In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 237

BETWEEN:

DR. JAY JAY SOARES

First Applicant

THE HAMILTON MEDICAL CENTER LTD.

Second Applicant

- and -

BERMUDA HEALTH COUNCIL

Respondent

JUDGMENT

Application for judicial review of the decision of the Bermuda Health Council refusing the appeal against decision denying the Applicants' application to provide certain medical services under the Standard Health Benefit; whether the decision not to grant the approval or allow the appeal was irrational in all the circumstances; whether the Appeals Panel was impartial, fettered its discretion, considered irrelevant considerations, and failed to provide adequate reasons; statutory interpretation; Court's discretion to make a declaratory order and to substitute its own decision.

Date of Hearing: **23, 24 February 2021**
Date of Judgment: **8 April 2021**

Appearances: **Keith Robinson, Kyle Masters, Carey Olsen Bermuda Limited, for the Applicants**

Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent

JUDGMENT of Mussenden J

Introduction

1. In these proceedings dated 21 July 2020 Dr. Soares and the Hamilton Medical Center Ltd seek judicial review of the decisions by the Bermuda Health Council ("**BHC**") dated 6 July 2020 ("**First Appeal Decision**") and 29 September 2020 (**Second Appeal Decision, and together with the First Appeal Decision "the Appeal Decisions"**).

2. The Appeal Decisions refused the Applicants' appeal ("**Appeal**") against an earlier decision of the BHC dated 22 January 2020 ("**SHB Decision**") denying the Applicants' application ("**SHB Application**") to provide certain medical services ("**Services**") under the Standard Health Benefit("**SHB**").

The Applicants

3. Dr. Soares is a Bermudian physician who has practiced general medicine for 26 years, 21 of which have been in Bermuda.

4. The Second Applicant is the medical practice of which he is the medical director. It was established by Dr. Soares in or about 2007 and until January 2021 was providing general medical services and medical physical assessments ("**GP Services**"), medical laboratory blood testing and Ultrasound Imaging ("**Ultrasound**") on a walk-in basis, medical and ancillary services ('together '**Original HMC Services'**) to the Bermuda public from a location on Victoria Street in Hamilton.

5. In January 2021 the Applicants moved its operations to a purpose built building located on Burnaby Street in Hamilton. In addition to being equipped to offer the Original HMC Services, the Applicants also installed medical equipment with a view to offering additional services through a trading name of "Hamilton Medical Center - Burnaby Urgent Care & Medical Imaging". These additional services would include urgent medical services ("**Urgent Care**") as well as the specific imaging services Magnetic Resonance Imaging ("**MRI**"), Computed Tomography scans ("**CT Scans**"), X-Ray, Mammography, Bone Densitometry, Cardiac Investigations and Ultrasound services.

6. Since opening on Burnaby Street, the Applicants have become one of only two private providers in Bermuda offering MRI and CT Scans. As submitted by the Applicants, the only other privately owned facilities providing MRI and CT Scans have a common ownership. Those other facilities have permission to provide MRI and CT Scans under SHB.

The Respondent

7. The Respondent is a body created by the Health Council Act 2004 ("**the 2004 Act**"). Section 5 of the 2004 Act sets out the statutory functions of the Respondent which includes:

> *"(a) to ensure the provision of essential health services and to promote and maintain the good health of the residents of Bermuda;*
>
> *(b) to exercise regulatory responsibilities with respect to health services and to ensure that health services are provided to the highest standards;*
>
> *(c) to regulate health service providers by monitoring licensing and certification, establishing fees in respect of the standard health benefit, and establishing standards and codes of practice;"*

8. The Respondent regulates the process through which health services providers can be approved to provide services under the SHB. The Respondent has been operating a non-statutory application policy called the Standard Health Benefit Proposal Guide V.2 dated 18 October 2018 ("**SHB Proposal Guide**") which sets out how health service providers can make an application for SHB approval.

The Judicial Review Application

9. As a result of the Appeal Decisions the Applicants seek judicial review of those decisions. They submit that the Respondent's decision to reject the Appeal is irrational in the sense that it is a decision which no sensible person who had applied their mind to the question of whether or not to grant the SHB Application could have made. Further, or alternatively, the Respondent made the decision by unlawfully fettering its discretion to consider the SHB Application fairly.

10. The Applicants submit that the result of the Respondent's decision is the preservation and perpetuation of a private sector monopoly for the provision of CT Scans and MRI services under the SHB. Also, they submit that the decision has caused a reduction in competition in other areas of the SHB and it has reduced access to such services for Bermuda's residents. Further, they submit that each of these outcomes are contrary to the policy reasons for which the Respondent has been granted the discretion to approve SHB applications, namely to ensure the provision of access to affordable, quality health care services to Bermudians.

11. The Applicants seek relief as follows:

    (i) An order of certiorari quashing the Appeal Decisions.

    (ii) A declaration that X-Ray, MRI, CT Scans and Ultrasound are services which can be provided under the SHB by the Applicants pursuant to the Health Insurance (Standard Health Benefit) Regulations 1971 ("**Regulations**") without the approval of the BHC.

(iii) An Order reversing the Appeal Decisions and approving the Applicants' application to provide the medical services applied for in its application dated 6 March 2019 under the SHB with immediate effect.

(iv) Alternatively, a direction that the Appeal be reconsidered by a properly reconstituted fair and impartial appeals panel of the Respondent directed to take into account only relevant considerations and no irrelevant ones.

(v) Damages or such further or other relief as the Court may deem appropriate.

Statement of Grounds on which Relief is Sought

12. On 10 February 2021 the Court granted leave to file an Amended Notice of Application for Leave to Apply for Judicial Review and Statement of Grounds as follows.[1]

13. Ground 1 - Breached the rules of procedural fairness in that the Respondent failed to provide any, or any adequate reasons for the Second Appeal Decision and members of the Second Appeals Panel were not impartial.

14. Ground 3 – Took into account irrelevant considerations of a moratorium and self-referrals.

15. Ground 4 –Fettered its discretion and/or acted irrationally

16. Ground 5 – Made a decision so unreasonable that no reasonable public body properly advised could have made it.

17. Ground 6 - The Respondent does not have the power to determine the Applicant's ability to provide MRI, X-Ray, Ultrasound and CT Scan services under the SHB.

[1] Grounds 1(b), (d), 2 and 3(b) are no longer being pursued.

The Applicants' SHB Application and Appeals

18. On 6 March 2019 the Applicants applied to the Respondent for Mid-Year approval to provide imaging services under the SHB at its new location upon completion of the building on Burnaby St.

19. Also on 6 March 2019, the BHC announced, without prior warning, that a moratorium would be placed on all provider-submitted SHB applications for new services until further notice ("**the Moratorium**").

20. After some time, the BHC agreed to exempt the SHB Application from the Moratorium indicating that the SHB Application could be supplemented with additional documents up until 1 July 2019.

21. On 28 June 2019, the BHC acknowledged and accepted supplemental documents submitted by the Applicants as the Applicants' final submission dated 27 June 2019 in respect of the SHB Application. The Applicants submit that the SHB Application explained the need for the services they intended to supply and the neutral effect on the SHB loss ratios.

22. The Application was considered by various committees of the Respondent including the Health Technology Review Committee ("**HTRC**") and the SHB Review Committee. Dr. Brathwaite, the Respondent's CEO, attended each of these committee meetings. The Applicants submit that Dr. Brathwaite did participate in the deliberations. Dr. Brathwaite states "I attend all such meetings however as always, I abstained from voting. My role, as I see it, is to guide the process and help the committees understand the process and what has gone on before. I always abstain from the actual decision.[2]"

23. On 22 January 2020 the SHB Review Committee issued the SHB Decision, rejecting the SHB Application and citing various reasons including that the SHB Application did not meet the Key Mid-Year Criteria, and specific concerns from the HTRC that the First

[2] HB/Tab 8/para 29

Applicant would self-refer and/or provide unnecessary treatments resulting in an increase in the use of services under the SHB and negatively impact the standard premium rate ("**SPR**") ("**HTRC Reasons**").

24. On 11 February 2020, the Applicants appealed the Decision. The Appeal was heard by an appeals panel on 11 May 2020 ("**the First Appeals Panel**"). The First Appeals Panel included Ms. Cynthia Thomas, Dr. Wesley Miller and Dr. Brathwaite. They had each previously been involved in the Standard Health Benefit Review Committee's (**"SHB Committee"**) deliberation and decision relating to the SHB Application. The First Appeals Panel refused the application on behalf of the Applicants that those people recuse themselves from the Appeal Panel. Ms. Thomas and Dr. Miller voted on the appeal and Dr. Brathwaite participated in the deliberations.

25. On 6 July 2020 the First Appeals Panel issued the First Appeal Decision denying the Applicants' Appeal.

26. On 11 August 2020 leave was granted to the applicants for this judicial review application.

27. On 11 September 2020 the Respondent held a re-hearing of the SHB Decision appeal ("**the Appeal Re-hearing**") before a differently constituted appeal panel ("**the Second Appeals Panel**"). The panel included Dr. Brathwaite, the Assistant Financial Secretary to the Minister of Finance, the Acting Permanent Secretary for the Ministry of Health and the Chief Medical Officer ("**the Civil Servants**"). Dr. Richmond, the CEO of the Bermuda Hospitals Board, operator of the King Edward VII Memorial Hospital, was also on the panel. The Second Appeals Panel refused the application on behalf of the Applicants that the Civil Servants, Dr. Brathwaite and Dr. Richmond recuse themselves on the basis that there was an appearance of bias which could endanger the validity of any decision that the panel made with respect to the re-hearing of the appeal.

28. The Applicants submit that in addition to the recusal application, there were several other matters raised on behalf of the Applicants at the Appeal Re-hearing as follows:

a. It was argued that the Respondent ought to have considered the SHB Application on a Full-Year basis, notwithstanding the fact that it was made as a Mid-Year application. ("**Full-Year Argument**")
b. The Applicants argued the SHB Application should have been approved even if considered on the Mid-Year basis as sufficient evidence had been provided to the meet the Key Mid-Year Criteria. ("**Mid-Year Criteria Argument**")
c. The Applicants argued that it would be unfair to treat the SHB Application any differently to that of those providers already approved ("**Incumbent Providers**") which must re-apply annually for SHB approval. ("**Fairness Argument**")
d. The Applicants argued that on a proper interpretation of the Regulations, the Respondent did not have authority to determine whether any applicants would be entitled to X-Ray, MRI, CT Scan and Ultrasound services as a part of the SHB. ("**Jurisdiction Argument**")
e. The Applicants argued that it was irrational for the SHB Application to be denied because doing so would perpetuate a private sector monopoly with respect to the offering of CT Scans and MRI Services. ("**Monopoly Argument**")
f. The Applicants invited the Second Appeals Panel to reject the reasons accepted from the HTRC which were relied upon by the SHB Review Committee in the SHB Decision. ("**HTRC Argument**")

29. On 29 September 2020 the Respondent informed the Applicants that their appeal had been denied ("**Second Appeal Decision**"). The letter enclosed minutes of an Appeal Panel Meeting from the Appeal Re-hearing dated 23 September 2020 ("**the Second Appeal Minutes**"). The Applicants submit that the letter provided no reason for the Respondent's Second Appeal Decision and that the Second Appeal Minutes also provided no adequate reason for the Second Appeal Decision.

