

Costs – Whether a cost order should properly be made in the circumstances –The appropriate cost order to be made in the circumstances – Civil Procedure Rules, 2002, rules 56.15(4) and (5), 64.3, 64.6(1), 64.6(3), 64.6(4)(a),(b),(d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

A. NEMBHARD J

- [1] On 13 November 2020, the Court gave its reasons orally for its refusal of the Notice of Application for Leave to Apply for Judicial Review, which was filed on 31 August 2020. At that time, the Court promised to provide written reasons for its decision and heard oral submissions in relation to the issue of costs. The Court indicated that it would pronounce its Order in relation to the issue of costs in its written reasons. This is a fulfilment of that promise.
- [2] The Court deeply regrets the delay in the provision of these written reasons.

INTRODUCTION

- [3] This is an application by Salada Foods Jamaica Limited (“Salada”), pursuant to Part 56 of the Civil Procedure Rules, 2002, for leave to apply for judicial review. Additionally, Salada seeks an Order that the grant of leave to apply for judicial review operates as a stay.
- [4] In the alternative, Salada seeks an interim declaration that it is not legally obligated to implement or comply with any of the decisions outlined in the letter of the Respondent, Jamaica Agricultural Commodities Regulatory Authority (“the Authority”), dated 29 July 2020.

THE ISSUES

- [5] The application raises the following issues for the Court’s determination: -
- (i) Whether Salada ought properly to be granted leave to apply for judicial review in the circumstances of this case?

- (ii) Whether Salada has an arguable case with a reasonable prospect of success?
- (iii) Whether the Authority acted ultra vires its powers in its application of Regulation 19(1) of the Jamaica Agricultural Commodities Regulatory Authority Regulations, 2018?
- (iv) Whether the Authority acted illegally and irrationally in its application of Regulation 19(1) of the Jamaica Agricultural Commodities Regulatory Authority Regulations, 2018?
- (v) Whether the waivers granted by the Authority gave rise in law to a legitimate expectation on the part of Salada?
- (vi) Whether Salada should be granted leave to apply for judicial review in respect of its Import Permit Applications?

BACKGROUND

- [6]** Salada is in the business of processing coffee and has been since 1957. It operates the largest processing plant in Jamaica and is the only soluble coffee processing plant in the Caribbean. Its primary business is the manufacture, sale and distribution of instant coffee. It is licenced to process and deal with coffee in Jamaica and is regulated by the Authority.
- [7]** The Authority is a statutory body established under the Jamaica Agricultural Commodities Regulatory Authority Act, 2017 (“the Act”).¹ It was established for the development, regulation, promotion and standardization of the agricultural commodities industry and for connected matters.
- [8]** In November 2017, the Minister with portfolio responsibility for agriculture (“the responsible Minister”) amended the Coffee Industry Regulations to provide that

¹ This legislation came into operation on 1 January 2018

no person shall export or sell in Jamaica, “roasted coffee” made from imported coffee beans unless it is a blend of which twenty percent (20%) of the weight is comprised of locally produced coffee.

- [9]** In December 2017, Salada objected to the application of this requirement to instant coffee, by way of a letter to the responsible Minister.
- [10]** In response, the Authority informed Salada that it would advise the responsible Minister to permit Salada to manufacture instant coffee using only a ten percent (10%) blend of locally produced coffee, that is, to waive the requirement imposed under the Coffee Industry Regulations. The waiver was granted for a period which was to end in December 2018.
- [11]** In March 2018, the Jamaica Agricultural Commodities Regulatory Authority Regulations, 2018 (“the Regulations”) were gazetted. Regulation 19 of the Regulations prohibits the sale or export of roasted coffee unless it is a blend including not less than thirty percent (30%) beans cultivated and produced in Jamaica.
- [12]** Salada again adopted the position that Regulation 19 of the Regulations did not apply to instant coffee and that, in any event, it was discriminatory against Salada.
- [13]** Salada continued to use no more than ten percent (10%) of locally produced coffee in its instant coffee blend. The Authority subsequently extended the waiver it had granted on two (2) occasions, the first being for a period which was to end in June 2019 and then for a period which was to end in December 2019.
- [14]** Since then, Salada has continued the manufacturing of its instant coffee using no more than ten percent (10%) of locally produced coffee in its instant coffee blend.
- [15]** Neither the responsible Minister nor the Authority responded to Salada’s objection to the interpretation or application of Regulation 19 of the Regulations,

to its instant coffee product, until 11 August 2020, when Salada received a letter from the Authority, dated 29 July 2020 (“the Waiver Termination Letter”).

