JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 3/08

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN ORRETT BRUCE GOLDING
THE ATTORNEY GENERAL OF JAMAICA APPELLANTS

AND PORTIA SIMPSON MILLER RESPONDENT

R. N. A. Henriques, Q.C., Richard Small, Allan Wood, and Miss Daniella Gentles, instructed by Livingston, Alexander and Levy, for the appellants

Ms. Akilah Anderson and Franklin Halliburton, instructed by Linton Walters & Co. for the respondent

March 3, 4 and April 11, 2008

PANTON, P.

1. On March 4, 2008, we allowed the appeal herein, and set aside the order of Donald McIntosh, J. made on January 10, 2008, extending time to apply for judicial review consequent on the order of Miss Justice Beckford, made on December 13, 2007. We also awarded costs of the appeal to the appellants.

2. The decision of McIntosh, J., fell to be considered against the background of the earlier proceedings before Beckford, J. The latter had granted leave to

the respondent to apply for judicial review, and had ordered a stay of all proceedings connected with the application until January 10, 2008, the date of the next hearing. Miss Justice Beckford had also ordered that the relevant documents be served in accordance with the Civil Procedure Rules.

3. The application before Beckford, J., stemmed from a disagreement between the first appellant, who is Prime Minister of Jamaica, and the respondent, who is Leader of the Opposition in respect of the intended removal from office of the members of the Public Service Commission. The record of appeal indicates that by the time the matter was called on before Beckford, J., King's House had already issued a news release that His Excellency the Governor General had issued the instruments of revocation, and they had been served on the members of the Commission.

4. As indicated earlier, the respondent was nevertheless given leave to apply for judicial review, with the hearing date fixed for January 10, 2008. The granting of leave was in accordance with the provisions of Part 56 of the Civil Procedure Rules which came into force in 2003. Rule 56.2 lists the persons who may apply for judicial review, whereas rule 56.3 states the method of application and the details that must be given when an application is made. Rule 56.4 deals with the hearing of the application, stating what the judge may or must do. Rule 56.4 (12) is of great importance for the purposes of this appeal, and so must be quoted:

> "Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave".

This provision required the respondent to file and serve certain documents on the appellants within fourteen days of December 13, 2007, that is, by December 27, 2007. Among these documents would have been a fixed date claim form. The record indicates that the respondent did not comply with this requirement, although her attorneys-at-law were reminded of this failure by the appellants' attorneys-at-law by virtue of a printed form served on them on December 20, 2007.

5. On January 10, 2008, the parties appeared before Donald McIntosh, J. This appearance ought to have been for the hearing of the application for judicial review. However, this was not to be. Instead the respondent placed before the learned judge a "notice of application for court orders". The orders sought were:

> "1. That the time for making the application for judicial review as granted on December 13, 2007 by this Honourable Court be extended until the date of the making of this order;
>
> 2. Liberty to apply;
>
> 3. That time for service be abridged."

The record indicates that this application had been filed and served on that very day! In making this application, the respondent relied on an affidavit filed by Miss Akilah Anderson who appears on behalf of the respondent in this appeal.

Miss Anderson is an attorney-at-law of the law firm of Knight, Junor & Samuels. Her affidavit states, incorrectly it seems, that that firm was on record as attorneys-at-law for the respondent. She was on leave from her chambers and out of the jurisdiction at the time of the granting of leave to apply for judicial review. She assumed conduct of the matter on Christmas Eve, 2007, and on January 9, 2008, while preparing for the hearing scheduled for the 10th January, she realized that the December 13 order of the Court had not been complied with – hence, the application before McIntosh, J.

6. Having heard submissions from the attorneys-at-law for the appellants and respondent, McIntosh, J., ordered thus:

> "1. This Court extends time for a period of fourteen (14) days for the Claimant to apply for Judicial Review.
>
> 2. Application to be served on Respondent.
>
> 3. Leave to appeal granted generally."

It will be noted that the application that was before the learned judge was for time to be extended from December 13, 2007, until the date of the making of this order, that is January 10, 2008; and for the time for service to be abridged, that is, shortened or cancelled. Learned Queen's Counsel, Mr. Henriques, felt compelled to pen a letter to the learned judge seeking clarification of the order as there was an "element of ambiguity in the order". McIntosh, J., replied expressing his regret that the learned Queen's Counsel had found his orders ambiguous. He continued:

> "The claimant was granted fourteen (14) days in which to file a Fixed Date Claim Form for Judicial Review.
>
> The fact that I granted leave generally for the parties to appeal any of my orders or the orders of Beckford J., pursuant to these proceedings should have removed any misunderstanding."

If it was the intention of the learned judge to have made an order in terms of the contents of paragraph 1 of his letter, this would not have been in conformity with paragraph 1 of the order that he made at the hearing.

Grounds of Appeal

7. The appellants filed six grounds of appeal. They read thus:

> "(a) The learned Judge was wrong in law in extending the time within which the Respondent was to file a Fixed Date Claim Form as the grant of leave to the Respondent to apply for Judicial Review was conditional on the Respondent making a claim for Judicial Review pursuant to Rule 56.4 (12) of the Civil Procedure Rules 2002 within fourteen (14) days of the grant of leave and as the time had expired without the Respondent making a claim for Judicial Review and it was incumbent on the Respondent to re-apply for leave.
>
> (b) The learned Judge erred as a matter of law as he failed to appreciate that once the Respondent had not filed a Claim Form for Judicial Review within fourteen (14) days of receipt of the Order granting leave to apply for Judicial Review, the leave lapsed and/or had expired and in accordance with the Practice Direction, issued on the 30th May 2006 effective on the 1st June 2006, the Respondent ought to have made a new application for leave to apply for Judicial Review in the same proceedings and the Respondent failed to give any or any reasonable basis for departing from the requirements of the Practice Direction.