The Legal and Policy Framework

30. The Health Insurance Act 1970 (**"1970 Act"**) governs the access to and application of health insurance for Bermuda residents. Section 40(1)(a) of the 1970 Act empowers the

Minister responsible for health ("**Minister**") acting on recommendation of the BHC, to make regulations:

> *"40 (1) The Minister may, acting on the recommendations of the Council, make regulations for the purpose of carrying this Act into effect and, without prejudice to the generality of the foregoing, regulations may—*
>
> *(a) prescribe the items of treatment to be included in standard health benefit;*
>
> *(b) prescribe the amount of the standard premium payable in respect of standard health benefit and the Mutual Re-insurance Fund;*

31. The Regulations make provision for prescribing the items of treatment. Regulation 9 of the Regulations provides that the current SPR is $355.31 per month. The last amendment was effective 1 June 2019.

> *"Reg 9 - Standard premium - Subject to regulation 10, the standard premium payable in respect of the standard health benefit shall be $355.31 a month (or $81.99 a week where paid weekly) of which $331.97 a month (or $76.61 a week) shall be paid into the Mutual Re-Insurance Fund."*

32. Section 15 of the 2004 Act provides that the Minister may, after consultation with the BHC, make regulations by the affirmative resolution procedure amongst other things:

> *"(a) governing applications for the issue of licenses to health service providers;*
>
> *(b) prescribing, in respect of the standard health benefit, fees for services provided by health service providers;*
>
> *(c) establishing an appeals procedure where a licence is refused, suspended or cancelled by the Council;"*
>
> *[…]*
>
> *(h) necessary or convenient to be prescribed for carrying out or giving effect to this Act."*

33. There are no regulations governing the application and approval of SHB providers. The Respondent relies on the SHB Proposal Guide which makes the following express representations:

    a. "1.0 – Purpose - The purpose of this document is to provide guidance on (1) the application process for addition of benefits to Standard Health Benefit (SHB), and (2) the application process for approval of health professionals or health facilities to provide existing benefits as SHB".

    b. "6.2 – As the base insurance package, SHB has three main goals:

        i. Access: by providing "a set of benefits that ensures an individual has access to essential health services and procedures. There are no exclusions for coverage with this set of benefits as the aim is to provide care to all individuals, regardless of their health status. There is further opportunity for providers to increase access by helping patients gain entry to the system at times which help them achieve the best health outcomes".

        ii. Affordability: "The benefits included in this [SHB] package are priced based upon a community rating process. The benchmarked utilization costs of a benefit are divided by the total insured population which reduces the cost per person […] The community rating provides a large pool of funds to cover the cost of utilization across the insured population."

        iii. Quality: "SHB should be delivered by trained health professionals using safe equipment in quality health facilities […] Applicants can voluntarily apply for approval to be reimbursed for SHB services if they provide information about the provision of these services and meet a set of requirements. Approvals are granted on an annual basis and all providers must reapply annually."

c. "7.1.b - Approval to add a new benefit: Appropriately trained health professionals or health facilities may submit an application and supporting documentation for a new benefit to be considered for addition to SHB and for the applicant to be approved to provide the proposed benefit".

Bermuda Healthcare System Infrastructure and Application Procedure

34. Dr. Brathwaite in his First Affidavit sworn 1 October 2020 sets out the infrastructure of the healthcare system in Bermuda and states that it is currently going through a complex and lengthy reform. I have set out some key aspects of the infrastructure in the following paragraphs from his affidavit.

35. Healthcare in Bermuda is founded on the SHB which is a mandated form of health benefits which must be covered by registered insurers and Government programs. It is not available to purchase in isolation. Insurers provide SHB cover and then provide additional coverage which is referred to as 'supplemental benefits'[3]. Most of the costs of SHB cover are met by insurers charging what is called the SPR, however Government bears most or all SHB hospital costs for children and seniors. The SPR is charged for each SHB policy and is set by the Minister pursuant to the Regulations. The SPR is used for several purposes including that a part is kept by insurers to pay eligible SHB claims and a part is paid over to Government to help fund the Bermuda Hospital and other healthcare programmes.[4]

36. The SPR is set by the Minister with a major part of the BHC's work committed to providing such advice. The SPR is set every year based on actuarial modelling for the year ahead as part of an expensive and very detailed 40 step process. There are many dependencies that must be considered on a tight timeline so as to ensure that the expected spend on SHB services match the budget applied for and allocated to it.[5] The aim of the process is to achieve a 'loss ratio of 100%' meaning for the SPR to cover the costs of the SHB without any surplus or deficit. When there is a budget shortfall there are various negative impacts

[3] First Affidavit of Dr. Brathwaite para 6
[4] First Affidavit of Dr. Brathwaite para 7
[5] First Affidavit of Dr. Brathwaite para 8

which include the need for additional funds, potential risks to the resources of the Health Insurance Department which cares for the most vulnerable people and services to insured persons may have to be restricted.[6]

37. Each year, the BHC calculates the likely cost of the SHB and advises the Minister on the level of SPR to meet the projected costs, a process involving a great deal of consultation with stakeholders.[7] The Minister then determines the budget based on what services will comprise the SHB, what level of utilization is expected and the rates that will be set for those services[8].

38. In light of the above circumstances, the BHC has a lengthy process for approving new services and service providers into the SHB system. Any new service will impact the costs of the SHB and could knock the budget off kilter. The BHC has issued a Guidance ("the Guidance") which provides for two kind of applications.[9]

39. First, the Full-Year Application – the applicants must apply prior to July of each year for their services to be considered for approval for introduction into the SHB system in the following year. Also, the applications are considered when submitting the budget for the following year.[10]

40. Second – the Mid-Year Application[11] – The application is submitted during the BHC's financial year and therefore after the SPR has been seen set as of the previous 1 April. Any services introduced mid-cycle risk endangering the budget for the SHB and therefore the Guidance states that such applications will only be accepted if it can clearly be shown that there would be no negative impact. The Guidance states:

> "8.2 Applications may be considered mid-year if there is documented evidence that they (1) will not have a negative impact on the cost of SHB (Standard Premium

[6] First Affidavit of Dr. Brathwaite para 9
[7] First Affidavit of Dr. Brathwaite para 10
[8] First Affidavit of Dr. Brathwaite para 11
[9] First Affidavit of Dr. Brathwaite para 13
[10] First Affidavit of Dr. Brathwaite para 13 & 15
[11] First Affidavit of Dr. Brathwaite para 18

Rate (SPR)) loss ratios, (2) will reduce cost to the system and (3) will not impact utilization of SHB."

41. The requirements for approval of a Mid-Year Application are more stringent because the budget has already been set for the year. Prior to the October 2018 introduction of the Mid-Year Application, once budgets were set, there was no procedure for changing the SHB. However flexibility was required to introduce changes if, for example, it was clear that a new service was urgently required and clearly would not impact the budget.[12]

Case Law on Failure to Provide Reasons

42. In respect of the adequacy of reasons test, in *South Bucks District Council and Another v Porter (No. 2)* [2004] UKHL 33 at 36 Lord Brown of Eaton-under-Heywood stated:

> *"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments*

[12] First Affidavit of Dr. Brathwaite para 19

advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

43. In *R (on the application of C) v Financial Services Authority* [2012] EWHC 1417 at 67 Silber J stated:

> *"The position therefore is that the claimant will only succeed with a reasons challenge to the RDC's decision if first he does not know, in Lord Brown's words, "why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", and second, again in Lord Brown's words, he has been "substantially prejudiced" by this failure to provide reasons."*

44. The Courts have considered the extent of the common law requirement of procedural fairness, as regards the reasons and their adequacy, depending on context. In the case of *Asha Foundation v Millennium Commission* [2003] EWCA Civ 88 the Court stated:

> *"24 Before turning to the judgment of Sedley J in Ex party Institute of Dental Surgery, it is convenient to identify the following general propositions. First, in the case of a decision of the sort that the Commission was making, as a matter of good administration and fairness the body concerned should give such reasons as are appropriate and reasonable in the circumstances. This should be done: (a) because the obligation to give reasons causes a decision-making body properly to focus its mind on the task before it; (b) the exercise of giving reasons causes the body to consider in turn the relevant considerations. A second reason why it is important is connected with the first reasons. When a decision as significant as this is made by the Commission for a body such as Asha, it is important that that body should have a reasonable and practicable opportunity to satisfy itself that the decision has been properly taken. If it has not been properly taken, the body should be in a position to come before the court and ask for the decision to be set aside or amended. However, that does not mean that in every case there is a duty to give*

detailed reasons. As was said by Lightman J, it all depends on the circumstances as the circumstances are always important.

25. In the course of his judgment in Ex parte Institute of Dental Surgery, Sedley J reviewed the obligations to give reasons. He referred to a number of relevant authorities, including R v Civil Service Appeal Board, Ex parte Cunningham [1992] 1 CR 816, [1991] 4 All ER 310 CA, and R v Secretary of State for the Home Department, Ex parte Doody [1993] 3 WLR 154, [1993] All ER 92, HL(E). I do not think that it would be helpful to go through what was said in those well-known cases. However, at page 256 of the judgment Sedley J said:

> *"It follows nonetheless from Lord Mustill's reasoning that the 'more familiar route' exemplified by Ex parte Cunningham [1992] 1 CR 816 may be broader than the Cunningham situation alone and capable of embracing other situations in which 'it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene.' This being so, it seems both desirable and practical to test by a common standard both the fairness of not telling a person the reasons for a decision affecting him and the desirability of exposing any grounds of legal challenge. There are, moreover, reasons of principle for a unitary test. As the judgments in Ex parte Cunningham show, one aspect of unfairness may be precisely the inability to know whether an error of law or of process has occurred. But since the latter is not a freestanding ground for requiring reasons (for if it were, it would apply universally), it can only be on grounds of fairness that it will arise; so that the need to know whether there has been an error of law or of process is rightly seen not as an alternative to the demands of fairness but as an aspect of them. This approach places on an even footing the multiple grounds on which the giving of reasons may in any one case be requisite. The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the*

process. On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. It is the relationship of these and other material considerations to the nature of the particular decision which will determine whether or not fairness demands reasons."