- [16] The Waiver Termination Letter indicated that, effective 1 September 2020, the Authority was terminating its waiver and that Salada would now be required to include not less than thirty percent (30%) locally produced coffee content in the production of instant coffee.
- [17] By way of letters dated 12 and 24 August 2020, respectively, Salada objected to the decisions indicated in the Waiver Termination Letter.

THE LAW

The role of the court in matters of judicial review

- [18] Part 56 of the Civil Procedure Rules, 2002 (“the CPR”), is entitled Administrative Law and deals with applications such as this. The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.
- [19] The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**².

- [20] Roskill, LJ stated as follows: -

“...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable

² [1984] 3 All ER 935

a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

- [21] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.
- [22] The requirement for leave is one aspect of the courts' function to act as a filter in relation to these types of claims. The starting point is rule 56.3(1) of the CPR, which provides that a person wishing to apply for judicial review must first obtain leave. Whilst the rule provides that leave must first be obtained in order to claim judicial review, it is silent as to the threshold that must be met, in order to obtain leave. It has been accepted that, the test, as enunciated by the Privy Council in **Sharma v Brown-Antoine**³ is the applicable test.

The threshold test

- [23] In **Sharma v Brown-Antoine**⁴, Lords Bingham and Walker stated in their joint judgment, at paragraph 14(4), as follows: -

"(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...But arguability cannot be judged without

³ [2007] 1 WLR 780

⁴ (supra), per Lord Bingham and Lord Walker, page 787 D-H, at paragraph 14(4)

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 (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, 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.”

- [24] This test has been adopted and applied in decided cases in Jamaica such as **Digicel (Jamaica) Limited v The Office of Utilities Regulation**⁵; **Coke v Minister of Justice et al**⁶ and **Tyndall et al v Carey**⁷.
- [25] In **R v IDT (Ex parte J. Wray and Nephew Limited)**⁸, Sykes J (as he then was) describes the threshold test as being a new and higher test than that which had previously obtained. At paragraph [58] Sykes J opined that the application for leave to apply for judicial review is no longer a perfunctory exercise that turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. Judges are required to make an assessment of whether leave should be granted in the light of the now stated approach.

⁵ [2012] JMSC Civ 91

⁶ Claim No. 2010 HCV 02529, unreported, judgment delivered on 9 June 2010

⁷ Claim No. 2010 HCV 00474, unreported, judgment delivered on 12 February 2010

⁸ Claim No. 2009 HCV 04798, unreported, judgment delivered on 23 October 2009

The statutory and regulatory framework

The establishment and functions of the Authority

[26] The Act was enacted to establish a body to be known as the Jamaica Agricultural Commodities Regulatory Authority, for the development, regulation, promotion and standardization of the agricultural commodities industry and for connected matters. Part II of the Act sets out the establishment and functions of the Authority.

[27] Section 4(1) of the Act provides as follows: -

“4.—(1) The functions of the Authority are to –

- (a) promote interest, growth and efficiency in the development of the regulated agricultural commodities industry in Jamaica;*
- (b) provide technical advice to the Minister and to persons engaged in the regulated agricultural commodities industry;*
- (c) establish, prescribe and enforce standards of quality, handling, grading, export and import for regulated agricultural commodities;*
- (d) specify the varieties of regulated agricultural commodities which may be cultivated or manufactured in Jamaica for export or for local trade or which may be imported into Jamaica;*
- (e) initiate consultations and other services within the regulated agricultural commodities industry in Jamaica;*
- (f) subject to subsection (2), grant licences and certificates of registration;*
- (g) subject to subsection (2), allocate quotas of regulated agricultural commodities that may be exported or imported during any period by licenced exporters or authorized importers under this Act;*

- (h) *intervene in disputes pertaining to the regulated agricultural commodities industry and initiate and engage in arbitration, mediation or other forms of alternative dispute resolution to resolve such disputes; and*
- (i) *perform such other functions pertaining to the regulated agricultural commodities industry as may be assigned to it, from time to time, by the Minister under this Act or by or under any other enactment.*