(c) The learned Judge was wrong in law in extending the time to apply for Judicial Review based on Rule 56.6(2) of the Civil Procedure Rules 2002 as this rule refers to applications for leave to apply for Judicial Review and not applications for Judicial Review after leave has been granted and was therefore inconsistent with the requirements of the Practice Direction and Rule 56.4 (12) that leave was conditional upon the filing of a Fixed Date Claim Form within fourteen (14) days and upon the failure to do so, an application for leave had to be renewed in the same proceedings.

(d) If the learned Judge had a discretion to extend time for the filing of the application for Judicial Review by the filing of a Fixed Date Claim Form the learned Judge wrongly exercised the discretion in circumstances where the orders and relief being sought had been overtaken by the dismissal of the members of the Public Service Commission and the appointment of a new Public Service Commission.

(e) If the learned Judge had a discretion to extend time for the filing of the application for Judicial Review by the filing of a Fixed Date Claim Form, the learned Judge wrongly exercised the discretion as there was no material or no sufficient material before him explaining the failure to file the application upon which he ought to have exercised such a discretion.

(f) The learned Judge failed to give adequate or any reasons for his decision."

8. Learned Queen's Counsel submitted that judicial review proceedings are different from ordinary civil proceedings, and it is important that the procedures specified be followed. He said that the failure to comply with the order of Beckford, J., in keeping with Rule 56.4 (12) was fatal, as the leave to apply for judicial review had lapsed on December 27, 2007, by which date the Fixed Date

Claim Form should have been filed. In support of this point, he cited the case ***Re: Board of Governors of the Jonathan Grant High School ex parte Castel Gordon*** (1997) 34 J.L.R. 592, with particular reference to page 594 C-F. Indeed, he combed the entire Part 56 of the Civil Procedure Rules in his effort to show that the respondent was not entitled to an order extending time. Mr. Henriques also cited the following cases: ***Beverley Levy v. Ken Sales & Marketing Ltd.*** (P.C. App. No. 87 of 2006), ***Flannery v Halifax Estate Agencies Ltd*** [2000] 1 W.L.R. 377, *and* ***English v Emery Reimbold*** [2002] 3 All ER 385.

9. Miss Anderson, for the respondent, submitted that although claims must be brought and pursued expeditiously, the Court is more flexible in dealing with matters of judicial review. She contended that under Rule 56.4 (12), if fourteen days have passed, the right to apply for judicial review is extinguished only if there has been undue delay. "The right was delayed, not extinguished", she said. She submitted further that the Court had the power to vary the condition imposed by Rule 56.4 (12), although there was no specific provision to that effect. Notwithstanding this observation by Miss Anderson as to the absence of a specific provision, she submitted that by embracing the provisions of Part 11 of the Rules, dealing with applications for Court Orders, the power to vary the condition would be available to the Court.

10. I do not find Miss Anderson's arguments attractive in any respect. Part 11 of the Civil Procedure Rules provides "general rules" in relation to application for Court Orders, whereas Part 56 deals specifically with Administrative Law. Where it is intended that these special rules are to be affected by other rules, it is so stated. For example, in Rule 56.13(1), it is provided that Parts 25 to 27 of the Rules apply. The provision reads thus:

> "At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and Parts 25 to 27 of these Rules apply".

It cannot be that without there being a statement to that effect, the special rules are to be watered down by any and every other provision in the body of Rules. That would make a mockery of the entire Rules, and provide countless loopholes for dilatory litigants and their attorneys-at-law. The whole point of providing for the orderly conduct of litigation would be defeated.

11. By an amendment made on September 18, 2006, Rule 56.4(12), as mentioned earlier, provides that "leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave". One does not require the use of a dictionary to appreciate that "conditional" means "not absolute", "dependent". In the instant circumstances, the leave that was granted was dependent on the applicant making her claim within fourteen days of the order. By ordinary calculation, the claim ought to have been made by the 27th December that is within fourteen days from the 13th December, 2007,

the date of the order of Beckford, J. The Interpretation Act provides that when an act is directed to be done within any time not exceeding six days, excluded days (that is, Sundays and public holidays) shall not be reckoned in the computation of the time. That means that where, as here, the period is more than six days, excluded days are to be counted. Even if it were to be thought that Christmas Day and Boxing Day were to be excluded, the respondent would still have been out of time.

12. Prior to the introduction of the Civil Procedure Rules, there was a similar provision in the law that governed these applications. The case ***Re: Board of Governors of Jonathan Grant High School, Ex Parte Castel Gordon*** (1997) 34 J.L.R. 592 illustrates how our Courts have interpreted the provision. Section 564 (c) of the Judicature Civil Procedure Code provided thus:

> "Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than one month after the date of the proceeding ..."

Section 564 D(2) provided :

> "Unless the notice or summons is filed within fourteen days after leave has been granted the leave shall lapse".