[…]

27. However, although it is often convenient to divide the obligations to give reasons into two stages -- the first stage being to decide whether or not any reasons are required as a matter of law; and the second stage being to inquire into the content of the reasons to be given if there is an obligation to give reasons -- in many situations it is difficult to make a distinction between the two situations. Where the obligation to give reasons exists, this does not require a single standard of reasons to be given. The standard of reasons required depends upon the circumstances of the particular case. Where reasons are required to be given, the obligation is to give appropriate reasons having regard to the circumstances of the case. The second situation which Sedley J described and the approach to which he there referred, in my judgment, applies not only to the question whether there is an obligation to give reasons, but also to determining the quality of reasons required to be given."

45. Also in *H.W.R. Wade and C.F. Forsyth, Administrative Law*, 11th end (Oxford: 2014) at page 445 on the adequacy of reasons, it states:

"Thus the question arises whether a failure to give reasons at or about that time of the disputed decision, may be remedied by reasons given much later in the respondent's affidavit responding to the grant of permission. If the duty to give reasons is an element of natural justice, the failure to give reasons, like any other

breach of natural justice, should render the disputed decision void. And a void decision could not be validated by late reasons even if they show that the decision was justified. Consistent with this analysis the Court of Appeal has quashed a decision that an applicant was intentionally homeless notwithstanding that the bad reasons given when the decision was made were supplemented by good reasons given in the respondent's affidavit. 'It is not ordinarily open, the Court of Appeal said in another case, 'to a decision maker, who is required to give reasons, to respond to a challenge by giving different or better reasons'. There is always the danger that the decision-maker in giving supplementary reasons may drift 'perhaps subconsciously, into ex post facto rationalisation' of the decision. Thus decision-makers should not be given 'a second bite at the cherry'. European law requires reasons to be given with the decision.

But the Courts are reluctant to quash sound decisions marred only by a technical failure of reasons. The Court of Appeal has said that to quash a judicial decision simply because of a failure to give adequate reasons 'is likely to be a disproportionate and inappropriate response.'"

46. In respect of the provision of reasons for decisions at a later stage in the judicial review proceedings, in the case of *Hereford Waste Watchers Limited v Hereford [2005] EWHC 191* Elias J stated*:*

"46. I consider that in accordance with these principles there should be no absolute bar to considering supplementary reasons, even if given in the course of the judicial review itself. The report was produced by non lawyers, and it covered significant ground. It will sometimes be the case that certain matters may not be analysed with the clarity or detail which is desirable, and it is surely proper to allow further explanation in an appropriate case.

47. However, as the principles enunciated in Nash and indeed the decision in Ermakov make plain, any supplementary reasons must elucidate or explain and not contradict the written reasons. It will be rare indeed for an inconsistent

explanation, given in the course of the judicial review proceedings, to be accepted as the true reason for the decision.

48. This is in accordance with basic principles of fairness. Plainly the courts must be alive to ensure that there is no rewriting of history, even subconsciously. Self deception runs deep in the human psyche; the truth can become refracted, even in the case of honest witnesses, through the prism of self justification. There will be a particular reluctance to permit a defendant to rely on subsequent reasons where they appear to cut against the grain of the original reasons."

The case law on Impartiality

47. In respect of a tribunal's independence and impartiality, in the case of *Davidson v Scottish Ministers* [2004] UKHL 34 at 6 Lord Bingham stated:

"6. The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."

48. In respect of the test of apparent bias, in *Porter v Magill* [2001] UKHL 67 adopted in the recent Bermuda case of *Dr. Gina Tucker v The Public Service Commission* [2020] SC (Bda) 8 Civ at 49 the test was set out as follows:

> *"49. The accepted test for determining bias is whether a fair minded reasonably informed observer would conclude that there was a real possibility of bias on the part of the decision maker."*

49. The law of apparent bias was summarized in *Meerabux v Belize* [2005] 2 AC 513 PC where Lord Hope stated:

> *"23. Turning to the facts of the present case, it has not been suggested that Mr. Arnold had any personal or pecuniary interest in the outcome of these proceedings. He was not a member of the Bar Committee of the Bar Association on whose initiative the complaints in the name of the Bar Association had been brought to the attention of the Governor General. He did not attend any of the meetings in which the complaints were discussed and resolutions passed which led to this action being taken. He was a member of the Bar Association simply because, as he was an attorney-at-law, membership of the association was in his case compulsory. Section 43(1) of the Legal Profession Act (Laws of Belize, 2000 rev, c 320) provides that every person qualified for admission as an attorney-at-law must pay a subscription to the Bar Association and shall become a member of the association without election or appointment. Section 43(3) requires an attorney-at-law's annual subscription to be renewed on each occasion on which a practising certificate is issued to him.*
>
> *24. The question is whether it can be said, simply because of his membership of the Bar Association, that Mr. Arnold could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause. Only if that proposition could be made good could it be said, on this highly*

technical ground, that he was automatically disqualified. Their Lordships are not persuaded that the facts lead to this conclusion. Leaving the bare fact of his membership on one side, it is clear that Mr. Arnold's detachment from the cause that the Bar Association was seeking to promote was complete. He had taken no part the in the decisions which had led to the making of the complaints, and he had no power to influence the decision either way as to whether or not they should be brought. In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Professor David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does: Feldma, English Public Law and Registration (1889) 43 Ch D 366 where mere membership of the committee of the Medical Defence Union was held not to be sufficient to disqualify and Allison v General Council of t Medical Education and Registration [1894] 1 QB 750 where mere ex officio membership of the committee of the Medical Defence Union too was held to be insufficient. The same contrast between active involvement in the affairs of an association and mere membership is drawn by Shetreet, Judges on Trial (1976), p 310. Their Lordships are of the opinion that the principle of automatic disqualification does not apply in this case.

25. The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that the law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the Porter v Magill test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr. Arnold's membership of the Bar Association into proper context. But the facts he would take into account go

further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed chairman, the fact that the first proviso to section 54(11) of the Constitution directs the chairman to preside where the BAC is convened to discharge its duties under section 98 and the fact that this direction is subject only to the special provision which the second the proviso makes for what is to happen if the BAC is convened to consider the chairman's removal. Their Lordships are inclined to agree with Carey J that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr. Arnold was biased. But they also agree with the Court of appeal that there is another answer to this complaint."

50. In respect of apparent bias and unconscious bias, in the case of *Hofstetter v The London Borough of Barnet* [2009] EWHC 3282, Charles J stated:

"104 I invited Counsel to comment on the test for apparent bias approved by the Court of Appeal in R (PD) v West Midlands and North West Mental Health Tribunal [2004] EWCA Civ 311 at paragraphs 6 and 8 of the judgment of Lord Phillips MR in the following terms:

"6. Silber J summarised the relevant principles to be deduced from recent authorities as follows:

(a) in order to determine whether there was bias in a case where actual bias is not alleged " the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased" (per Lord Hope of Craighead in Porter v Magill [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased" (ibid [104]).

(b) "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the

fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"" (per Lord Steyn in Lawal v Northern Spirit Limited [2003] ICR 856, 862 [14]),

(c) in ascertaining whether there is a case of unconscious bias, the court must look at the matter by examining other similar analogous situations. "One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 862 [15]),

(d) the approach of the court is that "one starts by identifying the circumstances which are said to give rise to bias – [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 864-5 [20]),

(e) the need for a Tribunal to be impartial and independent means that "it must also be impartial for (sic) an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect" (Findlay v United Kingdom (1997) 24 EHRR 221 at 224-5 and quoted with approval by Lord Bingham of Cornhill in R v Spear [2003] 1 AC 734 [8]."

8. We would endorse the judge's summary of the relevant legal principles. We would add only this comment in relation to the judge's statement that one must consider a case where unconscious bias is alleged by examining "other similar analogous situations". Lord Steyn stated that these "may arguably throw light on the problem". The natural reaction of the lawyer to any problem is to look for case precedent and this is true even where

the issue is essentially one of fact. In such circumstances precedent can be helpful in focusing the mind on the relevant issues and producing consistency of approach. In a case such as the present, however, the search is for the reaction of the fair-minded and informed observer. The court has to apply an objective assessment as to how such a person would react to the material facts. There is a danger when applying such a test that citation of authorities may cloud rather than clarify perception. The court must be careful when looking at case precedent not to permit it to drive common sense out of the window."

51. In respect of procedural unfairness in the context of a tribunal member improperly influencing the tribunal, in the case of *R v The Leicestershire Fire Authority Ex Parte Thompson* [1979] IRLR 166 the Court stated:

"24. But there is a final and far more formidable objection to what occurred on the occasion of this hearing, and that is the submission that, whatever may have in fact happened when Mr. Lockyer went into the room whilst the committee were considering the sentence, it must have appeared to the accused and his advisors that he was taking part in the deliberations as to sentence, and so there has been a denial of natural justice because the has been a breach of the principle that not only must justice be done but that it must manifestly be seen to have been done.

[…]

28. Finally, in a case relating to domestic proceedings, Ward v Bradford Corporation and Ors (1972) the present Master of the Rolls Lord Denning, restated these principles as applicable not only to judicial bodies but also to quasi-judicial bodies. Clearly, when one is dealing with a quasi-judicial body, there has to be some degree of flexibility, and there may be exceptional circumstances in which it will not be right to apply the rule in its full rigour. But those will be exceptional cases.

[…]

31. Accordingly, in my judgment, though I am quite satisfied that in fact no injustice was done to this fire officer, I feel that the general rule is of such great importance that must be upheld in this case. For that reason, and that reason alone, I myself would order Certiorari to go and quash this order of the fire authority."

52. In respect of circumstances where a tribunal member is a part of various sub-committees and also had competing interests, in the case of *R v Chesterfield Borough Council Ex parte Darker Enterprises Limited* [1992] Lexis Citation 3853 Brooke J stated as follows*:*

"Accordingly, I apply the test of "would a reasonable and fair minded person sitting in at the Committee meeting, knowing all the relevant facts, having a reasonable suspicion that a fair trial or a fair hearing of the applicants' application was not possible?" In my judgment, a reasonable fair minded person, who was sitting there, who knew that Mr. Webber was a director of the Co-operative society and who had interests in the premises next door and who realised that his society could be seen as having an interest in expanding into the sex shop if the license was not renewed, would not regard it as fair for Mr. Webber, having realised his interest in February, to have returned to the sub-committee in May and taken part in the questioning of the applicants and then retired with the sub-committee as part of the decision-making process, even though at that stage he took no part in the debate and declared an interest."

Case Law on Fettering Discretion

53. In respect of fettering discretion, in the case of *Lawe v The Minister of Labour, Home Affairs and Public Safety and Ors* [2005] Bda LR 11, Kawaley J stated:

"… where Parliament confers a statutory discretion on a Minister or other public body to consider an application, it is not legally permissible to adopt a policy which

is so rigid that it binds or fetters the decision maker's discretion in such a way as to eliminate the statutory obligation to determine each application on its merits."