(2) *The Minister may, on the advice of the Authority, approve the grant of import permits or other authorizations, as the case may be, for the importation of any regulated agricultural commodity and substitutes in Jamaica.”*

The definition of coffee

[28] The interpretation section of the Act, section 2, defines “coffee” as follows: -

“coffee” means the plant botanically known as coffea species, the fruit (whether on the plant or detached therefrom) and coffee beans, whether –

- (a) *whole or broken;*
- (b) *in the cherry or pulp or separated from the pulp;*
- (c) *cured or uncured;*
- (d) *ripe or unripe;*
- (e) *in the form of parchment, double husk, or clean;*
- (f) *dried or undried;*
- (g) *washed or unwashed;*
- (h) *fermented or unfermented;*
- (i) *roasted or unroasted;*

[29] “Coffee blend” means the mixing of different types of coffee so that one brand of coffee constitutes at least thirty per cent of the blend or as otherwise specified in the regulations.

[30] “Coffee product” includes –

“(a) any coffee blend or coffee products, whether from Jamaica or from any other country or combination of countries; and

(b) any product made wholly or in part from coffee;”

The management of regulated agricultural commodities

[31] Part III of the Act deals with the Management of Regulated Agricultural Commodities. Section 14(1) of the Act provides that, subject to section 16 and except under and in accordance with the Act and the regulations, a person shall not –

- (a) manufacture, distribute or process a regulated agricultural commodity or its substitute;
- (b) export or import a regulated agricultural commodity or its substitute;
- (c) operate works related to a regulated agricultural commodity;
- (d) establish or operate a nursery for a regulated agricultural commodity; or
- (e) operate as a dealer or a special coffee dealer.

[32] Section 15(1) of the Act mandates every person who carries out or intends to carry out any of the activities stated above, to apply to the Authority for the appropriate licence.

The power to make regulations

- [33] Section 37 of the Act allows the Authority, with the approval of the Minister, to make regulations for the purpose of giving effect to the provisions of the Act. Regulations may contain provisions relating to the setting of minimum standards for quality in respect of cultivation, trade, export, import and distribution of regulated agricultural commodities; the establishment of different grades of regulated agricultural commodities; among other things.

Regulation 19(1) of the Regulations

- [34] Regulation 19(1) of the Regulations provides as follows: -

“Notwithstanding regulation 18, a person shall not offer for sale in Jamaica, or export, roasted coffee made from imported green coffee beans, unless the roasted coffee is a blend comprising coffee cultivated and produced in Jamaica in such proportion as to account for not less than 30 per cent of the weight or the roasted coffee offered for sale or exported.”

ANALYSIS AND FINDINGS

Whether the Authority acted ultra vires its powers in its application of Regulation 19(1) of the Regulations?

The submissions made on behalf of Salada

- [35] Salada contends that the Authority is a statutory body established by the Act and that its powers are limited to that which the Act allows. The duties and powers of the Authority are set out in section 4 of the Act. The power to mandate and determine the composition of coffee is outside of the scope of the duties and powers of the Authority. Furthermore, section 37 of the Act gives the Authority the power to make regulations for specific purposes which do not include the mandating or the determining of the composition of coffee.

- [36] It was further submitted that, where the Authority does not have the power to impose a requirement as to the composition of coffee, its purported exercise of its powers to apply Regulation 19 is ultra vires and therefore illegal.

The Authority's response

- [37] On the other hand, the Authority submitted firstly, that, in order for Salada to produce its instant coffee, it must first roast the green coffee beans. That process, it is submitted, involves the blending and mixing of locally produced coffee with imported coffee which is then roasted and further processed to produce instant coffee. Regulation 19 of the Regulations therefore applies to Salada's processing of coffee beans which is a blend of local and imported coffee beans used in the production of instant coffee.
- [38] The Authority further submitted that Regulation 19 of the Regulations was approved by both Houses of Parliament and therefore has the same force as the parent act. Regulation 19 of the Regulations is made pursuant to section 37 of the Act which confers the overriding general power to make regulations for the purposes of giving effect to the provisions of the Act.
- [39] Regulation 19 of the Regulations falls within the parameters and objectives of the Act. The Regulation requires a licensee, such as Salada, when blending roasted coffee for sale, to include in the blend of imported coffee beans not less than thirty per cent (30%) by weight of roasted coffee produced in Jamaica. This is a measure which promotes the local industry and, as such, Regulation 19 of the Regulations is clearly intra vires.

