has not been made available on the Defendant's website for public inspection. That is the starting point. If an Applicant were to discharge that burden, then it would become the Defendant's evidential burden to prove that disclosure is exempted under s. 158(3).

[78.] The Applicants seem to have proceeded on the basis of the lack of a response to their letter. I am satisfied that the email thread as provided by the Defendant, demonstrates that, as a result of the parties' previous dealings, the Applicants were well aware as to where to find the information that is made available to the public.

[79.] The failure of the Defendant to respond in writing to the June 22 letter of request, does not, in my view, amount to a failure to make the information available. Otherwise, every failure to answer an email in matters of this sort would amount to a statutory breach. Such a result would retard the operations of the statutory body and would prove unworkable. I think that this is a result that the statute sought to preempt by having the information made available on a website that members of the public could access quickly and without recourse to the staff of the Commission.

[80.] It is my determination that in this matter the Applicants will be unable to demonstrate that the conduct that they seek to impugn is illegal, or Wednesbury unreasonable or irrational or procedurally improper.

[81.] In my view, the Applicants do not have an arguable case. For that reason, leave to pursue judicial review is refused.

ALTERNATIVE REMEDY

[82.] Judicial Review is said to be a remedy of last resort. If an applicant has the option of an alternative remedy, then that remedy ought to be pursued before an applicant seeks to invoke the court's supervisory jurisdiction.

[83.] If the Applicants have an alternative and suitable remedy that they have not pursued, then that is a discretionary bar to the granting of leave.

[84.] **Ex parte Dwight Ambrister, Justice Charles also noted,** at paragraphs 19 to 21**:**

> [19] It is also well-settled that an Applicant seeking leave to bring judicial review proceedings should first exhaust any right of appeal or other means provided for challenging the decision before making an application for judicial review. Lord Scarman in **R v Inland Revenue Commissioners, ex parte Preston** [1985] AC 835 at page 852:
>
> > **"My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."**
>
> [20] In **Dwayne Woods et al v John Pinder et al** 2020/PUB/jrv/21, the Respondents raised the preliminary challenge that the Applicants had not exhausted alternative remedies before applying for judicial review. The Court affirmed the position of Isaacs JA in **Moxey v Bahamas Bar Council and Others** [2017] 1 BHS J. No. 125 that an application for judicial review will be denied where there are available alternative remedies. At para 17, the learned judge stated:
>
> > **As indicated, the Respondents raised the preliminary attack on the application for judicial review, that the Applicants have not exhausted alternative remedies before seeking judicial review. The law in this area is fairly well settled. <u>The legal principle is simply that judicial review is a remedy of last resort and not first recourse</u> and the Court will exercise its discretion to refuse to hear applications for judicial review where there are available alternative remedies. (See also Isaacs JA in Moxey v Bahamas Bar Council and others [2017] 1 BHS J. No. 125)** [Emphasis added]
>
> [21] In determining whether the Applicant had an alternative remedy, the Court considers whether the alternative remedy offers

recourse that is equal to or better than the recourse available under judicial review. In **Moxey v Bahamas Bar Council** [supra], the Applicant unsuccessfully argued that section 54 of the Legal Profession Act did not afford the appellant an alternative remedy. What is relevant is the effect of the alleged alternative remedy as compared to judicial review:

> **"I readily accept that a statutory right of appeal is not necessarily to the exclusion of an applicant availing himself of judicial review proceedings. However, in my judgment, where a person is accorded an appeal route to a tribunal superior to the tribunal to which judicial review lies, it would border on an abuse of the courts' processes to allow him to circumvent the appeal process."** Para 42
>
> **"There is no reason to restrict the amplitude of an appeal under the section to the merits only. As a matter of fact, by bypassing the Supreme Court pursuant to section 54 of the Act, Parliament has indicated that issues involving counsel and attorneys-at-law should be heard quickly and definitively. It would make a nonsense of the section if a person was able to approach the Supreme Court, a court subordinate to this Court, for judicial review, bearing in mind that Bar Council's decision under section 12 is placed on the same footing as "a judgment or order" of the Supreme Court. In effect then, the Judge was being asked to rule on a decision taken by a tribunal of concurrent jurisdiction. That is not the purpose for judicial review, that is the purpose of an appeal as is provided in section 54."** Para 44

[85.] In this case, the Defendant argues that the Applicant failed to avail themselves of the appeal procedure set out under the act.