54. The Courts have also opined on how decision-makers should avoid adopting rigid policies that fail to allow for exceptions where it is reasonable to do so. In the case of *R v Hampshire County Council Ex Parte W* [1994] Lexis Citation 3624 Sedley J stated:

> *"But public law is also jealous to guard the discretion which a permissive power carries with it, and discretion is negated if an inflexible rule is adopted for the exercise of the power. This is why the British Oxygen case [1971] AC 610, [1970] 3 All ER 165 lays down principles which permit, and indeed encourage, the adoption of a policy but forbid the decision-maker to allow the policy to ossify. This had happened in ex parte J because the two exceptions, being in themselves rigid and exclusive, were simply sub-sets of a rigid rule.*
>
> *What is required by the law is that, without falling into arbitrariness, decision-makers must remember that a policy is a means of securing a consistent approach to individual cases, each of which is likely to differ from others. Each case must be considered, therefore, in the light of the policy but not so that the policy automatically determines the outcome."*

55. The Courts also recognized the principle of fairness in the decision-making process as in the case of *Council of AME Churches and Tweed v The Minister of Home Affairs* [2017] Bda LR 66, Kawaley J stated:

> *"6. The second umbrella principle upon which the merits of the application turn are best reflected in a judicial statement upon which Mrs Sadler-Best for the Minister relied. Lord Bridge famously observed in Lloyd-v-McMahon [1987] UKHL 5 (at page 10); [1987] AC 625: "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better*

expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Case Law on Irrationality

56. In respect of the formulation of the test for irrationality in the judicial review context, in the Privy Council case of *HMB Holdings Ltd. V Antigua and Barbuda* [2007] UKPC 34 at 31 the Court stated:

> *"The test of irrationality will be satisfied if it can be shown that it was one which no sensible person who had applied his mind to the question to be decided could have arrived at."*

57. In respect of unreasonableness, in *Coxon et Al v The Minister of Finance et Al* [2007] Bda LR 78 at 23, Nazareth JA stated:

> *"Accordingly, we do not have to adumbrate and address the detailed and lengthy submissions replete with copious authorities contending for a desired formulation of irrationality or Wednesbury unreasonableness. It suffices to outline that formulation, which is to the effect that a decision would be Wednesbury unreasonable if it disclosed an error of reasoning which robbed the decision of its logical integrity; if such an error could be shown then it was not necessary for the applicant to demonstrate that the decision maker was "temporarily unhinged (R – v- Parliamentary Commissioner for the Administration ex. P Balchin [1998] 1 PLR*

1). Put another way, irrationality and Wednesbury unreasonableness encompass flawed logic."

58. In respect of taking into consideration the purposes for which a power was granted, in *Pitcher v Commissioner of Corrections and Anr* [2011] Bda LR 68 at 74, Kawaley J stated:

> *"74. To my mind, the starting point for any analysis of whether the impugned decision was reached lawfully, in terms of the decision-maker applying the law correctly and proceeding in a fair manner, is the identification of the main elements of the statutory power or powers pursuant to which the relevant decision has purportedly been made. This analysis is undertaken with a view to elucidating the interrelated factors of (a) how the power may lawfully be exercised, and (b) what essential aspects of fairness the statutory procedure requires. Sometimes this will be an exercise of pure statutory analysis; more often than not, the statutory analysis must be married to an analysis of the relevant facts. This is because ensuring that statutory powers have been properly exercised is not just germane to judicial review of specific instances of administrative action; this task is an incident of ensuring respect for the rule of law. As Lord Bingham, writing extra-judicially, has opined:*
>
> > *"Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred and not unreasonably. This rule recognizes, as did Magna Carter, that public power is held on trust, not as a privilege conferred on its possessor. So while we would readily accept that in a complex society such as ours power must necessarily be conferred on many ministers, officials, administrators and judges, we do not give any of them, ever, a blank cheque to draw on as they choose. The power is given for a purpose, which must be honoured.[13]""*

[13] 'Lives of the Law: Selected Essays and Speeches 2000-2010' (Oxford University Press: Oxford, 2011), page 11

Case Law on Statutory Interpretation

59. In respect of statutory interpretation, in *Minister of the Environment v Rodrigues Trucking and Excavating* [2004] BDA LR 39 Kawaley J stated at pages 2, 3 and 4:

> *"However, if regard was to be had to the canons of construction, Mr. Froomkin relied on three interpretive principles. Firstly, the presumption that Parliament does not intend unworkable or impracticable, inconvenient, anomalous or illogical, futile or artificial results, or a disproportionate counter-mischief: Bennion, page 751 et seq. Secondly, he submitted, that the "starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. If there is more than one ordinary meaning, the most common and well-established is preferred (other things being equal": Bennion, page 917. However, the context may drive the interpreter to one of the others. This may be a quire different meaning, or a subdivision of the common meaning": ibid, page 920."*
>
> *"the applicability of the presumption against absurdity or inconvenience in Bermuda law was supported by reference to Hope Bowker real Estate v Roderick DeCouto [1986] BDA LR 19, where the Court of Appeal for Bermuda (at page 4-5 of the Court's judgment) gave a statutory provision a restricted meaning to avoid "an untoward result which does nothing towards achieving the object of the legislation."*
>
> *"For the principle that the main purpose of the statutory interpretation is to ascertain the meaning of the words used, The Plaintiff's Counsel cited Sir James Astwood JC at pages 2-3 of his judgment in Ministry of Finance v Hawkes [1991] Bda LR 57…. It was submitted that the Chief Justice's articulation of the canons of interpretation remain good law."*
>
> *"In essence, there is a presumption that Parliament does not intend to confer more powers than is strictly necessary. This principle is essentially the same as the*

principle against penalization under a doubtful law, save that the latter principle looks at the impact of the statute on the citizen from the citizen's perspective.

The Defendant's counsel relied on the following passages from Bennion, 2nd edition (sections 271,278):

> *"The court … should strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear … One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.""*

Case Law on Declaratory Judgments

60. In the case of *Guide Dogs for the Blind v Box* [2020] EWHC 1948 the Court stated:

> *81. "I now turn therefore to the third limb of Mr Learmonth's arguments which is that even if the jurisdiction to make a declaration on the Aggregation Point is not permissible under the 1930 Act, the court still has an inherent jurisdiction at its discretion to make the declaration sought.*
>
> *82. He points out that the court's power to make declarations is not confined to circumstances where there is a present cause of action between the parties. He draws attention to CPR 40.20 which provides that "the court may make binding declarations whether or not any other remedy is claimed."*
>
> *83. He argues that the court jurisdiction to grant declaratory relief is free standing and the discretion is a wide one.*
>
> *84. I have been referred to a number of cases in which the court has considered its jurisdiction to make declarations. The first in time is Gouriet v Union of Post Office Workers [1978] AC 501.*
>
> *85. In that case Lord Diplock stated:*
>
> > *"... a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another*

party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally upon the happening of an event.

.. the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation for it and not those of anyone else".

86. *It seems clear that the jurisdiction has developed somewhat since that case. In Rolls-Royce plc v Unite the Union [2009] EWCA civ 387 at paragraph 86 Aikens LJ set out a summary of the principles that he considered were to be derived from earlier cases. He stated thus;*

    (1) The power of the court to grant declaratory relief is discretionary.

    (2) There must in general be a real and present dispute between the parties before the court as to the existence or extent of a legal rights between them. However, the claimant does not need to have a present cause of action against the defendant.

    (3) Each party must in general be affected by the court's determination of the issues concerning the legal right in question.

    (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration provided that it is directly affected by the issue.

    (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish even on "private law" cases. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.

(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected either before it will have the arguments put before the court.

(7) In all cases assuming that other tests are satisfied the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

87. *In Milebush v Tameside MBC [2011] EWCA Civ 270 Moore-Bick LJ at paragraph 87 thought that paragraph 2 of the guidance of Aikens LJ in Rolls-Royce was expressed somewhat too narrowly and at paragraph 88 he states that:*

"In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grants declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings."

In other words, that the court has jurisdiction to make a declaration in relation to prospective as well as existing legal rights.

88. *In Pavledes v Hadjisavva [2013] EWHC 124 (Ch) David Richards J (as he then was) recognised, at paragraph 23, that "it is widely acknowledged that the circumstances in which the court will be prepared to make a declaration have broadened since the decision of the House of Lords in Gouriet". And at paragraph 25, having considered the guidance given in Rolls-Royce he noted that:*

"…there is nothing in these general statements (of Aikens LJ) requiring an actual or imminent infringement of a legal right before a declaration will be made. The willingness of the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties suggests that the court jurisdiction is not so tightly constrained"

91. *In my opinion, the fundamental question that David Richards J (as he then was) asked himself is that set out in paragraph 48 of the judgment. He asked*

himself "would it be just and would it serve a useful purpose to grant declaratory relief?"'"

Law on the Court substituting its own judgment

61. Order 53/Rule 9(4) of the Rules of the Supreme Court 1985 states:

> *"Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."*

62. In respect of the Court substituting its own judgment, in the case of *Re Blast 106 Ltd's Application for Judicial Review* [2015] NICA 16 it stated:

> *"37* […] *Rather, it is clear that the judge was alive to the point that the court was faced with competing interests and duties, namely the interests of Blast in seeking to protect and extend its broadcasting licence and the interests and duties of Ofcom in ensuring that (inter alia) the matters set out in Section 253A(6) of the 2003 Act were properly addressed. The judge bore in mind that the public interest in proper broadcasting standards was protected by the existence of a power of revocation of a licence or an extended licence (which is a power exercisable only after due process). Since the public interest was so protected the order for the extension of the licence could not produce an unjust result or a result contrary to the public interest whereas a failure to order an extension would produce irremediable damage to a licence holder who, even in Ofcom's case, might well have been entitled to have an extension granted before the licence expired. To refuse to make an order requiring an extension would be to visit on the licence holder a disproportionately unfair result compared to the alleged unfairness to Ofcom in having to grant a licence which if abused could be revoked. We conclude that the*

judge's decision was in the circumstances an entirely appropriate order to make in the hopefully unique circumstances of this case. This case can be considered to be one of those exceptional cases in which it was not appropriate to follow the usual and normal course of remittal of the matter to the statutory decision-maker who had disabled itself from making a decision in accordance with its statutory obligations before the expiry of the licence."

Ground 1(a) - The Respondent failed to provide any, or any adequate reasons for the Second Appeal Decision

The Applicants' Case

63. The Applicants submit that the letter containing the Second Appeal Decision provides no reasons for the denial of the Appeal. It enclosed the Second Appeal Minutes. They submit that the Appeals Policy section 9.9 entitles them to a written decision. Also, they submit that the reasons were not adequate. In particular the Applicants submit that the "principal important controversial issues" in the SHB Application and the Second Appeal were (i) the Full-Year Argument; (ii) the Mid-Year Argument; (iii) the Jurisdiction Argument; (iv) the Fairness Argument; (v) the Monopoly Argument; and (vi) the HTRC Argument. They assert that the Second Appeal Decision addressed none of these arguments and that the Second Appeal Minutes only addressed the Full-Year Argument and the Jurisdiction Argument. The Applicants submit that Dr. Brathwaite attempts unsuccessfully, to provide affidavit evidence justifying the Second Appeal Decision after the fact.

