[2015] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2015

THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

BETWEEN	**MINISTER OF NATIONAL SECURITY**	**1st APPELLANT**
AND	**ATTORNEY GENERAL**	**2nd APPELLANT**
AND	**HERBERT HAMILTON**	**RESPONDENT**

Written submissions on behalf of the appellants received from the Director of State Proceedings

Written Submissions on behalf of the respondent received from Lightbourne & Hamilton

29 October 2015

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules, 2002)

MORRISON P (AG)

Introduction

[1] This is an appeal from an order made by F Williams J (as he then was) on 10 March 2015. By that order, the learned judge refused the appellants' application to

strike out the fixed date claim form filed against them by the respondent on 17 April 2014. In this appeal (brought by leave of the judge), the appellants contend that F Williams J erred in law, in that he failed to appreciate that, in substance, the respondent's claim seeks to enforce a public law right and that he ought therefore to have proceeded by way of the procedure for judicial review set out in Part 56 of the Civil Procedure Rules (CPR). Accordingly, the appellants seek an order from this court striking out the claim, with costs.

The background

[2] The matter arises in this way. By letter dated 12 July 2010, the respondent was appointed by the 1st appellant (the minister) as a member of the Firearms Licensing Authority (the authority). The term of the appointment was stated to be three years, with effect from 12 July 2010, at an annual salary of $910,500.00 per annum. Then, by a subsequent letter dated 1 May 2012, the minister wrote to the respondent as follows:

> "Dear Mr. Hamilton,
>
> I wish to express sincere appreciation for the service you rendered as a Member of the Firearm Licensing Authority.
>
> Please accept this Ministry's kindest regards and best wishes for the future."

It is common ground between the parties that this was a letter terminating the respondent's appointment as a member of the authority.

[3] The authority is established pursuant to section 26A(1) of the Firearms Act (the Act). Section 26A(2) of the Act provides that the provisions of the Third Schedule shall

have effect as to the constitution of the authority; and section 2 of the Third Schedule provides that members of the authority shall be appointed by the minister in writing, "and shall, subject to the provisions of this Schedule, hold office for a period of three years".

[4] After identifying the parties to the action, the fixed date claim form states the following (at paragraph 4):

> "4. The Claimant's claim is for loss of remuneration arising out of a breach of the Claimant's fixed term contract of employment wherein by letter dated 12th July 2010 the First Defendant appointed the Claimant a member of the Firearm Licensing Authority for the statutory period of three years with effect from 12th day of July, 2010 at a remuneration of Nine Hundred and Ten Thousand, Five Hundred Dollars ($910,500.00) per annum which contract was breached by the First Defendant by letter dated the 1st day of May, 2012 terminating the Claimant's appointment as a member of the Firearm Licensing Authority."

[5] On this basis, the respondent claims (i) a declaration that he is entitled to the sum $1,138,125.00, "representing loss of remuneration for fifteen (15) months being the unexpired period of the Claimant's Contract of employment"; (ii) interest at the rate of 12% per annum; and (iii) an order for payment by the minister of the said sum of $1,138,125.00, plus interest and costs.

[6] In his affidavit sworn to on 17 April 2014 and filed in support of the fixed date claim form, the respondent stated[1], among other things, that "in breach of the [Act] and the said letter of appointment, the [minister] by letter dated 1st day of May 2012, wrongfully terminated my appointment". Further[2], that "[b]y reason of the wrongful termination of my statutory appointment I have been deprived of the salary I would otherwise have earned during the continuance of my said statutory term of appointment and I have suffered loss and damage".

[7] The first hearing of the fixed date claim form was duly fixed for hearing on 3 February 2015. But, by notice of application for court orders filed on 2 February 2015, the appellants sought an order striking out the claim. The grounds of the application were set out in the notice as follows:

> "1. The facts supporting the claim are such that the main relief is for an administrative order, specifically, for judicial review for an order for certiorari to quash the Minister's decision to terminate the appointment of the Claimant to the Board of the Firearm Licensing Authority (FLA).
>
> 2. The appointment, and removal, of an individual to the Board of the FLA are administrative actions exercised by a Minister pursuant to the discretionary power vested in him under statute. Any challenge to the Minister's decision to remove the Claimant is one that ought properly to have been the subject of judicial review proceedings.
>
> 3. The claim for declaratory relief and damages, without an accompanying relief by way of judicial review to

[1] At para. 7
[2] At para. 8

impugn the Minister's decision, is an abuse of process in that it seeks to circumvent the requirements of:

i. leave to commence a claim for judicial review; and

ii. the time limit attendant [sic] the application for such leave."