In delivering the judgment of the Full Court, Harris, J. (as she then was), said:

> "Leave to apply for the order of certiorari was granted on July 10th, 1996 and proceeding on the premise that the granting of leave had been regularly

> obtained, a Notice of Motion should have been filed on or before the 25th July, 1996 but was however filed on 10th February, 1997, a date which far exceeded the 14 days limited for its filing. The leave granted would have lapsed by the 25th July, 1996.
>
> There has been non-compliance on the part of the applicant in making his application for leave to apply for an order of certiorari within one month of the decision of the School Board, which is sought to be quashed. No application for extension of time to make the application was presented, nor was any notice of intention to extend time given to the Respondent. Although leave was granted to apply for the order to issue the writ of certiorari, the notice of motion was not filed within 14 days as prescribed and the leave would have therefore lapsed". (Emphasis added).

Wolfe, C.J. and Ellis, J. agreed with the conclusions drawn by Harris, J.

13. In the instant case, the respondent had the benefit of fourteen days after the 13th December, 2007, to file the claim. This was not done. The effort by Miss Anderson, through her affidavit, to have time extended for the purpose of filing the claim was wasted effort. The Rules forbid an extension of time in the instant circumstances. Notwithstanding the fruitlessness of Miss Anderson's effort, no harm is done by examining her affidavit. In it, she stated that the attorneys-at-law on the record for the respondent were Knight, Junor & Samuels, and that she is an attorney-a-law of that firm. The record however does not disclose Knight, Junor & Samuels as being the attorneys-at-law on the record. Rather, the record has Linton Walters & Company of 2 Duke Street, Kingston, as the attorneys-at-law on the record. Indeed, Mr. Walters filed an affidavit in this

Court on February 1, 2008, stating that he was the attorney-at-law on record. His affidavit was filed in support of an application to have the appellate proceedings adjourned when the matter came before us on February 4, 2008. At that time, he said that Mr. K. D. Knight, Q.C., was the attorney-at-law who would be arguing the appeal and he was out of the jurisdiction. The application was granted.

14. Knight, Junor & Samuels, not being the attorneys-at-law for the respondent, compliance with the order of Beckford, J. could not therefore have been expected from them. It is therefore difficult for me to see how Miss Anderson came into the picture as someone offering an excuse for the lapse on the part of the respondent and her legal team. Indeed, Miss Anderson was on leave and outside the jurisdiction of the Court. It appears to me that she unjustifiably took unto herself blame which lies elsewhere. That being so, assuming that McIntosh, J., had jurisdiction to extend the time, there would not have been any proper material before him for the exercise of such jurisdiction.

15. Before leaving this matter, I have to remind litigants and their attorneys-at-law that they ignore the Civil Procedure Rules at their peril. The days of paying scant regard to the Rules are over. Those days went out with the 1990s. It will not always be productive to cite authorities from diverse jurisdictions on this point. Those jurisdictions do not necessarily suffer from the problems that we face in our Courts. Ignoring the Rules over the years has been a major

factor in the length of time that matters have taken to be disposed of in this country. There can be no return to such times as it is not in the interests of justice for the Courts to permit such laxity.

16. It is for the above stated reasons that I agreed with my very learned colleagues that there was merit in the appeal which should be allowed, with costs to the appellants to be agreed or taxed. However, there is one other aspect of the matter, though not argued, that requires comment. It is the question of the locus standi of the respondent. The Rules set out in unambiguous terms the persons who have a right to bring an action such as this. The respondent does not seem to fall in any category there stated. As Leader of the Opposition, she does not seem to have the authority to bring an action of this nature in the circumstances that obtain in this case. Had she not been consulted, the situation would have been different as the Constitution makes it mandatory for such consultation to take place.

SMITH, J.A.:

The issue in this appeal is whether or not D. McIntosh, J. erred in enlarging the time within which an applicant, to whom conditional leave had been granted, may make a claim for judicial review.

On the 13th of December, 2007 Beckford J. granted the respondent leave to apply for judicial review of the 1st appellant's recommendation to His Excellency the Governor General that the members of the Public Service Commission be removed from office for reasons of misbehaviour. Beckford, J. also ordered that all proceedings be stayed until the 10th of January, 2008.

Leave having been granted, the next procedural step required the respondent to file a fixed date claim form for judicial review within fourteen (14) days of receipt of the order granting leave. See rule 56. 4 (12). The Respondent did not make a claim for judicial review within the prescribed time or at all.

On the morning of the 10th of January, 2008, the respondent filed an application in the Supreme Court for an order granting an extension of time within which to file a claim for judicial review.

The application for extension of time went before D. McIntosh, J. who made the following order:

> "1. This court extends time for a period of fourteen (14) days for the claimant to apply for judicial review.
>
> 2. Application to be served on respondent.
>
> 3. Leave to appeal granted generally."

Before this court Mr. Henriques, Q.C. for the appellants argued that, on a proper interpretation of rule 56.4 (12) of the Civil Procedure Rules 2002, the effect of the respondent failing to make a claim for judicial review within fourteen (14) days of receipt of the Order granting leave, (to apply for judicial review) is that leave has expired. Learned Queen's Counsel contended that on the 10th of January, 2008, when the matter came up for the first hearing, there was nothing for the court to extend, as the leave had expired on the respondent's failure to file the claim for judicial review.