64. In respect of the Mid-Year Argument, the Applicants submit that the Second Appeal Decision only stated that the Application did not meet the SHB Proposal Guide, that is, the Key Mid-Year Criteria, but did not provides reasons. Further, neither the Second Appeal Decision, The Second Appeal Minutes nor Dr. Brathwaite's evidence explains what analysis took place and where the Application was defective when on the contrary, the Applicants are entitled to know what would satisfy the Key Mid-Year Criteria in the eyes of the BHC. Such information would assist future applications.

65. In respect of the Fairness Argument, the Applicants submit that at the Second Appeal Hearing, it was argued that it was incumbent for the Second Appeals Panel to review the Applicants' Application on the basis of fair approach without any weight given to existing facilities. However, they submit the Second Appeal Decision, the Second Appeal Minutes and Dr. Brathwaite's evidence say nothing about the Fairness Argument thus a failure to provide any reasons.

66. In respect of the Monopoly Argument, the Applicants submit that the Second Appeal Decision and the Second Appeal Minutes do not address the issue at all and thus failed to provide effective competition in the Island. They also submit that Dr. Brathwaite's affidavit evidence makes reference to a finding by the Technical Committee but that that finding was not considered by the Second Appeals Panel and makes reference to a lack of documented analysis without saying what that be or look like. Therefore, the Applicants submit that the Respondent failed to provide adequate reasons.

67. In respect of the HRTC Argument, the Applicants submit that Dr. Brathwaite relied on the HTRC Reasons as a reason for the Second Appeal Decision despite the Second Appeal Decision making no mention of them; and that the Court cannot know whether or to what extent the HTRC Reasons were taken into account, how they were assessed and whether the Applicants' arguments in response were considered. Therefore, they submit that the BHC failed to provide reasons and alternatively it took into account irrelevant considerations.

The Respondent's Case

68. The Respondent counters that the Regulations do not require reasons and that context justified brevity. This was on the basis that the hearing was a 'reconsideration' of the January 2020 SHB Decision which had before it the recommendations from specialist committees. Also, the main argument that the BHC should have treated the application as a Full-Year Application was fully addressed by the Second Appeals Panel which gave reasons why it was unpersuaded to overturn the SHB Decision. Further, Dr. Brathwaite

affidavit evidence provided further evidence as to the BHC's thinking, to deal with all the Applicants' objections.

Analysis on Failure to Provide Reasons or Adequate Reasons

69. In my view the BHC, as set out above in the various "Arguments", failed to provide reasons or adequate reasons for the Second Appeal Decision for several reasons. First, I do not agree with the Respondent that the context required brevity. On the contrary, in applying the principles set out in *Asha Foundation v Millennium Commission*, as a matter of good administration and fairness, the context of SHB Applications requires appropriate and adequate reasons in light of the circumstances including (a) the detailed application process; (b) the detailed consideration process; (c) the significant capital expenditure involved; (d) the significant financial consequences of not being granted approval; (e) the private monopoly circumstances; (f) the public interest; (g) the ability to resubmit further applications; and (h) the Appeals Policy stated that Appellants will receive a written decision of the appeal outcome. Giving adequate reasons would have caused the Second Appeals Panel to focus its mind on the task before it and consider in turn the relevant considerations. I also rely on *Ex parte Institute of Dental Surgery* such that giving reasons may concentrate the appeals panel's mind on the right questions, demonstrate to the Applicants that this is so, show that the issues have been conscientiously addressed and how the result has been reached, or alert the Applicants to justiciable flaws in the process.

70. Second, I disagree with the Respondent's inference that as the Regulations do not require reasons then reasons or detailed reasons do not need to be provided. Despite the Regulations, the Appeals Policy stated that the Appellants will receive a written decision. In my view, the Second Appeals Panel should have provided reasons in its decision. I note that the Second Appeal Minutes were provided. I am not persuaded that that document provided reasons to a proper standard, especially since Dr. Brathwaite filed further affidavit evidence as to the BHC's thinking. In respect of such evidence I rely on the extracts from *Wade and Forsyth* on the adequacy of reasons such that in my view I should be careful to the danger that Dr. Brathwaite in giving supplementary reasons may drift perhaps

subconsciously into ex post facto rationalization of the Second Appeal Decision. So too I rely on *Hereford Waste Watchers Limited v Hereford Council* in that it will be rare indeed for an inconsistent explanation, given in the course of judicial review proceedings to be accepted as the true reason for the decision.

71. Third, I am of the view that the "principal important controversial issues" were the issues as identified by the Applicants as 'Arguments'. Therefore, in applying the dicta in *South Bucks District Council and Another v Porter* these issues required decisions that were intelligent and adequate such that the Applicants would understand why the matter was decided, disclosing how they were resolved and removing substantial doubt as to whether there were errors in law. I am not persuaded that the Second Appeal Minutes or the further affidavit evidence of Dr. Brathwaite satisfied this test.

72. Fourth, *South Bucks District Council and Another v Porter* also sets out that an unsuccessful applicant should be provided with reasons in order to enable them to understand how the policy or approach underlying the grant of approval may impact future applications. In my view, the Applicants should not be shooting in the dark in order to fulfill future applications. A reasoned decision would set out where and how they failed such that a future application had a better chance of success in meeting the criteria. In my view, again applying *South Bucks District Council and Another v Porter* as well *as R (on the application of C) v Financial Services Authority* the Applicants have genuinely been prejudiced by the failure to provide an adequately reasoned decision, namely not being provided with reasons as to how they failed to meet the criteria in order to address the same in a future application.

Ground 1C - The Second Appeals Panel was Not Impartial

The Applicants' Case

73. The Applicants submit that the Second Appeals Panel was not impartial. For the various Committee Members, they submit that a fair-minded observer would conclude that there

was a real possibility of bias on their parts. This is based on the participation of several people as follows:

a. Dr. Brathwaite who had been involved in every stage of the SHB Application. They complain that he had received the initial SHB Application, he met and advised Dr. Soares regarding the Key Mid-Year Criteria, he attended the meetings of each of the committees carrying out the Technical Review and the SHB Review and he was a part of the First Appeals Panel and Second Appeals Panel in a non-voting capacity. In oral submissions, the Applicants pointed out in the sub-committee meeting minutes that there was no record that stated that Dr. Brathwaite had not participated in the discussions and had not voted. In the Conyers letter dated 24 April 2020 in the Schedule Dr. Brathwaite was listed on two committees but only on one of those committees was he labelled as 'non-voting'. The Applicants submit that this contradicts Dr. Brathwaite's sworn evidence.

b. Civil Servants, namely the Assistant Financial Secretary to the Minister of Finance, the Acting Permanent Secretary for the Ministry of Health and the Chief Medical Officer. The Applicants complain that in light of the Government determination to reform the healthcare system, the Civil Servants could not be in a position to decide the Appeal and approve the SHB Application on its legal and factual merits uninfluenced by their employment by the Bermuda Government in the specific capacity of advising he Government on the issue of phasing out SHB or otherwise not feel pressure extraneous to the case.

c. Dr. Richmond, CEO of the Bermuda Hospitals Board ("**BHB**"). The Applicants complain that the Hospital offers Imaging Services under SHB, is funded by portions of the SHB and any new provider under SHB could affect the BHB budgets and services.

The Respondent's Case

74. The Respondent rejects the Applicants' case as follows:

a. In respect of Dr. Brathwaite, he rightly attended all committee meetings to ensure that they operated properly and were aware of what had gone on before and he did not vote. There is no evidence to suggest that he controlled the Committee or had an axe to grind against the Applicants.

b. In respect of the Civil Servants, all reputable individuals in industry or Government, that there is no evidence to suggest that they were controllable.

c. In respect of Dr. Richmond and employees of Government, it is speculation that that the Hospital or Government may have an internal position as regards the approval of additional diagnostic imaging service providers.

d. A fair minded observer would appreciate that (i) all committee members make appropriate commitments to independence; (ii) the Government and Hospital are public institutions seeking public good rather than private advantage; (iii) neither the Government or Hospital have agendas and the Applicants are speculating illogically; and (iv) it is unrealistic for the BHC to consist of complete outsiders, if a premium is placed on industry knowledge.

Analysis on Impartiality

75. The SHB provider application process is a complex subject involving detailed information requiring a high level of analysis in what is an equally complex and long approval process. In my view, as a start point, I accept the Respondent's submissions about what a fair minded observer would appreciate.

76. In respect of the Civil Servants, I do not agree that a fair-minded observer would conclude that there was a real possibility of bias or apparent bias on their parts. First, there is no evidence of bias other than the fact that they were Civil Servants. In finding no apparent bias, I rely on the line of cases citing the test in *Porter v Magill*, namely *Dr. Gina Tucker v the Public Service Commission, Meerabux v Belize* and *Hofstetter v The London Borough*

of Barnet. In my view, it seems commonsensical that Civil Servants can have a variety of views on Governments, their policies, agendas, reform measures and indeed Ministers. However, in this case, the BHC appointed high level Civil Servants who would no doubt bring to the Committee experience and understanding of a range of private sector matters as well as general government matters including budget, policy, applications, consideration of merits for and against an application/appeal and process. I strongly doubt that the mere fact of their employment would cause them to side with the BHC. Second, it seems to be speculation to me that the Chief Medical Officer and Permanent Secretary for Health, knowledgeable about the reform, if indeed they were, would automatically come to a conclusion to deny SHB Applications when they would also be equally knowledgeable that people still required such diagnostic imaging services. In light of all the circumstances, I am of the view that there is no real possibility that the Civil Servants were biased.

77. In respect of Dr. Richmond, I find that a fair-minded observer would conclude that there was a real possibility of bias on his part. I distinguish Dr. Richmond from the Civil Servants in that there is no evidence that the Civil Servants are involved with SHB. I acknowledge the Respondent's contention that a fair minded observer would appreciate that the Government and Hospital are public institutions seeking public good rather than private advantage. However, in my view, Dr. Richmond's role as CEO of the BHB brings him into the scope of actual bias. I accept the Applicants' submissions that the Hospital offers Imaging Services under SHB, is funded by portions of the SHB and any new provider under SHB could affect the BHB budgets and services. Therefore, in my view there is actual bias when applying *Davidson v Scottish Ministers* where Lord Bingham stated that "the rule of law requires that judicial tribunals … should be independent and impartial", "should decide such issues on their legal and factual merits as they appear to the tribunal uninfluenced by any interest, association or pressure extraneous to the case". Can it be said that Dr. Richmond, in his participation as an appeals panel member would meet such criteria? To my mind, per *Davidson and Scottish Ministers*, the role of Dr. Richmond as CEO of the Hospital could prevent him bringing an objective judgment to bear, which could distort his judgment.