Findings

- [40] The Court accepts the submissions advanced on behalf of the Authority in relation to this issue.

- [41]** The doctrine of ultra vires provides that the power given to a statutory authority to do something extends only to that thing. A purported exercise of the power that extends to a different thing is to that extent not an exercise of the power at all and in so far as it purports to depend on the power, it is void as being ultra vires. In practice, the doctrine of ultra vires mainly arises in connection with the making of delegated legislation.⁹ The power exercised must be the power conferred.
- [42]** In this regard, section 37 of the Act allows the Authority, with the approval of the Minister, to make regulations for the purpose of giving effect to the provisions of the Act. The regulations made may contain provisions relating to the setting of minimum standards for quality in respect of cultivation, trade, export, import and distribution of regulated agricultural commodities; the establishment of different grades of regulated agricultural commodities; among other things.
- [43]** The preamble to the Act makes it clear that the Authority was established for the purpose of the development, regulation, promotion and standardization of the agricultural commodities industry and for connected matters.
- [44]** Section 4 of the Act sets out the functions of the Authority. They are, among other things, to promote interest, growth and efficiency in the development of the regulated agricultural commodities industry in Jamaica;¹⁰ to establish, prescribe and enforce standards of quality, handling, grading, export and import for regulated agricultural commodities;¹¹ to specify the varieties of regulated agricultural commodities which may be cultivated or manufactured in Jamaica for export or local trade or which may be imported into Jamaica;¹² and to allocate

⁹ See - Halsbury's Laws of England/Statutes and Legislative Process (Volume 96 (2018)/2

¹⁰ See - Section 4(1)(a) of the Act

¹¹ See - Section 4(1)(c) of the Act

¹² See - Section 4(1)(d) of the Act

quotas of regulated agricultural commodities that may be exported or imported during any period by licensed exporters or authorized importers under the Act.¹³

- [45] Section 4(2) of the Act confers on the Minister, on the advice of the Authority, a discretion to approve the grant of import permits or other authorizations, as the case may be, for the importation of any regulated agricultural commodity and substitutes into Jamaica.
- [46] The issue to be determined therefore, is, whether Regulation 19(1) of the Regulations falls within the parameters of these powers which are conferred on the Authority by virtue of the Act.
- [47] The Court accepts the submission that the imposed requirement for a licensee, such as Salada, when blending roasted coffee for sale, to include in the blend of imported coffee beans not less than thirty per cent (30%) by weight of roasted coffee produced in Jamaica, falls squarely within the ambit and objective of the Act.
- [48] The Court is of the view that the requirement contained in Regulation 19(1) of the Regulations is a measure which promotes the local coffee industry and, in particular, the setting of minimum standards for quality in respect of the trade and distribution of coffee. As a result, the Court finds that Regulation 19(1) of the Regulations is *intra vires*.

Whether the Authority acted illegally and irrationally in its application of Regulation 19(1) of the Regulations?

The submissions made on behalf of Salada

- [49] Salada contends that, on a proper application of Regulation 19(1) of the Regulations, its provisions do not apply to instant coffee. It contends further, that, while the term “roasted coffee” is not defined either in the Act or in the

¹³ See - Section 4(1)(g) of the Act

Regulations, the evidence is that, in the coffee industry, “roasted coffee” is understood to mean coffee beans which are roasted and which do not undergo further processing. It does not include or apply to instant coffee.¹⁴ The definition of “coffee” as provided in the Act indicates that “coffee” means the plant botanically known as *coffea* species, the fruit (whether on the plant or detached therefrom) and coffee beans, etc. It is evident, from this definition, that “roasted coffee” could only properly mean roasted coffee beans, which does not include instant coffee.

- [50] The evidence is further that instant coffee undergoes further processing into powdered form. Interpreting “roasted coffee” as including instant coffee is therefore inconsistent with the provisions of the Act.

The Authority’s response

- [51] For its part, the Authority asserts that in order for Salada to produce its instant coffee, it must first roast the green coffee beans. That process, it is submitted, involves the blending and mixing of locally produced coffee with imported coffee which is then roasted and further processed to produce instant coffee. Regulation 19(1) of the Regulations therefore applies to Salada’s processing of coffee beans which is a blend of local and imported coffee beans used in the production of instant coffee.