The judge's ruling

[8] After a hearing on 3 February 2015, F Williams J, in a written judgment given on 10 March 2015, declined to grant the appellants' strike-out application. The learned judge considered that, firstly, the power to strike out, whether pursuant to the inherent jurisdiction of the court or the provisions of rule 26.3 of the CPR, "is one that should be used sparingly; and only in the clearest cases"[3]; secondly, applying the decisions of the Court of Appeal in **Sykes v Minister of National Security and Justice and others**[4] (**Sykes**) and of the Privy Council in **Swann v Attorney General of the Turks & Caicos Islands**[5] (**Swann**), rather than involving a "purely public-law right … this matter really involves an attempt to assert a private-law right"[6]; and thirdly, the respondent had therefore adopted the appropriate procedure in the circumstances. The learned judge then went on to make the necessary case management orders and the fixed date claim form is now fixed for hearing on 20 November 2015.

[3] Para. [15] of the judgment of F Williams J
[4] (1993) 30 JLR 76
[5] [2009] UKPC 22
[6] Para. [30] of the judgment of F Williams J

The appeal

[9] The appellants challenge the learned judge's decision on grounds which substantially rehearse the grounds on which the strike-out application was made:

> "i. The learned judge erred in law failing to appreciate that in bringing the claim for declaratory relief and damages, the claimant is in substance seeking to impugn the Minister's decision to terminate his appointment to the Board of the Firearm Licensing Authority.
>
> ii. The learned judge erred in failing to find that in seeking to impugn the decision of the Minister to terminate his statutory appointment, the claimant is in effect seeking to enforce a public law right and that by bringing the claim as an ordinary action in private law, the claimant is seeking to circumvent the requirements of the judicial review procedure.
>
> iii. The learned judge erred and/or misdirected himself in applying the cases of **Sykes v Minister of National Security and Justice and others** and **Swann v Attorney General of the Turks and Caicos Islands** to the instant case in circumstances where the factual premise is so different as to render any underlying principle inapplicable."

[10] In their written submissions filled on 31 March 2015, the appellants submit firstly that, upon consideration of the respondent's statement of case, it is clear that the basis on which the claim for salary is being made is that the termination of the respondent's appointment as a member of the authority was a wrongful act by the minister, and in breach of the mandatory provisions of the Act. Therefore, it is submitted, for the court to declare that the remuneration claimed is due, it will be necessary to consider

whether the minister's action in terminating the appointment was wrongful. This, the appellants contend, "is plainly a matter of administrative law".

[11] Next, on the authority of the well-known decision of the House of Lords in **O'Reilly v Mackman**[7] (**O'Reilly**), the appellants submit that since the respondent's appointment and his entitlement under the Act to remain a member of the authority are issues of public law, he ought properly to have brought his claim by way of an application for judicial review. In that event, the respondent would have been subject to the requirements which must be satisfied as a precondition to the grant of leave to apply for judicial review, including the requirement that the claim be commenced promptly.

[12] And lastly, the appellants submit that the learned judge erred in his reliance on the cases of **Sykes** and **Swann**, in that the circumstances of both cases are "far different from the instant case". In this case, it is submitted, unlike in **Sykes**, **Swann** and other cases, such as **Roy v Kensington and Chelsea and Westminster Family Practitioner Committee**[8] (**Roy**), the respondent's claim depends exclusively on a public law right and as such ought properly to have been the subject of an application for judicial review. More to the point, the appellants submit, is the decision of this court in **The Attorney General of Jamaica v Keith Lewis**[9] (**Keith Lewis**), in which it was held that the respondent, a district constable, ought to have brought proceedings

[7] [1982] 3 All ER 1124
[8] [1992] 1 AC 624
[9] SCCA No 73/2005, judgment delivered 5 October 2007

challenging his dismissal from the Rural Police Force by way of judicial review rather than by ordinary action.