Miss Anderson for the respondent submitted that the learned Trial Judge had the power and discretion to extend the time prescribed by rule 56.4 (12) for the filing of the claim on receipt of the order granting leave. She relied on rules 26.1 (2) (c) and 56.13.

The Legislative Scheme

Part 56 of the Civil Procedure Rules 2002 deals with applications for judicial review. Such applications are referred to generally in part 56 as

applications for administrative orders – see rule 56.1 (2). Judicial review, of course, includes the remedies of certiorari, prohibition and mandamus.

A person wishing to apply for judicial review must first obtain leave – rule 56.3 (1). An application for leave must be considered forthwith by a judge of the Court – rule 56.4 (1). The requirement for leave is to ensure that no frivolous, vexatious or unmeritorious applications for judicial review are made and also to avoid abuse of the process of the Court. This is clearly the aim and intendment of rule 56.3 (3) and (4).

This appeal turns on the interpretation of rule 56.4 (12) which provides:

> "Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim form for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute.

The question is – does the court have the power to vary the condition by enlarging the time prescribed by rule 56.4 (12)?

Miss Anderson relied on rules 56.13 (1) and 26.1 (2) (c) in arguing that the court has such a discretion.

Rule 56.13 (1) reads:

> "At the first hearing the judge must give directions that may be required to ensure the expeditious and just trial of the claim and the provisions of parts 25 to 27 of these rules apply".

Rule 26.1 (2) (c) provides:

> "Except where the rules provide otherwise, the court may –
>
> (a) ...
> (b) ...
> (c) Extend or shorten the time for compliance with any rule practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;
> (d) ..."

As Mr. Henriques, Q.C. submitted, rule 56.13 speaks to a situation where the claim form and affidavit in support thereof have been duly filed and served pursuant to rule 56.11. Rule 56.13, in my view, mandates the court to treat the first hearing as a case management conference.

An application for an administrative order can only get to the case management stage as contemplated by rule 56.13 after leave has been granted and the claim for review has been made within the time prescribed by rule 56.4 (12).

It seems to me that the main procedural stages in an application for judicial review are as follows:

1. The application for leave (rule 56.3).

   This application must be made promptly and in any event within three (3) months from the date when grounds for the application first arose (rule 56.6 (1). However the court may extend the time for applying for leave – see rule 56.6 (2).

2. If leave is granted the judge must fix a date for the first hearing (rule 56.4 (11). Such leave is conditional on the applicant filing a fixed date claim form in form 2, within fourteen (14) days of the order granting leave – see rule 56.4 (12) and 56.9. This is the commencement of the substantive application. (If leave is refused rule 56.5 (infra) applies).

3. The claim form and affidavit in support must be served on all the parties directly affected not less than fourteen (14) days before the date fixed for the first hearing (rule 56.11 (1)).

4. The claimant must file, not less than seven (7) days before the date fixed for the first hearing, an affidavit giving the names and addresses of all persons who have been served and the details of such service as specified in rule 56.11 (5).

5. The first hearing pursuant to rule 56.13 (case management conference).

6. The full hearing.

It seems reasonably clear to me that in the scheme of things rule 56.13 does not support the contention that rule 26 is applicable at the leave stage. Rule 56.13 clearly states that the provisions of parts 25 to 27 apply at the first hearing.

Another question which arises is whether a claimant, who fails to file a claim within fourteen (14) days of the receipt of the order granting leave, may renew the application for leave.

Rule 56.5 speaks to this situation. It provides:

> "(1) Where the application for leave is refused by the judge or is granted on terms (other than under rule 56.4 (12)) the appellant may renew it by applying –
>
> (a) in any matter involving the liberty of the subject or in any criminal cause or matter to a full court.
>
> (b) In any other case to a single judge sitting in open court.
>
> (2) A single judge may refer the application to a full court.
>
> (3) No application not involving the liberty of the subject or a criminal cause or matter may be renewed after a hearing.
>
> (4) An applicant may renew his application by lodging in the registry notice of his intention.
>
> (5) The notice under paragraph (4) must be lodged within 10 days of service of the judge's refusal or conditional leave on the applicant.
>
> (6) The court hearing an application for leave may permit the application under rule 56.3 to be amended".

It is not disputed that there was a hearing before Beckford, J. on the 13th of December, 2007. The application does not involve the liberty of the subject or

a criminal cause or matter. Accordingly, by virtue of rule 56.5 (3), the Respondent's application may not be renewed. Recently this court (Smith, J.A., Harrison, J.A. and G. Smith, J.A. (Ag.)) in **Barrington Gray v the Resident Magistrate for the parish of Hanover,** Application No. 148/07 delivered on the 23rd of November, 2007 held that an application for leave which did not involve the liberty of the subject or a criminal matter and which was refused after a hearing could not be renewed.

Further, rule 56.5 (1) does not permit the renewal of an application for leave where the applicant has failed to make a claim for judicial review pursuant to rule 56.4 (12). I do not think that the Practice Direction issued to take effect on June 1, 2006 to which reference was made by Mr. Henriques, Q.C., is helpful in this regard.

The provisions of part 56.4 (12) are apparently intended to protect respondents, usually government bodies, from tardy challenge. I feel constrained to mention that the curtailing of an applicant's right to renew a leave application has been criticized by the English Court of Appeal - see **R v Income Tax Special Commissioner ex p. Stipplechoice Ltd**. (1985) 2 All E.R. 465, 467b.