[86.] Section 55 of the SIA provides

> 55. Administrative proceedings and reviews.
>
> (1) Any person directly affected by a decision of the Executive Director or any employee exercising delegated authority from the Commission may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the

notice of the decision, request and be entitled to a hearing and review of that decision by the Commission.

(2) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

(3) Notwithstanding the fact that a person requests a hearing and review under subsection (2), the decision under review takes effect immediately but the Commission may grant a stay until disposition of the hearing and review.

[87.] Section 157 of the SIA provides:

157. Appeals to court.

(1) A person directly affected by a final decision of the Commission, other than those stated not to be subject to appeal, may appeal to the Supreme Court in accordance with the rules of court within thirty days after the later of the making of the final decision or the issuing of the reasons for the final decision.

(2) Notwithstanding the fact that an appeal is taken under this section, the decision appealed from takes effect immediately but the Commission or the Supreme Court may grant a stay until disposition of the appeal.

(3) The Secretary shall certify to the Supreme Court -

(a) the decision of the Commission, together with a statement of reasons for that decision;

(b) the record of the proceedings before the Commission; and

(c) all written submissions to the Commission or other material that is relevant to the appeal.

(4) The Minister is entitled to be heard by counsel or otherwise on the argument of an appeal under this section, whether or not the Minister is named as a party to the appeal.

(5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorised and empowered to do under securities laws and as the court considers proper, having regard to the material and submissions before it and to securities laws, and the Commission shall make such decision or do such act accordingly.

(6) Despite an order of the court on an appeal, the Commission may make any further decision upon new material or where there is a significant change in the circumstances and every such decision is subject to this section.

[88.] The Defendant submits that The Applicants failed to observe the proper practice in exhausting the alternative remedy provided for in sections 155 of the SIA and 157 (1).

[89.] The Applicant contends by their Application and in their affidavit that:

> I truly believe that, in the above circumstances, there is no alternative remedy by way of appeal or internal complaints procedure and there is no other body which has exclusive jurisdiction in respect of the inspection requested by the Applicants, in the circumstances, there is no alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' and 'no other equally effective and convenient remedy as judicial review.

[90.] I find that there are two explicit avenues of remedy available to an Applicant in these circumstances. I consider whether these are appropriate and available alternatives. The Applicants submits that "there is no alternative statutory remedy…so convenient, beneficial and effectual… as judicial review." In this case, I find that the alternative remedies were available and effective options for the Applicants.

[91.] Under section 155 Securities Industry Act, the Applicants could have brought about a review of their request – especially in circumstances where their position is that they received no response which they have treated as a denial of their request. That procedure would also have given them an opportunity to be heard in relation to their letter of request. Section 157 provides a route by statutory appeal. There the decision has to be identified and the appeal is to be lodged within a certain time (30 days.) Those attendant considerations (save the length of time) are no different from some of the considerations on filing an application for leave for judicial review.

[92.] It is my determination that the Applicants did not exhaust the alternative remedies available to them.

COSTS

[93.] In the circumstances of this case, I make no order as to costs.

CONCLUSION

[94.] In this case, I find that the Applicants have a sufficiency of interest but no arguable case. I also find the Applicants they did not exhaust available alternative remedies before approaching this court.

[95.] In the circumstances the application for leave to pursue judicial review proceedings is refused.

[96.] This court makes no order as to costs.

ORDER

[97.] The order and directions of this Court are as follows.

1. Application for leave to apply for judicial review is refused.
2. No order as to costs.

Dated this 7th Day of April 2025

Carla D. Card-Stubbs

Justice