[13] In his written submissions filed on 8 April 2015, the respondent observes that the substantive issue raised in this matter, as pleaded, is a claim by him for the remuneration which he would have received, "had not the Minister peremptorily terminated his contract which was fixed by statute for a mandatory period of three (3) years". Further, the respondent points out, it is to be noted that there is no claim by him for a reversal of the minister's decision. Accordingly, the respondent submits, his claim for compensation is an exercise of his private law rights, "and in no way impugns the Minister's decision to terminate the contract if and when he pleases". The respondent therefore contends that the appellants' reliance on **O'Reilly** is misplaced. Instead, the respondent invites attention to the subsequent decision of the Court of Appeal of England and Wales in **McLaren v Home Office**[10] (**McLaren**), to make the point that he had a right in private law to initiate proceedings for payment of the sum due to him by way of ordinary claim and without resort to judicial review. Finally, the respondent maintains that the learned judge was entirely correct in his reliance on **Sykes** and **Swann** and that **Roy**, to which the appellants refer, "only bolsters [his] contention that his action was properly initiated by ordinary claim".

[14] Albeit variously put, the single issue which arises on this appeal is therefore whether the respondent ought to have brought his claim by way of proceedings for judicial review, as the appellants contend; or whether the procedure adopted by him

[10] [1990] IRLR 338

was, as he contends and as the judge found, appropriate in the circumstances of the case. For present purposes, it is, I think, unnecessary to review the provisions of Part 56 of the CPR, which set out the procedure to be followed by an applicant for judicial review. It suffices to say that, if the appellants are correct, then they will be entitled to the order which they seek, it being common ground that the manner in which this action was instituted did not conform to the requirements of Part 56.

The authorities

[15] It is convenient to start with **O'Reilly**. The appellants in that case were all prisoners serving long sentences of imprisonment. Each of them brought an action against the board of visitors of the relevant prison seeking to establish that a disciplinary award for forfeiture of remission of sentence made by the board of governors, acting in the exercise of their disciplinary jurisdiction under the prison rules, was null and void because of a failure to observe the rules of natural justice. The board's application to strike out the actions as an abuse of the process of the court ultimately succeeded. It was held by the House of Lords that, since a prisoner's right that a board of prison visitors should act within its jurisdiction and observe the rules of natural justice when conducting a hearing concerning him is a right protected only under public law and not by private law, a prisoner who seeks to challenge a decision of a board of prison visitors must do so by way of an application for judicial review of the board's decision.

[16] In arriving at this decision, Lord Diplock, who delivered the only substantive judgment, explained the context in which it was made. In 1977, the rules governing applications for the prerogative writs of prohibition, mandamus and certiorari (now all subsumed under the generic label 'judicial review') were substantially revised and recast. The then new RSC Ord 53 streamlined the process by providing what Lord Diplock described[11] as —

> "… a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ."

[17] But the new RSC Ord 53 also enshrined protections for public authorities ("against claims which it was not in the public interest for courts of justice to entertain"[12]). Among other things, they preserved the requirement of leave to apply as well as the rule that complaints against public authorities should be verified on oath ("an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity"[13]); and also further limited the period within which applications to quash decisions of public authorities had to be made (since "public authorities and third

[11] At page 1133
[12] Per Lord Diplock at page 1130
[13] Per Lord DIplock at page 1131

parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision"[14]).

[18] In the result, Lord Diplock concluded[15] —

> "The position of applicants for judicial review has been drastically ameliorated by the new Ord 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under Ord 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Ord 53 provided.
>
> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none

[14] See pages 1130-1131
[15] At page 1134

> of the parties objects to the adoption of the procedure by writ or originating summons."