We have seen that rule 56.13 does not support the contention that the court may invoke the provisions of rule 26 at the leave stage. Rule 56.13 speaks only to the powers of the court at the first hearing stage. We have also seen

that leave is granted on terms of rule 56.4(12) and that the rules do not permit the renewal of the application for leave in the event that the applicant fails to file the claim within the prescribed time.

The critical questions now are:

1. whether or not the court in the exercise of its general powers under rule 26.1 (2) (c) may enlarge the time for the filing of the claim form notwithstanding the provisions of rule 56.13; and

2. whether or not the court has the power to grant the extension under rule 26.9 (3), which addresses the general power of the court to rectify matters, where there has been a procedural error.

Rule 26.9 (3) provides:

> "Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put things right".

The second question can be dealt with shortly. Rule 26.9 (1) clearly states that rule 26.9 only applies where the consequence of non-compliance has not been specified.

It seems to me that under rule 56.4 (12) the consequence of failure to make a claim for review within the prescribed time is that the leave will lapse – it will become invalid.

It is interesting to note that the wording of section 564 D (2) of the Civil Procedure Code, the predecessor of the CPR 2002, was:

> "Unless the Notice or Summons is filed within fourteen (14) days after leave has been granted, the leave shall lapse".

The wording was changed in the CPR 2002, which came into effect on January 1, 2003 to read:

> "Leave must be conditional on the applicant making a claim for judicial review within 14 days of the receipt of the order granting leave".

This wording was altered on September 18, 2006 by the deletion of the words "must be" and the substitution of the word "is" therefor. It seems to me that the removal of the auxiliary verb "must be" makes it clear beyond peradventure that, when granted, the leave automatically becomes conditional. In other words, the court need not state that it is conditional. Failure of the judge to so state cannot be the basis for the argument that the order is imperfect.

In light of the foregoing, I am firmly of the view that rule 56.4 (12) provides a consequence for failure to comply. Accordingly, rule 26.9 (3) is not applicable to the instant case – see **Barrington Gray v the R.M. for Hanover ex p. Dr. D.K. Duncan** (No. 1), SCCA 99/07 delivered 19th October, 2007.

I now turn to the question as to whether the court may invoke the general powers under rule 26.1 (2) (c) to enlarge the time within which the respondent may file the claim.

Miss Anderson, for the respondent, placed emphasis on the provisions of subsection 1 which is, in some sort, a preamble to rule 26.1. This subsection states:

> "(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment".

Of greater significance, in my view, is the restriction imposed on the power conferred by the introductory words of rule 26.1 (2) – "Except where these rules provide otherwise".

In my judgment, the provisions of rule 56.13 which expressly make the provisions of rule 26 applicable at the first hearing stage, limit the circumstances in which the court may exercise its general powers under the latter in applications for administrative orders.

Unless a particular rule so provides, the court may not exercise its general powers of case management at any stage before the substantive proceedings have commenced. And proceedings are properly started by the filing of the claim form within fourteen (14) days of the granting of leave. One such particular rule is rule 56.6 (2) which empowers the court to extend the time for making the application for leave. There is no special provision permitting the

extension of time for filing the claim pursuant to rule 56.4 (12). This is why, of course, the respondent seeks to pray in aid the general provisions of rule 26.1 (2) (c). But these provisions cannot avail the respondent because the rules provide otherwise.

Further, the curtailing of the applicant's ability to renew the application where he has failed to file the claim in the time prescribed by R. 56.4 (12) seems, in my view, to support the contention that the court may not, in the exercise of its general powers, enlarge the time prescribed by that rule.

The English case of **Vinos v Marks and Spencer** plc (2001) 3 All ER 784 is instructive. The facts as stated in the headnote are as follows:

> "The claimant, V, suffered injuries in an accident at work. After lengthy negotiations with the defendant's insurers had failed to produce a final settlement, V's solicitors issued proceedings about a week before the expiry of the limitation period. Due to an oversight however, they did not serve the claim form until nine days after the expiry of the four month period prescribed by the CPR. V subsequently applied for an extension of time for serving the claim form, while the defendant applied to set aside service. Under CPR 7.6 (3) where a claimant applied for an order to extend the time for service of this claim form after the end of the prescribed period for service, the court could make an order "only if" (a) the court had been unable to serve the claim form, or (b) the claimant had taken all reasonable steps to serve the claim form, but had been unable to do so, and (c) in either case, the claimant had acted promptly in making the application. The district judge held that he had no discretion to extend the time since the case fell outside paras (a) and (b) of r. 7.6 (3). Accordingly he dismissed V's application and granted the defendant's

> application. The district judge's decision was upheld by the circuit judge and appealed to the Court of Appeal. On appeal V accepted that he could not rely on r. 7. 6 (3) or on r.3.1 (2) which gave the court a power to grant a post – expiry application for extension of time for complying with a rule except where the CPR provided otherwise. (R 3.1 (2) is almost identical to our rule 26.1 (2) (c)). He nevertheless contended that the court had power to grant the extension under CPR 3.10 which provided that where there had been an error of procedure, such as a failure to comply with a rule, the court could make an order to remedy the error (Also this rule is almost identical to our rule 26.9 (3).) In particular, V contended that rule 3.10 (r 26.9 (3) contained a general power to rectify matters where there had been an error of procedure, that a failure to serve the claim form within the prescribed period was an error of procedure and that the only restriction on the power in r 3.10 was that to be derived from the CPR's overriding objective, namely to enable the court to deal with cases justly..."