78. Also, in respect of Dr. Richmond and apparent bias I again rely on the line of cases citing the test in *Porter v Magill*, namely *Dr. Gina Tucker v the Public Service Commission*, *Meerabux v Belize* and *Hofstetter v The London Borough of Barnet*. I am of the view that the fair-minded and informed observer would conclude that there was a real possibility of bias on the part of Dr. Richmond once all the facts of the circumstances are considered including his role as CEO of the Hospital and to the significance of SHB to the Hospital.

79. In respect of Dr. Brathwaite, I am of the view that there was procedural unfairness in his participation as part of the Second Appeals Panel for several reasons. First, in respect of the 'secretariat' or 'committee secretaries', I note in the SHB Proposal Guide as follows: (a) in Definitions 2.0, secretariat is defined as Health Council Staff that carry out the day-to-day functions and operations as directed by the CEO; (b) in SHB Review Committee 4.2 and 4.5 there is a role for the Secretariat and SRC Secretary; and (c) in Health Technology Review Committee (HTRC) 5.1 and 5.5 there is a role for the Secretariat and HTRC Secretary. I note in the BHC Appeals Policy as follows: (a) in Definitions 3.2 it states that the Secretariat is the employed staff of the BHC, including the CEO; and (b) in Appeals Policy 9.3 it states that the CEO (Dr. Brathwaite) serves as the Secretary (of the Panel). The Secretariat has roles in Appeals Policy 9.1, 9.2, 9.5 and 9.6. In my view, only the Appeals Policy expressly defines that the CEO is the Secretary of the Appeals Panel. Per the SHB Proposal Guide, for the other committees the Secretary could have been some other staff member of the BHC; however Dr. Brathwaite appeared as the 'secretariat' for each committee.

80. Second, Dr. Brathwaite's evidence, including in his Third Affidavit sworn 2 March 2021 with leave of the Court to clarify some issues, is that his role is that: (a) he does not take part in the decision making or discussions about the decisions; (b) he started meetings about the Applicants' application and Appeal by explaining to the other members the purpose of the meeting, what the documents are and what the process is per the documents they would have received; (c) he explains his role that he is not there to make the decision or take part in the discussion; (d) he is there as part of his secretarial role; (e) he does answer questions as they arise for example about process, technical issues or context for what the documents are; and (f) he does not seek to influence the discussions nor is there any reason why he

would want to. It appears that Dr. Brathwaite was involved in every step of the application process for the Applicants' application. These stated roles give me cause for concern particularly in light of some contemporaneous minutes which do not state that he did not participate in discussion and did not vote.

81. Third, in respect of role (b) and (d), Dr. Brathwaite attended the deliberations of the Health System Capacity Review Committee, the SHB Committee which determined not to approve the SHB Application, the First Appeals Panel which rejected the appeal and the Second Appeals Panel which also rejected the appeal. In my view, in each succeeding meeting, Dr. Brathwaite was taking with him the knowledge of all of what had gone on before him, including the discussions. It seems commonsensical to me that if the First Appeals Panel or the Second Appeals Panel needed a 'secretariat' then, despite the Guidance, someone else other than Dr. Brathwaite should have been assigned to that role precisely because of his prior involvement in the other committees. Alternatively, if BHC recognised that in any application there could be an appeal and the SHB Proposal Guide expressly stated that the CEO was to be the Secretary, then in all the earlier meetings, the secretariat should have been someone else from the BHC staff as envisaged by the SHB Proposal Guide. In my view, using the same person as the secretariat for all three (3) stages of the application process and then for the appeal process would cause a reasonable and fair minded person sitting in the Second Appeals Panel, knowing all the relevant facts, to have a reasonable suspicion that a fair hearing was not possible. Surely, the expectation would be that an independent panel would be assisted by a 'secretariat' that had no involvement in the previous stages. In applying the test in *R v The Leicestershire Fire Authority Ex Parte Thompson* I am of the view that Dr. Brathwaite's presence on the Second Appeals Panel having previously been on the other Committees breached the general rule of great importance that not only must justice be done but that it must manifestly be seen to have been done.

82. Fourth, in respect of roles (e) and (f), Dr. Brathwaite admits that he provides information of an explanatory nature to the Appeals Panels, although I note there is no evidence of what precise information he provided in the Second Appeal Hearing. Further, Dr. Brathwaite states that he does not seek to influence the discussions. In my view, however well-

intentioned that reservation may have been on his part, in providing information to the Second Appeals Panel, whether or not he did have some influence is an unknown. In applying the test in *R v Chesterfield Borough Council Ex Parte Darker Enterprises Limited* I am of the view that a reasonable and fair minded person sitting in the Second Appeals Panel, knowing all the relevant facts, would have had a reasonable suspicion that a fair hearing was not possible. In the scheme of things and to protect the integrity of the process, I would have thought it obvious to the BHC that there should be one 'secretariat' for the SHB approval process, and then if there was an appeal, then establish a different 'secretariat' for the appeal process.

83. Fifth, in respect of role (c), I note that Dr. Brathwaite states that he does not participate in discussions and that he does not vote. I have considered whether this is an exceptional circumstance along the lines set out by Lord Denning in *Ward v Bradford Corporation and Ors*, However, I find it difficult to reconcile all the knowledge that Dr. Brathwaite possessed from the previous hearings and providing information to the Committee with his statement that he was not involved in the discussions. In my view, I do not accept not being involved in the discussions and not voting as an exceptional circumstance for why the rule should not be applied in its full rigour in this case. Also, I do not see any other exceptional circumstances.

Ground 3 - Irrelevant Considerations

The Applicants' Case

84. The Applicants submit that the BHC took into account irrelevant considerations. This is based on accepting the Applicants application as a waiver of the Moratorium but then taking the Moratorium into account. They rely on Dr. Brathwaite's First Affidavit sworn 1 October 2020. At para 27 where he states that the BHC agreed to consider the Application despite the moratorium and at para 34 where he states:

"The main difficulty is that the application simply did not meet the guidance. While the Plaintiff urged that the Guidance should not be applied, by for example treating the Application as a full-year application, the Council did not agree. The Appeal Panel considered the fact that the Minister has extended the current cycle and that the SPR has not been changed since June 2019 due to the Reform. It appreciated the Applicants' point that this meant that they could not make a full year application as they otherwise could. This was however out of the Council's control. I point out that, contrary to Mr. Soares' claim, the delay did not mean the Applicants could not make a full-year application. First, there is a moratorium. Second, there has been no rebasing exercise for the SPR since prior to the Application and therefore no applications could have been or can currently be considered that when a full-year basis."

The Respondent's Case

85. The Respondent made submissions in respect of Grounds 3, 4, 5 together posing the question "Was the decision on appeal confirming disapproval perverse?". Mr. Adamson submits that the main argument was and remains that the Mid-Year Application should have been treated as a Full-Year Application. He contends that this is because the Application did not and does not meet the guidance for Mid-Year Applications and thus it cannot be perverse for a regulator to apply its own guidance.

86. Further, Mr. Adamson submits several reasons in support of his position: (a) The Application was and was framed as a Mid-Year Application; (b) As the approval process involves a complex and careful process involving multiple steps and committees, their input was based on the Mid-Year application and relevant input would be missing if the appeal was based on a Full-Year Application. Also it would be speculative for the committee analysis to be carried over; (c) Full-Year applications are different in character to Mid-Year Applications and involve a different process. (d) The Applicants could have made a Full-Year application and a failure to do so was not the fault of the BHC; (e) It is and remains unclear what impact an approval would have had on the SHB budget – a

rational concern and the Second Appeals Panel concluded that it was dispositive for the appeal; and (f) the lengthy reform process is hampering applicants, but the delay is not caused by the BHC, it is the Minister's decision, a political decision, not to allow the SHB budget to be recalibrated. Finally, Mr. Adamson submits that the Applicants have now submitted a Full-Year Application and that quashing the decision would serve little or no sense. Likewise, the request for certiorari for the Court to itself order approval should be rejected due to all the potential ramifications for the SHB budget.

Analysis of Irrelevant Considerations

87. I have reviewed Dr. Brathwaite's First affidavit at para 27 and 34. In order to put para 34 into context, I found it necessary to read para 33 which states as follows:

> "S*ince I had been involved throughout this process, I believe I can properly comment on why the Appeal Panel rejected the application and on the complaints made by the Plaintiff in the present court challenge."*

88. In my view, Dr. Brathwaite was dealing with two issues in para 34. The first issue was his comments on why the application was rejected. The second issue was his comments on the Applicants' comments in the present court challenge. I consider that from the sentence beginning with "I point out …" Dr. Brathwaite was commenting on the comments in the present court challenge.

89. However, upon reviewing the Second Appeal Decision Letter dated 6 July 2020 to Dr. Soares, Dr. Brathwaite set out the reasons for rejecting the appeal. In the first reason he states:

> *"Turning to the issue of whether HMCL should be approved as a diagnostic imaging facility, the Council notes the current moratorium. While the Council agreed to consider this application as an exception, the Council is and must be*

cautious in approving additional facilities or services pending the larger reform of health care provision in Bermuda."

90. After stating a second reason, and possibly a third reason, Dr. Brathwaite stated:

"For these reasons, the Council is not minded to approve HMCL as a mid-year application as an approved SHB facility."

91. In my view Dr. Brathwaite stated that the BHC took into account the Moratorium in its deliberations in the Application and/or the Second Appeal Decision. On that basis, I accept that the BHC took into account irrelevant considerations.

Ground 4 - The Respondent Unlawfully Fettered Its Discretion to and Failed to Consider the SHB Application with an Open Mind

The Applicants' case

92. The Applicants submit that the BHC has unlawfully fettered its discretion for several reasons. Also, they contend that the BHC's conduct is a classic example of a decision maker operating a policy in an inflexible manner such that the outcome is predetermined.

93. First the Applicants submit that the BHC applied the Mid-Year application policy in a manner that is inflexible such that the outcome – that the SHB Application would only be considered on a Mid-Year basis – was automatically determined. The Applicants refer to Dr. Brathwaite's Second Affidavit wherein he states that the Minister has not rebased the budget for the 2020 year, that this will likely remain the case for 2021, the BHC needs to be careful about adding new services which would add costs and that although these factors were a consideration of the Second Appeals Panel, it was not the reason the application was rejected; the reason was because the application did not meet the SHB Proposal Guide.