[19] Next, I should mention **McLaren**. Appointed in 1978, Mr McLaren was a prison officer. The schedule to his letter of appointment stated that, "in consequence of the constitutional position of the Crown, the Crown has the right to change its employees' conditions of service at any time, and the Crown's employees hold their appointments at the pleasure of the Crown". But in 1987, the national prison officers' union and the Home Office negotiated a 'Fresh Start' agreement on working hours. That agreement envisaged local agreements on shift systems and working practices, applying a statement of agreed principles. Accordingly, in 1988, a local agreement was reached between the governor of the prison at which Mr McLaren was employed and the union's local branch. However, in 1989, a dispute arose. The union claimed that the governor was imposing a new shift system in breach of the local agreement. Prison officers, including Mr McLaren, who were not prepared to work the new shifts (though willing to work the old shifts) were sent home and not paid for the days they had not worked. With the support of the union, Mr McLaren brought an action claiming that the terms of the Fresh Start agreement and the local agreement were incorporated in his contract of employment or, alternatively, his conditions of service and that there had been a breach of the agreements. He sought relief by way of declarations to that effect, and also claimed payment of the salary withheld.

[20] The Home Office successfully applied to have the claim struck out and the action dismissed on the ground that no cause of action in private law was disclosed. Hoffmann

J (as he then was) took the view that there was no contract of employment between a prison officer and the Home Office, so that the relationship between Mr McLaren and the Home Office was a matter of public law and not of private law. Therefore, applying **O'Reilly**, if Mr McLaren had any claim against the Home Office, it had to be raised by way of an application for judicial review.

[21] Mr McLaren appealed successfully to the Court of Appeal, which held that the cause of action upon which he relied raised issues of private law rather than public law. The Home Office had power to enter into a contractual relationship with prison officers and the question whether a public body, having power to enter into a contract of service with a particular individual, has or has not done so in a particular case must necessarily be a question of private, and not of public law. Woolf LJ (as he then was) considered that **O'Reilly** had been misunderstood and, in an analysis upon which the respondent in the instant case heavily relies, said this[16]:

> "1. In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceedings for damages, a declaration or an injunction (except in relation to the Crown) in the High Court or the County Court in the ordinary way. The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power or, as in this case, a statutory power. If he holds such an appointment then it will almost

[16] At page 342

> invariably be terminable at will and may be subject to other limitations but whatever rights the employee has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so …
>
> 2. There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is not domestic or wholly informal its proceedings and determination can be an appropriate subject for judicial review."

[22] Woolf LJ went on to observe[17] that what Mr McLaren sought were declarations as to the terms of his employment and a sum which he alleged to be due to him for services rendered:

> "They are private law claims which require private rights to support them ... Whether or not he is an employee of the Crown or has a contract of service, or holds an office under the Crown, he is entitled to bring private law proceedings if he has reasonable grounds for contending that his private law rights have been infringed."

[23] Then there is **Roy**. In that case, Dr Roy, a general practitioner, commenced an action in the Queen's Bench Division against his family practitioner committee seeking,

[17] At page 343

among other things, payment of part of his basic practice allowance withheld by the committee following their decision that he had failed to devote a substantial amount of time to general practice as required by the applicable rules. The committee applied for an order striking out the claim as an abuse of the process of the court, on the ground that their finding had been a public law decision which could only be challenged by way of judicial review under RSC Ord 53. The judge struck out the claim, but Dr Roy's appeal to the Court of Appeal succeeded on the basis that he had a contract for services with the committee and that his proper remedy was accordingly by ordinary action and not by judicial review. The House of Lords dismissed the committee's appeal, holding that (i) a litigant possessed of a private law right could seek to enforce that right by ordinary action notwithstanding that the proceedings would involve a challenge to a public law act or decision; (ii) Dr Roy's relationship with the committee, whether contractual or statutory, conferred on him private law rights to remuneration in accordance with his statutory terms of service; and (iii) accordingly, the bringing of an ordinary action to enforce the right to receive that remuneration did not constitute an abuse of process.

[24] After observing that, despite academic criticisms of **O'Reilly**, he was not minded to depart from its essential principle, Lord Bridge of Harwich said this[18]:

> "But if it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review

[18] At pages 628-629

> proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him."