Findings

- [52] Regrettably, the Court is unable to accept the submissions advanced by Salada in this regard. The resolution of this issue involves a determination of the appropriate interpretation to be applied to the term “roasted coffee” and whether it includes “instant coffee”.

¹⁴ See - Paragraph 18 of the First Affidavit of Dianna Blake-Bennett in support of Application for Leave to Apply for Judicial Review, filed on 31 August 2020; and Paragraph 6 of the Affidavit of Neidene Robinson in response to Application for Leave to Apply for Judicial Review, filed on 10 September 2020

- [53] The Act defines “coffee” as meaning, among other things, “coffee beans”, whether “roasted” or “unroasted”. “Coffee blend” means the mixing of different types of coffee and “coffee product” means any coffee blend or coffee products and any product made wholly or in part from coffee.
- [54] The Court accepts the submission that the starting point in the making of any instant coffee product must be the coffee beans which are then roasted and further processed in order to produce instant coffee. The Court does not find that that process so transforms the coffee product as to take it outside of the definition of “coffee”, “coffee blend” and/or “coffee product”, as contemplated by the Act.
- [55] Consequently, the Court is unable to accept the submission that the Authority acted illegally and irrationally in its application of Regulation 19(1) of the Regulations to Salada’s instant coffee product.

Equality of treatment

The submissions made on behalf of Salada

- [56] It has been submitted on behalf of Salada that, the Authority is a public authority purporting to exercise a public function by enforcing Regulation 19(1) of the Regulations. The evidence is, it was submitted, that the Authority is not seeking to enforce this Regulation, in respect of other vendors and exporters of instant coffee. In those circumstances, it was further submitted, the Authority’s conduct would not be “fair and just”, as it requires Salada to incur substantial expense and potential reputational harm, while allowing its direct competitors to sell instant coffee, without the need to comply with Regulation 19(1) of the Regulations.
- [57] The evidence is that the Authority carries out periodic inspections of a licensee’s operations to ascertain the quantities of coffee that they have stockpiled. The evidence is further, that the Authority monitors the amount of local coffee that

each licensee has in production and, in that way, makes an assessment of the licensee's compliance with the provisions of Regulation 19 of the Regulations.

[58] Nestlé, Salada's main competitor, does not process its coffee in Jamaica. As such, on its own evidence, the Authority would not be able to determine whether Nestlé is complying with Regulation 19(1) of the Regulations.

[59] It was also submitted that Salada produces instant coffee for several companies which export it. On the Authority's own admission, its assessment of whether all companies are complying with Regulation 19(1) of the Regulations would be flawed because it would not be able to determine the composition of the instant coffee that Salada produces for other companies. The evidence is that the instant coffee blend used by these other companies does not comply with Regulation 19(1) of the Regulations.

The Authority's response

[60] The Authority denied that Regulation 19(1) of the Regulations is discriminatory against Salada and contends that the latter has failed to demonstrate that it has been treated differently from other producers within the industry. The Court was referred to the evidence that there are other producers within the local coffee industry which produce instant coffee that is a blend comprising of more than thirty percent (30%) of coffee that is cultivated and produced in Jamaica.

[61] The Authority contends that Salada is the only producer within the industry that has consistently refused to comply with the requirements of Regulation 19(1) of the Regulations. Salada has consistently sought to obtain Import Permit Licences to import coffee into Jamaica, in circumstances where there are in excess of Four Hundred Thousand pounds (400,000 lbs) of local green coffee beans which are available and more than adequate to meet the requirements of Salada.

The principle of equality of treatment

- [62] It is a cardinal principle of good public administration that all persons who are in a similar position should be treated similarly. It is a fundamental rule of public law that public officials are required to apply the law consistently and even-handedly.
- [63] The case of **In re Wright and Fisher (Applications for Judicial Review)**,¹⁵ is instructive. Equality of treatment has shown itself to be a principle of lawful administration in English law.
- [64] This principle is enshrined in the Constitution, section 13(3)(h), which provides that every person has a “right to equitable and humane treatment by any public authority in the exercise of any function.” The Full Court has held that “equitable” means “fair” or “just” and not necessarily “equal” and that fairness is a concept that must be decided, having regard to all the facts and circumstances of a particular case.¹⁶

Findings

- [65] The Court accepts the submissions advanced on behalf of the Authority and finds that Salada has failed to establish that it has been treated unfairly, unjustly or inequitably. In this regard, the Court finds that it cannot be said that Salada has an arguable ground with a reasonable prospect of success.