It was held that –

> "where a claimant, after the expiry of the time limit for serving a claim form, applied for an order extending the time for service, the court had no power to make such an order if the circumstances fell outside CPR 7.6 (3). The general words of r 3.10 (r. 26.9) (3)) could not extend to enable the court to do what r 7.6 (3) expressly forbade, nor to extend time when the specific provision of the rules which enabled extensions of time specifically did not extend to making that extension of time.
>
> Interpretation to achieve the overriding objective did not enable the court to say that provisions which are quite plain meant what they did not mean, nor that the plain meaning should be ignored..."

Although the Vinos case can be distinguished from the instant case, it is helpful in that it involves the consideration and application of the introductory

words of rule 26.1 (2) – "Except where these rules provide otherwise", the interpretation of rule 26.9 (3) and the application of the overriding objective principle of rule 1.1.

It certainly fortifies my view that rule 26.9 (3) cannot avail the respondent.

It was for the foregoing reasons that I agreed that the appeal should be allowed.

HARRIS, J.A.

On March 4, 2008 we allowed an appeal by the appellants in respect of an order of Donald McIntosh, J. made on January 10, 2008 extending time to apply for judicial review consequent on an order of Beckford, J. made on December 13, 2007. We promised to reduce our reasons to writing. We now fulfil that promise.

Two appeals were before the court. The first was in respect of an order of Beckford, J., made on December 13, 2007 granting the respondent leave to proceed to judicial review. The second challenged an order of Donald McIntosh, J. made on January 10, 2008 extending the time within which the respondent may apply for judicial review.

On December 13, 2007 the respondent filed an amended exparte application for judicial review seeking the following orders:

> "(1) An Order of Certiorari quashing the recommendations of the First Defendant to His Excellency the Governor General that the members of the Public Service Commission be removed from office for reasons of misbehaviour.
>
> (2) An Order of Prohibition prohibiting the First Defendant from recommending to His Excellency the Governor General the removal from office for reasons of misbehaviour the members of the Public Service Commission.
>
> (3) An injunction restraining the First Defendant from recommending to the Governor General that the members of the Public Service Commission be removed from office for misbehaviour until the members of the Public Service are afforded a fair hearing by an independent and impartial Tribunal into the allegations of misbehaviour.
>
> (4) Such further and/or other relief as this Honourable Court deems just.
>
> (5) An Order as to the costs of this claim.
>
> (6) A Declaration that the First Defendant acted unconstitutionally, unlawfully and/or contrary to the Principles of Natural Justice when he recommended to the Governor General that the members of the Public Service Commission be removed from the office for misbehaviour."

The application was heard on December 13, 2007, by Beckford, J. The appellants' attorneys-at-law were present at the hearing, having been made

aware of the date of the application through the news media. Orders in the following terms were made by the learned judge:

> "1. Leave for Judicial Review is granted as prayed;
>
> 2. All proceedings connected herewith be stayed until 10th January 2008, the date of the next hearing;
>
> 3. Service on the Defendants be done in accordance with the Civil Procedure Rules;
>
> 4. Hearing to last one (1) day."

On December 18, 2007, the respondent filed yet another application for judicial review. In that application the remedies sought were substantially the same as those sought in the application of December 13, 2007. It was heard by Donald McIntosh, J. on December 18, and he made the following orders:

> "1. Application for Judicial Review to be heard inter parties on the 28th day of December, 2007 at 10:00am. in the fore noon.
>
> 2. That the First Defendant makes no recommendations to fill the vacancies in the Public Services Commission before the inter parties hearing of the matter.
>
> 3. The Defendants to be served with all relevant documents by the 20th day of December, 2007.
>
> 4. The Claimant, her Agents and/or Representatives not to have proceedings aired in public media prior to the hearing of inter partes matter.
>
> 5. Claimant to prepare, file and serve orders."

On December 19, 2007 the appellants were served with copies of the formal orders of December 13th and 18th, 2007. Following this, they made an application for leave to appeal the order of December 13th. This was fixed for hearing on January 10, 2008.

On December 28, 2007, the application which was fixed for hearing on that date was heard by Donald McIntosh, J. He refused leave to apply for judicial review.

On January 10, 2008 the respondent filed an application for an extension of time within which to apply for judicial review purportedly in pursuance of the orders of December 13, 2007. The applications for extension of time and for leave to appeal were heard by Donald McIntosh, J., on January 10, 2008 when he made the following order:

> "1. This Court extends time for a period of fourteen (14) days for the Claimant to apply for Judicial Review.
>
> 2. Application to be served on Respondent.
>
> 3. Leave to appeal granted generally. "

Arguments in respect of the second appeal were first heard, as, it was the opinion of the court that the second appeal subsumes the first.

The following grounds of appeal were filed:

> "(a) The learned Judge was wrong in law in extending the time within which the

Respondent was to file a Fixed Date Claim Form as the grant of leave to the Respondent to apply for Judicial Review was conditional on the Respondent making a claim for Judicial Review pursuant to Rule 56.4(12) of the Civil Procedure Rules 2002 within fourteen (14) days of the grant of leave and as the time had expired without the Respondent making a claim for Judicial Review and it was incumbent on the Respondent to re-apply for leave.