94. The Applicants submit that the reference to the SHB Proposal Guide is a reference to the Key Mid-Year Criteria. On this factual basis, the Applicants complain that the BHC unlawfully fettered its discretion to waive obligations regarding applications for SHB by requiring the SHB Application to be considered only on a Mid-Year basis. They argue that several factors should have been considered by the Respondent when determining whether to consider the SHB Application on a Full-Year or Mid-Year basis: (a) the application made in March 2019 was not just for the period of March – April 2019 but going forward into the following year; (b) the SHB Application was made in March 2019 because the BHC has issued the Moratorium without prior notice and the Applicants wanted their application considered before the Moratorium came into effect; (c) the SHB Application, despite being called a Mid-year Application was the subject of further submissions accepted by the Respondent up to June 2019; (d) the SHB Policy Guide allows applications for SHB made before 1 July of any given year to be considered for 1 April of the following year; when the Applicants made their final submissions, the BHC should have been considering other SHB applications from new and Incumbent Providers; and (e) the SHB Application met the Full-Year criteria.

95. Second, the Applicants submit that the BHC exercised unlawful policies which are rigid and inflexible. It submitted that the BHC stated that it could not have considered the SHB Application on a Full-Year basis in any event due to factors outside its control. The Applicants refer to Dr. Brathwaite's First Affidavit wherein he states that (a) the Second Appeals Panel considered the fact that the Minister had extended the current cycle and the SPR had not been changed since June 2019 due to the reform; and (b) as there had been no rebasing exercise for the SPR, no applications could have been or can currently be considered on a Full-Year basis. The Applicants submitted that in actual fact, that BHC had departed from SHB Proposal Guide and extended SHB approval for Incumbent Providers.

96. Third, the Applicants submit that the BHC fettered its discretion because it has closed its mind to the question of whether or not the Applicants could provide the same services, as

an alternative to any Incumbent Providers, thus creating a Closed Category of Incumbent Providers.

97. Fourth, the Applicants submit that the BHC fettered its discretion because having considered the impact of the Covid-19 Pandemic on its resources and that the Minister had not renewed the SPR, then the Incumbent Providers would be entitled to continue to provide services under the SHB as if they had applied for renewal, even thought they had not. Such an extension put the Applicants at a distinct and obvious disadvantage.

98. Fifth, the BHC had a duty to consider the SHB Application in the context within which it was made, which included the timing and contents of the SHB Application itself and the BHC's duty to make decisions which are consistent with the policy goals for which it was created.

99. Sixth, the BHC could not credibly rely on the ongoing reform and the non-basing of the SPR and budget as reasons for failing to consider the SHB Application fairly.

100. Seventh, the BHC had shown a willingness to exercise great latitude with respect to SHB Applications in that it waived the obligation for Incumbent Providers to re-apply for SHB annually.

The Respondent's Response in respect of Ground 3, 4 and 5

101. The Respondent's response in respect of this Ground is as set out above for Ground 3, 4 and 5.

Analysis on Fettering Discretion

102. I have considered these competing arguments. I have found that the BHC has indeed fettered its discretion in respect of this matter for several reasons as set out below. As a start point, I acknowledge that in the absence of any regulations for the application process for SHB approval, there is a published SHB Proposal Guide that sets out the

framework and procedure for approval for applicants for SHB coverage. It is quite detailed according to the evidence of Dr. Brathwaite. In my view, both Incumbent Providers and new applicants have an expectation to be dealt with according to the SHB Proposal Guide in a fair and reasonable way.

103. First, the timing of the application and subsequent submissions had all the hallmarks of a Full-Year Application. I accept the factors submitted by the Applicants as reasons why the application should have been treated as a Full-Year Application. In March 2019, the Mid-Year Application, if successful, would have only been for a limited period of time, that is, March 2019 to April 2019. In my mind, it is inconceivable that the Applicants were applying for that short period of time, having made a considerable investment in their business and premises. If that were the case, then they would have been required to submit another application by 1 July 2019 for a Full-Year Application. The genesis of the March 2019 application as a Mid-Year application may have been both the announcement of the Moratorium and the related waiver of the same for the Applicants, but having made further submissions to the March 2019 application right up until June 2019, then in effect, the Applicants had met the 1 July 2019 deadline for a Full-Year Application and to be treated as such.

104. The Respondent has maintained that the Applicants had requested the matter be dealt with as a Mid-Year Application and so it was processed as a Mid-Year Application. In my view, that contention lacks merit. In following *Lawe v The Minister of Labour, Home Affairs and Public Safety and Ors,* the BHC's adoption of and adherence to such a rigid Guidance indeed fettered its discretion in such a way as to eliminate the statutory obligation to determine each application on its merits. With some reasonable exceptions as envisaged in *R v Hampshire County Council Ex Parte W* and purposeful flexibility, it was commonsensical for the BHC to have received the completed application in June 2019 as a Full-Year Application and processed it accordingly.

105. Second, I note that the Minister did not reset the SPR and therefore the SHB budget was not rebased. For clarification, I accept Mr. Adamson's argument that the fault for that

does not lie with the BHC because those matters fall under the remit of the Minister. But obvious consequences flow from such a position, including that life goes on for citizens and applicants. I disagree with the Respondents that the application could not be considered as a Full-Year Application for this reason. Again, in my view the BHC had adopted a rigid and inflexible approach on the type of application when what was really required was for the BHC to accept the application as a Full-Year Application and then consider it along with the applications of the Incumbent Providers and then work through the detailed approval process.

106. Third, in following *Council of AME Churches and Tweed v The Minister of Home Affairs* the element of fairness was lacking when the BHC departed from the SHB Proposal Guide in extending approval for the Incumbent Providers, but would not process the Applicant's application as a Full-Year Application. In my view, the mere if not automatic extension for the Incumbent Providers whilst processing the Applicants' Application as a Mid-Year Application was not a level playing field by any stretch of the imagination.

107. Fourth, I have considered Mr. Adamson's submissions in respect of the outcome of the Second Appeal and the question he elegantly poses namely, "Was the decision on appeal confirming disapproval perverse?". That Second Appeal Decision was based on a Mid-Year Application, the process of which relies on an analysis of information including the criteria that the new applicant should not cause the budget to be exhausted mid-year. However, in my view, that question is not the proper question, and need not be answered, because it is posed on the basis of the Mid-Year Application and the finding that it failed to meet the Key Mid-Year Criteria. However, as already stated, the application should have been considered as a Full-Year Application.

108. Fifth, I have considered the arguments about the Covid-19 Pandemic and its effect on resources available to the Minister. However, I accept the Applicants' submissions to reject any such reliance on the Covid-19 Pandemic because that pandemic had not affected Bermuda in 2019 and was not heard of until March 2020. It could have hardly been a part of the reasons for the advice of any committee or the SHB Decision.

Ground 4 and 5 - The Respondent's Decision is Irrational and Unreasonable

The Applicants' Case

109. The Applicants submit that the Respondent's Decision is irrational. They state that in refusing the appeal: (a) the Respondent determined to consider the SHB Application on a Mid-Year Basis only – which they say was illogical; (b) decided that the SHB Application did not meet the Key Mid-Year Criteria without saying how, despite the Applicants filing all the information Dr. Brathwaite indicated would be required; (c) refused to consider whether the Applicants could have provided services in place of the Incumbent Providers and perpetuated a private service monopoly despite its obligations to ensure that the goals of access, affordability and quality are met in the delivery of healthcare to people in Bermuda.

110. The Applicants also contend that the BHC acted unreasonably in requiring the Applicants to meet the Key Mid-Year Criteria in circumstances where Incumbent Providers were not even required to apply annually for the SHB. They submit that there was no realistic basis upon which the Applicants could have satisfied the Second Appeals Panel that the Key Mid-Year Criteria had been met when the Applicants could not know what the SPR budget is in any given year, and could not know the overall impact their services would have on the use of SHB when the Respondent knew at all material times that the budget had not been rebased and was operating a closed policy in respect of Incumbent Providers.

The Respondent's Case

111. The Respondent's response in respect of this Ground is as set out above for Ground 3, 4 and 5.

Analysis of Irrationality and Unreasonableness

112. The Applicants contend that the Applicants' Mid-Year Application met the Key Mid-Year Criteria primarily on the basis that the information submitted was what Dr. Brathwaite had told them to submit. They rely on Dr. Brathwaite's Second Affidavit sworn 7 December 2020 para 23. There, Dr. Brathwaite's evidence is that he gave Dr. Soares examples of information based on previous successful submissions, explained how previous providers had submitted spreadsheets of information but clarified that any decision would be for the BHC. They argue therefore that it was illogical that the application did not meet the criteria. In my view, it is difficult to accept this argument because there can be a difference in being told what to submit and what is actually submitted. The evidence does not say that Dr. Brathwaite reviewed the information before it was submitted and gave it his approval. Even if he did, Dr. Brathwaite had informed Dr. Soares that the decision was for the BHC. As it turns out, the BHC was not satisfied that the application met the Key Mid-Year Criteria. I do not agree with the Applicants that these specific circumstances amount to irrationality or unreasonableness.

113. However, I am of the view that the BHC acted irrationally and unreasonably for several other reasons. First, as stated previously and for the reasons given, the BHC should have treated the application as a Full-Year Application. In applying the test *in HMB Holdings Ltd. V Antigua and Barbuda*, I am satisfied that the BHC's decision to treat the Applicants' application as a Mid-Year Application is one which no sensible person who had applied his mind to the question could have arrived at. My view is based on the fact that the BHC has received the application in March 2019 and it was supplemented with further information at BHC's invitation until June 2019, in the time frame for the annual consideration of the Incumbent Providers. In those circumstances, despite the Applicants' request to treat the application as a Mid-Year Application, it was irrational and unreasonable in all the circumstances to do so. This was 'flawed logic' of the kind envisaged in *Coxon et Al v The Minister of Finance et Al*. In my view, the rational thing to do was to treat the Applicants' application as a Full-Year Application along with the Incumbent Providers.

114. Second, the Guidance at S.6(2) set out the aims of access, affordability and quality. It also states that that approvals are granted on an annual basis and all providers must reapply annually. In following the dicta of Kawaley J in *Pitcher v Commissioner of Corrections and Anr*, I have focused on these stated aims as well as how the powers of approval may be lawfully exercised and what essential aspects of fairness the statutory process and SHB Proposal Guide require. In that same case, I am mindful of the commentary of Lord Bingham about Ministers and public officers exercising the powers conferred on them in good faith, fairly and for the purpose for which the powers were conferred and not unreasonably. In my view, it was the height of unfairness to treat the Incumbent Providers with an extension whilst requiring the Applicants to meet the Key Mid-Year Criteria. On an in-depth analysis, these circumstances had the result of running afoul of the SHB Proposal Guide aims of affordability and quality as well as the requirement for all providers to reapply annually.