[25] Lord Lowry, who delivered the leading judgment, said this[19]:

> "Dr. Roy's printed case contained detailed arguments in favour of a contract between him and the committee, but before your Lordships Mr. Lightman simply argued that the doctor had a private law right, whether contractual or statutory. With regard to *O'Reilly v. Mackman* … he argued in the alternative. The 'broad approach' was that the rule in *O'Reilly v. Mackman* did not apply generally against bringing actions to vindicate private rights in all circumstances in which those actions involved a challenge to a public law act or decision, but that it merely required the aggrieved person to proceed by judicial review only when private law rights were not at stake. The 'narrow approach' assumed that the rule applied generally to *all* proceedings in which public law acts or decisions were challenged, subject to some exceptions when private law rights were involved. There was no need in *O'Reilly v. Mackman* to choose between these approaches, but it seems clear that Lord Diplock considered himself to be stating a general rule with exceptions. For my part, I much prefer the broad approach … It would also, if adopted, have the practical merit of getting rid of a procedural minefield. I shall, however, be content for the purpose of this appeal to adopt the narrow approach, which avoids the need to discuss the proper scope of the rule, a point which has not been argued before your Lordships and has hitherto been seriously discussed only by the academic writers."

[26] And, in a final word, Lord Lowry added[20] that —

[19] At page 653

> "… it seems to me that, unless the procedure adopted by the moving party is ill suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings."

[27] In all three of the cases to which I have already referred, the commencement of proceedings by ordinary action was challenged on the basis that they ought to have been commenced by way of judicial review. The roles were reversed in **Sykes** and **Swann**: in both cases the commencement of actions for judicial review was successfully impugned on the ground that they ought to have been commenced by ordinary action.

[28] In **Sykes**, this court held that an application for certiorari made on behalf of the members of the Legal Officers Staff Association to quash a cabinet decision to withhold sums from the salaries of officers who had participated in industrial action was, in essence, a claim to enforce a private right. Accordingly, it was held that the claim ought properly to have been commenced by writ and that therefore, as Downer JA put it[21], "[t]o seek the public law remedies of certiorari and prohibition was an abuse or to use polite language, a misuse of the process of the court".

[29] In **Swann**, the appellant, who had been the chairman of the Public Service Commission of the Turks & Caicos Islands, sought judicial review of a decision of the cabinet to reduce his remuneration from $90,000.00 to $30,000.00 a year. The Board considered that, "[i]n order to found a legal claim on that complaint, the appellant

[20] At page 655
[21] At page 82

would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of the PSC". On this basis, the Board concluded that[22]:

> "13. … the appellant's complaint amounts to a straightforward private law claim for around $15,000, being the difference over a period of about three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of his entitlement is a conversation, or a series of conversations, described in paragraphs 10 to 13 of his affidavit, cited in paragraph 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on an estoppel), and whether it is made out will turn on oral evidence.
>
> 14. In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel). Furthermore, proceeding by writ would in any event be the more convenient course, given that a properly particularised pleaded case would be appropriate, and discovery and oral evidence will probably be required."

[30] And lastly in this brief survey of the cases to which we were referred by the parties, there is **Keith Lewis**. Mr Lewis, a district constable, was charged before the Resident Magistrate's Court with breaches of the Corruption Prevention Act. As a consequence, he was suspended from the Rural Police Force without pay while the charges were pending. But, in the end, the charges were never prosecuted, as the virtual complainant died and, on 12 August 1997, a "no order" was made by the resident magistrate. By letter dated 10 August 1998, the Commissioner of Police advised Mr Lewis that, for reasons which were stated, he would be removed from the

[22] Paras 13-14

force as a district constable with effect from 1 August 1998. However, in accordance with the provisions of the Police Service Regulations 1961, Mr Lewis was invited to respond in writing within seven days "stating why you should not be so removed". Mr Lewis made no response to this letter; but, on 17 May 2000, he commenced an action in the Supreme Court claiming damages for wrongful dismissal.

[31] The Crown's contention that Mr Lewis should have challenged the Commissioner's decision to dismiss him by instituting proceedings for judicial review was upheld by this court. K Harrison JA, with whom Panton P and Marsh JA (Ag) (as he then was) agreed, said this:[23]

> "In the instant case, the Police Service Regulations (1961) sets out the procedure for dismissal. [Mr Lewis] was advised by Notice from the Commissioner of Police that he had seven (7) days within which to challenge the termination of his services but he failed to respond. In my view, he could have challenged the Commissioner's decision to dismiss him by instituting judicial review proceedings pursuant to the provisions of The Judicature (Civil Procedure Code) Law (Judicial Review) Rules of 1998[24]. In the circumstances, he would have been obliged to seek such a review within three (3) months of the date that he was effectively dismissed but he chose not to go by this route. In my judgment, he cannot circumvent the process by recourse to the common law."

[32] Although the decision in **O'Reilly** is nowhere mentioned in the judgment in **Keith Lewis**, I think it is clear from the language of Harrison JA's conclusion that he had the principle of that case firmly in mind. It seems to me that Mr Lewis, if he wished to challenge the Commissioner's decision to dismiss him, ought properly to have availed

[23] At para. 22
[24] Which were the rules then in force

himself of the route of challenge provided to him as a matter of public law by the Police Service Regulations. The court's conclusion that, by filing an ordinary action nearly two years after the deadline for making a judicial review application had passed, Mr Lewis was seeking to evade the requirements of the judicial review process and thereby abusing the process of the court was therefore inevitable.

Conclusion

[33] In his judgment in **Roy**, Lord Bridge referred to various academic criticisms of **O'Reilly**. One particular problem was, as Professor Paul Craig observed in his leading text on Administrative Law[25], "the difficulty of deciding whether a particular interest should be characterised as a private right". Other textbook discussions suggest that, in practice, aspects of the decision continue to be problematic[26]. But, for present purposes at any rate, it seems to me that an important dimension of the problem has been clarified by the decisions of the Court of Appeal in **McLaren** and of the House of Lords in **Roy**. In my view, both cases provide clear authority for saying that, firstly, if a case turns exclusively on a purely public law right, then the only remedy will in general be by way of judicial review, pursuant to Part 56 of the CPR; and secondly, if the case involves the assertion of a private law right, the fact that the existence of that right might incidentally involve the examination of a public law issue does not prevent a claimant from proceeding by way of ordinary action outside of Part 56. In this regard, it

[25] 6th edn, para. 26-008

[26] See, for instance, Judicial Review Proceedings – a practitioners guide, 3rd edn, by Jonathan Manning, Sarah Salmon and Robert Brown, paras 3.9-3.68

will not matter whether the claimant is asserting a private law right based on contract or derived from statute.

[34] It follows from the above that I do not think that the decision in **O'Reilly** can avail the appellants in this case. On the face of it, the respondent's claim is for loss of remuneration arising out of an alleged breach of the contract constituted by the minister's letter of appointment dated 12 July 2010. There is plainly no other agenda, since, as the respondent points out, he makes no claim to be reinstated as a member of the authority. He therefore asserts, as F Williams J found, a private law right. The fact that he also seeks, incidentally, to pray in aid the provisions of the Act in support of his claim to be entitled to be paid for the unexpired portion of his contract cannot prevent him, in my view, from proceeding by way of an action commenced by fixed date claim form in the ordinary way.

[35] This conclusion suffices to dispose of the appeal in the respondent's favour. But I would add for completeness that the learned judge was in my view also correct to resolve the case by analogy to **Sykes** and **Swann**, both of which characterised claims to recover unpaid remuneration as claims involving the assertion of a pure private law right.

Disposal of the appeal

[36] I would accordingly dismiss the appeal and affirm the decision of F Williams J. In particular, I would order that the case management orders made by the learned judge are to stand, unless otherwise ordered by a judge on the Supreme Court. I would also

order that the respondent is to have the costs of the appeal, such costs to be taxed, unless sooner agreed between the parties.

McDONALD-BISHOP JA

[37] I have read in draft the judgment prepared by Morrison P (Ag). I agree entirely with his reasoning and conclusion and have nothing useful to add.

P WILLIAMS JA (AG)

[38] I too have read and agree with the judgment prepared by Morrison P (Ag).

MORRISON P (AG)

ORDER

Appeal dismissed. Decision of F Williams J affirmed. Ordered that the case management orders made by F Williams J are to stand, unless otherwise ordered by a judge of the Supreme Court. Costs of the appeal to the respondent to be agreed or taxed.