(b) The learned Judge erred as a matter of law as he failed to appreciate that once the Respondent had not filed a Claim Form for Judicial Review within fourteen (14) days of receipt of the Order granting leave to apply for Judicial Review, the leave lapsed and/or had expired and in accordance with the Practice Direction, issued on the 30th May 2006 effective on the 1st June 2006, the Respondent ought to have made a new application for leave to apply for Judicial Review in the same proceedings and the Respondent failed to give any or any reasonable basis for departing from the requirements of the Practice Direction.

(c) The learned Judge was wrong in law in extending the time to apply for Judicial Review based on Rule 56.6(2) of the Civil Procedure Rules 2002 as this rule refers to applications for leave to apply for Judicial Review and not applications for Judicial Review after leave has been granted and was therefore inconsistent with the requirements of the Practice Direction and Rule 56.4(12) that leave was conditional upon the filing of a Fixed Date Claim Form within fourteen (14) days and upon the failure to do so, an application for leave had to be renewed in the same proceedings.

(d) If the learned Judge had a discretion to extend time for the filing of the application for Judicial Review by the filing of a Fixed Date Claim Form the learned Judge wrongly exercised the

discretion in circumstances where the orders and relief being sought had been overtaken by the dismissal of the members of the Public Service Commission and the appointment of a new Public Service Commission.

(e) If the learned Judge had a discretion to extend time for the filing of the application for Judicial Review by the filing of a Fixed Date Claim Form, the learned Judge wrongly exercised the discretion as there was no material or no sufficient material before him explaining the failure to file the application upon which he ought to have exercised such a discretion.

(f) The learned Judge failed to give adequate or any reasons for his decision."

Mr. Henriques, Q.C. submitted that the respondent was under an obligation to have filed a Fixed Date Claim Form by December 27, 2007 and having not done so, the leave granted to her, being a condition precedent, expired by reason of her failure to file the requisite pleading within the prescribed period and there was therefore no basis upon which the court could have extended time.

Miss Anderson argued that the court is empowered to vary conditions imposed by rule 56.4 (12) of the Civil Procedure Rules 2002, (C.P.R.) and although there are no specific provisions in Part 56 of the said rules dealing with extension of time for the filing of an application for judicial review subsequent to the grant of leave, rule 56.13, by importing the provisions of rules 25 - 27,

permits the court to extend time to comply with any rule, order, directions or practice directions.

Part 56 of the C.P.R. outlines the procedure with respect to applications for administrative orders. It mandates that the judicial review process be carried out in two stages. An application for leave to apply for judicial review must first be made. This is followed by the filing of a Fixed Date Claim Form supported by evidence on affidavit for judicial review, after leave has been granted. Under rule 56.4 (12) of the C.P.R. leave is conditional upon the applicant making a claim within 14 days from the date of the obtaining of leave. The rule reads:

> "Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

The critical issue in this case is centered on the true interpretation of this rule.

Rule 56.6 makes provision for extension of time for making an application for leave for judicial review where there is a delay in doing so. Under rule 56.6 (1) an application for judicial review must be made promptly or within 3 months from the date on which the grounds for the application first arose. The court, however, will entertain an application for leave made outside the 3 months period if good reasons for delay are proffered. I must hasten to add that this is not a situation where the applicant had been tardy in making her application.

She had been afforded a hearing and therefore could not have been aided by rule 56.6. Miss Anderson had in fact correctly observed that Part 56.6 of the rules is inapplicable to a situation in which there has been a prior hearing.

Rule 56.5 (1), makes provision for circumstances in which an application for leave is granted on terms or refused. The rule reads:

> "56.5 (1) Where the application for leave is refused by the Judge or is granted on terms (other than under rule 56.4 (12), the applicant may renew it by applying—
>
> (a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a full court; or
>
> (b) in any other case to a single judge sitting in open court."

Only in certain matters rule 56.5 (3) permits the renewal of an application for judicial review after a hearing. The rule states:

> "56.5(3) No application not involving the liberty of the subject or a criminal cause or matter may be renewed after a hearing."

Rule 56.9 outlines the procedure by which an application for judicial review is made. Rule 56.9 (1) and (2) states:

> "56.9 (1) An application for an administrative order must be made by a fixed date claim in form [sic] 2 identifying whether the application is for—
> (a) judicial review;

(b) relief under the Constitution;

(c) a declaration; or

(d) some other administrative order (naming it), ...

(2) The claimant must file with the claim form evidence on affidavit."

Rule 56.11 makes provision for the claim form to be served on all interested parties not less than 14 days before the date of the first hearing.

It is a cardinal rule of construction that words must be given their ordinary and natural meaning. The words of the rules are plain. There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4 (12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9 (1) (a) and 56.9 (2). It follows therefore that it would be obligatory on the part of the applicant to present the requisite documents within the time specified.

Rule 56.5 (1) expressly excludes the renewal of an application after a hearing has taken place under rule 56.4 (12). Rule 56.5 (3) does not allow the renewal of an application for judicial review save and except in matters affecting the liberty of the subject or in criminal causes. It is abundantly clear that an applicant who obtains leave to apply for judicial review must comply with the

condition laid down in rule 56.4 (12) by bringing a claim before the expiration of 14 days from the grant of such leave.