Ground 6 - X-Ray, Ultrasound, MRI and CT Scans are Part of the SHB as of Right

The Applicants' Case

115. The Applicants submit that the X-Ray, Ultrasound, MRI and CT Scans are part of the SHB as of right pursuant to a proper statutory interpretation of regulation 1, 3(1) and 3(2) and that I should grant a declaration to that effect. In the Applicants' Appeal against the SHB Decision they put it this way:

> *"21. MRI and X-Ray are specifically prescribed as being services included in SHB without more. (Regulation 3 Services);*
>
> *22. Ultrasound and C.T. Scans are very arguably services described in the regulation 3(i) as "…diagnostic procedures not obtainable or generally provided in a doctor's office, as prescribed by a physician…" (Regulation 3 (i) Services).*

23. In respect of the Regulation 3 Services and Regulation 3(i) Services, there is no basis upon which the Council could be entitled to require health service providers to make an application for permission to provide these service sunder the SHB. To the extent that the Respondent has sought to exercise a power to approve or deny the Application in respect of these services, it is acting beyond its powers and the Decision in this regard is ultra vires."

116. The Applicants submit that the question for the Court to consider is what the intention of the legislature was when enacting Regulation 3(2) of the Regulation bearing in mind the presumption against doubtful penalization and the presumption against absurdity or inconvenience. Further, they submit that the broader interpretation should be given.

The Respondent's Case

117. The Respondent submits that the Court should not a grant a declaration on this issue as the Courts do not grant declaratory judgments unless it is just and would serve a useful purpose. They submit that a declaration would not serve a useful purpose as not all the interested parties are before the Court. Also, they argue that on the substantive issue, the Applicants rely on Regulation 3(1) but ignore Regulation 3(2). Further, they submit that this issue is not BHC's fight as their only role is to grant or refuse or approval for 6 or so services but not for nearly 40 other services. That is an issue for the Minister and insurers who the Applicants have chosen not to join in these proceedings.

Analysis on whether X-Ray, Ultrasound, MRI and CT Scans are Part of the SHB as of Right

118. The Court is asked to determine what Regulation 3(2) means. The use of the phrase "For greater clarity …" now turns out to be oxymoronic in that it seems to have provided "greater confusion" for the parties.

119. I have reviewed the Health Insurance Amendment Bill 2019 Explanatory Memorandum which states for the relevant part "*Regulation 3 is amended to clarify that, to be standard health benefit, out-patient services must be provided by the Board or, as the case may be, must be approved as such by the BHC*." In my view, this Explanatory Memorandum is not of any assistance as it speaks of only two categories when in my view there are more categories as set out below. Also, it does not address the application of Regulation 3(2) to the regulation 3(1) list or where there is overlap.

120. I have reviewed Regulation 2 which sets out that SHB includes the listed in-patient services provided by the Board. I have reviewed Regulation 3(1) which sets out that SHB shall include a list of outpatient services. In my view, in following *Minister of the Environment v Rodrigues Trucking and Excavation*, the words used include references to the "hospital" and the requirement for approval of "other facilities" which leads me to conclude that the services can be provided by the Board or by a non-Board facility, that is, a private facility.

121. In my preliminary view, each of the outpatient services fall in only one of three categories, except 2 services ((ii) and (iii)), which fall in a combined category. I shall categorise the outpatient services as follows:

a. "Council Approval Required of Facility and/or Rates" Category:
    i. Services (v), (vi), (xii), (xiv), (xv), (xxxviii), (xlii), (xliii) and (xliv);
    ii. In my preliminary view this category of outpatient services <u>does</u> requires the approval of the BHC for non-Board facilities and/or the rates charged by non-Board facilities.

b. "Services provided by the Board" Category:
    i. Services (xxix – xxxvii), (xxxix – xli) and (xlv);
    ii. In my preliminary view this category of outpatient services <u>does not</u> require the approval of the BHC as the services are provided by the Board, who presumably can set their own rate.

c. "Section 3(2)" Category:

i. Services (i), (iv), (vii – xi), (xiii), (xvi – xxviii);

ii. In my preliminary view this category of outpatient services does not require the approval of the BHC when provided by a non-Board facility. Further, this category is included in SHB when the service provided to the outpatient has been or will be provided by the Board. In my view, bearing in mind the *Minister of the Environment v Rodrigues Trucking and Excavation* presumption against absurdity, it does not mean that those services provided, or to be provided, by a non-Board facility are only included in SHB if they are already provided by the Board. The absurdity of this interpretation would be that a service offered by a private facility would be at the whim of whether or not the Board provided the service. Also, this interpretation would affect the economic rights of a private facility thus infringing on the presumption of doubtful penalization.

d. "Section 3(2) and Using Board Facilities" Category:

i. Services (ii) and (iii).

ii. In my preliminary view, these services use Board facilities. Further, this category is included in SHB when the service provided, or to be provided, to the patient has been or will be provided by the Board.

122. I have been urged to exercise my discretion to grant a declaration based on a finding that certain services do not require the approval of the BHC. As noted above I expressed preliminary views. However, I am not persuaded to take a final view, make an order on this issue or grant such a declaration for several reasons. First, in following *Guide Dogs for the Blind v Box*, I rely on Lord Diplock's dicta in *Gouriet v Union of Post Office Workers*[14] that the Court's role in the civil jurisdiction is concerned with legal rights vis-à-

[14] Para 84 - 85

vis one party claiming a right against another whilst noting that the jurisdiction of the Court is not to declare the law generally or to give advisory opinions.

123. Second, I accept that this is not an issue for BHC, who submit that this is not their fight. I am of the view that this issue is one for which the Minister should be a party but who has not been joined in these proceedings. I rely on *Guide Dogs for the Blind v Box* where the case of *Rolls-Royce plc v Unite the Union*[15] was cited for my view that all sides of the argument are not fully and properly put and that all those affected have not had their arguments put before the Court.

124. Third, there are issues of where in the Regulation 3(1) list of outpatient services various services fall. For example, there is a dispute about where CT Scans fall, about where ultrasound falls, and about what diagnostic imaging services means as it is undefined. I have not been provided with any evidence, expert or otherwise, to assist with a determination of these questions and I have not had the assistance of the Minister. Again I rely on *Guide Dogs for the Blind v Box* where the case of *Pavledes v Hadjisavva* was cited in respect of an answer to the fundamental question to be asked, as in my view it would not be just and serve a useful purpose to grant declaratory relief when all the issues about these categories of services and approvals have not been ventilated by the relevant parties.

The Court Should Substitute its Own Decision

The Applicants' Case

125. The Applicants submit that the Court should adopt its own decision for that of the BHC. They accept the general rule that in judicial review applications where the relief sought is certiorari that the ordinary practice is to remit the matter to a differently constituted decision maker for reconsideration. However, they submit that there are exceptions which apply in this case, namely (a) the time taken thus far in hearings and

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appeal since the application was submitted in March 2019; (b) it appears the BHC does not have resources to consider an appeal re-hearing; and (c) there can only be one outcome – the Applicants clearly meet the Full-Year criteria and should be entitled to offer the services which require BHC's approval without further delay.

The Respondent's Case

126. The Respondent submits that if the Court itself ordered approval, then there are potential ramifications for the SHB Budget as the BHC is a specialist regulator with technical and industry specialists and oversees a large and complex budget. It submits that the Court should not intervene and should not grant approval.

Analysis on Court Ordering Approval

127. If I were minded to remit this matter to another appeals panel hearing then it would be with the direction that it did not include Dr. Richmond, CEO of BHB and did not include Dr. Brathwaite, CEO of the BHC in the secretariat or any other role along with some time lines.

128. However, I have heard detailed submissions generally about the SHB and the lengthy process involved for any application. I have heard that the application process in this case has been going on now for more than two years of hearings and appeals as well as this application. Therefore, I am reluctant to have the matters extended further.

129. I have also heard the evidence of Dr. Brathwaite in his Second Affidavit wherein he states that the Minister has not-rebased the budget for the 2020 year and this will remain the case for 2021. Additionally, I have heard submissions that concurrent to that or because of that the Incumbent Providers are extended rather than a re-application being made by them and considered for approval. In my view, in these circumstances, to remit the matter for a third appeal hearing would continue the aspect of unfairness that I have already opined upon.

130. However, I am aware that nonetheless there is a budget for the SHB and that there are consequences if that budget is exhausted, primarily the Board possibly would not be able to continue some services. In mitigation against this possibility, the Applicants say that there will be no adverse impact on the budget as there will be no increase in quantity and cost of tests, as the same amount of tests will be shared by all the approved providers. Also, the Respondent in its 6 July 2020 First Appeal Decision letter stated that the issue of self-referrals was not considered by the First Appeals Panel and expressed no view on it, adding that further study is required.

131. In light of all the circumstances, and in applying the principles in the case of *Re Blast*, I am persuaded that I should substitute my own decision, as in my view it is not appropriate to follow the usual and normal course of remittal of the matter to the BHC. I recognise that there are competing interests in this matter. Factors in favour of remitting the matter are that the BHC can fulfill its obligations under the Regulations and the SHB Proposal Guide along with satisfying the public interest of ensuring that applicants are considered for approval. That public interest is also protected by the existing powers of the BHC in dealing with the annual re-application process for Incumbent Providers as and when they choose to apply it.

132. On the other hand, there are several reasons for granting the approval including that (a) there needs to be finality to the Applicants' Application which I anticipate has likely incurred considerable expenses by all parties thus far; (b) based on the historical timeline, there is likely to be further delay by the Respondents in (i) constituting a fresh appeals panel and secretariat and (ii) rendering a third appeal decision in a timely manner; (c) the reform of the healthcare system is a lengthy process, apparently without momentum currently - but life goes on for citizens and applicants; (d) the Incumbent Providers are operating in the current system and are being extended for 2021 rather than having to re-apply as a Full-Year Application; (e) I am reluctant to continue a process that in my view is unfair as between Incumbent Providers and the Applicants; (f) Incumbent Providers and the Applicants should be treated the same in respect of annual Full-Year Applications; (g) I am not persuaded that an additional service-provider will increase the quantity of testing

and thus costs; rather I am of the view that the testing will be shared amongst all the service providers; (h) According to the BHC itself, self-referral causing a negative impact on the budget is not an issue; and (i) the Applicants' Application that was submitted on a Full-Year Application has a reasonable prospect of success on its merits, including quality of care and modality of equipment, when leaving out the Key Mid-Year Criteria.

Conclusion

133. In light of the above reasons, the application by the Applicants for the relief sought is as follows:

a. I grant an order for certiorari quashing the decisions of the BHC dated 6 July 2020 and 29 September 2020;
b. I decline to make a declaration as sought;
c. I grant an order reversing the Appeal Decisions and approving the Applicants' application to provide the medical services applied for in its application dated 6 March 2019 under the Standard Health Benefit with immediate effect;
d. In light of granting approval by my order, there is no need to remit the matter for a re-hearing;

134. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs and/or damages, I direct that costs shall follow the event in favour of the Applicants on a standard basis, to be taxed by the Registrar if not agreed.

Dated 8 April 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT