

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 106/2015**

**APPLICATION NO 194/2015**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MRS JUSTICE MCDONALD-BISHOP JA  
THE HON MR JUSTICE WILLIAMS JA (AG)**

<b>BETWEEN</b>	<b>DALE AUSTIN</b>	<b>APPLICANT</b>
<b>AND</b>	<b>THE PUBLIC SERVICE COMMISSION</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Dale Austin in person and Duane Thomas for the applicant**

**Mrs Jacqueline Samuels-Brown QC and Lorenzo Eccleston for the respondents**

**2, 3 and 4 December 2015**

**ORAL JUDGMENT**

**PHILLIPS JA**

[1] The applicant has placed before us, an amended notice of application for court orders filed 27 November 2015 relating to appeal no 106/2015. We have heard detailed and comprehensive arguments from the applicant on his own behalf and have had the benefit of affidavit evidence and limited submissions on behalf of the respondents. The applicant sought several orders which were consequential on the main order sought

which was permission to appeal the orders made by G Fraser J on 23 October 2015 and by Lindo J on 25 November 2015.

[2] The order of G Fraser J, that is attached to the affidavit of Dale Austin, filed 28 October 2015, in support of notice of application for court orders, reads as follows:

**“In respect of the Defendants’ Notice of Application for Court Orders for Extension of Time filed on July 28, 2015 and served on September 9, 2015**

- (1) The time for the Defendants to file and serve the Defence to the Particulars of Claim is abridged.
- (2) The Defendants are granted an extension of time of ten (10) days of the date hereof to file the Defence to the Particulars of Claim.
- (3) Costs of the application is awarded to the Claimant payable within thirty (30) days in the sum to be agreed or taxed, otherwise the Defendants’ statement of case stands as struck out.

**In respect of the Defendants’ Notice of Application for Court Orders filed on October 7, 2015 and served on October 8, 2015:**

- (4) The Claimant’s claim for Judicial Review is to be adjudicated upon and tried separately from the private law defamation claim.
- (5) Costs of this application is [sic] to be costs in the claim.

**In respect of the Claimant’s Application for Court Orders filed and served on September 8, 2015 (and thereafter amended and filed on September 22, 2015 and further amended on October 12, 2015):**

- (6) The application for Court Order for the issues in connection with the claims for damages herein be treated and dealt with summarily at the next

hearing of the matter herein or in proceedings in the matter herein before the Full Court is refused.

- (7) The application for Court Order that the Defendants shall not be permitted to lead evidence and/or challenge the Claimant's evidence or allegations in the said proceedings as a consequence of their failure to file within time a Defence of the claims that are pleaded and particularised in the Claimant's Affidavit filed and served on December 19, 2014 and in his Particulars of Claim filed and served on June 15, 2015, is refused.
- (8) The application for Court Order that in the event that these claims become the subject of separate proceedings, that permission be granted to the Claimant to enter Judgment in Default of Defence against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of his claims in Defamation and Breach of Confidence is refused.
- (9) The application for Court Order that in any event the statement of case comprising the Defence and the Affidavit of Lois Parkes in response to the Affidavit of Dale Austin dated December 19, 2014 filed in the matter herein, is refused.
- (10) No order as to costs
- (11) Leave to appeal is refused in respect of all applications."

[3] The order of Lindo J, as contained in the supplemental affidavit of Dale Austin in support of amended notice of application for court orders filed 30 November 2015, reads as follows:

- "(1) The order made on October 23, 2015 by the Honourable Georgiana Fraser (Ag.), to wit,  
'Costs of the application is awarded to the Claimant payable within thirty (30) days in the sum to be agreed or taxed,

otherwise the Defendants' statement of case stands as struck out' is varied.

- (2) The varied order is to now read 'costs of the application awarded to the Claimant on October 23, 2015 payable within sixty (60) days of the Registrar issuing the costs certificate, otherwise the Defendants' statement of case stands struck out'.
- (3) The time for serving the Notice of Application is abridged.
- (4) Costs of this application to be costs in the claim.
- (5) Leave to appeal is refused."

[4] As is well known, rules 1.8(1), (2) and (9) of the Court of Appeal Rules, 2002 (CAR) govern this application. These rules read as follows:

Rule 1.8(1):

"Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."

Rule 1.8(2):

"Where the application for permission may be made to either court, the application must first be made to the court below."

Rule 1.8(9):

"The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

Both the decisions of G Fraser J and Lindo J required permission to appeal from the court below or this court. Both judges refused permission to appeal in the court below. The applications were therefore renewed before this court. Pursuant to the above

rules, this court can grant permission to appeal only if it is satisfied that the appeal has a “real chance of success”; that is the threshold. “Real chance of success” has been interpreted in several cases in this court such as **Donovan Foote v Capital and Credit Merchant Bank Limited et al** [2012] JMCA App 14 and **Duke St John-Paul Foote v University of Technology and Elaine Wallace** [2015] JMCA App 27 to mean “a real, and not a fanciful or unrealistic chance of success in the proposed appeal”. Indeed, as the applicant put it, “it is a gateway used by the court to distil matters that are fanciful and ought not to detain the court at all”.