If the framers of rule 56.4 (12) had intended to confer on the court the power to renew an application for the grant of leave for judicial review after a hearing, specific provisions for so doing would have been made by Part 56. No such provision had been made. By rule 56.4 (12), when read in conjunction with rules 56.5 (1) and 56.5 (3), it is obvious that an application for judicial review is not renewable after a hearing. On a true construction of rule 56.4 (12) the grant of leave is dependent upon the respondent filing a Fixed Date Claim Form and supporting affidavit within 14 days of the grant of leave. The pleading having not been filed within the prescribed time, the condition remained unfulfilled and the leave thereby lapsed.

Miss Anderson's attempt to seek sanctuary under rule 56.13 of the rules by contending that the rule permits the court to extend time is unsustainable. She argued that the rule, by its importation of rules 25 - 27 gives the court the right to order an extension of time and that the grant of conditional leave under rule 56.4 (12) does not mean that right had been extinguished. She cited several authorities, none of which was of any assistance to her.

Rule 56.13 , reads:

"56.13 (1) At the first hearing the judge must give any directions that may be required to ensure to the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.

(2) In particular the judge may —

(a) Make orders for —

(i) witness statements or affidavits to be served;
(ii) cross-examination of witnesses;
(iii) disclosure of documents; and
(iv) service of skeleton arguments;

(b) allow the claimant to —

(i) amend any claim for an administrative order;
(ii) substitute another form of application for that originally made; or
(iii) add or substitute a claim for relief other than an administrative order;

(c) allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard whether or not served with the claim form;

(d) direct whether any person or body having such interest —

(i) is to make submissions by way of written brief; or
(ii) may make oral submissions at the hearing; and

(e) direct that claims by one or more persons or bodies or against one or more persons in respect of the same office made on the same grounds be consolidated or heard together."

Rules 25 - 27 deal with the case management powers of the court. A clear reading of rule 56.13 (1) shows that the provisions of rules 25 - 27 can only be invoked in circumstances where a claim is in existence. Case management powers cannot be exercised in a vacuum. There must be proper foundation giving a right for these powers to become operative. There is nothing showing that rule 56.13 (1) is applicable. The rule must be construed to mean that the court may only apply the provisions of rules 25 – 27 where a Fixed Date Claim Form has been filed.

A further effort was made by Miss Anderson to persuade this court that Part 11 of the rules was also relevant in enabling the court to extend time. Part 11, she argued, grants similar powers to the court as those set out in Parts 25 – 27. This submission is devoid of merit. Part 11 of the rules deals with applications for the making of orders before, during or after the commencement of proceedings. The respondent was required to file a Fixed Date Claim Form. None was filed. The time for doing so expired. There was nothing before the court upon which any application under Part 11 of the rules could have been employed.

The order of December 13, 2007 mandated the respondent to have filed a Fixed Date Claim Form and affidavit by December 27, 2007. This she failed to do. Her right to pursue the remedy of judicial review ceased and determined as of December 27. The learned trial judge would have had no authority to extend the time for obtaining leave for judicial review which he had obviously done. The order made on January 10, 2008, must be set aside for want of jurisdiction.

It was also submitted by Mr. Henriques, Q.C. that no reasons were given by the learned trial judge to show whether he had extended the time for leave for a judicial review or whether he had extended time to file a Fixed Date Claim Form.

The learned trial judge proffered no reasons for the making of his order. Judicial authorities have shown that a judge has a duty to give reasons for his decision. In **Flannery and Another v. Halifax Estate Agencies Ltd.** (Trading as **Colleys Professional Services**) 1 W.L.R. 383, the defendants, a firm of surveyors were requested by the plaintiffs to prepare a valuation of a flat. Acting on the valuation, the plaintiffs subsequently purchased the flat. It was later discovered that there were structural defects in the building. The plaintiffs commenced an action for negligence against the defendants. The trial judge heard evidence from experts on both sides, dismissed the plaintiffs claim but gave no reasons for his decision. The plaintiffs appealed. On appeal, it was held that:

> "... a judge was under a duty to explain why he had reached his decision; that the scope of what was required to fulfil that duty depended on the subject matter of the case; that where reasons and analysis were advanced on either side a judge had to enter into issues canvassed and explain why he preferred one case over the other; that failure to supply reasons in those circumstances offended against requirements inherent in the duty of showing fairness to both parties and of producing a decision soundly based on the evidence and constituted a good free-standing ground of appeal;.."

The order of the trial judge was ambiguous. It could have meant that he had granted an extension of time of 14 days within which the respondent could apply for leave for judicial review or, that the extension of time was granted for the respondent to file a Fixed Date Claim Form for judicial review as Mr. Henriques, Q.C. rightly pointed out.

This is not a case in which the court was faced with simply a matter in which there were disputed facts, the resolution of which was dependent on the credibility of eyewitnesses. In such a case, a trial judge would not necessarily be obliged to give reasons, as, it may be sufficient for him to say he accepts one witness' account in preference to another, based on whom he believes. The case under review is clearly different. In this case, the learned trial judge had affidavits before him. He would have read them before delivering a decision. It was for him to have explained why he reached the decision which he made. His failure so to do deprived the appellant of knowing the reasons for reaching his conclusions.

The foregoing are my reasons for allowing the appeal.

ORDER:

PANTON, P.

Appeal allowed.

Order of Mr. Justice D. McIntosh made on 10th January, 2008, to extend time to apply for Judicial Review consequent on the Order of Ms. Justice Beckford made on the 13th December, 2007 is set aside. Costs to the Appellants to be agreed or taxed.