¹⁵ [1998] NIJB 176

¹⁶ See – **Ashton Pitt v Attorney General & Anor** [2018] JMFC Full 7, at paragraph [159]

Whether the waivers granted by the Authority gave rise in law to a legitimate expectation on the part of Salada?

The submissions made on behalf of Salada

- [66] Salada asserts that it has consistently objected to the application of Regulation 19(1) of the Regulations to its instant coffee product. To those assertions, the Authority responded, it was submitted, by waiving the application of the Regulation to its instant coffee product for more than two (2) years. To that extent, Salada has had the benefit of continued production without having to include the less readily available local coffee bean.
- [67] Salada complains that the Authority issued its Waiver Termination Letter without affording it an opportunity to be heard relative to the decisions it contained and without communicating to it the rationale for the termination of the waiver.
- [68] In this regard, it was submitted that Salada has an arguable ground with a reasonable prospect of success.

The Authority's response

- [69] The Authority's contention in this regard, simply, is that there is no power stated in the Act or in the Regulations which enables the Authority to waive the requirements of Regulation 19(1) of the Regulations. As such, it was submitted, there can be no legitimate expectation which is contrary to law and which the Authority has no power to grant.

Findings

- [70] This issue involves a consideration of whether the 'waivers' granted by the Authority gave rise in law to a legitimate expectation on the part of Salada or is the Authority entitled to resile from its assurances?

- [71] The concept of a legitimate expectation arose in the case of **Council of Civil Service Union and Ors v Minister of the Civil Service**¹⁷. Lord Fraser opined that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which a claimant can reasonably expect to continue.¹⁸
- [72] In the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts.¹⁹ The principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty.²⁰ Neither can there can be a legitimate expectation which is contrary to law and which the authority has no power to grant.²¹
- [73] The Court accepts that, in order to make out a case for legitimate expectation, there must be a clear and unambiguous promise or representation made which is within the power of the Authority to grant. In the instant case, there is no power stated in the Act or in the Regulations which enables the Authority to waive the requirements of Regulation 19(1) of the Regulations.
- [74] Furthermore, the context in which the representations were made by the Authority is significant. The evidence is that, in 2018, at a time when the production of local coffee was low, the Authority permitted a relaxation in the application of Regulation 19(1) of the Regulations. The Authority subsequently

¹⁷ (supra)

¹⁸ At page 944

¹⁹ **R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd** [1990] 1 WLR 1545, at page 1569, per Bingham LJ, cited with approval by Lord Hoffmann in **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)** [2009] AC 453, at paragraph 60

²⁰ See - **Attorney General of Hong Kong v Ng Yuen Shiu** [1983] 2 AC 629 at page 636, per Lord Fraser of Tullybelton

²¹ See - **Digicel (Jamaica) Limited v The Office of Utilities Regulation**, (supra), at paragraph [56], per Mangatal J

extended its waiver on two occasions; firstly, by letter dated 11 February 2019, to June 2019; and secondly, by letter dated 18 April 2019, to December 2019.²²

- [75] In those circumstances, it cannot be argued that there could be an expectation that the ‘waiver’ would continue beyond December 2019.

Whether Salada should be granted leave to apply for judicial review in respect of its Import Permit Applications?

The submissions made on behalf of Salada

- [76] On 20 January and 30 March 2020, Salada applied to the Authority for permits to import coffee beans for use in its instant coffee productions (“the Import Permit Applications”). The Import Permit Applications indicated that Salada intended to import the coffee beans in May, July and September 2020.

- [77] It was further submitted that the Authority has not indicated to Salada whether it has advised the responsible Minister in relation to the Import Permit Applications and that none have been granted. It was not until after the filing of the application for leave to apply for judicial review that the Authority, by way of an Affidavit of Gusland McCook, indicated that it had advised the responsible Minister not to grant the Import Permit Applications.

- [78] As a result, Salada contends that the Authority has failed to act within a reasonable time.

The Authority’s response

- [79] In response, the Authority asserts that it has discharged its duty under the Act and that it did so when it advised the responsible Minister not to grant the Import Permit Applications.

²² See - Exhibit “DBB-1” of the Affidavit of Dianna Blake-Bennett in support of Application for Leave to Apply for Judicial Review, filed on 31 August 2020

[80] The Court was referred to the evidence of Mr McCook that a significant downturn in sales of locally produced coffee, due to the current COVID-19 pandemic, resulted in a massive stockpile of locally produced green coffee beans. Consequently, it was submitted, the Authority made a policy decision against the recommendation of the granting of any further import licences. This was done in an effort to promote the local coffee industry and to encourage producers to utilize the stockpile of locally produced green coffee beans. The Authority's advice to this effect was embodied in a draft public announcement which was to be issued by the responsible Minister.²³

Findings

[81] Section 14(1) of the Act stipulates that no person shall export or import coffee or its substitute, except under and in accordance with the Act and the Regulations. Section 15 of the Act requires persons who import or intend to import coffee, to apply for the appropriate licence.

[82] Section 4(2) of the Act provides that the Minister may, on the advice of the Authority, approve the grant of import permits or other authorizations, as the case may be, for the importation of coffee into Jamaica.

[83] The Court accepts the evidence of Mr McCook in this regard and finds that the Authority acted in accordance with the requirements of the Act, in providing the responsible Minister with its recommendation in respect of the Import Permit Applications. It is to be noted that the discretion to grant Import Licences is vested in the responsible Minister and does not rest with the Authority.

[84] The Court also finds that the Authority provided the rationale behind its recommendation in this regard. It cannot be said that the Authority acted

²³ See - Paragraphs 13, 14 and 15 of the Affidavit of Gusland McCook in Response to Application for Leave to Apply for Judicial Review, filed on 8 September 2020, as well as, Exhibit "GM-2" of the said Affidavit

unreasonably, unlawfully or irrationally. On this ground, the application for leave to apply for judicial review must also fail.

The availability of an alternative remedy

- [85] The Court notes that the Act provides for the establishment of a tribunal to be called the Regulated Agricultural Commodities Appeal Tribunal.²⁴ The Act allows for a person who is aggrieved by a decision of the Authority to appeal to the Appeal Tribunal, by way of a notice of appeal, within twenty-one (21) days of being advised of the decision or within such longer period as the Appeal Tribunal may, in special circumstances, allow.²⁵
- [86] Whilst it is correct that no such Appeal Tribunal had been established at the time of the filing of Salada's application for leave to apply for judicial review, the evidence before the Court is that the Appeal Tribunal had been established prior to the commencement of the hearing in the instant matter.
- [87] The availability of an alternative remedy is another basis on which the application for leave to apply for judicial review must also fail.

The appropriate cost order

The applicable principles considered

- [88] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.²⁶

²⁴ See - Section 35(1) of the Act

²⁵ See - Section 35(3), (4), (5), (6), (7), (8) and (9) of the Act

²⁶ Rule 64.6(1) of the CPR

- [89] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.²⁷
- [90] The provisions of the CPR make it quite clear that the court has a wide discretion to make any cost order it deems fit, against any person involved in any type of litigation, including an application for judicial review. The general rule is, however, that no order for costs may be made against an applicant for an administrative order, unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.²⁸
- [91] The Court has regard to the principles outlined above and is of the view that the Authority should be allowed to recover from Salada, sixty-six and two-thirds percent (66 2/3%) of its costs in respect of the instant matter.
- [92] The Court has regard to the fact that, at the time of the filing of the application for leave to apply for judicial review, no Appeal Tribunal had been established. Whilst the Court does not find that Salada acted unreasonably per se in the filing of its application for leave to apply for judicial review, the Court is of the view that it is unfortunate that it did not seek to explore the available, alternative remedy in the form of an appeal to the Appeal Tribunal, which had been established prior to the commencement of the hearing in the instant matter.

²⁷ Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

²⁸ Rules 64.3 and 56.15(4) and (5) of the CPR and **Regina v The Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**, (supra)

DISPOSITION

[93] It is hereby ordered as follows: -

- (1) The Notice of Application for Leave to Apply for Judicial Review, which was filed on 31 August 2020, is denied;
- (2) Leave to appeal is also denied;
- (3) The Respondent, Jamaica Agricultural Commodities Regulatory Authority, is awarded sixty-six and two-thirds percent (66 2/3%) of its costs; and
- (4) The Respondent's Attorneys-at-Law are to prepare, file and serve the Orders made herein.