[5] The applicant seeks several orders on the amended application no 194/2015. He has relied on 10 proposed grounds of appeal in relation to the order of G Fraser J and two proposed grounds of appeal in relation to the order of Lindo J.

[6] The applicant complains *inter alia* that G Fraser J: (i) erred in computing the time relating to the delay in filing the defence and as a consequence exercised her discretion wrongly to extend the time to file the defence therein; (ii) exercised her discretion wrongly, also in those circumstances, as no evidence had been provided in respect of the said defence; (iii) erred in also failing to examine the defence to ascertain whether it had any merit and (iv) also failed to assess the potential prejudice to the applicant on the grant of extension of time to file the said defence.

[7] The learned judge, the applicant averred, further erred in not properly considering whether the defence ought to be struck out and failing to do so, he said, was a breach of his constitutional rights under section 16(2) of the Charter of Rights.

The applicant also contended that G Fraser J had failed to exercise her discretion properly and judicially by separating the proceedings, that is, between the cause of action in defamation and the application for judicial review of *inter alia* the 1<sup>st</sup> respondent's decision to terminate the applicant's appointment as Assistant Crown Counsel in the Attorney-General's Chambers and for an order of certiorari to quash the same and for an order of mandamus directing the 1<sup>st</sup> respondent to reinstate him as this was, he submitted, also a breach of his fundamental rights.

[8] The applicant also challenged the judge's failure, once the order had been made to segregate the claims, not to permit the default process to follow in respect of the defamation claim. He also challenged the learned judge's interpretation of the application of rules 26 and 27 of the CPR with regard to the striking out of the claim and/or the power to deal with the same summarily.

[9] In the amended application no 194/2015, the applicant complains that Lindo J ought not to have varied the order of G Fraser J in relation to the payment of costs as at the time that Lindo J made the order, the period specified in the unless order of Fraser J had expired and the sanction embodied in the said unless order had already taken effect. As indicated the unless order of Fraser J was varied by Lindo J to permit the claimant to pay the costs within 60 days of the registrar issuing a costs certificate, otherwise the defendant's statement of case stood struck out.

[10] It is not disputed that the costs have not yet been taxed or agreed and that the application filed to vary G Fraser J's order had been filed before the date specified in

the unless order had expired, but it is absolutely clear that no order had been made before the time specified had expired. The issue therefore is whether the agreement and/or taxing of the costs was a condition precedent to the unless order taking effect, as counsel for the respondent submitted; or as the applicant submitted, were costs payable in any event, in that the application, which would not have stopped the effect of the order and the said order would have taken effect if the money was not paid. The applicant claims that the learned judge erred in failing to fully comprehend and take into account the law and the applicable principles relating to variation of orders previously made in this court.

[11] At the close of arguments on 3 December 2015, we indicated that we would give our decision in the matter with dispatch as we were cognizant of the fact that the fixed date claim form for judicial review was scheduled to be heard in March 2016; that the matter had had several adjournments and that if a substantive appeal is to be heard before that date then it was imperative that the outcome of this application be communicated promptly. Based on the orders we propose to make, we did not think it either prudent or necessary to regurgitate the arguments detailed before us, or to outline any specific views we hold in relation thereto.

[12] Suffice it to say, in our opinion, the applicant has crossed the threshold set out in rule 1.8(9) of the CAR as there are several issues arising from the proposed grounds of appeal outlined therein which, in our view, have a real chance of success on appeal. Therefore, in keeping with the provisions of the CAR as stated, and the overriding

objective, we consider it appropriate in all the circumstances to make the following orders:

- 1) Permission is granted to appeal the order of G Fraser J made on 23 October 2015.
- 2) Notice and grounds of procedural appeal filed in relation to Fraser J's order and the written submissions filed in support thereof shall be allowed to stand as the appeal.
- 3) Permission is granted to appeal the order of Lindo J made on 25<sup>th</sup> November 2015.
- 4) Notice and grounds of procedural appeal filed in relation to the order of Lindo J and the written submissions filed in support thereof shall be allowed to stand as the appeal.
- 5) There shall be a stay of the proceedings in the court below pending determination of the appeals in respect of the orders of G Fraser J and Lindo J.
- 6) Costs of the applications before G Fraser J and Lindo J in the court below shall be deferred for determination at the hearing of the appeal.
- 7) There shall be consolidation of the appeals against the orders of G Fraser J made on 23 October 2015 and Lindo J made on 25 November 2015; the appeals shall therefore be heard together.
- 8) Costs in relation to the consolidated appeal shall be determined at the hearing of the appeal.
- 9) The applicant is hereby allowed to add/amend/delete any of his grounds of appeal already filed and allowed to stand pursuant to orders 2 and 4 herein on or before 30 December 2015 and any such amended notice and grounds of appeal must be served on the respondents within five days of the filing of the same.



- 10)The respondents shall file and serve written submissions in reply with the authorities on which they intend to rely on or before 29 January 2016.
- 11)The applicant shall settle file and serve supplemental record of appeal and there shall be a case management conference fixed for hearing at the earliest practicable date.